Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference

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INTRODUCTION

In 1972, Congress extended title VII of the Civil Rights Act of 1964[1] to higher educational institutions.[2] The federal courts have since struggled with the problems of defining and discerning employment discrimination in academic environments. Initially, courts enforced title VII against educational institutions with reservation and reluctance. Despite

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[1] Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980)) [hereafter title VII].

[2] When title VII was enacted in 1964, Congress exempted educational institution employees engaged in educational activities from the statute's requirements. *Id.* § 702, 78 Stat. at 255. The Equal Employment Opportunity Act of 1972 removed this exemption. Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (codified at 42 U.S.C. § 2000e-1 (1976)). An oft-quoted passage from the Report of the House Committee on Education and Labor explained the intent of Congress:

> There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of these educational institution employees — primarily teachers — from Title VII coverage. Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.
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> The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their fuure [sic] development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the nation . . . should be subject to the provisions of the Act.

Equal Employment Opportunity Act of 1972, H.R. REP. NO. 238, 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2155.

the clear congressional mandate, courts hesitated to intervene in battles between university decisionmakers and disappointed, aspiring academics. More recently, federal judges have realized that a decision not to intervene is a decision to tolerate academic discrimination, contrary to the express wishes of Congress. Federal courts have attempted to shift from an inflexible noninterventionism[3] toward a reasoned and principled deference to the judgments of academic employers. This deferential approach is designed to allow a careful search for discriminatory bias while ensuring that academic institutions' "prerogatives [are] left undisturbed to the greatest extent possible."[4]

The judicial struggle with the problem of equal employment opportunity in universities and colleges has taken place while judicial standards for resolution of discrimination cases in industrial and commercial settings were still developing. Although the development of antibias standards for educational institutions and for industry and business have been concurrent and similar, the standards are not identical. Courts continue to exhibit a reluctance to supervise an essentially subjective process of evaluation and decision in academic cases, although subjectivity in most other title VII cases provokes considerable judicial suspicion. More importantly, courts have been sensitive to the countervailing constitutional interests in institutional academic autonomy.[5]

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[3] *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal supervision.").

[4] United Steelworkers v. Weber, 443 U.S. 193, 206 (1979) (quoting congressional report); *see also* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1342-43 n.3 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982); Kunda v. Muhlenberg College, 621 F.2d 532, 550-51 (3d Cir. 1980); Davis v. Weidner, 596 F.2d 726, 730-32 (7th Cir. 1979); Powell v. Syracuse Univ., 580 F.2d 1150, 1154-55 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

[5] *See, e.g.*, Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980). In affirming a judgment for the plaintiff, the court nevertheless expressed the idea that academic freedom also requires a measure of deference to the needs of institutional autonomy:

> The essence of academic freedom is the protection for both faculty and students "to inquire, to study and to evaluate, to gain new maturity and understanding." It is the lifeblood of any educational institution because it provides "that atmosphere which is most conducive to speculation, experiment and creation." Only when students and faculty are free to examine all options, no matter how unpopular or unorthodox, without concern that their careers will be indelibly marred by daring to think along nonconformist pathways, can we hope to insure an atmosphere in which intellectual pioneers will develop. Academic freedom prevents "a pall of orthodoxy over the classroom"; it fosters "that robust exchange of ideas which

The federal law of equal employment opportunity would, at first glance, seem to be an unlikely subject of concern to the defenders of academic freedom. After all, ideological liberty, free speech and associational privacy, which are often at the heart of academic freedom issues, would seem to be only remotely involved in a suit challenging alleged employment discrimination. However, the Supreme Court has expressed a view of academic freedom that protects a broader academic autonomy from unwarranted government interference:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[6]

> discovers truth." Our future, not only as a nation but as a civilization, is dependent for survival on our scholars and researchers, and the validity of their product will be directly proportionate to the stimulation provided by an unfettered thought process. . . . Therefore, academic freedom, the wellspring of education, is entitled to maximum protection.
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> Wherever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

621 F.2d at 547-48 (citations and footnote omitted).

[6] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In a plurality opinion Justice Powell indicated that the university's academic freedom represented a "countervailing constitutional interest" that the Court has "long viewed as a special concern of the First Amendment." *Id.* at 312-13. Although Justice Powell's invocation of an institutional academic freedom to seek a racially diverse student body cannot be distorted into an academic freedom to discriminate in the selection and promotion of professors, his use of the following language illustrates the conflict between academic autonomy and equal employment opportunity:

> "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind of authoritative selection.' "

Id. at 312 (quoting Keyishian v. Board of Regents, 358 U.S. 589, 603 (1967)).

This Article explores the influence of judicial solicitude for institutional academic autonomy in title VII cases brought against higher educational institutions. Part I discusses the development of title VII prohibitions against intentional discrimination as embodied in the theory of "disparate treatment." This discussion emphasizes two related ideas. First, disparate treatment theory protects the legitimate interests of academic employers by imposing a heavy burden of proof on the plaintiff to show discriminatory intent. Second, if disparate treatment theory is to constitute a meaningful restriction against biased employment practices, title VII plaintiffs must not be unduly handicapped in their already difficult quest to prove discriminatory intent.

Part II focuses on the most obvious difference between academic and nonacademic cases arising under title VII: the theory of "disparate impact" or "adverse impact" as originated in the landmark decision of *Griggs v. Duke Power Co.*[7] has not been applied to higher educational institutions with the same rigor as to business and industry. This double standard arises from a continuing judicial understanding that academic decisionmaking processes are inevitably and necessarily subjective. As a result, academic employers are more frequently able to show the "business necessity" of their policies and practices.

Finally, this Article concludes that courts should continue to respect the needs of institutional academic autonomy by deferring to the substance of academic policies when such policies are manifestly reasonable and evenhanded, but not when academic decisions are demonstrated to be the products of intentional discrimination.

I. THE THEORY OF DISPARATE TREATMENT: SEARCHING FOR DISCRIMINATORY INTENT

Most employment discrimination suits against higher educational institutions have been resolved on the basis of the so-called "disparate treatment" theory.[8] Simply, disparate treatment is intentional discrimination. This theory is the oldest and "most easily understood" of the accepted theories of discrimination.[9]

In essence, a single plaintiff alleging disparate treatment accuses a defendant employer of treating the plaintiff, a member of a protected class (usually blacks or females) more harshly than some other favored

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[7] 401 U.S. 424 (1971).

[8] *See, e.g.*, Sweeney v. Board of Trustees, 569 F.2d 169 (1st Cir.), *vacated and remanded per curiam*, 439 U.S. 24 (1978).

[9] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

employees (usually whites or males).[10] The plaintiff bears the ultimate burden of proving that the challenged employment decisions would not have occurred "but for" the plaintiff's race, sex, national origin, religion, handicap, age, or other characteristic prohibited as a basis for decision.[11]

A. The Prima Facie Case of Disparate Treatment

In *Texas Department of Community Affairs v. Burdine*,[12] the Supreme Court established that the plaintiff's initial burden of establishing a prima facie case of disparate treatment "is not onerous."[13] The Court has never attempted to define a comprehensive test for what constitutes a prima facie case.[14] Instead, it has either framed the elements of a plaintiff's initial burden to establish an inference of discrimination in the context of a specific case,[15] or has spoken more generally about the function of the prima facie case as a requirement that the plaintiff present proof "eliminat[ing] the most common nondiscriminatory reasons for" a challenged employment decision.[16] In *McDonnell Douglas Corp. v. Green*,[17] the Court defined a prima facie case of racial discrimination in a hiring case. The plaintiff was required to show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek appli-

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[10] It is quite common to assume that a disparate treatment case will involve a single plaintiff, while disparate impact cases will involve large groups or classes or employees. *See, e.g.*, Connecticut v. Teal, 102 S. Ct. 2525, 2536 (1982) (Powell, J., dissenting); Note, *Title VII on Campus: Judicial Review of University Decisions*, 82 COLUM. L. REV. 1206, 1209-10, 1211 (1982). However, this assumption is erroneous. The seminal case of International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), is an excellent example of a case alleging that an employer systematically and deliberately treated blacks and hispanics more harshly than favored whites. *Teamsters* is illustrative of a theory of discrimination that some commentators have christened "systemic disparate treatment." *See, e.g.*, M. ZIMMER, C. SULLIVAN & R. RICHARDS, EMPLOYMENT DISCRIMINATION 30-64 (1982).

[11] McDonald v. Sante Fe Transp. Co., 427 U.S. 273, 282 n.10 (1976).

[12] 450 U.S. 248 (1981).

[13] *Id.* at 253.

[14] *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

[15] *Id.*

[16] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); *see also* note 28 *infra*.

[17] 411 U.S. 792 (1973).

cants from persons of complainant's qualifications."[18] Although these elements are frequently cited as the standard for a prima facie case,[19] subsequent cases have shown that the *McDonnell Douglas* formulation is only illustrative. Since the facts of particular cases vary, and since the theories of disparate treatment vary, the elements of the prima facie case will also vary.[20]

Still, it appears that the plaintiff alleging disparate treatment must establish three basic elements in order to prevail. First, the plaintiff must demonstrate that he or she belongs to a protected class. For example, a black suing under title VII must make sure that the record reflects his or her race; similarly, a female must ensure that the fact of her sex is present on the record. Needless to say, this standard engenders little controversy.

A second element of a prima facie case is proof that some employment decision adversely affected the plaintiff. Many of the *McDonnell Douglas* elements are designed to show that the plaintiff was not hired for an available job opening. However, rejection for an available job opening is only one type of adverse employment decision. A title VII claim based on the theory of disparate treatment could involve denial of promotion,[21] denial of tenure,[22] lower compensation,[23] undesirable job assignments,[24] discharge,[25] discipline,[26] or harassment.[27]

The final element of a disparate treatment prima facie case is the most critical and the most difficult to define. The plaintiff must prove enough facts to demonstrate a disparity in the employer's treatment of employees from which discrimination can be inferred.[28] In *McDonnell*

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[18] *Id.* at 802.

[19] *See* notes 31-35 and accompanying text *infra*.

[20] *Compare* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 n.6 (1981) (allocation of evidentiary burdens in sex discrimination case involving promotion and discharge) *with* County of Washington v. Gunther, 452 U.S. 161 (1981) (slightly different allocation in wage differential case) *and* Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982) (same).

[21] *E.g.*, United States Postal Serv. Bd. of Governors v. Aikens, 103 S. Ct. 1478 (1983), *vacating and remanding* 665 F.2d 1057 (D.C. Cir. 1982).

[22] *E.g.*, Kunda v. Muhlenberg College, 621 F.2d 532 (3d Cir. 1980).

[23] *E.g.*, County of Washington v. Gunther, 452 U.S. 161 (1981).

[24] *E.g.*, Slack v. Havens, 7 Fair Empl. Prac. Cas. (BNA) 885 (S.D. Cal. 1973), *aff'd as modified*, 522 F.2d 1091 (9th Cir. 1975).

[25] *Id.*

[26] *Id.*

[27] *E.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

[28] In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Court summarized the prima facie case in the following, albeit general, terms:

Douglas, this final element was satisfied by the plaintiff's proof that he possessed the basic qualifications for the job he sought and that after his rejection the position remained open and the employer continued to seek applicants from persons with the plaintiff's qualifications.[29] However, qualifications are not always the basis for an employer's legitimate decision, and the concept of "vacancy" or continued canvassing of applicants is not always relevant. For example, in a discharge case, the existence of a vacancy, the plaintiff's qualifications, and the qualifications of any replacement might be totally irrelevant to the basic question of whether the employer discharged the plaintiff for legitimate or discriminatory reasons. Thus, the general observations of the Supreme Court in *Burdine* are far more significant than the specific "elements" so frequently cited from *McDonnell Douglas*.

The *Burdine* Court's analysis of the significance of the prima facie case illuminates the essential test for determining whether a plaintiff's evidence is sufficient. The plaintiff must prove enough facts to demonstrate the existence of disparity in treatment, which must include "eliminat[ion of] the most common nondiscriminatory reasons" for the challenged decision.[30] Thus, the essential test is unfortunately general. The critical question is whether a reasonable fact-finder could infer from a plaintiff's showing that it is more probable than not that the defendant engaged in an employment practice made unlawful by title VII.[31] Since this test is to apply to hiring cases, discharge cases, promotion cases, wage differential cases, and all other types of employment discrimination cases, federal courts rarely have dared attempt to inject more specificity into the standards for a prima facie case.

> The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination. The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. . . . [T]he prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.

Id. at 253-54 (citations and footnotes omitted).

[29] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[30] *Burdine*, 450 U.S. at 253.

[31] Briggs v. City of Madison, 536 F. Supp. 435, 444 (W.D. Wis. 1982).

Two recent decisions illuminate the nature of the plaintiff's evidentiary burden to establish a prima facie case of discrimination in an academic environment. In *Smith v. University of North Carolina*,[32] the Fourth Circuit affirmed the dismissal of a female plaintiff's title VII claim. In so doing, the court drew upon the *McDonnell Douglas* standards for its own formulation of elements essential to a prima facie case when the plaintiff alleges that a university denied reappointment and promotion on account of sex and religion. According to the Fourth Circuit, the plaintiff was required to show: (i) that plaintiff was a member of a class protected by title VII; (ii) that she was qualified for the position or rank sought; (iii) that she was denied promotion or reappointment; and (iv) that in cases of reappointment or tenure, others (i.e., males) with similar qualifications achieved the professorial rank or position.[33]

The *Smith* analysis was followed in *Lynn v. Regents of the University of California*.[34] There, the Ninth Circuit offered an important observation about the difference between a plaintiff's proof of a prima facie case and the requisite proof of discriminatory intent after all parties have had their opportunity to present evidence. Basically, the Ninth Circuit found that the court is ill-advised to take too harsh a view of the plaintiff's qualifications when attempting to ascertain whether the plaintiff has established a prima facie case. Closer scrutiny of the plaintiff's qualifications, particularly in relation to alternative candidates or other employees, is appropriate at a later stage of judicial analysis of the plaintiff's allegations.[35] The court rejected the defendant's contention that the plaintiff must present some evidence refuting the university's "legitimate, nondiscriminatory reason" as part of the prima facie case.[36] Any effort by the plaintiff to refute the employer's asserted reason is largely speculative until presentation of the defendant's case. The court preferred to leave detailed and searching inquiry on the issues raised by the employer's explanations and defenses until after all the employer's evidence was presented. In other words, the searching analytical inquiry on the issues of qualifications, pretext, and discriminatory motive should occur only after the defendant has satisfied its burden to produce evidence of a lawful reason for its decisions. At the first stage of analysis — examination of the plaintiff's purported prima facie

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[32] 632 F.2d 316 (4th Cir. 1980).

[33] *Id.* at 340.

[34] 656 F.2d 1337, 1341 (9th Cir. 1981).

[35] *Id.*

[36] *Id.* at 1344-45.

case — the focus should be on clear, undisputed, and objective criteria. For example, if the plaintiff purported to be a teacher, the sole issue respecting a prima facie case would be whether the plaintiff was in fact a teacher who met certain objective qualifications "such as level of education, years of teaching experience, in general and at the particular institution, and the publication of scholarly materials."[37] Questions of skill, excellence, and other qualifications of a subjective nature would be left for the final stage of judicial analysis.[38]

B. The Employer's Burden to Articulate Legitimate, Nondiscriminatory Reasons

There has been little dispute about the relatively simple and superficial analysis to be employed when examining a plaintiff's purported prima facie case. The real controversy in title VII litigation has arisen over the nature of the burden imposed on the defendant after the plaintiff has succeeded in presenting a prima facie case. Even this evidentiary controversy is of less practical consequence to the outcome of disparate treatment cases than was initially thought. Still, it is this controversy — aggravated by the considerable confusion generated by conflicting Supreme Court language — which has been the most important problem in judicial analysis of the theory of disparate treatment.

1. Evolution of the Employer's Burden

In *McDonnell Douglas*, the Supreme Court held that if the plaintiff succeeded in establishing a prima facie case, some ill-defined burden

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[37] *Id.* at 1345 n.8.

[38] *Id.* Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979), also involved the applicability of the *McDonnell Douglas* elements to a plaintiff's case in the academic setting. The university argued that an "additional" requirement should be imposed upon the plaintiff at the prima facie stage when the challenged decision arose from " 'a simultaneous choice between prospective employees on the basis of relative qualifications under circumstances which involve judgment.' " *Id.* at 730. (quoting the university). This additional requirement was that the plaintiff demonstrate that his rejection did not result from a relative lack of qualifications. The court rejected the idea as a result of an analysis similar to that employed in *Lynn*: "It seems more sensible to require the employer, in his rebuttal to the complainant's case, to offer his justification for his employment decision, rather than to force the complainant to refute hypothetical reasons why the employer might have found him relatively less qualified." *Id.* The court continued in a footnote: "If a 'relatively less qualified' applicant for a job possessed qualifications significantly and obviously inferior to the person actually given the job, this rationale for adhering to the *McDonnell* model would be less persuasive." *Id.* at 730 n.2.

shifted to the defendant "to *articulate* some legitimate, non-discriminatory reason" for the challenged employment decision.[39] In *Furnco Construction Corp. v. Waters*,[40] the Court confused matters when it stated that "it is apparent that the burden that shifts to the employer is merely that of *proving* that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."[41] Of course, lawyers would read such language and discern that there is a world of difference between "articulating" and "proving" reasons for challenged employment decisions, at least theoretically. From this distinction came the controversy presented to the Supreme Court in *Board of Trustees v. Sweeney*.[42] In a per curiam opinion, the Court held there was "a significant distinction between merely 'articulat[ing] some legitimate non-discriminatory reason' and 'prov[ing] absence of discriminatory motive.' "[43] The defendant, the Court held, need only articulate; it need not prove. In a dissenting opinion Justice Stevens chided the Court for its "novel distinction" and pointed out:

> In litigation, the only way a defendant can "articulate" the reason for his action is by adducing evidence that explains what he has done; when an executive takes the witness stand to "articulate" his reason, the litigant for whom he speaks is thereby proving those reasons. If the Court intends to authorize a method of articulating a factual defense without proof, surely the Court should explain what it is.[44]

Justice Stevens might have added that only the most foolhardy defendant would attempt to rest a case on mere articulation without proof. Whatever magic there is in the concept of burden of proof, surely a preponderance of evidence standard would leave the plaintiff who has proved a prima facie case in a strong position, if the defendant merely attempted to articulate without admissible evidence.

The sensible criticisms offered by Justice Stevens provoked the Court to resolve this controversy in *Burdine*. The Court held that the burden that shifts to the employer is merely to rebut the presumption of discrimination arising from proof of a prima facie case by "producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate non-discriminatory reason."[45] Adhering to the *Sweeney*

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[39] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (emphasis added).

[40] 438 U.S. 567 (1978).

[41] *Id.* at 577 (emphasis added).

[42] 439 U.S. 24 (1978), *vacating and remanding per curiam* 569 F.2d 169 (1st Cir. 1978).

[43] *Id.* at 25.

[44] *Id.* at 28-29 (Stevens, J., dissenting).

[45] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

holding, the Court reaffirmed that the employer need not prove that it was actually motivated by the proffered reasons; rather, it need only present evidence sufficient to raise a genuine issue of fact as to whether it discriminated against the plaintiff.[46] Borrowing directly from the criticisms of Justice Stevens in his *Sweeney* dissent, the Court proceeded to hold that the employer can satisfy this "burden" only by introducing admissible evidence; the reasons for the plaintiff's rejection could not merely be stated by an attorney or written in a trial brief. "The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity."[47]

This legalistic process is designed, in the view of the Supreme Court, "to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[48] Moreover, limiting the defendant's evidentiary obligation to a burden of production should not unduly hinder the plaintiff for two reasons:

> First, as noted above, the defendant's explanations of its legitimate reasons must be clear and reasonably specific. This obligation arises both from the necessity of rebutting the inference of discrimination arising from the prima facie case and from the requirement that the plaintiff be afforded "a full and fair opportunity" to demonstrate pretext. Second, although the defendant does not bear a formal burden of persuasion, the defendant nevertheless retains an incentive to persuade the trier of fact that the employment decision was lawful. Thus, the defendant normally will attempt to prove the factual basis for its explanation.[49]

2. The Deferential Quality of the Legitimate Nondiscriminatory Standard in Academic Cases

As *Burdine* reveals, the employer's burden to present admissible evidence of a legitimate nondiscriminatory standard, like the plaintiff's burden to prove a prima facie case, is not onerous. As a matter of law — quite apart from practical necessity and prudence — the employer need only create a "genuine issue of fact."[50] Satisfaction of the employer's burden merely sets the stage for a closer inquiry of evidence to ascertain discriminatory intent.[51]

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[46] *Id.*

[47] *Id.* at 255 (footnote omitted).

[48] *Id.* at 255-56.

[49] *Id.* at 258 (citations omitted).

[50] *Id.* at 254.

[51] *Id.* at 255-56. The *McDonnell Douglas* approach to disparate treatment cases is a

The phrase "legitimate and non-discriminatory" is not defined in *Burdine.* However, the opinion does indicate that the employer fulfills its burden if it articulates "lawful" reasons for a challenged action.[52] Whether the employer must present "legitimate," "non-discriminatory," or "lawful" reasons, the judicial definition of the employer's burden at this stage of analysis reflects a judicial desire to defer to any reasonable judgment of the employer. In title VII cases arising from the academic context judicial deference is even more marked and obvious than in industrial employment cases.[53]

A typical example of the judicial deference to academic employers is *Labat v. Board of Education.*[54] There the court rejected the claim of a black plaintiff that the defendant's failure to grant him tenure was motivated by race discrimination. The defendant's criteria for awarding tenure were teaching effectiveness, research and other scholarly activity, and service to the community, college, and nation.[55] Rejecting the plaintiff's "obscure," "confusing," and unpersuasive statistics as the basis for a prima facie case, the court deferred to the defendant's evaluation of the plaintiff's qualification: "[T]he decision to deny tenure was made in good faith based on criteria fairly applied to plaintiff and all other candidates . . . ."[56] The court emphasized that academic evaluations of scholarly writings were "judgmental." Expressing the common view that academics are best qualified to judge academics, the court noted that "scholarship and research have been described as 'the indispensa-

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three-step analytical process — it is not a guide to trial procedure. The plaintiff's proof of discriminatory motive may be presented in the case-in-chief or in rebuttal. The defendant's legitimate nondiscriminatory reason may actually be presented through the plaintiff's witnesses. The requirement that the plaintiff be given a "full and fair opportunity to demonstrate pretext" does not necessarily require that the trial judge let the analytic rules of *McDonnell Douglas* govern the presentation of evidence at trial. *Compare Burdine with* Sime v. Trustees of Cal. State Univ. and Colleges, 526 F.2d 1112 (9th Cir. 1975) (three-step analysis is not mandatory; involuntary dismissal was appropriate where plaintiff's witnesses showed legitimate, nondiscriminatory reasons for plaintiff's rejection).

[52] *Burdine,* 450 U.S. at 257.

[53] *Compare* Laborde v. Regents of the Univ. of Cal., 686 F.2d 715 (9th Cir. 1982), *cert. denied,* 103 S. Ct. 820 (1983) (university's evaluation of plaintiff's scholarship was not a pretext for discriminatory motive) *and* Johnson v. Michigan State Univ., 547 F. Supp. 429 (W.D. Mich. 1982) (university's decision that plaintiff was not qualified academically or by temperament for tenured position was not discriminatory) *with* Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1971) (subjective evaluation system allowed covert discrimination).

[54] 401 F. Supp. 753 (S.D.N.Y. 1975).

[55] *Id.* at 756.

[56] *Id.* at 757.

ble tools of the scholar's trade' and as such they should be left to scholars."[57]

As *Labat* indicates, judicial deference to the judgments of academic employers reflects substantial tolerance for subjective standards used for deciding questions of promotion, tenure, salary, hiring, and the like. Even in those cases that have recognized the need for judicial scrutiny of university employment practices, courts have remained cognizant of the necessary subjectivity of university processes.[58] In *Peters v. Middlebury College*,[59] the plaintiff's allegation of sex discrimination intertwined with personal and professional disagreements with decisionmakers at the college. Specifically, she alleged that her efforts to introduce feminist issues into her academic courses engendered opposition from other, biased members of the faculty. The plaintiff presented evidence to suggest that the chairman of the English department in which she taught considered her "too political." The college's explanations for its decision not to extend her nontenured position emphasized the plaintiff's intellectual qualities. The department chairman alleged that she was not discriminatingly rigorous in her examinations, in her presentation of literature, literary history, or intellectual history. The plaintiff was described as "energetic, enthusiastic [but] uncritically open to any view. . . . She seems not to know, or perhaps is unable to articulate, the principle of criticism, the intellectual assumptions by which she operates."[60] It is difficult to imagine a more subjective assessment of a faculty member. However, "subjectivity" is not a synonym for "error." In *Peters*, the court found the plaintiff's case to be unpersuasive. The court focused on the procedures of decision, the plaintiff's appeal, and on the individual views of the members of the English department. The conclusion of the court emphasized the reasonable character of the criteria — primarily teaching — and the evidently nondiscriminatory application of the standards.[61]

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[57] *Id.* at 757 (footnote omitted) (quoting Weise v. Syracuse Univ., 522 F.2d 397, 405 (2d Cir. 1975)).

[58] *See, e.g.*, Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978): " 'A professor's value depends on his creativity, his rapport with students and colleagues, his teaching ability, and numerous intangible qualities which cannot be measured by objective standards.' " *Id.* at 1157 (Moore, J., concurring) (quoting Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969)); *see also* Cussler v. University of Md., 430 F. Supp. 602 (D. Md. 1977).

[59] 409 F. Supp. 857 (D. Vt. 1976).

[60] *Id.* at 860 (quoting letter from department chairman).

[61] *Id.* at 867.

The original appellate court decision in *Sweeney*[62] also recognized that the common judicial reluctance to intervene in university employment decisions derived mainly from the recognition that hiring, promotion, and tenure decisions were inevitably subjective and were best made by responsible academics with the experience and expertise in making such decisions. Having made this observation, however, the court pointed out that this deference to subjectivity is unusual, since in industrial employment cases arising under title VII, the judiciary has regarded subjective criteria with obvious suspicion.[63]

C. Plaintiff's Ultimate Burden to Prove Discriminatory Motive

The deferential quality of disparate treatment theory in academic cases is also evidenced by the nature of the plaintiff's ultimate burden to prove discriminatory intent on the part of academic decisionmakers. After the employer has presented admissible evidence of "lawful" reasons for its employment decision, the plaintiff must meet the ultimate burden of persuasion that those reasons are merely a pretext or camouflage for discriminatory motives. It will not suffice to convince a court that the employer was imprudent or ill-advised in its "legitimate, nondiscriminatory" reasoning.[64] The plaintiff is obligated in theory and

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[62] Sweeney v. Board of Trustees, 569 F.2d 169 (1st Cir.), *vacated and remanded per curiam*, 439 U.S. 24 (1978), *discussed in* notes 79-87 and accompanying text *infra*.

[63] *Id.* at 176 n.14. *See, e.g.*, Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972). The plaintiff, a black employee, complained that his promotion depended upon his receiving a favorable recommendation from one of several white foremen. The court upheld the complaint because the subjective criteria and recommendation procedures contained "no safeguards . . . to avert discrimination practices" and provided "a ready mechanism for discrimination . . . much of which can be covertly concealed." *Id.* at 359; *see also* Wade v. Mississippi Cooperative Extension Serv., 528 F.2d 508 (5th Cir. 1979). *But see* Rogers v. International Paper Co., 510 F.2d 1340 (8th Cir. 1975) (subjective criteria not unlawful per se).

[64] *See, e.g.*, Smith v. University of N.C., 18 Fair Empl. Prac. Cas. (BNA) 913 (M.D.N.C. 1978), *aff'd in relevant part and rev'd in part*, 632 F.2d 316 (4th Cir. 1980). The plaintiff alleged that she was denied reappointment and promotion because of her sex and religion in violation of title VII. The plaintiff also pleaded other causes of action, including age discrimination. The university offered two reasons for its adverse decision: that the plaintiff lacked adequate knowledge in her scholarly discipline, and that she could not relate her specialized field of study to issues of more general concern to the department of religion. The district court found the university's analysis underlying the first reason to be erroneous, but refrained from finding it to be a pretext for sex or religious discrimination. In the district court's view, a mistaken though nondiscriminatory assessment is not actionable under title VII. The court concluded that the university's second reason was not a pretext for sex or religious discrimination, because evidence indicated that the department sincerely was concerned about the need

practice to show that the employer defendant is simply lying or that its judgment is tainted by bias, stereotype, or bigotry.[65]

The nature of the plaintiff's burden was clarified by the Second Circuit in the decision of *Lieberman v. Gant*.[66] The plaintiff alleged sex discrimination and sought damages and injunctive relief because of the university's refusal to grant her tenure in the English department. After extensive discovery and trial,[67] the district court ruled for the defendants[68] and the Second Circuit affirmed. Distinguishing other academic cases involving renewal of teaching contracts, as well as industrial cases, the court of appeals noted that a tenure decision involves a lifelong commitment by a university. The court concluded that judicial imposition of such a commitment could threaten the university's academic

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to relate a specialized field of study to issues of more general importance.

In affirming the relevant factual determinations of the trial court, the Fourth Circuit added an extensive analysis of the university's claim of academic freedom, expressing the same reservations about judicial intervention in university employment cases that had been expressed in prior decisions:

> Tenure is one of the most difficult of all academic decisions. . . . It is a decision which, in addition to delineating basic qualifications, involves a degree of subjectivity. Furthermore, since professors are individuals and perform different roles within a department, it is difficult to compare the reasons for promoting one faculty member with the reasons for promoting or not promoting another.
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> . . . .
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> University employment cases have always created a decisional dilemma for the courts. Unsure how to evaluate the requirements for appointment, reappointment and tenure, and reluctant to interfere with the subjective and scholarly judgments which are involved, the courts have refused to impose their judgment as to whether the aggrieved academician should have been awarded the desired appointment or promotion. Rather, the courts [sic] review has been narrowly directed as to whether the appointment or promotion was denied because of a discriminatory reason. "[T]he law does not require, in the first instance, that employment be rational, wise, or well-considered — only that it be nondiscriminatory." We conclude that the district court had ample foundation for its determination that the University's decisions were not discriminatory.

632 F.2d at 345-46 (citations and footnotes omitted); *see also* Johnson v. University of Pittsburgh, 435 F. Supp. 1328 (W.D. Pa. 1977).

[65] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

[66] 630 F.2d 60 (2d Cir. 1980), *aff'g* 474 F. Supp. 848 (D. Conn. 1979).

[67] The appellate court expressed amazement at the length of the district court proceedings: "We do not understand how either the federal courts or universities can operate if the many adverse tenure decisions against women or members of a minority group that must be made each year are regularly taken to court and entail burdens such as those here incurred." *Id.* at 62 n.1.

[68] 474 F. Supp. 848 (D. Conn. 1979).

autonomy,[69] and that plaintiff therefore must present much more than a showing of performance "of sufficient quality to merit continued employment."[70] The court analyzed the Supreme Court holdings in *McDonnell Douglas*, *Furnco*, and *Sweeney* to assess the plaintiff's ultimate burden of persuasion on the issue of discriminatory motive. The court held that the defendants need not establish that the basis for their decision was sound. Rather, the plaintiff bears the burden to demonstrate that the employer's asserted reason is pretextual. Short of proving an outright lie by the employer, the plaintiff must prove "that the asserted neutral basis was so ridden with error that defendant could not honestly have relied upon it."[71]

The analysis of *Lieberman* was cited and followed by the Supreme Court in *Burdine*:[72] the plaintiff always retains the ultimate burden of persuasion that the defendant intentionally discriminated against the plaintiff.[73] Thus, after the plaintiff's proof of a prima facie case and the defendant's presentation of evidence of a legitimate nondiscriminatory reason, the disparate treatment case not only moves to a new level of "specificity," it also proceeds to the *essence* of the issue.[74]

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[69] Title VII does not require that the candidate whom a court considers most qualified for a particular position be awarded that position; it requires only that the decision among candidates not be discriminatory. When a decision to hire, promote, or grant tenure to one person rather than another is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn. Indeed, to infer discrimination from a comparison among candidates is to risk a serious infringement of first amendment values. A university's prerogative " 'to determine for itself on academic grounds who may teach' " is an important part of our long tradition of academic freedom. Although academic freedom does not include "the freedom to discriminate", this important freedom cannot be disregarded in determining the proper role of courts called upon to try allegations of discrimination by universities in teaching appointments. The Congress that brought educational institutions within the purview of Title VII could not have contemplated that the courts would sit as "Super-Tenure Review Committee[s]"; their role was simply to root out discrimination.

Lieberman, 630 F.2d at 67 (citations and footnote omitted).

[70] *Id.* at 64.

[71] *Id.* at 65.

[72] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 n.4, 259 (1981).

[73] *Id.* at 259.

[74] International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977).

The *Sweeney* litigation[75] is both illustrative of the plaintiff's ultimate burden and significant as a case in which plaintiff *succeeded* in proving sex discrimination. Ms. Sweeney, the female plaintiff, succeeded in securing promotion to the rank of full professor, but not until after she had been denied promotions on two prior occasions. She challenged the two rejections as illegal sex discrimination under several federal statutes, including title VII, and sought back pay and a future pay adjustment to make her "whole" for the financial injury resulting from the wrongful delay of her rightful promotion. The district court found that the plaintiff had been a victim of sex discrimination in her second effort to gain promotion. The court ordered her promotion backdated to the time of the illegal denial with appropriate back pay.[76]

On appeal to the First Circuit in *Sweeney I* the defendants contended that the evidence was insufficient to support the district court's finding of discrimination, because the plaintiff had failed to prove that a discriminatory motive accounted for the denial of promotion.[77] The First Circuit correctly discerned that proof of discriminatory motive was indeed essential to the plaintiff's success in a disparate treatment case, but noted that such proof need *not* be direct.[78] In approving the district court's willingness to sift the facts, circumstances, and statistics for evidence of bias, the First Circuit rejected the noninterventionist stance adopted by some federal courts in academic cases.[79]

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[75] Sweeney v. Board of Trustees, 569 F.2d 169 (1st Cir.) [hereafter *Sweeney I*], *vacated and remanded per curiam*, 439 U.S. 24 (1978), *aff'd*, 604 F.2d 106 (1st Cir. 1979) [hereafter *Sweeney II*], *cert. denied*, 444 U.S. 1045 (1980).

[76] *Sweeney I*, 569 F.2d at 169 (discussing unpublished district court proceedings).

[77] The focus of defendant's appeal from the district court — and then to the Supreme Court — was on the debatable principle that the defendant had to "prove absence of discriminatory motive" since it was blessed with the advantage of "greater access to . . . evidence" bearing upon the question of discriminatory motive. *Id.* at 177. This debate over who has the burden of proof proved to be of little consequence to the final resolution of the *Sweeney* litigation. Of greater significance was the First Circuit's observation that "a plaintiff may rely upon inferential proof of discriminatory motive in a disparate treatment case." *Id.* at 177.

[78] *Id.* at 175.

[79] Citing a number of reported decisions in which female plaintiffs lost title VII challenges to the decisions of schools and colleges, the First Circuit commented:

> [W]e voice misgivings over one theme recurrent in those opinions: the notion that courts should keep "hands off" the salary, promotion, and hiring decisions of colleges and universities. This reluctance no doubt arises from the courts' recognition that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting. Nevertheless, we caution against permitting judicial deference to result in judicial abdication of a responsibility

As the First Circuit held, discriminatory intent may be inferred from proof of different treatment, from evidence of discriminatory atmosphere, from statistical proof of females faring poorly within the institution and from a wide variety of other facts and circumstances.[80] The court concluded that the inherent difficulty of proving discriminatory state-of-mind necessitated reliance on indirect proof: "Particularly in a college or university setting, where the level of sophistication is likely to be much higher than in other employment situations, direct evidence of sex discrimination will rarely be available."[81]

Thus, the First Circuit approved the district court's reliance on historical and statistical data as support for the plaintiff's allegation of sex discrimination. Only four women in the entire history of Keene State College had achieved the rank of full professor.[82] There existed a striking discrepancy between the many men and few women at the ranks of professor and associate professor despite the numerical majority of women at the instructor level.[83] No female had been promoted to the highest rank without a terminal degree, while several male professors advanced without such a degree.[84] Finally, there was evidence of the college's ineffective affirmative action plan[85] and sex-based wage discrimination.[86] These facts supplemented the testimony of various witnesses that sex bias did influence promotion decisions. The court concluded: "This bias may often be unconscious and unexpressed, but its potential for harm is greatest in reaching decisions on the basis of criteria which simply cannot be objectively measured or definitely stated."[87]

On remand after Supreme Court review,[88] the First Circuit reaffirmed in *Sweeney II* the findings of the district court that the plaintiff had been victimized by sex discrimination.[89] Although the controversy in *Sweeney I* about the burden of proof imposed upon the defendant

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> entrusted to the courts by Congress. That responsibility is simply to provide a forum for the litigation of complaints of sex discrimination in institutions of higher learning as readily as for other Title VII suits.

Id. at 176 (footnotes omitted).

[80] *Id.* at 177.

[81] *Id.* at 175.

[82] *Id.* at 178.

[83] *Id.* at 178 & n.19.

[84] *Id.* at 178.

[85] *Id.* at 179.

[86] *Id.*

[87] *Id.*

[88] *See* notes 40-42 and accompanying text *supra.*

[89] Sweeney v. Board of Trustees, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

after proof of the plaintiff's prima facie case was worthy of Supreme Court consideration, the subsequent opinion of the First Circuit in *Sweeney II* indicated that the judgment for the plaintiff never rested on the idea that the employer had to "prove" absence of discriminatory animus. The First Circuit affirmed the district court's conclusion that the reasons advanced by the defendant were not the real reasons for the plaintiff's nonpromotion.[90] The court adhered to its earlier holding that indirect proof may be sufficient. The court found sex bias based on evidence that the college's criticisms of Ms. Sweeney were either "insubstantial or fictitious," that women at the college were "evaluated by a stricter standard than their male colleagues," and that a discriminatory atmosphere prevailed on the faculty.[91] In sum, the First Circuit concluded that the district court reasonably inferred that Ms. Sweeney's failure to achieve promotion was "implicitly influenced by the fact that Sweeney was a woman."[92]

D. Discriminatory Intent: Techniques of Proof

The *Sweeney* litigation helps to illustrate the judicial emphasis on discriminatory intent as the critical element in a plaintiff's disparate treatment case. *Sweeney* also illuminates the necessity of a careful judicial search for evidence of bias. Plaintiffs must resort to indirect and inferential methods of demonstrating an employer's discriminatory purpose. The courts must be alert to subtle signs of prejudice or unfair treatment. Since discrimination is rarely explicit or blatant in recent cases, the diverse ways in which courts have gleaned evidence of discrimination should be kept clearly in mind.

These standards for determining intentional discrimination in a disparate treatment case under title VII are similar to those for finding purposeful discrimination in violation of the equal protection clause of the fourteenth amendment.[93] In both statutory and constitutional cases courts must search for inferences of improper motive, unless the requirement for proof of discriminatory intent is to be a guarantee for plaintiffs' failure. As Justice Powell noted in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*:[94] "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence

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[90] *Id.* at 111.
[91] *Id.* at 113-14.
[92] *Id.*
[93] Washington v. Davis, 426 U.S. 229, 238-39, 241-42 (1976).
[94] 429 U.S. 252 (1977).

of intent as may be available."[95] Justice Powell's summary of the available sources of such evidence is useful as a summary for evidence in a title VII disparate treatment case. First, the historical background of policies under challenge may be relevant to a plaintiff's allegation of discriminatory bias.[96] Although past discriminatory acts that have not been challenged in a timely manner cannot be the basis of a title VII remedy, evidence of such past discriminatory acts may constitute probative background evidence which bolsters a plaintiff's challenge against current practices.[97] Second, departures from standard operating procedure or other indications that the plaintiff has been treated unfairly can be evidence from which inferences of discriminatory treatment may be drawn. Deviations from past policies, standards, rules, or requirements may reflect disparity of treatment born of discriminatory intent.[98]

For example, even courts sensitive to the special conditions of the academic setting usually undertake careful scrutiny to determine whether procedures of decision are fair and asserted standards are applied equally.[99] This focus on the regularity of the decisionmaking process is not unique to the university academic setting.[100] However, in an academic environment, where standards of evaluation are general, subjective, and debatable, courts are particularly sensitive to the presence or absence of procedural safeguards in the employer's personnel practices.[101] The absence or extreme generality of standards, the absence of recorded evaluations, and the absence of minorities or females on employment decisionmaking bodies all "can add credence" to a plaintiff's allegations of employment discrimination.[102] On the other hand, although well-developed job descriptions and evaluation standards illuminate the fairness of employment practices, disparate treatment theory

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[95] *Id.* at 267.

[96] *Id.*

[97] United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

[98] *Village of Arlington Heights*, 429 U.S. at 267-68.

[99] *See, e.g.*, Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1357 (W.D. Pa. 1977) ("[W]here there are no criteria for promotion except the unfettered recommendation of a foreman this can become a ready mechanism to conceal discrimination.").

[100] *See, e.g.*, Stewart v. General Motors Corp., 542 F.2d 445, 450 (7th Cir. 1976) (hiring and promotions for industrial salaried and clerical positions); United States v. Hazelwood School Dist., 534 F.2d 805, 813 (8th Cir. 1976), *vacated on other grounds and remanded*, 433 U.S. 299 (1977) (standards for hiring primary and secondary school teachers); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) (promotions and transfers at auto assembly plant).

[101] *See, e.g.*, Davis v. Weidner, 596 F.2d 726, 732 (7th Cir. 1979) (analyzing university's procedural safeguards).

[102] *Id.*

does not require that employment "be rational, wise or well-considered — only that it be nondiscriminatory."[103] Still, many courts focus on regularity of procedure as an alternative to a more searching scrutiny of the substance of qualifications and standards. In the view of these courts, fair procedure is a symptom of good faith and effectively refutes inferences of discriminatory purpose.[104]

Kunda v. Muhlenberg College[105] is a case in which procedural irregularities were the basis for a finding of unlawful discrimination. An instructor in the department of physical education challenged the college's decisions not to promote her or grant her tenure. The plaintiff's allegations of sex discrimination rested, in part, on disparate treatment theory. The college denied the plaintiff's promotion because she had failed to achieve a "terminal degree." The court was careful not to question the qualifications established by the college, but noted that several male members of the department in which the plaintiff was working had been promoted, notwithstanding their failure to earn a terminal degree.[106] By contrast, with respect to the plaintiff's claim for tenure, the court emphasized that the terminal degree requirement had been applied evenhandedly and in a nondiscriminatory manner. The court nonetheless found discrimination as the result of differential treatment in counseling. Ms. Kunda, unlike male members of the department, had not been told that a master's degree would be a requirement for tenure.[107] The court's remedy was to grant her the opportunity to secure the terminal degree within two full school years, the period between the time she should have been counseled in 1972 and the adverse tenure decision in 1974. The court thus attempted to place the plaintiff in the position in which she would have been but for the unlawful discrimination.[108]

Judicial scrutiny of the academic decisionmaking process also involves careful sifting of facts and circumstances for overbroad generalizations, stereotypical attitudes, or bias on the part of influential par-

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[103] Powell v. Syracuse Univ., 580 F.2d 1150, 1157 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); *see also* Meehan v. New England School of Law, 522 F. Supp. 484, 498-99 (D. Mass. 1981) (no discriminatory purpose found, although defendant was less than skillful in its decisionmaking process).

[104] *See, e.g.*, Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1357-58 (W.D. Pa. 1977).

[105] 621 F.2d 532 (3d Cir. 1980).

[106] *Id.* at 539.

[107] *Id.*

[108] *Id.* at 549.

ticipants in the process.[109] For example, in *EEOC v. Tufts Institute of Learning*,[110] the district court granted the application of the Equal Employment Opportunity Commission (EEOC) for preliminary injunctive relief, because the EEOC sustained its burden of establishing a prima facie case for one of the teachers alleged to have been aggrieved by sex discrimination. The evidence demonstrated that a particular faculty member with a reputation of sex bias exerted significant influence in the decision against the female candidate. The court found that there was a reasonable likelihood that the plaintiff would prevail on the merits of the complaint by showing that this biased faculty member intentionally engaged in a course of conduct to deny a female faculty member tenure because she was female.[111]

A practical lesson from this introduction to the methods of proving bias is that the plaintiff's task is truly difficult. The plaintiff possesses only limited tools to demonstrate the most difficult of "facts" — a decisionmaker's state of mind. In light of the difficulty of satisfying the plaintiff's ultimate burden of proof, it is appropriate to consider to what extent the plaintiff should be allowed latitude to search for evidence of bias.

E. Privilege, Secrecy, and Academic Freedom

Although disparate treatment theory is already quite deferential to the needs and concerns of employers, federal courts continue to entertain arguments that the plaintiff's discovery in an academic employment discrimination case should be limited in order to protect the academic institution's interests in confidentiality and academic freedom. The judicial reluctance to allow plaintiffs a reasonable measure of latitude in searching for proof of pretext and discriminatory motive is a residue of the earlier noninterventionist policies of courts in academic cases.

Gray v. Board of Higher Education[112] reflects the uncertainty of some courts about the limits of a plaintiff's freedom to search for evi-

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[109] *See, e.g.*, Campbell v. Ramsey, 484 F. Supp. 190 (E.D. Ark. 1980) (remark that female plaintiff didn't really "need the money teaching" sufficient to establish prima facie case of discrimination; however, nondiscriminatory business reason not proved to be pretext), *aff'd*, 631 F.2d 597 (8th Cir. 1980); Hill v. Nettleton, 455 F. Supp. 514 (D. Colo. 1978) (sex discrimination based on university's stereotypical perception of intercollegiate athletics as a masculine domain).

[110] 421 F. Supp. 152 (D. Mass. 1975).

[111] *Id.* at 164-65.

[112] 692 F.2d 901 (2d Cir. 1982), *rev'g* 92 F.R.D. 87 (S.D.N.Y. 1981).

dence of bias. The plaintiff, a black professor at a state community college, had initiated an action under the Reconstruction Civil Rights statutes,[113] challenging the defendant's rejection of his application for reappointment and tenure. The plaintiff sought to discover the votes of two members of the Personnel and Budget Committee, and, apparently, the substance of the Committee's discussions and deliberations. The plaintiff's argument was a simple one: he had never received an explanation for the employer's adverse decisions. Evidence of the Committee's decision, deliberations, and reasoning was material — indeed, it was indispensable — to the plaintiff's case, which was premised on a theory of intentional race discrimination. The two members of the Committee refused to answer questions and moved for a protective order on the grounds that their secret votes and their discussions were privileged under first amendment guarantees of academic freedom. The district court granted the order because, among other reasons, it considered the confidentiality of the decisionmaking process to be essential to the peer review system for granting or withholding tenure.[114]

The Second Circuit reversed the interlocutory order, holding that the district court had denied the plaintiff a realistic opportunity to prove his case. As argued by the EEOC in an amicus brief: "The approach taken by the district court in restricting discovery in this case . . . would virtually foreclose proof of intentional discrimination in university promotion and tenure cases . . . ."[115] The Second Circuit agreed in light of the plaintiff's intentional discrimination theory.[116] The effort

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[113] 42 U.S.C. §§ 1981, 1983, 1985 (1976 & Supp. IV 1980).

[114] 92 F.R.D. 87 (S.D.N.Y. 1981):

> [T]he preservation of the confidentiality of voting with regard to tenure decisions is of value to society; . . . the communications made during such decision-making were made in reliance on the expectation that they would not be disclosed; . . . the element of confidentiality is necessary to the promotion of professional and harmonious relationships between the parties; and . . . the relationship is one which ought to be fostered . . . .

Id. at 93.

[115] *Gray*, 692 F.2d at 904; *see also* Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1347 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982). *But see* McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270 (N.D. Cal. 1975) (upholding confidentiality of tenure file, but suggesting review by impartial academician for evidence of discrimination).

[116] *Gray*, 692 F.2d at 905. The elements of the plaintiff's case under 42 U.S.C. § 1981 require a finding of intent. At the time of the decision in *Gray*, the Supreme Court had not decided whether intent was necessary in a § 1981 suit. However, in General Bldg. Contractors Ass'n v. Pennsylvania., 102 S. Ct. 3141 (1982) the Supreme Court resolved the issue, holding that discriminatory intent is a necessary element of the plaintiff's cause of action.

to demonstrate discriminatory intent on the part of the decisionmakers would be futile, without knowing precisely what the decisionmakers did and why. "[F]orced as Dr. Gray is to chase an invisible quarry, without at least knowing the votes, he can hardly be said to have a full and fair opportunity to demonstrate employment discrimination."[117]

Thus, in *Gray*, the appellate court held that the plaintiff was entitled to the requested discovery. However, the Second Circuit also intimated that some sort of "qualified privilege" against a plaintiff's discovery does exist in title VII cases brought against higher educational institutions, and suggested an appropriate balance between the academic employer's claim to academic freedom and the plaintiff's right to discover relevant evidence.[118] Adopting the position proposed by the American Association of University Professors (AAUP), the Second Circuit suggested that if unsuccessful candidates for promotion, reappointment, or tenure receive "a meaningful written statement of reasons" from the body charged with making the decision, and are accorded proper grievance procedures, courts should not require disclosure of individual votes.[119] The Second Circuit defended this privilege as "carefully designed to protect confidentiality and encourage a candid peer review process."[120]

Of course, the problem created by such a qualified privilege is whether the plaintiff will have adequate opportunity to search for telltale evidence of discriminatory intent. If the plaintiff receives only a collective explanation — which may or may not be meaningful or detailed — the plaintiff must still have an opportunity to inquire about the reality and sincerity of the offered reason. Even if such a statement "permits a plaintiff a fair opportunity to uncover evidence necessary to

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[117] 692 F.2d at 906.

[118] Rather than adopting a rule of absolute disclosure, in reckless disregard of the need for confidentiality, or adopting a rule of complete privilege that would frustrate reasonable challenges to the fairness of hiring decisions, our decision today holds that absent a statement of reasons, the balance tips toward discovery and away from recognition of privilege. A policy requiring disclosure of votes in the absence of stated reasons when they have been requested permits a plaintiff a fair opportunity to uncover evidence necessary to establishing a prima facie case of discrimination.

Id. at 908. For a further discussion and criticism of tenure committees' alleged academic freedom privilege of confidentiality, see Gregory, *Secrecy in University and College Tenure Deliberations: Placing Appropriate Limits on Academic Freedom,* 16 U.C. DAVIS L. REV. 1023 (1983) (*supra* this volume).

[119] *Gray*, 692 F.2d at 908.

[120] *Id.* at 907.

establishing a prima facie case of discrimination,"[121] this limited discovery right falls far short of the latitude necessary to allow plaintiff a "full and fair opportunity to demonstrate" that an offered legitimate, nondiscriminatory reason is but a pretext for improper bias.[122] The plaintiff would be denied the opportunity to test the reasoning underlying the meaningful statement by depositions in preparation for cross-examination. The plaintiff could not even begin to interrogate the actual decisionmakers to find whether "the asserted neutral basis was so ridden with error that the defendant could not honestly have relied upon it."[123] The plaintiff would be prevented from undertaking the careful, factual, and adversarial inquiry that might reveal the telltale signs of stereotypes, overbroad generalizations, and improper reasoning that are sometimes the only evidence of discrimination.

Unless academic freedom is to be distorted into a privilege to discriminate, the interests of confidentiality must be subordinated to the plaintiff's right to search for evidence of discriminatory bias. In the case of *In re Dinnan*,[124] the Fifth Circuit rejected a faculty member's claims of an academic freedom privilege in a factual context virtually indistinguishable from *Gray*. The court noted that a privilege is a right not to give testimony and that such privileges are based on the idea that certain societal values are more important than the search for truth in a federal courtroom. Still, the appellate court emphasized that privileges are disfavored. The fundamental principle is that the public has the right to everyone's evidence.[125]

The *Dinnan* court made several points of importance to the issue of an "academic freedom" privilege from discovery processes in an employment discrimination case. First, a plaintiff's suit under a federal antidiscrimination statute is not an effort to "suppress ideas"; to the contrary, "[i]deas may be suppressed just as effectively by denying tenure as by prohibiting the teaching of certain courses."[126] Since the judicial standards for assessment of disparate treatment cases involve substantial deference to the academic and professional judgments of educators, the only remaining inquiry is whether the decisionmakers are acting in good faith and for reasonable and lawful motives. This is

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[121] *Id.* at 908.

[122] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

[123] Lieberman v. Gant, 630 F.2d 60, 65 (2d Cir. 1980).

[124] 661 F.2d 426 (5th Cir. 1981), *cert. denied sub nom.* Dinnan v. Blaubergs, 457 U.S. 1106 (1982).

[125] *Id.* at 428-29.

[126] *Id.* at 430 (emphasis omitted).

a limited and narrow inquiry, not a broad investigation into political and philosophical viewpoints.

The *Dinnan* Court assumed that it was desirable for government — including the judiciary — to stay out of academic affairs. However, it professed to be unaware of how title VII discovery involved excessive intrusion in academic questions. Here, the court's analysis is not completely forthcoming, even if its eventual resolution of the issue is justifiable and commendable. When a recalcitrant faculty member's vote is scrutinized, and when his reasons, motivations and pyschology are dissected by hostile counsel in an adversarial process, there is real potential that the faculty member's ideas will be subject to a withering and critical scrutiny. In this process, there is also potential for chilling effects: the prospect of litigation may deter candid and critical evaluations of a faculty member who might bring suit under a statute like title VII. To avoid the time, expense, and pain of litigation, school officials might well feel pressure to tailor their decisions and conduct "to steer far wider of the unlawful zone"[127] of impermissible conduct than might be necessary or desirable from a legitimate academic perspective.

The danger of this litigation process is real. Nevertheless, courts must recognize that the evaluation of a faculty member's motivations and intent, the process of testing his view for bias, prejudice, and stereotyped generalizations is no different than placing a businessman or industrialist in the same position. Even if the title VII litigation process places the courts in the position of ultimate arbiter of a scholar's motives, it does not place the courts in the position of arbiter of a scholar's professional judgment. The courts do not second-guess the schools on the substance of qualifications in a disparate treatment case; the courts search for discriminatory motive. The intent of the parties must be determined and this can be done only by examining their acts, words, and motives.

II. DISPARATE IMPACT, BUSINESS NECESSITY, AND ACADEMIC AUTONOMY

A. Griggs v. Duke Power Co.: *The Theory of Disparate Impact*

In the early years of title VII's existence, plaintiffs' attorneys were faced with an enormous challenge: to escape the strait jacket of disparate treatment theory under which the plaintiff was obligated to prove the employer's biased state of mind. The objective of these attorneys was to develop a way to prove discrimination without proving discrimi-

[127] Speiser v. Randall, 357 U.S. 513, 526 (1958).

natory intent.

The development of this disparate impact theory climaxed in the decision of the Supreme Court in *Griggs v. Duke Power Co.*[128] In that historic case, the employer had been guilty of overt discrimination, including the segregation of black employees into the least desirable and lowest-paying department. In 1965, as the effectiveness date of title VII approached, the employer adopted a number of policies that were challenged in the *Griggs* litigation. Under the new plans, a high school diploma, which was already being used to select from among candidates for the all-white departments, would also be required for any transfer from the previously all-black department to the more desirable all-white departments. Applicants or employees would also be required to register satisfactory scores on two professionally developed aptitude tests in order to qualify for placement in the previously all-white departments.

The Supreme Court held that the effect of these requirements was to systematically exclude black applicants, who suffered from educational deprivations, from the traditionally all-white positions. Moreover, the employer was unable to demonstrate that the requirements had any reasonable relationship to job performance. The Supreme Court concluded that the employer's testing and diploma requirements were "fair in form, but discriminatory in operation" and thus constituted "artificial, arbitrary, and unnecessary barriers to employment" in violation of title VII.[129]

Griggs has been criticized for a number of reasons. There was evidence of discriminatory intent, which could have been a firm basis for decision on disparate treatment theory.[130] More significantly, the principles of *Griggs* were ill-defined and caused confusion in later cases.[131] Nevertheless, *Griggs* is law. The case establishes that if illegal disparate impact is shown, discriminatory intent need not be proved as a condition precedent to a plaintiff's recovery. After a plaintiff proves that a practice generally applicable to employees or applicants has a significant disparate impact against a protected class, the employer is required to show that the practice, policy, or procedure is justified by

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[128] 401 U.S. 424 (1971).

[129] *Id.* at 431.

[130] *See, e.g.*, Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 953 (1982).

[131] *See, e.g.*, Connecticut v. Teal, 102 S. Ct. 2525 (1982) (evidence that overall employment system has no disparate impact is irrelevant to whether one component of system does have illegal disparate impact).

"business necessity." Unlike disparate treatment cases, in which the employer must show merely a "rational relationship" between a challenged practice and legitimate business objectives, *Griggs* requires that the employer prove a "manifest relationship."[132]

An oft-quoted formulation of the "business necessity" concept from the Fourth Circuit demonstrates that the standard is usually defined in stringent terms:

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact: the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.[133]

This definition of business necessity contains several elements which illuminate the fact that the disparate impact doctrine, like the "strict scrutiny" standard applied in equal protection cases under the fourteenth amendment, is "strict in theory, and fatal in fact."[134] First, the business purpose cited by the employer must compete for a court's sympathies with the national policy of equal employment opportunity. Second, the test is necessity; the existence of equally effective alternatives that arguably result in less disparate impact against a protected class is fatal to the employer's operating procedure. Finally, the employer's practices must be effective in carrying out the cited business purpose. This last principle raises the problem of "validation." The employer must demonstrate an empirical correlation between its policies and its objectives.[135]

These standards of business necessity are stringent when applied to most industrial and commercial contexts. Fundamental to the analysis applied by the courts is the idea that employers cannot justify exclusionary practices merely by asserting a legitimate business purpose, a nondiscriminatory state of mind, or a reasonable basis for believing that

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[132] .401 U.S. at 432.

[133] Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) (footnotes omitted), *cert. dismissed*, 404 U.S. 1006 (1971).

[134] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361-62 (1978) (Brennan, J. dissenting) (quoting Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

[135] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

the challenged employment practices were job-related.[136] Instead, business necessity, validation, and job-relatedness must be demonstrated based on the relatively strict standards borrowed from industrial psychologists and adopted in the Federal Uniform Guidelines on Employee Selection Procedures.[137] Under these principles, employers can satisfy their burden of proof only by identifying the actual tasks and skills involved in the job at issue, and by demonstrating that the policies, standards, or procedures under challenge actually predict an ability to perform the identified job tasks or skills. In this context, the courts have generally required that validation be based upon either a demonstration that satisfaction of the employer's test or standard correlates with actual job performance (empirical validity), or proof that the test under challenge is only a sample of the actual job tasks (content validity).[138]

The business necessity standards born of the *Griggs* analysis have had an enormous impact on personnel practices throughout American industry. Objective tests,[139] height and weight requirements,[140] work experience requirements,[141] employers' insistence that employees be free of arrest or conviction records,[142] job evaluation systems based on supervisorial ratings,[143] high school diplomas,[144] and other credential requirements have been struck down repeatedly in all but the rare cases in which an employer demonstrated that the challenged practice was required by business necessity.[145]

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[136] *But see* Contreras v. City of Los Angeles, 656 F.2d 1267, 1277-80 (9th Cir. 1981) ("employment practices that significantly serve, but are neither required by nor necessary to, the employer's legitimate business interests" are not prohibited by title VII disparate impact theory).

[137] 29 C.F.R. §§ 1607.1 to .18 (1982) (first published at 43 Fed. Reg. 38,290 (1978)) [hereafter Uniform Guidelines]. The Uniform Guidelines, promulgated in 1978 by the four federal agencies chiefly involved in the enforcement of title VII, superseded the 1970 EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12,333 (1970) (original version promulgated Aug. 24, 1966).

[138] For a useful introduction to the methodology of validation, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 66-73 (1976).

[139] *E.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Guardians Ass'n v. Civil Serv. Comm'n, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981).

[140] *E.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977).

[141] *E.g.*, Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978).

[142] *E.g.*, Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).

[143] *E.g.*, Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972).

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

[145] *See, e.g.*, Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (college degree and flight experience legitimate qualifications for airline pilots).

B. Avoidance of Disparate Impact Theory in Academic Cases

The leap from disparate treatment theory to disparate impact theory did not lead to a parallel transformation in the judicial standards applicable to academic title VII cases. The courts generally have avoided applying the *Griggs* theory of disparate impact to higher educational institutions. This avoidance is evident primarily from those cases in which courts have approved academic credentials and subjective standards as appropriate bases for decision.[146]

Although some courts have rejected disparate impact claims that are based on inadequate statistics,[147] there is little dispute that the theory is applicable to academic institutions.[148] The controversy is whether the full rigors of the business necessity doctrine as applied to industrial and commercial settings should also be applied to educational institutions. Here the contrast between academic and nonacademic cases is most striking.

In *Scott v. University of Delaware*,[149] the plaintiff, a black sociology teacher, alleged that the defendant university failed to renew his contract because of his race. Scott alleged that the university requirement of a Ph.D. degree or its equivalent systematically excluded a disproportionate number of blacks.[150] He also alleged the university's "subjective employment criteria" and its "decentralized decision making process"

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[146] *See, e.g.*, Campbell v. Ramsay, 631 F.2d 597 (8th Cir. 1980); Hernandez-Cruz v. Fordham Univ., 521 F. Supp. 1059 (S.D.N.Y. 1981); EEOC v. Tufts Inst. of Learning 421 F. Supp. 152 (D. Mass. 1975); Pace College v. Commission on Human Rights, 38 N.Y.2d 28, 339 N.E.2d 880 (1975).

[147] *See, e.g.*, Davis v. Weidner, 596 F.2d 726, 732 n.5 (7th Cir. 1979) (small statistical sample); Carpenter v. Board of Regents, 30 Fair Empl. Prac. Cas. (BNA) 1395, 1419-21 (W.D. Wis. 1983) (plaintiff failed to allege and prove disparate impact as separate, alternative theory of recovery); Johnson v. Michigan State Univ., 547 F. Supp. 429 (W.D. Mich. 1982) (evidence fails to establish prima facie case of title VII violation under the disparate impact theory).

[148] *See, e.g.*, Peters v. Lieuallen, 693 F.2d 966 (9th Cir. 1982) (disparate impact theory applicable to subjective tests employed in search for administrative officer for Oregon State Board of Education); *see also* Bartholet, note 130 *supra*; Note, *Title VII on Campus Judicial Review of University Employment Decisions*, 82 COLUM. L. REV. 1206, 1228-29 (1982).

[149] 455 F. Supp. 1102 (D. Del. 1978), *aff'd in part, vacated and remanded in part*, 601 F.2d 76 (3d Cir. 1979).

[150] The university employed certain general, university-wide principles for appointments to the various ranks among full-time faculty: professor, associate professor, assistant professor, and instructor. A Ph.D. degree or its equivalent was required for the three ranks of professorship. *Id.* at 1106-07.

had an overall disparate impact against blacks.[151] These two allegations were the basis for plaintiff's disparate impact theory.[152]

The district court found that the "Ph.D. or its equivalent" requirement probably had a disparate impact on blacks.[153] Nevertheless, the court upheld this credential requirement because it was "justified by the legitimate interest of the University in hiring and advancing persons who are likely to be successful in adding to the fund of knowledge in their chosen disciplines and effective in the teaching of graduate students in those disciplines."[154] The university had urged the common sense view that the experience, knowledge, and skills developed while obtaining the Ph.D. are "reasonably related" to the ability to do research, think creatively, and add to the existing fund of knowledge through publications. All of this, the university argued, was related to scholarship — a prime function of a true university. Second, the university argued that the Ph.D. experience was reasonably related to an ability to teach students attempting to achieve a Ph.D.[155] As a matter of credibility, apparently, those teaching should have more extensive academic training than those being taught. The court accepted the university's analysis and found that the credential requirement was justified by business necessity, despite the fact that the evidence supporting the Ph.D. or equivalent requirement was, in the court's words, "surprisingly sparse."[156] The district court's reasoning reflects the prevalent judicial reluctance to second-guess the academic judgments of higher educational institutions.[157] The court also rejected the plaintiff's claims that

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[151] Within the boundaries of general, university-wide principles, the university followed a policy of decentralized decision-making. It required that each department adopt more specific criteria, establish its own procedural rules, and make its own recommendations on appointments. The departments were required to submit written statements regarding their personnel policies. These policies were subject to the approval of the university tenure and promotion committee and the provost. *Id.* at 1107.

[152] The plaintiff also alleged that the university intentionally discriminated against blacks because of a more critical evaluation of black faculty members compared to evaluations of some of the whites. This allegation was the essence of plaintiff's separate disparate treatment claim. *Id.* at 1117-23.

[153] *Id.* at 1126.

[154] *Id.*

[155] *Id.* at 1125.

[156] *Id.* at 1124.

[157] The University regards the expansion of knowledge as one of its primary missions and requires scholarship activity from virtually all of its faculty. While plaintiff is critical of the emphasis currently being placed on scholarly research and publication by the University, the University's choice of mission is not a subject for judicial review. The purpose of Title VII is not to dictate what the function or business of an institution will be or what

the university's subjectivity and decentralization in hiring resulted in disparate impact in hiring.[158]

The Supreme Court appears to have acquiesced in the judicial reluctance to apply rigorous business necessity standards to academic judgments. In *National Education Association v. South Carolina*,[159] the Supreme Court summarily affirmed the judgment of a three-judge panel of the district court over the dissent of Justices White and Brennan. The United States had brought the action against the State of South Carolina and its primary and secondary educational institutions on the basis of alleged violations of title VII and the fourteenth amendment.

For over thirty years South Carolina used scores on the National Teachers Examinations (NTE) to make decisions on the certification of teachers and the amount of state aid payable to local school districts. Local school boards within the state used NTE scores for selection and compensation of teachers. Also, between 1969 and 1976 the state required a minimum score for certification. After an exhaustive validation study by the Educational Testing Service (ETS) and after a critical review and evaluation of the study by a board of education committee, South Carolina established new certification requirements involving different minimum scores in various areas of teaching specialization.

The plaintiffs challenged the use of the NTE on the grounds that

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> tasks and responsibilities its employees will undertake. Its sole purpose is to eliminate employment discrimination against the classes which it protects and what it precludes is hiring criteria which have a disparate impact on a protected class and which do not bear a demonstrable relationship to responsibilities of their position, whatever they may be.

Id. at 1126 (footnote omitted).

[158] *Id.* at 1127-30. Interestingly, the court's findings on this issue appear to have been influenced by the failure of the plaintiff to prove the existence of any example of disparate treatment:

> Despite the voluminous testimony in this case, not one individual has been identified who claims to have been discriminated against in the hiring process on grounds of race, and, as earlier indicated, at least one of plaintiff's witnesses familiar with the University scene over a substantial period of time testified that he knew of no black who had been interested in employment with the University and who had been unfairly denied a job opportunity. While . . . a plaintiff in a disparate impact case is entitled to rely solely on statistics, the absence of any identified victim is nevertheless significant.

Id. at 1129-30. Since the court held that disparate impact had not been proved, it did not reach the issue of whether the university practices could be justified by business necessity.

[159] 434 U.S. 1026 (1978), *aff'g mem.* United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977).

blacks tended to fail to achieve the required minimum score more frequently than whites. This disparate impact created a racial classification, in the plaintiff's view, in violation of title VII and the equal protection clause of the fourteenth amendment. Under the Supreme Court's decision in *Washington v. Davis*,[160] establishment of a constitutional violation required proof of discriminatory purpose in the use of the tests. The district court was unable to find such intent, despite South Carolina's history of a dual pay system[161] and the state's five-year delay in implementing a unitary system after the Fourth Circuit struck down a dual pay system in another state.[162]

The district court found that South Carolina presented "sufficiently trustworthy" evidence of validation to satisfy the business necessity requirement of title VII.[163] However, the commentary utilized by the court to reach this result is striking, for its contrasts with other more rigorous formulations of the business necessity doctrine.

> [The] "business necessity" doctrine appears neither in the explicit language nor in the legislative history of Title VII. The court in *Griggs* and subsequent Title VII cases did not establish judicial standards for determining whether a particular practice is a business necessity. . . .
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> We think that *Griggs* did not import into Title VII law the concept of "compelling interest" developed as a part of the "strict scrutiny" standard for assessing certain classifications under the Fourteenth Amendment. Under this concept, the court would balance the disparate impact on blacks against the business purpose of the employer and uphold the business practice only if it were sufficiently "compelling" to overcome the disparate impact.[164]

The contrast between the relaxed standard of validation employed by the district court in *South Carolina* and that employed in nonacademic title VII cases was illuminated by Justice White in his dissenting opinion.[165] First, South Carolina used the NTE in hiring and classifying teachers despite the advice of the test's authors that it should not be

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[160] 426 U.S. 229 (1976).

[161] Prior to 1945, South Carolina paid black teachers less than white teachers, even if both had the same credentials and responsibilities. United States v. South Carolina, 445 F. Supp. at 1105.

[162] *Id.* at 1106. In Alston v. School Board, 112 F.2d 992 (4th Cir. 1940), *cert. denied*, 311 U.S. 693 (1940), the dual pay system of Virginia was declared unconstitutional.

[163] United States v. Sourth Carolina, 445 F. Supp. at 1112. South Carolina relied on a validity study conducted by ETS. The study, described by the district court as "novel," sought to measure content validity by measuring the degree to which the content of the tests matched the content of teacher training programs.

[164] *Id.* at 1115.

[165] National Educ. Ass'n v. South Carolina, 434 U.S. at 1026-29.

used in such a way. Second, the evidence of disparate impact was patent: the NTE disqualified a greater proportion of black than white applicants and it placed a greater percentage of black teachers in lower paying classifications. Third, South Carolina's evidence of "validation" was found by the district court to be sufficient, even though ETS's validation study showed that the NTE measured not job aptitude but, at best, the familiarity of the candidate with the content of certain teacher training courses.[166] The authors of the NTE advised against using it either for salary determination or as the sole criterion for initial certification. Justice White concluded that South Carolina's use of the NTE was not justified by business necessity as defined by *Griggs*, because the test scores did not "bear some 'manifest relationship to the employment in question,' and it is insufficient for the employer 'to demonstrate some rational basis for the challenged practices.' "[167]

C. Academic Freedom and Business Necessity

The justification for avoiding disparate impact theory in academic cases is rarely expressed explicitly. Some courts appear willing to defer to the greater expertise of academic decisionmakers. Other courts express doubts about the adequacy of statistical proof of disparate impact.[168] Perhaps this avoidance is symptomatic of a general judicial tendency to relax standards in cases involving jobs which might be categorized as "professional," "high-status," or "elite."[169] However, it appears that in title VII cases brought against colleges and universities, these relaxed standards are more the result of judicial protection of the constitutional interests in academic freedom and institutional autonomy. The academic freedom to decide "who may teach"[170] is a relevant factor in employment discrimination cases.[171] This judicial solicitude for academic autonomy is supported by the principle articulated by Justice Frankfurter that the "essential freedom" of the academy should not be

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[166] *Id.* at 1027.

[167] *Id.* at 1027-28 (citations omitted).

[168] *See, e.g.*, Davis v. Weidner, 596 F.2d 726, 732 n.5 (7th Cir. 1979) (plaintiff's statistics found unpersuasive because of small size of relevant sample).

[169] Bartholet, note 130 *supra*, at 948 n.2.

[170] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

[171] *See, e.g.*, Smith v. University of N.C. 632 F.2d 316, 345 (4th Cir. 1980); Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980); Kunda v. Muhlenberg College, 621 F.2d 532, 547-48 (3d Cir. 1980); Faro v. New York Univ., 502 F.2d 1229, 1231-32 (2d Cir. 1974); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1353-54 (W.D. Pa. 1977); Keddie v. Pennsylvania State Univ., 412 F. Supp. 1264, 1270 (M.D. Pa. 1976).

restricted except for compelling reasons.[172]

It is in this context that courts must evaluate the business necessity of academic qualifications. An educator must be able to compete in the intellectual marketplace. Aside from hard work and the power of ideas, a professor's value is generally assumed to be force of intellect, creativity, rapport with students and colleagues, teaching ability and a host of other intangible qualities which only the most optimistic social scientist believes can be measured by statistics.[173] These intangible qualities can only be discerned and judged on the basis of subjective criteria, and even then not without debate and controversy. An educator must deal with resistance from the advocates of conventional ideas and from skeptical colleagues. The educator must contend with the subjective judgments, intellectual criticism, and occasionally bitter opposition of other academicians on issues of controversy. Persuasiveness, teaching skill, and academic merit are in the eye of the beholder. Unless the government is to arrogate for itself the right to make those judgments for university and college decisionmaking bodies, academic autonomy requires a deference to the capacity of academic institutions for self-government based on reasonable and professional standards. No legislator and no judge can evaluate a faculty member's force of intellect except at the peril of government becoming the ultimate arbiter of academic qualifications.

Subjectivity in academic standards inheres in the nature of academic merit. The great fear of federal courts is that title VII, if applied to educational institutions with the same rigor as applied to industry and business, will result in de facto abolition of such standards, at least as applied to members of protected classes. This fear is not unreasonable.[174]

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[172] Sweezy v. New Hampshire, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring) ("Political power must abstain from intrusion in this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.").

[173] Powell v. Syracuse Univ., 580 F.2d 1150, 1157 (2d Cir.) (Moore, J., concurring), *cert. denied*, 439 U.S. 984 (1978).

[174] One of the most colorful articulations of this fear appears in Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974):

> Dr. Faro, in effect, envisions herself as a modern Jeanne d'Arc fighting for the rights of embattled womanhood on an academic battlefield, facing a solid phalanx of men and male faculty prejudice.
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> . . . .
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> . . . *[She] would remove any subjective judgments by her faculty colleagues in the decision-making process by having the courts examine "the university's recruitment, compensation, promotion and termination [proce-*

In disparate impact cases, the employer bears the burden of proving the business necessity of challenged qualifications. Unlike the evidentiary burdens in disparate treatment cases, there is magic in the burden of proof respecting business necessity in a disparate impact case. If an employer's qualifications were presumed valid — and if the plaintiff had to prove that the qualifications were arbitrary or unnecessary — there would usually be sufficient confusion to ensure deference to the judgment of the employer. This guarantee of confusion arises from the inevitable controversies surrounding individual evaluations of academic merit. However, if qualifications are presumed to be arbitrary or unnecessary unless the employer "proves" business necessity — as current disparate impact jurisprudence in nonacademic cases requires — the risk of confusion and nonpersuasion generally will result in the plaintiff's victory. In other words, if the standards are matters about which reasonable persons can differ, the controversy will likely be resolved against the employer who is burdened with the duty to prove the worth of qualifications. This situation is inevitable in cases involving subjective judgments since adequate empirical evidence of validation is so difficult to attain.

Even the EEOC has recognized that the requirement of empirical validation might not be applicable to all types of disparate impact cases. In *Scott*, the EEOC initially suggested in oral argument that "formal validation" of a Ph.D. or equivalent requirement was not necessary. Ultimately, the EEOC withdrew from this position and declined to

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> *dures] and by analyzing the way these procedures are applied to the claimant personally*". . . This argument might well lend itself to a *reductio ad absurdum* rebuttal. Such a procedure, in effect, would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful. . . . But such a procedure would require a discriminating analysis of the qualifications of each candidate for hiring or advancement, taking into consideration his or her educational experience, the specifications of the particular position open and, of great importance, the personality of the candidate.
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> In practically all walks of life, especially in business and the professions, someone must be charged with the ultimate responsibility of making a final decision — even as are the courts. The computer, highly developed though it be, is not yet qualified to digest the punch cards of an entire faculty and advise the waiting and expectant onlookers of its decision as to hiring or promotion.

Id. at 1231-32 (citation omitted) (emphasis added).

take a stand on the question.[175] This indecisiveness is reflected in the Uniform Guidelines on Employer Selection Procedures[176] which provide that "[t]here are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate [disparate] impact . . . ."[177] The guidelines go on to specify the appropriate validation for "informal or unscored procedures," which includes the employer's right to try to "otherwise justify continued use of the procedure in accord with Federal law" if it is impossible to "modify the procedure to one which is a formal, scored or quantified measure or combination of measures."[178] In short, it is by no means clear that the rigorous standards of business necessity *can* be applied to the subjective standards of academicians. Formal validation may not be "technically feasible."[179] Certainly, the subjective devices most commonly employed

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[175] Scott v. University of Del., 455 F. Supp. 1102, 1125 n.64 (D. Del. 1978).

[176] Uniform Guidelines, note 137 *supra.*

[177] 29 C.F.R. § 1607.6(B) (1982).

[178] *Id.* § 1607.6(B)(1); *see also* Hawkins v. Anheuser-Busch, Inc., 30 Fair Empl. Prac. Cas. (BNA) 1170, 1175 (8th Cir. 1983) ("A validation study . . . is the preferred type of evidence in a disparate impact case . . . . We cannot say, however, that validation studies are always required, and we are not willing to hold under the facts of this case that such evidence was required here.").

[179] Hunt & Pazuniak, *Special Problems in Litigating Upper Level Employment Discrimination Cases*, 4 DEL. J. CORP. L. 114, 128 (1978). It is possible, of course, to urge that the strict business necessity requirements should be applicable only to manifestly arbitrary job requirements such as the high school degree requirement for shoveling coal in *Griggs.* Certainly, the courts and commentators have expressed uneasiness over the apparent unavailability of formal validation data for some basic requirements for skilled positions. *See, e.g.*, Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17:

> All recognized scientific validation methods require the use of elaborate, formal procedures which are difficult, time-consuming, and costly. As a result, no significant group of employers has routinely used any of these methods to ascertain the worth of all non-test selection devices . . . . What they have relied upon instead is what psychometricians call "face validity."
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> Face validity is not a scientific form of validation. It is only a modern name for the basic, centuries-old standard of Anglo-American law — reasonableness — and business and factory managers are hardly the only ones who rely upon it in selecting people for jobs. Face validity or reasonableness is what courts, legislatures and the professions also rely upon when they insist that a law degree is required for the practice of law, a psychology degree for the practice of psychology, or training in education for the practice of teaching. These requirements have never been vali-

in educational institutions and professional positions rarely have been validated.[180] It is therefore not surprising that federal courts generally have concluded that the intangible qualities required of a professor "cannot be measured by objective standards."[181]

If the formal validation normally required by the EEOC and federal courts is not technically feasible, any requirement of such validation transforms disparate impact analysis into a mandate for proportional representation. Yet, even *Griggs* clearly stated that title VII's purpose in eliminating unwarranted barriers to minority employment was not to mandate proportional representation:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[182]

In short, despite the caricatures offered by some advocates of equal employment opportunity — and by some of the most vehement critics of title VII — the goal of title VII is not proportional representation or the abolition of legitimate qualifications.[183] Although irrelevant creden-

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> dated. They probably could not be validated. Face validity has simply been accepted and enforced on the basis of its inherent plausibility for the jobs enumerated.

Id. at 18-19.

[180] Bartholet, note 130 *supra*, at 988. It must be added that Professor Bartholet concludes that the rarity of successful validation of "subjective devices most commonly used in upper level employment" argues only for "the need to do more validation." *Id.*

[181] Lewis v. Chicago State College, 299 F. Supp. 1357 (N.D. Ill. 1969), *quoted in* Powell v. Syracuse Univ., 580 F.2d 1150, 1157 (2d Cir.) (Moore, J., concurring), *cert. denied*, 439 U.S. 984 (1978).

[182] Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). *But see* United Steelworkers v. Weber, 443 U.S. 193 (1979) (title VII does not prohibit voluntary affirmative action plans designed to eliminate manifest racial imbalance).

[183] Section 703(j) of title VII provides:

> Noting contained in [title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . because of . . . race, color, religion, sex or national origin . . . on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin . . . .

42 U.S.C. § 2000e-2j (1976); *see also* Contreras v. City of Los Angeles, 656 F.2d 1267, (9th Cir. 1981):

> Title VII does not ultimately focus on ideal social distributions of persons

tials should not be required for any job, it defies logic and law to suggest that an education credential for a position as an educator is arbitrary. In *Griggs*, the Supreme Court rightly held that educational deprivation — a consequence of historic race discrimination — should not prevent an individual from employment in, for example, a coal-handling department.[184] Educational deprivations, however, do handicap individuals from performing as educators. Legitimate standards to screen out individuals who have been handicapped by an inadequate education have a "manifest relationship" to the job of a teacher or educator.[185] To abolish the use of reasonable standards in the name of equal opportunity means that a member of a protected class without the requisite educational attainments should still be given a place in the academic world because society has deprived that individual of the means to do the job well. This anomaly is not mandated by title VII.

D. A Suggested Approach to Business Necessity in Academic Cases

The magic of the burden of proof should not be misused to achieve either a de facto abolition of subjective or exacting academic standards or automatic judicial approval for all such standards. The key to a reasoned, principled, and limited deference to neutral, apparently fair judgments of academic employers is a well-balanced allocation of evidentiary burdens. The *South Carolina* case is evidence of the real possibility that avoidance of reasonable business necessity standards can make the disparate impact analysis all but meaningless.[186] Also, the history of *Griggs*-type litigation in the nonacademic setting does illuminate the fact that many policies and standards assumed to be valid were not

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> of various races and both sexes. Instead it is concerned with combating culpable discrimination. In disparate impact cases, culpable discrimination takes the form of business decisions that have a discriminatory impact and are not justified by their job-relatedness.

Id. at 1275 n.5.

[184] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[185] *Id.* at 432. The Court also stated:

> What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. . . . What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

Id. at 436.

[186] National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978), *aff'g mem.* United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *discussed in* notes 159-67 and accompanying text *supra.*

supported by even minimal evidence when challenged.[187]

After the plaintiff has presented sufficient statistical evidence to demonstrate that a challenged practice does cause substantial disparate impact, the employer should still be required to come forward with evidence justifying the academic practice. Based on *Griggs*, the employer's evidence should prove more than that the challenged policies are common in education or superficially rational.[188] First, the employer should present substantial evidence that the standards are designed to achieve an important educational objective.[189] The importance of the cited objective is most easily demonstrated by showing that the objective relates to the essence of the educational function.[190] Finally, the employer should be required to demonstrate that there is substantial evidence of a policy's effectiveness and validity that was, in fact, believed by educators acting in good faith. This final element of the employer's burden of proof is a fusion of objective and subjective standards. The academic employers would be required to show that there was an objectively reasonable basis for adopting the challenged policies at the time of adoption, *and* that the decisionmakers actually relied upon the justification at the time of decision. This suggested approach is designed to avoid excessive judicial deference to after-the-fact rationalizations, to speculative motivations for adopting the challenged policy, and to such practices as existed in *South Carolina*, in which even the authors of the challenged test did not recommend the use to which it was being put by the state.[191] Equally important, the objective of such an intermediate standard would be to insure that educators are not prevented from acting on their best judgments, if there is substantial evidence to support the potential validity of such judgments. That a particular standard of an academic institution might be subject to reasonable criticism or even considerable controversy should not be a

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[187] Professor Bartholet provides examples of this fact in a discussion of *Griggs*' impact on traditional employment systems. Bartholet, note 130 *supra*, at 991-98.

[188] Such a formulation is precisely the type of overly deferential standard which *Griggs* rejected. See notes 133-36 and accompanying text *supra*.

[189] See notes 192-93 and accompanying text *infra*; *see also* Lerner, note 179 *supra*, at 38-39.

[190] A requirement that the standard relate to the "essence" of a particular business is well-established in disparate impact cases. It is also a component of judicial interpretation of the "bona fide occupational qualification" exception to the general prohibitions of title VII against intentional discrimination. *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971); Weeks v. Southern Bell Tel. & Teleg. Co., 408 F.2d 228 (5th Cir. 1969).

[191] National Educ. Ass'n v. South Carolina, 434 U.S. at 1026 (White, J., dissenting).

basis for a federal court to treat such a standard automatically as invalid. Disparate impact theory and business necessity doctrine should not be principles that require academic institutions to act only on those standards that are beyond dispute, controversy, or doubt. To borrow from Justice Brennan's attempt to articulate an intermediate standard in an equal protection context, "it is inappropriate to inquire only whether there is *any* conceivable basis that might sustain" employer policies causing unintended disparate impact.[192] "Instead, to justify such a [policy] an important and articulated purpose for its use must be shown."[193] For policies that have been proved to have a disparate impact, the standard of review "should be strict—not 'strict' in theory and fatal in fact, because it is stigma [born of discriminatory motive] that causes fatality—but strict and searching nonetheless."[194]

CONCLUSION

Although federal courts initially hesitated to enforce title VII in higher education cases because of a fear of excessive judicial intrusion into legitimate academic activity, more recent opinions demonstrate that the first amendment interest in academic freedom will not be distorted into a freedom to discriminate. In particular, courts have been searching for the overbroad generalizations and stereotypical assumptions that are so often the telltale signs of illegal disparate treatment. Educational institutions cannot justify a policy of judicial deference to biased judgments, in light of the congressional decision that educational institutions are subject to title VII.

Nevertheless, academic freedom means that government shall not sit in judgment of the substance of the political, philosophical, or academic policies of higher educational institutions. The requirement that an academic employer demonstrate the necessity of any policies or standards having a disparate impact must be interpreted in light of the legitimate constitutional interest in academic autonomy. A principled and measured deference to the right of educators to judge other educators according to professional standards is not a decision to tolerate discrimination. It is a recognition that academic evaluations cannot be easily or

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[192] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 361 (Brennan, J., dissenting) (emphasis added). Although the intermediate equal protection standard has never been used in the context of racial discrimination, it has been applied in the context of alienage, *see, e.g.*, Plyer v. Doe, 102 S. Ct. 2382 (1982), and gender, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

[193] *Bakke*, 438 U.S. at 361.

[194] *Id.* at 362.

certainly reduced to objective quantification and statistical analysis.[195] Therefore, the right to make academic evaluations that are demonstrably reasonable should be regarded as essential to the business of education and to academic freedom.

[195] *But see* Cooper, *Title VII in the Academy: Barriers to Equality for Faculty Women*, 16 U.C. DAVIS L. REV. 975 (1983) (*supra* this volume) (proposal for more extensive use of statistics in title VII cases).