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The Employer's Fetal Injury Quandary After Johnson Controls

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The Employer's Fetal Injury Quandary
After Johnson Controls

BY SUSAN S. GROVER*

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INTRODUCTION

When hazards in the workplace threaten the health of fetuses carried by female workers, an employer has two options. It can comply with state tort law, or it can comply with federal anti-discrimination law. The quandary that employers face in the wake of the Supreme Court's decision in *International Union, UAW v. Johnson Controls, Inc.*¹ is that they cannot comply with both laws at once.

In *Johnson Controls*, the Supreme Court struck down a fetal protection policy that excluded all fertile women from working in a battery manufacturing plant.² Despite fetal hazards posed by airborne lead in the plant, the Court concluded that Johnson Controls' policy discriminated against women in violation of federal law.³ The Court held that Title VII of the 1964 Civil Rights Act,⁴ particularly the 1978 amendment to that title known as the Pregnancy Discrimination Act ("PDA"),⁵ preserves the employee's autonomy to decide for herself whether she wishes to work in a hazardous environment, regardless of the employer's concern about fetal health.⁶

In striking down Johnson Controls' fetal protection policy, the Supreme Court essentially ruled that the worker's interest in employment and autonomy⁷ takes precedence over the countervailing interest offered

² *Id.* at 1209-10. All references in this Article to "fetal protection policies" denote gender-specific policies that exclude women, but not men, based on the women's potential to become pregnant.
³ *Id.* at 1199-208.
⁶ 111 S. Ct. at 1207. The essence of the PDA in this regard is that, for purposes of Title VII, forbidden sex discrimination is defined to include discrimination on the basis of pregnancy and related conditions. 42 U.S.C. § 2000e(k) (1981). Under the PDA, then, a woman capable of performing a particular job cannot be excluded from that job on the ground that she is pregnant or capable of becoming pregnant, any more than she can be excluded based on her sex per se.
⁷ Professor Kim Dayton has argued that [b]y framing the maternal protection issue as one of conflicting rights—between the mother and the fetus—advocates of the concept of fetal protection successfully have created an analytical framework that invites a resolution of the alleged conflict in favor of fetal protection, even if that means denying the mother job opportunities or even her freedom.

Kim Dayton, *Patriarchy, Paternalism and the Masks of "Fetal Protection, "* 2 KAN. J.L. & PUB. POL’Y 25, 28 (1992) (citing Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1335 (1990)). Fertile women who are excluded from jobs under a policy as broad as the one in *Johnson Controls* may have absolutely no intention of becoming pregnant, and consequently, may be unconcerned about fetal hazards. Even those women who intend to procreate or who are already pregnant may find that it is in the family’s best interest
by Johnson Controls in defense of its policy—the well-being of future generations. The question that remains open is whether the dominance of the worker's interest is absolute, regardless of what particular interest inspires the employer to exclude women, or whether interests other than those relied upon in Johnson Controls may sometimes override the interest of the employee. If such overriding is possible, then fetal protection plans are defensible under appropriate circumstances, even though the Johnson Controls case established that the employer's narrow, altruistic interest in the welfare of future generations cannot support such a defense. If such overriding is not possible, then employers must include eligible women in their workforce, regardless of what ramifications the hazards present may threaten.

To take extra precautions and remain in the higher-paying, albeit riskier, position rather than to accept a safer position at a pay level insufficient to provide for their families.

To the extent that fetal protection policies focus on women's reproductive capacities to the exclusion of their work capacities, such policies arguably relegate women to the "one-dimensional" role of "vessel and nurturer for the next generation" which Title VII was intended to correct. Wendy W. Williams, Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII, 69 Geo. L.J. 641, 653 (1981).

See Johnson Controls, 111 S. Ct. at 1216 (Scalia, J., concurring); Maria A. Longi, International Union, UAW v. Johnson Controls, Inc.: Can Science Ever Justify Gender Discrimination?, 19 N. KY. L. Rev. 425, 445-46 (1992) (discussing the assignment of responsibility for fetal protection in the workplace). Johnson Controls offered no rationale for its policy other than the altruistic interest in the health of future generations. See infra note 18. Despite the professed concern for the well-being of future generations, commentators suggest that employers' true motivation in adopting fetal protection policies is to keep women either out of the workplace or in the lower-ranking, lower-paying jobs that women have traditionally occupied. See, e.g., Mary E. Becker, From Muller v. Oregon to Fetal Vulnerability Policies, 53 U. Chi. L. Rev. 1219, 1240 (1986). The fact that employers also tend not to be concerned about the fetal hazards in other occupations, such as nursing and secretarial work, that have traditionally employed women anyway, while expressing concern for hazards to fetuses of women holding traditionally male-occupied positions, suggests to many that impermissible bias is at work. See id. at 1237-41 (concluding that employers tend to exclude all fertile women from hazardous jobs where the work force is predominantly male, but only pregnant women where the work force is predominantly female); Williams, supra note 7, at 649 (finding that women are more likely to be excluded from male dominated jobs even though males and females are both vulnerable to the toxins present); cf. Becker, supra, at 1225 (finding that state protective legislation excluded women only from occupations in which they were deemed unimportant); Hannah A. Furnish, Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964, 66 Iowa L. Rev. 63, 81 (1980) (recognizing that the legislative history of PDA "is replete with documentation of employer use of women's childbearing capacity as an excuse for not hiring women . . . despite the illegality of such conduct under Title VII"). Such bias is also suggested by the fact that employers tend to adopt fetal protection policies that exclude women because of certain toxins, but ignore evidence that the same toxins harm male reproduction. See Williams, supra, at 655-61. In this connection, it is noteworthy that Johnson Controls' battery-manufacturing employees consisted exclusively of males before the passage of the Civil Rights Act of 1964. Johnson Controls, 111 S. Ct. at 1199.

Johnson Controls, 111 S. Ct. at 1208.

Critics of the Johnson Controls decision consider it a threat to fetal well-being and to the financial interests of businesses that will be liable in tort for fetal injuries. See Jerry J. Jasinowski,
As a result of the Johnson Controls decision, employers are left fearful of the no-win situation described above. An employer that chooses to comply with the federal law announced in Johnson Controls by admitting women to a hazardous workplace risks liability under state tort law for fetal harm. On the other hand, an employer that chooses to avoid tort liability by excluding women from the workplace risks liability under Title VII.

A third possibility is that some employers will never face the envisioned quandary because the threat of tort liability simply will never materialize. Any of several factors could eliminate the prospect of employer tort liability for fetal harm. Employers may, for example, be found to enjoy workers' compensation immunity for injuries sustained by fetuses while the fetuses are "part of" employees who are themselves constrained by workers' compensation immunity. In the alternative, employers may avoid tort liability by entering into contracts of indemnity with female workers, or by using some other measure to ensure that the women who elect to expose their fetuses to workplace hazards, and not

Protect Employers from Irrational Laws, USA TODAY, Mar. 25, 1991, at A23 (criticizing Johnson Controls as subjecting employers to irrational requirements); Lawrence Postol & Mary Adelman, Protecting Progeny and Pocketbooks, LEGAL TIMES, May 13, 1991, at 37 (discussing alternatives available to businesses in the wake of Johnson Controls, such as moving their operations to other countries, and noting the threat to fetuses); see also Barbara R. Grumet, Fertile Women May Now Apply: Fetal Protection Policies After Johnson Controls, 2 RISK: ISSUES HEALTH & SAFETY 261 (1991) (discussing options available to respond to fetal injury).


the employers, will foot the bill for resultant injuries. There is also the possibility that employers will avoid the quandary as a result of the enactment of federal or state legislation that some commentators have advocated. Thus, despite the outcry of employers in the wake of Johnson Controls, some employers may never confront the dilemma in question.

Those employers that do confront the dilemma have two potential escape routes. The employer that elects to comply with federal law will invoke the doctrine of federal preemption as a defense to the fetal tort suit. This employer will argue that conflicts between the federal law and the state law render the state law void. The employer that elects instead to exclude women in apparent violation of Johnson Controls in order to avoid catastrophic fetal tort liability will invoke the statutory bona fide occupational qualification ("BFOQ") defense. This employer will argue that the prohibitive costs of tort liability render infertility an essential qualification for female employees in the hazardous workplace. Although both of these escape routes elicited Supreme Court commentary in Johnson Controls, neither was actually presented by the facts of the case. Thus, the Court's comments on both are arguably dicta.

This Article analyzes the employer's prospects for escaping its fetal injury quandary by means of either the BFOQ defense or federal preemption. After a brief explanation of Title VII doctrine governing employer fetal protection policies, the Article assesses the likelihood that
either, or both, of these escape routes will be available to employers confronted with the problem of fetal hazards in the workplace. The Article concludes that the BFOQ is, in theory, a more promising escape mechanism than federal preemption. As a result, employers facing ruinous tort liability may sometimes fare best by excluding women in violation of Johnson Controls, and relying on the BFOQ defense. The Article further concludes that any BFOQ predicated upon the potential cost of fetal tort liability should be confined to situations in which the costs of such liability will be ruinous to the employer.

I. Johnson Controls

A. Historical Context and Analytical Methodology

The major debate in fetal protection cases prior to the Johnson Controls decision centered on the issue of which Title VII analytical methodology should govern cases challenging fetal protection plans. Title VII provided courts with two methodologies to choose from: disparate treatment (for intentional discrimination) and disparate impact (for neutral practices or policies with statistically adverse effects on women as a group). A court’s choice of methodology was significant because, under Title VII, the court’s decision of whether to analyze the case as either disparate treatment or disparate impact determined which defense an employer could invoke. As explained below, the disparate impact

19 This Article assumes that the employer under discussion has done all within its power to make the workplace safe and is involved in a business that simply cannot rid itself of fetal hazards. An employer that has not taken available precautions certainly should not succeed in defending its exclusion of women to protect their fetuses.

20 This conclusion would traditionally have been reinforced by the fact that fetal tort damages are more likely to be of astronomical proportions than are Title VII damages. Under the 1991 Civil Rights Act, however, the availability of punitive damages for intentional violations of Title VII means that employers who knowingly violate Title VII, as construed in Johnson Controls, may face equally large damages awards. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1072-73 (1991) (codified at 42 U.S.C.S. § 1981a(b) (Law. Co-op. Supp. 1992)).


In addition to forbidding employment discrimination based on sex, Title VII forbids discrimination based on race, color, religion and national origin. See 42 U.S.C. § 2000e-2(a) (1988). Because this Article pertains to sex discrimination, it describes the operation of Title VII in terms of sex.

defendant could prevail by persuading the court that the practice was warranted by "business necessity," whereas the disparate treatment defendant had to prove the elements of the more stringent BFOQ defense.

Prior to the Supreme Court's decision in Johnson Controls, employers defending fetal protection plans advocated impact analysis because the business necessity defense is broader and easier to prove than the BFOQ defense. The Civil Rights Act of 1991, for example, describes the employer's business necessity burden in impact analysis as that of "demonstrating that the challenged practice is job related for the position in question and consistent with business necessity." The more stringent BFOQ defense, on the other hand, has been described as requiring the defendant to demonstrate that the "essence of the business operation would be undermined by not hiring members of one sex exclusively."

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21 42 U.S.C § 2000e-2(k)(1)(A)(i) (Supp. 1990). Unlike the BFOQ, which is a statutory defense, the recently enacted business necessity defense was originally the product of Supreme Court decision. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (when neutral employer practices are discriminatory in operation, the touchstone is business necessity).


23 The defense is further constricted by virtue of its unavailability in cases alleging race discrimination. See Malhotra v. Cotter & Co., 885 F. 2d 1305, 1308 (7th Cir. 1989). Under the terms of Title VII, the BFOQ requires the defendant to persuade the court that the exclusion of women is "reasonably necessary to the normal operation of [the] particular business." 42 U.S.C. § 2000e-2(e)(1) (1981), quoted in Western Air Lines v. Criswell, 472 U.S. 400, 413 (1985).

24 See Wright v. Olin Corp., 697 F.2d 1172, 1185 n.21 (4th Cir. 1982) (noting that employers restricted to the BEOQ to defend fetal protection plans, rather than the business necessity defense, would have no effective defense at all); see also Brown, supra note 11, at 491 (describing the differences between business necessity and BFOQ). Such business reasons can be far broader than the job performance question under the BFOQ. See Befort, supra note 24, at 11; Mark S. Brodin, Costs, Profits, and Equal Employment Opportunity, 62 NOTRE DAME L. REV. 318 (1987); cf. id. at 358 (advocating a narrowing of the business necessity defense by arguing that BFOQ and business necessity defenses should be substantially similar).


26 Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971), quoted in Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); see also Torres v. Wisconsin Dep't of Health & Social Servs., 859 F.2d 1523, 1530 (7th Cir. 1988) (holding that BFOQ must be reasonably necessary to furthering an objective that is the essence of the business), cert. denied, 489
Rather than choose between these two methodologies, courts prior to *Johnson Controls* strained to combine the two approaches, creating a hybrid analysis that tended to preserve the challenged fetal protection measures. The hybrid analysis allowed employers to avoid the onerous task of proving the elements of the BFOQ. Instead, employers had only to demonstrate that fetal hazards were, indeed, transmitted by women and not by men. The advantage that this gave to employers disappeared with the Supreme Court's decision in *Johnson Controls*.

**B. Johnson Controls’ Fetal Protection Policy**

Johnson Controls manufactures batteries using a process that exposes plant employees to lead. Because of that exposure and the reality that many pregnancies are unplanned, the company adopted a fetal protection policy that excluded all fertile women from portions of the plant in which tests had revealed excessive lead levels. The company’s fetal protection policy applied to female applicants for positions and to any female

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28 The two major opinions on the subject were *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543 (11th Cir. 1984) and *Wright v. Olin Corp.*, 697 F.2d 1172 (4th Cir. 1982).

In *Hayes*, a hospital fired a pregnant x-ray technician to protect her fetus from radiation. 726 F.2d at 1546. Meshing impact and treatment analysis, the *Hayes* court permitted the hospital to rebut what the court termed the “presumption that [an] . . . employer’s policy which by its terms applies only to women or pregnant women is facially discriminatory” by showing that the “policy is neutral in the sense that it effectively and equally protects the offspring of all employees.” *Id.* at 1552. But see infra note 44 (discussing the irony of this decision). Similarly, in *Wright*, the Fourth Circuit held that the employer was entitled to assert the business necessity defense, rather than being required to assert the BFOQ defense, in a suit challenging the employer’s “fetal vulnerability” program. 697 F.2d at 1185-86 n.21. The hybrid analysis found acceptance at the Equal Employment Opportunity Commission [hereinafter EEOC], which patterned guidelines on the *Wright-Hayes* analysis, only to have the guidelines dismantled when the Supreme Court decided *Johnson Controls*. See EEOC: *Policy Guidance on Supreme Court’s Johnson Controls Decision*, 8 Lab. Rel. Rep. (BNA) 405:6941, 6943 (June 28, 1991).


employee who sought transfer to a lead-exposed position, regardless of
the intentions of the applicant or employee regarding procreation.\textsuperscript{31}

\textbf{C. The Lower Courts}

A group of employees affected by this policy and a labor union brought
a class action in federal district court to challenge the policy as sex discrimi-
nation under Title VII.\textsuperscript{32} Applying the hybrid impact/treatment analysis, the
district court granted summary judgment for the defendant.\textsuperscript{33} The hybrid
analysis required this result because there was substantial expert opinion
recognizing a significant risk to the unborn from maternal lead exposure
at the levels present in the defendant's workplace.\textsuperscript{34}

On appeal, the Seventh Circuit accepted this hybrid analysis\textsuperscript{35} and
found in addition that the facts of the case also supported the BFOQ
defense.\textsuperscript{36} For BFOQ purposes, the appellate court found the essence of

\textsuperscript{31} Thus, Johnson Controls' policy was broad enough to exclude all fertile women, rather than
excluding only those women who were pregnant or planning pregnancies. The company's rationales
for the breadth of their policy were that lead could harm the fetus between conception and discovery
of the pregnancy, that reduction of blood lead levels once the pregnancy was detected could take a
significant period of time, and that pregnancies are frequently unplanned. 886 F.2d at 878, 882.

\textsuperscript{32} \textit{Johnson Controls}, 111 S. Ct. at 1200. Union plaintiffs were the International Union, United
Automobile, Aerospace and Agricultural Implement Workers of America [hereinafter UAW], and
several UAW local unions. 886 F.2d at 874.

\textsuperscript{33} Id. at 315. The district court followed Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th
Cir. 1984), finding disparate impact analysis appropriate since the established threat of harm through
the mother effectively rebutted a presumption of facial discrimination. 680 F. Supp. at 316. Having
found the presumption rebutted, the court necessarily found that, under \textit{Hayes}, the defendant had met
the requirements of the business necessity defense. \textit{Id.} For a discussion of \textit{Hayes}, see \textit{supra} note 28.

\textsuperscript{34} \textit{Johnson Controls}, 886 F.2d at 884-86 (discussing and adopting hybrid analysis). The appellate
court concluded that it was irrelevant whether a challenged fetal protection policy amounted to
intentional discrimination (thus calling for disparate treatment analysis) or merely resulted in a
disparate impact (thus calling for impact analysis). \textit{Id.} at 886-87. In either event, the business
necessity defense would be available.

All of the dissenting judges argued that the case was strictly disparate treatment, and that the
only available defense was BFOQ. \textit{See id.} at 902 (Cudahy, J., dissenting); \textit{id.} at 904 (Posner, J.,
dissenting); \textit{id.} at 909 (Easterbrook, J., dissenting). The dissenters differed, however, on the question
of whether the BFOQ might ever successfully defend a fetal protection case. Their disagreement
centered on the issue of whether an employer's goal of protecting fetuses can qualify as the essence
of the employer's business, or whether the BFOQ is limited to considerations of the employee's ability
to perform the functions of the job, disregarding any effect on fetal health. \textit{Compare id.} at 904 (Posner,
J., dissenting) \textit{and id.} at 901 (Cudahy, J., dissenting) with \textit{id.} at 912 (Easterbrook, J.,
dissenting). The appellate court's BFOQ analysis was, in effect, an alternative rationale that would
support its holding even if the business necessity defense turned out to be unavailable in such cases.
\textit{Id.} at 893.

\textsuperscript{35} \textit{Id.} at 893 (concluding that Johnson Controls' policy should be upheld as a BFOQ).

\textsuperscript{36} Id. at 893 (concluding that Johnson Controls' policy should be upheld as a BFOQ).
Johnson Controls' business to include the safe manufacture of batteries.\textsuperscript{37} Thus, the goal of protecting fetuses was part of the essence of defendant's, and probably every, business.\textsuperscript{38} The Seventh Circuit also found that Johnson Controls had demonstrated that the absolute exclusion of fertile women was necessary to meet this essential fetal protection goal.\textsuperscript{39}

\textbf{D. Supreme Court Resolution}

The Supreme Court voted unanimously to permit women to decide for themselves whether to risk the fetal hazards present in Johnson Controls' battery plant.\textsuperscript{40} The Court first rejected the hybrid approach that had permitted employers to rely on the business necessity defense.\textsuperscript{41} Instead, the Court concluded that fetal protection plans

\textsuperscript{37} Id. at 896. This decision represented a departure from traditional BFOQ doctrine, which tended to limit the defense to matters pertaining to the worker's ability to perform the job. See Dothard v. Rawlinson, 433 U.S. 321, 332-37 (1977).

\textsuperscript{38} Johnson Controls, 886 F.2d at 896-97; see supra note 27 and accompanying text (explaining BFOQ essence requirement). This conclusion highlights a point of contention with respect to "business essence." How many "essences" can a business have? If the "essence" of Johnson Controls' business is not just battery manufacture, but battery manufacture without damage to the unborn, then what other goals might also be deemed the "essence" of the business? Can we, for example, include in the essence of a company's business the goals of not harming the environment, of not adding to unemployment in times of national economic recession, of not inflaming international relations in volatile situations, and of earning enough money to stay in business? Or, is essence simply the part of the business activities or production that causes people to turn their money over to the business?

\textsuperscript{39} Id. at 897-99. The court explained that women could not be permitted to "brush off" environmental threats to the fetus the way they could ignore similar threats to their own health. The court found support in the fact that the law sometimes forbids parents from refusing blood transfusions for their children, even though the parents would be permitted to refuse such treatment for themselves. Id. at 897. In addition, the court recognized that society is legitimately concerned with risks to unborn children because society may ultimately be responsible for meeting the special needs of children damaged by lead. Id. It is odd that the court found support for distinguishing between the right to harm one's self and the absence of a right to harm one's fetus in the fact that society may be burdened with the costs of damage to the fetus. Society so frequently ends up paying for damage that adults inflict on themselves, as well.

\textsuperscript{40} Johnson Controls, 111 S. Ct. at 1199, 1210. Shortly after the Supreme Court struck down Johnson Controls' policy, women began to apply for the jobs involving lead exposure from which the policy had excluded them. See Florence Estes, \textit{Supreme Friends: The Stars of the Fetal Case Stood Their Ground-Together}, CHI. TRIB., Apr. 28, 1991, § 6, at 3. Supporters of the Johnson Controls decision term it "a resounding victory for women's and workers' rights." Floyd, supra note 30, at 413 (quoting Kary L. Moss, \textit{A Victory for Choice}, 13 NAT'L L.J., April 8, 1991, at 13). Whether for or against the decision, commentators tend to view the case as having cleared the path to the major undertaking of making the workplace safe for all workers, regardless of sex, and free of hazards that could harm the offspring of workers whether through fathers or mothers. See Ellen Goodman, \textit{Equal But Not Safe}, BOSTON GLOBE, Mar. 24, 1991, at A23; Ruth Rosen, \textit{What Feminist Victory in the Court?}, N.Y. TIMES, Apr. 1, 1991, at A17.

\textsuperscript{41} Johnson Controls, 111 S. Ct. at 1203.
constitute intentional, overt, sex discrimination that calls for disparate treatment, not disparate impact, analysis. The Court explained that such plans' open exclusion of women and not men renders the plans antithetical to disparate impact, which seeks to remedy discriminatory effects of facially neutral practices.

Because it was subject to the disparate treatment approach, Johnson Controls' plan could survive challenge only if Johnson Controls could establish the BFOQ defense. Inasmuch as Johnson Controls had not shown that infertility constituted a BFOQ for all female employees, the Court concluded that Johnson Controls had failed to prove the only defense available. Having agreed on these two particulars, however, the justices parted company.

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4 Id. at 1202-04. The Court based its characterization of the discrimination as intentional and overt on the fact that under Johnson Controls' policy, "[f]ertile men, but not fertile women, were given a choice as to whether they wish to risk their reproductive health for a particular job." Id. at 1202. In the Title VII context, to say the employer intentionally discriminates means simply that the employer makes an employment decision based on the sex of the plaintiff. The employer's action need not be motivated by any malice toward the plaintiff or toward women generally, but only by the simple fact of the plaintiff's sex. See Goodman v. Lukens Steel Co., 482 U.S. 656, 668-69 (1987).

5 Johnson Controls, 111 S. Ct. at 1202-04 (analyzing fetal protection plans under disparate treatment analysis because such plans amount to facial discrimination). Even without the PDA, traditional Title VII doctrine would suggest that fetal protection policies are facially discriminatory. The Supreme Court has established that employers that exclude only a subset of women, rather than all women, are nevertheless guilty of discrimination. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (holding that a policy of hiring men, but not women, with preschool-age children violates Title VII). As long as a policy excludes fertile women, and not fertile men, then the policy constitutes overt sex discrimination. The enactment of the PDA simply confirms that such policies discriminate on their face. See 42 U.S.C. § 2000e(k) (1981).

4 Because fetal protection measures constitute facial discrimination, and thus clearly are subject to disparate treatment analysis, the ruling in Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984), was particularly ironic. See supra note 28. The Hayes court permitted the defendant to avoid treatment analysis with a mere showing that the policy, though facially discriminatory, had a "neutral impact" on the offspring of men and women. Hayes, 726 F.2d at 1548. In both Hayes and Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982), the disparate impact analysis was distorted to accommodate fetal protection because the courts believed that disparate treatment analysis would yield unfair decisions for the plaintiffs. See supra notes 25 & 28. The courts concluded that the defendants would fail on a straight BFOQ defense because the defendants could not prove that pregnancy or fertility interfered with women's ability to perform their work. See Hayes, 726 F.2d at 1542; Wright, 697 F.2d at 1185.

4 Johnson Controls, 111 S. Ct. at 1207. The Court explained that safety of fetuses could support a BFOQ only if fetal safety were "indispensable to the particular business at issue" in the same way that customer safety is indispensable to a business. Id. at 1205. Johnson Controls, moreover, could not have argued that the fetus constituted part of the employee so that employee safety would require exclusion because an employee may usually elect to waive her own interest in working in a hazard-free environment. See Dothard v. Rawlinson, 433 U.S. 321, 335 (1977).
Although a unanimous decision, Johnson Controls was unanimous only on the narrow facts of the case; that is, all of the justices agreed that a fetal protection plan predicated on an employer's interest in fetal health violated Title VII. The main points of disagreement among the justices concerned where the decision left employers with respect to the fetal injury quandary and the two potential escape routes. First, the justices disagreed on whether employers forced by federal law to expose fertile women to unavoidable fetal hazards could invoke the doctrine of federal preemption in order to escape state tort liability to the fetus. Second, the justices differed on whether the prospect of fetal tort liability could support a Title VII BFOQ even though the altruistic interest in fetal health could not.

The Court’s failure to agree is of no consequence, of course, if the majority’s holding can be considered to have encompassed decisions on these issues. Although the facts of the case presented neither the preemption issue nor the cost BFOQ issue, Justice Blackmun’s opinion for the majority made predictions on both. Justice Blackmun predicted that Title VII would preempt tort law, so that employers that complied with the Johnson Controls holding would not be liable for fetal injury. He also predicted that employers that violate

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41 111 S. Ct. at 1209-10; id. at 1214-15 (White J., concurring); id. at 1216-17 (Scalia, J., concurring).

42 See infra notes 49-50 and accompanying text.

43 Although some commentators suggest that the Court in Johnson Controls struck down all fetal protection plans, see, e.g., Women Workers and Benign Bias, CHRISTIAN SCIENCE MONITOR, Mar. 25, 1991, at 20, in fact, Justice Blackmun stated that the issue of cost justification, as opposed to fetal health justifications, was not before the Court, 111 S. Ct. at 1209; see also id. at 1216 (Scalia, J., concurring) (acknowledging that Johnson Controls did not assert a cost-based BFOQ). See supra note 8 and accompanying text.

44 The majority’s statements regarding preemption are more clearly dicta than are its statements on the BFOQ. See Johnson Controls, 111 S. Ct. at 1208, 1209; id. at 1211 (White, J., concurring); id. at 1216 (Scalia, J., concurring); see also Befort, supra note 24, at 50 (noting that the “majority [in Johnson Controls] suggested, although without deciding, that compliance with Title VII may preempt liability under state tort laws”). Blackmun’s statement regarding preemption was clearly dicta since Johnson Controls was a Title VII suit and, therefore, preemption was not even a potential defense.

45 Johnson Controls, 111 S. Ct. at 1208-09 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)). Justice Blackmun surmised that even if Title VII does not preempt state tort law, companies would not be at risk of liability for fetal injuries as long as the companies gave adequate warnings and were not negligent. Id. at 1208. Justice Blackmun did not discuss state law that imposes strict liability, although Justice White opined that strict liability was a possibility. Id. at 1211 (White, J., concurring) (citing RESTATEMENT (SECOND) OF TORTS § 869 cmt. b (1979)). But see International Union, UAW v. Johnson Controls, 886 F.2d 871, 914 (7th Cir. 1989) (en banc) (Easterbrook, J., dissenting) (“[S]o far as I know no child has recovered a judgment on account of parents’ occupational exposure to lead.”); Joanne J. Ervin, Title VII: Misapplication of the Business Necessity Defense, 15 U. DAYTON L. REV. 241, 280-84 (1990) (arguing that the possibility of fetal
Johnson Controls in order to avert fetal injuries will be able to predicate a BFOQ defense on the need to avoid the costs of tort liability. Justice Blackmun's statements, whether or not they are dicta, are likely to guide lower courts confronting these issues. In fact, they have already led some commentators to conclude that the BFOQ is entirely unavailable in the fetal protection context. Nevertheless, as explained below, the BFOQ defense may sometimes hold more promise for employers than the federal preemption doctrine.

II. WHETHER TITLE VII SHOULD PREEMPT STATE FETAL TORT LAW

When state law and federal law conflict, creating no-win situations for those governed by both laws, the state law becomes a prime target for

tort liability is remote).

51 Johnson Controls, 111 S. Ct. at 1209.

52 The concurring justices took issue with both of these conclusions. Justice White, joined by Justice Kennedy and Chief Justice Rehnquist, believed that Johnson Controls might be able to show that it would be liable in tort to the injured offspring of female employees, even if such liability could be predicated only on negligence, rather than strict liability. Id. at 1211 (White, J., concurring). In addition, Justice White argued that warnings to the parents could not absolve the employer of tort liability to the offspring. Id. The concurring justices also argued that Title VII would not preempt the state tort laws giving rise to such liability. Justice Scalia suggested that the Title VII BFOQ defense may be intended to accommodate state tort law. Id. at 1216 (Scalia, J., concurring). Under this view, rather than Title VII preempts state tort liability, the BFOQ defense would become operative in the face of such liability. Id. Title VII, rather than tort law, would give way. Id. Both Justice White and Justice Scalia concurred in the result of the case because Johnson Controls had not offered a cost-justification defense. Id. at 1214-15 (White, J., concurring); id. at 1216 (Scalia, J., concurring).

53 See, e.g., Postol & Adelman, supra note 10, at 37; see supra note 48. The case is likely to guide courts on both the BFOQ and the preemption issue. Thus, without deciding the issue, the Johnson Controls case plants a seed that may grow to full-blown preemption when the issue is ripe. Regardless of what result a full analysis under traditional preemption doctrine would yield, there is now the possibility that lower courts will rely on Justice Blackmun's dicta in Johnson Controls as controlling the preemption issue.

the federal preemption doctrine. 55 Federal law that preempts state law effectively renders the state law inoperative. 56 If an employer complies with the federal law requiring inclusion of women in a workplace that contains fetal hazards, and if state law renders the employer liable for resultant fetal injury, the employer can escape tort liability only if the federal law preempts the state law. 57 As argued below, and despite Justice Blackmun's predictions to the contrary, state tort law imposing liability for fetal harm may withstand the preemption challenge. 58

A. Traditional Preemption Doctrine

In theory at least, the preemption doctrine allows federal law to supplant state law only if Congress intends a preemptive effect. 59 Absent

55 See Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374, 2383 (1992). This doctrine effectuates the Supremacy Clause, which provides:
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

56 See Cipollone, 112 S. Ct. at 2617 (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 16-17 (1824). The preemption issue may arise in either of two procedural postures. Those challenging the state law (or other exercise of state power) may bring a suit seeking an injunction against operation of the allegedly preempted state law. See, e.g., California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 577, 588-89 (1987) (holding that a plaintiff who mounts a facial challenge to state statute must demonstrate that there are no possible constructions of the act that would not warrant preemption). In the alternative, the issue may be raised as a defense when suit is brought pursuant to the state law alleged to be preempted. See, e.g., Silkwood, 464 U.S. at 246.

57 In Johnson Controls, Justice Blackmun relied upon the potential for such preemption when he rejected the idea that the BFOQ might be predicated upon tort liability to those who were damaged as fetuses. 111 S. Ct. at 1208-09.

58 Although the preemption inquiry turns on the particular facts of the case, see City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973); Elaine M. Martin, Note, The Burger Court and Preemption Doctrine: Federalism in the Balance, 60 NOTRE DAME L. REV. 1233, 1234 (1985), it is, of course, necessary to rely on generalities in order to make predictions about the application of preemption doctrine to state fetal tort laws.

some demonstrable evidence of intent, Congress is presumed not to have intended such an effect. This presumption against preemption is particularly strong where the state regulation is an exercise of the state's police powers.

There are three avenues by which Congress can be found to have intended a preemptive effect. One of these is the rarely employed


* See Maryland v. Louisiana, 451 U.S. 725, 746 (1981) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973) (In preemption analysis, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted'.") (quoting Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963)).

4 See Cipollone, 112 S. Ct. at 2617; Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 206 (1983); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978); Head v. New Mexico Bd. of Examiners, 374 U.S. 424, 428-29 (1963) (citations omitted). Although some cases suggest that the presumption against preemption of a state's exercise of police power operates primarily in the field preemption context, see infra notes 65-68 and accompanying text (explaining field preemption), other cases suggest that the presumption applies to all types of preemption. Compare Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (finding an overriding presumption for all types of preemption that courts should assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress") and Fidelity Fed. Sav. & Loan Ass’n v. De la Cuesta, 458 U.S. 141, 153 (1982) ("[The] relative importance to the State of its own law is not material when there is conflict with a valid federal law.") (quoting Free v. Bland, 369 U.S. 663, 666 (1962)) with Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (finding, in cases of field preemption, a presumption in favor of state laws in areas traditionally regulated by the states). This presumption is, in turn, bolstered when the exercise of police power focuses particularly on issues of health and safety, and when the state law provides a remedy not duplicative of federal law. See William L. Lynch, Note, A Framework for Preemption Analysis, 88 YALE L.J. 363, 381 (1978) (recognizing that a mechanism within the federal law which provides the same protection as the state law at issue is a significant factor in support of preempting the state law) (citations omitted); cf. Burbank v. Lockheed Air Terminal, Inc. 411 U.S. 624, 629-32, 638-39 (1973) (finding preemption of state law acceptable where federal law protects the interests in question).

4 E.g., International Paper Co. v. Ouellette, 479 U.S. 481, 491-92 (1987); Michigan Canns & Feeders Ass’n, Inc. v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984). The First Circuit has cautioned that while "[t]he different forms of preemption are usually summarized by neat citations to familiar Supreme Court Authority...these ready citations list, but do not describe, and catalog, but do not define, any real distinctions among the various types of preemption." Palmer v. Liggett Group, Inc., 825 F.2d 620, 624 (1st Cir. 1987); see also English v. General Electric Co., 496 U.S. 72, 86 n.5 (1990) (finding the preemption categories not absolute). But see Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 444 (1960) ("Although verbal generalizations do not of their own motion decide concrete cases, it is nevertheless within the framework of these basic principles that the issue...[of preemption] must be determined."); Dion W. Hayes, Note, Emasculating State Environmental Enforcement: The Supreme Court's Selective Adoption of the
device of express legislative language. Congress may expressly preempt an entire field of regulatory activity or a specified portion thereof. Title VII does not contain such express preemption of state law, although it does contain what Justice Scalia has termed "antipre-emption" provisions, which are discussed below.

The other two methods of finding a congressional intention to preempt are by implication. Implied preemption occurs as either "field preemption" or "conflict preemption." Federal law implicitly occupies the field when it so pervasively regulates an area that there is, in effect, "no room for the states to supplement it," or when it regulates an area of such dominant federal interest that the states are simply not permitted to.

Preemption Doctrine, 16 WM. & MARY J. ENVTL. L. 30, 32, 36 (1991) (noting that although the three categories of preemption are not rigidly distinct, insufficient evidence of one type of preemption cannot combine with insufficient evidence of another type of preemption to effectuate preemption).

See, e.g., Cipollone, 112 S. Ct. at 2617 (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); see also Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96 (1983) (discussing "the scope of several provisions of ERISA that speak expressly to the question of pre-emption"). It is unnecessary for Congress to provide statutorily that a piece of federal legislation will preempt conflicting state laws because such federal law preempts the state law by operation of the Supremacy Clause, without reference to congressional intent underlying the statute. See U.S. CONST. art. VI., cl. 2. A finding of such actual conflict, then, dispenses with the need to inquire into congressional intent. See Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963); Wolfson, supra note 59, at 88. But cf. S. Candice Hoke, Preemption Pathologies and Civic Republican Values, 71 B.U. L. REV. 685, 726 (1991) (recognizing a judicial trend of focusing on constitutional preemption under the Supremacy Clause instead of statutory conflict). On the other hand, when preemption is effectuated by agency regulation, rather than statute, the Supreme Court has voiced an expectation that the agency "declare any intention to pre-empt state law with some specificity." California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 583 (1987) (citing Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 718 (1985)).

California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 295 (1987) (Scalia, J., concurring). Such provisions provide either that the statute is not intended to have a preemptive effect, or that the scope of any intended preemption is limited in a specified way. See, e.g., Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374, 2382 (1992) (recognizing limitations on preemption in the Occupational Safety and Health Administration's savings clause). There are two provisions in the 1964 Civil Rights Act that expressly pertain to limitations on preemption. See infra notes 72-92 and accompanying text. Congress' enactment of such provisions delineating the preemptive effect of its laws has not eliminated the Supreme Court's role of applying preemption doctrine to construe such provisions. See Gade, 112 S. Ct. at 238; Guerra, 479 U.S. at 282-90.


See, e.g., Gade, 112 S. Ct. at 2383 (citing Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))). Throughout the remainder of this Article "field preemption" is used to denote "implied field preemption," rather than express field preemption, which is denominated as "express."
act within the area. If the federal government is deemed to have occupied a given field, then the test of whether federal law in that area preempts a particular state law is whether the state law regulates a matter already regulated by federal law.

The second type of implied preemption, "conflict preemption," is the only relevant category for purposes of the Title VII/fetal tort inquiry. Preemptive conflict may take one of two forms. Such conflict occurs either when it is physically impossible for one to comply with both federal and state law at the same time ("impossibility preemption"), or when "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress" ("obstacle preemption").

...
Two provisions of the 1964 Civil Rights Act focus specifically on the Act’s preemptive scope, and so potentially govern Title VII’s impossibility and obstacle preemption capabilities. One of these is located in Title VII itself,\textsuperscript{72} and the other is in Title XI of the Act.\textsuperscript{73} There is disagreement among the Justices of the Supreme Court, however, on the question of whether Title VII preemption is covered exclusively by the Title VII provision or whether the Title XI provision applies as well.\textsuperscript{74}

B. Purpose and Scope of Sections 708 and 1104

Section 708 of Title VII and section 1104 of Title XI contain preemption “saving clauses”\textsuperscript{75} that are effectively identical in all but one pertinent respect.\textsuperscript{76} Both legislatively eliminate the potential for field

\footnotesize
Tobacco & Firearms, 779 F.2d 1407, 1412 (9th Cir.) (suggesting that the query is whether compliance with federal law would obstruct accomplishment of the purposes of state law), \textit{cert. denied}, 476 U.S. 1111 (1986). The Supreme Court first articulated the “obstacle” preemption test in the case of Hines v. Davidowitz, 312 U.S. 52, 67 n.11 (1941), as a way of generalizing what is required for preemption of all sorts. Subsequent courts have sometimes adhered to the \textit{Hines} articulation of this second type of conflict preemption as simply another way of phrasing the field and impossibility inquiries. \textit{See}, e.g., Perez v. Campbell, 402 U.S. 637, 649 (1971) (citing \textit{Hines}, 312 U.S. at 67); Securities Indus. Ass’n v. Connolly, 883 F.2d 1114, 1118 (1st Cir. 1989), \textit{cert. denied}, 495 U.S. 956 (1990). In addition to the “obstacle” label, such conflict has been referred to variously as “impairment,” \textit{Hoke}, supra note 63, at 741 n.257, “hindrance,” \textit{Lynch}, supra note 61, at 369, and “frustration,” \textit{Rothschild}, supra note 70, at 857. This Article adheres to the “obstacle” label, borrowing from the \textit{Hines} language.


\textsuperscript{73} Id. § 2000h-4.

\textsuperscript{74} \textit{See infra} notes 87-96 and accompanying text.


\textsuperscript{76} Section 708 states:

\begin{quote}
Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.
\end{quote}


Section 1104 provides:

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

preemption.\textsuperscript{77} Both preserve the potential for impossibility preemption. The difference is that section 1104 of Title XI permits obstacle preemption, and section 708 of Title VII does not.\textsuperscript{78}

The Supreme Court debated the applicability of section 1104 to Title VII in \textit{California Federal Savings & Loan v. Guerra}.\textsuperscript{79} In \textit{Guerra}, the Supreme Court held that Title VII's Pregnancy Discrimination Act, or PDA, did not preempt a California law requiring that employers provide certain benefits to pregnant employees.\textsuperscript{80} The employer argued that the state's pregnancy benefit requirement conflicted with the PDA requirement that pregnant workers receive the same treatment as workers disabled by conditions other than pregnancy.\textsuperscript{81} A majority of the Court considered this preemption issue under section 1104, as well as under section 708.\textsuperscript{82}

Initially applying an impossibility preemption analysis, the \textit{Guerra} Court concluded that the state law did not require any act that would violate the PDA.\textsuperscript{83} This result followed directly from the Court's construction of the PDA. The Court announced that the PDA permits employers to provide pregnant workers with benefits superior to those provided to workers disabled by conditions other than pregnancy.\textsuperscript{84} Even accepting the defendant's argument that the PDA prohibits disparity in benefits, the Court concluded that impossibility preemption would not apply.\textsuperscript{85} In the majority's view, the California law simply required employers to provide certain minimum benefits to workers disabled by pregnancy, but did not impose a maximum limit on what could be given to nonpregnant workers.\textsuperscript{86} Thus, there was nothing to keep employers

\textsuperscript{77} Needless to say, by excluding such implied preemption, Congress made clear that it was not engaged in express preemption either.

\textsuperscript{78} Because Title VII's preemption provision was aimed at preserving state fair employment laws, rather than state tort laws, there is a question of whether it should limit preemption of tort laws at all. See \textit{Guerra}, 479 U.S. at 282-83.

\textsuperscript{79} Id. at 281-82.

\textsuperscript{80} Id. at 292.

\textsuperscript{81} Id. at 278-79.

\textsuperscript{82} Id. at 282.

\textsuperscript{83} Id. at 290.

\textsuperscript{84} Id. at 284. A total of five justices agreed on this point. Joining in Justice Marshall's opinion for the Court were Justices Brennan, Blackmun and O'Connor. Id. at 273. Justice Stevens agreed on this aspect of the Court's opinion. Id. at 292 (Stevens, J., concurring).

\textsuperscript{85} Id. at 290-91. Here, Justice Stevens agreed with Justice Marshall's opinion, id. at 295 (Stevens, J., concurring), and Justice Scalia found it unnecessary to reach the question of whether conflict would exist if the PDA imposed a ceiling on pregnancy benefits, id. at 296 (Scalia, J., concurring).

\textsuperscript{86} Id. at 290-92. The majority was not deterred in this conclusion by the fact that the employer might encounter significant cost requirements in the process of elevating the benefit levels of all its employees to the benefit level of pregnant workers. This burden did not demonstrate a preemptive conflict. See id. at 291 (relying on petitioners' concession at oral argument "that compliance with both
from providing nonpregnant workers the same level of benefits given to pregnant workers. Hence, impossibility preemption would not result.

Having found that the PDA did not preempt the state law under impossibility analysis, the Guerra Court nevertheless went on to apply obstacle preemption analysis, as embodied in section 1104. The Court’s analysis on this issue was brief. It simply found that the challenged California law had a common purpose with Title VII, and did not stand as an obstacle to accomplishment of the purposes of Title VII. Guerra thus assessed both types of conflict preemption and concluded that the California statute manifested neither.

In a concurring opinion, Justice Scalia echoed the majority’s view that California law did not require a violation of the PDA, and thus concluded that preemption was not a possibility. Unlike the majority, however, Justice Scalia viewed section 708 as the only preemption provision relevant to the question of Title VII’s preemptive scope. Because section 708 more narrowly restricts the scope of Title VII preemption than section 1104 restricts preemption for the entire Act, applying section 1104 would have the effect of permitting forms of preemption forbidden by the very terms of Title VII.
Although disagreement on the question of whether Title VII is capable of obstacle preemption may seem to confuse the Title VII/fetal tort issue, the importance of the disagreement in this context is more apparent than real. In theory, analysis of the Title VII/fetal tort preemption question under the impossibility doctrine is far less likely to yield preemption than is analysis under the obstacle doctrine. Situations where it is physically impossible to comply with the two laws are less likely to occur than situations where the state law merely stands as an obstacle to the accomplishment of federal purpose. Nevertheless, in the Title VII/fetal tort context, the two approaches will prove to be largely indistinguishable. Under either approach, the chances of preemption appear far less likely than Justice Blackmun surmised in Johnson Controls.

C. Conflict Preemption

It is clear that there is some tension between the Title VII Johnson Controls decision on the one hand and state tort law liability for fetal harm on the other. The state law exerts pressure to violate the federal law because, by violating the federal law, an employer could avert state tort liability. What is less clear is whether that tension is sufficient to result in preemption.

Impossibility preemption analysis differs from obstacle preemption analysis with respect to how tension is measured. Impossibility analysis looks for mutual exclusivity of operation in the two laws. Obstacle analysis engages in a more ephemeral assessment of statutory goals. In his treatise American Constitutional Law, Professor Laurence Tribe agrees with Justice Scalia that the "antipreemption" provision of Title VII should not be read to permit preemption where there is no facial conflict between the federal and state laws. Laurence Tribe, American Constitutional Law 482-83 n.8 (2d ed. 1988).

See infra notes 98-149 and accompanying text (discussing strictures of impossibility and obstacle preemption).

See infra notes 141-47 and accompanying text (discussing similarity between the two conflict preemption tests in the Title VII/fetal tort context).


The Johnson Controls decision should be read to require employers to make the workplace as safe as possible for all employees and their offspring. See supra note 40. The preemption issue should arise only where it is impossible for the employer to make the workplace safe for the offspring of fertile women. See supra note 19.


"Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two step process of first ascertaining the construction of the two statutes and then determining the constitutional question [of] whether they are in conflict." Perez v. Campbell, 402 U.S. 637, 644 (1971).
the Title VII/fetal tort context, however, there is no significant distinc-
tion.100

1. Impossibility Preemption

Because section 1104, which permits obstacle preemption,101 may be inapplicable to Title VII, that Title's preemptive scope arguably is confined to impossibility preemption.102 Thus, only if Title VII requires one action and state tort law requires an incompatible action, so that the employer must literally choose between the two required actions, is federal preemption of state law assured.103 Such true impossibility is rare inasmuch as courts are under a duty to reconcile the two laws if possible.104

Defendants advancing the impossibility preemption argument in the Title VII/fetal tort situation are likely to lose. If the analysis turns on the intended mandates of the state law, courts will find these mandates to be entirely consistent with inclusion of women in the workplace. Only when the analysis turns away from the intended requirements of the state law, focusing instead on the unintended, incidental, effects of the state law, is preemption conceivable. Yet, as explained below, permitting the analysis to reach into such incidental effects does not comport with the reconciliation requirement.

Impossibility preemption analysis begins with the task of discerning exactly what the two laws require: what act does the state fetal tort law

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100 See infra notes 141-47 and accompanying text.
102 See supra notes 90-92 and accompanying text.
104 The impossibility preemption cases are sometimes lumped together with other cases of "explicit conflict." See Wiggins, supra note 67, at 43. The analysis in this Article categorizes the explicit conflicts, such as that in Ray v. Atlantic Richfield Co., 435 U.S. 151, 159 (1978), as express preemption, and therefore, does not analyze them.
105 See California Coastal Comm'n v. Granite Rock Co., 480 U.S. 578, 586 (1987) (construing state law to allow consistency with the federal law); California v. Zook, 336 U.S. 725, 733 (1949) ("it 'must be clear that the federal provisions are inconsistent with those of the state to justify the thwarting of state regulation") (quoting Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 157-59 (1942)); cf. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 446 (1960) (discussing duty not to seek out conflicts between state and federal regulations where none exists) (citations omitted); see also James A. Riddle, Note, Preemption of Reconcilable State Regulation: Federal Benefit Schemes v. State Marital Property Law, 54 HASTINGS L.J. 685, 691-92 & n.51 (1983) (acknowledging that impossibility preemption should be found only when the federal and state law are "irreconcilable").
require the employer to do, and is this compelled deed capable of being done at the same time the employer is performing all acts required by Title VII?\(^{105}\) The *Johnson Controls* decision plainly sets forth the requirements of the federal law in this context: namely, the inclusion of women without regard to their fertility.\(^{106}\) Identifying the state law requirements is more complex.

It is physically impossible to comply with both Title VII and state tort law only if the tort law is construed to require employers to exclude from the workplace women whose inclusion is guaranteed by Title VII.\(^{107}\) A decision about whether state law requires exclusion of such women depends on whether the decision maker is constrained by the direct mandates of the state law or is instead free to consider the practical results of the state law's operation.\(^{108}\) The state law's direct mandates are different from the state law's intended, but unexpressed, mandates, which, in turn, may differ from the state law's unintended, but inevitable, coercive effect.

**a. State Law's Direct Mandates**

If only direct mandates are relevant,\(^{109}\) then a facially "benign" purpose can save a state law that, in operation, effectuates a violation of federal law.\(^{110}\) State fetal tort laws do not directly compel employers

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\(^{105}\) See Perez v. Campbell, 402 U.S. 637, 644 (1971). Needless to say, "act" is used here to encompass both the notion of required action and required forbearance from action.


\(^{107}\) Whether pressures imposed by tort-damages awards are considered under impossibility or obstacle analysis could also make a difference with regard to the police power presumption. For a discussion of the police power presumption, see supra note 61 and accompanying text. The presumption against federal preemption of state laws protecting health and safety arguably applies in obstacle, but not impossibility cases. See Ridgway v. Ridgway, 454 U.S. 46, 54 (1981) (holding that "'[t]he relative importance to the State of its own law is not material when there is a[n] [impossibility] conflict with a valid federal law"") (quoting Free v. Bland, 369 U.S. 663, 666 (1962)); cf. Lynch, supra note 61, at 364 (arguing that preemption of any sort is unlikely when the challenged state law protects vital interests within the state's borders—particularly state laws protecting against physical injury within the state's borders).

\(^{108}\) It has been suggested that impossibility conflict preemption should occur only when the two laws' conflicting requirements are express. See Lynch, supra note 61, at 366. No state law currently in effect expressly requires exclusion of fertile women in order to avoid fetal injury.

\(^{109}\) See Wiggins, supra note 67, at 43 (equating impossibility conflict with "explicit conflict").

\(^{110}\) The discussion in the text focuses on the purposes of the state law in the sense that state law is designed to, or does in fact, effectuate a certain end. This should be distinguished from two other broader contexts in which purposes are considered in preemption doctrine. One is the context of field preemption, in which a state law's operation upon the same subject matter that the federal law operates upon has the effect of preemping the state law. See supra notes 65-68 and accompanying text. The other is in the context of obstacle preemption, in which the Supreme Court has stressed that neither consistency nor identity of the federal and state goals is sufficient to save a state law that
either to avoid all fetal injury or to exclude women in an effort to avoid such injury. For the most part, the common law judgments that comprise state fetal tort law simply require that employers pay damages based on injuries to the fetus once the harm has been done.\(^\text{111}\) Hence, compliance with the state law, by paying damages, does not render compliance with Title VII impossible.\(^\text{112}\) If the inquiry focuses only on the acts that the state law directly requires, then the state fetal tort law in no way conflicts with federal anti-discrimination law, and therefore cannot be preempted.

**b. State Law's Indirect Mandates**

**i. Damage Awards as Coercion**

Although a state law does not directly mandate violation of the federal law, it may nevertheless indirectly mandate a violation.\(^\text{113}\) The damages that fetal tort law imposes may have a coercive effect, whether intentionally or inadvertently.\(^\text{114}\) Damages arguably compel whatever

\(^{111}\) The universal rule is that a child born alive may maintain a tort action to recover damages for prenatal injuries. See McElveen, supra note 11, at 563; see also Bolen v. Bolen, 409 F. Supp. 1371, 1372 (W.D. Va. 1975) (summarizing the current status of the law regarding a child's right to recover for prenatal injuries) (quoting Ronald F. Chase, Annotation, Liability for Prenatal Injuries, 40 A.L.R.3d 1222, 1228 (1971)).

\(^{112}\) The concept of damages as regulation has often arisen in the field preemption context. If Congress has preempted an area, then the inquiry is whether the states are attempting to regulate a subject within that area. In the impossibility preemption context, the damages as regulation inquiry focuses not on whether the state is regulating within a federally preempted field, but rather whether the state is requiring the defendant to act in a manner inconsistent with behavior required by federal legal duty impose requirements or prohibitions).
behavior would enable the employer to avoid further imposition of such damages.\textsuperscript{115}

Several Supreme Court cases that declined to preempt state laws' imposition of damages for activities also covered by federal law involve situations fundamentally different from the Title VII/fetal tort scenario.\textsuperscript{116} The Supreme Court decisions in question upheld state laws that focus on the same subject matter as the federal law where it is possible to comply with both laws at once.\textsuperscript{117} The state laws in such cases simply impose heightened standards for behavior already regulated by federal law.\textsuperscript{118} This relationship between the federal and state law does

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\textsuperscript{115} See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (finding an obligation to pay compensation to be a potent form of regulation); \textit{cf.} Silkwood, 464 U.S. at 276 (Powell, J., dissenting) (arguing that punitive damages are regulatory). But see Cipollone, 112 S. Ct. at 2628-29 (Blackmun, J., concurring in part and dissenting in part) (arguing that state common law damages do not amount to direct regulation); Schwartz v. Volvo N. Am. Corp., 554 So. 2d 927, 930 n.30 (Ala. 1989) (Hornsby, J., concurring in part and dissenting in part) (rejecting view that common law damages effectively regulate).

\textsuperscript{116} See, e.g., English v. General Electric Co., 496 U.S. 72, 90 (1990) (holding that an employee could recover in tort for employer's retaliatory response to employee's reporting of employer's violation of federal nuclear safety standards); Silkwood, 464 U.S. at 249-58 (allowing tort recovery for plutonium contamination of employee even though federal law occupied the nuclear energy field including all safety aspects of plant operation). Similarly, in Wood v. General Motors Corp., 673 F. Supp. 1108 (D. Mass. 1987), the court held that tort damages were not preempted by federal law because the defendant could simply make an economic choice to compensate future victims and continue in its tortious activity. \textit{Id.} at 1113.

\textsuperscript{117} See International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1208-09 (1991) (distinguishing between state laws that expand upon the requirements of the federal laws and state laws that make compliance with federal law impossible).

\textsuperscript{118} See \textit{English}, 496 U.S. at 88-90 (distinguishing between state tort law allowing for recovery for nuclear injury and federal law pertaining to nuclear safety); \textit{Silkwood}, 464 U.S. at 249-58 (same); \textit{see also} Kersee v. Chevron Chem. Co., 736 F.2d 1529, 1542 (D.C. Cir. 1984) ("mere compliance with [federal or state] regulatory labeling requirements does not preclude a [jury from] finding that additional warnings should have been given"); Shipp v. General Motors Corp., 750 F.2d 418, 421 (5th Cir. 1985) (compliance with federal automobile safety standards does not exempt manufacturer from tort liability); Schwartz v. Volvo N. Am. Corp., 554 So. 2d 927, 939 (Ala. 1989) (Hornsby, J., concurring in part and dissenting in part) (citing numerous cases for the proposition that compliance with federal safety standards is not a defense to state tort claims against automobile manufacturers).
not make it impossible for an individual to comply with both laws at once.\textsuperscript{119}

In the Title VII/fetal tort context, by contrast, the two laws pull in opposite directions. Rather than simply imposing a heightened standard to encourage exactly the behavior the federal law mandates, state tort law tends to encourage employers to engage in precisely the behavior that the federal law forbids. In this setting, damages can create an impossibility conflict if they exert sufficient pressure on the employer to cause the exclusion of women from the workplace. The question is: how much pressure is required? The probable answer is that there must be sufficient pressure on the employer to effectuate the feared exclusion. As explained below, the hypothetical threat of a Title VII violation will not be enough.

\textit{ii. Intended Coercion}

If the analysis focuses on acts that state law does not expressly require, but that it nevertheless intentionally coerces, the potential for impossibility preemption is greater than where the analysis merely focuses on the express mandates of the state law.\textsuperscript{120} Even considering these unexpressed, but intended, mandates of fetal tort law, however, a preemption result is unlikely. Whether the state tort law rests on theories of negligence or strict liability, neither presents truly fertile grounds for preemption.

If negligence law is viewed as coercive, its goal is to cause the employer to take reasonable precautions to avert fetal injury. Negligence law thus may effectively coerce the employer to exclude women from the workplace, if exclusion is the only way that the employer can avoid fetal injury.\textsuperscript{121} The "reasonable precautions" that negligence law requires, however, should not be deemed to include expulsion of women from the workplace. Such expulsion is not a legally available option, and thus is not

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\textsuperscript{119} See Silkwood, 464 U.S. at 256.

\textsuperscript{120} Professor Wiggins has suggested that the impossibility category of preemption should actually focus on whether the laws are facially in conflict, rather than (or in addition to) on whether it is impossible to comply with both. See Wiggins, supra note 67, at 43.

\textsuperscript{121} This Article focuses only on the plight of the employer who is unable to avert injury by the use of mechanisms short of excluding women. See supra note 19.
An employer that takes all legally available precautions should, in principle, not be found liable under a negligence theory. If negligence law does not intend to coerce exclusion of women, it is even more clear that strict liability law is not intended to effectuate this result. On the contrary, a major purpose of strict liability law is the allocation of loss, rather than modification of tortfeasor behavior. State strict liability law thus does not intentionally require action in contravention of Title VII. Like the state law's direct mandates, the state law's unexpressed, but intended, requirements do not coerce acts in violation of Title VII. Whether predicated upon negligence or strict liability, the state tort law is "benign" in intent. Consequently, impossibility preemption is unlikely.

iii. Unintended Coercion

The third way of looking at state law requirements is to focus on the inadvertent impact of the state law. State law may be read to require not just the act that it mandates directly (payment of damages) and the act that it intentionally, but implicitly, requires (e.g., taking reasonable precautions to avoid fetal injury), but also any act that will inevitably, although inadvertently, follow from the direct and implied mandates. Because fetal tort law penalizes the employer for injuries that could be

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122 If the state negligence law can be read to intend that the employer exclude women, even though such exclusion violates the federal law, then the employer could avoid liability through the preemption doctrine. See supra note 70 and accompanying text. Likewise, a state law that requires the defendant to violate federal law is in direct conflict with the federal law, and thus preempted. See supra note 55 and accompanying text.

123 International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1208 (1991) (arguing that, absent negligence, an employer that warns employees and complies with OSHA regulations should not be liable). However, where such an employer is held liable, the coercive effect of the state law is to facilitate violation of Title VII. If, on the other hand, precautions other than exclusion of women are available and the employer fails to take them, then liability results from the employer's own dereliction of duty, rather than from the employer's compliance with Title VII.

124 Likewise, finding no preemption is consistent with the whole notion of strict liability. The strict liability rationale is that the employer finds it profitable enough to engage in this particularly dangerous business and is, therefore, the proper party to bear the cost of damage done by the business. Restatement (Second) of Torts § 519 cmt. d (1979) (strict liability founded upon policy imposing on one who, for his own purposes, creates abnormal risks of harm to his neighbors). The negligence rationale is that, if the workplace cannot be made safe and fertile women must be admitted, then it is unfair to subject the employer to lawsuits based on injuries the employer could not avoid. Restatement (Second) of Torts § 282 cmt. f (1979) (negligence does not include acts "which, although done with every precaution ... practicable ... involve an irreducible minimum of danger to others").
avoided if the employer were to exclude women, arguably tort law unintentionally requires the exclusion of such women. A state tort law that applies such "irresistible" pressure to exclude women arguably is preempted in the same manner as a state statute that by its terms or intent requires exclusion of women. The inquiry therefore becomes whether the state tort liability for fetal harm is likely to create such irresistible pressure to violate Title VII.

Given the context in which the irresistible pressure argument is likely to arise, a finding of preemption seems improbable. The most likely occasion for the preemption argument is in a tort suit predicated on fetal harm, in which the employer attempts to defend with the argument that Title VII forbade the only expedient that could have averted the injury: namely, exclusion of the mother. When this matter is before the court, the defendant will not actually have been pushed over the theoretical edge into violating Title VII, for its exposure to tort liability will result precisely from compliance with Title VII. Instead, the defending employer will argue that, if the court does not excuse the employer from the strictures of the state tort law in this case, the financial pressures of potential tort liability will be so severe as to compel the employer (and perhaps other employers) to violate Title VII to avoid the prospect of repeated liability. Only when extant employer liability history demonstrates that the state tort law has actually caused Title VII violations are courts likely to find that Title VII preempts the state tort law in pending cases.

The question of whether fear of tort liability will cause violations of Title VII will thus arise, at least initially, as a hypothetical threat, rather than as a fact before the court. The conjectural character of the inquiry does not bode well for employers invoking the defense. Courts commonly

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126 The employer faced with the prospect of such liability may find it more cost-effective to exclude women from the workforce and pay them damages under Title VII, rather than admit the women and pay tort damages based on fetal injury. See supra note 11 and accompanying text.

127 This situation differs from that where an entire federal scheme is thwarted by the state law. See supra notes 65-68 and accompanying text. In the case of DPT vaccine injuries, for example, it was argued that "[f]tort judgments threatened the availability of sufficient DPT vaccine to carry out [the goal of federal] immunization programs." Peggy J. Naile, Note, Tort Liability for DPT Vaccine Injury and the Preemption Doctrine, 22 Ind. L. Rev. 655, 693 (1989).

seek concrete evidence that the pressure exerted by state law damages is actually causing violations of the federal law.\textsuperscript{129}

The Supreme Court's \textit{Guerra} decision supports the proposition that financial burdens imposed by state law do not portend preemptive conflict absent actual violations of the federal law.\textsuperscript{130} The \textit{Guerra} Court was willing to reject preemption even if the state law imposed pressure to violate the federal law and even if the only measure available to avert the need of such violation was extremely costly to the employer.\textsuperscript{131} In \textit{Guerra}, if the PDA required equality between benefits to pregnant workers and others, the Court was willing to impose on the employer the perhaps prohibitively costly requirement that it provide nonpregnant workers the same benefits required by state law for pregnant workers.\textsuperscript{132} As long as the employer could, in theory, bring its practices into compliance with both laws, then preemption would not occur.\textsuperscript{133}

Similarly, the employer in the Title VII/fetal tort situation can achieve the ends required by state law by a mechanism (payment of tort damages) short of excluding women in contravention of Title VII.\textsuperscript{134} In fact, the

\textsuperscript{129} See Boyle v. United Technologies Corp., 487 U.S. 500, 506-07 (1988); Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982); Huron Cement Co. v. Detroit, 362 U.S. 313 (1960). \textit{But see} Schneiderwind v. ANR Pipeline Co., 485 U.S. 293, 310 (1988); Maryland v. Louisiana, 451 U.S. 725, 751 (1981); Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 91-92 (1963). As long as the facts before the court present a situation in which it is the state rather than the federal law that is violated, preemption is unlikely. \textit{Cf.} Hillsborough County v. Automated Medical Lab., Inc., 471 U.S. 707, 720-21 (1985) (holding that state law did not threaten accomplishment of federal goal); Jones v. Rath Packing Co., 430 U.S. 519, 549 (1977) (Rehnquist, J., dissenting) (arguing that in absence of explicit preemptive clause no preemption should be found); Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 489-93 (1974) (holding state trade secret law not preempted by federal patent law); Goldstein v. California, 412 U.S. 546, 552 (1973) (holding that the power to grant copyrights is not under exclusive federal control). \textit{But see} Rath Packing Co., 430 U.S. at 541 (holding state law that required different labeling information preempted because it was an obstacle to accomplishment of federal purposes). The question is not just whether the employer will be tempted, but whether the temptation will be irresistible.


\textsuperscript{131} \textit{id}.

\textsuperscript{132} See \textit{id.} (relying on petitioners' concession at oral argument "that compliance with both statutes is theoretically possible") (quoting Tr. of Oral Argument 6).

\textsuperscript{133} \textit{id.} at 290-92. \textit{Guerra} suggests that the Supreme Court evaluates the question of whether dual compliance is physically impossible, in theoretical terms, without considering the practical feasibility. \textit{Id.} The \textit{Guerra} Court simply assumed that the State of California would be financially able to give unpaid leave to nonpregnant workers. \textit{Id.} at 291.

\textsuperscript{134} Heartless as it may sound, the payment of strict liability tort damages may be viewed, like licensing requirements, as just another cost of doing business in compliance with applicable laws. Admittedly, there is an important difference between the \textit{Guerra} situation and the Title VII/fetal tort situation. In the former, the employer is incurring costs in the form of payment of additional employee benefits. In the latter, the employer is incurring costs in the form of damages resulting from harm to fetuses, an expenditure undoubtedly repugnant for more than financial reasons. It should be noted, however, that if the employer has made the workplace as safe as possible, it is the mother who
employer's violation of the state law in the envisioned tort suit is
evidence that any irresistible urge will be in the direction of violating
state law, not federal law. Thus, the posture of the case before the
court actually goes a long way toward convincing the court that
irresistible pressure is not present.

2. Obstacle Preemption

State laws that impose "obstacle[s] to the accomplishment and
execution of the full purposes and objectives of Congress" are deemed
contrary to federal law for purposes of preemption analysis. 135
Although the Supremacy Clause calls for the preemption of any state
law that is contrary to a valid federal law, the Supremacy Clause does
not require that every state law that interferes with the accomplish-
ment of a federal purpose be preempted. 136 In fact, the difficult part
of obstacle preemption analysis, as with impossibility analysis, is
determining how much interference is sufficient interference to render
the state law preempted.

Cases analyzing laws alleged to be obstacles to federal purposes
generally disclose a two-fold inquiry. 137 The first part of the inquiry
considers whether the federal purpose alleged to be obstructed by
the operation of state law is, indeed, a purpose of the federal law. 138

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Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); see Felder v. Casey, 487 U.S. 131, 138 (1988);

136 The difference between impossibility analysis and obstacle analysis is that obstacle analysis
permits preemption of state law even where no actual violation of federal law is likely to occur, or
where the violator of the federal law will be someone other than the one upon whom the state
imposes its requirement. If the state law entails interference with some ultimate purpose of the federal
law, but does not translate into an affirmative obligation to violate federal law, then obstacle
preemption is the appropriate approach. One writer has described obstacle preemption as a type of
preemption used by courts "when they can locate no other justification for preemption." Hoke, supra
note 63, at 750.

137 See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 86 (1987) (holding state law allowing
delay in tender offers not preempted by state law).

138 For discussions of the federalism issues relevant to the inquiry, see Fernandez, supra note 65,
at 1241-42; Hoke, supra note 63, at 701-10; and Wiggins, supra note 67, at 24-30.

Discerning the purpose of the federal law can, of course, present difficulties in some cases. See
Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2487 (1991) (rejecting proffered purposes
Second, the inquiry turns to the frequently more irksome question of whether the state law’s operation obstructs the accomplishment of this federal purpose enough to render the state law an “obstacle.” In other words, does the state law require behavior that precludes the achievement of the federal goal or prohibit behavior necessary to its achievement?

In judicial decisions, obstacle analysis routinely follows upon a court’s conclusion that the relationship between the federal and state law does not call for impossibility preemption. In such cases, the court may find that, even though it is possible to comply with both laws, there is something about compliance with the state law that will interfere with the accomplishment of federal objectives distinct from the affirmative obligations imposed by the federal law. Such sequential analysis is almost certainly unnecessary in the Title VII/fetal tort context, however, because in this context the court’s rejection of impossibility preemption assures rejection of obstacle preemption as well.

of the federal statute as “rest[ing] on little more than snippets of legislative history and policy speculations”); CTS Corp., 481 U.S. at 97-99 (White, J., dissenting) (disagreeing with majority’s identification of the federal statute’s goals for purposes of obstacle analysis).

According to Professor Fernandez, if the state law does not make it impossible to achieve the federal purposes, then the court should gauge the extent to which the incidental effects of the state law nevertheless “make . . . more difficult or . . . delay the achievement of the federal goal . . . .” Fernandez, supra note 65, at 1248. For this category of cases, Professor Fernandez advocates balancing the benefits to be achieved by the stated goals of the state statute against the degree of harm to the federal regulatory scheme. Id. One difficulty with this approach is that it may force courts to make value-laden, legislative-like choices between substantive governmental interests. Id. at 1248-49; cf. Riddle, supra note 104, at 689 (discussing subjective, judicial interpretation of federal legislation in the context of preemption inquiries). Courts might be able to achieve the goals envisioned by Professor Fernandez by balancing the detriment to the federal scheme against the detriment to the state interest, as is done in the conflict of laws situation. See Bernhard v. Harrah’s Club, 546 P.2d 719, 723 (Cal. 1976). This would be a more objective test that would not require the court to measure the worth of the substantive values underlying the state law, but would instead permit the court simply to assess the comparative impairment of presumptively valid state goals that would result from a decision not to apply state law. See Naile, supra note 127, at 695 (“If the state interest is strong and only the potential for conflict exists, the state regulation may stand.”) (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973)); Lynch, supra note 61, at 386. Responding to the problem of excessive judicial discretion resulting from his proposal, Professor Fernandez argues that courts exercise such discretion every time they determine the occupation of a field by federal legislation or define the goals of federal legislation. Fernandez, supra note 65, at 1249.

In CTS Corp. v. Dynamics Corp. of America, the Supreme Court indicated that a state statute interfering with the federal objective of avoiding delay in tender offers did not constitute a preemptive obstacle where the statute did not make delay inevitable. 481 U.S. 69, 84 (1987).

See, e.g., id. at 79 (“Because it is entirely possible for entities to comply with both [federal and state law], the state statute can be pre-empted only if it frustrates the purposes of the federal law.”); California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 289 (1987) (applying obstacle analysis after impossibility analysis).
In the typical case that entails both impossibility and obstacle analysis, the court's impossibility analysis focuses on the interference with the affirmative obligations imposed by the federal law, whereas the obstacle analysis focuses on a federal goal above and beyond simply obtaining compliance with those obligations. In the Title VII/fetal tort context, by contrast, proponents of preemption would not be able to cite any federal objective different from the goal of inclusion of women—precisely the goal already analyzed in the impossibility query. In rejecting impossibility preemption, the court will have rejected the contention that state law thwarts this objective.

The purpose of Title VII, as construed in *Johnson Controls*,

is to assure the inclusion of women in the workplace without regard to their reproductive status. If the pressure that fetal tort liability imposes on employers to interfere with this federal purpose is insufficient to effectuate impossibility preemption, then it is equally insufficient to effectuate obstacle preemption. If it is possible for an employer to bear the costs of fetal tort liability without succumbing to the temptation to violate Title VII, then any threat to the purpose of Title VII is far too attenuated to constitute an obstacle to the accomplishment of that purpose. The duty to reconcile the state law with the federal law, moreover, should be especially strong in this context. State law imposing damages liability for fetal harm is an exercise of the police power in an area of peculiarly local concern. Those injured by these hazards certainly cannot turn to Title VII to seek recovery.

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143 Id.
144 See supra notes 127-29 and accompanying text.
145 See *infra* notes 62 and 66.
146 But cf. *Cipollone v. Liggett Group Inc.*, 112 S. Ct. 2608, 2632 (1992) (Scalia, J., concurring in part and dissenting in part) (rejecting the proposition that federal law should be narrowly construed).
147 See *Barnes v. Glen Theater, Inc.*, 111 S. Ct. 2456, 2462 (1991); *supra* note 61.
148 *Silkwood v. Kerr-McGee Co.*, 464 U.S. 238, 252 (1984). Although it was argued above that congressional intent is irrelevant to conflict analysis, see *supra* note 63, courts may have a special duty to reconcile where the absence of congressional intent to preemp is clear, as it is here. If Congress had thought about tort liability when it enacted Title VII, it would not have intended to permit employers to escape liability, anymore than it intended to permit them to escape liability under state fair employment laws. Cf. *H.P. Welch Co. v. New Hampshire*, 306 U.S. 79, 85 (1939) (finding a presumption that Congress did not intend to preempt state safety regulation).
Title VII thus is unlikely to preempt state fetal tort law.\textsuperscript{148} Employers concerned about tort liability resulting from workplace fetal hazards must look elsewhere for an escape from the quandary. If Title VII will not preempt employer liability for fetal harm, then, absent legislation, employers will escape their quandary only if the prospect of unavoidable tort liability can support a \textit{BFOQ} defense for employers excluding fertile women from the workplace in ostensible violation of Title VII.\textsuperscript{149}

\section*{III. The BFOQ Defense: Cost as Business Essence\textsuperscript{150}}

If an employer cannot rely on the federal preemption doctrine to avert fetal tort liability, then it may elect instead to exclude women in apparent violation of \textit{Johnson Controls} in the hope that some remnant of the BFOQ defense remains intact for fetal protection cases. Although the \textit{Johnson Controls} Court rejected the altruistically based BFOQ proffered in that case, it did not actually decide the issue of whether the defense might by predicated upon the cost of tort liability. In fact, the Court's holding suggests that the BFOQ may operate where the cost of tort liability would be high.

\subsection*{A. Business Essence}

To establish the BFOQ defense, the employer must show that being a member of the favored sex (here males and infertile women) is a qualification necessary to performance of an essential aspect of

\textsuperscript{148} It may be argued that employers doing all within their power to protect fetal health should not bear financial responsibility for injuries they could not have averted. Parents who choose to risk the health of their fetuses arguably should be responsible, whether in tort or otherwise, for the results of their risk-taking. It would be difficult as a practical matter to move the burden from the employer to the parents. If a pregnant or soon-to-be pregnant woman decides to stay in a hazardous work environment, the employer may obtain a legally binding waiver of the woman's own right to bring subsequent legal action against the employer for harm to her own health. The woman is powerless, however, to waive the right of the fetus to sue in the future. \textit{See} International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1211 (1991) (White, J., concurring). Employers concerned about fetal tort liability may use the expedient of a contract providing that parents who elect to undergo exposure despite warnings will indemnify the employer for fetal damage. Yet, many workers do not possess the financial resources, including insurance, that would permit them to indemnify employers for such tort liability. \textit{See} Lawrence Postol et al., \textit{The Birth of Uncontrolled Injury}, \textit{Recorder}, May 23, 1991, at 4.

\textsuperscript{149} \textit{See supra} notes 16-18 and accompanying text.

\textsuperscript{150} The term "costs" is used to include both affirmative expenditures and profit losses.
the job. In order to make this showing, the employer must demonstrate:

(1) that the aspect of the job which women are unable to perform is part of the “essence” of the defendant’s business, rather than something “peripheral to the central mission of the . . . business” and

(2) that all or substantially all members of the excluded class are incapable of performing the job, so that exclusion of the class is necessary. This “necessity” requirement actually may have two facets:

(a) exclusion of females, rather than some measure short of exclusion, must be necessary, and

(b) the defendant must have a factual basis for believing either

(1) that virtually all women are incapable of performing the job without sacrificing the goal, or

In the context of fetal protection, the women whose exclusion the employer seeks to justify are the subcategory of fertile women. See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (holding that discriminating against a subset of women and not a comparable subset of men constitutes sex discrimination). The fact that only a subset of women is affected has no impact on the analysis. See supra notes 6, 42-43.

Western Air Lines v. Criswell, 472 U.S. 400, 413 (1985) (citing Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976)); see Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 388 (5th Cir.), cert. denied, 404 U.S. 950 (1971), cited with approval in Dothard v. Rawlinson, 433 U.S. 321, 333 (1977); see also Torres v. Wisconsin Dep’t of Health & Social Servs., 859 F.2d 1523, 1528 (7th Cir. 1988) (first step in deciding applicability of BFOQ defense is understanding employer’s business), cert. denied, 489 U.S. 1017, and cert. denied, 489 U.S. 1082 (1989). The “essence” requirement derives from the requirement in the statutory language setting forth the BFOQ that the qualification be necessary to the particular business of the employer. See Brown, supra note 11, at 512. One writer has argued that courts have applied the “essence” test articulated in Diaz in two different manners: (1) as a requirement that exclusion of one sex be necessary to the very essence of the total business and (2) as a requirement that exclusion of one sex be necessary to the essence of the particular job. Michael L. Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification, 55 Tex. L. Rev. 1025, 1043 n.113 (1977). Another commentator has noted that after Dothard the courts have applied a hybrid test combining the two above tests. Befort, supra note 24, at 13. The present Article assumes that the essence requirement focuses on the need to employ members of a particular sex in order to assure accomplishment of some aspect of the particular job, which is essential to the very functioning of the business.

See Diaz, 442 F.2d at 388.

See Levin v. Delta Air Lines, 730 F.2d 994, 1000-01 (5th Cir. 1984); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971), and cert. dismissed, 404 U.S. 1007 (1972); cf. Fesel v. Masonic Home of Del., Inc., 447 F. Supp. 1346, 1351 (D. Del. 1978) (allowing sex discrimination based on the privacy rights of customers only if there is no way the employer can selectively assign jobs to avoid conflicts). Professor Befort has suggested that this “no reasonable, less discriminatory alternative” criterion applies only in cases where client safety and privacy are at stake. Befort, supra note 24, at 16-17.

Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969), cited in Dothard,
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(2) that some women are incapable of performing the job without sacrificing the goal and there is no way to distinguish between those women who could do the job and those who could not.156

The crux of the Johnson Controls debate on whether the BFOQ defense should be available in fetal protection cases is the question of what kinds of goals can qualify as business "essence" under the first prong of the BFOQ analysis.157

B. An Unresolved Issue

Part of the Johnson Controls holding is that fetal safety can never be the essence of a manufacturing business. The employer's goal of

433 U.S. at 333. The BFOQ defense is most clearly implicated in situations where physical differences between the sexes disqualify one sex and not the other from performing the task at hand. Accordingly, the BFOQ would clearly be available to enable an employer in the business of providing wet-nursing services to hire only women. See Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971). Under the analysis set forth in the text, wet nursing is the essence of the business; that is, possession of breasts is necessary to wet nurse, so exclusion of males is necessary to achieve the goal, and virtually all men lack the qualification in question. The Civil Rights Commission, established by the Civil Rights Act of 1964, has also acknowledged that the BFOQ defense is applicable where employment of members of a particular sex is necessary for authenticity, e.g., a male or female acting role. 29 C.F.R. § 1604.2(a)(2) (1992). Although courts have approved application of the BFOQ defense beyond such biological difference and authenticity situations, the BFOQ remains a very narrow defense. See Dothard, 433 U.S. at 333 (noting the "virtually uniform view of the federal courts that [BFOQ defense] provides only the narrowest of exceptions"). But see Sirota, supra note 152, at 1026 (arguing that "[the meager legislative history of the BFOQ provision indicates that Congress intended it to have broad application in the area of sex discrimination").

154 This standard has emerged in cases where inclusion of the class at issue allegedly threatens the safety of third persons. See Usery, 531 F.2d at 235-36; Weeks, 408 F.2d at 235 n.5; cf. Western Airlines, 472 U.S. at 414-18 (adopting Weeks standard for age discrimination cases based on safety considerations).

157 Recall that the employer's first task in proving this defense is to show that the task for which women are not qualified is the "essence" of the business. There are three possible purposes that employers could offer to justify their fetal protection policies as BFOQs. They might proffer fetal protection as a goal unto itself, the way Johnson Controls did. See International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1208 (1991). They might proffer the goal of saving costs either by averting potential tort liability, or by avoiding the expense of accommodating the workplace to women. Such accommodation might include measures to shield women from excessive lead exposure. Interestingly, the Eleventh Circuit, in Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984), was willing to recognize fetal health as a proper foundation for the business necessity defense, but was unwilling to recognize the cost of such prospective tort liability as such a foundation. Id. at 1553 n.15. Employers might also proffer good public relations goals as a reason for not wanting to endanger fetuses. See Johnson Controls, 886 F.2d at 905 (Posner, J., dissenting).

In addition to failing the essence requirement, Johnson Controls' policy also failed the BFOQ requirement that all or substantially all women be disqualified. International Union, UAW v. Johnson Controls, 111 S. Ct. 1196, 1208 (1991). Johnson Controls' plan excluded all women within a given age group who did not supply medical documentation of their infertility, regardless of the women's procreative plans. Id. at 1200.
protecting future generations, then, cannot support a BFOQ to defend a sex-specific fetal protection plan. Five justices joined in this portion of Justice Blackmun's majority opinion.

In concluding that fetal safety is not the essence of the business, however, Justice Blackmun's opinion ventured beyond the narrow fetal safety defense that Johnson Controls had offered. Justice Blackmun additionally answered the broader question of what, besides the rejected fetal safety factor, will qualify as business essence for purposes of the BFOQ. In particular, Justice Blackmun rejected the idea that defendants could rely on the costs of tort liability as a foundation for the BFOQ in fetal protection cases. He argued that the Supreme Court and Congress had already rejected costs-savings as a ground for pregnancy-related exclusion of women. Justice Blackmun read in the statutory language of Title VII congressional intent to limit availability of the defense to situations where the

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158 The five-justice majority, joined by Justice Scalia for purposes of this issue, ruled that the simple, altruistic goal of fetal protection (the rationale actually offered by the defendant in the case), was not the essence of the business. See 111 S. Ct. at 1207; id. at 1216 (Scalia, J., concurring). In fact, Johnson Controls' expressed purpose for the policy was "protecting pregnant women and their unborn children from dangerous blood lead levels." 886 F.2d at 876. According to Justice Blackmun's opinion for the majority, "[d]ecisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents." 111 S. Ct. at 1207. This rationale of the holding should extend to prohibit policies that exclude pregnant women, as well as to those that exclude all fertile women. But see Johnson Controls, 886 F.2d at 898 (holding that Johnson Controls' policy constituted a BFOQ); id. at 904 (Posner, J., dissenting) (suggesting that employer's business essence encompasses the ethical and legal concerns of the employer).

159 Justice White argued in a concurrence joined by two other justices, that a fetal-safety based BFOQ defense could conceivably be available to Johnson Controls, but that the record before the Court was too sparse to tell. 111 S. Ct. at 1212-15 (White, J., concurring).

160 Id. at 1208-09.

161 Id. at 1209 (citing Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-18 & n.32 (1978) and Arizona Governing Comm'n v. Norris, 463 U.S. 1073, 1080 (1983)); see Price Waterhouse v. Hopkins, 490 U.S. 228, 248 (1988). In fact, Justice Blackmun took the position that the BFOQ should never be available to defend fetal protection policies, regardless of what purpose the employer articulates. 111 S. Ct. at 1207-09. For Justice Blackmun, the first prong of the BFOQ defense uses the term "essence" to mean only the production of and profit from the product, and not additional prefatory goals such as preserving fetal health or otherwise making the world a better place. Id. at 1205-06. In the wake of Johnson Controls, "only when an employer has pointed to a specific, legitimate safety responsibility necessarily assumed by the employer that is not generally shared by every other person in the workforce has the narrow 'safety BFOQ' been met." Brown, supra note 11, at 515. In so ruling, the Court confined the safety justification that had been recognized as supporting the BFOQ to situations where the individuals whose safety was threatened were "customers [or] third parties whose safety is essential to the business of battery manufacturing." Johnson Controls, 111 S. Ct. at 1206. On the question of cost-based BFOQs, by contrast, Justice Blackmun did note at the end of his opinion that costs so steep that they threaten to ruin the employer might qualify as business essence. Id. at 1208-09; see infra note 163, 174-95 and accompanying text.
excluded women were literally unable to perform the rudimentary functions of the job, regardless of cost considerations. At the same time that he pronounced the irrelevance of cost factors, however, Justice Blackmun also acknowledged that cost justifications, particularly those involving ruinous costs, were not before the Court, so required no ruling in any event.

Justices White and Scalia, by contrast, predicted in separate concurrences that there would be cases in which the BFOQ would justify fetal protection policies. These justices believed that cost justifications, whether based on potential fetal tort liability or on the expense of transforming the workplace to accommodate women, could constitute business essence for BFOQ purposes.

The Johnson

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111 S. Ct. at 1204. Justice Blackmun argued that, "[b]y modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." Id. at 1205. Although Justice White suggested that no court had ever similarly relied upon the "occupational" language, id. at 1210 n.1 (White, J., concurring), it would seem that the first two prongs of the BFOQ analysis derive, in part, from this language.

Although the majority opinion contains language rejecting cost considerations as an adequate rationale for the BFOQ defense, Justice Blackmun arguably limited the Court's holding to situations where the rationale offered in defense of the policy was the goal of protecting fetuses, as opposed to the goal of protecting finances. In addition, he noted that "costs ... so prohibitive as to threaten the survival of the employer's business" were not before the Court. Id. at 1209; see infra notes 174-95 and accompanying text (discussing ruinous costs).

Although the issue of cost justification was not before the Court, the Equal Employment Opportunity Commission ("EEOC") and commentators have suggested that the case decided that cost justifications cannot support a BFOQ defense. See, e.g., EEOC: Policy Guidance on the Supreme Court's Johnson Controls Decision, 8 Lab. Rel. Rep. (BNA) 405:6941, 6943 (June 28, 1991); Postol & Adelman, supra note 10, at 37. But see Marcia Coyle, Fetal-Protection Ruling Buoys Rights Groups, Nat'l L.J., Apr. 1, 1991, at 5 (suggesting that Johnson Controls left open the narrow possibility of a cost-based BFOQ for fetal protection plans).

111 S. Ct. at 1210 (White, J., concurring); id. at 1216 (Scalia, J., concurring). With regard to the scope of the BFOQ defense, Justice White wrote that showing that a policy is "reasonably necessary to the 'normal operation' of making batteries, which is Johnson Controls' 'particular business,'" would be difficult, but not impossible. Id. at 1210 (White, J., concurring). Along with the Chief Justice and Justice Kennedy, Justice White joined with the majority in reversing the affirmance of summary judgment, but only because he believed that the Johnson Controls' policy was overbroad and because there remained factual issues about whether the Johnson Controls' policy comported with the elements of the BFOQ defense. Id. at 1210, 1214-15 (White, J., concurring). Facts remaining in dispute were: whether the employer demanded a risk-avoidance level for fetuses substantially higher than risk levels tolerated for others, such as employees and consumers; whether the risks of fetal harm or associated costs had substantially increased to justify the employer's decision to adopt a broader policy than it had earlier used; and whether harm caused to offspring by lead exposure in females was sufficiently in excess of that caused by exposure of males to warrant exclusion of only women. Id. at 1215 (White, J., concurring).

As indicated above, the two disagreed on whether the goal of protecting future generations, standing alone, could support the BFOQ defense. On this issue, Justice Scalia agreed with the
Controls Corporation, Justice Scalia remarked, simply had not presented such rationales.\(^6\)

The Supreme Court's stance in *Johnson Controls* leaves some doubt about whether the cost-based BFOQ defense can ever save a fetal protection plan. Lower courts may feel bound by Justice Blackmun's pronouncements on the cost BFOQ issue.\(^6\) His statements can arguably be characterized as part of a very broad holding in the case: that sex-specific fetal protection plans are absolutely unlawful without exception.\(^16\) It appears, moreover, that Justice White, who disagreed with Justice Blackmun on the question, viewed the holding of *Johnson Controls* broadly enough to encompass Justice Blackmun's rejection of the cost justification defense.\(^6\)

Although the cost justification language has been and will be cited as part of the Court's holding, there is good reason to consider it dicta. Justice Blackmun qualified his statements with the caveat that "Johnson Controls has not argued that it faced any costs from tort liability."\(^7\)

In addition to Justice Blackmun's own statements of majority that the employer's interest in fetal health, standing alone, could not support the BFOQ. *Id.* at 1216 (Scalia, J., concurring). Thus, for Justice Scalia, as for Justice Blackmun, the question of fetal safety was a question for parents, not employers, to answer. Justice White believed that fetal protection interests, alone, could support a BFOQ defense, but that Johnson Controls had not shown evidence of substantial fetal health risks. *Id.* at 1214-15 (White, J., concurring).

\(^6\) *Id.* at 1216-17 (Scalia, J., concurring); see also International Union, UAW v. Johnson Controls, 886 F.2d 871, 914 (7th Cir. 1989) (Easterbrook, J., dissenting) (noting Johnson Controls' failure to argue that the costs from tort liability or transforming the workplace for safety reasons were prohibitive), rev'd, 111 S. Ct. 1196 (1991). Justice Scalia apparently had additional, unexpressed reservations about the majority's opinion. See 111 S. Ct. at 1216 (Scalia, J., concurring).

\(^7\) See Befort, supra note 24, at 53 ("[T]he potential for a future return to . . . expansionary viewpoints [on BFOQ] should not be dismissed entirely. . . . [T]he majority's narrow construction won the support of only five justices [, and] [t]he appointment of a more conservative jurist than Justice Souter . . . may well have led to a very different formulation of the BFOQ test."); Coyle, supra note 163, at 5 (suggesting that *Johnson Controls* left open the narrow possibility of cost BFOQ for fetal protection plans). Subsequent lower court decisions that have cited *Johnson Controls* in connection with the BFOQ have pertained to privacy and religion, rather than cost justifications. See Hernandez v. University of St. Thomas, 793 F. Supp. 214, 216-17 (D. Minn. 1992) (privacy); Jennings v. New York State Office of Mental Health, 786 F. Supp. 376, 380, 383 (S.D.N.Y.) (privacy), aff'd, 977 F.2d 731 (2d Cir. 1992); EEOC v. Kamehameha Schools/Bishop Estate, 780 F. Supp. 1317, 1320, 1322 (D. Haw. 1991) (religion). It remains uncertain how the lower courts will read the cost BFOQ language.

\(^16\) Even so, if employers face significant enough fetal tort liability, they may elect to take their chances, opting for exclusionary fetal protection measures despite the odds that lower courts will prohibit use of a cost-based BFOQ. See Louise Van Dyck, Comment, *The Costs of Fetal Protection*, 23 CONN. L. REV. 1049, 1052-53 (1991) (discussing potential for heavy tort liability).

\(^17\) See 111 S. Ct. at 1210 (White, J., concurring) (referring to the majority's "[erroneous holding] that the BFOQ defense is so narrow that it could never justify a sex-specific fetal protection policy").
limitation, Justice Scalia’s concurrence, after arguing that costs would support a BFOQ, cautioned that “[i]n the present case, . . . Johnson Controls has not asserted a cost-based BFOQ.” These caveats make inroads on the majority’s ostensibly unequivocal statement that fetal protection policies are absolutely banned by Title VII. To the extent that the majority’s statements are not part of the Court’s holding, but simply indicators of how the Court would decide the question if it were presented, then the statements are probably not very good indicators of what decision the Court would reach today. The four concurring justices who believed emphatically that costs can support a BFOQ remain on the Court, whereas Justice Marshall, who joined in the five-justice majority opinion that rejected cost factors, has relinquished his seat to Justice Thomas. In the event that another such fetal protection policy reaches the Supreme Court, the Court has left itself a wide enough berth to uphold the BFOQ defense in future cases.

C. Ruinous Costs

As a general rule, employers cannot escape Title VII liability by proving that discrimination would be economically expedient.

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7 Id. at 1207 (Scalia, J., concurring).
8 The four concurring justices were Scalia, White, Rehnquist, and Kennedy.
9 See Johnson Controls, 111 S. Ct. at 1216 (Scalia, J., concurring) (suggesting that result may be different in a case with different facts); cf. California Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 296 (1987) (Scalia, J., concurring) (noting that when “it is entirely clear that an issue of law is not presented by the facts of the case, it is beyond [the Court’s] jurisdiction to reach it”). Writers have recognized this potential loophole. See Befort, supra note 24, at 53 (recognizing potential for broader BFOQ than that described in Johnson Controls decision); Coyle, supra note 163, at 5 (recognizing that Johnson Controls left open the possibility of cost BFOQ for fetal protection plans). Understandably, employers may be reluctant to risk violating what is arguably a Supreme Court rule, but there may be cases in which deliberate violation of Title VII as construed by the Supreme Court is regarded as the lesser of two evils. See infra notes 174-95 and accompanying text.
"[R]emedying inequality normally costs money." The BFOQ can defend fetal protection policies only if employers overcome this anti-cost bias and convince the trier of fact that cost factors should, in this context, qualify as business essence for purposes of BFOQ analysis. The controversy that surrounds the cost-BFOQ question makes predictions tenuous. Nevertheless, it is probably safe to conclude that there is a category of cases in which the BFOQ defense can be predicated upon cost factors. The more difficult question concerns the breadth of that category.

There is some consensus that "ruinous" costs support the BFOQ defense. When the Johnson Controls majority argued that costs should not support the BFOQ, it expressly reserved the ruinous costs issue: "We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discrimination against them." Costs are "ruinous" if they are so steep that they threaten to

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176 Even if employers can make this showing, they need to make the further showing under the second prong of the BFOQ that avoidance of such costs can be achieved only by excluding all fertile women, all pregnant women, or whatever class of women it is that the particular policy excludes. See Western Airlines v. Criswell, 472 U.S. 400, 414 (1985) (citing Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969)); Diaz v. Pan Am. World Airways, 442 F.2d 385, 388-89 (5th Cir.), cert. denied, 404 U.S. 950 (1971).

177 Compare Johnson Controls, 111 S. Ct. at 1204-07 (suggesting no cost BFOQ) with id. at 1211-12 (White, J., concurring) ("[BFOQ] defense is broad enough to include considerations of cost") and id. at 1216 (Scalia, J., concurring) (suggesting costs may support a BFOQ defense).

178 See infra notes 185-93 and accompanying text.

179 See Johnson Controls, 111 S.Ct. at 1209; Diaz, 442 F.2d at 388; see also International Union, UAW v. Johnson Controls, 886 F.2d 871, 905 (Posner, J., dissenting) (envisioning a broad interpretation of business essence that would encompass prohibitive costs); cf. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1098-99 (1983) (Powell, J., dissenting) (suggesting prohibitive costs may justify discrimination); Industrial Union Dep't, AFL-CIO v. Hodgson, 499 F.2d 467, 477-78 (D.C. Cir. 1974) (permitting defense of ruinous costs in OSHA context); Brodin, supra note 25, at 358 (advocating against cost justifications in impact cases except where "the very financial existence of the enterprise is at stake"). But cf. Sirota, supra note 152, at 1052 n.164 (arguing against prohibitive cost BFOQs because an employer would not be able to prove that hiring both sexes caused business to fail and also because allowing ruinous cost BFOQs would prohibit discrimination by financially successful businesses, but not by marginal businesses).

180 111 S. Ct. at 1209. The concurring justices argued that the facts before the Court did not present any question of costs, whether ruinous or non-ruinous, and that the Court's precedents did not resolve the question of whether cost factors can support the BFOQ. Id. at 1210-14 (White, J.,
destroy the employer's business. If the exclusion of some category of employees is so important to the business that the costs of including those employees will put the employer out of business, then avoiding those costs is part of the essence of the business. Thus, in the fetal tort liability context, infertility among women would be a permissible job qualification for purposes of the BFOQ defense if potential fetal tort liability costs were heavy enough to threaten the viability of the business.

Although Supreme Court views on ruinous costs as a BFOQ are limited primarily to the passing dicta in *Johnson Controls,* two lower court decisions tend to confirm that costs severe enough to threaten the viability of a business can support the BFOQ defense. In *Diaz v. Pan* concurring); *id.* at 1216-17 (Scalia, J., concurring).

The detriment inquiry here is necessarily more hypothetical than it was in the preemption context. Preemption analysis focused on the degree to which state law interfered with federal requirements or objectives overall. The focus was on federalism, whereas in BFOQ analysis, the focus is on the viability of the individual defendant. The concreteness that preemption analysis required was some showing that these kinds of cases have resulted in violations of federal laws or purposes, not a showing that the individual defendant has violated the federal law. BFOQ analysis, by contrast, measures the extent of detriment the individual employer must experience in order to be able to invoke that detriment to support a BFOQ defense. Given that this narrow defense is available only if the individual employer meets its requirements, not where employers in the defendant's class tend to meet them, the courts should accept threatened, rather than actual detriment. Concrete evidence of the scope of detriment to this defendant would be evidence that the employer has already gone out of business.

* See *Diaz,* 442 F.2d at 388; *Wilson v. Southwest Airlines,* 517 F. Supp. 292, 299-300 (N.D. Tex. 1981). The argument in the text admittedly ignores the first prong of the BFOQ defense, which requires the defendant to show that women are incapable of performing some aspect of the job. Perhaps courts would rephrase this prong to require that women be incapable of doing the job without ruinous costs being imposed, much as certain safety-BFOQ and privacy-BFOQ cases incorporate safety and privacy into the essence of the business. See, e.g., *Western Airlines v. Criswell,* 472 U.S. 400, 420-21 (1985).

Under the "sex plus" doctrine and the Pregnancy Discrimination Act, discrimination against only that subset of women who are fertile is nevertheless discrimination against women. See supra notes 6, 42-43.

American Airways, the Fifth Circuit rejected profit loss as a foundation for BFOQ and suggested that the financial costs of complying with Title VII could support a BFOQ only if such costs actually kept the employer from "perform[ing] the primary function or service it offers." If a cost will keep the employer from doing what it is in business to do, then that cost undermines the essence of the business. Ruinous costs clearly render normal operations impossible and meet the BFOQ requirement.

Similarly, in Wilson v. Southwest Airlines, the district court recognized that hiring males as flight attendants would harm the defendant's image as the "love airline" and would diminish profits accordingly. Nonetheless, the court held that the BFOQ is not available merely because the business "goal" of making a profit would be thwarted if men were employed. The court explained that the defense would be available, however, where accomplishment of the very tasks that the employer is in business to perform would be thwarted. If forcing a business to hire women has the direct result that the business will be entirely ruined, then the business essence must be defined to require the tasks for which women are deemed unsuitable.

The more difficult question is whether costs that do not threaten extinction for the employer may support a BFOQ defense. Discussing

187 492 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971).
188 Id. at 389.
190 Id. at 296, 302 n.25; see Smallwood, 661 F.2d at 307; Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 235 n.26 (5th Cir. 1976); cf. Johnson v. Pike Corp., 332 F. Supp. 490, 495-96 (C.D. Cal. 1971) (stating that a cost justification cannot support business necessity defense).
191 Wilson, 517 F. Supp. at 302 n.25.
192 Id. at 302-03 (citing Fernandez v. Wynn Oil Co., 20 Fair Empl. Prac. Cases 1162, 1163-64 (C.D. Cal. 1979), aff'd, 653 F.2d 1273 (9th Cir. 1981)). The airline alleged that female flight attendants' function of being sexually alluring to male passengers was a crucial component of the airline's success. Although the court recognized that the airline's growth and prosperity depended in large part on the attractive attendants who created a "love airlines" image, the court ruled that transporting passengers, rather than sexual allurement, constituted the essence of the airline's business. Id. at 302. If, however, the airline could have shown that most passengers would have switched to a different airline if the alluring attendants had been removed, and that this would have destroyed the business or posed a serious threat to continued operations, this showing likely would have been enough to demonstrate that the essence of the business was sexual allurement, rather than transport. It would have been the allurement, not simple transportation, that people had been paying for, as evidenced by the fact that they stopped paying when the allurement ended.
193 Wilson exemplified a willingness on the part of courts to decide for themselves what the defendant's business is. See 517 F. Supp. at 302. Courts confronted with the prospect of a ruined business should perhaps be more ready to accept the defendant's definition of the essence of the business.
194 One writer has suggested that cost factors necessarily come into play under the second prong of the BFOQ, where the employer may prevail by showing that it is "impractical to deal with women
the question as a hypothetical matter in *Johnson Controls*, the justices exhibited disagreement. The two prior Supreme Court cases relied upon in *Johnson Controls*, moreover, do not necessarily support either position.

D. Dothard and Manhart

In *Johnson Controls*, the justices debated the availability of a cost justification defense that the defendant never raised. Justice Blackmun cited *Los Angeles v. Manhart* for the proposition that anticipated costs short of extinction of the business cannot support a BFOQ defense. Justice White relied on *Dothard v. Rawlinson* to support the position that cost justifications may provide a proper foundation for the BFOQ defense.

*Manhart* challenged an employer’s requirement that women contribute more to a pension plan than men. The employer defended the resulting disparity in take-home pay with the argument that women would ultimately live longer, and, therefore, cost the plan more in benefits. The Court accepted the truth of the proposition that “[w]omen as a class, do live longer than men,” and would receive more benefits than men, as a group, would receive. Despite this cost justification, the *Manhart* Court concluded that the premium disparity constituted sex discrimination in violation of Title VII. *Manhart*, however, was not a BFOQ case. Rather, the case concerned whether the plaintiff had made a prima facie case of sex discrimination.

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on an individual basis." See Brodin, supra note 25, at 331 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 n.5 (5th Cir. 1969)).

"See supra notes 162-66 and accompanying text. A good educational program in the workplace may avert ruinous tort liability costs in many cases. See Van Dyck, supra note 168, at 1083-86 (advocating non-preemption decision on the Title VII/fetal tort issue in order to encourage employers to implement greater safety mechanisms in the workplace).

The major portion of the Court’s BFOQ analysis went to rejecting the safety BFOQ that Johnson Controls had offered. International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1204-08 (1991). The Court rejected the safety BFOQ because fetal safety is not an essential element of battery manufacture. Id. at 1206.


*Johnson Controls*, 111 S. Ct. at 1209 (citing *Manhart*, 435 U.S. at 716-18, 717 n.32).


*Johnson Controls*, 111 S. Ct. at 1212 (White, J., concurring) (citing *Dothard*, 433 U.S. at 335-36).

*Manhart*, 435 U.S. at 704.

*Id. at 706.

*Id. at 707-08.

*Id.* at 716-17 nn.31-32; see *Johnson Controls*, 111 S. Ct. at 1211 (White, J., concurring). But see Brodin, supra note 25, at 326 & n.47 (citing CHARLES A. SULLIVAN ET AL., FEDERAL
Nevertheless, Justice Blackmun's reliance on Manhart for his prediction in Johnson Controls that cost factors would not support the BFOQ defense was not unreasonable. Justice Stevens's opinion for the Court in Manhart does venture from the narrow question before the Court of whether the plaintiff established a prima facie case to the broader question of cost as a defense generally under Title VII. Specifically, in response to the Manhart petitioner's argument that cost considerations had rebutted the prima facie case, Justice Stevens explained that cost arguments could have helped the petitioner only if Title VII had an affirmative defense for cost justifications. The Manhart opinion's dismissal of the petitioner's argument on the ground that Title VII contains no "cost justification" defense does not necessarily mean that cost must be irrelevant to the available, but far narrower, BFOQ defense. Even though the Manhart case is arguably relevant to the BFOQ scenario, then, it is also easily distinguishable should the Court choose to distinguish it when the issue comes before it.

In his Johnson Controls concurrence, Justice White relied on Dothard v. Rawlinson for the proposition that costs may support a BFOQ defense. In Dothard, the Supreme Court held that the Alabama prison system could rely on the BFOQ defense to justify its exclusion of women from positions that entailed contact with inmates. The Dothard Court found that "[a] woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama [then ran] could be directly reduced by her womanhood." Relying on Dothard, Justice White's Johnson Controls concurrence argued that "[i]f the cost of employing women could not be considered, the [state of Alabama in Dothard] should have been required to hire more staff and restructure the prison environment rather than exclude women.

Although Justice White's reliance on Dothard to support a general cost BFOQ is reasonable, Dothard is entirely consistent with the narrower view that only costs so severe as to destroy the defendant support a BFOQ. While it is true that Dothard recognized a BFOQ where


205 See Manhart, 435 U.S. at 716-17.
206 Id. at 716.
207 But see Kaminshtein, supra note 174, at 245-46.
209 Johnson Controls, 111 S. Ct. at 1212-13 (citing Dothard, 433 U.S. at 335-36).
210 433 U.S. at 337.
211 Id. at 335.
212 Johnson Controls, 111 S. Ct. at 1213.
expenditure of money might eventually have eliminated the conditions requiring exclusion of women, the costs of those improvements would have been ruinous. In fact, a federal district court had already ordered the state of Alabama to rectify the prison situation, and the state had been unable financially to make the improvements. The Dothard decision supports a cost-based BFOQ, but only of the type where requiring admission of women would have the effect of putting the defendant out of business.

E. Breadth of the Cost BFOQ

Despite language in Dothard, Manhart, and Johnson Controls, the Supreme Court has yet to decide whether costs can support a BFOQ. It appears likely that ruinous costs will support such a defense. It remains entirely uncertain, and may ultimately depend on the composition of the Court, whether costs short of ruinous costs can form a valid foundation for the BFOQ defense. The prospect that non-ruinous costs may be capable of supporting the BFOQ defense raises the specter that Title VII will become a scheme more protective of employer interests than of the employee interests it was enacted to safeguard. Another problem is one of line-drawing: if non-ruinous costs support the BFOQ, how close to ruinous must those costs come in order to support a BFOQ?

The answer to the question of whether non-ruinous cost can and should support a BFOQ turns on what balance is struck between employer interests and the public interest in employment equality. This balance is, of course, already broadly sketched in the dictates of Title VII. The public interest outweighs employer interests in profits to the extent that Title VII may be deemed to have an anti-cost basis. On the other hand, by making the BFOQ defense available, Congress has tilted the balance in favor of employer interests.

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214 Both sides of the dispute have strong economic interests at stake. The employee has an economic interest in gainful employment, the employer in keeping costs down. Arguably, both sides face economic ruination. If the balance is struck in favor of the employer, then the employee faces unemployment, which may constitute economic demise for the individual. Cf. Los Angeles Dep't of Water & Health v. Manhart, 435 U.S. 702, 709 (1978) (stating the policy behind Title VII focuses on fairness to the individual).

215 If non-ruinous costs can support the BFOQ defense, the problem of line-drawing must be addressed. How close to ruinous must the costs be in order to support the defense? If hiring women would be so expensive that the employer would have to close down one entire plant, for example, would that be a sufficient cost to support the BFOQ?
In including the BFOQ in Title VII, Congress clearly showed concern that businesses be permitted to continue to accomplish their essential objectives, to remain viable, despite the strictures of Title VII. The BFOQ, as usually applied, thus permits the employer to exclude those whose sex precludes their performing tasks essential to the employer’s business. In cases recognizing the potential for a ruinous cost BFOQ, courts would permit invocation of the BFOQ defense anytime forcing an employer to employ an individual (or category of individuals) would potentially destroy the business, even though the excluded workers are capable of performing the specifics of the job they seek to fill. If they are capable of performing the job, but their inclusion in the work force threatens the continued existence of the business, then the BFOQ essence requirement is met and the defense is available. The reason the BFOQ would be available where specific job performance is possible, but employment of the individual would otherwise ruin the business, is that any factor so important that it can ruin the business must be deemed “essence.”

The BFOQ itself, of course, has no ruination qualification. The defense is available when the business purposes will be thwarted or at least not furthered by employment of the worker in question. Although threat of ruination is not a prerequisite to the defense when worker performance of the assigned tasks is at issue, it should be a prerequisite when employers use the defense to excuse exclusion of people who can do the work, but whose inclusion harms the employer financially. To do otherwise would wander too far from the narrow defense created by Congress.

As suggested above, it was only by inference that the Court in Johnson Controls could conclude that a threat to financial viability permits invocation of the BFOQ. This was a reasonable inference given that the BFOQ “essence” requirement demonstrates that the congressional concern underlying the BFOQ defense is business viability. Although the Court’s extrapolation from this defense to permit exclusion of anyone who threatens business viability makes sense, it is merely an extrapolation and therefore should be taken no farther than can be supported by the rationale for the BFOQ that Congress created. To permit use of the defense in situations where the harm threatened to the business falls short of ruination would be unfaithful to the congressional intent as manifested in the essence requirement.

When achievement of the public interest in equality can be accomplished only at the expense of the employer’s viability, then employer interests must win. In the fetal tort context, the ruinous cost BFOQ should be permitted only if the employer can convince the trier of fact by
a preponderance of the evidence that the prospect of tort liability is so certain and so large that, in the wake of such liability, the business could no longer function. Such a showing should entail evidence that ruinous tort liability is more than a mere hypothetical possibility, but is instead a concrete likelihood. To draw the line anywhere short of a showing of concrete likelihood of ruin would sacrifice the public interest in employment equality for mere business profits, rather than actual business viability.

Consider the problem that remains at the Johnson Controls plant. Assume that Johnson Controls stands to lose substantial profits in the way of tort damages for fetal harm because Title VII does not preempt fetal tort law, and that Johnson Controls cannot rely on the BFOQ defense to exclude women to avert that liability because the costs are not ruinous. This could mean that Johnson Controls will now face tort liability for fetal harm and that Johnson Controls shareholders will enjoy lower profits because of that liability. It could also mean that Johnson Controls will act in such a way as to enhance profits. This may include installing protective equipment to make the workplace safer than had previously been understood as possible, providing better warnings and education to employees, providing at-risk female employees with truly comparable positions in less hazardous areas of the business, and other safeguards.

CONCLUSION

In the aftermath of the Johnson Controls decision, employers face an unappealing choice between violating state law and violating federal law. Employers that admit fertile women to the workplace in compliance with Johnson Controls face potential state tort liability for fetal harm. In these tort suits, employers will seek to avoid liability by arguing that the federal law announced in Johnson Controls preempts the state fetal tort law. Employers that retain fetal protection policies, on the other hand, face the prospect of employment discrimination suits by the excluded women. The question for these employers will be whether they can avoid Title VII liability by presenting a BFOQ defense predicated on the argument that the fetal protection plan is necessary to protect the employer from ruinous (or near ruinous) fetal tort liability.

Despite the Johnson Controls dicta on the preemption question, Title VII will not necessarily preempt the fetal tort liability of employers that include fertile women in the hazardous workplace. Particularly when there is no evidence that the tort laws are effectively causing employers to violate Title VII, the tort laws do not present a conflict with the federal law that would warrant preemption. Therefore, employers facing the fetal
hazard quandary may not have access to the preemption escape route held forth by the *Johnson Controls* majority.

The BFOQ as an escape device may hold more promise than the *Johnson Controls* majority suggested. The justices ruled unanimously only that employers cannot predicate the BFOQ defense on altruistic interests in fetal health. Despite the majority's language rejecting a cost BFOQ, the opinions actually implied that the justices would unanimously agree to allow ruinous costs to support the BFOQ defense. They discussed when, if ever, costs short of ruinous costs can defend a fetal protection plan but did not decide the question since it was not presented by the facts of the case. Hence, there should be some group of fetal protection cases for which the cost BFOQ is available, but how far that group may extend beyond cases of ruinous costs remains unclear.

In *Johnson Controls*, the Supreme Court discussed two escape routes from the employer's fetal hazard quandary. Although the *Johnson Controls* majority predicted that preemption held more promise than the BFOQ, there will be cases in which the opposite is true. Some employers may fare better if they violate Title VII and invoke the BFOQ than if they violate state law and invoke the federal preemption doctrine.