BARRIERS OPERATING IN THE PRESENT: A WAY TO RETHINK THE LICENSING EXCEPTION FOR TEACHER CREDENTIALING EXAMINATIONS

Michele A. Yankson*

Notwithstanding Title VII legal remedies, structural barriers have driven many teachers of color out of the workforce in recent decades. Legislative changes in education policy have exacerbated the problem, notably by mandating teacher certification exams. These exams often disproportionately affect teachers of color. Many teachers suing under a Title VII disparate impact claim, however, cannot name states—the actors that create and promulgate the tests—as defendants because courts have interpreted Title VII's employment relationship requirement to preclude state defendants. This Note proposes a framework that involves a real-world analysis of the extent to which states control local school governance. The framework shows that courts should allow state defendants in these Title VII disparate impact claims when the test at issue is a state-mandated teacher certification test.

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Introduction

In the years following the Civil War, Allen A. Williams, a black teacher in Tuscaloosa, Alabama, taught for over a year before his employment was terminated. Williams built the school in which he taught and used his own funds to finance the project.[1] When he could no longer afford to maintain the school, he petitioned the United States government for resources.[2] In response to his claim, a government official ordered that Williams be replaced by a white teacher from Ohio.[3] When Williams refused to hand over the school, the government official called him "self-conceited, ignorant, [and] crafty."[4] Postbellum[5] narratives similar to Williams's were not uncommon: Across the South, African American teachers were driven out of schools because racialized attitudes pegged them as incompetent, while others watched the schools they had built close, often because of financial constraints.[6]

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1 Ronald E. Butchart, Schooling the Freed People: Teaching, Learning, and the Struggle for Black Freedom, 1861–1876, at 32 (2010) (telling the story of Allen A. Williams).

2 *See id.* Specifically, Williams petitioned the Freedmen's Bureau, an agency the United States government created after the Civil War, to provide educational and other resources to assist recently freed slaves. *See id*. at 31, 144 (describing efforts by the Freedmen's Bureau to organize Southern black education initatives beginning in 1865).

3 *See id.* at 32 (recounting how a change in personnel at the Bureau led to Williams's removal).

4 *Id.*

5 "Postbellum" refers to the years immediately following the end of the Civil War. Webster's Third New International Dictionary 1771 (1993). The narratives conveyed in Butchart, *supra* note 1, took place during the postbellum period.

6 *See, e.g.*, Butchart, *supra* note 1, at 32–35 (telling the story of Solomon Derry, a black minister and school teacher whom the Freedmen's Bureau attempted to replace with a "white Yale graduate"); Leon F. Litwack, Been in the Storm So Long: The

A similar trend emerged some decades later. Following *Brown v. Board of Education*, in which de jure segregation was held unconstitutional under the Equal Protection Clause,[7] many black teachers were left unemployed.[8] Desegregation enforcement meant that black students would be ushered into white schools. In turn, the mostly black schools these students left behind—often already underfunded—were forced to close.[9] Because black teachers and principals that once taught in the newly closed schools "could not compete against those at the formerly white schools on the standards set by school boards," they eventually were terminated.[10] Wendy Parker writes that by 1972, almost 40,000 African American teachers were unemployed due to the desegregation efforts of *Brown*.[11] What was left, then, were fewer black schools and a surplus of black teachers who found it difficult to gain employment in newly integrated schools.

Title VII of the Civil Rights Act of 1964 was a legal fix meant to remedy this trend.[12] Title VII prohibits employers from terminating or refusing to promote or hire an individual because of race.[13] Furthermore, the legislative history of Title VII's 1972 amendments—which extended Title VII's coverage to federal, state, and local government employers[14]—suggests that drafters intended the amendments, and Title VII as a whole, to be focused particularly on rooting out employment discrimination in the field of education.[15]

Notwithstanding Title VII legal remedies, other barriers, more structural[16] than direct, have driven many teachers of color out of the

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AFTERMATH OF SLAVERY 487–88 (1979) (recounting the stories of aspiring black teachers whose attempts to build schools were thwarted by private acts of violence or state-sanctioned interference).

[7] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[8] *See* Wendy Parker, *Desegregating Teachers*, 86 WASH. U. L. REV. 1, 14–15 (2008) (describing *Brown*'s effect on the employment of African American teachers and noting that "almost 40,000 African-American teachers were unemployed by 1972 because of *Brown*").

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *See* discussion *infra* Part III.C.1 (expounding Title VII's remedial-based purpose).

[13] 42 U.S.C. § 2000e(a)–(c) (2012).

[14] 1972 Amendments to Title VII, Pub. L. No. 92-261, § 2, 80 Stat. 662 (codified as amended at 42 U.S.C. § 2000e(a) (2012)); *see also* DIANE AVERY ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 12 (8th ed. 2010) (noting the entities included in the 1972 amendments to Title VII).

[15] *See* discussion *infra* Part III.C (summarizing legislative reports that demonstrate Title VII's particular focus on education).

[16] When this Note refers to "structural" barriers of discrimination, it intends to refer to "processes or environmental conditions that slot people into particular positions, roles and networks." DARIA ROITHMAYR, REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE 22–23 (2014). With standardized testing—the particular subject of

workforce in recent decades. For example, in Texas, Allene Fields and Earline Daniels, two black public school teachers, were discharged despite having over ten years of satisfactory teaching instruction.[17] The reason: both women failed to achieve a certain cutoff score on a state-promulgated certification test, a test that was shown to have a disproportionate impact on teachers of color.[18] Experiences like these may explain the declining number of black teachers nationally over the last two decades.[19] One report, for example, indicates that the per-

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this Note—the "processes" or "environmental conditions" could be framed in this way: Because of residential segregation, inequities in education persist—blacks tend to live in poorer neighborhoods. *See* Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (May 21, 2014), http://www.theatlantic.com/features/archive/2014/05/the-case-for-reparations/361631/ (citing a study which indicated that "from 1955 through 1970 . . . 4 percent of whites and 62 percent of blacks across America had been raised in poor neighborhoods" and stating that, decades later, the same study showed that "virtually nothing had changed"). Therefore, they are more likely to attend underfunded, lower-performing schools, as funding for schools is often tied to property values. *See* BRUCE D. BAKER & SEAN P. CORCORAN, THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING 3 (2012) (explaining that school districts often rely on property taxes for their share of revenues). This in turn affects their ability to perform well on standardized tests. *See* W. James Popham, *Why Standardized Tests Don't Measure Educational Quality*, 56 EDUC. LEADERSHIP 8 (1999) (noting that standardized tests assess "out-of-school" learning, which correlates with home environment, and "what's taught in school," which is what an individual learns throughout schooling). When these tests are tied to employment, a structural barrier arises: The tests, though not overtly discriminatory, disproportionately burden those whose environmental conditions did not adequately prepare them for the subjects on which they are tested. *See* ROITHMAYR, *supra*, at 71 (noting the link between environmental conditions and access to employment).

[17] Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017, 1018 (5th Cir. 1990). Daniels and Fields were the two plaintiffs in a Title VII suit against the state and school district. *Id.* at 1017. *Fields* is discussed in more detail *infra* Part II.A.

[18] For example, in one administration of the Texas Examination for Current Administrators and Educators (TECAT), "black examinees had a pass rate of 80.69% while whites had a 98.98% pass rate." Fields v. Tex. Cent. Educ. Agency, 754 F. Supp. 530, 532 (E.D. Tex. 1989), *aff'd sub nom.* Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017 (5th Cir. 1990). A later administration of the TECAT produced similar results, with a pass rate of 73.56% for black examinees as compared with a pass rate of 88.41% for whites. *Id.* Despite this difference, the district court found that, because the pass rate of black examinees was not less than four-fifths the rate of whites, Fields and Daniels failed to demonstrate "intentional discrimination" and "discriminatory impact." *Id.*

[19] First, these tests can disproportionately negatively impact black teachers. *See* Don Goldhaber & Michael Hansen, *Race, Gender, and Teacher Testing: How Informative a Tool Is Teacher Licensure Testing?*, 47 AM. EDUC. RES. J. 218, 219 (2010) ("[M]inority teachers (Black teachers in particular) tend to perform substantially less well on licensure tests than do White teachers."). In the past decade, for example, news stories have analyzed the problem of "disappearing" or "vanishing" black teachers. *See, e.g.*, Elizabeth Green, *Fewer Blacks, More Whites Are Hired as City Teachers*, N.Y. SUN (Sept. 25, 2008), http://www.nysun.com/new-york/fewer-blacks-more-whites-are-hired-as-city/86580 ("The percentage of new teachers in New York City public schools who are black has fallen substantially since 2002, dropping to 13% in the last school year from 27% in 2001-02 . . . ."); Brandon Johnson, *Disappearing Acts: The Decline of Black Teachers*, CTUNET

centage of African Americans in the teaching force in Chicago went from forty-five percent in 1995 to just nineteen percent in 2012.[20]

Considering Title VII's remedy-based purpose,[21] this shift should give pause. This national decline in teachers of color bears striking similarity to the postbellum and post-*Brown* landscape Congress sought to alter with Title VII. One of the primary goals of Title VII was the eradication of employment discrimination in the field of education.[22] Unfortunately, the existing legal regime has inadequately addressed the current situation—that is, that the African American teaching force continues to shrink. Accordingly, the moment is ripe for a new legal regime that could satisfy Title VII's remedy-based purpose.

In recent years, legislative changes in education policy may have exacerbated this decline.[23] The No Child Left Behind Act of 2001 (NCLB) requires that schools receiving federal funds under the Act ensure that teachers of "core academic subjects"—such as English, mathematics, and history—be "highly qualified."[24] Teacher performance on standardized tests—not to be confused with *student* performance on standardized tests[25]—is arguably the core metric NCLB encourages states to use to determine whether a teacher is highly

.com (Jan. 31, 2013), http://www.ctunet.com/blog/disappearing-acts-the-decline-of-black-teachers ("In 2000, 52 percent of Chicago Public Schools (CPS) students and 41 percent of CPS teachers were black. Today, 43 percent of students and just 25 percent of teachers are black."); James Vaznis, *Officials in Boston Seeking Black Teachers*, BOS. GLOBE (Jan. 20, 2014), http://www.bostonglobe.com/metro/2014/01/20/boston-public-schools-seeks-more-diverse-teaching-force/PweKkx5C6NQmaSGXDmmccJ/story.html (discussing the decline in black teachers in Boston in the past decades).

[20] Stephanie Simon & James B. Kelleher, *Analysis: Striking Chicago Teachers Take on National Education Reform*, REUTERS (Sept. 10, 2012), www.reuters.com/article/2012/09/10/us-usa-chicago-schools-analysis-idUSBRE8890VS20120910. In Denver, the number of black teachers in public schools dropped from 299 in 1999 to 247 in 2009, even though the total number of teachers grew from 4075 to 4579. Charlie Brennan, *In Search of Black Teachers*, CHALKBEAT COLO. (May 3, 2011), http://www.ednewscolorado.org/2011/05/03/18277-in-search-of-black-teachers.

[21] *See* discussion *infra* Part III.C.1 (highlighting cases that expound on Title VII's remedy-based purpose).

[22] *See infra* notes 193–95 and accompanying text (summarizing legislative reports that demonstrate Title VII's focus on rooting out discrimination in education fields).

[23] *See* Goldhaber & Hansen, *supra* note 19, at 219 (noting the increasing emphasis on testing teachers under the No Child Left Behind Act).

[24] 20 U.S.C. § 6319(a)(2) (2012).

[25] That is, how a teacher fares on an entry-level test used for employment. Here, I do not mean to refer to how a teacher is evaluated based on how his or her students perform.

qualified.[26] Given the financial incentives[27] attached to the Act, many states, unsurprisingly, increased their use of tests to identify highly qualified teachers.[28] Ultimately, the results of those tests can be used to determine whether a district will continue to employ a teacher.[29]

The potential for standardized tests to generate outcomes harmful to people of color—particularly Blacks and Latinos—is well documented.[30] Because of this potential, Title VII affords employees or potential employees a remedy when standardized tests used to make employment decisions have a disproportionately negative effect on both students and teachers of color.[31] Employees may bring a claim under a theory of disparate impact[32] under Title VII if (1) an employer conditions employment on a test or practice that has a disproportionately negative effect on minority test-takers and (2) the test or practice is an inadequate measure of qualification.[33]

Many teachers suing under a Title VII disparate impact claim are unable to name states—the actors that create and promulgate the tests—as defendants. There are two interrelated reasons courts refuse to allow state defendants in these cases. The first is the "licensing exception."[34] As formulated by some circuits, this exception precludes plaintiffs from naming states as defendants when the implementation

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[26] *See* 20 U.S.C. § 7801(23)(A)(i)–(ii) (defining a highly qualified teacher as one who has either "obtained full State certification as a teacher" or "passed the State teacher licensing examination").

[27] *See infra* note 159 (describing financial incentives).

[28] *See* Regina R. Umpstead & Elizabeth Kirby, *Reauthorization Revisited: Framing the Recommendations for the Elementary and Secondary Education Act's Reauthorization in Light of No Child Left Behind's Implementation Challenges*, 276 EDUC. L. REP. 1, 13 (2012) (stating that after NCLB's passage, "most states developed rigorous requirements for new teacher certification [and] thirty-seven states mandat[ed] that new teachers pass a content knowledge assessment").

[29] *See infra* Part III.B (discussing some states' use of standardized tests in deciding whether to hire or retain teachers).

[30] Scholars have noted that standardized tests often favor the learning style and perspectives of whites. *See generally* Christopher Jencks & Meredith Phillips, *Introduction* to THE BLACK-WHITE TEST SCORE GAP 1–4 (Christopher Jencks & Meredith Phillips, eds., Brookings Inst. Press 1998) (describing the disproportionate standardized test scores of blacks and whites); *see also* Goldhaber & Hansen, *supra* note 19, at 222 (pointing out the disproportionate failure rates of minority teachers on these tests).

[31] *See infra* Part I.A (discussing seminal Title VII cases concerning the use of standardized tests).

[32] *See id.* (discussing the components of a Title VII disparate impact claim).

[33] Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971) (holding that an employer's test was unlawful because it had a discriminatory effect on minority test-takers and was not a reasonable measure of job performance). *Griggs* is discussed *infra* notes 44–49 and accompanying text.

[34] *See infra* Part I.C (analyzing case law that first asserted the licensing exception).

of professional certification tests is at issue.[35] These circuits have also extended this exception to state agencies that devise and administer standardized tests for teacher credentialing.[36] Second, because states do not have sufficient "control" over teachers, there is no employment relationship between them.[37] As a result, some educators are potentially left without a legal remedy when teacher certification tests have a disproportionate impact on minority test-takers.[38]

This Note argues that there should be a presumption that states are appropriate defendants in these Title VII disparate impact claims.

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[35] *See infra* Part II.A (describing the Fifth Circuit and Seventh Circuit holdings that states did not stand in an employer-employee relationship with license applicants, as well as a Second Circuit case that based its analysis on whether the state exercised sufficient control).

[36] *See infra* Part II.A (analyzing circuit decisions—specifically those from the Second, Fifth, and Seventh Circuits—that have extended the exception to state agencies that administer standardized tests for teacher credentialing).

[37] *See infra* Part II.B (describing courts' rationales for finding insufficient control).

[38] A question arises as to whether plaintiffs can sue districts or local school boards if a state is not held liable. Some circuits have allowed teachers to sue school districts, even if they dismiss states as defendants in these claims. *See infra* notes 113–14 and accompanying text (noting that the Second Circuit has allowed a local school board to be named defendant in a disparate impact claim involving teacher credentialing tests). Still, there is reason to believe that a court might find it inequitable to hold a district liable for action it takes that is required by the State. *See infra* note 206 and accompanying text (noting that a court might refuse to allow districts to be named defendants out of "fairness").

Further, even if districts are made defendants, state defendants are desirable for other reasons. Successful disparate impact suits often rely on sophisticated statistical analyses, for which class action claims are most appropriate. *See* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 257 (2011) (describing the levels of sophistication and funding necessary to prevail on a disparate impact theory). Allowing claims against states increases the possibility for class actions with a larger number of plaintiffs and stakeholders, thus facilitating the acquisition of resources necessary to launch successful claims. Additionally, in districts where there are few African American and Latino teachers, class actions are difficult, or perhaps even impossible, to pursue on a district level. Wendy Parker presents data indicating that several districts in North Carolina, Texas, and New Jersey have a teaching force that is fewer than five percent African American or Latino. Parker, *supra* note 8, at 22–28. Assuming that the percentages of those already in the workforce reflect those seeking to gain access, teachers in these districts would be hard pressed to meet the numerosity requirements set forth in the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 23(a)(1) (requiring that a class be "so numerous that joinder of all members is impracticable"). Essentially, this could mean that only teachers in districts with large numbers of minority teachers would be able to bring suit. Teachers in districts with few teachers of color (for example, rural areas and areas in the South and Midwest) could be precluded completely from building such claims.

The theoretical bases for class actions also lend support for the states-as-defendant framework. Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 374 (2012). Because the policies that create the requirements connected to teacher qualification are often the product of state legislatures, under Issacharoff's theory of class actions, the best way to address the "harm" is to create conditions that would compel the state to rework existing policy. *See id*. at 376 (suggesting that addressing systemic discrimination through class action compels states to confront the consequences of state policy).

Part I outlines the Title VII disparate impact jurisprudence, formulations of the employer-employee relationship based on "control," and the original formulation of the licensing exception. Part II analyzes the exception in the context of teacher certification tests, and how it has been interpreted in circuit law. Part III discusses NCLB and its effects on education policy and proposes a framework that would allow state defendants when the test at issue is a state-mandated teacher certification test. This framework involves a real-world analysis of the extent to which states control local school governance. This Note argues that, after NCLB, states are more likely to exert sufficient control to prove the existence of an employer-employee relationship. The framework involves recognition of two important background norms: first, uncertain correlation between teacher examinations and teacher success,[39] and second, a recognition of Title VII's pro-remedy purpose.

I
Establishing Disparate Impact Liability Under Title VII: The Various Employment Relationship Tests

Theoretically, teachers wishing to contest the use of teacher credentialing tests with a disparate impact would have a claim against the state in which they teach under Title VII. Nevertheless, some courts have weakened these claims or precluded them entirely. Part I.A describes Title VII disparate impact theory. Part I.B describes the common law tests used to determine what constitutes an "employer" under Title VII. Finally, Part I.C analyzes early circuit court cases in which the licensing exception was invoked in disparate impact cases.

A. Title VII and Disparate Impact

Title VII makes it unlawful for public and private employers, labor organizations, and employment agencies to discriminate against applicants and employees on the basis of their race, color, sex, religion, and national origin.[40] The disparate impact theory of liability under Title VII prohibits the use of tests as a condition of employment if these tests (1) have a disparate impact on minority test-takers and (2) are not "demonstrably a reasonable measure of job performance."[41] The second part of this inquiry, also known as the "business

[39] *See infra* Part III.C.2 (arguing that credentialing tests can be a poor proxy for teacher success).

[40] 42 U.S.C. § 2000e-2(a)(2) (2012).

[41] Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

necessity" requirement,[42] is a matter of degree, not kind—that is, it hinges not on whether the test is related to the job, but whether the relation is sufficiently close.[43]

In *Griggs v. Duke Power Co.*,[44] the case in which the Supreme Court first articulated the disparate impact theory, Duke Power based employment for managerial positions on the receipt of a high school diploma and successful completion of two aptitude tests.[45] The plaintiffs were a class of African American employees.[46] The Court held that Duke Power's policy was not clearly related to the job's requirements and thus prohibited under Title VII.[47] Important to the Court's holding was its emphasis on the purpose of Title VII. The Court stressed that the statute sought 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."[48] Notably, the Court rejected Duke Power's assertion that the tests could be used to improve the quality of the workforce, as many employees who had not taken the tests still performed satisfactorily.[49]

Cases and legislation following *Griggs* adhered to its core principles. In *Albemarle Paper Co. v. Moody*, the Supreme Court upheld an injunction against Albemarle for using general intelligence tests to determine eligibility for promotion.[50] In arriving at its holding, the Court emphasized Title VII's remedial focus, stating that remedies for Title VII violations should both "secur[e] complete justice" and "so far as possible *eliminate the discriminatory effects of the past*."[51] Congress invigorated the disparate impact theory via the Civil Rights Act of 1991, which explicitly stated that an employer's intent was not rele-

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42 *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (describing the business necessity requirement).

43 *See* Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 Am. U. L. Rev. 799, 803 (1985) ("The issue in most cases is not whether an employment criterion is or is not related to ability to do the job, but rather whether the relationship between the criterion and job performance is sufficiently close.").

44 401 U.S. 424 (1971).

45 *Id.* at 427–28.

46 *Id.* at 426.

47 *Id.* at 431–32.

48 *Id.* at 429–30.

49 *Id.* at 431–32 ("The evidence, however, shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.").

50 *See* 422 U.S. 405, 435–36 (1975) (agreeing with the court of appeals that Albemarle had not proved the "job relatedness of its testing program" but remanding to the district court to determine the specific details of relief). The company set a cutoff score for two pre-employment tests that few African Americans were able to meet. *Id.* at 429.

51 *Id.* at 418 (emphasis added).

vant to a disparate impact inquiry.[52] Recently, some courts have emphasized that the robust remedies Title VII affords successful plaintiffs demonstrate that it is meant to serve a deterrent function as well.[53]

In 2010, the Second Circuit held that the use of written tests by the Fire Department of New York (FDNY) violated Title VII,[54] underscoring the continued importance of disparate impact in employment discrimination litigation.[55] In *United States v. City of New York*,[56] the plaintiffs—a class of 335 African American firefighters currently working in FDNY and the thousands of African Americans that were prevented or discouraged from gaining employment[57]—showed a statistically significant difference in the test passage rates of whites and racial minorities.[58] Because the City had failed to demonstrate that the current test measured successful job performance, the court found that the use of these tests violated Title VII under the disparate impact theory.[59]

Thus, early Title VII cases (and later amendments to the statute) convey important lessons about its scope. First, since disparate impact focuses on injury and not intent, they acknowledge the importance, if not necessity, of a remedy against structural discrimination. Second, both *Griggs* and *Abermarle* articulated that the purpose of Title VII—eliminating employment discrimination—motivated the Court's con-

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[52] *See* Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C. § 2000e (2012)) (outlining what constitutes an "unlawful employment practice based on disparate impact").

[53] *See, e.g.*, McMullen v. Meijer, Inc., 355 F.3d 485, 491 n.5 (6th Cir. 2004) (noting the remedial and deterrent functions of Title VII); Morrison v. Circuit City Stores, 317 F.3d 646, 670 (6th Cir. 2003) (same).

[54] *See* United States v. City of New York (*City of New York II*), 717 F.3d 72, 95–96 (2d Cir. 2013) (affirming the district court's finding of disparate impact).

[55] *See id.* (upholding in part and rejecting in part an injunction issued by the district court to remedy disparate impact liability in the firefighter hiring exam).

[56] United States v. City of New York (*City of New York I*), 683 F. Supp. 2d 225 (E.D.N.Y. 2010).

[57] Intervenor's Complaint at 4, Vulcan Soc'y Inc. v. City of New York, No. 07-2067 (E.D.N.Y. July 17, 2007), *available at* http://ccrjustice.org/files/VulcanSociety_Complaint_07_07.pdf.

[58] For example, for one of the examinations administered by the defendants, whites had a passing rate of 89.9%, while the pass rates of blacks on that examination was only 61.2%. *Id.* at 13; *see also City of New York I*, 683 F. Supp. 2d at 233–37 (discussing details about the hiring exam and noting that the disparities between pass rates of white and minority candidates ranged from 10.5 to 33.9 units of standard deviation).

[59] *City of New York I*, 683 F. Supp. 2d at 233–37 (noting that summary judgment on the Title VII disparate impact claims had been previously decided by the district court in 2009). Although the disparate treatment claim was later vacated by the Second Circuit because of a failure to show discriminatory intent, the finding of disparate impact and order for injunctive relief was upheld. *City of New York II*, 717 F.3d at 95–96 (2d Cir. 2013).

clusion. Lastly, the use of disparate impact reflects recognition that testing can be a poor proxy for qualification.[60] And, as *City of New York* demonstrates, disparate impact continues to be a method of obtaining a remedy against employers utilizing tests that have discriminatory effects.

Therefore, in order to launch a successful disparate impact claim, a teacher-plaintiff needs to show that a state or district required passing a test for employment and that this test had a disproportionate impact on minority test-takers (a teacher-focused inquiry). This prong of the claim has been supported by research and demonstrated by plaintiffs in numerous cases.[61] If the employer-defendant claims that the test is related to the job and consistent with business necessity, the teacher would have to show that the tests are not related to job qualifications (primarily a student-focused inquiry).[62]

In some circuits, however, plaintiffs fail to make it past the preliminary step of the disparate impact inquiry. That is, they cannot even reach the stage where the case is considered on the merits because the court determines that the teacher and the State do not have an employee-employer relationship. The next Subparts will analyze the different tests used by courts to determine whether an employee-employer relationship exists, as well as the licensing exception, which, in some circuits, precludes plaintiffs from naming states as defendants in certification test disparate impact claims.

B. Control and Interference in the Employment Relationship

Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees."[63] To determine whether or not a particular entity in question is an employer, courts generally require the finding of an employment relationship between defendant and plaintiff.[64] The lack of certainty over whether

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[60] *See supra* notes 48–49 and accompanying text (describing the Court's rationale in *Griggs*); *see also Griggs*, 401 U.S. at 433 ("History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment . . . .").

[61] *See infra* Part III.C.2 (describing statistics on the disproportionate failure rates of white teachers and teachers of color).

[62] *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i)–(ii) (2012) (specifying that the establishment of an unlawful employment practice based on disparate impact requires that "the respondent fail[ ] to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity" or the failure to adopt an established "alternative employment practice").

[63] 42 U.S.C. § 2000e(b).

[64] *See* Muhammad v. Dallas Cnty. Cmty. Supervision & Corr. Dep't, 479 F.3d 377, 380 (5th Cir. 2007) ("Determining whether a defendant is an 'employer' under Title VII involves a two-step process. First, the court must determine whether the defendant falls

states and teachers have an employment relationship in part animates the debate at issue in this Note.

Courts generally use agency or common law principles.[65] Under the common law "control test," a court considers a nonexhaustive list of thirteen factors to assess the amount of control the defendant exerts over the plaintiff's employment.[66] These factors include the following: the duration of the relationship between the defendant and plaintiff; whether or not the defendant has the discretion to hire or fire the plaintiff; whether or not the defendant controls the manner and means through which the product is accomplished; whether or not the plaintiff receives compensation and benefits from the defendant; the extent of the hired party's discretion over when and how long to work; and whether the hiring party has the right to assign additional projects to the hired party.[67] In *Nationwide Mutual Insurance Co. v. Darden*, the Supreme Court held that when a statute is silent on the precise definition of employer, the control test is the determinative analysis for whether an employment relationship exists.[68]

In *Community for Creative Non-Violence v. Reid*, one of the first Title VII cases that used the control test, the Supreme Court suggested that a holistic, fact-based assessment of the factors was required. The Court emphasized that a single factor in the test need not be dispositive,[69] and it used a totality of the circumstances inquiry.[70] Moreover, at least one scholar noted that the factors in *Reid*

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within Title VII's statutory definition of an 'employer' . . . . [i]f the defendant meets this definition, the court must then analyze whether an employment relationship exists . . . ."); *see also infra* Part II.A–B (describing case law in which courts undertake a similar inquiry).

[65] *See* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322 (1992) ("Where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal citations omitted). Courts have reiterated this proposition in the employment context since *Darden*. *See, e.g.*, Clackamas v. Wells, 538 U.S. 440, 445–46 (2003) (quoting *Darden*).

[66] *Clackamas*, 538 U.S. at 445 n.5; Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989).

[67] *See Reid*, 490 U.S. at 751–52 (outlining these and other factors). The other factors are as follows: the sources of the instrumentalities and tools used during employment; the skill required; whether the work is in the regular business of the hiring party; the method of payment; the hired party's role in hiring and paying assistants; and whether the hiring party is in business. *Darden*, 503 U.S. at 323–24.

[68] 503 U.S. 318, 322–23 (1992) (stating that when "Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine").

[69] 490 U.S. 730, 752 (1989) (listing the factors relevant to the existence of an employment relationship and concluding that "[n]o one of these factors is determinative").

[70] *See id.* at 752–53 (cataloging all of the factors in the Court's analysis).

were "not exhaustive and other factors can be considered."[71] There has been no definitive answer from the Supreme Court as to which factor or factors should carry more weight, and circuits run the gamut on the factors they find most significant.[72]

In *Sibley Memorial Hospital v. Wilson*, the District of Columbia Circuit established what was later described as the "interference test," which dispensed with the traditional control-test factors.[73] The interference test made actionable a claim in which the defendant had only an indirect employment relationship with the plaintiff. Under the test, a plaintiff only needs to show that the defendant interfered with her access to employment opportunities.[74] In *Sibley*, a male nurse claimed that a hospital policy that prohibited him from serving female patients violated Title VII.[75] In holding that the hospital was an employer under Title VII, the court did not require a direct employer relationship; rather it only required that the hospital had "[c]ontrol over [the plaintiff's] access to the job market."[76]

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71 Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 618 (2012) (noting that the *Reid* factors are not meant to be exhaustive).

72 Some circuits have placed special importance on the ability to control the "manner and means" by which assigned tasks are completed. *See, e.g.*, Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 112 (2d Cir. 2000) ("[I]n determining whether a worker is an employee within the meaning of Title VII . . . courts ordinarily should place particular weight on the extent to which the hiring party controls the manner and means by which the worker completes her assigned tasks."). Others have seemed to elevate "the hiring party's right to control the manner and means by which the product is accomplished." *See* Alexander v. Rush N. Shore Med. Ctr., 101 F.3d 487, 493 (7th Cir. 1996), *cert. denied*, 522 U.S. 811 (1997) (refusing to find the existence of an employment relationship primarily because the plaintiff had sole control over how he rendered services to his patients, despite the fact that the defendant had the ability to hire and fire him, supplied his equipment, and determined his work hours). Some scholars and courts contend that finding that the defendant could hire or fire the plaintiff is a necessary, but not sufficient, component of an employment relationship. *See, e.g.*, Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1243–44 (11th Cir. 1998) (citing case law that suggests that compensation is equally relevant to the existence of an employment relationship); Rubinstein, *supra* note 71, at 618 (stating that the *Reid* factors are "non-exhaustive").

73 *See* 488 F.2d 1338, 1341 (D.C. Cir. 1973) (stating that allowing interference with an individual's employment opportunities is contrary to the purpose of Title VII).

74 *Id.*; *see also* Rubinstein, *supra* note 71, at 642 (stating that *Sibley* held that "employers had a duty under Title VII not to discriminate against employees whose employment opportunities could be affected by an employer *even if that employer did not directly employ the individual in question*") (emphasis added).

75 *Sibley*, 488 F.2d at 1339–40.

76 *Id.* at 1341. In formulating this test, the court relied on the overarching purpose of Title VII—to achieve equal access to employment opportunities—and the fact that the definition of "employer" and "employee" in Title VII should be construed broadly. *See id.* at 1340–41 (stating that the "[c]ongressional objective in Title VII is 'plain from the language of the statute,' and that it is 'to achieve *equality of employment opportunities*' ")

C. The Licensing Exception

The original formulation of the licensing exception arose in the 1970s in cases involving bar, dentistry, and veterinarian examinations. In this Subpart, the earliest cases invoking the exception are outlined.[77]

Tyler v. Vickery was the first case to use the licensing exception. In *Tyler*, a class of black law school graduates that failed the bar exam sued the Georgia Board of Bar Examiners.[78] The court's only direct treatment of Title VII came in a brief preface: The court stated that "Title VII does not apply by its terms, of course, because the Georgia Board of Bar Examiners is neither an 'employer,' an 'employment agency,' nor a 'labor organization' within the meaning of the statute."[79] Cases that followed used the same analysis to reach a similar conclusion.[80]

Almost ten years after *Tyler*, another case—this time involving a board of dental examiners—expanded the exception. In *Haddock v. Board of Dental Examiners of California*, Sherman Haddock, a black man, alleged that the California Board of Dental Examiners intentionally lowered his dental examination scores because of his race.[81] In denying Haddock's claim, the court used the oft-quoted language from *Tyler* and declared that Title VII did not apply to the Board of Dental Examiners because the board was not an employer, an employment agency, or a labor organization.[82]

Some licensing agencies—through facilitating the employment of professionals with examinations—are arguably akin to employment agencies, which *are* covered under Title VII.[83] In all of the licensing

(quoting Griggs v. Duke Power Co., 401 U.S. 424, 429 (1969)). Other circuits have endorsed the "interference test" in some contexts. *See infra* Part II.C (describing the Ninth Circuit opinion that adopted the interference test).

77 The Supreme Court has yet to hear a case involving the licensing exception in the context of teacher certification examinations.

78 517 F.2d 1089, 1089 (5th Cir. 1975).

79 *Id.* at 1096.

80 *See, e.g.*, Woodard v. Va. Bd. of Bar Exam'rs, 598 F.2d 1345, 1346 (4th Cir. 1979) (citing *Tyler* to advance the conclusion that Title VII could not be extended to the bar examination board); *see also* Delgado v. McTighe, 442 F. Supp. 725, 730 (E.D. Pa. 1977) (relying on *Tyler* and *Woodard* to hold that the Pennsylvania State Board of Law Examiners was not an employer under Title VII).

81 777 F.2d 462, 463 (9th Cir. 1985).

82 *Id.* at 463–64. The court in *Haddock* also supported its conclusion with an analysis of the legislative history of Title VII. Not persuaded by the significance of the 1972 Amendments to the Act, which extended Title VII liability to state governments and their subdivisions, the court found that since state agencies were not explicitly mentioned, the definition of "employer" could not include licensing agencies. *Id.* at 464.

83 *See* 42 § 2000e(c) (2012) (defining an employment agency as "any person regularly undertaking with or without compensation to procure employees for an employer or to

exception cases, the examination boards at issue served as a conduit between employees and eventual employers. This suggests that a more fact-specific inquiry as to the activities of the agency in question—rather than just a blanket-exception approach—is more appropriate. These tensions, and others, become clear in cases in which the licensing exception protects states when they administer teacher certification tests.

II
Circuit Split: How Circuits Have Interpreted the Licensing Exception and Control Test in the Context of Teacher-Credentialing Disparate Impact Claims

In *Fields v. Hallsville Independent School District*, the Fifth Circuit extended the licensing exception that originated in cases dealing with dentists, veterinarians, and attorneys to states that administered teacher tests.[84] Thus, in the Fifth Circuit, even if a state-mandated teacher certification test could support a finding of disparate impact under Title VII, teachers cannot name the state in question as a defendant. The same holds true in the Second and Seventh Circuits.[85] The Ninth Circuit, however, has rejected the exception and reached the opposite result.[86] In this circuit, teachers have a more robust possibility of a remedy—that is, they can name states as defendants in Title VII disparate impact claims.[87]

Although all courts that have held that states cannot be named as defendants invoke the licensing exception, courts have used different approaches in doing so. This Part distills the main approaches courts use when adjudicating these claims. It concludes by describing the Ninth Circuit's decision, which departed from the rationale and conclusions asserted by other circuits.

A. Courts Denying States as Defendants Because of the Licensing Exception

Although more recent court cases undertake a more multifaceted cumulative test, the foundational cases that brought about these issues primarily relied on the licensing exception in reaching their conclu-

procure for employees opportunities to work for an employer and includes an agent of such a person").

[84] 906 F.2d 1017, 1020 (5th Cir. 1990).

[85] *See infra* Part II.A–C (analyzing the case law in these and other circuits).

[86] *See infra* Part II.C (discussing the Ninth Circuit opinion). As of the date this Note was published, the Supreme Court had not reviewed the issue.

[87] *See* discussion *infra* Part II.C (discussing the Ninth Circuit opinion).

sions. These cases suggest that because the state acts in a licensing capacity when administering the test, invoking the licensing exception is appropriate, and thus disallowing state-defendants is appropriate.

In *Fields*, for example, Allene Fields and Earline Daniels alleged that a state-mandated cutoff score violated Title VII because it had a disparate impact on black teachers.[88] The teachers named Hallsville School District and the State of Texas as defendants.[89] The Fifth Circuit held that the State was not the employer of Fields and Daniels.[90] In making this determination, the court undertook a two-step analysis. First, the court considered whether or not there was an employee-employer relationship using the "hybrid economic realities/ common law control test."[91] Second, citing *Tyler*, *Woodard*, *George*, and *Haddock*, the court invoked the licensing exception and concluded that "the State's role with respect to the [examination] is analogous to that of state bar administrators and other state licensing . . . agencies previously held not to be employers of unsuccessful test takers under Title VII."[92] Without any other analysis, the court held that the State could not be considered employers of the teachers.[93]

The other circuits that invoke the licensing exception have also spent considerable time discussing other factors. In a Seventh Circuit case analyzing a similar issue, the court only emphasized the licensing exception after it assessed whether there was sufficient control to find an employment relationship.[94] The Second Circuit, in a case dealing

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[88] 906 F.2d at 1018.

[89] *Id.*

[90] *Id.* at 1020.

[91] *Id.* at 1019. The hybrid test assesses whether there is an employer-employee relationship. The Fifth Circuit has articulated the considerations of the hybrid test as follows: whether the alleged employer has the right to hire, fire, and supervise the employee, and whether the alleged employer pays the employee's salary, withholds taxes, provides benefits, and sets the terms and conditions of employment. Deal v. State Farm Cnty. Mut. Ins. Co. of Tex., 5 F.3d 117, 118–19 (5th Cir. 1993).

[92] *Fields*, 906 F.2d at 1020.

[93] Several issues are notable in the court's rationale. The court found that the State did not exert sufficient control over the plaintiffs, suggesting that the State's ability to decertify a teacher based on poor performance on the test (which is arguably similar to the potential to hire or fire) is not indicative of the requisite amount of control. The court also held that the State did not sufficiently interfere with the plaintiff's economic realities. But, interestingly, two central facts were not before it: (1) the State's role in funding school facilities and (2) the State's payment of teacher's salaries. *Id.* at 1019 n.3 (noting that evidence of state funding and payment of salaries "is not part of the summary judgment record on appeal"). The court did not state or suggest whether these facts would have changed the outcome. Additionally, it is unclear what role the licensing exception plays in the analysis; the court was not explicit as to whether it is simply a factor that tips the scale against finding that the State is an employer, or whether it is dispositive on the issue.

[94] *See* EEOC v. Illinois (*EEOC II*), 69 F.3d 167, 171 (7th Cir. 1995) (analyzing the licensing exception question first, then discussing the licensing exception issue); *see also*

with disparate impact and teacher licensing tests, did not mention the exception at all.[95] Instead, the court grounded its analysis in whether the State exerted sufficient control.[96] At the district level, however, in an opinion written by Judge Constance Baker Motley, the court held that both the State and the Board of Education could be considered employers of the defendants under Title VII.[97] Judge Motley distinguished the original licensing exception cases on the ground that the State evinced a "high level of involvement in the operation of local public schools."[98] To demonstrate this high involvement, the court cited examples of the State's control from the plaintiffs' brief, including that the State "assisted the Board in recruiting teachers for New York City schools," the "Commissioner's regulations [that] delineate professional development requirements for public school teachers, regulate incidental teaching positions and regulate substitute teaching in public schools," and that the "Commissioner's regulations set the maximum required number of teaching periods."[99]

The district court's analysis illustrates the central problem with courts' use of the licensing exception to categorically bar states as defendants. Namely, in the traditional licensing exception cases involving dentistry or bar examinations, a state's *only* relationship with the plaintiffs was the licensing activity.[100] However, in the context of education—and, as this Note will argue, especially after NCLB—a state does much more than simply licensing.

B. Courts Holding That States Do Not Have Sufficient Control over Teachers

The main factor motivating some courts' decisions to deny plaintiffs the ability to name states as defendants is the notion that states do not have sufficient control of the work activities of teachers. Courts that have applied the "control test" generally reason that a state's inability to directly control teachers' day-to-day activities counsels against liability. The Ninth Circuit, conversely, invoked *Sibley*'s inter-

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infra Part II.B (analyzing cases that considered the licensing exception issue after the control test).

[95] *See* Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361 (2d Cir. 2006) (analyzing the control test and police power argument but not mentioning the licensing exception cases).

[96] *See infra* Part II.B (analyzing the approach of the Second Circuit, among others).

[97] Gulino v. Bd. of Educ. (*Gulino I*), 236 F. Supp. 2d 314, 328–33 (S.D.N.Y. 2002).

[98] *Id.* at 330.

[99] *Id.* (internal citations omitted).

[100] *See id.* at 331 (stating that "[t]he *Fields* opinion was based on the fact that '[t]he only evidence presented by [plaintiffs] suggesting control is the Texas State Board of Education's administration of the TECAT exam . . . and its ability to decertify teachers who fail the exam'").

ference test and held that a state can properly be considered an employer.[101] Thus, it appears that which test the court employs is outcome determinative.

In *Gulino v. New York State Education Department* (*Gulino II*), the Second Circuit held that states could not be properly deemed employers of public school teachers on several grounds, the most central being its assertion that states do not control the day-to-day activities of teachers.[102] *Gulino* involved a class of African American and Hispanic teachers that filed suit against the New York Department of Education and the Board of Education, claiming that two standardized certification exams had a disparate impact on minority test-takers.[103] Educators were required—by *state* law—to pass the test in order to teach in any district in New York.[104] The plaintiffs proffered evidence showing a statistically significant difference between the pass rates of African American and Latino educators and white educators: While around eighty-five percent of whites passed the examinations, the pass rate was only forty-five percent among African Americans and Latinos.[105]

The Second Circuit held that the State of New York did not exercise sufficient control over teachers such that it could be named a defendant. Although the court noted that the State engaged in substantial oversight of schools, the court asserted that there was a "long-standing principle" in "New York State that public schools [are] controlled largely by local school boards."[106] The court suggested that this principle is reflected in school boards' control over budgeting,[107] their ability to bargain with teachers' unions,[108] their ability to provide transportation for students,[109] and their ability to buy and sell school

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[101] *See* discussion *infra* Part II.C (analyzing the Ninth Circuit's opinion that came to this conclusion).

[102] 460 F.3d 361, 366 (2d Cir. 2006) ("[W]hile some discretion has been taken from local school boards . . . most of the day-to-day management of the affairs of public schools rests entirely with local school boards.").

[103] *Id.* at 364.

[104] *See id.* at 368–69 (describing the New York law that required that all teachers licensed to teach in public schools be "licensed under the same statewide standards").

[105] Gulino v. Bd. of Educ. (*Gulino I*), 236 F. Supp. 2d 314, 339 (S.D.N.Y. 2002). These findings were not disputed on appeal. *See Gulino II*, 460 F.3d at 383 ("The district court found that plaintiffs had made a prima facie showing of disparate impact. Appellees do not challenge this finding.").

[106] *Gulino II*, 460 F.3d at 383.

[107] *See id.* ("[S]chool boards approve yearly operating budgets, set tax rates, and collect taxes to fund public school budgets.").

[108] *Id.* ("[The Board] and the United Federation of Teachers enter into collectively bargained agreements governing the employment of the City's public school teachers.").

[109] *Id.* (noting that local school boards have also been "given broad authorizations" to "provide transportation to and from schools").

property.[110] These elements of control, the court argued, supported and reflected the idea that the day-to-day management of schools rests in the school board. Based on this factual context, the court found that plaintiffs failed to meet the common-law control test.[111] First, the court reasoned that the plaintiffs did not meet the threshold requirement of demonstrating that the State hired and compensated them.[112] Second, the court held that the plaintiffs did not show that the State controlled their day-to-day activities.[113] The court held, however, that the Board of Education could rightfully be deemed the teachers' employer.[114]

The court's analysis was incomplete. Although the court spoke to the principle of local management of schools, the court did not consider the more practical elements of teachers' activity that demonstrates the State's prominent role in school governance. Perhaps most notably, the court failed to consider the district court's findings that indicated the State's control of day-to-day activities, such as the State's ability to regulate the length of teachers' work days[115] and its ability to regulate teachers' professional development activities.[116] Similarly, while the court held that the plaintiffs did not demonstrate that the State "hired" or "compensated" them, the court did not con-

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[110] *Id.* (noting that local school boards have been given "broad authorizations to purchase, maintain, and sell property on behalf of a school").

[111] The court refused to use *Sibley*'s interference test based on statutory and federalism arguments. First, the court argued that Title VII only extended to employment agencies and labor unions, stating that "Congress [did not] extend Title VII liability in a general way; rather, it limited the statute's additional liability to labor unions and employment agencies." *Id.* at 375. Invoking an *expressio unius* argument, the court reasoned that this language trumped the purpose of Title VII as espoused by *Sibley* and its progeny. *See id.* at 374–75 (stating that "*Sibley*'s central reason for creating 'interference' liability under Title VII was that . . . Congress intended a comprehensive solution to employment discrimination and that such a comprehensive solution must entail an expansive view of potentially liable parties" but that "[t]his reading of Title VII, however, ignores the very language that Congress employed"). Second, the court argued that federalism concerns counseled against extending liability to the states. *Id.*

[112] *Id.* at 379. The court arrived at this conclusion based on its belief that the control test as described in *Reid*, *see supra* notes 68–72 and accompanying text, "countenance[s] a relationship where the level of control is direct, obvious, and concrete, not merely indirect or abstract." *Id.*

[113] *Id.* at 379. Another holding might be found in the court's statement that "[a]bsent some evidence that Congress intended otherwise, we conclude that all other parties with a similar 'nexus' to a plaintiff's employment are excluded from the Title VII liability scheme." *Id.* at 375. However, the court does not provide any indication as to the contours of this "nexus," giving little guidance about how to apply this test.

[114] *Id.* at 381.

[115] *See supra* note 99 and accompanying text (quoting the district court's finding that the "[State] set[s] the maximum required number of teaching periods").

[116] *See id.* (quoting the district court's finding that the state "delineate[s] professional development requirements for public school teachers").

sider—as the district court did—the State's role in teacher recruitment.[117] It furthermore dismissed the fact that school boards receive a portion of their funds from the state out of hand.[118]

Additionally, the court's interpretation of the control test under *Reid* was questionable. The court held that each of the aforementioned elements of state control did not meet the control test asserted by *Reid* because they were not "direct, obvious, and concrete."[119] The court did not cite any authority to demonstrate that the *Reid* test relies only on directness or concreteness, and *Reid* itself does not indicate that directness is a prerequisite for meeting its requirements. Furthermore, the elements that the court relied on to demonstrate local school board control—for example, the budgetary power enjoyed by school boards, and school boards' involvement in labor disputes[120]—are perhaps even less direct and less concrete than the elements of state control that the court rejected.

The central licensing exception case in the Seventh Circuit came to the same conclusion as the court in *Gulino II*, based on a similar theory of the control test. *EEOC v. Illinois* (*EEOC II*) involved a claim by the Equal Employment Opportunity Commission (EEOC)[121] against the State of Illinois for the enforcement of a statute that violated the Age Discrimination in Employment Act (ADEA),[122] which prohibits employers from discriminating against employees on the basis of age.[123] In 1987, the statute applied to individuals over seventy years old.[124] The Illinois legislature failed to repeal a statute that prohibited public school teachers over seventy from receiving tenure after

117 *See id.* (quoting the district court's finding that the state "assist[s] the Board in recruiting teachers for New York City schools").

118 *See* Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 379 (2d Cir. 2006) ("Finally, while [the school board] receives some state funds, a portion of which may go to paying teachers, such an indirect source of funds cannot be the basis for Title VII liability.").

119 *Id.*

120 *See id.* at 365 (noting that several operating decisions were confined to local school board discretion by a New York state statute).

121 The Equal Employment Opportunity Commission, or the EEOC, is the federal agency responsible for administrative resolution of claims brought under Title VII and the Age Discrimination in Employment Act. The EEOC can also seek judicial enforcement of discrimination claims in federal courts. *See generally* AVERY ET AL., *supra* note 14 (describing the enforcement powers of the EEOC).

122 69 F.3d 167, 167 (7th Cir. 1995). Although the claim in *EEOC* was not brought under Title VII, the analysis used in ADEA cases often informs that of Title VII cases. *See id.* at 169 ("We are mindful that . . . Title VII precedents have been influential in the interpretation of the age discrimination law.").

123 *See* Age Discrimination in Employment Act, 29 U.S.C. § 631 (2012) (outlining provisions of the ADEA).

124 *EEOC II*, 69 F.3d at 168; *see also* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99–592, 100 Stat. 3342 (codified at 29 U.S.C. § 630 (2012)).

ADEA coverage was extended to the over-seventy age group.[125] Moreover, school officials enforced the statute; teachers were directly or constructively discharged upon turning seventy.[126] The EEOC claimed that by publishing, maintaining, and enforcing the statute, the State discriminated against public school teachers over seventy.[127] The Central District Court of Illinois granted summary judgment for the plaintiff, holding that the State was an employer and that holding otherwise would facilitate "'corporate veil' violations."[128] On appeal, however, the Seventh Circuit summarily dismissed the claim. Citing the licensing exception cases, the court held that the State was not the employer of public school teachers.[129]

The court conceded that the State exercised substantial control over teachers, but it concluded that the dispositive factor in the control test is whether a defendant had the ability to hire and fire the plaintiff. In language that belied the court's ultimate conclusion, the court asserted that the State of Illinois "exerts more control over public school teachers than over any private employees in the state and probably over any other persons formally employed by local government in the state."[130] Nevertheless, the court concluded that "[s]o far as discrimination in hiring and firing on the basis of age or other forbidden characteristics is concerned, the key powers are, naturally, those of hiring and firing."[131] In essence, because the State did not directly hire and fire teachers, it was an inappropriate defendant.[132]

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125 *See EEOC II*, 69 F.3d at 168 (noting that the provision remained in use for two years after its repeal and was used to force teachers over the age of seventy into retirement).

126 *Id.* at 171.

127 *Id.* at 170–71.

128 EEOC v. Illinois (*EEOC I*), 877 F. Supp. 1207, 1212 (C.D. Ill. 1994). Generally used in the context of corporate liability, corporate veil "piercing" refers to the judicial practice of dividing a corporation (or for the context of this Note, the State) from its shareholders, directors, or officers (for the context of this Note, districts and school officials) and creating a separate, legally recognized corporate entity that can face liability. The court in this case, wary of allowing the State to hide behind districts and school officials, was essentially exercising an attempt at corporate veil piercing.

129 *EEOC II*, 69 F.3d at 171.

130 *Id.* at 171. The court went through a nonexhaustive list to demonstrate the aspects of State control: "The state fixes not only a minimum salary . . . but also the number of days a teacher must work, what holidays he gets off, the amount of sick leave . . . the minimum lunch period, the terms of teachers' tenure, [and] the rights of recalled teachers . . . ." *Id.* (alteration in original).

131 *Id.*

132 *See id.* at 168 (acknowledging that *EEOC* was a "curious" case). A claim that a state is liable for disparate treatment under the ADEA because of legislative inaction is, by most accounts, an ambitious one. Theoretically, it would require stronger proof than a disparate impact claim based on discriminatory testing. In that light, then, perhaps the court's strong rejection of the State as employer can be understood as only extending to the question of whether states can be considered employers in this narrow context.

For several reasons, the court's approach was problematic. The court stated that "the key factors" in the control test were naturally the ability to hire and fire—without citing any authority to support this assertion.[133] However, the court in *Reid*—the case that first advanced control test factors—indicated that no single factor was dispositive.[134] Moreover, although the court indicated that an "indirect" theory of liability could be applicable to age discrimination claims,[135] it did not articulate any standard at which a state's indirect control would be sufficient to find an employment relationship. Specifically, although the court acknowledged that Illinois regulates aspects such as "the number of days a teacher must work,"[136] "the terms of teachers' tenure, [and] the rights of recalled teachers,"[137] the court concluded that this was insufficient, without indicating what would rise to the level of sufficient control. The court went on to suggest—and faultily so—that Illinois's role in relation to teachers was solely as that of licensing agent.[138]

C. *The Ninth Circuit: Departure from Other Circuits*

The Ninth Circuit stands as the only circuit that has extended disparate impact liability to states in this context. The circuit upheld *Sibley* and the idea of an indirect employment relationship and rejected a broad rendering of the licensing exception.[139] In *Association of Mexican-American Educators v. California* (*AMAE*), the Ninth Circuit allowed plaintiffs, a class of Mexican American, Asian Amer-

A district court in the Seventh Circuit cited *EEOC* and suggested that, as a categorical matter, districts, not states, were the employers of teachers. Hearne v. Bd. of Educ., 185 F.3d 770, 777 (7th Cir. 1998). Like *EEOC*, *Hearne* also involved legislative action that plaintiffs—members of the Chicago Teachers Union—claimed had a discriminatory impact on racial minorities. *Id.* at 772–73. This would be the case, presumably, regardless of the level of control the state exerted over teachers at the case at issue. *See id.* at 777 ("Title VII actions must be brought against the 'employer.' In suits against state entities, that term is understood to mean the particular agency or part of the state apparatus that has actual hiring and firing responsibility."). The Seventh Circuit, then, applies the licensing exception broadly and construes the term "employer" narrowly. Instead of recognizing that states should not be employers only when acting in a licensing capacity, the Circuit seems to posit that states, regardless of the capacity in which they act, are not "employers" of teachers under Title VII.

[133] *See EEOC II*, 69 F.3d at 172.

[134] *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 752 (1989).

[135] *See EEOC II*, 69 F.3d at 171 ("We may assume therefore that the indirect-employment doctrine is applicable to age discrimination.").

[136] *Id.*

[137] *Id.*

[138] *See id*. ("We think the present case is closer to *Fields* and *Haddock* than to the cases that classify the defendant as an indirect employer.").

[139] *See infra* notes 140–47 (discussing the Ninth Circuit opinion).

ican, and African American teachers, to name the State of California as their employer in a disparate impact claim.[140]

Speaking to the way in which the licensing exception has been extended in other courts, the court asserted that there is "no overarching 'licensing' exception" to Title VII.[141] The court reasoned that cases suggesting so broad a proposition only carry precedential value when "the [sole] connection among the licensing agency, the plaintiff, and the universe of prospective employers is the agency's implementation of a general licensing examination."[142]

In considering whether an employment relationship existed between the State and teachers, the court did not rely only on the theoretical "principle" that school governance is in the province of school districts (as the court in *Gulino II* did), but assessed aspects of control based on the more practical realities of State governance. The court reasoned that California's involvement in schools was "plenary" and that licensing was "but one aspect of pervasive state control."[143] In advancing this conclusion, the court noted that the State had authority over areas such as district budgets and governance,[144] "duties of public school employees,"[145] instructional materials, and "proficiency testing."[146] Using *Sibley*'s interference test, the court found that the State's level of involvement with schools and teachers was sufficiently high to sustain indirect employer liability.[147]

140 231 F.3d 572, 576 (9th Cir. 2000). As a preliminary matter, the court held that the State did indeed fit within the statutory definition of employer. According to the court, the inclusion of employment agencies and labor unions in Title VII was evidence that Congress intended the statute to extend to indirect employment relationships. *Id.* at 579–81.

141 *Id.* at 583.

142 *Id.*

143 *Id*. at 582.

144 *Id.* at 581.

145 *Id.* at 582.

146 *Id.* at 581.

147 *Id.* Additionally, the court rejected the idea that the State was acting pursuant to only its police power in administering the test, instead holding that the State also acted pursuant to its proprietary power. *Id.* at 584. In the cases that first articulated the licensing exception (discussed *supra*), the examinations at issue applied to every individual that endeavored to practice the profession in the State. In contrast, the examination requirement at issue in cases involving teacher credentialing applies only to public school teachers—private school teachers can teach without taking a licensing exam. The fact that a large portion of teachers in a state do not receive licensing by the state and, presumably, perform successfully, cuts against this notion of police power. The court in *AMAE* noted the tension. *See id.* (stating that because the test at issue applies only to public school teachers, it cannot be classified as only an exercise of the state's police power).

III
Framework Going Forward: Incorporation of NCLB's Effect on State Control and Interpretive Norms

On the whole, the approaches used by the Second, Fifth, and Seventh Circuits generate two normative concerns: (1) courts are paying insufficient attention to the factual circumstances surrounding modern-day state control of schools; and (2) courts are refusing to fully effectuate the purpose of Title VII by foreclosing the possibility of a remedy for plaintiffs. The Ninth Circuit addressed these concerns in *AMAE* by examining state involvement in schools from a more practical standpoint, and by rejecting the use of a blanket licensing exception. Although the court in *AMAE* suggested that the amount of control California exerts over teachers is somewhat distinctive, the examples the court cited to elucidate California's control—for example the State's ability to control "teacher credentialing"[148] and "rights and duties of public school employees"[149]—do not seem radically different from the type of control exerted by the states in *Gulino* or *EEOC*.[150]

Thus, the inquiry that this Note argues should be employed by all circuits depends on whether a state is merely "licensing" teachers, or whether it treads more deeply into district governance through the imposition of requirements for teachers' employment. The amount of control a state exerts is central to this inquiry: The more control a state has over nonlicensing activity, the weaker the basis for applying the exception. This Note attempts to demonstrate that many states no longer act solely in a licensing capacity after NCLB, and that even within the common-law control test framework, state activity can be deemed sufficiently controlling. In analyzing control, this Note seeks to emphasize that *Community for Creative Non-Violence v. Reid*[151]—the case that formulated the "control test" factors—treats no single factor as dispositive or carrying the most weight.[152] That is, a court is not precluded from using all of the *Reid* factors in its analysis.

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148 *Id.* at 581.

149 *Id.* at 581–82.

150 For example, in *Gulino II* it was undisputed that the state controls teacher credentialing. Gulino v. N.Y. State Educ. Dep't, 460 F.3d 361, 379 (2d Cir. 2006) (conceding that "[the state] . . . controls basic curriculum and credentialing requirements"). Further, in *Gulino I*, the court found that the State of New York regulated, among other things, the professional development requirements (in other words, a duty) of teachers. *Gulino I*, 236 F. Supp. 2d at 330; *see also supra* note 99 and accompanying text (listing other elements that *Gulino I* used to support a finding of "control").

151 490 U.S. 730 (1989).

152 *See supra* notes 68–72 and accompanying text (discussing the *Reid* factors).

With these concerns in mind, Part III suggests a framework that will allow courts to engage in a real-world analysis of the present relationship between states, teachers, and schools. Part III.A will first analyze how NCLB has altered the relationship between states and teachers. Part III.B will incorporate this analysis into a control test inquiry. It will further demonstrate how these NCLB-inspired changes can allow a court to find sufficient control to prove the existence of an employment relationship. Part III.C suggests that two background norms should operate as a presumption against rejecting state liability in these claims: (1) Title VII's pro-remedy purpose and (2) the lack of consensus as to whether teacher credentialing tests are valid indicators of successful performance.

A. *No Child Left Behind and the Increase of State Control*

Enacted in 2001, NCLB is in many ways a continuation of the standards-based reform movement that started in the 1980s.[153] The standards-based education reform movement—spurred in part by political discourse around the United States's decreasing international competiveness[154] and recognition of the racial "achievement gap"[155]—had, at its essence, the goal of increasing student achievement on a national level.[156] Complicating this, however, was the tension between attempting to encourage a national system of reform and allowing localities to maintain control in an area traditionally outside federal authority.[157] To avoid upsetting this traditional state-federal balance, early federal standards-based policy encouraged states to meet certain educational standards without providing any true mechanism to ensure state compliance.[158]

NCLB required states to develop standards and tests to assess school performance. Notably, enforcement of these standards came with monetary incentives. Under the Act, any state receiving Title I funding is required to set a uniform bar of "Adequate Yearly Pro-

[153] "Standards-based reform movement" refers to the confluence of political, economic, and social factors that called for a push for uniform national standards in education. *See* Lauren B. Resnick et al., *Standards-Based Reform: A Powerful Idea Unmoored*, *in* IMPROVING ON NO CHILD LEFT BEHIND 103 (Richard D. Kahlenberg ed., 2008) ("No Child Left Behind is the current expression of a twenty-year drive to use a 'standards strategy' to steer American education toward higher levels of achievement and greater equity.").

[154] *Id.* at 105.

[155] *Id.* at 107.

[156] *Id.* at 111.

[157] *Id.*

[158] *Id.* at 114.

gress" (AYP).[159] Schools receiving Title I funding must meet the AYP goals set by the state.[160] Additionally, schools receiving Title I funds may only hire "highly qualified" teachers, and they may only retain veteran teachers that can demonstrate that they are highly qualified.[161] What is more, NCLB imposed standards on teachers in *non*–Title I schools, requiring those that taught "core academic subjects" to be highly qualified.[162]

Therefore, although NCLB started as a push toward national reform, state policy became "the fuel that power[ed] the federal NCLB engine" because states were central to its implementation.[163] This dynamic becomes even clearer when considering NCLB's way of handling "academic bankruptcy"—that is, when a school fails to meet state-dictated goals.[164] If a district fails to make AYP, NCLB allows for greater state involvement in a district's governance. Specifically, under NCLB, states can require a district to adopt a new curriculum,[165] replace district personnel,[166] or remove authority from school

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[159] Title I is a grant program that allocates federal funding to schools based on percentages or numbers of low-income students. U.S. DEP'T OF EDUC., IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES (TITLE I PART A), http://www2.ed.gov/programs/titleiparta/index.html (last updated June 4, 2014). The amount of funding a school receives is based on a formula that uses census poverty estimates and the cost of education in the state. *Id*. When NCLB was first enacted, over half of the nation's schools received Title I funds. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 942 (2004). Since then, Title I funding has increased by sixty-one percent. *No Child Left Behind – Title I Distribution Formulas*, NEW AMERICA FOUNDATION, *available at* http://febp.newamerica.net/background-analysis/no-child-left-behind-act-title-i-distribution-formulas (last visited Oct. 13, 2014).

[160] *See* 20 U.S.C. § 6311(b)(2) (2012) ("Each State plan shall demonstrate that the State has developed and is implementing a single, statewide State accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress . . . .").

[161] NCLB outlines three separate ways a teacher can be deemed highly qualified. First, under NCLB, any public school teacher needs to pass the state's certification test or licensing examination. 20 U.S.C. § 7801(23)(A)(i). The second standard requires only new middle and secondary school teachers to "pass[ ] a rigorous State academic subject test." *Id.* § 7801(23)(B)(ii). The third standard, for teachers who have taught for more than one year (who NCLB deems "veteran teachers"), gives states the option between administering a similar "rigorous" test or assessing teachers based on a "high objective uniform State standard of evaluation." *Id.* § 7801(23)(C)(ii).

[162] 20 U.S.C. § 6319(a)(2); *see also* Ryan, *supra* note 159, at 939 (discussing the highly qualified teacher provisions).

[163] P. Manna, *NCLB in the States: Fragmented Governance, Uneven Implementation*, *in* EDUCATIONAL POLICY AND THE LAW 925 (Yudof et. al eds., 5th ed. 2012).

[164] *See* Charles F. Faber, *Is Local Control of the Schools Still a Viable Option?*, *in* EDUCATIONAL POLICY AND THE LAW, *supra* note 163, at 935 ("Perhaps the most intrusive state intervention in local school district affairs arises in the context of 'academic bankruptcy,' or situations in which schools are performing poorly.").

[165] Manna, *supra* note 163, at 927.

[166] *Id.*

officials and place it into the hands of state-appointed receivers.[167] Other states mandate the sending of turnaround specialists—for example, state agency employees or private consultants—into districts that fail to meet performance goals.[168]

B. Reconsidering Elements of Control Based on the Effect of NCLB

As demonstrated above, the post-NCLB era is one in which the regulation of schools has become increasingly centralized. Schools must meet a baseline level of yearly progress that is set by the State.[169] States set the standards on which students are tested.[170] States also determine the method, procedure, and content for the assessments that determine whether or not a teacher is highly qualified.[171] These changes suggest that the pre-NCLB world in which the Fifth Circuit decided *Fields*—the first case to consider a licensing exception in the context of teacher testing—has been altered substantially. Therefore, a court should analyze any increase of state regulation of schools post-NCLB in order to arrive at a more accurate understanding of the State's control.

The first aspect of control this framework considers is whether a state can regulate the hiring of teachers. Although most states require some sort of licensing test to determine employment,[172] because of NCLB, some states impose requirements in addition to teacher licensure. Many of these requirements are the effect of NCLB's "highly qualified teacher standard."[173] Under NCLB, states develop a plan

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167 *Id.*

168 *Id.* To say NCLB has in many ways increased state control of local education policy is not to say that the state did not exert any control before its enactment. States have historically maintained some involvement in local school affairs. *See* Faber, *supra* note 164, at 935 (noting, for example, that in all states, "the local district must offer a curriculum approved by the state"). Most states have statutes and laws that govern the employment or dismissal of teachers. *Id.* Between 1982 and 1986, several states passed omnibus laws mandating higher standards for teachers and students. *Id.* By 1986 thirty-three states had passed legislation mandating teacher testing, and by 1989, forty-five states required that teachers pass a competency exam. *Id.* Thus, the "reform" movement of the 1980s was the beginning of increased state control that NCLB took to another level.

169 20 U.S.C. § 6311(b)(2)(B) (2012); *see also* Dear Colleague Letter from Rod Paige, U.S. Sec'y of Educ., (July 24, 2002), *available at* http://www2.ed.gov/policy/elsec/guid/secletter/020724.html (summarizing the procedure by which states should establish "adequate yearly progress").

170 *See* 20 U.S.C. § 6311(b)(1)(C) (requiring that states create challenging academic standards in reading and math).

171 *See supra* note 161 (describing the provisions of NCLB that indicate how a teacher can demonstrate highly qualified status).

172 *See* Faber, *supra* note 164, at 882.

173 *See supra* note 161 (describing NCLB's "highly qualified teacher" requirements).

detailing how they will ensure that all teachers of core academic subjects will be highly qualified.[174] A brief overview of states governed by NCLB shows that many states' authority to define what constitutes highly qualified also comes with the authority to encroach into some of the more traditional aspects of control. For example, some states have a substantial role in recruiting highly qualified teachers.[175] Others require teachers to participate in mentoring and professional development programs in order to achieve the status of highly qualified.[176] An increase in the scope of requirements that determine quali-

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[174] *See* Beatrice F. Birman et al., State and Local Implementation of the No Child Left Behind Act Volume II—Teacher Quality Under NCLB: Interim Report 27 (2007), *available at* http://www.rand.org/content/dam/rand/pubs/reprints/2007/RAND_RP1283.pdf (stating that "[i]n the years since NCLB became law, states have established their own standards for what it means to be highly qualified"). For example, Louisiana creates an incentive to fill "low-performing public school[s]" with "eligible classroom teacher[s]." La. Rev. Stat. Ann. § 17:427.5(B)(1)–(2) (2013). The state's definition gives teachers the option between possessing state certification and meeting the federal definition. *See* La. Rev. Stat. Ann. § 17:427.5 (stating that a highly qualified teacher can be someone who "[m]eets the definition of a highly qualified teacher under the federal No Child Left Behind Act"). Pursuant to NCLB, Minnesota created a "highly qualified" plan in order for teachers to meet the requirements for NCLB's highly qualified teacher status. *See* Minn. Stat. Ann. § 122A.16 (West 2011) ("[A] highly qualified teacher is one who holds a valid license under this chapter . . . and is determined by local administrators as having highly qualified status according to the approved Minnesota highly qualified plan."). Under Minnesota's plan, most new and veteran teachers must pass a skills-based standardized assessment in order to be considered highly qualified. *See* Minn. Dep't of Educ., Minnesota State Plan for Federal "Highly Qualified" Teacher Requirements 2012 Revision 7–8 (2012), *available at* http://education.state.mn.us/MDE/EdExc/Licen/HighQualTeach/ (listing requirements to be a highly qualified teacher). New Jersey similarly changed its licensing requirements in accordance with NCLB. *See* Christopher D. Cerf, New Jersey's Plan for Meeting the Highly Qualified Teacher Goal 16 (2011), *available at* http://www.state.nj.us/education/data/hqt/06/plan.pdf ("The State Board of Education adopted new licensing regulations in 2004 which are explicitly aligned with the highly qualified provisions of NCLB.").

[175] *See, e.g.*, La. Rev. Stat. Ann. § 17:427.5(C) (2005) (setting out requirements of the State of Louisiana's "Qualified Teachers' Incentive Program"); Cerf, *supra* note 174, at 13–14, 16 (describing the role of New Jersey in ensuring that all teachers are "highly qualified," which includes various state-administered trainings with "specific emphasis on the highly qualified provisions of the [NCLB]").

[176] *See, e.g.*, Wash. Dep't of Educ., School District Procedures For Hiring a Teacher that Is Not Yet Highly Qualified (2010), *available at* http://www.k12.wa.us/titleiia/highlyqualifiedteachers.aspx (click on link labeled "Procedures for Hiring a Teacher Not Yet Highly Qualified" under "Manuals and Documentation for School Districts") (requiring an "Individual Teacher Plan for Achieving Highly Qualified Teacher Status" for each teacher not meeting the standard). Under Virginia state law, school districts are required to provide specified professional development programs for teachers and administrators. *See* Va. Code Ann. § 22.1-253.13:5 (2013) (stating that "each local school board shall also provide teachers and principals with high-quality professional development programs each year in (a) instructional content" and other areas). In the years following NCLB, professional development was the most common use of NCLB funds at the state level, with forty-two states using a portion of these funds for professional development activities. Birman et al., *supra* note 174, at 69.

fication indicates a larger role played by the state in school affairs. These aspects of control reveal that states are no longer only licensing—as the Seventh and Fifth Circuits have suggested—but are also imposing soft and hard mandates on schools with respect to how teachers are hired and trained. They also demonstrate the extent to which districts have their hands tied when it comes to vetting teachers based on qualifications, thus calling into question the fairness of holding only districts liable.

Next, this framework considers whether a state can regulate teachers' day-to-day activities. This inquiry incorporates two of the *Reid* factors, and considers the extent to which a state controls "when and how long [teachers] work" and "the manner and means by which the product is accomplished."[177] On the first point—whether a state can control when and how long teachers work—the courts in both *Gulino* and *EEOC* noted that New York and Illinois, respectively, can control the length of teachers' work days and how many days they work each year.[178] Other states impose similar requirements.[179] Furthermore, states control not only the form of teachers' day-to-day activities (how long they work), but also the substance—that is, what teachers are doing while in the classroom. This implicates the second point: whether states can control the "manner and means through which the product is accomplished." In the context of teaching, the product being accomplished can be understood as student achievement, or how students perform when evaluated. One of the means through which this product is accomplished is the curriculum, or what students are taught and how. Although districts have traditionally been the primary curriculum designers, NCLB has shifted this responsibility—in the post-NCLB era, teaching increasingly centers on preparing students for standardized tests.[180] And states, not districts, set the standards for student testing, thus determining what teachers are able to teach.[181] This focus on standardized testing means that the cur-

[177] Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751 (1989); *see also supra* note 67 and accompanying text (listing the *Reid* factors).

[178] *See supra* note 99 and accompanying text (noting the district court's finding that the state of New York "sets the maximum required number of teaching periods"); *supra* note 130 and accompanying text (noting that the Seventh Circuit conceded that the state determines the number of days a teacher must work).

[179] *See, e.g.*, LA. REV. STAT. ANN. § 17:154.3 (2013) (setting the minimum number of days teachers must work each year); N.C. GEN. STAT. ANN. § 115C-301.1 (2011) (mandating that full-time teachers receive "duty-free instructional planning time" each day); N.C. GEN. STAT. ANN. § 115C-84.2 (setting requirements for number of instructional days each school year).

[180] *See infra* notes 181–182 and accompanying text.

[181] For example, Florida's statewide assessment standards are extremely specific; they dictate not only the broad subject area that students must learn, but also the methods that

riculum starts to increasingly reflect these standards. As a point of example, since NCLB's enactment, studies have demonstrated that many school districts have reduced the time spent on sciences and the arts in order to focus on reading and math—two subjects that are heavily tested on state-promulgated standardized tests.[182] In a study involving 1250 government and social studies teachers, seventy-five percent of them reported that they had scaled back on teaching current events in order to accommodate standardized-test instruction.[183] Professional development activities are often centered on instruction that promotes high achievement on standardized tests.[184] Therefore, in at least some instances, teachers' instruction is determined by standards set by a state. When much of what teachers do in the classroom is determined by state-mandated standards, state activity should not be considered merely licensing—rather, a state's regulation directs teachers' day-to-day activities.

Finally, this framework considers whether a state can control teacher termination or reassignment. This consideration relies on two *Reid* factors—namely, whether a state has the ability to "fire" and whether a state has the "right to assign additional projects." As discussed above, state control over schools can be particularly acute when a school performs poorly or when a school fails to attain AYP.[185] Sometimes, this remedial action can cause teachers to lose their positions.[186] For example, under NCLB, states have several

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must be used to teach them. *See* STATE OF FLORIDA, MATHEMATICS FLORIDA STANDARDS, *available at* http://www.fldoe.org/pdf/mathfs.pdf (setting forth one such requirement: "[students must] [a]dd within 100, including adding a two-digit number and a one-digit number, and adding a two-digit number and a multiple of 10, *using concrete models or drawings and strategies based on place value*") (emphasis added).

182 *See* DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION 108 (2010) (citing a 2007 study that found that sixty-two percent of districts surveyed had increased time spent on reading and math, and forty-four percent had reduced time spent on "science, social studies, and the arts").

183 CARNEGIE-KNIGHT TASK FORCE ON THE FUTURE OF JOURNALISM EDUCATION, MANDATORY TESTING AND THE NEWS IN SCHOOLS: IMPLICATIONS FOR CIVIC EDUCATION 9 (2007), *available at* http://shorensteincenter.org/wp-content/uploads/2012/03/mandatory_testing_and_news_in_schools_2007.pdf.

184 *See* BIRMAN ET AL., *supra* note 174, at 70 (stating that sixty-one percent of school districts professional development activities place a "major emphasis" on aligning the curriculum with state standards).

185 *See supra* notes 159–160 and accompanying text (describing the requirements connected to AYP).

186 *See infra* note 188 and accompanying text; *see also* Ras J. Baraka, *A New Start for Newark Schools*, N.Y. TIMES, Oct. 20, 2014, at A25 (stating that under New Jersey's takeover of Newark schools, "[p]rincipals were given the power to re-interview teachers for their jobs and in some cases hire new teachers. . . the rejected teachers joined a pool of floating staff members . . . until reassigned to other schools or bought out").

options when taking over a school or a district: reopening the school as a charter school; replacing all or most of the staff and bringing in a state-appointed "turnaround leader"; contracting with an entity such as a private management company; or engaging in another major restructuring effort.[187] In any of these options, teachers in schools can be dismissed or transferred.[188] Additionally, some of these options can come with the imposition of additional projects on schools and teachers. In turnaround schools, for example, teachers can be asked to undertake additional professional development and training activities.[189] Currently, twenty-three states have a legal right to take over schools that are deemed low performing.[190] One of these states, Louisiana, mandates state takeover of schools when students fail to meet certain testing requirements,[191] and since NCLB, it has assumed control of twenty-six schools in its state.[192] Thus, in at least some instances (particularly in Louisiana), the state plays a significant role in the firing of teachers in schools. And, in states where remedial measures come with additional constraints or demands on teachers, states have the ability to impose additional projects, particularly in the form of additional professional development requirements. A court should include these factual contexts, as well as the *Reid* factors, in their analysis when determining whether a state has sufficient control over teachers to establish an employer-employee relationship.

C. Interpretive Norms from Legislative History of Title VII and Early Cases

Abandoning the narrow control-test analysis used by some courts and incorporating more practical considerations into the framework

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[187] LUCY M. STEINER, CTR. FOR COMPREHENSIVE SCH. REFORM AND IMPROVEMENT, STATE TAKEOVERS OF INDIVIDUAL SCHOOLS 18 (2005), *available at* http://www.centerforcsri.org/pubs/restructuring/KnowledgeIssues1StateTakeovers.pdf.

[188] *See id.* at 6 (describing a state takeover in which "a substantial percentage of the previous staff has been replaced").

[189] *See* U.S. DEP'T OF EDUC., TURNING AROUND CHRONICALLY LOW-PERFORMING SCHOOLS 15–16 (2008), *available at* http://ies.ed.gov/ncee/wwc/pdf/practice_guides/Turnaround_pg_04181.pdf (describing the additional training, professional development activities, and duties imposed on teachers in some turnaround schools).

[190] STEINER, *supra* note 187, at 5.

[191] *Id.* at 6. Specifically, the schools have been placed under state control when they received a rating of "academically unacceptable." *Id.* Under Louisiana law, the department of education has authority to "develop the criteria used to identify schools that are at risk of being labeled academically unacceptable" in addition to those criteria listed as mandatory in the statute. LA. REV. STAT. ANN. § 17:10.8(B) (2013). The statute states that a school can be considered "academically unacceptable" if the school falls below a certain school performance score, or if the school does not meet its "growth target" for two consecutive years. *Id.* § 17:10.8(B)(1)–(2) (2013).

[192] STEINER, *supra* note 187, at 6.

suggested by this Note might not sufficiently counter some courts' refusal to name states as defendants in this context. Early Title VII cases and its legislative history contain evidence of the statute's breadth and scope, yet courts have paid insufficient attention to these principles. This Subpart will briefly reiterate two of these points: Title VII's pro-remedial purpose and a recognition that testing can serve as a poor proxy for qualification. These lessons should both guide a court's analysis and establish a reason to allow state defendants in these claims.

1. Consideration of Title VII's Remedial-Based Purpose

The legislative history of Title VII reveals that Congress intended its scope to be far reaching. The stated purpose of the Act was "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."[193] Moreover, eradicating discrimination in the field of education carried particular importance. Senate reports indicate that Members of Congress thought that issues of employment discrimination were "particularly acute and ha[d] the most deleterious effect in . . . governmental activities which are most visible to the minority communities (*notably education*, law enforcement, and the administration of justice)."[194] Congress also stated that since schools expose students to the multitude of ideas that will shape their future development, discrimination against racial minorities in the field of education would perpetuate "existing misconceptions and stereotypical categorizations which in turn would lead to future patterns of discrimination."[195]

Thus, legislative history reveals Title VII's focus on discrimination that reduces minority representation in education-related work fields. Congress arguably put forward a diversity rationale for eradicating discrimination in public school employment.[196] Cynthia Estlund

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[193] H.R. Rep. No. 88-914, pt. 1, at 26 (1963).

[194] *Id.* (emphasis added); *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, 1591 (2001) (arguing that Congress specifically pointed to employment discrimination in public schools as "one of the most pressing for a remedy") (citing S. Rep. No. 92-415, at 12 (1971)).

[195] S. Rep. No. 92-415, at 12 (1971).

[196] The "diversity rationale" as established by the Supreme Court in race-based affirmative action cases, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 325 (2003), has been used to stress the importance of ensuring that classrooms are racially and ethnically diverse. *See, e.g.*, 8 Brief for Respondents at 1–3, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (citing *Grutter* to defend the constitutionality of the University of Texas's measures to increase diversity in the classroom); Vinay Harpalani, *Diversity Within Racial*

has argued that the Supreme Court's recent interpretation of the diversity rationale can be understood to extend to employment contexts.[197] The 1972 amendments' particular focus on education conceivably was driven by the impact *Brown* had on black teachers. The reasons for this proposition are mostly temporal—the years directly following *Brown* represented those in which there was a steady decline of black teachers.[198] Regardless of whether these amendments originally met their objective in relation to the latent effects of *Brown*, the beginning of the reliance on standardized tests to assess teacher qualification led to another era in which black teachers were at greater risk for job loss,[199] and thus served as another impediment to the realization of the amendments' original purpose.

Further, *Griggs* and *Albemarle*, the earliest Title VII disparate impact cases, underscore that Title VII was also meant to remedy discrimination resulting from structural barriers.[200] The Court in these cases suggested that once a Title VII violation is found, there should be a presumption that the appropriate remedy is that which is necessary to "secure complete justice."[201] Because some courts' interpretation of the licensing exception and *Reid*'s control test preclude an examination of the existence of a violation, it diminishes their ability to further Title VII's remedial focus. Additionally, Title VII's deterrent function, suggested by its focus on robust remedies,[202] is thwarted when courts refuse to hold states liable for teacher certification tests. Because the exception can work to prevent courts from examining the

Groups and the Constitutionality of Race-Conscious Admissions, 15 U. PA. J. CONST. L. 463, 477–78 (2012) (arguing that *Grutter* called for a broad understanding of diversity that takes into account ethnic differences within races). When the enactors of Title VII drew the connection between precluding discrimination—that is, ensuring that racial-minority teachers have access to employment—and positive gains in students' educational experiences, *see supra* text accompanying note 141, they were arguably asserting a similar rationale. *See Grutter*, 539 U.S. at 330 (describing the "educational benefits" of diversity and stating that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints").

[197] Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 13 (2005).

[198] *See supra* notes 8–11 and accompanying text (describing *Brown*'s effect on the unemployment of African American teachers).

[199] *See supra* notes 16–19 and accompanying text (describing the possible effects of standardized tests on teachers of color).

[200] *See supra* Part I.A (describing how the rationales of these cases support the notion that Title VII had a broad remedial purpose). That is, the Court in these cases recognized that a test—which did not take into account unequal access to education or inequities in schooling—could also be deemed a discriminatory act.

[201] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (internal quotation marks and alteration omitted).

[202] *See supra* note 53 and accompanying text (noting cases that indicate that Title VII's allowance for broad remedies suggests that it has both deterrent and remedial purposes).

tests' validity, there is no ability to adequately deter states and districts from mandating tests that are discriminatory in their effects, and—as will be demonstrated below—not necessarily correlated to job qualifications.

Thus, in order to protect and further Title VII's principles, courts should consider whether or not plaintiffs in similar cases would be precluded from obtaining a remedy if the exception were invoked. There is some reason to believe this would be the case: By refusing to allow plaintiffs to bring claims against states for discriminatory tests, districts or local school boards may insulate themselves from liability by claiming that they were simply carrying out state mandates.[203] Alternatively, a district or local board could argue that through testing teachers, it is acting in a licensing capacity; thus, the licensing exception also applies to *its* activities.[204] This potential for remedy-less plaintiffs—for example, in states where there are districts with low numbers of minority teachers[205]—should make a court less likely to invoke the exception for states.[206]

2. *Recognition that Testing Can Be a Poor Proxy for Qualification*

This Note does not argue that courts should find that every administration of teacher certification tests constitutes a discriminatory act; however, it does seek to emphasize the tests' high potential for producing a disparate impact on minority test takers. Scholars have described the "litany of cases . . . in which testing programs have had a disproportionate impact on minorities."[207] Further, there is evidence that these disparities can be quite stark. In *Gulino v. Board of Education*, for example, plaintiffs proffered evidence showing that

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[203] *See* Michael T. Blotevogel, *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*, 81 WASH. U. L. Q. 561, 585 (2003) (arguing that a court might insulate districts from liability in such circumstances out of fairness concerns).

[204] Indeed, in *Gulino v. New York State Education Department*, the New York Board of Education made that precise argument. *See* 460 F.3d 361, 380 (2d Cir. 2006) ("[The Board] argues that, because it is merely engaged in the licensing of teachers, Title VII does not apply."). Although the court rejected the Board's arguments, it first "acknowledge[d] the difficult situation that this creates," *id*. at 381, suggesting that with a different set of facts, a district or board might be able to escape liability.

[205] *See supra* note 38 (discussing the potential for remedy-less plaintiffs in jurisdictions with few black and Latino teachers).

[206] This is not to argue that if a district can be named a defendant there are not extremely compelling reasons for allowing states to be defendants. *See supra* note 38 (summarizing these reasons).

[207] Jerry R. Parkinson, *The Use of Competency Testing in the Evaluation of Public School Teachers*, 39 U. KAN. L. REV. 845, 878 (1999).

racial minorities had a passing rate only half that of whites.[208] Professor Dan Goldhaber and researcher Michael Hansen found that two commonly used teacher licensing tests demonstrated a failure rate of fifty-six percent for black teachers and only fourteen percent for white teachers.[209]

The argument that teacher certification exams ensure a minimum quality of instruction in the classroom holds less weight in the education employment context for several reasons. First, while NCLB's reliance on tests to determine teacher qualification is based in part on a purported connection between subject area knowledge and teacher effectiveness,[210] research supports the proposition that while test performance signals proficiency in a subject area, it is not a clear marker of teacher success.[211] Research on whether proficiency on certification exams necessarily indicates qualification to teach (or, conversely, whether lack of proficiency means that one is unqualified) is far from conclusive.[212] Presumably, the skills tested on a dentistry exam are more clearly related to an ability to do the job, making a licensing exception more applicable in that context and less so in regards to teaching.[213] Moreover, studies have found that a teacher sharing a cul-

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[208] *See* 236 F. Supp. 2d 314, 339 (S.D.N.Y. 2002) (stating that plaintiff's statistical expert demonstrated that the pass rates of African American/Latino educators and white educators were roughly 45% and 85%, respectively), *rev'd in part sub nom.* Gulino v. New York State Educ. Dep't, 460 F.3d 361 (2d Cir. 2006).

[209] Goldhaber & Hansen, *supra* note 19, at 230 n.17.

[210] *See* U.S. DEP'T OF EDUC., MEETING THE HIGHLY QUALIFIED TEACHERS CHALLENGE: THE SECRETARY'S ANNUAL REPORT ON TEACHER QUALITY 19 (2002), *available at* https://www2.ed.gov/about/reports/annual/teachprep/2002title-ii-report.pdf ("[R]igorous research indicates that verbal ability and content knowledge are the most important attributes of highly qualified teachers.").

[211] *See* Marilyn Cochran-Smith, *Reporting on Teacher Quality: The Politics of Politics*, 53 J. TEACHER EDUC. 379, 380 (2002) (citing empirical studies that conclude that subject matter knowledge is only one, among many, qualifications related to student achievement); Goldhaber & Hansen, *supra* note 19, at 243–45 (finding that some teacher tests have no correlation to student achievement).

[212] *See infra* note 213 and accompanying text (discussing research that finds that proficiency on exams does not correlate with success in the classroom).

[213] This is primarily because a teacher's success is measured on more varying metrics. *See*, *e.g.*, Cochran-Smith, *supra* note 211, at 380; Karen Eppley, *Rural Schools and Highly Qualified Teacher Provision of No Child Left Behind: A Critical Policy Analysis*, 24 J. RES. RURAL EDUC. 1, 9 (2009) (suggesting that in some schools, a teacher's success is also based on her ability to "nurture[ ] students" and "sustain[ ] communities"). Moreover, the content of teaching exams can be overbroad. For example, in some states a teacher that wishes to teach mathematics would also need to pass writing and science examinations to acquire certification, while proficiency in mathematics is perhaps all that she would need to successfully teach the subject. *See*, *e.g.*, *Frequently Asked Questions—Massachusetts Tests for Educator Licensure*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., https://www.doemass.org/mtel/faq.html?section=general (last updated Sept. 10, 2014) (describing the licensure requirements for teaching in the State); VA. DEP'T OF EDUC., ASSESSMENT REQUIREMENTS FOR VIRGINIA LICENSURE 1 (2014), *available at* http://www.doe.virginia

tural background with the student can have a positive effect on student achievement.[214] This means that in some instances, teachers that can perform satisfactorily are kept out of teaching positions, calling into question teaching exams' content[215] and criterion validity.[216] This lack of clear consensus on whether or not teacher-credentialing tests can correctly determine a teacher's success in the classroom emphasizes the importance of reaching the merits of these Title VII claims.

Conclusion

The common law "licensing exception" has shielded states from disparate impact liability when they administer teacher certification tests. While the Ninth Circuit has refused to apply the exception, the Fifth, Seventh, and Second Circuits have held the exceptions to be doctrinally sound. This Note argues that the continued use of the exception, and more broadly, the refusal to hold that states and teachers have an employment relationship, is improper. This Note also supplies a framework for a fairer adjudication of these claims. The framework involves a more robust effectuation of Title VII's purpose by considering the social and legal milieu and reconsidering the amount of control states exert over schools post-NCLB. Statistics like those from Chicago[217] are reminiscent of the circumstances that compelled Congress to enact Title VII decades ago. Once courts reject the licensing exception, teachers will have a more viable chance of chal-

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.gov/teaching/licensure/prof_teacher_assessment.pdf (describing requirements of initial licensure in Virginia). This is not to suggest that a math teacher that has mastered both science and writing is not desirable. Rather, it is to highlight the inherent difference between content validity of teaching exams as compared to other professions' certification exams.

[214] *See* Goldhaber & Hansen, *supra* note 19, at 219–20 (suggesting matching students with teachers of a similar background correlates with positive gains in student achievement). In this regard, narrative and statistics meet. For example, Malcinia Conley, an African American teacher, spoke of her experience having black teachers as a child and said: "It was a feeling of, here is someone with an understanding of the cultural things that I am experiencing . . . . I'd look at them, and believe, 'You can do anything you want.' I could follow in their footsteps." Brennan, *supra* note 20; *see also* Adam Fairclough, *The Costs of* Brown*: Black Teachers and School Integration*, 90 J. Am. Hist. 43, 44 (2004) ("In the environment of the segregated school, teachers enjoyed close relationships with their pupils based on empathy with the individual child and an intimate knowledge of the black community, enabling them to motivate their charges.").

[215] "Content validity" refers to whether or not the content of "[a test] is representative of important aspects of performance on the job." 29 C.F.R. § 1607.16(D) (2013).

[216] For a test to be criterion-valid, there must be a statistically significant correlation between high test scores and successful performance on the job. *Id.* § 1607.5(B).

[217] *See supra* note 20 and accompanying text (noting the decline in percentage of African American teachers, from forty-five percent in 1995 to nineteen percent in 2012).

lenging the tests or devices that create barriers operating in the present.