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Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean

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DEFINING THE BUSINESS NECESSITY DEFENSE TO THE DISPARATE IMPACT CAUSE OF ACTION: FINDING THE GOLDEN MEAN

ANDREW C. SPIROPOULOS*

In this Article, Professor Spiropoulos seeks to clarify the burden placed on employers who use the business necessity defense to justify their employment practices in "disparate impact" causes of action under Title VII of the Civil Rights Act of 1991. Although the original 1964 version of Title VII did not provide for a disparate impact cause of action, the Supreme Court held in Griggs v. Duke Power Co. *that Title VII authorized such claims. Subsequent cases initially placed a heavy burden on employers seeking to justify their business practices, but later cases shifted the burden to plaintiffs. As a result of this pro-employer shift, civil rights advocates went to Congress to secure legislation of the earlier standards. After several compromises with the Bush Administration, Congress enacted the Civil Rights Act of 1991, legislating the disparate impact cause of action. Interestingly, advocates of the strict standard and proponents of the more lenient standard both claimed victory in the legislative struggle to define the business necessity defense.*

In this Article, Professor Spiropoulos endeavors to make sense of the business necessity defense. After surveying Supreme Court opinions, Professor Spiropoulos examines the Title VII interpretation problems faced by advocates of both plaintiffs and employers. He concludes that the case law itself offers the solution: The Supreme Court has established different standards for different types of jobs, giving employers less discretion in hiring workers for jobs that require skills and qualities that can be measured by scientific validation techniques, and providing more discretion to employers in selecting employees for more complex jobs requiring special skills and other qualities that cannot be

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measured empirically. Professor Spiropoulos concludes by responding to potential criticisms of his solution.

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INTRODUCTION

The passage of the Civil Rights Act of 1991 (the "Act")[1] marked a profound reform of the law of employment discrimination. Many of the changes effected by the Act provided new remedies for harms already covered by federal civil rights laws. For example, victims of sex discrimination in employment now can sue for punitive damages under federal civil rights law,[2] when before only victims of racial discrimination could do so.[3] In addition to these remedial provisions, Congress reversed several of the Supreme Court's decisions

1. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C.).

2. 42 U.S.C. § 1981a(a)(1). These new remedies were also extended to plaintiffs suing for disability discrimination. § 1981a(a)(2).

3. For remedial provisions pre-dating the Civil Rights Act of 1991, see 42 U.S.C. § 2000e-5(g) (1988 & Supp. 1993) and 29 U.S.C. § 206(d)(3) (1988).

interpreting Title VII of the Civil Rights Act of 1964 ("Title VII")[4] and reinstated earlier interpretations of the legislation.[5]

The most controversial "reinstatement" provisions of the Act concern the "disparate impact" cause of action under Title VII.[6] The disparate impact cause of action empowers plaintiffs to challenge employment practices based on their impact on the employment prospects of groups protected by Title VII without regard to the intentions of the employer.[7] The entire range of policies and practices of an employer may be challenged in a disparate impact case, including policies governing employee benefits and criteria used in selecting employees.[8] Thus, if the harmful effects of an employment policy disproportionately fall on African-Americans or women, an employer may be enjoined from using this policy even if the employer never intended to harm the groups affected.

The original version of Title VII did not specifically provide for the disparate impact cause of action.[9] Despite strong evidence that Congress intended to hold employers liable only for intentional discrimination, the Supreme Court held, in the seminal 1971 case of *Griggs v. Duke Power Co.*,[10] that Title VII authorized the disparate impact cause of action.[11]

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4. Pub. L. No. 88-352, title VII, §§ 701 to 716, 78 Stat. 253 (codified as amended in scattered sections of 42 U.S.C). These decisions included: Lorance v. AT&T Technologies, 490 U.S. 900, 905 (1989) (requiring plaintiffs to file challenges to seniority systems at the time of the institution of the schemes); Martin v. Wilks, 490 U.S. 755, 761-69 (1989) (holding that white firefighters are not precluded from challenging employment decision); Price Waterhouse v. Hopkins, 490 U.S. 228, 237-58 (1989) (reversing lower court's standard of clear and convincing evidence and adopting a preponderance of the evidence standard for gender discrimination); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650-55 (1989) (restructuring the burdens of pleading and proof of the disparate impact cause of action).

5. *See* Pub. L. No. 102-166, §§ 2, 3, 105 Stat. 1071, 1071 (noted at 42 U.S.C. § 1981 note (1994) (Findings and Purposes)).

6. 42 U.S.C. § 2000e-2(k) (1994).

7. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

8. *See, e.g.*, Colby v. J.C. Penney Co., 926 F.2d 645 (7th Cir. 1991) (challenging benefits); Davis v. City of Dallas, 777 F.2d 205 (5th Cir. 1985) (challenging employee selection).

9. The original act appeared to prohibit only intentional discrimination. *See* 42 U.S.C. §§ 2000e to 2000e-12 (1964).

10. 401 U.S. 424 (1971).

11. *Id.* at 429-32; *see* RICHARD EPSTEIN, FORBIDDEN GROUNDS 184-200 (1992). The *Griggs* Court, in agreement with a legion of civil rights lawyers and commentators, reasoned that the goal of equal opportunity for historically disadvantaged groups would never be achieved by banning only intentional discrimination. *See Griggs*, 401 U.S. at 431; *see also* Steven R. Greenberger, *A Productivity Approach to Disparate Impact and the Civil Rights Act of 1991*, 72 OR. L. REV. 253, 259-69 (1993) (arguing that *Griggs* was correctly decided). The legacy of hundreds of years of discrimination assured that even if

The recognition that elimination of intentional discrimination alone will not establish equal opportunity is founded in the understanding that conscious, overt discrimination is not the only form of discrimination.[12] Effective anti-discrimination legislation also must address three subtler forms of discrimination. First, laws must address pretextual discrimination, which occurs when those wishing to discriminate against African-Americans and other disadvantaged groups mask their discriminatory intent by instituting and applying neutral job criteria that disproportionately disqualify these groups.[13] The second form of subtle discrimination is statistical discrimination which occurs when employers who possess no discriminatory intent nevertheless believe that the lingering effects of discrimination have so affected the abilities of minority groups and women that being a member of one these groups can serve as an efficient criteria for selecting qualified employees.[14] Civil rights laws must also address unconscious discrimination. Many remaining barriers to equal opportunity are not the result of deliberate discrimination but instead are the result of habits of mind instilled in majority groups over hundreds of years.[15] Employers, for example, who do not want to discriminate against African-Americans often unconsciously institute job requirements that will disproportionately disqualify African-Americans.[16]

Disparate impact theory attacks these subtle forms of discrimination by forcing employers to justify the maintenance of practices that disproportionately affect particular groups. The goal of the disparate impact cause of action is not to force employers to hire unqualified individuals; rather, it is to require the employer to take a hard look at its practices and make sure that the requirement is truly

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intentional discrimination were eliminated, other, equally serious barriers to equal opportunity would still exist. *See Griggs*, 401 U.S. at 430; Greenberger, *supra* at 256. For example, if an employer were permitted to condition employment on possessing a particular educational degree or passing a general ability test when the job in question could be performed successfully by someone without that education or tested ability, the years of discrimination against African-Americans in the provision of education would needlessly continue to disqualify them from many jobs.

12. George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1309-11 (1987).

13. *Id.* at 1309-10.

14. David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1622 (1991).

15. DERRICK BELL, AND WE ARE NOT SAVED 159 (1987).

16. *Id.*

necessary for the performance of the job.[17] In this way, the disparate impact cause of action will in theory both increase equal opportunity in employment by striking down unnecessary barriers and protect genuine employer prerogatives by preserving necessary requirements.

In applying disparate impact theory, *Griggs*, particularly as applied by the lower federal courts, originally placed a seemingly stiff burden on employers seeking to justify their employment practices. Employers carried the burden of proof of demonstrating the necessity of their practices, with many courts holding that the employer had to prove that these practices were strictly necessary or essential to the operation of the enterprise. Under this standard, very few employers could show that their job requirements were absolutely essential to the operation of their businesses.[18] Therefore, many employers chose to eliminate job requirements to guard against a disparate impact cause of action.[19]

After the *Griggs* decision, however, employers who were concerned that the disparate impact theory would force them to restructure their enterprises entirely implored courts to place limits on the cause of action. They argued that the burden of justifying their employment practices imposed upon them by *Griggs* and its progeny was so great that they were forced to use quotas in hiring in order to avert any disparate impact litigation. Their years of labor finally bore fruit in 1989 when a Supreme Court far more sympathetic to employer concerns than the *Griggs* Court placed severe limits on the disparate impact cause of action. *Wards Cove Packing Co. v. Atonio*[20] placed the burden on the plaintiffs to prove that employers' employment practices were unnecessary and established a more lenient standard of necessity for justifying these practices. Rather than proving that their requirements were essential, employers under

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17. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

18. This opportunity for employers to justify their practices is called the "business necessity" defense. *See, e.g.*, EEOC v. Roth Packing Co., 787 F.2d 318, 331-32 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1016 (11th Cir. 1982); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 355 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

19. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 68 (2d ed. 1995).

20. 490 U.S. 642 (1989).

Wards Cove only had to show that their requirements significantly served legitimate employment goals.[21]

The civil rights advocates who had proposed and nurtured the disparate impact cause of action immediately went to Congress to secure legislation reinstating the earlier, more rigorous standards. While the Democratic majorities in Congress both in 1990 and 1991 were willing to pass strongly pro-plaintiff legislation, President George Bush was not willing to sign such legislation because of his professed concern that the *Griggs* standards led employers to impose quotas.[22] President Bush successfully vetoed the 1990 bill and was threatening to veto the 1991 legislation when he reached a compromise with Congress.[23] The Act, as we shall explore in depth, purports to restore the law regarding business necessity to its state before *Wards Cove.*

In response to the Act, advocates of the strict *Griggs* standards and proponents of the more lenient *Wards Cove* standards both have claimed victory in the legislative struggle over the meaning of the business necessity defense.[24] Needless to say, when diametrically opposed camps can read a particular provision in their favor, that provision must be ambiguous. Indeed, the Act is a classic demonstration both of how difficult it is to determine the legislative intent of a particular provision when different members of the legislative majority voted for the statute for different reasons, and of how Congress avoids the resolution of difficult questions by drafting ambiguous statutes.

In this Article, I will endeavor to make sense of the Act's interpretation of the business necessity defense. In Part I, I will first survey the seven Supreme Court opinions, starting with *Griggs* and ending with *Wards Cove*, which attempted to define the disparate impact cause of action. This survey will demonstrate that the Court articulated two very different versions of the business necessity defense: a strict one that would be very difficult for employers to meet, and a lenient one that would give employers more discretion. I will then demonstrate that those who contend that the Act establishes a strict business necessity defense and those who argue

21. *See infra* notes 129-45 and accompanying text.

22. Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896, 900 (1993); *see infra* notes 171-74 and accompanying text.

23. *See* Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1081 (1993); *infra* notes 163-80 and accompanying text.

24. *See infra* notes 146-242 and accompanying text.

that the Act enacted the more lenient business necessity defense both have plausible arguments for their interpretations founded in two lines of Supreme Court precedent. Finally, I will show that because Congress built the conflicting Supreme Court doctrine into the legislation, neither side can conclusively show that their interpretation was embodied in the Act.

In Part II, I will demonstrate that the problem with the extreme pro-plaintiff and the extreme pro-employer interpretations is that each side wrongly seeks to impose one standard on all disparate impact cases. The Supreme Court precedent that the Act directs courts to consult applies a flexible standard of business necessity depending on the job at issue, rather than embodying one uniform approach to all disparate impact cases. Building on the foundation of this precedent, I will demonstrate that the only way to fulfill both of the objectives of Title VII—the removal of artificial barriers to employment and the preservation of the legitimate prerogatives of the employer—is to interpret the amended Title VII as establishing different standards for different types of jobs. A more flexible standard of business necessity should be applied to qualifications for positions that, because of their difficulty, great responsibility, or special risks to the public, require skills or intangible qualities that cannot be measured empirically. In the vast majority of jobs where such qualifications are not necessary, the stricter standards of necessity should apply. This is the best possible interpretation because it most accurately explains the Supreme Court's doctrine before *Wards Cove* and it most effectively achieves the policy objectives of Title VII.

In conclusion, I will respond to potential criticisms of my suggested solution to the problem of the business necessity defense. The goal of this Article is to demonstrate that the only effective way to dismantle barriers to advancement of disadvantaged groups and maintain the support of a society that is unwilling to sacrifice the most important interests of employers, is to restructure hiring for jobs that do not require the exercise of discretion, while providing more, but not total, leeway to employers in selecting employees for more complex jobs. The enforcement of a strict standard for hiring most workers will ensure actual, empirical gains for disadvantaged groups, without causing the severe efficiency losses and workplace disruption that would result from applying a strict standard to managerial or safety-sensitive positions.

I. THE INTERPRETIVE PROBLEM

A. *Background*

Any lawyer who seeks to understand the business necessity defense of the Act first must grapple with the Supreme Court opinions articulating the nature and boundaries of that defense. These cases evince the developing division on the Court concerning the interpretation of the disparate impact cause of action. It appeared that the Court resolved this division in *Wards Cove Packing Co. v. Atonio*.[25] This resolution, however, was unacceptable to many in the civil rights community, as well as to a majority of the members of Congress.[26] The legislature responded by passing the Civil Rights Act of 1991.[27] What the Act accomplished can be understood only by comparing the standards Congress established to the standards articulated in the various Court opinions.

The Supreme Court first recognized the disparate impact cause of action in *Griggs v. Duke Power Co.*[28] A class of African-American employees of the Duke Power Company alleged that two of Duke Power's requirements for placement in the company's better jobs—a high school diploma and a passing grade on a general intelligence test—unjustifiably disqualified a disproportionate number of African-Americans.[29]

The Court held that employers may use hiring criteria that have a disparate impact on groups protected by Title VII only if the employer can justify such criteria.[30] The Court articulated this burden of justification in several different ways. For example, the Court first suggested that the employer must demonstrate that its job requirements are "significantly related to successful job performance."[31] The Court later stated that the requirements simply must

25. 490 U.S. 642 (1989); *see infra* notes 129-45 and accompanying text.
26. *See infra* notes 144-62 and accompanying text.
27. Pub. L. No. 102-166, 105 Stat. 1071-81 (codified in scattered sections of 42 U.S.C.).
28. 401 U.S. 424 (1971).
29. *Id.* at 427. The defendant's plant was organized in five departments: (1) labor, (2) coal handling, (3) operations, (4) maintenance, and (5) laboratory and test. *Id.* Jobs in the last four departments were more desirable than those in the labor department. *Id.* The high school degree and intelligence tests were required for placement in the four desirable departments. *Id.* at 427-28. Transfer from labor and coal handling to the other departments was contingent on passing the Wonderlic Personnel Test, a general intelligence test, and the Bennett Mechanical Comprehension Test. *Id.* at 428.
30. *Id.* at 431.
31. *Id.* at 426.

be "related to job performance."[32] In rejecting the company's justifications, the Court stated that neither the diploma nor the test requirements were "shown to bear a demonstrable relationship to successful performance of the jobs for which [they were] used."[33] The "touchstone" of this analysis is "business necessity:"[34] The employer bears the burden of showing that the requirement at issue has "a manifest relationship to the employment in question."[35] With regard to employment tests, the Court concluded that Congress proscribed giving these devices and mechanisms controlling force "unless they are demonstrably a reasonable measure of job performance."[36] The Court thus reasoned that Duke Power's job requirements were not justified by any business necessity.[37] The defendant in fact conceded that "the requirements were instituted on the Company's judgment that they generally would improve the overall quality of the work force."[38] The Court concluded that while "[d]iplomas and tests are useful servants,"[39] they could not be used to exclude certain groups disproportionately when they did not measure an applicant's ability *to perform the job*.[40]

By articulating different formulations of the standard, however, the Court left lawyers and potential litigants unsure of the showing required to make out a defense of business necessity. Did an employer merely have to show that its requirements were "related" to the job, or would it have to show that employee satisfaction of the requirements is "necessary," meaning essential, to the operation of the business? Was this strict interpretation of necessity required by the injunction to prove that the requirements were "significantly" or "demonstrably" related to successful job performance? Did the emphasis on successful *job performance* mean that employers may institute only requirements (assuming they had a disparate impact) that are meant to test job performance, as opposed to other desirable qualities, such as intelligence or honesty, that an employer might desire?

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32. *Id.* at 431.
33. *Id.*
34. *Id.*
35. *Id.* at 432.
36. *Id.* at 436.
37. *Id.* at 431-32.
38. *Id.* at 431.
39. *Id.* at 433.
40. *Id.* at 436.

Intimately related to the question of what standard of business necessity employers have to meet to justify their job requirements is what kind of evidence employers need to submit to show that their requirements meet the standard. The Court remarked that one of the reasons the company's defense failed is that the diploma and test requirements were adopted "without meaningful study of their relationship to job-performance ability."[41] This statement, combined with the Court's reliance on the Equal Employment Opportunity Commission's ("EEOC") Guidelines on Employment Selection Procedures,[42] suggests that the Court intended to require employers to submit empirical validation of their job requirements.[43]

Four years after *Griggs*, the Court revisited these questions in *Albemarle Paper Co. v. Moody*.[44] In *Albemarle Paper*, a class of African-American employees charged that the paper company's job requirements disqualified African-Americans at a higher rate than whites and that these requirements were not justified by any business necessity.[45] In defining the standard of business necessity, the Court first quoted the language in *Griggs* that required an employer to show

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41. *Id.* at 431.

42. *Id.* at 433-34, 433 n.9 (relying on 29 C.F.R. § 1607.4(c) (1971)). For a current version of the EEOC Guidelines, see 29 C.F.R. § 1607 (1995). The Court made particular reference to the portion of the Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.1-.14 (1971) (current version at 29 C.F.R. § 1607.16F (1995)), which demanded that employers using tests make available " 'data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.' " *Griggs*, 401 U.S. at 433 n.9 (quoting 29 C.F.R. § 1607.4(c) (current version at 29 C.F.R. § 1607.16(F) (1995))).

43. Unfortunately, the Court did not supply definite answers to these questions, perhaps because it was aware of the serious consequences of the *Griggs* decision and wished to see how the disparate impact cause of action would be treated by lower courts and commentators. Instead, the Court left to others the job of defining the specifics of the business necessity defense. *See* Greenberger, *supra* note 11, at 270-71 ("[T]he standard the Court articulates varies . . . sowing the seeds of a confusion which remains unresolved even under the new Act. . . . *Griggs*, then, introduced the impact principle into fair employment law, but also left its definition largely to the future."); *see also* Mack A. Player, *Is* Griggs *Dead? Reflecting (Fearfully) on* Wards Cove Packing Co. v. Atonio, 17 FLA. ST. U. L. REV. 1, 18 (1989) ("The Court in *Griggs* thus gave conflicting signals as to the meaning of 'business necessity' and launched the concept of impact analysis into a sea of ambiguity.").

44. 422 U.S. 405 (1975). The opinion also explicated the standards for awarding backpay to successful Title VII plaintiffs. *Id.* at 413-25.

45. *See id.* at 408-09, 425. The company in *Albemarle Paper*, much as in *Griggs*, had divided its operation into different lines of progression, some requiring more skills than others. *See id.* at 409. In order to be hired for or to transfer to the more skilled positions, an applicant was required to have a high school diploma and pass two tests, the Revised Beta Examination and the Wonderlic Personnel Test. *Id.* at 410-11.

that a requirement have " 'a manifest relationship to the employment in question.' "[46] The standard settled on in *Albemarle Paper*, however, evinced by repeated statements by the Court, was that an employer may meet its burden of justification by demonstrating that its requirements were "job-related."[47] More important, however, than the terms used to define the business necessity defense in *Albemarle Paper* was the way in which the Court applied the "job-relatedness" defense. Starting from the premise that "[t]he concept of job-relatedness takes on meaning from the facts of the *Griggs* case,"[48] the Court imposed a heavy burden of justification on employers by refusing to permit employers to use tests that are not empirically demonstrated to be significant measures of job performance.[49]

The enormity of the burden placed on employers seeking to provide empirical proof of job-relatedness, or, as it is called in the literature, "validation,"[50] of employment qualifications is demonstrated by the Court's treatment of the company's attempt to validate its requirements. For example, the company argued that it should be permitted to require a minimum score on a general verbal ability test because the increasing sophistication of its operations called for employees with better verbal skills.[51] Shortly before trial, the employer attempted to validate the use of the tests by measuring the test scores against supervisor ratings to prove the job-relatedness of its testing.[52] The Court rejected this attempt to prove business necessity, relying as it did in *Griggs*, on the EEOC Guidelines on

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46. *Id.* at 425 (quoting *Griggs*, 401 U.S. at 432).

47. *See, e.g.*, *id.* at 411 ("Albemarle engaged an industrial psychologist to study the 'job-relatedness' of its testing program."); *id.* at 425 ("If an employer does then meet the burden of proving that its tests are 'job-related' [the complaining party may show] that other tests . . . without a similarly undesirable racial effect, would also serve the employer's legitimate interests . . . ."); *id.* at 425 ("In the present case, however, we are concerned only with the question whether Albemarle has shown its tests to be job-related."); *id.* at 427 (referring to "[t]he question of job-relatedness").

48. *Id.* at 426.

49. *Id.* at 430-32. In contrast, the Court could have permitted tests measuring abilities, such as verbal skills, that an employer might desire its employees to have, regardless of their position.

50. The term "validation" is used most often when discussing the use of testing in hiring or promotion. *See, e.g.*, Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 951-52 (1982). The federal government has promulgated the Uniform Guidelines on Employee Selection Procedures ("Guidelines"), 29 C.F.R. § 1607.1-.18 (1995), to give employers guidance as to what standards must be met in order for the employers' job requirements to be considered sufficiently job-related.

51. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 427-28 (1975).

52. *Id.* at 429-30.

employee selection.[53] The Court found the employer's validation study defective because it did not demonstrate that the employer's tests predicted the possession of, or sufficiently correlated with, the skills required for the particular jobs for which the applicants were being tested.[54]

Thus, given the opportunity to mold the disparate impact cause of action established in *Griggs*, the Court in *Albemarle Paper* chose to impose a heavy burden on employers seeking to justify their business practices when these practices have a disparate impact on disadvantaged groups.[55] By closely scrutinizing the company's validation study under the rigorous standards established by the EEOC Guidelines, the Court signaled that employers would have to undertake an expensive, difficult validation study in order to justify employment practices with a disparate impact.[56]

In *Washington v. Davis*,[57] decided a year after *Albemarle Paper*, the Court seemed to back away from strict business necessity standards. The case concerned allegations brought by unsuccessful African-American applicants for employment in the District of Columbia police department ("District").[58] The plaintiffs contended

53. *Id.* at 430-31.

54. *See id.* at 431-36.

55. *See* Greenberger, *supra* note 11, at 273 (indicating that the Court imposed "a rather exacting validation requirement" on the use of tests and required "a relatively high level of justification from the employer"); Player, *supra* note 43, at 20 ("*Albemarle Paper* thus construed 'business necessity' to require an extremely demanding level of proof: the demonstration of a clear and unambiguous relationship between the selection device and actual job performance."). The Court in *Albemarle Paper* also indicated, for the first time, that even if the defendant meets its burden, the plaintiff should be given an opportunity to show that "other tests or selection devices, without a similarly undesirable racial effect" would serve the employer's interests. *Albemarle Paper*, 422 U.S. at 425.

56. In fact, Chief Justice Burger and Justice Blackmun, in concurring opinions, expressed concern over the strict standards of validation announced by the majority. In particular, they warned against strict adherence to the standards set forth in the Guidelines. *See id.* at 449 (Blackmun, J., concurring in judgment); *id.* at 451-52 (Burger, C.J., concurring in part and dissenting in part).

57. 426 U.S. 229 (1976).

58. *Id.* at 232-33. The most important aspect of the case is its rejection of the plaintiffs' claims that state actions that have a disparate impact against particular racial groups, that cannot be justified by some standard of necessity, violate the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 238-48. This Article is concerned only with the Court's treatment of Title VII.

While the plaintiffs in *Washington* did not file suit under Title VII, in adjudicating their claim under the provision of the District of Columbia Code that enjoined any officer or employee of the District from hiring on the basis of race, the trial court applied the disparate impact standards of Title VII. *Id.* at 234 n.4, 249 n.15. After the court of appeals reversed the grant of summary judgment for the defendants because it found the

that the requirement that applicants pass a written personnel test, "Test 21," disqualified African-American applicants at a higher rate than white applicants and that use of this test could not be justified by business necessity.[59] Test 21 was designed to measure verbal ability, vocabulary, reading, and comprehension.[60] The plaintiffs maintained that this test was not validated for performance as a police officer;[61] indeed, the employer conceded that it was validated only for performance in the police *training* program.[62] The plaintiffs contended that a demonstration that the test predicted or was significantly correlated with performance in the police training program was not sufficient to validate the test as a prerequisite to being hired as a police officer.[63]

In affirming the district court's decision in favor of the employer, the Court characterized the business necessity standard as a "job-relatedness" test, citing *Griggs* and *Albemarle Paper*.[64] In applying this test, however, the Court seemed to apply a much more flexible test than it had in *Albemarle Paper*. Rather than rigorously scrutinizing each part of the Test 21 validation study conducted by the employer, the Court was satisfied with the employer's arguments that the test was helpful in hiring individuals who make good police officers.[65]

The terms used by the Court to describe the degree of business necessity required to defend against a disparate impact cause of action are significant because they demonstrate a flexibility missing in

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plaintiffs had stated a constitutional claim, the Court held that the court of appeals erred in failing to affirm the district court on both the constitutional and the statutory claims. *Id.* at 236, 248. The Court, although the statutory claims were not directly based on Title VII, applied Title VII standards in reviewing the statutory claims. *Id.* at 249.

59. *Id.* at 235.

60. *Id.*

61. *Id.* at 236.

62. The employer's validation study examined the relationship between performance on Test 21 and performance in the police training program. *Id.* at 251-52 n.17.

63. *Id.* at 249-50. "The [c]ourt of [a]ppeals reversed because the relationship between Test 21 and training school success, if demonstrated at all, did not satisfy what it deemed to be the crucial requirement of a direct relationship between performance on Test 21 and performance on the policeman's job." *Id.*

64. *Id.* at 251.

65. *Id.* at 250-52. When discussing the difference between the discriminatory purpose required to demonstrate a constitutional violation and the disparate impact cause of action, the Court explained that the employer can meet its burden of justification by validating his requirements "in any one of several ways, *perhaps* by ascertaining the minimum skill, ability, or *potential* necessary for the position at issue and determining whether the qualifying tests are *appropriate* for the selection of qualified applicants for the job in question." *Id.* at 247 (emphasis added).

Albemarle Paper.[66] According to the *Washington* Court, there are several ways to demonstrate business necessity.[67] The *Albemarle Paper* Court, however, relied strictly on the professional methods authorized in the Guidelines.[68] The *Washington* Court stated that a test shown to measure potential to do the job may pass scrutiny,[69] while the *Albemarle Paper* Court insisted that any test measure actual job performance.[70] The *Washington* Court also held that a test may be validated if it is "appropriate" for the selection of qualified applicants,[71] but the *Albemarle Paper* Court appeared to require that use of the test be "necessary," meaning essential, not helpful.[72]

Washington, then, disrupted the development of the business necessity defense begun in *Albemarle Paper.* Even though the case did not directly concern Title VII, the *Washington* Court seemed to state that the expensive and difficult requirement of validating all job requirements by proving their relationship to actual job performance will not be found in all cases. The *Washington* Court, without providing any explanation, thus seemed to raise the possibility that the Court would be flexible in interpreting the elements of the business necessity defense.[73] A flexible standard would provide an

66. This increased flexibility is best demonstrated by the Court's conclusions on the validation of Test 21. The Court found that the police training course was advisable because it informed the recruit about his job and its demands, while imparting "a modicum of required skills." *Id.* at 250. Also, the Court thought it significant that "some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the *training regimen.*" *Id.* (emphasis added). The Court concluded that the district court's findings that "Test 21 was directly related to the requirements of the police training program and that a positive relationship between the test and training-course performance was sufficient to validate the former, wholly aside from its possible relationship to actual performance as a police officer," were not foreclosed by *Griggs* or *Albemarle Paper. Id.* at 250-51. Indeed, the Court thought that the district court's flexible view of these cases was a "much more sensible construction of the job-relatedness requirement" than the strict standard demanded by the plaintiffs. *Id.* at 251. The validation study demonstrating that Test 21 was directly related to the requirements of the police training program, therefore, was sufficient to demonstrate business necessity.

67. *Id.* at 247 n.13.

68. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-31 (1975).

69. *Washington*, 426 U.S. at 247.

70. *See Albemarle Paper*, 422 U.S. at 431.

71. *Washington*, 426 U.S. at 247.

72. *See Albemarle Paper*, 426 U.S. at 431. This debate over whether, in a particular context, the term "necessity" means "essential" or "appropriate" is similar to the debate over the meaning of the Necessary and Proper Clause of the Constitution. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323-26 (1819).

73. *See* Player, *supra* note 43, at 20 n.90. (commenting that the Court in *Washington* "appeared" to relax the strict validation requirements of *Albemarle Paper*).

employer an opportunity to argue for the propriety of a less rigorous form of validation in its case.

The next year, however, the Court apparently dashed the hopes of employers for a broader business necessity defense in *Dothard v. Rawlinson*.[74] In *Dothard*, the Alabama Board of Corrections denied the plaintiff employment because she did not meet the minimum weight requirement set by statute for the position.[75] The plaintiff sued under Title VII, contending that the employer's height and weight requirements disproportionately disqualified women.[76] The employer contended that the height and weight requirements were justified by business necessity because they were good measurements for the requirement that a prison guard be strong.[77]

In considering whether the employer proved that the requirements were "job-related," the Court stated that "a discriminatory employment practice had to be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[78] Thus, to pass muster under the "job-related" standard, the requirements must be shown to be necessary for the safe and efficient performance of the job of prison guard. The employer must demonstrate this necessity by producing evidence "correlating the height and weight requirements with the requisite amount of strength thought *essential* to good job performance."[79] The Court held that this evidence could be produced by "adopting and validating a test for applicants that measures strength directly."[80] Quoting *Griggs*, the Court concluded that this test must " 'measure the person for the job and not the person in the abstract.' "[81]

This formulation of the business necessity test is closer to the strict formulation articulated in *Albemarle Paper* than to the more flexible test described in *Washington*.[82] First, the *Dothard* for-

74. 433 U.S. 321 (1977).

75. *Id.* at 323-24.

76. *Id.* at 328-29. Rawlinson also claimed the employer's policies violated the Equal Protection Clause of the Fourteenth Amendment of the Constitution. *Id.* at 324.

77. *Id.* at 331.

78. *Id.* at 331, 332 n.14.

79. *Id.* at 331 (emphasis added).

80. *Id.* at 332. Significantly, the Court cited the EEOC Guidelines in favor of this proposition. *Id.* at 332 n.15 (citing 29 C.F.R. § 1607 (1976)). It should be noted, however, that the Court also cited *Washington* in further support of its conclusion.

81. *Id.* at 332 (citations omitted).

82. Mack Player agrees that *Dothard* established a strict standard in which "necessary" is defined as "essential." Player, *supra* note 43, at 21. In addition, Player argues that *Dothard* strengthened the plaintiff's ability to prevail by showing lesser discriminatory

mulation returned the emphasis to performance of the actual job, rather than performance in a training regimen. Second, the *Dothard* test required the employer to demonstrate that strength is an essential, not just an appropriate, component of job performance.[83] Finally, the Court indicated that the skill or attribute essential for safe and efficient job performance, in this case, strength, must be demonstrated by a scientifically validated test.[84] Thus, in *Dothard*, after the uncertainty created by *Washington*, the Court seemed finally to settle the question of the rigor of the business necessity test in favor of a test that would be difficult for employers to meet.

This resolution, however, came into question after the Court's decision in *New York City Transit Authority v. Beazer*.[85] This case concerned a challenge to the New York Transit Authority's policy against hiring anyone using methadone. The plaintiffs claimed that the ban disproportionately disqualified particular racial groups in violation of Title VII.[86] While most of the Court's opinion reversing the district court's decision in favor of the plaintiffs dealt with why the plaintiffs did not make out a prima facie case of disparate impact, the Court did articulate a definition of the disparate impact defense. After explaining why the plaintiffs' statistical evidence was insufficient to establish a prima facie case of disparate impact, the Court remarked that "even if [the plaintiffs are] capable of establishing a prima facie case of discrimination, it is assuredly rebutted by the [Transit Authority's] demonstration that its narcotics rule (and the rule's application to methadone users) is 'job-related.' "[87] After

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alternatives in that if the plaintiff shows such alternatives, she would prevail without any further inquiry into the employer's justification for the practice. *Id.* at 21.

83. *But see* Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1031 (1993). Alito contends that *Dothard* does not require absolute or compelling necessity because the Court, in describing the standard, stated that the employer must prove only that the practice is essential to *efficient* job performance, not job performance period. By using the word efficient, Alito argues, the Court required employers to show only that the practice is reasonable, not indispensable. *Id.* at 1031. Alito's interpretation, however, is excessively literal. As exemplified by the various formulations of the business necessity standard articulated in *Griggs*, what matters is not the exact words the Court uses to define the standard; what is crucial is the kind of proof the Court requires for a successful business necessity defense. Thus, we know that *Dothard* establishes the strict standard because it requires proof of scientific validation.

84. *But see* Greenberger, *supra* note 11, at 277. Greenberger contends that the weakness of the state's business necessity defense in *Dothard* makes it difficult to be certain of the Court's thinking regarding business necessity.

85. 440 U.S. 568 (1979).

86. *Id.* at 576-77.

87. *Id.* at 587.

rendering this conclusion, the Court defined the business necessity defense in a footnote, stating that the district court correctly established that the Transit Authority's "legitimate employment goals of safety and efficiency require the exclusion" of methadone users.[88] It is sufficient, the Court wrote, that these goals are "significantly served by" a rule excluding methadone users; the rule need not be "required."[89] The Court concluded that when the employer's job requirement significantly serves a legitimate employment goal, the standards established by *Griggs* and *Albemarle Paper* are met.[90]

Despite the Court's purported reliance on the former cases, the *Beazer* standard is not the same as the one developed in *Griggs*, *Albemarle Paper*, and *Dothard*. Under the *Beazer* standard, the employer's desires need only be legitimate and the qualification must only significantly serve these goals.[91] Under the standard developed in *Griggs*, *Albemarle Paper*, and *Dothard*, the employer must demonstrate that the trait desired in the employee is essential, not simply legitimate or appropriate.[92] The means for testing that trait must not merely significantly serve that goal; rather, the test or the requirement must be scientifically validated to test for that trait. This need for scientific certainty forces the employer to demonstrate that its requirements are absolutely necessary to the operation of the business, rather than helpful or convenient. In contrast, *Washington* and *Beazer* were more lenient; they allowed the employer to use a qualification that has a disparate impact if it is a convenient tool for serving legitimate employer goals.[93] As of *Beazer*, the Court had not yet directly confronted the conflict between these lines of doctrine, much less resolved it.

The next case addressing the business necessity defense provided strong evidence of how the Court would finally resolve its division. In *Watson v. Fort Worth Bank & Trust*,[94] Clara Watson, an African-American, brought two causes of action against her former employer. First, she alleged that the bank intentionally discriminated against her

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88. *Id.* at 587 n.31.

89. *Id.*

90. *Id.* The Court also stated, contrary to *Griggs*, that the ultimate burden of proof on the disparate impact cause of action remains with the plaintiff. *Id.*

91. *Id.* at 592-93.

92. *See supra* notes 28-56, 74-84 and accompanying text.

93. *See* Greenberger, *supra* note 11, at 280; Player, *supra* note 43, at 22 ("[T]here was certainly no showing of job-relatedness of the kind previously demanded in *Griggs*, *Albemarle Paper*, and *Dothard*.").

94. 487 U.S. 977 (1988).

because of her race when she did not receive several promotions for which she had applied.[95] Second, and more important for purposes of this Article, she alleged that the employer's system for determining promotions had a disparate impact against African-Americans.[96] Watson particularly objected to the employer's reliance on the judgment of its supervisors, rather than developing precise, formal criteria.[97] Watson alleged that the use of a subjective or discretionary system disproportionately disqualified African-Americans.[98]

The employer argued that the Court should not allow disparate impact challenges to subjective or discretionary employment practices because the nature of disparate impact analysis would make it impossible for employers to defend subjective hiring systems.[99] The employer attributed the difficulty of defending these systems to the strict validation requirements articulated in *Griggs* and *Albemarle Paper*, claiming that "[s]ome qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques,"[100] and, therefore, that any employer who wishes to employ the devices necessary to select employees with these qualities would be put in the difficult position of either having to forgo the use of these devices or risk Title VII suit.[101] Because these qualities are so important to employers, the employer argued, most employers will continue to use subjective hiring practices. In making their decisions, however, they will attempt to discourage any filing of a disparate impact suit by using quotas in promotions and hiring to mask the disparate impact of their hiring practices.[102] Thus, to avoid a disparate impact cause

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95. *Id.* at 982-83.
96. *Id.* at 983-84.
97. *Id.* at 982.
98. *Id.* at 989.
99. *Id.*
100. *Id.* at 991.
101. *Id.* at 992.
102. *Id.* at 992-93. It should be noted that the Court, in Connecticut v. Teal, 457 U.S. 440 (1982), made clear that the ultimate absence of any numerical disparity between classes of employees at a workplace does not insulate an employer from a disparate impact challenge if an individual employment practice disproportionately affects a particular group. *Id.* at 452-56. While the Court's disallowance of the "bottom line" defense theoretically should discourage employers from using quotas to forestall disparate impact causes of action, common sense dictates that employers who hire and promote proportional numbers of all classes of potential plaintiffs will be a less tempting target for suit than employers who do not. In *Watson*, the Court recognized this reality, remarking, "[i]f quotas and preferential treatment become the only cost-effective means of avoiding

of action, employers will be forced to employ the very devices that Title VII states may not be required of employers.[103] The employer insisted that the only way to free employers from this impossible dilemma is to prohibit disparate impact challenges against subjective or discretionary employment systems.[104]

The Court did not agree, unanimously holding that in order to preserve an effective disparate impact cause of action, plaintiffs must be allowed to pursue challenges to subjective employment systems.[105] The Court reasoned that if the use of these systems insulated employers from disparate impact causes of actions, many employers would add a subjective component to their employment practices in order to immunize themselves against disparate impact suits.[106] The Court concluded, "If we announced a rule that allowed employers so easily to insulate themselves from liability under Griggs, disparate impact analysis might effectively be abolished."[107]

A plurality, however, was sympathetic to the employer's concerns. These Justices, speaking through Justice O'Connor, believed that while disparate impact challenges to subjective hiring systems must be allowed, the extension of disparate impact analysis to these cases warranted a reexamination of the structure of the cause of action as a whole.[108] In the course of this reexamination, the plurality suggested that the solution to the problem of proving the

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expensive litigation and potentially catastrophic liability, such measures will be widely adopted." *Watson*, 487 U.S. at 993.

103. *Watson*, 487 U.S. at 992. The statute provides:

> Nothing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to 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 national origin employed by any employer . . . in comparison with the total number of persons of such race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(j) (1988).

104. *Watson*, 487 U.S. at 989.

105. *Id.* at 989-90.

106. *Id.* An employer could, for example, add an interview requirement to an otherwise objective process. *Id.*

107. *Id.* at 990.

108. *Id.* at 993-94 (plurality opinion). The plurality began with the premise that any construction of the disparate impact cause of action and its accompanying business necessity defense that required the employer to use quotas is incorrect. In short, Title VII must be construed so employers are not presented with the Hobson's Choice between foregoing the use of necessary business practices and imposing quotas. *Id.* at 992-93 (plurality opinion). The only way to prevent this dilemma from arising, the plurality held, is to elucidate and enforce constraints on the use of the disparate impact cause of action. *Id.* at 993-94 (plurality opinion).

necessity of subjective employment practices lay in articulating a more lenient definition of business necessity than the one suggested in *Griggs*.[109]

In defining the business necessity standard, the plurality began with the familiar "job-relatedness" and "manifest relationship to the employment in question" language first seen in *Griggs*.[110] Justice O'Connor's interpretation of this language, however, revealed that the plurality accepted the conception of the business necessity defense articulated in *Beazer* and *Washington*, rather than the one set forth in *Griggs*, *Albemarle Paper*, and *Dothard*.[111] The plurality stated that once the plaintiff makes out a prima facie case of disparate impact, the employer must produce "legitimate business reasons" for the practice in question.[112] In defending its practices, the employer should not be required to prove scientifically the necessity of its practices through formal validation studies.[113] Indeed, the plurality stated that formal validation is not even required when the practice in question is a standardized or objective test.[114] All an employer must do is demonstrate that its practice serves legitimate business goals.[115] Relying on *Beazer* and *Washington*, the plurality stated that this lenient standard was supported by Court precedent.[116]

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109. *Id.* at 997-98 (plurality opinion).

110. *Id.* at 997 (plurality opinion) (citing *Griggs*, 401 U.S. at 432).

111. The plurality first demonstrated its intent to reduce the burden on employers by maintaining that, contrary to the common understanding of the lower courts, the ultimate burden of proof of demonstrating whether or not an employment practice that produces a disparate impact violates Title VII is on the plaintiff, not the employer. *Id.* at 997 (plurality opinion). Rather than treating the employer's burden as an affirmative defense, the plurality treated it much like the burden of production in a disparate treatment cause of action. In those actions, all the defendant must do in response to a plaintiff's prima facie case is produce a reason for its action. The burden then shifts to the plaintiff to disprove the reason and persuade the fact-finder that the employer is guilty of illegal discrimination. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (describing elements of a disparate treatment cause of action); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981).

112. *Watson*, 487 U.S. at 998 (plurality opinion).

113. *Id.* (plurality opinion).

114. *Id.* (plurality opinion).

115. *Id.* (plurality opinion).

116. *Id.* at 998-99 (plurality opinion). The plurality contended that in order to prevail the plaintiff must show that other devices would serve the employer's legitimate interests—but without the disparate impact—once the defendant met its burden of production. *Id.* at 998 (plurality opinion). The suggested practices, however, must serve these goals equally effectively, and if the plaintiff's alternative practices are more costly or burdensome, the higher costs and increased burdens will be considered in determining the effectiveness of the alternate practices. *Id.* (plurality opinion).

The plurality concluded that when judging whether an employer's practices are necessary, judges should keep in mind that in most cases they are not competent to restructure the workplace.[117] Judges should instead defer to an employer's designs for its workplace, unless Congress mandates otherwise.[118] Plaintiffs must be forced to meet these high standards of proof in order "to avoid giving employers incentives to modify any normal and legitimate practices by introducing quotas or preferential treatment."[119]

Thus, the plurality opinion leaves no doubt as to where the four Justices stood on the question of whether to follow the *Griggs/Albemarle Paper/Dothard* line of cases or the *Washington/Beazer* line; they chose the latter.[120] Dispensing with the need for formal validation and rejecting the notion that the employers must demonstrate an overriding need for the offending criteria, the plurality stated that an employer may retain its employment practices if it can show that they are "legitimate," meaning convenient or useful.[121]

How far the plurality's conclusions stray from the model of the disparate impact cause of action articulated in *Griggs*, *Albemarle Paper*, and *Dothard* is best understood by comparing the plurality opinion to Justice Blackmun's separate concurrence. Joined by Justices Brennan and Marshall, Blackmun first castigated the plurality for constructing a new disparate impact framework that is "flatly contradicted by our cases."[122] Then, combing the Court's previous pronouncements for support, Blackmun demonstrated how each component of the plurality's framework constituted a departure from the one developed in previous cases.

Blackmun began by discussing which party should carry the ultimate burden of proof in a disparate impact case. Citing *Albemarle*

This conception of the plaintiff's opportunity to present less burdensome alternatives is very different than that, for example, presented in *Dothard*. In that case, the Court held that the plaintiff would prevail if she showed the existence of any alternatives; if alternatives exist, the defendant's practice cannot be necessary. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977). But even if no alternatives existed, the plaintiff could still prevail if the defendant failed to carry its burden of persuasion that its practices were necessary. *Id.* In *Watson*, however, the plurality argued that the plaintiff, in order to prevail, *must* submit evidence of alternative practices in order to meet its burden of showing the insufficiency of the employer's business justification. *Watson*, 487 U.S. at 998 (plurality opinion).

117. *Watson*, 487 U.S. at 999 (plurality opinion).

118. *Id.* (plurality opinion).

119. *Id.* (plurality opinion).

120. *See* Greenberger, *supra* note 11, at 285-86.

121. *Watson*, 487 U.S. at 999 (plurality opinion).

122. *Id.* at 1000-01 (Blackmun, J., concurring in part and concurring in the judgment).

Paper, *Dothard*, and *Griggs*, Blackmun asserted that the Court's cases made it clear that "a plaintiff who successfully establishes [a] prima facie case shifts the burden of *proof*, not production, to the defendant, to establish that the employment practice in question is a business necessity."[123] Because the plaintiff "has [already] proved that the employment practice has an improper effect; it is up to the employer to prove that the discriminatory effect is justified."[124]

After establishing the appropriate burden of proof, Blackmun explained the nature of the employer's burden. He emphasized that establishing business necessity meant that the employer must show that its requirements are literally necessary, concluding that "[t]o be justified as a business *necessity* an employment criterion must bear more than an indirect or minimal relationship to job performance."[125] In support of this statement, Blackmun cited *Dothard* for the proposition that job requirements must measure qualities that are " 'essential to good job performance.' "[126] Thus, if they are to pass muster under Title VII, job requirements cannot simply measure qualities that an employer would find convenient or useful in an employee; they must instead "directly relate to a prospective employee's ability to perform the job effectively."[127] Given this interpretation of *Griggs* and its progeny, Blackmun concluded that the plurality's views "cannot be squared with our prior cases."[128]

Despite this conclusion by Justice Blackmun, it cannot be said that the plurality was either following or acting contrary to the Court's precedents. The Court, in fact, had charted two separate

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123. *Id.* at 1001 (Blackmun, J., concurring in part and concurring in the judgment) (citations omitted).

124. *Id.* at 1004 (Blackmun, J., concurring in part and concurring in the judgment).

125. *Id.* at 1005 (Blackmun, J., concurring in part and concurring in the judgment) (citations omitted).

126. *Id.* (Blackmun, J., concurring in part and concurring in the judgment) (citing Dothard v. Rawlinson, 433 U.S. 321, 331-32 (1977)).

127. *Id.* (Blackmun, J., concurring in part and concurring in the judgment). Curiously, Justice Blackmun later states that an employer will not be liable under Title VII if its hiring process is "shown to be necessary to fulfill legitimate business requirements." *Id.* at 1006 (Blackmun, J., concurring in part and concurring in the judgment). Allowing the employer to retain job practices with a disparate impact for requirements that are only legitimate, as opposed to essential, appears inconsistent with Blackmun's earlier, specific defense of a strict definition of business necessity. Given the clarity of that earlier discussion, it is possible that Justice Blackmun did not perceive that this choice of words would cast doubt on his earlier conclusions. It is also possible that ambiguity in Justice Blackmun's explanation of the business necessity standard resulted from the ambiguity of the precedents themselves. *See infra* notes 230-52 and accompanying text.

128. *Watson*, 487 U.S. at 1006 (Blackmun, J., concurring in part and concurring in the judgment).

courses for the disparate impact defense. In *Watson*, four Justices selected one standard, while three of their colleagues, judging from Blackmun's opinion, apparently selected the other. Only the failure to secure the vote of a fifth Justice prevented the Court from firmly establishing a single framework for the business necessity defense.

In *Wards Cove Packing Co. v. Atonio*,[129] however, the *Watson* plurality secured that fifth vote and implemented the framework it had outlined in *Watson*. In *Wards Cove*, employees of Alaska salmon canneries filed a class action suit alleging that the employers' hiring practices resulted in a workforce that was racially segregated.[130] The plaintiffs contended that this segregation made out a prima facie case of disparate impact because it demonstrated that the employers' practices harmed the job opportunities of racial minorities.[131]

The Court, in an opinion by Justice White, first concluded that the plaintiffs had failed to establish their prima facie case at trial.[132] Because the case was going to be remanded, however, the Court decided to settle, once and for all, the outstanding questions concerning the business necessity defense.[133]

The Court first held that employers need not show that their job qualifications were justified by business necessity in the strictest sense.[134] The Court explained that while the employer may not prove "[a] mere insubstantial justification" for its practice, "there is no requirement that the challenged practice be 'essential' or 'indispensable' to the employer's business. . . . [The] dispositive issue is whether a challenged practice significantly serves the legitimate

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129. 490 U.S. 642 (1989).

130. *Id.* at 646-47. The higher paying, more skilled positions were held mostly by whites, while the lower paid, more menial positions were occupied predominantly by Filipinos and native Alaskans. *Id.* at 647.

131. *Id.* at 648. The plaintiffs sued under both the disparate treatment and disparate impact theories of Title VII. *Id.* All the lower courts ruled in favor of the employers on the disparate treatment claims. *Id.* at 649.

132. *Id.* at 655. The plaintiffs contended that the racial segregation in and of itself constituted prima facie proof of disparate impact. *Id.* at 650-51. The Court rejected this contention, holding that a disparate impact plaintiff must compare the racial composition of the employers' workforce to that of the pool of potential applicants. *Id.* at 650-55. The Court also held that the plaintiffs did not make out their prima facie case because they failed to demonstrate which of the employers' practices had caused the alleged disparate impact. *Id.* at 656-58.

133. *Id.* at 658 ("If, on remand, respondents meet the proof burdens outlined above, and establish a prima facie case of disparate impact with respect to any of petitioners' employment practices, the case will shift to any business justification petitioners offer for their use of these practices.").

134. *Id.* at 659.

employment goals of the employer."[135] Agreeing with the *Watson* plurality, the Court held that while an employer carries the burden of producing evidence of a business justification, the ultimate burden of proof remains with the plaintiff at all times.[136]

Consequently, if an employer attempts to meet its burden of production by demonstrating that its practice significantly serves a legitimate employment goal, a plaintiff may prevail in two ways. First, the plaintiff can persuade the factfinder that the practice is not justified by business necessity.[137] Second, the plaintiff can persuade the court that there are alternative employment practices that will be equally effective in meeting the employer's legitimate goals that do not produce a disparate impact.[138] This alternative employment practice stage of litigation, the Court held, is analogous to the pretext stage of the disparate treatment cause of action in that a plaintiff can demonstrate that the employer's contentions that it needs the offending practices are untrue.[139]

In assessing whether the plaintiff's burden of persuasion has been met, the Court stated that trial courts must engage in a "reasoned review" of the employer's justification for the practice. They must not, however, establish such a high burden of justification that the law produces a "host of evils."[140] The central evil the Court sought to avoid, as had the plurality in *Watson*, was a construction of Title VII that left the use of hiring quotas as "[t]he only practicable option" for employers seeking to avoid liability. This result could not be allowed because it was one that "Congress expressly rejected in drafting Title VII."[141] Courts should defer to the employer's business judgment, "proceed[ing] with care before mandating that an employer must adopt a plaintiff's alternative selection or hiring practice in response to a Title VII suit."[142]

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135. *Id.*

136. *Id.* at 659-60. In reaching this conclusion, the Court acknowledged that one could read its previous decisions as having established a different rule. *Id.* at 660. Rather than conceding that it was establishing a new rule, the Court argued that those decisions *should* have been read as articulating the rule propounded in *Wards Cove*. *Id.* at 660. With regard to the other parts of the business necessity defense discussed in *Wards Cove*, the Court did not even acknowledge that a reading of its previous cases could have led to differing conclusions. *See* Player, *supra* note 43, at 3.

137. *Wards Cove*, 490 U.S. at 660.

138. *Id.* at 660-61.

139. *Id.*

140. *Id.* at 659.

141. *Id.* at 652 (citations omitted).

142. *Id.* at 661.

Both admirers and detractors of *Wards Cove* saw the decision as the most significant development of the disparate impact cause of action since its advent in *Griggs*.[143] The new framework permitted employers to establish requirements that served their legitimate goals, but were not precisely related to the particular job. Employers, thus, would be encouraged to rely more on ability tests in order to recruit higher caliber workers. Certainly, proponents of the *Wards Cove* framework argued, recruiting an intelligent work force is a legitimate employment goal; they celebrated this freedom of employers to implement desirable, but not essential, employment practices.[144]

Opponents of *Wards Cove* contended that it is precisely this effort to establish general hiring qualifications not firmly anchored in the specific requirements of the position at issue that has raised barriers to historically disadvantaged groups. These groups, because of past injustices, have difficulty competing with other groups in general measures of attainment. They may very well be able, however, to do the job as well as anyone who has a more extensive education or a better test score.[145]

The opponents of *Wards Cove*, many of whom were located in Congress, then moved to overturn the decision by statute, but met fierce opposition from President Bush. After almost two years of wrangling, however, a compromise was reached and the Civil Rights Act of 1991 was signed into law. This Article will examine how the different parties to the compromise understood the agreement they reached.

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143. Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1, 33-45 (1990); Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1, 23-29 (1990); Player, *supra* note 43, at 2 ("In the seventeen years between *Griggs* and the Court's recent decision in *Wards Cove Packing Co. v. Atonio*, the Court failed to define with any precision what it meant by 'business necessity.' *Wards Cove Packing* provides that definition."); *see also* Philips S. Runkel, Note, *The Civil Rights Act of 1991: A Continuation of the* Wards Cove *Standard of Business Necessity?*, 35 WM. & MARY L. REV. 1177, 1186 (1994) (arguing that *Wards Cove* is "extremely important with regard to the ability of minority employees to protect themselves in the workplace.").

144. *See, e.g.*, Paul Craig Roberts, *Bipartisan Assault on Equality*, WASH. TIMES, Nov. 2, 1989, at F4.

145. Paul Gerwitz, *Discrimination Endgame: A Civil Rights Summer Primer*, THE NEW REPUBLIC, Aug. 12, 1991, at 18-23; Clarence Page, *The Reagan Court Shows Its Colors*, CHI. TRIB., June 11, 1989, § 4, at 3; Herman Schwartz, *Illogical Force*, THE NATION, July 10, 1989, at 40.

B. *The Case for Strict Necessity*

The primary opponents of *Wards Cove* were civil rights organizations who saw the decision as a step backward in the fight against employment discrimination.[146] These organizations were determined to overturn the decision and write legislation that would codify a narrow definition of the business necessity defense. They believed that *Griggs* and its progeny required the employer to demonstrate that any practice or qualification used for hiring, promotion, or termination was, to use the specific terms rejected by *Wards Cove*, "essential" or "indispensable" to actual performance of the specific duties required by the job.[147]

In other words, the civil rights organizations believed that the only legitimate interpretation of the disparate impact standard was the strict standard established in *Griggs*, *Albemarle Paper*, and *Dothard*.[148] Many lower courts supported them in this view, interpreting *Griggs* as requiring a strict standard of business necessity.[149] Indeed, this implementation of a strict business necessity standard was vital to reforming the employment practices of large employers and, thus, crucial to providing employment opportunities to previously excluded groups.[150] Civil rights advocates, believing that the strict standard was the norm, viewed the *Watson* plurality opinion and *Wards Cove* as usurpations.

Certainly such a view was not without foundation. A reasonable lawyer could argue that the discussions of business necessity in both *Washington* and *Beazer* were dicta. *Washington* did not deal with a

146. For example, one leader in the attempt to persuade Congress to overturn *Wards Cove* was the Leadership Conference on Civil Rights, a coalition of civil rights groups. Note, *supra* note 22, at 900 n.32. Other civil rights groups that took prominent roles in the debate included the following groups that filed amicus briefs in favor of the plaintiffs in *Wards Cove*: the American Civil Liberties Union, the Lawyers' Committee for Civil Rights, the National Association for the Advancement of Colored People (NAACP), and the NAACP Legal Defense and Education Fund.

147. Runkel, *supra* note 143, at 1185-86; Note, *supra* note 22, at 899-900.

148. Note, *supra* note 22, at 899-900; *see also* C. Boyden Gray, *Disparate Impact: History and Consequences*, 54 LA. L. REV. 1487, 1491-93 (1994) (arguing that civil rights activists viewed *Wards Cove* as a "disquieting trend" in Supreme Court decisions).

149. *See, e.g.*, EEOC v. Roth Packing Co., 787 F.2d 318, 331-32 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1016 (11th Cir. 1982); James v. Stockham Valves & Fittings Co., 559 F.2d 310, 355 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1168 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976).

150. *See* ESKRIDGE & FRICKEY, *supra* note 19, at 68.

Title VII claim at all.[151] The Title VII claim in *Beazer* was resolved by rejecting the plaintiff's prima facie case; the Court discussed the business necessity defense only as an aside in a solitary footnote.[152] Thus, proponents of a strict necessity defense can argue that because *Washington* and *Beazer* were not considered discussions of the business necessity defense, they should be ignored.

Stripping these two cases from the line of precedent makes *Watson* and *Wards Cove* seem like a sharp break from a consistent line of cases. This perception is, of course, exactly the one shared by the civil rights community. The civil rights community perceived *Wards Cove* as a conservative hijacking of the civil rights laws rather than the Court's final resolution of a closely fought debate over the real meaning of *Griggs*.[153] Given this view, it is not surprising that the civil rights groups turned to Congress to restore their view of the law.[154]

The Democratic Party leadership in Congress gave these groups a friendly reception. After months of consultations with the civil rights groups, Senator Edward M. Kennedy, the chairman of the Labor and Human Resources Committee, introduced the Civil Rights Act of 1990 (the "1990 Act") to the Senate.[155] This bill, as it was finally passed by Congress, stated that it was designed to "codify the meaning of 'business necessity' as used in *Griggs* . . . and to overrule the treatment of business necessity in *Wards Cove*."[156] The bill stated that in order for an employer to prevail against a prima facie case of disparate impact, it must demonstrate that the practice is

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151. *See supra* notes 57-73 and accompanying text.

152. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979); Note, *supra* note 22, at 908 n.83 ("[B]ecause *Beazer* is decided on other grounds and the job necessity issue is dealt with in one sentence and part of a footnote, this dicta should not carry much weight."); *supra* notes 85-93 and accompanying text; *see also* Greenberger, *supra* note 11, at 281 (arguing that "caution is in order with respect to concluding that *Beazer* fundamentally altered the first stage of an impact claim.").

153. Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1155 (1993) ("The *Wards Cove* opinion led to some of the more unbelievable rhetoric among the civil rights community that I have ever heard. The civil rights community claimed that the *Wards Cove* opinion 'was a resurrection of Jim Crow.' "); Gerwitz, *supra* note 145, at 23 ("[C]ivil rights advocates can no longer avoid the political arena . . . . The entire current crisis was caused by a series of unfriendly civil rights decisions by the Court.").

154. Indeed, the civil rights community sought to overturn not only *Wards Cove*, but also several other Supreme Court decisions limiting the reach of Title VII. *See* Greenberger, *supra* note 11, at 256 n.21. The civil rights organizations viewed these decisions as an attempt by conservative Justices to revamp Title VII. *Id.* at 291-92.

155. S. 2104, 101st Cong., 2d Sess. (1990); *see* Leibold et al., *supra* note 23, at 1056 n.66.

156. S. 2104, 101st Cong., 2d Sess. § 3(o)(3) (1990).

"required by business necessity."[157] The bill then provided a two part definition of business necessity:

(o)(1) The term "required by business necessity" means—
(A) in the case of employment practices involving selection such as tests, recruitment, evaluations, or requirements of education, experience, knowledge, skill, ability, or physical characteristics, or practices primarily related to a measure of job performance, the practice or group of practices must bear a significant relationship to successful performance of the job; or
(B) in the case of other employment decisions, not involving employment selection practices . . . or that involve rules relating to methadone, alcohol, or tobacco use, the practice or group of practices must bear a significant relationship to a manifest business objective of the employer.[158]

After it had run the gauntlet of the legislative process, this bill emerged in a form that appeared to satisfy the concerns of the civil rights groups. The most important concern of the groups, restoring the *Griggs* standard in the selection of employees, was accomplished by the bill's language requiring the employer to prove that the practice had a significant relationship to job *performance*.[159]

Proponents of this job performance standard intended that the employer prove the necessity of its practices by scientifically validating its practices in accordance with the EEOC Guidelines. For example, the report of the Senate Committee on Labor and Human Resources on the 1990 Act states that the EEOC Guidelines "embody the legal principles that were accepted and applied prior to *Wards Cove*, and which the Committee intends . . . to restore."[160] These legal principles required employers to prove through scientific methods that their requirements were necessary for successful job performance.[161]

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157. *Id.* § 4(k)(1).

158. *Id.* § 3(o)(1)(A), (B).

159. *See id.* § 3(o)(1)(A); Leibold et al., *supra* note 23, at 1071 ("[S]upporters of the original 1990 legislation believed that employers should not be permitted to use practices which effectively screen out minorities unless those practices exactly measure 'job performance.' ").

160. S. REP. NO. 315, 101st Cong., 2d Sess. 42 (1990).

161. Thus, if an employer wants to hire employees with a high school diploma, he must prove that a high school education is significantly related to successful performance of the job in question by undertaking a validation study. Griggs v. Duke Power, Co., 401 U.S. 424, 431 (1971). Under *Wards Cove*, the civil rights groups contended, the employer could impose the requirement simply because he had the legitimate objective of raising the educational level of his workforce. The education need not be necessary for the successful

The requirement of such strong proof amounts to making employers show that their requirements are essential or indispensable.[162]

President Bush, on the other hand, was determined to preserve an employer's freedom to use employment practices and impose job qualifications that served legitimate purposes of the employer even if those practices and qualifications were not strictly related to the duties of the job itself.[163] Indeed, the Bush Administration was particularly interested in legislating a standard that would permit employers to implement educational requirements for the same reasons that were rejected in *Griggs*.[164] The Administration argued that employers should be allowed to hire more educated workers even if the academic or analytical skills embodied in the earning of the degree are not directly involved in the job in question, (e.g., an entry level, labor job).[165] President Bush argued that employers will impose these requirements whether or not these practices are considered justified by business necessity.[166] Echoing the arguments in *Wards Cove*, the Administration argued that employers would simply use quotas to make sure there is no disparate impact, thereby resulting in exactly the kind of intentional discrimination everyone wishes to prevent.[167]

A group of "moderate" Senate Republicans who were habitual supporters of strong civil rights legislation urged the President to reach a compromise with the Democrats.[168] They played a leading

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performance of the job. The civil rights groups insisted that restoration of the *Griggs* standard was vital to the removal of arbitrary barriers to the employment of disadvantaged groups. Gerwitz, *supra* note 145, at 19-20.

162. Indeed, at least some members of the Bush Administration believed the main intention of the civil rights groups was the codification of the EEOC Guidelines. Gray, *supra* note 148, at 1490-93. The Administration believed that the stringency of the validation requirements advanced by the Guidelines would encourage employers to forego the validation of their requirements and instead impose quotas. *Id.* at 1491. Mr. Gray was Counsel to the President of the United States during the negotiations concerning both the 1990 legislation and the final Act.

163. Runkel, *supra* note 143, at 1188-89.

164. Gray, *supra* note 148, at 1493 ("[T]he demands of global competition for a more educated work force had, twenty years after *Griggs*, raised the stakes on the importance of education to productivity. . . . Indeed, it was this argument over education that constituted the core dispute between the Bush administration and the legislation's supporters.").

165. *Id.* at 1493-95.

166. Carvin, *supra* note 153, at 1155-56.

167. Note, *supra* note 22, at 900.

168. Leibold et al., *supra* note 23, at 1060-61. The following discussion of the negotiations over the Act relies heavily on an account of the negotiations rendered by, in their words, "counsel to three of the key Senate [Republicans], [who were] intimately

role in the negotiations that led to the addition of the second part of the definition of business necessity.[169] This second definition imposed a more lenient standard of justification on employment practices that did not concern selection. The standard stated that the employment practice is justified if it is significantly related to a manifest business objective. Unlike selection practices, this standard of justification did not require an employer to show that the practice in question is related to successful performance of a particular job, thus providing for the justification of a wider range of practices than allowed by a strict *Griggs* standard.[170]

Despite these compromises, President Bush concluded that the statute as written confined the business necessity defense to "an unduly narrow definition of 'business necessity.' "[171] The President argued that this definition would drive employers to adopt quotas to avoid liability because they could not defend their employment practices.[172] President Bush vetoed the bill,[173] and the Senate, by one vote, failed to override.[174]

The next year, the civil rights groups and the Democrats remained determined to enact a civil rights bill. In fact, the first bill introduced in the 1991 Congress was the Democratic leadership proposal to overturn *Wards Cove* and the other offending Supreme Court cases.[175] Hoping to build on the momentum gained the year before, original H.R. 1, as did the 1990 Act, articulated two separate definitions of business necessity, one for practices involving the selection of employees and one for other practices. With regard to

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involved in the negotiations surrounding" the Act. *Id.* at 1043. According to this account, the Senators involved in the effort to persuade President Bush to sign civil rights legislation were John C. Danforth (R-Mo.), Dave Durenberger (R-Mont.), James Jeffords (R-Vt.), John H. Chafee (R-R.I.), Arlen Specter (R-Pa.), William S. Cohen (R-Me.), and John Heinz (R-Pa.). *Id.* at 1043 n.2.

169. ESKRIDGE & FRICKEY, *supra* note 19, at 102.

170. Leibold et al., *supra* note 23, at 1074. For example, if an employer bans the use of alcohol or drugs on the job and this practice has a disparate impact on a particular group, the employer may justify this practice by showing that it is significantly related to a manifest business objective, such as the prevention of accidents on the job. The employer need not demonstrate that the prohibition of the use of these substances is significantly related to successful performance of particular jobs, thereby giving the employer more leeway to implement such practices.

171. Message to the Senate Returning Without Approval of the Civil Rights Act of 1990, 2 PUB. PAPERS 1437, 1438 (1990).

172. *Id.*

173. *Id.* at 1437.

174. *See* 136 CONG. REC. S16,589 (daily ed., Oct. 24, 1990).

175. H.R. 1, 102d Cong., 1st Sess. 2 (1991).

selection, the practice had to "bear a significant relationship to successful performance of the job"[176] in order to be justified under H.R. 1. Other practices had to "bear a significant relationship to a significant objective of the employer."[177]

Needless to say, given that this proposal was almost identical to the one vetoed the year before, President Bush immediately rejected the bill's formulation of the business necessity standard.[178] The "moderate" Republican group of Senators was also disappointed with the efforts of the Democratic leadership.[179] Nevertheless, over the next several months, these Senators were more determined than ever to craft a bill that would be acceptable to themselves, the Democrats, and the Administration.[180] After the introduction of H.R. 1, however, these Senators discovered that they and the Administration fundamentally disagreed over the correct definition of the business necessity defense.

The Republican Senators originally believed that they could craft an acceptable compromise by building on the 1990 Act's distinction between selection practices and other employment practices.[181] In agreement with the Democrats, the Senators founded their position on the principle that in order to establish business necessity an employer should have to prove that his selection practices either predict or are correlated with successful job performance.[182] They believed, however, that if employers were permitted by Title VII to justify non-selection practices such as drug or discipline policies under a more lenient standard than the one they thought was established by *Griggs*, the Bush Administration would agree that employer

176. *Id.* at 3.

177. *Id.*

178. Runkel, *supra* note 143, at 1188.

179. Leibold et al., *supra* note 23, at 1059-60.

180. *Id.* at 1060-61. The authors noted that:

> Seven Republican Senators emerged dissatisfied from the 1990 debate on the Civil Rights Bill. They believed that heated political rhetoric was damaging to race relations, and clearly destructive of a civil rights consensus which would be enacted into law . . . . Understanding the substantial division between the two sides, the Senators sought solutions in these three areas which would not only be acceptable to them, but also to the fiercest proponents and opponents of the 1990 bill.

Id. (footnotes omitted).

181. *Id.* at 1073.

182. *Id.* at 1074 (indicating the Senators believed that "in 'selecting' employees, employers should be permitted to use practices that disproportionately excluded minorities or women only if such practices measured, predicted, or otherwise related to the requirements for effective job performance").

prerogatives were sufficiently protected. While they knew that the President had vetoed a bill containing this exact kind of distinction the year before, they believed that the President would agree to this kind of compromise if they found the correct verbal formulation for both business necessity definitions.[183]

In the course of negotiations over the business necessity provisions, the Senators discovered that the Administration vehemently disagreed with the strict necessity standard for selection practices no matter how it was framed.[184] The Senators crafted several different versions of the selection standard, but the Administration rejected every one because they all employed a job performance standard.[185] The Administration insisted that it would only sign a bill that permitted employers to use selection practices that served legitimate business objectives, even if these objectives did not concern successful performance of the particular job in question.[186]

In October 1991, following over nine months of negotiations, the parties were at an impasse. The Senators were desperate to cobble together a successful bill. According to political observers, they were particularly anxious that the President sign a civil rights bill because the media was portraying the Republican Party as an enemy of civil rights in the recent wake of the Clarence Thomas nomination[187] and the political success of former Ku Klux Klan member David Duke as a Republican candidate for governor of Louisiana.[188]

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183. *See id.* at 1057-59, 1075-77.

184. For accounts of the negotiations, *see id.* at 1074-84; Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 990-99 (1993); Runkel, *supra* note 143, at 1193-1200.

185. *See, e.g.*, S. 1208, 102d Cong., 1st Sess. § 5(a) (1991) (requiring employment selection practices to bear a "manifest relationship to requirements for effective job performance"); S. 1408, 102d Cong., 1st Sess. § 5(n)(1) (1991) (stating that employment practices "that are used as job qualifications or used to measure the ability to perform the job . . . must bear a manifest relationship to the employment in question").

186. *See* Leibold et al., *supra* note 23, at 1077-78.

187. The controversy over allegations of sexual harassment against Supreme Court nominee Clarence Thomas led some to question the Bush Administration's commitment to civil rights. For an account of the controversy and its effect on the Act, see Pamela Fessler et al., *Rights Bill Rises From the Ashes of Senate's Thomas Fight*, 49 CONG. Q. WKLY. REP. 3124 (1991).

188. *See* Devins, *supra* note 184, at 996; Runkel, *supra* note 143, at 1999-1200; William Raspberry, *Bush, Civil Rights, and the Specter of David Duke*, WASH. POST, Oct. 30, 1991, at A23.

The Senators urged the President to sign Senate Bill 1745,[189] drafted by John Danforth of Missouri, the unofficial leader of the group.[190] This bill continued to distinguish selection practices and other practices, but, in an attempt to persuade the President that he could live with the business necessity standard established for selection practices, the bill defined the business necessity defense in language similar to that used in the Americans With Disabilities Act ("ADA").[191] The Senators reasoned that the President surely could not object to language similar to that contained in a bill he had signed just the year before.[192]

As late as October 23, 1991, the Administration stated that the Senators' proposal was unacceptable.[193] That day, however, two of the Senators announced that they would vote to override a presidential veto of a civil rights bill they considered acceptable.[194] On October 24, the Republican Senators met with Administration representatives and finally agreed to a compromise bill.[195]

At first glance, the compromise embodied in the Act seems to favor the proponents of a strict business necessity standard. Section Three of the Act, which sets out the purposes of the legislation, states that one of these purposes is "to codify the concepts of 'business necessity' and 'job-related' enunciated by the Supreme Court in *Griggs*" and in "the other Supreme Court decisions prior to *Wards Cove*."[196] Thus, if an interpreter, following the civil rights groups, reads out *Washington* and *Beazer* from the line of cases and dismisses *Watson* because no one opinion on the business necessity issue commanded a majority, she must conclude that the purpose of the Act is to codify the business necessity standard articulated in *Griggs*, *Albemarle Paper*, and *Dothard*.

The Act's definition of business necessity is contained in § 105(a), which amended § 703 of the 1964 Act by adding a new subsection (k).[197] This new section states that an unlawful employment practice

189. S. 1745, 102d Cong., 1st Sess. (1991).

190. For accounts of Danforth's role, see Devins, *supra* note 184, at 994-99; Runkel, *supra* note 143, at 1193-1200.

191. *See* 42 U.S.C. § 12112(b)(6) (1994); Leibold et al., *supra* note 23, at 1078-79.

192. Leibold et al., *supra* note 23, at 1078-80.

193. *Statement of Administration Policy on S 1745 October 23, 1991*, Daily Lab. Rep. (BNA) No. 206, at F-1 (Oct. 24, 1991).

194. Devins, *supra* note 184, at 996; Fessler et al., *supra* note 187, at 3124.

195. Leibold et al., *supra* note 23, at 1081.

196. Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071 (noted at 42 U.S.C. § 1981 note (1994)).

197. *Id.* § 105(a) (codified at 42 U.S.C. § 2000e-2k (1994)).

based on disparate impact is established if the plaintiff demonstrates that the employer "uses a particular employment practice that causes a disparate impact" and the employer "fails to demonstrate that the challenged practice is *job-related for the position in question and consistent with business necessity*."[198]

This definition, which was the fruit of the last-ditch negotiation session between the "moderate" Republican Senators and the Administration, rejects the two-definition approach to business necessity in favor of one standard for both selection and other employment practices. The Republican Senators' idea of drawing the Act's business necessity standard from the ADA did play an integral role in the compromise. The Act's definition of the business necessity defense, "job-related for the position in question and is consistent with business necessity," was taken word for word from the ADA.[199]

Borrowing the language of another statute presents, it would seem, an easy way to ascertain the meaning of the provision at issue. If we can understand how those responsible for the enactment of the ADA interpreted business necessity, we would then understand the Act's definition.[200] The Act unfortunately forecloses this easy path to understanding. Section 105(b) provides that:

> No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.[201]

The interpretive memorandum merely states that "[t]he terms 'business necessity' and 'job-related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs* . . . and in the other Supreme Court decisions prior to *Wards Cove*."[202] In this provision, then, Congress told the courts, the executive, and other interpreters of the Act that they may not refer to extrinsic sources of

198. *Id.* § 105(a) (codified at 42 U.S.C. § 2000e-2(k) (1994)) (emphasis added).

199. *See* Americans With Disabilities Act, 42 U.S.C. § 12112(b)(6) (1994).

200. At the time of the enactment of the Act, the ADA's employment provisions had not yet become effective. *See* 42 U.S.C. § 12112 note (1994). Therefore, one could not have, even in theory, turned to judicial interpretations of the ADA to assist in understanding the Act.

201. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (noted at 42 U.S.C. § 1981 note (1994)).

202. 137 CONG. REC. S15,276 (daily ed. Oct. 25, 1991).

interpretation other than the Supreme Court precedents prior to *Wards Cove*. Thus, Congress has precluded interpreters from relying on the legislative history of the ADA in the search for the meaning of the business necessity defense. Other than the conflicting Supreme Court precedent, an interpreter of the Act is left with only the bare language of the Act.

If one credits the account written by three of their aides, the "moderate" Republicans believed that the Act's compromise language, in conjunction with the purposes section, implements the strict necessity standard for selection practices, at the very least.[203] Certainly the Democratic leadership as well must have believed that the Administration had conceded the fight on the business necessity question. Otherwise, it is difficult to see why they would have agreed to this compromise. Those who read the Act as establishing a strict necessity standard emphasize that an employer who wishes to prove that a practice is justified by business necessity must meet two requirements.

First, the employer must demonstrate that the practice is "job-related" for the position in question.[204] The proponents of a strict business necessity standard argue that the term "job-related" is the exact term used in *Griggs* and *Albemarle Paper*, both of which interpreted the defense strictly.[205] In addition, because the practice must be related to the *position* in question, the Act should be read as establishing a job performance standard, requiring the employer to prove that the practice either predicts or is correlated with successful performance of the particular job at issue. The employer, as required by *Griggs*, *Albemarle Paper*, and *Dothard*, must prove this relationship by scientifically validating its requirements in accordance with the Guidelines.

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203. Leibold et al., *supra* note 23, at 1081 ("This compromise accomplished the Republican sponsors' original goals because the agreed upon standard, borrowed from the ADA, codified the flexible 'job-related' standard of *Griggs*."). According to the account written by three of their aides, the "moderate" Republican Senators believed that, despite being phrased as a single standard, the Act essentially enacted the two definition standard they advocated all along. *See id.* at 1081-84. They intended that the first part of the business necessity standard, "job-related for the position in question," would establish a job performance standard for selection standards, while the second part of the standard, "consistent with business necessity," would be defined similarly to the Court's definition in *Wards Cove*. *Id.* at 1082-83. Thus, if a practice did not concern particular positions because it did not deal with selection, it could be justified if it served a legitimate employment interest. *See id.*

204. *Id.* at 1082.

205. *See id.*

Second, in addition to the "job-related" requirement, the employer must demonstrate that the practice is "consistent with business necessity."[206] Supporters of a strict business necessity standard both for selection and for other employment practices can thus argue that it is not sufficient that the employer's practice is related to the job in question; it also must be *necessary*. Many employment requirements are related to the job, but they are not all necessary. The use of the word "necessity" suggests that the practice must be more than related or convenient; it should be required or essential for the accomplishment of the goals of the employer. Use of the word "necessity" must mean that Congress rejected a standard that would allow an employer to impose requirements that merely served legitimate employment goals. Taken together, then, the "job-related" and "business necessity" requirement impose a job performance standard, rather than a legitimate interest standard, and require that the employer's practice be essential for determining job performance, rather than just serving an employment goal.

Perhaps the most powerful argument in favor of finding that the Act establishes a strict necessity standard is the Act's clear rejection of *Wards Cove*. The entire motivation for the introduction and passage of the Act was the majority of Congress's disapproval of the rules laid down in *Wards Cove* and the other Supreme Court decisions overturned or modified by the Act. This opposition to the *Wards Cove* standard is expressed in the Act itself. For example, Section Two of the Act states that "the decision of the Supreme Court in Wards Cove . . . has weakened the scope and effectiveness of Federal civil rights protections . . . [and] legislation is necessary to provide additional protections against unlawful discrimination in employment."[207] Section Three of the Act makes clear that the legislation is intended to codify the concept of "business necessity" enunciated in *Griggs* and all cases *prior* to *Wards Cove*,[208] thus explicitly rejecting the understanding of business necessity articulated in *Wards Cove*.

The extent of Congress's disapproval of *Wards Cove* can be most clearly understood by examining the substantive changes effected by the Act. As one commentator has noted, the very fact that Congress decided to codify the disparate impact cause of action as distinct from

206. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(K) (1994)).

207. *Id.* § 2, 105 Stat. 1071, 1071 (noted at 42 U.S.C. § 1981 note (1994)).

208. *Id.* § 3 (noted at 42 U.S.C. § 1981 note (1994)).

the intentional discrimination action demonstrates the legislature's flat rejection of the Supreme Court's attempt in *Watson* and *Wards Cove* to redefine the disparate impact cause of action using the intentional discrimination action as a model.[209] This deliberate rejection of the merger of the intentional discrimination and the disparate impact lines of analysis was accomplished by making the business necessity defense an affirmative defense, rather than a mere burden of production.[210] Therefore, unlike in an intentional discrimination case, the employer bears the burden of persuading the fact finder that it is not guilty of discrimination once the plaintiff establishes a prima facie case. The imposition of this burden of persuasion is precisely the factor that the *Wards Cove* Court believed led to the danger of quotas and motivated it to reform the law governing the disparate impact cause of action.[211]

If the Act so clearly rejects the *Wards Cove* standard and codifies the strict necessity approach, why would the Bush Administration agree to the compromise? Proponents of the strict necessity standard proffer a simple explanation: The Administration, facing a veto override, accepted the Act in order to save face.[212] Put more bluntly, the Administration caved in under the pressure applied by the Republican Senators and by criticism in the media over the Thomas and Duke debacles.[213] Indeed, even conservative commentators accused the Administration of capitulating to its opponents.[214]

In sum, a strong argument can be made that *Griggs*, in its strictest form, is again the law. This means, say the proponents of the

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209. Note, *supra* note 22, at 913.

210. The Act's provision that an employer will be found liable for discrimination under the disparate impact theory if it "fails to demonstrate" the required level of business necessity overruled this particular aspect of *Wards Cove*. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994). The Act states that the "term 'demonstrates' means meets the burden of production and persuasion." *Id.* § 2000e(m) (1994).

211. For a discussion of the *Wards Cove* decision, see *supra* notes 129-45 and accompanying text.

212. Devins, *supra* note 184, at 996 ("With fears of his coalition collapsing, Bush was compelled to strike a deal with bill supporters.").

213. *Id.* at 996 ("Given Bush's erratic track record on civil rights and his apparent desire to place political popularity ahead of a principled vision, it is not inappropriate to conclude that the October 24 compromise was a political capitulation."). Civil rights supporters advanced these arguments in the press at the time of the passage of the Act. *See, e.g.*, William T. Coleman, Jr. & Vernon E. Jordan, Jr., *How the Civil Rights Bill Was Really Passed*, WASH. POST, Nov. 18, 1991, at A21.

214. *See, e.g.*, L. Gordon Crovitz, *Bush's Quota Bill: (Dubious) Politics Trumps Legal Principle*, WALL ST. J., Oct. 30, 1991, at A17; Chester E. Finn, Jr., *Quotas and the Bush Administration*, COMMENTARY, Nov. 1991, at 17, 23.

Act, that employers must prove that their job practices and qualifications either predict or are significantly correlated with actual job performance.

C. The Case for the Wards Cove Standard

At the time of the passage of the Act, the Bush Administration insisted that it forced its opponents to compromise on the Administration's terms.[215] Since the Act's enactment, those responsible for negotiating for the Administration have advanced an interpretation of the Act that demonstrates that Congress actually adopted the *Wards Cove* standard.[216]

Proponents of a more lenient business necessity standard argue that the fatal flaw of the civil rights proponents' argument is their contention that *Wards Cove* was a sudden break with precedent.[217] This view, *Wards Cove* proponents argue, ignores the true nature of the doctrinal development since *Griggs*. *Wards Cove* was not a conservative hijacking of civil rights law; rather it was the natural result of the Court's continuing attempt over many years to construct a workable structure for the disparate impact cause of action.[218] In order to accept the civil rights groups' view of the precedent, one must ignore *Washington*, *Beazer*, and *Watson*, half of the six court cases elucidating the disparate impact cause of action before *Wards Cove*. The importance of these cases lies not only in their number, but in their specific factual background. *Griggs* and *Albemarle Paper* both involved unvalidated, or insufficiently validated, objective ability tests and educational requirements for entry-level positions. Thus, they presented straightforward applications of the disparate impact cause of action and the business necessity defense: If one wants to use objective standards, one must prove that they are related to the job. *Beazer* and *Watson*, in contrast, presented difficult cases. The former involved a requirement that employees be drug free, and the

215. C. Boyden Gray, *Civil Rights: We Won, They Capitulated*, WASH. POST, Nov. 14, 1991, at A23.

216. For an argument in the press, see *id.* at A23. For law review articles, see Carvin, *supra* note 153 *passim*; Gray, *supra* note 148 *passim*. Gray, as Counsel to the President, and Carvin, as a member of the Civil Rights Division of the Bush Department of Justice, were deeply involved in the negotiations over the Act.

217. *See* Gray, *supra* note 148, at 1489.

218. *See* Carvin, *supra* note 153, at 1161. Carvin stated that "[o]pponents of the Act . . . argued that Title VII case law, in particular *New York Transit Auth. v. Beazer*, *Watson v. Fort Worth Bank & Trust*, and *Washington v. Davis*, simply required that a selection device bear a demonstrable relationship to job performance or some business purpose and that *Wards Cove* merely adopted and applied this well established principle." *Id.*

latter involved subjective employment standards. As with the development of any legal doctrine, it is the difficult cases, the ones at the margin, that are most helpful in correctly articulating the boundaries of the cause of action at issue. Therefore, *Washington* and *Beazer* are not anomalies to be discarded; they are the direct precursors to *Watson* and *Wards Cove*.

Both President Bush and many of the Republicans in Congress who supported the final version of the bill explicitly relied upon this interpretation of Supreme Court doctrine when they supported the final bill. For example, in the statement he made upon his signing of the bill, President Bush remarked that

> the law of disparate impact has been developed by the Supreme Court in a series of cases stretching from the *Griggs* decision in 1971 to the *Watson* and *Wards Cove* decisions in 1988 and 1989. Opinions by Justices Sandra Day O'Connor and Byron White have explained the safeguards against quotas and preferential treatment that have been included in the jurisprudence of disparate impact.[219]

The executive branch's interpretation of these decisions, the President declared, was embodied in an interpretive memorandum submitted by Senate Minority Leader Robert Dole, on behalf of himself and several other Republican Senators. This memorandum, President Bush stated, "will be treated as authoritative interpretive guidance by all officials in the executive branch with respect to the law of disparate impact."[220]

The memorandum sets forth an interpretation of both the Supreme Court's disparate impact decisions since *Griggs* and the Act's effect on disparate impact law that relies squarely on the view that the *Wards Cove* standard was the natural culmination of the Court's treatment of disparate impact. Regarding the concept of business necessity, the memorandum avers that the Act "embodies longstanding concepts of job-relatedness and business necessity and rejects proposed innovations. In short, it represents an affirmation of existing law, *including Wards Cove*."[221]

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219. *President Bush's Statement On Signing the Civil Rights Act of 1991*, Daily Lab. Rep. (BNA) No. 226, at D-1 (Nov. 22, 1991).

220. *Id.*

221. 137 CONG. REC. S15474 (daily ed. Oct. 30, 1991) (emphasis added).

The existing law relied upon by the memorandum includes, not surprisingly, *Washington*, *Beazer*, and the plurality opinion in *Watson*.[222] Senator Dole and the Bush Administration argued that in those cases the Supreme Court held that a job practice or qualification was job-related and required by business necessity if it served "any legitimate purpose, even those that may not be strictly required for the actual day-to-day activities of an entry level job. . . . This is a flexible concept that encompasses more than actual performance of actual work activities or behavior important to the job."[223] Thus, the Administration argued, on this specific issue, *Wards Cove* is still the law; an employer can justify a practice that has a disparate impact if it serves some valid business purpose. The practice need not be essential or indispensable to the actual performance of the job.[224]

Is this argument tenable? Possibly not, if one considers the clear intent of an overwhelming majority of Congress, including many Republicans, to overturn the *Wards Cove* standard and codify a strict necessity standard, especially as to job selection. However, in a provision insisted upon by the Administration, the Act specifically precludes courts from inquiring into this kind of intent. As we have seen, section 105(b) of the Act states that the only valid legislative history for the disparate impact provisions is the interpretive memorandum inserted into the Congressional Record on October 25, 1991.[225] This memorandum confirms what is already stated in the Act. The relevant terms " 'business necessity' and 'job-related' are intended to reflect the concepts enunciated by the Supreme Court in *Griggs*" and "in the other Supreme Court decisions prior to *Wards Cove*."[226] This memorandum thus tells interpreters of the Act to turn to the very cases the Republicans argue established the *Wards Cove* standard. The Republican argument seems at least as viable as that of the Democrats.

In addition to their argument from precedent, supporters of a lenient business necessity standard argue that the Act's definition of the standard—"job-related for the position in question and consistent with business necessity"—supports their interpretation.[227] The use

222. *Id.* at S15474-76.
223. *Id.* at S15476.
224. *Id.*
225. Pub. L. No. 102-166, § 105(b), 105 Stat. 1071, 1075 (noted at 42 U.S.C. § 1981 note (1994)); *see supra* notes 220-21 and accompanying text; Gray, *supra* note 148, at 1495.
226. 137 CONG. REC. S15474 (daily ed. Oct. 30, 1991).
227. Carvin, *supra* note 153, at 1157-60; Gray, *supra* note 148, at 1495-98.

of the term "job-related for the position in question," for example, suggests that the practice at issue need merely be related to the job, rather than requiring that it measure job performance.[228] Compare the use of the term "job-related," the lenient standard proponents argue, to the language used in the vetoed 1990 Act or the language of the Act originally advanced by the Democrats.[229] For example, amended H.R. 1, the version of the Act first passed by the House, mandated that a practice required by business necessity "bear a significant and manifest relationship to the requirements for effective job performance."[230] This standard specifically referred to job performance, as did all the standards proposed during the negotiations over the Act.[231] After insisting on such a standard throughout the negotiations, Congress's consent to a standard that does not refer to job performance demonstrates that the Act rejected a job performance requirement.[232] Consequently, supporters of the lenient standard contend, Congress also rejected the requirement of strict validation of employment practices.[233] The entire project of validation involves demonstrating that the practices at issue measure, predict, or are correlated with job performance. If the employer is allowed to institute requirements that do not concern job performance, it cannot be required to validate in every case.

The supporters of a lenient standard also argue that the second part of the Act's standard, "consistent with business necessity," demonstrates that Congress did not enact a strict standard.[234] The use of the word "consistent," rather than "required," as was used in the 1990 Act, suggests that the employment practice need only serve business needs, rather than be essential or indispensable to the securing of these needs.[235] Given this definition, any employment requirement that is related to the job will satisfy business necessity. The Act's language, then, in effect, codifies *Wards Cove* because any

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228. Carvin, *supra* note 153, at 1159.

229. One should note, however, that if the exclusive legislative history provided for in the Act precludes supporters of a strict necessity standard from citing the negotiations over the Act in support of their position, it also ought to preclude the supporters of a lenient standard from doing the same.

230. 137 CONG. REC. H3923 (daily ed. June 5, 1991).

231. *See supra* notes 155-95 and accompanying text.

232. Carvin, *supra* note 153, at 1159.

233. *Id.* at 1160.

234. Carvin, *supra* note 153, at 1158; Gray, *supra* note 148, at 1495-96.

235. Carvin, *supra* note 153, at 1158 ("The practice simply has to be connected with, associated with, or related to business necessity, which is not a particularly demanding standard.").

employment practice that significantly serves legitimate employment interests will be related to the job and consistent with business necessity.[236]

Finally, supporters of a lenient standard argue that the "Findings and Purposes" sections of the Act do not explicitly overrule *Wards Cove*.[237] While the findings section implicitly criticizes *Wards Cove* for weakening civil rights protections and the purposes section seeks to codify the standard as it stood in the disparate impact cases prior to *Wards Cove*, the Act, unlike the 1990 Act, never explicitly states that *Wards Cove* should be overruled.[238] Rather than forthrightly rejecting the *Wards Cove* standard and risking a veto from the President, Congress, in the words of Michael Carvin, "simply did not resolve the question that had animated this two-year debate. In short, the opposing sides of the 1991 Act simply agreed to disagree about what substantive standard guided pre-*Wards Cove* case law and the extent to which *Wards Cove* was faithful to that standard."[239]

Carvin and the rest of the Bush Administration were confident when they agreed to the compromise embodied in the Act that the Court would interpret Congress's directive to interpret the Act in light of the decisions leading to *Wards Cove* as permission to reinstate the *Wards Cove* standard.[240] In their desperation to avoid a presidential veto, the Democrats, civil rights groups, and "moderate" Republican Senators allowed themselves to be hoodwinked into accepting a bill that in reality, even if not in literal terms, codifies the *Wards Cove* standard.

D. *Who Is Right?*

If the legislature has the duty to articulate clear legal rules in its statutes to the best of its ability, Congress may have shirked its duty in crafting the business necessity provisions of the Act. When each of two parties with diametrically opposing views plausibly can claim that its views were codified by the legislation, Congress has failed to legislate competently. Before we reach this harsh conclusion, however, we should make one last attempt to scrutinize both the strict necessity defense interpretation of the Act and the lenient necessity

236. *Id.* at 1157-58.
237. *See id.* at 1160-61.
238. Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 2, 3, 105 Stat. 1071, 1071 (noted at 42 U.S.C. § 1981 note (1994)).
239. Carvin, *supra* note 153, at 1161.
240. *Id.* at 1157, 1164.

defense interpretation to see if one can refute the other so completely that it is clear that the refuter's interpretation is the one embodied in the Act.

In favor of the strict necessity interpretation, we can say that even if one accepts the proposition that Congress did not explicitly enact the strict necessity standard, the only thing that the disparate impact provisions, taken as a whole, tell us for certain is that *Wards Cove* is wrong. Congress demonstrated its disagreement with the *Wards Cove* resolution of the business necessity problem by codifying the disparate impact cause of action and placing the burden of persuasion on the employer.[241] The only interpretation of the Act's business necessity defense that should be ruled out as a matter of course would be one that restores *Wards Cove*.

Rejecting the argument that the Act codifies the *Wards Cove* standard, however, does not mean that the Act codifies the strict business necessity standard. It is reasonable to ask that if Congress desires to overrule the Supreme Court and enact a rule that the Court has emphatically rejected, it should do so explicitly. No one could argue with a straight face that the Act's definition of business necessity is unambiguous. Indeed, it was the very ambiguity of the language that made compromise possible.[242]

Also, the Act's command to interpret the definition of business necessity according to the cases decided prior to *Wards Cove* presents the proponents of the strict necessity defense with an insurmountable problem. The strict necessity interpretation ultimately fails because it relies on an interpretation of the Supreme Court precedent prior to *Wards Cove* that ignores the true nature of the problems faced by the Court in explaining the disparate impact cause of action.

The problems that confronted the Court in *Beazer*, *Washington*, and *Watson* were quite real. These cases involved employment practices, such as testing requirements for entrance into training programs for jobs involving public safety, rules against hiring narcotics users, and subjective hiring practices, all of which raised serious questions about whether employers should be given more leeway in these particular instances. The arguments used to distinguish the

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241. *Compare* 42 U.S.C. §§ 2000e-2(k)(1)(A)(1) (1994) (stating that an unlawful employment practice based on disparate impact is established if the employer uses a practice that has a disparate impact on the basis of race, color, religion, sex, or national origin and the employer cannot show the practice is job-related) *with* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989) (holding there is no requirement that challenged practice be "essential" or "indispensable").

242. *See supra* notes 155-98 and accompanying text.

Court's pronouncements in these cases cannot conceal the fact that as the Court faced more difficult disparate impact cases, it began to question the utility of the rigid interpretation of business necessity advanced in *Griggs*, *Albemarle Paper*, and *Dothard*. One may not agree with the *Wards Cove* solution to that problem, but one cannot plausibly claim that the problem does not exist.

Aside from these problems, an interpretation of the Act maintaining that it adopts the strict necessity approach does not sufficiently account for the fact that two of the three indispensable parties who produced the Act—the President and the "moderate" Republican Senators—believed that the application of a strict, *Griggs* business necessity standard in all cases was undesirable. While the President and the moderate Republicans disagreed both as to what the standard should be and as to what was finally enacted, they agreed that the Act instituted something other than a uniform, strict necessity standard. As was said of the *Wards Cove* standard, what was enacted is open to debate, but it is certain that what was enacted was not a rigid, strict necessity standard.

What interpretation is left? Two propositions concerning the business necessity provisions of the Act are certain: (1) they instruct the Court to implement neither the strict necessity standard of *Griggs* nor the lenient standard of *Wards Cove*; and (2) they instruct the Court to interpret these provisions according to its precedent, excluding *Wards Cove*. If this precedent establishes two directly opposed, irreconcilable lines of cases, the Act's definition of business necessity is meaningless, and once the Court decides which of the diverging paths it chooses to follow, the war over the disparate impact standard will need to be refought.

If, however, the Supreme Court's attempts to define disparate impact in the cases leading to *Wards Cove* were not in fact incoherent or irreconcilable, then it might be possible to articulate a business necessity standard that is neither absolutely strict nor absolutely lenient. I contend that the Court's opinions, properly understood, articulate the seeds of a moderate approach to the business necessity defense that was successfully implemented by many lower courts before *Wards Cove* established an absolute lenient standard and that this moderate understanding of business necessity provides the best possible interpretation of the Act.

II. A BETTER, MORE MODERATE APPROACH

The Act's definition of business necessity directs courts to look to the pre-*Wards Cove* Supreme Court cases interpreting the defense.

Because these cases articulate, at the very least, two different standards of business necessity, the natural conclusion is that Congress, desperate to overcome the main obstacle to a compromise, enacted an incoherent standard and left it to the courts to make sense of the mess. A closer examination of these cases, however, demonstrates that the Court was neither indecisive nor inconsistent in articulating the strict and lenient versions of business necessity. Instead, there were good reasons why the Court articulated different standards in different cases. Rather than applying one uniform, rigid standard of business necessity, the Court applied the most appropriate standard for the job in question, based on the special nature of each job. In this Part, building on the foundation of these cases, I will elucidate a moderate, flexible approach to business necessity that ties the definition of the business necessity standard to the job in question.

A. *The Foundation of the Moderate Standard*

In the negotiations over the final form of the Act, Congress and the President decided to settle their differences by leaving the precise definition of business necessity to the courts.[243] The language the parties chose, "job-related for the position in question and consistent with business necessity,"[244] does not embody either of the extreme standards. Instead, the parties decided to tell the judiciary to interpret this provision in the same manner it had interpreted the business necessity defense before *Wards Cove Packing Co. v. Atonio*.[245]

If the Court precedents from *Griggs v. Duke Power Co.*[246] up to but not including *Wards Cove* do not establish any coherent doctrine, then the Court is free to interpret the business necessity defense any way it wishes, meaning that all the negotiations regarding the Act settled nothing. If, however, the cases from *Griggs* through *Watson* do construct a coherent, moderate approach to the question of business necessity, then we can demonstrate that the Act establishes a particular standard of business necessity that is a true compromise between the disputed positions.

A careful review of the relevant Supreme Court precedents reveals that without ever directly articulating what it was doing, the Court applied a two-tier standard of business necessity to disparate

243. *See supra* notes 146-242 and accompanying text.
244. 42 U.S.C. § 2000-e2(k)(1)(A)(i) (1994).
245. 490 U.S. 642 (1989); *see supra* notes 129-45 and accompanying text.
246. 401 U.S. 424 (1971).

impact cases before it decided to overhaul its approach to disparate impact in *Wards Cove*. In other words, it applied different standards of justification to different kinds of jobs. In cases in which the Court examined practices governing less complex, entry-level jobs, it applied the strict necessity standard. In cases in which complex jobs were at issue, the Court applied a more lenient standard of business necessity.

The Court's first two cases arose in contexts in which the use of a strict necessity test was appropriate. In *Griggs*, for example, the Court applied the strict necessity standard to high school diploma and general ability test requirements for jobs in the higher operating departments of a power generating facility.[247] In *Albemarle Paper Co. v. Moody*,[248] following *Griggs*, it applied the strict necessity standard to general ability test requirements for jobs in a paper mill.[249]

The Court abandoned the strict necessity approach in *Washington v. Davis*.[250] In *Washington*, the Court held that an exam given to police department applicants was sufficiently job-related because successful performance on the exam correlated with higher scores in the police training program, "wholly aside from its possible relationship to actual performance as a police officer."[251] The Court reasoned that "[i]t is . . . apparent to us . . . that some minimum verbal and communicative skill would be very useful, if not essential, to satisfactory progress in the training regimen."[252] Doubtless, the employers in *Griggs* and *Albemarle Paper* would have argued that the ability to communicate would be useful for their employees. Nevertheless, the Court allowed the police department in *Washington* more discretion than it gave the employers in *Griggs* and *Albemarle Paper*.

Similar leeway was granted to the New York City Transit Authority in *New York City Transit Authority v. Beazer*.[253] There, the Court held that the no-methadone-users requirement was job-related.[254] This statement was made without any analysis of the jobs at issue. Indeed, the Court stated that the Authority's "legitimate

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247. *See supra* notes 28-43 and accompanying text.
248. 422 U.S. 405 (1975).
249. *See supra* notes 44-56 and accompanying text.
250. 426 U.S. 229 (1976); *see supra* notes 57-73 and accompanying text.
251. *Washington*, 426 U.S. at 250.
252. *Id.*
253. 440 U.S. 568 (1979); *see supra* notes 85-93 and accompanying text.
254. *Beazer*, 440 U.S. at 587.

employment goals of safety and efficiency" justified excluding methadone users from positions with the Authority.[255]

The proponents of the strict necessity standard write off these differences in doctrine either as dicta or simply as mistaken statements of the *Griggs* standard. The proponents of the more flexible *Wards Cove* standard see these differences as evidence that the Court could not articulate a sensible definition of the business necessity defense without entirely restructuring the disparate impact cause of action as proposed by the plurality in *Watson v. Fort Worth Bank & Trust*[256] and accomplished by the Court in its next case, *Wards Cove*.[257]

Both of these explanations for the Court's seemingly schizophrenic decisions are at once too convenient and too cynical. Rather than demonstrating the Court's carelessness or the unfairness of placing the burden of proving business necessity on employers, these cases demonstrate that the Court had been lurching towards the definition of a moderate business defense, a process that was cut off by *Wards Cove*.[258]

In the cases before *Wards Cove*, the Court applied a more flexible standard of business necessity to complex jobs involving the exercise of significant discretion than it did to entry level positions, although it never characterized its decisions as establishing a new standard. For example, in cases involving jobs that concern the protection of the public, such as police and transit workers, the Court applied a lenient standard of business necessity.[259] On the other hand, in cases involving less complex jobs, such as working in a power plant or a paper mill, the Court applied the strict necessity standard.[260] In short, the Court before *Wards Cove* applied a two-tier standard of business necessity without naming it as such.

The one case that does not seem to fit the two-tier pattern is *Dothard v. Rawlinson*,[261] which concerned prison guards, a complex

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255. *Id.* at 587 n.31.

256. 487 U.S. 977, 993-1000 (1988).

257. *Compare* Note, *supra* note 22, at 906 n.74 *with* Carvin, *supra* note 153, at 1161-62.

258. 490 U.S. 642 (1989); *see supra* notes 129-42 and accompanying text.

259. *See* New York Transit Auth. v. Beazer, 440 U.S. 568, 592-93 & n.39 (1979); Washington v. Davis, 426 U.S. 229, 246-48 (1976). The Court in these cases held that employers could establish business necessity by showing that their requirements were sufficiently related to legitimate employment goals. *See supra* notes 57-73, 85-93 and accompanying text.

260. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

261. 433 U.S. 321 (1977); *see supra* notes 74-84 and accompanying text.

job involving public safety. Under a two-tier standard, the Court should have applied a lenient standard of business necessity to the height and weight requirements for prison guards. Instead, it seemed to apply a strict standard, holding that the defendant must prove that the employment practice was "essential to good job performance."[262]

A closer examination of the opinion, however, reveals that the Court's opinion cannot be taken as an authoritative statement of what kind of proof of business necessity is needed to justify practices for a complex job. While the Court in *Dothard* used language consistent with a strict standard, it never had to apply that standard in the case because the employer did not submit *any* evidence in support of its practices.[263] In other words, it cannot be said that the Court in *Dothard* intended that a strict necessity standard be applied to complex jobs because the defendant did not really attempt to justify its standards in that case. In fact, Justice Rehnquist, in his concurring opinion, warned that the Court's ruling was "essentially dictated by the peculiarly limited factual and legal justifications" offered by the defendants on behalf of their practices.[264] In another case, a defendant could very well present evidence that would persuade a court to hold that the employer's height and weight requirements were justified.[265]

The Court's de facto acceptance of a moderate standard of business necessity in the cases before *Wards Cove* is evident in the many pleas for flexibility in the application of the business necessity standard made in those cases. In *Albemarle Paper*, for example, Chief Justice Burger and Justice Blackmun both expressed concern that the strict necessity standard articulated in that case would be interpreted as instructing courts to require strict EEOC Guidelines validation in every case. Chief Justice Burger, for example, argued that "slavish adherence to the EEOC Guidelines regarding test validation should not be required."[266] Justice Blackmun continued this theme, stating that "a too-rigid application of the EEOC Guidelines will leave the employer little choice, save an impossibly expensive and complex validation study, but to engage in a subjective quota system of employment selection."[267]

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262. *Dothard*, 433 U.S. at 331.
263. *Id.*
264. *Id.* at 337 (Rehnquist, J., concurring).
265. *Id.* at 339 (Rehnquist, J., concurring).
266. Albemarle Paper Co. v. Moody, 422 U.S. 405, 452 (1975) (Burger, C.J., concurring in part and dissenting in part).
267. *Id.* at 449 (Blackmun, J., concurring).

The final proof of the Court's de facto acceptance of a flexible standard of business necessity in the pre-*Wards Cove* cases comes from Justice Blackmun's opinion in *Watson*. This opinion is important because Blackmun, joined by Brennan and Marshall, articulated the primary alternative to the new structure of the disparate impact cause of action elucidated by the *Watson* plurality and adopted in *Wards Cove*. While Blackmun stated that he wished to preserve the strict necessity standard defined in *Griggs* and *Albemarle Paper*, he defined the standard differently than the Court had previously.[268] Rather than requiring that the employer validate its practices, Blackmun characterized the Court's earlier cases as instructing courts to make "a case-specific judgment which must take into account the nature of the particular business and job in question."[269] In other words, those Justices who wished to preserve the Court's existing approach to business necessity and opposed the *Watson* plurality's proposed restructuring of the disparate impact cause of action contended that the existing approach was workable precisely because it applied a flexible definition of business necessity. The Court's decisions, even if undertheorized, confirm that it was not wedded to a rigid definition of business necessity.

In sum, before it definitively changed direction in *Wards Cove*, the Court defined business necessity on a case-by-case basis, taking due account of the nature of the job at issue. This prudent approach, while it was never fully explained by the Court, best captures the intent of the parties that supported the Act. Thus, the Act's instructions to the judiciary to interpret the business necessity defense as it did before *Wards Cove* require courts to tailor the business necessity justification to the job at issue. Application of a flexible, two-tier standard best satisfies Congress's mandate. The effective application of this standard, however, requires a far more thorough elaboration and defense of this standard than the Court was able to supply in these cases. This Article will now define and defend this two-tier standard.

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268. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1005-06 (Blackmun, J., concurring in part and concurring in the judgment).

269. *Id.* at 1005 (Blackmun, J., concurring in part and concurring in the judgment).

B. Defining the Standard

1. The Purposes of Title VII

Since the Act's original enactment in 1964, the Court has frequently stated that Title VII should be interpreted in light of its purposes.[270] Because the statute represents our society's commitment to bring previously excluded groups into the workplace, the primary purposes of Title VII are the elimination of discrimination in the workplace and the dismantling of arbitrary barriers to equal employment opportunity.[271] Title VII, however, was not intended and is not designed to achieve these purposes at all costs. As the Court stated in its latest pronouncement regarding the federal employment discrimination laws, a law such as Title VII "is not a general regulation of the workplace but a law which prohibits discrimination. [Such a] statute does not constrain employers from exercising significant other prerogatives and discretions in the course of the hiring, firing, and the discharge of their employees."[272]

Thus, courts must interpret Title VII in a manner that will both facilitate the removal of arbitrary barriers to equal employment opportunities and protect legitimate employer prerogatives. In other words, in designing Title VII, Congress intended that there be limits to the extent courts will interfere with the employment practices of employers.

The structure of the statute demonstrates that Congress intended both to eliminate discrimination in the workplace and to preserve legitimate employer discretion. For example, § 2000e-2(h) of Title VII protects the right of employers to institute or retain bona fide seniority or merit systems.[273] In fact, seniority systems are protected even if they have a disparate impact on disadvantaged groups.[274] The same section also protects the right of employers (qualified by the need to demonstrate business necessity) to give and act upon the results of professionally developed ability tests.[275] Section 2000e-2(j)

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270. *See* McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879, 884 (1995); United Steelworkers of America v. Weber, 443 U.S. 193, 201-04 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

271. *See Albemarle Paper*, 422 U.S. at 417-18; *Griggs*, 401 U.S. at 429-30.

272. *McKennon*, 115 S. Ct. at 886 (citations omitted).

273. 42 U.S.C. § 2000e-2(h) (1994).

274. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 64-65 (1982).

275. *Id.*

precludes any interpretation of Title VII that would require preferential treatment of any group on the basis of race, color, religion, gender, or national origin in response to any numerical imbalance in the group composition of the workforce.[276] To put it simply, employers cannot be required to use quotas in choosing their workforce.[277]

In addition to these kinds of specific protections, the remedial structure of Title VII is designed to encourage, not force, cooperation from employers in eliminating discrimination from the workplace. In the words of the Court, "Congress designed the remedial measures in [statutes such as Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination."[278] These measures call for the employment of more informal administrative processes in order to persuade employers to change their employment practices. Lawsuits are filed when the employer refuses to remedy any identified problems within a reasonable period of time.[279]

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276. 42 U.S.C. § 2000e-2(j) (1994).

277. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989).

278. McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879, 884 (1995) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975)).

279. For example, under Title VII, before an employee can sue in federal court, he must file a charge with the EEOC, which will then investigate the charge. 42 U.S.C. § 2000e-5(f)(1) (1994). If there is reasonable cause to believe that the employer has violated Title VII, neither the EEOC nor the employee are authorized to file suit before the EEOC attempts to encourage the employer to voluntarily reform its practices through the conciliation process. 42 U.S.C. § 2000e-5(b) (1994) ("If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."). The complexity of this remedial scheme arose out of the original legislative bargain to enact Title VII, in which supporters of the statute sought to reassure hesitant legislators and nervous employers that they had devised a remedial scheme which would protect employer prerogatives to the fullest extent possible. The report of the House Judiciary Committee on Title VII, for example, states:

> It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, *management prerogatives, and union freedoms, are to be left undisturbed to the greatest extent possible.* Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1963) (additional remarks made by Rep. William M. McCulloch) (emphasis added).

When interpreting Title VII, Courts should both seek to prevent discrimination and to ensure equal employment opportunities for previously disadvantaged groups by dismantling arbitrary barriers to employment. In serving these purposes, however, courts must protect the legitimate prerogatives of employers.

2. The Importance of Quotas and the Impossibility of a Pure Strict Necessity Standard

Employers will be allowed to retain practices that disproportionately disqualify members of disadvantaged groups when they demonstrate some quantum of business necessity. In other words, employers must show that their prerogatives as employers trump concerns of removing barriers to equal employment opportunity in a particular instance. Thus, a sound definition of the business necessity defense depends on a sound understanding of the legitimate prerogatives of employers under Title VII.

As discussed, the statute itself delineates the fundamental prerogatives of employers.[280] While employers must eliminate practices that impair equal employment opportunity, they cannot be forced to hire members of particular groups in order to achieve some particular numerical group distribution of employees. In other words, they cannot be forced to impose quotas.[281] The key term here is "forced."[282] If the business necessity defense is defined so narrowly that it is impossible for employers to meet the standard, then they will be forced to do one of two things: They will either discontinue using the practice that causes a disparate impact, or they will continue to use the standard, but will attempt to avert any potential liability by using hiring quotas, ostensibly because the practice is so vital to the operation of the business.

Since the recognition of the disparate impact cause of action in *Griggs*, the Court has made it quite clear that employers are entitled to more discretion in operating their businesses than is illustrated by

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280. *See supra* notes 273-79 and accompanying text.

281. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652 (1989) (stating that the forced adoption of racial quotas "is a result that Congress expressly rejected in drafting Title VII." (citations omitted)).

282. Under Title VII, employers may choose to engage in affirmative action. But this privilege is qualified; employers may engage in affirmative action only if it is meant to remedy a demonstrated historical imbalance in the industry in question, if it is temporary, and if it does not unnecessarily trammel the rights of members' groups that are awarded preferences under the employer's program. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 208-09 (1979).

the above scenario. No matter how strictly the Supreme Court has interpreted the business necessity defense, the Court has never defined it so narrowly that it is impossible for employers to meet. The cases that define the business necessity the most strictly—*Griggs*, *Albemarle Paper*, and *Dothard*—all state that if the employer can prove the necessity of its requirements, then use of the practice will be allowed.[283] The text and structure of Title VII, it must be understood, require that the employer be given such an opportunity; if courts do not afford employers any chance to prove business necessity, then they will be imposing quotas on the employers, contrary to the explicit instructions of the statute.[284]

The strict necessity cases provide this statutorily required opportunity to prove business necessity by allowing an employer to validate its job requirements in accordance with the EEOC Guidelines. To quote the crucial language from *Albemarle Paper* once again, the Court stated that "[t]he message of these Guidelines is the same as that of the *Griggs* case—that discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job.' "[285]

This strict necessity, EEOC Guidelines-based approach, however, must be founded on the premise that validation is possible for the jobs at issue in the litigation. It is this potential for validation that protects employers from the impossible choice between eliminating job practices that they consider crucial to the operation of the business and the imposition of quotas. As long as validation is possible, the strict necessity approach is feasible both under the structure of Title VII and in practice.[286] This validation need not be easy, it need only be *possible.*

If it is *impossible* to validate essential job requirements for particular kinds of jobs, however, then the EEOC Guidelines standard

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283. *See supra* notes 28-56 and 74-84 and accompanying text.

284. *See* 42 U.S.C §§ 2000e-2(h), (j) (1994); *Wards Cove*, 490 U.S. at 659; EPSTEIN, *supra* note 11, at 233-36.

285. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (quoting 29 C.F.R. § 1607.4(c) (1971)).

286. In this section, I am analyzing the propriety of different standards of business necessity under the basic structure of Title VII without directly considering the definition contained in the Act. My argument—that because it is impossible to validate some jobs, the application of the strict necessity standard in all cases would be inconsistent with the scheme contained in Title VI—is a reason to reject a pure strict necessity standard independent of any reading of language of the Act.

cannot be applied to employer attempts to justify these practices in a manner consistent with Title VII. Put another way, employers cannot cast doubt on the strict necessity standard by showing the cost or difficulty of validating their job requirements. However, if they can show that validation is impossible for the necessary requirements of particular jobs, then they can show that the imposition of the strict necessity standard in these particular cases would be a de facto imposition of quotas in clear contravention of Title VII. The existence of any necessary job requirements for which scientific validation is not possible would compel the development of a different standard of business necessity for jobs with such requirements.

In interpreting Title VII, the Supreme Court has recognized the possibility of the existence of jobs for which EEOC Guidelines validation is impossible.[287] Indeed, even Justices advocating the strict *Griggs* standard have been forced to acknowledge that EEOC Guidelines validation may not always be appropriate. For example, in his opinion opposing the plurality in *Watson*, Justice Blackmun conceded that EEOC Guidelines validation "may sometimes not be effective in measuring the job-relatedness" of some practices.[288] Justice Blackmun concluded that "[t]he fact that job-relatedness cannot always be established with mathematical certainty does not free an employer from its burden of proof, but rather requires a trial court to look to different forms of evidence to assess an employer's claim of business necessity."[289]

What these Justices do not understand or acknowledge, however, is that once one concedes that validation is impossible for certain jobs and other forms of proof of business necessity must be accepted, one has conceded that the strict necessity standard cannot be used in all cases. The heart of the strict necessity approach is the requirement of scientific validation or, in Justice Blackmun's words, proving the

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287. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991-92 (1988).

288. *Id.* at 1006 (Blackmun, J., concurring in part and concurring in the judgment). While acknowledging the possibility that Guidelines validation may not always be appropriate, Justice Blackmun, in a footnote, states that the author of the Guidelines, the American Psychological Association, contends that scientific validation is possible for job requirements used in complex jobs. *Id.* at 1007 n.5 (Blackmun, J., concurring in part and concurring in the judgment). Thus, advocates of the EEOC Guidelines approach, understanding that the utility of scientific validation is at the heart of their approach, refuse to concede that validation is impossible for some jobs. *See* Bartholet, *supra* note 50, at 987-88.

289. *Watson*, 487 U.S. at 1008 (Blackmun, J., concurring in part and concurring in the judgment).

need for one's requirements "with mathematical certainty."[290] As one scholar has stated, the Guidelines transplant "strict standards of validity from the theoretical context of scientific inquiry to the practical context of employment decisions."[291] If one cannot produce scientific proof, the proponents of the strict standard argue, one should not use a practice that deprives particular groups of equal employment opportunities. Once one has admitted that this validation requirement is not appropriate, one has acknowledged both that the strict necessity standard does not work in all cases and that we need to articulate another standard.

3. Defining the Two-Tier Standard

Because there are jobs in which the job requirements measuring necessary qualities cannot be validated, a different business necessity standard must be applied to these positions in order to protect fundamental employer prerogatives.

What, then, are the jobs that require the use of practices that cannot be validated? They are jobs which require abilities that cannot be measured by the scientific validation techniques described in the EEOC Guidelines. In the *Watson* plurality opinion, Justice O'Connor identified some of these particular abilities and the problems in measuring them:

> Some qualities—for example, common sense, good judgment, originality, ambition, loyalty, and tact—cannot be measured accurately through standardized testing techniques. Moreover, success at many jobs in which such qualities are crucial cannot itself be measured directly. Opinions often differ when managers and supervisors are evaluated, and the same can be said for many jobs that involve close cooperation with one's co-workers or complex and subtle tasks like the provision of professional services or personal counseling.[292]

Thus, there are some jobs that require intangible qualities like judgment and common sense that cannot be measured by practices that can be validated. It is impossible to devise a test to measure an applicant's wisdom or ability to motivate co-workers. One therefore cannot scientifically validate employer practices, such as interviews or

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290. *Id.* (Blackmun, J., concurring in part and concurring in the judgment).
291. Rutherglen, *supra* note 12, at 1315.
292. *Watson*, 487 U.S. at 991-92 (plurality opinion).

soliciting recommendations, that are aimed at determining whether an employee possesses these intangible qualities.

In addition to the problem of measuring intangible qualities, the project of scientific validation faces another hurdle. There are some jobs, such as management or the provision of professional advice or analysis, in which success is difficult to measure objectively. Employer practices that seek to measure performance for these kinds of positions, then, would be impossible to validate. The strict necessity standard could not be applied to these practices consistently with Title VII's protections of employer prerogatives.

A review of the scientific validation techniques authorized by the EEOC Guidelines confirms that employers cannot hope to scientifically validate practices that attempt to measure either intangible qualities or performance in a job requiring complex skills. There are three techniques of validation approved by the Guidelines: criterion, content, and construct validation.[293] The Guidelines and these techniques of validation are intended to apply to selection procedures that are used as a basis for any employment decision.[294] Employers may satisfy the requirements of the Guidelines by relying upon studies using any of the three techniques of validation, as long as the study conducted meets the Guidelines' technical criteria.[295]

Criterion validation, the technique of validation most favored by the Guidelines, requires the employer to establish a statistically significant correlation between successful performance on a selection device, such as a test, and successful performance of the job judged by acceptable measures of work performance.[296] These measures of work performance should "represent critical or important job duties, work behaviors or work outcomes as developed from [a] review of job

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293. 29 C.F.R. §§ 1607.14A-D, 1607.5A (1995).

294. 29 C.F.R. § 1607.2B (1995). At first glance, the EEOC Guidelines seem to allow for the possibility that employers can justify their employment practices without performing validation studies. *Id.* § 1607.6B ("There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines."). However, in the very section that appears to allow this flexibility, the EEOC Guidelines state that if an employer wishes to use "informal or unscored" procedures, it should "eliminate the adverse impact, or modify the procedure to one which is a formal, scored, or quantified measure or combination of measures and then validate the procedure in accord with these guidelines." *Id.* § 1607.6B(1). So if the employer wishes to use a practice that is not amenable to validation, it must either make sure there is no adverse impact or modify the practice to an objective one. In other words, an employer can avoid the validation requirement only if its practices do not have any adverse impact, meaning that it can justify its practices only by validating them.

295. 29 C.F.R. § 1607.5A (1995).

296. Rutherglen, *supra* note 12, at 1317.

information."[297] This technique of validation thus requires that the employer devise a method of objectively measuring job performance so that it can be compared with a score on an objective test. Only by reducing work performance to an empirical measure can the required statistical study be carried out.

Because this technique of validation is effective only for jobs in which job duties or behaviors can be identified and empirically measured, criterion validation cannot be used with jobs that involve complex skills, such as high level management or the professions. Performance of these jobs can effectively be measured only through subjective evaluations such as supervisor reviews. In fact, the EEOC Guidelines caution against the use of these very kinds of evaluations in criterion studies because of the possibility of bias.[298] As there is essentially no way to construct an objective measure of performance in jobs that involve the use of skills such as judgment, one cannot perform the required statistical study. Because of the difficulty in measuring job performance for all but the most simple jobs, successful use of this technique of validation has been rare.[299]

The second method of validation, content validation, is the most straightforward. Employers may validate a selection practice by demonstrating that it is "a representative sample of the content of the job."[300] The typing test for hiring typists is the obvious example of a content-based selection practice because it directly measures job performance. This technique of validation does not work for jobs involving complex tasks for the same reason the criterion validation technique does not work. If job performance cannot be measured empirically, one cannot devise a content-based practice for selecting an applicant for that position. Indeed, the EEOC Guidelines state that "a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, common sense, judgment, leadership and spatial ability."[301]

The final technique of validation is construct validation. Employers may validate their practices by empirically demonstrating that "the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be

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297. 29 C.F.R. § 1607.14B(2) (1995).
298. *Id.*
299. Rutherglen, *supra* note 12, at 1317.
300. 29 C.F.R. § 1607.14C(1) (1995).
301. *Id.*

important for successful job performance."[302] Employers thus must prove two things: (1) that a practice or test measures an abstract ability and (2) that this ability is correlated with successful job performance.[303] Construct validation is only effective if both the job at issue can be objectively evaluated and the abilities needed to perform that job can be empirically measured. If performance of a particular job cannot be measured or the successful performance of the job calls for an ability that cannot be empirically measured, then construct validation is not possible. Complex jobs, which require the use of common sense, judgment, or other intangible qualities, cannot be validated for both reasons; one can measure neither job performance for these positions nor the abilities these jobs require.[304]

Before the Supreme Court finally attempted to settle the law in *Wards Cove*, lower federal courts perceived these problems in validating selection practices for particular kinds of jobs under the Guidelines. Many lower courts formulated a variety of doctrines designed to deal with jobs that arguably required employers to use practices that were difficult or even impossible to validate.

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302. 29 C.F.R. § 1607.16E (1995). The EEOC Guidelines warn that construct validation is particularly difficult, requiring "an extensive and arduous effort involving a series of research studies.... Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth [in the Guidelines.]" 29 C.F.R. § 1607.14D(1) (1995).

303. Rutherglen, *supra* note 12, at 1324.

304. Elizabeth Bartholet argued that the Guidelines validation requirements should be applied to complex jobs. Bartholet, *supra* note 50, at 986-89. She was supported in this view, she maintained, by the industrial psychology literature. *Id.* at 988. In discussing the application of the different validation techniques, however, Bartholet recognized the difficulty in using these techniques for validating practices concerning complex jobs. For example, she conceded that "[a] meaningful job analysis will be difficult for many upper level jobs, because we are uncertain what constitutes good performance," and that "without an adequate job analysis, validation is impossible." *Id.* at 1010.

Bartholet was even less confident about the feasibility of using the other validation techniques in the complex job context. To illustrate, she remarked that while content validation was considered "appropriate for jobs that consist primarily of a few simple tasks, [it] provides little justification for upper level ... selection systems." *Id.* at 1016. With regard to construct validation, Bartholet commented that while this kind of validation demands empirical proof, the experts had not yet agreed on how to conduct this kind of validation study. *Id.* at 1019.

In the years since the publication of Bartholet's article, it has become clear that, despite what some might have expected in 1982, industrial psychology has not developed to the point where it has substantially overcome the problems of validation identified by Bartholet. *See* Rutherglen, *supra* note 12, at 1318. Indeed, one could argue that our society's skepticism towards the entire project of the empirical measurement of intangible qualities such as intelligence has increased dramatically. *See* RICHARD HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE (1994); THE BELL CURVE DEBATE (R. Jacoby & N. Glauberman eds., 1995).

Before *Wards Cove*, several federal circuits adhered to what was known as the *Spurlock* doctrine, which originated from the Tenth Circuit's seminal decision in *Spurlock v. United Airlines, Inc.*[305] The *Spurlock* court addressed the question of whether requirements for the selection of airline pilots could be justified under the business necessity standard.[306] The court maintained that employers should bear a lighter burden in proving job-relatedness if the job at issue clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great.[307] Courts approving the *Spurlock* doctrine generally applied it to jobs that involved public safety, such as police officers or firefighters.[308]

The Fifth Circuit's decision in *Davis v. City of Dallas*[309] was a paradigmatic application of the *Spurlock* doctrine.[310] In *Davis*, the court considered a challenge to several Dallas police department requirements, including one that applicants for positions earn at least forty-five semester hours of college credit with at least a "C" average at an accredited college or university.[311] In determining which standard of business necessity to apply, the court held that "the professional nature of a Dallas police officer's job distinguishes it . . . from positions which have been previously evaluated in the Title VII decisions of the Supreme Court."[312] Recognizing the difficulty in validating complex jobs, the court held that "the danger the hiring of an unqualified police officer might pose to the public and the impossibility of reducing job characteristics to measurable components separate the position of police officer from jobs considered in cases where validation studies were required."[313]

Giving the employer the benefit of a lower burden of justification, the court concluded that "[b]ecause of the professional nature of the job, coupled with the risks and responsibility inherent

305. 475 F.2d 216 (10th Cir. 1972).
306. *Id.* at 219.
307. *Id.* at 219.
308. *E.g.*, Davis v. City of Dallas, 777 F.2d 205, 213-215 (5th Cir. 1985); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1262-63 (6th Cir. 1981); Townsend v. Nassau County Medical Ctr., 558 F.2d 117, 120 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); Boyd v. Ozark Air Lines, 568 F.2d 50, 54 (8th Cir. 1977).
309. 777 F.2d 205 (5th Cir. 1985).
310. *Id.* at 213-18.
311. *Id.* The other practices challenged were a requirement that a successful applicant not have a history of recent or excessive marijuana use and a requirement that a successful applicant not exceed a certain number of traffic citations. *Id.*
312. *Id.* at 216.
313. *Id.* at 217.

in the position . . . empirical evidence is not required to validate the job-relatedness of the educational requirement."[314] The court stressed that it was not relieving the city from producing any proof of job-relatedness; it held only that the city did not have to meet the strict standards of validation articulated in *Albemarle Paper* and *Griggs*.[315] Accepting evidence such as national studies and expert testimony rather than specially prepared validation studies, the court held that the employer successfully met its burden of justification for all its practices.[316]

Another category of cases concerning jobs for which objective validation is difficult involves promotion decisions in universities. In these cases, similar to those decided under the *Spurlock* doctrine, several courts have given employers more discretion than seems warranted under *Griggs*, *Albemarle Paper*, and *Dothard*. For example, in *Zahorik v. Cornell University*,[317] the Second Circuit held that a university could maintain its tenure criteria if the criteria were "legitimately related to the position of tenured professor."[318] The court did not require empirical validation of either the university's tenure requirements or its subjective peer review tenure process.[319] To courts following the *Zahorik* approach, the difficulty of validating selection practices for professional positions justified affording colleges and universities more deference in making their professional employment decisions than was given to other employers.[320]

Finally, to deal with the infeasibilty of validation, some federal courts went so far as to hold that subjective hiring practices, such as interviews, could never be challenged under a disparate impact theory.[321] This view, which the Court rejected in *Watson*, was based on the notion that employers would never be able to validate subjective hiring practices under the EEOC Guidelines standards.[322] While rejecting the blanket exemption for subjective hiring practices

314. *Id.*
315. *Id.*
316. *Id.* at 218-26.
317. 729 F.2d 85 (2d Cir. 1984).
318. *Id.* at 96.
319. *Id.* at 95-96.
320. *See, e.g.*, Merwine v. Board of Trustees, 754 F.2d 631, 639-41 (5th Cir.), *cert. denied*, 474 U.S. 823 (1985); Carpenter v. Board of Regents, 728 F.2d 911, 914 (7th Cir. 1984); Campbell v. Ramsay, 631 F.2d 597, 598 (8th Cir. 1980).
321. *See, e.g.*, Talley v. United States Postal Serv., 720 F.2d 505, 506-07 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984); Pope v. City of Hickory, 679 F.2d 20, 22 (4th Cir. 1982); Pouncy v. Prudential Ins. Co., 668 F.2d 795, 801 (5th Cir. 1982).
322. Rutherglen, *supra* note 12, at 1342.

from disparate impact analysis, the *Watson* plurality responded to the problems raised by these courts by contending that a more lenient standard of business necessity should be applied to all cases.[323]

All three of these lines of cases responded to the problem of employment selection practices that cannot be validated under the EEOC Guidelines. While the cases arose in slightly different contexts, the decisions contained the foundation for a standard of business necessity that will enable employers to justify their necessary practices while still promoting equal employment opportunity for disadvantaged groups.

The principle that unites these lines of doctrine is that employment practices governing jobs that at their core require the possession of intangible qualities or the performance of complex tasks cannot be subjected to the strict validation test.[324] These jobs include, but are not limited to, high-level managerial positions and professional positions such as doctor, lawyer, or university professor. Any job in which the employee must be afforded a significant amount of discretion because the job duties require her to solve complex problems using intangible skills such as judgment or tact would be included in this category.[325] For example, police officers would be included, as would other positions in which employees are responsible for the health and safety of others.[326]

The special nature of these jobs requires employers to use selection and evaluation procedures that are designed to determine whether the applicant possesses complex qualities or skills. The only kinds of employment practices that work in this context are subjective practices, such as interviews, supervisor evaluations, and requirements that serve as proxies for the qualities or skills desired.[327] These proxies include college degree requirements and relevant work experience. Because these practices do not seek to measure quantifiable skills or performance, they cannot be scientifically validated. In order to give employers an opportunity to prove the need for these

323. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989 (1988); *see also supra* notes 94-128 and accompanying text.

324. *See* Rutherglen, *supra* note 12, at 1343-44 ("Complexity, not status, should determine the appropriate standards for validation.").

325. *Id.* at 1343.

326. Alito, *supra* note 83, at 1035.

327. Rutherglen, *supra* note 12, at 1344 ("Jobs consisting of a variety of duties, with few simple measures of successful performance, generally require selection procedures that cannot be scientifically validated, such as subjective evaluations and objective qualifications of education and experience.").

practices, a more lenient form of the business necessity defense must be articulated.

For jobs in which the qualifications needed for successful performance can be measured objectively, the Act requires the application of the strict necessity standard. The strict necessity standard forces employers to make the most rigorous showing of business necessity possible. Employers may retain practices that produce a disparate impact only if they meet this high burden of proof. This strict standard ensures that offending practices will be maintained only in cases where employers are willing to incur the high costs of scientific validation. On the other hand, the fact that this strict requirement is applied only in cases where validation is possible ensures that employers will not be forced to impose quotas. Because employers are able to choose whether or not they wish to validate, they still may exercise their fundamental prerogatives.

C. Defending the Standard

1. The Need for a Strict Standard for Most Jobs

As articulated by the Court, the purpose of the disparate impact cause of action is to serve the primary purposes of Title VII by attacking the more subtle forms of discrimination.[328] Discrimination against the historically disadvantaged does not take only the form of overt, intentional discrimination. This most obvious form of discrimination is effectively addressed by the disparate treatment cause of action alone. There are three other forms of discrimination, however, that can be effectively remedied only by a powerful disparate impact cause of action accompanied by a strict business necessity defense.[329]

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328. This Article does not seek to articulate the author's preferred policy regarding employment discrimination law in general or the disparate impact cause of action in particular. Its goal is to elucidate the most accurate and workable interpretation of what Congress and the President agreed to in the Act. If given a free hand to devise the best policy regarding discrimination in the workplace, the author would offer a different solution to these problems than the one presented here. This Article should be judged primarily on whether it presents a sensible interpretation of policies embodied in the Act, not whether it articulates the ideal policy regarding the problems of race and employment.

329. Richard Epstein argues that the benefits of eliminating subtle forms of discrimination by the strict necessity version of the disparate impact cause of action would be far outweighed by the costs to society of such an approach. EPSTEIN, *supra* note 11, at 231-33. He does not dispute that placing such a burden on employers is the most effective way for the law to reach this kind of discrimination. *Id.*

The first form of subtle discrimination is pretextual discrimination, which is intentional discrimination hidden behind a veneer of facially neutral practices.[330] For example, an employer may implement a high school degree requirement or an ability test requirement with the knowledge that African-Americans will be disproportionately disqualified by the requirement. Unless the plaintiff can discover direct evidence of the employer's discriminatory intent, a highly unlikely occurrence, a disparate treatment cause of action will never root out this discrimination because the disqualified applicant's failure to meet a seemingly reasonable and neutral requirement will always provide the employer with a defense for its failure to hire the applicant.[331]

The disparate impact cause of action combats pretextual discrimination by forcing employers to defend their facially neutral practices with proof of an objective need for the practice. Employers cannot simply implement a practice because it is neutral on its face or because it seems reasonable. If a plaintiff can show that the practice has a disparate impact, the burden shifts to the employer to show that business necessity justifies the practice. The more difficult it is to establish business necessity, the more likely it is that the employer is lying about the real reason for the implementation of the practice. If the employer can, as the strict necessity standard requires, scientifically validate its requirements, there can be no greater assurance that the practice was instituted without any intent to discriminate.

An even more subtle form of discrimination is statistical discrimination, which takes place when an employer does not have any animus against a particular group but nevertheless believes that the members of the group are less productive on average than members of other groups.[332] In response to this belief, the employer institutes neutral practices that will disproportionately disqualify this group.[333] The employer could, for example, recruit employees from

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330. Strauss, *supra* note 14, at 1649; *see also* Rutherglen, *supra* note 12, at 1304-07 (describing how Congress addressed pretextual discrimination in Title VII). The classic work on the economics of discrimination is GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971).

331. Strauss, *supra* note 14, at 1649 ("[T]he disparate treatment approach will detect discrimination only when the victim can demonstrate that he or she was as productive as some nonminority employee.").

332. *Id.* at 1622. The classic articulations of the theory of statistical discrimination are Kenneth J. Arrow, *The Theory of Discrimination*, *in* DISCRIMINATION IN LABOR MARKETS 3, 23-32 (Orley Ashenfelter & Albert Rees eds., 1973) and Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972).

333. Strauss, *supra* note 14, at 1622; Rutherglen, *supra* note 12, at 1311.

particular areas, so as to hire particular groups and avoid others. This kind of discrimination is especially difficult to combat, even with a disparate impact cause of action, because the employer is not acting out of animus toward the group. Instead, the employer is seeking to maximize productivity while minimizing the costs of hiring employees. Given that the employer's purpose in fashioning its practices is increased efficiency, it is likely that it will be able to articulate objective reasons in support of its practices.

There is evidence that statistical discrimination is widespread and quite harmful to disadvantaged groups. For example, one study found that most employers surveyed in Chicago believed that inner-city African-Americans were less productive than members of other groups.[334] They devised their employment practices to screen out these applicants, using an array of practices including skills tests, personal interviews, and references.[335] These practices were used in selecting employees for a wide range of jobs, including sales, customer service, clerical, and low-skilled laboring or service jobs.[336] Thus, statistical discrimination by these employers presented a formidable obstacle to African-Americans seeking employment in Chicago.

A related, and still more subtle, form of discrimination is unconscious discrimination. This kind of discrimination results from the ingrained desire of majority groups to maintain their superior position over minority groups.[337] The most obvious example is some white Americans' unconscious desire to be superior to African-Americans.[338] This unconscious need to maintain superiority manifests itself in the use of employment practices that disproportionately disqualify the minority group. This kind of discrimination is extremely difficult to detect because the employer truly believes it is acting on neutral motives; given this belief, certainly the employer will have a neutral explanation for its practices. Indeed, because the

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334. Joleen Kirschenman & Kathryn M. Neckerman, *"We'd Love to Hire Them, But . . .": The Meaning of Race for Employers*, *in* THE URBAN UNDERCLASS 203, 209 (Christopher Jencks and Paul Peterson eds., 1991).

335. *Id.* at 231.

336. *Id.* at 218-30.

337. *See* Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659, 1671 (1991).

338. BELL, *supra* note 15, at 159 ("[P]rogress in American race relations is largely a mirage, obscuring the fact that whites continue, consciously or unconsciously, to do all in their power to ensure their dominion and maintain their control." (emphasis omitted)); *see also* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL (1992) (discussing civil rights law and policy).

employer's conscious motive is to run its business in the most efficient manner, the employer likely will be able to make a strong case that its business requires the use of the offending practices.

Both statistical and unconscious discrimination therefore present difficult problems because in each case the employers are attempting to increase the efficiency of their businesses and thus will be able to mount a strong defense of the reasonableness of their practices. If a lenient standard of business necessity is applied, these employers will mostly likely meet their burden of proving business necessity, and the barriers to equal employment opportunity will remain.

Given this predicament, the only way to combat these forms of discrimination effectively is to make it so difficult and costly to defend practices with a disparate impact that employers will be convinced either to abandon the practices or to make sure that they eliminate the disparate impact by hiring sufficient numbers of the affected groups.[339] Employers thus will be given a strong incentive to hire individuals they would have otherwise rejected for ostensibly neutral reasons. Only by changing employers' cost-benefit calculus in this fashion may the pernicious effects of statistical and unconscious discrimination be overcome.

The strict necessity standard accomplishes this goal of raising the costs of maintaining practices with a disparate impact by requiring employers who wish to defend their practices to do so by an expensive means—scientific validation. For example, the cost of the most favored form of validation, criterion validation, has been estimated to be at least $100,000, an expense that has to be incurred each time a practice is used for a particular job.[340] Many employers, faced with this enormous expense, would rather give in than fight. The strict necessity standard, then, is a most effective tool for eliminating practices with a disparate impact. Consequently, it is the best means to ensure the removal of barriers to equal employment opportunity.[341]

The strict necessity standard, however, should not be used if it does not satisfy the other significant purpose of Title VII: protection of the fundamental prerogatives of the employer. The Supreme Court

339. In fact, Justice Blackmun, in his influential concurring opinion in *Weber*, argued that private employers should be allowed to engage in affirmative action, in part because of the difficult position in which they were placed by the disparate impact cause of action. United Steelworkers of America v. Weber, 443 U.S. 193, 209-11 (1979) (Blackmun, J., concurring).

340. Rutherglen, *supra* note 12, at 1317-18.

341. *But see* EPSTEIN, *supra* note 11, at 231-33.

in *Wards Cove* recognized the heavy pressure that the strict necessity standard places on employers either to abandon their practices or to engage in affirmative action.[342] The Court's determination to prevent this financial coercion was a central motivation in its restructuring of the disparate impact cause of action.[343]

Confining the strict necessity defense to non-complex jobs alleviates this problem and protects employers' fundamental prerogatives. Because the strict necessity standard will be applied only to jobs for which scientific validation is possible, application of the high standard does not deprive employers of their fundamental prerogatives because it does not *require* employers to impose quotas.

Application of the strict necessity standard only to non-complex jobs protects employer prerogatives in another way. One of the most disturbing results of applying the strict necessity standard to practices that cannot be validated is that many of the affected jobs are managerial positions. Managers are the means by which an enterprise's proprietor exercises rights of ownership; they are the personal representatives of the owner at the workplace. Forcing employers either to hire managers of whom they disapprove or to use selection criteria that they consider insufficient invades the deepest sphere of employer autonomy.[344]

The application of the strict necessity standard only to non-complex jobs would exempt the requirements for managerial positions from the strict standard in most instances. Without this exemption, an owner of a small or medium-sized company would have two unpalatable choices. On one hand, the employer could select a manager without the benefit of subjective selection criteria, such as interviews or relevant experience, that are the best means for determining whether a particular person is worthy of the highest trust. On the other hand, the employer could use the practices but eliminate disparate impact by using hiring quotas. Either way, the employer faces the real danger of hiring someone it does not fully trust. Application of the more flexible standard of justification to managerial positions, however, permits employers to use selection practices with which they feel comfortable.

A final advantage of applying the strict necessity standard only to non-complex jobs is that it places an upper boundary on any

342. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 652, 659 (1989).

343. *Id.* at 652-53, 659-60; *see supra* notes 129-45 and accompanying text.

344. Earl M. Maltz, *Title VII and Upper Level Employment—A Response to Professor Bartholet*, 77 NW. U. L. REV. 776, 790-91 (1983).

efficiency losses suffered by employers. The central assumption of free-market economic theory is that employers are in a better position to judge the efficiency of a particular practice than is the government.[345] The disparate impact cause of action, particularly if accompanied by the strict necessity standard, significantly interferes with employer discretion by giving employers a strong incentive to abandon practices that they otherwise have judged efficient. The effect of government interference would be to force employers to hire less efficient employees than those they would have hired using other practices.[346]

If the strict necessity standard is applied to jobs for which validation of job-related practices is impossible, the prospect of unlimited efficiency losses exists. Because the employer cannot prove the necessity of its practice, it will be forced to abandon even valuable practices.[347] Moreover, large losses are even more likely when given the fact that the positions for which practices cannot be validated are precisely those kinds of complex positions in which good or bad performance can greatly affect the business' profitability or even survival.[348] Without a different standard for complex jobs, employers would have no choice, other than the imposition of hiring quotas, but to abandon their practices regarding these jobs, no matter their value.

If, however, this powerful incentive to abandon efficient practices is limited to jobs for which selection practices can be validated, the efficiency costs have a natural limit. If the costs imposed by the abandonment of a particular practice are more than the cost of validating the practice, the employer can validate the practice.[349] Thus, the most an employer can lose is the cost of validation.

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345. *Id.* at 790.

346. *Id.* at 787; EPSTEIN, *supra* note 11, at 212-16.

347. Alternatively, the employer could "choose" to implement hiring quotas. In this context, however, the choice would be a requirement. If the existence of the business depended on the use of the practice, the employer, having been deprived of any opportunity to prove the need for the practice, would be forced to implement quotas. This "offer you can't refuse" is contrary to Title VII's mandate to protect fundamental employer prerogatives.

348. For discussion of the economics involved in these issues, see Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 783-85 (1972); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290-92 (1980).

349. Of course it is quite possible that the employer will find that the costs of validation, while perhaps less than the costs of abandoning the practice entirely, outweigh the costs of combining the practice with racial quotas to eliminate the disparate impact.

In sum, limiting the strict necessity standard to non-complex jobs dismantles significant barriers to equal employment opportunity without unduly burdening employers, as it neither deprives them of their fundamental prerogatives or imposes unlimited costs on them.

2. The Need for a Different Standard for Complex Jobs

If some jobs exist for which neither job qualifications nor job performance may be objectively measured, then the strict necessity standard cannot apply to these jobs. If a practice cannot be validated, an employer will be required either to abandon the practice, no matter how valuable it is to its business, or to implement quotas. This Hobson's Choice violates Title VII's command to protect the fundamental prerogatives of the employer. Preventing the employer from being placed in this dilemma would be a sufficient reason to abandon the strict necessity test for these jobs.

There is, however, much more to be said in favor of applying a more lenient standard of business necessity to complex jobs. A business necessity standard for complex jobs modeled on the one proposed in this Article would allow judges to strike the best balance between the different purposes of Title VII.

This less strict form of the business necessity defense consists of two steps. First, employers must prove that successful performance of the job in question, because of the complex duties of the job, requires the possession of unmeasurable qualities. Alternatively, employers can prove that the position involves duties so complex that performance on the job cannot be measured objectively. If employers make this first showing, they must prove that the employment practices they have implemented for the position significantly serve their legitimate employment interests. Thus employers need not scientifically validate such practices; instead, they can prove to the court that their practices are a legitimate way to judge whether the employee possesses the qualities or skills necessary to do the job.

Courts that have resisted allowing employers to meet a lesser standard of justification for subjective practices have been concerned that, if given more freedom to use these practices, employers will attempt to insulate discriminatory practices from scrutiny.[350] For example, if subjective practices are immunized from disparate impact attack, employers will simply change their systems to include a

350. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 989-91 (1988); Green v. USX Corp., 843 F.2d 1511, 1525 (3d Cir. 1988), *cert. granted and vacated*, 490 U.S. 1103 (1989); Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985).

subjective element such as an interview.[351] They might be particularly tempted to include such an element in hiring practices for jobs, such as entry-level positions, in which qualifications for the jobs are difficult to define.[352] This unaccountable discretion opens the door to infection of the hiring process by both conscious and unconscious biases.

The two-stage business necessity standard for complex jobs, unlike the exemption of subjective practices from disparate impact analysis, does not provide employers an opening to discriminate. First, employers cannot simply choose to use subjective practices to gain the benefit of the more lenient standard of justification. They must *prove* that the job at issue requires the kinds of skills or tasks for which objective measures of performance cannot be designed. It is insufficient to say that the job sometimes requires the exercise of discretion or tact, as almost any job requires these qualities at some time. Rather, the employer, must prove that the essence of the job requires the exercise of these intangible qualities. Only when this burden of proof is met will employers be afforded the lesser standard of justification.[353] If an employer fails to prove its need to use

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351. In one representative case, *Green v. USX Corp.*, the employer's hiring process for laborers relied primarily on interviews with both a personnel officer and the foreman of the department in which the prospective laborer would work. 843 F.2d at 1516. The interviewing foreman was given absolute discretion to hire or reject the applicant. *Id.* Neither of the interviewers was given any instructions regarding the evaluation of candidates, and the trial court found that the interviewers made wholly subjective evaluations regarding the applicants' satisfaction of the hiring criteria. *Id.* at 1516-17. The court rejected the employer's attempt to argue that all subjective hiring practices should be insulated from disparate impact analysis. *Id.* at 1525. The court concluded that excluding subjective hiring criteria from disparate impact analysis would encourage employers to use these selection practices in order to avoid validating their practices. *Id.* If unsupervised by courts, subjective hiring practices such as interviews allow "unarticulated biases or unconscious prejudices" to infect the hiring process. *Id.* The court decided that employers should defend their subjective hiring practices just as they should defend their objective practices. *Id.*

Justice Blackmun's opinion in Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), also addressed this problem. Employers, Justice Blackmun warned, should not be able "to escape liability simply by articulating vague, inoffensive-sounding subjective criteria . . . . Such a rule would encourage employers to abandon attempts to construct selection mechanisms subject to neutral application for the shelter of vague generalities." *Id.* at 1009-10 (Blackmun, J., concurring in part and concurring in the judgment).

352. The use of subjective practices for hiring laborers, for example, as was the case in *Green*, would allow employers to select employees they like without justifying their choices.

353. Thus, an employer could not add a subjective element to the hiring process, as the defendant attempted in the *Green* case, for jobs which by nature do not require the use of these practices in order to maximize its discretion in making employment decisions.

practices that cannot be validated, the practices will be subjected to the strict necessity test, a standard that employers cannot meet if the practices cannot be scientifically validated.[354]

Second, even if an employer could show that the position in question qualified for the more lenient standard of justification, it would not be assured of meeting its burden of proving business necessity. The employer would still have to show that the practice significantly serves its legitimate employment interests. This standard does not give carte blanche to employers to implement any practices they choose; rather, it instructs courts to be flexible in what practices they find justified and in the kinds of proof they will accept to justify these practices.[355]

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354. One possible criticism of requiring proof that the nature of a particular job requires a standard of business necessity is that it adds a complicating stage to disparate impact litigation. In fact, this two-stage standard of business necessity for complex jobs will be easier for courts to administer effectively than applying the strict necessity standard to all jobs.

Assuming that an employer decided to go through the trouble of using practices that are difficult to evaluate objectively, the strict necessity standard asks courts to answer the social science question of whether the proposed form of validation meets scientific standards. *See* Bartholet, *supra* note 50, at 986-89. Whether the job at issue is the kind that requires a more flexible standard of justification, however, is one far more suited for legal adjudication than is the question of whether a particular form of validation is scientifically acceptable. Judges are far more capable of answering the common sense question of whether a job requires complex skills or the performance of complex tasks than they are of judging the current state of industrial psychology.

355. For example, if an employer wants to use an objective ability test as an employment qualification, a court may require more objective proof of the test's job-relatedness than it would for a more subjective practice. After all, the employer, by using an objective test, has said that some qualifications for the job can be quantified. The court would be justified in making the employer present more scientific proof that the test substantially relates to the job.

Where, however, the employer wishes to impose a requirement that a reasonable person might expect to ensure the hiring of more effective employees, but would be difficult to justify empirically, a court may accept less objective forms of evidence. For example, the court could base its acceptance of the employer's proffered justification on expert testimony explaining how the practice in question significantly serves the employer's legitimate employment interests. The Fifth Circuit in *Davis* relied, in part, on this kind of evidence in finding that the employer demonstrated that a college credit hours requirement for police officers was sufficiently job-related or necessary. Davis v. City of Dallas, 777 F.2d 205, 222-23 (5th Cir. 1985). A court therefore should use its own judgment in deciding whether the employer has proven a sufficient connection between its practice and its legitimate employment interests. The court must seek to promote equal employment opportunity while giving due deference to the special role that the employer's subjective judgment must play in selecting employees for complex jobs.

The concrete advantages of such a flexible approach are obvious.[356] Keeping in mind that some departure from the strict necessity rule is required for complex jobs in order to protect the fundamental prerogatives of the employer, the flexible standard of business necessity ensures that these prerogatives will be secured by giving more leeway to employers to implement subjective employment practices, education requirements, and other practices that cannot be validated. Placing more discretion in the hands of employers will allow the people who are in the best position to make economic decisions to implement the practices that they believe will increase the efficiency of the business.[357] If given the discretion to use subjective practices, for example, an employer will identify those potential managers who possess the intangible qualities that will motivate other employees to work harder. Without such discretion, these large efficiency gains will be squandered.

In addition to making efficiency gains possible, the flexible standard will prevent large efficiency losses. If an employer is forced to select managers or other key employees through a hiring process that the employer does not trust, the rational employer will closely monitor these employees to make sure that they are performing satisfactorily.[358] This monitoring could be very costly and provides no real benefit to the employer. The employer would most likely not choose to incur such a cost if it were permitted to use a hiring process it trusts.

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356. The need for more flexibility than is afforded by the strict necessity standard has been recognized even by judges arguing for the application of the strict standard. Justice Blackmun's opinion in *Watson* illustrates this point. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 1007-08 (Blackmun, J., concurring in part and concurring in the judgment). In arguing for adherence to the previous business necessity rules articulated by the Court, Justice Blackmun argued that:

> The proper means of establishing business necessity will vary with the type and size of the business in question, as well as the particular job for which the selection process is employed. . . . The fact that job-relatedness cannot always be established with mathematical certainty does not free an employer from its burden of proof, but rather requires a trial court to look to different forms of evidence to assess an employer's claim of business necessity.

Id. (Blackmun, J., concurring in part and concurring in the judgment). Indeed, in making this argument, Justice Blackmun cited with approval Davis v. City of Dallas, 777 F.2d 205 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986) and Zahorik v. Cornell Univ., 729 F.2d 85 (2d Cir. 1984), which explicitly applied a lesser standard of justification to particular kinds of jobs. *Watson*, 487 U.S. at 1007-08 (Blackmun, J., concurring in part and concurring in the judgment).

357. EPSTEIN, *supra* note 11, at 231-32.

358. Maltz, *supra* note 344, at 788-89.

A final advantage of the flexible standard is that by providing courts with an opportunity to make allowances for the special nature of complex jobs, courts will be dissuaded from inappropriately weakening other parts of the disparate impact cause of action to protect the fundamental prerogatives of employers.[359] Examples of this mistaken weakening are the cases that exclude subjective practice from disparate impact analysis entirely. Other courts have made it more difficult for disparate impact plaintiffs to establish their prima facie case by rigorously scrutinizing the statistical evidence submitted in support of that case.[360]

Excessive scrutiny of the plaintiff's prima facie case defeats the purpose of the disparate impact cause of action, which is designed to test employers' need for practices that disproportionately exclude particular groups. If a plaintiff cannot pass the prima facie stage of the litigation, employment practices that may constitute barriers to equal employment opportunity will not be tested by any business necessity standard. The purpose of ensuring equal employment opportunity will be better served if courts are encouraged to protect the legitimate interests of employers by articulating a practical business necessity defense rather than by manipulating the prima facie case. The recognition that some kinds of jobs require a more flexible business necessity defense will enable courts to best serve the different purposes of Title VII.

D. Criticisms and Response

1. The Continuing Problem of Subtle Discrimination

One possible objection to the two-tier standard outlined above is that reducing the burden of justification for complex jobs may open the door for the operation of cleverly concealed or unconscious biases. This licensing of subtle discrimination creates a "glass ceiling," preventing the elevation of historically disadvantaged groups to the very kinds of important jobs that members of disadvantaged groups need to fill in order to create a more just society.[361] The initial

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359. *See* Rutherglen, *supra* note 12, at 1343 ("A strict insistence on highly technical standards of validation only perpetuates the tendency of courts to avoid placing such a heavy burden of justification upon defendants in the first place.").

360. For example, a court could find that a plaintiff has not identified the correct geographical labor market or has not drawn a comparison with the correct pool of potential employees. *See, e.g.*, EEOC v. Chicago Miniature Lamp Works, 947 F.2d 292, 299-300 (7th Cir. 1991).

361. *See* Bartholet, *supra* note 50, at 955-59.

force of this argument, which is the analogue to the argument in favor of the strict necessity standard, is undeniable; certainly, if it is easier for employers to establish business necessity, there will be some instances in which the concealed or unconscious bias cannot be reached.

Critics of the two-tier standard may argue that a flexible standard of business necessity also gives freer rein to the concealed or unconscious biases of judges to exclude historically disadvantaged groups from positions of power.[362] After all, as Elizabeth Bartholet argues, judges are drawn from the same social strata as the employers whose decisions they are reviewing; this familiarity with the dilemmas faced by their social and economic peers may make them hesitant to interfere with the practices of these employers.[363] This objection is plausible, for if judges are given more discretion to decide whether a defendant has established business necessity, a greater possibility exists that judges will render mistaken or biased decisions than if the judges are required to apply a more objective standard.

These objections could be rebutted by showing that increased employer and judicial discretion is necessary to prevent the mandated use of quotas.[364] If averting the deprivation of employers' fundamental prerogatives results in a failure to reach some cases of subtle discrimination, we must be satisfied with the knowledge that courts have to be as faithful to Title VII's mandate to protect employer prerogatives as they are to its command to eliminate both discrimination and arbitrary barriers to equal employment opportunity.[365]

These objections can also be answered by demonstrating that in allegations of discrimination involving complex jobs, the demands of the disparate impact model may be relaxed because the disparate treatment model will reach much of the discrimination involving these jobs. Disparate treatment causes of action are especially effective in this context because decisions regarding complex jobs generally implicate few jobs and few applicants. For example, in the average

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362. *See id.* at 978-80.

363. *Id.*

364. *See supra* notes 280-91 and accompanying text.

365. In the pre-Act debate regarding the correct interpretation of Title VII, Elizabeth Bartholet argued that careful attention to the 1972 amendments to Title VII demonstrates that Congress opposed the creation of a two-tier standard of business necessity. Bartholet, *supra* note 50, at 980-83. Whatever the merits of Bartholet's argument, however, any present definition of the standard of business necessity must start with the Act, which establishes a two-tier standard of necessity.

workplace, there are fewer managerial positions than entry-level ones. Applicants for managerial positions usually are the few individuals who are qualified for a job with complex duties. Thus the hiring or promotion decision for this kind of job most often requires employers to make a direct and personal comparison between particular individuals.

In the managerial context, therefore, it is likely that the employer will be, or should be, able to articulate specific reasons why it decided to hire or promote one person over another. Thus, by refuting the specific grounds for the decision, plaintiffs can show, more easily than in a case involving general policies for the hiring of many workers, that the employer's articulated rationale is either a pretext for discrimination or is so irrational that the only possible motive for the employer's actions is discrimination.[366] Courts can police these kinds of employment decisions far more easily than they can police the institution of general hiring practices for entry-level workers.[367]

Even assuming, however, that the disparate treatment cause of action is incapable of reaching some forms of subtle discrimination, the disparate impact cause of action codified by the Act, even when coupled with a more flexible definition of business necessity, still will reach most cases of subtle discrimination. The most important

366. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-58 (1981). Plaintiffs may also bring a class-based disparate treatment claim. A class of plaintiffs can prove that an employer has engaged in a practice or pattern of discrimination by demonstrating, through statistical evidence in combination with proof of specific instances of discrimination, that discrimination is the employer's "standing operating procedure." International Bhd. of Teamsters v. United States, 431 U.S. 324, 334-41 (1977).

367. One can better understand why the disparate treatment cause of action is the more appropriate and effective approach in discrimination cases involving complex jobs by looking at the facts of *Watson*. In that case, a female African-American, after over six years on the job as a proof operator and teller at a bank, applied four times for promotion to separate managerial positions. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 982 (1988). Each time, she was turned down in favor of a white employee. *Id.* In her disparate impact claim, Watson challenged the subjective system used to select managers. *See supra* notes 94-128 and accompanying text. The real problem in this case, if there was one, however, was not the subjective system itself, since deciding who will be the best manager always requires subjective judgment. The potential problem was in how the subjective system was used. In each of the four employment decisions, Watson was personally rejected in favor of a particular white person. *Id.* In her disparate treatment cause of action, however, Watson was given the opportunity to demonstrate that the employer's reasons for preferring specific individuals to her were false and were a pretext for discrimination. *Id.* at 984. Her failure to prove that the employer's reasons for promoting others over her were discriminatory is persuasive evidence that the employer acted legitimately. *Id.* at 984. It is difficult to conceive how Watson could have been given a more fair chance to prove that an unbiased decision would have awarded her a promotion.

component of the Act for fighting subtle discrimination is not any particular definition of business necessity; rather, it is the requirement that, if the plaintiff demonstrates that a practice has a disparate impact, the employer must bear the burden of proving that its practices are necessary.[368]

Making the business necessity justification an affirmative defense, rather than a *Wards Cove*-type burden of production, requires courts both to make employers show exactly why the need for their practices outweighs the harm to the plaintiffs and to make independent judgments about these rationales. Practices produced by concealed or unconscious bias are much more likely to fail if an employer must affirmatively justify them, and if a disinterested arbiter scrutinizes them.[369] If the employer cannot prove that its practices meet the standard of necessity, the court must rule for the plaintiffs.

In addition to imposing the burden of proof on employers, the Act provides plaintiffs with another way to demonstrate that the practice at issue is unnecessary, despite the strength of any proffered justification. The plaintiff will prevail if he or she can show that there is an alternate employment practice that will meet the employer's goals but eliminate the disparate impact.[370] This opportunity to refute the employer's explanation provides another method to identify and eliminate subtle discrimination.

Thus, consistent with the Act, each level of the two-tier business necessity standard requires both that the employer affirmatively prove the necessity of its practices and that the plaintiff be given the opportunity to show alternative employment practices that will accomplish the employer's goals without producing a disparate impact.[371] Even though it is possible that the application of a more

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368. 42 U.S.C. § 2000e-2(k)(1)(a)(i) (1995).

369. Bartholet, *supra* note 50, at 1004 ("The difference between these burdens on the employer will often be the difference between winning and losing.").

370. 42 U.S.C. § 2000e-2(k)(1)(a)(ii).

371. Placing the burden of persuasion on the employer contrasts sharply with the *Wards Cove* conception of the disparate impact cause of action, which was based on the disparate treatment model. *See supra* notes 129-45 and accompanying text. As Justice O'Connor explained in *Watson*, the premise underlying the modeling of the disparate impact cause of action on the disparate treatment action was the elimination of practices that amount to intentional discrimination.

> The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used . . . . [T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.

flexible standard of business necessity to some jobs will mean that some subtle discrimination will go undetected, the Act's rejection of the *Wards Cove* structure of the cause of action and its imposition of the burden of persuasion on the employer will reach most discrimination, no matter how subtle. By forcing employers to undergo a close scrutiny of their practices at both levels of the two-tier inquiry, courts will possess sufficient tools to ensure a workplace free of arbitrary barriers to equal opportunity.

2. The Case Against the Sliding Scale Approach

Commentators who have criticized a rigid, strict approach to the problem of business necessity also have suggested that, rather than adjusting the required level of justification to the difficulty of the job at issue, courts should tie the rigor of the business necessity standard to the strength of the proof of disparate impact presented by the plaintiff.[372] For instance, if the plaintiff demonstrates that the employer's practices disqualify almost all applicants of a particular group, the employer would have to meet a strict necessity standard in order to justify its practices.[373] If, on the other hand, the employer's practices only have a mildly disproportionate impact on the job opportunities of the group in question, then a more lenient standard of business necessity would apply.[374]

These commentators argue that if one understands the disparate impact cause of action as a tool for eliminating concealed discrimination, the level of disparate impact caused by the challenged practice is a good measure of the probability that the practice is founded on discrimination.[375] Since a practice that causes a large disparate impact is more likely to be rooted in discrimination than one that causes a smaller impact, courts should presume that the most harmful practice is invalid and impose the strict burden of justification

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Watson, 487 U.S. at 987.

Neither the plurality in *Watson* nor the Court in *Wards Cove* discussed the necessity of preventing subtle discrimination such as statistical or unconscious discrimination. *See id.* at 977. It is not surprising that they did not do so; requiring the plaintiff to persuade the court that the employer's proffered justifications are illegitimate makes it likely that the plaintiff will only prevail when the employer's justifications are so weak that the practices amount to intentional discrimination. More subtle forms of discrimination cannot be reached without a more searching inquiry into the employer's justifications.

372. *See* Player, *supra* note 43, at 4, 36-44; Rutherglen, *supra* note 12, at 1320.

373. Player, *supra* note 43, at 42.

374. *Id.*

375. *See* Rutherglen, *supra* note 12, at 1323.

on employers.[376] In contrast, courts should be more flexible in evaluating employers' justifications for practices that have a lesser disparate impact.[377]

The problem with this approach is that it misapprehends the reason why a rigid, strict necessity standard is unworkable. It is not unworkable because it is unfair or impractical to require scientific validation when there is a small disparate impact; it fails because it requires scientific validation when such validation is impossible. Even if, for example, an employer's subjective hiring process for managers results in the near-total exclusion of African-Americans or women, a faithful interpretation of Title VII and the Act does not permit courts to apply the strict necessity standard because it is impossible for an employer to defend subjective practices through scientific validation. The employer would either have to abandon its practices or use quotas, a dilemma which may not be imposed under Title VII. Instead, the court should apply the more flexible standard of business necessity, which requires the employer to prove that the job in question requires the use of subjective practices and that the practices significantly serve its legitimate interests.[378]

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376. *Id.* at 1324.

377. Player, *supra* note 43, at 42; Rutherglen, *supra* note 12, at 1324.

378. One commentator has suggested that the Act's definition of business necessity should be interpreted as a mandate for courts to scrutinize the efficiency of employer practices. Greenberger, *supra* note 11, at 308. Founding his argument on the premise that employers frequently use practices that are both inefficient and have a disparate impact, Greenberger argues that courts should strike down practices with a disparate impact that do not accurately measure merit and thus do not contribute to productivity. *Id.* at 307-08.

This approach is unworkable because it is based on two false premises. First, Greenberger misstates the concept of economic efficiency or, as he calls it, productivity. He argues that the sole measure of whether a practice is efficient is whether it effectively measures merit. *See id.* at 306 ("As embodied in Title VII, impact doctrine serves primarily as an injunction to employers to assess the abilities of their employees accurately.").

This definition of efficiency is at best incomplete. The most efficient practice for the employer is the one that most effectively evaluates the merit of potential or present employees at the cheapest cost. Thus, while a practice other than the one used by the employer may measure merit more effectively, it may be more efficient for the employer to maintain its practice because the mistakes made using the current practice may be less costly than implementing a new one. A court that is directed to impose the most efficient practice must allow employers to retain practices that both are not the most accurate measures of ability and have a disparate impact. It is doubtful that Greenberger has this result in mind when he calls for a productivity-based approach.

Second, Greenberger mistakenly asserts that Title VII does not require that employers suffer productivity losses in order to eliminate practices that serve as barriers to equal employment opportunity. *See id.* at 308 ("Efficient practices need never be abandoned, even if they exclude minorities completely.") (emphasis omitted). On the contrary, one

Conversely, even if the employer's practices only have a mild disparate impact, Title VII, as amended by the Act, does not instruct courts to ignore this potential barrier to equal opportunity. Rather, the judiciary's mandate is to eliminate all arbitrary barriers to equal employment opportunity, and if an employer's practice is one amenable to scientific validation, then the employer should have to provide that level of proof in order to justify its practice. After all, while the good achieved by attacking an isolated practice with a mild impact may seem negligible, the cumulative effect of eliminating such practices may have a great effect on the promotion of equal employment opportunity.

CONCLUSION

The inherent ambiguity of language and the problem of attributing a single intent to a group of disparate individuals makes the task of statutory interpretation a difficult one, particularly when different factions of the legislature and the executive cannot agree on the correct legal rule and instead write a hopelessly ambiguous statute, leaving all parties with the hope that the courts will give the statute their favored interpretation. Certainly, one can see the business necessity provisions of the Act as the paradigmatic example of this phenomenon.

Those who support the return to a *Griggs* standard are confident that the courts will impose a uniform strict necessity standard. This outcome is unlikely, not only because a close reading of the Act and a thorough understanding of the circumstances of its enactment reveal that the statute does not enact the *Griggs* standard. More fundamentally, an absolute strict standard is unworkable. The serious issues regarding qualifications for supervisors, professionals, and other complex jobs will resurface, and the passage of the Act will not make the professional, often intangible, qualities desired for these positions any more amenable to the objective analyses called for by the strict job-relatedness test. Even if the courts intend at first to apply the strict necessity test, it will be only a matter of time before they will again be forced to address the impossibility of applying the strict

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of the main premises of disparate impact theory is that the most effective way to eliminate subtle discrimination is to make justifying practices with a disparate impact so costly that the employer will closely examine its need for the practices. This theory relies on and approves of the fact that an employer will choose to suffer some productivity losses to avoid the higher costs of justification. *See supra* notes 328-41 and accompanying text.

standard to employment practices used in connection with complex jobs.

It is also unlikely that the courts will interpret the Act's business necessity provisions as having incorporated the *Wards Cove* standard. Even if the majority of the Supreme Court believes that the *Wards Cove* approach was correct, it cannot legitimately ignore the fact that the majority of the Congress that enacted the Act found this new approach unacceptable. Unless the Court is willing to defy the known intent of Congress, it must interpret the Act as establishing a business necessity standard that is stricter than *Wards Cove.*

Despite the intent of all the parties responsible for the Act to write a statute that courts might possibly interpret in their favor, the Act does in fact provide the judiciary a workable definition of business necessity quite different from that offered by either extreme in the debate. By instructing courts to interpret business necessity in the same way that the Court interpreted it before *Wards Cove*, the Act turns our attention to the Court's struggle to apply one standard of business necessity to diverse jobs. By examining how the Court confronted the particular problems raised by the practices used for particular jobs, one discovers that before *Wards Cove* the Court did not apply one unbending standard to business necessity in all cases. Instead, it adjusted the standard to the job. Taking the search a step further, one finds that many lower federal courts applied the same flexible standard and were much more willing to do so openly. In studying all these cases, we find that the courts in essence applied different standards to jobs based on their complexity.

This two-tier standard, in which courts apply a strict standard to non-complex jobs and a more flexible one to complex jobs, is not only the best answer to the question of what the Act established. It also serves the vital purposes of Title VII. By applying a strict standard to non-complex jobs, it sweeps away both cleverly concealed discrimination and the barriers to equal employment opportunity resulting from unintended, and even unconscious, discrimination.

These gains, however, are not made at the cost of depriving the employer of its fundamental prerogatives. By ensuring that an employer has a fair opportunity to defend any of its practices, we can be sure that we do not purchase more equal employment opportunity at the price of either forcing employers to abandon legitimate practices or mandating quotas. After all, what does it profit us to remove barriers to employers when, by requiring employers either to abandon practices they legitimately need to run their business or to engage in pure discrimination, we lose the soul of Title VII?