

TESTING TITLE VII'S PATIENCE? THE NEED FOR BETTER REMEDIES WHEN STATE "TEACHER TESTING" REQUIREMENTS HAVE A DISPARATE IMPACT ON EMPLOYMENT OPPORTUNITIES FOR MINORITY POPULATIONS

I. INTRODUCTION

The failures of education reform efforts have led to increased demands for accountability from schools, teachers, and students.¹ Unfortunately, while every new federal education bill comes with "lofty statements, more programs and higher spending,"² there has been no corresponding increase in achievement during the past forty years.³ The demands for accountability

1. See Mary Lord, *Teaching America*, U.S. NEWS & WORLD REPORT, Jan. 28/Feb. 4, 2002, at 28, 28-29 (discussing various accountability measures in the No Child Left Behind Act of 2001 Pub. L. No. 107-110, 115 Stat. 1425 (2002), the most recent federal education legislation, including annual school "report cards" to enable parents to compare their child's performance against that of students in similar schools and annual testing of students in grades three through eight in both reading and math); Mary Alice Barksdale-Ladd & Karen F. Thomas, *What's At Stake in High-Stakes Testing: Teachers and Parents Speak Out*, 51 J. TCHR. EDUC. 384, 384 (2000) (stating that publication of NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, A NATION AT RISK (1983), which compared the decline in the quality of education to unilateral educational disarmament, has been the impetus of a "focused march" toward accountability and high-stakes testing); Chris E. Vance, Comment, *Teacher Competency Testing: "Decertification" and the Federal Constitution and Title VII*, 37 EMORY L.J. 1077, 1077 (1988) (stating that the American public has demanded educational accountability because of the widely publicized inadequacies of public education); Hagit Elul, Note, *Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas*, 30 COLUM. HUM. RTS. L. REV. 495, 496 (1999) (noting that student accountability programs rely on "high-stakes testing," with test results used to determine important educational decisions, grade promotion, and diploma denial).

2. Krista Kafer, *Education Reform: Half a Loaf*, WASH. TIMES, Jan. 15, 2002, at A12. For example, in 1974, immediately after signing a highly touted bipartisan education reform bill, President Gerald Ford announced, "Today, and for generations to come, America will benefit from this law, which expresses our national commitment to quality education for all children." *Id.* In 1978, President Carter echoed the sentiment, stating that with the new education bill he had signed, "we have together taken an historic step in the evolution of the federal role in education." *Id.* Similarly, Massachusetts Democrat Edward Kennedy announced that the education reform package of 1994 was "the most important reauthorization in this legislation's history." *Id.* Eight years later, President George W. Bush hailed the No Child Left Behind Act of 2001, *supra* note 1, as "the most important piece of legislation most of us will ever work on." Kafer, *supra*, at A12. Massive expenditures have accompanied these "lofty statements." See Eric A. Hanushek & Margaret E. Raymond, *The Confusing World of Educational Accountability*, 54 NAT'L TAX J. 365, 367 (2001) (stating that "real spending per student has more than tripled between 1960 and 1995").

3. Kafer, *supra* note 2. Despite the long-running history of efforts to improve education, more than half of all poor children still score below "basic" on the National Assessment of Education

have prompted more than forty state governments to require at least some of their teachers to pass a standardized test as a condition of their employment.⁴ States use teacher tests to measure an individual's basic skills, general knowledge, content knowledge, and knowledge of teaching strategies.⁵ The tests are designed to determine which teachers "are at least minimally competent in the areas assessed."⁶

The states' emphasis on standardized testing has resulted in the exclusion of a disproportionate number of minority applicants from the teacher supply.⁷ The authors of a study commissioned by the United States Department of Education found that minority candidates had lower passing rates than the non-minority candidates on all of the state teacher tests they reviewed.⁸

Progress reading and math tests. *Id.* See also Lord, *supra* note 1, at 28 (noting that even though federal spending on education has exceeded \$200 billion since 1965, two-thirds of all fourth graders still read at or below the basic level, while achievement gaps between white and minority pupils have begun to widen in some areas); Hanushek & Raymond, *supra* note 2, at 366-67 (analyzing student scores on National Assessment of Educational Progress from 1960 to 1995, finding slight improvements in reading and math scores but noticeable declines in science and writing and noting that the United States has placed at or below the middle of the international distribution on international tests since they began in the 1960s); Louis V. Gerstner Jr., *Find, Support Best Teachers*, USA TODAY, Jan. 23, 2003, at 23A ("In 1989, at an education summit headed by the first President Bush and attended by all 50 governors, we set a national goal of leading the world in math and science. Ten years later, we weren't even in the middle of the pack. High-minded aspirations do not equal action."). States and schools are struggling to meet the dozens of new requirements imposed by the No Child Left Behind Act, the latest effort by the federal government to reform and improve the education system in the United States. See Greg Toppo, *States Strain to Keep Up With 'No Child Left Behind,'* USA TODAY, Jan. 29, 2003, at 1A; Mary Leonard, *Schools Reported Lagging New Law*, THE BOSTON GLOBE, Jan. 4, 2003, at A3.

4. See KAREN J. MITCHELL ET AL., NAT'L RESEARCH COUNCIL, TESTING TEACHER CANDIDATES: THE ROLE OF LICENSURE TESTS IN IMPROVING TEACHER QUALITY 1 (2001) (noting that forty-two states require teacher candidates to pass one or more tests to earn a license); Susan L. Melnick & Diana Pullin, *Can You Take Dictation? Prescribing Teacher Quality Through Testing*, 51 J. TCHR. EDUC. 262, 263 (2000) (stating that more than forty states now use teacher tests rather than entitlement for certification); see also Vance, *supra* note 1, at 1077-78 (stating that the predominant manifestation of the accountability movement is testing teachers' competency).

5. MITCHELL ET AL., *supra* note 4, at 3.

6. *Id.* There is substantial variation among the states in their implementation of teacher testing requirements. *Id.* "Each of the 42 states that require tests uses a different combination of them, uses them at different points in a candidate's education, and sets its own passing scores." *Id.*

7. See Rona F. Flippo & Michael P. Riccards, *Initial Teacher Certification Testing in Massachusetts: A Case of the Tail Wagging the Dog*, 82 PHI DELTA KAPPAN 34, 36 (2000) (noting that several studies have concluded that teacher testing has an adverse effect on the number of prospective non-white teachers, and that educators "fear that too many minorities are being shut out of classrooms because of standardized testing."). See also *infra* Part II.B.1. (discussing how standardized testing has a disparate impact on minority populations).

8. See MITCHELL ET AL., *supra* note 4, at 4; see also Vance, *supra* note 1, at 1094 & n.97 (discussing the disproportionate impact on minorities in several states). Standardized testing of students has also had a disproportionate impact on minority populations. See Elul, *supra* note 1, at 496 ("Opponents charge that these programs have a disproportionate impact on minority students and effectively deny them the right to an adequate education."). While student testing raises similar

Title VII of the Civil Rights Act of 1964⁹ should provide a remedy for minority educators who are denied opportunities due to a state's use of standardized competency testing as a condition of employment.¹⁰ Title VII states that it is unlawful for any employer to discriminate against an individual because of his or her race, color, religion, sex, or national origin.¹¹ The statute prohibits the use of employment tests that have a disparate impact on minorities, unless the tests have a manifest relationship to the job in question and no less discriminatory alternatives are available.¹² Title VII applies to state and local government employers.¹³

Minority educators encounter unique obstacles to Title VII relief when a school district imposes testing requirements pursuant to state mandates.¹⁴ Courts consider the local school district, not the state, the teacher's employer because the district hires and fires the teacher, and conducts her daily supervision.¹⁵ Federal courts have generally held that an employer can be liable under Title VII if it interferes with an individual's employment with another employer,¹⁶ however, federal courts have also held that Title VII

concerns, this Note will concentrate on issues raised by teacher testing programs. See *id.* for a general discussion of the disparate impact created by student testing, and possible remedies for aggrieved plaintiffs.

9. 42 U.S.C. § 2000e (2000).

10. See discussion *infra* Parts II.A, B.

11. The Statute states:

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin[.]

42 U.S.C. § 2000e-2 (2000).

12. *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982) (summarizing and quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971)). See also 42 U.S.C. §2000e-2(k) (2000); *infra* Part II.A. Title VII permits employers to rely on the results of an ability test "provided 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." 42 U.S.C. § 2000e-2(h) (2000).

13. Congress specifically extended Title VII's coverage to state and local government employers in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(a)-(b), 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e-2 (2000)). The Eleventh Amendment is thus no bar to suits under Title VII. *Id.* See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (stating Eleventh Amendment does not bar suits under Title VII); see also *Hearne v. Bd. of Educ. of Chicago*, 185 F.3d 770, 777 (7th Cir. 1999) (noting the State defendants conceded that the Eleventh Amendment did not bar the plaintiffs' Title VII suit).

14. See *infra* Part II.C.

15. See *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1020 (5th Cir. 1990) (holding that the state could not be considered an employer because it did not play any role in the general hiring or firing of teachers, or in their daily supervision); *EEOC v. Illinois*, 69 F.3d 167, 171 (7th Cir. 1995) (holding that the state could not be considered an employer of teachers because it did not control hiring and firing). See also *infra* Parts II.C.1, 2.

16. See *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983) (holding that Title

does not apply to state licensing requirements for certain professionals, such as dentists and veterinarians.¹⁷ Thus, states can argue that Title VII does not apply to teacher licensing, because their use of the tests as a licensing requirement for prospective teachers constitutes an exercise of the states' police power to protect the public.¹⁸

The federal circuit courts have split on the issue of whether a state can be liable under Title VII when it mandates that schools hire only teachers who pass prescribed competency tests.¹⁹ The Fifth Circuit Court of Appeals has held that a state's role in administering teacher tests creates no more than a licensing relationship, thereby insulating the state from liability.²⁰ The Seventh Circuit Court of Appeals has indicated that states cannot be liable because they do not possess hiring and firing powers.²¹ Conversely, the Ninth Circuit Court of Appeals has held that a state can be liable under these circumstances.²²

This circuit split creates uncertainty for applicants, school districts, and states, even as teacher testing becomes increasingly pervasive.²³ Congress adopted Title VII to prevent all employment discrimination, including discrimination by state and local governments.²⁴ States do not have any incentive to reduce the discriminatory impact of their tests if they cannot be liable under Title VII.²⁵ Moreover, if minority applicants can only sue their direct employers, i.e., the school districts, they may be left without a Title VII remedy.²⁶ Courts may be unwilling to impose liability on school districts that

VII language that it "shall be an unlawful employment practice for an employer...[to] otherwise . . . discriminate against any individual" encompasses situations in which a "defendant subject to Title VII interferes with an individual's employment opportunities with another employer"); *Luchter v. Musicians Union Local 47*, 633 F.2d 880, 883 n.3 (9th Cir. 1980) (noting that a connection with employment need not necessarily be direct for Title VII to apply, and the connection may include interference); *Sibley Mem'l Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (stating that holding employers liable for interference with employment relationships is necessary to effectuate Congressional intent). *See also infra* Part II.B.3.

17. *See Haddock v. Bd. of Dental Exam'rs*, 777 F.2d 462, 463-64 (9th Cir. 1985) (holding that State Board of Dental Examiners was not subject to Title VII liability, reasoning that Title VII was not intended to apply to state licensing agencies or those licensed by them).

18. *See infra* Parts II.B.4, II.C.1.

19. *See infra* notes 20-22 and accompanying text. *See also infra* Part II.C.

20. *Fields*, 906 F.2d, at 1020. *See also infra* Part II.C.1.

21. *EEOC v. Illinois*, 69 F.3d at 171. *See also infra* Part II.C.2.

22. *Ass'n of Mexican-Am. Educators v. California*, 231 F.3d 572, 584 (9th Cir. 2000) (en banc). *See also infra* Part II.C.3.

23. *See infra* Part III.

24. *See infra* Part II.B.4.

25. *See infra* notes 104, 124-25 and accompanying text (discussing the need to hold states accountable for discriminatory conduct).

26. *See infra* notes 103-04, 121-23 and accompanying text.

are merely complying with state mandates.²⁷ If courts *are* willing to find school districts liable, the districts will have to choose between potentially violating Title VII or defying state mandates.²⁸ Finally, the states, which have imposed testing requirements in response to pressures from the public and the federal government, have no guidance in determining how they can ensure teacher quality without risking Title VII liability.²⁹

Part I of this Note examines the standards developed by the courts in applying Title VII to employment testing, the potential application of these standards to teacher testing, and the case law regarding whether states who implement or enforce teacher testing requirements are subject to Title VII liability. Part II analyzes the implications of the controversies that have developed in this area of the law. Part III proposes a federal statute to resolve the split among the circuit courts. This statute will ensure that (1) aggrieved plaintiffs possess a remedy whenever a state's teacher testing program violates Title VII, (2) local school districts are insulated from Title VII liability if they act pursuant to state mandates, and (3) state governments are provided with opportunities to develop examinations that will be compliant with Title VII.

27. *Id.*; but see *infra* note 28.

28. School districts may be held liable under Title VII even if they do nothing more than comply with state mandates. See *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1246-47 (11th Cir. 1991) (noting that even if the county school board's decision not to hire an applicant who failed a teacher certification test had been required by state statute, the board would still lack a Title VII defense, because federal law pre-empts state law) (citing *Int'l Union v. Johnson Controls*, 499 U.S. 187, 209 (1991)). See also *Gulino v. Bd. of Educ.*, 236 F. Supp. 2d 314, 335 (S.D.N.Y. 2002), *rev'd on other grounds*, 2002 WL 31887733 (S.D.N.Y. 2002) (rejecting city school board's defense that it was merely following state mandates, stating "[i]t is well-settled that Title VII preempts any state laws in conflict with it."). However, the school district may still elect to risk liability under Title VII to avoid violating state mandates. See *United States v. New York State Dep't of Motor Vehicles*, 82 F. Supp. 2d 42, 49 (E.D.N.Y. 2000) (stating that even though federal anti-discrimination laws take precedence over state laws or regulations, a district may prefer to avoid challenging the coercive power of the state, even if it might ultimately prevail). A school district may be unwilling to engage in costly litigation to obtain an employee's services. *Id.* Thus, even an unlawful state mandate could still interfere with the district's employment decisions. *Id.*

29. Teacher testing has led to frequent litigation. See EUGENE MCQUILLIN 16B, *THE LAW OF MUNICIPAL CORPORATIONS* § 46.12 (3d ed. Supp. 2002); see also Patricia M. Lines, *Teacher Competency Testing: A Review of Legal Considerations*, in 23 WEST'S EDUC. LAW REP. 811, 818-19 (1985) (noting that a number of states have been sued because of their teaching testing programs, with varying results); *infra* note 115 and accompanying text. The State of Alabama was embroiled in litigation regarding its teacher testing program from 1981 through 2000. See *Allen v. Alabama State Bd. of Educ.*, 816 F.2d 575 (11th Cir. 1987) (describing the history of the litigation to that point); see also *Allen v. Alabama State Bd. of Educ.*, 216 F.3d 1263 (11th Cir. 2000) (the latest ruling in this litigation).

II. HISTORY

A. Title VII and Employment Testing

Congress adopted Title VII to eliminate employment practices, including testing, that have discriminatory impacts.³⁰ However, Title VII allows employers to use tests that are not discriminatory.³¹ The United States Supreme Court established the basic scheme for employment testing litigation in *Griggs v. Duke Power Co.*³² The plaintiff(s) must first prove that the tests in question have a significantly discriminatory impact.³³ The burden of proof then shifts to the employer to show that the tests have a manifest relationship to the employment in question.³⁴ The plaintiff(s) may still

30. See *Connecticut v. Teal*, 457 U.S. 440, 448 (1982) (“The statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*.”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971) (“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.”). Congress identified employment testing as a practice that could promote discrimination. See *id.* at 430 (“Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”); see also *id.* at 431 (“Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox . . . The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”); see also *id.* at 433 (“The facts . . . demonstrate the inadequacy of broad and general testing devices . . . Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.”); see also Anna S. Rominger & Pamela Sandoval, *Employee Testing: Reconciling the Twin Goals of Productivity and Fairness*, 10 DEPAUL BUS. L.J. 299, 306 (1998) (noting that Congress was aware of employers’ discriminatory use of employment tests to deprive minorities of employment opportunities and responded by passing Title VII to establish fair employment policy).

31. See 42 U.S.C. §2000 e-2(h) (2000):

Notwithstanding any other provision of this subchapter, 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.

Id.

32. 401 U.S. at 424-36.

33. *Teal*, 457 U.S. at 446 (summarizing *Griggs*, 401 U.S. at 431). See also *Bew v. City of Chicago*, 979 F. Supp. 693, 695 (N.D. Ill. 1997) (stating that to establish a prima facie case of disparate impact, the plaintiff must show “that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants”) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

34. *Griggs*, 401 U.S. at 432. In *Griggs*, the defendant-company imposed a requirement that employees seeking to work in its higher-paying departments had to either possess a high school diploma or register a satisfactory score on two professionally prepared aptitude tests. *Id.* at 427-28. The requirements had a disparate impact on the African American workers. *Id.* at 430. The Court held that neither requirement bore a demonstrable relationship to successful performance of the job. *Id.* at 431. The Court noted that the company appeared to lack discriminatory intent, but held that “Congress

prevail, even if the tests are shown to be “job related,” by showing that other, less discriminatory tests could advance the employer’s interests.³⁵ The Civil Rights Act of 1991 codified the *Griggs* framework.³⁶

directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation,” and that “Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.” *Id.* at 432. *See also Albemarle*, 422 U.S. at 425 (“Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets ‘the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question’”) (quoting *Griggs*, 401 U.S. at 432).

35. *Albemarle*, 422 U.S. at 425 (summarizing and quoting *Griggs*, 401 U.S. at 432). The complainant may prevail by showing that “other tests or selection devices, without a similarly undesirable racial effect, would serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’” *Id.* at 425 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 793, 801 (1973)).

36. *See* 42 U.S.C. § 2000e-2(k) (2000) (stating that to prove an unlawful employment practice based on disparate impact, the complaining party must demonstrate the disparate impact, and the respondent must fail to demonstrate that the challenged practice is “job related for the position in question and consistent with business necessity”); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071 (1991) (stating that one of the purposes of the statute was to codify the concepts of “business necessity” and “job related” enunciated by the Supreme Court in *Griggs* and “other Supreme Court decisions prior to *Wards Cove Packing Co. v. Antonio*.”). In *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), the United States Supreme Court held that the burden of persuasion remained with plaintiff. *Id.* at 659. The Court also held there was no requirement that the challenged practice be “essential” or “indispensable” to the employer’s business. *Id.* Congress placed the burden of demonstrating business justification squarely back onto the defendant with the Civil Rights Act of 1991. Civil Rights Act § 2(2). Congress stated that “the decision of the Supreme Court in *Wards Cove* . . . has weakened the scope and effectiveness of Federal civil rights protections.” *Id.*

Congress further found that the legislation was “necessary to provide additional protections against unlawful discrimination in employment.” *Id.* at § 2(3). *See also* Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. Rev. 1479, 1514 (1996):

Perhaps the most powerful argument in favor of finding that the Act establishes a strict necessity standard is the Act’s clear rejection of *Wards Cove*. The entire motivation for the introduction and passage of the Act was the majority of Congress’s disapproval of the rules laid down in *Wards Cove* and the other Supreme Court decisions overturned or modified by the Act.

Id. The House Education and Labor Committee argued that the consensus among experts was that *Griggs* triggered a dramatic improvement in the quality and reliability of employee selection criteria, benefiting employers subject to its standards. H.R. REP. NO. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 563-64. According to the House Committee, *Griggs* prompted employers “to forsake reliance on unsubstantiated tests and other arbitrary job requirements that excluded large numbers of well-qualified individuals from employment or promotion.” *Id.* at 563.

The Committee noted that it considered and rejected an amendment that would have presumed “business necessity” when an employer relied on academic achievements. *Id.* at 643. The Judiciary Committee noted that Congress expressly rejected an amendment to insulate professionally developed ability tests when Title VII was first enacted “because it would have exempted employers from an obligation to demonstrate that a disputed test in fact led to significantly enhanced job performance.” H.R. REP. NO. 102-40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 704. The Education and Labor Committee added that its “clear intent” was that an employer actually demonstrate the relationship between a challenged practice and successful job performance. H.R. Rep. No. 102-40(I) at 576-77. The Committee added that “presumptions or preconceptions about the usefulness of an employment practice are insufficient to establish business necessity.” *Id.* at 576.

B. Issues Affecting Application of Title VII to Teacher Testing

1. The Disparate Impact of Teacher Testing on Minorities

Minority teaching candidates tend to have significantly lower passing rates than non-minority candidates on state teacher tests, resulting in the exclusion of a disproportionate number of prospective minority teachers from the classroom.³⁷ Some analysts contend that standardized testing tends to value the particular personality traits of the majority culture, to the detriment of minority populations, and merely reflects the candidates' competencies in test-taking.³⁸

2. The Tests' Relation to the Employment in Question

Education reformers contend that improving the quality of instruction in the classroom is the solution to students' underachievement.³⁹ Supporters of

37. See Jerry R. Parkinson, *The Use of Competency Testing in the Evaluation of Public School Teachers*, 39 U. KAN. L. REV. 845, 878-80 (1991) (describing a "litany of cases . . . in which testing programs have had a disproportionate impact on minorities"); Linda L. Strassle, Note, *Minimum Competency Testing of Teachers for Certification: Due Process, Equal Protection and Title VII Implications*, 70 CORNELL L. REV. 494, 495 n.5 (1985) (reviewing a number of sources describing how teacher competency requirements have resulted in the disproportionate disqualification of minorities); Flippo & Riccards, *supra* note 7, at 36 (noting that minorities in several states throughout the United States have not, on average, performed as well as whites on teacher certification tests); see also *supra* notes 7-8 and accompanying text.

38. See Rominger & Sandoval, *supra* note 30, at 343-44 (citing criticism that standardized testing programs "value particular personality traits according to the majority culture's view of those abilities, then allocate opportunities and resources on the basis of this valuation," while in reality reflecting nothing more than competencies in test-taking); see also Elul, *supra* note 1, at 516-517 ("Test bias is often subtle and not facially apparent. Bias may result from many factors, such as a failure to standardize tests across various cultural groups or from testmakers' subconscious prejudices rather than from an intent to alter the test content to the detriment of certain groups.").

39. See Lynn Olson, *Quality Counts Reveals National 'Teacher Gap,'* EDUC. WEEK, Jan. 8, 2003, at http://www.edweek.org/ew/ew_printstory.cfm?slug=16qc.h22:

"Studies show that when it comes to student achievement, effective teachers are more important than any other school ingredient," said Virginia B. Edwards, the editor of *Quality Counts 2003* and of *Education Week*. "If states hope to close the achievement gap between minority and non-minority students and those from rich and poor families, they must first close the gap in access to skilled teachers."

Id. See also Rosetta Marantz Cohen, *Schools Our Teachers Deserve: A Proposal for Teacher-Centered Reform*, 83 PHI DELTA KAPPAN 532, 532 (2002) (contending that the "whole failed history of modern education reform" has "paid hardly any attention to the work of the teacher, the one critical player in the school who makes the biggest difference."); Marilyn Cochran-Smith, *Desperately Seeking Solutions*, 52 J. TCHR. EDUC. 347, 347 (2001) (noting the "unprecedented intensity of current public attention" to teacher education); Robert Holland, *How to Build a Better Teacher*, POL'Y REV., Apr. & May, 2001, at 37 (describing Tennessee statistician William Sanders' findings that teacher effectiveness is far more important to educational outcomes than class size, ethnicity, location, or poverty); Melnick & Pullin, *supra* note 4, at 263 (stating that teacher qualifications have become a

teacher testing argue that testing ensures the competence and professional reputation of teachers.⁴⁰ The No Child Left Behind Act,⁴¹ the federal education legislation passed in 2002, requires schools to ensure that all of their teachers are “highly qualified,” a phrase that can (and sometimes must) include passage of a “rigorous state test.”⁴²

Critics contend that current teacher tests focus exclusively on the teacher’s knowledge of content or teaching strategies and ignore other critical aspects of teacher competency, such as motivating and engaging students of varied backgrounds, serving as good role models, and engaging parents and the community.⁴³ Thus, critics allege, teacher tests produce erroneous

national issue).

40. See Sandra Feldman, American Federation of Teachers, *Building a Profession*, (June 2000), at <http://www.aft.org/stand/previous/2000/0600.html> (contending that requiring all new teachers to pass high-level professional exams would “strengthen the professional component of teaching and bring teaching more in line with other professions like medicine or law.”); William S. Dolan, *The Twenty Thousand Dollar Question—What is a Preposition? Teacher Competency Testing and the Increasing Risk of Failure*, 27 J.L. & EDUC. 667, 668 (1998) (“Competency testing will not ensure competent educators. An understanding of subject matter is but one of many requisite skills. However, testing will make certain that candidates have a baseline knowledge that they may then rely upon in pursuit of educational excellence.”); Jane G. Noble, Note, *Teacher Termination and Competency Testing*, 63 TEX. L. REV. 933, 937-41 (1985) (advocating the extension of competency testing, and addressing several common objections to teacher testing). Testing supporters argue that the public will not want individuals to teach their children if the candidates cannot meet certain minimum knowledge and skills standards, irrespective of how good they are at other teaching skills. S.E. Phillips, *Extending Teacher Licensure Testing: Have the Courts Applied the Wrong Validity Standard?*, 8 T.M. COOLEY L. REV. 513, 546-47 (1991). Supporters argue that if states lower standards to allow more “incompetent” minority teachers in the classroom, minority students will be unable to “learn the basic skills necessary for a technological world.” *Id.* at 548-49.

41. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

42. The law requires that local education agencies ensure that all teachers hired after January 8, 2002 be “highly qualified.” *Id.* at § 6319(a)(1) (2002). All teachers teaching in core academic subjects must be “highly qualified” by the end of the 2005-2006 school year. *Id.* at § 6319(a)(2). The term “highly qualified” when used with respect to an elementary school teacher who is new to the profession means that the teacher “holds at least a bachelor’s degree” and “has demonstrated, by passing a rigorous State test, subject knowledge and teaching skills in reading, writing, mathematics, and other areas of the basic elementary school curriculum.” 20 U.S.C.S. § 7801 (23)(B)(i) (2002). The term “highly qualified” with respect to all other teachers means that the teacher has either passed a rigorous State test or otherwise demonstrated competence in the relevant academic subjects. 20 U.S.C. § 7801 (23)(C).

43. See MITCHELL, *supra* note 4, at 3 (citing these and other skills teachers need, noting that “[t]here is no single agreed-upon definition of what competencies a beginning teacher should have.”); *id.* at 4 (“Because a teacher’s work is complex, even a set of well-designed tests cannot measure all of the prerequisites of competent beginning teaching. Current paper-and-pencil tests provide only some of the information needed to evaluate the competencies of teacher candidates.”); *id.* at 7 (stating that “[l]ittle research has been conducted on the extent to which scores on current teacher licensure tests relate to other measures of beginning teacher competence. Much of the research that has been conducted suffers from methodological problems that interfere with making strong conclusions about the results.”). See also Arthur E. Wise & Jane A. Leibbrand, *Standards in the New Millennium: Where We Are, Where We’re Headed*, 52 J. TCHR. EDUC. 244, 251 (2001) (stating that “commonly used teacher licensure assessments examine only part of the knowledge and skills that new teachers should

information regarding who is truly competent.⁴⁴

3. *The Application of Title VII Beyond Direct Employers*

Because teachers are hired and fired by their local school districts, federal courts do not consider the state governments who impose teacher testing requirements their direct employers.⁴⁵ However, the District of Columbia Circuit Court of Appeals, in *Sibley Memorial Hospital v. Wilson*, ruled that a direct employment relationship is not required for an entity to be liable under Title VII.⁴⁶ The court ruled that a male plaintiff who alleged that supervisory nurses at the defendant hospital used their authority to prevent him from working as a private duty nurse for female patients had stated a cause of action under Title VII.⁴⁷

The D.C. Circuit held that Title VII could be extended to defendants who were not the direct employers of the plaintiffs, if the defendants controlled the plaintiffs' access to employment and denied such access on the basis of

acquire.”); Lines, *supra* note 29, at 811 (1985) (noting that teacher tests “fail to measure important characteristics that make for an effective teacher—such as compassion, love of children, energy, wisdom, or dedication.”).

44. See Marilyn Cochran-Smith, *Reporting on Teacher Quality: The Politics of Politics*, 53 J. TCHR. EDUC. 379, 381 (2002) (noting that a teacher who passes a state teacher test may nevertheless be “unqualified” if he or she does not have classroom experience, courses in pedagogy, knowledge of cultural differences, or knowledge of human development); see also Rominger & Sandoval, *supra* note 30, at 342-44 (arguing that standardized testing performance reflects nothing more than competencies in test-taking); see also *id.* at 342 (stating that employment tests create false positives, which overrate the potential of some workers, and false negatives, which underrate the potential of other workers); Catherine Luna et al., *Defining Literacy: Lessons from High-Stakes Teacher Testing*, 51 J. TCHR. EDUC. 276, 276 (2000) (stating that teacher tests often “run counter to educators’ most deeply held beliefs about literacy, learning, and teaching”); Flippo & Riccards, *supra* note 7, at 35-36 (arguing that teacher tests do not measure the intangibles of a good teacher, but instead focus on minimum skills rather than the higher-order qualities of excellent teachers; there is little evidence of a correlation between test performance and job performance; and that the tests undesirably affect instruction in teacher education programs).

45. See *supra* note 15. See also Part I.C.2.

46. 488 F.2d 1338 (D.C. Cir. 1973).

47. *Id.* at 1342. The plaintiff was considered the employee of the patients. *Id.* at 1339. Patients who requested the services of private duty nurses were matched with the nurses through a registry and referral system. *Id.* If the patients rejected the nurses who were selected for them, they were still obligated to pay those nurses for a full day’s work. *Id.* This system was designed to insure that the nurses would not be “victimized by invidious discrimination.” *Id.* The plaintiff alleged that on two occasions, supervisory nurses at the defendant hospital had rejected his services because he was male and the requesting patients were female, preventing him from receiving compensation. *Id.* at 1339-40. The plaintiff further alleged that over a thirty-four-year period every patient whom he attended at the defendant hospital was male, despite the fact that female nurses routinely served both male and female clients. *Id.* at 1340.

race, color, religion, sex, or national origin.⁴⁸ The court stated that allowing an employer to exploit circumstances “peculiarly affording it the capability of discriminatorily interfering with an individual’s employment opportunities with another employer” when it could not do so directly would “condone continued use of the very criteria for employment that Congress has prohibited.”⁴⁹ The D.C. Circuit noted that under Title VII, it is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual.”⁵⁰ The court added that Title VII explicitly included parties not involved in direct employment relationships, such as employment agencies and labor organizations.⁵¹ Courts in other circuits have endorsed *Sibley*’s holding.⁵²

4. Title VII’s Applicability to Teachers Employed by State and Local Governments

Congress eliminated the immunity of state and local governments from Title VII through legislation passed in 1972.⁵³ The committee report accompanying the legislation stated that discriminatory tactics, including invalid selection techniques, were more pervasive in state and local

48. *Id.* at 1341. The D.C. Circuit noted that Congress created Title VII to provide access to the job market for both men and women. *Id.* (quoting *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971)). The court also noted that Congress had prohibited labor organizations, employment agencies, and employers from foreclosing, on discriminatory grounds, access by any individual to available employment opportunities. *Id.* at 1341.

49. *Id.*

50. *Id.* (quoting 42 U.S.C. § 2000e-2(a)(1)). The court noted that the Civil Rights Act’s provisions for the filing of complaints with the EEOC did not use the term “employee,” but rather the “person aggrieved,” which would include individuals who did not stand in a direct employment relationship with an employer. *Id.*

51. *Id.* at 1342. The court acknowledged, however, that certain Title VII remedies could only be provided where there was a direct employment relationship (*e.g.*, reinstatement, hiring). *Id.*

52. *See Bender v. Suburban Hosp., Inc.*, 159 F.3d 186, 188 (4th Cir. 1998) (“We also need not resolve . . . whether Title VII allows indirect liability for an employer’s interference with an individual’s employment with third parties. Every Court of Appeals to consider this issue has followed the lead of the District of Columbia Circuit in allowing such a claim.”); *Christopher v. Stouder Mem’l Hosp.*, 936 F.2d 870, 875 (6th Cir. 1991) (agreeing with *Sibley* and noting that a private scrub nurse could not pursue employment opportunities if the defendant denied her privileges, even though the defendant did not pay the nurse’s salary, stating that the nurse’s lack of status as a direct employee or independent contractor did not negate the fact that the defendant had exclusive control over the nurse’s ability to practice); *Zaklama v. Mt. Sinai Med. Ctr.*, 842 F.2d 291, 294 (11th Cir. 1988) (“It is clear from the language of the statute that Congress intended that the rights and obligations it created under Title VII would extend beyond the immediate employer-employee relationship.”); *Pardazi v. Cullman Med. Ctr.*, 838 F.2d 1155, 1156 (11th Cir. 1988) (agreeing with *Sibley* and noting that “[s]everal courts have recognized that Title VII’s protection does extend to a claim that a defendant has interfered with an individual’s employment relationship with a third party.”). *See also infra* note 117.

53. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §2, 86 Stat. 103, 103 (1972).

governments than in the private sector.⁵⁴ Congress also expanded Title VII's coverage to include teachers and other educational institution employees with the 1972 legislation.⁵⁵ The committee report argued that to permit discrimination in educational institutions, "where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development . . . would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination."⁵⁶

However, courts have routinely held that Title VII does not apply to state governments that establish licensing requirements for particular professions.⁵⁷ The Third Circuit Court of Appeals, in *George v. New Jersey Board of Veterinary Medical Examiners*,⁵⁸ held that Title VII does not apply to the licensing functions of a public agency exercised under the police powers of a state.⁵⁹ The court stated that there was "nothing even remotely resembling an employer-employee relationship" between the plaintiff and a state board regulating admission to the practice of veterinary medicine.⁶⁰ The court distinguished *Sibley*, noting that in *Sibley*, the defendant hospital had a close relationship to the employment by its patients of private duty nurses.⁶¹ The court further noted that in *Sibley*, the exercise of the police power was not involved; in *George*, the defendant was exercising its police power to protect the public from unqualified veterinary service.⁶² Other circuit courts have endorsed this "licensing exception" to Title VII.⁶³

54. The House Report cited reports of "widespread perpetuation of past discriminatory practices" by public employers through "segregated job ladders, *invalid selection techniques*, and stereotyped misconceptions by supervisors regarding minority group capabilities." H.R. REP. NO. 92-238 (1971), *reprinted in* U.S.C.C.A.N. 2137, 2152 (emphasis added).

55. Equal Employment Opportunity Act of 1972 §3 (removing educational institution employees from the list of Title VII exemptions).

56. H.R. REP. NO. 92-238 (1972), *reprinted in* U.S.C.C.A.N. 2137, 2155. The House Education and Labor Committee stated that the "problem of employment discrimination is particularly acute and has the most deleterious effect in these governmental activities which are most visible to the minority communities (notably education, law enforcement, and the administration of justice) . . ." *Id.* at 2153. The Committee also made the following observation:

The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development.

Id. at 2155.

57. *See infra* notes 58-63.

58. 794 F.2d 113 (3d Cir. 1986).

59. *Id.* at 114.

60. *Id.* The plaintiff asserted that the board denied his application because of his national origin. *Id.* at 114.

61. *Id.*

62. *Id.* at 114-115.

63. The Ninth Circuit has also held that Title VII does not apply to licensing activities. In *Haddock v. Bd. of Dental Exam'rs*, 777 F.2d 462 (9th Cir. 1985), the plaintiff, a black male, failed to

C. Title VII and Teacher Testing

Prior to 1990, it was not clear whether states that required school districts to make passage of teacher tests a prerequisite to employment could be liable under Title VII. One line of cases suggested that any employer who unlawfully interfered with an individual's employment relationships could be liable under Title VII.⁶⁴ However, a separate line of cases held that a state could not be liable under Title VII if it was exercising its police powers to control the entry of individuals into certain occupations.⁶⁵ The Fifth, Seventh, and Ninth Circuits have responded to this quandary with varying approaches.

1. Fifth Circuit: The State Cannot be Liable Because It Is Engaged in a Licensing Activity

The Fifth Circuit has ruled that states and state agencies are not liable under Title VII for teacher testing. In *Fields v. Hallsville Independent School District*,⁶⁶ a school district terminated the plaintiffs from their teaching positions after they failed to pass a certification examination.⁶⁷ The teachers filed suit against the State of Texas and certain officials and agencies of the State.⁶⁸ The teachers claimed that the state actors violated Title VII by choosing a cut-off score "that worked to discriminate against them based on age and/or race."⁶⁹

achieve a passing score on a dental licensing examination, and his application for a license to practice dentistry was denied by the defendant Board. *Id.* at 463. The plaintiff alleged that the Board "intentionally lowered his dental examination scores and refused to issue him a license" because he was African-American. *Id.* The Ninth Circuit held that Title VII was not intended to apply to the Board's licensing activity. *Id.* at 464. The court noted that the Board did not pay the wages nor engage the services of the examinees. *Id.* The court argued that Congress intended to benefit only those actually employed by state governments or their subdivisions when it removed the exemption for state governments and their subdivisions from Title VII in 1972. *Id.*

64. *See supra* Part II.B.3.

65. *See supra* Part II.B.4.

66. 906 F.2d 1017 (5th Cir. 1990).

67. *Id.* at 1018. Both of the plaintiffs were black women, fifty-nine years old or older, each with at least eleven years of experience with their school district. *Id.* The test involved was the Texas Examination for Current Administrators and Teachers (TECAT). *Id.*

68. *Id.* The teachers sued the Texas Education Agency, Texas Commissioner of Education, Texas State Board of Education and State of Texas. *Id.* The teachers also claimed that their school district "discriminated against them, subsequent to their termination, by failing or refusing to consider them for non-certified positions that became available the following school year." *Id.* The Fifth Circuit affirmed the district court's grant of summary judgment for the school district, agreeing with its finding that the teachers had not applied for subsequent vacancies at the school district. *Id.* at 1022.

69. *Id.* at 1018. The teachers also brought claims under the Age Discrimination in Employment Act and the Employee Retirement Income Security Act. *Id.* at 1018 n.1.

The Fifth Circuit affirmed summary judgment for the State defendants.⁷⁰ The court stated that an employment relationship between the State defendants and the teachers would not exist unless the defendants had the right to control the teacher's conduct.⁷¹ The Fifth Circuit stated that the only evidence the teachers provided with respect to control was the State's administration of the exam and its ability to decertify teachers who failed the exam.⁷² The court noted that there was no evidence in the record that the State played any role in the general hiring or firing of teachers, or in their daily supervision.⁷³ The court stated that the evidence before the district court "suggested no more than a licensing relationship between the State and the teachers."⁷⁴ The court compared the State's role with respect to the teacher test to that of state bar administrators and other state licensing or certification agencies, which are not considered employers for the purposes of Title VII.⁷⁵

2. *Seventh Circuit: The State Cannot Be Liable Because It Does Not Do the Actual Hiring and Firing of Teachers*

The Seventh Circuit has indicated that a state cannot be liable under federal anti-discrimination laws because it does not hire or fire teachers. In *EEOC v. Illinois*,⁷⁶ a school district terminated two teachers pursuant to a mandatory retirement provision of the Illinois school code that was no longer valid because of an amendment to the Age Discrimination in Employment Act ("ADEA").⁷⁷ The Equal Employment Opportunity Commission

70. *Id.* at 1020.

71. *Id.* at 1019. The Fifth Circuit adopted a hybrid "economic realities/common law control test for determining the existence of an employment relationship." *Id.* Under the test, "the right to control an employee's conduct is considered the 'most important factor.'" *Id.* (quoting *Broussard v. L.H. Bossier, Inc.*, 789 F.2d 1158, 1160 (5th Cir. 1986)) "[I]f an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist." *Id.* (quoting *Spirides v. Reinhardt*, 613 F.2d 826, 831-32 (D.C. Cir. 1979)). At least eleven additional factors beyond the control element may also be considered when assessing the "economic reality" of the supposed employment relationship. *Id.* at 1019-20 & n.4.

72. *Id.* at 1019. A footnote in the teachers' appellate brief presented evidence regarding state funding of facilities, payment of salaries and selection of textbooks. *Id.* at 1019 n.3. The Fifth Circuit did not consider this evidence because it was not presented to the district court. *Id.*

73. *Id.* at 1020. The court stated that the record indicated that the school district was responsible for hiring, firing and transfers, and was listed as the employer on application and personnel forms. *Id.* at n.6.

74. *Id.* at 1020.

75. *Id.*

76. 69 F.3d 167 (7th Cir. 1995).

77. *Id.* at 168. The Illinois provision was repealed two years after the ADEA amendment, and after the teachers' termination. *Id.*

("EEOC") sued the State of Illinois.⁷⁸ The EEOC argued that the State violated the ADEA because it did not repeal the unlawful provision or notify the school districts that the provision was invalid and unenforceable.⁷⁹

The Seventh Circuit held that the State could not be liable under an interference standard.⁸⁰ The court stated that a person aggrieved by the application of a legal rule cannot sue the rule maker, but only the person whose acts hurt him.⁸¹ The court argued that because the State did not control hiring and firing, it could not be considered the "real" employer of public school teachers, despite its extensive regulations of Illinois schools.⁸² The Seventh Circuit noted that the defendant hospital in *Sibley* actively attempted to prevent a nurse from being employed by a hospitalized patient.⁸³ The court held that the State's failure to notify the school district that the mandatory retirement statute was invalid did not constitute active interference with employment.⁸⁴ The court noted that there was no evidence that the State of Illinois had insisted that school districts comply with the state code after the passage of the ADEA amendment.⁸⁵

78. *Id.*

79. *Id.*

80. *Id.* at 171-72. The court's holding reversed a judgment against the State in which the EEOC had obtained several hundred thousand dollars on behalf of the teachers. *Id.* at 168.

81. *Id.* at 170 (quoting *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995)). The "persons whose acts hurt" the two teachers in this case, according to the Seventh Circuit, were the school districts that fired them. *Id.* at 170.

82. *Id.* at 171. The Seventh Circuit acknowledged that the State of Illinois fixed a minimum salary for all teachers, the number of days teachers had to work, the holidays teachers had off, the amount of sick leave they were entitled to, their eligibility for and length of sabbatical leave, the minimum amount of time for their lunch periods, the terms of teachers' tenure, the rights of recalled teachers, and many other things. *Id.* However, the court stated that the key powers in suits based on discrimination in hiring and firing were the powers to hire and fire. *Id.* The court noted that if the State were telling the local school districts whom to hire and fire and how much to pay them, "a point would soon be reached at which the state was the *de facto* employer and the local school districts merely its agents." *Id.* at 171-72. However, the court found no suggestion that the State knew about the two plaintiffs or wanted them to resign. *Id.* at 172. The court did not treat the provision of the school code requiring retirement at age seventy as a firing directive from the State because the provision was invalid, and there was no evidence that the State had made any effort to enforce it. *Id.*

83. *Id.* at 169. According to the court, in *Sibley* and in other cases, "the defendant so far controlled the plaintiff's employment relationship that it was appropriate to regard the defendant as the *de facto* or indirect employer of the plaintiff, as where a hospital prevents a nurse from being employed by a hospitalized patient." *Id.* In this case, the powers of hiring and firing were controlled by the school districts, subject only to the tenure provision of the State's school code. *Id.* at 171. *See also supra* Part II.B.3 (discussing *Sibley*).

84. *Id.* at 170. The court held that because the Illinois statute was nullified as soon as the amendment to the federal ADEA was passed, due to the Supremacy Clause in the Constitution, the State could not be considered to have aided and abetted the school district's violation. *Id.*

85. *Id.* at 169-70.

3. *Ninth Circuit: The State Can Be Liable Because It Interfered With the Hiring and Firing of Teachers, and It Was Not Engaged in a Licensing Activity*

In *Ass'n of Mexican-American Educators v. California* (“*AMAE*”),⁸⁶ the State of California required all elementary and secondary school teachers, as well as many non-teaching employees, to pass the California Basic Education Skills Test (“*CBEST*”) in order to serve in its public schools.⁸⁷ Minority candidates disproportionately received failing scores on the *CBEST*.⁸⁸ The plaintiffs included three nonprofit organizations representing the interests of minority educators, as well as eight minority job candidates.⁸⁹ The defendants were the State of California and the California Commission on Teacher Credentialing (“*CCTC*”).⁹⁰ The plaintiffs sought to enjoin use of the *CBEST*.⁹¹

The Northern District of California held that the State of California could be liable under Title VII for its teacher testing requirements.⁹² The court reasoned that the *CBEST* was an employment test, rather than a licensing exam, because passage of the *CBEST* was required only for individuals seeking employment in California’s public schools.⁹³ The court observed that individuals wishing to teach in private schools in California did not need to pass the *CBEST* or be certified by the *CCTC*.⁹⁴ The court rejected the defendants’ analogy to the bar exam for lawyers, noting that while an unsuccessful bar applicant may not hold himself out as a lawyer, an unsuccessful *CBEST* candidate may pursue employment with any private school in the State.⁹⁵

86. 231 F.3d 572 (9th Cir. 2000) (en banc).

87. *See id.* at 577-578 (detailing the legislative mandate and administrative response, and describing the *CBEST*, a pass-fail examination consisting of reading, writing and mathematics sections).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* The plaintiffs claimed the test had a “disproportionate, adverse impact on minority candidates” and that the defendants had “failed to adopt screening procedures with a less adverse impact.” *Id.*

92. *Ass'n of Mexican-Am. Educators v. California* (“*AMAE*”), 836 F. Supp. 1534, 1549-50 (N.D. Cal. 1993), *aff'd en banc*, 231 F.3d 572 (9th Cir. 2000).

93. *Id.* at 1549.

94. *Id.* The court stated that the *CBEST* was an examination testing “an individual’s qualification for a job with a particular employer (the State)” rather than “an examination that tests minimal competence for the job of teaching.” *Id.* at 1550.

95. *Id.* at 1549-50. Three years later, the Northern District of California determined that the *CBEST* had a disparate impact on the plaintiff class. *AMAE*, 937 F. Supp. 1397, 1406 (N.D. Cal. 1996), *aff'd en banc* 231 F.3d 572 (9th Cir. 2000). However, the court determined that the *CBEST*

A Ninth Circuit panel reversed the district court, ruling that the CBEST was a licensing exam and thus exempt from Title VII.⁹⁶ The court held that the State was acting in its regulatory capacity rather than creating qualifications for its own employees.⁹⁷ The panel contended that teachers were not employees of the State of California.⁹⁸ The court also noted that the Legislature, rather than an administrator responsible for overseeing the teachers, had created the requirements.⁹⁹ The panel, by way of example, stated that if the State Legislature required public defenders to pass a Fourth Amendment examination, the State would be exercising its police powers to protect California citizens and could not be liable under Title VII.¹⁰⁰

Judge Boochever, in dissent, argued that Title VII does not have any language creating exceptions for governmental licensing activities.¹⁰¹ The dissent argued that if the State, as an employer, administered a test to applicants as a condition of employment, the exam would be subject to Title VII, even if it were considered a licensing exam or characterized as an exercise of the State's regulatory power.¹⁰² The majority's ruling, according to Judge Boochever, left minority teachers without a remedy if states imposed certification requirements that were invalid and had a disparate impact.¹⁰³ The dissent argued that plaintiffs under these circumstances would not be able to sue their direct employers, the school districts, because the districts did not require or administer the teacher tests.¹⁰⁴

tested skills that were job-related, and was a valid measure of those basic skills.*Id.* at 1419. The court also found that the plaintiffs failed to show the existence of a viable alternative to the CBEST that "would have a significantly smaller adverse impact on the members of the plaintiff class." *Id.* at 1426. The plaintiffs appealed these findings, while the defendants cross-appealed the district court's earlier finding that Title VII could apply to the CBEST. *AMAE*, 195 F.3d 465, 472 (9th Cir. 1999), *rev'd en banc*, 231 F.3d 572 (9th Cir. 2000).

96. *Id.* at 484. The court stated that the principle behind the licensing exception was that a state would not be liable under Title VII for "interference" with an employment relationship if the alleged interference involved an exercise of the state's regulatory responsibilities. *Id.* at 483.

97. *Id.* at 484.

98. *Id.* (citing *Gonzales v. California*, 105 Cal. Rptr. 804 (Cal. Ct. App. 1972)).

99. *Id.* at 484.

100. *Id.* Because it concluded that the test was a valid licensing exam, and thus exempt from liability under Title VII, the panel did not decide whether the exam could constitute an actionable interference with an employment relationship. *Id.*

101. *Id.* at 496 (Boochever, J., dissenting).

102. *Id.* Judge Boochever contended that in the "licensing" cases, the courts exempted the licensing entities from Title VII because they lacked an employment relationship with the employees, not because their activities were characterized as licensing activities. *Id.*

103. *Id.* at 499.

104. *Id.* The dissent noted that:

Only the state Legislature possesses the constitutional authority to regulate public school teacher hiring on a statewide level, such as by imposing a credentialing requirement like the CBEST, but under the majority opinion, the State is not subject to Title VII because it is not a direct employer.

The Ninth Circuit granted a rehearing en banc,¹⁰⁵ and held that teacher tests are employment tests, not licensing tests administered solely pursuant to a state's exercise of its regulatory power, and are thus subject to Title VII liability.¹⁰⁶ The majority stated that interference with employment opportunities is sufficient to create Title VII liability.¹⁰⁷ The court contended that the State interfered with the plaintiffs' employment opportunities with local school districts by requiring, implementing, and administering the CBEST, because the State used the CBEST to dictate whom the school districts could and could not hire.¹⁰⁸

On the other hand, local school districts, which are the direct employers, are not subject to Title VII because it is the State and CTC that require and administer the CBEST. Given these circumstances, as a practical matter, the majority's reading of Title VII leaves minority public school teachers without any of the protections afforded by Title VII to challenge a state-imposed employment practice such as the CBEST.

Id. The dissent argued that the State should be treated as the plaintiffs' employer, because there was substantial evidence that it participated in or influenced the employment policies of local school districts. *Id.* at 497-99. The dissent contended that *Gonzales*, 105 Cal. Rptr. at 804-09, the case relied on by the majority for the proposition that public school teachers are not state employees, only held that the State would not be liable for the torts of local school districts or their employees. *AMAE*, 195 F.3d at 497-98 n.3. The dissent argued that *Gonzales* did not address whether the State could be subject to Title VII for its efforts to regulate education. *Id.* Finally, Judge Boochever argued that even if the State were not considered the teachers' direct employer, it could still be subject to Title VII if it discriminatorily interfered with the employment opportunities of teachers with local public school districts. *Id.* at 499.

105. *AMAE*, 208 F.3d 786 (9th Cir. 2000). The court did not cite any reasons for granting the rehearing. *Id.*

106. 231 F.3d at 584.

107. *Id.* at 580. The majority acknowledged that teachers were employees or potential employees of individual school districts, rather than the State. *Id.*

108. *Id.* at 581. The court argued that the Fifth Circuit might have ruled differently in *Fields* if there had been evidence of the state's right to control the work of the teachers. *Id.* at 583. The Ninth Circuit, noting California's extensive control over its school districts, had "no difficulty" concluding that the State was in a position where it could interfere with the employment decisions of local school districts. *Id.* at 581-82. The majority noted that California public schools' establishment, regulation and operation were covered by the State Constitution and the State Legislature. *Id.* at 581. "Unlike most states, California school districts have budgets that are controlled and funded by the state government rather than the local districts." *Id.* at 581 (quoting *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 251 (9th Cir. 1992)). California statutes regulate "district organization, elections, and governance; educational programs, institutional materials, and proficiency testing; sex discrimination and affirmative action; admission standards; compulsory attendance; school facilities; rights and responsibilities of students and parents; holidays; school health, safety, and nutrition; teacher credentialing and certification; rights and duties of public school employees; and the pension system for public school teachers." *Id.* at 581-82 (quoting *Butt v. California*, 842 P.2d 1240, 1254 (Cal. 1992)). The State also "dictates when students may be expelled or suspended, and...exerts control over the textbooks that are used in public schools." *Id.* at 582 (quoting *Belanger*, 963 F.2d at 253). The majority noted that the State was so entangled with the operation of California's local school districts that individual districts were treated as "state agencies" for purposes of the Eleventh Amendment. *Id.*

The Ninth Circuit stated that there is no overarching “licensing” exception to Title VII, and held that the “licensing” cases did not apply.¹⁰⁹ The court stated that in the licensing cases, licensing was the entire connection between the plaintiffs and the defendants; in this case, the CBEST was but one aspect of pervasive state control of the school districts.¹¹⁰ Additionally, the court found that because the CBEST applied only to public school employees, the state was acting as an employer, as well as through its regulatory power.¹¹¹ The majority stated that the licensing exemption could only exist if the state required all teachers to pass the CBEST.¹¹²

Judge Kleinfeld, in a dissent joined by Judge O’Scannlain, argued that the majority’s holding needlessly created a split among the circuit courts,¹¹³ and exposed the State of California to expensive and time-consuming litigation.¹¹⁴

Judge Gould, in a dissent joined by Judges Kleinfeld and O’Scannlain, argued that the United States Supreme Court required a clear expression of

109. *Id.* at 582-83.

110. *Id.* at 582.

111. *Id.* at 583.

112. *Id.* at 584. The Ninth Circuit ultimately concluded that the “district court did not clearly err in concluding that the CBEST was validated properly.” *Id.* at 589. The holdings regarding Title VII’s applicability are nevertheless binding in the Ninth Circuit, even though decision of that issue was arguably unnecessary to the case. *See* *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir. 2001) (“where the court heard evidence and argument from both parties, and specifically ruled on the issue, a party may not escape the ruling’s binding effect on the ground that it was not logically essential to the court’s ultimate determination.”) (citing *United States v. Weems*, 49 F.3d 528, 532 (9th Cir. 1995)). *See also id.* at 914 & n.6 (noting that as early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), appellate courts have found it appropriate to resolve several issues in a case, where each could be dispositive, “in order to avoid repetition of errors on remand or provide guidance for future cases.”). *See also id.* at 915 (stating that much circuit law would be put in doubt, creating substantial uncertainty, if lawyers and clients had to guess as to whether a later panel would identify a prior panel ruling as unnecessary). Judge Reinhardt and two other circuit judges dissented from this aspect of the ruling and argued that the test was not validated properly. *AMAE*, 231 F. 3d at 594-95 (Reinhardt, J., dissenting).

113. *Id.* at 602 (Kleinfeld, J., concurring in part and dissenting in part). *Id.* at 600. Judge Kleinfeld’s dissent argued that the majority’s decision that the test was properly validated rendered the Title VII discussion moot. Judge Kleinfeld noted that the court could have assumed, without deciding that the state was potentially liable under Title VII. *Id.* at 600-01 Judge Kleinfeld argued:

In this case, our reaching out to hold that Title VII applies to non-employers opens the door to more litigation, instead of shutting it. We have now created a circuit split on a national issue of great importance. As Judge Gould points out, all the other circuits to have ruled on whether Title VII (or the analogously construed ADEA provision) applies to non-employers such as state licensing boards have gone the other way.

Id. at 602.

114. *Id.* at 602. “I doubt that the State of California really wants to know that now it may have to spend hundreds of thousands, maybe millions of dollars, and years of litigation, validating examinations and possibly all the other screening it does of all licensed professions.” *Id.*

congressional intent before a federal statute could limit a state's traditional police powers, which include the establishment and regulation of a public school system.¹¹⁵ Congress, according to Judge Gould, had not shown any intent to extend Title VII liability to states that indirectly affected employment prospects in the course of exercising their police powers.¹¹⁶ Judge Gould argued that the removal by Congress of the states' exemption from Title VII was meant to protect only those actually employed by state governments or their subdivisions.¹¹⁷ Judge Gould argued that the critical concern underlying the "licensing" exemption from Title VII was not the extent of the state's involvement in the regulated activity, but rather "the principle that courts should not infer a congressional intent to regulate in areas of peculiarly state concern."¹¹⁸ Finally, Judge Gould contended that California was using the testing requirements in a purely regulatory fashion, and argued that the decision not to require private school teachers to pass the exam constituted a rational exercise of the State's police power.¹¹⁹

D. Commentators' Perspectives on Policy Considerations

1. Ensuring That Prospective Teachers Have a Remedy for Employment Discrimination

Plaintiffs must show that an employment relationship with the defendant existed to establish a prima facie claim under Title VII.¹²⁰ Strassle and Finnerty contend that courts must adopt a broad conception of what constitutes an employment relationship to ensure that plaintiffs are able to sue the parties that caused their injuries.¹²¹ If courts strictly construe the term "employer" to include only those with direct hiring and firing powers,

115. *Id.* at 604-05. (Gould, J., dissenting).

116. *Id.* at 604.

117. *Id.*

118. *Id.* at 605. The majority's argument that the State had more than a licensing relationship with the school districts and teachers was therefore irrelevant to Judge Gould. *Id.*

119. *Id.* at 606. For example, Judge Gould noted that the California Constitution created a special duty for the State to "ensure basic educational equality" in its public schools. *Id.*

120. Strassle, *supra* note 37, at 510. To establish a prima facie claim under Title VII, a plaintiff must also establish (1) disparate impact; (2) that the defendant was responsible for the challenged act or decision; and (3) that the challenged act or decision was a deprivation of an employment opportunity protected under Title VII. *Id.*

121. *See id.* at 514-15; *see also* Kevin Finnerty, Comment, *The Ninth Circuit Does Its Homework and Leaves the Supreme Court with an Assignment: Settle the Question Whether Title VII's Antidiscrimination Provisions Apply to States Requiring Public School Teachers to Pass Certification Examinations*, 95 NW. U. L. REV. 1569, 1601 (2001) (noting that a particular school district will have little choice but to follow state mandates, and adding that justice dictates allowing the plaintiff to sue the entity that caused his or her injury).

plaintiffs may not be able to sue those who set the certification standards, because those setting the standards may not perform the hiring.¹²² Additionally, the school districts who do the hiring and firing may escape liability because they are merely following state mandates.¹²³

2. *Ensuring That Those Who Discriminate Are Held Accountable*

Strassle and Rogers argue that courts must extend the application of Title VII to hold the state authorities who establish certification standards accountable under Title VII for any resulting discriminatory impact.¹²⁴ Finnerty argues that the legislative history reveals that Congress was primarily concerned with holding the parties who cause discrimination liable, regardless of the labels that could be placed on those parties.¹²⁵ Finnerty adds

122. See Strassle, *supra* note 37, at 514 (arguing that without a broad construction of the term “employer,” Title VII relief will be unavailable, because the state agencies developing certification standards and tests will not be considered “employers” of the plaintiffs).

123. See *id.*; Finnerty, *supra* note 121, at 1600.

124. Strassle, *supra* note 37, at 514; see also W. Sherman Rogers, *Title VII Preemption of State Bar Examinations: Applicability of Title VII to State Occupational Licensing Tests*, 32 How. L.J. 582-83 (1989) (arguing that Title VII’s purpose of eradicating discrimination throughout the economy would be frustrated if state agencies administering licensing examinations, which control important aspects of individuals’ employment opportunities, were allowed to escape coverage). Strassle identifies four additional reasons for a broad construction of the employer-employee relationship: first, the Act’s protections are not limited only to “employees” or “applicants for employment” but, rather, extend to “any individual.” Strassle, *supra*, at 511. Second, the legislative history of Title VII reveals a congressional intent to “remove barriers to minority admission into the professions wherever possible.” *Id.* at 512. One way to accomplish this goal is to remove artificial barriers to professional certification as well as to professional employment. *Id.* Third, there is a general principle that remedial legislation should be “broadly construed to achieve its purposes.” *Id.* The courts are thus obligated 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.” *Id.* (quoting *Culpepper v. Reynolds Metals*, 421 F.2d 888, 891 (5th Cir. 1970)). Finally, the EEOC has shown “little hesitation in extending Title VII protection beyond conventional employer-employee relationships,” and there should be deference to the interpretations of a statute by the agency responsible for its enforcement. *Id.* Finnerty proposes that the Supreme Court rule that the term “employer,” for purposes of Title VII, should be “interpreted broadly to apply to states when they administer certification exams to public school teachers.” Finnerty, *supra* note 121, at 1602.

125. Congress recognized that parties other than an individual’s direct employer could cause unlawful employment discrimination. See Finnerty, *supra* note 121, at 1573-74 (noting that an interpretative memorandum written during the Senate debate over Title VII stated that “An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. If the hiring hall discriminates against Negroes, and sends him only white males, he is not guilty of discrimination—but the union hiring hall would be.”) (quoting 110 Cong. Rec. S7217 (daily ed. Apr. 8, 1964)). When the state determines whom a local school district can hire, the local district is not the party that causes the discrimination. *Id.* Moreover, Finnerty discusses how Congress either overruled a variety of Supreme Court decisions outright or made clear that it preferred the decisions be interpreted with the Civil Rights Act of 1991. *Id.* at 1579-80. Finnerty notes that “[I]n addition to codifying *Griggs* and reversing numerous Court decisions, Congress also . . . reminded the Court that when civil rights statutes are open to alternative interpretations, it should ‘select the construction

that the concept of a “licensing” exception is not supported by Title VII’s language or its legislative history.¹²⁶

III. ANALYSIS

The federal courts are sharply divided on whether states who require teachers to pass tests to begin or continue their employment can be liable under Title VII. The Fifth Circuit has held that states cannot be liable, because the states’ role in administering teacher testing creates no more than a licensing relationship.¹²⁷ The Seventh Circuit has indicated that states cannot be liable because they do not possess hiring and firing powers.¹²⁸ Conversely, the Ninth Circuit has held that a state that requires only its public school teachers to pass an exam prior to employment can be liable under Title VII for interfering with the hiring and firing of a school district’s teachers.¹²⁹

Teacher testing clearly raises Title VII concerns. The suits in *AMAE, Fields*, and other jurisdictions, as well as numerous studies, illustrate the tests’ discriminatory impact on minority applicants.¹³⁰ There is a contentious debate regarding whether the tests have a manifest relationship to the job of teaching.¹³¹ Moreover, under the doctrine established by the Supreme Court in *Griggs v. Duke Power Co.*, plaintiff teachers may also succeed by proving that other, less discriminatory tests could advance the states’ interests.¹³²

*Sibley Memorial Hospital v. Wilson*¹³³ and the long line of cases adopting its holding reflect a consensus among the federal courts that interference with employment relationships is sufficient to subject an entity to Title VII liability, even without a direct employment relationship.¹³⁴ The Ninth Circuit

which most effectively advances the underlying congressional purpose to provide equal opportunity and to provide effective remedies.” *Id.*

126. Finnerty argues there is no textual support in Title VII for exempting states when they act in their regulatory capacities. *Id.* at 1591. Congress did not create any such exception when it amended Title VII to encompass state and local governments. *Id.* See also *Teal, supra* note 45, at 449 (discussing the 1972 amendments, noting that “The Committee Reports and the floor debates stressed the need for equality of opportunity for minority applicants seeking to obtain governmental positions” and that “Congress voiced its concern about the widespread use by state and local governmental agencies of ‘invalid selection techniques’ that had a discriminatory impact.”).

127. See *supra* Part II.C.1.

128. See *supra* Part II.C.2.

129. See *supra* Part II.C.3.

130. See *supra* notes 29, 67-68, 86-91 and accompanying text.

131. See *supra* Part II.B.2.

132. See *supra* note 35 and accompanying text.

133. See *supra* Part II.B.3.

134. *Id.*

based its *AMAE* decision on this principle.¹³⁵ One of the shortcomings of the Fifth Circuit's decision in *Fields* is that the court did not address *Sibley* or any of the other cases that have held that interference is sufficient to subject an employer to Title VII liability.¹³⁶

The Seventh Circuit's attempt to distinguish the *Sibley* line of cases in *EEOC v. Illinois* is unconvincing. The Seventh Circuit suggested that in *Sibley*, the hospital could be considered the *de facto* or indirect employer of the plaintiff nurse, because it had the power to prevent the nurse from being employed by a hospitalized patient.¹³⁷ Under this analysis, states that use their power to prevent school districts from employing prospective teachers should also be liable as *de facto* or indirect employers. Surprisingly, the Seventh Circuit reached the opposite conclusion and held that a state could not be liable when its statute prompted a school district to dismiss teachers.¹³⁸ The Seventh Circuit's narrow interpretation of the "interference" standard may allow third parties to accomplish indirectly what employers are otherwise prohibited from doing.¹³⁹

Congress, by removing the exemption for state and local governments and educational institutions from Title VII in 1972, clearly demonstrated a desire to eliminate discrimination in the employment of teachers.¹⁴⁰ However, the circuit courts, including the Ninth Circuit, have held that Title VII does not apply to the licensing efforts of public agencies that are designed to protect the public by limiting entry into certain professions.¹⁴¹ The Ninth Circuit's determination that the State of California was not involved in a licensing activity because it was only requiring public school teachers to pass the state's teacher exam is unpersuasive—a state may have legitimate reasons for restricting entry into the public segments of a profession (such as public defenders), while placing fewer or no restrictions on the profession's private component.¹⁴² The Fifth and Seventh Circuits, by ruling that states enjoy immunity from Title VII if they are engaged in licensing activities, have partially restored the exemptions of state and local governments and educational institutions from Title VII that Congress removed in 1972.¹⁴³

135. See *supra* notes 107-08 and accompanying text.

136. See *supra* Part II.C.1.

137. See *supra* note 83 and accompanying text.

138. See *supra* notes 84-85 and accompanying text.

139. See *supra* notes 48-49 and accompanying text.

140. See *supra* notes 53-56 and accompanying text.

141. See *supra* notes 57-63, 73, 75, 96-100, 115-19 and accompanying text.

142. See *supra* notes 100, 119 and accompanying text.

143. See *supra* notes 53-56 and accompanying text.

The effort to end discriminatory employment practices should not be eviscerated because of a desire to defer to states' licensing activities.¹⁴⁴ Gould's dissent in *AMAE II* indicates that the support for states' immunity from Title VII for their licensing activities stems from concerns with preserving state autonomy and the proper balance between state and federal power.¹⁴⁵ However, Congress, citing the pervasive employment discrimination that existed among state and local governments, consciously chose to subject state and local governments to Title VII liability.¹⁴⁶ Neither the Fifth nor the Seventh Circuits have contended that a state, through its licensing authority, could discriminate against its own employees without subjecting itself to Title VII.¹⁴⁷ The rationale of *Sibley* and its progeny applies to public and private employers: no employer should be allowed to circumvent Title VII's prohibition of employment discrimination by resorting to indirect interference.¹⁴⁸

The current split among the circuit courts works to the detriment of all parties. Teacher testing is a key component of education reform in more than forty states,¹⁴⁹ as states respond to increasing pressure from their constituents and the federal government to use testing to assure the competence of educators.¹⁵⁰ However, the Ninth Circuit's holding in *AMAE*, in addition to numerous lawsuits filed throughout the country, indicates that states' implementation of testing requirements can lead to ongoing litigation and substantial costs.¹⁵¹ School districts, teachers' direct employers and the proper parties to sue according to the Fifth Circuit in *Fields*¹⁵² and the

144. See *supra* notes 101-04, 123-25 and accompanying text.

145. See *supra* notes 115-19 and accompanying text.

146. See *supra* notes 53-56 and accompanying text.

147. See *supra* note 101 and accompanying text.

148. See *supra* Part II.B.3. For example, a teacher certification scheme restricting certification to Caucasians would seem to implicate Title VII, even though the applicants for teacher positions would be hired by school districts, rather than the state, even if the certification scheme was considered an assertion of a state's licensing power. See, e.g., 42 U.S.C. 2000e-2(a) (2000).

149. See *supra* note 4 and accompanying text.

150. See *supra* notes 1-4, 42 and accompanying text.

151. See *supra* note 29 and accompanying text. See also Diana Pullin, *Key Questions in Implementing Teacher Testing and Licensing*, 30 J.L. & EDUC. 383, 385 (2001) (stating that teacher testing litigation based on unlawful race-based discrimination against minority teachers is likely to increase, due to the increased visibility and utilization of teacher testing). See also *id.* at 398 ("The dual issues of whether a teacher test is a licensure test or an employment test and whether a potential cause of action rests against the state administering the test or the local school relying upon passage of a teacher test in order to hire an individual will be of critical importance in future litigation of federal law claims.").

152. See *supra* note 73 and accompanying text.

Seventh Circuit in *EEOC v. Illinois*,¹⁵³ may be held liable under Title VII for merely complying with state mandates.¹⁵⁴

Finally, as the Ninth Circuit and various commentators have noted, minority applicants for teaching positions who are excluded from employment due to discriminatory teacher testing requirements may not have a Title VII remedy in jurisdictions that treat states as immune from Title VII, even though Title VII has ostensibly protected them from such discrimination for more than thirty years.¹⁵⁵ Courts may invoke fairness considerations to insulate school districts from liability when their hiring decisions are dictated by state policies.¹⁵⁶ Moreover, even if the local school districts can be liable, organizations representing minority educators will not have access to a full remedy, because any equitable relief (such as an injunction stopping a discriminatory testing requirement) could only be imposed on the local district.¹⁵⁷ Additionally, the ability of Title VII to deter states from imposing discriminatory teacher testing requirements will be compromised if the states cannot be held liable.¹⁵⁸ The absence of a full Title VII remedy would remove a critical weapon against discrimination.¹⁵⁹

The split among the circuit courts creates tremendous uncertainty,¹⁶⁰ without providing clear protection to any party. A unified approach that accommodates the goals of education reform and nondiscrimination is needed to avoid litigation and ensure justice.

IV. PROPOSAL

A legislative solution is needed to address the concerns of states, school districts, and minority teaching applicants. The courts are unlikely to resolve

153. See *supra* note 82 and accompanying text.

154. See *supra* note 28 and accompanying text.

155. See *supra* notes 53-56, 103-04, 121-23 and accompanying text.

156. *Id.*

157. For example, in *AMAE*, organizations representing minority educators sought injunctive relief. See *supra* notes 89-91 and accompanying text. If those plaintiffs had prevailed in a jurisdiction that did not recognize the State as a proper defendant, they would only be able to secure relief on a piece-meal, case-by-case basis.

158. See *supra* note 49 and accompanying text (stating that Title VII cannot be effective if employers are allowed to discriminate indirectly by interfering with a plaintiff's opportunities to be employed by a third party); see also *supra* notes 123-25 and accompanying text (arguing that Title VII cannot be effective if states can impose discriminatory policies without facing any consequences).

159. See Pullin, *supra* note 151, at 398 (noting that Title VII "provides some of the most powerful federal law claims that can be presented against a program where there are significant race, ethnicity, or gender disparities in success rates."); see also *supra* note 56 and accompanying text (arguing that permitting discrimination in educational settings will create unique setbacks for efforts to eliminate discrimination).

160. See, e.g., *supra* notes 113-14 and accompanying text.

the competing concerns of the parties, due to their institutional constraints,¹⁶¹ tendency to defer to state education officials,¹⁶² and recent unwillingness to construe civil rights statutes broadly.¹⁶³ Accordingly, the United States Congress should resolve the split among the circuit courts through a statute amending and clarifying Title VII. The statute should contain the following elements:

§ 1. (a) The phrase “or otherwise to discriminate against any individual” within 42 U.S.C. § 2000e-2(a)(1)¹⁶⁴ includes, but is not limited to, any conduct by a public or private employer that interferes with an individual’s compensation, terms, conditions, or privileges of employment with another employer.

(b) The conduct of a public or private employer shall be subject to § 1(a) notwithstanding its characterization as a licensing activity, regulatory activity, exercise of police power, or other activity designed to protect the public welfare.

161. One inherent constraint on courts’ effectiveness derives from their institutional limitations. MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICYMAKING AND THE COURTS* 5-18 (1982). A number of concerns have traditionally been raised regarding the social utility of court action. *Id.* One question is “whether the parties for whom lawyers speak are sufficiently representative of all those interests likely to be affected by a court order.” *Id.* at 9. In theory, more affected views and interests will be represented during the policy deliberations of legislatures, as they are not limited to the case and parties at hand. *Id.* A separate concern is that any generalized remedies created by a court would “impinge on the interests of groups not represented in the litigation.” *Id.* Critics of court-imposed solutions also note that the common law system emphasizes a piecemeal approach to data gathering that relies on the competing parties to provide information to the court, and that excludes valuable (from a public policy standpoint) evidence from books, articles and reports as “hearsay.” *Id.* at 11. More generally, where issues are presented in a case-by-case format, judges have little occasion to make a broad policy review or to consider the overall implications and consequences of specific orders. *Id.* at 14. While advocates of change through the court system have answers for many of these objections (see *id.*), these objections should not be overlooked.

162. See Latham Fernandez, Comment, *TAAS and GI Forum v. Texas Education Agency: A Critical Analysis and Proposal for Redressing Problems with the Standardized Testing in Texas*, 33 ST. MARY’S L.J. 143, 145 (2001) (“By granting states unmitigated latitude in education policies . . . the judiciary has effectively denied those members of our community with the least status and least political access any remedy against policies that unfairly affect them or their children.”).

163. Finnerty, “hopes” the Court will have “learned from its previous Title VII decisions—both good (*Griggs*) and bad (*Wards Cove*).” Finnerty, *supra* note 121, at 1602. *Wards Cove* is by far the more recent decision. See *supra* note 36 and accompanying text (discussing the decisions and the Civil Rights Act of 1991). One would therefore expect that it might be the more accurate predictor of future Court action. See also Civil Rights Act of 1991, *supra* note 36, at § 3(4) (stating that one of the purposes of the Act was “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”).

164. Under Title VII, it is an unlawful employment practice for an employer “to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added). The proposed section codifies the holdings of the *Sibley* line of cases to include any conduct that interferes with another employment relationship. See *supra* Part II.B.3.

§ 2. A state, territory, or any governmental body within the United States that limits employment in a profession to individuals who successfully complete an employment test or some other certification procedure shall have:

(a) a full affirmative defense to actions commenced under 42 U.S.C. § 2000e-2 if it has received a written authorization from the Equal Employment Opportunity Commission stating that its certification procedure is job related for the position in question and consistent with business necessity, or is otherwise consistent with the Uniform Guidelines on Employee Selection Procedures.¹⁶⁵

(b) in the case of a governmental body that is not a state or territory, a full affirmative defense to actions commenced under 42 U.S.C. § 2000e-2 if it proves by a preponderance of the evidence that its actions were limited to compliance with an otherwise legally valid¹⁶⁶ mandate of a statute or comparable authority issued by the state or territory with controlling authority in its jurisdiction.

This statute balances the competing interests involved when state teacher testing requirements have a disparate impact on minority applicants. States who impose teacher testing requirements that are discriminatory and either (1) without a valid business justification, or (2) implemented instead of effective, less discriminatory alternatives will be subject to Title VII because of the expanded definition of liability established in § 1. The expansion of

165. Congress endorsed the Uniform Guidelines on Employee Selection Procedures, which had been adopted by several federal agencies to help employers develop tests that were consistent with Title VII, in the Civil Rights Act of 1991. H.R. REP. NO. 102-40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 573. The Guidelines have been adopted as regulations by the Departments of Justice, Labor, Treasury, the EEOC, and the Civil Service Commission, the predecessor to the Office of Personnel Management. H.R. REP. NO. 102-40(I), at 573, H.R. REP. NO. 102-40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, at 703. Under the 1991 Act, the standard set forth in *Albemarle* and in the Uniform Guidelines is applicable to written tests and most other objective selection procedures. H.R. REP. NO. 102-40(I), at 573. By 1991, the Guidelines had remained in effect for more than a dozen years under three Presidents and five Attorney Generals. H.R. REP. NO. 102-40(II), at 703. The committees noted that the Uniform Guidelines have been recognized by the American Psychological Association as being consistent with the standards of the psychological profession for showing the validity of tests. H.R. REP. NO. 102-40(I), at 573-74, H.R. REP. NO. 102-40(II), at 703-04. The Judiciary Committee stated that the Guidelines “represent the interpretation of *Griggs* applied by the federal government in enforcing Title VII.” *Id.* at 704.

166. The phrase “an otherwise legally valid mandate” is intended to remove immunity when the state mandate is clearly invalid because of conflicting federal legislation, such as in *EEOC v. Illinois*. See *supra* Part II.C.2. A state mandate could also be considered not “legally valid” if it were declared unlawful or unconstitutional by a court of law. The phrase “an otherwise” is necessary to ensure that the district’s immunity is preserved if the state’s mandate is invalid only because of Title VII.

Title VII's scope is needed to ensure remedies for plaintiffs and deter future misconduct.¹⁶⁷

The statute also provides more definite protection from litigation to states and school districts than currently exists. The statute creates a mechanism to limit litigation through § 2(a), which allows the EEOC to "pre-validate" particular certification requirements. Additionally, § 2(b) provides much needed protections for school districts, creating a full affirmative defense for local governments who are merely complying with state mandates.

This statutory scheme provides minority populations with a weapon to challenge state certification requirements that are not job related for the positions in question and consistent with "business necessity," while providing safe harbors to states and school districts to reduce the threat of unrestricted litigation. Concerns with potential litigation could be further addressed through the establishment of carefully crafted legislative exceptions for particular exams,¹⁶⁸ or a mandate that the EEOC make validation services available to public employers, with such validations carrying presumptive weight in a court of law.¹⁶⁹

V. CONCLUSION

The trend toward teacher testing as a condition of professional certification is likely to continue. Litigation regarding its potentially disparate impact is likely to significantly increase over the next few years, considering the controversies that have arisen with standardized testing in general, and

167. This would render state licensing examinations subject to the usual framework for employment testing. *See supra* Part II.A. *See also supra* notes 53-56 and accompanying text (describing legislative findings regarding the need for Title VII to cover state and local government employers and educational institutions). *See also* Rogers, *supra* note 124, at 620-21 (advocating the application of Title VII to state licensing activities, adding that "[i]t is too clear to require argument that legislation prohibiting the use of employment tests that have the effect of discriminating against racial minorities or women would constitute 'appropriate legislation' to enforce the equal protection clause of the fourteenth amendment.").

168. For example, legislation could state that long-standing certification exams (e.g., for dentists, veterinarians, lawyers, and doctors) are not subject to Title VII liability so long as they are reasonably related to the state's interest. This would eliminate the third component of the *Griggs* regime, wherein an employer's testing can be found pretextual whenever less discriminatory but equally effective alternatives can be found. *See supra* note 35 and accompanying text. While Congress could also confer absolute immunity for such exams, such a move would eliminate a critical check that may become necessary if the exams become more pernicious through the revision process.

169. *See* Strassle, *supra* note 37, at 517 (noting that several federal regulatory agencies have adopted the Uniform Guidelines on Employee Selection Procedures, which are designed to provide guidance for the use of employment selection standards). "The Guidelines require documented evidence of a test's validity whenever a test has an adverse impact on minorities." *Id.* *See also supra* note 165 and accompanying text.

teacher testing in particular. The adoption of legislation that carefully balances the interests of minority populations in combating discrimination and of states and school districts in creating and implementing legitimate licensing requirements is necessary to bolster social justice while resolving a split within the federal court system.

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