THE REVIEW OF STANDARDIZED TESTING CASES: THE QUEST FOR A STANDARD

The confusion surrounding the use and validity of standardized tests as employment qualification criteria, particularly their effect on racial minorities,[1] has left courts in a state of uncertainty.[2] A recent decision signifies a reconciliation of the disparate standards of review applied by previous courts. In the consolidated cases of *Walston v. County School Board* and *United States v. Nansemond County School Board*,[3] a group of black teachers formerly employed by defendant school systems alleged that the respective school board had violated their fourteenth amendment rights by requiring the teachers to take, and achieve a certain score on, the National Teacher Examination (NTE).[4] This qualification and selection plan resulted in a substantial reduction in the county's black teaching staff.[5]

The district court upheld the school board's utilization of the NTE as a hiring criterion, finding a "reasonably necessary connection between

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1. *See* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria for Hiring and Promotion*, 82 HARV. L. REV. 1598, 1638-42 (1969); *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1123 (1971); Comment, *Equal Protection and Standardized Testing*, 44 MISS. L.J. 900, 901, 905 (1973). *See generally* Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 NW. U.L. REV. 907 (1967); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 68 COLUM. L. REV. 691 (1968); Comment, *Validity of Standardized Employment Testing Under Title VII and The Equal Protection Clause*, 37 MO. L. REV. 693 (1972).

2. *Compare* Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (1972), *modified*, 360 F. Supp. 733 (N.D. Cal. 1973), *with* Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972). *See also* Comment, *Equal Protection and Standardized Testing*, *supra* note 1, at 904, 906.

3. 492 F.2d 919 (4th Cir. 1974).

4. The school board adopted the requirement in January, 1970. Those teachers completing their first year of teaching in the school district and all new applicants were required to achieve a minimum score of 500 on the weighted common section of the examination. Teachers in such nonacademic areas as physical and driver education were exempted. *Id.* at 921.

5. Prior to the inauguration of the NTE, the school district's faculty was 59% black. After the implementation of the exam, the percentage dropped to 52% by 1972. At the end of the 1970-71 school year, 21 of the 25 teachers who were not offered new contracts were black. Fifteen of these black teachers were terminated solely on the basis of their NTE scores. *Id.* at 922.

the qualities tested . . . and the actual requirements of the job to be performed."[6] The Court of Appeals for the Fourth Circuit reversed the district court decision, declaring the NTE invalid for failing to bear a *demonstrable relationship* to successful teacher performance.[7] Since no study had been made to show any correlation between the NTE score and the "ultimately effective in-service teacher," the court found the use of a cut-off score to be patently arbitrary and discriminatory.[8]

While most courts are in general accord with *Walston* in holding that utilization of standardized tests as qualification criteria for employment are often arbitrary and discriminatory,[9] they have deviated radically in choosing the applicable standard of review.[10] By examining the confusing and dissimilar standards of review applied by previous courts

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6. 351 F. Supp. 196, 203, 205 (E.D. Va. 1972), *rev'd*, 492 F.2d 919 (4th Cir. 1974). Recognizing the dilemma faced by the school board, the district court stated:

> This case is interesting and deserves close attention in that it clearly defines the paradox which is currently facing the school boards and district courts. . . . On the one hand, the school board is admonished for using subjective standards in evaluating its teachers and is told that only objective standards are acceptable. Conversely, once the school board adopts a criteria which could hardly be more objective, protests are lodged because employment decisions are made without reference to some purely subjective standards. If we were required to invalidate both guidelines, the school board would find itself forced to adopt a quota system, disregarding the qualifications of the teachers involved. Such a result is the antithesis of the philosophy underlying much civil rights litigation.

Id. at 200.

7. 492 F.2d at 924-25.

8. *Id.* at 925.

9. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975); Davis v. Washington, 512 F.2d 956 (D.C. Cir.), *rev'd*, 96 S. Ct. 2040 (1976); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Moody v. Albermarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *vacated*, 422 U.S. 405 (1975); Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972); Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972); Castro v. Beecher, 459 F.2d 725 (1st Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (1972), *modified sub. nom.* Chance v. Board of Educ., 496 F.2d 820 (2d Cir. 1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (1972), *modified*, 360 F. Supp. 733 (N.D. Cal. 1973); Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1969). *But see* Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975); Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972); Morton v. Charles County Bd. of Educ., 373 F. Supp. 394 (D. Md. 1974).

10. There is consensus on only one point. In all testing cases courts will shift the burden of proof to defendants after plantiffs' statistical data indicates that the use of a particular requirement resulted in the elimination of a disproportionate number of blacks. *See* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971);

in fourteenth amendment challenges to standardized tests, one perceives how testing law under the fourteenth amendment,[11] and Title VII of the Civil Rights Act of 1964,[12] has come to be so inextricably interwoven. *Walston* demonstrates that the review of a standardized testing requirement under the fourteenth amendment today necessarily entails a complementary analysis of Title VII.

Discrimination in public employment has been prohibited since the ratification of the fourteenth amendment in 1868.[13] It was not until the adoption of the Civil Rights Act of 1964 (Title VII),[14] however, that discrimination in private employment was proscribed. Title VII of the Act originally prohibited discrimination against employees because of race, color, religion, sex or national origin by any employer with twenty-five or more employees engaged in interstate commerce.[15] By its own terms Title VII afforded protection only to private employees, excluding public school teachers and other public employees from the scope of its coverage.[16] Until 1972, federal courts confronted with cases involving

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Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975); Davis v. Washington, 512 F.2d 956 (D.C. Cir.), *rev'd*, 96 S.Ct. 2040 (1976); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *vacated*, 422 U.S. 405 (1975); Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); Armstead v. Starkville Municipal Separate School Dist., 461 F.2d 276 (5th Cir. 1972); Chance v. Board of Examiners, 458 F.2d 1167 (1972), *modified sub. nom.*, Chance v. Board of Educ., 496 F.2d 820 (2d Cir. 1974); Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966); P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Western Addition Community Organization v. Alioto, 340 F. Supp. 1351 (1972), *modified*, 360 F. Supp. 733 (N.D. Cal. 1973).

11. U.S. CONST. amend XIV, § 1.

12. 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972).

13. The fourteenth amendment is directed to the states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

14. 42 U.S.C. §§ 2000e to 2000e-15 (1970), *as amended*, 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972).

15. *Id.* §§ 2000e(b), 2000e-2(a), *as amended*, (Supp. II, 1972) (now applies to employers with fifteen or more employees).

16. 42 U.S.C. § 2000e-1, *as amended*, (Supp. II, 1972) (amendment removed exemption for non-religious (public) educational institutions).

equal protection challenges to various testing qualification plans imposed on public employees were confined in their standards of review to the two traditional equal protection standards—rational relationship or strict scrutiny.[17]

Administrative deficiencies in the statutory program led Congress to reconsider its effectiveness, resulting in the enactment of the Equal Employment Opportunity Act of 1972 (EEOA)[18] (amending Title VII). EEOA widened the definition of "employer" to include states and their political subdivisions, and removed the exemption previously enjoyed by educational institutions.[19] Additionally, the Equal Employment Opportunity Commission (EEOC)[20] promulgated guidelines[21] to insure fair employment practices in hiring.[22] A significant feature of the regulations is the method provided to measure test validity. The

17. The most lenient equal protection standard is the rational relationship test which requires that a classification bear a "rational relationship" to the object of the legislation. A statute will be reasonable if it is designed to effectuate some legitimate state interest. *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949); Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552, 556 (1947); Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155 (1897). A more exacting equal protection standard is employed if a statute infringes on a recognized "fundamental right" or embodies a "suspect classification." This standard mandates rigorous judicial scrutiny. *See* Shapiro v. Thompson, 394 U.S. 618 (1969); Korematsu v. United States, 323 U.S. 214 (1944). Under the strict scrutiny standard the state must demonstrate a compelling state interest to justify the suspect classification without which it is reduced to an invidious discrimination forbidden by the equal protection clause. *See* Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). The strict scrutiny standard of review recently has been extended beyond statutes that are discriminatory on their faces to apparently neutral statutes that have been arbitrarily administered. In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), the strict scrutiny standard was applied to a statute which, though neutral on its face, had a discriminatory impact on members of a minority race. *See also* Gaston County v. United States, 395 U.S. 285 (1969); Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972).

18. 42 U.S.C. §§ 2000e to 2000e-17 (Supp. II, 1972), *amending* 42 U.S.C. §§ 2000e to 2000e-15 (1970).

19. The EEOA also reduced to 15 the number of employees a person must have in order to qualify as an "employer" under the Act. *Id.* § 2000e(b), *amending* 42 U.S.C. § 2000e(b) (1970).

20. The EEOC was created by Congress to administer the 1964 Act and to regulate the use of standardized tests for employment qualification. *Id.* § 2000e-4 (Supp. II, 1972).

21. 29 C.F.R. §§ 1607.1-.14 (1975).

22. The EEOC advocated employment testing procedures which emphasize these elements:

1. Careful job analysis to define the skill requirements related to the performance of the specific job.
2. Special efforts in recruiting minorities.

employer must be able to show evidence of test validity by proving a satisfactory correlation between performance on the standardized test and job performance.[23]

Thus, a public school teacher who prior to 1972 had only a cause of action under the fourteenth amendment could now bring suit under Title VII. Even before the enactment of the EEOA, however, courts referred to Title VII to determine the appropriate standard of review under the equal protection clause.[24] Consequently, judicial review of

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3. Screening and interviewing related to job requirements.
4. Tests selected on the basis of specific job-related criteria.
5. Comparison of test performance to job performance.
6. Opportunity for retesting of those who failed the tests but then acquired more training or experience.
7. Validation of tests for norms that include representative minority group members.

Comment, *Validity of Standardized Employment Testing, supra* note 1, at 696-97. The current regulations have expanded the above guidelines. *See* 29 C.F.R. § 1607 (1975).

23. 29 C.F.R. § 1607.4(c) (1975). The two most common categories of test validation are content and predictive validity. A test has content validity if the test items reflect an accurate sample of the qualities sought to be measured by the test. The burden of proof is on the employer to conclusively demonstrate that the knowledge and skills necessary for the job bear a relation to the questions on the examination. 29 C.F.R. § 1607.5 (1975). Content validity alone will be acceptable only in the case of well-developed tests. Such tests consist of suitable samples of the essential knowledge, skills or behavior which compose the job in question. For example, a test for typists that requires the applicant to perform some typing would be content valid. *See generally* W. MEHRENS & J. LEHMAN, STANDARDIZED TESTS IN EDUCATION 43 (1969).

Predictive validity involves testing a large representative sample of applicants, permitting all the test takers to perform the job in question and then correlating test performance with job performance. A test is valid to the extent that those who perform well on the test tend to perform better on the job. Predictive validity is particularly unreliable, however, when tests are administered to mixed racial groups. A basic assumption underlying prediction from test scores is the "equal exposure" assumption. A test measures how well a person has learned various skills and retained information. To the extent an entire group tested has had equal opportunity to learn these skills and information, test scores might be expected to bear some relationship to how well persons in the group can perform the job. But in the case of a comparison of blacks and whites, the "equal exposure" assumption is undercut. The general pattern of racial discrimination, lesser educational and cultural opportunities for black people, and cultural separatism, have impeded blacks in attaining the background necessary for success on existing standardized tests. A consequence of this discrimination and segregation is the lower average score for blacks on most standardized tests, verbal as well as nonverbal. *See* Cooper & Sobol, *supra* note 1, at 1639-49, 1656-69. When a test has an adverse effect on blacks, a more direct showing of the relevance of the test to job performance is required. 29 C.F.R. § 1607.5(b)(5) (1975). *See generally Developments in the Law, supra* note 1, at 1123; Comment, *Equal Protection and Standardized Testing, supra* note 1, at 904-08.

24. For a comparison of the standard of review under Title VII with the fourteenth amendment standards see *Developments in the Law, supra* note 1; Comment, *Validity of Standardized Employment Testing, supra* note 1.

employment tests under the fourteenth amendment and Title VII overlapped. This development was prompted by the Supreme Court's sole decision in the confused testing field. In *Griggs v. Duke Power Co.*[25] the Supreme Court, establishing the framework of the law on job testing under Title VII, held that: (1) tests must demonstrate a reasonable measure of job performance; (2) discriminatory intent need not be apparent on the face of the employment criteria; and (3) once an uneven racial impact has been shown, the employer bears the burden of proving the job relatedness of the test.[26] The Court emphasized the "job relatedness" standard as the proper criterion for review of standardized testing cases.[27]

At first courts were hesitant to extend their review beyond the lenient rational relationship test of the fourteenth amendment.[28] In *Western Addition Community Organization v. Alioto*,[29] however, in addition to establishing a "reasonably necessary" relationship between the qualities tested and the requirements of the job, the district court went one step beyond the traditional analysis by examining the different methods of test validation.[30]

Subsequent to *Alioto* courts became willing to temper their equal protection determinations with consideration of Title VII criteria. In *Chance v. Board of Examiners*[31] the district court concluded that the rational relationship standard was inappropriate because the case

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25. 401 U.S. 424 (1971). In *Griggs* blue collar workers in defendant's power plant were required to take a general intelligence test. The test was invalidated because the employer had not made the necessary job analysis to prove a reasonable relationship between test scores and job performance. *Id.* at 433-36.

26. *Id.* at 432-36.

27. *See* Note, *Employment Testing: The Aftermath of* Griggs v. Duke Power Co., 72 COLUM. L. REV. 900 (1972).

28. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub. nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

29. 340 F. Supp. 1351, 1352, 1354-55 (1972) (civil service test required for firemen), *modified*, 360 F. Supp. 733 (N.D. Cal. 1973).

30. The test was invalidated in this case because the employer had not made a job analysis required to prove a relationship between the test and performance on the job. *Id.* at 1355-56; *see* note 25 *supra*. Impetus for the application of the EEOC guidelines under Title VII to clarify an appropriate standard of review under the equal protection clause appears to have come from the Supreme Court's Title VII decision in *Griggs*. *See* 22 BUFFALO L. REV. 655, 659 (1973).

31. 458 F.2d 1167 (1972), *modified sub. nom.* Chance v. Board of Educ., 496 F.2d 820 (2d Cir. 1974). Plaintiffs challenged the constitutionality of exams administered by the Board of Examiners for permanent employment in supervisory positions.

involved racial discrimination. The Second Circuit affirmed but refused to apply the strict scrutiny standard as prescribed by the lower court.[32] Instead, the court suggested that challenges brought under the fourteenth amendment should be subject to the same standard of review as Title VII challenges.[33] Shortly thereafter, in *Castro v. Beecher*,[34] the First Circuit found the district court's application of the rational relationship test to be inadequate in cases in which there was a racial impact.[35] Although the court refrained from a rigorous application of strict scrutiny, the standard employed was similar to strict scrutiny, since it related "the substantial congruence of employment requirements to job performance."[36] Rather than rely on strict scrutiny, the *Castro* court chose to clothe its decision in Title VII terms, thus equating the protection afforded by Title VII with that of the fourteenth amendment.[37] Finally, the Fifth Circuit, forced to reach the issue of employment discrimination[38] in *Baker v. Columbus Municipal Separate School District*,[39] determined that the Graduate Record Examination was actually used for the purpose and with the effect of racial discrimination. Using the strict scrutiny standard, the court required a compelling state interest to justify the test.[40]

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32. *Id.* at 1174-78.

33. *Id.* at 1177. *Chance* is notable for going further than any previous court in requiring high standard for validation. The Board of Examiners had formulated its test for the specific job, utilizing expert advice, and produced expert testimony in court. Yet the court found that the test resulted in such substantial inequalities that it was forced to invalidate it.

34. 459 F.2d 725 (1st Cir. 1972).

35. The court explained that the lenient rational relationship test was adequate only if there was no racial impact. *Id.* at 732.

36. *Id.* at 733.

37. Holding the *Griggs* rule controlling, the court declared, "We cannot conceive that the words of the Fourteenth Amendment, as it has been applied in racial [employment discrimination] cases, demand anything less." *Id.*

38. The Fifth Circuit was reluctant at first even to reach the issue of employment discrimination. The court skirted the racial discrimination issue in Armstead v. Starkville Municipal School Dist., 461 F.2d 276 (5th Cir. 1972). In *Armstead* the court agreed that the arbitrary use of the Graduate Record Examination was impermissible in teacher selection but withheld judgment on whether the use of this examination created a suspect racial classification. For an analysis of *Armstead* see 22 BUFFALO L. REV. 655 (1973).

39. 462 F.2d 1112 (5th Cir. 1972).

40. The court cited Korematsu v. United States, 323 U.S. 214 (1944), stating that "[w]henever the effect of a law or policy produces such a racial distortion it is subject to strict scrutiny." 462 F.2d at 1114. Distinguishing *Korematsu* as a case involving

In an attempt to devise a standard of review for fourteenth amendment testing cases, *Walston* reaffirms the *Baker* court's use of strict scrutiny and the *Castro* court's application of the *Griggs* rule.[41] In this way the Fourth Circuit synthesized the limited precedent,[42] equating equal protection allegations with Title VII challenges. Previous courts had skirted the discrimination issue by invalidating the tests on the basis of their arbitrary administration.[43] The *Walston* court, instead, avoided the arbitrary administration issue,[44] and focused on the legality of the standardized test itself. By equating an equal protection claim with a challenge brought under Title VII, the Fourth Circuit found that the district court had applied too lenient a test. Instead of merely bearing a *rational* relationship to job performance, the court borrowed the more stringent *Griggs* standard that a test must "bear a *demonstrable relationship* to successful performance on the job for which [the test is] used."[45] Because the NTE produced racial distortion, the court reasoned

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"intentional" discrimination rather than "incidental" or "unintentional" discrimination, the *Baker* court then noted: "Even though this policy [in *Baker*] does not on its face purport to classify along racial lines as in *Korematsu* . . . its *effects* can be just as devastating." *Id.* at 1114 (emphasis added). *See, e.g.*, Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973), in which the court held that the same issues were involved in litigation under both the fourteenth amendment and Title VII and thus applied the *Griggs* rationale.

41. 492 F.2d at 924-25.

42. The blanket grouping of employees for testing in a single examination had been condemned by the Fourth Circuit in an earlier Title VII case. In Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *vacated*, 422 U.S. 405 (1975), the court set out principles under which the use of a standardized test for employment selection could be measured. *Id.* at 138 n.2.

43. *See* note 38 *supra.*

44. It is quite possible that the court could have invalidated the school board's selection plan solely on the basis of its arbitrary administration. Although in theory the test was only required of first year teachers and new applicants, the board nevertheless compelled several experienced teachers, some with more than 10 years of teaching service, to take the test. The fact that they were transfer teachers (experienced teachers from other school districts) or absent on maternity leave extinguished their seniority. The exemptions to the test were not administered uniformly in the nonacademic areas. A teacher instructing physical education classes, an exempt category, was compelled to take the test on the presumption she might also teach health, a nonexempt area. Other teachers who were not required to take the test had never completed a teacher training program or earned a college degree. These teachers were reemployed solely on the basis of their principals' evaluations. Brief for Appellants at 16-18, Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974) (on file with *Urban Law Annual*).

45. 492 F.2d at 924, *quoting* Griggs v. Duke Power Co., 402 U.S. 424, 431 (1971).

that it should be subject to stricter scrutiny.[46]

The school board supported the use of the standardized test as a means of assuring "that . . . teachers coming into Nansemond County should at least bring a minimal amount of general knowledge into the classroom."[47] Thus, they adopted a cut-off score of 500 to accomplish this goal. The Fourth Circuit, while acknowledging a school board's right to "improve the caliber of its faculty," mandated that the "policies and procedures employed must be clearly and fairly related to this goal."[48] The court adopted this standard from the *Baker* rationale that "[i]n order to withstand an equal protection attack [the NTE] must be justified by an overriding purpose independent of its racial effects."[49]

Satisfied with this more rigorous standard, the court then attacked the lower court's approval of content validation.[50] The Fourth Circuit emphasized the inadequacies inherent in the use of broad and general testing devices in teacher selection.[51] When such tests are used to determine which of several teachers will perform best on the job, the court determined that predictive validity[52] was certainly the proper area of judicial scrutiny. The court's analysis comes as a surprise, particularly after the lower court's finding that predictive validity would

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46. *Id.* at 925. In 1970-71, 127 in-service teachers were required to take the NTE: 21 were black and 106 white. Seventy percent of the blacks failed, compared to two percent of the whites. *Id.* at 922; *see* note 5 *supra.*

47. 492 F.2d at 925.

48. *Id.*

49. *Id., quoting* Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112, 1114 (5th Cir. 1972).

50. Because the school board had failed to make a validation study demonstrating that the knowledge necessary for the teaching positions bore any relation to the questions on the examination, the Fourth Circuit could find no justification for the lower court's determination. *Id.* at 924-26; *see* note 23 *supra.*

51. 492 F.2d at 926. The court perceived that evaluating teacher ability involves a great number of unknown variables. To validate a standardized examination which ostensibly tested "ability" would be a difficult task. The court realized how difficult it was to agree on what constitutes "teaching ability" itself, much less its determinants. *Id.*

Tests have no way of measuring classroom activity, personality, teacher-student rapport, and enthusiasm. "[B]ecause any *independent determination* of teaching ability employed to establish the validity of a particular test instrument would be qualitative at best, it would be virtually impossible to establish a score on any standardized examination below which a person could be considered incompetent to teach. Teaching is quite simply more of an art than a quantifiable skill." 22 BUFFALO L. REV. 655, 669 (1973).

52. *See* note 23 and accompanying text *supra.*

be impossible to achieve.[53] *Walston*, in essence, holds that if present technology is not sophisticated enough to design a test with a marked capability of predicting teacher performance, school boards will have to resort to alternative criteria for selecting teachers.[54]

The *Walston* court makes clear the applicability of Title VII guidelines to employment discrimination challenges in the teaching profession. The court's additional acknowledgement of the *Baker* court's strict scrutiny standard is relevant in reconciling the law under equal protection and Title VII. The court equates the standard of compelling state interest and demonstrable relationship and affords similar treatment to all challenges to standardized tests, whether they are brought under Title VII or the fourteenth amendment. This equivalence might have removed some of the uncertainty confronting courts. By disregarding the traditional equal protection tests and focusing instead on the Title VII guidelines (job-relatedness and predictive validity),

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53. The Fourth Circuit was unmindful of the lower court's plea:

> The evidence clearly establishes that no study has shown any correlation between any score and the ultimately effective in-service teacher, that is, teacher ability to increase learning capacity of students. Thus the NTE lacks predictive validity. However, the evidence also reveals that *no* test currently measures this relationship; nor is it likely that any test could be developed to accomplish this goal. . . . It seems ridiculous to say that before a test is a reasonable measure it must also do the impossible.

351 F. Supp. at 203-04; *see* note 51 *supra*. Impetus for the court's approach also appears to be derived from a prospectus issued by the originators of the NTE which states:

> "The National Teacher Examinations are designed to provide objective standardized measures of the *academic achievement of college seniors completing four-year programs of teacher education*. . . . [T]he [National Teacher Examinations] . . . *are not intended as a measure of classroom performance*; those desiring to test teachers in service will not find the National Teacher Examinations a substitute for direct observation of their on-the-job accomplishments."

492 F.2d at 924-25 n.4. The court also quoted from the Guidelines for Using the National Teacher Examination which stated that "*test scores contribute little or nothing to the evaluation of an* in-service teacher." *Id.* at 925 n.4

54. The issue that courts seem so reluctant to reach is a determination of precisely what test instruments, if any, will be permissible. *Walston*, while condemning the use of the general section of the NTE, suggests that "subject area testing" may be acceptable if properly and fairly administered. 492 F.2d at 926. Previously, the *Baker* court in a footnote cited the appendices to its decision in United States v. Texas Educ. Agency, 459 F.2d 600 (5th Cir. 1972), as examples of "objective, nonracial, and reasonable" criteria. 462 F.2d at 1115 n.4. Commentators, however, have criticized the latter criteria for failing to provide a single means of evaluating a teacher's classroom performance. *See* 22 BUFFALO L. REV. 655, 674 (1973). In Armstead v. Starkville Municipal School Dist., 461 F.2d 276 (5th Cir. 1972), the Fifth Circuit approved the requirement of a masters degree as an objective qualification criterion for teacher selection. *See, e.g.*, Cooper & Sobol, *supra* note 1, at 1666-69; Note, *Employment Testing supra* note 27, at 920-24.

courts would have a much more concrete standard upon which to render judgments. The *Walston* decision, however, comes too late. Because the EEOA of 1972 expanded the coverage of Title VII, aggrieved public school teachers will most likely bring future suits under both Title VII and the fourteenth amendment. With the EEOC Guidelines and validation studies to rely on, courts will no longer be confronted with the added task of attempting to fit fourteenth amendment challenges into the framework of Title VII.

The semblance of order that *Walston* brought to the review of standardized testing, however, may still be of consequence. *Walston* still can be significant for narrowing the school board's discretionary power to select "qualified" faculty members. The *Baker* court stressed the importance of maintaining the school board's discretion in the teacher selection process.[55] *Walston* is more concerned with granting employees their rights to an equal employment opportunity.[56] Any discretionary power harbored by the school board is only secondary. The use of a general standardized test, when coupled with an arbitrary cut-off score, certainly defeats the right to an equal employment opportunity. The school board must bear the burden of showing that the use of a standardized test is within its discretionary power and only through Title VII validation studies can such a burden be met.[57] Whether this school board or any school board will be successful in meeting this burden is at best speculative.

Finally, *Walston* may signify the demise of the standardized test as qualification criteria for teacher employment. The inherent error of a standardized test is that it fails to test important determinants of teaching competence such as classroom activity, personality, teacher-student rapport, and enthusiasm. Taking into account the negligible validity of the generally available standardized test used to evaluate teachers, it is not surprising that the *Walston* court declared the NTE cut-off score of 500 to be patently arbitrary and discriminatory. Unless testing techniques can be sufficiently refined to meet minimum Title VII validation standards, courts following the Fourth Circuit's lead will force school boards to look with ever-increasing favor upon academic

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55. 462 F.2d 1112, 1115 (5th Cir. 1972).

56. "[T]he principle of equal employment opportunity is the law of the land . . . and it must never be dishonored." 492 F.2d at 927.

57. *See generally* Brief for Appellants at 36-43, Walston v. County School Bd., 492 F.2d 919 (4th Cir. 1974).

records as the sole legitimate index of teaching competence.[58] Though the *Walston* court may have provided a helpful standard of review for future testing cases, whether brought under Title VII or the fourteenth amendment, it does little to relieve the dilemma facing school boards in choosing satisfactory criteria for teacher selection. This task remains for future courts.

Catherine Meier Walsh

58. One commentator criticizes this trend:

> The development of such a trend will be unfortunate not only because it is likely to result in the nation's classrooms being conducted by academically qualified people, many of whom may simply not be good teachers. It will be unfortunate because it will represent the presupposition on the part of the courts of the very issue being challenged . . . which is by no means self-evident: that an academic degree is a valid determinant of teaching ability. As well respected as they are in this country, degrees should not be permitted to escape the scrutiny of stringent equal protection and Title VII standards when used as a sine qua non for employment. Where the requirement of an academic degree establishes a racial classification, it should be "demonstrably a measure of job performance," and its correlation with teaching ability should be shown to be as great as that for permissible standardized tests.

22 BUFFALO L. REV. 655, 675 (1973). *See also* note 54 *supra.*