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## *American Insurance Association v. United States Department of Housing and Urban Development: Reframing Chevron to Achieve Partisan Goals*

Margaret Burgess\*

### INTRODUCTION

With the Supreme Court poised to decide the fate of the disparate impact theory this term,<sup>1</sup> a recent decision by the U.S. District Court for the District of Columbia—*American Insurance Ass’n v. United States Department of Housing & Urban Development*<sup>2</sup>—has reshaped the debate over this issue. In a brief thirteen-page opinion, the court vacated the U.S. Department of Housing and Urban Development’s (HUD) rule codifying the disparate impact theory under the Fair Housing Act (FHA).<sup>3</sup> This is the first time that a court in the D.C. Circuit has addressed whether or not a discrimination claim is cognizable under the disparate impact theory.<sup>4</sup> By contrast, all other eleven circuit courts have

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1. See *Inclusive Cmty. Project, Inc. v. Tex. Dep’t of Hous. & Cmty. Affairs*, 747 F.3d 275, 280 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 46 (2014).

2. *Am. Ins. Ass’n v. U.S. Dep’t of Hous. & Urban Dev.*, No. 13-00966, 2014 WL 5802283 (D.D.C. Nov. 7, 2014).

3. See *id.* at \*13.

4. See, e.g., *Greater New Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urban Dev.*, 639 F.3d 1078, 1085 (D.C. Cir. 2011) (“We have not decided whether [the FHA] permits disparate impact claims.”).

already addressed this question and held the opposite—that such claims are indeed cognizable.<sup>5</sup> Naturally, the *American Insurance* opinion raises alarm across the civil rights community as it braces for the Supreme Court’s decision; yet perhaps less predictably, the opinion should raise alarm for administrative law scholars as well.

Legal commentators have already dissected this decision’s significance regarding disparate impact,<sup>6</sup> but there has been no meaningful discussion on its significance regarding administrative case law. In particular, the decision delivers a serious blow to the legitimacy of the *Chevron* framework, the key test for determining whether courts should defer to agency decisions or not.<sup>7</sup> Some postulate that *Chevron* has already been fading in importance, characterizing the lower courts’ application of it as “rife with inconsistency,”<sup>8</sup> but to date, this inconsistency has remained within the bounds of the Supreme Court’s evolving interpretation of the *Chevron* framework.<sup>9</sup> The *American Insurance* decision, however, stepped outside these bounds in its formulation and application of the *Chevron* framework, thus adding a level of inconsistency that approaches mere partisanship. For one, in order to vacate HUD’s rule, the *American Insurance* court essentially had to reframe step one of the *Chevron* framework. Moreover, even aside from the framing issue, the court downplayed or simply turned a blind eye to traditionally relevant facts about the statutory language and to judicial precedent leading up to the HUD rule in reaching its conclusion. The result is an opinion that reads more like a legal brief than a judicial opinion.

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5. See, e.g., *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 49–50 (1st Cir. 2000); *Mountain Side Mobile Estates P’ship v. U.S. Dep’t of Hous. & Urban Dev.*, 56 F.3d 1243, 1250–51 (10th Cir. 1995); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935–36 (2d Cir. 1988); *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1386 (5th Cir. 1986); *Arthur v. City of Toledo*, 782 F.2d 565, 574–75 (6th Cir. 1986); *United States v. Marengo Cnty. Comm’n*, 731 F.2d 1546, 1559 n.20 (11th Cir. 1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065 (4th Cir. 1982); *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1311 (9th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 146–47 (3d Cir. 1977); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977); *United States v. City of Black Jack*, 508 F.2d 1179, 1184–85 (8th Cir. 1974).

6. *Consumer Fin. Servs. & Hous. Grps., Federal District Court Vacates HUD Disparate Impact Rule*, BALLARDSPAHR.COM (Nov. 5, 2014), <http://www.ballardspahr.com/alertspublications/legalalerts/2014-11-05-federal-district-court-vacates-hud-disparate-impact-rule.aspx>; Andrew G. Simpson, *Insurers Win Case to Kill HUD Disparate Impact Rule*, INS. J. (Nov. 3, 2014), <http://www.insurancejournal.com/news/national/2014/11/03/345769.htm>.

7. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

8. Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 727 (2007).

9. See *id.* at 782 (describing lower courts’ inconsistency as largely arising from the Supreme Court’s reformulation of *Chevron* step one from an intentionalist to a textualist inquiry). The following two cases illustrate the inconsistency resulting from the Supreme Court’s evolving interpretations of *Chevron* over time. In *Office of Consumers’ Counsel, State of Ohio v. Federal Energy Regulatory Commission*, 783 F.2d 206 (D.C. Cir. 1986), for example, the D.C. Circuit centered its step one inquiry on Congress’s intent in drafting the law. But later in *Consumer Electronics Ass’n v. Federal Communications Commission*, 347 F.3d 291 (D.C. Cir. 2003), the court relied almost exclusively on the plain text of the law in its step one inquiry.

This Comment attempts to highlight the flawed reasoning in *American Insurance* that, if adopted by other courts, could severely undermine *Chevron* deference going forward—to a much greater degree, at least, than it has been undermined already. Without some semblance of consistency in the application of *Chevron*, the legitimacy of the courts themselves is in question. And because *American Insurance* lays out a roadmap for the Supreme Court to follow in its upcoming decision, its impact could be significant and troubling.

## I.

### BACKGROUND

In November 2011, HUD proposed a rule that provided for disparate impact liability under the FHA,<sup>10</sup> and, after responding to public comments, it issued the final rule in February 2013.<sup>11</sup> The final rule stated that “liability may be established under the Fair Housing Act based on a practice’s discriminatory effect . . . even if the practice was not motivated by a discriminatory intent.”<sup>12</sup> This is the crux of the disparate impact theory: plaintiffs may prove discrimination through evidence of effects regardless of evidence of intent.

Though HUD had not issued a formal rule on disparate impact liability before this point, it had long interpreted the FHA as including this type of liability, evidenced by its formal adjudications, statements by the Secretary, and guidance documents over the years.<sup>13</sup> The eleven circuit courts that addressed this issue varied slightly in their application of the disparate impact standard, but they unanimously agreed with HUD’s interpretation that disparate impact claims are cognizable.<sup>14</sup> Thus, in the preamble to its final rule, HUD explained that it issued the rule “for purposes of providing consistency nationwide” on the application of disparate impact.<sup>15</sup>

Others saw HUD’s new rule in a different light—as a calculated and illegitimate move to save disparate impact. For example, the American Insurance Association (AIA)—the plaintiff in this case—implied that HUD only proposed the rule when it did because the Supreme Court had recently granted certiorari in *Magner v. Gallagher*,<sup>16</sup> a case in which the disparate impact theory was again at issue.<sup>17</sup> The AIA viewed HUD’s decision as agency

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10. See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 76 Fed. Reg. 70,921, 70,921 (proposed Nov. 16, 2011) [hereinafter Proposed Rule] (to be codified at 24 C.F.R. pt. 100).

11. See Implementation of Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) [hereinafter Final Rule] (to be codified at 24 C.F.R. pt. 100).

12. Discriminatory Effect Prohibited, 24 C.F.R. § 100.500 (2013).

13. See Final Rule, 78 Fed. Reg. at 11,460.

14. See Jellum, *supra* note 8.

15. See Final Rule, 78 Fed. Reg. at 11,460.

16. 132 S. Ct. 548 (2011). This case settled before the Court could decide it.

17. Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 5–6, *Am. Ins. Ass’n v. U.S. Dep’t of Hous. & Urban Dev.*, No. 13-cv-966 (D.D.C. Dec. 20, 2013), 2013 WL 9925462.

overreach: attempting to get *Chevron* deference for its rule but lacking the statutory authority to do so.<sup>18</sup> HUD, however, remained firm in its position that its interpretation was well within its authority under the FHA.<sup>19</sup>

Thus, four months after HUD issued the final rule, the AIA filed suit against HUD in the U.S. District Court for the District of Columbia, challenging the rule as invalid under the Administrative Procedure Act.<sup>20</sup> The AIA and HUD subsequently filed cross motions for summary judgment, resulting in the current *American Insurance* opinion in favor of the AIA.<sup>21</sup>

## II.

### ANALYSIS

As a matter of administrative law, *American Insurance* was wrongly decided for two key reasons: it improperly framed step one of the *Chevron* test, and it incorrectly applied the facts of the case in step one. These flaws allowed the court to decide in favor of the AIA, since the correct interpretation and application of the law would otherwise have favored HUD.

#### A. Improper Framing of *Chevron's* Step One

In *Chevron*, the Court established a “principle of deference to administrative interpretations,” meaning that “considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”<sup>22</sup> It then laid out the two steps that a court should take in determining whether or not to defer to an agency’s interpretation of a statute. First, the court should ask whether Congress has spoken directly to the question at issue. If it has, such that Congress’s intent is clear, the court must give effect to that intent regardless of the agency’s interpretation. But “if the statute is silent or ambiguous with respect to the specific issue,”<sup>23</sup> the court should simply ask whether the agency’s interpretation of the statute is a permissible one.

In answering *Chevron's* first question (i.e., step one), courts have been somewhat divided over the years about the nature of the inquiry: Should it be broad and include sources such as legislative history, or should it be narrow and focus only on the statutory text?<sup>24</sup> Courts engaging in a broader inquiry are

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18. *See id.* at 8–9.

19. Defendants’ Memorandum in Support of Their Motion to Dismiss or, in the Alternative, for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment at 18, Am. Ins. Ass’n v. U.S. Dep’t of Hous. & Urban Dev., No. 13-cv-966 (D.D.C. Dec. 20, 2013), 2013 WL 9925462.

20. Am. Ins. Ass’n v. U.S. Dep’t of Hous. & Urban Dev., No. 13-00966, 2014 WL 5802283, at \*1 (D.D.C. Nov. 7, 2014).

21. *Id.*

22. *Chevron*, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

23. *Id.* at 843.

24. *See* Jellum, *supra* note 8, at 743.

known as “intentionalist” in their approach, whereas courts engaging in a narrower inquiry—exclusive to the text—are known as “textualist.”<sup>25</sup> Some courts, such as the *American Insurance* court in this case,<sup>26</sup> employ both approaches as a comprehensive measure.

However, the *American Insurance* court erred in step one before it ever reached the intentionalist versus textualist debate. Instead of asking whether the FHA unambiguously expressed Congress’s intent to provide for disparate impact liability or was silent or ambiguous on that point, the court asked a different question: Does the FHA unambiguously provide for *only intentional discrimination*?<sup>27</sup> This is a significant reframing of the original question in *Chevron* step one. Here, to find disparate impact liability, the court is requiring that the statute affirmatively include “clear language to that effect,” rather than asking whether the statute is silent or ambiguous about disparate impact.<sup>28</sup> In this way, the *American Insurance* court undermines the principle of deference established in *Chevron* by making it nearly impossible to reach step two.

### B. Misapplication of the Facts in Step One

Setting aside the *American Insurance* court’s construction of step one, its application of the facts in step one was still incorrect for several reasons. First, the court overlooked the inherent ambiguity in certain words, such as “make unavailable” and “deny.”<sup>29</sup> It recited their definitions in Webster’s Dictionary and made the conclusory statement that these words only pertain to intentional discrimination and not discrimination based on effects.<sup>30</sup> Yet the definitions are far from clear on this point. For example, the word “make” means “to produce as a result of action, effort, or behavior,”<sup>31</sup> which could just as easily mean that the discrimination resulted from a defendant’s behavior, i.e., an *effect* of its behavior.

Second, contrary to the court’s suggestion,<sup>32</sup> the fact that the FHA’s language tends to mirror the language in Title VII and in the Age Discrimination in Employment Act (ADEA)—specifically the sections providing for intentional discrimination liability<sup>33</sup>—does not preclude the FHA

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25. *Id.*

26. *See Am. Ins.*, 2014 WL 5802283, at \*7.

27. *See id.* (finding an analysis under *Chevron* step two “unnecessary” because the FHA “unambiguously prohibits only intentional discrimination”).

28. *See id.*

29. *See id.* at \*8 (analyzing the key portion of the FHA at issue, where it states that it is unlawful to “make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin”).

30. *See id.*

31. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1966).

32. *See Am. Ins.*, 2014 WL 5802283, at \*9.

33. 29 U.S.C. § 623(a)(2) (2012) (ADEA) (making it unlawful to “refuse to hire or to discharge any individual, or otherwise to discriminate” because of age); 42 U.S.C. § 2000e–2(a)(2)

from also providing for disparate impact liability. Congress may know “full well how to provide for disparate-impact liability,”<sup>34</sup> but where Congress has *not* included such clear language about its intent, *Chevron* instructs that Congress may be either silent or ambiguous as to its intent. This means that the court should not step in and interpret the statute itself, but should defer to the agency specifically authorized to interpret it.<sup>35</sup> Thus, the FHA’s silence about effects-based discrimination, and the fact that its language resembles other statutes’ language on intentional discrimination, is not foolproof evidence that the FHA does not include disparate impact.

Third, the court gives short shrift to the fact that eleven circuit courts have interpreted the same statutory language as providing for disparate impact liability, and no other circuit courts have disagreed so far.<sup>36</sup> Furthermore, these courts were not giving deference to HUD to arrive at this conclusion; rather, before the HUD rule ever existed, they were interpreting the FHA in private plaintiff cases and concluded that the FHA provided for disparate impact liability. It is alarming to observe the *American Insurance* court dismissing decades of case law, particularly when the courts interpreted the statute this way without deferring to an agency’s interpretation.

In sum, if the *American Insurance* court had given the proper weight to these facts in its analysis—specifically, the statute’s inherently ambiguous language, its lack of otherwise explicit language, and the unanimity among eleven circuit courts to the contrary—it would not have been able to reach the conclusion that it did. The court’s flagrant disregard for these facts, which other courts have traditionally considered highly relevant to the step one analysis, only underscores the partisan nature of its opinion.

#### CONCLUSION

Although the legal community has primarily focused on the *American Insurance* decision for its effect on the disparate impact theory, it is also important to highlight its possible effects on administrative case law. The *American Insurance* decision represents a more flagrant mistreatment of *Chevron* and the principle of deference toward administrative agencies. This sort of inconsistency in constructing and applying *Chevron* risks the legitimacy of the courts and their reputation of impartiality.

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(2012) (Title VII) (making it unlawful to “refuse to hire or to discharge any individual, or otherwise to discriminate” because of a protected characteristic).

34. See *Am. Ins.*, 2014 WL 5802283, at \*9.

35. See *Chevron*, 467 U.S. at 843–44.

36. See *Am. Ins.*, 2014 WL 5802283, at \*12.