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In this article, Professor Perry identifies the split among the Justices of the Supreme Court on the appropriate standard to be used for establishing the business necessity justification to disparate impact discrimination under Title VII. She proposes that the business necessity standard be modeled on the framework of the bona fide occupational qualification (“BFOQ”) defense to disparate treatment discrimination under Title VII, after modifying the BFOQ’s strict scrutiny standard to account for the differences between disparate impact and disparate treatment discrimination.

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**INTRODUCTION**

Last term, the new majority on the Supreme Court\(^1\) went out of its way to redefine the balance between equal employment opportunity and employers’ business needs under Title VII of the Civil Rights Act of 1964 \[hereinafter Title VII\].\(^2\) By reducing employers’ evidentiary and sub-

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1. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2123-24 (1989) (White, J., joined by Rehnquist, C.J., O’Connor, Scalia, Kennedy, J.J.) (Business Necessity analysis was dictum because Court found no disparate impact discrimination to be excused by Business Necessity exception).

   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate
stantive burdens for the Business Necessity exception to disparate impact discrimination, the decision from last term is the latest in a trend to undercut the nation's previously established commitment to prohibit facially neutral selection criteria that are proved to be discriminatory based on race, color, religion, sex, or national origin absent stringent proof of the criteria's Business Necessity. Those Justices espousing the new, more deferential Business Necessity standard, however, have neither explicitly defined their standard nor reconciled it with or over-

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Although an employer's discrimination under Section 703 is the focus of this article, employment agencies and labor organizations, and joint labor-management committees are also constrained from discriminating on the basis of race, color, religion, sex, or national origin. Civil Rights Act of 1964 § 703(b)-(d), 42 U.S.C. § 2000e-2(b)-(d) (1988). In addition, employers, employment agencies, labor organizations, and joint labor-management committees are constrained from retaliating against either those opposing unlawful conduct under Title VII or those participating in proceedings to enforce Title VII. Civil Rights Act of 1964 § 704, 42 U.S.C. § 2000e-3 (1988). Finally, employers, employment agencies, and labor organizations are required to post notices regarding Title VII's protection. Civil Rights Act of 1964 § 711, 42 U.S.C. § 2000e-10 (1988).

3. Disparate impact discrimination under Title VII prohibits an employer from using facially neutral practices that treat employees differently because of their race, color, religion, sex, or national origin. Thus, distinctions motivated by differences such as test scores or educational attainments, which are not in themselves protected by Title VII but which may differentially affect candidates based on their race, sex, religion, national origin or color, raise claims of disparate impact discrimination.

In its first pronouncement on Title VII, the Supreme Court articulated both the prohibition against disparate impact discrimination and its limit, Business Necessity:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (unanimous decision in which Justice Brennan did not participate).

4. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2123-24, 2125-26 (dictum) (employer bears only burden of production that the disparately impacting criterion "serves, in a significant way, the legitimate employment goals of the employer").

5. Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977) (employer must prove that disparately impacting selection criteria, minimum height and weight restrictions, are "necessary to safe and efficient job performance" to survive Title VII challenge); Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975) (employer permitted to use disparately impacting tests only when employer proves "by professionally acceptable methods" that tests are "predictive of or significantly correlated with important elements of work behavior" of the jobs at issue) (quoting 29 C.F.R. § 1607.4(a)); Griggs v. Duke Power Co., 401 U.S. at 431-32 (Business Necessity requires employer to show that disparately impacting selection criteria, employment tests and high school diploma requirements, bear "demonstrable relationship to successful performance of the jobs for which [they were] used"). In each of these cases the Court expressly considered and rejected the employer's Business Necessity defenses.

6. Indeed, in only one decision articulating a broad Business Necessity exception did the Court actually apply its standard to a factual controversy under Title VII. See infra note 134.
ruled the earlier law of Business Necessity. The Court’s interpretation of the Business Necessity exception to disparate impact discrimination is, therefore, subject to dispute. Moreover, while the Justices on the Court are opining on the law of Business Necessity, Congress is considering legislation to clarify its intent that Business Necessity be a narrow, exacting exception to otherwise prohibited disparate impact discrimination. Thus, the law of Business Necessity is ripe for clarification.

Resolution of this confusion requires development of a coherent standard for Business Necessity which reflects the intent of Congress. This article delineates a standard for Business Necessity that is modeled on Congress’ bona fide occupational qualification exception [BFOQ ex-
ception] to disparate treatment discrimination, also prohibited by Title VII. Although disparate treatment discrimination—focusing on an employer’s intentionally different treatment of similarly situated employees based on their race, color, religion, sex, or national origin—is distinct from disparate impact discrimination, the BFOQ exception, like the Business Necessity exception, attempts to balance the prohibited discrimination against an employer’s legitimate discretion to run its business. Adapting the standard for the BFOQ exception to the disparate impact context of the Business Necessity exception would appropriately excuse disparate impact discrimination only when it is justified by a standard that is both logical and Congressionally sanctioned. Moreover, the standard developed from the BFOQ model requires heightened judicial scrutiny of employers’ Business Necessity response to disparate impact discrimination, thereby preserving Title VII’s original commitment to prohibit disparate impact discrimination.

The consequences of the Court’s expansion of the Business Necessity exception can best be illustrated by an example. Title VII’s prohibition of disparate impact discrimination would require an employer to justify its preference for high school graduates or those passing standardized tests because disproportionate numbers of African-Americans lack

11. By Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1988), Congress expressly created the BFOQ exception to excuse disparate treatment discrimination: where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. See infra note 12 and accompanying text.

12. The fundamental and definitional difference between disparate treatment and disparate impact discrimination is that under disparate treatment discrimination employers are liable for intentional discrimination, whereas under disparate impact discrimination employers are liable for the discriminatory consequences of their selection criteria, regardless of the motivation for adopting them. The Supreme Court distinguished disparate impact from disparate treatment in International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977): “Disparate treatment” . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Claims of disparate treatment may be distinguished from claims that stress “disparate impact.” The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory.

13. See infra notes 176-78 and accompanying text.

14. Under the BFOQ exception, disparate treatment discrimination is excused only when an employer establishes that distinguishing between employees or applicants based on protected factors is the only effective way to insure that the employer can operate its business. See infra Section IIA.

15. See infra Sections IIB-E. Under the Business Necessity exception developed in this article, disparate impact discrimination is excused only when an employer establishes that distinguishing between employees or applicants based on a disparately impacting selection criterion is substantially effective to achieve an important business purpose that cannot be accomplished by using a less discriminatory criterion.

16. See infra Sections IB1 & IIC.
those credentials. Yet under the still amorphous, but broader view of Business Necessity now put forth by the Court, the employer would be permitted to select employees for even routine, unskilled jobs on the basis of such disparately impacting criteria by articulating a rational business reason for using the criteria. For example, an employer might testify that such criteria produce a smarter work force or that although the criteria are not necessary to perform in entry-level positions, they might be required for employees to perform someday in higher-level skilled positions. The new majority on the Court would not prohibit the employer’s use of the criteria, regardless of their effect on employment of African-Americans in entry-level positions, unless the employee could persuade the court that the criteria were not rationally related to achieving a business purpose. Expanding the Business Necessity exception in this manner directly undercuts the protection provided by the law against disparate impact discrimination by allowing differences between African-Americans and Euro-Americans to jeopardize African-American employment based on only the slightest justification.

Under the more exacting standard for Business Necessity proposed in this article, by contrast, the employer would not be permitted to use criteria proved to curtail employment opportunities of those protected by Title VII without persuading the court that the criteria were substantially effective in achieving important business purposes that could not be accomplished by less discriminatory criteria. By that standard, an employer’s unsubstantiated preference for “smarter” employees would be insufficient to justify the disproportionate impact of the criteria under Title VII absent proof that employees need those credentials to perform in entry-level jobs, or those higher-level jobs to which entry-level employees would routinely, and relatively quickly, be promoted. This standard, like the original standard developed by the Supreme Court, would preserve the protections provided by disparate impact doctrine absent a demonstrable burden on an employer’s business. Such a standard

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17. See Griggs v. Duke Power Co., 401 U.S. 424, 430 & n.6, 431 (1971). Moreover, although the percentage of those in the civilian labor force who failed to complete high school has been cut by more than 50% since 1970, the percentage of Blacks falling to complete high school remains at almost double that of whites, such that in 1988, 13.8% of whites compared with 22.6% of Blacks did not have high school diplomas. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, BULLETIN 2340, HANDBOOK OF LABOR STATISTICS Table 65 (1989).

18. See infra Section IB2.

19. See infra Section IB2. The factual record in the case from which this example was drawn exposed that incumbent employees without these credentials performed equally well on both the entry-level and upper-level jobs at the company. Griggs v. Duke Power Co., 401 U.S. at 431-32.

20. See infra Section IIB-E.


22. See infra Section IB1.
appropriately reflects the nation's commitment to equal employment opportunity as evidenced by Title VII without undermining the true needs of business.

I

JUDICIAL INTERPRETATION OF DISPARATE IMPACT DISCRIMINATION AND THE BUSINESS NECESSITY RESPONSE UNDER TITLE VII

Disparate impact discrimination identifies facially neutral differences between groups protected by Title VII that are used by employers to discriminate between employees.\textsuperscript{23} The Business Necessity\textsuperscript{24} response dictates whether those group differences may be used as a basis for discrimination in employment consistent with Title VII.

A. Proving Disparate Impact Discrimination

To establish disparate impact discrimination, employees bear the burden of production and persuasion\textsuperscript{25} on each component of the prima facie case of disparate impact. The interrelated components of an employee’s prima facie case include, first, that the employee identify the specific selection criterion\textsuperscript{26} used by the employer that causes disparate impact based on a protected factor.\textsuperscript{27} It is insufficient to establish the


\textsuperscript{24} Throughout this article, I will distinguish between “Business Necessity,” the term of art for the defense to disparate impact discrimination, and “business necessity” or “necessity,” the level of proof required for a given defense.

\textsuperscript{25} To bear the burden of production on an issue requires the party to produce admissible evidence sufficient to raise a genuine question of fact on the issue, whereas the burden of persuasion requires the party to persuade the fact finder on the issue. See Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 Vand. L. Rev. 1205, 1216 (1981).

\textsuperscript{26} The term “selection criterion” used throughout this article shall mean the factor used by an employer to distinguish between employees or applicants for purposes of hire, discharge, compensation, terms, conditions and privileges of employment, employment opportunities, or status as employee. See Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1988).

\textsuperscript{27} Race, color, religion, sex, or national origin are protected under Title VII. See Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1988) (quoted supra note 2). Women, people of color, and underrepresented religious and ethnic groups are, therefore, protected groups under Title VII. See Green v. USX Corp., 843 F.2d 1511, 1523 (3d Cir. 1988), vacated, 109 S. Ct. 3151 (1989) (vacating judgment for employee where employee failed to isolate disparately impacting criterion); Wards Cove Packing Co., Inc. v. Atonio, 109 S. Ct. 2115, 2124-25 (1989) (although issue regarding employee’s obligation to isolate disparately impacting selection criterion was raised on appeal to Supreme Court, resolution of the issue “pretermitted” by the Court’s ruling that statistical evidence on which court of appeals relied was insufficient to prove disparate impact discrimination) (“[a] plaintiff must demonstrate that it is the application of a specific or particular employment practice
disparate impact of an employer’s overall selection process. Under disparate impact discrimination, the challenged criterion is “facially neutral,” a factor not expressly prohibited by Title VII and one applied to all candidates regardless of their protected status. For example, disparate impact has created the disparate impact under attack”); Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 983-84 (1988) (O’Connor, J., joined by Rehnquist, C.J., White, Scalia, J.J.) (dictum because lower court refused to consider employee’s disparate impact proof as a matter of law) (“We note that the plaintiff’s burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer’s work force. The plaintiff must begin by identifying the specific employment practice that is challenged. . . . [T]he plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.”); EEOC v. Joint Apprenticeship Committee, 52 Empl. Prac. Dec. (CCH) ¶ 39,609 (2d Cir. 1990) (remand for proof of whether challenged employment practice caused the statistical disparities). Cf. Arnold v. United States Postal Serv., 863 F.2d 994, 999 (D.C. Cir. 1989) (employer’s Career Path Policy counted as one selection criterion, notwithstanding its three component parts).

28. Those who support requiring employees to identify the impacting criterion argue that it ensures employers are responsible for defending by Business Necessity only their own impacting criterion, not every statistical imbalance. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2125; Watson v. Fort Worth Bank and Trust, 487 U.S. at 992. Moreover, they assert that employees will usually be aided in isolating the disparately impacting criterion by both the liberal discovery rules and the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4A-B (1989) (requiring employers to maintain records of the impact of its “tests and other selection procedures”). Cf. Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2125 & n.10, 2133 n.20 (employee responsible for isolating disparately impacting criterion notwithstanding that employer had no statistical personnel records).

Some have argued that by demonstrating the disparate impact of an employer’s selection criteria, the employee raises a sufficient inference of discrimination so as to excuse an employee from having to isolate the offending selection criterion. Indeed, modifying an employee’s obligation to single out the disparately impacting criterion is particularly appropriate where the employee is impeded in determining which criterion accounts for the disparate impact because the employer’s selection process is poorly defined. Watson v. Fort Worth Bank and Trust, 487 U.S. at 1009 n.10; Sledge v. J.P. Stevens & Co., 52 Empl. Prac. Dec. (CCH) ¶ 39,537 (E.D.N.C. 1989). But see Green v. USX Corp., 843 F.2d at 1523, vacated, 109 S. Ct. 3151 (1989) (vacating judgment for employee where employee failed to isolate disparately impacting criterion because of USX’s own refusal to be pinned down as to the selection criteria it employ[ed], beyond listing twenty subjective criteria . . . and stating that these criteria were applied as an ‘amalgam’” (quoting the district court decision)). Cf. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1787-88 (1989) (Brennan, J., joined by Marshall, Blackmun, Stevens, J.J.); id. at 1795 (White, J., concurring in judgment); id. at 1796, 1804-05 (O’Connor, J., concurring in judgment) (allowing burden shifting to prove causation under certain circumstances in disparate treatment case).

Congress is considering legislation to allow employees to prove disparate impact discrimination based on proof that a group of an employer’s practices results in disparate impact without requiring employees to isolate the one selection criterion causing the disparate impact. See Civil Rights Act of 1990, S. 2104, supra note 9, § 4; H.R. 4000, supra note 9, § 4 (allowing employee to prove disparate impact discrimination by showing the disparate impact of a group of practices, but requiring employer to defend that disparate impact either by showing that a specific practice does not contribute to disparate impact or by showing Business Necessity of the practice(s)); Fair Employment Reinstatement Act, S. 1261, supra note 9, § 2 (same). Final resolution of this debate is beyond the scope of this article.

29. Griggs v. Duke Power Co., 401 U.S. at 431 (“The Act [Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”). The Supreme Court found that even a “subjective” selection criterion could be challenged under disparate impact doctrine. See Watson v. Fort Worth Bank and Trust, 487 U.S. at 989-90.

Congress exempted from disparate impact challenge specified selection criteria used for speci-
impact discrimination has been used to challenge testing and educational requirements as well as subjective decisions of supervisors. In addition, the employee must prove that the identified criterion distinguishes between employees based on race, color, religion, sex, or national origin.


31. Although employees usually prove disparate impact discrimination by direct evidence with statistical proof of impact, they may also prove disparate impact discrimination by circumstantial evidence combined with nonstatistical evidence. See Craig v. Alabama State Univ., 804 F.2d 682, 685 & n.7 (11th Cir. 1986) (disparate impact proved with nonstatistical evidence that preference for those on study leave from racially segregated institution would produce a racial effect); Walker v. Jefferson County Home, 726 F.2d 1554, 1558 (11th Cir. 1984) (disparate impact proved with nonstatistical evidence that requiring prior supervisory experience would discriminate against Blacks because nursing home only promoted whites into supervisory positions).

32. There is dispute whether the group differences must be reflected in the employer’s actual applicant population, New York City Transit Auth. v. Beazer, 440 U.S. at 585-86; Dothard v. Rawlinson, 433 U.S. at 348-49 (White, J., dissenting); or in society’s population statistics, Dothard v. Rawlinson, 433 U.S. at 329-30 (using national population figures); Griggs v. Duke Power Co., 401 U.S. at 430 n.6 (using figures from North Carolina population and another case evaluated by the Equal Employment Opportunity Commission).

Moreover, the level of disparate impact required has not been quantified precisely. Watson v. Fort Worth Bank and Trust, 487 U.S. at 955 & n.3 ("the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. Our formulations, which have never been framed in terms of any rigid mathematical formula, have consistently stressed that statistical disparities must be sufficiently substantial that they raise such an inference of causation"). Courts have adopted neither the Equal Employment Opportunity Commission’s (EEOC) standard for exercise of its prosecutorial discretion, requiring the minority selection rate to be less than 80% of the majority selection rate, Section 4D of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D (1989), nor a level of required statistical significance, such as standard deviation, New York City Transit Auth. v. Beazer, 440 U.S. at 598 n.3 (White, J., dissenting). See, e.g., Connecticut v. Teal, 457 U.S. at 443 & n.4, 446 (disparate impact prima facie case established where "facially neutral employment practice had a significantly discriminatory impact," where 54.17% Blacks passed compared to 79.54% whites, yielding a Black-to-white pass rate of only 68%); New York City Transit Auth. v. Beazer, 440 U.S. at 584-87 & n.30 (prima facie disparate impact violation "established by statistical evidence showing that an employment practice has the effect of denying the members of one race equal access to employment opportunities," shown weakly, at best, where assumptions based on inconclusive statistics indicate rule excludes between 40-50% of Black or Hispanic candidates when Blacks or Hispanics are 36.3% of the total population); Dothard v. Rawlinson, 433 U.S. at 329 (disparate impact shown where combination of criteria selected applicants in a "significantly discriminatory pattern" as shown by United States census figures indicating that 32.29% of women compared to 1.28% of men were excluded by 5'2" height requirement alone and that 22.29% of women compared to 2.35% of men were excluded by 120-pound weight requirement alone); Griggs v. Duke Power Co., 401 U.S. at 426, 430 & n.6 (disparate impact shown where high school diploma and standardized test "disqualify Negroes at a substantially higher rate": North Carolina census figures indicated 34% of white males compared to
Finally, the employee must prove causation by establishing that the criterion was the reason for the adverse employment action affecting the employee.\textsuperscript{34}

The employer can overcome the employee's prima facie case of disparate impact discrimination by introducing evidence to deny the elements of the employee's case. Such denial evidence might dispute either that the practice caused the impact or that the statistical disparity was significant enough.\textsuperscript{35} To establish disparate impact discrimination, the

\textsuperscript{34}12\% of Black males had completed high school and an EEOC case indicated 58\% of whites compared to 6\% of Blacks had passed standardized tests, including ones at issue in case). Resolution of these issues is beyond the scope of this article.

\textsuperscript{33}The disparate impact theory requires disproportionate impact based on the factors protected under Title VII. See Williamson v. A.G. Edwards and Sons, 876 F.2d 69, 70 (8th Cir. 1989) (Title VII does not prohibit discrimination on the basis of homosexuality), cert. denied, 110 S. Ct. 1158 (1990); DeSantis v. Pacific Tel. and Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979) (Sneed, J., concurring and dissenting) ("To establish a prima facie case under Griggs it will not be sufficient to show that appellees have employed a disproportionately large number of female homosexuals and a disproportionately small number of male homosexuals. Rather it will be necessary to establish that the use of homosexuality as a bar to employment disproportionately impacts on males, a class that enjoys Title VII protection. Such a showing perhaps could be made were male homosexuals a very large proportion of the total applicable male population.") (emphasis in original). Cf. Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1784-85 (1989) (disparate treatment case) (Title VII, "[t]he converse . . . of 'for cause' legislation, . . . eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice"). Thus, Title VII represents a very limited change from the traditional at-will employment, in that statistical discrimination based on factors other than race, sex, religion, national origin, or color, no matter how unfair, is not prohibited. See Chamallas, Evolving Conceptions of Equality under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle, 31 UCLA L. REV. 305, 331-32 (1983); Willborn, The Disparate Impact Model of Discrimination: Theory and Limits, 34 AM. UNIV. L. REV. 799, 821-22 (1985); Note, Business Necessity: Judicial Dualism and the Search for Adequate Standards, 15 GA. L. REV. 376, 377 & n.7 (1981) [hereinafter GA. NOTE].

There is debate whether disproportionate impact against a majority individual is protected by disparate impact theory. Cf. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 710 n.20 (1978). But cf. Craig v. Alabama State Univ., 804 F.2d at 688 (finding disparate impact based on race against white female in predominantly Black institution). Related to that question is the question whether the protection against disparate impact discrimination is temporary, much like affirmative action, and will no longer be required when employers' and society's discrimination is remedied. Resolution of these questions is beyond the scope of this article.

\textsuperscript{35}See Watson v. Fort Worth Bank and Trust, 487 U.S. at 997 ("the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times"); Connecticut v. Teal, 457 U.S. at 458-59 (Justices Powell, Burger, Rehnquist and O'Connor dissenting) ("In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of inference—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process' 'built-in headwinds.' ") (emphasis in original); Walls v. City of Petersburg, 52 Empl. Prac. Dec. (CCH) ¶ 39,602 (4th Cir. 1990) (summary judgment for City where Walls failed to demonstrate that City adversely affected employees based on questionnaire with disparate impact); Robinson v. Polaroid Corp., 732 F.2d 1010, 1016-17 (1st Cir. 1984) (plaintiffs failed to show that seniority rule had disparate impact). Cf. Dothard v. Rawlinson, 433 U.S. at 348 (White, J., dissenting) (no proof that smaller women were interested in applying for job as prison guard).

\textsuperscript{35}See Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2131; Watson v. Fort Worth Bank
employee must overcome the employer’s denial evidence and persuade the trier of fact of all elements of the prima facie case of disparate impact discrimination. If the employee successfully establishes disparate impact discrimination, liability will follow unless the employer can show Business Necessity.

B. The Supreme Court’s Dispute on Business Necessity

In the unanimous decision, Griggs v. Duke Power Co., the Supreme Court defined disparate impact discrimination and its defense, Business Necessity. In that case and two subsequent cases, the Court evaluated the employer’s proof of Business Necessity against an exacting standard. These cases established the law of Business Necessity to require the employer to bear both the burden of production and the burden of persuasion that the purpose for adopting the disparately impacting criterion was important to the business and that the criterion was demonstrably and substantially effective in achieving that purpose.

In the remaining five decisions discussing Business Necessity, however, Justices on the Supreme Court have espoused a much more lenient review of an employer’s Business Necessity justification, requiring an


37. Disparate impact discrimination requires an employee to prove that the employer’s selection criterion has a disparate impact, regardless of whether the impact is an innocent byproduct or the subtle motive of the employer’s selection criteria.

38. Business Necessity was adopted as part of and is coextensive with disparate impact discrimination. See Griggs v. Duke Power Co., 401 U.S. at 431 (unanimous decision):

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Moreover, Business Necessity is the only defense to a disparate impact challenge. See Connecticut v. Teal, 457 U.S. at 442, 451 (nondiscriminatory overall hiring statistics will not excuse disparate impact of one of many selection criteria).


40. See supra note 25.
employer to bear only the burden of production that the purpose for adopting the criterion is legitimate and that the criterion is related to that purpose. This substantive and evidentiary retreat from the more exacting standard for Business Necessity undermines the protection promised by disparate impact discrimination law.\(^4\) Equally troubling, however, is the manner in which the Court accomplished this retreat. Consequently, the law of Business Necessity is in a confused state.

1. \textit{In the Beginning—Heightened Scrutiny}

The Justices endorsing heightened judicial scrutiny of an employer’s response to an employee’s case of disparate impact discrimination commanded a majority in the first three cases on disparate impact discrimination under Title VII. In \textit{Griggs v. Duke Power Co.},\(^42\) the Court unanimously\(^43\) held Duke Power Company liable under Title VII for hiring or transferring pursuant to employment criteria which had disparate impact based on race\(^44\) because the Company could not show that such criteria had “a manifest relationship to the employment in question” or bore “a demonstrable relationship to successful performance of the jobs for which it was used.”\(^45\) By that standard of Business Necessity, the Court required the Company to establish both that its purpose for adopting the criteria constituted “a genuine business need”\(^46\) and that it was “manifest” or “demonstrable” that the facially neutral but disparately impacting criteria did in fact achieve its business purpose.\(^47\) Duke Power

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\(^41\) See Belton, \textit{supra} note 25, at 1209-10 (reduction in employer’s burden of proof for Business Necessity is discrete avenue to repudiate disparate impact discrimination); Brodin, \textit{Costs, Profits, and Equal Employment Opportunity}, 62 \textit{NOTRE DAME L. REV.} 318, 320 (1987); Willborn, \textit{supra} note 33, at 824.

\(^42\) 401 U.S. 424 (1971).

\(^43\) (Brennan, J., did not participate).

\(^44\) The disparately impacting criteria were high school graduation and passing scores on general intelligence tests. \textit{Id.} at 430 \& n.6, 431. The Court interpreted the exclusion allowing professionally developed tests in Section 703(h), 42 U.S.C. § 2000e-2(h), to require proof that the professionally developed ability tests were job-related. \textit{Id.} at 433-36. \textit{See infra} note 182.

\(^45\) \textit{Griggs} v. Duke Power Co., 401 U.S. at 431-32. Notwithstanding the Court’s reference to “artificial, arbitrary, and unnecessary barriers to employment,” the Court’s articulated and applied standard for Business Necessity required a more searching judicial review than mere rationality. \textit{Id.} at 431.

\(^46\) \textit{Id.} at 432. The \textit{Griggs} Court examined three employer purposes to justify the use of the disparately impacting high school diploma and intelligence test requirements. The first employer purpose, using the disparately impacting selection criteria to predict effective job performance on the very jobs for which the criteria were to be used, was judged a sufficient business purpose. Second, the Court found that the employer’s business purpose of abstractly improving “the overall quality of the work force” did not have sufficient relationship to the efficiency of the business to justify the use of the disparately impacting criteria. The Court instead required that the criteria “must measure the person for the job and not the person in the abstract.” \textit{Id.} at 431, 436. Third, the Court rejected the employer’s purpose of “preserving the avowed policy of advancement within the Company” because the employer failed to justify the purpose “upon a showing that such long-range requirements fulfill a genuine business need.” \textit{Id.} at 432.

\(^47\) The Court rejected the effectiveness of the criteria to predict effective job performance,
Company failed to establish Business Necessity in that case because, although it established a sufficiently important business purpose, predicting successful performance of the jobs at issue, it failed to prove that the educational and testing criteria were effective to achieve that purpose.\textsuperscript{48}

In \textit{Albemarle Paper Co. v. Moody},\textsuperscript{49} the Supreme Court again found illegal an employer's use of two general ability tests\textsuperscript{50} that produced a disparate impact based on race. Relying on \textit{Griggs} and the Equal Employment Opportunity Commission [EEOC] Guidelines on Employee Selection Procedures,\textsuperscript{51} the Court stated:

\begin{quote}
    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 or jobs for which candidates are being evaluated."  \textsuperscript{52}
\end{quote}

The Court rejected the Paper Company's Business Necessity defense because it failed to show that the job performance skills for which it was testing were sufficiently "important elements of work behavior" to justify use of the discriminatory tests.\textsuperscript{53} The Court also rejected the Business Necessity defense because the Company failed to establish that the pro-

\textsuperscript{48} Id. at 431-32 & n.7, 436.


\textsuperscript{50} The employer used the intelligence tests to determine who to hire and transfer. Id. at 428-29.


\textsuperscript{52} \textit{Albemarle Paper Co. v. Moody}, 422 U.S. at 431 (citing 29 C.F.R. § 1607.4(c)).

\textsuperscript{53} More particularly, supervisors ranked employee performance "by a 'standard' that was extremely vague and fatally open to divergent interpretations," such that there was "simply no way to determine whether the criteria \textit{actually} considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify" the testing system. Id. at 433 (emphasis in original). Also, similar to \textit{Griggs}, the Court refused to allow the employer to use a disparately impacting entry-level test to predict long-range potential for promotion, absent proof that practically all entry-level candidates will fill the higher-level positions, almost automatically, within a reasonable period of time. Id. at 434. Indeed, failure to qualify for upper-level jobs should not excuse under Title VII an employer's failure to hire African-Americans for entry-level jobs for which they qualify, absent sufficient business justification that virtually no entry-level employees remain in entry-level jobs sufficiently long to justify their hire.
fessionally developed employment tests sufficiently achieved the business purpose of predicting job performance to justify their use, considering their disparate impact.\textsuperscript{54}

After an ambiguous discussion of Business Necessity in \textit{Washington v. Davis},\textsuperscript{55} the Supreme Court reaffirmed its stringent standard for Business Necessity in \textit{Dothard v. Rawlinson}.\textsuperscript{56} In \textit{Dothard}, the Court found that Alabama's statute establishing minimum height and weight qualifications for prison guards\textsuperscript{57} violated Title VII \textsuperscript{58} because Alabama\textsuperscript{59} failed to justify the qualifications' disparate impact on women by showing the criteria to be "necessary to safe and efficient job performance."\textsuperscript{60} In

\begin{footnotesize}
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\item \textsuperscript{54} First, the Court rejected plant officials' conclusory allegations that the tests were "locally validated" when introduced, confirming that "job relatedness cannot be proved through vague and unsubstantiated hearsay." \textit{Id.} at 428 n.23. In addition, for five of the eight lines of progression (and for some job groupings within each line of progression), the test was not proved to be "predictive of or significantly correlated with job performance to justify its use." \textit{Id.} at 431-32. Moreover, jobs for which the tests were validated were not sufficiently similar to jobs for which the tests were used but not validated to justify use of the tests for the non-validated jobs. \textit{Id.} at 432. Finally, proving that experienced white incumbent employees near the top of lines of progression performed well on the tests did not establish the employer's burden of proving that the tests could distinguish between qualified and unqualified inexperienced employees, both Black and white, seeking entry-level jobs. \textit{Id.} at 433-34. This last problem raises concern about Albemarle's concurrent validation study. \textit{Id.} at 429.

\item \textsuperscript{55} 426 U.S. 229 (1976). There the Supreme Court upheld a disparately impacting "qualifying" test against challenge that it was a discriminatory "recruiting" procedure under the Due Process Clause of the United States Constitution, 42 U.S.C. \S 1981, and D.C. Code \S 1-320. \textit{Id.} at 232-33, 250. The Court affirmed the District Court finding that the test's relationship to the police training program, rather than performance on the job, satisfied the legal requirements at issue in that case. \textit{Id.} at 250. Although Title VII was not applicable to that case, the majority also found the relationship to training, rather than job performance, not to be "foreclosed" by \textit{Griggs} or \textit{Albemarle}. \textit{Id.} at 236 n.6, 238 n.10, 250-51. See \textit{infra} notes 97-110 (discussing \textit{Washington v. Davis} more fully).


\item \textsuperscript{57} \textit{Id.} at 323-24.

\item \textsuperscript{58} Rawlinson claimed both disparate impact discrimination to challenge facially neutral selection criteria of height and weight, and disparate treatment discrimination to challenge the overt rule against hiring women. Although the employer was not successful defending its height and weight criteria against the disparate impact challenge, it was successful in defending its disparate treatment challenge. \textit{See infra} notes 153, 156, 160, and accompanying text.

\item \textsuperscript{59} The Court confirmed that public employers, such as the state of Alabama in this case, are held to the same Title VII standards as private employers. \textit{Id.} at 331 n.14.

\item \textsuperscript{60} \textit{But cf.} \textit{Weeks v. Southern Bell Tel. & Tel. Co.}, 408 F.2d 228, 235 (5th Cir. 1969) (more stringent BFOQ standard) (employer must establish that those excluded, based on gender, "would be unable to perform safely and efficiently the duties of the job involved"). \textit{See also} Aguilera v. Cook County Police and Correctional Merit Bd., 760 F.2d 844, 846-47 (7th Cir.) (questioning whether \textit{Albemarle}'s Business Necessity standard is one of mere efficiency, a deferential standard), \textit{cert. denied}, 474 U.S. 907 (1985).


Alabama unsuccessfully sought to respond to the disparate impact challenge by arguing that height and weight "have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor." \textit{Id.} at 331.
\end{itemize}
\end{footnotesize}
applying that standard, the Court first found the necessity of the state's purpose to be insufficient by questioning whether strength, the trait purportedly measured by the height and weight test, was even a "bona fide" prerequisite for performing as a prison security guard.62 The Court next found the effectiveness of the criteria to be insufficient by objecting to the state's reliance on the height and weight test, rather than adopting and validating a "test for applicants that measures strength [the trait desired] directly."63

Interrelated with this heightened substantive standard for Business Necessity, the majority in these initial three cases required the employer to bear both the burden of production and persuasion on Business Necessity.64

Although the Griggs decision was unanimous, the Albemarle and Dothard decisions showed the beginnings of a breakdown of the consensus regarding Title VII's Business Necessity standard. Justice Blackmun articulated a more lenient substantive Business Necessity standard in his concurring opinion in Albemarle,65 calling for employers to prove only that disparately impacting pre-employment tests be "fairly related to the job skills or work characteristics desired."66 He would have excused disparately impacting tests that predict job skills that are merely "desired" (as opposed to "important," thus contradicting the majority's necessity test) and that are only "fairly related" to job skills (where "significantly correlated with" job skills at issue was required to meet the majority's effectiveness test).67 Justice Burger also endorsed a broader Business Necessity standard in his concurring opinion in Albemarle, by rejecting strict adherence to the EEOC Guidelines to establish Business Necessity.68

Similarly, Justices Rehnquist, Burger and Blackmun articulated
more deferential evidentiary and substantive standards for Business Necessity in their concurring opinion in *Dothard.*\(^6^9\) They would have excused Alabama's use of disparately impacting height and weight criteria had the state merely "advance[d] job-related reasons for the qualification."\(^7^0\) By this standard, an employer would meet its evidentiary burden merely by "offering evidence or by making legal arguments not dependent on any new evidence."\(^7^1\) To meet their more lenient, substantive burden, these Justices advised the state to substitute "appearance of strength" for strength as the "job-related" reason for the disparately impacting height and weight criteria.\(^7^2\)

Notwithstanding this breakdown of consensus, this trilogy of cases established the law of Business Necessity to require the employer to persuade the court that its disparately impacting selection criterion met a searching judicial scrutiny of the criterion's necessity and effectiveness. Congress endorsed the *Griggs* decision, with its heightened scrutiny of employer's Business Necessity defense, during deliberations on the 1972 Amendments to Title VII.\(^7^3\) Without benefit of further congressional ac-

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\(^{6^9}\) Dothard v. Rawlinson, 433 U.S. at 339-40 (Rehnquist, J., joined by Burger, C.J., Blackmun, J., concurring). These Justices affirmed the district court decision rejecting employer's business necessity because Alabama failed to show the height and weight criteria to be rationally effective predictors of the job-related qualification of strength.

\(^{7^0}\) Id. at 339.

\(^{7^1}\) Id. at 339 (citing the rebuttal standard from the inferential disparate treatment case, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). The Justices' assertion that Alabama's burden could be fulfilled by legal arguments alone would not be sufficient to fulfill the burden of production. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 & n.9 (1981). Introducing evidence is the essence of the burden of production. See *supra* note 25. Indeed, these Justices would equate the state's burden to prove Business Necessity to be equivalent to its burden to deny elements of employee's prima facie case, on which the employer bears neither the burden of production nor persuasion. Dothard v. Rawlinson, 433 U.S. at 338-39 (Rehnquist, J., joined by Burger, C.J., Blackmun, J., concurring).

\(^{7^2}\) Dothard v. Rawlinson, 433 U.S. at 339-40 (Rehnquist, J., joined by Burger, C.J., Blackmun, J., concurring). The concurring Justices suggested that appearance of strength would pass the necessity test because "the primary job of correctional counselor . . . to maintain security and control of the inmates" . . . I at least would imagine is aided by the psychological impact on prisoners of the presence of tall and heavy guards." Id. at 339-40. The Justices suggested that appearance of strength would pass the effectiveness test because "even if not perfectly correlated, I would think that Title VII would not preclude a State from saying that anyone under 5'2" or 120 pounds, no matter how strong in fact, does not have a sufficient appearance of strength to be a prison guard." Id. at 340. This substantive standard, relying on the intuition of Justice Rehnquist, clearly contradicts the majority's more exacting standard for Business Necessity. Moreover, mere arguments by counsel that the appearance of strength would satisfy the employer's Business Necessity burden contradicts both the majority's evidentiary standard that the employer bears both the burden of production and persuasion and contradicts even the majority's evidentiary standard that the employer bears only the burden of production. See *supra* note 71.

\(^{7^3}\) See Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982); Rutherglen, *Title VII Class Actions,*
tion to evidence congressional intent, the Court subsequently altered the Griggs interpretation of Business Necessity, and therefore, disparate impact discrimination.

2. The Supreme Court’s Surreptitious Retreat

One decision to contradict the line of cases establishing Business Necessity as a limited exception to disparate impact discrimination is New York Transit Authority v. Beazer. The Beazer case is the only opinion espousing lenient Business Necessity where a majority on the Court actually evaluated an employer’s Business Necessity defense under Title VII. There, however, the majority equivocated on whether there was disparate impact discrimination, holding that “even if” there were prima facie discrimination, it was rebutted by the Authority’s Business Necessity proof. Moreover, the majority articulated its more lenient evidentiary and substantive standards for Business Necessity in a footnote and without reconciling its departure from Griggs, Albemarle, and Dothard. Perhaps this explains why the lower courts have virtually ignored the decision when ruling on disparate impact challenges under Title VII.

The Beazer case articulated the substance of Business Necessity to require stringent scrutiny of the criterion’s effectiveness, but only rational basis scrutiny of the criterion’s necessity. The Court applied an even more lenient standard than it articulated when it reversed the district court’s ruling that the Transit Authority’s blanket policy of refusing to employ persons who currently use methadone violated Title VII because of its impact on African-Americans and Hispanics, without disturbing the district court’s finding that the rule was “not rationally related to any employment or business needs of the TA.”

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75. (Stevens, J., joined by Burger, C.J., Stewart, Blackmun, Rehnquist, J.J.).
76. 440 U.S. at 587. See Chrisner v. Complete Auto Transit, 645 F.2d 1251, 1266 n.5 (6th Cir. 1981) (interpreting Beazer to be dicta); Lamber, Alternatives to Challenged Employee Selection Criteria: The Significance of Nonstatistical Evidence in Disparate Impact Cases under Title VII, 1985 Wis. L. REV. 1, 27. Absent proof of disparate impact, the defendant is not obligated to make a Business Necessity response. See supra Section IIA.
78. Lower courts evaluating employers’ Business Necessity responses almost never mention the Beazer decision. Where they do, however, they read it as consistent with Griggs. See, e.g., EEOC v. Kimbrough Inv. Co., 703 F.2d 98, 107 (5th Cir.), reh’g denied, 715 F.2d 577 (5th Cir. 1983); Chrisner v. Complete Auto Transit, 645 F.2d at 1266 n.5. Cf. infra notes 233, 236 and accompanying text (lower courts adopting stringent standards for Business Necessity).
79. The Court’s articulated Business Necessity standard required that the Authority’s “legitimate goals” of safety and efficiency be “significantly served by—even if they do not require”—the Authority’s methadone rule. 440 U.S. at 587 n.31.

The district court initially examined the Transit Authority’s blanket rule to exclude all metha-
larly lenient evidentiary standard by requiring employees to maintain the burden of persuasion even on the Business Necessity issue:

Whether or not [employees'] . . . weak showing was sufficient to establish a prima facie case, it clearly failed to carry [employees'] . . . ultimate burden of proving a violation of Title VII.\(^{81}\)

Justices White, Brennan, and Marshall\(^{82}\) challenged the Beazer majority's lenient Business Necessity standard and would require the Transit Authority to show:

that the rule results in a higher quality labor force, that such a labor force is necessary, or that the cost of making individual decisions about those on methadone was prohibitive.\(^{83}\)

done users from all positions with the Authority under the Due Process and equal protection clauses of the fourteenth amendment to the United States Constitution. Using a rational basis analysis, because the methadone rule was not shown to affect either a suspect class or a fundamental right, the lower court found the rule unconstitutional for lack of a reasonable basis. Beazer v. New York City Transit Auth., 399 F. Supp. 1032, 1058 (S.D.N.Y. 1975). The district court did note, however, that the Transit Authority would not be prevented from adopting reasonable rules, such as "forbidding methadone maintained persons employment in sensitive categories such as that of subway motorman, subway conductor, subway towerman, bus driver, and jobs dealing with high voltage equipment." \(^{1}\)

The district court did not initially rule on Beazer's Title VII challenge. \(^{1}\) at 1058-59. At the time of the trial court's decisions in Beazer, plaintiffs' only recourse to attorney's fees was under Title VII, 42 U.S.C. § 2000e-5(k). See Beazer v. New York City Transit Auth., 414 F. Supp. 277, 278 (1976). Thus, in an effort to recover attorneys fees under Title VII, the district court issued a supplemental opinion extending its ruling that the Authority's blanket exclusion of methadone users violated the United States Constitution to hold that the blanket rule also violated Title VII, based on the same factual finding of irrationality. Beazer v. New York City Transit Auth., 414 F. Supp. 277, 278-79 (S.D.N.Y. 1976).


The Supreme Court reversed the district court's after-the-fact and unreviewed findings under Title VII, ruling that the disparately impacting methadone rule was a Business Necessity:

the findings of the District Court establish, that TA's legitimate employment goals of safety and efficiency require the exclusion . . . of a majority of all methadone users. The District Court also held that those goals require the exclusion of all methadone users from the 25% of its positions that are "safety sensitive." . . . [T]he District Court noted that those goals [of safety and efficiency] are significantly served by—even if they do not require—TA's rule as it applies to all methadone users including those who are seeking employment in non-safety-sensitive positions.

New York City Transit Auth. v. Beazer, 440 U.S. at 587 n.31 (citation omitted). This is clearly a misstatement of the findings of the lower court.

81. 440 U.S. at 587 n.31. See infra notes 393-95 (Beazer majority defined violation of Title VII to be disparate impact without adequate Business Necessity justification whereas the majority in Griggs, Albemarle, and Dothard defined violation to be disparate impact).


83. \(^{1}\) at 602. The dissent also would require the employer to bear the burden of persuasion on the Business Necessity issue. \(^{1}\). The dissent's standard is consistent with the majority opinions in Griggs, Albemarle, and Dothard. See infra Section IB1.
They found the Transit Authority's Business Necessity proof deficient regarding the disparately impacting no-methadone rule\(^{84}\) even though they might consider justified a more specific application of the no-methadone rule, one that either excluded those successfully maintained for one year or limited the rule's application to safety-sensitive positions.\(^{85}\)

In *United States v. South Carolina*,\(^{86}\) a five-Justice majority\(^{87}\) voted to affirm without opinion\(^{88}\) an ambiguous decision of a district court.\(^{89}\) There the district court found South Carolina's use of the National Teacher Examinations (NTE) had a disparate impact.\(^{90}\) The court articulated a Business Necessity standard requiring the state to justify\(^{91}\) continued use of the tests by establishing the rationality of both the effectiveness and necessity of the tests.\(^{92}\) The court found that the state proved Business Necessity not just by the rationality standard, however, but by the more strict mid-level review standard.\(^{93}\) Thus, it is unclear

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84. Indeed, the Transit Authority never studied the relationship between methadone use and job performance at the Authority. *Id.* at 602, 609 n.15. Moreover, its assertion of necessity was contradicted by the district court's finding that the Transit Authority's normal screening process was as effective and efficient in removing high-risk applicants without need for the disparately impacting rule. *Id.* at 608 n.14. The dissent found no need for any special supervision of employed methadone users. *Id.* Moreover, the Transit Authority's assertion of effectiveness was contradicted by the district court finding that applicants on methadone for one year were "no more likely than the average applicant to turn out to be poor employees." *Id.* at 608.

85. *Id.* at 608 n.14. The dissent found "it insufficient that the rule as a whole has some relationship to employment so long as a readily identifiable and severable part of it does not." *Id.* at 602.

The majority may have inappropriately adopted more deferential scrutiny to accommodate the Transit Authority's concerns for public safety, particularly with regard to applicants and employees who were using drugs, albeit legally. See infra notes 228-32.

86. 434 U.S. 1026 (1978).

87. (Burger, C.J., Powell, Stewart, Rehnquist, and Stevens, J.J.; Marshall, Blackmun, J.J., took no part in the consideration or decision; White, Brennan, J.J., dissented).

88. Lower courts are bound by the Supreme Court's summary affirmance of three-judge district court opinions, at least until subsequent doctrinal developments justify giving them less than full precedential weight. See *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). However, summary dispositions by the Supreme Court are more easily distinguished by lower courts because it is sometimes unclear on what basis the Court was ruling. See *Gibson v. Berryhill*, 411 U.S. 564 (1973) (summary decisions are "somewhat opaque").


90. *Id.* at 1112, 1116. Employer used the NTE both to certify teachers and to set their pay.

91. The district court appeared to place both the burdens of production and persuasion on the state. *Id.* at 1112.

92. The court stated:

Thus, it was held not sufficient for the government entity to prove that the classification resulting from the test scores had a rational basis, that is, that it differentiated between persons who did and did not have some minimum verbal and communication skill. It was necessary, in addition, for the governmental entity to demonstrate that the minimum verbal and communication skill, in turn, had some rational relationship to the legitimate employment objectives of the employer.

*Id.* at 1111-12. The court stated that it adopted this standard from *Washington v. Davis*, 426 U.S. 229 (1976), a case discussing Business Necessity in dictum. See infra notes 97-110 and accompanying text.

93. The court stated: "We find however, that . . . the defendants' use of the NTE bears a 'fair
whether the Supreme Court's affirmance rests on the articulated standard or the more strict standard applied.

Justices White and Brennan dissented from this summary affirmance in an opinion questioning whether furthering the purpose of successful job training, rather than job performance, would excuse a disparately impacting test under the Business Necessity standard. Justices White and Brennan also disputed the lower court's factual finding on the effectiveness of the NTE, asking "whether . . . the validation requirement was satisfied by a study which demonstrated only that a trained person could pass the test." 9

The remaining Business Necessity decisions by the Court are all dicta. First, in Washington v. Davis, the Court discussed the Title VII Business Necessity standard although Title VII was not applicable to the case. Although the majority articulated a heightened scrutiny standard for Business Necessity under Title VII, they in fact endorsed a

and substantial relationship to the achievement of an important and constitutionally permissible governmental objective." 445 F. Supp. at 1107. See infra note 238.

The court allowed the state to use the test to certify its teachers based on the findings (1) that the state's purposes for using the test, to improve the quality of public school teaching, to certify only those with minimum knowledge to teach effectively, and to measure objectively candidates from the variety of training institutions, were not only legitimate, but also important and (2) that there was not just a rational, but a "substantial", relationship between the NTE and mastery of teacher training programs, which programs were "acknowledged" to be related to the job of teaching. 445 F. Supp. at 1108, 1112-13.

The court also allowed the state to set teachers' pay with the test based on the findings (1) that the state's purpose of providing incentives for teachers to improve their academic qualifications were both legitimate and important and (2) that the NTE provided "a reliable and economical means for measuring one element of effective teaching—the degree of knowledge possessed by the teacher." 445 F. Supp. at 1108-09, 1116.

94. Justices White and Brennan questioned "whether the court was legally correct in holding that the NTE need not be validated against job performance." 445 F. Supp. at 1028. They distinguished Washington v. Davis, see infra notes 97-106 and accompanying text, and, therefore, found this to be a question of first impression for the Court.

95. United States v. South Carolina, 434 U.S. at 1028. See infra note 110.

96. See Greenwalt, Reflections on Holding and Dictum, 39 J. LEGAL EDUC. 431, 434 (1989) ("If the authority of courts to 'make law' in a society with a legislative branch is largely a product of the necessity of courts' resolving disputes, then the authority of a particular court should extend only to what is needed to resolve the dispute, not further.").


100. The majority articulated the following standard:

[i]t is an insufficient response to demonstrate some rational basis for the [disparately impacting] challenged practices under Title VII. It is necessary, in addition, that they be "validated" in terms of job performance 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. However this process proceeds, it involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and execu-
reduced standard to determine the necessity of the criterion. After holding that the disparately impacting test was legal under non-Title VII standards\textsuperscript{101} where it achieved the end of selecting those candidates who could master the police training program, rather than those candidates who could perform as police officers,\textsuperscript{102} the majority opined that the conclusion was not foreclosed by \textit{Griggs} and \textit{Albemarle}\textsuperscript{103} and "seems to us the much more sensible construction of the job-relatedness requirement."\textsuperscript{104} In actuality, however, the importance of candidates successfully completing a training program is merely the marginal cost of training unsuccessful candidates,\textsuperscript{105} a less compelling purpose than required for Business Necessity by \textit{Griggs} and \textit{Albemarle}.\textsuperscript{106}

The dissent in \textit{Washington v. Davis},\textsuperscript{107} however, would find Business Necessity only where the disparately impacting criterion used to make hiring decisions\textsuperscript{108} furthered the end of predicting successful job performance as a police officer, not predicting success in the training program.\textsuperscript{109}

\begin{itemize}
  \item \textit{Id.} at 247.
  \item \textit{Id.} at 249-50.
  \item \textit{Id.} at 250-52 (The majority found that the "advisability [of the police recruit training program] . . . seems conceded" and further found that the "conclusion of the District Court Judge that training-program validation may itself be sufficient is supported by the regulations of the Civil Service Commission, by the opinion evidence placed before the District Judge, and by the current views of the Civil Service Commissioners who were parties to the case").
  \item \textit{Washington v. Davis}, 426 U.S. at 251. These decisions were the only precedent on Business Necessity at the time of this decision.
  \item \textit{Id.}
  \item \textit{Id.} at 234. See infra notes 212-16 and accompanying text.
  \item \textit{Washington v. Davis}, 426 U.S. at 266-68 (Brennan, J., joined by Marshall, J., dissenting from summary affirmance of district court decision) (limiting \textit{Washington v. Davis} to cases challenging disparate impact of a test used to determine eligibility to enter a police training course, not to become certified for employment or to set pay for those employed); Blake v. City of Los Angeles, 595 F.2d 1367, 1382 n.17 (9th Cir. 1978) (limiting applicability of \textit{Washington v. Davis} to determine whether candidate has minimal capacity needed to understand training), \textit{cert. denied}, 446 U.S. 928 (1980); Brunet v. City of Columbus, 642 F. Supp. 1214, 1247 (S.D. Ohio 1986) (same).

Examination of \textit{Washington v. Davis}, in fact, reveals the more limited use of the disparately impacting test in that case: "to be accepted by the [Police] Department and to enter an intensive 17-week training program, the police recruit was required . . . to receive a grade of at least 40 out of 80 on 'Test 21.'" \textit{Washington v. Davis}, 426 U.S. at 234. Indeed, the test was characterized as a "qualifying" test challenged as a discriminatory "recruiting" procedure. \textit{Id.} at 232. See \textit{id.} at 256 (Stevens, J., concurring) (test used to predict ability to master training program, not ability to perform job).

\item The dissent supported its strict view of Business Necessity with citation to precedent,
The majority and dissent also disputed the factual predicate necessary to prove the effectiveness of the test to achieve the employer’s purpose.  

In the last two terms, members of the Court have articulated a lenient Business Necessity standard in dicta. In Watson v. Fort Worth Bank and Trust, a plurality espoused a lenient Business Necessity standard notwithstanding that neither the district court nor the court of appeals even evaluated, much less credited, the prima facie disparate impact evidence. Substantively, the plurality would only require an employer to explain that the disparately impacting criterion is “based on legitimate business reasons.” Without factual context to explain their standard by application, the Justices endorsed the lenient effectiveness showing of New York City Transit Authority v. Beazer, and the lenient necessity showing of Washington v. Davis. They did not refer to EEOC regulations and Congressional intent. Washington v. Davis, 426 U.S. at 264-69. Indeed, they would find the correlation between Test 21 and training performance to be sufficient to satisfy Business Necessity to justify employer’s hiring decisions only when: “(1) the training curriculum includes information proved to be important to job performance and (2) the standard used as a measure of training performance is shown to reflect the trainees’ mastery of the material included in the training curriculum.”  

110. Id. at 250-52 (majority) (finding correlation between disparately impacting Test 21 and final examination score in training program to support effectiveness of Test 21); id. at 270 (dissent) (“Where employers try to validate written qualification tests by proving a correlation with written examinations in a training course, there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than ‘job specific ability’. As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is ‘job-related’ is plainly erroneous.”).  


112. (Justices O’Connor, Rehnquist, White and Scalia).  

113. Id. at 2783. The Court granted certiorari to decide whether disparate impact analysis could be applied to subjective selection practices, such as “simply committing employment decisions to the uncheckered discretion of the white supervisory corps.” Watson v. Fort Worth Bank and Trust, 483 U.S. 1004 (1987). The Court unanimously reversed the lower court decision and ruled that as a matter of law, disparate impact analysis did apply to evaluate an employer’s subjective selection criteria. Watson v. Fort Worth Bank and Trust, 487 U.S. at 988, 999, 1009 (Justice Kennedy did not participate in the decision).  

The District Court considered Watson’s challenge to her employer’s subjective promotion practices under the disparate treatment theory and refused to consider them under the disparate impact theory. Id. at 984. The Court of Appeals affirmed. Id. When the Supreme Court reversed and determined that Watson’s claims should be evaluated under the disparate impact theory, Justice O’Connor, joined by Chief Justice Rehnquist and Justices White and Scalia, felt required to opine on the standards for establishing Business Necessity, id. at 994 n.2, whereas Justice Stevens, id. at 1009-10, and Justice Blackmun, joined by Justices Brennan and Marshall, id. at 1001 n.1, felt discussion on the standards for establishing Business Necessity to be unnecessary.  

114. Id. at 997.  


Griggs, Albemarle, or Dothard. Procedurally, they would require an employer to bear only the burden of production.

In response, Justices Blackmun, Brennan and Marshall articulated a stricter standard for Business Necessity requiring the employer to bear both the burden of production and the burden of persuasion that its disparate impacting employment criteria are "necessary to fulfill legitimate business requirements" (emphasis added). They supported this standard with early Business Necessity precedent and concluded: "The criterion must directly relate to a prospective employee's ability to perform the job effectively." Most recently, in Wards Cove Packing Co., Inc. v. Atonio, a new Court majority endorsed a light Business Necessity standard despite its recognition that inquiry into the Business Necessity standard was "pretermitted" by their ruling that Atonio's statistical showing failed to make out a prima facie case of disparate impact, the prerequisite for an employer's Business Necessity response. The majority determined that an employer bore only the burden of production on Business Necessity.

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117. See supra Section IBI.
118. Watson v. Fort Worth Bank and Trust, 487 U.S. at 997. The plurality quoted Griggs' evidentiary standard and concluded: "such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to defendant." Id.
119. Watson v. Fort Worth Bank and Trust, 487 U.S. at 1011 n.1 (Blackmun, J., joined by Brennan, Marshall, J.J., concurring). Justice Stevens refused to opine regarding the standard for Business Necessity in the context of this case. Id. at 1011 (Stevens, J., concurring).
120. Id. at 1000 (Blackmun, J., joined by Brennan, Marshall, J.J., concurring). They support their evidentiary standard with precedent and the substantive distinction between employer's rebuttal in pretextual disparate treatment cases, where employer bears the burden of production, and employer's defense to disparate impact discrimination. Id.
121. Id. at 1005-06. By this stricter standard, the disparately impacting criterion must be "necessary to fulfill legitimate business requirements" rather than merely "based on legitimate business reasons." Compare Watson v. Fort Worth Bank and Trust, 487 U.S. at 997-98 (O'Connor, J., joined by Rehnquist, C.J., White, Scalia, J.J.) with Watson v. Fort Worth Bank and Trust, 487 U.S. at 1005-06 (Blackmun, J., joined by Brennan, Marshall, J.J.).
122. See supra Section IBI.
123. Watson v. Fort Worth Bank and Trust, 487 U.S. at 1005-06.
126. Id. at 2124. The questions presented on appeal were:
(1) Does statistical evidence that shows only concentration of minorities in jobs not at issue fail, as a matter of law, to establish disparate impact of hiring practices where employer hires for at-issue jobs from outside workforce and does not promote from within or provide training for such jobs, and where minorities are not underrepresented in at-issue jobs? (2) Did court below commit error in allowing employees to challenge cumulative effect of wide range of alleged employment practices under disparate impact model? Wards Cove Packing Co. v. Atonio, 57 U.S.L.W. 3028 (1988). The issue of employer's Business Necessity response to disparate impact discrimination was not presented.
peared to depart from precedent, rather than confront the precedent and overrule it, they stated that inconsistent precedent, such as \textit{Dothard}, “should have been understood to mean an employer’s production—but not persuasion—burden.”

Substantively, they required that the disparately impacting criterion “serves, in a significant way, the legitimate employment goals of the employer.” Justice White’s attempts to explain this standard were crippled by the lack of specific factual context before the Court. He, therefore, ruled out only the most extreme of standards in explanation of his substantive standard:

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mere insubstantial justification . . . will not suffice. . . . At the same time, though, there is no requirement that the challenged practice be “essential” or “indispensable” to the employer’s business for it to pass muster. . . .
\end{quote}

Justice Stevens, writing for the dissent, disputed assigning employers merely the burden of production for Business Necessity and refused to comment on the substantive standard for the Business Necessity defense because it was “not fairly raised at this point.”

In sum, the Court has not only retreated from the law of Business Necessity, but has done so indirectly. As this review of the Supreme Court’s Business Necessity precedent has shown, those Justices who have expanded the Business Necessity exception have done so in opinions whose precedential value is limited, in opinions that articulate one

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\item \[128. \textit{Id. at 2125-26.} \text{This substantive standard sounds more stringent than the plurality’s standard in \textit{Watson v. Fort Worth Bank and Trust, 487 U.S. at 996-97, see supra notes 114-17 and accompanying text, in that it requires the disparately impacting selection criterion to serve “in a significant way,” rather than merely be “based on” employer’s legitimate business purpose.}
\item \[130. \textit{109 S. Ct. at 2126.} \text{Ambiguously, Justice White refers to the Business Necessity burden alternatively as “the expensive and time-consuming task of defending the ‘business necessity’ of the methods used,” \textit{id. at 2122, and “the legitimate business justification defense,” \textit{id. at 2126.}
\item \[131. \textit{Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2127 (Stevens, J., joined by Brennan, Marshall, Blackmun, J.J., dissenting).}
\item \[132. \text{Justice Stevens found \textit{FED. R. EVID. 301} inapplicable to proof of Business Necessity because \textit{FED. R. EVID. 301} is applicable only where a presumption arises. \textit{id. at 2132 n.18. Moreover, he criticized applying the evidentiary standard from employer’s rebuttal burden in pretextual disparate treatment cases to the wholly distinct case of an employer’s affirmative defense to disparate impact discrimination. \textit{id. at 2130-32.}
\item \[133. \textit{Id. at 2127 n.3.}
\item \[134. \text{One opinion endorsed the lenient standard in a footnote reversing the district court based on misstatements of the district court’s findings, without benefit of the court of appeal’s review of the issue, and after finessing whether it found a prima facie case of disparate impact. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 & n.31 (1979). In a second opinion, the Court affirmed without opinion a district court decision espousing a lenient Business Necessity standard. United States v. South Carolina, 434 U.S. 1026 (1978) (Burger, C.J., and Powell, Stewart, Rehnquist, Stevens, J.J.). The final three opinions espoused a lenient Business Necessity standard in dictum. See \textit{Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2124 (dictum because no prima facie case of disparate impact); Watson v. Fort Worth Bank and Trust, 487 U.S. at 983-84, 998-99 (dictum because lower court dismissed as matter of law without finding prima facie case of disparate impact);\textit{}}
\end{itemize}
level of judicial scrutiny and then apply a different one,\textsuperscript{135} in opinions that contradict one another,\textsuperscript{136} and in opinions that neither admit their departure from the earlier law of Business Necessity nor reconcile their standard with earlier law.\textsuperscript{137}

The consequence of this manner of expanding the Business Necessity exception is confusion regarding the legal standard for Business Necessity.\textsuperscript{138} Indeed, not only is the emerging standard less than clear, but

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\textsuperscript{137} See, e.g., Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2125, 2126 (Acknowledging that precedent "can be read as suggesting otherwise," majority reinterpreted, without overruling, precedent to require that employer bear only burden of production. Majority also glossed over the distinction between their more lenient and the more exacting substantive standard for Business Necessity by noting: "though we have phrased the query differently in different cases, . . ."); Watson v. Fort Worth Bank and Trust, 487 U.S. at 993 n.2, 996-98 (O'Connor, J., joined by Rehnquist, C.J., White, Scalia, J.J.) (dismissing, without distinguishing, precedent with "we do not believe that each verbal formulation used in prior opinions to describe the evidentiary standards in disparate impact cases is automatically applicable in light of today's decision." The plurality reinterpreted Griggs to redefine the evidentiary standard and cited only questionable precedent, ignoring sound precedent, to redefine the substantive standard of Business Necessity); New York City Transit Auth. v. Beazer, 440 U.S. at 587 n.31 (citing precedent as consistent); Washington v. Davis, 426 U.S. at 250-51 (conclusorily stating "in our conclusion foreclosed by" inconsistent precedent).


\textsuperscript{138} Authors have opined on the appropriate standard for Business Necessity. See, e.g., Brodin, supra note 41, at 320 (limit BFOQ exception and Business Necessity defense to situations where employee is unable to perform the job); Caldwell, \textit{Reaffirming the Disproportionate Effects Standard of Liability in Title VII Litigation}, 46 U. PITT. L. REV. 555, 591-93 (1985) (endorsing strict Business Necessity of Robinson v. Lorillard Corp., 444 F.2d 791, 798 & n.7 (4th Cir. 1971)); Cox, \textit{Substance and Process in Employment Discrimination Law: One View of the Swamp}, 18 VAL. U.L. REV. 21, 86, 91-118 (varied levels of scrutiny Under Business Necessity reflect three functions of disparate impact discrimination); Furnish, \textit{A Path Through the Maze: Disparate Impact and Disparate Treatment
it is questionable just what the law is—the emerging, lenient standard or the earlier, more exacting one.\(^{139}\) Moreover, the Court’s approach may explain the lower courts’ almost complete failure to use or distinguish the emerging Business Necessity standard.\(^{140}\) Finally, the Court’s method of

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\(^{139}\) Notwithstanding that Wards Cove Packing Co. v. Atonio is the latest decision in the trend toward reducing employer’s Business Necessity burdens, it is heralded as effecting a change to the law. See Nash v. Jacksonville, 837 F.2d 1534 (11th Cir. 1988), vacated, 109 S. Ct. 3151 (1989) (vacating judgment for employee where employer merely presented evidence of how test was prepared because lower court imposed on employer burden of persuasion that test was job-related); Zamlen v. City of Cleveland, 906 F.2d 209, 217 (6th Cir. 1990) (Wards Cove lowered Business Necessity standard even further than deferential standard normally used when practices are justified by concerns of safety), petition for cert. filed, 59 U.S.L.W. 3483 (U.S. Dec. 27, 1990) (No. 90-1046) (see infra note 228); Green v. USX Corp., 896 F.2d 801, 805 (3d Cir. 1990) (Ward’s Cove “relaxed the employer’s burden to rebut the plaintiff’s prima facie case”), petition for cert. filed, 59 U.S.L.W. 3771 (U.S. May 23, 1990) (No. 89-1816); Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989) (Posner, J.) (Wards Cove “modified the ground rules that most lower courts had followed in disparate-impact cases” by “return[ing] the burden of persuasion to the [employee], and also dilut[ing] the ‘necessity’ in the ‘business necessity’ defense.”).

\(^{140}\) Most lower courts have adopted the more exacting standard for Business Necessity without discussing the Court’s split. See, e.g., Comment, supra note 138, at 918-20, 933-34; GA. NOTE, supra note 33, at 386-400; Note, Rebutting the Griggs Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives, 1981 U. ILL. L. REV. 181, 193 n.67, 199-200, 203-07 [hereinafter ILL. NOTE] (noting lower court’s exacting standard for both Business Necessity and employee’s rebuttal to Business Necessity). See infra note 362 (lower courts assigning employer burden of persuasion); infra notes 233, 236 (lower courts adopting heightened review for Business
changing the law of Business Necessity has inhibited dialogue on the Court and has, until the last Supreme Court term, diffused public debate on the issue.

The law of Business Necessity is ripe for clarification. The new majority on the Court has expressed its inclination to contract the protection of disparate impact doctrine by expanding Business Necessity, despite the wealth of contradictory precedent and the still vehement objection of Justices Blackmun, Brennan, and Marshall. At the same time, Congress is considering legislation to reassert its commitment to minimizing disparate impact discrimination by clarifying that Business Necessity is intended to be narrow. The next section proposes a stan-

141. Justice Stevens twice refused to discuss the Business Necessity issue when not fairly presented by the case before the Court. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2127 n.3 (Stevens, J., joined by Brennan, Marshall, Blackmun, J.J., dissenting); Watson v. Fort Worth Bank and Trust, 487 U.S. at 1011 (Stevens, J., concurring). Moreover, the faction endorsing a lenient Business Necessity standard has failed to respond to the challenge that their standard contradicts precedent.

142. The drift towards a more lenient standard for Business Necessity has gone virtually unnoticed by the public until recently. During the current Supreme Court term, however, Reagan appointees, Justices O'Connor, Scalia, and Kennedy, have aligned with Chief Justice Rehnquist and Justice White to create a five-person majority that has sharply restricted civil rights of women and non-whites. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (restricting voluntary affirmative action plans under equal protection clause of the fourteenth amendment to the United States Constitution); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (expanding employer's Business Necessity defense to disparate impact discrimination under Title VII); Martin v. Wilks, 109 S. Ct. 2180 (1989) (allowing "collateral attacks" to affirmative action plans contained in previously approved consent decrees under Title VII); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (construing 42 U.S.C. § 1981 to deny relief for racial harassment). Those decisions, including the Atonio decision espousing lenient Business Necessity, have begun to spur public debate on Business Necessity. See, e.g., Biskupic, Groups Look to Capitol Hill for Help on Civil Rights, 47 CONG. Q. WEEKLY REP. 1479-81 (June 17, 1989).


145. See supra note 9.

standard for Business Necessity that preserves the protection of disparate impact doctrine while accommodating employers' business needs.

II
DEVELOPING A COHERENT STANDARD FOR BUSINESS NECESSITY

As there no longer exists a clear and consistent standard for the Business Necessity exception to disparate impact discrimination under Title VII, it is essential that one now be developed. Given that Congress has not adopted an explicit Business Necessity defense, Congress' explicit BFOQ defense to disparate treatment discrimination provides the most appropriate model to develop a Business Necessity standard. The Business Necessity standard developed in this article would require an employer to bear the burden of persuasion that the disparately impacting criterion is substantially effective in achieving its important business purpose that cannot be accomplished by a less discriminatory criterion. This Business Necessity standard is essentially Congress' BFOQ exception, with a slightly less stringent level of judicial scrutiny to accommodate the distinctions between defending against disparate treatment discrimination (BFOQ exception) and disparate impact discrimination (Business Necessity exception).

A. Beginning at the Source: Congress' BFOQ Exception

1. The BFOQ Standard under Title VII

In resolving disputes regarding statutory interpretation, the intent of Congress is critical. Congress did not articulate an explicit standard for


Moreover, even absent response by Congress, state legislatures may respond. Many states have laws which are virtually identical to Title VII. See 3 Empl. Prac. Guide (CCH). To the extent the federal judiciary changes its commitment to equal employment opportunity, the state judiciaries or legislatures might be encouraged to take the initiative.

146. Cf. supra note 9.

147. The proposed standard can be made law either by its resurrection by the Supreme Court or by explicit amendment by Congress. Indeed, Congress could accomplish explicit adoption of this standard by adding to Section 703(e):

It shall not be an unlawful employment practice for an employer to use an employment practice which results in a disparate impact based on race, color, religion, sex, or national origin in those circumstances where the employment practice is substantially effective in achieving an important business purpose.
Business Necessity. Indeed, the 88th Congress, which enacted Title VII, did not specifically contemplate disparate impact discrimination, much less the Business Necessity defense.\textsuperscript{148}

By Section 703(e)(1),\textsuperscript{149} however, Congress did provide an explicit exception to excuse discrimination otherwise prohibited under Title VII. That Section created the bona fide occupational qualification exception [BFOQ exception] to disparate treatment discrimination.\textsuperscript{150}

Courts have interpreted the BFOQ exception to provide a clear, consistent standard to excuse disparate treatment discrimination. Procedurally, the BFOQ exception has been interpreted as an affirmative defense where the employer bears the initial burden of production and the

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148. Debate in the literature regarding the legitimacy of disparate impact is beyond the scope of this article. The focus of this debate is whether the legislative history of Title VII supports the disparate impact theory. See Gold, supra note 138, passim (Congress did not intend disparate impact theory as evidenced by 1964 legislative history). But see Thompson, supra note 73 (1972 legislative history ratified disparate impact theory); Gold, \textit{Reply to Thompson}, 8 INDUS. REL. L.J. 117 (1986) (absent amendment or reenactment of pertinent provisions of Title VII, 1972 legislative history did not "ratify") disparate impact theory). See generally Fiss, \textit{A Theory of Fair Employment Laws}, 38 U. CHI. L. REV. 235, 240 (1971) (likely neither statutory language nor legislative history regarding goals of fair employment statute is decisive).


\textit{it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those circumstances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . }

150. The BFOQ exception excuses distinctions based on the religion, sex or national origin of the employee—disparate treatment discrimination—whereas the Business Necessity exception excuses distinctions based on such facially neutral criteria as educational attainments—disparate impact discrimination. \textit{Compare} Dothard v. Rawlinson, 433 U.S. 321, 331 n.14 (1982) (Business Necessity defense for facially neutral criteria, such as minimum height and weight standards with \textit{id.}, at 332-33 (BFOQ defense for protected criteria, such as sex). See Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1086 n.8 (8th Cir.), \textit{cert. denied} 446 U.S. 966 (1980). In fetal vulnerability cases, however, courts have excused what appears to be disparate treatment discrimination with the Business Necessity defense. \textit{See} International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 886-87 (7th Cir. 1989), \textit{cert. granted}, 110 S. Ct. 1522 (1990); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984); Wright v. Olin Corp., 697 F.2d 1172, 1186 n.21 (4th Cir. 1982). \textit{Cf.} S. 2104, supra note 9, § 4 (limiting Business Necessity defense to disparate impact claims); H.R. 4000, supra note 9, § 4 (same).

The distinctions between disparate treatment and disparate impact discrimination are not of a nature to undermine using Congress' BFOQ exception to interpret the Business Necessity exception under Title VII. \textit{See infra} notes 274-300 and accompanying text.
ultimate burden of persuasion for proving the exception.151 Substantively, to be excused from liability for disparate treatment discrimination under the BFOQ exception, the employer must persuade the court using strict judicial scrutiny that distinguishing based on employees' protected status is both necessary and effective.

The necessity test under the BFOQ exception requires that the employer first identify the goal or end to be achieved by its disparate treatment of employees. The employer then must show that its identified purpose is "reasonably necessary to the normal operation of that particular business." The necessity test, therefore, examines the relationship between the purpose achieved by the disparate treatment and the needs of the business.

The standard of scrutiny under the necessity test is strict,152 such that:

discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex [or other protected category] exclusively.153

Courts have allowed only one purpose to satisfy the strict necessity test of the BFOQ exception: predicting successful performance of a job shown to be essential to the operation of the business.154 For example, using gender to predict ability to portray authentically a character would satisfy the BFOQ exception for actors/actresses.155

The BFOQ exception also requires that an employer establish that the challenged criterion actually "is a bona fide occupational qualification." Thus, the employer must demonstrate effectiveness by examining the relationship between the protected factor and employer's purpose of predicting successful performance for an essential job.

151. Dothard v. Rawlinson, 433 U.S. at 332-34; Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228, 232 (5th Cir. 1969) (party claiming to fall within exception to humanitarian, remedial statute serving important public purpose (such as Title VII) bears burden of persuasion).

152. Thus, the BFOQ defense requires "a business necessity test, not a business convenience test." Diaz v. Pan American World Airways, 442 F.2d 385, 388 (5th Cir.) (emphasis in original), cert. denied, 404 U.S. 950 (1971).

153. Id. (emphasis in original) (employer failed to establish the BFOQ exception because even the proved inability of men to perform the non-mechanical functions of the flight cabin attendant job was merely "tangential" to the essence of the airline's business. "No one has suggested that having male stewards will so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide safe transportation from one place to another.") See Dothard v. Rawlinson, 433 U.S. at 334-35 (BFOQ established in part where Alabama selected only male correctional officers for maximum-security male prisons because their ability to maintain order in the prisons was the "essence of a correctional officer's job" and was clearly essential to the functioning of the prison).


The standard of scrutiny under the effectiveness test is also strict. The most direct way of satisfying that standard of effectiveness would require the employer to establish:

reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women [or other groups protected by Title VII] would be unable to perform safely and efficiently the duties of the job involved.156

Thus, the protected factor must almost perfectly accomplish the employer's purpose of predicting job performance to satisfy the BFOQ's effectiveness test.

Courts have adopted an alternative effectiveness test to accommodate situations where the challenged criterion, although imperfect, proved to be the only feasible way to accomplish the employer's purpose. By that alternative, the employer may apply merely a "reasonable" rule after proving that it is "impossible or highly impractical" to predict successful job performance without reference to the protected factor.157 In Western Air Lines v. Criswell,158 the airline could not retire flight engineers on the basis of age because it failed to persuade the fact finder that virtually all individuals over age 60 were incapable of performing as flight engineers, or in the alternative, that it was impossible or impracticable to judge future job performance except by age.159

The BFOQ exception excuses disparate treatment discrimination under Title VII only when the employer satisfies strict judicial scrutiny under both the necessity and effectiveness tests.160 Even then, the em-

156. Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228, 235 (5th Cir. 1969). See Dothard v. Rawlinson, 433 U.S. at 335-36 (Alabama established BFOQ to select only male correctional officers where court found that all women are unable to perform the job of correctional officer because their "very womanhood" directly reduced their ability to maintain order in a male, maximum-security prison where inmates were not classified or segregated by their offense or level of dangerousness.). Cf. id. at 343-46 (Marshall, Brennan, J.J., dissenting) (adopting effectiveness standard of majority but challenging majority's use of gender stereotype as a substitute for factual support for that component of BFOQ test, see infra note 226); Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 YALE L.J. 913 (1983) (critique of Court's, sometimes unconscious, use of stereotypes and societal constraints to excuse gender discrimination under the equal protection clause of the fourteenth amendment to the United States Constitution).

157. See Weeks v. Southern Bell Tel. & Tel., 408 F.2d at 235 n.5.


159. Western's argument that it was impracticable to test flight engineers on an individualized basis was undercut by evidence that other businesses in the industry evaluated employees individually, that this airline used individual testing for younger flight staff, and that the Federal Aviation Agency believed individualized testing to be practicable. See Western Air Lines v. Criswell, 472 U.S. at 423.

160. In Diaz v. Pan American World Airways, 442 F.2d at 388-89, the court refused to find
ployer must establish that there are no less discriminatory ways to accomplish its business need. Thus, an employer must respect the equal employment opportunities of those protected by Title VII absent proof of the most compelling of business need. Efforts in Congress to shift the balance from equal employment opportunity more in favor of employer prerogatives were defeated.

2. Analogies between BFOQ and Business Necessity

The standard for the BFOQ exception provides useful insight for developing a Business Necessity exception based on the many analogies between the BFOQ and Business Necessity exceptions.

Early on Congress recognized the analogy between the BFOQ and

customer preference for one sex to be a BFOQ, even if all or substantially all men would not be preferred by airline customers as cabin flight attendants—the effectiveness test—because dissatisfied customer preference does not establish "the company's inability to perform the primary function or service it offers," in this case safe transportation—the necessity test. The Diaz court distinguished Weeks v. Southern Bell Tel. & Tel., by finding:

[I]n Weeks, the job that most women supposedly could not do was necessary to the normal operation of the business. Indeed, the inability of switchmen to perform his or her job could cause the telephone system to break down. This is of an entirely different magnitude than a male steward who is perhaps not as soothing on a flight as a female stewardess.

Diaz v. Pan American World Airways, 442 F.2d at 388. Analogously, in Weeks v. Southern Bell Tel. & Tel., 408 F.2d at 234-36, the court refused to find a BFOQ, despite satisfaction of the necessity test, because the company could not prove that all or substantially all women could not perform effectively as switchmen—the effectiveness test.

The Dothard Court found that defendant successfully established the BFOQ exception where gender was both necessary and effective: "The employee's very womanhood would thus directly undermine her capacity to provide security that is the essence of a correctional counselor's responsibility." Dothard v. Rawlinson, 433 U.S. 321, 336 (1977).

161. See Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087 (8th Cir.) (BFOQ established only upon proof of no less discriminatory alternative), cert. denied, 446 U.S. 966 (1980).

162. Senator McClellan attempted to expand employer prerogatives by amending Title VII to excuse disparate treatment discrimination:

where the employer involved believes, on the basis of substantial evidence, that the hiring of such an individual of a particular race, color, religion, sex, or national origin will be more beneficial to the normal operation of the particular business or enterprise involved or to the good will thereof than the hiring of an individual without consideration of his race, color, religion, sex, or national origin, or . . . where the employer involved believes, on the basis of substantial evidence, that the hiring of such individual would not be in the best interests of the particular business or enterprise involved, or for the good will thereof.

110 Cong. Rec. 13,825 (June 15, 1964). Senator Case spoke against the amendment, characterizing it as an effort to, in effect, eliminate Title VII. Id. The amendment was defeated in a roll-call vote of 30 yeas and 61 nays. Id. at 13,826.

163. See Brodin, supra note 41, at 359 & n.228. Cf. Comment, supra note 138, at 922 (look to Congress for guidance on how to weigh equal employment opportunity and employer business costs and needs).

Several lower courts view the BFOQ and Business Necessity standards as interchangeable. Chambers v. Omaha Girls Club, 834 F.2d 697, 704, 706, 708 (8th Cir. 1987) (BFOQ analysis “similar to and overlaps with” the business necessity test); Davis v. City of Dallas, 777 F.2d 205, 214 n.8 (5th Cir. 1985), cert. denied, 476 U.S. 1116 (1986); Levin v. Delta Air Lines, 730 F.2d 994, 997-99 (5th Cir. 1984) (both BFOQ and Business Necessity require justifications “grounded in the functional necessities of business operation”).
the Business Necessity standards when it sought to legislate a Business Necessity exception. Congress proposed to excuse professionally developed ability tests which were: "directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position concerned."\footnote{164} Although that provision was not incorporated into the 1972 amendments to Title VII, the legislative history of the provision suggests that Congress' failure to enact it did not reflect disagreement with its substance.\footnote{165}

Despite the lack of explicit language for the Business Necessity exception, however, the parallels between the BFOQ and Business Necessity exceptions support adopting the BFOQ as the model for the Business Necessity exception. Initially, courts will not scrutinize an employer's selection criteria under either the BFOQ or Business Necessity exceptions absent proof of discrimination based on race, color, religion, sex, or national origin.\footnote{166} Under disparate treatment theory, an employer must prove the BFOQ exception only when an employee proves her employer purposefully,\footnote{167} whether overtly\footnote{168} or pretextually,\footnote{169} distinguished be-

\footnote{164. The 92d Congress sought to amend Section 703(h) to codify the Business Necessity exception which had been read into that provision by Griggs v. Duke Power Co., 401 U.S. at 436. See supra note 182. By that amendment, Section 703(h) would have read: nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test which is directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position concerned: Provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. (emphasis added) H.R. 1746, 92d Cong., 1st Sess., 117 Cong. Rec. 17,539 (1971), H.R. Rep. No. 238 (amendment emphasized). That amendment tracked the language of the BFOQ exception in creating an explicit Business Necessity exception under Section 703(h). Compare Section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1988) (BFOQ exception) with H.R. 1746 (quoted supra) (Business Necessity exception).}
between employees based on their race, color, religion, sex, or national origin.\footnote{170} Absent such proof, disparate treatment theory does not authorize a court to interfere with the employer’s discretion to use any selection device to discriminate between employees, even if that device is irrational or arbitrary. Similarly, under disparate impact theory, an employer must prove that its use of a facially neutral selection criterion is a Business Necessity only after an employee demonstrates that her employer’s selection criterion has a disparate impact based on race, color, religion, sex, or national origin.\footnote{171} Absent such proof of disparate impact discrimination, the inference that the employer had a discriminatory motive, \emph{Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)} (inferences of discrimination are raised because “when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer’s actions, it is more likely than not the employer, who we generally assume acts only with \emph{some} reason, based his decision on an impermissible consideration such as race”) (emphasis in original).

Employer may respond to employee’s prima facie proof in two ways. First, employer may try to defeat the employee’s prima facie case by denying or challenging employee’s prima facie proof. International Bhd. of Teamsters v. United States, 431 U.S. at 361-62 & n.50. Second, employer may try to overcome the inference of discriminatory intent established in employee’s successful prima facie case by bearing the burden to produce evidence of some legitimate, nondiscriminatory reason to explain the employment decision. \emph{See Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 251, 254-57 & n.9 (1981)} (employer must articulate lawful reason (i.e. reason other than race, color, religion, sex, or national origin) to explain decision affecting employee; in this case employer explained decision not to promote and to terminate employee by testifying that she was not as qualified as the employee who was promoted and that she did not work well with coworkers); Furnco Constr. Corp. v. Waters, 438 U.S. at 578 (employer did not hire employees at the gate because it hired no one at the gate, rather it hired only those employees known to be experienced). \emph{See International Bhd. of Teamsters v. United States, 431 U.S. at 342 & n.24.}

Finally, an employee may challenge the employer’s rebuttal explanation, and attempt to reassert the inference that the employer had a discriminatory motive, by trying to establish that employer’s explanation is really a “pretext” for discriminatory motive. \emph{Furnco Constr. Corp. v. Waters, 438 U.S. at 578} (distinguishing “pretext,” a subterfuge for illegal discriminatory motive, from hiring policies which maximize hiring members of underrepresented groups, not required absent proof of violation of Title VII); International Bhd. of Teamsters v. United States, 431 U.S. at 331, 337; McDonnell Douglas Corp. v. Green, 411 U.S. at 804 (pretext evidence includes, for example, evidence that white employees in the same position as plaintiff with regard to employer’s explanation were nonetheless rehired). Employees retain the burden of persuasion throughout to prove that the employer violated Title VII by purposefully treating the employee differently because of one of the factors protected by Title VII. \emph{Texas Dep’t of Community Affairs v. Burdine, 450 U.S. at 253, 256.}

\footnote{170} Thus, judicial scrutiny under a disparate treatment theory is triggered when an employer’s selection criterion is itself one of the factors protected under Title VII.

\footnote{171} \emph{See supra} Section IA.
the employer may use any facially neutral selection criterion, regardless of its rationality.

Once an employee establishes either disparate treatment or disparate impact discrimination, however, the employer would be liable absent establishing justification sufficient to excuse that discrimination under Title VII. Although the focus of the theories, and therefore the proof under them, is distinct, the BFOQ exception to disparate treatment discrimination and the Business Necessity exception to disparate impact discrimination both excuse discrimination which is otherwise prohibited by Title VII.

Both the BFOQ and Business Necessity exceptions constrain the nation's commitment to equal employment opportunity by excusing justified discrimination under Title VII. The thrust of the BFOQ exception is not to rebut or deny the disparate treatment. Indeed, the employer must offer its rebuttal and denial evidence before the court rules on whether the employee has proved disparate treatment discrimination. Rather, the BFOQ exception focuses on justifying the already established disparate treatment discrimination. Analogously, the Court has interpreted Business Necessity not as rebuttal or denial of an employee's disparate impact case; rather, the Supreme Court's various standards of Business Necessity discrimination.

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172. Disparate treatment discrimination is concerned with employers' motivation for selection decisions whereas disparate impact discrimination is concerned with the consequences of employers' selection decisions, regardless of the employer's motivation for adopting them. See supra notes 12, 23. Authors' attempts to unify disparate treatment and disparate impact discrimination gloss over this fundamental difference. See Willborn, supra note 33, at 825. But see Furnish, supra note 138, at 445 (noting Court's trend toward merger and cautioning against such a merger where inappropriate to substance, rather than ease of proof, between two types of discrimination); Smith, supra note 138, at 394-95 n.112.


Proof of disparate impact in an employer's workforce, while perhaps sufficient to prove disparate impact discrimination, see supra Section IA, has not been deemed sufficient to raise an inference of intentional discrimination, except in extreme cases. See Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266-68 (1977); Washington v. Davis, 426 U.S. at 239, 242.

This does not necessarily mean that employee's proof under disparate impact is easier than under disparate treatment. To establish case of disparate impact discrimination, employee must prove that a particular employment practice caused a disproportionate impact against his protected group. See Section IA, supra. See Caldwell, supra note 138, at 591, 604 (prima facie case of impact requires highly sophisticated and particularized statistical proofs); Smith, supra note 138, at 394-95 n.112. To establish a case of intentional discrimination, on the other hand, employee can offer a variety of proof, including proof regarding his individual circumstance alone. See supra notes 168-69. But cf. supra note 31 (individual cases of disparate impact without statistical evidence). Indeed, treating men with pregnant wives differently than men and women with spouses disabled by any medical conditions constitutes disparate treatment, but may not have sufficient impact against men to constitute disparate impact. See Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 684 (1983).

174. See supra Section I; Furnish, supra note 138, at 441. It would be illogical to have employer's Business Necessity response consist of the same denial proof already evaluated when consid-
sity all require the employer to justify using the disparately impacting criterion in the employment context. Thus, like the BFOQ, Business Necessity does not establish that the challenged criterion is nondiscriminatory or neutral; rather the defense establishes that the criterion is sufficiently effective and necessary to the employer's business to overcome the discrimination.

Moreover, the substance of both the BFOQ and the Business Necessity justifications reflect an attempt to accommodate employers' business needs against the challenge to minority employment raised by the prohibited discrimination. When the burden on an employer's business of eliminating the disparate treatment discrimination is sufficiently high, as determined by the BFOQ, Congress excused, rather than prohibited, the discrimination. Similarly, when the burden on an employer's business of eliminating the disparately impacting criterion is sufficiently high, as determined by Business Necessity, courts have excused that discrimination.

Although the BFOQ and Business Necessity exceptions provide general standards for balancing employers' business needs against protected employees' employment opportunities, Congress specifically judged that certain forms of both disparate treatment and disparate impact discrimination would be exempted from the respective general balancing standards. Thus, under the BFOQ exception, only that disparate treatment discrimination challenging an employer's practice of hiring and employing on the basis of sex, religion, or national origin may be excused. All other disparate treatment discrimination is flatly pro-

175. Although the standards differ, all opinions discussing the Business Necessity defense recognize its focus to be justification, not denial. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2125. See supra Sections IB. See International Bhd. of Teamsters v. United States, 431 U.S. at 335 n.15 (Business Necessity defense to disparate impact discrimination is focused on justifying discriminatory effects, not explaining improper motivation).


177. See supra Section IIA.

178. See supra Section IB. See Willborn, supra note 33, at 821 (Business Necessity moderates purely statistical discrimination).

179. Congress exempted certain employers from liability for either disparate treatment or disparate impact under Title VII. See Civil Rights Act of 1964 § 701(b), (f), 42 U.S.C. § 2000e(b), (f) (1988) (limiting scope of Title VII with definitions of employer and employee); Civil Rights Act of 1964 § 702, 42 U.S.C. § 2000e-1 (1988) (exempting from Title VII "employer[s] with respect to the employment of aliens outside any State . . .").

hibited regardless of an employer's justification. Analogously, Congress exempted from disparate impact challenge certain facially neutral selection criteria used for specified purposes, despite their impact. For

181. The BFOQ exception does not provide a defense to disparate treatment actions challenging any employer practices on the basis of race and color, or actions challenging such employer practices as discharge, unless encompassed within the phrase "hire or employ"; discrimination in compensation, terms, conditions, or privileges of employment; limiting, segregating, or classifying employees or applicants, or otherwise adversely affecting an employee's status as an employee. See Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1988).

182. Although the Business Necessity exception is applicable to all forms of disparate impact discrimination, see supra note 38, Congress exempted from disparate impact challenge certain criteria in Sections 703(f)-(h) and 712 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(f)-(h), 2000e-11 (1988).

Section 703(f), 42 U.S.C. § 2000e-2(f), provides in pertinent part:
the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer . . . with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization . . . .

Section 703(g), 42 U.S.C. § 2000e-2(g), provides in pertinent part:
Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position . . . if—
(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States . . . ; and
(2) such individual has not fulfilled or ceased to fulfill that requirement.

Section 712, 42 U.S.C. § 2000e-11 provides:
Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preferences for veterans.

These provisions exempt from disparate impact challenge membership in certain Communist organizations, national security requirements, and veterans' preferences adopted pursuant to law, regardless of the impact from those preferences.

Section 703(h), 42 U.S.C. § 2000e-2(h), provides in pertinent part:
Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

By that provision, an employer may use bona fide systems based on seniority, merit, quantity or quality of production or work location to differentiate between employees regarding compensation, terms, conditions or privileges of employment, regardless of their impact, without judicial scrutiny under the disparate impact theory. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 349-50 (1976). To the extent employers use seniority, merit, quantity or quality of production or work location to differentiate between employees regarding compensation, or terms, conditions, or privileges of employment with an intent to discriminate based on race, color, religion, sex, or national origin, Section 703(h) provides no protection. See id. at 353. Such practices would be analyzed, however, under the disparate treatment theory of discrimination with its focus on employer intent, rather than under the disparate impact theory. See supra note 12.

Section 703(h), 42 U.S.C. § 2000e-2(h), also provides:
nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

Although this provision sounds like it allows an employer to use professionally developed ability
example, Congress allowed employers to use seniority to determine conditions or privileges of employment despite its disparate impact. With the exception of these explicit judgments, however, Congress generally prohibited both disparate treatment and disparate impact discrimination which was not justified by the BFOQ exception or the Business Necessity exception, respectively.

Based on the analogies between the BFOQ and Business Necessity exceptions to discrimination prohibited under Title VII, the BFOQ exception in Section 703(e)(1) provides a useful model for developing a standard for Business Necessity. The BFOQ standard can be divided into four components: the substantive tests, the level of scrutiny, the burden of proof, and the examination of alternatives. The appropriateness of adopting each of these components as the standard for Business Necessity will be examined below.

B. Adopting the Substantive Tests of BFOQ for Business Necessity

Adopting the BFOQ's substantive tests to excuse disparate impact discrimination would require employers to establish with objective proof both that the purpose for using the disparately impacting criterion is sufficiently necessary to the business—the necessity test—and that the selection criterion is sufficiently effective in achieving that purpose—the effectiveness test—to justify use of the criterion. The judiciary has experience using these two tests to evaluate employers' justifications for discrimination not only with the BFOQ exception under Title VII, but with the equal protection clause of the Fourteenth Amendment to the United States Constitution. Moreover, most precedent on Business Necessity tests, regardless of their impact, the Supreme Court has interpreted this provision to protect from disparate impact scrutiny only job-related professionally developed ability tests. See Connecticut v. Teal, 457 U.S. 440, 452 (1982); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971). This interpretation virtually eliminates the protection of this clause of Section 703(h) because the employer must prove job-relatedness either to fall within the protection of 703(h) or, assuming no protection from 703(h), to establish the Business Necessity defense to overcome a disparate impact challenge. The clause does assure employers, however, that job-related professional ability tests are permitted by Title VII, an assurance required by Congressional confusion before passage of the Act. See Griggs v. Duke Power Co., 401 U.S. at 434 & n.10.

Finally, Section 703(h), 42 U.S.C. § 2000e-2(h), provides:

It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 206(d)).

This provision has raised debate about whether disparate impact theory is available to challenge sex-based wage compensation discrimination. See County of Washington v. Gunther, 452 U.S. 161, 170-71 (1981) (dictum); American Nurses' Ass'n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986). Resolution of this debate is beyond the scope of this article.

184. See supra Section II A.1.
185. The two-test BFOQ standard is analogous to the ends and means tests used under the equal
implicitly adopts both tests.186

I. The Necessity and Effectiveness Tests Explained

Evaluation of an employer's facially neutral selection criterion under the two tests is appropriate to justify the proved disparate impact caused by the criterion. Identification of an employer's purpose for using the criterion proved to impact disparately groups protected by Title VII is necessary,187 but not sufficient, to justify use of the criterion. Articulation of an employer's purpose merely explains the motivation for using the criterion, it does not justify the disparate impact caused by the criterion.188 To justify the disparate impact, an employer must first establish that its purpose is sufficiently important to overcome the relative reduction in employment opportunities resulting from the disparately impacting criterion—the necessity test.

One critical aspect of the necessity test is that it limits the employer's purpose for using the otherwise prohibited criterion to achievement of business needs. Limitation of the necessity test in this manner is

186. See supra Section IB. But see infra notes 224, 228, 377-80. More controversial is the question of how intensely to evaluate employer's proof under those tests. See infra Section IIC.

187. Identification of purpose under Title VII is more exacting than under the equal protection clause of the fourteenth amendment of the United States Constitution. See Ill. Note, supra note 140, at 198-99 n.105. That clause insures that government distinctions do not deny "any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV. Courts have interpreted that clause to require governments to establish that their distinctions serve the "general good" or a "legitimate public purpose." Tussman & ten Broek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 350 (1949). In determining whether the distinctions serve a public purpose, regardless of the standard of review employed, the Court requires the two-part analysis. First, the public purpose must be sufficiently necessary to the government, depending on the standard of review, to justify the classification—the ends or necessity test. Second, the classifications used must achieve the purpose with sufficient effectiveness, depending on the standard of review, to justify the classification—the means or effectiveness test.

188. See supra Section IB. But see infra notes 224, 228, 377-80. More controversial is the question of how intensely to evaluate employer's proof under those tests. See infra Section IIC.

Sometimes the courts have confused the two tests. See Nolting v. Yellow Freight System, 799 F.2d 1192, 1199 (8th Cir. 1986) (ADEA case) (finding ambiguity in circuit between standard that "practice significantly served the employer," focusing on the effectiveness test, and that the employer had a compelling need, focusing on the necessity test); Contreras v. City of Los Angeles, 656 F.2d 1267, 1277-78, 1280, 1287-90 (9th Cir. 1981) (both majority and dissent rejected strict scrutiny and adopted mid-level scrutiny, but the majority focused on necessity test and set the standard to be disparately impacting criterion must be related to "important elements of work behavior," rather than necessary to operation of the business; whereas dissent focused on effectiveness test and set the standard to be reasonably, not absolutely, necessary to achieving the employer's purpose), cert. denied, 455 U.S. 1021 (1982).

187. Identification of purpose under Title VII is more exacting than under the equal protection clause of the fourteenth amendment to the United States Constitution, because under Title VII the employer bears the burden of at least articulating its purpose whereas under the Constitution any imagined purpose of the diversely motivated legislative body which is proper will satisfy the ends analysis. Compare Kotch v. Board of River Port Pilot Comm'n, 330 U.S. 552, 563 (1947); McGowan v. Maryland, 366 U.S. 420, 426 (1961) (equal protection clause cases) with supra Section IB (Title VII disparate impact cases).

188. Such proof would not appropriately respond to employee's prima facie proof of disparate impact because disparate impact discrimination focuses on justifying consequences of employer's selection criterion, not on determining employer motivation. See supra notes 12, 23, 175.
consistent with Congress' BFOQ exception. There Congress limited the range of purposes that would excuse disparate treatment discrimination to business needs. Moreover, merely generalized business needs were insufficient. The BFOQ exception has been limited to the needs of the particular employer's business, and indeed, the particular employer's business as it normally operates—not as it might operate in an emergency, for example. It is only in that instance that the parties are in a better position than Congress to debate the conflict between the needs of business and Congress' mandate for equal employment opportunity. Similarly, Business Necessity should excuse disparate impact discrimination only where it is necessary for the particular employer's business.

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190. See supra notes 152-55, 189 and accompanying text.

191. See supra note 189.

The court in Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228, 234 (5th Cir. 1969), refused to find a BFOQ exception where employer argued that switchmen were required to lift 34 pounds in order to perform emergency work. The court found: "[a] speculative emergency like that could be used as a smoke screen by any employer bent on discriminating against women." Absent the BFOQ exception, the employer was found to be in violation of Title VII. Id at 236.

Analogously, in Dothard v. Rawlinson, 433 U.S. 321, 342 (1977), Justices Marshall and Brennan challenged the majority's BFOQ finding allowing Alabama to exclude women from contact positions at maximum security prisons based on justification stemming from the unconstitutionally "'barbaric and inhumane' " conditions at the Alabama prisons. The two found the conditions not to be "the normal operation" of a prison, as required by the language of the BFOQ exception. Their challenge fails to recognize that the unconstitutional conditions at the Alabama state prison were "normal" to that facility, at least until they could be changed as required by the court's order in Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), aff'd, 559 F.2d 283 (5th Cir. 1977). "Normal" in Section 703(e) does not require courts to ignore the realities of the business or enterprise.

192. Such a limitation would be consistent with defining the defense to disparate impact discrimination to be Business Necessity. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 1005 (1988) (Blackmun, J., joined by Brennan, Marshall, J.J., concurring) ("Precisely what constitutes a business necessity cannot be reduced, of course, to a scientific formula, for it necessarily involves a case-specific judgment which must take into account the nature of the particular business and job in question."); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1302-03 (9th Cir. 1982) (disparate impact in wages, hours, and job assignments not excused by social policy of protecting and providing for family, noting "nepotistic concerns cannot supersede the nation's paramount goal of equal economic opportunity for all"), *cert. denied,* 467 U.S. 1251 (1984); Colby v. J.C. Penney Co., 811 F.2d 1119, 1127-28 (7th Cir. 1987) (questioning whether company's decision that only employees who earned less than their spouses needed spousal coverage would be "a valid business justification for the alleged discrimination."). *But see* Wambheim v. J.C. Penney Co., Inc., 705 F.2d 1492 (9th Cir. 1983) (disparate impact of extending medical and dental coverage only to "head of household" can be justified as benefitting largest number of employees and keeping cost of benefits to employees down), *cert. denied,* 467 U.S. 1255 (1984). Cf. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.) (except for its evaluation of employer's efficiency purpose, court evaluated Lorillard's proffered purposes in the abstract, on occasion appearing to second guess the employer and on occasion citing to Title VII precedent
Excusing either disparate treatment or disparate impact discrimination to accomplish any of the multitude of abstract social policy goals that might sincerely be judged more important than equal employment opportunity by the value system of either employers or the judiciary would be inconsistent with Title VII. In Title VII, Congress determined those few instances where non-business related social policies would override Title VII's promise of equal employment opportunity. For example, by Section 712, Congress exempted veterans' preference laws from challenge under Title VII, despite any disparate impact resulting from those preferences. Conversely, Section 708 preempted state statutes causing discrimination under Title VII, despite the public policy they reflect.  Even a social policy goal articulated in another federal


Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preferences for veterans.

195. If compliance with public policy as evidenced by the law of the state were sufficient to excuse the disparate impact under Business Necessity, then state veterans' preference laws would not be preempted by Title VII and Section 712 would be unnecessary. See Civil Rights Act of 1964 §§ 708, 1104, 42 U.S.C. §§ 2000e-7, 2000h-4 (1988) (quoted infra note 196). Moreover, if the public policy reflected in the exemption for veterans' preference laws were sufficient to excuse disparate impact under Business Necessity, then even an employer's own veterans preference policy would excuse disparate impact without more. The court in Dozier v. Chupka, 395 F. Supp. 836, 850-51 (S.D. Ohio 1975), however, held that an employer must demonstrate Business Necessity to justify its policy of awarding bonus points for veterans with honorable or disability discharges, but not with dishonorable discharges.


Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title. Similarly, Civil Rights Act of 1964 § 1104, 42 U.S.C. § 2000h-4 (1988) provides:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

197. See Rosenfeld v. Southern Pacific Co., 444 F.2d 1219, 1225-27 (9th Cir. 1971) (state statute
statute was found insufficient to overcome disparate treatment discrimination prohibited by Title VII. In *Johnson v. Mayor of Baltimore*, the Supreme Court refused to excuse Baltimore's age-based retirement of firefighters, even though the federal civil service statute contained a provision for mandatory retirement of federal firefighters based on age. The Court clearly affirmed that age discrimination could only be justified by compelling business needs as reflected in the standards for the BFOQ exception adopted by Congress in the Age Discrimination in Employment Act (ADEA).

Although the standard for Business Necessity should require that the disparately impacting criterion be justified by needs of the business, it should not restrict the type of business need that will satisfy the standard. Courts interpreting the BFOQ exception have approved an employer's use of a protected factor only when it successfully predicts ability to perform a job shown to be essential to the operation of the business. This is consistent with Congress' limitations that the BFOQ exception applies only to situations where employers "hire and employ" and only then where the criterion is a "bona fide occupational qualification" deemed necessary to that particular business. Most courts and commentators, however, have interpreted the Business Necessity defense to excuse disparately impacting criteria even when they do not predict job performance. This interpretation is consistent with defining the defense to be a

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201. See *supra* note 154.
204. *See Nashville Gas Co. v. Satty, 434 U.S. 136, 143 n.5 (1977) (examine company's own economic and efficiency interests to justify facially neutral seniority system that denies accumulated seniority to pregnant woman (decision prior to Pregnancy Discrimination Act, amending Title VII to clarify that distinctions based on pregnancy are not facially neutral)); *See International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 888-90 (7th Cir. 1989), cert. granted, 110 S. Ct. 1522 (1990); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1549 (11th Cir. 1983); Wright v. Olin Corp., 697 F.2d 1172, 1185 n.21 (4th Cir. 1983); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641, 672, 692-98 (1981); *Yale Note, supra* note 138, at 108 (legitimate employer purposes justifying disparately impacting criterion include ends of safety and efficiency, defined as "the economic benefits resulting from an employee's greater competence to perform his tasks, the administrative costs of predicting such task-related efficiency, and other costs associated with an individual employee, such as those arising from wage garnishments"); *But see Wallace v. Debran Corp., 494 F.2d 674, 677 (8th Cir. 1974) (employee productivity only proper purpose excusing disparate impact); Johnson v. Pike Corp., 332 F. Supp. 490, 495-96 (C.D. Cal. 1971) (same). Cf. Brodin, *supra* note 41, at 358 (Title VII ends accomplished only if the justifications for disparate impact are "nar-
more general Business Necessity and with finding it to be applicable to disparate impact discrimination in contexts other than hiring and employing. For example, the defense is also available in cases challenging disparately impacting criteria used to determine benefits, compensation, and working conditions, where job performance may not be sensible. Thus, the Business Necessity exception should excuse disparately impacting criteria to further any sufficiently important business purpose, even those other than job performance. This approach would accommodate the relatively broader, more flexible applicability of Business Necessity compared with the BFOQ.

The necessity test alone, however, establishes only an employer's business purpose for using the criterion shown to reduce the employment opportunities of women or people of color, it does not establish any narrowly confined to situations where job performance, productivity or the very financial existence of the enterprise is at stake.

205. See Williams, supra note 204, at 672. The Supreme Court's equation of Business Necessity with job-relatedness, see I.C. Sullivan, M. Zimmer, R. Richards, Employment Discrimination 188-89 (2d ed. 1988) [hereinafter "Sullivan"], can be explained because all of its disparate impact cases presented only the factual issue of hiring and employing. Cf. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (although interpreting Business Necessity in hiring and promotion context of case to require job-relatedness, the Court defined the defense: "The touchstone is business necessity"); Williams, supra note 204, at 689 (although job-relatedness appropriate for testing and employment qualifications, it is inappropriate for fetal vulnerability cases). B. Schlei & P. Grossman, Employment Discrimination Law 1387, 1325, 1328-30 (2d ed. 1983) [hereinafter "Schlei"] (job-relatedness is one means of proving the generic Business Necessity exception); Sullivan, supra, at 190 (lower courts have interpreted Business Necessity to be broader than job relatedness); Williams, supra note 204, at 692. But see H.R. 1746, 92d Cong., 1st Sess., 92d Cong., 1st Sess. (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) (amending Section 703(h) to except professionally developed ability tests which were: "directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position"); The Civil Rights Act of 1990, S. 2104, supra note 9, § 3; H.R. 4000, supra note 9, § 3 (defining Business Necessity to require that the disparately impacting criterion be "essential to effective job performance"); S. 1261, supra note 9, § 2 (same as S. 2104 and H.R. 4000).

206. The Business Necessity defense is co-extensive with disparate impact theory. See supra note 38.

207. See, e.g., Lynch v. Freeman, 817 F.2d 380, 389 (6th Cir. 1987) (working conditions); Colby v. J.C. Penney Co., Inc., 811 F.2d 1119, 1127-28 (7th Cir. 1987) (fringe benefits); Liberles v. County of Cook, 709 F.2d 1122, 1132-33 (7th Cir. 1983) (compensation); Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983) (benefits); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), cert. denied, 467 U.S. 1251 (1984) (shareholder preference plan constituting privilege of employment).

208. The standard of scrutiny will determine whether an employer's business purpose is sufficiently important to overcome the discrimination shown to accompany use of the criterion. See supra Section IIC.

209. But see H.R. 1746, 92d Cong., 1st Sess.; H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) (proposed amendment to Section 703(h) to excuse disparately impacting professionally developed ability tests which were: "directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position"); The Civil Rights Act of 1990, S. 2104, supra note 9, § 3; H.R. 4000, supra note 9, § 3 (defining Business Necessity to require that the disparately impacting criterion be "essential to effective job performance"); S. 1261, supra note 9, § 2 (same as S. 2104 and H.R. 4000).

A more general Business Necessity exception, with a similarly exacting justification burden compared with the proposed amendments, might excuse disparately impacting criteria that are "directly related" or "essential" to achieving an important business purpose.
nection between the challenged selection criterion and achievement of that purpose. Absent proof that the discriminatory criterion in fact furthers an employer's business purpose, discrimination caused by that discriminatory criterion cannot be justified by even a compelling purpose.210 Thus, an employer must demonstrate that the criterion proved to cause the discrimination is sufficiently effective in accomplishing the approved purpose to justify its disparate impact—the effectiveness test.

Proof under the effectiveness test sometimes exposes the "true"211 purpose achieved by the criterion. In Spurlock v. United Airlines,212 the purported purpose justifying United's racially skewed job prerequisites213 was effective job performance. This purpose was found to satisfy the necessity test because of the "staggering" risks involved in hiring unqualified pilots.214 Proof under the effectiveness test, however, revealed the prerequisites to further only United's much less lofty goal of protecting United's investment in an applicant's training program.215 United would be able to establish Business Necessity for these job prerequisites only if its "true" purpose, investment in training, also satisfied the necessity test.216

An employer must satisfy both the necessity and effectiveness evaluations to excuse its use of a disparately impacting criterion. Only in that instance has the disparately impacting criterion been proved effective

210. See supra notes 152-53 and accompanying text (BFOQ exception).
211. The effectiveness test can identify which purpose is actually achieved by the selection criterion, regardless of whether employer inaccurately identified the purpose, either through mistake or subterfuge. Indeed, if the selection criterion only incidentally accomplishes employer's purpose, but almost exactly accomplishes another purpose, the more "true" purpose achieved by the selection criterion is the latter one. It is the "true" purpose, rather than just employer's articulated purpose, which must be examined under the necessity test.
212. 475 F.2d 216, 219 (10th Cir. 1972).
213. United's college degree and 500 flight hour minimum requirements were found to impact against Black applicants for the pilot positions at issue. Id. at 218.
214. The court noted risks to the aircraft, worth $20 million, and to the lives of up to 300 passengers per flight. Id. at 219.
215. United's 500 flight hour requirement was shown effective to insure that applicants pass United's high cost training program. Id. at 218-19. Moreover, United's college degree requirement was shown effective based on testimony from United officials: "that the possession of a college degree indicated that the applicant had the ability to understand and retain concepts and information given in the atmosphere of a classroom or training program" and because an applicant with a degree "is more able to cope with the initial training program and the unending series of refresher courses than a person without a college degree." Id. at 219. Apparently United failed to show specifically any relationship between its selection criteria and effective job performance.
216. See supra notes 187-209 and accompanying text. An employer can always pick an end which will be achieved by use of the disparately impacting selection criterion, even if that end is to purposefully exclude or prefer employees based on their race, color, religion, sex, or national origin. That purpose, however, is prohibited by Title VII and cannot justify an employer's disparate impact. Civil Rights Act of 1964 § 703(a), 703(j), 42 U.S.C. §§ 2000e-2(a), (j) (1988). Indeed, such purposeful discrimination based on the protected factors would prove a disparate treatment violation under Title VII which could only be justified with an employer purpose deemed essential to the business. See supra notes 152-55 and accompanying text.
enough to achieve an employer's sufficiently important business purpose to overcome the loss of equal employment opportunities caused by the challenged practice. Thus, logic supports adopting both the necessity and effectiveness tests from the BFOQ analysis to develop the Business Necessity standard.

2. The Nature of Proof Required under the Tests

Objective evidence of both necessity and effectiveness is required to excuse an employer's use of disparately impacting criteria.217 Objective evidence of necessity might include evidence that the selection criterion predicts successful job performance on a task consuming a high percentage of an employee's time or a task shown to be important to the overall operation. Moreover, objective evidence of effectiveness might include evidence that those not meeting the selection criterion cannot perform the job at issue.218

An employer's good faith or sincerity is irrelevant to justify dispa-

217. See Comment, supra note 138, at 934.

Proof which undercuts employer intent and thus rebuts the existence of disparate treatment discrimination, is different from the objective justification required to excuse disparate impact discrimination. Indeed, objective justification for employer's actions discovered only after the employer makes his decision is irrelevant to prove Business Necessity. See Zamlen v. City of Cleveland, 686 F. Supp. 631, 654 (N.D. Ohio 1988) (fact that test validated through post-hoc studies makes test suspect but does not necessarily render validation procedure invalid), aff'd, 906 F.2d 209 (6th Cir.), petition for cert. filed, 59 U.S.L.W. 3483 (U.S. Dec. 27, 1990) (No. 90-1046); Comment, supra note 138, at 934. Cf. Price Waterhouse v. Hopkins, 109 S. Ct. 1791 (after-the-fact justification not appropriate for disparate treatment discrimination with its focus on employer motivation); Smith v. General Scanning, Inc., 876 F.2d 1315, 1319-20 (7th Cir. 1989) (employee's subsequently discovered resume fraud irrelevant to question of whether employer advanced discriminatory reasons for discharging employee); Summers v. State Farm Mut. Auto. Ins., 864 F.2d 700, 708 (10th Cir. 1988) (after-acquired evidence of employee wrongdoing does not undercut improper motivation). Moreover, sincere, but insufficiently important, explanation of employer's selection decisions, which would dispel improper motivation, would not satisfy Business Necessity. See Watson v. Fort Worth Bank and Trust, 487 U.S. at 1004 (Blackmun, J., joined by Brennan, Marshall, J.J., concurring) ("An employer accused of discriminating intentionally need only dispute that it had any such intent—which it can do by offering any legitimate, nondiscriminatory justification. Such a justification is simply not enough to legitimize a practice that has the effect of excluding a protected class from job opportunities at a significantly disproportionate rate."); Dadino v. Delaware River Port Auth., 703 F. Supp. 331, 349 (D.N.J. 1988) (treating male employees who failed to confess wrongdoing more favorably than female employee who did confess undercuts inference of intent to discriminate based on sex); Grimes v. District of Columbia, 630 F. Supp. 1065, 1067 (D.D.C. 1986) (paying male different salary than female based on clerical error undercuts intent to discriminate based on sex), vacated on other grounds, 836 F.2d 647, 652 (D.C. Cir. 1988) (appellate decision not based on Title VII). Compare Peters v. City of Shreveport, 818 F.2d 1148, 1167-68 (5th Cir. 1987) (paying female-dominated job less than male-dominated job based on state statute undercuts inference of intent to discriminate based on sex) with supra notes 193-97 and accompanying text.

218. A valuable byproduct of using objective proof to establish both the necessity and effectiveness tests is to increase productivity by revealing practices which are either ineffective or non-business related.
rate impact discrimination with its focus on effects, not motivations.²¹⁹ Moreover, employers may not satisfy their Business Necessity obligation with intuition and assumptions.²²⁰ Examination of objective evidence under the effectiveness analysis has exposed mistaken notions of effectiveness.²²¹ In the pathbreaking Griggs decision, for example, a high school diploma requirement was adopted to preserve "the avowed policy of advancement within the Company."²²² Proof under the effectiveness test revealed, however, that nongraduate employees achieved their proportionate share of promotions at the company.²²³

Courts have sometimes dispensed with the requirement of objective

²¹⁹. Employer motivation is irrelevant to disparate impact discrimination. See supra note 12.  
²²⁰. See, e.g., Watson v. Fort Worth Bank and Trust, 487 U.S. at 1009 (Blackmun, J., joined by Brennan, Marshall, J.J., concurring) ("Allowing an employer to escape liability simply by articulating vague, inoffensive-sounding subjective criteria would disserve Title VII's goal of eradicating discrimination in employment."); Dothard v. Rawlinson, 433 U.S. 321, 326 (1977) (Court refused to assume necessary connection between job performance, as judged by strength, and efficiency of the business notwithstanding that the "primary duty" of correctional counselors was "to maintain security and control of the inmates"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 428 n.23 (1975) (Court rejected plant officials conclusory allegations that the tests were "locally validated" when introduced, confirming that "job relatedness cannot be proved through vague and unsubstantiated hearsay"); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (effectiveness of selection criteria not proved where effectiveness was not even studied); Blake v. City of Los Angeles, 595 F.2d 1367, 1378-79 (9th Cir. 1979) (rejecting on summary judgment employer's explanation that taller officers could more easily control resisting suspects with minimum force and could better observe field situations absent sound empirical justification because Business Necessity is "not a burden that can be carried by the assertion of an 'obvious', but unmeasured, relationship between selection standards and qualities thought necessary for job performance"), cert. denied, 446 U.S. 928 (1980); Donnell v. General Motors Corp., 576 F.2d 1292, 1299-1300 (8th Cir. 1978) (Business Necessity not satisfied by testimony of employees or validation studies failing to meet EEOC guidelines where "neither validation study even attempted to compare the performance of the class of applicants which meet the educational requirement with the performance of the class of applicants which failed to meet the educational requirement"); EEOC v. Greyhound Lines, 494 F. Supp. 481, 485 (E.D. Pa. 1979) ("conclusory allegations" about consumer preferences regarding the disparately impacting beard requirement does not satisfy Business Necessity), rev'd, 635 F.2d 188, 195 (3d Cir. 1980) (no disparate impact found). But see Dothard v. Rawlinson, 433 U.S. at 339-40 (Rehnquist, J., joined by Burger, C.J., Blackmun, J., concurring) (Justices would have found Business Necessity based on their argument "that anyone under 5'2" or 120 pounds, no matter how strong in fact, does not have a sufficient appearance of strength to be a prison guard" and that maintaining security and control "I at least would imagine is aided by the psychological impact on prisoners of the presence of tall heavy guards"). Compare EEOC v. Rath Packing Co., 787 F.2d 318, 332-33 (8th Cir. 1986) (requiring that the problem to be addressed by the no-spouse rule must be "concrete and demonstrable, not just 'perceived'", the Court rejected disparately impacting no-spouse rule, in part, based on the failure of proof regarding the connection between the rule and job problems), cert. denied, 479 U.S. 910 (1986) with Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 499-500 (7th Cir. 1977) (upholding disparately impacting no-spouse rule notwithstanding district court's findings that employer did not prove effectiveness of rule to achieve its job-related justifications and notwithstanding its finding that rule "may not in the long run prove to be a fruitful one", but only based on its determination that rule was "plausible" for four unproved reasons, which reasons were "far from frivolous"), cert. denied, 435 U.S. 934 (1978).

²²¹. See infra notes 226-32.  
²²³. Id. at 431-32 & n.7. See id.at 433 ("History is filled with examples of men and women who
proof where the disparately impacting criteria are “plainly relevant”, “obvious” or “historically settled” or where the employer uses a disparately impacting criterion to further an important business purpose, such as customer safety. This is inappropriate because sometimes “obvious” job prerequisites cannot be justified. Moreover, “historically settled” criteria may perpetuate the sometimes discriminatory status quo. To the extent “normal” criteria disparately impact on minority employment opportunities, deference to the status quo undercuts Title VII.

Proof under the effectiveness test is also essential even where the employer’s articulated goal is shown to be compelling to the business, rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees”).

224. See Watson v. Fort Worth Bank and Trust, 487 U.S. at 996-1000 (dictum); International Union, UAW v. State of Michigan, 886 F.2d 766 (6th Cir. 1989) (allowing state to use market rate to determine salary notwithstanding its disparate impact against women because it is “a normal and legitimate practice”); Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984) (allowing University to use peer review based on “generations” of experience, despite its impact against protected groups); Yuhas v. Libbey-Owens-Ford Co., 562 F.2d at 499 (upholding disparately impacting no-spouse rule because it is “widely prevalent in our society” notwithstanding district court’s findings that employer did not prove its effectiveness and that the rule “may not in the long run prove to be a fruitful one”).

225. See infra note 228.

226. In Smith v. Olin Chemical Corp., 555 F.2d 1283, 1286 (5th Cir. 1977), the court upheld employer’s good back requirement for a laborer’s job without proof of Business Necessity because it found the requirement, despite its racial impact, to “be so manifestly job-related so as not to be ‘the kind of ‘artificial, arbitrary, and unnecessary barriers’ Title VII prohibits.” The Business Necessity of the selection criterion was called into question by the dissent because Smith had been successfully performing the job of manual laborer for 90 days prior to the physical examination which revealed, only through x-rays, his bad back. Id. at 1284, 1290 (Godbold, Wisdom and Goldberg, dissenting). The dissent also criticized the majority’s finding of manifest job-relationship because the only information the majority knew about the job was its title, “manual laborer”:

We do not know what work is done by a manual laborer in the pool of such employees at this Olin installation, whether he picks up heavy weights, sweeps floors, picks up trash from the grounds with a spearing stick, or polishes company cars. This court’s ruling is based upon a two-word job description.... Business necessity is a proper subject for factual inquiry at the trial level not for appellate hunches reached in the dark. See Recent Decisions, Title VII—Race Discrimination Business Necessity, 12 GA. L. REV. 104 (1977) (criticizing decision).

The dissent in Dothard v. Rawlinson, 433 U.S. 321, 343 (1977) (Justices Brennan and Marshall) challenged the majority’s finding of BFOQ exception where it used gender stereotypes as a substitute for factual support that there is a 100% correlation between gender and inability to perform safely and effectively as a security guard at the prison. Id. at 343-46. They argued that a guard’s moral authority and threat of future punishment, rather than gender, deters inmate assaults. Id. at 343. They disputed the majority’s “factual” finding by citing the successful use of female prison guards in other states. Id. at 341. In addition, they find irrelevant evidence of the attacks on a clerical worker and a student visitor because neither of these women were trained correctional officers. Id. at 344 n.3. Absent a factual predicate, the dissent would not allow the employer to use sex as a selection criterion.

227. Watson v. Fort Worth Bank and Trust, 487 U.S. at 1008 (Blackmun, Brennan, Marshall, J.J., concurring) (“Indeed, to the extent an employer’s ‘normal’ practices serve to perpetuate a racially disparate status quo, they clearly violate Title VII unless they can be shown to be necessary, in addition to being ‘normal’... practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the [discriminatory] status quo.” (citing Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971))).
such as customer safety. 228 Although logic cautions against the judiciary arbitrarily second-guessing an employer regarding standards for high risk and critical jobs, 229 logic does not support using ineffective or barely effective criteria to distinguish between qualified and unqualified applicants for those jobs. 230 More important, however, Title VII should not permit such deference where the criterion used to distinguish between applicants has a proved disparate impact. 231 Title VII does not exempt high risk, critical jobs from its strictures. 232

Thus, it is critical that the Business Necessity standard require objective proof that the disparately impacting criterion is effective in achieving (effectiveness test) an employer's business purpose (necessity

228. The court in Spurlock v. United Airlines, 475 F.2d 216, 219 (10th Cir. 1972), however, deferred to safety:

when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job related. Cf. 29 C.F.R. § 1607.5(c)(2)(iii) [not reenacted in current Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Part 1607 (1989)].


229. Although "courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it," Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978), where disparate impact discrimination is proved, Congress has mandated courts to "restructure" employment practices by enjoining their use. See Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1988).

230. Needing qualified employees to perform high-risk jobs would certainly establish necessity. See Williams, supra note 204, at 695. A wholly distinct but equally important requirement is that employer's selection criteria are effective. See supra notes 210-15 and accompanying text.

231. Indeed, the Supreme Court explicitly rejected that notion in the context of the BFOQ exception under the ADEA: "Even in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision." Western Air Lines v. Criswell, 472 U.S. 400, 423 (1985).

232. See Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L. Rev. 947 (1982). But see Maltz, Title VII and Upper Level Employment—A Response to Professor Bartholet, 77 NW. U.L. Rev. 776 (1983). The appropriate balance between equal employment opportunity and employer business concerns underlies the social policy debate between Professors Bartholet and Maltz. See infra Section II.C.

test). The more controversial questions of how effective the selection criterion must be and how important the business purpose must be do not undercut the need for adopting the two tests of the BFOQ, but rather implicate the level of judicial scrutiny required for the two tests.

C. Adapting Heightened Scrutiny of BFOQ for Business Necessity

1. The Widely Varied Possibilities

Adopting the level of judicial scrutiny of the BFOQ substantive model to the disparate impact context would require courts to scrutinize strictly an employer's proof on necessity and effectiveness. As applied, an employer would be excused by the BFOQ exception to use religion, sex or national origin as selection criteria when those prohibited criteria are shown to be the only effective way to insure that the employer can operate its business. Although several lower courts have adopted such strict scrutiny for Business Necessity, Supreme Court authority rejects it. Where such strict scrutiny is rejected, however, precedent varies widely on the appropriate intensity of judicial scrutiny required for Busi-

233. In Robinson v. Lorillard Corp., 444 F.2d 791, 798 & n.7 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971), the Fourth Circuit would require employer to prove:

the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve, and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.


234. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126 (1989) (Business Necessity does not require that the challenged practice be "essential" or "indispensable" to the employer's business); United States v. South Carolina, 445 F. Supp. 1094, 1115 (D.S.C. 1977) (rejecting strict scrutiny, defined as: "the Court would balance the disparate impact on blacks against the business purpose of the employer and uphold the business practice only if it were sufficiently 'compelling' to overcome the disparate impact"), aff'd mem., 434 U.S. 1026 (1978). But see Brodin, supra note 41, at 358 (applying strict scrutiny to justify disparate impact); CATHOLIC NOTE, supra note 138, at 668 (advocating stricter review for Business Necessity than for BFOQ exception without considering relevant arguments).
ness Necessity. Some decisions would require mid-level scrutiny of the employer’s Business Necessity response, whereas other decisions would require only rational basis scrutiny.

The debated standards of scrutiny for employer’s Business Necessity are analogous to the various levels of scrutiny employed under the equal protection clause of the fourteenth amendment to the United States Constitution. Further explanation of the various standards of review

235. See Cox, supra note 138, at 91-95; Lamber, supra note 76, at 40-41; GA. NOTE, supra note 33, at 404-20.

236. See, e.g., supra Section IB1 (Supreme Court authority adopting mid-level scrutiny); Contreras v. City of Los Angeles, 656 F.2d 1267, 1276-80 (9th Cir. 1981) (rejecting more strict analysis of necessity of employer’s purpose than that adopted in Albemarle), cert. denied, 455 U.S. 1021 (1982); id. at 1287-90 (dissent) (rejecting more strict analysis of effectiveness of criterion than that adopted in Albemarle); Chrisner v. Complete Auto Transit, 645 F.2d at 1261-62 (distinguishing between strict scrutiny and Business Necessity tests of Griggs and Dothard).

237. See supra Section IB2 (Supreme Court decisions adopting rational basis scrutiny). See supra notes 224, 228. Courts interpreting the new Wards Cove standard have applied only rational basis scrutiny. See, e.g., Green v. USX, 896 F.2d 801, 805 (3d Cir. 1990) (finding unreasonable an employer’s unsupported claim that subjective evaluation process enabled it to identify the “best qualified” candidates), cert. denied, 111 S. Ct. 53 (1990); International Union, UAW v. Michigan, 886 F.2d 766, 770 (6th Cir. 1989) (equating Business Necessity with rebuttal proof in pretextual disparate treatment cases) (see supra note 169); Mallory v. Booth Refrigeration Supply Co., 882 F.2d 908, 912 (4th Cir. 1989) (equating Business Necessity with rebuttal proof in pretextual disparate treatment cases) (see supra note 169); Evans v. City of Evanston, 881 F.2d 382, 384-85 (7th Cir. 1989) (remand on Business Necessity issue despite finding the City’s effort to justify cut-off point as “feasible” and “consistent of little more than testimony that one standard deviation above the mean is a frequent cut-off point on tests”); Allen v. Seidman, 881 F.2d 375, 380-81 (7th Cir. 1989) (remanding Business Necessity issue despite dramatic evidence that disparately impacting test was unreasonable); Sledge v. J.P. Stevens & Co., 52 Empl. Prac. Dec. (CCH) ¶ 39,537, at 60,498 (E.D.N.C. 1989) (conclusory assertion that subjective assessments were rationally related to hiring best qualified candidates deemed unreasonable); Richardson v. Lamar County Bd. of Educ., 729 F. Supp. 806, 825 (M.D. Ala. 1989) (“A court should find a test invalid only if the evidence reflects that the test falls so far below acceptable and reasonable minimum standards that the test could not be reasonably understood to do what it purports to do,” as was the case at bar); EEOC v. Andrew Corp., 51 Empl. Prac. Dec. (CCH) ¶ 39,364, at 59,541-42 (N.D. Ill. 1989) (word of mouth recruiting by exclusively white clerical staff judged not reasonable where employer encouraged it and where employer affirmatively advertised in newspapers aimed at white markets, ignoring newspapers aimed at Black markets). But see Blake v. City of Los Angeles, 595 F.2d 1367, 1377 (9th Cir. 1979) (rational relation means test not enough), cert. denied, 446 U.S. 928 (1980); Jones v. Lee Way Motor Freight, 431 F.2d 245, 249-50 (10th Cir. 1970) (employer’s “rational and bona fide considerations” are insufficient), cert. denied, 401 U.S. 954 (1971).

238. See ILL. NOTE, supra note 140, at 198 n.105. There, the Supreme Court has very generally applied three levels of judicial scrutiny under the fourteenth amendment: 1) strict scrutiny review for suspect classifications, such as race or national origin, and for fundamental interests, such as the right to travel interstate, where courts require the government to prove the classification “to be necessary to promote [means test] a compelling government interest [ends test].” Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (interstate travel); Korematsu v. United States, 323 U.S. 214, 216 (1944) (race/national origin); 2) mid-level scrutiny for quasi-suspect classifications, such as sex or illegitimacy, where courts require the government to prove that classifications "serve important government objectives [ends test] and must be substantially related to achievement of those objectives [means test].” Craig v. Boren, 429 U.S. 190, 197 (1976) (sex); Weber v. Aetna Casualty & Sur., 406 U.S. 164, 170, 175 (1972) (illegitimacy); and 3) deferential, rational basis scrutiny for all other classifications, those which do not trigger independent substantive values under the fourteenth amendment, where courts allow the classification to stand when rationally related [means test] to a
will both illustrate the possibilities and give insight for selecting between them.

Strict judicial scrutiny has oftentimes proved "'strict' in theory and fatal in fact". It is best illustrated by the standard of review required under the BFOQ exception. With regard to the necessity evaluation of the BFOQ exception, courts have limited employer's purpose for using factors protected by Title VII to predicting the applicant's ability to perform a job function essential to the operation of the business. For example, using gender to predict ability to soothe anxious airline passengers, although important to the job of a flight attendant, would not be deemed a sufficiently necessary purpose because failure to adequately perform that job function would not be essential to transporting passengers safely to their destinations. With regard to the effectiveness test of the BFOQ exception, the employer must, to the extent practicable, establish that all or substantially all of those excluded by the protected factor cannot perform the job. That religion, sex or national origin is a merely valid, but imperfect, predictor of success is insufficient under the BFOQ exception. This level of judicial scrutiny reflects Congress' decision to eliminate the use of religion, sex, or national origin as selection criteria absent the most extreme business necessity.3

Those advocating mid-level scrutiny for Business Necessity would require the relationship between the employer's purpose and the business—the necessity test—to be important. Using a disparately impacting criterion to predict ability to perform important elements of the job at issue, even if those elements are not essential to the business, has been judged sufficient to pass this level necessity test. Using such a criterion to judge ability to perform merely minor, tangential, or rarely used emergency tasks would not be sufficient under mid-level scrutiny. In-
deed, business reasons found to be simply rational would not satisfy mid-level scrutiny of necessity under Business Necessity.\footnote{244}

Those advocating mid-level scrutiny for Business Necessity would also require the relationship between the impacting criterion and the employer's purpose—the effectiveness test—to be substantial.\footnote{245} Proving the validity of the criterion to predict successful job performance by a professionally acceptable method would be substantial enough to satisfy the effectiveness test of Business Necessity.\footnote{246} Minimally effective selection criteria would not pass scrutiny under this standard of review.\footnote{247}

In contrast, proponents of deferential scrutiny advocate that disparate impact should be justified on a rationality basis.\footnote{248} To the extent they propose rationality similar to the standard under the equal protection clause of the fourteenth amendment to the United States Constitution,\footnote{249} characterized as "minimal scrutiny in theory and virtually none in fact,"\footnote{250} the disparate impact theory would be negated; either there would be no review at all because there was no disparate impact or there would be virtually no review even with proof of disparate impact. Although some advocates of deferential scrutiny propose standards that amount to no review,\footnote{251} most require real, but deferential, review of the criterion's necessity and effectiveness.

\footnote{flect, more or less accurately, the strength necessary for the job does not, by itself, validate the test".), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987), cert. denied, 485 U.S. 1034 (1988); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.14(C)(4) (1989) (need "representative sample of behavior(s) of the job in question" to satisfy validity requirements for Business Necessity); ILL. NOTE, supra note 140, at 201. But cf. Berkman v. City of New York, 812 F.2d 52 (2d Cir.) (employer has discretion to limit test to anaerobic functions, on which women are impacted, and to exclude testing of aerobic functions, on which women do better, even though both needed for job because anaerobic functions implicate safety concerns and fire fighters with anaerobic, but not aerobic, prowess can be replaced when they tire), cert. denied, 484 U.S. 848 (1987).

244. See infra notes 252-59 and accompanying text. See Dothard v. Rawlinson, 433 U.S. 321, 332 (questioning whether strength was a "bona fide" prerequisite necessary for the job of prison security guard); Albemarle Paper Co. v. Moody, 422 U.S. at 433-34 (no showing that job prerequisites or long-range promotion potential, for which it was testing, were sufficiently important to justify disparate impact); Griggs v. Duke Power Co., 401 U.S. 424, 431-32, 436 (1971) (rejecting employer purposes of improving overall quality of workforce and insuring long-range promotional potential of employees).

245. See Caldwell, supra note 138, at 593-94; Willborn, supra note 33, at 824 (preferring significant correlation test to rational basis test, but preferring sliding scale means/effectiveness to significant correlation test). See infra Section IIC2 (critiquing balancing).


247. See infra note 260 and accompanying text. New York City Transit Auth. v. Beazer, 440 U.S. 568, 602 (dissent) (blanket methadone rule not proved sufficiently effective where "rule as a whole has some relationship to employment [but] . . . a readily identifiable and severable part of it does not"); Albemarle Paper Co. v. Moody, 422 U.S. at 428 n.23, 431-34 (Business Necessity exception rejected for failure to validate disparately impacting tests under EEOC guidelines).

248. See Gold, supra note 138, at 590 (level of Business Necessity is reasonableness).

249. See supra note 238.

250. See Gunther, supra note 239, at 8.

251. See supra notes 224 and infra notes 376-80.}
Rational basis review under the necessity test would require the relationship between the employer’s purpose for using the selection criterion and the business to be only rational or legitimate. Under that standard, an employer’s purpose of preferring smarter employees, saving potential litigation costs, saving more than de minimis amounts of administrative costs, pleasing customers, aiding in employee training programs, all rational business reasons, would be judged sufficient to excuse the proved disparate impact of the employer’s selection criterion. Concern that this standard is too lenient, because improper discrimination can sometimes be a rational business decision, has caused even proponents of rational basis review to modify the “standard” so that even rational business reasons yielding only de minimis advantage are deemed insufficient to justify disparate impact discrimination.

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252. See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 993 (O’Connor, J., joined by Rehnquist, C.J., White, Scalia, J.J.) (“We do not believe that disparate impact theory need have any chilling effect on legitimate business practices”); Rutherford, supra note 138, at 1327 (disparately impacting criterion allowed when shown to serve business purpose, proved either by effectiveness test or proof of no lesser-impacting alternative); Comment, supra note 138, at 933-34; Yale Note, supra note 138, at 99-100, 101-02, 115-18 (coupling rational basis necessity analysis with no lesser-impacting alternatives analysis, see infra Section IIIE). But see Willborn, supra note 33, at 824 (criticizing job-related purpose test of Business Necessity, even when coupled with no-alternatives rebuttal, see infra Section IIIE, as undercutting protection of disparate impact discrimination).


254. But see Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1552 n.15 (11th Cir. 1984) (rejecting cost to employer arising from potential litigation regarding harm to employee’s offspring caused by exposure to work place hazard as “too contingent and too broad” for Business Necessity).

255. But see EEOC v. Kimbrough Inv. Co., 703 F.2d 98, 107 n.12 (5th Cir. 1983) (dissent) (disparately impacting folder system permitted under rational basis scrutiny because “easier to file”). But see Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979) (administrative convenience not enough); Johnson v. Pike Corp. of Am., 332 F. Supp. 490, 495-96 (C.D. Cal. 1971) (administrative expense of administering wage garnishment not enough), cert. denied, 446 U.S. 928 (1980); Comment, supra note 138, at 916 (cannot justify legitimate business practice to avoid cost of changing the status quo). Indeed, it is questionable whether Title VII would permit a cost-justification defense to disparate impact discrimination. See Liberles v. County of Cook, 709 F.2d 1122, 1130-31, 1133 (7th Cir. 1983) (public employer may not justify paying Case Aides, predominantly people of color, less than Case Workers by saving taxpayer money): Cf. Los Angeles Dept of Water & Power v. Manhart, 435 U.S. 702, 716-17 & nn.31-32 (9th Cir. 1978) (rejecting cost justification as defense to disparate treatment action). Ultimately, however, even ability of applicant to perform is a question of cost; Brodin, supra note 41, at 324-27.


258. But cf. Griggs v. Duke Power Co., 420 F.2d 1225, 1246 (4th Cir. 1970) (Sobeloff, concurring in part and dissenting in part) (“There can be no legitimate business purpose apart from business need; and where no business need is shown, claims to business purpose evaporate.”).

259. See Comment, supra note 138, at 916, 925 & n.70, 934 (legitimate business purpose does not include business purposes with only de minimis advantage, purposes of catering to bigoted tastes of customers or other employees, or purposes supported by conformity with industry practice, the
Rational basis review under the effectiveness test would require an employer's disparately impacting selection criterion to be minimally effective in achieving its legitimate purpose. Under that standard, the Supreme Court excused a disparately impacting criterion even assuming seventy percent of those excluded by the criterion were shown to be no different than employees not excluded by it.260

The debate over the level of scrutiny is even more complicated than choosing between strict, mid-level or rational basis scrutiny. Indeed, some courts and commentators have proposed adopting a sliding level of scrutiny that correlates with the level of impact caused by an employer's selection criterion.261 Thus, sliding scale review may tend to allow a relatively unnecessary criterion because of its marginal impact against only a few protected individuals while disallowing a relatively necessary criterion because of its more dramatic impact against many protected individuals. In addition, there seems to be a trend toward applying only rational basis scrutiny to judge necessity while applying more strict scrutiny to judge effectiveness.262

status quo, or the good faith of employer); YALE NOTE, supra note 138, at 115, 116 (legitimate business purpose must increase safety or efficiency by more than "insubstantial amount").

260. New York City Transit Auth. v. Beazer, 440 U.S. 568, 577 & n.14, 587 n.31, 590 n.33 (1979) (criterion excluded from employment current methadone users). Such imperfect fit between the employer's business purpose and the disparately impacting selection criterion raises a question about whether a business purpose, rather than employer's desire to enforce the public policy against the use of drugs or to encourage racial discrimination, is the true purpose for the selection criterion. To the extent another purpose is the true purpose for the selection criterion, Business Necessity would require that purpose be evaluated under the necessity test. See supra notes 225-29. See, e.g., United States v. South Carolina, 434 U.S. 1026, 1028 (D.S.C. 1978) (White, Brennan, J.J., dissenting) (disputing lower court's factual finding regarding test's effectiveness by asking "whether . . . the validation requirement was satisfied by a study which demonstrated only that a trained person could pass the test"); Washington v. Davis, 426 U.S. 229, 270 (Brennan, J., dissenting) (disputing that Test 21 was proved effective for distinguishing between candidates who could succeed in the training program, based on proof of correlation between Test 21 and final examination from training course because "there is a substantial danger that people who have good verbal skills will achieve high scores on both tests due to verbal ability, rather than 'job-specific ability.' As a result, employers could validate any entrance examination that measures only verbal ability by giving another written test that measures verbal ability at the end of a training course. Any contention that the resulting correlation between examination scores would be evidence that the initial test is 'job related' is plainly erroneous.").

Rational basis effectiveness represents quite a departure from the almost perfect fit required to justify using a protected factor under the BFOQ exception. See Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228, 235 (5th Cir. 1969) (employer must establish factual basis that "all or substantially all" of those excluded by criterion were unqualified for the job). See supra notes 245-46 (mid-level scrutiny).

261. See, e.g., Clady v. County of Los Angeles, 770 F.2d 1421, 1432 (9th Cir. 1985) ("As a general principle, the greater the test's adverse impact, the higher the correlation which will be required"), cert. denied, 475 U.S. 1109 (1986); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006 (1971); Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252, 272-73 (N.D. Ind. 1977); Willborn, supra note 33, at 825. Cf. Rutherglen, supra note 138, at 1321-27 (balancing of effectiveness and impact appropriate to dispel inference of pretextual discrimination established by disparate impact prima facie case).

BUSINESS NECESSITY

2. Uniform Level of Scrutiny for Both Tests is Appropriate

The Business Necessity standard should have a consistent level of review for both the necessity and effectiveness tests. Adoption of a consistent standard is preferable to the sliding scale proposal for several reasons. First, Congress did not adjust the scrutiny required under the BFOQ defense to the magnitude of the disparate treatment. Moreover, discrimination under Title VII has focused on the disparate impact or treatment of individuals in the protected group, rather than on the magnitude of the impact on the protected group itself. Thus, an individual employee's protection from proved discrimination should not depend on the number of other employees against whom the employer also discriminated. In addition, adjusting the level of scrutiny to the level of impact would sacrifice consistency for an amorphous, ever changing standard of review. By that approach, an employer's requirements under Business Necessity would depend on the actual impact from each application of the selection criterion. Moreover, rather than clarifying one uniform standard through precedent, the sliding scale approach would require case-by-case analysis of the relative importance of the employer's purpose or the relative effectiveness of the criterion compared to the impact caused by the selection criterion. Thus, judgments regarding Business Necessity would forever be subjected to the second-guessing of both the employer and the court.

Finally, adopting a consistent standard of scrutiny for both the necessity and effectiveness tests acknowledges the equally important nature of both inquiries. Indeed, Congress required strict justification under

Davis, 426 U.S. at 250-52; Gold, supra note 138, at 590-93; Rutherglen, supra note 138, at 1312-16, 1320-29; YALE NOTE, supra note 138, at 101-02, 115-18.

263. A consistent standard is preferable to a sliding scale notwithstanding evidence that lesser, compared to greater, impact is preferred. See, e.g., Gunther v. Iowa Men's State Reformatory, 612 F.2d 1079, 1086 (8th Cir.) (minimize job assignments requiring specific gender for privacy reasons), cert. denied, 446 U.S. 966 (1980); supra Section IIE.

264. Heightened judicial scrutiny is required under the BFOQ exception regardless of whether there is 100% impact or less than 100% impact. See infra note 281 and accompanying text.


266. Disparate impact discrimination, however, requires a threshold level of impact against the group. See supra note 33.

267. See Comment, supra note 138, at 919 n.49.

268. Cf. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (1971) (with regard to the necessity test, employer was required to establish that the identified purpose was "sufficiently compelling to override any racial impact"), cert. dismissed, 404 U.S. 1006 (1972).

269. Cf. Willborn, supra note 33, at 825.

270. See Sullivan, supra note 205, at 191; Brodin, supra note 41, at 364 (courts not equipped to engage in cost-benefit analysis); YALE NOTE, supra note 138, at 117-18.

271. See supra Section IIB.
both tests to justify disparate treatment discrimination under the BFOQ exception. Justification of disparate impact discrimination should be similarly focused on both the necessity and effectiveness of the disparately impacting criterion.

3. Business Necessity Requires Mid-Level Scrutiny

The most appropriate level of scrutiny for the necessity and effectiveness tests of the Business Necessity exception is mid-level. That level of scrutiny is supported by rejection of both the stricter and rational basis standards as well as by affirmation of mid-level scrutiny.

a. Strict Judicial Scrutiny is too Stringent

Before analyzing why strict judicial scrutiny of the necessity and effectiveness tests is too stringent for the Business Necessity defense, it is important to recognize the arguments for adopting the strict scrutiny standard of the BFOQ exception. That standard requires that the challenged criterion is virtually perfectly suited to accomplish a compelling business reason.

Both the BFOQ exception and the Business Necessity exception attempt to justify discrimination prohibited by Title VII by balancing employers’ business needs against employees’ equal employment opportunities. By Section 703(e)(1), Congress set that balance: disparate treatment discrimination is excused only when an employer satisfies strict judicial scrutiny that the discrimination is essential for the continued operation of the employer’s business. To the extent the effective distinctions between disparate treatment discrimination (excused by the BFOQ exception) and disparate impact discrimination (excused by the Business Necessity exception) are slight, analogously burdensome requirements should excuse both types of discrimination.

272. See Brodin, supra note 41, at 358 (employer’s justifications for disparate impact should be subject to the same level of review as the BFOQ in disparate treatment cases).

273. See supra notes 239-41 and accompanying text.

274. The Supreme Court distinguished review of disparate treatment, requiring strict scrutiny, from disparate impact discrimination, requiring only rational basis review, under the equal protection clause of the fourteenth amendment to the United States Constitution. See Washington v. Davis, 426 U.S. at 242-48. Standards of review of disparate impact under the equal protection clause and Title VII are distinguishable on several grounds. First, Title VII is a remedial statute with specific substantive content which contemplated prohibiting impact discrimination, absent specific justification. Id. at 246-48. See Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U.L. REV. 36, 40 (1977); Percy, The Disproportionate Impact Theory of Racial Discrimination, 125 U. PA. L. REV. 540, 555-56 (1977). Moreover, even under the Constitution, impact based on substantive rights closely tied to the Constitution has been held to require strict scrutiny. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (interstate travel). Similarly, impact under Title VII based on substantive rights articulated in the statute, prohibitions of selections based on race, color, religion, sex, or national origin, should also be subject to searching scrutiny. Second, precedent under Title VII supports more searching inquiry, whereas it did not under the Constitution. See Washington v. Davis, 426 U.S. at 238-45. Third, strict scrutiny under
An employee's proof that her employer uses a selection criterion that disproportionately eliminates members of underrepresented groups from the employment opportunity at issue may evidence not just disparate impact discrimination, but also disparate treatment discrimination. Indeed, purposeful use of selection criteria that accentuate group differences more fully uncovers purposeful discrimination than searching for other evidence of elusive intent. Moreover, use of subjective or standardless procedures with disparate impact allows subconscious stereotypes and prejudices to determine employment decisions, and is virtually indistinguishable from purposeful discrimination. Thus, disparate impact discrimination may evidence discrete or subconscious discriminatory intent—the determinative characteristic of disparate treatment discrimination. Whether the employer's action is ultimately judged to be disparate impact discrimination or disparate treatment discrimination turns on the finding regarding the employer's motivation.

Moreover, to the extent either employers or society have purposefully impeded the ability of African-Americans, for example, to meet an employer's selection criteria—for example, by denying them past job opportunities or equal education—then the use of prior experience or education as a selection criterion (disparate impact) becomes more equivalent to using race as a selection criterion (disparate treatment). Even absent purposeful discrimination, employer recklessness or inadvertence in using criteria with a proved disparate impact, particularly in light of employer's obligation to monitor the effects of its selection criteria, suggests only slightly less employer culpability than purposeful use of such a factor.

Even the class-wide effects of the two theories of discrimination are not distinguishable in relevant ways. Disparate treatment discrimination

Title VII would be limited to the employment context, which is not nearly as "far reaching and would [not] raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes . . . ." Id. at 248.


277. Intentional discrimination which occurred prior to the effective date of Title VII or which occurred prior to Title VII's limited statute of limitations would not be actionable under Title VII. See United Airlines v. Evans, 431 U.S. 553, 555-57 (1977) (time barred discrimination); International Bhd. of Teamsters v. United States, 431 U.S. 324, 356-57 (1977) (pre-Act discrimination).

278. Disparate impact discrimination is not limited to selection criteria which perpetuate past discrimination, rather it includes any selection criteria with the requisite impact. See supra Section IA.


is characterized by singling out for different treatment one protected group or subset of a protected group resulting in exclusive, but not necessarily 100%\(^2\) impact against the protected group. Disparate impact discrimination is characterized by different treatment of a disproportionate number\(^2\) of those in a protected group, virtually always resulting in neither exclusive nor 100% impact against the protected group. Thus, disparate impact and disparate treatment discrimination are not necessarily distinguishable based on the magnitude of the impact,\(^2\) but rather only on the exclusivity of the impact.\(^2\)

Although the exclusive impact of disparate treatment discrimination arguably reinforces prejudice and imposes stigma more severe than the non-exclusive but disproportionate impact of disparate impact discrimination,\(^2\) distinguishing between disparate treatment and disparate impact discrimination based on distinctions in the non-job-related effects of the discrimination is inconsistent with the remedial scheme established by Title VII.\(^2\)

Finally, both disparate treatment and disparate impact discrimina-

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281. See Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669, 682-84 (1983) (disparate treatment where employer distinguishes between men with pregnant wives versus men without pregnant wives and women); Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (disparate treatment where employers distinguish between women with school-age children versus women without school-age children and men). But see General Electric v. Gilbert, 429 U.S. at 134-35 (no disparate treatment where employer distinguishes between pregnant persons (women) and non-pregnant persons (men and women), overruled by Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. at 678 (“When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the Gilbert decision.”); Willborn, supra note 33, at 825 (characterizing disparate treatment cases as having 100% impact).

282. The range of impact prohibited by disparate impact discrimination is from significant disproportion to almost 100%. See Wright v. Olin Corp., 697 F.2d 1172, 1182 (1982) (disparate impact where fetal vulnerability rules excluding all fertile women, defined as any woman between the ages of 5 and 63, absent medical evidence of infertility, which would exclude virtually all women); supra note 32 (defining threshold amount of impact required for disparate impact case).

283. Even if it were, the standard of scrutiny is not dependent on the magnitude of the impact. See supra Section IIC2.

284. Disparate treatment discrimination distinguishes between employees based on their protected status, thus, only those within the protected category are adversely affected. By contrast, disparate impact discrimination distinguishes between employees based on facially neutral criteria that adversely affect members of the protected group, but also others who are not within the group. For example, exclusion based on gender will operate to exclude only women, whereas height and weight criteria adversely affect not only women, but also some men.

285. In some ways, however, disparate impact discrimination is even more invidious because the presence of any people from underrepresented groups, even at a token level, tends to legitimize the underrepresentation by suggesting that meritorious distinctions between the groups, rather than non-neutral preferences, caused the underrepresentation.

tion prohibit employers from using illegal selection criteria and seek to make whole those employees denied employment opportunities based on illegal selection criteria.\textsuperscript{287} The distinction between the two is that under disparate treatment discrimination, Euro-American males are given undue legitimacy and preference over others in the workplace,\textsuperscript{288} whereas under disparate impact discrimination, values and inclinations of Euro-American males rather than the individuals themselves, are given undue legitimacy and preference over values and inclinations of others in the workplace.\textsuperscript{289} Protected individuals, who likely possess different backgrounds and values, must be protected against both disparate treatment and disparate impact discrimination to ensure equivalent employment opportunities compared with Euro-American males. Indeed, from the perspective of the victim,\textsuperscript{290} the effects of disparate impact discrimination, exclusion based on a factor highly correlated with protected status,\textsuperscript{291} are indistinguishable from the effects of disparate treatment discrimination, exclusion based on protected status itself.\textsuperscript{292} Consequently, the similarities between disparate impact and disparate treatment do not warrant using a standard significantly different than Congress required for the BFOQ exception to justify disparate impact discrimination. Based on that argument, heightened scrutiny, like that required under Section 703(e)(1), provides the appropriate level for justifying disparate treatment and disparate impact in the workplace.

Notwithstanding the similarities between disparate impact and disparate treatment, however, there is intuitive consensus\textsuperscript{293} that disparate

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\item Thus, disparate impact discrimination does not violate the anti-preference mandate of Section 703(j), 42 U.S.C. § 2000e-2(j). See infra notes 336, 338-41 and accompanying text.
\item Disparate treatment and disparate impact discrimination are distinguishable, however, in that Euro-American males are protected by disparate treatment discrimination, whereas they may not be protected by disparate impact discrimination. See McDonald v. Sante Fe Trail Transp., 427 U.S. 273, 279-80 (1976) (disparate treatment protects whites); supra note 33.
\item See Freeman, supra note 106, at 1052, 1075-76, 1093-99, 1114-18 (advocating victim perspective to overcome discrimination).
\item See supra Section IA (describing proof of disparate impact).
\item See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 987-91 (1988) (O'Connor, J., joined by Rehnquist, C.J., White, Scalia, J.J.) ("a facially neutral practice, adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices"). Brodin, supra note 41, at 358.
\item The debate on the level of judicial scrutiny for the Business Necessity response implicates Congress', and the nation's, commitment to equal employment opportunity. See GA. NOTE, supra note 33, at 421. There is complete consensus on eliminating intentional discrimination absent compelling business need, whereas there is considerable debate regarding the appropriate cost to business
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impact discrimination, distinguishing between people based on facially neutral differences, is less objectionable than disparate treatment discrimination, distinguishing between people based on their religion, sex, or national origin.\(^{294}\) Thus, despite strong argument for adopting the BFOQ's strict standard of scrutiny for Business Necessity, a slightly less burdensome standard than the BFOQ's standard is appropriate for Business Necessity.

The nation's objection to distributing jobs based on religion, sex, or national origin has a moral, social policy component\(^{295}\) whereas the nation is ambivalent about whether distributing jobs based on disparately impacting neutral rules is objectionable on moral, social policy grounds, or merely on efficiency grounds.\(^{296}\) Moreover, intentionally discriminatory conduct is deemed more blameworthy than conduct that is similarly discriminatory, but unintentional.\(^{297}\)

of eliminating disparate effects. \textit{Compare} Section IIA, \textit{supra}, with Section IB, \textit{supra}, and notes 306-25, \textit{infra}.

\(^{294}\) \textit{But see} Caldwell, \textit{supra} note 138, at 603-04 (it is not evident that intentional discrimination is a more compelling form of discrimination); Friedman, \textit{The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique}, 65 \textit{Cornell L. Rev.} 1, 22 (1979) ("Equally undesirable societal costs result from both intentional and unintentional discrimination."); Lawrence, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 \textit{Stan. L. Rev.} 317, 322-23, 330-31 (1987) (racism in America is a cultural phenomenon which infects Americans even in their unconscious thoughts).

Congress' decision to limit the BFOQ exception to excuse employment decisions based on religion, sex, or national origin, but not race or color perhaps reflects the intuitive consensus that distinguishing between people based on religion, sex, or national origin is less objectionable than distinguishing between people based on race or color. \textit{See} Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1988). Moreover, interpretation of the BFOQ exception under the ADEA reflects a somewhat more lenient strict scrutiny, perhaps reflecting an intuitive consensus that distinguishing between people based on their age is less objectionable than distinguishing between people based on their religion, sex, or national origin. \textit{See} Johnson \textit{v. American Airlines}, 745 F.2d 988, 993-94 (5th Cir. 1984) (mandatory retirement of flight officers based on age excused by BFOQ of ADEA to avoid blocking training paths for pilots who must retire based on age and to avoid "back seat driving" by ex-pilots forced to retire based on age), \textit{cert. denied}, 472 U.S. 1027 (1985); Murname \textit{v. American Airlines}, 667 F.2d 98, 100-01 (D.C. Cir. 1981) (refusal to hire based on age excused by BFOQ of ADEA to maximize experience of active pilots), \textit{cert. denied}, 456 U.S. 915 (1982).


\(^{295}\) This consensus is reflected in the fact that Title VII excuses distinctions based on religion, sex, or national origin only where it will undermine employer's ability to operate its business. All other social policy and employer concerns are subordinated to equal employment opportunity in this situation. \textit{See supra} Section IIA.

\(^{296}\) This ambivalence is reflected in the debate over the standard for Business Necessity: whether neutral distinctions with a disparate impact should be excused under rational basis scrutiny only when they are inefficient or whether they should be excused despite their efficiency under heightened scrutiny in order to promote the goal of equal employment opportunity. \textit{See supra} Section IB, IIC.

\(^{297}\) Freeman, \textit{supra} note 106, at 1054-55. \textit{See S. 2104, supra} note 9, § 8 and H.R. 4000, \textit{supra}
Because employment opportunities are comparatively scarce, employers must distinguish between individuals in granting opportunities. Although distinguishing between employees based on facially neutral but consequentially discriminatory rules will eliminate a disproportionate number of protected individuals, it is preferable to eliminating all of them by facially discriminatory rules. Indeed, admitting some women, people of color, or underrepresented religious or ethnic groups into employment opportunities may accomplish the goal of challenging stereotypes of them. The nation's relative tolerance of disparate impact discrimination, compared with disparate treatment discrimination, should be reflected in a relatively more lenient standard of scrutiny used to excuse it.

In addition to the notion that distinctions based on facially neutral rules are less invidious than distinctions based on the protected factors, despite the similarities between the two forms of discrimination, other arguments support rejection of the strict judicial scrutiny of the BFOQ exception for the Business Necessity exception. Facially neutral differences can be objectively justified by needs of the business more frequently than can differences based on religion, sex or national origin. The risks of improperly disallowing a neutral rule by creating too stringent a defense are, therefore, greater than the risks of improperly disallowing religion, sex, and national origin as a selection criterion by a similarly stringent standard. This would support adopting a more lenient Business Necessity justification to reduce the relatively higher risk of improperly interfering with employer's prerogatives in the workplace.

Moreover, requiring strict judicial scrutiny for the Business Neces-

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299. But see supra note 281.

300. Members of underrepresented groups hired based on disparately impacting criteria are most similar to members of overrepresented groups, at least with regard to their ability to “pass” the neutral tests which statistically tend to favor the overrepresented. Recognizing the similarities between members of underrepresented and overrepresented groups does tend to challenge gross, harmful stereotypes that all people from underrepresented groups are not fit for the workplace. However, it also tends to perpetuate our bias that those who are different are not as meritorious. See Minow, Foreward: Justice Engendered, 101 HARV. L. REV. 10, 13-14, 41-48, 55-67 (1987). Absent proof that the differences used to distinguish between employees is effective to accomplish a business purpose, then the bias is all that distinguishes between the employees, contrary to the dictates of Title VII.

301. Compare precedent under the BFOQ exception with precedent under Business Necessity. The more frequent justification of facially neutral criteria cannot be accounted for merely by the different standards of scrutiny applied to the justification process.

302. This is analogous to proving a criminal case beyond a reasonable doubt in order to reduce the risk of improper conviction compared with proving a civil case by a preponderance of the evidence.
sity exception is inconsistent with congressional intent. Indeed, the language of proposed amendments to Title VII specifying a standard for Business Necessity reflect a less stringent standard of scrutiny than that used for the BFOQ exception: whereas justification under BFOQ must be necessary to the continued operation of the business, justification under Business Necessity must be necessary to job performance, regardless of whether that job function is critical to the business.\(^3\) In sum, the strict scrutiny standard of review of the BFOQ exception should be rejected in favor of a relatively less strict standard of scrutiny.

\section*{b. Rational Basis Scrutiny is too Deferential}

Accommodating the need for more deferential review than that required under the BFOQ exception for disparate treatment discrimination is quite distinct, however, from granting employers undue deference to use disparately impacting factors, as is allowed under rational basis review. By that standard, the disparately impacting criterion must be merely related to achieving any legitimate business reason.\(^4\)

Proponents of adopting rational basis scrutiny do not so much affirmatively justify that standard as reject the various articulations of heightened scrutiny. They argue that defending disparate impact discrimination under a heightened scrutiny standard is so costly that employers will avoid the disparate impact, and therefore the need to defend it, by selecting employees based on their protected status in proportion to the group's percentage in the relevant labor population, in violation of Section 703(j) of the statute.\(^5\)

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\item By H.R. 1746, 92d Cong., 1st Sess. § 8(c), 117 Cong. Rec. 31,983 (1971), the 92d Congress proposed to amend Section 703(h) to provide a defense for a disparately impacting professionally developed ability test which would require the test to be: "directly related to the determination of bona fide occupational qualifications reasonably necessary to perform the normal duties of the particular position." This amendment tracks the language of the BFOQ defense, except the BFOQ requires the criterion to be "reasonably necessary to the normal operation of that particular business or enterprise," a slightly more stringent standard. See Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1988). Congress' failure to enact that amendment does not reflect disagreement with its substance. See supra note 165 and accompanying text.

The 101st Congress proposes to add a section defining the Business Necessity exception to require that the disparately impacting criterion be "essential to effective job performance." The Civil Rights Act of 1990, S. 2104, supra note 9, § 3; H.R. 4000, supra note 9, § 3; S. 1261, supra note 9, § 2. These amendments are similar to the BFOQ exception, except the BFOQ exception requires the criterion to be "reasonably necessary to the normal operation of that particular business or enterprise," a slightly more stringent standard. See Civil Rights Act of 1964 § 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1988). Cf. S. 2104, supra note 9, § 8 and H.R. 4000, supra note 9, § 8 (limiting proposed amendment to allow for compensatory and punitive damages to cases of disparate treatment discrimination).

\item See supra notes 248-60. The deference of this standard is even more pronounced when it is coupled with assigning employer merely the burden of producing, rather than proving, the rationality of using the disparately impacting criterion. See infra Section IID.

\item See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2122, 2126 (1986); Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 991-94, 994 n.2 (1988) (O'Connor, J., joined by Rehnquist,
Their concern is unfounded for several reasons. Although there is no dispute that adoption of a heightened scrutiny standard entails various costs to employers, the additional cost of adopting heightened scrutiny, as opposed to rational basis scrutiny, is exaggerated. The first cost associated with heightened scrutiny is that employers must forego some productive selection criteria. However, the magnitude of this cost must be examined. A selection criterion yielding no or low productivity will be barred under Title VII, but its prohibition requires employers to forego only no or low productivity. Moreover, a selection criterion yielding high business productivity will not be barred by Title VII because it will be excused by the Business Necessity exception. Adopting a higher level of scrutiny than rational basis would require an employer to abandon its selection criterion only when the selection criterion is found to be only rationally effective, but not more effective, in achieving the employer’s purpose or when the employer’s purpose is found to be only rationally related, but not more important, to the business.

The second cost of the heightened scrutiny standard is the cost of justifying the selection criteria. Once again the magnitude of this cost must be examined. Absent virtual deference to employers who use disparately impacting selection criteria, a decision which would effectively eliminate the protection afforded by disparate impact doctrine, employers must justify their use of disparately impacting criteria with objective evidence. Thus, consistent with preserving protection against disparate


307. Indeed, Business Necessity evaluation promotes business productivity. See supra note 218; Brodin, supra note 41, at 358, 322-24; Fiss, supra note 148, at 257; Maltz, supra note 232, at 786-89; Willborn, supra note 33, at 818.

Productivity, however, is not the only priority of employers. Indeed, employers use such selection criteria as seniority, irrespective of its impact on productivity, employers substitute less expensive proxies for more accurate indicators of productivity, and, particularly prior to Title VII, employers purposefully reduced their supply of productive labor to satisfy their tastes for discrimination. See Bartholet, supra note 232, at 991-96; Willborn, supra note 33, at 818-20. Moreover, productivity in the market has been sacrificed to support such public policies as minimum wage where competition is not permitted to determine the minimum wage. See Fiss, supra note 148, at 250-52. Requiring employers to forego some productivity in order to support the public policy of equal employment opportunity contained in Title VII, therefore, seems appropriate.
impact discrimination, the only additional cost of requiring a higher level
than rational basis scrutiny for Business Necessity would be that employ-
ers must prove more than slight effectiveness and more than merely a
rational business relationship.

Requiring heightened scrutiny for employers' Business Necessity de-
fense, however, does not mandate only individualized or costly proof.
Courts have allowed varied proof308 without undermining the require-
ment for objective proof.309

Courts have allowed employers to support the even more stringent
BFOQ justification with proof developed by other employers or legisla-
tures. The Supreme Court limited employers' use of this "borrowed"
proof under the BFOQ exception310 to cases where the standards of
BFOQ had been previously met311 and where the jobs at issue were
shown to be similar to the jobs evaluated previously.312 This limitation
has also been applied to cases interpreting the Business Necessity excep-
tion.313 In Davis v. City of Dallas,314 the court upheld the disparately

308. See Watson v. Fort Worth Bank and Trust, 487 U.S. at 1007-09 & n.6 (Blackmun, J.,
joined by Brennan, Marshall, J.J., concurring) (nationwide studies, expert testimony, prior success-
ful, or unsuccessful, experience); Chambers v. Omaha Girls Club, 834 F.2d 697, 701-02 (8th Cir.
1987) (explanation of Club purpose, expert testimony that absent impacting criterion purpose would
be undermined, and two incidents supporting expert testimony); Uniform Guidelines on Employee
Selection Procedures, 29 C.F.R. § 1607.6B(1)-(2) (1989); infra notes 310-15 and accompanying text
(“borrowed proof”).

309. See Watson v. Fort Worth Bank and Trust, 487 U.S. at 1008 (Blackmun, J., joined by
Brennan, Marshall, J.J., concurring) ("[W]hile common sense surely plays a part in this assessment,
a reviewing court may not rely on its own, or an employer's, sense of what is 'normal'... as a
substitute for a neutral assessment of the evidence presented.").

310. The Supreme Court allowed such "borrowed" proof notwithstanding congressional lan-
guage that the BFOQ be "reasonably necessary to the normal operation of that particular business."

under ADEA) (federal statute mandating retirement of federal fire fighters at age 55, adopted for
reasons other than determination of occupational qualifications, is irrelevant to prove BFOQ excus-
ing Baltimore's municipal code provision mandating retirement of municipal fire fighters at any age
protected under ADEA).

312. Id. (even if statute were adopted because age deemed BFOQ, proof would be relevant, but
not conclusive, depending on similarity between jobs studied and job at issue); Western Air Lines v.

313. See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 1006-07 (1988) (Blackmun, J.,
joined by Brennan, Marshall, J.J., concurring) (relying on "nationwide studies" and abstract testi-
mony from experts); Bernard v. Gulf Oil, 890 F.2d 735, 743 (5th Cir. 1989) (employer may extrapo-
late test validity from crafts where validity study was done to other crafts where no validity study
was done to the extent the crafts are similar); Brunet v. City of Columbus, 642 F. Supp. 1214, 1247
(S.D. Ohio 1986) (test validity study for Akron fire fighter applicable to Columbus fire fighters based
on testimony of similarity in jobs), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987), cert. denied, 485
defective in that the jobs for which the employment test were validated were not sufficiently similar
to jobs for which the same tests were used but not validated).

314. 777 F.2d 205, 211 & n.6, 218-23 (5th Cir. 1985). This decision was endorsed by the Court
impacting forty-five hour college credit requirement for police officers based, in part, on precedent regarding police officers in other jurisdictions, nationwide studies, and general expert testimony. That “borrowed” proof was buttressed, however, with evidence that the other jurisdictions’ conclusions were based on standards of Business Necessity and that the jobs for which the conclusions were adopted were similar to the jobs for which the disparately impacting selection criteria were used. Allowing the flexibility to use “borrowed” proof, with the safeguard of ensuring both legal and factual similarity, promotes efficiency with no loss of protection for equal employment opportunity.

Proponents of deferential scrutiny have pointed to the unfeasibility or impracticability of establishing a higher level justification for subjective selection criteria in particular. Similar concerns under the BFOQ exception caused the courts to develop an alternate standard for those selection criteria which could not be validated, rather than reduce the level of judicial scrutiny required for the defense. Thus, under the BFOQ exception, if an employer can persuade the court that it is impossible or impracticable to prove the strict level of effectiveness required for that defense, courts have allowed the employer to establish effectiveness by showing mere reasonableness. Analogously, an employer should be permitted to avail itself of the reasonable effectiveness standard to establish Business Necessity when it can prove that it is impossible or impracticable, not just bothersome or difficult, to validate the effectiveness of the criterion under mid-level scrutiny. Thus, if employers were able to prove that it is impracticable to validate subjective criteria, they would be


315. In the hiring context, it is appropriate to evaluate the factual similarity between the case at hand and the precedent to be borrowed by comparing the jobs at issue. In another context, such as practices impacting against underrepresented groups regarding benefits, other proof of factual similarity might be required.

316. See Watson v. Fort Worth Bank and Trust, 487 U.S. at 991-92 (plurality) (Bank argued that subjective criteria could not be practicably validated). But see Watson v. Fort Worth Bank and Trust, 487 U.S. at 1007 n.5 (concurrence) (citing amicus brief of American Psychological Association arguing that subjective criteria are “amenable to the same ‘psychometric scrutiny’ as more objective screening devices”); Bartholet, supra note 232, at 986-89; But cf. Rutherglen, supra note 138, at 1315.

317. See supra notes 157-59 and accompanying text.

318. See Davis v. City of Dallas, 777 F.2d at 216-17 (that subjective and not clearly definable skills needed for job cannot be shown effective by formal validation does not relieve employer from lighter validation obligation); Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.6B (1989) (where validity not feasible or required, employer should “either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law”). In Los Angeles Dept’ of Water & Power v. Manhart, 435 U.S. 702, 710-11 n.20 (1978), employer’s concern that adoption of a neutral rule requiring equal contributions from men and women for pensions impacts against males as a group, but see supra note 33, because women as a group live longer and therefore receive higher payout, could be overcome by proposed Business Necessity defense. In light of the fact that no one can tell in advance which women and which men
permitted to establish Business Necessity by a more lenient standard.\textsuperscript{319}

The costs of prohibiting disparately impacting selection criteria that are not substantially effective in achieving important business purposes along with the costs necessary to prove effectiveness and necessity are appropriate to foster equal employment opportunity.\textsuperscript{320} Indeed, the more significant costs of combating disparate treatment discrimination\textsuperscript{321} do not deter the nation’s commitment to remedying that form of discrimination.\textsuperscript{322}

In addition to concern over the marginal cost of heightened scrutiny, proponents of rational basis scrutiny fear that employers will avoid these costs by selecting employees according to quotas.\textsuperscript{323} This is, at best, a relative concern. Incentive to avoid the costs of justifying a disparately impacting selection criterion exists, albeit to a lesser extent, even where the disparate impact can be defended by a deferential standard of review.\textsuperscript{324} Moreover, evidence of disparate impact may raise the inference of disparate treatment discrimination, thereby requiring employer explanation, including the cost and risk of litigation.\textsuperscript{325}

In addition, quota selections may not shield employers from proving Business Necessity. In \textit{Connecticut v. Teal},\textsuperscript{326} the Court ruled that the state’s proportionate hiring at the bottom line could not shield it from proving Business Necessity of a written examination that eliminated a disproportionate number of blacks from being eligible for hire.\textsuperscript{327} The

\begin{itemize}
  \item \textsuperscript{319} See supra note 318.
  \item \textsuperscript{320} See supra Section IIC3c.
  \item \textsuperscript{321} The BFOQ exception requires employer to bear even greater costs because criteria found to be substantially, but not quite perfectly effective, and important, but not compelling, to the business would not be justified as a BFOQ, even though it would be justified under heightened Business Necessity. See supra notes 240-47 and accompanying text, and see generally supra Section IIA. Moreover, the level of impracticability which excuses proof of virtually perfect effectiveness is determined in relation to a more strict standard of scrutiny.
  \item \textsuperscript{322} See Fiss, supra note 148, at 257-63.
  \item \textsuperscript{323} See supra note 305.
  \item \textsuperscript{324} See Cox, supra note 289, at 789-94.
  \item \textsuperscript{327} See Burney v. City of Pawtucket, 559 F. Supp. 1089, 1099-1100 (D.R.I. 1983), appeal dismissed, 728 F.2d 547 (1st Cir. 1984). See also Wilmore v. City of Wilmington, 699 F.2d 667, 674-75 (3d Cir. 1983).

  That ruling appeared to answer in the negative the rhetorical question raised by Furnco Constr. Corp. v. Waters, 438 U.S. 567, 584 (1978) (Marshall, J., joined by Brennan, J., concurring in part and dissenting in part): “it is at least an open question whether the hiring of workers primarily from a list of past employees would, under \textit{Griggs}, violate Title VII where the list contains no Negroes but the company uses additional methods of hiring to increase the numbers of Negroes hired.” But cf. Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(C) (1989) (EEOC will not prosecute employers with proportional bottom line statistics).
\end{itemize}
Court, thus, interpreted Title VII to require the employer to respond with Business Necessity, rather than quota modification, when faced with a disparately impacting selection criterion.\footnote{328} The dissent in \textit{Teal} resurrected the incentive for quota selections by suggesting that employers with proportional bottom lines could circumvent the \textit{Teal} holding by combining the disparately impacting component with other selection factors, rather than making it a pass/fail factor.\footnote{329} This technique condones two preferences, rather than neutrality. Indeed, an employer could only achieve a proportional bottom line despite one criterion which impacts on a protected group where another criterion preferred that group. As \textit{Teal} instructed, an employer’s use of discriminatory criteria against some members of a protected group is not excused by its subsequent use of preferential criteria for other members of that protected group.\footnote{330} Combining exclusionary and preferential criteria violates the spirit of \textit{Teal} because some women, people of color, or other religious or ethnic minorities would be impeded, if not eliminated, by selection devices that distinguish them from Euro-American males without proof that the selection devices satisfy Business Necessity.\footnote{331}

\footnote{328. Some courts have limited the reach of \textit{Teal} to individual, rather than class, actions. See EEOC v. Andrew Corp., 51 Empl. Prac. Dec. (CCH) ¶ 39,364, 59,542 (N.D. Ill. 1989); Brunet v. Columbus, 642 F. Supp. 1214, 1227 (S.D. Ohio 1986), appeal dismissed, 826 F.2d 1062 (6th Cir. 1987), cert. denied, 485 U.S. 1034 (1988); Coser v. Moore, 587 F. Supp. 572, 588 (E.D.N.Y. 1983), aff’d, 739 F.2d 746 (2d Cir. 1984). That limitation is illogical. To establish disparate impact discrimination, an employee must establish that the disparately impacting criterion caused her, not merely her protected group, harm. See supra note 34. Thus, those protected individuals who would have been harmed by the disparately impacting criterion but for the employer’s preference to achieve a proportional bottom line would have no claim under disparate impact discrimination. If the subgroup of the protected group actually harmed by the disparately impacting criterion is sufficiently numerous for a class action, however, nothing in \textit{Teal} forbids it.


331. Just as certain African-Americans in \textit{Teal} were eliminated from consideration based on the test, certain people from underrepresented groups here would be disadvantaged based on the selection criterion. Both violate individual opportunity and operate as “‘built-in headwinds’ for minority groups” which was the concern of the Court in \textit{Teal}. 457 U.S. at 448-51, 455 (“It is clear that
The feared possibility of quotas could, thus, occur only where an employer surreptitiously manipulated the results of its otherwise disparately impacting selection criterion to achieve proportional selections.\textsuperscript{332} Such manipulation would require giving preference to some protected individuals based solely on their protected status. The Supreme Court, in \textit{Johnson v. Transportation Agency, Santa Clara County}\textsuperscript{333} and \textit{United Steelworkers of America v. Weber},\textsuperscript{334} however, suggested that employers could not engage in preferential treatment unless they complied with specific requirements for affirmative action programs. Thus, detected manipulation might result in liability for reverse discrimination.\textsuperscript{335} Consequently, selecting employees by quota would not protect employers from liability.

The concern with quotas is that they undermine business productivity and violate the anti-preference mandates in Section 703(j) of Title VII.\textsuperscript{336} While quotas may be a problem, heightened scrutiny under em-

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\textsuperscript{332} \textit{See} Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 993 (1988) ("The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms... "); Gold, \textit{supra} note 138, at 460, 587. "True" results on the selection device would be diminished by the manipulation required to avoid impact. The selection device would still be a factor in the selection of employees, however. \textit{See supra} notes 326-28 and accompanying text. \textit{Cf} Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. \S 1607.6B (1989) (advocates eliminating adverse impact or justifying "in accord with Federal law" where employer cannot or must not validate). Moreover, an employer's assertion that its practices are necessary to its business is undermined where the employer chooses to employ individuals who do not meet its standards rather than to justify the merit of its standards.

\textsuperscript{333} 480 U.S. 616, 640-43 (1987).

\textsuperscript{334} 443 U.S. 193, 208-09 (1979).


\textsuperscript{336} \textit{Civil Rights Act of 1964} \S 703(j), 42 U.S.C. \S 2000e-2(j) (1988) provides:

Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or 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
employer’s Business Necessity obligation does not compel quotas. A searching Business Necessity test insures that employees are selected on the basis of their productivity, not their protected status.337 Moreover, while Section 703(j) does prohibit compelled quota selections,338 it does not prohibit requiring employers to forego using unjustified and non-neutral selection criteria. Prohibiting disparate impact discrimination does not violate the anti-preference requirements of Section 703(j), regardless of the level of scrutiny required for Business Necessity.339 Both the proof340 and the relief341 under disparate impact discrimination are dis-

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337. See supra note 304 and accompanying text.
338. See United Steelworkers of Am. v. Weber, 443 U.S. at 204-06 (avoiding the strictures of Section 703(j) because company’s affirmative action program was voluntary).
339. See Blumrosen, supra note 176, at 106; Blumrosen, Griggs Was Correctly Decided—A Response to Gold, 8 INDUS. REL. L.J. 443 (1986); Maltz, supra note 306, at 355 n.43. Cf. Cox, supra note 138, at 78-79, 101 (eliminating illicit barriers under disparate impact consistent with prohibition against proportional employment in 703(j)); Fiss, supra note 148, at 290-301 (anti-preference prohibition does not bar compelled elimination of disparately impacting criterion shown to be unrelated to productivity and beyond the individual’s control). But see Gold, supra note 138, at 503-11; Rutherford, supra note 138, at 1313-16, 1326-27, 1345.
340. The prima facie proof of disparate impact requires employees to prove that an employer’s selection criterion caused disproportionate elimination of people from underrepresented groups. See supra Section IA. See Caldwell, supra note 138, at 590-91. By Section 703(j), on the other hand, an employer is protected where the employee proves only the existence of a statistical imbalance in the race, color, religion, sex, or national origin of the employer’s work force as compared with the relevant labor population, without identifying a cause of that imbalance. See, e.g., Wards Cove Packing Co. v. Atonio, 109 S. Ct. at 2124 (“a Title VII plaintiff does not make out a case of disparate impact simply by showing that, ‘at the bottom line,’ there is racial imbalance in the work force,” (emphasis in original)); Watson v. Fort Worth Bank and Trust, 487 U.S. at 994 (“we note that the plaintiff’s burden in establishing a prima facie case goes beyond the need to show that there are statistical disparities in the employer’s work force.”); United States v. Local 638, Enter. Ass’n of Steam and General Pipe Fitters, 347 F. Supp. 169, 181 (S.D.N.Y. 1972).
341. The relief for disparate impact discrimination is to enjoin the employer from using the disparately impacting criterion and to make whole employees adversely affected by the illegal criterion. Even where the employee prevails, to the extent the employer can establish that an employee is not entitled to the employment opportunity based on a legal selection criterion, the employee would not be entitled to make whole relief, including employment. See Evans v. City of Evanston, 881 F.2d 382, 386 (7th Cir. 1989) (plaintiffs must pass new physical agility test and perform well enough on other measures to show that “but for unfair scoring of the 1983 test they would have been hired in 1983” in order to recover make-whole relief); Ross v. Buckeye Corp., 733 F. Supp. 363, 377-78 (M.D. Ga. 1990) (plaintiffs must demonstrate individual injury caused by discriminatory practice by proving that they satisfied the employer’s bona fide job qualifications); Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g) (1988) which provides in pertinent part:

No order of the court shall require . . . the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was . . . refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin . . . .

Moreover, relief is deemed equitable and subject to the court’s discretionary judgment as constrained by Title VII’s purposes to achieve equality of employment opportunity and to make whole victims of discrimination. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

Section 703(j), on the other hand, protects against preferential treatment of group members based solely on statistical imbalances with respect to race, color, religion, sex, or national origin. See Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC, 478 U.S. 421, 464 n.37 (1986) (Section 703(j)
tinct from the prohibitions of Section 703(j).

In sum, the fear that adoption of a level of scrutiny more stringent than rational basis will result in violation of Section 703(j) is legally unfounded. The obsession with Section 703(j) by proponents of deferential review has obscured the more relevant BFOQ exception in Section 703(e)(1). It is Section 703(e)(1) that set the priority for equal employment opportunity compared with business needs—a priority undercut by deferential review of disparate impact discrimination.

Moreover, the predictions that adoption of heightened scrutiny for Business Necessity will result in burdensome costs leading to quota selections are historically unfounded. Indeed, the Court's endorsement of a deferential standard of review is relatively recent. Courts have been applying at least mid-level scrutiny for the almost two decades since the disparate impact theory was developed. During that time the costs of heightened Business Necessity did not jeopardize employers' business productivity, nor did heightened scrutiny result in quota employment decisions, as evidenced by the still dramatically unbalanced employment figures for the nation.

Perhaps the recent adoption of more deferential review of disparate


342. See supra Section 1B.

343. See supra note 139.

344. Indeed, employers had accepted the strict Business Necessity standard from Griggs. 47 Cong. Q. No. 45, at 3059 ("Over the course of the past 18 years, since Griggs, there has built up in the employment community a kind of consensus that these changes wrought by Griggs and similar cases are changes that employers can live with"); quoting William L. Taylor, presently a private lawyer, formerly staff director of the U.S. Civil Rights Commission); Philadelphia Inquirer, March 11, 1990, at 5-C ("lawyers who represent such industrial giants as IBM and the National Manufacturers Association testified in congressional hearings that the business community has learned to live with the Griggs decision—even those who oppose the proposed legislation [the Civil Rights Act of 1990 (S. 2104, H.R. 4000)]").

345. Whereas the white unemployment rate since 1965 was consistently below the overall average rate, the unemployment rate for people of color during that same time was consistently almost double the overall average rate. BUREAU OF LABOR STATISTICS, U. S. DEPT OF LABOR, BULLETIN 2340, HANDBOOK OF LABOR STATISTICS, Table 26 (1989). For example, during 1988 the overall unemployment rate for all civilian workers was 5.5%, for white workers was 4.7%, for Black workers was 11.7% and for Hispanic workers was 8.2%. Id. Moreover, over the last decade, of those working full time for wages or salaries, white males have increasingly earned more than Black males and women, such that in 1988, the median weekly earnings of white men was $465 compared with Black men who earned $347, white women who earned $318, or Black women who earned $288. Id. at Table 41.
impact discrimination is better explained by a dissatisfaction with the theory of effects discrimination in favor of a theory focusing on intentional discrimination.\textsuperscript{346} Adopting a broad Business Necessity defense, although consistent with redefining disparate impact discrimination to require intent,\textsuperscript{347} would condone the harm resulting from the use of non-neutral selection criteria that were traditionally examined under disparate impact theory. Regardless of the merits of redefining disparate impact discrimination, it is Congress, rather than the courts, which should steer this new course. Thus, rational basis scrutiny for Business Necessity should be rejected for lack of legal support.

c. \textit{Mid-Level Scrutiny is Appropriate}

Setting the standard of review for Business Necessity at mid-level accommodates the political and practical concerns mitigating against adopting the strict scrutiny of the BFOQ standard, without capitulating to the unfounded fears of those endorsing rational basis scrutiny. Mid-level scrutiny would require the disparately impacting criterion to be substantially effective in achieving an important business purpose.\textsuperscript{348} That level of scrutiny not only steers a course between the too stringent strict scrutiny and the too deferential rational basis scrutiny, it also is consistent with Congress' commitments reflected in Title VII.

Title VII was enacted to increase minority representation in the workforce.\textsuperscript{349} Although that goal is not absolute,\textsuperscript{350} it reflects Congress'
strong commitment to curtailing discrimination based on the prohibited factors, intentional or not.\textsuperscript{351} Indeed, the 92d Congress recognized employment discrimination to comprise "'systems' and 'effects' rather than simply intentional wrongs."\textsuperscript{352} Requiring the employer to forego using only those disparately impacting criteria which are irrational in the business context acknowledges only the employers’ perspectives and recognizes no commitment to eliminating disparate impact discrimination.\textsuperscript{353} This is particularly true where disparately impacting selection criteria would be judged rational where they promote existing employment conditions, which are structured with Euro-American male employees as the standard.\textsuperscript{354} In order to improve equal employment opportunity it is, therefore, necessary to challenge business as usual: efficiency must be tempered by a commitment to neutrality. Providing protection against disparate impact discrimination commensurate with Congress' commitment in Title VII, therefore, demands at least mid-level scrutiny for Business Necessity.\textsuperscript{355}

Adopting mid-level review is also consistent with early Supreme Court precedent on Business Necessity, including the \textit{Griggs} decision, which coined the term "Business Necessity" and which was endorsed by Congress.\textsuperscript{356} Moreover, proposed amendments to Title VII specifying a standard for Business Necessity\textsuperscript{357} reflect a mid-level, as opposed to strict or rational,\textsuperscript{358} standard of scrutiny. Thus, requiring heightened scrutiny of employers' disparately impacting selection criteria strikes the balance.

\begin{itemize}
\item \textsuperscript{351} See Brodin, supra note 41, at 322-24; Caldwell, supra note 138, at 592-93. \textit{But see} Gold, supra note 138, at 503-11; Rutherglen, supra note 138, at 1313-16, 1326-27, 1345.
\item \textsuperscript{352} See S. REP. No. 415, 92d Cong., 1st Sess. 5 (1971); H.R. REP. No. 238, 92d Cong., 1st Sess. 8 (1971). \textit{See generally} Thompson, supra note 73 passim.
\item \textsuperscript{353} See Eisenberg, \textit{Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication}, 52 N.Y.U. L. REV. 36, 112, 121 (1977); International Union, UAW v. Johnson Controls, Inc., 886 F.2d 871, 903 (7th Cir. 1989) (Posner, C.J., dissenting) ("If the defense of bona fide occupational qualification were broadly construed—for example, to excuse all sex discrimination that the employer could show was cost-justified—very little sex discrimination in employment... would be forbidden. Title VII's reach would be shortened drastically."); \textit{cert. granted}, 110 S. Ct. 1522 (1990). \textit{Cf.} Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1785-87 (1989) (recognizing that employer may be motivated by both legitimate and illegitimate purposes).
\item \textsuperscript{354} Freedman, supra note 156, at 949 ("legal standards that uphold neutral rules as long as they can be shown to be efficient or functional in terms of current social arrangements fail to take into account the cultural dynamics of sexism"); Littleton, \textit{Reconstructing Sexual Equality}, 75 CALIF. L. REV. 1279, 1325-26 (1987); Minow, supra note 300, at 33-70.
\item \textsuperscript{355} \textit{See} Freedman, supra note 156, at 961 (Business Necessity is normative standard reflecting priority to end discrimination). \textit{Cf.} S. 2104, supra note 9, § 11 and H.R. 4000, supra note 9, § 11 (proposing amendment to require broad construction "to effectuate [the] purpose" of the law).
\item \textsuperscript{356} \textit{See supra} Section IB1 and supra note 73.
\item \textsuperscript{357} \textit{See supra} note 303.
\item \textsuperscript{358} The standards proposed are less strict than that required for the BFOQ exception codified.
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between increasing employment opportunities of those protected by Title VII and accommodating employers' business needs as Congress mandated in Title VII.

To allow an employer to use a disparately impacting criterion absent substantial effectiveness and important business reason would condone substitution of judges' and employers' judgments for that of the people as defined by Title VII.\textsuperscript{359} It is critical that the judiciary scrutinize employers' disparately impacting criteria consistent with Congress' commitment to eliminate disparate impact discrimination because Congress gave the judiciary virtually exclusive authority to enforce Title VII.\textsuperscript{360} Thus, if the courts are not vigilant to prohibit disparate impact discrimination consistent with the mandates of Congress, employees are otherwise powerless to have those mandates enforced.

Consequently, the Business Necessity exception should require mid-level scrutiny of both the necessity and effectiveness of the disparately impacting criterion. This level of scrutiny appropriately accommodates the nation's somewhat lesser commitment to ending disparate impact discrimination compared with disparate treatment discrimination, by modifying the strict scrutiny standard of Section 703(e)(1)'s BFOQ exception to disparate treatment discrimination, yet preserves Congress' still strong commitment to minimizing disparate impact discrimination, by avoiding the deferential rational basis standard of scrutiny.

**D. Adopting the Burden of Proof of BFOQ**

Adopting the evidentiary standard of the BFOQ would require employers to bear both the burden of production and persuasion on Business Necessity.\textsuperscript{361} Precedent on assigning the burdens of proof for

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\textsuperscript{359} Congressionally mandated judicial scrutiny of employer's Business Necessity exception, by contrast, contemplates judging and balancing the employer's need to select its employees by using disparately impacting selection criteria against Congress' desire to increase employment opportunities of underrepresented groups. This is not gratuitous restructuring of an employer's business practices, as feared by proponents of deferential scrutiny. See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 999 (1988) ("In evaluating claims that discretionary employment practices are insufficiently related to legitimate business purposes, it must be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."). Indeed, by Section 703(a) of Title VII, see supra note 2, Congress has mandated courts to enjoin unnecessary disparately impacting criteria.


\textsuperscript{361} See supra note 151 and accompanying text. This is analogous to assigning the state the burden of production and persuasion to justify discriminatory classifications under the fourteenth
Business Necessity, however, is split. Some decisions require employers to bear both the burden of production and persuasion on Business Necessity, whereas other decisions require employers to bear merely the burden of production. Both the substantive policies under Title VII and evidentiary guidelines support assigning employers both the burden of production and persuasion on Business Necessity.

I. Title VII Policies Require Employers to Persuade on Business Necessity

The substantive policies under Title VII support assigning employers both burdens on Business Necessity. Employers are not obligated to prove Business Necessity until after employees have proved that they were denied employment opportunities based on an employer’s facially neutral criterion which disproportionately eliminated those of their particular race, color, religion, sex, or national origin. Such disparate impact proof establishes that the employer discriminated on the basis of a protected trait in violation of Title VII. Moreover, employers’ Business Necessity response is one of justification and excuse to avoid liability, not denial of the discrimination. Consequently, the Business Necessity exception, like the BFOQ exception, constitutes an affirmative defense on which the defendant, in this case the employer, bears the burden of pleading, producing evidence, and persuading. The party seeking to be excepted from a humanitarian, remedial statute, such as Title VII,
traditionally bears those burdens.\textsuperscript{368}

Assigning employer the heavier evidentiary burden, like requiring a heightened substantive burden,\textsuperscript{369} promotes the policy of encouraging equal employment opportunity under Title VII.\textsuperscript{370} It is also consistent with congressional intent. First, the 92d Congress considered legislation to create an explicit Business Necessity exception that tracked the language of the BFOQ exception, which had been unanimously interpreted to require the employer to bear the burden of persuasion.\textsuperscript{371} Moreover, that same Congress endorsed the \textit{Griggs} decision, where the Supreme Court assigned the Power Company the burden of persuasion on Business Necessity.\textsuperscript{372} Today, the 101st Congress is considering legislation “to clarify the burden of proof”\textsuperscript{373} for Business Necessity by requiring employers to bear both the burden of production and persuasion.\textsuperscript{374} Finally, giving the employer the risk of non-persuasion on Business Necessity is also consistent with the guidelines issued by the Equal Employment Opportunity Commission.\textsuperscript{375}

Assigning employers the lighter evidentiary burden, on the other hand, like assigning employers a deferential substantive burden,\textsuperscript{376} allows them almost complete deference to use disparately impacting criteria. In \textit{Dothard v. Rawlinson},\textsuperscript{377} for example, Justice Rehnquist suggested that employers could satisfy their evidentiary burden without offering any evidence, but merely by arguing to the court a plausible business reason for using the disparately impacting criterion—in that case by arguing that

\textsuperscript{368} See \textit{Weeks v. Southern Bell Tel. \\& Tel.}, 408 F.2d 228, 232 (5th Cir. 1969) (statutory exception). By raising the Business Necessity exception, employers seek to escape liability for using a selection criterion which disproportionately eliminates groups protected by Title VII. In order to enforce the equal employment opportunity mandates established by Title VII, employers should, therefore, bear the risk of non-persuasion on whether use of that criterion is justified notwithstanding this impact.

\textsuperscript{369} See \textit{supra} Section IIC.

\textsuperscript{370} See \textit{Belton, supra} note 25, at 1285-87 (assigning employer burden of persuasion enforces the equal employment opportunity goals of Title VII by aiding employee, prosecutor under the statute, and by requiring employer to examine its policies and make socially responsible decisions).

\textsuperscript{371} See \textit{H.R. 1746, 92d Cong., 1st Sess., 117 CONG. REC. 17,539 (1971)}, quoted \textit{supra} note 164.

\textsuperscript{372} 401 U.S. 424, 432 (1971) ("Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question"). See \textit{supra} note 73.


\textsuperscript{374} Civil Rights Act of 1990, S. 2104, \textit{supra} note 9, §§ 3-4; \textit{H.R. 4000, supra} note 9, §§ 3-4 (disparate impact discrimination is an “unlawful employment practice” where employer “fails to demonstrate that such practice is required by business necessity,” defining “demonstrate” to mean “meets the burdens of production and persuasion”); S. 1261, \textit{supra} note 9, § 2 (same).

\textsuperscript{375} Section 5 of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.5 (1989), places responsibility for justifying the use of disparately impacting selection criteria on employers. See \textit{supra} note 51.

\textsuperscript{376} \textit{But see supra} Section IIC.

appearance of strength justified the height and weight criteria which eliminated virtually all women from employment with the prisons. 378

Allowing employers to avoid liability for its disparately impacting criterion with legal argument, rather than introduction of objective evidence, does not even satisfy the burden of production, 379 much less justify the disparate impact. 380

Even where the burden of production is appropriately applied, the employer is obligated merely to introduce evidence of a business reason for using the challenged selection criterion. 381 By that standard, it is the employee who must persuade the factfinder that the challenged criterion is not reasonable. 382 Moreover, the employee bears this weighty burden after already proving disparate impact discrimination. 383 This result is unfair. It would be more appropriate to require the employer to bear the burden to persuade on the Business Necessity defense after the employees bore that burden when proving disparate impact discrimination.

Indeed, assigning the employer the burden of producing evidence, a mechanism for the judge to evaluate whether the case can be submitted to the trier of fact, 384 is even more meaningless where, as under Title VII, the judge is traditionally the trier of fact. 385 Moreover, that evidentiary assignment facilitates employer awards of summary judgment, thereby

378. Id. at 339 (Rehnquist, J., concurring). Thus, that decision allows the judiciary to evaluate a lawyer’s argument rather than objective evidence to justify employer’s disparately impacting criterion. Cf. supra Section IIB2.

379. See Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 255 & n.9 (1981); see also supra note 71.

380. See supra Section IIB2.


382. See Mallory v. Booth Refrigeration Supply, 882 F.2d 908, 912 (4th Cir. 1989) (“claimants must prove that the proffered justification for the practice does not serve any legitimate employment goals of the employer”); Allen v. Seidman, 881 F.2d at 379 (after Wards Cove, employee “must prove the test unreasonable”); Evans v. City of Evanston, 881 F.2d 382, 385 (7th Cir. 1989) (employee has burden of persuasion that “test, because of its method of scoring, did not serve the legitimate ends of the employer but instead unreasonably excluded women”); Cf. EEOC v. Andrew Corp., 51 Empl. Prac. Dec. (CCH) ¶ 39,364, at 59,541-42 (N.D. Ill. 1989) (word of mouth recruiting shown unreasonable, and indeed purposefully discriminatory, where it was imposed on exclusively white clericals to the almost total exclusion of Blacks and where corporation supplemented it with advertising in only white suburban newspapers).

383. See supra Section IA (proof of disparate impact).

384. See supra note 36.

denying employees the benefit of trial, despite their proof of disparate impact discrimination.  

Proponents of assigning employers this light burden support their argument by analogy to the burden of proof an employer must carry to rebut employees' pretextual case of disparate treatment discrimination. That analogy is inappropriate. The Business Necessity exception allows the employer to avoid liability through justification of proved disparate impact discrimination. The rebuttal burden in pretextual disparate treatment cases, on the other hand, requires the employer merely to rebut and deny the inference of discrimination. An employer's weightier obligation to justify proved disparate impact discrimination with Business Necessity, compared with its obligation to rebut merely the inference of disparate treatment discrimination, merits the weightier evidentiary burden. Consequently, to promote the policies of Title VII, employers should bear both the burden of production and the burden of persuasion on Business Necessity.

2. Evidentiary Standards Require Employers to Persuade on Business Necessity

Assigning employers the burden of persuasion for Business Necessity is most consistent with evidentiary guidelines. The law generally assigns the burden of persuasion to the party (1) who seeks to prove the affirmative allegation, (2) who has the greatest means of knowledge of the fact, and (3) whose case requires the fact. On the Business Necessity


388. See supra note 169. Even in that instance, articulation of a rational business reason may not be sufficient to overcome the inference of intent. See Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1785 (1989) (employer may commit disparate treatment discrimination where both a legal and an illegal reason motivated the adverse employment action); the Civil Rights Act of 1990, S. 2104, supra note 9, § 5a; H.R. 4000, supra note 9, § 5a (employer commits disparate treatment discrimination where an illegal reason motivated the adverse employment action regardless of additional legal reason).

389. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2130-32 (Stevens, J., joined by Brennan, Marshall, Blackmun, J.J., dissenting); NAACP v. Medical Center, Inc., 657 F.2d 1322, 1352-55 (3d Cir. 1981) (Gibbons, J., concurring and dissenting); Williams v. Colorado Springs, Colo. School Dist. No. 11, 641 F.2d 835, 841-42 (10th Cir. 1981); Kirby v. Colony Furniture Co., 613 F.2d 696, 703-04 n.5 (8th Cir. 1980); Caldwell, supra note 138, at 591, 604-05; Furnish, supra note 138, at 441; Lamber, supra note 76, at 14-15; Smith, supra note 138, at 393-94; Terrell, supra note 367, at 313-14. But see NAACP v. Medical Center, Inc., 657 F.2d at 1335-36 (en banc) (Title VI case discussing burdens of proof under Title VII) (advocating employee bear burden of persuasion for rebuttal of disparate treatment and Business Necessity defense of disparate impact); Belton, supra note 25, at 1247-50, 1257-73, 1284 (advocating employer bear burden of persuasion to defend against liability in both mixed motive disparate treatment and disparate impact cases).

issue, the employer seeks to prove the affirmative allegation—Business Necessity. Assigning the employee the burden of persuasion would require the employee to persuade the judge of a negative, that the employer’s articulated justification is not sufficient to satisfy Business Necessity.\(^{391}\) Moreover, the employer also has the greatest means of knowledge on Business Necessity, focusing on whether the disparately impacting criterion effectively furthers its business needs.\(^{392}\)

Determining whose case requires the fact at issue, in this case, Business Necessity, is more controversial. Proponents of assigning employers the burden of persuasion would define the violation under disparate impact theory—traditionally employee’s case—as the disproportionate effects on protected individuals and the affirmative defense—traditionally employer’s case—as Business Necessity.\(^{393}\) The proponents of assigning employees the burden of persuasion, by contrast, would define the violation under disparate impact theory as non-business-related effects on protected individuals, for which there is no affirmative defense.\(^{394}\) The substantive law under Title VII, however, supports the first position.\(^{395}\)

Proponents of assigning the employer only the burden of production for Business Necessity also cite Federal Rule of Evidence 301\(^{396}\) for support.\(^{397}\) That evidentiary rule, which dictates the assignment of evidentiary burdens where a presumption arises, is inapplicable for two

5, 7-8 (1959) (generally plaintiffs prove the "ifs" and defendants prove the "unlesses," but neither three factors nor considerations of fairness provide helpful guidance on assigning the burdens of proof).


392. See NAACP v. Medical Center, Inc., 657 F.2d 1322, 1352 (5th Cir. 1981) (Gibbons, J., concurring and dissenting); Johnson v. Uncle Ben’s, Inc., 657 F.2d 750, 753 (5th Cir. 1981), cert. denied, 459 U.S. 967 (1982); Belton, supra note 25, at 1284; Caldwell, supra note 138, at 605 (critiquing discovery and administrative investigation as avenues for employee access to information on Business Necessity); Smith, supra note 138, at 395-96.


395. See supra Section IID1.

396. Fed. R. Evid. 301 provides:

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.


398. A presumption is a rule of evidence which requires the fact finder to infer the ultimate fact
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reasons.

First, the rule is applicable only where a presumption, a legally compelled inference, arises. The employee’s proof of disparate impact discrimination, however, does not raise an inference to be rebutted by Business Necessity; rather the employee’s proof establishes a violation of Title VII to be justified and excused by Business Necessity.399

In addition, Federal Rule of Evidence 301 is inapplicable to “civil actions . . . provided for by Act of Congress.” The presumption of intentional discrimination in pretextual disparate treatment cases under Title VII occurred through interpretation of the statute, not by operation of Federal Rule of Evidence 301.400 To the extent proof of disparate impact discrimination raises only a presumption which proof of Business Necessity rebuts, it would not be governed by a rule of evidence, but by interpretation of Title VII.401 Thus, Federal Rule of Evidence 301 does not support assigning employers only the burden of production for Business Necessity. It and other evidentiary guidelines, rather, support assigning employers both the burden of production and the burden of persuasion for Business Necessity.

E. Adapting the BFOQ’s Least Discriminatory Alternative

In addition to proving that the protected factor satisfies strict judicial scrutiny of the necessity and effectiveness tests, the BFOQ exception requires employers to prove that there are no less discriminatory alternatives than using the protected factor to achieve their compelling business purposes.402 Similarly, even where an employer proves by objective evidence that the disparately impacting selection criterion substantially achieves an important business purpose, that prima facie case of Business Necessity may be rebutted with evidence that an alternative selection criterion with less impact against protected individuals403 would also ac-

400. See supra note 396; J. WEINSTEIN & M. BERGER, 1 WEINSTEIN’S EVIDENCE at 301-43 to 301-48 (1989).
401. See Belton, supra note 25, at 1266-67 (FED. R. EVID. 301 inapplicable to Business Necessity adopted pursuant to an act of Congress).
402. See Gunther v. Iowa State Men’s Reformatory, 612 F.2d 1079, 1087 (8th Cir. 1980) (no BFOQ established absent proof of no “reasonably available,” less discriminatory alternatives that meet the legitimate needs of business), cert. denied, 446 U.S. 966 (1980).
403. The alternative can either impact on fewer people or have a slighter impact on those affected. See Levin v. Delta Air Lines, 730 F.2d 994, 1000-02 (5th Cir. 1984); Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1553-54 (11th Cir. 1984); Zuniga v. Kleberg County Hosp., 692 F.2d 986, 992 (5th Cir. 1982).
complish that purpose. Although Business Necessity precedent acknowledges that alternative proof can be used to rebut an employer's showing of necessity, there are disputes on the goal for offering proof of alternatives, on the proof required to establish an alternative, and on who bears the burden of proving the alternatives.

1. The Goal of Alternatives Proof

The first dispute questions whether the goal of offering alternatives is to undermine an employer's Business Necessity or merely to establish intentional discrimination. Objective evidence of a lesser-impacting alternative which would accomplish the employer's business purpose challenges the necessity of the employer's Business Necessity, regardless of the employer's intent.\footnote{See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 1005-06 (1988) (Blackmun, J., concurring, joined by Brennan, Marshall, J.J.) (selection process that is sufficiently job-related may still be unlawful if another selection process with a lesser discriminatory effect could also service the employer's business needs); Dothard v. Rawlinson, 433 U.S. 321, 332 (1977) (alternative of testing strength directly found to be more effective); Dothard v. Rawlinson, 433 U.S. at 339-40 (Rehnquist, J., joined by Burger, C.J., Blackmun, J, dissenting) (alternative of requiring appearance of strength found to be more effective); United States v. South Carolina, 445 F. Supp. 1044, 1115-16 (1977) (rejecting use of graduation from approved program as alternative to disparately impacting test because it does not serve employer's purpose to certify minimally competent "equally well"); Contreras v. City of Los Angeles, 656 F.2d 1267, 1275 n.5, 1285 (9th Cir. 1981) (rejecting plaintiff's assertion that oral interviews, on which Spanish-surnamed individuals usually performed better than on written examinations, were as effective in meeting hiring needs), cert. denied, 455 U.S. 1021 (1982); Blake v. City of Los Angeles, 595 F.2d 1367, 1383 (9th Cir. 1979) ("So long as non-discriminatory alternatives serve the legitimate interests of the police in safe and efficient job performance, police departments cannot pursue policies that require the use of selection standards that are themselves prima facie violations of Title VII");, cert. denied, 446 U.S. 928 (1980); Robinson v. Lorillard Corp., 444 F.2d 791, 798 & n.7 (4th Cir. 1971) ("a practice is hardly 'necessary' if an alternative practice better effectuates the intended purpose or is equally effective but less discriminatory");, cert. dismissed, 404 U.S. 1006 (1971); Sullivan, supra note 205, at 195 (acknowledging both uses of alternatives proof); Barthalet, supra note 232, at 1023-26 ("Title VII standards demand that the employer opt for any available alternative system that has a lesser impact, so long as it also serves the employer's job needs"); Caldwell, supra note 138, at 601 ("plaintiff's... proof may consist solely of evidence of reasonable alternatives to the challenged practice without putting the defendant's state of mind in issue"); Lamber, supra note 76, at 6-7 ("evidence of workable alternatives... may illustrate that the relationship between the selection criterion and the employer's purpose is not substantial enough to justify use of that criterion"); Comment, supra note 138, at 925 (if there is an "obvious, costless alternative," a "more disadvantaging test cannot be justified as a business necessity"); GA. NOTE, supra note 33, at 397-400 (employment practice is not "necessary" if there exists reasonably available alternative with a lesser discriminatory impact); YALE NOTE, supra note 138, at 101-02, 115-16 ("practice with a disparate impact" that substantially increases the safety or efficiency of business is not permitted "if another practice can achieve equal benefits with a lesser disparate impact"). Cf. New York City Transit Auth. v. Beazer, 440 U.S. 568, 590 & n.33 (1979) (Stevens, J., joined by Burger, C.J., Stewart, Blackmun, Rehnquist, J.J.) (recognizing alternatives proof to challenge rationality of disparately impacting methadone rule under Constitution); Trimble v. Gordon, 430 U.S. 762, 771-72 (1977) (categorical denial of the right of illegitimate children to inherit by intestate succession from their fathers is unconstitutional under mid-level scrutiny where prior adjudication of paternity would also serve the state's interest in establishing method of property disposi-}
individuals, rather than the alternative with a lesser impact, to accomplish its goal, the employer's choice might evidence intentional discrimination.\footnote{405}

The Court in \textit{Albemarle Paper Co. v. Moody} \footnote{406} first suggested, in dictum, that the employee could prevail over the employer's Business Necessity proof by offering evidence of lesser-impacting alternatives. The Court stated that such evidence would establish that the employer used the criterion merely as a "pretext" for discrimination.\footnote{407} Some commentators read that statement to restrict use of alternatives evidence to prove intentional discrimination.\footnote{408} Subsequently, the Court in \textit{New...
York City Transit Authority v. Beazer precluded remand for the district court to consider alternatives proof to show intentional discrimination, finding such a remand to be contrary to the district court's express finding that the methadone "rule was not motivated by racial animus." Authors have concluded that Beazer foreclosed alternatives proof except to prove intentional discrimination.\(^{410}\)

Neither Albemarle nor Beazer restricted the use of alternatives proof to establishing intentional discrimination. Albemarle's description of using alternatives, merely dicta, was ambiguous. It is illogical that the Court's brief reference to pretext in Albemarle\(^ {411}\) was meant to undermine the theory of disparate impact discrimination by inserting intentional discrimination into that theory.\(^ {412}\) It is more likely that the Court's reference to pretext was meant as an analogy: whereas pretext proof in a disparate treatment case\(^ {413}\) would undermine the employer's rebuttal evidence by reestablishing an inference of intentional discrimination,\(^ {414}\) pretext proof in a disparate impact case would undermine the employer's Business Necessity proof by contradicting the necessity or effectiveness of using the disparately impacting criterion.

Moreover, the Beazer Court's reference to the employees' disparate impact rebuttal proof stated:

The District Court's express finding that the [disparately impacting no-methadone] rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination.\(^ {415}\)

The district court's unchallenged finding that the rule was not intentionally discriminatory foreclosed consideration of alternatives proof to establish that the rule was adopted with intent to discriminate. The Court's failure to remand for the district court to evaluate Beazer's alter-


\(^ {410}\) See Furnish, supra note 138, at 424-25; Maltz, supra note 306, at 352 & n.38; Ill. Note, supra note 140, at 207-10. But see Watson v. Fort Worth Bank and Trust Co., 487 U.S. 977, 998 (1975) (O'Connor, J., joined by Rehnquist, C.J., White, Scalia, J.J.) (suggesting two reasons for alternatives); Caldwell, supra note 138, at 601-02 (Beazer allows alternatives proof both to specify available alternatives and to demonstrate discriminatory purpose); Lamber, supra note 76, at 21, 23-25 (first outlining the "common reading" of Beazer, then presenting several reasons why Beazer should not be read as substantially modifying the disparate impact theory).

\(^ {411}\) Indeed, the Supreme Court subsequently quoted Albemarle's reference to alternatives without quoting the "pretext" language, indicating its relative insignificance. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

\(^ {412}\) See supra notes 12, 23.


\(^ {414}\) Employer's rebuttal sought to prove that its actions were not motivated by intent to discriminate based on race, color, religion, sex, or national origin. Id. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981).

\(^ {415}\) 440 U.S. at 587.

\(^ {416}\) Id. at 584 n.25.
natives proof, offered for the purpose of undermining the employer's Business Necessity, cannot be taken to foreclose the possibility of using alternatives proof for this purpose. Indeed, the Court also failed to demand for the district court to reevaluate its finding that the Authority had failed to establish Business Necessity. Moreover, the Beazer Court itself evaluated and rejected lesser-impacting alternatives to challenge necessity, albeit in the context of the constitutional, rather than the Title VII, challenge.

In Dothard v. Rawlinson, the Supreme Court found that alternatives proof undermined the state's Business Necessity justification. There the Court rejected a Business Necessity claim excusing the state's disparately impacting height and weight criteria because the goal of predicting qualified job performance could have been accomplished by measuring strength directly, presumably a more effective and lesser impacting alternative. Using alternatives proof to rebut the Business Necessity justification for an employer's use of a disparately impacting criterion is consistent with the objective justification required under the Business Necessity exception to Title VII. Moreover, courts interpreting the BFOQ exception have found the availability of lesser-discriminatory alternatives to undermine the employers' proof of the BFOQ exception. Thus, consistent with the BFOQ exception, employees may rebut employers' Business Necessity justifications with evidence of lesser-impacting alternatives.

417. Employee's proposed lesser impacting alternative would require the Transit Authority to replace its no-methadone rule with individualized checking of the employability of those on methadone. Id. at 590 n.33.

418. See id. at 597-98 (White, J., joined by Brennan, Marshall, J.J., dissenting). See supra note 80 and accompanying text.

419. The Court rejected the alternative of applying individualized screening procedures rather than the disparately impacting blanket methadone rule, claiming that employees failed to show that its alternative to the methadone rule would accomplish employer's purpose equally as well as the disparately impacting alternative. Id. at 590 n.33. The Beazer Court's requirement, that employee's alternatives be "as cheap and effective," is consistent with its lax Business Necessity standard. See infra note 425.


421. See Hardin v. Stynchcomb, 691 F.2d 1364, 1374 (11th Cir. 1982); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087 (8th Cir.) (no BFOQ established absent proof of no less discriminatory alternatives), cert. denied, 446 U.S. 966 (1980). Cf. Chambers v. Omaha Girls Club, 834 F.2d 697, 702-03 (8th Cir. 1987) (less discriminatory alternatives did not rebut BFOQ/Business Necessity because they were "unworkable"); id. at 708-09 (McMillian, J., dissenting) (BFOQ/Business Necessity rebutted by availability of less discriminatory alternative in personnel policy).

422. Alternatives proof offered to establish employer's intent to discriminate, however, is not irrelevant to Title VII liability. Indeed, it could establish disparate treatment discrimination, the alternate theory of employer liability under Title VII. Thus, even if employer's use of a disparately impacting selection criterion were objectively justified as a Business Necessity, employer's improper motivation for using that criterion would be subject to redress as disparate treatment discrimination under Title VII.
2. The Proof Required for Rebuttal

The second dispute regarding employees’ rebuttal evidence concerns the proof required to establish an alternative. Precedent under the BFOQ would allow evidence of a workable, available alternative to defeat the exception.423 Some Business Necessity decisions similarly allow the alternative to suitably serve an employer’s business purpose424 whereas other decisions require that the alternative be at least as effective and no more costly to implement.425

Consistent with fixing the substantive burden for Business Necessity at mid-level scrutiny,426 employees’ alternatives proof need not be equally as effective or inexpensive.427 To the extent the alternative is not as effective as the challenged criterion, then the business purpose for not

423. See Gunther v. Iowa State Men’s Reformatory, 612 F.2d at 1087 (no BFOQ established absent proof of no “reasonably available” alternatives); Fesel v. Masonic Home of Delaware, 447 F. Supp. 1346, 1351 (D. Del. 1978) (small nursing home not required to hire additional staff member as alternative to hiring only female nurses to respect patients’ privacy concerns); aff’d, 591 F.2d 1334 (3d Cir. 1979). Cf. Chambers v. Omaha Girls Club, 834 F.2d at 704 (less discriminatory alternatives must be workable); id. at 709 (McMillian, J., dissenting) (Club must prove unavailability, not merely inconvenience, of alternative allowing unmarried pregnant staff members to take leave of absence rather than be discharged).


425. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2127 (1989) (dictum); Watson v. Fort Worth Bank and Trust, 487 U.S. at 998 (O’Connor, J., joined by Rehnquist, C.J., White, Scalia, J.J.) (dictum); United States v. South Carolina, 445 F. Supp. 1094, 1115-16 (D.S.C. 1977) (“In examining alternatives, the risk and cost to the employer are relevant”; alternative rejected because it does not serve employer’s purpose to certify minimally competent “equally well”). Cf. New York City Transit Auth. v. Beazer, 440 U.S. at 590 & n.33 (Stevens, J., joined by Burger, C.J., Stewart, Blackmun, Rehnquist, J.J.) (recognizing alternatives proof to challenge rationality of disparately impacting methadone rule under Constitution, but requiring proof that alternative works “as cheaply and effectively”). See ILL. NOTE, supra note 140, at 193 n.66; YALE NOTE, supra note 138, at 114-15 & nn.70, 72 (requiring alternative to involve no additional cost or not be substantially more costly defined as benefits offset by administrative costs and ignoring costs of eliminating overt discriminatory practices, such as union pressure and the morale of current employees).

426. See supra Section 11C.

Allowing only alternatives which are at least as effective and no more costly to rebut Business Necessity is consistent with rational basis scrutiny because any loss of effectiveness or additional cost to implement would constitute the rational business reason for failing to substitute the lesser impacting alternative for the challenged criterion. Indeed, if an alternative selection criterion having a lesser discriminatory impact as effectively promoted the employer’s purpose at no greater cost, an employer might still be justified under a rational basis standard in failing to adopt it under the rational basis test were there any cost of switching to the lesser impacting alternative selection criterion.

427. See Lamber, supra note 76, at 59-65 (recognizing debate regarding Business Necessity impacts uses of alternatives proof); Comment, supra note 138, at 920.
substituting the alternative criterion is additional effectiveness of the challenged criterion. An employer can establish the Business Necessity of the challenged criterion only by showing that the additional effectiveness of the challenged criterion is a sufficiently important business purpose to justify the marginal impact of using the challenged criterion. Similarly, to the extent the alternative is more expensive than the challenged criterion, then the business purpose for not substituting the alternative for the challenged criterion would be the marginal cost of using the alternative. An employer can establish the Business Necessity of the challenged criterion only by showing that saving the marginal cost of the alternative criterion is a sufficiently important business purpose to justify the marginal impact of using the challenged criterion.

3. The Burden of Proving Alternatives

The final issue regarding employee's rebuttal evidence concerns assignment of the burdens of proving the alternative. Courts evaluating employers' BFOQ proof have required the employer to bear both the burden of production and persuasion that no less discriminatory alternatives are available. Business Necessity precedent usually assigns employees both burdens on alternatives, although some courts assign employers those burdens. Both assignments under Business Necessity precedent are inconsistent with the function of alternatives proof. It would be appropriate to assign employees the burden of production and employers the burden of persuasion on alternatives proof in disparate impact cases.

Consistent with fixing the evidentiary burden for Business Necessity to require employers to bear the burden of persuasion to prove Business

428. See supra notes 242-44 and accompanying text.
429. See supra notes 242-44.
430. See New York City Transit Auth. v. Beazer, 440 U.S. at 602 (White, J., joined by Marshall, Brennan, J.J., dissenting) (Transit Authority failed to show job relatedness, in part, by failing to establish "that the cost of making individual decisions about those on methadone [a lesser impacting alternative] was prohibitive"); Chambers v. Omaha Girls Club, 834 F.2d 697, 709 (8th Cir. 1987) ("Administrative inconvenience is not a sufficient justification for not utilizing these less discriminatory alternatives.").
431. See Hardin v. Stynchcomb, 691 F.2d 1364, 1374 (11th Cir. 1982); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079, 1087 (1980).
Necessity, it would be inappropriate to assign employees the burden of persuasion on alternatives offered to undermine employers' proof that the impacting criterion is a Business Necessity. Rather, assigning employees only the burden of production to rebut Business Necessity maintains the burden of persuasion for Business Necessity with employers. Moreover, assigning employees the burden to produce evidence of lesser-impacting alternatives is consistent with the function of that proof, to undermine or rebut an employer's Business Necessity defense. In addition, assigning employees the burden of production and employers the burden of persuasion on alternatives is consistent with evidentiary policies. Finally, assigning employees only the burden of production is consistent with Equal Employment Opportunity Commission's guidelines requiring employers to investigate alternatives of which they become aware.

434. See supra Section IID.

By contrast, if the evidentiary burden for Business Necessity required employee to bear the burden of persuasion that the disparately impacting criterion is not justified as a Business Necessity, cf. supra Section IID, employee should also bear the burden of persuasion that alternatives undermine the necessity of using the disparately impacting criterion.

435. On the other hand, to the extent the alternatives proof is offered to establish that the employer adopted the more impacting alternative with intent to discriminate, it would be appropriate for the employee to bear both the burden of production and persuasion. See Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115, 2126-27 (1989) (dictum); Watson v. Fort Worth Bank and Trust, 487 U.S. at 998 (O'Connor, J., joined by Rehnquist, C.J., White, Scalia, J.J.) (dictum); Albemarle Paper Co. v. Moody, 422 U.S. at 425 (dictum); NAACP v. Medical Center, Inc., 657 F.2d 1322, 1354 n.22 (1981) (Gibbons, concurring and dissenting). But cf. Rutherglen, supra note 138, at 1327-28 (employer bears burden of proving no lesser impacting alternative as part of Business Necessity proof to overcome inference of pretextual discrimination established by prima facie proof of disparate impact). This is consistent with the assignment of burdens of proof for establishing intentional discrimination under pretextual disparate treatment theory. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

436. To assign employee the burden of persuasion on alternatives proof when used to undermine employer's Business Necessity would be inconsistent with assigning employer the burden of persuasion to establish Business Necessity. Cf. New York City Transit Auth. v. Beazer, 440 U.S. at 590 n.33 (assign employee burden of persuasion on alternatives proof, and on Business Necessity); NAACP v. Medical Center, Inc., 657 F.2d at 1335 (advocating assigning burden of persuasion for Business Necessity to employee consistent with burden of persuasion for alternatives proof); Belton, supra note 25, at 1274 (proposes elimination of alternatives proof because it improperly shifts burden of Business Necessity from employer to employee).

437. Analogously, the Court assigned the employer the burden of production to rebut the employee's inference of intentional discrimination in pretextual disparate treatment cases. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254-56 & n.9.

438. See GA. NOTE, supra note 33, at 398-99; YALE NOTE, supra note 138, at 113-14 & n.68 (assigning employee the burden of producing evidence of alternatives places the burden on the party most interested in exploring alternatives, separates proof on business justification of the challenged criterion from alternatives proof, and avoids requiring employer to prove a negative, that no alternative exists; whereas assigning employer the burden to persuade that the proposed alternative does not accomplish its business purpose places the burden on the party most able to evaluate the feasibility and practicability of the alternative).

On the other hand, requiring employers to bear both the burden of production and persuasion on the alternatives issue would be tantamount to requiring the employer to prove the negative, that there are no appropriate alternatives. To place such a stringent burden on an employer would be inappropriate except in only the most extreme case, like the BFOQ exception where discrimination is excused only after an employer establishes that the selection criterion at issue is the only effective way, not just a substantially effective way, to achieve a compelling, not just important, business purpose. For the same reasons it is appropriate to adopt a slightly more lenient standard of scrutiny for Business Necessity compared with BFOQ, it is appropriate to switch to the employee the burden of production on alternatives.

Consequently, an employee can undermine the employer’s Business Necessity proof by bearing the burden of production that a lesser-impacting and similarly, but not necessarily equally, effective and costing alternative selection criterion also accomplishes the employer’s business purpose. In that instance, the employer must either persuade the court that the alternative will not suitably serve its important business interest or substitute the alternative selection criterion for the challenged disparately impacting criterion.

CONCLUSION

The confusion regarding the law of Business Necessity leaves the scope of illegal discrimination in limbo. On a more practical level, it denies employers concrete, reasoned guidance on how to order their business affairs and it denies employees enforceable protection under Title VII. Moreover, the Court’s retreat from the earlier law of Business Necessity jeopardizes the nation’s commitment to equal employment opportunity. The new, emerging standard undercuts the judiciary’s Congressionally mandated role in eliminating disparate impact discrimination absent true business need. The standard set forth in this article, requiring that the employer bear the burden of persuasion to show that


441. See supra Section IIC3a.

442. Moreover, to the extent employee successfully rebuts employer’s Business Necessity with alternatives proof, employee’s remedy may depend on when employer had or should have had knowledge of alternative. Usually employer is in a position, and, indeed, has the obligation to evaluate the impact and Business Necessity, including alternatives, of its selection criterion. See Section 3B of the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3B (1989). Cf. Contreras v. City of Los Angeles, 656 F.2d at 1275 n.5 (1989). To the extent employer is unaware of an alternative, after its obligation to search, the remedy should be limited to enjoining use of alternative, not make whole relief.
its disparately impacting criterion is substantially effective in achieving its important business purpose and that a less discriminatory criterion would not accomplish that business purpose, establishes a standard for Business Necessity that preserves the protection against disparate impact discrimination, in a manner which is both logical and congressionally sanctioned.

**POSTSCRIPT**

Subsequent to the completion of this article, many of the suggestions on the business necessity standard proposed in this article were incorporated into the business necessity standard proposed in subsequent drafts to the Civil Rights Act of 1990. President Bush's veto of that legislation prevented it from becoming law.

A similar bill has been introduced and is currently pending before Congress.