Affirmative Action after Teal

A New Twist or a Turn of the Screw?

Michael W. McConnell

IT IS BY NO MEANS surprising to see a Supreme Court decision in which Justice William J. Brennan (joined by his colleagues Marshall, White, Blackmun, and Stevens) rules in favor of a black female plaintiff in an employment discrimination suit. Nor is it surprising to find Justice Lewis Powell (joined by his colleagues Burger, Rehnquist, and O'Connor) in dissent. But what is to be made of an opinion in which Justice Brennan and his liberal colleagues repeatedly stress the *individual's* right to employment *opportunity* under Title VII of the Civil Rights Act of 1964—in effect returning to the original language and legislative history of the statute—and leave the conservative dissenters to defend the race-conscious hiring requirements created by the jurisprudence of the past decade?

To be sure, the field of civil rights is no stranger to judicial twists and turns. The Supreme Court's abrupt abandonment in 1954 of its former position on racial segregation (*Brown* v. *Board of Education,* 1954) was followed by nearly two decades of judicial assault on race-based decisions in public and private matters. With a strong if belated boost from congressional passage of the Civil Rights Act of 1964, the courts from 1954 well into the 1970s stood for a clear and forceful idea: all persons should be treated as individuals without regard to their race. The democratic logic and moral force of this idea was responsible for the success of the civil rights movement and the unparalleled societal transformation it inspired.

For the last decade, however, the Court—and especially its liberal wing—has backpedaled from the idea of color-blind treatment for all. The principle of equal opportunity for all individuals seems to be viewed as an impediment to the new agenda: race- and sex-conscious decisions for the benefit of black (and other minority and female) workers. The legal theories enunciated during the last decade, therefore, have studiously avoided or denigrated the concept of race- or sex-neutral treatment of individuals. The new buzz words are "statistical impact," "protected groups," "discriminatory results."

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Michael W. McConnell is assistant general counsel, Office of Management and Budget. The views expressed here are his own.

The shift was subtle, but rapid. In 1971, in *Griggs* v. *Duke Power Co.*, the Court—without so much as footnoting evidence in the legislative history to the contrary—announced that "Congress directed the thrust" of Title VII of the Civil Rights Act of 1964 "to the *consequences* of employment practices, not simply the motivation" (emphasis in original). That shift cast suspicion on any and all job qualifications, whether or not motivated by race, that have the consequence of excluding more blacks than whites. And if the true purpose of Title VII was really to decrease discriminatory consequences, that is, to increase minority employment, it was but a short logical step to the conclusion that the law intended minority employment to increase even if it meant deliberate discrimination against whites. While in *Griggs* the Court could still say that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress proscribed," by 1979, in *United Steelworkers of America* v. *Weber*, it found "ironic indeed" the notion that Title VII prohibits "all voluntary, private, race-conscious" hiring.

The Latest Twist

Connecticut v. *Teal*, decided on June 21, 1982, provides the latest twist in this already convoluted history. The facts were straightforward enough. Winnie Teal, a black female employee of the Connecticut Department of Public Welfare, applied for promotion to the position of permanent welfare supervisor. Her first hurdle in the selection process was a written examination. Forty-six percent of the black applicants for the position failed this test, compared with twenty percent of the whites. Teal failed. She therefore filed suit on the ground that the examination was racially discriminatory under the "disparate impact" theory espoused in *Griggs*. Meanwhile, the Connecticut Department of Public Welfare carried on its selection process. From among the applicants who had passed the written test, the department chose permanent welfare supervisors on the basis of other factors, such as seniority, work performance, recommendations from supervisors, and (apparently) race. Eleven blacks and thirty-five whites were hired—22.9 percent of the total number of black applicants, 13.5 percent of the white applicants. The "bottom line" was thus much more favorable to blacks than to whites.

Nonetheless, Teal continued to press her suit, contending that the ultimate success rate of black applicants was irrelevant to her complaint against the disparate impact of the examination. Unless her employer could prove to the court's satisfaction that the examination validly predicted job performance, Teal argued, its use was racially discriminatory. Connecticut defended on the ground that its final selection rate—its bottom line—showed that the selection process had no discriminatory effect. In the absence of a disparate racial impact from the process as a whole, the state argued, there was no reason for the court to second-guess the validity of the test. Five members of the Supreme Court agreed with Teal.

The Court's holding in *Teal* seems as straightforward as the facts. The hiring or promotion of sufficient numbers of black (or other minority, or female) applicants does not preclude a disappointed applicant from stating a prima facie case of discrimination based on the disparate impact of one component of the employer's selection process, such as a written test. Nor does the achievement of an acceptable bottom line provide the employer with a defense to such a lawsuit.

At this point we must take a moment to distinguish between the two different charges that a plaintiff can bring in employment discrimination cases under Title VII: "disparate treatment" and "disparate impact." Disparate treatment occurs when an employer intentionally treats an employee or applicant differently on the basis of race. Disparate impact cases, those based on the Court's decision in *Griggs*, occur when the statistical effects of an employment process on the races are markedly different—for example, if 80 percent of white applicants and only 30 percent of black applicants are hired. When the effects are sharply different, an employer is presumed to have discriminated —even if there is no evidence of intentional discrimination—unless the employer can prove that its employment selection devices were "job-related." And even if the employer can prove job-relatedness to the satisfaction of the court, its employment selection practices can still be found unlawful under the disparate impact theory if other practices, with more favorable results to black applicants, would also

serve the employer's interests. Teal's case was based on disparate impact.

If *Teal* is considered as an exercise in interpreting the disparate impact theory, the question at issue boils down to this: at what level of particularity should the disparate impact test be applied? Should it be applied to the process as a whole (the bottom line), or to any identifiable component or subcomponent of the process (say, a written examination)?

Since the focus of disparate impact analysis is ultimately on the job-relatedness of the employer's selection devices, it would seem sensible to apply the analysis at the level of particularity that best reflects such job-relatedness. If a single component of the process is only a fair predictor of job performance, but when taken in conjunction with several other factors is an excellent predictor, it would seem logical to look at the impact of the various factors taken together, rather than at the single component. To import an example from the college admissions process, grade point averages and Scholastic Aptitude Test (SAT) scores, taken individually, are only fair predictors of college performance, while the composite of the two is superior to either. Most colleges therefore consider both—as well as other, more subjective factors. If disparate impact analysis were applied to grade point averages or SAT scores individually, rather than to the composite actually used by the colleges, the "college-success-relatedness" of the admissions process as a whole would be significantly understated. Similarly, if an employer uses a composite of factors in making hiring or promotion decisions, it would understate the job-relatedness of the process to apply disparate impact analysis to each factor separately. And, since the process as a whole will almost invariably predict job performance more accurately than would any single component of the process —since if it did not, the employer would simply rely on the single, more reliable, component—it would seem that the bottom line is the proper place to look for evidence of disparate impact.

But in *Teal* the Court did not follow the internal logic of the disparate impact theory. It returned instead to first principles—to the purposes of Title VII. Justice Brennan's opinion for the majority relied on two basic propositions about the nature of Title VII protections.

First, the opinion emphasized that Title VII was intended to guarantee equality of employment opportunities. In just three pages of discussion, the Court used the term "opportunity" twelve times, eight times in italics. One may well wonder why Title VII's emphasis on "opportunity" would strengthen Teal's claim. Ordinarily, the term "opportunity" is used in contradistinction to the term "result." But Teal was not claiming that she was denied an equal *opportunity* to be considered on her merits for the position of Connecticut welfare supervisor. That would have been a disparate treatment claim. No, her argument was simply that the *results* of the written examination were statistically unfavorable to members of her race.

To be sure, the word "opportunity" is **the** key term in section 703(a)(2) of Title VII—the section that is taken to be the basis for disparate impact claims. This may explain the Court's repeated use of the term. But that use still begs the key question: by opportunity did Congress really mean result, as measured by statistics, whether at the bottom line or elsewhere?

The majority's second proposition was that Title VII focuses on protection of the individual. The majority used the term "individual" some seven times (twice in italics) in its discussion of this point, along with numerous synonymous terms. Again, however, the connection to Teal's claim was not made clear. Teal did not contend that she was discriminated against as an *individual*, but simply that her racial *group* fared poorly on an examination.

It may seem persuasive to say, with the Court, that the employer's bottom-line defense merely seeks "to justify discrimination against [Teal], on the basis of . . . favorable treatment of other members of [Teal's] racial group." There is, after all, no reason why discrimination against one individual should be excused merely because of the treatment accorded to others. However, since the very basis of Teal's lawsuit was that her *group* did not fare well in the process, it is difficult to understand why the ultimate job success of the same group should be treated as irrelevant.

Reneging on the "Devil's Deal"

In business circles, the precedent set in *Teal* has been viewed as just one more way for plaintiff-oriented judges to rule in favor of sympathetic minority group members. To them, *Teal* is not

so much a twist as another turn of the screw. But the irony of *Teal* is that, from a broader perspective, both its rhetoric and its practical implications constitute a reversal of the direction in which employment discrimination law has developed over the last dozen years.

The disparate impact theory of *Griggs*—that no employment selection process having a disparate impact on blacks may be used unless it is proved to be job-related—has created pressure on employers to move in one or both of two directions. Either they must engage in race-conscious hiring ("affirmative" discrimination) in order to ensure that their process has no disparate impact on blacks, or they must engage in a costly and unproductive exercise of proving that all of their tests and other employment selection devices are job-related.

The latter exercise is not an easy one. At best, validating a test means hiring an army of psychologists, statisticians, and lawyers. Nor will even the most widely accepted validation procedure guarantee success to the employer in the end; virtually no procedure, however pristine, is immune to critical reexamination by plaintiff-oriented judges and agencies. The rules of the game have been set by civil rights bureaucracies and courts with neither expertise nor interest in effective personnel management. Their apparent intent has been not to identify genuinely job-related testing methods, but merely to make it more difficult to use objective tests at all. A recent three-year study by the National Research Council found that even carefully constructed and researched tests seldom withstand legal challenge. The researchers concluded that under prevailing legal and administrative standards, "adequate or useful tests are being abandoned or struck down along with the bad" (*Ability Testing: Uses, Consequences, and Controversies*, 1982).

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It is no surprise, then, that most employers have reacted by moving toward race-conscious hiring. It is easier, cheaper, and safer for employers to hire according to race than to attempt to thread the needle of test validation. In effect, employers have made a "devil's deal" with the Title VII system: if they hire sufficiently large numbers of black (and other minority and female) employees, they will be left alone to manage their businesses (including personnel matters) as they see fit.

This devil's deal by the employers found support in *United Steelworkers of America* v. *Weber* (1979), the famous decision upholding the legality of voluntary affirmative discrimination in employment. It is easy to forget that *Weber* was a pro-employer decision—intended, in the Court's words, to prevent "undue federal regulation of private businesses." *Weber* absolved the employer, Kaiser Aluminum, of liability for deliberate discrimination against white employees. The argument put forward by Justice Brennan for the majority was that Title VII was intended to "integrat[e] ... blacks into the mainstream of American society" by increasing their employment, without unnecessarily curtailing "traditional business freedom." In the Court's view, "a prohibition against all voluntary, race-conscious, affirmative action efforts would ... augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals." Seldom has the Court expressed greater solicitude for circumscribing federal power or for maintaining traditional business freedom. Yet, of course, the whole purpose of Title VII in the Court's view is to constrict that same business freedom by increasing minority employment above the levels that would otherwise prevail. This seeming contradiction is resolved, however, if employers can be induced to discriminate *voluntarily*—at least apparently voluntarily—against nonminority workers, in the hope of heading off more intrusive federal interference. This, as we have seen, they are quite willing to do.

Teal reneges on this devil's deal. Even if an employer hires and promotes enough black employees, it will still not be permitted to manage its business as it sees fit. The courts and the Equal Employment Opportunity Commission will still feel free to second-guess the job-relatedness of its hiring practices, and every component and subcomponent of them, no matter

how favorable to black (and other minority and female) workers the bottom line may be. In fact, no type of vigorous affirmative discrimination program short of straight quota-based hiring will suffice to get the employer off the hook. Under the logic of *Teal,* plaintiffs and courts can divide and subdivide an employer's selection procedures to an infinite degree, requiring elaborate proof of job-relatedness wherever the employer bases selection decisions on a factor not equally distributed among the races. Employer may thus be driven to more subjective criteria for hiring and promotion—criteria less susceptible to disparate impact scrutiny, but also more likely to reflect unconscious predispositions based on race and extraneous cultural values.

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Teal is bad news for business, because it vastly increases the odds that employers will be held liable for unintentional racial discrimination. But this does not make *Teal* good news for civil rights activists, for it also eliminates a large part of the incentive for employers to engage in affirmative discrimination. If employers are to be called to task (and subjected to the possibility of liability, including back pay liability) *whether or not they have hired or promoted a sufficient number of minority employees,* they will have no incentive to engage in affirmative discrimination (other than that created by other governmental requirements). If the devil's deal is off for the courts, it is off for the employers as well.

Moreover, the decision in *Teal* deprives employers of the most sensible and efficient means of hiring and promoting larger numbers of minority employees: to establish minimum job qualifications on a nonracial basis, and then to hire or promote disproportionately large numbers of black (and other minority and female) workers from among those qualified. By precluding this approach the Court increases the cost of engaging in affirmative discrimination even as it decreases the incentive to do so. This is the great irony of *Teal:* that Justice Brennan and the liberal wing of the Court delivered what may be the most serious blow the judiciary has struck yet against affirmative discrimination.

A Return to Individual Rights?

Not only does *Teal* suggest an abrupt change in the practical means of complying with Title VII, but it suggests a change in the realm of ideas as well. A comparison of *Teal* and *Weber* is revealing: the two opinions, written four years apart by the same justice, take diametrically opposed positions on both the purpose and the methods of Title VII.

The *Weber* opinion adopted the view that Title VII was intended to increase black employment, irrespective of proven acts of discrimination against individual black complainants.

> Congress' primary concern in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with "the plight of the Negro in our economy." Before 1964, blacks were largely relegated to "unskilled and semi-skilled jobs." Because of automation the number of such jobs was decreasing. As a consequence, "the relative position of the Negro worker [was] steadily worsening."

Remarkably, the *Weber* Court's discussion of the purpose of Title VII does not even mention that there might be a moral objection to discriminating against an individual because of race. In fact—aside from unavoidable quotations from the statute itself in the footnotes—the *Weber* opinion does not even *use* the word "individual." The race problem, to the *Weber* Court, is solely an economic problem. In contrast, the *Teal* Court repeatedly stressed the word "individual," and stated that the "principal focus" of Title VII "is the protection of the individual employee, rather than the protection of the minority group as a whole."

Moreover, the *Weber* Court viewed affirmative discrimination programs in favor of black workers, even if they never claimed to be victims of discriminatory acts by the employer, as "effective steps to accomplish the goal that Congress designed Title VII to achieve." The *Teal*

Court, in counterpoint, observed that "an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of . . . discrimination.' "

To put the point simply, either affirmative discrimination is an effective step toward complying with Title VII or it is not. If the *Teal* Court is correct that increased hiring of minority workers does *not* diminish an employer's liability or advance the purposes of Title VII, then the *Weber* Court could not have been correct that prohibiting such discrimination to accomplish such increased hiring would be "completely at variance with the purpose of the statute." This inconsistency, unfortunately, is unexplained: *Teal* does not cite, let alone discuss, the earlier decision in *Weber*.

But the liberal wing of the Court has no monopoly on irony. The dissenters, too, claimed their share. In their closing remarks, Justice Powell and his fellow dissenters approvingly quoted a lower court opinion:

> Title VII should not be construed to prohibit a municipality's using a hiring process that results in a percentage of minority [employees] approximating their percentage of the local population, instead of relying on the expectation that a validated job-related testing procedure will produce an equivalent result, yet with the risk that it might lead to substantially less hiring.

There could hardly be a clearer statement of preference for hiring according to racial percentages instead of neutral procedures, or from a more surprising quarter.

Either the policy of this nation is to guarantee that all individuals are treated fairly and neutrally, without regard to their race, or it is to produce social and economic results more closely reflecting the numerical division of the races in society. The former policy does not produce the latter result.

In fact, the tergiversations of the justices in *Teal* may reflect the clash between two irreconcilable visions of a racially just society. Either the policy of this nation is to guarantee that all individuals are treated fairly and neutrally, without regard to their race; or it is to produce social and economic results more closely reflecting the numerical division of the races in society. The former policy does not produce the latter result. Yet the Supreme Court has not faced up to the inconsistency between these visions. In its decision in *Teamsters* v. *United States* (1977), the Court stated:

> it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

The Court's expectation is simply unrealistic, and will remain so for the foreseeable future. So long as black (and other minority and female) Americans continue to differ in economically significant ways, fair and neutral selection procedures will disproportionately exclude them from better paying jobs. But direct efforts to produce proportionate results necessarily involve a return to the morally questionable practice of racial discrimination, with its attendant social divisiveness and resentment, encouragement of racial stereotyping, stigmatization of its supposed beneficiaries, and often perverse distributional effects.

Until the Supreme Court faces the problem and chooses between the two fundamental understandings of equality, it will continue, as in *Teal*, to mix the apples of nondiscrimination with the oranges of group statistics.

Reopening the Issue

The underlying problem is the disparate impact construct itself. And that takes us back to *Griggs*, the first decision to abandon fairness of process and embrace statistical consequences instead. Oddly enough, the nine justices in *Teal* were unanimous on one point: the continued authority of *Griggs*. Both sides relied on it without a hint that it might be in conflict either with the literal language of Title VII or with the principle of nondiscrimination that Title VII embodies. In permitting plaintiffs to establish a prima facie case purely on the basis of results, the *Griggs* decision left employers to choose between two unpalatable alternatives—either to engage in race-conscious hiring, or to lose their discretion over the establishment of

job qualifications. Mere neutrality, mere nondiscrimination, was not enough. Both of these alternatives are unattractive not simply as an abstract moral judgment, but also on the basis of the original congressional intention. There are no propositions so clear in the language and legislative history of Title VII as the propositions that employers would not be required to engage in affirmative discrimination for the purpose of racial balance,[1] and that employers would continue to be free to establish and enforce job qualifications.[2]

Griggs is water under the dam. The Court's departure from the original intention and language of Title VII is old news. This is especially true if the history of the 1972 amendments to Title VII is read as effectively ratifying the full sweep of *Griggs* and incorporating it into law. These relics of legal history would hardly be worthy of attention in 1983 were it not that the opinion in *Teal* drives us to retrieve them. If the emphasis of Title VII is truly on opportunity—as the *Teal* Court would have it—then what do we make of a system that relies on results, impacts, outcomes, consequences? If the emphasis of Title VII is on the individual—as the *Teal* Court would have it—then what do we make of a system that relies on racial groups and statistics?

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The final irony of *Teal* is that—taken seriously—the opinion not only lessens the incentive of employers to practice race-conscious affirmative discrimination, but invites a fundamental reexamination of the very premises of employment discrimination law as they have evolved since *Griggs*. The Department of Justice has recently filed a historic brief opposing for the first time the imposition by consent decree of a 50 percent racial quota for promotions in the New Orleans police department. In the spirit of *Teal*, the Justice Department has appealed to the original ideals and meaning of Title VII in an effort to stop the trend toward employment quotas on the basis of race. The decision rests in the hands of the courts: does *Teal* genuinely signal a return to color-blind principles of individual rights, or was *Teal*, as the critics will suggest, no more than another device to ensure plaintiff victories? ■

[1] Senators Joseph Clark (Democrat, Pennsylvania) and Clifford Case (Republican, New Jersey), who were the bipartisan "captains" in charge of explaining and defending Title VII in the Senate, prepared an interpretative memorandum answering a number of charges leveled against Title VII by the opposition. This memorandum has been described by the Supreme Court as one of the "authoritative indicators" of the meaning of Title VII (American Tobacco Co. v. Patterson, 1982). The memorandum stated: "There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial ballance, whatever such a balance may be, would involve a violation of title VII because maintaining a balance would require an employer to hire or to refuse to hire on the basis of race" (*Congressional Record*, vol. 110 [1964], p. 7213).

This is but one authoritative statement among many to similar effect. For example, ibid., p. 1518, Rep. Emanuel Celler (Democrat, New York); p. 11848, Sen. Harrison Williams (Democrat, New Jersey); and p. 7207, Justice Department memorandum.

To protect against possible misunderstanding, Congress added the following language to Title VII itself: "Nothing in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or any group . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or community, State, section, or other area" (42 U.S.C. §2000e–2[j]).

[2] The Clark-Case memorandum (see note 1) also addressed this issue: "[T]itle VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them. . . . Title VII says merely that a covered employer cannot refuse to hire someone simply because of his color. It expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications" (*Congressional Record*, vol. 110 [1964], pp. 7246-47).

This also is but one authoritative statement among many to similar effect. For example, ibid., p. 1518, Rep. Celler; pp. 7246-47, memorandum of Sen. Case; pp. 13079-80, Sen. Clark; p. 13088, Sen. Hubert Humphrey (Democrat, Minnesota); and p. 13825, exchange between Sens. Case and John McClellan (Democrat, Arkansas).

To protect against possible misunderstanding, Congress added the following language to Title VII itself: "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex or national origin" (42 U.S.C. §2000e–2[h]).