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FORUM

Griggs Was Correctly Decided—A Response to Gold

Alfred W. Blumrosen†

The author disputes Gold's conclusion in Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination, 7 INDUS. REL. L.J. 429 (1985), that Congress did not adopt the adverse impact theory established in Griggs v. Duke Power Co. The author disagrees with Gold's recommendation that the courts abandon Griggs and return to a narrower "intent-based" theory of employment discrimination. In disputing Gold's contentions, the author notes that ambiguity in the legislature's intent cannot imply congressional preference for the narrower definition. He further argues that it was proper for the Court to rely on administrative guidelines which had adopted the broad adverse impact interpretation. He concludes that adoption of the adverse impact theory was an enlightened move which has furthered the congressional purpose of enhancing employment opportunity for minority groups and women.

Professor Michael Gold argues that Congress did not intend to adopt the "disparate impact" concept of discrimination in Title VII of the Civil Rights Act of 1964. Therefore, he concludes the Supreme Court decision in Griggs v. Duke Power Co. which adopted the concept was erroneous. His premise is correct. His conclusion is wrong. First, his argument implies that the interpretation of a statute must be limited to concepts which the legislators specifically considered. This is incorrect. In interpreting a statute, courts and agencies must address many problems which were not specifically identified or resolved by the Congress. Secondly, Gold suggests that Griggs resulted in mindless quota

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hiring because of the difficulty and expense in identifying valid tests. The response to Title VII was indeed to increase minority and female employment opportunities, but this was not accomplished by quota hiring without regard to qualifications.

I

The legislators and commentators who addressed the problem of discrimination in the early 1960's engaged in only the most general discussion of discrimination, as a difference in treatment based on race. This phrase sheds no light on whether the "difference in treatment" had to be intended, because the issue of "intent versus impact" had not arisen. The fact that a concept was not discussed by the legislators is not evidence that they rejected it. Gold's "proof" that they did not consider the impact concept negatives the possibility that they rejected it. Rather, there was a general and vague understanding that "all aspects of discrimination in employment" would be ended. The legislators wished to improve the status of minority groups as well as to protect individual rights.

Group interests are claims and demands made in the name of an identifiable segment of society, such as workers, consumers, ethnic minorities, women, and so forth, which are distinct from, although related to, the claims of individual members of these groups on the one hand, and the claims of the total society ("social interests") on the other. The concept of group interests was not well developed in 1964 and the legislators spoke in language of individual rights because there existed no accepted terminology to discuss the desire to improve the economic position of minority groups. Therefore, it is possible to find in the legis-

4. For example, Sen. Humphrey defined discrimination as "a distinction in treatment given to different individuals because of their different race..." 110 CONG. REC. 5423 (1964); Sen. Muskie discussed discrimination in terms of a general "distinction in treatment given to different individuals because of their race, religion, or national origin." 110 CONG. REC. 12,617 (1964); and Sen. Clark noted that "differences in the treatment of employees..." constituted discrimination. 110 CONG. REC. 7218 (1964).

5. The fact that Congress had not discussed a certain narrow interpretation of legislation does not support the conclusion that the legislature intended to preclude that particular interpretation. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984).

6. S. REP. NO. 867, 88th Cong., 2d Sess. 10 (1964) (cited in Hishon v. King & Spalding, 467 U.S. 69, 75 (1984) in support of a broad definition of opportunities protected by the statute). The REPORT states, "Overt or covert discriminatory selective devices, intentional or unintentional, generally prevail throughout the major part of the white economic community. Deliberate procedures operate together with widespread built-in administrative processes through which nonwhite applicants are automatically excluded from job opportunities." Id. at 5.

7. Cowan, Group Interests, 44 VA. L. REV. 331 (1958). Evidence that Congress was concerned with minorities as a group is reflected in the use of statistics in reports showing the disadvantaged state of minorities. See A. Blumrosen, Black Employment and the Law 271-92 (1971); S. REP. NO. 867, 88th Cong., 2d Sess. 4, 6, 8, 9 (1964).

relative history statements to support either the "intent" or the "impact" concept of discrimination, although these statements were not addressed to the specific issue here at hand.\footnote{See supra note 4. Also, Sen. Dirksen made remarks consistent with both interpretations. 110 Cong. Rec. 14,508-11 (1964).}

The Equal Employment Opportunity Commission (EEOC), the agency set up to implement Title VII, could not long afford this kind of uncertainty. The EEOC's obligation to investigate and to attempt conciliation required it to develop definitions of illegal conduct.\footnote{See M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 80-102 (1966) (discussion of the authority of the EEOC). The EEOC developed its views of the statute in published decisions, see McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279-80 (1976), and in published Guidelines. These have been held entitled to deference as useful administrative interpretations. See Griggs, 401 U.S. at 433-34; Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 54 U.S.L.W. 4984, 4995 (U.S. July 2, 1986); Meritor Sav. Bank v. Vinson, 54 U.S.L.W. 4703, 4705-06 (U.S. June 19, 1986).}

It did so consciously in an effort to give the statute a broad "permissible" interpretation. This is appropriate conduct for agencies charged with implementing a statute.\footnote{See Meritor, 54 U.S.L.W. at 4705-06 (Rehnquist, J., writing for the Court); Young v. Community Nutrition Inst., 54 U.S.L.W. 251, 260, 265-67 (1975) (Brennan, J., writing for the Court); Griggs, 401 U.S. at 433-34 (Burger, C.J., writing for the Court).}

In the crucible of administration and in the course of litigating early cases, the functional need for an objective test of discrimination as distinct from the mens rea test became evident.\footnote{Professor Gold was kind enough to cite my work to justify a note concerning my thinking about making the anti-discrimination principles operative. See Gold, supra note 1, at 562-64 & nn.493-501 (citing Blumrosen, The Duty of Fair Recruitment Under the Civil Rights Act of 1964, 22 Rutgers L. Rev. 465 (1968)). My first examination of this problem came as part of an extensive study of anti-discrimination laws in operation in New Jersey conducted during the time the Civil Rights Act of 1964 was being considered. This study, a report to the New Jersey Civil Rights Commission, was published as Blumrosen, Anti-Discrimination Laws in Action in New Jersey: A Law-Sociology Study, 19 Rutgers L. Rev. 189 (1965). The study contains an early discussion of the problems of implementing an equal opportunity statute utilizing a "subjective intent" test, and recommended instead the use of an objective standard. It was written before I went to Washington, D.C. to help set up the EEOC. The study provided a foundation for my subsequent thinking about the definition of discrimination.

The New Jersey statute which originally provided for individual complaints, had been amended to permit the administrator to file a complaint. The administrators had not made extensive use of their power under this section. In criticizing their inaction, I considered how a case without a complainant would be made out: Where there is a "live complainant" the proof typically shows that the complainant applied for the job, was qualified for it, but was denied it because of his race. Where there is no complainant, this type of proof will not exist. The proof will have to support, in some less direct way, an inference that the respondent has engaged in discrimination. If the
concept was pressed by the EEOC in a variety of ways, including the development of the notion that a nonvalidated test with adverse impact was illegal.\(^\text{13}\)

This effort by the government to give the statute a broad interpretation was expressly called to the attention of the Supreme Court in a brief in \textit{Griggs} filed by the Chamber of Commerce which argued for the "intent" standard. The brief argued against deference to the EEOC position on the following grounds:

[It] should be recognized that the EEOC has consciously sought to construe Title VII "as broadly as possible in order to maximize the effect of the statute on employment discrimination without going back to Congress for more substantive legislation." In doing so, the Commission "depart[ed] . . . from previous notions of what discrimination is" and, in taking "its interpretation of Title VII a step further than other agencies

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respondent admits this, or publishes advertisements to this effect, the proof is relatively clear. Another type of proof might include a showing that the respondent's employment pattern was segregated, and that the method of recruitment he used would lead foreseeably to a continuation of the segregated pattern of his labor force. These facts establish that the recruitment method constituted discrimination within the meaning of the statute. The reasoning process here involves the time-honored analysis that persons will be held to have intended the consequences which were substantially certain to result from their conduct.

This proof-plus inference would establish a prima facie case of discrimination and require the employer to justify his recruitment practices on some nondiscriminatory ground. The Division would then have to pass upon the validity of the justification. One such ground might be that the employer had attempted to but was unable to recruit an integrated labor force because no nonwhites were available. This defense, if established, would tend to justify the employer's conduct.

\textit{Id.} at 235-36.

I reflected on the problem of "intention" in anti-discrimination laws as follows:

What is suggested here is that the Division depart from its approach to proof of discrimination which requires a finding that the subjective intent of the respondent was to discriminate, and adopt instead an objective standard for the determination of discrimination. The law has long been more concerned with the consequences of human behavior than with professed intentions which were contrary to the results actually produced. Discrimination should be identified by the objective standards of the civil law, rather than the subjective standards associated with the criminal law.

\textit{Id.} at 236.

When I returned from Washington, D.C. and wrote \textit{The Duty of Fair Recruitment Under the Civil Rights Act of 1964}, 22 \textit{RUTGERS L. REV.} 465 (1968), I tried to fit the effects standard within the statutory framework. The least demanding way to do this, although it entailed some cost, was to adapt the foreseeable consequence test used in cases such as NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), and NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), to the language of Title VII. Cooper & Sobol, \textit{Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion}, 82 \textit{HARV. L. REV.} 1598, 1669-79 (1969) overtly argued for an objective standard. When the Court adopted this view in the \textit{Griggs} decision, I considered that we were in the presence of one of those great decisions which carries the law with clarity a step forward. See Blumrosen, \textit{Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination}, 71 \textit{MICL. L. REV.} 59, 61-63 (1972). I believe my enthusiasm has been justified.


DISPARATE IMPACT THEORY

have taken their statute,” disregarded “intent . . . as crucial to the finding of an unlawful employment practice.” In the process of this “creative interpretation” of the law, the legislative history of the Act was regarded as only an outer limit, not a guide, apparently based on the premise that the courts “were available to prevent serious error” and might sustain the EEOC’s interpretation of Title VII “partly out of deference to the administrators.” 14

The Court shrugged off the argument with a reference to the principle of deference to administrative interpretation. 15

Thus the Court in Griggs was specifically faced with precisely the argument made some fifteen years later by Gold, and the Griggs court explicitly rejected it under the principle of deference to administrative interpretations. Thus the decision in Griggs was not inadvertent on the issue of legislative intent that Professor Gold discusses. Rather, his point was made and rejected.

The development and evolution of legal concepts by an enforcing agency to implement a regulatory statute has long been sanctioned by the Supreme Court. For example, the Court has allowed the Securities and Exchange Commission to adopt a “novel” concept of equitable obligation under the securities law; 16 permitted the National Labor Relations Board to expand the concept of “concerted activities” beyond that originally contemplated by the Board or the courts; 17 and upheld agency regulations which adopt an “impact” standard in a civil rights statute which, in the absence of the regulations, required proof of intent. 18 These, and other examples of “evolutionary jurisprudence” have been extensively discussed in the recent decision in the Chevron case. 19 Justice Stevens’ language is relevant to the appropriateness of reading the disparate impact principle into Title VII:

First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s


15. Griggs, 401 U.S. at 433-34.


answer is based on a permissible construction of the statute.\textsuperscript{20}

This principle is applicable to agency interpretations which are made in the exercise of express rulemaking power,\textsuperscript{21} by adjudication,\textsuperscript{22} or in the exercise of discretionary enforcement authority.\textsuperscript{23} EEOC interpretations have less binding force in most cases because the power to adopt regulations is limited.\textsuperscript{24} Nevertheless, the principle applies to the development of the concept of discrimination by the EEOC. In 1964, Congress sought to improve the economic condition of minorities and women as measured by unemployment rates, occupational distribution and relative wages.\textsuperscript{25} The \textit{Griggs} decision properly and correctly adopted a concept of discrimination to further this objective. Thus \textit{Griggs} was rightly decided. The interpretation proposed by the agencies, and articulated in some lower court opinions, was a fit doctrine to carry out this legislative objective.\textsuperscript{26}

Professor Gold's arguments parallel those of Justice Rehnquist, in \textit{United Steelworkers v. Weber},\textsuperscript{27} that the anti-discrimination concept itself precluded affirmative action because it required color blindness, and that the "no quota" provision of the statute reinforced this conclusion. Both arguments have the same flaws. One is that their very complexity makes them unworkable. The quest for legislative intent must remain a practical working tool for lawyers and administrators. Therefore, it must

\begin{itemize}
\item \textsuperscript{20} Id. at 842-43 (emphasis added) (citations omitted).
\item \textsuperscript{21} \textit{Guardians}, 463 U.S. at 584 n.2, 607 n.27; id. at 642-45 (Stevens, J., dissenting).
\item \textsuperscript{22} \textit{Weingarten}, 420 U.S. at 260, 265-67.
\item \textsuperscript{23} Young, 54 U.S.L.W. at 4684.
\item \textsuperscript{24} See Blumrosen, \textit{The Binding Effect of Affirmative Action Guidelines}, 1 LAB. LAW. 261 (1985).
\item \textsuperscript{26} Gold attempts to psychoanalyze the justices who decided \textit{Griggs}. Gold, supra note 1, at 579-80. The venture is perilous, but, if undertaken, should consider two factors Gold does not mention.
\end{itemize}

First, federal judges had observed defendants' creative resistance to school desegregation, and may have wished to avoid the same development in the employment area. This was a prospect suggested by Judge Sobeloff in his dissent in \textit{Griggs} in the court of appeals, 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff, J., dissenting). The disparate impact doctrine effectively cuts off a wide range of arguments concerning intent which could have been used for evasive purposes. Chief Justice Burger, while sitting on the court of appeals, had been exposed to one facet of Southern resistance to school integration in \textit{Bossier Parish School Bd. v. Lemon}, 370 F.2d 847 (5th Cir. 1967). There a school board argued that it was entitled to segregate children who lived on a military base, because the base was a federal enclave, and thus the children were not subject to state jurisdiction. Therefore, it was argued that the fourteenth amendment did not apply. This "opera bouffe" argument was rejected by the court. Id. at 849-50 ("This case presents a new and bizarre excuse.").

Secondly, the Chief Justice, as a graduate of a less prestigious law school may himself have known some discomfort at the hands of those who believed that the university or law school one attends was more important than ability. \textit{See Griggs}, 401 U.S. at 433 ("History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees.").

\item \textsuperscript{27} 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting).
be limited to those concepts which can be readily quarried from the legis-
lative history. A matter which was clearly presented to the legislature will
leave tracks easily followed. Furthermore, a matter clearly presented will not
require an analysis based on negative inference to establish legislative rejec-
tion. Gold's argument is that the proponents of Title VII did not assert the
disparate impact concept under circumstances in which they should have, and
these proponents spoke in language compatible with the intent concept. Justice Rehnquist's argument in Weber essentially was that proponents of Title VII never asserted that goals and timetables would be appropriate, and spoke in language compatible with the "colorblind" concept.

The problem with both analyses is the same. After herculean efforts at
mining the legislative history, neither Professor Gold nor Justice
Rehnquist could find convincing evidence that the legislature had ad-
dressed and rejected the concept in issue. Given this situation, they draw
the wrong conclusion—that the use of the concept is illegitimate. But, as
has been demonstrated above, the proper question to ask after such an
analysis of legislative history is whether the use of the concept is appro-
priate in light of the statutory language and the objective of the
legislation.

The statutory language used in Title VII had no settled meaning
from prior court interpretations. The constitutional concept of "dis-
\textsuperscript{28} crimination" had recently undergone—and continues to undergo—dramatic changes.\textsuperscript{32} The objective of the legislation was to improve the

\textsuperscript{28} See especially Gold, \textit{supra} note 1, at 429, 578-88.
\textsuperscript{29} See Weber, 443 U.S. at 222, 228-30, 238 (Rehnquist, J., dissenting).
\textsuperscript{30} See \textit{supra} notes 16-20 and accompanying text. \textit{See also} Local 28 of the Sheet Metal Work-
\textsuperscript{31} To the bitter end of the debate on Title VII, Southern senators continued to object that the
concept of discrimination was not clear. Sen. Tower, in his final speech against the bill, on June 9,
1964, the day it passed the Senate, introduced a series of editorials from the Dallas Morning News. The
issue of April 6, 1964 dealt with Title VII. It included the following statement: "Yet, nowhere in Title VII—or any other part of the bill, for that matter—are any standards or definitions given for judging what discrimination is." 110 CONG. REC. 14,496 (1964).

Sen. Tower also introduced a publication entitled "Realtor's Headlines" published by the Na-
tional Association of Real Estate Boards which included the following comment on Title VII:
"Although the title addresses itself to equality and discrimination, it defines neither. Its standards
are subjective and vague. No employer can be sure that he is not inviting the Commission's displea-
sure. As one Congressman remarked recently you may need a Ph.D. to stay out of the penitentiary."

\textsuperscript{32} With respect to the "common understanding" of the term discrimination, Professor Gold
that the term was well understood from its fourteenth amendment context. Gold, \textit{supra} note 1, at
564-67. However, as was pointed out in Justice Brennan's opinion in \textit{Bakke}, the Supreme Court had
but recently redefined illegal conduct under the fourteenth amendment, so its definition was uncer-
noted in dissent in \textit{General Electric Co. v. Gilbert}, 429 U.S. 125, 160-62 (1976), the term does not
appear in the equal protection clause and is susceptible to varying interpretations.
employment opportunities of minorities and women. Thus both the "goals and timetables" approach and the "disparate impact" approach satisfy the proper standards for statutory interpretation.

II

Ms. Thomson in her Response to Professor Gold correctly describes the "ratification" of the Griggs principle by Congress when it amended Title VII in 1972. Gold accepted arguendo the ratification, but concluded that the effort by the 1972 Congress could not validly ratify a mistaken interpretation of the 1964 Act. He is correct. However, the action of the 1972 legislature could also be understood as its expression that Griggs was a correct exposition of the 1964 Act in that it permitted the evolution of the concept of discrimination in light of experience with enforcement. While such legislative judgment cannot bind the courts, it does support the argument that Griggs was correct when decided. If in 1972 the legislature had explicitly adopted the Griggs principle, the Court would have been inclined to conclude that the 1964 Act had the same meaning in order to further the values of stability and continuity. This is precisely what happened in connection with the concept of religious discrimination. Thus the action of Congress in 1972 supports the thesis that the original decision was correct.

III

Professor Gold assumes that because Griggs prohibited unvalidated tests with adverse impact and because validation was a difficult, uncertain and expensive process, employers have simply gone to mindless quota hiring without regard to qualifications. This simply did not happen. Employers could never afford to disregard qualifications, and the government never asked them to hire the unqualified. Under the impact of Griggs, employers discovered that many standards they thought necessary to find qualified employees were not in fact required. Once liberated from their attachment to non-job related criteria, they were able

33. See supra note 25 and accompanying text.
36. The Congressional Conference Report's Section-by-Section Analysis of the 1972 Amendments to Title VII states, "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 CONG. REC. 7166 (1972). Gold recognized this statement and its nonbinding quality. Gold, Reply to Thomson, 8 INDUS. REL. L.J. 117 & nn.5-6 (1986).
38. Gold, supra note 1, at 587.
to increase dramatically their employment of minorities and women. This performance is one of great successful social revolutions of this, or any, era.  

The resultant increase in employment opportunities was consistent with the objectives of Congress. Legislators expected not only procedural fairness under Title VII, but substantive improvement in minority and female opportunity. Under the regime of Griggs, they got both.

IV

Professor Gold's reading of the objectives of Congress in enacting the 1964 Civil Rights Act is too narrow. The statute is no mere technical correction of a flaw in our economic system. The language of the statute is "majestic in its sweep" as Justice Powell noted in Bakke. It was designed to "lift the Negro from the status of inequality to that of equality" to quote Senator Muskie. It deserved to be interpreted, as Senator Humphrey suggested, consistently with its "spirit" for "the letter killeth, but the spirit giveth light."

That spirit was perhaps best expressed by the senator whose position was critical to the passage of Title VII, and who had the last word in the longest congressional debate in our history. After paying tribute to the flexibility in our system of government which permitted legislation to improve the life of the citizens in pursuit of moral progress, and his respect to the lifelong suffering of suppressed peoples on the other side of the globe, Senator Dirksen quoted lines from John Donne.

This vision deserves a more generous perspective of statutory interpretation than that which limits implementation to concepts specifically discussed by the legislature.

It is true that both concepts, "goals and timetables" and "disparate impact" emerged in public discussion after the statute had been passed. The reason for this delayed emergence of the concepts has to do with the emphasis on enforcement problems which arose after the statute was passed.

It is appropriate to allow these considerations to influence interpretation, and implementation of the anti-discrimination principle. This

42. 110 CONG. REC. 14,328 (1964).
43. 110 CONG. REC. 6550 (1964).
44. Sen. Dirksen said, "Mr. President, in line with the sentiment offered by the poet, 'Any man's death diminishes me, because I am involved in mankind,' so every denial of freedom, every denial of equal opportunity for a livelihood, for an education, for a right to participate in representative government diminishes me." 110 CONG. REC. 14,511 (1964).
conclusion is underscored by the fundamental decision concerning implementation which Congress did make. After strenuous debate, it rejected the liberals' desire for an administrative agency with "cease and desist" powers in favor of de novo proceedings in federal court sitting in equity. The decision to rely on the equity powers of the courts is inherently a call upon the contemporary sense of justice of the judges.45 Thus the courts were deliberately and consciously given wide-ranging powers to end discrimination.

Griggs was no folly, rather it was a penetrating and perceptive interpretation of our most recent charter of liberty.