Cornell Law Review

Volume 70
Issue 3 *March 1985*

Article 5

Minumum Competency Testing of Teachers for Certification Due Process Equal Protection and Title Vll Implications

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NOTES

MINIMUM COMPETENCY TESTING OF TEACHERS FOR CERTIFICATION: DUE PROCESS, EQUAL PROTECTION AND TITLE VII IMPLICATIONS

INTRODUCTION

Widespread concern about teacher incompetency[1] has given rise in recent years to state legislation[2] establishing minimum competency requirements as a prerequisite to teacher certification.[3]

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1 *See, e.g., A Nation at Risk: The Imperative for Educational Reform, A Report to the Nation and the Secretary of Education by the National Commission on Excellence in Education,* AM. EDUC., June 1983, at 2, 14 (making seven recommendations for improving the quality of teaching); Funston, *Educational Malpractice: A Cause of Action in Search of a Theory,* 18 SAN DIEGO L. REV. 743, 744-45 (1981) (pointing to "a burgeoning legal literature on the subject of educational malpractice" in response to public concern about "functional illiteracy" and desire for "accountability" in education); *Help! Teacher Can't Teach!,* TIME, June 16, 1980, at 54-63 (commenting that teachers are too busy trying to solve social problems and that many are incompetent); Solorzano, *What's wrong with our teachers,* U.S. NEWS & WORLD REP., Mar. 14, 1983, at 37-40 (a two-part crisis in American education: increased teacher incompetency and factors that tempt competent teachers to leave the profession).

2 At least thirteen state legislatures have enacted legislation requiring or authorizing state boards of education to institute competency testing as a prerequisite for teacher certification. *E.g.,* ARIZ. REV. STAT. ANN. § 15-53 (Special Pamphlet 1983); ARK. STAT. ANN. § 80-1201 (Supp. 1983); CAL. EDUC. CODE § 44252 (West Supp. 1984); COLO. REV. STAT. § 22-60-113 (Supp. 1983); FLA. STAT. ANN. § 231.17 (West Supp. 1984); LA. REV. STAT. ANN. § 17:7 (West Supp. 1984); MISS. CODE ANN. § 37-9-11 (1972); N.Y. EDUC. LAW § 3004 (McKinney 1981); N.C. GEN. STAT. § 115c-296 (1984); OKLA. STAT. ANN. tit. 70, § 6-154 (West Supp. 1983-84); S.C. CODE ANN. § 59-25-110 (Law. Co-op 1976); TENN. CODE ANN. § 49-5-102 (1983); TEX. EDUC. CODE ANN. § 13.032 (Vernon Supp. 1984); VA. CODE § 22.1-298 (1980).

3 Although some state legislatures use the term "licensure" instead of the term "certification," the terms are not technical equivalents. *See* Gardner & Palmer, Certification and Accreditation: Background, Issue Analysis, and Recommendations 3-5 (Report prepared for the National Commission on Excellence in Education, Aug. 1982) (available through ERIC Clearinghouse on Teacher Education, ERIC catalogue number ED 226 003). Gardner and Palmer explain the distinction as follows:

> *Certification* is the process of legal sanction which authorizes the one certified to perform specific services in the public schools of the state . . . . Primarily, the process is applied to people entering the profession . . . .
>
> *Licensure* is the legal process of permitting a person to practice a trade or profession once that person has met certification standards; through licensure a profession controls the quality of its membership and its efficacy as a profession. The right to license members of a profession is generally regarded as a clear sign of professional autonomy and the acceptance of responsibilities by a professional group . . . . Although several of the states currently issue "licenses" rather than "certificates,"

Both the suddenness with which such requirements have become effective[4] and the disproportionate disqualification of minorities[5]

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education professionals . . . do not have control over entry to the profession . . . in the same sense as the examiners in law or medicine.

Id. at 3-4 (emphasis in original). *See also* Shimberg, *Testing for Licensure and Certification,* 36 AM. PSYCHOLOGIST 1138 (1981) (contrasting certification, which identifies individuals who have met an established standard, with licensure, which makes it illegal for unlicensed individuals to engage in activities defined by "scope of practice" statements contained in licensing laws).

4 In some cases, the testing requirements took effect immediately or within a year or two of enactment. *See, e.g.,* Act of Apr. 1, 1980, ch. 9, §§ 9, 101, 2d Spec. Sess., 1980 Ariz. Sess. Laws 1176, 1183, 1272 (requiring test as of Oct. 1, 1980); Act of Oct. 1, 1981, ch. 1136, 1981 Cal. Stat. 4455 (requiring test as of Mar. 1, 1982); Act of May 18, 1982, ch. 206, 1982 Cal. Stat. 682 (extending date for requiring test to Feb. 1, 1983); Act of Apr. 17, 1981, ch. 172, 1981 Tenn. Legis. Serv. (1981 Tenn. Pub. Acts) 85 (requiring test as of Apr. 1, 1982).

5 *See* United States v. South Carolina, 445 F. Supp. 1094, 1101-02 (D.S.C. 1977), *aff'd mem.,* 434 U.S. 1026 (1978). Soutb Carolina raised the minimum National Teacher Examination (NTE) scores required for certification several times, resulting in an increasingly disproportionate disqualification of candidates from predominantly black colleges. During the 1967-68 academic year, approximately 3% of the candidates from predominantly black colleges were disqualified for failure to meet the minimum NTE score while less than 1% of the candidates from predominantly white colleges were disqualified. When South Carolina raised certification requirements in 1969-70, approximately 41% of the candidates from predominantly black colleges were disqualified, while the disqualification of candidates from predominantly white colleges remained less than 1%.

See also Harris, *Tests Taking a Toll on Black Teachers,* Washington Post, Apr. 26, 1983, at A2, col. 1 ("Across the country, but especially in the South, competency tests to screen prospective teachers are eliminating blacks and other minorities from the profession at what some educators call alarming rates."); Divoky, *Third of Teacher Candidates Fail Proficiency Test,* Sacramento Bee (Calif.), Jan. 14, 1983 (available in NewsBank Fiche 14 EDU 5 at G10) ("Approximately one-third of all candidates have failed the state's new proficiency test required to become a teacher, including more than two-thirds of the minority candidates."); Klein, *No one can pinpoint why so many blacks fail the state's teacher certification test,* St. Petersburg Times (Fla.), Dec. 27, 1982 (available on NewsBank Fiche 13 EDU 110 at B8-10) ("No matter what the reason, statistics show that black teaching candidates simply aren't performing as well on the exam as their white counterparts." In 1981, 34% of black candidates passed the Florida test, compared to almost 90% of white candidates; 38% of black candidates passed, compared to 90% of white candidates in 1982); Bouler, *State board focuses on teacher testing,* Birmingham News (Ala.), Dec. 9, 1982 (available on NewsBank Fiche 13 EDU 110 at B11) (noting that "[s]ince [Alabama] began testing graduates of teacher-education programs in 1981 . . . seven colleges and universities—most of them predominantly black . . . have overall passing rates of less than 70%," while overall scores of the poorest performing predominantly white colleges are above the 70% passing rate); Smith, *Setting Minimal Scores on Teachers Test Urged,* Arkansas Gazette (Little Rock), July 16, 1982 (available on NewsBank Fiche 13 EDU 76 at A4-5) (based on past performance by blacks on the National Teacher Examination, establishing minimal NTE scores for public school teachers "would have the effect of disqualifying well over half of the black teacher applicants in Arkansas": between November 1980 and February 1982, 82% of blacks compared with 12% of whites taking the NTE English language and literature test scored lower than the minimum recommended by the Arkansas State Education Department; 75% of blacks, compared with 25% of whites scored lower than the recommended minimum on the NTE mathematics test).

raise questions concerning the legality of these requirements.[6]

Written tests are the most frequently used instruments for measuring competency.[7] Applicants denied teacher certification may try to challenge the use of competency test scores on three different legal theories: due process,[8] equal protection,[9] or title VII disparate impact.[10]

Challenges brought under the due process clause of the fourteenth amendment will probably fail because plaintiffs will most likely be unable to show an unjustifiable violation of any constitutionally protected interest.[11] Similarly, success under an equal protection theory is unlikely because plaintiffs will be unable in most cases to prove discriminatory intent.[12]

The most promising means for challenging the use of competency test scores for certification is suit under title VII of the Civil Rights Act of 1964.[13] In *Griggs v. Duke Power Co.*,[14] the Supreme Court determined that title VII not only proscribes overt disparate treatment of minorities but also prohibits practices neutral in form and intent that have a disparate impact.[15] Plaintiffs will probably be able to establish a prima facie claim with evidence that minimum competency testing of teachers has a disproportionate effect on minority applicants.[16] Defendants, however, will most likely succeed in rebutting plaintiff's prima facie claim by establishing the job-relatedness of the tests or by showing another legitimate employment

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6 This Note examines only the legal validity of minimum competency tests that result in disproportionate disqualification of applicants for *initial* teacher certification. It does not examine the validity of other evaluation methods used for certification decisions or conduct an empirical validation study of any test. For an excellent example of such a study in the context of teacher testing, see Ellett, Assessing Minimum Competencies of Beginning Teachers: Instrumentation, Measurement Issues, Legal Concerns, (Paper presented at the Annual Meeting of the National Council on Measurement in Education, Apr. 8-10, 1980) (available through ERIC Clearinghouse on Teacher Education, ERIC catalogue number ED 189 175).

7 For a discussion of various types of teacher examinations, including the National Teacher Examination (NTE), a history of their use, and recommendations for the improvement of teacher competency testing, see generally Gardner & Palmer, *supra* note 3, at 38-43.

8 U.S. CONST. amend. XIV, § I; *see infra* section I.

9 U.S. CONST. amend. XIV, § I; *see infra* section II.

10 Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15 (1982) [hereinafter cited as title VII]; *see infra* section III.

11 *See infra* notes 29-62 and accompanying text.

12 *See infra* notes 68-72 and accompanying text.

13 *See infra* note 75.

14 401 U.S. 424 (1971).

15 *Id.* at 431-32. For a comparison of the "disparate impact" and "disparate treatment" theories of discrimination under title VII, see generally Note, *Rebutting the* Griggs *Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. ILL. L. REV. 181.

16 *See supra* note 5.

objective.[17] If defendants meet their burden of proof in showing job-relatedness, plaintiffs' title VII challenge will succeed only if plaintiffs can show that the adoption of a job-related selection standard was actually a pretext for a discriminatory purpose.[18]

An examination of the Supreme Court's attitude toward the job-relatedness/business necessity defense suggests that plaintiffs will encounter almost as much difficulty under a title VII disparate impact theory as under an equal protection theory. The burden of proving pretext under title VII after defendants have demonstrated a legitimate purpose is similar to the burden of proof under the equal protection clause, which requires a showing of discriminatory intent to invoke meaningful court scrutiny. Furthermore, defendant's showing of legitimate purpose may even preclude an attempt by plaintiffs to rebut with evidence of pretext.[19] Plaintiffs, therefore, are unlikely to succeed in defeating a state's use of minimum competency test scores for teacher certification under any legal theory.

To date, only one court has addressed the legality of teacher certification decisions based on results of minimum competency exams.[20] In *United States v. South Carolina*,[21] plaintiffs sued the state of South Carolina, various state agencies, education officials, and local school districts alleging that the use of National Teacher Examination (NTE) scores for certification and salary purposes was racially discriminatory. The United States District Court for the district of South Carolina rejected the equal protection challenge to the use of NTE scores for certification and pay purposes because plaintiffs

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17 *See infra* text accompanying notes 125-51.

18 *See infra* text accompanying notes 152-54.

19 *See infra* text accompanying notes 155 & 157.

20 United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978). An earlier case, United States v. North Carolina, 400 F. Supp. 343 (1975), which held that the state could no longer use a minimum NTE score of 950 as a criterion for teacher certification, was vacated in United States v. North Carolina, 425 F. Supp. 789 (1977), in light of the Supreme Court's ruling in Washington v. Davis, 426 U.S. 229 (1976). *See infra* note 146 (discussing *Davis*). A later court challenge to the use of the NTE as part of the teacher certification program in North Carolina resulted in a settlement and dismissal. *See* Johnson, *Accord ends suit over teacher certification*, News & Observer (Raleigh, N.C.), June 21, 1983 (available on NewsBank Fiche 14 EDU 48 at G9-10). Plaintiffs had contended that the state was using the NTE to discriminate against black teacher candidates in violation of the 14th amendment and title VII. Under the North Carolina settlement, the State Board of Education agreed to comply with three conditions: (1) "to provide the plaintiffs with breakdowns by race of the results on the NTE exam for the next four years;" (2) "to provide counseling and remedial services for prospective teachers who do not make a sufficient score on the NTE to become certified;" and (3) "to provide to the plaintiffs copies of a validation study on the new, three-part core battery of NTE examination, which will measure general knowledge, professional education and writing skills," and to refrain from "rais[ing] the minimum scores required on teaching specialty exams until new validation studies of these tests can be completed." *Id.*

21 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).

failed to prove discriminatory intent[22] and because the use of NTE scores had a rational relation to legitimate employment objectives of the state and local school districts.[23]

The court also held that use of the tests did not violate title VII despite the fact that it resulted in a disproportionate disqualification of minorities.[24] The court found that, although plaintiffs shifted the burden of proof to defendants by showing a disparate impact, defendants met their burden of proving a business necessity by producing the results of a test validation study "adequate for Title VII purposes."[25] Although courts have generally found that an employment test must be shown to predict job performance in order to be valid under title VII,[26] the court in *United States v. South Carolina* openly acknowledged that the defendants' validation study measured the test's correspondence with the content of academic teacher training programs rather than its ability to predict job performance.[27] The court found such validation to be "specifically endorsed in principle" by the Supreme Court in *Washington v. Davis*.[28]

I
DUE PROCESS

An applicant[29] for teacher certification who fails to pass a teacher competency examination may challenge the legality of a certification denial by alleging a violation of due process. The elements of such a claim will be difficult to establish, however. A successful challenge to the use of teacher competency tests for certification purposes must show that some governmental action[30] deprived the plaintiff of a constitutionally protected liberty or property right[31] without adequate notice[32] or without opportunity to be

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22 *Id.* at 1104.

23 *Id.* at 1107-08.

24 *Id.* at 1112.

25 *Id.* at 1112-13.

26 *See infra* note 133.

27 445 F. Supp. at 1112-13.

28 *Id.* at 1113; *see infra* notes 146-47 and accompanying text.

29 The availability of a fourteenth amendment due process claim is not limited to members of minority groups. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 501-06 (1978).

30 The 14th amendment due process clause provides: "Nor shall any *State* deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 2 (emphasis added).

31 Plaintiffs may invoke the due process clause whenever governmental action unjustifiably violates their life, liberty, or property right. *See* E. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 528 (1983). Plaintiffs may choose to frame due process challenges to the denial of certification in terms of deprivation of a property right or of a liberty right. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Debra P. v. Turlington, 474 F. Supp. 244, 266 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part*, 644 F.2d 397 (5th Cir. 1981).

heard.[33] Even if a prima facie case is established, the state may defeat the due process claim by demonstrating a sufficiently compelling interest in teacher competency testing to justify such a deprivation.[34]

The Supreme Court, in *Board of Regents v. Roth*,[35] set out a standard for determining the existence of a protected liberty or property interest. In *Roth*, a nontenured teacher challenged an unexplained failure to renew his teaching contract. The Supreme Court held that fourteenth amendment due process did not require opportunity for a hearing unless the plaintiff could show that the nonrenewal deprived him of a liberty interest or that he had a property interest in continued employment.[36] The Court found no liberty interest, stating that "there is no suggestion whatever that the [plaintiff's] 'good name, reputation, honor, or integrity' is at stake"[37] and "there is no suggestion that the State . . . imposed on [the plaintiff] a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities."[38]

In determining that the plaintiff did not have a property interest, the Court articulated the following standard for recognizing a constitutionally protected property interest:

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32 *See* E. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 31, at 555 (listing adequate notice as an essential element of due process); *see infra* notes 53-56 and accompanying text.

33 *See* E. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 31, at 559.

If plaintiff can establish that the deprivation of a liberty or property right is based on disputed facts or issues, then due process guarantees the plaintiff some opportunity to present objections. In some cases a hearing *prior* to the governmental deprivation may be required. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (hearing required prior to termination of basic welfare benefits). In other cases, a hearing *after* the deprivation may suffice. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974) (hearing after termination of government employment satisfies due process). Finally, in some cases, a procedural safeguard other than a hearing may provide the plaintiff with an adequate opportunity to be heard. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651 (1977) (availability of tort action is adequate to protect liberty interest of child subjected to corporal punishment in school).

If denial of teacher certification results in a deprivation of a liberty or property right, the use of a fair test may be considered an adequate procedural safeguard under the due process clause. *See* E. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 31, at 557. ("The essential guarantee of the due process clause is that of fairness.") *See infra* notes 57-58 and accompanying text.

34 *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (balancing individual interest sought to be protected by due process clause against conflicting interest of state); *see also* E. NOWAK. R. ROTUNDA & J. YOUNG, *supra* note 31, at 573 ("The justices use a balancing test to determine whether the individual interest merits a specific procedure in view of its cost to the government and society in general."); *see infra* note 62 and accompanying text.

35 408 U.S. 564 (1972).

36 *See id.* at 579.

37 *Id.* at 573.

38 *Id.*

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . .
>
> Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[39]

Although courts have not reviewed due process claims in the context of teacher competency testing, *Debra P. v. Turlington*[40] addresses the due process argument in the context of competency testing of students. In *Debra P.*, both the district court and the court of appeals found that withholding high school diplomas from students who failed a minimum competency test constituted denial of due process. The district court held that the students' legitimate expectation that satisfactory attendance and completion of required courses would result in the receipt of a diploma created a constitutionally protected property interest.[41] In addition, the district court found that students had "a liberty interest in being free of the adverse stigma associated with [failure to earn a normal diploma.]"[42] The court of appeals rendered no opinion as to the existence of a liberty interest, basing its decision that the test violated due process upon the finding of a property right alone.[43] Even though the district court in *Debra P.* found that a liberty interest had been violated, any "stigma or other disability" resulting from a failure to obtain teacher certification is likely to be less than the stigma of functional illiteracy associated with the absence of the certificate of completion in *Debra P.* It is also less likely to foreclose the opportunity for other employment than is failure to receive a high school diploma.[44]

Similarly, courts are unlikely to find that graduates from teacher training programs have a protected property interest in teacher cer-

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39 *Id.* at 577.

40 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part, vacated and remanded in part*, 644 F.2d 397, *reh'g denied*, 654 F.2d 1079 (5th Cir. 1981).

41 In affirming the district court's opinion, the Fifth Circuit stated: "This expectation can be viewed as a state-created 'understanding' that secures certain benefits and that supports claims of entitlement to those benefits." 644 F.2d at 404. *See also* Note, *State-Mandated Literacy Test as a Condition to Receipt of High School Diploma Violates the Equal Protection and Due Process Clauses*—Debra P. v. Turlington, 644 F.2d 397, *reh'g denied*, 654 F.2d 1079 (5th Cir. 1981), 55 TEMP. L. Q. 460, 481 (1982) (contending court's recognition of due process rights was correct because of gravity of plaintiff's interest in future job opportunities).

42 474 F. Supp. at 266.

43 644 F.2d at 404.

44 *See supra* text accompanying note 38.

tification.[45] In *Bestera v. Tuscaloosa City Board of Education,*[46] the Eleventh Circuit decided that students challenging minimum reading standards for promotion had "no property right in an expectation that they [would] be promoted despite objectively substandard classroom work."[47] The *Bester* court distinguished *Debra P.*, noting that *Debra P.* challenged denial of a diploma on the basis of a test "unrelated to academic work required in school."[48] The *Bester* court reasoned:

> [A]n expectation of the plaintiff students that the schools would continue to promote students performing in a substandard manner is not reasonable and cannot form the basis of a property right. Students have no legitimate expectation that the meaning of "satisfactory work" done in the classroom will remain constantly fixed at a level that in truth is academically unsatisfactory.[49]

Assuming that a teacher competency test measures knowledge of materials taught in a teacher training program and abilities or skills reasonably expected of teachers entering the profession, *Bester* strongly supports an argument against the existence of a protected property interest in certification.[50]

Even where the validity of a test is questionable, courts will probably find teacher certification cases to be more analogous to the situation in *Board of Regents v. Roth* than the situation in *Debra P. v. Turlington*. Until recently, students in teacher training programs were automatically awarded certification upon program completion.[51] Three distinguishing factors suggest, however, that expecta-

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45 *See* Coleman v. School Dist., 87 N.H. 465, 183 A. 586 (1936). In *Coleman,* the Supreme Court of New Hampshire upheld the power of a school board to prescribe tests for the eligibility of teachers: "Contrary to the plaintiff's assertion, no constitutional issue of personal rights is involved. No one has a guaranteed or vested right to become or to continue in position as a public school teacher, even subject to regulation." *Id.* at 466, 183 A. at 586. *See generally* G. COLLINS, THE CONSTITUTIONAL AND LEGAL BASES FOR STATE ACTION IN EDUCATION 1900-1968, at 53-54 (1968) ("Ordinarily, a teaching license or certificate of qualification is not a constitutional right . . . but only a privilege to be exercised under the restrictions imposed by the constituted authorities. . . .").

46 722 F.2d 1514 (11th Cir. 1984).

47 *Id.* at 1516.

48 *Id.*

49 *Id.*

50 *See* E. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 31, at 547-48 (discussing the nature of an entitlement-property interest in employment and absence of a right to a hearing where initial employment is refused).

51 *See* R. O'Reilly, Changing Certification and Endorsement Programs 4-5 (Paper presented at the Annual Meeting of the National Conference of Professors of Educational Administration, Aug, 17, 1981) (available through ERIC Clearinghouse on Teacher Education, ERIC catalogue number ED 207 193). O'Reilly goes so far as to say: "Typically, certification is an *entitlement* upon evidence of accomplishment, and a chief state school officer may not deny a qualified applicant the appropriate certificate." *Id.* at 5 (emphasis added).

tions based on past practices may not create a property right in the teacher certification context. First, enrollment in teacher training programs is not compulsory, unlike school attendance for children. Second, attendance in teacher training programs is relatively short-term[52] compared to the twelve years of attendance required for receipt of a high school diploma. Third, failure to obtain teacher certification does not preclude most other forms of gainful employment, unlike possession of a high school diploma, which today is a prerequisite to many forms of gainful employment.

Even if plaintiffs establish the existence of a constitutionally protected liberty or property right in teacher certification, they will probably encounter difficulty in showing that they have been deprived of this right without adequate notice or opportunity to be heard. The *Debra P.* court viewed adequate notice to require setting the effective date of new testing requirements far enough in advance to permit adequate student preparation.[53] In the context of teacher competency testing, therefore, states may avoid due process objections by sufficiently forewarning applicants about new certification requirements to enable them to prepare for a competency exam.

Several state statutes suggest ways in which legislatures might avoid due process notice objections. Some statutes allow several years to elapse between the enactment of competency testing requirements and the actual use of test scores as a basis for granting or denying certification.[54] Other states publish test results from various schools for the benefit of those intending to enroll in teacher training programs[55] or provide remedial help for candidates already

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52 Generally, states require their primary and secondary school teachers to have four years of college; some states require a fifth year or master's degree after a period of student or probationary teaching. *See* G. COLLINS, *supra* note 45, at 54-56.

53 The district court observed that high school students in Florida were required to attend school under the state's compulsory attendance statute and that graduation was "the logical extension of successful attendance." 474 F. Supp. at 266. The court found that the state had "redefined" the requirements for successful attendance by requiring a passing score for graduation and that withholding high school diplomas just 13 months later constituted inadequate notice in violation of due process.

54 *See. e.g.*, TEX. EDUC. CODE ANN. § 13.032(g) (Vernon Supp. 1984). Louisiana's competency statute provides:

> In adopting requirements for certification pursuant to this Section the board shall provide that such requirements shall not be applicable to students enrolled in a teacher education program in Louisiana on the effective date of this Section, unless the board finds that any such requirement can be made applicable without undue hardship to the student.

LA. REV. STAT. ANN. § 17:7.1C (West Supp. 1984).

55 California's statute provides that the Commission on Teacher Credentialing "shall compile data regarding the rate of passing the state basic skills proficiency test by persons who have been trained in various institutions of higher education. The data shall be available to members of the public, including to persons who intend to enroll in teacher education programs." CAL. EDUC. CODE § 44252(e) (West Supp. 1984).

enrolled who lack sufficient competency in the basic skills.[56] States that adopt such provisions, either alone or in combination, may successfully eliminate due process notice objections to teacher certification testing.

In addition to requiring adequate notice of new certification standards if a constitutional liberty or property interest is at stake, the due process clause of the fourteenth amendment also requires an opportunity to be heard through a fair test.[57] In *Debra P.*, the Fifth Circuit recognized that students must have an opportunity to be heard through a fair test before being denied a diploma.[58] Fairness in that context depended on "curricular validity," which requires testing on materials actually taught.[59] Because teacher certification tests purport to measure an applicant's competency for a particular occupation, courts may demand validation in terms of job-relatedness,[60] consistent with statutory and regulatory validation requirements under title VII of the Civil Rights Act of 1964.[61] Validation in terms of job-relatedness would require that a certification test measure knowledge, skills, or abilities essential to teaching.

Even if plaintiffs challenging teacher certification tests establish a prima facie due process claim, the state will probably succeed in

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56 *See* COLO. REV. STAT. § a 22-60-113(2)(a) (Supp. 1983).

57 In states that base permanent certification on evaluations of candidates' performances, due process may also require the existence of known performance standards. *See generally* Rosenberger & Plimpton, *Teacher Incompetence and the Courts*, 4 J. L. & EDUC. 469 (1975) (discussing judicial attempts to define teacher incompetency). Rosenberger and Plimpton raise the question of whether "a defined acceptable standard of teaching known by all in advance" is a necessary basis for determining teacher competency. *Id.* at 485. They conclude that courts may have different attitudes about the due process rights of probationary and tenured teachers, though "it would seem that all cases in which the courts or statutes deemed teachers entitled to due process, would involve standards of performance implicit or explicit." *Id.* at 486.

58 The *Debra P.* district court concluded that inadequacy of notice prior to invoking the diploma sanction resulted in a violation of due process. *See* 474 F. Supp. at 267. On appeal, the Fifth Circuit noted:

> The due process violation potentially goes deeper than deprivation of property rights without adequate notice. When it encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid action which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair . . . . We believe that the state administered a test that was, at least on the record before us, fundamentally unfair in that it *may* have covered matters not taught in the schools of the state.

644 F.2d at 404 (emphasis in original)(citation omitted). *See also* Gunn, Debra P. v. Turlington: *Due Process Enters the Classroom, But How Far?*, 11 J. L. & EDUC. 573, 580 (1982) (noting that, in *Debra P.*, "[a]ccurate individual student assessment . . . appears to be the crux of the court's application of fundamental fairness principles").

59 *See* 644 F.2d at 405.

60 *See infra* note 133 and accompanying text. *But see infra* text accompanying notes 144-50.

61 *See infra* text accompanying notes 140-43.

arguing that in the balance its interests are more compelling than those of unsuccessful certification applicants. The state's concern with improving its teaching force at a time when declining educational quality is viewed as a serious problem will probably override individual teachers' interests. In addition, the interests of the many children for whose education the teachers would be responsible are in conflict with and may outweigh the teachers' interests.[62]

Most likely, however, courts will not even reach the interest balancing stage of a due process challenge. Careful timing of competency test implementation and documentation of test validity should effectively eliminate due process as a ground for challenging the legitimacy of certification decisions based on test scores. Even if states cannot completely avoid timing or validation problems, however, the difficulty of establishing a property or other constitutional right in certification will discourage the use of a due process theory.

II
EQUAL PROTECTION

Teacher competency laws classify persons as eligible or ineligible for certification on the basis of a test. The equal protection clause of the fourteenth amendment guarantees protection from an arbitrary classification under state law that results in different treatment. Any statutory classification that results in different treatment must have at the very least a rational relation to a legitimate state interest.[63] In addition, the Supreme Court has determined that where the classification is based on a suspect trait such as race, courts must apply a strict scrutiny standard of review. According to that standard, the classification must be necessary to promote a compelling or overriding state interest.[64] Plaintiffs may invoke strict

62 Plaintiffs, however, may also be able to advance on the rights of school children. In particular, plaintiffs may argue that minority children benefit more from having a minority teacher for a role model than from having a more academically qualified but nonminority teacher. *See, e.g., Unclear Whether NTE Scores Can Forecast Teachers' Abilities,* Arkansas Gazette (Little Rock), Sept. 11, 1983 (available on NewsBank fiche EDU 75 at B7) (noting that educators "disagree on [the NTE's] value in elevating the quality of teaching" and that other social considerations, particularly "the benefits of having black teachers in classrooms that are predominantly black," are also important); Wheeler, *Va. educators split on test issue,* Virginian-Pilot (Norfolk), May 1, 1983 (available on NewsBank fiche EDU 41 at C13) (noting educators' concern that certification of fewer blacks "would set 'a dangerous trend away from a multicultural teaching force' ").

63 *See, e.g.,* McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."); Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

64 *See, e.g.,* McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (racial classification "upheld only if it is necessary, and not merely rationally related, to the accomplishment

scrutiny review by showing either that the law on its face designates a suspect class for different treatment; that the law, as administered, is applied with greater severity to members of a suspect class; or that the law, although containing no classification or containing only a neutral classification, is intended to impose a greater burden on members of a suspect class.[65]

Courts may also apply an intermediate degree of scrutiny in cases where both a "semi-suspect" classification, such as gender, and an important interest are implicated. Under the standard applied in intermediate scrutiny, the classification must be substantially related to the achievement of important governmental objectives.[66] To date, courts have not applied intermediate scrutiny in employment cases.[67]

In order to invoke strict scrutiny review of the use of minimum competency test scores for teacher certification decisions, plaintiffs must show that those who established the testing requirements intended the pass/fail classification to result in a disproportionate disqualification of minorities. Proving discriminatory intent[68] where states have instituted minimum competency testing requirements for teacher certification will be very difficult, particularly in the absence of a history of past discriminatory hiring practices within a school district. Although the plaintiffs in *United States v. South Carolina* presented evidence supporting a showing of discriminatory in-

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of a permissible state policy"); Korematsu v. United States, 323 U.S. 214, 216 (1944) (classification by race triggers "the most rigid scrutiny").

65 *See generally* E. NOWAK. R. ROTUNDA & J. YOUNG, *supra* note 31, at 527 (describing these three forms of equal protection challenge).

66 *See. e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

67 *But cf.* Note, *The Employment Interest and an Irrational Application of the Rationality Test:* New York City Transit Auth. v. Beazer, 51 U. COLO. L. REV. 641, 663-64 (1980) (arguing that courts should apply intermediate level of scrutiny in equal protection cases involving employment interests because of importance of those interests, even where no fundamental right or suspect classification is involved).

68 The Supreme Court in Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977), set out a list of factors to consider in determining whether discriminatory motivation underlies a particular classification:

> The historical background of the decision is one . . . source, particularly if it reveals a series of official actions taken for invidious purposes. . . . The specific sequence of events leading up to the challenged decision also may shed some light . . . . Departures from the normal procedural sequence might afford evidence . . . . Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.
>
> [Finally,] legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

429 U.S. at 267-68 (footnote omitted).

tent, the district court declined to infer discrimination, citing the remoteness of the historical circumstances indicating such intent.[69] The reluctance of courts to infer discriminatory intent in this and other cases suggests that courts will be reluctant to infer discriminatory intent in the context of teacher certification, unless evidence of discriminatory intent is unequivocal and recent.

In attempting to establish discriminatory intent, plaintiffs may argue that the state's choice to forego other means for improving teacher competency constitutes "means discrimination."[70] For example, plaintiffs may contend that the choice of minimum competency testing over some other equally or even slightly less effective means for improving the quality of teaching reveals an indifference to the greater burden that minorities must bear in achieving the desired goal.[71] Although the concept of "means discrimination" may be valid, the Supreme Court has not yet accepted it explicitly.[72] The likelihood of prevailing with a "means discrimination" argument is therefore uncertain.

The inability of plaintiffs to prove the discriminatory intent necessary to invoke strict scrutiny, the difficulty in countering states' prerogatives in education under intermediate scrutiny,[73] and the le-

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69 445 F. Supp. 1094, 1104 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978). The court stated:

> Plaintiffs' elaborate web of historical circumstances from which the court is being asked to infer discriminatory purpose, is noticeably silent about recent events. Significantly, the cases relied on by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* . . . and by plaintiffs in this case (for the proposition that historical circumstances do bear upon invidious purpose) involved events occurring within four years of the state act of decision under review.

Id. at 1104.

70 *See* Schnapper, *Two Categories of Discriminatory Intent,* 17 HARV. C.R.-C.L.L. REV. 31, 38-40 (1982) (choice of means for accomplishing legitimate goal may constitute "means discrimination" where there is "an invidious consideration of race in selecting or weighing the methods to be used" in achieving that goal).

71 Schnapper points out that

> a decisionmaker usually considers not only the goals . . . .
> A decisionmaker might select a different extent or speed of accomplishment of the goal according to whether the price was to be paid by blacks or by whites . . . .
> In many cases, these racial decisions will be based not on an affirmative desire to harm blacks, but on a greater willingness to see a given burden borne by blacks than whites, an attitude that . . . has aptly [been] described as "racially selective indifference."

Id. at 38-40 (footnotes omitted).

72 Schnapper views the Court's failure to recognize the concept of "means discrimination" as a result of the Court's tendency to confuse goals and means. Schnapper identifies elements of analysis based on means discrimination in the Court's equal protection decisions. *See id.* at 41-46.

73 Not only did the *United States v. South Carolina* court uphold the constitutionality of the classification under a rational relation standard, but it also stated that the use of test scores for certification decisions would have survived even an intermediate level of

nience of review exercised under a rational relation standard[74] suggest that equal protection claims in the context of certification testing will be unsuccessful.

III
TITLE VII

Future plaintiffs challenging the use of minimum competency test scores should rely on title VII of the Civil Rights Act of 1964.[75] The Supreme Court, in *Griggs v. Duke Power Co.*[76] and *Albemarle Paper Company v. Moody,*[77] established a three-part inquiry[78] to be applied in title VII discriminatory impact cases challenging the use of a particular employee selection standard. First, the plaintiffs must make out a prima facie case by showing the applicability of title VII and by proving that the selection standard has a substantial disparate impact.[79] Second, if the plaintiffs meet this burden, the defendants must demonstrate that the selection standard is job-related or a business necessity.[80] Third, if the defendants successfully establish this defense, the plaintiffs must then prove that the defendants could use other selection standards that would be equally or nearly as suitable to the defendants' needs but would be less discriminatory in their impact on minority applicants.[81]

A. Prima Facie Claim

Plaintiffs seeking to establish a prima facie claim of disparate

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scrutiny because the defendants had "offered a legitimate and important governmental objective for their use of the NTE." 445 F. Supp. 1094, 1107 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978).

74 In Newman v. Crews, 651 F.2d 222 (4th Cir. 1981), for example, the court watered down rational relation scrutiny in the certification context "to include administrative convenience and even inadvertence as ends justifying the [discriminatory] result." *See* Note, *Business Necessity Standard of Title VII Discriminatory Impact Cases Jeopardized by* Newman v. Crews, *651 F.2d 222 (4th Cir. 1981)*, 55 TEMP. L.Q. 435, 457-58 (1982).

75 *See* Holley & Field, *The Law and Performance Evaluation in Education: A Review of Court Cases and Implications for Use*, 6 J. L. & EDUC. 427, 430 (1977) (predicting that, because title VII does not require proof of discriminatory intent where discriminatory effect is clear, "most employment discrimination suits in the future will no doubt be brought under Title VII").

76 401 U.S. 424 (1971).

77 422 U.S. 405 (1975).

78 *See generally* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 91-92, 1287 (2d ed. 1983). Schlei and Grossman point out that the *Griggs/Albemarle* formula is an analytical tool for evaluating evidence and not a three-step procedure by which evidence is presented. Thus, in considering whether or not one side or the other has satisfied its burden at particular steps, the court will consider evidence relevant to that step offered by both plaintiff and defendant. *Id.* at 1325 (footnote omitted).

79 *See Albemarle Paper Co.*, 422 U.S. at 425; *see infra* notes 89-124 and accompanying text.

80 *See* 422 U.S. at 425; *see infra* notes 125-52 and accompanying text.

81 *See* 422 U.S. at 425; *see infra* notes 152-70 and accompanying text.

impact under title VII face two potential obstacles. First, they must offer adequate statistical evidence of a disparate impact. Second, plaintiffs must show that three requirements for the applicability of title VII have been met: (a) the plaintiff and defendant must have an employment or other relationship that is governed by title VII;[82] (b) the defendant must be responsible for the challenged act or decision;[83] and (c) the challenged act or decision must be a deprivation of a right, here an employment opportunity, protected under title VII.[84]

1. *Statistical Evidence of Disparate Impact*

Title VII provides that:

> It shall be an unlawful employment practice for an employer . . .[to] classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin.[85]

In *Griggs*, the Supreme Court interpreted title VII to prohibit not only intentional discriminatory treatment but also practices that have an unjustified disparate impact on minorities.[86] The Supreme Court has expressed the standard for establishing disparate impact only in general terms, speaking of "significantly different"[87] selection of applicants and "substantially disproportionate"[88] disqualification.

Statistical evidence is necessarily of primary importance both in establishing and rebutting a prima facie disparate impact claim.[89] Although various statistical methods may be used for establishing disparate impact in a teacher certification context,[90] pass/fail com-

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82 *See infra* notes 103-15 and accompanying text.

83 *See infra* notes 116-19 and accompanying text.

84 *See infra* notes 120-24 and accompanying text.

85 42 U.S.C. § 2000e-2(a)(2) (1982).

86 *See* 401 U.S. at 431-32.

87 *Albemarle Paper Co.*, 422 U.S. at 425.

88 Washington v. Davis, 426 U.S. 229, 246-47 (1976).

89 *See* United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.) ("[i]n many cases the only available avenue of proof is the use of racial statistics to uncover . . . covert discrimination"), *cert. denied*, 404 U.S. 984 (1971); B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1331 ("[s]tatistics play a dominant role in virtually all . . . disparate treatment class actions"); Copus, *The Numbers Game is the Only Game in Town*, 20 How. L.J. 374, 380-81 (1977) ("statistics are frequently the best available evidence of employer . . . discrimination"). For examples of nonstatistical evidence that may be used to support or rebut statistical evidence in disparate impact cases, see B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1391-94.

90 Population/work force statistics, in the context of teacher certification, seem less appropriate than pass/fail statistics but may bolster cases of borderline pass/fail statistical significance. *See, e.g.*, Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1019-20 & nn.3-4 (1st Cir. 1974) (finding 39% minority applicant passing rate on employment test

parisons are particularly appropriate.[91] If statistical evidence shows a sufficient disparity to eliminate chance as the likely explanation for the difference in certification between minority and white applicants, courts assume that the disparity results from a discriminatory selection standard.[92] The burden then shifts to the defendants to show that the selection standard is justified.[93]

Because both plaintiff and defendant will normally submit statistical evidence,[94] the prima facie determination will depend on the relative quality of the statistical evidence presented by the opposing parties.[95] That quality depends on the degree of refinement exhibited in the statistical data. Generally, larger sample sizes, "finely-tuned" to the relevant labor population, increase the reliability of inferences from statistical evidence.[96] This enhanced reliability permits courts to accept lower levels of disparity as meeting the prima facie standard.[97] Moreover, plaintiffs supported by "finely-tuned" statistics may argue successfully for a quantitative standard of statistical significance.[98] A quantitative standard is advantageous because

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compared to 56% white applicant passing rate sufficient disparity to establish prima facie case when combined with statistics showing disparity between population and work force racial composition), *cert. denied*, 421 U.S. 910 (1975).

Population/work force statistics compare the percentage of minorities in the general population or job market in a designated geographical area with the percentage of minorities in the relevant portion of the employer's work force. B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1333. The geographic scope of statistics may be an important factor in the weight accorded to statistical evidence and should be carefully considered. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 310-11 (1977) (noting that percentage of black teachers in St. Louis County school system dropped from 15.4% to 5.7% if city of St. Louis were excluded). In *Hazelwood,* the Supreme Court suggested refinements of the population/work force equation that should render results identical to a pass/fail comparison. 433 U.S. at 308-11. *See* B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1342.

One further statistical method that may be appropriate in the teacher certification context is a showing of the percentage of teachers who do not meet minimum competency requirements but are nonetheless successful teachers. *Id.* at 1346.

91 Pass/fail statistics compare the percentage of the minority applicants who qualify under the challenged selection standard with the percentage of white applicants who qualify. *See* B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1332. In addition to actual applicants, potential applicants may be included in disparate impact statistics. Dothard v. Rawlinson, 433 U.S. 321, 330 (1977). Defendants may negate the implications of these statistics by showing their irrelevance to the specific situation or by introducing contrary actual applicant pass/fail statistics. New York City Transit Auth. v. Beazer, 440 U.S. 568, 584-87 (1979). *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1349.

92 B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1334.

93 *Id.*

94 *Id.* at 1389.

95 *Id.* at 1390 & nn.356-57.

96 *See* Teamster v. United States, 431 U.S. 324, 339-40 & n.20 (1977).

97 B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1371.

98 Generally, three possible quantitative standards may apply when "finely-tuned" statistics are available: (1) the "two or three standard deviations" test applied by the Supreme Court in Hazelwood School District v. United States, 433 U.S. 299, 309-11 &

of the objectivity and certainty such a standard engenders.

2. *Potential Obstacles to Title VII Applicability*

In addition to establishing disparate impact, a plaintiff faces three interrelated obstacles to establishing a prima facie claim under title VII.[99] First, the defendant and plaintiff must be in an employer-employee relationship or other relationship governed by title VII.[100] Second, the defendant must be responsible for the challenged act or decision.[101] Third, the challenged act or decision must constitute a deprivation of an employment opportunity protected under title VII.[102]

a. *Requisite Relationship Between Plaintiffs and Defendants.* Section 2000e-2 of title VII prohibits discrimination by employers,[103] sug-

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nn.14 & 17 (1977); (2) the conventional standard of a .05 level of statistical significance applied by social scientists, *see* Hallock, *The Numbers Game — The Use and Misuse of Statistics in Civil Rights Litigation,* 23 VILL. L. REV. 5, 13 (1978); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal,* 89 HARV. L. REV. 387, 400 & n.58 (1975-76); (3) the four-fifths standard applied to pass/fail statistics by the Uniform Guidelines. *See infra* note 134 and accompanying text. The Uniform Guidelines state that where a minority group selection rate is less than four-fifths or eighty percent of the rate of the highest scoring group, federal employment agencies will presume disparate impact. 41 C.F.R. § 60-3.4(D) (1983). Some courts, however, reject the four-fifths standard because it sets an arbitrary level of disparate impact and ignores differences in sample size. *See* B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1374 & n.338; *see also* Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII,* 91 HARV. L. REV. 793, 805-11 (1978).

For other possible standards, see B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1374-75 & nn.340-42.

99 A fourth potential obstacle to establishing title VII application to state certification requirements may exist because title VII derives its authority from the commerce clause of the Constitution. U.S. CONST. art. I, § 8, cl. 3. Tenth amendment federalism limitations on the commerce power may limit title VII. *Cf.* National League of Cities v. Usery, 426 U.S. 833, 852 (1976) (application of Fair Labor Standards Act to state employees violated tenth amendment of the Constitution insofar as it would "operate to directly displace the States' freedom to structure integral operations in areas of traditional government functions").

One commentator predicts that, although title VII does not satisfy all the *National League of Cities* standards, "[a]bsent a showing that the structure or budget of government operations is seriously affected, Title VII should still win on balance." Jacobs, *A Constitutional Route to Discriminatory Impact Statutory Liability for State and Local Government Employers: All Roads Lead to Rome,* 41 OHIO ST. L.J. 301, 344-47 (1980). In addition, the continuing vitality of *National League of Cities* is open to question. *See* Note, *The Repudiation of National League of Cities: The Supreme Court Abandons the State Sovereignty Doctrine,* 69 CORNELL L. REV. 1048 (1984).

100 42 U.S.C. § 2000e(b) (1982); *see infra* note 103.

101 *See infra* notes 116-19 and accompanying text.

102 *See infra* notes 120-24 and accompanying text.

103 Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b) (1982). Within its definition of unlawful "employment" practices, however, title VII includes discriminatory practices by an "employer," "em-

gesting that an employer-employee relationship must exist before title VII applies. If this requirement is construed strictly, plaintiffs challenging certification standards under title VII face an insurmountable obstacle. Persons who set certification standards do not perform the hiring. Accordingly, states and state licensing boards would not be "employers" of the plaintiffs, and title VII relief would be unavailable.

No case has yet addressed the question of whether title VII should apply to situations beyond the conventional employer-employee relationship in the context of teacher certification.[104] Courts have extended title VII protections beyond a traditional employer-employee relationship in other contexts.[105]

Four factors support an extension of the Act's reach beyond conventional employment relationships. First, as a matter of statutory construction, the Court of Appeals for the District of Columbia has noted that the sections subsequent to sections 2000e(b) and 2000e-2(a)(2) of title VII do not limit the Act's protections to only "employees" or "applicants for employment" but, rather, extend to "any individual."[106] This supports a textual argument that title VII reaches beyond conventional employment relationships.

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ployment agency," and "labor organization," *Id.* § 2000e(a)-(c), and discrimination by any employer, labor organization, or joint labor-management committee in the admission of applicants to occupational training programs. *Id.* § 2000e-2(d).

104 In United States v. South Carolina, 445 F. Supp. 1094, (D.S.C.), *aff'd mem.*, 434 U.S. 1026 (1977), the state and the state board of education asserted as a defense that they were not "employers" of teachers within the meaning of title VII. They argued that their activities involved "certification" of teachers rather than "selection," and that the local school boards were responsible for hiring teachers. The court found that title VII had not been violated and therefore did not decide whether the state and the state board of education were employers of teachers within the meaning of title VII. *Id.* at 1109-10.

105 *See, e.g.*, Sibley Memorial Hosp. v. Wilson, 488 F.2d 1338 (D.C. Cir. 1973) (claim of private duty nurse recognized under Civil Rights Act although not an employee of hospital); Puntolillo v. New Hampshire Racing Comm'n, 375 F. Supp. 1089 (D.N.H. 1974) (State Racing Commission and breeding association recognized as employers of driver-trainers under Civil Rights Act); Hackett v. McGuire Bros., 445 F.2d 442 (3d Cir. 1971) (pensioner may sue under title VII for alleged violation by former employer). *See generally* Metzger & Suhre, *The Jurisdictional Reach of Title VII,* 34 Sw. L. J. 817, 817-18 (1980).

106 *Sibley Memorial Hosp.*, 488 F.2d at 1341. The *Sibley* court noted:

> The Act defines 'employee' as 'an individual employed by an employer,' but nowhere are there words of limitation that restrict references in the Act to 'any individual' as comprehending only an employee of an employer. Nor is there any good reason to confine the meaning of 'any individual' to include only former employees and applicants for employment, in addition to present employees. These words should, therefore, be given their ordinary meaning so long as that meaning does not conflict with the manifest policy of the Act.

Id. See also Metzger & Suhre, *supra* note 105, at 822 (discussing textual support for the argument "that the term 'employer' as used in sections [2000e(b) and -2(a)(1) & (2)] of the Act was merely intended to designate one class subject to the Act rather than to establish a relationship to which the Act's proscriptions apply") (footnotes omitted).

Second, the legislative history of title VII reveals congressional intent to remedy the disproportionate unemployment of minorities and their employment in predominantly unskilled or semiskilled labor.[107] This suggests that one of the purposes of the Act is to remove barriers to minority admission into the professions wherever possible. One way of accomplishing this goal is to remove artificial barriers to professional *certification* as well as to professional *employment*. Indeed, lowering certification requirements may be a necessary element of affirmative action to compensate for past unequal educational opportunities.

Third, the general principle that remedial legislation should be broadly construed to achieve its purposes[108] also supports an expansive interpretation of title VII. The Fifth Circuit of the United States Court of Appeals expressed the application of this principle to title VII:

> Title VII of the 1964 Civil Rights Act provides us with a clear mandate from Congress that no longer will the United States tolerate [racial discrimination in employment.] It is, therefore, the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics.[109]

A strict construction of title VII that precludes coverage of pre-employment relationships violates this principle.

Finally, deference to interpretations of a statute by the administrative agency responsible for its enforcement suggests that courts will endorse a broad interpretation of title VII. The Supreme Court has accorded great deference to title VII interpretations issued by the Equal Employment Opportunity Commission (EEOC).[110] The EEOC has shown little hesitation in extending title VII protection beyond conventional employer-employee relationships.[111] Contin-

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107 Both the House and Senate committee reports reveal that the underlying concern behind title VII was disproportionate unemployment or semiskilled and unskilled employment of nonwhites. *See* H. R. REP. No. 914, pt. 2, 88th Cong., 2d Sess. 26-27 (1963) (recognizing severity of problem and need for strong remedial action); S. REP. No. 867, 88th Cong., 2d Sess. 3-10 (1964) (same). Also, in 1972 Congress amended title VII to include "applicants for employment." Pub. L. No. 92-261, 86 Stat. 103, 109 (1972). *See also* 118 CONG. REC. 7169 (1972); Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 472 (1968) (noting title VII establishes affirmative obligation to "reach out and provide employment opportunities").

108 *See generally* J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 57.12 (4th ed., C. Sands 1972) (liberal interpretation of remedial statutes favored).

109 Culpepper v. Reynolds Metals, 421 F.2d 888, 891 (5th Cir. 1970) (footnote omitted).

110 Griggs v. Duke Power Co., 401 U.S. at 433-34 (EEOC interpretation of title VII entitled to great deference).

111 *See, e.g.*, EEOC v. Supreme Court of New Mexico, 17 Empl. Prac. Dec. (CCH) ¶

ued judicial deference would ensure that plaintiffs may challenge state certification standards under title VII.

Although these four factors support the application of title VII to actions challenging state certification standards, not all courts are receptive to extending title VII protection beyond traditional employment contexts.[112] In particular, attempts to extend the application of title VII to bodies responsible for professional licensing requirements have encountered strong resistance.[113] In a case involving licensing of attorneys, for example, the Supreme Court recognized a state's broad power to protect the public through licensing standards for professions.[114] Although states may have a compelling interest in establishing their own educational standards, including teacher certification standards, the quasi-professional status of teaching[115] distinguishes teacher certification cases from professional licensing cases. This quasi-professional status removes teacher certification from the realm of professional licensing. Thus,

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8536 (D.N.M. 1979) (EEOC maintaining that unsuccessful minority and female candidates may challenge New Mexico bar exam under title VII disparate impact theory because Supreme Court of New Mexico acts as employer in licensing attorneys and title VII does not require traditional employer-employee relationship); Ciano v. Family Life Ins. Co., EEOC Dec. (CCH) ¶ 6457 (May 6, 1975) (EEOC ruling that state agency requiring prospective insurance agents to pass exam given only in English violates title VII where evidence showed disparate disqualification of Hispanics). *See generally* Metzger & Suhre, *supra* note 153, at 842 (observing that EEOC interprets title VII to cover applicants before state licensing boards).

112 *See, e.g.*, Smith v. Dutra Trucking Co., 410 F. Supp. 513 (N.D. Cal. 1976), *aff'd*, 580 F.2d 1054 (9th Cir. 1978).

113 *See. e.g.*, Woodard v. Virginia Bd. of Bar Examiners, 420 F. Supp. 211 (E.D. Va. 1976), *aff'd per curiam*, 598 F.2d 1345 (4th Cir. 1979). In *Woodard*, a black plaintiff suing the state board of bar examiners after failing the bar exam contended "that the defendants' control over the [plaintiffs'] access to the attorney job market [was] sufficient to bring [the] controversy within the purview of Title VII." *Id.* at 212. Although the court acknowledged "both judicial and administrative support for this position," *id.*, the court dismissed Woodard's claim, concluding that title VII validation standards did not apply to professional licensing examinations. *Id.* at 214.

114 Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975).

115 *See generally* Funston, *supra* note 1, at 774-75 (discussing quasi-professional status of public school teaching in the context of potential malpractice actions).

Funston does not consider public school teachers to be professionals, citing the lack of technical knowledge acquired through post-graduate education and the failure to rely on status and reputation to determine earnings. *Id. See also* Goode, *The Theoretical Limits of Professionalization*, in THE SEMI-PROFESSIONS AND THEIR ORGANIZATIONS 266, 277-78 (A. Etzioni ed. 1969); Wilensky, *The Professionalization of Everyone?*, 710 AM. J. SOC. 137 (1964).

But see, e.g., McGrath v. Burkhard, 131 Cal. App. 2d 367, 376, 280 P.2d 864, 870 (1955) (imposition of extracurricular duties permissible because of nature of teacher's position); District 300 Educ. Ass'n v. Board of Educ., 311 Ill. App. 3d 550, 554, 334 N.E.2d 165, 168 (1975) (teacher's professional status not demeaned by assignment of extracurricular duties); McCullough v. Cashmere School Dist., 15 Wash. App. 730, 734, 551 P.2d 1046, 1050 (1976) (contract must require services within teacher's education, experience, and professional preparation).

application of title VII to authorities responsible for defining teacher certification standards will not require reversal of precedent.

b. *Defendant's Responsibilities*. The requirement that the defendants be responsible for the challenged act or decision is also problematic. If courts view the responsibility requirement narrowly, defendants not involved in establishing the contested certification standards may escape liability under title VII.

Establishing defendants' responsibility for the challenged act and defining "employer" under title VII are interrelated problems. The combination of these two requirements might allow all defendants to escape the reach of title VII where no defendant satisfies both requirements although each defendant satisfies one or the other. This could occur if state agencies responsible for establishing certification standards persuade the courts that only local school boards meet a narrowly defined employment relationship requirement and if local school boards persuade the courts that they are not responsible for certification standards mandated by the state.

Given the underlying purpose of title VII to provide equal employment opportunities,[116] courts should be reluctant to construe requirements for the applicability of title VII so rigorously that all defendants may avoid liability.[117] Courts should extend the application of title VII to defendants responsible for setting certification standards, regardless of whether they participate in the hiring process. This would allow courts to hold state authorities responsible for certification standards[118] accountable under title VII for any resulting discriminatory impact. Thus, if the state requires passing scores on competency tests for teacher certification, the state should be subject to title VII. In general, local school boards "may add to the rigor of [state] certification requirements, enhancing teacher qualifications [but] they may not reduce them or set them aside."[119] If a local school board adds to suggested certification requirements

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116 Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971); *see supra* note 107.

117 *See supra* text accompanying notes 108-09.

118 Although the state legislature has ultimate authority to set standards for teacher qualification, this authority is normally delegated to the state board of education. *See* G. COLLINS, *supra* note 45, at 53. Peterson, Rossmiller and Volz observe:

> The administration of a teacher certification program requires expertise and a day-by-day application of specialized knowledge which are beyond the capability of a legislative body. A state legislature can, as it must, establish the standards, the policies, and the guidelines for teacher certification, but their actual implementation must, of necessity, be delegated to an administrative agency, usually to the state board of education.

L. PETERSON, R. ROSSMILLER & M. VOLZ, THE LAW AND PUBLIC SCHOOL OPERATION 482 (1969).

119 R. O'Reilly, *supra* note 51, at 3 (noting discretion of state legislatures handling certification procedure). *See also* G. COLLINS, *supra* note 45, at 53.

or establishes its own certification requirements, the local school board should be accountable under the Act.

c. *Deprivation of a Right Protected under Title VII.* The third requirement for establishing title VII applicability is that the act or decision challenged must be a deprivation of a right protected under title VII. The protected right involved in the context of certification testing is that of employment opportunity.[120]

The same considerations that enter into defining relationships covered by title VII will also affect a court's determination of whether a plaintiff has been denied an employment opportunity protected by title VII. Thus courts will consider the legislative intent behind title VII,[121] the tendency to construe liberally a remedial statute such as title VII,[122] and the liberal interpretation of "employment opportunities" endorsed in decisions of the EEOC,[123] the administrative agency responsible for enforcing the Act.

Courts that have construed title VII to cover a wider range of relationships than conventional employer-employee relationships are likely to interpret "employment opportunity" broadly, finding title VII to apply in cases where applicants have been denied teacher certification based on minimum competency test scores.

Defendants may argue that denial of an "employment opportunity" within the meaning of title VII can occur only after an applicant for a teaching position has qualified for certification. The implications of applying title VII only in cases of post-certification discrimination suggest that courts may find a narrow interpretation of "employment opportunity" unacceptable. An inability to obtain certification severely limits a prospective teacher's employment opportunities. Moreover, construing title VII to prohibit discrimination only in a post-certification context would allow discrimination to continue at other levels, including training program admissions and certification. The fact that title VII prohibits discrimination in training program admissions[124] suggests an intent to prohibit discrimination at all entry levels.

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120 It shall be an unlawful employment practice for an employer—

(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)(2) (1982) (emphasis added). *See* Metzger & Suhre, *supra* note 105, at 818, 830.

121 *See supra* note 107 and accompanying text.

122 *See supra* text accompanying notes 108-09.

123 *See supra* notes 110-11 and accompanying text.

124 42 U.S.C. § 2000e-2(d) (1982). *See supra* note 103.

B. Job Relatedness/Business Necessity Defense

If plaintiffs demonstrate a sufficient disparate impact and establish the applicability of title VII to teacher certification, the burden will shift to defendants to show that the disparate impact is the result of a selection standard which is justified by business necessity.

1. *The Supreme Court's Job-Relatedness and Business Necessity Requirements*

In holding that title VII protections extended to cases of discriminatory impact as well as discriminatory treatment, the Supreme Court in *Griggs v. Duke Power Company*[125] stated:

> The [Equal Employment Opportunity] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is *business necessity*. If an employment practice which operates to exclude Negroes cannot be shown to be *related to job performance*, the practice is prohibited.[126]

Accordingly, a showing of business necessity or job-relatedness of a selection standard will rebut a title VII disparate impact claim.

The Supreme Court appeared to consider job-relatedness and business necessity interchangeable in *Griggs*. This raises the question of whether *Griggs* requires only a showing of legitimate business purpose or whether it requires a showing of actual necessity to justify the use of a challenged selection standard.[127] Later Supreme Court decisions have not settled this question.[128] As a result, some courts have focused on legitimacy of purpose, as evidenced by job relatedness,[129] while other courts have focused on necessity, finding

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125 401 U.S. 424 (1971).

126 *Id.* at 431 (emphasis added).

127 *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 78, at 112-13.

128 In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Supreme Court focused on job-relatedness without mentioning a requirement of business necessity. Likewise in Washington v. Davis, 426 U.S. 229 (1976), the Court found that the use of an employment test resulting in disproportionate disqualification of minorities must be "validated" in terms of job performance, again suggesting the equivalence of job-relatedness and business necessity. In Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977), however, the Court stated that a challenged selection standard must be "necessary to safe and efficient job performance." Later, in New York Transit Auth. v. Beazer, 440 U.S. 568 (1979), the Court again indicated that proof of strict necessity is not necessary as long as the selection standard bears a "manifest relationship to the employment in question." *Id.* at 587 n.31 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

129 For lower federal court decisons following this approach, see Annot., 36 A.L.R. FED. 9, § 5 (1978). Some commentators also have argued that the legislative intent behind title VII demands emphasis on legitimacy of purpose rather than necessity. *See, e.g.*, Note, *supra* note 15, at 210 (underlying purpose behind title VII is to eliminate discriminatory treatment of individuals, not to impair legitimate business needs); Comment, *The*

a legitimate business purpose insufficient to justify a challenged selection standard unless its use is essential.[130] The EEOC has followed both approaches in its decisions.[131]

Courts applying a requirement of strict necessity have generally expressed that requirement in terms of "safety" and "efficiency."[132] These criteria for determining business necessity seem more suited to industrial employment, where concerns for consumer safety and maximization of profits are the employer's high priorities.

In disparate impact cases involving tests, proof of job-relatedness requires a showing of test validity.[133] Several federal regulatory agencies have adopted the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines),[134] designed to provide guidance for the use of employment selection standards.[135] The Uniform Guidelines require documented evidence of a test's validity whenever a test has an adverse impact on minorities.[136] Because the Supreme Court showed varying degrees of deference to earlier versions of the guidelines,[137] uncertainty resulted about the proper

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Business Necessity Defense to Disparate-Impact Liability Under Title VII, 46 U. CHI. L. REV. 911, 926-34 (1979).

130 These courts seem to be in the majority. For lower federal court decisions following this approach, see Annot., 36 A.L.R. FED. 9, § 3 (1978).

131 For a list of EEOC decisions requiring that an employment practice be necessary to the safe and efficient operation of the employer's business and of EEOC decisions taking the view that a showing of business necessity includes a determination that the employment practice is job-related, see Annot., 36 A.L.R. FED. 9, § 7 (1978). One EEOC decision has taken the position that business necessity requires *only* that the employment practice be related to successful job performance. *See* EEOC Decision No. 72-1497, EEOC Dec. (CCH) ¶ 6352 (1972).

132 *See* Annot., 36 A.L.R. FED. 9, § 3 (1978) and cases cited therein.

133 42 U.S.C. § 2000e-2(h) (1982) states:

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

See B. SCHLEI & P. GROSSMAN, *supra* note 78, at 82 (noting that Supreme Court has construed this language to require job-relatedness in use of a professionally developed test).

134 29 C.F.R. §§ 1607.1-.16 (1984). The EEOC, Civil Service Commission, Department of Justice, and Department of Labor formally adopted the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) in 1978. *Id.* § 1607.1. The guidelines are to be used by the EEOC in enforcing title VII. *Id.* § 1607.2A. Although the guidelines lack the force of law, the Supreme Court has accorded them varying degrees of deference as the enforcing agencies' interpretation of title VII. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-36 (1975); Griggs v. Duke Power Co., 401 U.S.424, 433-34 (1971); *see infra* note 137.

135 29 C.F.R. § 1607.1B (1984) (purpose of guidelines is "to provide a framework for determining the proper use of tests and other selection procedures").

136 *See id.* § 1607.3A.

137 29 C.F.R. § 1607 (1978); 29 C.F.R. § 1607 (1976); *see* B.SCHLEI & P. GROSSMAN, *supra* note 78, at 92 n.31 (brief history of predecessors of the Uniform Guidelines).

weight to be accorded them.[138] Courts may be more likely to follow the Uniform Guidelines because of their formal promulgation.[139]

The Uniform Guidelines recognize three types of validity studies.[140] Criterion-related validation requires high statistical correlation between successful performance on a selection procedure, such as a competency test, and successful performance on the job.[141] Content validation requires evidence that the test calls for the application of knowledge, skills, or abilities critical in job performance.[142] Construct validation requires evidence that the selection standard measures the extent to which a candidate has the constructs or traits characteristic of those who presently perform the job successfully.[143]

A fourth type of validity study, curricular validation, measures correspondence between materials tested and materials taught in a training program. The acceptability of curricular validation is of particular concern in the context of teacher competency testing because it allows validation without reference to successful job performance. Although the Uniform Guidelines and earlier guideline

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Although the Uniform Guidelines superseded the earlier EEOC guidelines, judicial interpretations of the earlier versions have greatly influenced title VII jurisprudence. *See* Note, *supra* note 15, at 195-96. In *Griggs*, 401 U.S. at 433-34, the Supreme Court recognized that the EEOC guidelines were "entitled to great deference" as an "administrative interpretation . . . by the enforcing agency." The Court, however, upheld the challenged test even though it failed to meet EEOC guidelines. In *Albemarle Paper Co.*, 422 U.S. at 431, the Court emphasized the need for compliance with the EEOC guidelines and found that the test failed the job-relatedness requirement of the EEOC guidelines. In Washington v. Davis, 426 U.S. 229, 250 (1976), the Court acknowledged the EEOC guidelines but upheld a selection standard which was not validated in accordance with the guidelines. *But cf. infra* note 148.

138 *See* B. SCHLEI & P. GROSSMAN, *supra* note 78, at 96 (discussing approaches to Uniform Guidelines and earlier versions in lower federal courts); Note, *supra* note 74, at 445 ("general indecisiveness and lack of continuity [in Supreme Court decisions] concerning the details of the business necessity doctrine have done little to clarify a specific test for use by the lower courts and has [sic] invited a broader construction of *Griggs*").

139 Although the earlier guideline versions did not enjoy the status of official federal regulations, the Uniform Guidelines were formally promulgated in 1978 and are binding on all employers governed by title VII. *See supra* note 134. Because this overcomes at least some of the Supreme Court's earlier objections, some courts and commentators have predicted that the Supreme Court will adhere more closely to the Uniform Guidelines in the future. *See* Allen v. City of Mobile, 464 F. Supp. 433 (S.D. Ala. 1978) (predicting closer adherence in future to the Uniform Guidelines because they are created through joint cooperation of all federal enforcement agencies); Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies,* 28 CATH. U.L. REV. 605, 631 n.181 (1979) (predicting that the Supreme Court will accord greater deference to the Uniform Guidelines because formal promulgation and substantive changes meet Court's previous criticisms).

140 *See* 41 C.F.R. § 60-3.5A (1983).

141 *See id.* § 60-3.14B (discussing technical standards for criterion-related validation).

142 *See id.* § 60-3.14C (discussing technical standards for content validation).

143 *See id.* § 60-3.14D (discussing technical standards for construct validation).

versions do not endorse curricular validation, the Supreme Court has accepted validation in terms of a test's ability to predict success in a training program,[144] apparently finding validation to job performance unnecessary.[145] In *Washington v. Davis*,[146] the plaintiffs sought and were denied admission to a training program on the basis of test scores that assessed their ability to do well in such a program. *Davis* is distinguishable from *United States v. South Carolina*,[147] where persons who had already completed teacher training programs were denied certification based on competency test scores. Also, the Supreme Court's opinion in *Davis* that curricular validation was acceptable under title VII was dictum.[148] The Court's summary affirmance of *United States v. South Carolina*, in which the district court had upheld under title VII the use of a test based on curricular validation,[149] appears binding, however.[150]

The use of curricular validation for certification testing would greatly reduce the defendants' burden of showing job-relatedness. It is easier to demonstrate a correspondence between materials

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144 United States v. South Carolina, 434 U.S. 1026 (1978), *aff'g mem.* 445 F. Supp. 1094 (D.S.C. 1977); Washington v. Davis, 426 U.S. 229 (1976).

145 B. SCHLEI & P. GROSSMAN, *supra* note 78, at 127.

146 426 U.S. 229 (1976). In *Davis*, the Supreme Court upheld a test administered to applicants for admission to a police training program even though the defendants did not prove that the test was an adequate measure of job performance. Although the test had a disproportionate disqualifying effect on blacks, the Court found that evidence of a correlation between success on the test and success in the training program was sufficient to establish the legality of the challenged employment practice. Significantly, however, the Court held that title VII validation standards did not apply and decided the case on fifth and 14th amendment grounds. *Id.* at 246-51.

147 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978). The district court relied on a validity study that measured the correlation between test content and the content of teacher training curricula in South Carolina and estimated the accuracy of correlation between minimum test score requirements and the ability of minimally qualified students in South Carolina teacher education programs to achieve such scores. *Id.* at 1112.

In his dissent to the summary affirmance, Justice White criticized the district court's reliance on *Davis*, stating:

> *Washington v. Davis* . . . held only that the test there involved, which sought to ascertain whether the applicant had the minimum communication skills necessary to understand the offerings in a police training course, could be used to measure eligibility to enter that program. The case did not hold that a training course, the completion of which is required for employment, need not itself be validated in terms of job-relatedness. Nor did it hold that a test that a job applicant must pass and that is designed to indicate his mastery of the materials or skills taught in the training course can be validated without reference to the job.

434 U.S. at 1027 (White, J., dissenting).

148 *See* Note, *supra* note 15, at 197-98 n.104 (noting that, because *Washington v. Davis* was decided under the equal protection clause, "[i]t remains an open question whether this more general approach to validation is equally applicable in Title VII litigation").

149 *See supra* note 147.

150 *But cf. supra* note 139 (noting that formal promulgation of Uniform Guidelines may alter the Court's viewpoint).

taught in a teacher training program and materials tested on a competency exam than to show that a test measures knowledge, skills, abilities, or traits associated with successful job performance. Most of the critics of teacher competency tests have questioned the correlation between test scores and effectiveness in teaching.[151]

Once plaintiffs establish a prima facie claim of disparate impact under title VII, defendants will bear the burden of proving that the challenged competency tests are sufficiently job-related to justify their discriminatory effect. Test validation is the method for establishing the job-relatedness of employment testing. Courts' attitudes toward the Uniform Guidelines will have an important bearing upon the rigor with which defendants must validate the challenged selection standard and, ultimately, upon defendants' willingness and ability to carry out expensive, time-consuming validation procedures.

C. Negation of the Job-Relatedness/Business Necessity Defense

If the defendants successfully validate the challenged selection standard, plaintiffs may still prevail if they negate the evidence of job-relatedness/business necessity with evidence of alternative selection standards that have a comparable business utility but a lesser discriminatory impact.

Three issues present themselves in connection with the negation of a job-relatedness/business necessity defense: first, under what circumstances can plaintiffs defeat defendants' showing of job-relatedness with evidence of suitable alternatives;[152] second, who should bear the burden of proving the existence or nonexistence of suitable alternatives;[153] and third, how broad may be the range of alternatives presented in rebuttal.[154] The way in which courts resolve each of these issues may determine who will prevail in a title VII disparate impact challenge.

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151 *See, e.g.*, McDaniel, *The NTE and Teacher Certification*, 59 PHI DELTA KAPPAN 186 (1977). McDaniel asserts:

> It is no doubt true . . . that a written test (like the NTE) 'measures only a fraction' of teaching ability or potential. Cognitive knowledge of one's subject and of professional education is an aspect of professional competence—but how *much* of a determinant of teaching effectiveness is this in relation to such qualities as personality, commitment, flexibility, sense of humor, and hard work?

Id. at 188 (emphasis in original). *But cf.* Piper & O'Sullivan, *The National Teacher Examination: Can It Predict Classroom Performance?*, 62 PHI DELTA KAPPAN 401, 401 (1981) (study of NTE scores and performance scores of 32 randomly selected teachers showed "significant correlation between . . . performance and knowledge").

152 *See infra* notes 155-60 and accompanying text.

153 *See infra* notes 161-67 and accompanying text.

154 *See infra* notes 168-69 and accompanying text.

The Supreme Court's opinions are not clear on when to allow rebuttal of defendants' evidence of job-relatedness/business necessity. In *New York City Transit Authority v. Beazer*,[155] the Supreme Court stated that plaintiffs need not be given an opportunity to rebut defendants' showing of job-relatedness/business necessity when discriminatory intent on the part of defendants has been ruled out as a possibility.

In *Beazer*, plaintiffs challenged an employment rule that effectively excluded all drug users, including those on methadone maintenance, from eligibility for any position with the Transit Authority (TA). Plaintiffs based their title VII claim on the assertion that minorities were disproportionately affected by the rule. The Supreme Court held that the rule did not violate fourteenth amendment equal protection or title VII. The Court found that the blanket exclusion was legitimate under title VII because the employment rule bore a "manifest relationship to the employment in question."[156] The Supreme Court went on to find that "[t]he District Court's express finding that the rule was not motivated by racial animus *forecloses any claim in rebuttal* that [the rule] was merely a pretext for intentional discrimination."[157] This suggests that, once defendants demonstrate a legitimate purpose, plaintiffs will be precluded from establishing a title VII violation with evidence of "pretext"[158] based on defendants' failure to resort to a more suitable and less discriminatory alternative.

In *Furnco Construction Corp. v. Waters*,[159] however, the Court sug-

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155 440 U.S. 568 (1979).

156 *Id.* 587 n.31 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)). The Court based this conclusion on the district court's finding that TA's legitimate employment goals of safety and efficiency required the exclusion of a *majority* of all methadone users; that those goals required the exclusion of all methadone users from about 25% of TA's jobs which were "safety sensitive;" and that TA's goals of safety were "significantly served by—*even if they [did] not require*—TA's rule as it applies to all methadone users including those who [were] seeking employment in non-safety-sensitive positions." *Id.* (emphasis added). Although the Court recognized the effectiveness of methadone as a cure for physical addiction to heroin, *id.* at 575, it noted that a significant number of former addicts eventually return to drug or alcohol abuse. *Id.* at 576. Apparently the Court found this sufficient justification for excluding all methadone users from all jobs with TA. *But see Giving methadone patients a chance*, N.Y. Times, Apr. 11, 1979, at A24, col. 1 (editorial) (criticizing Supreme Court's *Beazer* decision saying: "Surely the Transit Authority can distinguish between jobs that can safely be handled by former heroin addicts and those that cannot").

157 440 U.S. at 587 (emphasis added).

158 The Supreme Court first articulated the "pretext" rule in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973), a disparate treatment case, *see supra* note 15 and accompanying text, stating that once the defendant offers a justification for the challenged selection procedure, the plaintiff must "be afforded a fair opportunity to show that [the defendant's] stated reason for [plaintiff's rejection by defendant] was in fact pretext."

159 438 U.S. 567 (1978).

gested that no showing by defendants of legitimate purpose can foreclose plaintiffs' opportunity to present evidence of pretext. "The plaintiff must be given the opportunity to introduce evidence that the proferred justification is merely a pretext for discrimination."[160] In light of this language, the meaning of *Beazer* is not clear.

If *Beazer* forecloses any claim by plaintiffs that the existence of suitable alternatives establishes "pretext" despite defendants' evidence of legitimate purpose, the implications are serious. The distinction between disparate impact and disparate treatment established in *Griggs* is diminished. Plaintiffs may, therefore, have almost as much difficulty prevailing under title VII as under the fourteenth amendment equal protection clause, which has been held to require proof of discriminatory intent.

Courts disagree on which party has the burden of showing the existence or nonexistence of suitable alternatives.[161] The Supreme Court has indicated that plaintiffs should bear the burden of proving that suitable alternatives exist. In *Albemarle Paper Co. v. Moody*,[162] the Court stated that, once defendants show job-relatedness, "it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[163]

Although several lower courts have held that plaintiffs bear the burden of proving the existence of suitable alternatives,[164] others have followed the approach of the Uniform Guidelines[165] and earlier guideline versions, requiring defendants to show the lack of suitable alternatives as part of their burden of proof in test validation.[166] The Supreme Court has cautioned, however, that courts

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160 *Id.* at 578.

161 *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 78, at 1330-31.

162 422 U.S. 405 (1975).

163 *Id.* at 425 (citation omitted); *accord,* Connecticut v. Teal, 457 U.S. 440, 447 (1982).

164 *See, e.g.,* Chrisner v. Complete Auto Transit, Inc., 645 F.2d 1251, 1261 n.9 (6th Cir. 1981) ("The burden of establishing the presence of available alternatives, however, belongs only to the plaintiff and must be sustained in the third stage of the analysis."); Guardians Ass'n of the New York City Police Dep't v. Civil Serv. Comm'n, 630 F.2d 79, 110 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981) (noting that *Albemarle* prohibits a selection standard only "if the plaintiffs can establish the existence of an alternative procedure with an equivalent degree of job relatedness and a lesser disparate racial impact").

165 29 C.F.R. § 1607 (1984).

166 *See, e.g.,* Kirby v. Colony Furniture Co., 613 F.2d 696, 703-04 (8th Cir. 1980) (defendant bears burden of proving absence of suitable alternatives); Blake v. City of Los Angeles, 595 F.2d 1367, 1376 (9th Cir. 1979), *cert. denied,* 446 U.S. 928 (1980) (same); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 244 n.87 (5th Cir. 1974) (same); *see also* Annot., 36 A.L.R. FED. 9, § 4 (1978) (citing federal court decisions requiring absence of reasonably available alternative with less disparate impact as part of

should be reluctant to impose their own judgment as to the suitability of alternatives on defendant employers, noting "[t]he dangers of embarking on a course . . . where the court requires businesses to adopt what it perceives to be the 'best' hiring procedures."[167] Thus, regardless of who bears the burden of proof, courts should find a negation of defendants' showing of job-relatedness/business necessity only in extreme circumstances.

The third issue relating to the negation of a showing of job-relatedness is what range of alternatives courts should consider. The cases provide little guidance on the proper scope of inquiry in ascertaining the existence of suitable alternatives.[168]

Plaintiffs are more likely to succeed where they only need to show a more suitable means for improving teacher competency, rather than where they must show a more suitable basis for selecting competent teachers for certification.[169] Even where plaintiffs may present alternatives for improving teacher competency, however, the highly speculative nature[170] of inquiring into the relative merits of such alternatives suggests that courts will be reluctant to accept evidence of greater suitability as dispositive. Courts are unlikely to reach this final issue, however, because plaintiffs will probably fail to satisfy one of the many requirements prior to this stage.

CONCLUSION

Plaintiffs seeking to challenge the legitimacy of using competency test scores as a basis for teacher certification will face siguificant obstacles under three legal theories: due process, equal protection, and title VII disparate impact. Courts will probably de-

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business necessity defense). Courts which take a literal approach to the requirement of business necessity and place the burden of proof as to availability of suitable alternatives on defendants may be in conflict with the Supreme Court's holding in *Furnco*. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration . . . .").

167 *Furnco*, 438 U.S. at 578.

168 *See, e.g., Furnco,* 438 U.S. at 578 (referring to "hiring procedures"); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (referring to "other tests or selection devices"); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) (referring to "acceptable alternative policies or practices").

169 Possible alternatives include: raising admission standards to training programs; applying more rigorous institution accreditation standards; requiring internships prior to full certification; reforming teacher education; lengthening preservice education; and paying higher salaries. *See* Vlaanderen, Testing for Teacher Certification, ECS Issuegram, Jan. 3, 1983, at 4-5 (available from Education Commission of the States, Denver, Colo.).

170 In spite of the vast quantity of literature recommending ways to increase the level of teacher competency in the public schools, plaintiffs will be unable to make a convincing argument until these ideas have been tried and tested.

cide that teacher certification applicants do not have a sufficient liberty or property interest in certification to invoke the due process clause of the fourteenth amendment. Even if the courts do find that plaintiffs have such an interest, a state may avoid due process objections by carefully timing the effective date of the new requirements and by designing valid test instruments. Further, courts will probably find that a state's interest in improving teacher competency is sufficiently compelling to outweigh any due process rights that plaintiffs might have.

Despite the discriminatory impact of testing requirements on minorities, equal protection challenges will probably fail because of plaintiffs' inability to prove discriminatory intent, a prerequisite to the courts' application of a strict scrutiny level of review.

Further, plaintiffs will experience difficulties in a challenge under title VII disparate impact, the most promising of the three theories. Although plaintiffs may be able to establish a prima facie claim, plaintiffs will probably have difficulty countering the defense of job-relatedness/business necessity. The Supreme Court first recognized this defense in *Griggs* and, in subsequent decisions, has suggested that defendants need only show a legitimate purpose rather than an absolute necessity for a particular selection procedure. In addition, the Supreme Court's reluctance to apply the stringent validation requirements suggested by the Uniform Guidelines makes it even easier for defendants to show the job-relatedness of a challenged selection standard. Finally, given the Supreme Court's apparent position that defendants' showing of legitimate purpose forecloses plaintiffs' demonstration of "pretext" in rebuttal, plaintiffs may encounter as much difficulty in challenging certification testing under title VII of the Civil Rights Act as under the equal protection clause of the fourteenth amendment.

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