

1997

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Recommended Citation

Alexander, Larry and Cole, Kevin, "Discrimination by Proxy." (1997). *Constitutional Commentary*. 602.
<https://scholarship.law.umn.edu/concomm/602>

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DISCRIMINATION BY PROXY

Larry Alexander and Kevin Cole***

I. THE PRINCIPLES

Here are three well-settled principles of constitutional law:

The Anti-Discrimination Principle. Government cannot use racial classifications, even as the most cost-effective proxies for other traits, unless using them as the most cost-effective proxies is necessary to further a compelling interest.¹ (The same holds for use of a gender classification as a cost-effective proxy, except government's burden is lower: the classification must be substantially related to an important interest.²)

The Disparate Impact Principle. A non-racial (or non-gender) classification that produces a disparate racial (or gender) impact is not forbidden on that ground by itself.³

The Intent Principle. However, a non-racial (or non-gender) classification adopted as a close proxy for race (or gender)—that is, *because* of its disparate impact—is assessed the same way as an explicit racial (or gender) classification, that is, under the *Anti-Discrimination Principle*.⁴

II. THE PROBLEM

Now consider the admissions policies of three hypothetical state-supported law schools in, say, the plains states:

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The authors wish to thank the following for their comments: Suzanna Sherry, Tom Smith, and Chris Wonnell.

1. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

2. *Craig v. Boren*, 429 U.S. 190 (1976).

3. *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

4. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

School A has admitted students solely on the basis of how they score on the LSAT. It has recently discovered that the LSAT overpredicts the performance of blacks relative to whites. It does not believe that race is causally related to the variation between predicted and actual performance; rather, it believes that race merely correlates with other factors that are causally related to that variation. However, it is unable either to identify those factors or to test for them in any way that would be cost-effective. It determines that classifying LSAT scores on the basis of the race of the applicant and then discounting the scores of all black applicants is the most cost-effective way of improving the performance of its entering class. University counsel concludes, however, that such a policy would violate the *Anti-Discrimination Principle*.

School B has historically followed the same admissions policy as School A, that is, admitting those with the highest LSAT scores. Recently, however, School B has decided for a variety of reasons to become a "regional" law school and restrict admissions to applicants from the plains states. It expects student quality to decline somewhat, at least in the short term, because of the constriction of the applicant pool. However, it discovers that its incoming students under the new policy, despite a lower average LSAT score, are outperforming previous entering classes.

School C, surprised by the news from School B, asks a statistician to analyze School B's policies. The statistician reports that the performance of School B's students is due to the fact that there are few black applicants to law school in the plains states. In the past, most of the white applicants to Schools A, B, and C had come from the plains states, but most of the black applicants had come from outside the region. Therefore, School B's policy, while not as effective in improving performance as the racial classification that School A rejected as unconstitutional, is more effective than an unrestricted admissions policy based solely on LSAT because it has an effect similar to the rejected racial classification.

School C would like to adopt the "plains states only" admissions policy of School B. Its sole reason is that it believes the performance of its students will improve. It asks University counsel whether that policy, adopted for that reason, would violate the *Intent Principle* rather than merely come under the *Disparate Impact Principle*. How should University counsel answer?

III. UNDERSTANDING THE RELATIONSHIP AMONG THE PRINCIPLES

University counsel should begin by analyzing the relation among the three principles. The *Disparate Impact Principle*, although frequently criticized prior to *Washington v. Davis*,⁵ is now relatively uncontroversial, as it should be. All laws have disparate impact along the axes of race, gender, national origin, religion, and so on. Unless all laws require a compelling interest to justify them—in which case either the nature of a compelling interest will be denatured or no set of laws will be constitutional except for that set that produces perfect group equality among all protected groups and in all respects—disparate impact will have to be treated as different constitutionally from racial and similar classifications. The *Disparate Impact Principle* is, therefore, unassailable.

If the *Disparate Impact Principle* is in place, then the *Intent Principle* is necessary to prevent easy circumvention of the *Anti-Discrimination Principle*. If government may not discriminate against blacks in the absence of a compelling interest, but it may discriminate against a “group” that has a ninety-nine percent overlap with “blacks” with only a permissible interest, then the *Anti-Discrimination Principle* will prove ineffective.

The question University counsel must answer is whether School C’s adoption of the regional restriction falls under the *Disparate Impact Principle*, in which case it is permissible, or under the *Intent Principle*, in which case it is not. Because the *Intent Principle* is there to prevent circumvention of the *Anti-Discrimination Principle* through the *Disparate Impact Principle*, deciding whether this case falls under the *Disparate Impact Principle* or the *Intent Principle* requires further analysis of the *Anti-Discrimination Principle*.

IV. THE ANTI-DISCRIMINATION PRINCIPLE AND TYPES OF RACIAL (AND GENDER) CLASSIFICATIONS

Understanding the *Anti-Discrimination Principle*—and hence the *Disparate Impact* and *Intent Principles*—requires asking why government might employ racial and other suspect and semi-suspect classifications. The first reason is pure bias: the people whose sentiments the government is expressing be-

5. See, e.g., Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540 (1977).

lieve that members of the group discriminated against have less moral value than the rest of the population. This is a moral belief, which may or may not be accompanied by particular empirical beliefs about the group.

We take it as axiomatic that human beings do not have differential moral worth, or at least that they do not have differential moral worth because of characteristics other than choices or perhaps character traits.⁶ Therefore, if a racial classification reflects the view that an entire racial group is less worthy of governmental concern and respect than others, we know the government is acting improperly.

The expression of pure bias is nonrational discrimination by government. But other racial classifications may reflect irrational or rational discrimination. A racial classification might be an instance of irrational discrimination if it is based on an empirical judgment about the group discriminated against that is either incorrect or correct but insufficiently supportive of the classification.⁷ If the government discriminates against blacks because it believes that blacks are more likely than others to have some relevant trait T, but in fact blacks are not more likely than others to have T, then government has discriminated irrationally. Or, if blacks *are* more likely than others to have T, but there is another classification C that is more probative of T and/or cheaper to employ than a racial classification, government has again discriminated irrationally.

On the other hand, if it is true both that blacks are more likely to have T and that there is no other classification that is as cost-effective as race in identifying those with T, government has discriminated rationally.

Why would we want a constitutional principle such as the *Anti-Discrimination Principle* that forbids rational discrimination (in the absence of a compelling interest) and not merely irrational and nonrational discrimination? First, we might believe that racial discrimination is almost never rational, and that we would therefore be wise to pay the cost of forbidding some rational racial discrimination in order to ensnare nonrational and irrational racial discrimination that might otherwise sneak through masquerading as rational discrimination.⁸

6. See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. Pa. L. Rev. 149, 158-59 (1992).

7. *Id.* at 169-70.

8. *Id.* at 203-8.

Second, we might believe that the *overt* use of racial classifications has negative side-effects even if it is otherwise rational discrimination in the context in which it is employed.⁹ Negative racial attitudes might be reinforced. Members of the group discriminated against might suffer psychically even if not personally affected by the law. Importantly, this justification for the *Anti-Discrimination Principle* does not apply to the covert uses of suspect classifications covered by the *Intent Principle*.

V. ANOTHER LOOK AT THE PROBLEM

We can now see why School B's regional policy is constitutionally legitimate. Having a regional law school is a legitimate governmental purpose—or, if not a legitimate governmental purpose, a rational means of achieving a variety of legitimate governmental purposes—and its disparate racial impact is immaterial, given that the disparate racial impact was not in any sense the reason the policy was chosen by School B.

We can also see why School A would act unconstitutionally if it discounted the LSAT scores of blacks. Although doing so would rationally further the legitimate governmental purpose of increasing law student performance, that purpose is presumably not so compelling as to justify a racial classification. Because the *Anti-Discrimination Principle* covers cases of rational as well as nonrational and irrational racial discrimination, it forbids School A's racial discrimination against blacks.

What now of School C's regional policy, the policy at issue? School C is engaging in rational discrimination against applicants outside the plains region. Region is not a racial or other suspect classification.¹⁰ On the other hand, unlike School B, School C would not be adopting the policy were it not in some sense the case that the policy produces a disparate racial impact. For School C, unlike School B, is interested only in improving its admittees and not in being regional for any other reason. And it is the disparate racial impact that correlates "regional" with "better admittees."

9. *Id.* at 185-87.

10. In some circumstances it may be. See *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

Notably, the constitutional principles of these cases do not extend to state or regional preferences regarding state-financed benefits such as higher education. See Jonathan D. Varat, *State 'Citizenship' and Interstate Equality*, 48 U. Chi. L. Rev. 487, 552-54 (1981).

Although it is tempting to view School C's plan as simply presenting a disparate impact case (deemed constitutional by the *Disparate Impact Principle*), the plan differs significantly from the paradigm case presented by School B's plan. School B's objective is to establish itself as a regional law school. Though the plan disparately impacts blacks, the benefits of becoming a regional law school are not thought (by School B) to derive from disparately impacting blacks, either directly or indirectly.¹¹

Of course, School C's ultimate goal is not disparately to impact blacks, which would constitute a kind of discriminatory purpose, covered by the *Intent Principle*. However, School C does intend to benefit from this disparate impact.

In terms of their impacts on blacks, the policies of School B and School C are thus prototypical examples in the debates over the meaning of "purpose." School C has a *purpose* to impact blacks adversely; School B does not. Though School C's ultimate goal is not to harm blacks—that is, it does not seek to harm blacks out of racist enjoyment in causing them harm—School C perceives excluding blacks as a means to its ultimate goal. School B, on the other hand, does not have a purpose to impact blacks adversely. It simply wants to be a regional law school, and it would pursue that goal even if the goal did not impact blacks adversely. School B is thus like the killer who bombs an airplane prototype in flight in order to delay production; under the criminal law, the killer is guilty of knowingly killing the pilot, but not of doing so purposely.¹² School C, on the other hand, is like the killer who bombs the plane to kill the pilot, so the killer can take up with the pilot's spouse. The difference between the schools also is captured by the doctrine of

11. For example, the school might think it will benefit by becoming a bigger fish in a smaller pond; it might think that regionalism will entice regional employers to recruit more heavily at the school, or even that student performance will improve if students generally perceive that they are going to school with persons they are likely to encounter frequently in a regional practice. Or the school might think that the regional placement advantages of becoming a regional law school will enhance student performance by enticing the best students from the region to remain in the region for law school.

A different case would exist if School B would not attempt to become a regional law school if doing so would not disparately impact blacks. For example, if alumni would better financially support a regional law school, but do so only because they were not thereby supporting blacks, and if School B were aware of this causal mechanism, then we should view School B as intending to discriminate against blacks (or as intending to increase financial support for the school through discriminating against blacks).

12. Of course, in criminal law, the distinction often will make no difference in terms of liability.

the double effect, which holds that acting to achieve an act's bad consequences is morally different from acting with awareness that the bad consequences will result as a byproduct of pursuing some other end.¹³

Acting with knowledge that a classification serves its purpose *because* of its disparate impact differs from the ordinary disparate impact cases in the following way: Whenever the classification ceases to produce as much disparate impact as it did originally, the government actor will be *motivated* to find a new classification that more closely correlates with the suspect class. In other words, government's classifications will continually track suspect ones. In an ordinary disparate impact case—a case like *Washington v. Davis*, for example—the government actor will be at worst indifferent to and at best delighted by a decline in the disparate impact of the classification. Not so when it understands that the classification serves the purpose in direct relation to the degree of disparate impact it produces.

Should the distinction between a classification that produces disparate impact as a by-product and one that is chosen precisely *because* of its disparate impact make a constitutional difference? Recall the reasons the *Anti-Discrimination Principle* encompasses rational as well as nonrational and irrational discrimination. First, use of a suspect classification might be so rarely rational that its proscription in the absence of a compelling purpose will produce little harm but perhaps prevent some otherwise undetected nonrational and irrational uses from sneaking past the courts. Second, use of a suspect classification, even if rational, may produce psychic and other costs beyond its effects on those directly disadvantaged. Do these reasons apply to use of a proxy for a suspect classification when the proxy is chosen because *it* is rational?

Unlike many of the uses of proxies that fall within the *Intent Principle*, in cases like School C's, the motivation to use the proxy ultimately comes not from the proxy's connection to race but from its connection to government's ultimate purpose, which connection just happens to run through race.

On the other hand, there *is* an argument that School C's contemplated regional policy falls under the *Intent Principle*. For once School C understands that the regional policy produces

13. The standard example compares the morality of wartime bombing of a munitions plant undertaken with the knowledge it will kill nearby civilians with a plan to kill civilians as a means of pressuring the enemy to surrender.

better student performance only to the extent the policy produces a disparate racial impact, School C will be tempted to go to policies that have an even greater disparate racial impact. Perhaps if School C is in South Dakota, and the Dakotas have even fewer black applicants to law schools than Nebraska, School A will be tempted to adopt a Dakotas restriction on admission, at least if the loss of Nebraska whites has less effect than the elimination of Nebraska blacks. Again, School C is ultimately concerned with school performance, not racial exclusion *per se*. But unless rational racial discrimination is exempted from the *Intent Principle*, that should be immaterial. For it is no defense to the *Anti-Discrimination Principle*—which the *Intent Principle* is meant to further—that government is aiming at race only because that is the best way to hit a target other than race, just as it is no defense to terror bombing that one would gladly pursue a different method of winning the war if one were feasible, and that one truly regrets having to terrorize. The *Anti-Discrimination Principle* is not limited to gleeful racial discrimination.

Most of the reasons that support the *Anti-Discrimination Principle* arguably support treating School C's plan differently from School B's. Because School C perceives that disparate racial impact is directly responsible for the gains it seeks from the regional-school approach, we have reason to be concerned that School C may have been too lax in examining the evidence that led it to adopt the plan. That is, School C may be too willing to embrace the view that discriminating against blacks will increase student performance because that view overlaps with pernicious stereotypes. Moreover, even if School C is acting in an entirely rational way, knowledge of the connection between race and performance may have untoward social effects of a kind that School C has little incentive to internalize in assessing the rationality of discrimination. School C's plan has these effects in a less marked way than would School A's plan of an explicit and overt racial classification (discounting the LSAT scores of blacks). But once School C's plan is challenged, the secret will be out, and the untoward social effects will result. Accordingly, there is a strong argument that School C's plan should fall under the *Intent Principle* as an effort to evade the thrust of the *Anti-Discrimination Principle*.

Of course, paradigmatic disparate impact cases can present some difficulties similar to those presented by School C's case. Suppose School D, believing that LSAT scores accurately pre-

dict student performance, and wishing to achieve a high level of student performance, decides to admit students solely on the basis of LSAT notwithstanding its knowledge that such an approach will disparately impact blacks. News of this disparate impact might well have untoward social effects. But because School D is not purporting to benefit by employing race as a proxy, any untoward effects that result from the correlation between race and academic potential have a better chance of reflecting reality, not merely School D's theory of reality. Moreover, because School D does not actually make use of race as a proxy, directly or indirectly, the chance is greatly reduced that School D is simply acting out of an objectionable desire to harm blacks or to vindicate its own misimpressions about blacks.

Moreover, the typical anti-discrimination case risks a different bad effect. While a black might feel bad upon learning of the effect of School D's admissions policy, and might fear that others will unjustly assume that she is unqualified for law school because of her race, she need not view race as a straitjacket. School D is not thinking of any individual black as a black; instead, it views each applicant as an LSAT score. In the absence of evidence that the LSAT itself is constructed or employed with the purpose to discriminate against blacks, any individual black knows that she will be evaluated for admission based on characteristics apart from race. It is surely demoralizing to fear being judged according to inapt stereotypes, such as that if one is black, one is a poor performer on the LSAT. And disparate impact may lead to such stereotyping. However, it is even more demoralizing to fear that meaningful action will be taken based on those stereotypes. When a school consciously employs a proxy for race, it sends a message, to blacks and whites alike, that it is permissible to think racially when making important decisions. This is not an effect of the paradigmatic disparate impact case.

This particular side effect of the typical anti-discrimination case also will result from School C's admissions policy, at least once it is challenged. The racial thinking of School C is somewhat more hidden from view than would be the case if School A were to employ its explicit racial classification. But when called on to explain its policy, School C will need to admit that it adopted the policy because of the way the policy's racial impact improves student performance. We will learn that School C thought in racial terms and acted to take advantage of such ra-

cial thinking. Thus, the doctrine of the double effect can be viewed, in this context at least, as having a utilitarian face too.

Now consider School E. Having observed that School B's student performance increased when School B became a regional school, but having no idea why, School E adopts a regional-school stance in hopes of increasing student performance. That is, School E is like School C in having the same ultimate end (to increase student performance), but differs from School C in not realizing the causal mechanism that explains the results. Is School E sufficiently different from School C to treat the plans differently?

We can feel quite confident that School E is not acting out of bias, pronounced or subtle. Its ignorance establishes innocence. And to the extent that untoward social effects are mainly the product of social awareness of the link between race and goal, that factor is also missing. But placing a premium on ignorance is an uncomfortable constitutional position. Moreover, once School E becomes aware of why its approach works, the morality of its continuing the approach seems virtually indistinguishable from the morality of School C's adoption of the policy in the first place.

Whether an actor has a purpose to impact disparately a protected group will sometimes depend on the state of our knowledge about the world. For example, if we learn that a regional strategy improves student performance by screening out those who had poor elementary schooling, a school that adopts a regional strategy to improve performance does not have the purpose to impact blacks disparately, even if disparately impacting those with poor elementary schooling will also disparately impact blacks.

There is one category of case, however, in which our state of knowledge will not affect our description of the causal mechanism by which a particular strategy works. That is the category in which a strategy works precisely because it taps someone else's noxious attitudes. For example, consider a law school that seeks to promote student satisfaction with teaching by recruiting and retaining teachers who have received good student teaching evaluations. Now assume that these evaluations are skewed because students typically are harder on female and minority professors solely because of gender and race. The school's scheme will disparately impact women and minorities,

and it is likely to succeed in significant part because it feeds its own students' noxious preferences for white male professors.¹⁴

Our tentative conclusion is that the problem of deciding whether School C's proposed policy violates the *Intent Principle* is a product of tension between the first two principles. The *Anti-Discrimination Principle* forbids rational racial discrimination along with nonrational and irrational racial discrimination. That is, it forbids using race as a rational means to permissible ends. The *Disparate Impact Principle*, however, allows non-racial discrimination that closely correlates with racial discrimination in pursuit of permissible ends. When that correlation is direct, so that the non-racial discrimination serves permissible ends in direct relation to its correlation with racial discrimination—the case of School C's regional policy—the two principles seem to collide.¹⁵

It is time, therefore, to rethink the issue of rational discrimination. The problem we have illustrated is not merely hypothetical, we suspect. Many classifications that correlate with race or sex may further permissible objectives *because* of that correlation rather than *despite* it. In those cases, demanding that government ignore race and sex but also act rationally will be demanding the impossible.

14. See Alexander, 141 U. Pa. L. Rev. at 173-76 (cited in note 6). See also note 11.

15. This at least apparent collision of the two principles explains the reaction we have gotten when we have described the problem of School C's admissions policy to others. Most people deemed the constitutionality of that policy to be an easy question. Half of them believed the policy was clearly constitutional, while the other half believed the policy was clearly unconstitutional. We take that reaction to be strong evidence that the question is *not* an easy one under current constitutional jurisprudence.