Business Necessity under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach

In Griggs v. Duke Power Co., the Supreme Court held that an employment practice which is nondiscriminatory on its face but which has a disparate impact on blacks is unlawful under Title VII of the Civil Rights Act of 1964 unless the employer can show that the practice is a "business necessity." The business necessity doctrine thus adopted in Griggs appears in neither the explicit language nor the legislative history of the 1964 Act.

The Court in Griggs did not establish judicial standards for determining whether a particular practice is a business necessity. Subsequent to Griggs, the doctrine of business necessity has been extended far beyond the original narrow holding that practices with a disparate impact must be "related to job performance." This is reflected in the

2. The facially nondiscriminatory hiring practices involved in Griggs were the requirements of a high school diploma and the achievement of satisfactory scores on two professionally prepared aptitude tests. Id. at 427-28.
3. The term "discriminatory impact," often used in the literature, is avoided since the word "discriminatory" signifies illegality without further analysis.
5. 401 U.S. at 431.
   (a) 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 against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
      (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
   
   (b) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.
7. The Court did not need to explicate such standards, since the employer conceded having adopted the requirements in question "without meaningful study of their relationship to job-performance ability." 401 U.S. at 425-26, 431.
8. Id. at 431, 432. One commentator has suggested that a court may have departed from the Griggs standard by permitting an employer to select the best qualified individual for a job opening when such a selection process helped to perpetuate a pattern of white
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widely held view of the Griggs test as a balancing approach which focuses on the disparate impact of the practice and weighs this negative factor against the benefits of the practice to the employer. By sometimes subordinating legitimate business purposes to the goal of additional minority hiring, the extension of the business necessity doctrine has resulted in the imposition of substantial costs on employers even where their practices may be valid predictors of job performance. Proper treatment of such costs is critical in achieving the congressional purpose of Title VII.

Focusing on these costs, this Note will analyze the concept of business necessity. Section I will review briefly the theories that have been suggested under Title VII to justify a practice with a disparate impact. Section II will demonstrate that Congress did not intend to sacrifice business efficiency for increases in minority employment and therefore envisioned a construction of the Act that would be directed to the propriety of the employment practice rather than to the adequacy of the numerical representation of blacks. Section III will show that the substantial costs associated with the expansive development of the balancing theory of business necessity can be avoided by the use of an approach which focuses upon the alternatives available to the employer to achieve his business goals rather than upon the disparate impact of the practices. Such an approach, herein called the no-alternative theory, will be shown to comport more satisfactorily with the congressional intent underlying Title VII than does the balancing test. Finally, Section IV will summarize the benefits from adoption of the no-alternative theory of business necessity.

I. Theories of Justification for a Disparate Impact

Several possible theories have been suggested under Title VII for testing a facially neutral employment practice that has a disparate impact on blacks. The most lenient is the "business purpose" test.

hiring. See Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 86 (1972) [hereinafter cited as Blumrosen]. Another commentator has suggested in criticism that a prominent version of the business necessity doctrine may well have invalidated any use of employment screening tests which have a disparate impact on blacks. See Wilson, supra note 6, at 854 n.62 (commenting on the standard in Robinson v. Lorillard Corp. 444 F.2d 791 (4th Cir.), cert. dismissed under Rule 60, 404 U.S. 1006 (1971)). Another example is a memorandum of the Equal Employment Opportunity Commission (EEOC), reproduced in full at 118 Cong. Rec. 4925-27 (1972), which suggests that a company that moves from an urban community to a suburban community which has a lower percentage of minority workers may be discriminating in the sense of the Griggs principle unless it provides to minority workers relief such as assistance in commuting and in obtaining new housing. For analysis of this idea, see generally Blumrosen, The Duty to Plan for Fair Employment: Plant Location in White Suburbia, 25 Rutgers L. Rev. 383 (1971).
Under this theory, a practice can be justified by showing that any benefit accrues to the business through the use of the practice. This theory derived from the notion that a subjective intent to discriminate was necessary for a violation of Title VII: the existence of a benefit indicated a business purpose which operated to negate the element of intent. This approach was effectively repudiated when Griggs rejected subjective intent to discriminate as a necessary element of a Title VII violation, but even prior to Griggs, courts had been reluctant to accept subjective intent as an element of a violation. Moreover, even if such an intent were required, the business purpose theory provided too easy a means for an employer to mask a discriminatory motive. For these reasons the business purpose theory has been rejected.

Another possible approach is the “no-perpetuation” theory. This can be viewed as the opposite of the business purpose test, since it renders unlawful any employment practice which perpetuates the effects of pre-Act discrimination regardless of the business interests served by the practice. Taken out of context, one statement of Griggs can be said to support the no-perpetuation theory. However, courts have recognized that although past discrimination has operated to deprive some blacks of valid job-related qualifications, an employer is not necessarily barred by Title VII from adopting such requirements.

11. 401 U.S. at 432.
16. “Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operated to ‘freeze’ the status quo of prior discriminatory employment practices.” 401 U.S. at 430.
17. See, e.g., United States v. Jacksonville Terminal Co., 451 F.2d 418, 445 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); Marquez v. Omaha Dist. Sales Office, Ford Div., 440 F.2d 1157, 1162-63 (8th Cir. 1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). Congressional treatment of seniority plans also suggests that Congress did not intend the no-perpetuation theory. Seniority plans are often not related to productivity. See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1157 & n.232 (1971) [hereinafter cited as Developments]. Notwithstanding this, however, it was clear that bona fide seniority systems were permissible under the Act even though they might continue the effects of past discrimination. Statements explaining Title VII showed that “last hired” blacks could be the “first fired” even though pre-Act discrimination was the cause of their status as the “last hired.” See 110 Cong. Rec. 7207 (Justice Dept. memorandum submitted by Sen. Clark), 7213 (interpretative memorandum of Sens. Clark & Case), 7217 (Sen. Clark’s response to Sen. Dirksen’s memorandum) (1964). These expressions of legislative intent were codified by the subsequent introduction and passage of § 703(h),
A third approach is the "balancing" test. This theory calls for a judicial balancing of the impact on an employer of disallowing a practice and the impact on blacks of allowing the employer to continue the practice.\textsuperscript{18} Under this test, "the business purpose must be sufficiently compelling to override any racial impact."\textsuperscript{19} The balancing theory concentrates on the factors to be balanced and their relative weights, resulting in practice in a requirement of empirical or technical evidence of the validity, or job-relatedness, of employment practices.\textsuperscript{20}

The final possibility is the "no-alternative" theory. This focuses on two determinations: (1) Does the practice serve a legitimate business purpose? (2) Is there available an alternative practice which will equally well promote the business purpose and yet will have a lesser disparate impact on blacks?\textsuperscript{21} In order to be lawful, a practice must both further

which expressly exempts from the dictates of the Act "bona fide seniority plans." 42 U.S.C. § 2000e-2(h) (1970). This section has been interpreted not to protect seniority plans based on the period of employment in a specific department, as distinguished from plans based on the total length of service with the employer. See note 51 infra (discussion of Jacksonville Terminal). This distinction between employment and departmental seniority plans is discussed and accepted in Waters v. Wisconsin Steel Works, 42 U.S.L.W. 2110 (7th Cir., Aug. 28, 1974).

These congressional statements are rejected in Watkins v. Local 2369, United Steel Workers, 369 F. Supp. 1221, 1227-28 (E.D. La. 1974), where the court felt that the later addition of § 703(h) to the Act was intended to supersede the earlier statements. However, Senator Dirksen was a cosponsor of the bill which added § 703(h), see 110 Cong. Rec. 11926, 11931 (1964) (Dirksen-Mansfield compromise bill), and it was Senator Dirksen’s serious reservations about the impact of Title VII on seniority systems which elicited Senator Clark’s assurances, discussed above. The conclusion that § 703(h) was added to codify the earlier statements rather than to supersede them seems inescapable, particularly in light of Senator Humphrey’s explanation that § 703(h) (misprinted § 703(b) in Record) did not change the intent and effect of Title VII, id. at 12723, and his praise for Senator Dirksen’s efforts to remove “ambiguities and uncertainties” in the bill, id. at 12725.


a valid business purpose and be necessary to achieve that purpose in the sense that no alternative practice with a lesser disparate impact would be as effective.

Elements of both the balancing and the no-alternative approaches are often intermingled in the case law. Although these two approaches will often lead to the same outcome in specific cases, they are fundamentally different in orientation and methodology. Because the issue is one of statutory interpretation, the critical consideration in selecting between them is which theory better accords with the legislative intent underlying Title VII.

II. The Purpose of Title VII

A fair employment law such as Title VII can impose economic costs on an employer in three ways. First, the law may result in a loss of economic efficiency because it forbids the overt use of race or color as a job requirement. A second cost to an employer results when facially nondiscriminatory qualifications that can achieve efficiencies are held to be unlawful. Finally, an "anticipatory" cost occurs if the employer substitutes less efficient hiring or promotion practices for his normal procedures in order to achieve results that reduce his risk of exposure to the enforcement machinery of the fair employment law. Title VII reflects congressional consideration of each of these three costs.

Overt use of race. Congress clearly intended to impose on employers

22. See cases cited in note 21 supra.
24. Professor Fiss identifies four situations in which consideration of race may be efficient for an employer: where, because of societal discrimination, race is an inexpensive indicator of talent; where consumers have racial preferences which they can and will enforce; where personnel conflicts can be reduced by use of racial hiring; where wage differentials allow exploitation of racial factors. Fiss, A Theory of Fair Employment Laws, 38 U. Chi. L. Rev. 235, 257-58 (1971).
25. The use of such qualifications may be held to be unlawful for two reasons:

(1) A facially neutral job-related practice may be outlawed because its disparate impact is deemed to outweigh, in some legal sense, the benefits accruing to the employer from use of the practice. See, e.g., Bing v. Roadway Express, Inc., 444 F.2d 687, 690 (5th Cir. 1971).

(2) The employer may fail to meet the requirements of a stringent burden of proof on job-relatedness. One case observed that no test known or available today can meet EEOC Guideline requirements. United States v. Georgia Power Co., 3 BNA FEP Cas. 707, 780 (N.D. Ga. 1971), aff'd in part, vacated in part, 474 F.2d 906 (5th Cir. 1973), criticized in Wilson, supra note 6, at 866. Other courts have noted that no written or preemployment test has ever passed muster under the EEOC Guidelines. See Henderson v. First Nat'l Bank, 360 F. Supp. 531, 545 (M.D. Ala. 1973); Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133, 141 (Iowa 1973).
26. See Fiss, supra note 24, at 256. Professor Fiss has analogized anticipatory costs to "insurance" which the employer is willing to pay to avoid enforcement proceedings.
any potential loss of efficiency resulting from the inability to use race as an employment qualification. While § 703(e) permits classification of employees by sex, religion, or national origin where such a classification is a "bona fide occupational qualification" (BFOQ), it does not allow race or color to be used as a BFOQ despite attempts to add these criteria to the section.28

Facially neutral qualifications. Congress rejected the notion that an employer's bona fide use of merit qualifications should be balanced against, or prohibited as a result of, the disparate impact caused by those qualifications. "Disparate impact" was not meant to be the touchstone of Title VII, for the statute was uniformly interpreted during congressional consideration to be directed against differences in treatment according to race and not against differences in achievement or ultimate result.29 Indeed, a great concern in Congress was that the enactment of Title VII might cause the imposition of quota systems to alleviate racial imbalance; this concern resulted in the inclusion of a provision specifically forbidding any interpretation of the Act which would require an employer to give preferential treatment to an indi-

28. Amendments attempting to add race and color as bona fide occupational qualifications were offered in the House, 110 Cong. Rec. 2550 (1964), and in the Senate, id. at 13825-26.
29. Professor Fiss has suggested that "equal opportunity" in the context of a fair employment law can be interpreted in two ways. The equal-treatment interpretation of fair employment holds that race must be ignored in the selection of employees. The equal-achievement interpretation holds that employee selection decisions must be made in such a way that racial inequalities in job distributions are not created or maintained. See Fiss, supra note 24, at 237.

The legislative history of Title VII indicates that Congress adopted the equal-treatment approach. Senators Clark and Case, floor managers of Title VII, defined "discrimination" in an interpretative memorandum:

It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor, which are prohibited by section 704 are those which are based on any of the five forbidden criteria: race, color, religion, sex and national origin. Any other criterion or qualification for employment is not affected by this title.
110 Cong. Rec. 7213 (1964). Senator Clark also indicated that the word "discrimination" was not vague because it had been used in state fair employment statutes for at least 20 years and had been used in federal statutes such as the National Labor Relations Act and the Fair Labor Standards Act for an even longer period. Id. at 7218 (answers to objections). The "difference in treatment or favor" definition of discrimination strongly supports an equal-treatment theory of Title VII. Similarly, the reference to previous statutory uses of the word "discrimination" also leans heavily toward an equal-treatment theory of discrimination. See Blumrosen, supra note 8, at 66-75.

This concept of equal treatment continued in the debates concerning amendment of Title VII in 1972. See 117 Cong. Rec. 31974 (1971) (remarks of Rep. Mitchell: "we have an objective of equal treatment under the law"); id. at 31978-79 (remarks of Rep. Dent, floor manager of bill: "fair treatment legislation"); blacks "do not want special treatment"); id. at 32089 (remarks of Rep. Dent: a "law to give all men and women equal treatment"). Congress intended, however, that this equal-treatment theory be limited to situations in which the requirements for employment were related to efficiency, see p. 105 & notes 34-36 infra.

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vidual or group because of racial disproportion within the employer's work force. Moreover, the "ability test" provision at issue in Griggs was specifically included to allow an employer's bona fide use of professionally developed tests despite their disparate impact on culturally disadvantaged minorities.

Rather than focusing predominantly on the issue of disparate impact, Congress evidenced a substantial concern for preserving business efficiency and indicated that Title VII was not intended to interfere with productivity. This protective attitude has continued and was one of

31. Id. § 2000e-2(b), quoted in note 6 supra. Senator Tower submitted the amendment adding the ability test language to this section primarily to ensure that Title VII would not prohibit the use of ability tests when they were standardized on advantaged groups and thus were affected by cultural deprivation. See 110 Cong. Rec. 11251 (1964) (letter to Sen. Tower). A prohibition on such tests had occurred in Myart v. Motorola, Inc., Ill. FEPC Charge No. 63C-127, (hearing examiner's opinion reprinted at 110 Cong. Rec. 5662-64, 9030-33 (1964)), and Senator Tower's amendment was directed to preventing this result under federal law. For the role of this case in Title VII, see Griggs v. Duke Power Co., 401 U.S. 424, 434 n.10 (1971); Wilson, supra note 6, at 852-58.

One concern of Senator Tower was that employers might be forced to establish grading differentials on tests to reflect cultural deprivation. See 110 Cong. Rec. 9028 (1964) (statement of Motorola Co.: this has been a pilot case for "a double standard for hiring with lower criteria for Negroes than for others"); id. at 11251 (letter from a prominent psychologist urging an amendment to avoid the Motorola holding that any replacement test must "reflect and equate inequalities and environmental factors among the disadvantaged and culturally deprived groups"). Senator Tower's second attempt at amending the Act to permit the use of ability tests passed without a roll call, Senator Humphrey noting that the "Senator has won his point." Id. at 13724.

In implementing Title VII, the EEOC Guidelines require tests to have "differential validity" where technically feasible. Under this concept "where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups." 29 C.F.R. § 1607.5(b)(5). For a discussion of the legal problems associated with differential validity, see Wilson, supra note 6, at 869-71.

32. In an effort to disparage the results reached in the Motorola case, see note 31 supra, Senator Case introduced a memorandum which was later cited in Griggs, 401 U.S. at 494 n.11. The memorandum indicates a congressional desire to allow efficient business practices and clearly rejects an equal-achievement theory for Title VII where the employer uses qualifications related to productivity:

There is no doubt, however, that such a result [in Motorola] would be unmistakably improper under the proposed Federal law. The Illinois case is based on the apparent premise that the State law is designed to provide equal opportunity to Negroes, whether or not as well qualified as White job applicants.

Whatever its merit as a socially desirable objective, title VII would not require, and no court could read title VII as requiring, an employer to lower or change the occupational qualifications he sets for his employees simply because proportionately fewer Negroes than whites are able to meet them. Thus, it would be ridiculous, indeed, in addition to being contrary to title VII, for a court to order an employer who wanted to hire electronics engineers with Ph.D's to lower his requirements because there were very few Negroes with such degrees or because prior cultural and educational deprivation of Negroes prevented them from qualifying. And, unlike the hearing examiner's interpretation of the Illinois law in the Motorola case, title VII most certainly would not authorize any requirement that an employer accept an unqualified applicant or a less qualified applicant and undertake to give him any additional training which might be necessary to enable him to fill the job.

110 Cong. Rec. 7246-47 (1964) [hereinafter cited as Memorandum of Senator Case].
the primary reasons the EEOC was not given cease-and-desist powers in 1972.  

Such solicitude becomes inapposite, however, when the qualifications used by the employer are unrelated to efficiency. Any disparate impact on racial minorities that results from such qualifications is therefore unnecessary and, as held in Griggs, unlawful under Title VII. In enacting the 1972 amendments, Congress expressly considered Griggs and indicated that it viewed the decision as correct not because of a focus on disparate impact but because of the focus on the absence of predictiveness of job performance when disparate impact was shown.


The most significant argument raised in opposition to granting cease-and-desist power was that the EEOC was a strong advocate for increased minority representation in employment and that an adjudicatory hearing before such a tribunal could not be fair. See H.R. Rep. No. 238, 92d Cong., 1st Sess. 59 (1971) ("Minority Views") [hereinafter cited as H.R. Rep.]; S. Rep. No. 415, 92d Cong., 1st Sess. 86 (1971) ("Individual Views of Mr. [Sen.] Dominick") [hereinafter cited as S. Rep.]. Such a hearing was frequently characterized in the debate as a "Star Chamber" proceeding. See, e.g., 118 Cong. Rec. 595 (1972) (remarks of Sen. Tower); id. at 698 (remarks of Sen. Dominick); id. at 3136 (remarks of Sen. Allen). Congress feared that the unfairness of a hearing before such a predisposed commission would detrimentally affect business efficiency. First, large costs, attributable to loss of merit standards and to subjection to unwarranted claims, would be imposed on employers. See, e.g., 117 id. 32108 (remarks of Rep. Rarick). A specific fear was that an overzealous EEOC would coerce employers to comply with rules and regulations inconsistent with congressional intent. See, e.g., 118 id. 699 (remarks of Sen. Dominick). Special concern was voiced for the small employer. See, e.g., id. at 1525-26 (remarks of Sen. Gambrell), 2388 (remarks of Sen. Stennis). Moreover, proceedings before a biased Commission would result as a practical matter in the shift of the ultimate burden of proof from the complainant to the employer, contrary to normal procedure under the Act. See, e.g., 117 id. 31959 (remarks of Rep. Martin), 31967 (remarks of Rep. Anderson in opposition to the argument), 32106 (remarks of Rep. Broomfield); 118 id. 2393 (remarks of Sen. Cotton). Such a shift was feared to overburden employers and to result in the law being used as a "bludgeon." See, e.g., 117 id. 31971-72 (remarks of Rep. Mazzoli).

34. 401 U.S. at 436.

35. Congress seemed to assume that, once explicit reliance on race was proscribed, employers would use only job-related qualifications. For example, Senator Williams, in responding to the charge that Title VII would result in employers being forced to hire blacks in order to establish racial balance, stated:

"Those opposed to [Title VII] should realize that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a "white only" employment policy. Both forms of discrimination are prohibited by title VII of this bill. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job." 110 Cong. Rec. 8921 (1964) (emphasis added). See also 117 id. 31963 (remarks of Rep. Hawkins: "[Title VII] only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications").

Anticipatory costs. Because the skills necessary for performance of a job may be found more in one cultural group than in another, an employment practice can have a large disparate impact and nonetheless be a measure of job performance. In this case the job, not the practice, is culturally biased. But when enforcement proceedings are triggered by racial imbalance within the employer's work force and the standards for proving the validity of practices with a disparate impact are stringent, the rational employer may "insure" against the costs of enforcement proceedings by using covert racial hiring practices to eliminate or reduce the disparate impact. Such an anticipatory action imposes on the employer a cost resulting from the hiring of blacks who are less suited for the particular position than are available whites, who cannot be hired because their presence would create or increase the racial imbalance. This anticipatory cost, however, may be less than the cost of the enforcement proceeding, discounted by its probability, which might ensue were a quota system not used. The legislative history of the antipreferential provision of Title VII shows a purpose to prevent, in addition to legally imposed quotas, the need for an employer to distort his normal job qualifications as a practical expedient to avoid enforcement proceedings triggered by racial disparity.

This concern over reverse discrimination was reiterated in the debates on the 1972 amendments of Title VII and led in part to the congressional decision to withhold cease-and-desist powers from the EEOC.

37. See Wilson, supra note 6, at 869-871-72.
38. See Fiss, supra note 24, at 256, 279; Wilson, supra note 6, at 873; Developments, supra note 17, at 1130.
40. Senator Allott introduced the forerunner of the antipreferential provision with:

"I have heard over and over again in the last few weeks that title VII, the equal employment opportunity section, would impose a quota system on employers and labor unions. . . . [One argument] is that an employer will hire members of minority groups, regardless of their qualifications, to avoid having any problems with the Equal Employment Opportunity Commission. The result . . . so the argument goes is that a quota system will be imposed, with employers hiring and unions accepting members, on the basis of the percentage of population represented by each specific minority group.

I do not agree with the argument.

. . . .

But the argument has been made, and I know that employers are also concerned with the argument. I have therefore prepared an amendment which I believe makes it clear that no quota system will be imposed if title VII becomes law.

110 Cong. Rec. 9881 (1964) (emphasis added). The sense of Senator Allott's amendment was incorporated into the Dirksen-Mansfield compromise bill as § 703(i). See id. at 13310, 13315. For the history of the bill in the Senate, see Vass, Title VII: Legislative History, 7 B.C. IND. & COM. L. REV. 431, 443-47 (1966).
41. Several members of Congress were concerned that granting cease-and-desist powers to the EEOC would in practical effect encourage reverse discrimination by employers in order to prevent harassment by the Commission. See, e.g., 117 Cong. Rec. 31965 (1971) (remarks of Rep. Green); 118 id. 698 (remarks of Sen. Dominick), 1521 (remarks
III. Application of the No-Alternative Theory

As the above section has demonstrated, Congress did not intend to promote the goal of increased minority employment at the expense of business efficiency. Against this background, the no-alternative theory can now be set forth and examined. The application of this theory involves four principal inquiries: whether the practice is facially neutral; whether it has a disparate impact on blacks; whether it fosters a valid business purpose; whether there is available an equally effective alternative that has a lesser disparate impact on blacks.

Is the employment practice facially neutral? Of the four major decisions, the question of facial neutrality is the least difficult legal issue. Congress clearly proscribed the explicit use of race as an employment qualification,\textsuperscript{42} and therefore even "business necessity" cannot justify an employment practice's overt reliance on racial classification.

Does the practice have a disparate impact on blacks? The party claiming that an employment practice is unlawful has the burden of establishing a prima facie case of discrimination.\textsuperscript{43} The complaining party will generally have met his burden if he can show through the use of statistics that a facially neutral practice has a disparate impact on blacks.\textsuperscript{44}

Disparate impact can be statistically demonstrated in two ways.\textsuperscript{45} The first considers whether new black applicants as a class are rejected by the challenged practice in greater proportion than are new white applicants. The second focuses on the actual employment results for the particular business to determine whether the percentage of blacks hired or promoted is less than the proportion of blacks in the relevant labor market. Plaintiffs have met the burden of showing disparate impact under both the class impact theory\textsuperscript{46} and the proportional employment theory.\textsuperscript{47}

Does the employment practice foster a valid business purpose? The third issue under the no-alternative theory is whether the challenged


\textsuperscript{43} See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).


\textsuperscript{45} See generally Blumrosen, supra note 8, at 91-93; Note, Employment Testing: The Aftermath of Griggs v. Duke Power Company, 72 Colum. L. Rev. 900, 909-12 (1972) (lists three ways, two of which are different approaches to Blumrosen's second method) [hereinafter cited as Note, Employment Testing].


practice serves a legitimate business purpose. As recognized by many of the leading statements of the business necessity doctrine, safety and efficiency are the essence of a valid business purpose.\textsuperscript{48} For the private employer the concept of efficiency encompasses 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 processing wage garnishments.\textsuperscript{49} Recognizing that employee efficiency is measured on a continuum, the congressional debate acknowledged that the employer could legitimately strive for the maximum level.\textsuperscript{50} Thus any facially neutral practice which increases the efficiency of a business should be regarded as meeting the "fostering" test.\textsuperscript{51}


\textsuperscript{49} The relevance of the third aspect of efficiency to the business necessity doctrine is presently disputed. Johnson v. Pike Corp. of America, 322 F. Supp. 490 (C.D. Calif. 1971), held that this facet of efficiency cannot be invoked by the employer to justify a practice with a disparate impact on blacks. This holding has been strongly criticized. See, e.g., Wilson, supra note 6, at 830-51; 85 HARV. L. REV. 1482 (1972). The Eighth Circuit has adopted the Pike Corp. rationale. Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974), rev'd 435 F. Supp. 887, 899 (E.D. Mo. 1976).

Resolution of this dispute is not necessary for the purposes of this Note, which can be limited to the first two elements of efficiency. The no-alternative approach would, however, seem to be an appropriate test for the third element of efficiency.

\textsuperscript{50} See, e.g., 110 CONG. REC. 7771 (1964) (remarks of Sen. Tower: "The successful business is one with every job filled by the most competent man available"; "develop maximum efficiency and maximum per-man productivity"); id. at 7218 (Sen. Clark responding to objections, answers: "The employer may set his qualifications as high as he likes"); Memorandum of Senator Case, supra note 32 (Title VII would not require an employer to "accept . . . a less qualified applicant"); 117 CONG. REC. 32108 (1971) (remarks of Rep. Rarick: "great American ideal that the individual best qualified gets the job").

\textsuperscript{51} In this regard the no-alternative test is similar to the discredited business purpose test. See p. 100 supra. But the two theories are fundamentally different in that the element of fostering a legitimate business purpose is only one aspect of the no-alternative approach rather than being the entire test. The "more stringent" nature of the business necessity doctrine, United States v. N.L. Indus., Inc., 479 F.2d 354, 365 (8th Cir. 1973), would properly require that the employer demonstrate the need, "business purpose," "benefit," or "necessity" of his practice against a background of realistic alternatives. This distinction is excellently demonstrated by Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971). The employer in Jones refused to grant transfers between two groups of employees. He sought to justify this no-transfer policy, which in practice had a disparate impact, for three reasons: bad past experience with transfers; additional training costs; increased personnel problems caused by different union contracts. Applying the business purpose test, the district court found the practice lawful; the Tenth Circuit conceded that the reasons advanced in justification were not insubstantial. \textit{Id.} at 249. However, the Court of Appeals found that two of the three reasons given in justification for the no-transfer policy were speculative or illusory, and that the third reason, appar-
The practical method of demonstrating an increase in safety or efficiency is a two-step process of persuading a court, first, that certain employee traits, attributes, or skills will result in greater safety or efficiency, and second, that the adopted practice actually is useful in measuring or predicting those qualities. The EEOC Guidelines require the employer to produce empirical evidence to satisfy this burden of persuasion. It is doubtful, however, whether deference to the

ently the one which was "concededly not insubstantial," did not give rise to better results than would an alternative screening procedure already in use for new hires. As a result, the no-transfer policy did not pass the business necessity test. Id. at 290.

The most significant challenge to the concept of "fostering" arises in cases where the employer offers the "best qualified" candidate for the job, merely choosing randomly among candidates admittedly "qualified." Congress recognized the lawfulness under Title VII of selecting the most qualified applicant. See note 50 supra. Courts have also acknowledged the legality of such a practice. In United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. denied, 460 U.S. 906 (1972), both the employer's hiring and promotion systems were attacked as racially discriminatory. Each system purported to use the "best qualified" standard. Although many black applicants were not the "best qualified" because they had been denied opportunities in pre-Act times to achieve necessary skills, the Fifth Circuit held that the hiring system was lawful since the qualifications used by the employer were related to the tasks the applicants were expected to perform. Id. at 445-48.

The promotion system, however, was held unlawful in its alleged use of the "best qualified" standard. Professor Blumrosen suggests that the "court rejected the company's desire to promote the 'most qualified' employee because this policy would have perpetuated the effects of past minority subordination." Blumrosen, supra note 8, at 86. However, the court actually based its decision on the determination that the company's definition of "best qualified" in the promotion system was not truly job-related; under this system, the most senior qualified employee was automatically considered to be the best qualified, and the particular departmental seniority systems were unrelated to job performance and perpetuated the effects of pre-Act discrimination. 451 F.2d at 452. Thus, the holding on the promotion system was squarely in accord with the Quarles line of cases finding departmental seniority systems to be unlawful where such systems continue the effects of past discrimination. See Quarles v. Philip Morris, Inc., 279 F. Supp. 103 (S.D. Va. 1968). See the "The 'ably Gould,' Seniority and the Black Worker: Reflections on Quarles and Its Implications," 47 Tex. L. Rev. 1039 (1969). The court's holding on Jacksonville Terminal's hiring system, where seniority was "scrupulously avoided" as a factor, 451 F.2d at 446, had already established that the employer could rely on job-related qualifications even if they perpetuated the effects of pre-Act discrimination. Accord, Marquez v. Omaha Dist. Sales Office, Ford Div., 440 F.2d 1187, 1162 (8th Cir. 1971).

52. For standardized tests this process is known as "validation" and is required by the EEOC Guidelines. 29 C.F.R. § 1607.5 (1973). For concise treatments of the process of validation, see Wilson, supra note 6, at 858-64; Note, Employment Testing, supra note 45, at 913-17.

53. 29 C.F.R. § 1607.4(c) (1973) calls for empirical evidence to validate "tests." But the definition of "test" in § 1607.2 includes not only "paper-and-pencil" tests but also "performance measures," "specific qualifying or disqualifying personal history or background requirements," and "specific educational or work history requirements." Moreover, the Guidelines suggest that the rules applicable to validation of tests are applicable to all facially neutral practices with a disparate impact on blacks. Id. § 1607.11. Disparate impact under this latter section can be either of the "class" or "proportional employment" kind.

This broadened definition of "test" is purportedly designed to serve as part of a "workable set of standards" to give effect to § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1970), which permits the use of a "professionally developed ability test." See 29 C.F.R. § 1607.1(c) (1973). This definition, however, is difficult to justify under § 703(h), which the legislative history intends to address traditional paper-and-pencil ability tests such as the intelligence test in the Motorola case. See Wilson supra note 6, at 852-53; note 31 supra. Moreover, the Supreme Court in Griggs noted that the high school diploma
technical requirements of the Guidelines is required in all cases involving practices with a disparate impact,\(^5\) and several courts have refused to adopt inflexible per se rules regarding proof of validity.\(^5\)

Some courts have developed the test of reviewing an employment practice to see whether job-relatedness is shown by "objective" or "subjective" standards. In such a review, subjective standards are given little or no weight.\(^5\) The problem in applying this test is the difficulty of identifying objective standards.\(^5\) Concepts such as loyalty, ability, reliability, aptitude, and experience seem inherently subjec-

requirement was not a "test" under § 703(h). 401 U.S. at 433 n.8. The Guidelines make such a diploma requirement a "test" since it is a "specific educational requirement." Similarly, in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.14 (1973), the Court noted that the employer's refusal to hire one who had participated in an illegal protest against the corporation did not raise a "test" issue. Under the Guidelines, however, the company's standard would be a "specific disqualifying personal history or background requirement"; the Eighth Circuit had felt that the Griggs principle was applicable. Green v. McDonnell Douglas Corp., 469 F.2d 337, 343 (8th Cir. 1972), aff'd in part, rev'd in part, 411 U.S. 792 (1973).

54. The Court in Griggs stated that the requirement of the Guidelines that tests be job-related was entitled to judicial deference as an administrative interpretation of the Act by the enforcing agency, 401 U.S. at 433-34; the Court further held that the EEOC's interpretation comported with congressional intent. Id. at 434-36. According to the Fifth Circuit, the deference mandated by Griggs applied to the Guidelines requirement that qualifications be job-related, and not to the EEOC's technical requirements on validation procedure. See United States v. Georgia Power Co., 474 F.2d 906, 913 (5th Cir. 1973). This holding would appear correct; in Griggs the issue before the Supreme Court was whether qualifications had to be job-related at all, and not how to prove job-relatedness. Others have similarly concluded that the Supreme Court did not formally adopt the technical aspects of the EEOC's testing Guidelines for Title VII cases. See Wilson, supra note 6, at 864. But see Blumrosen, supra note 8, at 80, 98 (Guidelines given a "binding effect" in testing situations); Note, Application of the EEOC Guidelines, supra note 18, at 521. Professor Blumrosen's approach is troublesome, however, since the term "binding" and the concept of "deference" are incompatible. See note 55 infra.

55. Three such rules have been urged by plaintiffs. The first is that a practice is per se discriminatory if it has not been validated prior to its use. This is the position of the EEOC Guidelines. 29 C.F.R. § 1607.3 (1973). It has been rejected under the theory that only after disparate impact has been shown does the law shift the burden of proof to the employer and require him to demonstrate job-relatedness. Cooper v. Allen, 467 F.2d 836, 839 (5th Cir. 1972).

The second per se rule urged by some plaintiffs is that an employment test is unlawful if not validated by a person who is a professional in the business of test construction and validation. This has been rejected under the theory that some tests, such as practical dictation or painting tests, can be obviously job-related even though not validated by a "professional." Broussard v. Schlumberger Well Servs., 315 F. Supp. 187, 519 (S.D. Tex. 1970).

The third per se rule urged by plaintiffs is that tests can be validated only by empirical data. This is the position of the EEOC Guidelines. 29 C.F.R. § 1607.4(c) (1973). Such an approach has been rejected. Davis v. Washington, 352 F. Supp. 187, 190-91 (D.D.C. 1972); cf. United States v. Jacksonville Terminal Co., 451 F.2d 418, 456 (5th Cir. 1971) (dictum: validation only "most often" by empirical evidence), cert. denied, 406 U.S. 906 (1972).


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tive, though facets of such concepts can be demonstrated by objective indicia.58

The confusion59 of the use of the terms "objective" and "subjective" can be avoided by focusing on the question of whether the employment practice is susceptible to review by the court.60 This approach involves two issues: (1) Is the reasonableness of the practice which the employer has chosen to achieve his stated goals suspect in light of current professional studies on employee selection61 (2) Is

58. For example, the seemingly subjective concept of "loyalty" was considered an appropriate concern of the employer where a job applicant had participated in an illegal protest involving an attempt to close off the employer's access roads during rush hour. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794, 806 n.21 (1973).

59. Compare 463 F.2d at 345, with 411 U.S. at 806 & n.21.

60. See, e.g., United States v. Local 56, Sheet Metal Workers, 416 F.2d 123, 136 (8th Cir. 1969).

61. The EEOC can ensure that it is a party to any Title VII action in which its expertise is needed to challenge the reasonableness of an employer's practice; under 42 U.S.C. § 2000e-5(f) (Supp. II, 1972), the Commission has the first opportunity to bring suit, and the person aggrieved cannot initiate litigation unless the EEOC has either dismissed the charge or taken no action for 180 days after the filing of charges. Perhaps the most significant contribution of the EEOC in exposing outmoded practices as unreasonable has been its work in attacking standardized tests, such as paper-and-pencil intelligence tests. These types of tests are often thought to be inherently related to business needs because a business should be better off with a "more intelligent" employee. Such notions have proved to be unsophisticated. In many cases there exists no correlation between test results and job performance. See Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 HARV. L. REV. 1598, 1643-44 (1969). The literature on these standardized ability tests is voluminous. For a comprehensive treatment of the legal problems involved in proving job-relatedness for such tests, see generally Wilson, supra note 6; Note, Employment Testing, supra note 45; Note, Application of the EEOC Guidelines, supra note 18.

An excellent example of the application of the first criterion of the "fostering" test is United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972). The court found that in the company's hiring system Terminal officials had often been able to place into skilled jobs applicants with previous experience in those same positions. In other cases individuals were hired without previous experience in a particular job but with previous experience in helper or apprentice-type jobs in the same craft. For positions such as clerical jobs, educational experience was used, so that applicants with typing and shorthand experience from business school were accepted over applicants with only a high school diploma. Id. at 445-46. Without requiring empirical or other evidence of the validity of the employment standards, the Fifth Circuit found that these rationales were "legitimate, non-discriminatory business justifications" for the hiring process. Id. at 448. However, the court found unlawful the use of a paper-and-pencil test in the promotion system when "validation" of the test was attempted by correlating estimates of job potential (rather than job performance) with test scores. The court found this evidence particularly unacceptable when actual results showed that a low scoring employee was functioning satisfactorily in the higher position. The court felt that Griggs demanded more substantial evidence, most often empirical proof, in such a situation. Id. at 455-56. See also Castro v. Beecher, 459 F.2d 725, 735-36 (1st Cir. 1972) (upholding without empirical evidence a high school education requirement for the job of policeman because such a requirement was recommended by two reports of national commissions, but disallowing the use of a paper-and-pencil employment test which had not been shown to be sufficiently related to job performance to justify its use), cited with approval in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). It is significant that both Jacksonville Terminal and Castro upheld the use of educational requirements without technical evidence of validity where the court was able to review the use of the educational standard as reasonable.
the court able to review the actual implementation of the practice
to determine whether it might have been subverted by discriminatory
application? Under this approach, a court should not require an
employer to use the most stringent and burdensome validation proce-
dures of the EEOC Guidelines unless the plaintiff has persuasively
shown that less exacting methods of validation are insufficient in the
particular circumstances of the case. Such selective application of
the EEOC Guidelines by the courts to avoid burdening employers with
unnecessarily strict requirements is consistent with the histories of
the 1964 Act and 1972 Amendments and with the Supreme Court's

1974). But neither case allowed the use of a paper-and-pencil employment test without
substantial proof of validity. This result may be attributable to the fact that the
reasonableness of such tests is suspect since they have proved to be unreliable in many
instances.

62. The second question of susceptibility to review is in issue, for example, where a
low level official evaluates employees for promotion. In Rowe v. General Motors
Corp., 457 F.2d 348 (5th Cir. 1972), the court held a promotion system unlawful under
Title VII not because the stated standards of "ability, merit and capacity" were im-
proper subjects for evaluation but because the employer's system of requiring a recom-

mendation by the foreman could not be judicially reviewed to see if "ability, merit
and capacity" were actually the factors considered by the foreman. Id. at 359.

If, contrary to the situation in Rowe, the employer's practice is susceptible to review,
the burden of proof falls on the plaintiff to show that the requirements were under-
mined in practice by discriminatory application. See McDonnell Douglas Corp. v. Green,
411 U.S. 792, 804 (1973) (suit by individual plaintiff); United States v. Jacksonville
Terminal Co., 451 F.2d 418, 446 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972)
("pattern-or-practice" suits).

63. Under this approach, content validity would usually be sufficient to meet the
employer's burden, and a demonstration of criterion validity, the preferred procedure
of the Guidelines, 29 C.F.R. § 1607.5 (1973), would normally be required only where
content validation was inconclusive. Content validation involves a comparison between
the skills or knowledge sampled by the practice in question and the skills or knowledge
required by the job. The archetypical example of a test with content validity is a
typing test for secretaries. See, e.g., Griggs v. Duke Power Co., 420 F.2d 1225, 1232
(1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980,
988 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). Criterion validity, on the other
hand, statistically correlates the results of the test or practical exercise with measures
of actual job performance. The criterion validity approach thus requires empirical data
for the statistical calculations. See generally Wilson, supra note 6, at 858-63. An example
of a case using the approach suggested here is United States v. Jacksonville Terminal
Co., 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972) (discussed in note
61 supra).

64. The debates reveal that Congress often had in mind a practical and nontechn-
ical concept of job-relatedness rather than one which required elaborate or expensive
validation. Representative Celler, the floor leader of the 1964 Civil Rights Act, indicated
that the discharge of an employee based on morals charges or theft was not the type
of employer conduct proscribed by Title VII. 110 CONG. REC. 2567 (1964). In the 1972
debate, Senator Williams, who was the bill sponsor and Senate floor leader, indicated
that the qualifications of the employee included "integrity." 118 id. 2395. Senator Byrd
identified morals, manners, and "appearances as to cleanliness" as relevant considerations
for the employer. Id. at 1412. There is no evidence in the legislative history that these
standards were deemed to be relevant only where some form of empirical or technical
proof showed the concepts to be job-related.

The debate on the ability test exemption, 42 U.S.C. § 2000e-2(h) (1970), also reflects
a practical view of job-relatedness. In discussing how Title VII differed from the
understanding of the concept of deference to the Guidelines.65

Is there available to the employer an alternative practice that would equally well achieve his business purpose but with a lesser disparate impact on blacks? Once the employer has persuaded the court that his employment practice reasonably accomplishes his valid business goals, the focus shifts to the question of whether that practice is necessary to attain these goals in view of available alternatives with a lesser disparate impact.66 The issue of who has the burden of proof to show that an alternative practice is or is not available has not yet been clearly resolved.67 The best approach would appear to be one that

Motorola decision, Senator Case introduced a memorandum stating that an electronics firm could require engineers to have a Ph.D. degree despite the practice's disparate impact on minorities. See note 32 supra. No indication was given of a need for empirical data showing that possession of a Ph.D. degree actually had an impact on job performance.

Moreover, Congress considered the federal judiciary to be superior to the EEOC in resolving civil rights issues. See, e.g., H.R. Rep., supra note 33, at 59-63 ("Minority Views"); 117 Cong. Rec. 32091 (1971) (remarks of Rep. Ford: "I don't want some administrative agency making decisions on basic human rights"); id. at 32107 (remarks of Rep. Shoup: courts are designed to balance all issues); 118 id. 700 (remarks of Sen. Fannin: civil rights are a matter of human understanding and common sense, qualities possessed by the judiciary as much as by an agency). One of the express reasons that adjudicatory hearings under Title VII were left to the federal courts rather than the EEOC was to protect employers from being subjected to rules and regulations of the EEOC which did not comport with congressional intent. See note 33 supra. Such subjection can occur not only from application of a Guideline which is inherently invalid but also from blind adherence to a generally valid Guideline in a situation which does not fit the particular fact pattern giving rise to the Guideline's validity. See note 65 infra.

65. Selective application of the EEOC Guidelines occurred in Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973). The Guideline involved in that case interpreted the statutory prohibition against discrimination on the basis of national origin to preclude discrimination on the basis of alienage. 29 C.F.R. § 1606.1(d) (1973). The Court, while recognizing that the Guideline might have significance for a wide range of situations, refused to recognize it as a valid per se rule and declined to apply it in the instant case. 414 U.S. at 92. This approach is consistent with the Court's prior interpretations of judicial deference to administrative agencies in de novo trials. See Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) (under the Fair Labor Standards Act, agency's interpretations respected though they are not necessarily binding on the courts in any particular case).

66. Griggs forbids the use of "artificial, arbitrary and unnecessary barriers to employment." 401 U.S. at 431. Certainly an employment practice with a disparate impact is unnecessary if the goals of that practice can be accomplished by a practice with a lesser disparate impact.

67. The EEOC Guidelines leave the burden on the employer. 29 C.F.R. § 1607.3 (1973). This Guideline appears to be impossible to follow and not even the EEOC applies it literally. See Developments, supra note 17, at 1130-31. Placing the burden on the party challenging the practice was advocated in Cooper & Sobol, supra note 61, at 1608. Another commentator has suggested that the employer be required to make some effort to show lack of a better alternative but that the burden on the employer should not be high because of the difficulty of proving a negative. Bernhardt, Griggs v. Duke Power Co.: The Implications for Private and Public Employers, 50 Tex. L. Rev. 901, 914 (1972). In litigation, the plaintiff has frequently been the party to raise the possibility of an alternative. See, e.g., United States v. Bethlehem Steel Corp., 446 F.2d 652, 659 (2d Cir. 1971). But see United States v. Local 24, United Ass'n of Journeymen, 364 F. Supp. 808, 828 (D.N.J. 1973).
places on the plaintiff the burden of proposing a reasonable alternative practice while leaving on the employer the ultimate burden of demonstrating that the suggested alternative is not as efficient or safe as the challenged practice. The plaintiff's burden of providing a reasonable alternative should be tailored to the nature of the employer's proof of job-relatedness, with "reasonableness" being a flexible standard. Where the employer has not used empirical data to demonstrate an increase in safety or efficiency, the plaintiff should not have to resort to such evidence to show the reasonableness of the suggested alternative. If, however, the employer has shown by empirical data that his practice is job-related, the plaintiff should be required to make a strong showing of a reasonable alternative, such as by empirical evidence developed in similar situations.

A question not yet addressed by the courts is what standard should be applied where the cost to the employer of the best alternative practice with a lesser disparate impact exceeds the cost of the challenged practice?

68. Allocating the burden to the plaintiff serves three important purposes. First, it places the burden on that party most interested in thoroughly exploring the availability of an alternative, thus ensuring that unnecessary disparate impact will not be unwittingly sanctioned merely because the employment practice is in some sense job-related. For example, one commentator has suggested that in Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972), the court failed to consider reasonable alternatives to the requirement that employees have a college degree. See Note, Employment Discrimination—Building Up the Headwinds, 52 N.C.L. Rev. 181 (1973).

Second, placing such a burden on the plaintiff helps reduce the potential for harassment under the Act by better ensuring that a plaintiff is not pressing his case on the theory that an employer will not be able to meet impractical standards of proof of job-relatedness rather than on the theory that an employer's practice is not actually job-related. Consider, for example, the plight of an employer trying to prove empirically that a job applicant's participation in an illegal strike against the employer indicates that the applicant should be rejected. The Supreme Court refused to place such an onerous burden on the employer:

"It is, of course, a predictive evaluation, resistant to empirical proof, whether "an applicant's past participation in unlawful conduct directed at his prospective employer might indicate the applicant's lack of a responsible attitude toward performing work for that employer." . . . But in this case . . . it cannot be said that petitioner's refusal to employ lacked a rational and neutral business justification." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 n.21 (1973) (emphasis added).

Finally, putting this burden on the plaintiff eliminates the serious problem of negative proof that would result if the employer had to demonstrate that no alternative was available. See Developments, supra note 17, at 1130-31.

Moreover, neither the burden on the plaintiff nor that on the defendant-employer would be unrealistic. The plaintiff will normally be the EEOC, see note 61 supra, an expert body having knowledge of the development of permissible alternatives such as those mentioned in Cooper & Sobol, supra note 61, at 1659-60. Moreover, the plaintiff would not be required to produce detailed data, such as administrative costs, which would be available as a practical matter only to the employer. Placing the ultimate burden of proof on the employer is also justified, since only he is in a position to evaluate and produce evidence concerning the impact of an employment practice on the safety or efficiency of his operations. See C. McCormick, Evidence § 337 (E. Cleary ed. 1972).

69. See Cooper & Sobol, supra note 61, at 1669.
practice. A "not insubstantial" test would seem to be appropriate here. Such a standard would permit a challenged practice with a disparate impact on blacks if the difference between the cost of the best alternative and the cost of the challenged practice is not insubstantial. While Congress intended that Title VII should not interfere with business efficiency, it is doubtful that such solicitude extended to a truly insubstantial effect on productivity.

IV. Advantages of the No-Alternative Approach

The primary purpose of a judicially developed business necessity doctrine should be to accommodate, in a manner consistent with the legislative intent of Title VII, both the preservation of efficient employer personnel practices and the elimination of employment policies that have an unnecessary disparate impact on minorities. The no-alternative theory is superior in several respects to the balancing approach in achieving that purpose.

Unnecessary disparate impact. The no-alternative theory permits

70. The term "cost" is intended to reflect a practice's benefits offset by its administrative costs. The courts have indicated that they will not consider certain costs of a suggested alternative when comparing its efficiency with that of a challenged practice. Such costs include the loss associated with pressure, such as a strike, threatened by a union where an employer attempted to adjust a departmental seniority system perpetuating overt pre-Act discrimination. The rationale of the courts in rejecting such costs is that black employees' rights under Title VII should not be subject to being bargained away by unions and employers. See, e.g., Robinson v. Lorillard Corp., 444 F.2d 781, 799-800 (4th Cir.), cert. dismissed under Rule 60, 404 U.S. 1006 (1971).

A second such cost is the loss of morale suffered by white employees due to realignment of their seniority rights in order to eliminate the disparate impact of a departmental seniority system of a no-transfer policy which perpetuates overt pre-Act discrimination. This cost has been rejected under the rationale that black employees' rights should not be afforded less weight than white employees' expectations derived from a departmental seniority system rooted in a history of overt discrimination. See, e.g., United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971).

The appropriateness of disregarding certain costs stemming from the employer's intentional choice of overt discrimination in pre-Act times has been recognized in a leading economic analysis of Title VII. See Fiss, supra note 24, at 303-04. But where the employer has not discriminated in the past, disregarding white employees' expectations from a seniority system would appear to be a form of preferential treatment for blacks. See Goodloe v. Martin Marietta Corp., 5 BNA FEP Cas. 1046, 1048-49 (D. Colo. 1972).


72. The phrase "not insubstantial" refers to a difference in costs which is not trivial or de minimis. This standard is a relative one and includes consideration of the economic situation of the specific employer. For example, a cost differential may be truly insubstantial for a large business with many employees but not for a smaller employer with fewer workers. A standard which takes into account the size of an employer's operation is consistent with the concern expressed in Congress for small business. See 118 Cong. Rec. 1525-26 (remarks of Sen. Gannrell), 2388 (remarks of Sen. Stennis) (1972). Moreover, it should again be noted that the standard suggested here is not a reversion to the discredited business purpose test. See note 51 supra.

73. See note 32 supra.
facially neutral practices that are essential for increasing the safety or efficiency of a business. These increases, unless truly insubstantial, are not subject to being "balanced" away because of a concomitant disparate impact, and this approach thus comports with the intent of Congress to allow the use of job-related qualifications notwithstanding an adverse ultimate impact on minorities.74 But the no-alternative theory does not permit the use of a practice with a disparate impact if another practice can achieve equal benefits with a lesser disparate impact. By focusing attention on the importance of examining alternatives, this approach helps prevent judicial approbation of job-related practices that adversely affect minorities but are not more efficient than available alternatives.75

Reducing reverse discrimination. Since reverse discrimination, including use of a private quota system, is both economically inefficient because of anticipatory costs76 and unlawful under Title VII,77 the business necessity doctrine should be designed to reduce the pressures for discrimination resulting from an employer's desire to avoid enforcement proceedings.78 In this regard, the no-alternative approach is superior to the balancing test in two ways.

The first issue is that of expense. Because of the need to determine if a practice's benefit to the employer is outweighed by its disparate impact, the balancing approach requires that the benefit be quantified.79 The preferred method of the EEOC Guidelines for quantifying the benefit is through the use of a measure of the criterion validity of the practice, i.e., a statistical measure of how well results of the practice correlate with actual job performance.80 Thus, the balancing ap-

74. See p. 106 supra.
75. See note 68 supra.
76. See p. 106 supra.
77. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); 110 Cong. Rec. 8921 (1964) (remarks of Sen. Williams); id. at 7210, 7213 (Interpretative Memorandum of Sens. Clark & Case: "[A]ny deliberate attempt to maintain a racial balance . . . would involve a violation of Title VII"); id. at 7218 (remarks of Sen. Clark: "Quotas are themselves discriminatory").
78. See p. 106 supra.
79. See p. 101 supra.
80. See 29 C.F.R. § 1607.5(a) (1973). In addition to expense, there are two major difficulties with using the degree of criterion validity as the sole measure of a practice's benefit to an employer. The first is that the profitability of a practice is not linearly related to its degree of validity. A practice with a very low, but positive, degree of validity can result in a substantial increase in profitability. See Note, Application of the EEOC Guidelines, supra note 18, at 520 n.89.

The second problem is that using degree of criterion validity to measure employer benefit ignores the administrative costs of a practice. Though one practice may predict job performance better than another, the administrative costs of the first may exceed the administrative costs of the second by an amount greater than the profitability of the increase in performance from use of the first. In such a case, the rational employer would choose the practice with the lower rather than the higher degree of validity.
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This approach tends to reject less technical evidence of the validity of a practice. This approach thus compels the employer to incur substantial expense in order to adduce the requisite technical evidence, thereby ensuring that Title VII will become a “full employment act for industrial psychologists.” The resultant expense realistically leaves the employer little alternative to adopting a private quota system to avoid the costs of an enforcement proceeding, particularly if the skills needed by his employees are found in proportionally fewer minority applicants than in whites. The no-alternative approach would require technical evidence of job-relatedness in those cases where the practice was suspected to be invalid, but in cases where a reasonable inference of job-relatedness was established, the approach would focus primarily on the alternatives available to achieve the employer’s goals. In such a review, the relative costs and benefits of practices could often be evaluated without expensive or technical procedures.

The no-alternative approach is also superior to the balancing test in reducing reverse discrimination in that it enables the employer to evaluate his personnel practices against a clear legal standard. Under the balancing approach the requisite weighing is between the incommensurable entities of employer benefit and disparate impact. Even if both the benefit and the disparate impact of a practice can be accurately quantified, such a weighing cannot be performed with any certainty by anyone other than the trier who decides the specific case. On the other hand, the no-alternative approach would allow the employer to assess his own practices since he can reasonably determine the facts necessary to make the comparisons among the levels of benefits for a range of practices and among the disparate impacts of practices that have equal benefits. This self-evaluation aspect of the

Indeed, almost all employment screening practices are an attempt to avoid the administrative expense of the highly valid but costly technique of hiring every applicant for a job and then firing all of them except the person with the highest actual performance.

81. The issue presented by Griggs and the EEOC Guidelines is whether the degree of validity of the test is sufficient to overcome its discriminatory impact. Although expert testimony may establish a reasonable inference of job-relatedness, it does not provide the trier of fact with an adequate basis for comparing the benefit of an employment test to the employer with its discriminatory impact on minority applicants. Note, Application of the EEOC Guidelines, supra note 18, at 523.


83. See p. 112 supra.


85. The outcome of such a weighing may reflect the predilection of the trier toward an equal-achievement or equal-treatment theory more than a search for neutral principles. See Fiss, supra note 24, at 240.
no-alternative approach comports with the congressional desire for clarity and predictability in this area so that employers can comply with the law in a manner consonant with sound business planning. According substantial weight to state decisions. Because of congressional concern for the concept of federalism, the EEOC is required under Title VII to defer action to state fair employment authorities and to accord “substantial weight” to final findings and orders made by such authorities. The EEOC has interpreted the latter mandate to exclude conclusions of law, thereby affording the specified weight only to determinations of fact. Since the balancing approach makes each business necessity case turn on an ad hoc conclusion of law concerning the relative value of each of the competing interests, “substantial weight” would not in any meaningful sense be given to the final orders of a state fair employment authority even if the EEOC agreed with both the state’s findings of fact and statutory construction of federal law. Such an approach is inconsistent with the congressional view of Title VII as a “states’ rights bill” under which the states and localities would be afforded every opportunity to resolve the problems of racial justice through their own agencies. This legislative policy would be better served by the no-alternative approach, under which findings of fact on differences in benefits and levels of disparate impact lead predictably to the ultimate legal conclusion.

Conclusion

Both the ultimate enforcement and interpretation of Title VII have been left to the federal judiciary. In choosing this scheme, Congress perceived the courts as the defender of minority groups against “arti-

88. Id. § 2000e-5(b).
90. Two related but nonetheless distinct legal issues are involved in a business necessity case. The first, a matter of statutory construction, concerns the proper standard to be applied under Title VII. Once this is established, the application of the standard to the facts in a particular case leads to a conclusion of law. Whether the balancing test is the correct rule under Title VII is a question of statutory interpretation; in contrast, the relative weights assigned in an individual case and the ultimate balance struck are conclusions of law.
92. If the balancing approach reflects the intent of Congress, a meaningful deference to state authorities could logically be established by amending the EEOC regulations to mandate “substantial weight” for state conclusions of law on the valuation of the relative weights applied in a particular case. Congress, however, considered the rights protected by Title VII as federal in nature. Id. Thus, the EEOC’s present policy of not according “substantial weight” to any conclusions of law by state authorities seems correct.
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ficial, arbitrary and unnecessary barriers to employment.” In so doing, however, it intended neither to subject employers to costly and unreasonable burdens nor to disadvantage white employees by preferential treatment for minority groups. Proper accommodation of these interests will not occur if the disparate impact on minority groups that results from a facially neutral employment practice is viewed as a negative factor to be balanced against the increase in profitability ensuing from the use of the practice. Rather, the courts can effectuate the congressional intent only if they treat such a disparate impact as an appropriate triggering mechanism for testing the practice against the best alternatives available to achieve the employer’s stated goals.


94. The federal courts cannot rely on the EEOC to assist in effectuating this congressional intent. Congress recognized the EEOC as an advocate for greater minority utilization in employment. See note 33 supra. Thus one EEOC staff member has stated, “The anti-preferential hiring provisions are a big zero, a nothing, a nullity. They don’t mean anything at all to us.” Developments, supra note 17, at 1165 n.279. Professor Fiss has suggested that to the extent equal achievement rather than equal treatment is seen as the goal of the law, the greater will be the pressures to construe the law in such a way as to allow preferential treatment of blacks. See Fiss, supra note 24, at 240.