Is Griggs Dead? Reflecting (Fearfully) on Wards Cove Packing Co. v. Atonio

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IS GRIGGS DEAD? REFLECTING (FEARFULLY) ON WARDS COVE PACKING CO. v. ATONIO

MACK A. PLAYER

In this Article Professor Player analyzes the effect of the recent United States Supreme Court decision in Wards Cove Packing Co. v. Atonio on impact analysis under Title VII of the 1964 Civil Rights Act as it has evolved since the seminal case of Griggs v. Duke Power Co. Notwithstanding facially dramatic changes announced in Wards Cove Packing, the author concludes that the decision need not produce dramatic changes in results. Professor Player also suggests that the courts should examine the underlying premises of impact analysis, and finally recommends that the courts impose on employers a two-tier evidentiary burden based on the strength of the presumed motive flowing from the degree of impact that the selection device has on employment opportunities of women and minorities.

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TITLE VII of the Civil Rights Act of 1964 proscribes discrimination in employment because of race, color, sex, national origin and religion, and does so in language suggesting that liability is premised on improper motivation. Little in the language of the Act and even less from its legislative history suggests that liability can be premised solely on the effect a selection device has on a class protected by the statute. Nonetheless, in the seminal case of Griggs v. Duke Power Co., the Supreme Court held that Title VII liability would be established when a device, neutral both on its face and in terms of intent, had an adverse effect on the employment opportunities of a class protected by the Act, and the employer could not justify the device in terms of "business necessity." From this holding evolved a two-, or perhaps three-, step analysis in which the plaintiff had the initial burden of proving that the device or system adversely affected a class protected by Title VII. If the plaintiff accomplished this, the burden then shifted to the employer to prove the "business necessity" of the challenged device. If the defendant met this burden, the plaintiff could present evidence of the existence of alternatives which could serve the employer's goals equally well but with less of a discriminatory effect.

In the seventeen years between Griggs and the Court's recent decision in Wards Cove Packing Co. v. Atonio, the Court failed to define with any precision what it meant by "business necessity." Wards Cove Packing provides that definition. Moreover, without ever precisely so holding, the Court over the years appeared to assume that the employer's burden in regard to the "business necessity" element was a burden of persuasion; this assumption had been adopted by every appellate court in the nation. Wards Cove Packing destroyed that assumption. In thus redefining the defendant's burden in adverse

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3. Id. at 436.
6. See infra note 39 and accompanying text.
impact cases, the Court also identified the role of evidence suggesting the presence of "lesser discriminatory alternatives." 7

This altering of shared assumptions as to the employer's burden in impact cases requires reexamination of virtually every such case decided since Griggs. In conducting this reevaluation, it is significant to note that Wards Cove Packing did not overrule, or even criticize, the numerous applications by the Court of the business necessity doctrine. This suggests that the Court's restatement of "business necessity," while using different words that fall far short of any dictionary definition of "necessity," nonetheless does not in fact create a significantly lighter standard than had been generally adopted prior to Wards Cove Packing.

No doubt the most significant aspect of Wards Cove Packing is its removal from the defendant of the burden of persuasion on the issue of business necessity, leaving with the defendant only a burden of presenting evidence on this issue. 8 While this change in the law seems dramatic, it may not in reality produce dramatic changes. In past major cases where the plaintiff has prevailed, it has been because the defendant failed to produce legally sufficient evidence from which the necessary relationship between the selection device and the employer goals could be found to exist; that is, the defendant failed because of failure to meet its burden of production. Because Wards Cove Packing did not reverse these past cases, the law announced in these cases remains unchanged. Therefore the defendant must still produce significant evidence to justify use of exclusionary devices. If the defendant fails to carry this burden, much as before, the plaintiff can expect to prevail.

Thus, projections of the demise of Griggs may be exaggerated. Perhaps, when the dust settles, the shifted burden of persuasion will result in a different outcome only in close cases, where the defendant has presented significant evidence of business justification demanded by the post-Griggs—and still valid—cases, and the plaintiff counters with a significant challenge to that justification. In cases where the defendants have presented strong evidence of necessity and have prevailed, they will continue to prevail. Where the defendants have failed because of insufficient evidence establishing a relationship between the challenged device and their business-related concerns, they should fail as they did before. Defendants must continue to meet the significant burden of presenting evidence sufficient for a fact finder to find that the necessary nexus exists.

7. See infra notes 130-35 and accompanying text.
In a broader sense, *Wards Cove Packing* refocuses the need to evaluate the fundamental premise upon which Title VII impact analysis has proceeded throughout the years. *Wards Cove Packing* and its ancestors may be too narrow in their analytical focus; this narrowness in many instances may have resulted in unfairness to both employers and employees. All Title VII impact cases, from *Griggs* to *Wards Cove Packing*, have relied upon a two-step analysis to create liability, each step being essentially a unitary standard unrelated to the other step. From *Griggs* to *Wards Cove Packing*, courts have disagreed over the proper line at which to set the standards at each step in the analysis. *Griggs* established a relatively low threshold of proving impact, and seemed to demand from employers a relatively high level of business necessity justification. *Wards Cove Packing* now indicates that a relatively high level of impact must be established by a plaintiff to trigger any employer's obligation to justify use of the device. Further, once that level of impact has been established by the plaintiff, the employer's burden of justification is now lower than the burden imposed by *Griggs* and its progeny. Regardless of the quantum imposed by the standard adopted at the particular time, a single threshold burden of proving impact exists. After the plaintiff has crossed that threshold, the employer's burden remains the same, regardless of whether the level of the impact is relatively slight or devastatingly exclusionary. Thus, the standard can be both overinclusive and underinclusive. It may demand too great a showing of necessity if impact is slight, or too little of a justification in the face of devastating effect.

What is needed is a standard of greater flexibility, one that measures the level of the employer's burden by the level of the impact the challenged device has on employment opportunities of a protected class. Devices of relatively slight impact can and should be justified by the employer's presenting evidence of legitimate business concerns that are rationally served by the device—a relatively light burden. On the other hand, if the device proves to be destructive of the statutory goal of equal employment opportunity, the burden on the employer should be correspondingly greater. The burden on such an employer to justify exclusionary devices should be that of proving—not just presenting evidence on—the true and absolute business necessity for use of the device.

This two-level, flexible standard can be accomplished by abandoning the notion pioneered in *Griggs* that motivation is unnecessary in an impact case, and adopting the concept used in labor relations cases that impact is evidence of motivation. Motive can be presumed from

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impact; the strength of that presumption should increase with the degree of impact. The greater the presumption of illegal motivation flowing from the impact, the greater the defendant's burden should be in negating that presumption.

I. GRIGGS AND THE CONCEPT OF "IMPACT ANALYSIS"

Griggs v. Duke Power Co.\(^\text{10}\) introduced impact analysis into employment discrimination law. In Griggs the Supreme Court held that use of a neutral employment selection device that results in a specific race, color, religion, sex, or national origin being treated differently is an act of forbidden discrimination, if the device has an adverse impact on the members of any of those classes and the use of the device cannot be justified in terms of "business necessity."\(^\text{11}\)

The employer, Duke Power Company, required new employees in all nonlabor departments to possess a high school diploma and to make a minimum score on two objective, pen-and-paper achievement tests. The plaintiffs were black applicants who lacked these credentials.\(^\text{12}\) The trial court construed Title VII to require proof of a racial motive and held that the employer imposed these requirements in good faith, without any intent to exclude the applicants because of their race.\(^\text{13}\) While the trial court's finding of no racial motivation on the part of Duke Power for imposing these facially neutral selection devices was suspect,\(^\text{14}\) in light of evidence of the employer's good faith presented at trial\(^\text{15}\) it would have been difficult for an appellate court to reverse on this factual ground.\(^\text{16}\) In any event, the thirteen black employees petitioning the Supreme Court had a broader vision of the statute than simply securing a reversal on the narrow factual issue of the employer's good faith. Notwithstanding the language and history of Title VII,\(^\text{17}\) which was steeped in motive,\(^\text{18}\) the petitioners presented

\(^{10}\) 401 U.S. 424 (1971).

\(^{11}\) Id. at 436.

\(^{12}\) Id. at 427.

\(^{13}\) Id. at 428.

\(^{14}\) Prior to the effective date of Title VII of the Civil Rights Act of 1964, Duke Power had "openly discriminated on the basis of race in the hiring and assigning of employees." Griggs, 410 U.S. at 427. Moreover, Duke Power's requirement of a high school diploma and a passing score on the objective tests, with their obvious potential for excluding black applicants, was instituted for the first time on July 2, 1965, the effective date of Title VII. Griggs, 401 U.S. at 427-28.

\(^{15}\) Duke Power assisted undereducated minority workers in financing two-thirds of the cost of tuition for high school training. Griggs, 401 U.S. at 432.


\(^{18}\) Section 703(a)(1) of Title VII makes it unlawful "for an employer ... to discriminate
the Supreme Court with an uncluttered, but not unique, problem\(^\text{19}\) of how to analyze ostensibly neutral selection devices that adversely affect a class protected by the statute, absent proof of a racial motive. The petitioners postulated that selection devices which are proven to adversely affect a class protected by the statute violate the statute regardless of the motives of the employers for using those devices.\(^\text{20}\)

In addressing neutral selection devices in the context of a statute dominated by a motive element for liability, at least five possible approaches were available to the Court: (1) motive must be proved by the plaintiff; impact of a device is merely some evidence of that motive; (2) motive is a requirement of liability, but adverse impact of a device shifts the burden of proving the lack of invidious motive to the employer; (3) motive theoretically is necessary, but is a fiction established through impact; the employer refutes the presumed motive by establishing objective justifications for the device; (4) motive is not necessary; liability is premised on impact without reference to motive, but liability can be avoided by establishing objective justifications for the device; and finally (5) motive is irrelevant; a device which has an adverse impact is per se illegal without regard to any employer justification.

The first option would require the plaintiff to prove the employer’s invidious motive in all cases. Adverse impact would be at most some

against any individual . . . because of such individual’s race, color, religion, sex, or national origin . . . .” 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Section 703(a)(2) makes it unlawful for an employer “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.” 42 U.S.C. § 2000e-2(a)(2) (emphasis added). Use of the phrase “because of” certainly suggests a requirement of motive. Further, improperly motivated disparate treatment “was the most obvious evil Congress had in mind when it enacted Title VII.” International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); see also Price Waterhouse v. Hopkins, 109 S. Ct. 1775, 1784 (1989).


20. The precise question presented by the Griggs petitioners was:

Whether the intentional use of psychological tests and related formal educational requirements as employment criteria violates the race discrimination prohibition of Title VII, Civil Rights Act of 1964, where:

(1) the particular tests and standards used exclude Negroes at a high rate while having a relatively minor effect in excluding whites, and

(2) these tests and standards are not related to the employer’s jobs.

evidence of improper motive. The lower courts followed this option in the *Griggs* litigation. 21

The second option is similar to the first in that actual motive is still essential, but a showing of adverse impact by the plaintiff shifts the burden of persuasion to the defendant to prove it used the device in good faith. Any evidence, subjective or objective, could be used by the defendant in an effort to convince the fact finder of its good faith. Stated somewhat differently, adverse impact would establish an inference of improper motive to which the employer would have a defense of good faith. 22

The third option would continue to require motive as an element of liability, but motive would be addressed through legal fictions which in turn would presume—not just infer—motive from objective facts. However, unlike option two, where the employer can prevail by convincing the fact finder of its subjective good faith, option three allows the employer to refute plaintiff's prima facie case *only* by presenting an *objective business reason* for using the exclusionary device. This objective reason alone would be sufficient to refute the presumed motive. In the absence of an *objective reason*, the plaintiff would prevail regardless of any good faith on the part of the employer. In such an analysis, because motive is a factual issue, the greater the impact of a device on a protected class the stronger the presumption that the result was intended. Consequently, the strength of the employer's reasons necessary to refute the presumed intent increases with the degree of impact the challenged device has on the protected class. That is, the greater the impact of the challenged device, the greater the employer's need must be for using it.

The Court adopted this general approach to impact several years prior to *Griggs* in the context of the National Labor Relations Act. 23

Section 8(a)(3) of that Act, in language similar to Title VII, makes it an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 24

This language had long been construed to require proof of the em-


22. This option would treat proof of a device which adversely affects employment of minorities as similar to proof of direct or statistical evidence that an employer in fact was improperly motivated. Such a standard of proof shifts to the employer the burden of proving that it would have made the same decision based on legitimate considerations. *See Price Waterhouse*, 109 S. Ct. at 1790.


24. *Id.* § 158(a)(3).
ployer’s motive behind the differential treatment of employees.25 When the Court was called upon to address the use of ostensibly neutral reasons uniformly applied to all workers, such as an award of extra seniority to all employees who continued working in the face of a union-called strike, or the hiring of replacement workers by an employer who had locked-out union workers, the Court continued to recognize that motive was necessary to establish the employer’s liability.26 The Court adopted the evidentiary concept that an actor is presumed to intend the natural and foreseeable consequences of his actions. Thus when a practice adopted by an employer in fact discourages protected activity, a court must presume that the employer desired or intended to achieve that result. Once it was presumed that the employer intended the result achieved by the device, the Court proceeded to analyze the strength of the presumption. When the effect on employees’ rights was “comparatively slight,” the initial presumption of illegal motive was similarly light.27 This weak presumption of improper motive could be refuted “if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.”28 At this point, “an antiunion motivation must be proved [by the charging party] to sustain the charge.”29 In sum, light impact shifted to the employer a simple burden of presenting a legitimate, but substantial, reason for using the device, which, if accomplished, dissolved the presumption of improper motive and required the plaintiff to address the defendant’s motive through conventional evidentiary means.

When it could “reasonably be concluded that the employer’s discriminatory conduct was ‘inherently destructive’ of important employee rights, no proof of antiunion motivation was needed, and the Board could find an unfair labor practice even if the employer intro-


As in a Title VII action, this motive can be established by direct evidence of an employer’s antiunion animus. NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). Motive can also be established by circumstantial evidence of animus motivating particular treatment suggested by the juxtaposition of protected activity and employer response. See Mueller Brass Co. v. NLRB, 544 F.2d 815, 821-25 (5th Cir.) (Godbold, J., dissenting), reh’g denied, 548 F.2d 355 (1977); Edward G. Budd Mfg. Co., 138 F.2d at 86.


28. Id. (emphasis omitted).

29. Id.
duced evidence that the conduct was motivated by business considerations." This created a heavy, perhaps insurmountable, burden to justify the use of an inherently destructive device. Thus, when the impact of the action on employee rights was great (as opposed to comparatively slight), the employer's burden was one of proving (as opposed to producing evidence of) an overpowering (as opposed to legitimate) business reason for adopting the device.

Although the Court had adopted the labor relations model for analyzing impact some years prior to \textit{Griggs}, this analysis was not presented to the Court in the petitioner's brief. No doubt the Court was sympathetic to the plight of the petitioners and could foresee that even good faith use of exclusionary devices would undermine the equal employment opportunity goal of Title VII. However, perhaps because the Court had not been briefed on the labor relations approach to the problem of impact, in \textit{Griggs} the Court adopted option four, which eliminated motive as a necessary element of Title VII liability:

\textit{[Title VII] 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. ... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.} \textsuperscript{32}

This holding resulted in a distinct and unique model of proof based solely on impact and divorced totally from motive and the various models developed by the Court to prove motive. \textsuperscript{33} This model was so clean and potentially advantageous to civil rights plaintiffs that it has

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} An employer's economic survival may not even be a sufficient basis for using a device if the impact on protected rights is sufficiently destructive. \textit{See NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); see also Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 109 S. Ct. 1225 (1989); NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967). Compare Ottawa Silica Co. v. NLRB, 197 N.L.R.B. 449 (1972), enforced by, 482 F.2d 945 (6th Cir. 1973) (finding conduct which was inherently destructive) with Inland Trucking Co. v. NLRB, 179 N.L.R.B. 350 (1969), enforced by, 440 F.2d 562 (7th Cir. 1971) (finding conduct which was comparatively slight).

\textsuperscript{32} \textit{Griggs}, 401 U.S. at 431-32 (emphasis in original).

\textsuperscript{33} The various models of proof used to prove improper motivation are: (1) "direct evidence—mixed motive," \textit{see Price Waterhouse v. Hopkins, 109 S. Ct. 1775 (1989)}; (2) "statistical—pattern or practice," \textit{see International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)}; (3) "individual disparate treatment," \textit{see Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)}; and (4) "perpetuation of past segregation," \textit{see Bazemore v. Friday, 478 U.S. 385 (1986). Each of these differs from the others and from the impact model outlined in \textit{Griggs}."
been urged upon the Court as a basis of analyzing numerous other statutory schemes. 34

Traditionally, a Title VII Griggs impact case proceeded in two evidentiary stages. The initial burden was on the plaintiff to prove to the satisfaction of the fact finder that the practice operated to exclude members of the class of which the plaintiff was a member—in short, to prove that the device had an adverse impact on a protected class. 35 Failure to prove this impact ended the litigation. The defendant carried no obligation to justify the use of devices not shown to have adverse consequences on a particular race, ethnic class, religion, or gender. 36

If the plaintiff successfully demonstrated the exclusionary effect of the device on a class protected by Title VII, stage two of the litigation was reached. At stage two, the employer’s justification for using the device which had an exclusionary or adverse effect on a protected class was at issue. Griggs held that at this stage the burden shifted to the employer to justify the device in terms of “business necessity.” 37 Without defining the phrase “business necessity,” the Griggs Court stated that “Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.” 38


36. See Teal, 457 U.S. at 440; Beazer, 440 U.S. at 568.

37. “What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications. . . . The touchstone is business necessity.” Griggs, 401 U.S. at 431 (emphasis added).

38. Id. at 432. Griggs also dealt with section 703(h) of Title VII, which ostensibly permits employers to utilize any “professionally developed ability test . . . not designed, intended or used to discriminate because of race . . . .” 42 U.S.C. § 2000e-2(h). The Court held that this proviso protected only job related tests. If the test had an exclusionary impact and was not “job related,” it was being “used to discriminate,” and thus was outside the protection of the proviso. Griggs, 401 U.S. at 433-36. Thus, in effect, the testing proviso was rendered virtually superfluous. It gave tests no more immunity than non-testing selection devices.
The objective weight of the employer's burden was not clearly defined by Griggs. However, one thing seemed clear: in evidentiary terms, the burden on the employer was a burden of proof or persuasion. The employer had to prove to the satisfaction of the fact finder the necessary "manifest relationship" between the device and bona fide employer business purposes. 39

In Griggs, the employer's proof of "business necessity" consisted of testimony from a Duke Power executive that a high school diploma and a passing score on the objective tests measured general ability and were implemented to raise the general quality of the work force. 40 This generalized, unsupported assumption, the Court held, fell far short of proving the necessary "manifest relationship" between the screening devices and actual employee performance. Thus, under Title VII, the Court ruled that such devices were illegal. 41

II. THE WATSON PRELUDE TO WARDS COVE PACKING

In 1988, the Court in Watson v. Fort Worth Bank & Trust 42 considered the narrow issue of whether the impact analysis model pioneered in Griggs applies to subjective selection devices. The plaintiff, a black female employee, had repeatedly been denied promotions by her employer, defendant Fort Worth Bank. In each case, the employer articulated a different subjective and facially neutral reason for the denial of her request for promotion. 43 Ms. Watson argued that the subjective system used by the defendant adversely affected the promotional opportunities of blacks at the Fort Worth Bank. 44 However, the Fifth Circuit Court of Appeals, consistent with its previous holding, 45 held

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40. Griggs, 401 U.S. at 431.

41. Id.


43. Id. at 2782.

44. Id.

that impact analysis was applicable only to identified objective devices, such as pen-and-paper tests, educational credentials, physical requirements, and the like.\(^{46}\)

An eight-member Supreme Court unanimously reversed on the narrow issue presented, and remanded the case for consideration of the plaintiff's proof of impact and, if necessary, for resolution of the sufficiency of the employer's justification for using the subjective devices.\(^{47}\) The precise holding, however, was that if the plaintiff established an adverse impact of the subjective selection system,\(^{48}\) such a system would be held to the same model of proof as applied to objective selection systems.\(^{49}\)

This much seemed a victory for civil rights plaintiffs, but the Court giveth and the Court taketh away. A four-Justice plurality opinion written by Justice O'Connor continued beyond the narrow issue presented and provided for the guidance of the lower courts on remand a "fresh and somewhat closer examination" of the impact model.\(^{50}\) This restated model emphasized the precision required to prove impact and dramatically restated commonly accepted principles of the employer's burden of proof after impact was proven by the plaintiff. Justice O'Connor described the employer's burden not as one of persuading the fact finder of the justification for use of an exclusionary device, but one of merely presenting evidence of justification. Use of an exclusionary device is justified, according to the \textit{Watson} plurality, if the employer presents evidence of "legitimate business reasons."\(^{51}\)

The plurality appeared to equate the employer's burden in a \textit{Griggs} impact case with the burden of an employer in the motive-oriented cases involving simple disparate treatment of minority and nonminority applicants. This suggested a shift from option four to option one.\(^{52}\) Impact on a protected class did nothing more than create a rebuttable inference of improper motive that could be refuted simply by presenting evidence of legitimate business reasons.

\(^{46}\) \textit{Watson}, 108 S. Ct. at 2783.

\(^{47}\) \textit{Id.} at 2791.

\(^{48}\) Such impact would probably have to be established through "applicant flow" data. This method analyzes the employer's own selection experience by comparing the percentage of otherwise qualified black applicants who were selected with the percentage of qualified white applicants who were selected. If the selection rates differed significantly, the subjectivity would be said to have an adverse effect. \textit{See generally} Shoben, \textit{Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII}, 91 Harv. L. Rev. 793 (1978).


\(^{50}\) \textit{Id.} at 2788-91.

\(^{51}\) \textit{Id.} at 2790.

\(^{52}\) \textit{See supra} p. 6.
In "disparate treatment" cases, which the plurality seemed to equate with impact cases, the employer's motive is inferred by proof that similarly situated persons from differently protected classes are treated differently. An example of disparate treatment is when a qualified minority person and a qualified nonminority person apply for a vacancy and the nonminority person is selected. In such cases, the employer's proof is directed to the relatively weak inference of improper motivation drawn from this proof of disparate treatment. This burden merely requires the employer to articulate a specific and objective reason for the plaintiff's rejection. 53

If the employer's burden upon proof of the adverse impact of a selection device is no different from the employer's burden upon proof that the employer had subjected the minority employee to disparate treatment, the impact analysis as pioneered by Griggs would be deprived of any significant viability apart from the motivational approaches to Title VII liability. 54 If a majority of the Court adopted this suggestion by the plurality, the consequences would be little short of revolutionary, in that an employer's burden of refuting the weak inference of motive flowing from simple disparate treatment would be notoriously weak and relaxed. It is a rare employer which cannot articulate some ostensibly rational reason for rejecting a minority applicant in favor of the white male applicant. Similarly, it would be a rare case in which the employer could not articulate a legitimate reason for using a particular selection device. Indeed, requiring an educational credential "to secure a more intelligent work force" would seem to be abstractly "legitimate." Such generalized rationality had been expressly rejected in Griggs. 55 However, Watson appeared to sanction such an approach, and thus effectively to undermine, if not overrule, Griggs. This approach would grant an employer the maximum amount of discretion to use devices which in fact exclude women and minorities at the price of seriously undermining the employment opportunity goal of Title VII recognized in Griggs. This "dicta" in Watson commanded only a plurality of the Court, and set the stage for


54. See Watson, 108 S. Ct. at 2792 (Blackmun, J., concurring). Justice Kennedy did not participate in this decision. Justice Stevens concurred in the result, but found these aspects of the plurality opinion unnecessary, and on this ground withheld comment. justices Blackmun, Brennan, and Marshall agreed with the holding that subjective devices should be subject to impact analysis, but "dissented" from the "fresh" restatement of impact analysis, particularly as it restated the employer's burden.

further "clarification" of impact analysis, which was accomplished in *Wards Cove Packing Co. v. Atonio.*

III. *WARDS COVE PACKING*

*Wards Cove Packing* involved the alleged impact of various practices, some of them subjective, adversely affecting the ability of minority workers in a cannery to move into noncannery positions with the same employer. The United States Court of Appeals for the Ninth Circuit concluded that the plaintiffs had proved the adverse impact of these devices and that the employer had failed to carry its burden of proving the "business necessity" of its selection system. The Supreme Court reversed. Because the Court in *Watson* had unanimously confirmed that impact analysis could be used to evaluate subjective devices such as those used in *Wards Cove Packing,* that point was not at issue. The Court was unsatisfied, however, that the *Wards Cove Packing* plaintiffs had sufficiently proved the adverse impact of the subjective, informal selection system. The Court remanded the case for evaluation of plaintiffs' proof. In the event the lower court found that plaintiffs had established adverse impact, the Supreme Court directed an evaluation of the "business necessity" of the challenged devices according to new, restated standards inspired by the plurality in *Watson.* Contrary to the *Watson* suggestion, however, *Wards Cove Packing* retained the basic theory of the *Griggs* impact analysis. It simply increased the threshold level of proof necessary to prove impact, and decreased the burden on defendants to justify the use of any device proved to have an adverse effect.

*Wards Cove Packing* made three major points. The first dealt with the type and scope of evidence necessary to prove adverse impact. It

57. The hiring officers for Wards Cove Packing, when filling most job positions, generally sought to hire individuals who were, "in the hiring officer's opinion, the best for the job." *Atonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1124 (9th Cir. 1985). Additionally, some positions required comparable experience. For example, the position of dry tender engineer included the required experience of one year with a related boat, or six months of engine mechanical and one season of tender. *Atonio v. Wards Cove Packing Co.*, 827 F.2d 439, 446 (9th Cir. 1987). However, apparently such requirements for comparable experience were not mandatory and could be waived by the hiring officer at his discretion. *Id.*
58. That subjective devices are subject to impact analysis was resolved by the Court in *Watson v. Fort Worth Bank and Trust,* 108 S. Ct 2777 (1988). *See supra* notes 42-49 and accompanying text.
60. *Id.* at 2123-24.
61. *Id.* at 2125-26.
confirmed prior authority that plaintiffs must prove adverse impact with precision far beyond that suggested in *Griggs.*

63. The Ninth Circuit held that the plaintiff established the adverse impact of the employer's hiring practices with regard to the noncannery jobs by comparing the high percentage of minority workers (52%) in the lower paying cannery jobs with the very low percentage of minority workers (15-17%) in the higher paying, more desirable noncannery positions. *Wards Cove Packing*, 109 S. Ct. at 2122. The Supreme Court first held that such "snap shot" data showing a simple racial imbalance between cannery and noncannery workers were insufficient to prove impact. While simple imbalance may prove a pattern or practice of improper motive, *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977), to prove the impact of a device the plaintiff must identify the device and show the effect of this device on a protected class. *Wards Cove Packing*, 109 S. Ct. at 2121. This conclusion is intuitively correct. See 3 LARSON, *EMPLOYMENT DISCRIMINATION* § 74.41 (1987); see also *Connecticut v. Teal*, 457 U.S. 440 (1982).

The Court then held that the plaintiffs had failed to refine their potential applicant pool data to include only those persons who were interested and qualified for the positions but were allegedly excluded by the devices. *Wards Cove Packing*, 109 S. Ct. at 2121-22. Justice White had made this argument in his dissent in *Dothard v. Rawlinson*, 433 U.S. 321, 348 (1977) (White, J., dissenting), the principle was accepted in a somewhat different context in *Hazelwood School District*, 433 U.S. at 308 n.13, and in *New York City Transit Authority v. Beazer*, 440 U.S. 568, 585-87 (1979), and ultimately this requirement was adopted in impact cases, see, e.g., *Valentino v. United States Postal Serv.*, 674 F.2d 56 (D.C. Cir. 1982); Pack v. *Energy Research & Dev. Admin.*, 566 F.2d 1111 (9th Cir. 1977). The courts have even used an applicant's assumed lack of interest in the job to refine such data. EEOC v. J.C. Penney Co., 843 F.2d 249 (6th Cir. 1988).

Next the Court held that use of the applicant pool was too narrow because data from a universe different from which the employer recruited applicants was inherently unreliable. Specifically, the employer recruited noncannery workers from the general area population, not just from cannery workers. Thus, a pool that evaluated only cannery workers was underinclusive. *Wards Cove Packing*, 109 S. Ct. at 2123. This principle had also been recognized in *Hazelwood School District*, 433 U.S. at 299, and is generally followed in the lower courts, e.g., *Markey v. Tenneco Oil Co.*, 707 F.2d 172 (5th Cir. 1983); *Williams v. Owens-Illinois*, Inc., 665 F.2d 918 (9th Cir. 1982); EEOC v. *United Va. Bank*, 615 F.2d 147 (4th Cir. 1980). This restriction has even been applied, precisely as in *Wards Cove Packing*, to the practice of using lower-level jobs as a comparative base for the under representation at higher levels. See *O'Brien v. Sky Chefs*, Inc., 670 F.2d 864 (9th Cir. 1982).

Finally, the Court indicated that if the defendant had reliable applicant flow data, this would generally prevail over any proof by the plaintiff drawn from the impact of the device on a potential applicant pool. *Wards Cove Packing*, 109 S. Ct. at 2121-22. This, too, was generally accepted dicta. In *Hazelwood School District*, 433 U.S. at 299, the Court had suggested a preference for actual data from an employer's experience over comparisons to the potential applicant pool. See also *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 564 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); Movement for Opportunity & Equality v. *General Motors Corp.*, 622 F.2d 1235 (7th Cir. 1980); 29 C.F.R. § 1607.4 (1988).

While the Court confirmed that the plaintiff had the duty of "fine tuning" data, *Wards Cove Packing*, 109 S. Ct. at 2124-25, this duty was not originally imposed by *Griggs* or by *Dothard*. These cases permitted the most generalized proof to create a prima facie case of impact and "[i]f the employer discerns fallacies or deficiencies in the data offered by the plaintiff, he is free to adduce countervailing evidence of his own." *Dothard*, 433 U.S. at 331. This burden was shifted from the defendant to the plaintiff in *Beazer*, 440 U.S. at 568. Thus, it was *Beazer*, not *Wards Cove Packing*, that shifted the burden of proof to the plaintiff to prove impact with a greater mathematical precision. This allowed a defendant to prevail by simply raising potential defects in the plaintiff's data without presenting countervailing evidence.
The second point of *Wards Cove Packing* was the definition, or rather redefinition, of "business necessity." While the Court had never clearly defined "business necessity," the *Wards Cove Packing* clarification produced a definition akin to "substantial business justification." 64 This definition does not expressly conflict with any prior pronouncements from the Supreme Court. Nonetheless, it will change how "business necessity" is articulated in virtually all circuits.

Finally, regardless of Justice White's condescending statement that we should have understood otherwise, 65 *Wards Cove Packing* in fact reversed eighteen years of uniformly accepted construction of earlier Supreme Court decisions that placed on employers the ultimate burden of justifying any device proved to adversely affect the employment opportunities of a protected class. This new burden on employers was one of simply presenting evidence of "business necessity" which, if accomplished, shifted the burden back to the plaintiff to prove that "business necessity" did not exist. This shift of the burden of persuasion away from the defendant to the plaintiff requires fundamental rethinking of all impact cases resolved on the basis that the defendant failed to carry its burden of proof.

**A. When is an Exclusionary Device Unlawful? The Meaning of "Business Necessity"**

One of the first substantive issues addressed under Title VII was how to analyze devices adopted after July 2, 1965, the effective date of Title VII, when the devices were race-neutral on their face, and even race-neutral in terms of motivation, but perpetuated the facial segregation practiced by the employer prior to July 2, 1965. For example, in one case a trucking company had two categories of drivers; the more desirable category of jobs was filled exclusively by whites, while the less desirable category was staffed predominately by blacks. This division continued up until the effective date of Title VII. After July 1965 the company filled vacancies in both job categories without regard to race. The company also prohibited all employees from transferring from one job to another, a practice that continued after the effective date of Title VII. This "no transfer" policy was neutral in

65. Justice White stated:
   We acknowledge that some of our earlier decisions can be read as suggesting otherwise. But to the extent that those cases speak of an employers' 'burden of proof' with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden.
*Id.* at 2126 (citations omitted).
appearance and uniformly imposed on all employees for business purposes. Obviously, however, a rule prohibiting transfers between units would perpetuate the initial segregation of black and white employees into those separate jobs.66

Even in the absence of any proof of racial motivation, rules which perpetuated racial segregation were held by courts to violate Title VII unless the employer carried the burden of proving the "business necessity" of the rule.67 It was in this context that the term and concept of "business necessity" was coined.

According to this perpetuation-premised, pre-Griggs definition, "business necessity" was construed literally to mean "essential" or "absolutely required."68 More fully explained: "the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose . . . and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced."69

It was this literal concept of "business necessity" that the petitioners in Griggs asked the Court to adopt and apply to factors having an adverse impact on protected classes.70 It is reasonable to assume, therefore, that the Court had in mind a similar conception of the term when it used these same words to define the employer's burden.71 Accordingly, many lower courts justifiably concluded that in using the

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66. See Jones v. Lee Way Motor Freight, Inc. 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971). In another case, a union, which previously had excluded blacks, abolished its express racial exclusionary provision, but continued to admit only relatives of current members. Obviously, a policy of admitting only relatives, who by no coincidence were all white, necessarily worked to exclude blacks. Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

67. See e.g., Beavers v. International Ass'n of Bridge & Structural Ironworkers, Local Union No. 1, 701 F.2d 601 (7th Cir. 1982); Lee Way Motor Freight, Inc., 431 F.2d at 245 (no-transfer rule improperly perpetuated initial discriminatory assignment); Vogler, 407 F.2d at 1047.

68. This literal interpretation of "necessity" and "necessary" is in line with their dictionary definitions. "Necessity" is defined as "the quality or state or fact of being necessary: as a condition arising out of circumstances that compels to a certain course of action . . . inevitableness, unavoidable; great or absolute need." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1511 (1986). "Necessary" is defined as "unavoidable, inevitable . . . that must be by reason of the nature of things . . . that cannot be done without . . . that must be done or had . . . absolutely required . . . essential, indispensable." Id. at 1510-11.


71. See Griggs, 401 U.S. at 431.
term "business necessity" in *Griggs*, the Court was adopting the pre-existing, literal definition of the term.\(^{72}\)

The *Griggs* Court did, however, state more specifically that "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question."\(^{73}\) This obviously suggests that, in the context of adverse impact (as opposed to practices which perpetuate pre-Act improperly motivated segregation), the employer's burden is something less than proving "necessity" but entails proving only a manifest relationship to the employment in question.

The Court in *Griggs* thus gave conflicting signals as to the meaning of "business necessity" and launched the concept of impact analysis into a sea of ambiguity. On one hand, the Court stated that the "touchstone is business necessity."\(^{74}\) This indicated that the Court would require the employer to prove that the device was "essential" as previously defined by the lower courts in perpetuation cases. On the other hand, the Court indicated that the employer was obligated to prove only that the device was "manifestly related" to the job or job performance.\(^{75}\) This ambiguity essentially remained unanswered for the eighteen years between *Griggs* and *Wards Cove Packing*.

1. **The Employer's Burden From *Griggs* to Watson: Albemarle Paper, Dothard, and Beazer**

   In *Albemarle Paper Co. v. Moody*,\(^{76}\) the Court's first impact case after *Griggs*, the Supreme Court addressed the validity of a widely used pen-and-paper aptitude test as a basis for selecting employees.\(^{77}\) The employer engaged a testing expert to conduct a post-challenge evaluation of the tests to determine the actual relationship between

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73. *Griggs*, 401 U.S. at 432. The Court explained that "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431 (emphasis added). "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432 (emphasis added). "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id.* (emphasis in original). "What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.* at 436.

74. *Id.* at 431.

75. *Id.* at 424.

76. 422 U.S. 405 (1975).

77. *Id.* at 410-11.
test performance and job performance. The litigation produced proof by the plaintiffs that the test adversely affected the employment of black applicants in that blacks failed the test at a significantly higher rate than white applicants. This finding was not challenged. Rather, the employer responded with the expert's testimony which concluded that the tests were widely adopted tests which measured to some degree the performance of workers on the job. The Court found that the employer's proof was inadequate and did not establish a "manifest relationship" between the tests and actual job performance. Specifically, the Court determined that the underlying statistical correlations between test scores and actual job performance were flawed because they did not meet professional standards of statistical validation adopted by the American Psychological Association.

In this context the Court adopted the term "manifest relationship," as opposed to "business necessity," to define the employer's burden. However, the Court applied the "manifest relationship" concept in such a way that the employer's burden approached one of demonstrating "necessity" for use of the device. The Court rejected the unsupported expert conclusions, declared the general popular use of the device irrelevant, and demanded a strong showing of a precise statistical relationship between performance on the test and actual job performance. Further, the Court recited the need to use professional standards of test validation to prove the required "manifest relationship."

Significantly, however, Albemarle Paper did not demand that the employer prove the absence of any lesser discriminatory alternative to the device or test being challenged. The Court recognized the importance of evidence showing an effective alternative that has less of an adverse impact on plaintiff's class, but placed the burden of presenting such viable alternatives upon the plaintiff. Moreover, even if the plaintiff presented alternatives that the defendant could have used to select employees, plaintiff's proof raised the issue of the employer's

78. *Id.* at 411, 429-30.
79. *Id.* at 411.
80. *Id.* at 412-13.
81. *Id.* at 433.
82. American Psychological Association, Standards for Educational and Psychological Tests and Manuals (1966); see also 29 C.F.R. § 1607.5(a) (1988); 41 C.F.R. § 60-3.5A (1988).
83. *Albemarle Paper Co.*, 422 U.S. at 435.
84. *Id.* at 430.
85. *Id.* at 428 n.23.
86. *Id.* at 430-31.
87. *Id.*
88. *Id.*
motive for adopting the challenged test. When an employer used a device having an adverse impact on minority applicants, when an equally effective alternative existed which did not have a similar impact, an inference that the employer was improperly motivated was created. Consequently, evidence of lesser discriminatory alternatives did not prove the absence of the challenged device’s "business necessity." Thus a plaintiff who proved that such an alternative existed did not prevail as a matter of law. The lesser discriminatory alternative only suggested the presence of illegal motive for the use of the device, which triggered a new inquiry into the employer’s motivation. 89

Albemarle Paper thus construed "business necessity" to require an extremely demanding level of proof: the demonstration of a clear and unambiguous relationship between the selection device and actual job performance. However, because the presence of alternatives would not entitle the plaintiff to judgment as a matter of law, the "business necessity" burden did not really mean "necessary" or "essential" in any absolute or literal sense. The "manifest relationship" aspect of Griggs seemed to control over the "business necessity" suggestions. 90

Two years later in Dothard v. Rawlinson, 91 the Court refused to accept a 5'2" minimum height requirement and a 120-pound minimum weight requirement as being "manifestly related" to the job of prison guard. The Court found that these two physical requirements had a significant impact on employment opportunities of women. The employer, however, identified its goal of securing guards with strength, and argued that minimum height and weight had a manifest relationship to the required strength and thus to bona fide business purposes. 92 The Court accepted that physical strength was a valid

89. The Court explained that "[i]f an employer does meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" Id. at 425. The Court was unclear as to the significance of this evidence. It was not sure whether this objectively proved the lack of "business necessity" for the challenged device, or whether it was simply some evidence that the device was utilized for an improper motive. The Court's statement that "[s]uch a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination" suggests that a lesser discriminatory alternative was not a part of "business necessity," but demonstrates improper motive behind the use of the device. Id.

90. A year after Albemarle Paper, the Court in Washington v. Davis, 426 U.S. 229 (1976), appeared to relax the Albemarle Paper demand of stringent proof of "business necessity" through scientific "validation" by permitting a "sensible construction of the job-relatedness requirement." Washington, 426 U.S. at 251. A correlation between test scores and job performance was not required if the test predicted success on a training program and appeared rationally to relate to some aspects of the content of the ultimate job. Id. at 252.

92. Id. at 331.
component of the prison guard job but concluded that there was "no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance." Because of the lack of underlying data necessary to prove a correlation between the exclusionary rule (height and weight minima) and a necessary requirement of the job (strength), the defendant failed to establish that physical size for a prison guard was "necessary" to successfully perform the job. Although a minimum physical size for a guard may be intuitively rational, it did not meet the high standard of a "business necessity."

Significantly, Dothard revisited the role of lesser discriminatory alternatives and noted that "[i]f the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also 'serve the employer's legitimate interest . . . ."' This suggests, contrary to Albemarle Paper, that if a plaintiff succeeded in establishing such an alternative, it would disprove the defendant's assertion of "business necessity" and would entitle the plaintiff to prevail without any further inquiry into the employer's motivation.

The "business necessity" aspects of the burden created in Griggs now seemed to prevail over the "manifest relationship" standard. At this stage "business necessity" seemed to mean, literally, "essential."

Two years after Dothard, and eight years after Griggs, this emerging yet still ill-defined concept of "business necessity" was thrown into disarray by New York City Transit Authority v. Beazer. Plaintiffs were challenging the broad application of a "no narcotics" rule to persons in non-safety sensitive positions who had been undergoing narcotics rehabilitation treatment for more than one year. The decision was initially resolved on constitutional grounds, and further disposed of on the basis that plaintiffs' proof failed to establish the impact of this narrow application of the "no narcotics" rule on racial

93. Id.
94. Id. at 329 (citation omitted).
95. Some lower courts have not followed the suggestion in Dothard that the burden of proving the viability of the alternative was on the plaintiff. They have held that the burden of coming forward with, or presenting evidence of, alternatives was on the plaintiff. However, once such evidence was presented, the employer carried the ultimate burden of proving "necessity" of a device, and also of proving that any proposed alternatives were not viable. See, e.g., Gutierrez v. Municipal Court, 838 F.2d 1031, 1042 (9th Cir. 1988), vacated as moot, 109 S. Ct. 1736 (1989). EEOC v. Rath Packing Co., 787 F.2d 318, 331 (8th Cir.), cert. denied, 479 U.S. 910 (1986).
97. Id. at 578.
98. See id. at 582-83 & nn.22-23.
minorities. However, in a brief footnote the Court gratuitously commented that the employer's goals were "significantly served by—even if they do not require—[the employer's] rule . . . . The record thus demonstrates that [the employer's] rule bears a 'manifest relationship to the employment in question.'" 100 However, the record accepted by the Court contained no evidence that persons enrolled in drug rehabilitation programs for more than a year presented a greater risk of drug abuse than persons drawn at random from the general public not in such programs. 101 The rule was sustained simply because it was "rational." As pointed out by the dissent, there was certainly no showing of job relatedness of the kind previously demanded in Griggs, Albermarle Paper, and Dothard. 102

The footnote in Beazer may have been merely ill-advised dicta, or perhaps the Court really meant what it said, or seemed to say—that "necessity" meant "rational." 103 As might be expected, the lower federal courts were in a frenzy of disharmony, their only unity being that of ignoring Beazer's footnote thirty-one. Some courts emphasized the "manifest relationship" aspects of Griggs, and others gave a more literal construction to the word "necessity." 104 An oversimplified, but

99. See id. at 587.
100. Id. at 587 n.31.
101. Indeed, the evidence indicated that a random selection of employees from the population would produce the same percentage of drug abusers as would employees drawn from a pool of persons who had been in a rehabilitation program for more than one year. Id. at 586 & n.28.
102. Id. at 602 (White, J., dissenting).
103. The Court was primarily concerned with the lower court's holding that the discrimination against those in drug rehabilitation programs was unconstitutional. Id. at 587-93. Discussion of Title VII was secondary, and was addressed largely to determine whether plaintiffs were entitled to statutory attorneys' fees. Beazer, 440 U.S. at 568. The thrust of the Court's opinion dealing with Title VII was directed toward the failure of plaintiff to prove adverse impact. See Beazer, 440 U.S. at 584-86. Consequently, the comment on "business necessity" was at most an alternative holding, but probably dicta. Further, the Court suggested that perhaps its relaxed view of the employer's burden was premised on, at best, a weak showing of impact. See id. at 587.
104. For example, the Ninth Circuit did not know what to make of all of this. See, e.g., Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); Craig v. County of Los Angeles, 626 F.2d 659 (9th Cir. 1980), cert. denied, 450 U.S. 919 (1981); Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979), cert. denied, 446 U.S. 928 (1980); deLaurier v. San Diego Unified School Dist., 588 F.2d 674 (9th Cir. 1978). The Tenth Circuit had similar problems. See, e.g., Williams v. Colorado Springs, 641 F.2d 835 (10th Cir. 1981). The Sixth Circuit was troubled as well. See Rowe v. Cleveland Pnuematic Co., 690 F.2d 88, 93-94 (6th Cir. 1982); Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1260-62 (6th Cir. 1981).

relatively accurate, summary of the lower court developments over the intervening nine years was that:

[a]lthough differing as to the precise terminology, the lower courts agree that "business necessity" contains three elements: (1) a substantial employer interest; (2) a close or "manifest" relationship between the employer's interest and the challenged criteria, a relationship that demands factual proof; and (3) no alternative practice that would serve the employer equally well with less of a discriminatory effect.

... If the plaintiff presents evidence of the existence of lesser discriminatory alternatives, the employer must establish the "necessity" for the practice.\textsuperscript{105}

2. Watson and Wards Cove Packing

The Court's next attempt at defining the employer's burden in an impact case came in the plurality opinion of \textit{Watson v. Fort Worth Bank and Trust}.

\textsuperscript{106} In \textit{Watson}, four Justices agreed to take a "fresh" look at "business necessity,"\textsuperscript{107} and in so doing, embraced a version unlike any used in the lower courts. This standard was reminiscent of \textit{Beazer}'s long-ignored (if not forgotten) footnote thirty-one. Indeed, the plurality went even further than \textit{Beazer}, suggesting that "necessity" was no more than a "legitimate reason."\textsuperscript{108} The burden of proving "necessity" would be the same as proving the light-to-nonexistent burden carried by employers when a weak inference of improper motive is created by a plaintiff proving simply disparate treatment of similarly situated minority and nonminority applicants.\textsuperscript{109}

\begin{footnotes}
\textsuperscript{106} 108 S. Ct. 2777 (1988).
\textsuperscript{107} See supra text accompanying note 50.
\textsuperscript{108} Watson, 108 S. Ct. at 2786-87.
\textsuperscript{109} The \textit{Watson} Court stated:

The distinguishing features of the factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used. Nor do we think it is appropriate to hold a defendant liable for unintentional discrimination on the basis of less evidence than is required to prove intentional discrimination. Rather, the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to inten-
The *Watson* plurality then articulated this "fresh" definition of "necessity," which would allow the defendant to meet its burden by simply "producing evidence that its employment practices are based on legitimate business reasons." It is indeed "fresh" to redefine the English language.

The *Watson* plurality then indicated that the employer had no obligation to justify use of exclusionary devices through formal "validation studies," as had been required in *Albemarle Paper* and *Dothard*, which seek to determine whether discrete selection criteria predict actual on-the-job performance.

The plurality of *Watson* evolved into a five-to-four majority in *Wards Cove Packing*. In addressing the definition of "business necessity" the Court, while still not accepting that "necessity" means what it says (i.e., essential or indispensible), nonetheless backed away significantly from the *Watson* plurality, which found no significant difference between impact and motive cases. The Court defined the weight of the employer's burden to be distinctly more weighty than merely articulating a rational reason for use of the device:

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*Id.* at 2785 (citation omitted).

In disparate treatment cases the employer's burden is to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). For similar language see *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981). This burden requires the employer to do more than produce evidence of a relatively specific reason that is sufficiently rational to carry an inference that the reason, rather than the race of the individual, could have motivated the decision. See generally Player, *Defining "Legitimacy" in Disparate Treatment Cases: Motivational Inferences as a Talisman for Analysis*, 36 MERCER L. REV. 855 (1985); Player, *The Evidentiary Nature of Defendant's Burden in Title VII Disparate Treatment Cases*, 49 Mo. L. REV. 17 (1984). Reasons that are extremely light, transient, and subjective will carry this inference. For example, in *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978), the fact that the employer did not know the plaintiff, but knew the white applicant, was a "legitimate" reason that carried the employer's evidentiary burden. In *Burdine*, 450 U.S. at 254-55, the existence of "personality conflicts" between the female discharged and co-workers was a "legitimate reason." A "legitimate reason" sustained in *United States Postal Service v. Aikens*, 460 U.S. 711, 715 (1983), was an exercise of discretionary, subjective judgment as to which employee was best suited for the promotion. See also *Holder v. City of Raleigh*, 867 F.2d 823, 825-26 (4th Cir. 1989) (friendship and nepotism of whites with other whites is "legitimate" basis for rejecting a black applicant).


11. Legitimate is defined as "lawfully begotten . . . genuine . . . conforming to recognized principles or accepted rules and standards . . . reasonable." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1291 (1986). See also supra note 68.


13. Justice Kennedy, who had not participated in *Watson*, joined with the *Watson* plurality to form the five-Justice majority. Justice Stevens, who had abstained from the debate in *Watson*, joined Justices Brennan, Blackmun and Marshall who had objected in *Watson* to the revision of impact analysis. Justice White wrote for the majority, Justice Stevens for the dissent.

14. See supra note 68.
The dispositive issue [in an impact case] is whether a challenged practice serves, in a significant way, the legitimate goals of the employer. . . . A mere insubstantial justification in this regard 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 . . . .

"Necessity" clearly does not mean "essential," as suggested in Dothard, but it does impose a burden of some significant justification. Employer goals must be "legitimate," that is, related to employment, and the practice must serve those goals in a "significant way."

The Court's emphasis that "insubstantial" justifications will not suffice retreats from the Watson plurality and Beazer's footnote thirty-one, both of which suggest that any legitimate or rational reason is adequate. Importantly, Wards Cove Packing does not indicate that impact is a proxy for, or the functional equivalent of, evidence of illegal motive. This silence is significant. Contrary to the Watson plurality, the employer's burden of justifying a device having adverse consequences is significantly heavier than the level of the employer's burden to refute an inference of improper motive drawn from simple disparate treatment.

The Watson plurality seemed to reject any obligation on employers to present statistical validation of selection devices, a core part of the required "manifest relationship" proof in Albemarle Paper, Dothard, and the Uniform Guidelines. Wards Cove Packing, however, was silent as to whether an employer's burden to present evidence that the

115. Wards Cove Packing, 109 S. Ct. at 2125-26 (citation omitted). Ironically, this is precisely how the dictionary defines "necessary." See supra note 68.

116. Ironically, the author of Beazer and the famous footnote thirty-one was Justice Stevens, author of the dissent in Wards Cove Packing. One might speculate as to whether Justice Stevens has any regrets over his loose pen. Additionally, Justice White, who dissented in Beazer, latched onto this ill-advised footnote in Wards Cove Packing, using it as justification to reject placing the "necessity" burden on employers. See Wards Cove Packing, 109 S. Ct. at 2125-26. In Beazer, Justice White attacked Justice Stevens' finding of no impact, and argued that defendants have not come close to showing that the present rule is "demonstrably a reasonable measure of job performance." No one could reasonably argue petitioners have made the kind of showing demanded by Griggs or Albemarle Paper Co. v. Moody . . . . By defendant's own stipulation, this employment barrier was adopted "without meaningful study of its relationship to job-performance ability."

Beazer, 440 U.S. at 602 (White, J., dissenting) (citations omitted). Clearly, Justice White was rejecting Justice Stevens' footnote thirty-one. Now, ten years later in Wards Cove Packing, Justice White embraces the footnote as if it were holy writ. Could it be that Justice Stevens was persuaded by Justice White's dissent in Beazer, and Justice White, after pondering Justice Stevens' Beazer footnote thirty-one, in Wards Cove Packing finally accepted the wisdom abandoned by Justice Stevens?

challenged practice significantly serves the legitimate employment goals of the employer includes, whenever practical, proof by professionally acceptable validation data.

This silence in *Wards Cove Packing* suggests that *Watson*, which addressed the impact of a subjective system, was merely cautioning that subjective systems, unlike objective systems, need not be professionally validated. That is, validation may work fine with objective tests that are capable of being objectively studied and measured, but because validation is difficult to apply to subjectivity, it should not be required for subjective selection devices.\(^\text{118}\) Moreover, if the Court was going to reject the concept of validation, long accepted by the enforcement agencies,\(^\text{119}\) and overrule *Albemarle Paper*,\(^\text{120}\) which specifically endorsed the concept, one would have assumed that the Court would have done so in express language, and not merely by failing to comment on the *Watson* plurality.

Therefore, in light of the more stringent definition of the employer's burden in *Wards Cove Packing*, the *Watson* commentary rejecting an obligation to present validation studies should be limited to the facts before the *Watson* Court: purely subjective selection systems. Traditional obligations of validation, where practical, should for the time being remain a critical part of the defendant's burden.

Clearly, the concept of "business necessity" is not what it was in the days preceding *Griggs*, when "necessity" meant what it said: "essential." But as bad as *Wards Cove Packing* is from the perspective of plaintiffs, it could have been worse. The Court could have adopted the "impact-as-a-proxy-for-motive inference" thesis of *Watson*; it did not. The Court could have rejected the use of professional validation; it did not. The Court could have adopted a simple legitimacy standard for the justification of exclusionary practices; it did not.

### B. The Role of "Lesser Discriminatory Alternatives"

The precise role of lesser discriminatory alternatives in justifying devices which have an adverse impact has never been clear. *Albemarle Paper* and *Dothard* recognized the relevancy of this element, and agreed that the employer had no initial burden to prove the absence of viable alternatives—the burden of presenting evidence of the existence of alternatives was upon the plaintiff. However, as pointed out

\(^\text{118}\) See Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815-16 (8th Cir. 1983) (recognizing that a validation study is the preferred type of evidence in a disparate impact case, but unwilling to hold that such studies are always required).  


\(^\text{120}\) 422 U.S. 405 (1975).
above, the effect on the analysis of the plaintiff's presentation of such alternatives was unclear. Viable alternatives to the challenged device could establish that the device was unnecessary and thus unjustified. Logically, if the employer must prove that a device is in fact "necessary" (as defined in the dictionary to mean "essential"), proof that alternatives exist establishes that the device is not "necessary" or "essential."122

Alternatively, as indicated by Albemarle Paper, the defendant's proof of "manifest relationship" could be considered sufficient to carry its burden, with existence of an alternative merely being some evidence that the device was being used for improper purposes. The last business necessity case prior to Watson, New York City Transit Authority v. Beazer,123 did not mention the concept of lesser discriminatory alternatives as it cryptically stated the nature of "business necessity" in footnote thirty-one.124 But the Court closed by stating that "[t]he District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination."125 This suggests, quite clearly, that proof of lesser discriminatory alternatives is not part of "business necessity," but is relevant only to prove the motive of the employer for imposing the standard.

Finally, perhaps because the issue was never presented prior to Wards Cove Packing, the Court failed to identify which party had the ultimate burden of persuading the fact finder of the existence or non-existence of any alternatives once the plaintiff presented evidence of an alternative.126 The Uniform Guidelines on Employee Selection Procedures placed that burden on the employer,127 as did many courts.128

Watson was ambiguous as to the role of lesser discriminatory alternatives.129 Wards Cove Packing, however, held unambiguously that the implication to be drawn from Beazer was accurate:

121. See supra notes 76-95 and accompanying text.
122. This was clearly the position of the pre-Griggs cases, see, e.g., Robinson v. Lorillard Corp., 444 F.2d. 791, 798 (4th Cir. 1971), and some post-Griggs constructions of Griggs, see, e.g., Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1297-98 (8th Cir. 1975).
124. See supra notes 100-16 and accompanying text.
125. Beazer, 440 U.S. at 587.
127. 29 C.F.R. § 1607.3 (1988).
129. For example the Watson Court stated:
the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and
[B]y so demonstrating [a lesser discriminatory alternative, plaintiffs] would prove that [defendants] were using their tests merely as a "pretext" for discrimination. If [plaintiffs], having established a prima facie case, come forward with alternatives to [defendants'] hiring practices that reduce the racially-disparate impact of practices currently being used, and [defendants] refuse to adopt these alternatives, such a refusal would belie a claim by [defendants] that their incumbent practices are being employed for nondiscriminatory reasons.130

This is perfectly consistent with the Court's abandonment of the concept of "necessity." If all that is required for a neutral factor to be legal is that it serve an employer's purpose, then the role of lesser discriminatory alternatives must be simply one of proving pretextual motive for the adoption of the device.

Unfortunately, the Court went further. It indicated that only after the employer has been informed of the alternative, and has refused to adopt the alternative, would the employer's motive become an issue.131 Of course, if the employer were actually aware of the impact of the device used, and knew of an equally effective, but less discriminatory device, yet refused to implement such an alternative on request, such behavior would be virtually conclusive evidence of improper motive. However, this does not require total rejection of proof of lesser discriminatory alternatives of which the employer should reasonably have known. Such evidence could create an inference of an employer's improper motive for adopting the device with the exclusionary effect.132

The viability of "lesser discriminatory alternatives" as a liability producing concept was further bled by the Court's notation that an employer can raise the cost of using an alternative as a bona fide reason for use of the device having a discriminatory effect.133 The Court further offered a gratuitous comment implying that discriminatory alternatives will be established only upon what amounts to clear and

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trustworthy workmanship." The same factors would also be relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for a discriminatory treatment.

Watson, 108 S. Ct. at 2790 (citations omitted).

130. Wards Cove Packing, 109 S. Ct. at 2126-27 (citation omitted).

131. Id.


133. "'[F]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer's legitimate business goals.'" Wards Cove Packing Co., 109 S. Ct. at 2127 (quoting Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2790 (1988)).
convincing evidence.\textsuperscript{134} This, coupled with the direction that lower courts are to view suggestions of alternatives with suspicion,\textsuperscript{135} virtually insures that only the most intrepid trial judge would dare find that an employer was improperly motivated based on the argument that the employer could have, but refused to, accept selection devices proposed by the plaintiff.

\textit{C. The Evidentiary Nature of the Burden: "Production" or "Persuasion"}

Properly motivated use of devices which have business "legitimacy," as opposed to business "necessity," will not violate Title VII. The problem, however, is which party has the burden of establishing that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer."\textsuperscript{136}

Notwithstanding a cryptic closing comment in \textit{Beazer's} infamous footnote thirty-one,\textsuperscript{137} the lower courts\textsuperscript{138} and the Equal Employment Opportunity Commission\textsuperscript{139} agreed that when the plaintiff proved the adverse impact of a particular device, the employer's burden in establishing "business necessity" was one of proof—of persuading the fact finder of the justification for using the exclusionary device.\textsuperscript{140} While none of the Court's prior cases addressing impact stated unambiguously that the defendant's burden in responding to proof of impact was that of persuasion,\textsuperscript{141} it was the

\textsuperscript{134} "Courts are generally less competent than employers to restructure business practices," consequently, the judiciary should proceed with care before mandating that an employer must adopt a plaintiff's alternate selection or hiring practice in response to a Title VII suit." \textit{Id.} (citation omitted).
\textsuperscript{135} See \textit{id.}
\textsuperscript{136} \textit{Id. at} 2125-26.
\textsuperscript{137} "Whether or not [plaintiff]'s weak showing was sufficient to establish a prima facie case, it clearly failed to carry [plaintiff]'s ultimate burden of proving a violation of Title VII." \textit{New York Transit Auth. v. Beazer, 440 U.S. 568, 587 n.31 (1979).}
\textsuperscript{138} See \textit{supra} note 39.
\textsuperscript{139} See 29 C.F.R § 1607.3 (1988).
\textsuperscript{140} \textit{Cf. Sullivan, Zimmer & Richards, Federal Statutory Law of Employment Discrimination} § 1.5 (1980) (perceptively recognizing that this language placed a burden of persuasion on the plaintiff, but arguing that placing such a burden on plaintiff was wrong).
\textsuperscript{141} \textit{See Connecticut v. Teal, 457 U.S. 440, 446-47 (1982) ("the employer must then demonstrate that 'any given requirement has a manifest relationship to the employment in question,' in order to avoid a finding of discrimination") (emphasis added); Dothard v. Rawlinson, 433 U.S. 321, 329 (1977) and Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (both quoting Griggs v. Duke Power Co., 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") (emphasis added).
clear and repeated underlying assumption of the Court.\textsuperscript{142}

The plurality in \textit{Watson} stated otherwise—that the plaintiff retained the ultimate burden of persuasion—though using an analysis that was patently ambiguous.\textsuperscript{143} Nonetheless, any lingering ambiguity as to the allocation of burdens was resolved by \textit{Wards Cove Packing}:

\begin{quote}
142. \textit{E.g.}, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (emphasizing that the burden on defendant in a disparate treatment case was one of "going forward" with the evidence, and assuming that this burden differed dramatically from the employer's burden when plaintiff proved adverse impact); accord Board of Trustees, Keene State College v. Sweeney, 439 U.S. 24 (1978) (reversing lower courts because they imposed a burden of persuasion in a disparate treatment case); see also Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) (identifying the case before it as involving disparate treatment with the employer's burden being to articulate a legitimate reason for the disparate treatment, and recognizing that had the plaintiff proved adverse impact the burden would have been different); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

In County of Washington v. Gunther, 452 U.S. 161, 168-69 (1981), the Court construed the Bennett Amendment proviso of 703(h) of Title VII to do no more than incorporate by reference the "factors other than sex defense" of the Equal Pay Act, 29 U.S.C. § 206 \textit{et. seq.}, into Title VII. In response to the argument that this rendered the proviso superfluous, the Court indicated that normally an employer's burden in a Title VII impact case would require more than proving, a "factor other than sex." \textit{Gunther}, 452 U.S. at 170. The Equal Pay Act unambiguously places a burden of persuasion on employers to prove the existence of the "factor other than sex." Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974). Thus, if the Title VII impact burden requires more from an employer than the Equal Pay Act, then "business necessity" must be a heavier burden than "factor other than sex," which is a burden of persuasion.

Even Justice White (author of \textit{Wards Cove Packing}) assumed that "business necessity" was a burden of persuasion. Dissenting in \textit{Beazer} he stated:

petitioners [the employer] had the burden of showing job relatedness. . . . [P]etitioners have not come close to showing that the present rule is "demonstrably a reasonable measure of job performance." No one could reasonably argue that petitioners have made the kind of showing demanded by \textit{Griggs} or \textit{Albemarle Paper Co. v. Moody.} By petitioners' own stipulation, this employment barrier was adopted "without meaningful study of its relationship to job-performance ability."

\textit{Beazer}, 440 U.S. at 602 (White, J., dissenting) (citations omitted).

143. The Court in \textit{Watson} stated:

Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," such a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, 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.

\textit{Watson}, 108 S. Ct. at 2790 (citations omitted).

That seems clear enough. If the defendant produces evidence of a "manifest relationship," the defendant will prevail unless the plaintiff can convince the fact finder that the relationship does not in fact exist. But the opinion did not say this. Immediately following the above statement, the plurality continued:

Thus, when a plaintiff has made out a prima facie case of disparate impact, and when the defendant has met its burden of producing evidence that its employment practices are based on legitimate business reasons, the plaintiff must "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the
In this phase [of responding to proof of adverse impact] the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff. To the extent that the Ninth Circuit held otherwise . . . suggesting that the persuasion burden should shift to [defendant] once the [plaintiffs] established a prima facie case of disparate impact—its decisions were erroneous. . . . [T]o the extent that those [prior Supreme Court] cases speak of an employer's "burden of proof" with respect to a legitimate business justification defense, they should have been understood to mean an employer's production—but not persuasion—burden.144

Thus, a defendant has the burden of presenting evidence that the challenged practice serves, in a significant way, the employment goals of the defendant. The evidence must be sufficient to permit the fact finder to infer that such a relationship exists. If the defendant fails to produce sufficient evidence to allow a fact finder to conclude that the challenged practice in fact serves, in a significant way, defined employment goals, the plaintiff is entitled to prevail. On the other hand, if the defendant satisfies the burden of production, Wards Cove Packing directs that the plaintiff bears the ultimate risk of persuasion on the nonjustification for the challenged practice.145

In sum, "necessity" no longer means, as the dictionary tells us, "essential," "absolutely required," or "indispensable";146 it means

employer's legitimate interest . . . "
Id. (citation omitted).

It seems as if Justice O'Connor left out a step. If the defendant merely produces some evidence of a "manifest relationship," will the plaintiff lose unless he can prove a lesser discriminatory alternative? That cannot be, because that accepts defendant's presentation as being established, and deprives the plaintiff of any opportunity, even if the plaintiff has a burden of persuasion, to prove that the proffered evidence of a "manifest relationship" is faulty and not to be believed. Consequently, with such a patent error in analysis, the entire discussion must be discounted.

144. Wards Cove Packing, 109 S. Ct. at 2126 (citation omitted). It is interesting, too, that while insisting that "business necessity" does not mean "essential" or "necessary," Justice White continues to use the term "necessary."

Moreover, the repeated use of the word "defense" in the opinion suggests that the Court recognizes, regardless of what it now says, that the burden traditionally has been imposed on the defendant. The burden of presenting a defense is uniformly placed upon the defendant. Thus, by use of the word "defense," the Court in essence concedes that we have not misread the previous cases to read that the burden of establishing business necessity was always upon the defendant.


146. See supra notes 68 and 111.
only "legitimate" and "significant." 147 And for eighteen years "business necessity" was a "defense" to be proved by the employer. Everyone, including Justice White, knew it was a defense448. But now the Court says it is not and never was. 149 So, the "business necessity" defense is now the "legitimate justification production burden." 150 Welcome to "Wonderland." 151

Justice White tells us that we had merely misread what the Court had previously said. But the Court must know that the courts, the enforcement agencies, the scholars and commentators have not misread anything. We all know that the Court has changed the law. That's all right; for good cause the Court can and should reverse itself, but should do so honestly. The Court has changed the law, changed it rather significantly, and the Court should know that we know that it has changed the law. Like Woodrow Wilson's nation "too proud to fight," 152 the Court, however, was simply too proud to confess that it had switched. Better to tell us that we cannot read. 153

147. Yet the dictionary tells us that "legitimate" means "reasonable." Id.
148. See New York City Transit Auth. v. Beazer, 440 U.S. 568, 602 (1979) (White, J., dissenting). It is interesting how Justice White, even in Wards Cove Packing, refers to the "legitimate business justification defense." Wards Cove Packing, 109 S. Ct. at 2126 (emphasis added). He does it twice, once in the above quotation, and again later on the same page where he comments on the "petitioner's business necessity defense." Id. (emphasis added). Generally, a defense authorizes conduct otherwise illegal, and, as any first-year law student knows, the burden of establishing a defense is on the defendant. County of Washington v. Gunther, 452 U.S. 161 (1981). A mere evidentiary obligation of coming forward with evidence is not a "defense." Perhaps this slip of the pen discloses the truth.
150. Judge Posner proposes that in the wake of Wards Cove Packing the "business necessity" defense should be renamed the "issue of legitimate employer purpose." Allen v. Seidman, 881 F.2d 375, 381 (7th Cir. 1989).
151. Alice conversed with Humpty Dumpty:
   "I don't know what you mean by 'glory,'" Alice said.
   Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"
   "But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.
   "When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less.
   "The question is," said Alice, "whether you can make words mean so many different things."
   "The question is," said Humpty Dumpty, "which is to be master—that's all."

L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND, (Through the Looking Glass) 246-47 (Modern Library ed.).

Clearly, the Court, not the word, is the master.
153. Relieving the employer of the burden of justifying the use of a device having exclusionary effect produces an anomaly in employment discrimination law, an anomaly the Court apparently did not recognize. It places on employers in Title VII cases a lighter burden than imposed
IV. The Employer's Evidentiary Burden After Wards Cove Packing

Upon proof that a device adversely affects employment opportunities, the evidentiary burden imposed by Wards Cove Packing on a defendant is one of producing evidence that the challenged practice "serves, in a significant way, the legitimate employment goals of the employer." While this appears to be a broad restatement of the well-established "manifest relationship" standard, the issue remains as to precisely how much evidence the defendant must produce.

Clearly, the defendant's burden must be more than simply restating the particular factor being challenged. Requiring only this would be no burden at all. To illustrate, if a plaintiff proves that a high school diploma has an adverse impact on blacks, a defendant's burden must be more than simply to restate the obvious—that the reason the plaintiff was rejected was because he lacked a high school diploma.

Consequently, the defendant's burden must include some proof that the device serves identified legitimate and substantial business goals. That is, the defendant's burden would be to identify the particular employment goal and to present evidence of how the required educational credentials "serve in a significant way" the identified goal. Merely being abstractly rational, as opposed to arbitrary, would not suffice. The defendant, therefore, has some burden of presenting ob-

under the Equal Pay Act. 29 U.S.C. § 206(d) (1982). Under the Equal Pay Act, if a plaintiff proves equal work between male and female employees for unequal pay, the employer can avoid liability only by proving that the difference was attributable to a "factor other than sex." Id. § 206(d)(1)(iv). This requires the employer to carry the burden of establishing the gender neutrality and "business rationality" of the factor used to make the pay distinction. County of Washington v. Gunther, 452 U.S. 161 (1981); Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982). Consequently, if an employer justified a pay difference between a male and a female by asserting that the difference was because the higher paid employee had a diploma, the employer would carry the burden of proving not only good faith in use of the diploma, but also that the diploma had a relationship to valid employer concerns. EEOC v. First Citizens Bank of Billings, 758 F.2d 397 (9th Cir.), cert. denied, 474 U.S. 902 (1989); Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 100 (8th Cir. 1980), overruled on other grounds, Robino v. Norton, 682 F.2d 192 (8th Cir. 1982). However, assume the employer uses the same device, a diploma, to justify a pay difference between a male and a female by asserting that the difference was because the higher paid employee had a diploma, the employer would carry the burden of proving not only good faith in use of the diploma, but also that the diploma had a relationship to valid employer concerns. EEOC v. First Citizens Bank of Billings, 758 F.2d 397 (9th Cir.), cert. denied, 474 U.S. 902 (1985); Strecker v. Grand Forks County Social Serv. Bd., 640 F.2d 96, 100 (8th Cir. 1980), overruled on other grounds, Robino v. Norton, 682 F.2d 192 (8th Cir. 1982). However, assume the employer uses the same device, a diploma, to justify a pay difference between a black employee and a white employee. Since the Equal Pay Act is applicable only to sex discrimination, Title VII is the only source of protection for the black employee. Assuming that a pay premium for education adversely affects minorities, Liberles v. Cook County, 709 F.2d 1122 (7th Cir. 1983), the burden on the employer after Wards Cove Packing is simply to produce evidence of a relationship between salary and education, with the ultimate burden of proving the absence of any relationship on the plaintiff. The Equal Pay Act places this burden on the defendant; Wards Cove Packing places this burden on the Title VII plaintiff. This is ironic because Title VII is supposed to go further and provide more sweeping protections than the Equal Pay Act. See Gunther, 452 U.S. 161 (1981).

jective evidence, perhaps even statistical evidence, of validation, factually showing a nexus between the selection device and a particular employment goal. Without evidence of such a relationship, it cannot be said that the defendant has presented any evidence that the "challenged practice serves, in a significant way, the legitimate employment goals of the employer." Thus, if an educational credential or an objective test were shown to have an adverse impact, and the burden of production is to have any meaning, the defendant would have to prove, through some objective evidence, that education or test scores in fact measured employee competence or potential.

Factual proof of a relationship between the challenged device and job performance that was "manifest" was precisely what was required of the defendants in Griggs, Albemarle Paper, and Dothard. The plaintiffs in each of these cases prevailed, even though the defendants presented rational or legitimate justifications for use of the challenged devices. However, the defendants presented insufficient evidence of a factual connection between their purpose and the device to permit a fact finder to conclude that such a nexus existed.

It is extremely important, even controlling, that Wards Cove Packing did not reverse Griggs, Albemarle Paper, and Dothard. Wards Cove Packing simply reinterpreted these cases. It had always been assumed that the defendants lost in Griggs, Albemarle Paper, and Dothard because in each case the defendant failed to carry a burden of establishing "business necessity," a burden that was assumed to be a burden of persuasion. However, we now know, because Wards Cove Packing so instructs us, that the defendants lost in each of these cases because they did not meet the required burden of producing sufficient evidence from which a fact finder could have concluded that the necessary "manifest relationship" existed. The employer's longstanding and substantial burden of producing a strong factual showing of a manifest relationship was not overruled in Wards Cove Packing; indeed it was confirmed.

155. Of course, where statistical validation is not practical, such as where the employer uses subjective devices, or where a high degree of risk flows from unsatisfactory performance, statistical validation is not now required. See Davis v. Dallas, 777 F.2d 205 (5th Cir. 1985) (subjective judgment and discretion permitted in selecting police officers), cert. denied, 476 U.S. 1116 (1986); Merwine v. Board of Trustees, 754 F.2d 631 (5th Cir.) (impractical to validate masters degree requirement for professional librarians), cert. denied, 474 U.S. 823 (1985); Zahorik v. Cornell Univ., 729 F.2d 85, 96 (2d Cir. 1984) (tenure decisions at university involved subjective judgment and discretion by university officials); Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810 (8th Cir. 1983) (educational requirements for mid-level supervisors a "business necessity"); Spurlock v. United Airlines, 475 F.2d 216 (10th Cir. 1972) (minimum level of skill requirement for airline pilots justified due to the high level of risk involved).

Thus, in *Griggs* the plaintiff won because the defendant, while indicating that it desired a better-educated work force, presented no factual basis from which a fact finder might conclude that a high school diploma in any way predicted the performance of lower level, semi-skilled workers.\(^{157}\) In *Albemarle Paper* the plaintiff prevailed even though the defendant presented evidence, including conclusions of an expert witness, that the pen-and-paper test predicted job performance. The plaintiff was entitled to prevail because the defendant had not presented sufficiently strong evidence, including professional validation, to permit a fact finder to conclude that the test actually predicted employee job performance with mathematical accuracy.\(^{158}\) The *Dothard* plaintiffs prevailed in spite of the general rationality of minimum height and weight requirements for prison guards. The defendants identified strength as the job-related quality that the requirement was designed to serve. However, once again the plaintiffs prevailed because the "[defendant] produced no evidence correlating the height and weight requirements with the requisite amount of strength thought essential to good job performance."\(^{159}\)

*Wards Cove Packing* cited each of these cases with approval.\(^{160}\) The result in each was thus confirmed. They are still valid for the points which they resolved. Presumably, the same results would be reached even after *Wards Cove Packing*. Defendant's evidentiary obligation is to present strong evidence manifesting a precise correlation between the device and job performance. Failure to present such evidence, as outlined in *Griggs*, *Albemarle Paper*, and *Dothard*, should result in a judgment for the plaintiff as a matter of law.

This result is as it must be. It is the employer that controls the work force. Consequently, only the employer has the ability to evaluate job performance, a key element in any scientific validation of selection devices.\(^{161}\) Thus, if anyone is to be required to present evidence of a correlation between selection devices and job performance, it must be the defendant. The plaintiff simply does not have access to the data necessary to make such a showing. Having access to such data, the defendant should have an obligation to present the "'best evidence' available of a device's correlation to job performance. It is the employer that selected the device, and since the device has been proved by the plaintiff to be exclusionary, the employer must carry a signifi-

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\(^{158}\) *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).


\(^{160}\) *Wards Cove Packing*, 109 S. Ct. at 2118-19, 2125, 2126.

cant burden of presenting fundamental, as opposed to conclusive, justifications.

In most cases where defendants present generalized or conclusive evidence of the relationship between the device and employer goals, the result reached now will be the same as it was prior to *Wards Cove Packing*. Now, as before, the defendant's burden is to present precise proof of the need for exclusionary devices. Failure to present such proof, as in *Griggs, Albemarle Paper*, and *Dothard*, will result in a judgment for the plaintiff. A different result can be expected, however, in close cases where the defendant presents data that would allow a fact finder to conclude that a correlation between the device and the job exists, and the plaintiff counters with probative data that includes possible flaws and potential unreliability in the defendant's showing. In the pre-*Wards Cove Packing* days, when the defendant was said to carry the burden of persuading the fact finder, uncertainty resulted in a judgment for the plaintiff. The judge would be expected to reason: "I do not know whose statistics are right. Defendant carries the burden of persuading me. He did not. Plaintiff wins." Today, after *Wards Cove Packing*, with the plaintiff carrying the burden of proving the lack of any relationship tentatively established by defendant's proof, uncertainty should result in a judgment for the defendant. Thus, in a battle of the experts where the trial judge is faced with unfathomable, complex and conflicting validation models, each with its potential flaws, a victory flowing from uncertainty that would have gone to the plaintiff prior to *Wards Cove Packing* can now be expected to go to the defendant. In such cases the court might be expected to reason as follows: "Defendant's validation data standing alone could be accepted. Plaintiff's challenge raises some serious doubts as to the probative value of defendant's data. But since I don't know whose statistics are more accurate, and since plaintiff carries the burden of persuading me, and he didn't, defendant wins."

V. A PROPOSED TWO-TIER IMPACT ANALYSIS WITH MOTIVE AS A CENTRAL ELEMENT

Two competing considerations exist in selecting the most appropriate standard for analyzing the impact of neutral selection devices. The first is the Title VII goal of seeking to ensure equal employment opportunities for women and minorities, a goal clearly articulated in *Griggs*. The second goal is protecting employers' ability to secure capable and efficient employees to the extent compatible with Title

VII equal employment goals. Striking down all employment barriers may well broaden employment opportunities, but will also impose upon employers unqualified and inefficient employees. Conversely, allowing employers to utilize any selection system, so long as the employer cannot be proved to have been acting in bad faith, will doom equal employment opportunity for vast numbers of minorities.

The best legal standard will be the one that most completely accommodates those competing ends, providing maximum job access to women and minorities consistent with securing the justifiable needs of employers to select the most qualified employees. In a utilitarian sense, to the extent the analysis used to evaluate the legality of impact serves one goal with little or no sacrifice to the competing goal, the analysis is valid. On the other hand, if the analysis serves one goal only marginally while subverting the alternative goal, the analysis is flawed. An analysis can tolerate a balance where the increased service of one end is counterbalanced by an equal sacrifice of the competing goal. In such a situation the issue of which goal to sacrifice is a policy question. However, when the application of a legal analysis results in a sacrifice of one goal without securing at least an equal counterbalancing service to the conflicting goal, the analysis is flawed.

In this regard, the Griggs approach to impact analysis has been proved by Wards Cove Packing to be flawed. The Griggs approach to impact, without regard to motive, is a single-tier analysis that can result in an unnecessary sacrifice of policy goals when applied to various factual patterns, without a counterbalancing service of the competing goal. This has produced judicial confusion and vacillation in a vain attempt to apply this analytical model in a way that reaches a balance deemed appropriate by the particular court.

The Griggs-Wards Cove Packing approach to impact requires first that plaintiff establish a threshold level of impact. If that threshold is established, at whatever level the Court directs as adequate to meet the legal standard of having an "adverse impact" on the class, the burden shifts to the defendant to establish the "business necessity" of the challenged rule. Once impact is proved, regardless of the intensity or level of the impact on employment opportunities, the employer can avoid liability by showing the "business necessity" at whatever level the Court defined for the concept of "necessity."

When "business necessity" was construed to mean something akin to "essential," as in the days of Griggs, Albemarle Paper, and Dothard, the evidentiary obligation imposed on employers was quite heavy in every case, regardless of the impact on women or minorities. However, if "business necessity" is defined to mean merely "legitimate," as suggested in Watson, the employer's burden would be very light
and remain very light, regardless of the impact of the selection device. Now, as "business necessity" is defined in *Wards Cove Packing* to mean "business purpose," the employer's burden, again regardless of the degree of impact, is merely to present evidence that would support a business purpose, a burden somewhere between the two extremes of "essential" and "legitimate." The key point is this: regardless of the intensity of the impact, once sufficient effect is established to meet a threshold definition of "impact," the burden of convincing the fact finder of "business necessity" (whatever the term means) is constant.

Such a rigid approach poorly serves the employer's goal of efficiency by requiring employers to justify devices having a relatively slight effect on minority hiring with the same level of evidence as is required to justify devices which have a devastating effect on minorities. Utilitarian logic would suggest that if the effect of a device on minorities is less, the employer should have less of a burden to justify the use of the device. Otherwise, employer efficiency is being sacrificed without a corresponding increase in the protection of equal employment opportunity. Conversely, allowing an employer to justify a devastatingly exclusionary device according to the same standards as are applied to a device having a relatively slight impact on minority opportunities can result in undermining the goal of equal employment without a counterbalancing improvement in employer efficiency.

Perhaps because threshold standards are central to the *Griggs* single-tier analysis, there has been confusion and vacillation in the judicial search for the proper level of these standards. Because *Griggs* version of impact analysis required that once impact was proved, the employer must provide some justification for use of the device regardless of the degree of impact—slight or exclusionary—or suffer an adverse judgment, those emphasizing employment opportunity have argued for a relatively slight threshold level of adverse impact. *Griggs*, and to some degree *Dothard*, illustrate acceptance of such thinking. Of course, the employer would have to meet the same high standard of justification as would be imposed on devices having a devastating effect. This could result in sacrificing an employer's ability to select qualified employees by striking down selection devices that have some viability in measuring potential with relatively little return in terms of truly increasing employment opportunities for qualified minorities.

Conversely, those sympathetic to employers' interests in efficiency have argued for a high level of required impact, imposing on the employer a burden of justification only if the evidence clearly established that a protected class was virtually excluded from employment by the device. *Beazer* and *Wards Cove Packing* represent a shift to an employer-sensitive, high threshold of impact. One consequence of requir-
ing a high level of impact is that devices which may have a significant, but less than devastating, impact on minority employment opportunities can be used by the employer without any evidence that the device is useful in selecting an efficient work force. Equal employment opportunity is sacrificed without a counterbalancing benefit to employer efficiency.

This problem of unitary analysis becomes focused when the issue is the degree of justification required once a device is found to have a legally sufficient effect to shift the burden of justifying use of the device to the employer. If legally sufficient impact is based on a relatively slight effect on employment opportunities, a high standard of business justification might deprive an employer of a useful selection device without a utilitarian balance in terms of significantly increasing employment opportunities for minorities. Griggs, Albemarle Paper and Dothard illustrate this possibility. Once the Court concluded that impact had been proved, the Court, without regard to the level of that impact, imposed on the employer a uniformly high standard for justifying the challenged device.

Beazer and Watson, on the other hand, represented a shift in thinking that is less sympathetic to the Title VII goal of securing employment opportunity in the face of exclusionary devices, and much more attuned to employer demands for autonomy and efficiency. These cases indicated that regardless of the level of impact, the justification required of an employer would be at a very low level: merely articulating a rational basis for use of the exclusionary device. The price to pay for such ease of justification is that devices with only marginal utility for selecting competent employees could be used, despite the fact that the device would deprive huge segments of the population access to employment. Such marginal increases in efficiency cannot be justified in terms of equal employment opportunity costs.

Wards Cove Packing settled on what might be considered a mid-tier burden of employer justification—less than absolute necessity, but considerably greater than mere rationality—and moved the ultimate burden of persuasion on the issue of justification to the plaintiff. Perhaps this can be considered an appropriate balance of the competing interests—a compromise—but because the Wards Cove Packing approach clings to the single-tier analysis of Griggs, the approach still lacks the flexibility to fully balance the competing interests.

The point is that all of these cases, Griggs through Wards Cove Packing, applied a single standard of employer justification for use of a device regardless of the level or degree of impact the device had on a protected class. Moreover, the Court never suggested that the placement of the burden of persuasion was dependent upon the degree of
impact the device had on employment of women and minorities in that particular case.\textsuperscript{163} Regardless of where the standard of impact is placed, and regardless of the level of justification, when a single standard is used the result in some cases is an unnecessary sacrifice of one or the other of these valid, but competing, interests.

Moreover, a unitary analytical standard has produced, and no doubt will continue to produce, judicial vacillation in the search for the single most appropriate standard. In the days of \textit{Griggs}, \textit{Dothard}, and \textit{Albemarle Paper}, the obvious socio-economic proclivities of a majority of the Court were to finding impact upon relatively thin evidence of effect, and, once impact was found, to imposing on the employer a uniformly heavy burden to justify use of such a device. \textit{Watson} and \textit{Wards Cove Packing} illustrate that with the change of personnel, and perhaps philosophy, in the eyes of five Justices the balance had tilted too far in favor of civil rights plaintiffs. As a result, \textit{Wards Cove Packing} confirmed the need for greater proof of effect to trigger an employer’s obligation to justify its selection system. The Court also relaxed an employer’s burden of justification, once the necessary level of impact is established, by shifting to plaintiff the ultimate burden of persuasion on the issue of “necessity.” One would suspect \textit{Wards Cove Packing} is not the final word, but rather is merely indicative of the current ideological predilections of five members of the Court. As the personnel of the Court changes with time, one would expect that the standards of proof will continue to shift to reflect the particular socio-economic philosophy of the justices. The next generation of justices might well conclude that the Title VII purposes of promoting employment opportunity are not served by the \textit{Wards Cove Packing} protection of employer interests, and, with no

\textsuperscript{163} In New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), the Court seemed to be flirting with the idea of adopting a flexible standard under the pure impact analysis created by \textit{Griggs}, the weight of the employer’s burden depending upon the degree of the impact of the challenged device. The weaker the proof of impact, the weaker would be the employer’s burden to justify the use of the device. When the proof of impact was weak, as it was in \textit{Beazer}, the employer’s burden was satisfied by a simple showing that employer’s goals were “significantly served.” If the plaintiff proved that the effect of using the device was destructive of employment opportunities of a protected class, as the plaintiffs appeared to do in \textit{Griggs}, the employer would have to prove full strength “necessity” for using the device. A device that eliminated significant numbers, but was far from exclusionary, as was the height and weight requirement in \textit{Dothard}, would beget a mid-tier burden on the employer to prove that the requirement was “manifestly related” to precise elements of the job. \textit{See M. Player, Employment Discrimination Law} § 5.41 (1988).

\textit{Wards Cove Packing} put such speculation to rest. The Court did not move toward a flexible or multi-tiered analysis that varied the employer’s burden with the degree of impact, but instead rigidly reasserted its commitment to a single-tier analysis, with a uniform employer burden of production. \textit{Wards Cove Packing}, 109 S. Ct. at 2115.
more hesitation than demonstrated by Justice White, switch definitions to make proof of liability more favorable to plaintiffs.

_Wards Cove Packing_, with its dramatic shift away from _Griggs_, has finally brought into focus the need to reexamine the analytical premises of _Griggs_. Perhaps the underlying instincts of Justice O'Connor were sound when she spoke for the plurality in _Watson_, that Title VII indeed does speak in terms of motive, and that impact can serve as a proxy for motive. Nonetheless, if Justice O'Connor's analysis had been accepted by the Court, and traditional motivational analysis were applied to all impact cases without regard to the level of exclusion, devastating consequences to the realization of equal opportunity goals would have resulted. The current featherweight burden on employers to counter inferences of illegal motive drawn from objective factors would result in all but the most outrageously unreliable selection devices remaining unchallenged. Thus, the conclusion that impact should do no more than trigger traditional motive analysis is too extreme in its failure to protect women and minorities from the consequences of mindless selection devices.

Perhaps also the instinct of Justice White, writing for the majority in _Wards Cove Packing_, was not too wrong, that in cases where the effect of the employer's systems on minority hiring is relatively slight, absent evidence of invidious motive, the employer should only have to present evidence of a significant business purpose to avoid liability. A burden of proving an absolute form of necessity in such cases may be unduly intrusive into the good faith efforts of an employer to select qualified employees. However, this, too, fails to allow for cases where the device, as in _Griggs_, effectively denies employment to a substantial segment of a racial minority. To guarantee that the overriding statutory goal of ensuring equal employment opportunity is met, a goal emphasized in _Griggs_, the statute should go beyond allowing the employer to use exclusionary devices by simply presenting some evidence of a business reason for use of such a device.

As applied to its facts, which appeared to demonstrate the relatively uncertain impact of the employer's practice on employment opportunities, _Wards Cove Packing_ may not be too wrong in granting relatively relaxed protection of equal employment opportunities. However, if the _Wards Cove Packing_ analysis is applied to devices which have an exclusionary effect, the employer's burden is simply too light to be consistent with the equal employment opportunity goals expressed in Title VII and heralded in _Griggs_.

An answer for the future lies in the past, in the compromise found in the labor relations cases. Contrary to the holding in *Griggs*, the courts should recognize, as would Justice O'Connor, that the clear wording and history of Title VII suggest, at least as strongly as does the National Labor Relations Act (NLRA), that motive is an element of Title VII liability. However, plaintiff's proof of the adverse impact of a selection system on a class protected by Title VII, similar to analysis under the NLRA, creates a presumption that use of the device was improperly motivated. Faced with this presumption of illegal motive, the defendant will have the burden of presenting objective business justifications for the use of the exclusionary device. These business justifications for the use of the device must be sufficiently weighty to create an inference of legal, or business, motive sufficiently strong to counter the plaintiff's presumption of improper motive. The weight of the defendant's burden will depend upon the degree of impact of the selection device upon the employment opportunities of a class protected by Title VII. The greater the impact, the more the presumption of improper motive strengthens. The stronger the presumption of improper motive, the heavier the employer's burden to refute the presumption becomes.

In this regard, if the impact of the selection device is proved to be only "relatively slight," the employer's burden would be the relatively light obligation to present evidence that the device serves significant business interests. This is a burden of presenting evidence of the employer's business concern and evidence that the device serves this concern in a significant way. However, if the impact of the device on a protected class is so great as to be destructive of Title VII's goal of equal employment opportunity—that is, the device falls very heavily on women and minorities—the presumption that the employer intended this result is so strong that it can be refuted only by the strongest possible proof of "business necessity." In such cases of devastating or destructive impact, the burden on the employer would be to prove the true "necessity" for the use of such a device. The employer's burden to justify a device with an exclusionary effect would be one of proving true necessity: that the device is essential to secure weighty employer goals to the point that the employer could not safely and effectively operate its business without utilizing the device.

Thus, the first step in this analysis is for the plaintiff to prove not only impact, but the degree of the impact on employment opportuni-

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ties of women or minorities. The burden assigned to the employer to refute the inference flowing from this impact is based upon the degree of impact. This standard would go beyond Griggs in its analysis and beyond Wards Cove Packing in its holding, and adopt a system quite similar to that used by cases under the NLRA.\textsuperscript{166} Further, this analysis would allow both Griggs and Wards Cove Packing to be affirmed by the Court. Griggs, as construed by Albemarle Paper and Dothard, would establish the employer's burden when the challenged device has a heavy or destructive impact on employment opportunities. Wards Cove Packing would establish the employer's burden in cases where the effect of a system on employment opportunities was relatively light.

Such a two-tier analysis based on a presumption of motive would eliminate the need for the seemingly unending judicial search for a single appropriate standard. The uncertainty and constant fluctuation experienced under the Griggs-Wards Cove Packing approach could be reduced. With more flexibility built into the analysis, there would be little need to constantly adjust and readjust the standards of proof based on shifting ideological beliefs. For example, "moderate" justices such as Justices White and O'Connor, when faced with the unitary analysis provided in Griggs, concluded in Wards Cove Packing that the pendulum had swung too far in favor of plaintiffs. Accordingly, they upwardly adjusted the level of proof to establish impact, and downwardly adjusted the employer's burden once that impact was proved. They might have accepted an analysis that required employers to carry a heavy burden of justification for use of devices that virtually excluded women and minority applicants if, in return, that heavy burden did not apply where the impact of a challenged device was comparatively slight. On the other hand, "liberal" justices such as Justices Brennan, Marshall, and Blackmun might be content with a standard of analysis that imposed on employers a relatively light burden of presenting a legitimate business reason for use of devices that had only a slight effect on opportunities of women and minorities if a higher level of justification were required of employers who used selection devices that had a heavy exclusionary effect on minority applicants.

To summarize, under this proposed standard the Court would accept the premise that motive is a necessary element of Title VII liability, but that presumptions of illegal motive are created by proof that a device adversely affects employment opportunities of classes protected

\textsuperscript{166} See supra notes 19, 23-31 and accompanying text.
by Title VII. If the impact on employment opportunities were relatively slight, the employer would have some burden of justifying the device. It would not escape from any justification simply because of the slight impact. However, since the slight impact created only a weak presumption of improper motive, the employer's burden would be correspondingly light—to present evidence that would permit a fact finder to conclude that the device serves significant business purposes. In this way, employers could utilize reasonable selection systems that have a relatively light impact on employment opportunities by simply showing business rationality. At the same time, it would not permit employers to utilize useless or arbitrary devices simply because the impact on women and minorities was relatively light.

When the impact of a device results in virtual exclusion of a protected class, the presumption that the employer must have foreseen and intended this result is particularly strong. Accordingly, use of such a system would be presumed to have been improperly motivated unless the employer could carry the heavy burden of proving the true necessity for using such a system. Employers would be allowed to use devices with heavy impact if the device proved necessary. However, employers would be precluded from using marginally useful selection devices where the price in terms of denying equal employment opportunity is greater than the usefulness of the selection device. Thus, the greater the impact, the greater the employer's burden. Such an analysis balances the needs of the employer to select an effective work force against the Title VII goals of increasing and ensuring equal employment opportunity. It does not sacrifice one goal without a counterbalancing service of a competing goal. This proposed two-tier impact analysis recognizes the need for flexibility; the Griggs-Wards Cove Packing single standard does not.167

167. Wards Cove Packing may also reduce the pressure for affirmative action and cause a reevaluation of United Steelworkers v. Weber, 443 U.S. 193 (1979). That is, the rearticulation of impact analysis in Wards Cove Packing may foretell some shift in affirmative action law and practice.

The underlying premise for permitting employers to consider race or gender to remedy underrepresentation was articulated in Justice Blackmun's concurrence in Weber. Id. at 209 (Blackmun, J., concurring). Potential liability on slim proof of impact, coupled with onerous burdens of employer justification, made it preferable, if not necessary, for employers to remedy racial imbalances by using racial considerations in hiring. From a liability perspective, this placed the employer on a "tightrope without a net." Id. at 209-211 (Blackmun, J., concurring). If the employer took no action to avoid the consequences of an imbalanced work force, the employer faced almost certain liability in a suit by underrepresented minorities. If the employer avoided impact by using racially conscious hiring systems, overriding traditional selection systems, the employer was subject to a complaint by the white male majority that it was utilizing "race" in selecting employees, an express and facial violation of Title VII. Thus, the conundrum needed
VI. CONCLUSION

To state that *Wards Cove Packing* is significant would be a classic understatement. It is important, not only for what it did, but also for what it did not do. In that the decision has a great capacity for being misconstrued by the lower courts. On the positive side, *Wards Cove Packing* could be a stimulus to rethink the entire impact analysis concept pioneered by *Griggs*, and to adopt the flexible NLRA approach of presuming improper motive based on the degree of impact of the selection device.

*Wards Cove Packing* analyzed in detail the nature of the plaintiff's obligation to prove impact. Aside from confirming that precise proof of a high level of impact is necessary to create a prima facie showing, the Court made no startling revelations in this regard. The Court also clarified the ambiguity of the substantive nature of an employer's bur-

resolution. Either liability should not be premised on a combination of impact drawn from numbers and a heavy burden of justification, or the employer should be permitted to make express racial decisions to remedy the numbers that create liability. So long as liability is premised on numerical proof of impact, the employer must be permitted by the statute which creates this vulnerability to avoid liability by taking racially-conscious remedial action.

In *Weber* it was assumed that impact analysis was inviolate, so the Court selected the only alternative. The Court allowed employers to utilize reasonable racially-conscious hiring practices to remedy "conspicuous racial imbalance" in "traditionally segregated job categories." *Id.* at 208-09.

*Weber* combined with *Griggs* resulted in a two-prong aid for the plight of minority employment; ease of proving liability, which, in turn, encouraged affirmative action hiring, the legality of which *Weber* confirmed. Herein lies the danger of *Wards Cove Packing*—it has undermined a key premise upon which affirmative action is based. When *Wards Cove Packing* made it more difficult for plaintiffs to prove impact and relaxed the burden on employers to justify any impact proved, this reduced the pressure on employers to adopt affirmative action plans as a basis for avoiding liability premised on impact. As the practical need to engage in affirmative action is tied to the ease in which Title VII liability can be proved, when the Court makes it more difficult to prove liability, the pressure on employers to initiate affirmative action as a defensive measure is similarly reduced.

Moreover, reducing the practical need for employers to engage in racially conscious hiring to remedy imbalances could cause the Court to revisit the legality of racially conscious programs sanctioned in *Weber*. Again, it was the practical problem of the employer's dilemma—faced on one hand with liability if it did not remedy underrepresentation, and liability to white males if it attempted a remedy through affirmative action—that served as the justification for *Weber* to torture the statutory language and reach the eminently practical result that allowed "affirmative action" hiring to remedy conspicuous imbalances. To the extent that *Wards Cove Packing* reduces the threat of liability premised on numbers, the Court may well apply the plain language of the statute which prohibits all racial discrimination and prohibit affirmative action hiring plans. Indeed, *Watson* recognized this reality, and specifically cited the need for employers to avoid draconian affirmative action steps as a justification for their proposed dilution of liability premised on impact. *See Watson*, 108 S. Ct. at 2787-88.

*Wards Cove Packing* may thus indirectly begin a process that results first in retrenchment of affirmative action voluntarily undertaken by employers. Thereafter, since the employer vulnerability premise which underpinned *Weber*'s sanction of race conscious affirmative action has been eroded by *Wards Cove Packing*, the ultimate result may be a reevaluation of *Weber* itself.
den once a plaintiff proved that a device adversely affected a class. This ambiguity as to the meaning of "business necessity" was created by Griggs, and had never before been clarified. The clarification provided by Wards Cove Packing certainly does not follow any dictionary definition of "necessity," and probably alters the conception of "business necessity" held by most lower courts. Nonetheless, this re-definition should not dramatically alter the obligation of employers to present approximately the same level of evidence to show a manifest relationship between an exclusionary device and business reasons for its use.

Where Wards Cove Packing dramatically changed the law is after such evidence has been presented by the defendant; it shifts to plaintiffs the ultimate burden of convincing the fact finder to reject defendant's evidence in favor of plaintiff's evidence, by demonstrating the lack of substantial business reasons. While this shift in the burden is dramatic in appearance, only in cases where the defendant has succeeded in carrying the considerable burden of providing the level of evidence necessary to satisfy the stringent production demands of Griggs, Dothard, and Albemarle Paper will there be any difference in result. Lower courts must not forget that Wards Cove Packing did not reverse any of these leading cases. They still stand, but as reconstrued, they stand for the proposition that in each case the defendants failed because they did not present sufficient evidence to carry their burden.

This change in burdens of persuasion, while still retaining the holdings of prior authority, should not dramatically alter the outcome of many cases. Nonetheless, this modified burden of persuasion no doubt will produce different results in close cases where defendants have sufficient evidence of a substantial business purpose and plaintiff has evidence challenging the viability of defendant's showing. Since plaintiffs now carry the ultimate burden of persuasion, they may well lose contested cases in which they would have prevailed prior to Wards Cove Packing. Griggs is certainly not dead, only wounded.

Perhaps this is for the better. The Wards Cove Packing shift both emphasized the wooden nature of a Griggs-inspired impact analysis and dramatized the fluctuation of standards based solely on the Court's current socio-economic predilections. Wards Cove Packing suggested that Griggs is not sacrosanct; its premises are open to question. Such a question might be whether to revisit the motive-driven labor relations analysis in impact cases. Giving proper scope to Title VII purposes of eliminating "unnecessary" barriers to employment opportunity, while allowing employers appropriate discretion, the Court should rethink its rejection of motive as a key element of Title VII, and consider adopting the analysis given to motive in the labor
relations statutes. Such an analysis would vary defendant’s burden of justification based on the degree of impact the challenged device imposes on a protected class. Slight impact of a device on minority employment opportunities would impose on employers only the Wards Cove Packing burden of presenting evidence of a substantial business reason for using the device. On the other hand, impact that is devastating to employment opportunities of women and minorities would have to be justified by the original Griggs standard of proving the business necessity for the device. Such a flexible approach would facilitate a utilitarian balancing of Title VII goals of economic opportunity and employment goals of economic efficiency.