Reply to Thomson

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In her response to my article, Ms. Thomson does not take issue with the central thesis of "Griggs' Folly," namely, that the Eighty-eighth Congress did not intend to adopt the adverse impact definition of employment discrimination. Nor does she argue that the Ninety-second Congress believed that adverse impact had been part of the statute from its inception. (Thus, she does not see this case as an example of a subsequent Congress that declares the intent of an earlier Congress.) Instead, she observes that the leadership that supported the 1972 amendments to Title VII was pleased with the Griggs decision, and on this basis she argues that the 1972 amendments amount to a ratification of Griggs. Accepting Thomson's observation arguendo, I find her argument is that Congress in 1972 ratified a mistaken interpretation of the 1964 statute.

The problem with this argument is that the Ninety-second Congress did not act to ratify Griggs. Had Congress reenacted Title VII, Thomson's argument would be convincing. Had Congress amended in any relevant way section 703, which contains the Act's basic definitions of discrimination, her argument would have considerable force. But Congress did neither. It is true that the authors of the Conference Report stated, "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." But this statement, the Supreme Court has held, "of course does not foreclose our consideration of" the meaning of the 1964 Act. It is also true that the

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1. E.g., Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942), in which the interpretation of a statute by the Senate committee that had reported the statute five years earlier was held "virtually conclusive." Id. at 329.
3. See, e.g., NLRB v. Gullett Gin Co., 340 U.S. 361, 365-66 (1951) (Congress' reenactment in 1947 of language from a 1935 statute was held to have endorsed the administrative and judicial constructions of that language).
4. Section 703(a)(2) was amended to add the words "or applicants for employment," and section 703(c)(2) was amended to add the words "or applicants for membership." These amendments made clear that employers and labor unions could not discriminate against applicants; nothing suggests the amendments were intended to incorporate adverse impact into law.
6. International Bhd. of Teamsters v. United States, 431 U.S. 324, 354, n.39 (1977). The issue was whether section 703(h), which declares that action based on a bona fide seniority system does not violate Title VII, protects seniority systems that preserve the effects of past discrimination. Prior
House report on H.R. 1746 and the Senate report on S. 2515 described employment discrimination in terms of "'systems' and 'effects' rather than simply intentional wrongs" and endorsed the *Griggs* decision. But neither of these bills was enacted. Thomson maintains that these bills were abandoned because they would have given cease-and-desist power to the Equal Employment Opportunity Commission, whereas Congress preferred that enforcement of Title VII remain in the federal courts. She may be correct, but she fails to explain why Congress dropped the clause of H.R. 1746 that would have implicitly ratified *Griggs* by repealing the Tower amendment and substituting a requirement that tests be job related. She also fails to explain why the reference in section 706(g) to intentional behavior remained in the law. This section requires proof that an employer has intentionally engaged in an unlawful employment practice before a court can order relief. The requirement of intent, which is strong evidence that Congress intended to prohibit only disparate treatment in 1964, would have been deleted by the Senate in 1972, but the House of Representatives insisted on preserving the requirement. In sum, Congress did not reenact Title VII or amend section 703 in any relevant way. Similarly, Congress rejected the bills that were accompanied by the committee reports that endorsed *Griggs*. And Congress defeated an effort, successful in one house, to delete the requirement of intent. Thus, statements of representatives and senators in praise of *Griggs* either supported unsuccessful bills or were not pertinent to any issue under consideration. As a matter of doctrine, therefore, there is little force to the argument that Congress ratified adverse impact.

As a matter of policy, however, a stronger argument can be presented: Congress apparently examined all aspects of Title VII and enacted amendments in those areas where judicial interpretations were unsatisfactory. *Griggs* was not only satisfactory to many legislators, but was vigorously praised by them. The reason adverse impact was not written into the 1972 amendment was probably the belief that such a step was unnecessary in light of *Griggs*. Although this expression of the will of Congress may not have satisfied strict doctrinal rules, it should not be

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ignored. Moreover, Congress did extend the reach of Title VII to new classes of employers, including federal, state, and local governments, colleges, and private employers with work forces between fifteen and twenty-four employees. Surely Congress intended to prohibit adverse impact by these employers, and it would make little sense to apply adverse impact to them but not to employers covered before the 1972 amendments.

These arguments, though forceful, must be rejected because they do not take account of the goals of Title VII. As I argued in "Griggs' Folly," the Act was meant to promote efficiency by opening jobs to qualified blacks and to provide a measure of industrial justice for all workers. Quotas, which result from adverse impact because of the paucity of job-related tests, work at cross purposes to these goals. In 1972, Congress did not foresee the problems of adverse impact, nor did Congress realize that adverse impact is, as a practical matter, tantamount to quotas. Of course, if Congress had enacted this definition of discrimination in 1972—for example, by writing it into the statute or by enacting the statute in full knowledge of the Griggs decision—we would be bound by that act today, whatever difficulties it may have caused. But Congress did not enact adverse impact in 1972. Whether the rules should be stretched in this case (that is, whether policy should prevail over doctrine) depends ultimately on whether adverse impact is a desirable definition of discrimination. When tests that reliably predict success on specific jobs become readily available at reasonable prices, perhaps adverse impact will become a more attractive definition. Until then, the goals of Congress in 1964 remain legitimate, and adverse impact should not be approved.