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VALIDITY OF STANDARDIZED EMPLOYMENT TESTING UNDER TITLE VII AND THE EQUAL PROTECTION CLAUSE

I. INTRODUCTION

The question whether using standardized tests in making job placement and promotion decisions constitutes unlawful racial discrimination under Title VII of the Civil Rights Act of 1964 (hereinafter referred to as Title VII) and the equal protection clause of the United States Constitution is controversial and important at present. Commentators have estimated that as many as 20 percent of all charges filed under Title VII involve the testing issue.[1] Also, many cases have been filed in the federal district courts alleging violations of equal protection through the use of standardized tests. After examining the arguments that employment testing can result in racial discrimination, this comment will evaluate the standards by which the validity of employment testing is measured under Title VII and the equal protection clause.

II. DISCRIMINATORY EFFECT OF STANDARDIZED EMPLOYMENT TESTING

Standardized tests have long played an important role in the making of employment decisions in both private industry and government service.[2] Probably the basic reason for the use and popularity of such tests is that they appear to provide the employer with objective criteria upon which to base decisions concerning job entry and promotion.[3] The problem with this is that there is impressive evidence that the standardized tests normally used—generalized intelligence and aptitude tests—are discriminatory when given to individuals of all races without regard to the differences in their social, economic, and cultural backgrounds.[4] "Intelligence is an attribute, not an entity . . . ."[5] capable of precise measurement by the use of the same means in all individual cases. Although innate ability is relevant to test performance, an individual's test performance depends also upon the extent to which he has assimilated or had the opportunity to assimilate the knowledge and skills that the test is designed to measure.[6]

Courts have recognized that standardized test scores are partly the product of an individual's cumulative experiences[7] and that blacks generally have received education inferior to that received by whites.[8] The same has been said in relation to other minority groups.[9] The following argument has led courts to adopt this position: (1) Minority groups have

1. Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1637 (1969).
2. *Id.* at 1638.
3. *Id. See also* 68 COLUM. L. REV. 691, 696 (1968) [hereinafter cited as Note].
4. *See* Cooper & Sobel, *supra* note 1, at 1639-41.
5. *Id., quoting* Wesman, *Intelligent Testing,* 23 AM. PSYCHOLOGIST 267, 269 (1968).
6. Cooper & Sobel, *supra* note 1, at 1639; Comment, *Employment Testing Under Title VII of the Civil Rights Act of 1964,* 12 B.C. IND. & COM. L. REV. 268, 270 (1970) [hereinafter cited as Comment].
7. *See* Hobson v. Hansen, 269 F. Supp. 401, 478 (D.D.C. 1967).
8. *See* Gaston County v. United States, 395 U.S. 285 (1969).
9. Cooper & Sobel, *supra* note 1, at 1641.

had inferior educational, economic, and cultural opportunities because of racial discrimination and the cultural separatism that has resulted therefrom; (2) this racial discrimination, lack of opportunity, and cultural separatism have combined to impede minority group members in attaining the kind of background necessary for successful performance on standardized tests; (3) therefore, minority group members achieve lower scores on standardized tests than do whites.[10] Thus, use of standardized tests by employers without regard to the racial, cultural, and educational differences of the individuals tested has a markedly discriminatory effect that is the basis of many allegations of racial discrimination in violation of Title VII or the equal protection clause.

Popular misconceptions about standardized tests and their utility tend to compound the problem created as a result of their use by employers. Most people assume that standardized tests measure only innate ability, but investigation reveals the importance of a person's background to his performance on such tests.[11] Many are inclined to believe that standardized tests developed by experts are valid regardless of the situation in which they are used; few realize how difficult it is scientifically to develop a paper and pencil test that will measure a person's possession of skills that are relevant to the performance of a particular job.[12] In fact, most people probably assume, merely because their use is widespread, that standardized aptitude tests are predictive of successful job performance, although scientific evidence on the subject points to the conclusion that they are not.[13] Also, most people accept the proposition that standardized tests are valid when used to predict ability to learn and promotability in general, when actually they must be geared to the employer's jobs and to the group tested in order to have any validity.[14]

III. Validity of Standardized Employment Testing Under Title VII and the Equal Protection Clause

Assuming that the use of standardized tests has a discriminatory effect, the remainder of this comment surveys the treatment of the problem by the courts when discrimination cases are brought under Title VII and the equal protection clause. The objective is to determine whether Title VII and the equal protection clause apply the same standard to testing cases and, if not, which one is more favorable to a plaintiff and which to an employer.

A. *Title VII*

In order for a case of alleged racial discrimination through the use of standardized tests to be covered by Title VII, the tests must be used in decision-making by an "employer," as defined by the Civil Rights Act of 1964 (hereinafter referred to as the Act of 1964) as amended by the Equal Opportunity Act of 1972 (hereinafter referred to as the Act of

10. *Id.* at 1640.
11. *Id.* at 1644-45.
12. *Id.* at 1643; E. Ghiselli, The Validity of Occupational Aptitude Tests 51 (1966).
13. Cooper & Sobel, *supra* note 1, at 1643-44.
14. *Id.* at 1647.

1972). Under the Act of 1964, such an employer is a "person engaged in an industry affecting commerce" and having 25 or more employees for each working day in 20 or more calendar weeks in the current or a preceding year.[15] The Act of 1972 reduced to 15 the number of employees a person must have in order to be an "employer".[16] The definition of employer comprehends the usual types of business organizations, as well as governments, governmental agencies, political subdivisions, labor unions, associations, mutual companies, joint-stock companies, trusts, and unincorporated associations.[17]

Once it is determined that the employer is covered by the Act of 1964, as amended, other sections of Title VII must be considered. Under section 703 (a) (1) & (2) (all section references are to the Act of 1964), it is an unlawful employment practice for an employer "to fail or refuse to hire . . . . because of an individual's race, color, religion, sex, or national origin . . . ."[18] or

> to limit, segregate, or classify his employees 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.[19]

These broad provisions appear to make it unlawful for an employer to use tests having a discriminatory impact upon minorities.

However, section 703 (h), which seems more specifically applicable, contains some ambiguous language that raises questions as to its standard for deciding the lawfulness of standardized employment testing. This section provides:

> It shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.[20]

The language exempting "professionally developed tests," unless "designed, intended, or used to discriminate" is ambiguous. It can be taken to approve the use of all standardized tests so long as the employer using them has no actual intent to discriminate. Or, it can be argued that the word "used" implies a more objective standard, and that any test that has a discriminatory effect is proscribed, regardless of the employer's intent or the fact that the test is "professionally developed."[21]

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15. Civil Rights Act of 1964 § 701 (b), 42 U.S.C. § 2000e (b) (1964), *as amended* 86 Stat. 103 (1972).
16. Equal Employment Opportunity Act of 1972 § 2 (2), 86 Stat. 103 (1972), *amending* § 701 (a), 42 U.S.C. § 2000e (b) (1964).
17. Civil Rights Act of 1964 § 703 (a) (1), 42 U.S.C. § 2000e-2 (a) (1964), *as amended* 86 Stat. 103 (1972).
18. *Id.* § 703 (a) (1), 42 U.S.C. § 2000e-2 (a) (1) (1964).
19. *Id.* § 703 (a) (2), 42 U.S.C. § 2000e-2 (a) (2) (1964).
20. *Id.* § 703 (h), 42 U.S.C. § 2000e-2 (h) (1964).
21. Note, *supra* note 3, at 709-10.

Although the legislative history of section 703(h) is of little help in determining the intent of Congress in adopting it, two distinct views have emerged. The first view is that Congress wanted to protect only tests that measure job-related abilities and skills in order to reduce the chance that standardized tests would be used in such a way as to have a discriminatory effect.[22] The other view is that Congress believed that standardized tests serve a genuine business purpose and, therefore, did not want the Equal Employment Opportunity Commission (E.E.O.C.), the agency created by Congress to administer the Act,[23] to regulate the use of such tests.[24]

When the E.E.O.C. developed its *Guidelines on Employment Testing Procedures* (hereinafter referred to as *Guidelines*), the regulations explicitly incorporated a job-relatedness standard rather than a business needs or genuine business purpose standard. The *Guidelines* adopted in 1967 provided:

> The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.[25]

The E.E.O.C. has always viewed testing as only one helpful component of a personnel system and has advocated employment testing procedures which emphasize these elements:

(1) careful job analysis to define skill requirements related to the performance of the specific job
(2) special efforts in recruiting minorities
(3) screening and interviewing related to job requirements
(4) tests selected on the basis of specific job-related criteria
(5) comparison of test performance against job performance
(6) opportunity for retesting of those who failed the tests but then acquired more training or experience
(7) validation of tests for norms that include representative minority group members[26]

In addition, new *Guidelines* adopted in 1970 place a heavy burden on the employer to justify his use of standardized tests having a detrimental impact on minority group members. Such tests are now presumed by the E.E.O.C. to be unlawful unless they have been scientifically validated, and "the person giving or acting upon the results . . . can demonstrate that

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22. *Developments in the Law--Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1125 (1971) [hereinafter cited as *Developments*].

23. *See* Civil Rights Act of 1964, § 705, 42 U.S.C. § 2000e-4 (1964).

24. *Developments, supra* note 22, at 1125. For a general survey of the legislative history of Title VII see Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966). *See also* Comment, *supra* note 6, at 275-76.

25. 29 C.F.R. § 1607 (1970).

26. *Id.*

alternative suitable hiring, transfer or promotion procedures are unavailable for his use."[27]

When all of the *Guidelines* are taken together, they establish requirements that are impossible for all but the largest of employers to follow. The *Guidelines* could influence employers away from objective criteria that have some differential impact on minorities toward more subjective criteria. The impracticality of the *Guidelines* may lead more employers to adopt a quota system for the hiring of minority employees or to adopt lower cut-off scores for minorities than for whites. Such alternatives could be just as discriminatory against culturally deprived whites as general intelligence and aptitude tests are against culturally deprived blacks, and could raise new legal problems in themselves.[28]

With a background of ambiguous statutory language, an uninstructive legislative history, and burdensome E.E.O.C. *Guidelines* that are difficult to interpret and to apply, the task of developing workable standards for the application of Title VII passed to the courts. Case law on the testing issue under Title VII tended to develop along two lines of authority. In some cases, the courts adopted the E.E.O.C. standard of job-relatedness and held that the use of standardized tests was unlawful, unless the tests measured only those skills and abilities necessary to the performance of a particular job.[29] Other decisions rejected the E.E.O.C. standard and held the use of standardized tests by an employer lawful if the use of the tests met a business need or served a legitimate business purpose.[30] These courts, in effect, recognized the right of an employer to maintain a work force with as much measured intelligence as he could find, regardless of the differential impact that the use of some tests might have on minorities.[31]

The most explicit endorsement of the *Guidelines* by a court is found in the case of *Hicks v. Crown Zellerbach Corp.*[32] Applicants of Crown were required to take the Wonderlic Personnel Test, the Bennett Test of Mechanical Comprehension, and the SRA Non-Verbal. Test scores were used in making hiring decisions and in deciding which employees should be promoted. Testimony revealed that 37.3 percent of the white applicants passed the Wonderlic, as compared to 9.8 percent of the black applicants; 64.9 percent of the whites and only 15.4 percent of the blacks passed the

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27. *Id.*

28. *Developments, supra* note 22, at 1128-31. *See also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) where Chief Justice Burger said that

> the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely what Congress has proscribed.

29. *See* Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970); United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968); Dobbins v. Electrical Workers Local 212, 292 F. Supp. 413 (S.D. Ohio 1968).

30. *See* United States v. Local 38, Electrical Workers, 428 F.2d 144 (6th Cir.), *cert. denied,* 400 U.S. 943 (1970); Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *rev'd,* 401 U.S. 424 (1971); United States v. Jacksonville Terminal Co., 316 F. Supp. 567 (N.D. Fla. 1970); Broussard v. Schlumberger Well Services, 315 F. Supp. 506 (S.D. Tex. 1970).

31. *See* cases cited note 29 *supra.*

32. 319 F. Supp. 314 (E.D. La. 1970).

Bennett; and that the SRA Non-Verbal also significantly favored whites.[33] The plaintiff, a black who had failed the tests, brought a class action alleging that these tests disqualified a disproportionate number of blacks; that the tests did not predict successful job performance; and that therefore, the use of the tests was unlawful under Title VII. He did not allege that Crown intended to discriminate against blacks.

In endorsing the *Guidelines* and holding the company's testing procedures unlawful, the court said that the *Guidelines*

> require that tests be validated in accordance with professional standards in order to comply with Title VII. In lay terms, this simply means that the skills measured by the tests must be shown to be relevant to the employer's job performance needs.[34]

The court also stressed that careful evaluation and study are required when standardized tests of the kind used by Crown are given to a mixed racial group, because such tests assume that persons taking them have had relatively equal exposure to educational materials, and blacks have not had this equal exposure.[35] Because Crown offered no study to support the utility of its testing program, it could not show that the program fulfilled any business need or that it served any legitimate business purpose. Finally, in dealing with section 703 (h) the *Hicks* court said:

> To interpret section 703 (h) as protecting use of tests which are not shown to be job related would be to drastically undercut the overall legislative purpose of Title VII, which is to eliminate all unjustified impediments to the realization of full equal employment opportunity for Negroes. No court should read this result into a minor subsection of Title VII absent the strongest and most explicit legislative intent; and such does not appear in support of section 703 (h).[36]

Using this approach, the court struck down the use of the tests for both hiring and promotion purposes.

The leading case rejecting the *Guidelines* and adopting the business needs or the legitimate business purpose approach was *Griggs v. Duke Power Co.*[37] In this case the company used the Wonderlic Personnel Test and the Bennett Mechanical Comprehension Test to implement a policy that promotion from the lowest paying department in the plant required (1) a high school diploma, or (2) scores on the two standardized tests equal to those achieved by the average high school graduate. The plaintiff alleged that Duke Power's testing requirements were discriminatory and unlawful because there was no showing of a business need for the requirements; that Duke Power did not conduct any studies to discern

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33. *Id.* at 318.

34. *Id.* at 319. *See also* Note, *supra* note 3, at 710, which indicates that validation requires that tests be judged against job performance, rather than by what they claim to measure, and that sample populations used in validating tests must include representative members of the minority groups to which the tests will be applied.

35. Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314, 319 (E.D. La. 1970).

36. *Id.* at 321.

37. 420 F.2d 1225 (4th Cir. 1970).

whether such requirements were related to an employee's ability to perform his duties; and that the tests were not job-related as required by section 703 (h). The company admitted that it began use of the tests without any formal studies of whether they measured job-related skills and abilities, but attempted to justify the use of standardized tests by arguing that as its business became more complex, it needed more intelligent employees who could progress within the company.[38] The court upheld the use of standardized tests, because they served the genuine business purpose of securing more intelligent employees, were developed by professional psychologists, and were not used with any intent to discriminate.[39]

The *Griggs* court rejected the *Guidelines* as explicitly as the *Hicks* court had adopted them. It recognized that agency interpretations are entitled to great weight, but stated that the *Guidelines* were not conclusive, because they were directly contrary to the legislative history of Title VII. According to the court, "At no place in the Act or in its legislative history does there appear a requirement that employers use only those tests which measure the ability and skill required by a specific job or group of jobs."[40]

The cases taking the *Hicks* view sought to establish a standard of job-relatedness which required the employer to show something close to a direct correlation between the abilities tested and the job skills required. This standard focused upon the individual applicant or employee and the requirements of the particular job for which he was tested.

On the other hand, the *Griggs* line of cases recognized testing as lawful if it served any legitimate business purpose or met a business needs standard. The business needs standard focused upon the pool of skills possessed by an employer's work force and recognized the validity of the employer's interest in maximizing the quality of that pool of skills through the use of standardized tests.[41]

The Supreme Court decided the *Griggs* case, and through it established the standard applicable to all employment testing cases brought under Title VII.[42] In the majority opinion in *Griggs v. Duke Power Co.*,[43] Chief Justice Burger used expansive language in dealing with whether Title VII prohibits conditioning employment or promotion on passing a standardized general intelligence test, when the test is not shown to be significantly related to job performance. This language tended to combine the job-relatedness and the business needs tests. For example, Chief Justice Burger stated:

> The Act proscribes not only overt discrimination but also practices

38. *Id.*
39. *Id.* at 1233.
40. *Id.* at 1235.
41. *Developments, supra* note 22, at 1138.
42. The Fourth Circuit Court of Appeals holding in Griggs v. Duke Power Co., 420 F.2d 1225 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971), put that circuit in conflict with the Fifth Circuit Court of Appeals decision in Local 189, United Paperworkers v. United States, 416 F.2d 980 (5th Cir.), *cert. denied*, 397 U.S. 919 (1969), which was followed in Hicks v. Crown Zellerbach Corp., 319 F. Supp. 314 (E.D. La. 1970).
43. 401 U.S. 424 (1971).

> 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.[44]

Also, the Court gave great deference to the *Guidelines,* as interpretations of the Act by the agency charged with enforcing it.[45] The Chief Justice said that the E.E.O.C.'s construction of section 703(h) as requiring that employment tests be job-related was consistent with Congress's intent in passing the section, as evidenced by the legislative history of the Act.[46]

In applying its standard to the testing procedure of Duke Power Co. the Court made it clear that the Act does not preclude the use of tests *per se.* The Court stated that the Act does forbid using tests to make employment or promotion decisions, unless they are "demonstrably a reasonable measure of job performance."[47] Because the company in *Griggs* failed to justify its testing procedures under this standard, the court reversed the part of the holding of the Fourth Circuit Court of Appeals that was favorable to Duke Power Co.

The test adopted by the Supreme Court for determining whether an employer's use of standardized tests is lawful under Title VII is a "reasonableness" test, somewhere between the strict job-relatedness test advanced by the E.E.O.C. and adopted by the court in *Hicks* and the business needs test adopted by the lower courts as in *Griggs.* Such a test does not require a one-to-one correlation between skills and abilities tested and job requirements, but requires the employer to show more than just an arguably legitimate business purpose.

An interesting and important aspect of the test now applicable in all Title VII testing cases is demonstrated in *United States v. Georgia Power Co.,*[48] decided two months after the Supreme Court handed down the *Griggs* test. The facts of the case were similar to those in *Griggs* with one important exception. The Georgia Power Co. introduced expert testimony and empirical evidence tending to show that the tests were "demonstrably a reasonable measure of job performance."[49] After reviewing the evidence, the court held that the company's conditioning employment or promotion upon a passing score on aptitude tests was lawful under Title VII, even though blacks scored significantly lower than whites.[50] The reasons given by the court were that the tests (one of which was the Bennett Test of Mechanical Comprehension) were (1) professionally developed, (2) adopted after study of their relationship to job performance, (3) predictive of or significantly correlated with important elements of work behavior com-

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44. *Id.* at 431.
45. *Id.* at 433-34.
46. *Id.* at 434.
47. *Id.* at 436.
48. 3 FAIR EMPL. PRAC. CAS. 767 (N.D. Ga. 1971). The United States is a party because the Civil Rights Act of 1964, § 707, 42 U.S.C. § 2000e-6(a) (1964) allows the Attorney General to bring civil actions when he has reasonable cause to believe that any employer is engaged in resistance to the full employment rights secured by the Act.
49. *Id.* at 786.
50. *Id.* at 791.

prising or relevant to jobs, (4) validated in a professional manner by reputable professionals, and (5) demonstrably a reasonable measure of job performance.[51]

This case demonstrates that the test adopted by the Supreme Court in *Griggs* shifts the burden of going forward with evidence on the issue of job-relatedness from the plaintiff to the defendant employer. This means that the steps taken prior to the institution of testing procedures are crucial, because the employer must be able to produce evidence showing that the tests are a reasonable measure of the skills required for successful performance of his jobs. He should consult with experts in the field of testing prior to instituting any testing program and have expert management of his program. If these steps are taken the chances are good that a court will find his procedures lawful under section 703(h) by applying the reasonableness test that the Supreme Court has held applicable to all Title VII testing cases.[52]

B. *The Equal Protection Clause*

If the required state action exists, it is possible for a minority-group plaintiff challenging an employer's use of testing as discriminatory to bring an action based on the equal protection clause of the fourteenth amendment. For such a plaintiff, an action on equal protection grounds may be preferable to a Title VII action for two reasons. First, a Title VII action may be unavailable because the employer is one not covered by Title VII. However, the importance of this reason for a plaintiff's preferring the equal protection clause to Title VII has declined since the Equal Employer Opportunity Act of 1972 expanded the coverage of Title VII.[53] That Act widened the definition of "employer" to include states and their political subdivisions and removed the exemption, contained in the 1964 Act, of educational institutions with respect to persons whose work involves educational activities.[54]

Second, courts tend to place a heavier burden upon the employer of justifying the discriminatory effect of his employment testing under the equal protection clause than under Title VII. In cases under the equal protection clause, district courts have tended to require employers to show a "compelling necessity or justification," rather than a mere "rational basis," in order to justify their employment testing when it produces a racially discriminatory effect.[55] Unfortunately, these cases contain little analysis of the equal protection issues involved in them. Further, few of these cases have been appealed; therefore, the equal protection arguments in them have received no further judicial treatment.

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51. *Id.* at 786-87.

52. 21 DRAKE L. REV. 188, 194 (1971).

53. *See* Equal Employment Opportunity Act of 1972 § 2(1), 86 Stat. 103 (1972), *amending* 42 U.S.C. § 2000e (1964); text accompanying notes 15-17 *supra.*

54. Equal Employment Opportunity Act of 1972 § 3, 86 Stat. 103 (1972), *amending* 42 U.S.C. § 2000e-1 (1964).

55. *See* Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971); Armstead v. Starkville School Dist., 325 F. Supp. 560 (N.D. Miss. 1971); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970). *But see* Davis v. Washington, 4 FAIR EMPL. PRAC. CAS. 1132 (D.D.C. 1972); Western Addition Community v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971).

In two of the cases that have been appealed,[56] the interplay between opinions of the district courts and the courts of appeals leaves an interesting uncertainty as to which equal protection standard applies to unintentional discrimination by employment testing—"compelling necessity or justification" or "rational basis." One of these cases, *Chance v. Board of Examiners,* will be considered here in order to illustrate the approach that the courts took. In *Chance,* the two class action plaintiffs, one black and one Puerto Rican, were both performing successfully as acting principals in New York City schools, but could not get permanent appointments because of failure to pass competitive intelligence tests. They alleged that the tests, given to candidates for supervisory positions in New York City schools, discriminated against blacks and Puerto Ricans, and were neither shown to test abilities and skills necessary to job performance, nor to predict whether a candidate would succeed on the job. Plaintiffs alleged that the discriminatory effect of the use of the tests, coupled with a lack of any valid justification for their use, violated their constitutional rights.[57]

The basic problem for the plaintiffs in *Chance* was to make a convincing argument that theirs was a racial case and thereby persuade the district court to apply the more stringent equal protection test applicable to racial discrimination cases.[58] They contended that once a discriminatory impact was shown, the burden shifted to the Board to show a compelling necessity or justification for tests having an unintended discriminatory effect.[59] The Board defended by contending that the plaintiffs had to show that there was no rational relationship between the examinations and the requirements of the supervisory positions for which they were given.[60]

Thus, the issue before the *Chance* court was whether the giving of general intelligence tests to applicants for supervisory positions in a school system, having a discriminatory effect against black and Puerto Rican applicants, violated their rights under the equal protection clause. The district court's decision turned on whether the compelling necessity test or the rational relationship test would be applied. The court applied the compelling necessity test in granting a preliminary injunction against further use by the Board of the tests in question.[61] It concluded that the testing program had a discriminatory impact on blacks and Puerto Ricans and said:

> Such a discriminatory impact is constitutionally suspect and places the burden on the Board to show that the examinations can be justified as necessary to obtain Principals, Assistant Principals and supervisors possessing the skills and qualifications required for

56. Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd,* 4 FAIR EMPL. PRAC. CAS. 596 (2d Cir. 1972); Armstead v. Starkville School Dist., 325 F. Supp. 560 (N.D. Miss. 1971), *aff'd* 4 FAIR EMPL. PRAC. CAS. 864 (5th Cir. 1972).

57. 330 F. Supp. at 205.

58. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Bolling v. Sharpe, 347 U.S. 497 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

59. 330 F. Supp. at 214-15.

60. *Id.* at 215.

61. *Id.* at 224.

> successful performance of the duties of these positions. The Board has failed to meet this burden.[62]

This standard arguably places a heavier burden on the employer than the Supreme Court's requirement under Title VII that the tests be "demonstrably a reasonable measure of job performance."

The United States Court of Appeals for the Second Circuit affirmed the district court's decision in *Chance,* but refused to hold that the "compelling necessity or justification" test was applicable. First, the court noted that the Supreme Court has never applied the more stringent equal protection standard to a case involving unintended racially discriminatory effects.[63] Then, the court stated:

> Manifestly, the question whether that test should be applied to de facto discriminatory classifications is a difficult one and is not to be resolved by facile reference to cases involving intentional racial classifications. We think, however, that the district court's decision may be upheld under the "more lenient equal protection standard" and so find it unnecessary to reach this most difficult question.[64]

Thus, the opinion provides no answer to the question of which standard applies to employment testing discrimination cases, but merely suggests that the Second Circuit will be reluctant to apply the "compelling necessity or justification" test.

It is submitted that in cases of unintended racial discrimination caused by employment testing the more lenient test, "rational basis," is the more appropriate. It is true that in racial classification cases the Supreme Court has consistently applied the compelling state interest or necessity test.[65] However, employment testing discrimination cases involve classifications racially neutral on their face, but which have a racially discriminatory effect. Under traditional equal protection analysis, racially discriminatory effect alone probably creates no substantial equal protection question.[66]

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62. *Id.* at 223. In reaching its conclusion the court relied on Shapiro v. Thompson, 394 U.S. 618 (1969), Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970) and Arrington v. Massachusetts Bay Transp. Auth., 306 F. Supp. 1355 (D. Mass. 1969).

The district court in Armstead v. Starkville Municipal Separate School Dist., 325 F. Supp. 560 (N.D. Miss. 1971), reached a result similar to that reached in *Chance.* The court there held that the defendant failed to sustain its burden of showing "an overriding purpose independent of invidious racial discrimination." The defendant was using Graduate Record Examination scores in teacher placement, and this had the effect of discriminating against blacks. *Id.* at 570.

63. 4 FAIR EMPL. PRAC. CAS. at 603.

64. *Id.* The Fifth Circuit in *Armstead* stated

> that it did not have to rule on the validity of the district court's determination that the school district's testing requirements created a racial classification to which the "compelling necessity" test applied. Instead, the court held the testing program invalid even under the "rational basis" test, stating that the program "is not reasonably related to the purpose for which it was designed." 4 FAIR EMPL. PRAC. CAS. at 866.

65. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964).

66. James v. Valtierra, 402 U.S. 137 (1971).

Furthermore, it is difficult to conceive of the employment testing situation as involving classifications that otherwise impinge on constitutional rights or "fundamental" interests, which require a more stringent equal protection review.[67] Therefore, the classifications created by employment testing arguably should be treated as economic, to which the "rational basis" test applies.

Cases which apply the compelling necessity test seem to skirt *James v. Valtierra*,[68] a case which indicates that the rational basis test should be applied in a case where a challenged practice is neutral on its face but discriminatory in effect. In that case, it was argued that a California requirement that public housing projects be approved by a majority of those voting at a community election violated equal protection in that it tended to place a "special burden" on minority groups, who are the predominant users of public housing. The Supreme Court noted that a state procedure that "disadvantages" a particular group "does not always deny equal protection" and in effect found a rational basis for the referendum arrangement.[69]

From a consideration of the testing cases brought under the equal protection clause, the one conclusion that can be reached is that many federal district courts are sympathetic to the plaintiff's cause. Even in cases lacking analysis, the courts grant injunctions preventing the continued use of tests. Because these cases are not being appealed, the battle for the plaintiff can be won at the district court level, where his major hurdle is convincing the court that his case falls within the "racial" category.

IV. Conclusion

The test that will always be applied in a Title VII testing case is whether the tests used by the employer are demonstrated to be a reasonable measure of job performance. Under the equal protection clause less is required if the rational basis test is applied. Then, the employer must show merely a rational connection between the tests used and his business needs. On the other hand, should a court fail to note that testing has only a discriminatory effect and view a testing case as a case of racial discrimination, more is required under the equal protection clause than under Title VII. The employer must show a compelling necessity for the use of his testing procedures, a burden virtually impossible for him to meet.

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67. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

68. 402 U.S. 137 (1971). *See also* Jefferson v. Hackney, 40 U.S.L.W. 4585 (U.S. May 30, 1972), in which Justice Rehnquist said at 4589:

> The acceptance of appellant's constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

69. 402 U.S. at 142.