Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 28

January 1985

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TEACHER COMPETENCY TESTING AND MERIT PAY PROPOSALS UNDER THE EQUAL PROTECTION CLAUSE AND TITLE VII

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I. INTRODUCTION

The decline in educational achievement among students in public elementary and secondary schools has caused great concern in this country.[1] This concern has focused to a great extent on teacher competency.[2] In general, students who intend to become teachers do not usually excel while in school.[3] Furthermore, many talented students are uninterested in teaching careers because the pay and job satisfaction are low. Low pay and lack of job satisfaction also have caused

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1. *See, e.g.*, Gallup, *The 11th Annual Gallup Poll of the Public's Attitude Toward the Public Schools*, 61 PHI DELTA KAPPAN 33 (1979).

2. *See, e.g., Education Secretary Asks Congress to Pledge Support for 'Great Teaching Profession,'* CHRON. OF HIGHER ED., Dec. 14, 1983, at 19, col. 1; Newport, *Let's Admit We Can't Train Teachers—and Ask for Help*, 65 PHI DELTA KAPPAN 102 (1983).

3. In 1970, students intending to major in education ranked in the top one-third of those taking the English section of the college boards; in 1976 they placed in the lowest third. E. GOODMAN, AT LARGE 233 (1979). Recently, students admitted to education schools had combined verbal and mathematical Scholastic Aptitude Test (SAT) scores 17.5 points below the national average. *Certification of Teachers Lacking Courses in Education Stirs Battles in Several States*, Wall St. J., Jan. 6, 1984, at 23, col. 3.

See generally Schlecter & Vance, *Institutional Responses to the Quality/Quantity Issue in Teacher Training*, 65 PHI DELTA KAPPAN 94 (1983) (discusses lower test scores and grades of prospective teachers today and possible ways to combat this problem).

many good teachers already in the profession to leave.[4]

Policy makers have suggested several ways to keep incompetent teachers out of the profession, to persuade capable teachers to remain, and to encourage some of the brightest students to enter teaching.[5] This Note discusses two of the most common suggestions—teacher competency testing and merit pay—and addresses potential legal challenges to these proposals under the equal protection clause[6] of the fourteenth amendment and Title VII of the Civil Rights Act of 1964.[7]

II. TEACHER COMPETENCY TESTING AND MERIT PAY PROPOSALS

A. *Teacher Competency Testing*

Several state statutes require prospective teachers to pass competency tests before the state certifies them as teachers.[8] The tests fall into two categories: 1) basic skills tests, which measure either a prospective teacher's expertise in English and mathematics or a prospective teacher's knowledge of basic teaching theory and methodology;[9] and 2) specialty field examinations, which determine whether a teacher is proficient in his or her specialty.[10]

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4. *See* Newport, *supra* note 2, at 102; *Aid Studied to Draw Best Students to Teaching*, St. Louis Post-Dispatch, Jan. 11, 1984, at 19A, col. 2; Schlechter & Vance, *Do Academically Able Teachers Leave Education? The North Carolina Case*, 63 PHI DELTA KAPPAN 106 (1981).

5. *See infra* note 14 for a discussion of methods other than competency testing or merit pay for increasing the quality of teaching.

6. U.S. CONST. amend. XIV, § 1. *See infra* note 31.

7. 42 U.S.C. § 2000e (1982). *See infra* note 101.

8. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-533 (Supp. 1983); CAL. EDUC. CODE § 44252 (Deering Supp. 1984); FLA. STAT. ANN. §§ 231.17(2)(a)-(c) (West Supp. 1983); LA. REV. STAT. ANN. § 17:7(6)(b) (West Supp. 1983); MISS. CODE ANN. § 37-3-2(9) (Supp. 1983); N.C. GEN. STAT. § 115C-296 (1983); OKLA. STAT. ANN. tit. 70, § 6-154 (West Supp. 1983); S.C. CODE ANN. § 59-25-110 (Law. Co-op. 1976); TENN. CODE ANN. § 49-5-110 (Supp. 1984); TEX. EDUC. CODE ANN. § 13.032(e) (Vernon Supp. 1982); VA. CODE § 22.1-298 (1984).

9. *See, e.g.*, CAL. EDUC. CODE § 44252(b) (Deering Supp. 1984) (applicant for certification must demonstrate "proficiency in basic reading, writing, and mathematics skills in the English language . . ."); MISS. CODE ANN. § 37-3-2(9) (Supp. 1983) (examination should determine "whether the candidate has the mastery of reading, writing and mathematics skills a prospective school teacher reasonably should be expected to achieve . . .").

10. *See, e.g.*, MISS. CODE ANN. § 37-3-2(9) (Supp. 1983). *See also* S.C. CODE ANN. § R43-63 (Law. Co-op 1976) (state administrative regulations require the prospective teacher to pass the portion of the National Teacher Examination that tests his area of specialization).

Most states require that only those persons who initially apply for certification after the effective date of the statute must take a basic skills examination.[11] Teachers already holding valid certificates are exempt from this examination under "grandfather" clauses.[12] None of the statutes require that schools give hiring preference to teachers with higher examination scores over teachers with lower, but passing, scores.

B. *Merit Pay Proposals*

One of the most common suggestions for making teaching a more attractive profession is merit pay, a plan by which state and local school districts award outstanding teachers with higher compensation.[13] California is the only state that has adopted a merit pay plan,[14]

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11. Pipho, *Stateline: An End to the State Tax Revolt—Maybe!*, 65 PHI DELTA KAPPAN 309, 309 (1984).

12. "Grandfather clauses operate to exempt from the requirements of legislative enactments certain defined individuals or entities that, at the time the requirements become effective, meet specific defined criteria." Paul Kimball Hosp., Inc. v. Brick Township Hosp., Inc., 86 N.J. 429, 440, 432 A.2d 36, 41 (1981). In Arkansas, practicing teachers who did not pass the National Teacher Examination (NTE) between 1980 and 1983 must take a basic skills test. Pipho, *supra* note 11, at 310.

13. One of the other suggestions is raising the salaries paid to all teachers. For example, the New Jersey Governor has recommended raising teachers' starting salaries to $18,500 per year. Pipho, *Stateline: Merit Pay/Master Teacher Plans Attract Attention in the States*, 65 PHI DELTA KAPPAN 165, 166 (1983). Former Secretary of Education Terrel H. Bell proposed that states raise teachers' starting salaries to the same levels as those of college graduates beginning business or engineering careers. *Bell's 4 Goals for Education*, CHRONICLE OF HIGHER EDUCATION, Dec. 14, 1983, at 19, col. 4.

Florida has established "a scholarship/loan program, a tuition reimbursement program, and a loan forgiveness program" to encourage teachers to teach mathematics and science and to teach in less popular locations, such as in inner-city and impoverished rural areas. Pipho, *Stateline: California and Florida Set the Pace for Educational Reform*, 65 PHI DELTA KAPPAN 85 (1983) [hereinafter cited as Pipho, *Stateline: California*].

Democratic Congressman Ron Wyden of Oregon introduced legislation to provide scholarships to prospective teachers ranking in the top 10% of their classes. *Aid Studied to Draw Best Students to Teaching*, St. Louis Post-Dispatch, Jan. 11, 1984, at 19A, col. 2.

14. *See* CAL. EDUC. CODE §§ 44490-96 (Deering Supp. 1984).

A plan that on its face resembled a merit pay scheme existed in South Carolina between 1945 and 1968. South Carolina issued four classes of certificates (A, B, C, and D) that reflected a teacher's score on the National Teacher Examination (NTE). The state awarded class A certificates to those who scored in the top one-quarter on the NTE. *See* United States v. South Carolina, 445 F. Supp. 1094, 1101 (D.S.C. 1977), *aff'd mem. sub nom.* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978). One criterion that the state used to set the level of its salary subsidies to a school district was the class

but several other states, including Florida, New Jersey and Tennessee, are seriously considering merit pay proposals.[15]

California's merit pay plan, the "California Mentor Teacher Program,"[16] allows the state school superintendent to authorize school districts to designate up to five percent of their "certificated employees"[17] as mentor teachers.[18] The statute provides that the selection committee[19] may nominate only tenured classroom teachers with substantial recent teaching experience and exemplary teaching skills.[20]

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of certificate held by each of the school district's teachers. This resulted in the state paying higher subsidies to holders of higher ranking certificates. 445 F. Supp. at 1105. While the state stopped issuing the four classes of certificates in 1969, *id.* at 1101, the old certificates are still valid and the state still bases its salary subsidies upon them. *Id.* at 1105 n.10. Teachers may retake the examination to try to upgrade their certificates. *Id.* at 1105 n.10.

Because the state bases its subsidies of teachers' salaries on the teachers' NTE scores, which purport to measure their competence to teach, the program resembles a merit pay plan. The scheme, however, differs from current merit pay proposals. The current state proposals are to reward excellence. *See, e.g.*, CAL. EDUC. CODE § 44490 (Deering Supp. 1984) ("It is the intent of the Legislature in the enactment of [the California Mentor Teacher Program] to encourage teachers . . . to continue to pursue excellence within their profession [and] to provide incentives to teachers of demonstrated ability and expertise to remain in the public school system. . . ."). In *United States v. South Carolina*, on the other hand, the district court characterized South Carolina's system as promoting holders of B, C and D certificates merely to attain a class A level of minimum competence. 445 F. Supp. at 1116.

15. *See* Pipho, *supra* note 13, at 165; Pipho, *supra* note 11, at 310.

16. CAL. EDUC. CODE §§ 44490-96 (Deering Supp. 1984).

17. "Certificated employees" are persons holding certificates, credentials, or life diplomas, *id.* § 44006 (Deering 1978), including librarians, *id.* § 44868, social workers and psychologists. *Id.* § 44874.

18. *Id.* § 44492(a). School districts with five to twenty certificated employees may choose one classroom teacher to be a mentor teacher. *Id.* School districts with fewer than five certificated employees may select one mentor teacher, but the state will provide the mentor with a lower stipend. *Id.* §§ 44492(b), 44494(a).

19. Certificated teachers must comprise a majority of the selection committee members. The remaining members must be school administrators. *Id.* § 44495(a).

20. *Id.* § 44491. The section reads:

> The [State Board of Education] rules and regulations shall specify that persons seeking classification as a mentor teacher shall meet each of the following qualifications:
> (1) Is a credentialed classroom teacher with permanent status.
> (2) Has substantial recent experience in classroom instruction.
> (3) Has demonstrated exemplary teaching ability, as indicated by, among other things, effective communication skills, subject matter knowledge, and mastery of a range of teaching strategies necessary to meet the needs of pupils in different contexts.

Id.

The school district's board of governors has the power to approve or disapprove the nomination.[21] In addition to their regular salaries, mentor teachers receive a $4,000 yearly stipend for up to three years.[22] The mentors may request that the school district use this stipend to provide them with "professional growth and release time."[23] The state is to provide funding for the stipends.[24]

III. LEGAL IMPLICATIONS OF COMPETENCY TESTING AND MERIT PAY PROPOSALS

A. *Equal Protection*

By using tests and merit pay plans, states and communities create classifications that treat persons differently.[25] For example, a test divides applicants into two classifications: one class composed of those who pass the test and receive certification to teach and the other class composed of those who fail the test and do not receive certification.[26] States that have "grandfather clauses"[27] create another classification scheme: persons who already have certificates and may continue to teach without passing an examination and persons applying for initial certification.[28] Merit pay plans also create two classes: one class composed of teachers who receive the additional benefits and the other class composed of all other teachers who continue to draw regular

21. *Id.* § 44495(d).

22. *Id.* §§ 44494(a), (c).

23. *Id.* § 44494(b).

24. *Id.* § 44492(a).

25. Sellers has stated:

> Any law or official act that does not apply to all people invites a classification. Inevitably, the benefits and burdens of the law are apportioned among those within and without the class. Equal protection analysis is an evaluation of the legitimacy of the differing treatment accorded by the law or act.

Sellers, *The Impact of Intent on Equal Protection Jurisprudence*, 84 DICK. L. REV. 363, 366 (1980).

26. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-533(A) (Supp. 1983) (to qualify for a teaching certificate, an applicant must pass a proficiency examination). Not all testing proposals, however, divide prospective teachers into two classes. A Missouri proposal would penalize education programs if fewer than 70% of students in the programs passed a competency examination, although students who failed the examination would still be able to teach. *Bill to Test Teachers Gets Bad Grade from Missouri Educators*, St. Louis Post-Dispatch, Feb. 26, 1984, § C1 (News Analysis), col. 5.

27. *See supra* note 12.

28. *See, e.g.*, MISS. CODE ANN. § 37-3-2(9) (Supp. 1983).

salaries.[29]

Because of the unequal treatment of different persons, the classifications that the testing requirements and merit pay plans create are subject to scrutiny under the equal protection clause of the United States Constitution, which prohibits the states or their political subdivisions[30] from denying individuals equal protection under the law.[31] To pass muster under the equal protection clause, most classifications must be merely rationally related to a legitimate state goal.[32]

Several classifications, however, require higher levels of scrutiny. Legislation that classifies on its face by gender or results in a gender-based classification must bear a substantial relation to an important governmental objective.[33] If a classification infringes upon a fundamental right[34] or is explicitly racial, or if a legislative body intends to discriminate on the basis of race, the classification must survive strict scrutiny. Under strict scrutiny analysis the law must be "necessary to promote a compelling governmental interest or it will be deemed

29. *See, e.g.*, CAL. EDUC. CODE § 44492 (Deering Supp. 1984).

30. Avery v. Midland County, 390 U.S. 474, 480 (1968) ("[I]t is now beyond question that a State's political subdivisions must comply with the Fourteenth Amendment. The actions of local government *are* the actions of the State.") (emphasis in original).

31. The equal protection clause of the fourteenth amendment states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

32. *See* Zobel v. Williams, 457 U.S. 55, 60 (1982) (Alaska dividend distribution scheme that gives to adult residents a monetary payment based on one unit of oil income per year of residency since 1959 violates equal protection because the state's interest in maintaining its residents and assuring fiscal stability is not rationally related to the classification between newer residents and residents in Alaska since 1959); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1980) (state statute that bans one type of milk container is valid if state "could rationally have decided" that the law would foster the use of environmentally desirable alternatives); McGowan v. Maryland, 366 U.S. 420, 425 (1961) ("the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective").

33. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). *See also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 274 (1979) (to be subject to the *Craig* test facially neutral actions must be taken with intent to discriminate on the basis of gender).

34. "Fundamental rights" are those individual rights that have their source, "explicitly or implicitly," in the Constitution. Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982) (public education not a fundamental right guaranteed by Constitution). *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.").

unconstitutional."[35]

1. Tests

Several cases have addressed the validity of teacher competency tests under the equal protection clause. In the early 1970s, two Fifth Circuit decisions[36] invalidated teacher competency tests on equal protection grounds. In *Baker v. Columbus Municipal Separate School District*,[37] the plaintiffs challenged a requirement that applicants for teaching positions and first-year teachers achieve a certain minimum score on the National Teacher Examination (NTE) in order to be eligible for employment.[38] The school district had made no attempt to validate[39] the test.[40] The requirement had a disproportionately heavy impact on blacks.[41] The requirement also had an unfair application because the only two second-year teachers whom the school district required to take the test were black.[42] The court invalidated the requirement after

35. Shapiro v. Thompson, 394 U.S. 618, 634 (1969). *Shapiro* involved an infringement of a fundamental right, the right to interstate travel. Basically, the same test is used to determine the constitutionality of overt or intentional racial discrimination. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) ("racial classifications . . . must be shown to be necessary to the accomplishment of some permissible state objective"). While no set test has emerged, in practice the Supreme Court scrutinizes "benign" racial quotas somewhat less carefully. "Benign" classifications are classifications that exist to benefit certain minorities. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (minority business enterprise provision of the Public Works Employment Act that uses racial and ethnic criteria to redress past discrimination valid means to achieve the objective); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 304 (1978) (medical school admissions policy to assist victims of "societal discrimination" does not justify a classification that imposes burdens on persons who are not responsible for the harm suffered by the special beneficiaries of the admissions policy).

36. Baker v. Columbus Mun. Separate School Dist., 462 F.2d 1112 (5th Cir. 1972); Armstead v. Starkville Mun. Separate School Dist., 461 F.2d 276 (5th Cir. 1972).

37. 462 F.2d 1112 (5th Cir. 1972).

38. *Id.* at 1113.

39. An employer validates a test by showing that it is directly or indirectly related to job performance. *See* Washington v. Davis, 426 U.S. 229, 250 (1976) (employer validated test sufficiently by a showing that test predicted performance in a job training program) *See also* Booth & Mackay, *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 EMORY L.J. 121, 159 (1980) ("A test that has been shown to be 'job related' and therefore not in violation of Title VII is commonly referred to by the courts as having been validated.").

40 462 F.2d at 1114.

41. Only one of 18 incumbent black teachers whom the school district required to take the test passed, while 64 of 73 white teachers passed the test. *Id.* at 1113.

42. *Id.* at 1114.

applying strict scrutiny because of its racially disproportionate impact.[43] It also found purposeful discrimination in the adoption of the requirement.[44]

In *Armstead v. Starkville Municipal Separate School District*,[45] the court of appeals struck down the use of Graduate Record Examination (GRE) scores in hiring and retention decisions. The school district required applicants and incumbent teachers to obtain either a given minimum GRE score or a Master's Degree to qualify for initial or continued employment.[46] The school district made no attempt to validate[47] the GRE, a test designed to evaluate an individual's ability to perform in a graduate program.[48] Although the court upheld the Master's Degree requirement,[49] it struck down the GRE standard[50] by employing the rational relation test.[51]

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43. *Id.* *See supra* note 41.

44. *Id.* at 1115. *See* Walston v. County School Bd. of Nansemond County, 492 F.2d 919 (4th Cir. 1974) (NTE not a valid criterion to measure competency because there is no reasonably necessary connection evidenced by validation study between the qualities tested and the actual requirements of the job to be performed), *rev'g* United States v. Nansemond County School Bd., 351 F. Supp. 196 (E.D. Va. 1972); Beazer v. New York City Transit Auth., 399 F. Supp. 1032, 1057 (S.D.N.Y. 1975) ("[P]ublic entity . . . cannot bar persons from employment on the basis of criteria which have no rational relation to the demands of the jobs to be performed."); Western Addition Community Org. v. Alioto, 369 F. Supp. 77, 79 (N.D. Calif. 1973) ("All that the law requires is that no minority job applicant . . . who is otherwise qualified . . . shall . . . be excluded from that job by an employment test that goes beyond the actual requirements of the job. . . .").

45. 461 F.2d 276 (5th Cir. 1972).

46. *Id.* at 277-78. The school district gave incumbent teachers two years to meet the new requirements. *Id.* at 278.

47. *See supra* note 39.

48. 461 F.2d at 279.

49. *Id.* at 280.

50. *Id.* at 279. The court concluded:

> It is unnecessary to decide whether there was a sufficient showing that the policy did in fact create a racial classification . . . because the GRE score requirement does not measure up to the equal protection requirements under the Fourteenth Amendment, i.e., it is not reasonably related to the purpose for which it was designed.

Id.

51. *See supra* note 33 and accompanying text. *See also* Tyler v. Vickery, 517 F.2d 1089, 1101-02 (5th Cir. 1975) (court determines that Georgia bar examination does not discriminate against minorities because it satisfies two *Armstead* criteria that the exam should be designed for intended purpose, and that the cutoff score related to the quality that the exam purported to measure); Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264, 1267 (9th Cir. 1974) (if high school admissions test excludes dispropor-

Even though the court in *Armstead* claimed to be applying the rational relation test,[52] the court actually may have been using a higher level of scrutiny. The court cited *Reed v. Reed*[53] and *Eisenstadt v. Baird*[54] as sources for the rational relation test,[55] yet those cases now are associated with more intense scrutiny than the traditional rational relation test.[56] The court's thorough examination of the test also ap-

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tionate number of minority students, the standard it employs must substantially further goal of improving quality of education) (citing *Armstead*); Georgia Ass'n of Educators, Inc. v. Nix, 407 F. Supp. 1102, 1107 (N.D. Ga. 1976) (use of minimum NTE score as one requirement for granting teaching certificate was arbitrary and not rationally related to purpose of certification).

52. *See supra* note 32 and accompanying text. *Baker* and *Armstead* are of questionable significance today. *Baker's* strict scrutiny of actions that affect blacks disproportionately is no longer valid because of the United States Supreme Court's 1976 decision in Washington v. Davis, 426 U.S. 229 (1976). In *Washington v. Davis*, persons applying to become police officers challenged the District of Columbia's requirement that all applicants pass a test as a prerequisite to admission into the police training program. *Id.* at 232, 234. The test was to determine whether the applicant had sufficient communicative abilities to complete the training program successfully. *Id.* at 249. The effect of the testing requirement was that it disqualified a disproportionate number of black applicants. *Id.* at 235.

The Supreme Court upheld the testing requirement because there was no showing that the requirement discriminated purposefully against blacks. *Id.* at 246. The Court stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." *Id.* at 242. The Court criticized court of appeals decisions that viewed proof of discriminatory purpose as unnecessary in determining a violation of equal protection. *Id.* at 245.

The *Washington v. Davis* Court held that challengers to a particular action must show that the defendant acted with discriminatory intent before a court will apply strict scrutiny. Even under this standard, however, the result in *Baker* is the same because the *Baker* court found discriminatory intent as well as discriminatory impact. *See* 462 F.2d at 1115. *But see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) (proof of discriminatory intent would not invalidate state action if state could show that it would have acted the same way if it had not intended to discriminate).

53. 404 U.S. 71 (1971). In *Reed*, the plaintiff was challenging an Idaho statute mandating that males be given preference over females in choosing administrators of estates.

54. 405 U.S. 438 (1972). At issue was a Massachusetts law that barred the sale of contraceptives to single persons but which permitted married individuals to obtain them.

55. 461 F.2d at 279, 279 n.6.

56. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684-96 (1977) (discusses *Eisenstadt* and other right of privacy cases); Craig v. Boren, 429 U.S. 190, 197-99 (1976) (discusses the higher level of scrutiny used by the Court in *Reed*). *See also* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer*

peared to be different from the deferential approach that courts usually take in rational relation test cases. For example, the court was concerned about the limitations of tests that measure classroom performance.[57] Under the rational relation standard, if the GRE measured a skill that a teacher should have, such as verbal ability, a school district rationally could conclude that it would be useful for making hiring decisions.[58] One possible reason for this implicit use of a higher level of scrutiny is that courts decided both *Armstead* and *Baker* before Congress applied Title VII[59] to the states.[60] It may have appeared unfair to the two courts to penalize private employers under Title VII for actions that had a discriminatory impact but no discriminatory intent, while allowing government employers to disregard completely the discriminatory impact on their decisions.[61]

Equal Protection, 86 HARV. L. REV. 1, 33-37 (1972) (discusses the more intense scrutiny used by the Supreme Court in several cases, including *Eisenstadt* and *Reed*).

57. 461 F.2d at 280.

58. *See* Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972). *Castro* was a pre-*Washington v. Davis* case that struck down a written test requirement for police force applicants on equal protection grounds. The *Castro* court acknowledged that it used a higher level of scrutiny than the rational relation test to invalidate the testing requirement, *id.* at 732-33, 736, and questioned another court's assertion that it merely had used the rational relation test to invalidate a similar requirement. *Id.* at 736, 736 n.14. The Supreme Court later disapproved both *Castro* and the case that *Castro* questioned, Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972). *See* Washington v. Davis, 426 U.S. 229, 244-45 n.12 (1976).

See also Recent Cases, *Teacher Qualifications—Use of Minimum Score on Standardized Examination as Requirement for Hiring and Retention of Teachers Where Examinations Not Reasonably Related to Purpose for Which it is Ostensibly Designed is Impermissible as Violative of Equal Protection of the Laws under the Fourteenth Amendment*, 22 BUFFALO L. REV. 655 (1973) (discusses *Armstead* and the pre-*Washington v. Davis* confusion about the proper standard that courts should apply in disproportionate impact cases).

59. 42 U.S.C. § 2000e (1982).

60. By enacting the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2(2), (3), 86 Stat. 103 (1972), Congress in effect applied Title VII to state employees. *See* Recent Cases, *supra* note 58, at 659.

61. *See* Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972).

> [O]nce discrimination has been found it would be analomous at best if a public employer could stand back and require racial minorities to prove that its employment tests were inadequate at a time when this nation is demanding that private employers in the same situation come forward and affirmatively demonstrate the validity of such tests.

Id. at 1176.

In *United States v. South Carolina*,[62] a three-judge district court upheld South Carolina's use of NTE scores to make certification decisions and to determine teacher pay subsidies. Between 1957 and 1969, South Carolina had issued four classes of certificates (A, B, C, and D) to teachers who passed the NTE, with the state awarding class A certificates to the highest scorers and class D certificates to the lowest scorers.[63] Teachers could upgrade their certification by retaking the NTE and receiving a higher score.[64] The state based its salary subsidies to school districts partially upon the types of certificates the districts' teachers held, with higher grades of certificates qualifying for higher salary subsidies.[65] At their discretion, school districts could supplement the state's salary subsidies.[66]

In 1969 and 1976, the state raised the minimum score necessary to pass the NTE and issued new types of certificates.[67] The state retained its salary subsidy system and subsidized the holders of the new certificates at the class A rate. All certificates that the state issued before 1969 remained valid.[68] The 1976 raise in standards followed a study which found that the NTE was a viable measure of a teacher's mastery of teacher training programs in South Carolina.[69]

The plaintiffs challenged both the minimum score requirement and the pay system on equal protection grounds by claiming that the systems discriminated against blacks.[70] Although the systems had a sub-

62. 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem. sub nom.* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978).

63. 445 F. Supp. at 1101. The state began using four classes of certificates in 1945, but it did not require prospective teachers to obtain a minimum score to get a certificate. The state used the applicant's percentile ranking on the test to determine which class of certificate to issue a prospective teacher. *Id.*

64. *See id.* at 1101 ("[c]andidates are able to take the NTE an unlimited number of times"); *id.* at 1106 (" Under this system, the Legislature provided to the holders of D certificates the greatest monetary incentive for improvement of the grade of the certificate.").

65. *Id.* at 1105.

66. *Id.*

67. *Id.* at 1101-02. In 1969, the state decided to issue two classes of certificates: warrants and professional certificates. The professional certificate required a higher NTE score than the warrant. *Id.* at 1101. In 1976, the state again changed its certification procedures. It began to issue only one type of certificate, but the minimum score required for the certificate varied depending upon the applicant's teaching field. *Id.* at 1102, 1113.

68. *Id.* at 1106-07.

69. *Id.* at 1103-04.

70. *Id.* at 1097-99. The plaintiffs also claimed that the NTE violated Title VII, *id.*

stantial discriminatory effect,[71] the court found no discriminatory intent.[72] In addition, the court held that the systems were rationally and substantially related to several "clearly important"[73] state goals of promoting effective teaching in the public schools.[74]

The Supreme Court summarily affirmed[75] the lower court's decision,[76] over a dissent that focused on the plaintiff's Title VII claims.[77] By its summary affirmance, the Court ruled that South Carolina did not violate the equal protection clause when it used the NTE to make certification and pay subsidy decisions following a validation study.

Based on the above cases, a validated minimum competency test that measures the content of teacher training programs will encounter no equal protection problems. None of the testing requirements contain overt racial classifications, nor do they infringe upon fundamental interests.[78] In order to attack these requirements on equal protection

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at 1097, and the due process clause, *id.* at 1099 n.4. The court chose to treat the due process claims "on the same basis" as the equal protection claims. *Id.*

71. The state had foreseen this discriminatory effect. Before the state began using the NTE for certification and pay subsidy purposes, it had data indicating that the test would have a discriminatory impact. *Id.* at 1102, 1105-06. Between 1945 and 1976, the state received statistics from the Educational Testing Service showing the gap between scores achieved by blacks and scores achieved by whites. *Id.* at 1102-03.

72. *Id.* at 1102.

73. *Id.* at 1108.

74. *Id.* at 1107-08. The court identified four purposes that the South Carolina certification requirements and pay scales served. These included:

> [I]mproving the quality of public school teaching, certifying only those applicants possessed of the minimum knowledge necessary to teach effectively, utilizing an objective measure of applicants coming from widely disparate teacher training programs, and providing appropriate financial incentives for teachers to improve their academic qualifications and thereby their ability to teach.

Id. at 1108.

75. Summary affirmances "are decisions on the merits, [but they] extend only to the 'precise issues presented and necessarily decided by those actions.'" Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 499 (1981) (quoting Mandel v. Bradley, 432 U.S. 173, 176 (1977)). The Supreme Court's summary disposition of a case is binding on lower federal courts. Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984). The Court, however, is more willing to reconsider a decision made by summary affirmance. 453 U.S. at 500.

76. National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978), *aff'g* South Carolina v. United States, 445 F. Supp. 1094 (D.S.C. 1977).

77. *See* 434 U.S. at 1027-28 (White, J., dissenting). Justice White's dissent did not question the district court's equal protection holding.

78. *Cf.* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). In *Schware*, the Court stated that " [a] state can require high standards of qualification . . . before it

grounds, a challenger would have to establish either that the state enacted these testing requirements with a racially discriminatory intent causing them to fail under the strict scrutiny test, or that they were not rationally related to a legitimate state goal.[79]

The difficulty of establishing a discriminatory intent[80] is evident from the history of South Carolina's testing requirement. It is unlikely that anyone challenging a teacher competency test today will be able to put forth any stronger proof of discriminatory intent than was present in *United States v. South Carolina*.[81] South Carolina first considered using a test to determine pay subsidies shortly after the Fourth Circuit decided *Alston v. School Board of Norfolk*,[82] which held that the state violated the equal protection clause by paying lower wages to black teachers than to white teachers. South Carolina tightened its certification standards shortly after the United States Supreme Court handed

admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or ability to practice law." *Id.* at 239.

By requiring only that the state's standards be rationally related to its purpose, the Court implicitly ruled that a person's interest in practicing law, and therefore presumably his interest in becoming a teacher, is not a fundamental one. If it were, restrictions upon it would have to be necessary to achieve a compelling state interest. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

79. *See supra* notes 32-35 and accompanying text. If a plaintiff could show that a state intended to discriminate through its test on the basis of gender, the classification it created would have to be substantially related to an important governmental goal. *See supra* note 33.

For cases that follow the *South Carolina* prescriptions, see, *e.g.*, Newman v. Crews, 651 F.2d 222, 224-25 (4th Cir. 1981) (state's denial of pay raise to grade B and C teachers had disproportionate effect on minority instructors but is still valid under Title VII and equal protection because it served legitimate state objectives of promoting teacher competence); York v. Alabama State Bd. of Educ., 581 F. Supp. 779, 786 (M.D. Ala. 1983) (for purposes of preliminary injunction, challengers to state's use of NTE scores in making employment decisions showed a likelihood of success on the merits of a title VII claim given evidence showing that two-thirds of those not rehired were black while only one-third of school system was black). *But see* Craig v. County of Los Angeles, 626 F.2d 659, 663 (9th Cir. 1980) (points out that Supreme Court in *South Carolina* failed to recognize cases in which academic training is in the hands of the immediate employer, making the qualifying test and program vulnerable to employer manipulation).

80. *See* Sellers, *supra* note 25, at 372 (discusses difficulty of linking discriminatory effects to discriminatory motives).

81. 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem. sub nom.* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978).

82. 112 F.2d 992 (4th Cir.), *cert. denied*, 311 U.S. 693 (1940).

down its landmark decision of *Brown v. Board of Education*[83] and the state tightened them further after *Green v. County School Board*[84] required authorities to take affirmative steps to eliminate dual school systems.[85] The state made no effort to validate the test until the Educational Testing Service threatened to stop sending NTE scores to the state unless the state acted to validate the tests.[86] The state also was aware of the disproportionate impact that its procedures had on black teachers.[87]

In the past several years other states[88] have instituted statewide tests in an atmosphere of widespread concern over student achievement and teacher competence.[89] There is no indication that these enactments are veiled attempts to exclude blacks from the teaching profession.[90]

One method that states use to protect incumbent teachers is the so-called "grandfather clause."[91] Nearly all states[92] use grandfather clauses that allow incumbent teachers to retain their posts without having to take competency tests. These clauses are virtually invulnerable to constitutional attack. A plaintiff may be able to persuade a court to use strict scrutiny in analyzing these grandfather clauses if they preserve the effects of past discrimination against black applicants for teaching positions.[93] If a plaintiff's goal is to attack the grandfather

83. 347 U.S. 483 (1954) (school segregation deprives minority children of equal protection of the laws).

84. 391 U.S. 430 (1968).

85. *Id.* at 437-39.

86. 445 F. Supp. at 1103-04.

87. *Id.* at 1101-03.

88. *See, e.g.*, ARIZ. REV. STAT. ANN. § 15-533 (Supp. 1983) (statute mandating minimum competency tests became effective in 1981); TEX. EDUC. CODE ANN. § 13.032(e) (Vernon Supp. 1982) (statute mandating minimum competency tests enacted in 1981).

89. *See supra* notes 1-2 and accompanying text.

90. One example of legislative sensitivity to charges of bias exists in the California Education Code. The state agency that administers the teacher specialty area examinations must scrutinize these tests for cultural bias. CAL. EDUC. CODE § 44295 (Deering 1978).

91. *See supra* note 12 (discussing grandfather clauses).

92. Only Arkansas requires incumbent teachers to take competency tests. *See supra* notes 11-13 and accompanying text.

93. *See* Louisiana v. United States, 380 U.S. 145, 154-55 (1965) (failure to require all voters to take new "citizenship test" was unconstitutional because it perpetuated past unconstitutional discrimination against blacks in voting registration). *Cf.* Debra P. v. Turlington, 644 F.2d 397, 407 (5th Cir. 1981) (student competency test requirement

clauses as a way to eliminate the tests entirely this approach may be ineffective because the legislature could cure the discrimination by abolishing the grandfather clause and requiring all teachers to take the test. A grandfather clause would almost certainly be valid under the rational relation test.[94] On several occasions the Supreme Court has upheld grandfather clauses by using the rational relation test.[95] The Court has justified these clauses on the theory that persons who already practice in a profession are more likely to be competent than new entrants because of the former group's experience.[96] The Court's assumption is tenuous. It is unlikely that the legislature would have bothered to enact the new requirements if the persons already in the profession were competent. State actions, however, need not be logical to be constitutional,[97] and a legislature is free to improve the state "one step at a time."[98] Because of this leeway states have at their disposal reasonable means to prevent additional incompetent teachers from en-

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for high school graduation violates equal protection clause if it perpetuates the effects of past discrimination).

In *Debra P.*, the district court found, on remand, that "the present effects of past school desegregation" did not cause the relatively high rate of failure among blacks. 564 F. Supp. 177, 186 (M.D. Fla. 1983). If such a causal link did exist, the competency test was necessary to remedy the effects of past segregation. *Id.* at 188. *See generally* Benjes, Heubert & O'Brien, *The Legality of Minimum Competency Test Programs Under Title VI of the Civil Rights Act of 1964*, 15 HARV. C.R.-C.L. L. REV. 537 (1980) (discussing the legality of student minimum competency tests). The article focuses on Title VI, 42 U.S.C. §§ 2000d-2000d-6 (1982), but a portion of the article assumes *arguendo* that the protection that Title VI provides is co-extensive with that of the equal protection clause. *Id.* at 582-98.

94. For a discussion of the rational relation test, see *supra* note 32 and accompanying text.

95. *See* New Orleans v. Dukes, 427 U.S. 297, 303-05 (1976) (per curiam); Watson v. Maryland, 218 U.S. 173, 176-78 (1910).

96. *See Watson*, 218 U.S. at 177. The Court stated that "such exception [from the competency requirement] proceeds upon the theory that those who have acceptably followed the profession in the community for a period of years may be assumed to have the qualifications which others are required to manifest as a result of an examination." *Id.*

97. Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955). When Justice Douglas stated that "the law need not be in every respect logically consistent with its aims to be constitutional," *id.*, the Justice was referring to the constitutionality of the challenged provision under the due process clause, U.S. CONST. amend. XIV, § 1, rather than its constitutionality under the equal protection clause. The requirements for satisfying the rational relation test are the same under both clauses. *See* United States v. South Carolina, 445 F. Supp. 1094, 1099 n.4 (D.S.C. 1977), *aff'd mem. sub nom.* National Educ. Ass'n v South Carolina, 434 U.S. 1026 (1978).

98. 348 U.S. at 489.

tering the profession without removing those teachers who are already in the profession.

2. Merit Pay

Equal protection concerns regarding merit pay plans are few. None of the proposals contains an explicit racial classification. A party who desires to place a proposal under the strict scrutiny standard faces the difficult task of showing discriminatory intent in the formation of criteria for selecting merit pay recipients.[99] The selection criteria also might be vulnerable if they are vague, or seemingly unrelated to teaching performance. A party could then challenge the classification by alleging that the classification is unrelated to the goals of the program, and that it would be irrational to assume that the use of such vague or irrelevant criteria likely would achieve the state's goal of rewarding the most deserving teachers.[100] The success of this approach lacks a foregone conclusion.

B. *Title VII*

Minimum competency tests and merit pay proposals are also vulnerable under Title VII,[101] which prohibits employment discrimination.

99. To strike down a merit pay system, it would be insufficient for challengers to show that the administrators of the system failed to follow the criteria and instead discriminated against persons on the basis of race or sex. Such a showing would entitle a plaintiff to relief against the offending official, but it would not be sufficient to abolish the system unless the system itself provided that an appropriate official had discretionary power to withhold or grant the merit pay. *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886) (ordinance gave officials total discretion in granting permits for wooden laundries; court held imprisonment of ordinance violators unconstitutional).

100. *Cf.* Armstead v. Starkville Mun. Separate School Dist., 461 F.2d 276, 280 (5th Cir. 1972) (use of GRE scores to select teachers was unconstitutional because it would deny employment to some good teachers when there was no evidence that the GRE had any relation to teacher competence).

101. 42 U.S.C. § 2000e (1982). Title VII states, in pertinent part:

> 2(a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982).

Standardized tests often have a disproportionate impact upon minorities.[102] In addition, merit pay proposals use subjective criteria that are so difficult to measure that the proposals may mask an intent to discriminate.[103]

1. Tests

Title VII generally prohibits discrimination in employment on the basis of race or gender.[104] It specifically allows the use of "professionally developed ability test[s]" if they are not "designed, intended or used to discriminate."[105] In *Griggs v. Duke Power Co.*,[106] the Supreme Court ruled that a plaintiff could establish a prima facie case of employment discrimination by showing that an employment practice had a discriminatory impact, even if the employer had no discriminatory intent.[107] The burden shifts to the employer to show that the practice "had a manifest relationship to the employment in question."[108] In *Albemarle Paper Co. v. Moody*,[109] the Supreme Court added to the *Griggs* test, stating that even if the employer showed that the questioned practice was job-related, a plaintiff could prevail if the plaintiff proves that the employer could have used a less discriminatory

102. *See generally* White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R.-C.L. L. REV. 89 (1979).

103. *Cf.* EEOC v. H.S. Camp & Sons, 542 F. Supp. 411, 447 (M.D. Fla. 1982) ("promotion procedures which are based almost entirely upon the subjective judgment and favorable recommendation of white male supervisors are a ready mechanism for discrimination") (citing Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972)).

104. Title VII also prohibits discrimination on the basis of color, religion or national origin. 42 U.S.C. § 2000e-2(a) (1982). *See supra* note 102.

105. 42 U.S.C. § 2000e-2(h) (1982). The section states in pertinent part:

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

Id.

106. 401 U.S. 424 (1971) (black employees sue employer under Civil Rights Act challenging requirement of high school graduation or passing exam grade).

107. *See id.* at 432 ("Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation.") (emphasis in original). *See also* Friedman, *Congress, the Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles*, 34 VAND. L. REV. 37, 44-45 (1981).

108. 401 U.S. at 432.

109. 422 U.S. 405 (1975) (minority class action suit for back pay to remedy past discrimination by employer in making job decisions).

alternative.[110]

No uniform test exists for determining when an examination has a discriminatory impact. The Uniform Guidelines on Employee Selection Procedures[111] use a "four-fifths" rule to find a discriminatory impact.[112] Under this rule a test has a discriminatory effect or impact if less than eighty percent as many members of one group pass as another.[113] Courts and commentators alike are reluctant to apply the rule. One court declined to use the rule and found no disproportionate impact because the percentage of blacks selected for the jobs in question was greater than the percentage of blacks in the surrounding community.[114] Furthermore, one commentator has criticized the "four-fifths" rule by suggesting that disproportionate impact be determined by asking whether the difference in hiring rates is statistically significant.[115]

If challengers can establish that a test has a discriminatory impact, the employer, to avoid being in violation of Title VII, must validate it by showing that it relates to job performance.[116] The employer may show either that it predicts or it relates to job performance (criterion-related validity), that it measures the skills necessary for the job (content validity), or that it measures character traits that are necessary for the job (construct validity).[117] According to *Washington v. Davis*,[118]

110. *Id.* at 425. *See* Friedman, *supra* note 107, at 44-45.

111. 29 C.F.R. § 1607 (1984).

112. *Id.* § 1607.4(D). The section reads:

> D. Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.

Id.

113. *Id. See also* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 805 (1978).

114. *See* Cormier v. P.P.G. Indus., 519 F. Supp. 211, 254-55 (W.D. La. 1981), *aff'd per curiam*, 702 F.2d 567 (5th Cir. 1983).

115. Shoben, *supra* note 113, at 806.

116. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). *See supra* note 39 for a definition of validation.

117. Benjes, Heubert & O'Brien, *supra* note 93, at 6; Barrett, *Is the Test Content-*

which addressed a statute similar to Title VII,[119] an employer may also validate a test by showing that it measures skills necessary to complete a training program successfully.[120] Finally, according to *United States v. South Carolina*,[121] an employer may validate a test by showing that it measures an applicant's mastery of his training program, as long as the employee concedes or the employer shows that the training program is job-related.[122] It is easier for an employer to validate a test when the employer uses the test to establish whether an applicant has the minimum skills necessary for the job, as opposed to when the employer uses the test purportedly to rank applicants according to their suitability for the job.[123]

The above principles have several important implications for the legality of teacher competency testing proposals. To begin with, persons who wish to challenge the tests can shift the burden of proof to the examiners merely by showing discriminatory impact.[124] This makes Title VII much more attractive for prospective plaintiffs to use than the equal protection clause, which requires proof of discriminatory intent.[125]

Valid: Or, Does It Really Measure a Construct?, 6 EMPLOYEE REL. L.J. 459, 459 (1980-81); Booth & Mackay, *supra* note 39, at 162.

118. 426 U.S. 229 (1976).

119. The statute in *Washington v. Davis* was the Civil Service Act, 5 U.S.C. § 3304(a)(1) (1982). *See* 426 U.S. at 249 n.15. "[The defendants in *Washington v. Davis*] appear not to have disputed that under the statutes and regulations governing their conduct standards similar to those obtaining under Title VII had to be satisfied." *Id.* at 249.

120. 426 U.S. at 250-51.

121. 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem. sub nom.* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978).

122. 445 F. Supp. at 1108, 1113.

123. *See* Ensley Branch of NAACP v. Seibels, 616 F.2d 812, 822 (5th Cir.), *cert. denied sub nom.* Martin v. Personnel Bd., 449 U.S. 1061 (1980).

124. *See supra* notes 107-14 and accompanying text.

125. Friedman, *supra* note 107, at 46. For a discussion of the need to prove discriminatory intent and the difficulties in providing such proof, see *supra* notes 52 & 83.

A prospective teacher may have trouble suing the state under Title VII because it is unclear if the state is an employer or an employment agency for Title VII purposes. The Act defines "employer" as "a person . . . who has fifteen or more employees." 42 U.S.C. § 2000e(b) (1982). It defines "employment agency" as a "person regularly undertaking . . . to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person." *Id.* § 2000e(c). It defines "employee" as "an individual employed by an employer." *Id.* § 2000e(f).

In *United States v. South Carolina*, the district court declined to decide the issue

Once the burden of proof shifts to the defendants, they must show that the test is valid if they wish to continue using it.[126] In light of *United States v. South Carolina*,[127] it appears that a state may validate its competency test by comparing the test's content to that of teacher training programs in the state.[128] Theoretically, challengers could claim that the teacher training programs are insufficiently job-related to validate the tests.[129] Given its great deference to teacher education requirements in other cases,[130] however, the Supreme Court is unlikely to find such an argument persuasive. Moreover, this argument is likely to be unpopular with teachers as well, who often contend that competency tests are unnecessary because requiring successful completion of an approved educational program is sufficient to protect the state's interests in certifying only competent teachers.[131]

The holding in *United States v. South Carolina* does leave several other avenues for Title VII challenges to competency programs. For example, if the evaluators fail to follow the instructions for validating the examination, challengers can attempt to show that this failure un-

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because it ruled that the plaintiffs could not prevail even if the Court reached the state's certification procedures under Title VII. 445 F. Supp. at 1109-10. A prospective teacher clearly could sue to enjoin a local school board from using the examination results in its hiring decisions, because under Title VII state laws that mandate or allow discriminatory hiring procedures do not bind employers. 42 U.S.C. § 2000e-7 (1982). *See also* Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 105 (2d Cir.), *cert. denied*, 452 U.S. 940 (1980).

A prospective teacher who desires to sue the state directly to get injunctive relief against the discriminatory effects of state testing policies may be able to sue under Title VI, 42 U.S.C. § 2000d (1982), even if the state is not an employer for Title VII purposes. Based on Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983), at least five members of the Supreme Court would approve injunctive relief under Title VI for actions having a discriminatory effect as long as federal administrative regulations that Title VI promulgated forbade practices having discriminatory impact. *See id.* at 3223, 3243, 3255 (use of impact standard); *id.* at 3230, 3244, 3251 (relief).

126. *See supra* notes 121-23 and accompanying text.

127. 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem. sub nom.* National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978).

128. *See supra* notes 125-27 and accompanying text.

129. In *United States v. South Carolina*, the plaintiffs failed to challenge the job-relatedness of the teacher training program, and acknowledged instead that successful completion of such a program was sufficient to insure that a teacher was competent. 445 F. Supp. at 1108.

130. *See, e.g.*, Harrah Indep. School Dist. v. Martin, 440 U.S. 194 (1979) (per curiam) (upheld dismissal of tenured teacher who failed to obtain five semester hours of college credits every three years).

131. *See* United States v. South Carolina, 445 F. Supp. at 1108.

dermined the validation study's persuasiveness.[132] This failure, however, will not automatically render the study inadequate.[133] The challengers may also be able to attack a study such as the one in *United States v. South Carolina* if a significant proportion of the state's teachers studied out-of-state, in programs other than those included in the validation study.[134]

Persons attempting to attack competency testing requirements should also prepare to offer less discriminatory alternatives that the state could use to prevent certification of incompetent teachers.[135] One commentator has suggested, for example, that essay examinations may have less cultural bias rather than the traditional standardized multiple-choice examination.[136]

2. Merit Pay

Attacking merit pay plans under Title VII is more difficult than attacking competency tests. First of all, they may not have a racially or sexually discriminatory impact. Even if they do, it will be difficult to show that the criteria themselves, rather than an official's application of the criteria, caused the discriminatory impact.[137] If states adopt plans that allow certain types of teachers greater access to merit pay, however, the plans could have a discriminatory impact. An example of such a plan would be one that favored high school teachers over elementary school teachers. Because elementary school teachers are more likely to be female,[138] such a plan could have a disproportionate impact upon women. The Governor of Florida has proposed one plan that

132. *See id.* at 1113-14.

133. *Id.* at 1114.

134. The South Carolina validation study involved representatives from every teacher training program in the state. *Id.* at 1112.

135. The offering of less discriminatory alternatives would allow plaintiffs to compel states to abandon the tests even if the state can justify their use. *See supra* note 99 and accompanying text.

136. *See* White, *supra* note 102, at 116-17.

137. Presumably if the criteria were valid and the official's application of those criteria were discriminatory, the criteria would stand while the official's decision would be struck down.

138. In 1980, 75.4% of all elementary school teachers were female, while 56.5% of high school teachers were female. U.S. DEP'T OF COMMERCE, BUR. OF THE CENSUS, 1980 CENSUS OF POPULATION SUPPLEMENTARY REPORT: DETAILED OCCUPATION OF THE EXPERIENCED CIVILIAN LABOR FORCE BY SEX FOR THE UNITED STATES AND REGIONS: 1980 AND 1970 (1984).

would award merit pay to teachers having students with the highest achievement scores in a school.[139] If a state adopted this plan, and there is a showing that black teachers were more likely to teach in predominantly black schools, the plan could have a discriminatory impact because of the gap between the achievement scores of white and black students.[140]

IV. CONCLUSION

Teacher competency testing and merit pay plans are popular remedial proposals for this country's education woes. These solutions, however, carry their own set of problems. Poorly designed tests and merit pay plans may be so arbitrary that they violate the equal protection clause.[141] Even somewhat less arbitrary examinations may run afoul of Title VII.[142] The key to avoiding constitutional and statutory problems with the plans is to be aware of their weaknesses. States should try to minimize the discriminatory effect of any tests they use. This will help to lessen a perception that a state intended the tests to discriminate against minorities. Minimized discriminatory effects will make them less vulnerable to Title VII challenges,[143] especially if the discrepancy between passing rates for minorities and non-minorities does not run afoul of the Equal Employment Opportunity Commission's "four-fifths" rule.[144] Similarly, merit pay plans should spell out the criteria for awards as specifically as possible. Greater specificity may help to eliminate the favoritism in the process and, perhaps more importantly, may assist in eliminating the perception of favoritism. Designers of merit pay plans should also be careful not to limit rewards to certain types of teachers, such as high school teachers, if those types of teachers are less likely to be women or members of minority groups.[145] By addressing the possible difficulties with these plans before implementing them, a state would make these proposals more fair, more effective, and more palatable for teachers to accept.

139. *See* Pipho, *supra* note 11, at 310.

140. *See supra* note 79.

141. *See supra* notes 25-100 and accompanying text.

142. *See supra* notes 101-31 and accompanying text.

143. *See id.*

144. *See supra* notes 112-15 and accompanying text.

145. *See supra* note 138.