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Griggs on Spin Cycle: A Commentary on Professor Graglia's Racial Preferences, Quotas, and the Civil Rights Act of 1991

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GRIGGS ON SPIN CYCLE: A COMMENTARY ON PROFESSOR GRAGLIA'S *RACIAL PREFERENCES, QUOTAS, AND THE CIVIL RIGHTS ACT OF 1991*

The opening sentence of Professor Graglia's attack on disparate impact theory is telling, and rather sad. It betrays a deeply nihilistic view of the world. In fact, it reminds me of the immortal words of Republican political consultant Lee Atwater, who before his death remarked, "bullshit has permeated our society at every level . . . . [S]tatus is bullshit, and status is a new value. Bullshit permeates everything."[1] A veritable poet of nihilism, Atwater was perhaps most famous for devising the infamous Willie Horton campaign commercials. Professor Graglia shows himself to be a sort of Lee Atwater of law professors, more of a spin-doctor than a seer. His legitimate points are marred by hyperbole, and he presents the facts of cases selectively or not at all. In short, while what he says contains bits of truth, it is characterized by distortion.

Take, for example, Professor Graglia's discussion of *Griggs v. Duke Power Co.*,[2] where he wonders, "How can a preference for educated and intelligent employees over employees who are less so violate a prohibition of racial discrimination?"[3] (Note the spin.) Nowhere in his discussion of the case does he make note of the fact that Duke Power had functioned for years without education requirements or, as he calls them, "intelligence conditions."[4] It should be enough to make most people curious that Duke Power's adoption of these requirements coincided with the passage of the Civil Rights Act of 1964.[5] That these facially neutral requirements operated to sustain a situation that pre-dated the Act, a situation in which blacks were segregated into the most menial and low-paying jobs, does not spark the least bit of suspicion in the professor's mind. The naivete seems a little forced.

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1. SIDNEY BLUMENTHAL, PLEDGING ALLEGIANCE: THE LAST CAMPAIGN OF THE COLD WAR 258 (1990).

2. 401 U.S. 424 (1971).

3. Lino A. Graglia, *Racial Preferences, Quotas, and the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1117, 1123 (1992).

4. *Id.*

5. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at scattered sections of U.S.C.).

Professor Graglia also engages in distortion when he says that the Court found education and testing requirements unlawful "because they had the effect of making a larger proportion of blacks than of whites ineligible for the positions to which the criteria applied."[6] This is simply not true. The Court held as it did because it believed that the requirements had been adopted for an entirely discriminatory purpose, a purpose that they were achieving. This is known as racial discrimination. Professor Graglia's presentation of the holding in *Griggs* typifies his habit of telling the half of the story that suits his purpose.

Still, Professor Graglia's challenge is a welcome one. His approach to the issues of racial discrimination and civil rights epitomizes the widespread doubt that is felt toward these subjects in our society today. The challenge that the professor represents is one that people in the civil rights movement (if there still is such a thing) must answer if they hope to restore the movement's credibility. They have not yet done so. This is a serious matter, despite what Professor Graglia says; fairness and basic justice are at stake. The discrimination at Duke Power was real enough, and if Professor Graglia and his ilk are so agnostic that only open, naked discrimination will convince them, then liberals (if there still are any) must show them that discrimination sometimes comes in disguises.

Assuming, *arguendo,* that employment discrimination is not always open and is sometimes achieved by devious or even inadvertent means, then "business necessity" and "job-relatedness" seem the only ways to ferret it out. Contrary to Professor Graglia's assertion, disparate impact theory does not "convert[] . . . a prohibition of racial discrimination into a requirement of racial preferences."[7] Disparate impact theory is a quasi-evidentiary principle. The disparate impact of an employment criterion is never in and of itself a violation of Title VII. It is a means of proving such a violation. If an employer can show how a practice that excludes a protected group is legitimately related to the job in question, the employer has successfully rebutted the presumption against it. Thus, a magazine publisher who required all his copy editors to pass an editing test would prevail if sued by the members of a group who were constantly scoring low on the test. Here, Professor Graglia would argue that the publisher should be able to test the would-be copyeditors'

6. *Id.* at 1123.
7. *Id.* at 1133.

knowledge of Beethoven, wood-carving, golf, or anything else that caught his fancy. The "business necessity" doctrine, as I understand it, would permit such tests assuming (1) that they did not have a discriminatory effect *or* (2) that the magazine's subject was music, wood-carving, or golf.

All this strikes Professor Graglia as outrageous. In his view, employers should be able to require anything they please of applicants in the interest of improving the quality of the workforce. This is fine, so long as we have no interest in ridding the workplace of discrimination. Interestingly, the professor finds himself unable to fathom the phrase, "the touchstone is business necessity."[8] Yet the meaning of what it is that would "generally improve the overall quality of the workforce"[9] is crystal clear to him. (I sort of think it's the other way around.) But be that as it may, no doubt requiring workers in a bicycle factory to have masters' degrees in a Romance language would "improve the overall quality of the workforce." What supervisor would not love to hear his workers tease each other in Catalan? Presumably, this is what Professor Graglia means. Let's have some *quality,* gosh darn it. It's been too long since we have. I have some more ideas about improving workforce quality, like requiring all law professors to be proficient at the saxophone, or to have senses of humor. While these requirements may not be "job-related," they would definitely improve the workforce by ensuring that law students would have professors who were imaginative, soulful, and funny. Why do I get the feeling that then, in an epiphanic moment, Professor Graglia would discover what "job-relatedness" meant?

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8. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
9. *Id.*