
In a recent issue of the INDUSTRIAL RELATIONS LAW JOURNAL, Professor Michael Gold criticizes the disparate impact theory as a definition of discrimination under Title VII of the Civil Rights Act of 1964. After discussing the problems he perceives with the disparate impact model, Professor Gold analyzes the legislative history of Title VII as it was passed in 1964. Gold contends that Congress intended to forbid disparate treatment under Title VII, but not practices that have a discriminatory impact on protected groups, regardless of the business necessity of the practice. Gold concludes, therefore, that the courts should abandon the adverse impact theory established in Griggs v. Duke Power Co. because adoption of the theory improperly extends the reach of Title VII.

What Gold fails to recognize, however, is that Congress approved the disparate impact theory and ratified Griggs when it amended Title VII.
VII in 1972. The purpose of the 1972 legislation\(^4\) was to expand the Equal Employment Opportunity Commission's (EEOC) enforcement powers, which under the 1964 Act had been limited to investigation and conciliation of discrimination claims. Additionally, Congress wrangled over various provisions that extended Title VII coverage to previously unprotected employees, especially employees of governmental entities. Although the *Griggs* theory of discrimination was not debated, legislators on both sides of the several issues referred to *Griggs*, often using the existence of institutional and systematic discrimination to support their arguments.

This paper will examine the legislative history of the 1972 amendments to Title VII and discuss Congress' intent with respect to the disparate impact doctrine when it passed those amendments. The examination will show that use of the disparate impact theory of discrimination was ratified in the 1972 amendments.

I

**LEGALISTIC HISTORY OF THE 1972 AMENDMENTS**

The Supreme Court handed down its decision in *Griggs* on March 8, 1971. Less than a week earlier, the General Subcommittee on Labor of the House Committee on Education and Labor had begun hearings\(^5\) on H.R. 1746, a bill which would have granted the EEOC power to issue cease and desist orders after an administrative hearing. The bill also provided for extending Title VII coverage to state and local employees, to federal employees, and to employers and unions with eight or more employees.\(^6\) Additionally, H.R. 1746 originally contained a provision designed to ratify use of the disparate impact theory. That provision would have amended section 703(h), which governs employment testing.\(^7\) On June 2, 1971, the House Committee on Education and Labor favorably reported H.R. 1746.\(^8\)

On June 17, 1971, Representative Erlenborn introduced a substitute

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6. Other major provisions of H.R. 1746 would have transferred the functions of the Attorney General in pattern or practice cases and the antidiscrimination functions of the Office of Federal Contract Compliance to the EEOC. The enacted version of H.R. 1746 retained the provision transferring pattern or practice cases in § 707(c).
7. The provision would have amended § 703(h) to read, "nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test which is directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position concerned: 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."
bill, H.R. 9247, which provided for judicial rather than administrative enforcement of Title VII. It made no provisions for extending the protection of Title VII to employees not covered by the 1964 Act. The House eventually agreed to substitute the text of this bill for that of H.R. 1746. The House passed H.R. 1746, with the substituted text of H.R. 9247, on September 16, after only two days of debate.

On October 4, the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare began hearings on S. 2515, S. 2617, and H.R. 1746, which now provided for judicial rather than administrative enforcement of Title VII. Senate Bill 2617, introduced by Senator Dominick, was identical to H.R. 1746 as passed by the House. Senate Bill 2515, like the original H.R. 1746, provided for EEOC cease and desist powers and for extension of Title VII coverage to employers with eight or more employees, to employees of state and local governments and to employees of the federal government. The bill also provided that certain functions of the Attorney General and the Office of Federal Contract Compliance Programs (OFCCP) be transferred to the EEOC.

On October 28, 1971, the Senate Committee on Labor and Public Welfare favorably reported S. 2515 with amendment and reported without recommendation H.R. 1746. The relevant sections of S. 2515, as reported by the Committee, differed from the original insofar as they provided that the Commission would refer to the Attorney General those cases involving employees of state and local governments. Senate Bill 2515 also gave to the Civil Service Commission (CSC), rather than the EEOC, the authority to enforce Title VII in the federal government.

The Senate debate on S. 2515 and H.R. 1746 began on January 19, 1972. Senate Bill 2617 was not considered during the debates, but Senator Dominick soon offered Amendment 611, which provided for judicial enforcement of Title VII. Although this amendment was rejected,
the Senate eventually opted for a compromise amendment\textsuperscript{20} which provided for expedited judicial enforcement. This compromise amendment was engineered by Senators Williams and Javits, co-sponsors of the cease and desist bill, and Senator Dominick, sponsor of the rejected substitute amendment.

On February 22, 1972, the Senate passed S. 2515 as amended by the Williams-Javits amendment.\textsuperscript{21} The language of S. 2515 was then substituted for that in H.R. 1746.\textsuperscript{22} House Managers and Senate Managers then met to resolve differences between the House and Senate versions of H.R. 1746. Eventually the final version of the bill as reported by the Conference\textsuperscript{23} was ratified by each house.\textsuperscript{24}

The final bill provided, \textit{inter alia}, that the EEOC could bring suit on behalf of alleged victims of discrimination and that the coverage of Title VII would be extended to employees of state and local governments, of the federal government, and of employers with fifteen or more employees.\textsuperscript{25} The provision of the original H.R. 1746 which was designed to ratify use of the disparate impact theory by amending section 703(h) of the Act\textsuperscript{26} was not incorporated into the final version of the bill.

Professor Gold dismisses the relevance of the 1972 amendments because this provision was not enacted. It is true that the House Labor Committee did purport to expressly codify \textit{Griggs} in the original version of H.R. 1746. The provision would have amended section 703(h) of the 1964 Act to allow tests such as those at issue in \textit{Griggs} only if “directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position concerned. . . .”\textsuperscript{27}

This provision, however, was never debated;\textsuperscript{28} it went down with the Committee cease and desist bill, which was rejected in favor of the Erlenborn judicial enforcement substitute bill. Since the debates preced-

\begin{itemize}
\item \textsuperscript{20} Amendment 878, 118 CONG. REC. 3373 (1972), \textit{amended by} Amendment 884, 118 CONG. REC. 3979-80 (1972).
\item \textsuperscript{21} 118 CONG. REC. 4944 (1972).
\item \textsuperscript{22} 118 CONG. REC. 4948 (1972).
\item \textsuperscript{23} 118 CONG. REC. 6643 (1972); H.R. REP. NO. 899, 92d CONG., 1st Sess. (1972); S. REP. NO. 681, 92d CONG., 1st Sess. (1972).
\item \textsuperscript{24} House vote, 118 CONG. REC. 7573 (1972); Senate vote, 118 CONG. REC. 7170 (1972).
\item \textsuperscript{26} \textit{See supra} note 7 and accompanying text.
\item \textsuperscript{27} H.R. REP. NO. 238, 92d CONG., 1st Sess. 8, 22 (1971). (“The provisions of the bill are fully in accord with the decision of the Court and with the testing guidelines established by the Commission.”) \textit{But cf. House Subcomm. Hearings} at 483 (statement of the National Association of Manufacturers) (“This proposal goes considerably beyond the issues in \textit{Griggs v. Duke Power} . . . and also is a significant extension of the EEOC guidelines on this subject.”)
\item \textsuperscript{28} The only reference to the provision in the Congressional Record is during an introductory explanation of the entire committee bill by Representative Perkins, Chairman of the House Education and Labor Committee. 117 CONG. REC. 31,961 (1971).
\end{itemize}
ing the vote centered on the cease and desist/judicial enforcement controversy and other provisions of the bill, but not the testing provision, the vote does not reflect rejection of either the testing provision or the Griggs doctrine.

Not only does Professor Gold fail to reveal the context in which that vote was taken, but he also fails to mention that the sponsors of the substitute House bill, as well as the sponsors of the original bill, used the disparate impact theory both to support their positions on methods of enforcement of Title VII and to advocate extension of Title VII protection to employees of governmental entities.

II

CONGRESSIONAL APPROVAL OF THE GRIGGS DISPARATE IMPACT THEORY OF DISCRIMINATION

The main struggle in both houses of Congress concerned whether the EEOC would have power to issue cease and desist orders after making findings of discrimination at an administrative hearing. Both the original H.R. 1746, favorably reported by the House Committee on Labor and Education, and S. 2515, proposed by the Senate Committee on Labor and Public Welfare, provided for cease and desist powers. In both houses, proponents of cease and desist powers argued that the expertise of the EEOC was necessary to effectively combat all forms of discrimination, including disparate impact discrimination, which they referred to as "institutional" or "systematic" discrimination. The House Committee report on the original H.R. 1746 stated:

During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. . . .

Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. The forms and incidents of discrimination which the commission is required to treat are increasingly complex. Particularly to the untrained observer, their discriminatory nature may not appear obvious at first glance. A recent striking example was provided by the U.S. Supreme Court in its decision in Griggs v. Duke Power Co., where the Court held that the use of employment tests as determinants of an applicant's job qualification, even when nondiscriminatory and applied in good faith by the employer, was in violation of Title VII if such tests work a discriminatory effect in hiring patterns and there is no showing of an overriding
business necessity for the use of such criteria. It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.

This kind of expertise normally does not reside in either the personnel or legal arms of employers, and the result in terms of conciliation is often an impasse, with the respondent unwilling or unable to understand the problem in the way the Commission perceives it.\(^{29}\)

The Senate Committee report on S. 2515 contained similar language.\(^{30}\)

The need for the EEOC's expertise was stressed during floor debates in both houses. Senator Humphrey argued:

Our original view that employment discrimination consists of a series of isolated incidents has been shattered by evidence which shows that employment discrimination is, in most instances, the result of deeply ingrained practices and policies which frequently do not even herald their discriminatory effects on the surface. The EEOC has stressed many times that much of what we previously accepted as sound employment policy does, in effect, promote and perpetuate discriminatory patterns which can be traced back to the Civil War and earlier.

\[\ldots\]

\[\ldots\] It has become obvious that title [sic] VII litigation requires specialized knowledge and expertise. The one agency which has the necessary experience and expertise to deal with the multitude of issues and variations of employment discrimination is the EEOC.\(^{31}\)

Opponents of the cease and desist proposals were in two camps. Some legislators were against any EEOC enforcement authority at all. The largest group, however, felt that the EEOC should be given the authority to bring actions in federal district court. Erlenborn in the House and Dominick in the Senate offered substitute bills\(^{32}\) granting the EEOC judicial enforcement powers. These legislators felt that the EEOC had become such a strong advocate for civil rights that it would not be a sufficiently impartial forum for discrimination cases.\(^{33}\) They argued that the courts had been instrumental in the progress of civil rights and that

\(^{29}\) H.R. REP. No. 238, 92d Cong., 1st Sess. 8, 9 (1971) (citations and footnote omitted).

\(^{30}\) See S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971).

\(^{31}\) 118 CONG. REC. 590 (1972). See also remarks of Representative Stokes ("The Commission hearing officers would have a trained eye for such devices as placement tests which are geared to the white middle-class applicant.") 117 CONG. REC. 32,106 (1971); remarks of Senator Javits (citing applicant testing as an example of the need for expertise in interpreting and applying Title VII: "Whether or not a given test is appropriate in a given case presents difficult psychological and sociological issues, as well as difficult problems in the analysis of job content and personnel policy.") 118 CONG. REC. 580-81 (1972).

\(^{32}\) Representative Erlenborn offered H.R. 9247 with Representative Mazzoli; Senator Dominick offered Amendment 611 to S. 2515.

\(^{33}\) See, e.g., H.R. REP. No. 238, 92d Cong., 1st Sess. 59 (1971) (minority views on H.R. 1746, signed by Representative Erlenborn among others).
courts could better develop civil rights law. 34

Advocates of judicial enforcement used the disparate impact theory to support their position. During the debates, Senator Dominick, the author of the substitute judicial enforcement bill, read an excerpt from an article appearing in The Wall Street Journal. 35

[University of Pennsylvania professor Bernard] Anderson contends that most discriminatory treatment is institutional: subtle practices that leave minorities at a disadvantage because of cultural and educational differences. He doubts whether such forms of bias could be rooted out by cease and desist powers.

... Mr. Anderson questions, for instance, whether any such order could ever have had the impact of the Griggs v. Duke Power Co. decision, in which the Supreme Court recently held that employment tests, even if fairly applied, are invalid, if they have a discriminatory effect and can't be justified on the basis of business necessity. 36

Although both the House and the Senate rejected cease and desist bills in favor of substitutes providing for judicial enforcement, it is clear that legislators on both sides of the cease and desist controversy were aware of and accepted use of the Griggs theory of discrimination.

Arguments in support of other provisions in the committee bills also referred to the Griggs doctrine. Both committee bills sought to extend coverage of Title VII to employees of state and local governments because of the existence of disparate impact discrimination. The House Committee report cited a report released in 1969 by the U.S. Commission on Civil Rights. 37

The report's findings indicate that widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices. The report cites widespread perpetuation of past discriminatory practices through de facto segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities. 38

The Senate Committee report also cited these findings reported in the

34. See e.g., S. REP. No. 415, 92d Cong., 1st Sess. 86 (1971) (individual views of Senator Dominick); 118 CONG. REC. 697 (1972) (remarks of Senator Dominick).
36. 118 CONG. REC. 697 (1972). This view was also expressed by David L. Norman, Deputy Assistant Attorney General, Civil Rights Division, Department of Justice, when he appeared before the House General Subcommittee on Labor: "We find it difficult to understand how pervasive practices of hiring, transfer and promotion which have a discriminatory impact can be successfully met in the complaint-oriented administrative procedures ..." House Subcomm. Hearings at 33-34 (1971).
1969 Commission document. During floor debates in both houses, these findings of widespread institutional discrimination were cited to support extending Title VII coverage to state and local government employees. In the Senate, the entire Commission report was printed in the Congressional Record.

Senator Allen of Alabama bitterly opposed extension of Title VII protection to state and local government employees; his main concern was that the bill would reach elected officials and their appointees.

If enacted, this bill would permit an agency of the Federal Government and the Federal courts to enter the political field in the appointment of State and local government employees. It is true that many State and local job requirements are in part unrelated to the job. But it is wholly in keeping with our political traditions to give our State and local leaders, and our national leaders for that matter, the discretion to give reasonable weight to factors other than job fitness in filling jobs.

In this context it is unclear whether Senator Allen was against the disparate impact doctrine in general, or only as applied to political appointees. Whatever his beliefs about the disparate impact doctrine, he clearly did not speak for the majority, which favored extension of Title VII coverage to state and local government employees. Although an amendment exempting elected officials and certain appointees was contained in the bill passed by the Senate and enacted into law, Senator Allen did not vote for the bill.

The Griggs doctrine was also used to support extension of Title VII coverage to federal government employees, whose remedies at that time were limited to CSC procedures. The Committee reports stressed the CSC's lack of awareness of systemic discrimination. In the House, Representative Fauntroy emphasized the misguided approach of the CSC to discrimination.

The Commission persists in searching out supervisors with malicious intent rather than focusing on personnel policies that have the inherent effect of discriminating against black, Spanish-surnamed and women employees.

. . . Present Civil Service standards continue to overemphasize paper qualifications and test results, even when an employee in his work experience of [sic] performance has demonstrated a capacity for a better job or advancement. Furthermore, the tests used by the Commission are

40. 117 CONG. REC. 31,961 (1971); 118 CONG. REC. 581 (1972); 118 CONG. REC. 1815 (1972).
41. 118 CONG. REC. 1816 (1972).
42. 117 CONG. REC. 38,402 (1971).
43. 118 CONG. REC. 4948 (1972).
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not directed in any significant way to the specific job requirements.\textsuperscript{45}

The Senate Committee report stated in no uncertain terms, "[t]he Committee expects the Civil Service Commission to undertake a thorough re-examination of its entire testing and qualification program to ensure that the standards enunciated in the \textit{Griggs} case are fully met."\textsuperscript{46} Quoting the memorandum accompanying Executive Order 11478,\textsuperscript{47} the report stated "discrimination of any kind based on factors not relevant to job performance must be eradicated completely from Federal employment."\textsuperscript{48} The report continued:

[T]o make clear the Congressional expectation that the Commission will take those further steps which are necessary in order to satisfy the goals of Executive Order 11478, the Committee adopted in Section 707(b) [sic] of the bill specific requirements under which the Commission is to function in developing a comprehensive equal employment opportunity program.\textsuperscript{49}

Section 717(b), which was eventually enacted into law,\textsuperscript{50} grants authority to the CSC to enforce Title VII in federal employment through "appropriate remedies." It also requires that the CSC annually review and approve national and regional equal employment opportunity plans.

The legislative history of the federal employment provisions constitutes strong evidence that Congress accepted \textit{Griggs}. Although the provisions themselves do not refer to disparate impact discrimination, it is clear that Congress intended to implement the disparate impact doctrine in federal employment.\textsuperscript{51}

The approval of \textit{Griggs} is not limited to the context of federal employment. Although Congress might be more comfortable prescribing employment guidelines for the federal government than for private employers or state and local governments, the command to implement the doctrine in federal employment shows that Congress had seriously con-

\textsuperscript{49} \textit{Id.} at 15.
\textsuperscript{51} Both the House Labor Subcommittee and the Senate Labor Subcommittee made substantial inquiries into the practices of the CSC, including inquiries concerning whether the CSC's practices were in compliance with \textit{Griggs}. \textit{House Subcomm. Hearings} at 371, 374-75, 381-84 (statement of Irving Kator, Assistant Executive Director of the CSC) (in response to specific questions as to whether CSC testing would withstand scrutiny under the \textit{Griggs} standard); see also \textit{Senate Subcomm. Hearings} at 207 (statement of Walter Fauntroy); \textit{Senate Subcomm. Hearings} at 319-20 (statement of Irving Kator).
considered the doctrine. Thus, references to *Griggs* and institutional discrimination during debates of other provisions cannot be disregarded.

Furthermore, the insistence that *Griggs* be followed in federal employment while omitting express reference to disparate impact discrimination within the statute itself indicates that omission of an express reference to disparate impact discrimination in other provisions of the statute is neither rejection of nor inattention to the theory behind the *Griggs* decision.

Other than the failure to enact the amendment to Section 703(h), only one action of Congress casts doubt on its approval of *Griggs* and the disparate impact theory of discrimination. The 1972 amendments retained the provision which requires that the court find that the employer "intentionally" engaged in an unlawful employment practice. The version of H.R. 1746 which passed the House preserved the word "intentionally," but the Senate version dropped the term. In conference on the resolution of differences between the two bills, the committee left the word "intentionally" in place.52

The conference reports do not indicate why the word was retained. However, in light of the frequent endorsement of *Griggs* throughout the debates, it is not likely that this action constitutes rejection of the doctrine. Congress was well aware that the decision in *Griggs* did not require an intent to discriminate before finding a violation of Title VII. Both committee reports reflected the consensus that the problem of employment discrimination went far beyond "ill-will" and "intentional wrongs."53

Senator Moss referred to this consensus when speaking in support of the Williams-Javits compromise amendment. "We have found that discrimination is pervasive, and that those discriminating often do not do so overtly. Many do not even recognize that they have constructed hiring and promotion systems that are discriminatory."54

The only negative response to this recognition of the disparate impact theory of discrimination was qualified. Senator Spong was uncomfortable with submitting cases of disparate impact to an EEOC administrative hearing, although he did not disagree with making intentional discrimination subject to cease and desist powers:

*I am not suggesting that because it may have been unintentional or unknowing, an act of job discrimination should be tolerated. I am saying such cases ought to be treated differently than other acts of discrimination.*

52. See H.R. REP. No. 92-899, 92d Cong., 2d Sess. 18; S. REP. No. 92-681, 92d Cong., 2d Sess. 18.

53. See H.R. REP. No. 92-238 92d Cong., 1st Sess. 8; S. REP. No. 92-415 92d Cong., 1st Sess. 5.

54. 118 CONG. REC. 3978 (1972).
The problem here is not one of simply assigning blame and requiring remedy, but of defining what constitutes a violation of law in the first place and of constructing a solution which takes account of all the circumstances. I believe that kind of question should be submitted to the full processes of a court of law. 55

This statement, then, is not a rejection of the disparate impact doctrine. Indeed, very little was said against the doctrine throughout the debates; those who spoke against the doctrine were not in the majority who voted for the bill.

For example, Representative Rarick spoke against the bill generally, claiming that it required preferential treatment and maintenance of racial balance. He complained of a proposal to drop requirements of a high school diploma and civil service test for fire department applicants in Washington, D.C.: “The employment criteria was not going to be dropped because of inability to get qualified men, but simply to let unqualified minority applicants be guaranteed employment.” 56

Senator Allen also objected to a particular application of the disparate impact doctrine in a last minute tirade against the EEOC. He entered into the record an EEOC memorandum that suggested applying the Griggs theory to prohibit plant relocations if the move was one, such as relocation into suburbs, which would have an adverse effect on the availability of jobs for blacks. 57 Neither Representative Rarick 58 nor Senator Allen 59 voted for the bill, however; their views were clearly in the minority.

Furthermore, neither the House subcommittee nor the Senate subcommittee received negative evidence on the Griggs decision during the hearings. Robert Nystrom, the attorney for Motorola in the decision 60 which prompted the testing provisions of Section 703(h) stated, “Now that the U.S. Supreme Court has construed Section 703(h) let us leave well enough alone. We now have legal precedence and guidance.” 61

The statement of the National Association of Manufacturers evidenced disagreement with the testing provision of H.R. 1746 on the basis that the provision went beyond Griggs to limit the use of tests “only to the immediate job under consideration” rather than for the advancement potential of an applicant. However, the National Association of Manufacturers made no argument against the Griggs theory and asserted that

55. 118 CONG. REC. 944-45 (1972).
57. 118 CONG. REC. 4925-27 (1972).
58. 118 CONG. REC. 7573 (1972).
59. See supra, n.43.
Thus, it is clear that the proponents of the 1972 amendments endorsed Griggs. Even though they did not express their approval of the disparate impact theory on the face of the Act nor debate the merits of the doctrine, they repeatedly referred to Griggs to support their proposals. Furthermore, Congress was adamant that disparate impact discrimination be eradicated from federal employment. Although several legislators spoke against applications of the disparate impact theory of discrimination, they were in the minority opposed to the bill in general. The majority, however, was aware of the disparate impact doctrine and acted to ratify Griggs.

CONCLUSION

An examination of the legislative history of the 1972 amendments to the Civil Rights Act of 1964 reveals that the disparate impact theory of discrimination was ratified in the 1972 amendments.

Congress was aware of the decision in Griggs v. Duke Power Co. and realized its importance in eradicating discrimination. Although the Griggs doctrine was not debated nor expressly approved by the 1972 amendments, proponents of the bill embraced the doctrine and used it to support their arguments in favor of various provisions of the bill. Congress also insisted that federal employees be protected under Title VII and directed the Civil Service Commission to comply with the requirements of Griggs. Thus, in the 1972 amendments, Congress ratified Griggs and the disparate impact theory of discrimination.