

1-1981

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### Recommended Citation

Joel W. Friedman, Congress, the Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles, 34 *Vanderbilt Law Review* 37 (1981)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol34/iss1/2>

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# Congress, the Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles

*Joel William Friedman\**

## I. INTRODUCTION

At the close of the nineteenth century, one-fifth of all university and college faculty members were women.<sup>1</sup> During the twentieth century, while minority group members and women have achieved greater assimilation into many sectors of the labor market, women seeking teaching positions with institutions of higher education unfortunately have not benefited from such advances. In fact, not only has their situation failed to improve, it has actually deteriorated over the last forty years.<sup>2</sup> A recent study by the former United States Department of Health, Education, and Welfare (HEW) reported that while the percentage of women on university faculties rose to a high of 27.6% in 1939-1940,<sup>3</sup> it dropped to 25.4% in 1977-1978.<sup>4</sup> At the same time, however, there has been a dramatic increase in both the number and the percentage of doctoral degrees awarded to women.<sup>5</sup>

These two statistical trends suggest that the inability of women to improve their collective position in the academic labor market is not the result of a dearth of qualified applicants. Rather, this situation is at least in part the result of discriminatory hiring

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1. In 1978, the United States Department of Health, Education, and Welfare (now the Department of Health and Human Services) reported that women constituted 19.76% of the university and college faculty in the 1899-1900 academic year. W. GRANT & C. LUND, *DIGEST OF EDUCATION STATISTICS* 100 (1979).

2. See 118 CONG. REC. 5803 (1972) (remarks of Sen. Bayh).

3. W. GRANT & C. LUND, *supra* note 1, at 100.

4. *Id.* at 104.

5. In 1969-1970, women received 3,976, or 13.3%, of the 29,866 doctorates awarded that year. This number more than doubled to 8,090, or 24.3%, of the doctorates received in 1976-1977. *Id.* at 100.

and promotion practices that have gone virtually unchecked by the judiciary despite the enactment by Congress of two antidiscrimination statutes designed to promote equal employment opportunity in this field. The courts' refusal to subject university employment decisionmaking to serious scrutiny has left many victims of alleged sex-based discrimination remediless and has thereby denied women their proportionate share of faculty positions.<sup>6</sup>

Since its enactment, Title VII of the Civil Rights Act of 1964<sup>7</sup> has been the preeminent weapon in efforts to eliminate employment practices that discriminate on the basis of race, color, religion, national origin, or sex. One of Title VII's major weaknesses, though, was that, as originally enacted, it did not apply to educational institutions.<sup>8</sup> In 1972 Congress tried to remedy this omission by extending the statute's protections to school employees.<sup>9</sup> This amendment, however, has been undermined by the unusually passive and deferential posture adopted by most courts in reviewing challenges under Title VII to hiring, promotion, and tenure decisions made by university authorities.<sup>10</sup> Most courts have refrained

6. Moreover, those women who have been able to secure faculty employment are disproportionately represented at the lower levels of the academic hierarchy. For the 1975-1976 academic year they were divided as follows: 9.1% full professor; 16.1% associate professor; 33.4% assistant professor; 32.7% instructor; 2.3% lecturer; and 6% undesignated. R. BEAZLEY, SALARIES, TENURE, AND FULL-TIME INSTRUCTIONAL FACULTY IN INSTITUTIONS OF HIGHER EDUCATION, 1975-76, at 2 (1976), reprinted in 1978-79 STANDARD EDUCATION ALMANAC 312 (11th ed. 1978). In 1977-1978, women constituted the following percentages of the total number of faculty at each rank: 9.5% full professor; 18.2% associate professor; 31.6% assistant professor; 50.6% instructor; and 43.4% lecturer. See W. GRANT & C. LUND, *supra* note 1, at 104.

In addition, women professors are less likely to receive tenure than their male counterparts. In 1977-1978, 60.6% of all male faculty members were tenured, as compared to 42.5% of the female teachers. HIGHER EDUCATION EXCHANGE 722 (J. Mitchell ed. 1978).

7. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

8. 42 U.S.C. § 2000e-1 (1976) (amended 1972). There is scant legislative history explaining the exclusion of educational institutions. See *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), cert. denied, 439 U.S. 984 (1978); Divine, *Women in the Academy: Sex Discrimination in University Faculty Hiring and Promotion*, 5 J.L. & Educ. 429, 429 n.4 (1976). This exemption was not included in the original Senate bill, but, rather, was part of an amendment offered by Senators Dirksen and Mansfield and subsequently adopted by both houses of Congress. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 1004 (1968).

9. Equal Employment Opportunity Act of 1972, § 3, 42 U.S.C. § 2000e-1 (1976) (amending 42 U.S.C. § 2000e-1 (1970)).

10. See *Powell v. Syracuse Univ.*, 580 F.2d 1150 (2d Cir.), cert. denied, 439 U.S. 984 (1978); *Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974); *Campbell v. Ramsay*, 484 F. Supp. 190 (E.D. Ark. 1980); *Shea v. Gant*, 22 Fair Empl. Prac. Cas. 371 (D. Conn. 1979); *Cooper v. University of Tex.*, 482 F. Supp. 187 (N.D. Tex. 1979); *Lieberman v. Gant*, 474 F. Supp. 848 (D. Conn. 1979), *aff'd*, 23 Fair Empl. Prac. Cas. 505 (2d Cir. July 17, 1980); *Lombard v. School Dist. of Erie*, 463 F. Supp. 566 (W.D. Pa. 1978); *Flucker v. Fox Chapel Area*

from subjecting these decisions to the careful and searching inquiry normally associated with Title VII actions.<sup>11</sup> Instead, the courts have chosen to uncritically accept or acquiesce to the defendants' explanations or justifications.

The courts' reluctance to subject the academic community's decisionmaking process to meaningful external review has had a debilitating impact on the ability of women academics to exercise their statutory rights to equal employment opportunity. This judicial diffidence has rendered impotent a statute expressly enacted by Congress to eradicate a long tradition of sex discrimination in an important sector of the labor market.<sup>12</sup> While this "academic abstention"<sup>13</sup> usually is couched in terms of avoiding judicial intrusion into university academic affairs,<sup>14</sup> the courts, in effect, have abdicated their role as ultimate enforcers of a clearly expressed national policy against gender-based discrimination in employment.

Moreover, Title VII is not the only area in which the judiciary has frustrated Congress' efforts to erect effective safeguards against the sexually discriminatory employment practices of institutions of higher education. Title IX of the Education Amendments of 1972, enacted to protect the right of all persons not to be denied the opportunity to participate in and benefit from federally funded programs because of their sex, has been held by most courts to be inapplicable to claims of employment discrimination. This restrictive construction, which is inconsistent with the con-

School Dist., 461 F. Supp. 1203 (W.D. Pa. 1978); *Smith v. University of N.C.*, 18 Fair Empl. Prac. Cas. 913 (M.D.N.C. 1978); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977); *Cussler v. University of Md.*, 430 F. Supp. 602 (D. Md. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976); *Van de Vate v. Boling*, 379 F. Supp. 925 (E.D. Tenn. 1974); *Green v. Board of Regents of Tex. Tech Univ.*, 335 F. Supp. 249 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594 (5th Cir. 1973).

11. See Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 889 n.61 (1979); Note, *Employment Discrimination—New Limitations on Appellate Review of Teacher Employment Discrimination Suits*, 54 N.C. L. REV. 1034, 1036 (1976).

12. See *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152, 157 (D. Mass. 1975); *Discrimination Against Women: Hearings on Section 805 of H.R. 16,098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. 123, 196, 312, 645 (1970); 118 CONG. REC. 5803 (1972) (remarks of Sen. Bayh).

13. See H. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 14-17 (1979).

14. See, e.g., *Megill v. Board of Regents of Fla.*, 541 F.2d 1073, 1077 (5th Cir. 1976); *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974); *Cussler v. University of Md.*, 430 F. Supp. 602, 605-06 (D. Md. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857, 868 (D. Vt. 1976); *Van de Vate v. Boling*, 379 F. Supp. 925, 929 (E.D. Tenn. 1974); *Green v. Board of Regents of Tex. Tech Univ.*, 335 F. Supp. 249, 250 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594 (5th Cir. 1973); *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1360 (N.D. Ill. 1969).

gressional intent underlying the enactment of Title IX, has effectively foreclosed the only real alternative to Title VII that teachers could utilize to attack allegedly discriminatory employment policies. Consequently, many teachers who are now the victims of sex discrimination by their employers have no effective means to redress their grievances.

This Article will examine the manner in which the federal courts have handled sex-based employment discrimination claims against colleges and universities. Specifically, the Article will suggest that most such judicial opinions have construed and applied the applicable federal laws<sup>15</sup> in a manner inconsistent with Congress' articulated desire to promote equal employment opportunity in, and to remove the taint of sex-biased decisionmaking from, the academic profession. In light of this judicial misconstruction of the remedial statutes, the Article proposes a different framework for analyzing Title VII and Title IX claims that will more adequately promote Congress' twin objectives.

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15. Titles VII and IX are not the exclusive federal statutory remedies for employment discrimination by private or public employers. Section 1 of the Civil Rights Act of 1866, which was reenacted in 1870, provides a private cause of action against employment discrimination in both the private and nonfederal public sectors. 42 U.S.C. § 1981 (1976); see *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976); *Brown v. General Servs. Administration*, 424 U.S. 820, 824-35 (1976) (§ 1981 inapplicable to claims of federal government employees); *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333, 1334 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975) (§ 1981 applies to action against municipal police force). The overwhelming majority of courts, however, have held that the statute does not apply to claims of sex-based bias. See, e.g., *Raether v. Phillips*, 401 F. Supp. 1393, 1396 (W.D. Va. 1975); *Strunk v. Western Ky. Univ.*, 11 Fair Empl. Prac. Cas. 355, 357 (E.D. Ky. 1975); *Rackin v. University of Pa.*, 386 F. Supp. 992, 1008 (E.D. Pa. 1974); *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636, 638-39 (N.D. Cal. 1972); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965, 966 (D. Neb. 1972). *But see Parmer v. National Cash Register Co.*, 346 F. Supp. 1043, 1046-47 (S.D. Ohio 1972) (plaintiff stated claim under §§ 1981 and 1982 for sex discrimination), *aff'd per curiam sub nom. United States v. Cupps*, 503 F.2d 275 (6th Cir. 1974).

Another of the Reconstruction Civil Rights Acts, § 1 of the Act of 1871, created an action for money damages to redress deprivations of constitutional rights by state agents. 42 U.S.C. § 1983 (1976). The Supreme Court has held that plaintiffs must prove the defendant's discriminatory intent in their *prima facie* case when asserting claims of constitutional violations. *Personnel Adm'r v. Feeny*, 442 U.S. 256, 273 (1979) (intent requirement extended to constitutional claim of sex discrimination); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (constitutional claim of race discrimination). Since actions under § 1983 seek relief from violations of the plaintiffs' constitutional rights, the intent requirement also should apply to § 1983 actions. In light of plaintiffs' recognized difficulty in proving intent, such a proof requirement severely reduces the viability of causes of action brought under this statute as well as those asserting claims directly under the equal protection and due process clauses of the fifth and fourteenth amendments. Consequently, this Article will focus exclusively on Titles VII and IX.

## II. TITLE VII

A. *The Problem of Judicial Reluctance*

In 1972 Congress removed the exemption for educational institutions that had been included in the original version of Title VII of the 1964 Civil Rights Act.<sup>16</sup> This amendment was enacted to combat a well-documented, notorious, and chronic history of discriminatory treatment of women by institutions of higher education with respect to initial hiring, promotion, and tenure.<sup>17</sup> Congress' goals have remained largely unattained, however, because of a pervasive judicial reluctance to subject university employment practices to the same level of scrutiny as is applied to other employers. The courts' conduct is itself the product of the interaction of two factors: (1) the judicially created formula for proving claims of discrimination under Title VII; and (2) the necessarily subjective nature of the criteria used by universities in making employment-related decisions.

To prevail on most<sup>18</sup> Title VII claims, plaintiffs ultimately must prove that the defendants' actions were motivated by an intent to discriminate. This is an extremely difficult burden to sustain in the face of defense claims that the challenged employment decisions were based on subjective judgments. Because the criteria upon which these judgments are based are not nearly as susceptible to review as objective standards, plaintiffs, in most instances, have been unable to meet this burden. Accordingly, they usually have been unsuccessful in their challenges to the merits<sup>19</sup> of a university's hiring, promotion, or tenure decision.

One cannot ignore the fact that the factors that must be considered by university administrators in connection with hiring,

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16. Equal Employment Opportunity Act of 1972, § 3, 42 U.S.C. § 2000e-1 (1976) (amending 42 U.S.C. 2000e-1 (1970)).

17. See *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), cert. denied, 439 U.S. 984 (1978); *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 175 (1st Cir.), vacated and remanded for reconsideration per curiam, 439 U.S. 24 (1978); on remand, 82 F.R.D. 683 (D.N.H.), aff'd, 604 F.2d 106 (1st Cir. 1979), cert. denied, 100 S. Ct. 733 (1980); *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152, 157 (D. Mass. 1975); 118 CONG. REC. 5803 (1972) (remarks of Sen. Bayh); 118 CONG. REC. 7166 (1972) (statement of Sen. Williams); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Post Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 154 (1975) (statement of Rep. Carr); 1976 B.Y.U. L. REV. 133, 140-42.

18. See text accompanying notes 25-38 *infra*.

19. It is, of course, easier to obtain judicial review of the procedural fairness of the defendant's decisionmaking process than over the substantive merit of its decision. See, e.g., *Huang v. College of Holy Cross*, 436 F. Supp. 639 (D. Mass. 1977); *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152 (D. Mass. 1975).

promotion, and tenure decisions are inherently subjective in nature.<sup>20</sup> Moreover, a reasonable degree of deference should be accorded to a professional's evaluation of a colleague's qualifications. This deference, however, should not immunize the administrator's decision from review. Such immunity is incompatible with the courts' obligation to safeguard the national interest in promoting equal employment opportunity. Certainly, when confronted with a claim of discrimination against a college or university, a court is faced with the difficult task of reconciling the school's interest in retaining autonomy over its personnel decisions with the teacher's interest in bias-free decisionmaking. The difficulty of this balancing effort, however, should not result in excessive judicial deference to academic personnel judgments. Rather, it will be demonstrated herein that by modifying the respective burdens of proof shouldered by the parties to such Title VII actions, a more appropriate balance between these competing institutional and individual interests can be struck by the courts.

## B. Theories of Discrimination

### 1. Disparate Treatment

There are two recognized formulas by which a plaintiff can prove a claim of discrimination under Title VII,<sup>21</sup> each of which is associated with a different concept of discrimination. The most obvious form of discrimination involves the overtly different treatment of individuals based exclusively on their sex, race, religion, or national origin. In *McDonnell Douglas Corp. v. Green*,<sup>22</sup> the Supreme Court set forth the general requirements for establishing a prima facie claim of "disparate treatment" discrimination. While it acknowledged that the facts of an individual case might require some deviation from the general scheme,<sup>23</sup> the Court declared that in most cases, a plaintiff would sustain this initial burden by proving (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4)

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20. See *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152, 158 (D. Mass. 1975); *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969).

21. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1-12, 14-17, 73-75 (1976). See generally Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979).

22. 411 U.S. 792 (1973).

23. *Id.* at 802 n.13.

that, after this rejection, the position remained open and the employer continued to seek applications from persons of the complainant's qualifications.<sup>24</sup>

As some commentators and courts have recognized, the burden placed on plaintiffs to compel a defendant to come forward with some defense is, in most contexts, minimal.<sup>25</sup> All a plaintiff need prove is that she was qualified for, but did not receive, an available employment opportunity. No evidence of discriminatory intent is necessary at this stage.<sup>26</sup>

Once the plaintiff meets the initial requirement, the defendant then must come forward and "articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>27</sup> The exact nature of the defendant's burden has been the subject of a great deal of confusion and controversy.<sup>28</sup> This confusion was generated in large part by the imprecise language used by the Court in discussing this issue in an important post-*McDonnell Douglas* opinion.<sup>29</sup>

24. *Id.* at 802. Because the nature of tenure and, sometimes, promotion decisions are such that the rejection of one person's application may not always result in the consideration of someone else for the same benefit, many courts handling cases involving such decisions do not require the plaintiff to satisfy the fourth element—continued availability—to establish a prima facie case. See *Huang v. College of Holy Cross*, 436 F. Supp. 639, 653 (D. Mass. 1977); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1360 (W.D. Pa. 1977).

25. See *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 177 (1st Cir.), *vacated and remanded for reconsideration per curiam*, 439 U.S. 24 (1978); *on remand*, 82 F.R.D. 683 (D.N.H.), *aff'd*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 733 (1980); *Friedman, supra* note 21, at 3-4; *Yurko, Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U. L. REV. 473, 492 (1980).

26. See 2 A. LARSEN, *EMPLOYMENT DISCRIMINATION* § 50.10 (1980).

27. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

28. There was some question as to whether the *McDonnell Douglas* Court's use of "articulate" as opposed to "prove" implied that defendants bear only the burden of coming forward with some evidence of a legitimate explanation for its actions, as opposed to the more onerous burden of persuasion on that issue. *Id.* at 802. Compare *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154-56 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978) (burden of coming forward), and *Barnes v. St. Catherine's Hosp.*, 563 F.2d 324, 329 (7th Cir. 1977) (burden of coming forward), and *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 411 (8th Cir. 1975) (burden of coming forward), and *Sabol v. Snyder*, 524 F.2d 1009, 1012-13 (10th Cir. 1975) (burden of coming forward), with *Burdine v. Texas Dep't of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979) (burden of persuasion), *cert. granted*, 48 U.S.L.W. 3820 (June 16, 1980), and *Williams v. Bell*, 587 F.2d 1240, 1245 n.45 (D.C. Cir. 1978) (burden of persuasion), and *Ostapowicz v. Johnson*, 541 F.2d 394, 399 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (burden of persuasion). For a more extended discussion of the issue, see *Friedman, supra* note 21 at 4-8.

29. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978) ("[T]he burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration . . . . To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate,



Nevertheless, the Court's most recent statement on this issue in *Board of Trustees v. Sweeney*<sup>30</sup> indicates that defendants can rebut the inference of discrimination created by the prima facie case simply by offering some evidence beyond a mere allegation in the pleading of a nondiscriminatory justification for their actions.<sup>31</sup>

If, as is usually the case, the defendant satisfies this relatively light burden, it is up to the plaintiff to prove, by a preponderance of the evidence, that the defendant's asserted justification is either nonexistent or a sham. It is at this stage, at which most claims of disparate treatment are decided,<sup>32</sup> that the plaintiff must identify discrimination as the true motivating force behind the employer's conduct. Thus, as the Supreme Court noted in *International Brotherhood of Teamsters v. United States*,<sup>33</sup> whenever plaintiffs assert a claim of disparate treatment, "[p]roof of discriminatory motive is critical."<sup>34</sup>

## 2. Disproportionate Impact

Disparate treatment is not, however, the only theory of discrimination available to plaintiffs under Title VII. In *Griggs v. Duke Power Co.*<sup>35</sup> the Supreme Court ruled that the use of facially neutral employment policies could violate Title VII if they tend to exclude members of a protected classification at a disproportionate rate and are not related to job performance. Proof of a substantially disproportionate exclusionary impact<sup>36</sup> creates a prima facie

nondiscriminatory reason for the employee's rejection." (emphasis added)).

30. 439 U.S. 24, 25 (1978) (per curiam) ("articulating some legitimate nondiscriminatory reason . . . will suffice to meet the employee's prima facie case of discrimination."). In addition, the Court recently granted a writ of certiorari in *Burdine v. Texas Dep't of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), to review a decision by the Fifth Circuit requiring the defendant to prove the evidence of a nondiscriminatory reason by a preponderance of the evidence. 48 U.S.L.W. 3820 (June 16, 1980).

31. This standard was applied by the *Sweeney* trial court on remand from the Supreme Court. 82 F.R.D. 683 (D.N.H. 1979), *aff'd*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 733 (1980).

32. See *Smith v. University of N.C.*, 18 Fair Empl. Prac. Cas. 913, 916 (M.D.N.C. 1978); B. SCHLEI & P. GROSSMAN, *supra* note 21, at 1155-56; Friedman, *supra* note 21, at 14.

33. 431 U.S. 324 (1977).

34. *Id.* at 335 n.15.

35. 401 U.S. 424 (1971). The defendant employer demanded that all its employees have a high school education or pass a standardized general intelligence test. The Court invalidated this policy as violative of Title VII's proscription of racial discrimination on the ground that both alternative requirements disqualified black applicants at a significantly higher rate than whites and that the employer had not proved that either standard was sufficiently related to success on the job. *Id.* at 431-32.

36. The federal courts have not adopted a uniform position on the level of impact

case of "disproportionate impact" discrimination. To rebut this claim, defendant is required to prove, by a preponderance of the evidence, that its challenged policy bears a "manifest relationship to the employment in question."<sup>37</sup> If the employer makes this showing, the plaintiff can prevail only if she convinces the factfinder that a less discriminatory selection device is available that would serve the employer's interest in maintaining a competent work force—in other words, that reliance on the presently used device is really a camouflage for the defendant's intent to discriminate.<sup>38</sup>

### C. Application of Discrimination Theories to Educational Institutions

#### 1. The Problem of Proving Intent

Under both the disparate treatment and disproportionate impact theories, plaintiffs can force defendants to meet their prima facie case without offering any evidence of discriminatory intent. Intent only comes into play at the third stage of each formula—when plaintiffs must prove either pretext or the employer's failure to adopt a less discriminatory, alternative screening device. Because, however, the burden placed on defendants to rebut the plaintiffs' prima facie case is more onerous in disproportionate impact cases than in disparate treatment cases, it is less likely that plaintiffs in impact cases will be required to meet the

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required to establish a prima facie case. See *Moore v. Southwestern Bell Tel. Co.*, 593 F.2d 607, 608 (5th Cir. 1979); B. SCHLEI & P. GROSSMAN, *supra* note 21, at 73-74; Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 794 (1978).

Several federal agencies, however, in 1978 adopted a set of uniform guidelines which provide standards for determining the legality of certain employment policies used by private and public employers. One of these guidelines, § 4D, known as the "four-fifths rule," states that a selection rate for minorities or women of less than 80% of the rate for the highest scoring group generally will create a prima facie case of disproportionate impact. This provision also indicates, however, that it is to be used only as a rule of thumb, with discretion retained to modify the standard for individual cases. See 2 EMPL. PRAC. GUIDE (CCH) ¶ 4010.04. See generally Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1979) (EEOC); 41 C.F.R. § 60-3 (1979) (OFCCP); 28 C.F.R. § 50.14 (1979) (Dep't of Justice); 5 C.F.R. § 300.103(c) (1980) (Office of Personal Management). These guidelines have been used by several courts. See *Guardians Ass'n v. Civil Serv. Comm'n*, 484 F. Supp. 785 (S.D.N.Y.), *aff'd in relevant part*, 23 Fair Empl. Prac. Cas. 909, 920 (2d Cir. July 31, 1980); *United States v. City of Chicago*, 21 Fair Empl. Prac. Cas. 200 (N.D. Ill. 1979); *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. 1256 (D. Conn. 1979).

37. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *accord*, *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

38. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

third, intent-oriented stage of proof. As a result, because motivation, like many subjective concepts, is difficult to prove, one would expect that the disproportionate impact theory would be more attractive to plaintiffs than the claim of disparate treatment.

Plaintiffs' anticipated preference for disproportionate impact-based claims, however, has not materialized in suits brought against educational institutions. The disproportionate impact model of discrimination normally is restricted to actions challenging the exclusionary results generated by a defendant's use of objective criteria.<sup>39</sup> Most academic employment policies, however, focus on subjective factors. Consequently, disproportionate impact theory necessarily plays a limited role in suits brought by allegedly aggrieved teachers.

The overwhelming preponderance of faculty employment-related decisions are based on evaluations of applicants with respect to some or all of the following criteria: (1) scholarship output and potential,<sup>40</sup> (2) teaching ability,<sup>41</sup> (3) collegiality,<sup>42</sup> and (4) service

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39. This theory's most obvious application relates to aptitude and intelligence examinations. *See, e.g.,* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). In addition courts have utilized it to invalidate employment practices that disqualify individuals on the basis of other objective standards: minimum height and weight requirements, *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977); arrest record history, *Gregory v. Litton Syss., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631, 632 (9th Cir. 1972); all criminal convictions other than minor traffic offenses, *Green v. Missouri Pac. R.R.*, 549 F.2d 1158 (8th Cir. 1977); and garnishment experience, *Johnson v. Pike Corp.*, 332 F. Supp. 490, 494-95 (C.D. Cal. 1971). The Equal Employment Opportunity Commission also has used this theory to void a requirement that all job applicants possess an honorable discharge from the armed forces after finding that this objective standard resulted in a disproportionate exclusion of blacks and was not supported by any business necessity. EEOC Decision No. 74-25, 2 EMPL. PRAC. GUIDE (CCH) ¶ 6400 (1973). The Commission similarly struck down an employment bar asserted against unwed parents because illegitimacy is more discernible with respect to a female parent and thus the rule disproportionately excluded women. EEOC Decision No. 71-332, [1973] EEOC Dec. (CCH) ¶ 6164 (1970). *See also* EEOC Decision No. 75-030, 12 Fair Empl. Prac. Cas. 1355, 1357 (1974) (no evidence that discrimination against transsexuals imposes disproportionate burden on male applicants). *See generally* Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527, 565-66 (1979); Siniscalco, *Homosexual Discrimination in Employment*, 16 SANTA CLARA L. REV., 495, 507-08 (1976).

40. *See, e.g.,* Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977); *Cussler v. University of Md.*, 430 F. Supp. 602 (D. Md. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976).

41. *See, e.g.,* Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977); *Cussler v. University of Md.*, 430 F. Supp. 602 (D. Md. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976).

42. *See* Van de Vate v. Bohing, 379 F. Supp. 925, 928 (E.D. Tenn. 1974).

to the university.<sup>43</sup> In addition, the university's actions often are constrained by present and predicted future curriculum and staffing considerations.<sup>44</sup> All of these factors call for a subjective judgment by the decision maker. Accordingly, to attack the substantive validity of a nonfavorable decision by the school, the teacher must usually challenge the substantive merits of these subjective judgments. The availability of impact analysis is consequently eliminated. The aggrieved is likely to assert a *Griggs*-based claim only in the rare instance in which the employment or promotion decision is based upon the plaintiff's failure to satisfy an objective standard, such as a Ph.D. or seniority requirement.<sup>45</sup> Thus, in the great majority of cases the aggrieved teacher must rely upon the disparate treatment model and, therefore, shoulder the difficult burden of proving that the defendant's conduct resulted from a discriminatory motive.

It is not surprising, then, to discover that most employment discrimination suits brought against universities and colleges are unsuccessful.<sup>46</sup> As noted, intent or motivation, like most subjective

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43. See, e.g., *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379 (5th Cir. 1980); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977); *Cussler v. University of Md.*, 430 F. Supp. 602 (D. Md. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976).

44. See *Davis v. Weidner*, 596 F.2d 726, 730 (7th Cir. 1979); *Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974); *Shea v. Gant*, 22 Fair Empl. Prac. Cas. 371 (D. Conn. 1979); *Van de Vate v. Boling*, 379 F. Supp. 925, 928 (E.D. Tenn. 1974). See generally *Yurko*, *supra* note 25, at 476-77.

45. See, e.g., *Campbell v. Ramsay*, 484 F. Supp. 190 (E.D. Ark. 1980); *Cooper v. University of Tex. at Dallas*, 482 F. Supp. 187, 198 (N.D. Tex. 1979); *Kunda v. Muhlenberg College*, 463 F. Supp. 294, 311 (E.D. Pa. 1978), *aff'd*, 621 F.2d 532 (3d Cir. 1980).

46. See *Lieberman v. Gant*, 23 Fair Empl. Prac. Cas. 505 (2d Cir. July 17, 1980); *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 733 (1980); *Powell v. Syracuse Univ.*, 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974); *Green v. Board of Regents of Tex. Tech Univ.*, 474 F.2d 594 (5th Cir. 1973); *Campbell v. Ramsay*, 484 F. Supp. 190 (E.D. Ark. 1980); *Shea v. Gant*, 22 Fair Empl. Prac. Cas. 371 (D. Conn. 1979); *Lombard v. School Dist. of Erie*, 463 F. Supp. 566 (W.D. Pa. 1978); *Smith v. University of N.C.*, 18 Fair Empl. Prac. Cas. 913 (M.D.N.C. 1978); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977); *Cussler v. University of Md.*, 430 F. Supp. 602 (D. Md. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976); *Van de Vate v. Boling*, 379 F. Supp. 925 (E.D. Tenn. 1974). *But see Fisher v. Dillard Univ.*, No. 77-3205 (E.D. La. Aug. 18, 1980) (judgment for plaintiff awarding back pay, compensatory damages, and attorney's fees); *Schwartz v. Florida*, 23 Fair Empl. Prac. Cas. 203 (N.D. Fla. May 14, 1980) (judgment for plaintiff; court orders appointment); *Kunda v. Muhlenberg College*, 463 F. Supp. 294 (E.D. Pa. 1978), *aff'd*, 621 F.2d 532 (3d Cir. 1980) (judgment for plaintiff and reinstatement ordered); *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152 (D. Mass. 1975) (preliminary injunction issued ordering reinstatement of plaintiff).

concepts, is extremely difficult to prove. Except for the very unlikely possibility that she will produce direct evidence of undisguised discrimination, the plaintiff must rely on less persuasive, circumstantial evidence. Moreover, to prove intent, the plaintiff must ask the judge to find that a subjective evaluation, rendered by a professional in an area that frequently is outside the judge's areas of expertise, is really only a pretext asserted to camouflage the defendant's true motive—discrimination. An examination of the existing case law reveals that the combination of these two related factors is responsible in large part for the high failure rate of Title VII actions against universities and colleges.<sup>47</sup>

## 2. Cases

The clearest and most frequently cited examples of the judiciary's response to the onerous burden faced by faculty plaintiffs can be found in the decision by the Second Circuit in *Faro v. New York University*<sup>48</sup> and the decision by a Texas federal district court in *Green v. Board of Regents of Texas Tech University*.<sup>49</sup> In *Faro*, plaintiff claimed that defendant's refusal to renew her appointment as a research employee of the university's medical center violated Title VII's ban on sex discrimination. In response to plaintiff's claim that she was treated less favorably than some male applicants, the court declared that the university's decision was based on subjective factors that were incapable of intensive review. The court stated that "[o]f 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 court supervision."<sup>50</sup> Similarly, in *Green*, an associate professor of English was repeatedly denied a promotion to the rank of full professor. Rejecting plaintiff's claim of sex discrimination, the court declared that "[i]t is undisputed that such evaluations are necessarily judgmental, and the Court will not substitute its judgment for the rational and well-considered judgment of

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47. See *Kunda v. Muhlenberg College*, 621 F.2d 532, 551 (3d Cir. 1980).

48. 502 F.2d 1229 (2d Cir. 1974).

49. 335 F. Supp. 249 (N.D. Tex. 1971), *aff'd*, 474 F.2d 594 (5th Cir. 1973).

50. 502 F.2d at 1231-32. There is a reference to plaintiff in the court's opinion, however, that suggests that its ruling on the merits may not have been exclusively tied to its interpretation of the relevant facts and case law: "Dr. Faro, in effect, envisions herself as a modern Jeanne d'Arc fighting for the rights of embattled womanhood on the academic battlefield, facing a solid phalanx of men and male faculty prejudice." *Id.* at 1231.

those possessing expertise in the field."<sup>51</sup>

This reluctance to subject university employment decisions to serious scrutiny is characteristic of most judicial responses to faculty Title VII claims.<sup>52</sup> As in *Faro* and *Green*, the courts tend to rely on one or more of the following arguments in defense of their deference to the defendant's judgment: (1) the subjective criteria considered in evaluating an applicant are not susceptible to external, objective review;<sup>53</sup> (2) even if the criteria could be objectively reviewed, a court does not possess the expertise needed to make a competent, informed decision;<sup>54</sup> and (3) to permit review would overburden the courts with litigation and remove any semblance of finality from the university's selection process.<sup>55</sup>

None of these defenses, however, is compelling enough to justify the extreme deference accorded the defendants' judgments. It is inevitable that tenure, promotion, and hiring decisions will turn, in large part, on subjective evaluation of the candidates. Nevertheless, the use of subjective criteria is not unique to the academic profession.<sup>56</sup> When the courts have been confronted with the use of such criteria in other contexts, they have not hesitated to examine closely the manner in which they were applied.<sup>57</sup> Moreover, the

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51. 335 F. Supp. at 250.

52. See *Megill v. Board of Regents of Fla.*, 541 F.2d 1073, 1077 (5th Cir. 1976); *Lieberman v. Gant*, 474 F. Supp. 848, 865 (D. Conn. 1979), *aff'd*, 23 Fair Empl. Prac. Cas. 505 (2d Cir. July 17, 1980); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1354 (W.D. Pa. 1977); *Cussler v. University of Md.*, 430 F. Supp. 602, 605-06 (D. Md. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857, 868 (D. Vt. 1976); *EEOC v. Tufts Inst. of Learning*, 421 F. Supp. 152, 158 (D. Mass. 1975); *Van de Vate v. Boling*, 379 F. Supp. 925, 929 (E.D. Tenn. 1974); *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1360 (N.D. Ill. 1969).

53. See *Scott v. University of Del.*, 455 F. Supp. 1102, 1131 (D. Del. 1978), *cert. denied*, 444 U.S. 931 (1979); *Lewis v. Chicago State College*, 299 F. Supp. 1357, 1359 (N.D. Ill. 1969).

54. See *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1350 (W.D. Pa. 1977); *Cussler v. University of Md.*, 430 F. Supp. 602, 605-06 (D. Md. 1977); *United States v. Wattsburg Area School Dist.*, 429 F. Supp. 1370, 1377 (W.D. Pa. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857, 868 (D. Vt. 1976).

55. See *Megill v. Board of Regents of Fla.*, 541 F.2d 1073 (5th Cir. 1976); *Faro v. New York Univ.*, 502 F.2d 1229, 1232 (2d Cir. 1974) ("[To have a court review the decisionmaking process] 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.")

56. See *Yurko*, *supra* note 25, at 498.

57. See *Regers v. International Paper Co.*, 510 F.2d 1340 (8th Cir.), *vacated*, 423 U.S. 809, *modified*, 526 F.2d 722 (8th Cir. 1975); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1337 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Leisner v. New York Tel. Co.*, 358 F. Supp. 359 (S.D.N.Y.

fact that subjective criteria are inherently manipulatable and thus constitute a readily available and effective mechanism for disguising discrimination<sup>58</sup> argues against the narrow scope of review currently imposed by most courts.

A lack of expertise in the underlying subject matter of a case has not prevented courts from carefully examining the complicated factual issues presented by patent cases, actions involving securities and other commercial transactions, and boundary and maritime disputes, to name but a few. In such cases, the courts willingly rely on the assistance provided by counsel and outside experts. There is no reason to assume that similar aid is unavailable in faculty employment cases.

The oft-cited "floodgates-of-litigation" claim also should not be permitted to defeat an aggrieved party's opportunity for relief from allegedly discriminatory actions. An adverse employment decision in this field can have particularly damaging permanent consequences. In addition, restricting these litigants' access to the courts is inconsistent with Congress' clearly stated policy of promoting teachers' rights to equal employment opportunity.<sup>59</sup> Finally, the courts offer no evidence to support their implicit claim that serious judicial review of academic employment decisions will generate a greater amount of litigation than is produced by other areas of the labor market.

A few courts have recognized that these decisions effectively grant immunity to university employers.<sup>60</sup> As one court noted:

[E]xhibit[ing] extraordinary deference to the judgment of university decisionmakers by expressly refusing to subject the reasons given for university employment decisions to more than the most minimal judicial scrutiny . . . can lead to the immunization of higher education from the requirements of Title VII. Congress did not intend such a result.<sup>61</sup>

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1973).

58. See *Rogers v. International Paper Co.*, 510 F.2d 1340, 1345-46 (8th Cir.), *vacated*, 423 U.S. 809, *modified*, 526 F.2d 722 (8th Cir. 1975); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359 (5th Cir. 1972); *Cooper v. University of Tex.*, 482 F. Supp. 187, 195 (N.D. Tex. 1979).

59. See *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

60. See *Kunda v. Muhlenberg College*, 621 F.2d 532, 551 (3d Cir. 1980); *Davis v. Weidner*, 596 F.2d 726, 731 (7th Cir. 1979); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1153 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 176 (1st Cir.), *vacated and remanded for reconsideration per curiam*, 439 U.S. 24 (1978); *on remand*, 82 F.R.D. 683 (D.N.H.), *aff'd*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 733 (1980).

61. *Davis v. Weidner*, 596 F.2d 726, 731 (7th Cir. 1979).

Nevertheless, the sentiments reflected in such statements do not appear in all cases to have affected the court's substantive ruling.

For example, in *Powell v. Syracuse University*<sup>62</sup> the Second Circuit suggested that the position it had previously enunciated in *Faro* may have been carried to an undesirable extreme by some courts.<sup>63</sup> Yet, while the court paid lip service to its statutory responsibility of insuring fair employment practices in institutions of higher education, it still ruled in favor of defendant. Moreover, the court's dismissal of plaintiff's case was inconsistent with its own findings of fact. For example, the court found that plaintiff was hired after a careful review of her qualifications,<sup>64</sup> was reappointed and promoted,<sup>65</sup> and never received any criticism or expression of dissatisfaction from her colleagues.<sup>66</sup> Dismissal was unwarranted in light of defendant's failure to provide the court with either a full description of plaintiff's duties or the criteria used in evaluating her performance.<sup>67</sup>

#### D. *Altering the Formula of Proof*

The judicial predilection towards nonintervention in academic employment matters is facilitated by the nature of the proof formula governing claims of disparate treatment. When the plaintiff is required to prove that discrimination, rather than a bona fide subjective judgment, motivated the defendant's actions, the court can more easily defer to the wisdom of the expert and avoid engaging in its own investigation of the substantive validity of the defendant's determination. In addition, the court then can claim that this approach preserves academic freedom<sup>68</sup> and autonomy and allocates decisions to the institutions best qualified to make them. All this is done, of course, at the cost of reducing the protections afforded the individual teacher. A more effective measure of

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62. 580 F.2d 1150 (2d Cir. 1978).

63. *Id.* at 1153. The court stated:

This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias . . . . We fear, however, that the common-sense position we took in *Faro*, namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of the Civil Rights Act of 1964.

*Id.*

64. *Id.* at 1155.

65. *Id.* at 1152.

66. *Id.* at 1155.

67. *Id.* at 1156.

68. *But see* Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 881-88 (1976).



statutory protection could be provided to victims of alleged sex discrimination, without sacrificing these other interests, by restructuring the general proof formula set forth in *McDonnell Douglas*.

Defendants currently are permitted to rebut a prima facie case simply by coming forward with *some* credible evidence of a legitimate, nondiscriminatory explanation for their challenged actions.<sup>69</sup> Most defendants, at this stage, proffer justifications predicated on subjective judgments. Since these judgments are not susceptible to exact measurement, but, rather, are evaluations about which reasonable persons could disagree, the defendant can easily meet its burden. This, then, forces the plaintiff to bear the heavy burden of persuading the court that the defendant was motivated by a discriminatory intent.

If, on the other hand, defendants were required to support their claims of nondiscriminatory justifications by a preponderance of the evidence, the courts would be forced to subject such offers of proof to closer scrutiny. Defendants no longer could base their defense on relatively unsupported claims of good faith subjective judgments and then escape liability because of the plaintiff's inability to refute these unquantifiable, amorphous determinations. In addition, it would put the burden of proof as to this issue on the party with greater access to the relevant evidence—the defendant. Certainly, in most cases, the defendant could more easily prove the motivation behind a particular employment decision.

Furthermore, such an increase in the defendant's burden is not inconsistent with the philosophy underlying the tripartite *McDonnell Douglas* formula. The defendant would be required only to prove by a preponderance of the evidence that there was a legitimate explanation for its action.<sup>70</sup> This would then shift the bur-

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69. See text accompanying notes 27-28 *supra*.

70. This reformulation of defendant's burden has been adopted and applied by the Fifth and Eighth Circuits. See *Vaughn v. Westinghouse Elec. Corp.*, 620 F.2d 655, 659 (8th Cir. 1980); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980); *Burdine v. Texas Dep't of Community Affairs*, 608 F.2d 563, 567 (5th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3820 (June 16, 1980); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977); *Schwartz v. Florida*, 23 Fair Empl. Prac. Cas. 203, 211 (N.D. Fla. May 14, 1980). In fact, the Fifth Circuit goes so far as to require defendant to prove that the person hired was better qualified than the plaintiff. *East v. Romine, Inc.*, 518 F.2d 332, 339-40 (5th Cir. 1975). This latter requirement was applied to a faculty employment discrimination claim in *Schwartz v. Florida*, 23 Fair Empl. Prac. Cas. 203, 211 (N.D. Fla. May 14, 1980). Not coincidentally, in all but one of these six cases, plaintiffs won because defendants were found not to have satisfied the burden placed upon them. The Fifth Circuit's position on the burden of proof issue currently is before the Supreme Court on a writ of certiorari in *Burdine*. 48 U.S.L.W. 3820 (June 16, 1980).

den back to the plaintiff to prove that although such a nondiscriminatory reason did exist, it was not the real motivating force behind the defendant's decision. Plaintiff would have to prove not that the defendant's proffered explanation was factually untrue, but that it was asserted only as a pretext to cloak the employer's actual discriminatory intent. Thus, the burden of proving intent would remain on the party asserting the claim of discrimination. This is appropriate since, as the Supreme Court has recognized, the presence of intentional bias *vel non* is the essence of an allegation of disparate treatment.<sup>71</sup>

Restructuring the general proof formula also is consistent with the courts' desire to avoid excessive judicial intrusion into academic matters.<sup>72</sup> While increasing defendant's burden will expand the extent and scope of judicial review over university employment decisionmaking (in order to promote the statutory policy prohibiting sex-biased employment policies), it need not create the spectre of an omnipresent judiciary overseeing all university employment practices. The courts obviously will become involved only after a complaint has been filed and the plaintiff has exhausted the available administrative remedies. Once a *prima facie* case has been made, the defendant will be required to prove that its decision can be supported by a nondiscriminatory justification. In evaluating the merits of the defendant's decision, however, the court will consider the subjective nature of the factors underlying that judgment, the university's record concerning the employment of women, and the decisionmaker's expertise in faculty appointments. The courts simply will not, and should not, be able to continue to avoid examining the substantive validity of the school's decision by deferring completely to the wisdom of the person or body making the decision. This approach should result in a more equitable balance between the individual's interest in freedom from arbitrary and biased conduct and the institution's interest in preserving its own autonomy.

In sum, then, the judiciary's unwillingness to subject university employment decisions to more than minimal scrutiny has seriously attenuated the effectiveness of Title VII as a remedy for hiring and promotion practices and policies that discriminate against women. As a result, the courts have contravened the express intent

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71. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

72. See *Davis v. Weidner*, 596 F.2d 726, 731 (7th Cir. 1979).

of Congress to shield teachers from discriminatory treatment. The subjective nature of the decisions under challenge and the analytic framework currently applied to these suits have contributed to the courts' passivity. The courts, however, could adopt a more aggressive posture that would more adequately promote congressional policy by ensuring the teacher's right to merit-based decisions, but that would also preserve universities' essential control over their personnel practices. Restructuring the formula of proof in these discrimination cases would accomplish both objectives.

While altering the Title VII proof formula would promote the policies underlying that act, it is important to note that the courts' treatment of Title VII litigation is not the only way in which congressional efforts to provide safeguards and remedies against employment discrimination by school authorities have been frustrated by the judiciary. The courts have also demonstrated an animosity toward employment discrimination claims brought under Title IX of the Educational Amendments of 1972. It is therefore important to examine the judicial mistreatment of that title as well.

### III. TITLE IX

#### A. *Scope of the Act*

On June 23, 1972, almost eight years after the initial passage of Title VII, Congress enacted the Educational Amendments of 1972.<sup>73</sup> Title IX, Section 901(a) of that statute provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."<sup>74</sup>

The statute also authorizes the Department of Health, Education and Welfare (now the Department of Education) to initiate compliance proceedings and promulgate regulations "consistent with achievement of the objectives of [section 901(a)] . . . ."<sup>75</sup> Pursuant to what it viewed as its authority under this provision, HEW issued regulations prohibiting sex-based discrimination in employment by any school receiving federal funds.<sup>76</sup>

73. Pub. L. No. 92-318, 86 Stat. 235 (codified in 20 U.S.C. §§ 1001-1686 (1976)).

74. 20 U.S.C. § 1681(a) (1976).

75. 20 U.S.C. § 1682 (1976).

76. 45 C.F.R. § 86.51 (1979). The regulations provide, in pertinent part:

§ 86.51 EMPLOYMENT.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or

Both the statute and its accompanying administrative regulations have been the focus of a significant amount of attention.<sup>77</sup> One of the most important controversies surrounding section 901(a) of Title IX is whether or not it creates a private right of action for sex-based discrimination in educational employment.<sup>78</sup> Inextricably tied to this question is whether the agency<sup>79</sup> acted within the scope of its statutory authority when it promulgated regulations governing the employment practices of schools receiving federal monies. While the courts have disagreed on these questions, a substantial majority has ruled that Title IX does not cover

recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance . . . .

(b) *Application.* The provisions of this subpart apply to:

- (1) Recruitment, advertising, and the process of application for employment;
- (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation, and changes in compensation;
- (4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;
- (5) The terms of any collective bargaining agreement;
- (6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;
- (7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;
- (8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;
- (9) Employer-sponsored activities, including social or recreational programs; and
- (10) Any other term, condition, or privilege of employment.

77. See, e.g., Buek & Orleans, *Sex Discrimination—A Bar to a Democratic Institution: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973); Kadzielski, *Title IX of the Education Amendments of 1972: Change or Continuity?*, 6 J.L. & EDUC. 183 (1977); Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49 (1976); Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103 (1974); Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 608 (1980); Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254 (1979); 1976 B.Y.U. L. REV. 133.

78. Other important controversies, such as those concerning the application of Title IX to university athletic programs, are beyond the scope of this Article.

79. On May 4, 1980, the Department of Education assumed jurisdiction over education-related issues. In connection with its newly created duties, the Department reissued these HEW regulations without change. 45 Fed. Reg. 30,802 (May 9, 1980) (to be recodified in 34 C.F.R. Chs. I-VIII). Regulations prohibiting discrimination are found in 45 Fed. Reg. 80,962 (to be recodified in 34 C.F.R. § 106.51). To avoid confusion with the references used by the courts, these guidelines will be referred to herein as the HEW regulations.

discrimination in employment. The Supreme Court, however, has recently granted certiorari on this very issue in *United States Department of Education v. Seattle University*.<sup>80</sup> The remainder of this Article examines these rulings and argues that this narrow interpretation of Title IX is based on both an imprecise construction of the statutory language and an erroneous evaluation of the relevant legislative history.

As with most questions of statutory construction, determining whether Title IX is applicable to claims of employment discrimination requires a careful examination of several factors related to the statute: (1) its language, (2) its legislative history and relationship to other antidiscrimination statutes, and (3) the policies underlying its enactment.

### B. *The Statutory Language*

One reason for the controversy surrounding the coverage issue is Congress' failure to set forth explicitly the class of persons that the statute was designed to protect. Section 901(a) states that "no person" shall be discriminated against under a federally funded educational program. Unfortunately, "person" is not defined clearly anywhere in the statute. As a result, a dispute has arisen as to the breadth of the beneficiary class. School authorities contend that the statute was designed to protect only students from discrimination.<sup>81</sup> Proponents of a broad interpretation, on the other hand, argue that Congress' use of the phrase "no person" is indicative of its desire to include all persons within the statute's

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80. *Seattle Univ. v. United States Dep't of HEW*, 621 F.2d 992 (9th Cir.) cert. granted, 49 U.S.L.W. 3409 (Dec. 2, 1980). For a review of lower court treatment of the question whether Title IX covers employment discrimination, compare *id.* and *Romeo Community Schools v. United States Dep't of HEW*, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), and *Junior College Dist. v. Califano*, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979), and *Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979), and *Kneeland v. Bloom Township High School Dist.*, 484 F. Supp. 1280 (N.D. Ill. 1980), and *Hoth v. Grinnell College*, 23 Fair Empl. Prac. Cas. 528 (S.D. Iowa June 19, 1980), and *Auburn School Dist. v. United States Dep't of HEW*, 19 Fair Empl. Prac. Cas. 1504 (D.N.H. 1979), and *Board of Educ. v. United States Dep't of HEW*, 19 Fair Empl. Prac. Cas. 457 (N.D. Ohio 1979), and *University of Toledo v. United States Dep't of HEW*, 464 F. Supp. 693 (N.D. Ohio 1979), with *Dougherty County School Sys. v. Harris*, 622 F.2d 735 (5th Cir. 1980) (dictum), and *North Haven Bd. of Educ. v. Hufstedler*, 23 Fair Empl. Prac. Cas. 604 (2d Cir. July 24, 1980), and *Piascik v. Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio 1976) (dictum).

81. See *Romeo Community Schools v. United States Dep't of HEW*, 600 F.2d 581, 584 (6th Cir.), cert. denied, 444 U.S. 972 (1979); *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1214 (E.D. Mo. 1978), *aff'd*, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979).

protection.<sup>82</sup>

While there is no specific definition of the class of "persons" covered by section 901(a), Title IX does include a list of nine limitations on or exclusions from its coverage.<sup>83</sup> For example, the service academies,<sup>84</sup> certain religiously affiliated schools,<sup>85</sup> and historically sex-segregated colleges<sup>86</sup> are not bound by the requirements of section 901(a). A similar exemption is provided for the membership policies of fraternal and youth service organizations traditionally limited to members of one sex,<sup>87</sup> the awarding of beauty pageant scholarships,<sup>88</sup> and for father-son/mother-daughter activities at educational institutions.<sup>89</sup> The other two exclusions relate exclusively to student admissions policies.<sup>90</sup>

None of these exemptions refers to school employees. Strict constructionists of the Act's language contend that the fact that all the exclusions concern student activities or admissions indicates that Congress was concerned only with the plight of students when it enacted Title IX. They argue that therefore only students should benefit from Title IX's substantive provisions.<sup>91</sup> This argument proves too much. The simple fact is that under section 901(a) "no person" may suffer discrimination.<sup>92</sup> If Congress had wished to carve out exemptions from the beneficiary class, it would have

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82. See *Dougherty County School Sys. v. Harris*, 622 F.2d 735 (5th Cir. 1980); *North Haven Bd. of Educ. v. Hufstедler*, 23 Fair Empl. Prac. Cas. 604, 608-12 (2d Cir. July 24, 1980). In addition, HEW (now the Department of Education) has tried to overcome this obstacle by asserting that teacher discrimination has a discriminatory effect on students and thus falls within the parameters of Title IX. This "infection theory" has properly been rejected by the courts because of the agency's failure, in each case in which it was raised, to offer any proof of this purported nexus. See *Seattle Univ. v. United States Dep't of HEW*, 621 F.2d 992, 993 n.6 (9th Cir. 1980); *Junior College Dist. v. Califano*, 597 F.2d 119, 121 n.3 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 430 & n.5 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979).

83. 20 U.S.C. §§ 1681(a)(1)-(9) (1976).

84. 20 U.S.C. § 1681(a)(4) (1976).

85. 20 U.S.C. § 1681(a)(3) (1976) (where application of Title IX would be inconsistent with the school's religious beliefs).

86. 20 U.S.C. § 1681(a)(5) (1976).

87. 20 U.S.C. §§ 1681(a)(6), (7) (1976).

88. 20 U.S.C. § 1681(a)(9) (1976).

89. 20 U.S.C. § 1681(a)(8) (1976) (as long as members of both groups have equal access to such activities).

90. 20 U.S.C. §§ 1681(a)(1), (2) (1976).

91. See, e.g., *Romeo Community Schools v. United States Dep't of HEW*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Seattle Univ. v. United States Dep't of HEW*, 16 Fair Empl. Prac. Cas. 719, 720 (W.D. Wash. 1978), *aff'd per curiam*, 621 F.2d 992 (9th Cir. 1980).

92. See *North Haven Bd. of Educ. v. Hufstедler*, 23 Fair Empl. Prac. Cas. 604, 608 (2d Cir. July 24, 1980).

done so, as it did with respect to the class of institutions and activities subject to its nondiscrimination provisions.<sup>93</sup> Moreover, none of the nine exemptions omits employment policies from the Act's coverage. This is particularly significant since three exemptions remove specified practices of otherwise covered institutions from the general prohibition.<sup>94</sup>

Whether Title IX applies to claims of employment discrimination also depends on the construction of another portion of section 901(a). The statute states that no person shall be "excluded from participation in, . . . denied the benefits of or . . . subjected to discrimination under" a federally funded educational program.

The majority of courts implicitly focus on the first two categories in ruling that the Act proscribes only discrimination against students. Because students are the sole participants in, and beneficiaries of, school programs, the courts reason, they are the only ones entitled to statutory protection.<sup>95</sup> The fact is, however, that federal money also is used to pay teacher salaries. Yet the courts fail to explain how it is that a teacher, whose salary at least in part is paid out of federal funds, is not "subjected to discrimination under" a federally funded school program when she is denied a position because of her sex.

The reason for this narrow judicial construction may lie in the concluding phrase of section 901(a). Discrimination is prohibited in connection with "any educational program or activity receiving Federal financial assistance . . . ." Most courts maintain that unless the federal monies go directly into the hands of teachers—*e.g.*, through federally supported research grants—the employees are not members of the protected class. Mere employment by a recipient institution is not enough.<sup>96</sup> Accordingly, the courts conclude,

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93. See text accompanying notes 84-86 *supra*.

94. See text accompanying notes 87-89 *supra*.

95. See, *e.g.*, *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1214 (E.D. Mo. 1978), *aff'd per curiam*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Brunswick School Bd. v. Califano*, 449 F. Supp. 866, 870 (D. Me. 1978), *aff'd sub nom. Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir. 1979); *Seattle Univ. v. United States Dep't of HEW*, 16 Fair Empl. Prac. Cas. 719, 720 (W.D. Wash. 1978), *aff'd per curiam*, 621 F.2d 992 (9th Cir. 1980); *Romeo Community Schools v. United States Dep't of HEW*, 438 F. Supp. 1021, 1031 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979). *Contra*, *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 737-38 (5th Cir. 1980).

96. See *Romeo Community Schools v. United States Dep't of HEW*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Auburn School Dist. v. United States Dep't of HEW*, 19 Fair Empl. Prac. Cas. 1504, 1505 (D.N.H. 1979); *Board of Educ. v. United States Dep't of HEW*, 19 Fair Empl. Prac. Cas. 457, 458 (N.D. Ohio 1979); *Brunswick School Bd. v.*

the HEW regulations prohibiting any employment discrimination by a recipient institution<sup>97</sup> are impermissibly overbroad.<sup>98</sup> In each of these cases, however, while the defendant admitted receiving federal funding, the court made no finding as to whether any of the federal monies were used to pay teacher salaries. The courts failed to consider the possibility that the regulations could apply in that narrower context.

If some portion of a school's federal financial aid is allocated to paying teacher salaries, those employees should be viewed as performing federally-assisted educational activities. The presence of an intermediary—the school—between the government grantor and the ultimate recipient in this context should not serve as a basis for disregarding the connection between the federal grant and the teachers' activities. That the funds first pass through a third party rather than go immediately to the teacher does not alter the fact that they are used to support the teacher's activities. Thus, if someone is denied a teaching position on the basis of her sex, and part of the salary supporting that job is subsidized by a federal grant, that individual has been "subjected to discrimination under an educational program or activity receiving Federal financial assistance." It is interesting to note, in this regard, that in the two cases in which the defendant was found to be using some of its federal aid to pay salaries, the courts ruled that Title IX was applicable to faculty employment discrimination claims.<sup>99</sup>

The overbreadth defense also is central to another argument asserted in support of a narrow construction of Title IX and invalidation of the HEW regulations—here in connection with the statute's enforcement provision. Section 902 sets forth the exclusive remedy for Title IX violations. It authorizes agencies such as the Department of Education (ED) to terminate their financial assistance to any recipient found to have violated the agency's regulations. This provision also states, however, that such termination must be limited to the particular program in which discrimination

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Califano, 449 F. Supp. 866, 870 & n.4 (D. Me. 1978), *aff'd sub nom.* Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979).

97. 45 C.F.R. § 86.51(a)(1) (1979). *See* note 76 *supra*.

98. *See* Romeo Community Schools v. United States Dep't of HEW, 438 F. Supp. 1021, 1033 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119, 120-21 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); Islesboro School Comm. v. Califano, 593 F.2d 424, 426 (1st Cir. 1979).

99. North Haven Bd. of Educ. v. Hufstedler, 23 Fair Empl. Prac. Cas. 604, 605 (2d Cir. July 24, 1980); Dougherty County School Sys. v. Harris, 622 F.2d 735, 737-38 (5th Cir. 1980).



has been found. This limitation obviously was designed to prevent a situation in which nondiscriminatory programs would lose funds because some of an institution's other programs engaged in discriminatory practices. While the courts have correctly interpreted this program-specific sanction to mean that ED can terminate only that aid allotted to noncompliant programs conducted by the recipient institution,<sup>100</sup> a majority of tribunals have misconstrued the application of this restriction to employment discrimination claims.

These courts state that Title IX precludes administrative regulation of employment practices because such control is inherently inconsistent with the restrictions imposed upon the agency's enforcement power by section 902.<sup>101</sup> This conclusion, however, either is asserted by the courts without further discussion or offer of authority,<sup>102</sup> or is predicated upon misdirected analysis. In *Seattle University v. United States Department of HEW*<sup>103</sup> and *Romeo Community Schools v. United States Department of HEW*<sup>104</sup> the trial judges declared that since a university applies the same general employment policies to all its programs and departments, the HEW regulations would control the actions of nonfunded programs, and, therefore, were impermissibly overbroad.<sup>105</sup> This reasoning, however, is misguided because it focuses on an irrelevant question and thus overlooks the real issue.

Congress restricted ED's enforcement power to "program-specific" remedies in order to accomplish one goal—to prevent the

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100. See *Romeo Community Schools v. United States Dep't of HEW*, 438 F. Supp. 1021, 1033 (E.D. Mich. 1977), *aff'd* 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

101. *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1215 (E.D. Mo. 1978), *aff'd per curiam*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979) ("By its very nature, supervision of employment policies is not program-specific."); *Romeo Community Schools v. United States Dep't of HEW*, 438 F. Supp. 1021, 1033 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979). ("Regulation of employment practices, however, is inherently non-'program specific.'"); *Seattle Univ. v. United States Dep't of HEW*, 16 Fair Empl. Prac. Cas. 719, 721 (W.D. Wash. 1978), *aff'd per curiam*, 621 F.2d 992 (9th Cir. 1980) ("Regulation of general employment practices . . . is inherently non-'program specific.'").

102. See *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1215 (E.D. Mo. 1978), *aff'd per curiam*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979).

103. 16 Fair Empl. Prac. Cas. 719 (W.D. Wash. 1978), *aff'd per curiam*, 621 F.2d 992 (9th Cir. 1980).

104. 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

105. 16 Fair Empl. Prac. Cas. at 721; 438 F. Supp. at 1033. The Ninth and Sixth Circuits affirmed the trial courts' opinions without discussion on this issue. 621 F.2d 992; 600 F.2d 581.

withdrawal of federal funds from nondiscriminating, *funded* programs.<sup>106</sup> The fact that an entire university may be governed by one general personnel policy is irrelevant to the congressional intention to preserve funding for nondiscriminatory programs. It relates only to the *potential* scope of an ED adjudication of the legality of a challenged policy. The courts have incorrectly assumed that ED regulation of university employment practices "necessarily entail[s] the regulation of employment practices unrelated to the particular programs funded by the federal government . . . ."<sup>107</sup> The fact that a general practice could be found by ED to be sex discriminatory would not *necessarily* affect the continued implementation of that policy. All ED could do is terminate its grant of financial assistance; that remedy is effective only with respect to those programs receiving federal aid. Since nonfunded programs have no funds to lose, ED has no real power to affect the way in which those programs conduct their personnel affairs. Accordingly, the courts' claim that the agency's regulations are overbroad because they could affect the conduct of nonfunded programs is without foundation.

Instead of concentrating on this funded/nonfunded dichotomy, the courts should address Congress' real concern—whether the regulations could have some impact on the flow of financial aid to funded activities that are in full compliance with the nondiscrimination requirements. The courts appear to imply that there is something intrinsic in an attempt to restrict *employment* practices that results in over-regulation. Yet they offer no justification for this conclusion. The absence of any such explanation is understandable. Whether faculty, as well as student, complaints of discrimination are subject to administrative scrutiny is irrelevant to this overbreadth issue. If the agency's enforcement action drains federal funds from a compliant program, the problem lies in an inability to trace the flow of federal dollars once the money reaches the university. This has nothing to do with the nature of the objects of the agency's investigation.<sup>108</sup>

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106. See generally Note, *Title VI, Title IX, and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 605, 624-25 (1980).

107. *Romeo Community Schools v. United States Dep't of HEW*, 438 F. Supp. 1021, 1033 (E.D. Mich. 1977), *aff'd*, 600 F.2d 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979). See also *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1215 (E.D. Mo. 1978), *aff'd per curiam*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Seattle Univ. v. United States Dep't of HEW*, 16 Fair Empl. Prac. Cas. 719, 721-22 (W.D. Wash. 1978), *aff'd per curiam*, 621 F.2d 992 (9th Cir. 1980).

108. See *North Haven Bd. of Educ. v. Hufstедler*, 23 Fair Empl. Prac. Cas. 604, 613

When a decision to terminate assistance to a discriminatory program also results in a withdrawal of federal financial support from a nondiscriminatory activity, the fault lies in the school's or government's failure to identify accurately the beneficiary of a specific grant. While pinpointing the exact grantee of a particular allocation of funds to a university is not a simple undertaking, there is no reason to assume that the difficulty of this task is related to the identity of the recipient. Although the recordkeeping necessary to trace the flow of federal funds within the university is not an insignificant burden, this burden, as well as the possibility of imprecision, exists regardless of who the beneficiary is.

The nature of the section 902 remedy also serves as the basis for another argument raised in opposition to a broad construction of Title IX. Some courts have contended that termination of federal funding is such an inappropriate method of combatting discrimination against teachers, compared to the relief available under other statutory remedies, that Congress could not have intended that the statute deal with such actions. Proponents of this view claim that because termination of funds results in the disruption of educational services, innocent students shoulder the cost of preserving teachers' individual rights. While the goal may be laudable, the courts continue, it can be achieved by pursuing other statutory remedies—such as that provided by Title VII—whereby the relief afforded involves no deprivation of student benefits.<sup>109</sup> Additionally, it is claimed that aid termination may also compel teacher layoffs and that this is an arbitrary and unreasonable method of vindicating employee rights.<sup>110</sup>

The latter argument assumes that teachers are incapable of determining for themselves whether vindicating their right to non-discriminatory treatment is worth the risks associated with such an effort. This choice should be made by the teachers rather than precluded by judicial fiat. If the potential cost of preserving their

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(2d Cir. July 24, 1980).

109. See *Romeo Community Schools v. United States Dep't of HEW*, 600 F.2d 581, 584 (6th Cir.), cert. denied, 444 U.S. 972 (1974); *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1215 (E.D. Mo. 1978), aff'd per curiam, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *Seattle Univ. v. United States Dep't of HEW*, 16 Fair Empl. Prac. Cas. 719, 721 (W.D. Wash. 1978), aff'd per curiam, 621 F.2d 992 (9th Cir. 1980); Kuhn, *supra* note 77, at 61-62.

110. See *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1215 (E.D. Mo. 1978), aff'd per curiam, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979); *Seattle Univ. v. United States Dep't of HEW*, 16 Fair Empl. Prac. Cas. 719, 721 (W.D. Wash. 1978), aff'd per curiam, 621 F.2d 992 (9th Cir. 1980).

rights is found unacceptable, aggrieved teachers can forsake this remedy and proceed under Title VII. As the Second Circuit recently noted, there is sufficient precedent for the existence of alternative remedies for employment discrimination claims.<sup>111</sup>

The argument that students should not be burdened with any of the costs of protecting the right of teachers overlooks Congress' clearly articulated and deeply held commitment to improve the position of women in academia.<sup>112</sup> Terminating federal aid does place some of the cost of promoting that national policy on nonteachers, but such an impact is not inconsistent with Congress' intention. On the contrary, it is a particularly effective way to achieve the national interest in nonbiased employment-related decisionmaking. The dissatisfaction that fund termination creates among students and their parents generates additional pressure on school authorities to cease discriminating so that school activities can continue without interruption. This can be a much more effective method to compel permanent changes in university employment policy than an isolated award of back pay or an order to take other affirmative action with respect to an individual complaint.<sup>113</sup>

Moreover, fears that recognition of Title IX's application to faculty members will somehow endanger non-federally funded programs are largely groundless. Since ED's primary sanction is its power to restrict the flow of federal funds, necessarily the only teachers ED can affect are those whose salaries are funded by ED-controlled money. Since the agency, because of the restrictions inherent in its statutorily-defined power, cannot affect personnel practices governing nonfunded teachers,<sup>114</sup> there is little, if any, problem of ED regulation of nonfunded faculty. Any potential for prejudicing nondiscriminatory programs is a function of the school's recordkeeping capacity and is unrelated to the inclusion of teachers within the statute's protected class. Moreover, termination of aid is an appropriate method to promote the statute's policy of attacking sex discrimination in university hiring. Section 902, therefore, does not forbid the application of Title IX to claims of faculty employment discrimination.

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111. See *North Haven Bd. of Educ. v. Hufstедler*, 23 Fair Empl. Prac. Cas. 604, 612 (2d Cir. July 24, 1980).

112. See text accompanying notes 138-39 *infra*.

113. See *North Haven Bd. of Educ. v. Hufstедler*, 23 Fair Empl. Prac. Cas. 604, 613 (2d Cir. July 24, 1980).

114. This interpretation of the statute recently was recognized and adopted by the Fifth Circuit. *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 737-38 (5th Cir. 1980).

### C. Legislative History

An examination of the legislative history of Title IX offers further support for including employment discrimination within its jurisdiction. This undertaking, however, is complicated somewhat by the fact that the bill that ultimately produced Title IX<sup>115</sup> was composed of several sections, each of which was intended to effect changes in different pieces of legislation but all of which addressed the problem of sex discrimination in education. In addition to the section that became known as Title IX,<sup>116</sup> one provision of this bill sought to amend Title VII of the 1964 Act by removing the exemption enjoyed by educational institutions,<sup>117</sup> and another was designed to extend the coverage of the Equal Pay Act of 1963 to teachers.<sup>118</sup> Consequently, when examining any particular portion of the legislative history, it is important to determine which of the three provisions was the subject of the speaker's remarks.

Senator Bayh, sponsor of the Senate bill<sup>119</sup> that, along with the House version, was the basis of the conference proposal finally adopted by Congress,<sup>120</sup> frequently stated that employment discrimination was within the compass of his proposal.<sup>121</sup> A careful

115. H.R. 7248, 92d Cong., 1st Sess. §§ 1006-1008 (1971). See 117 CONG. REC. 39,099 (1971). See generally 1976 B.Y.U. L. Rev. 133, 142-44.

116. 20 U.S.C. §§ 1681-1686 (1976).

117. This proposed change eventually was enacted, but through a *separate* bill, in the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-1 (1976).

118. H.R. 7248, 92d Cong., 1st Sess. § 1007 (1971). See 117 CONG. REC. 39,099 (1971). This provision was part of the Education Amendments of 1972 as enacted and is codified at 29 U.S.C. § 213(a) (1976).

119. Amendment No. 874 to S. 659, 118 CONG. REC. 5,802-03 (1972). For a thorough discussion of the history of the Senate bill, see *North Haven Bd. of Educ. v. Hufstedler*, 23 Fair Empl. Prac. Cas. 604, 605-09 (2d Cir. July 24, 1980).

120. See generally Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 YALE L.J. 1254, 1255 (1979).

121. As Senator Bayh stated:

[This bill] is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs . . . . More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships and faculty employment . . . . Other important provisions in this amendment would extend the equal employment opportunities provisions of Title VII . . . to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

118 CONG. REC. 5803 (1972).

The Second Circuit, in *North Haven Bd. of Educ. v. Hufstedler*, 23 Fair Empl. Prac. Cas. 604 (2d Cir. July 24, 1980), argued that Bayh's reference to "other important provisions" after first declaring that employment discrimination was the principal focus of his bill reflects his belief that § 901 was intended to apply to employment. *Id.* at 609. While this

reading of the Senator's comments, however, reveals that these references to employment addressed that portion of the bill seeking to amend Title VII, not the portion that became section 901(a) of what is now known as Title IX.<sup>122</sup>

On the other hand, there is a significant portion of Title IX's legislative history that demonstrates Congress' desire to include employment within the limits of the statute. The operative language of Title IX was patterned after, and is virtually identical to, the terminology used in Title VI of the 1964 Civil Rights Act,<sup>123</sup> which prohibits discrimination in all federally funded programs on the basis of race, color, and national origin. In addition to differences in the types of programs and bases of discrimination covered by these two statutes, Title VI specifically excludes employment

statement on its face is susceptible of such an interpretation, an examination of the total record of Bayh's remarks suggests that he did not intend to make such a broad statement. For example, in response to a question by Senator Pell concerning the applicability of the bill to private elementary and secondary schools, Bayh replied:

As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admissions to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

118 CONG. REC. 5812 (1972).

On another occasion, Senator Bayh more clearly identified Title VII and the Equal Pay Act as the target of the employment-related aspects of the bill:

Title VII . . . has been extremely effective in helping to eliminate sex discrimination in employment. Unfortunately it has been of no use in the education field, because the title by its terms exempts from its protection employees of educational institutions . . . . [T]herefore, the second major portion of this amendment would apply Title VII's widely recognized standards of equality of employment opportunity to educational institutions.

In addition . . . my amendment would extend the Equal Pay Act . . . to include . . . teachers . . . .

118 CONG. REC. 5807 (1972).

Finally, in a written summary of his proposal, read into the Congressional Record, Senator Bayh divided the bill into four categories. Here, the employment-related portion was described as an amendment to Title VII. 118 CONG. REC. 5808 (1972).

122. See *Remeo Community Schools v. United States Dep't of HEW*, 600 F.2d 581, 585 (6th Cir.), cert. denied, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 427 (1st Cir. 1979).

123. 42 U.S.C. §§ 2000d to 2000d-6 (1978). See *Cannon v. University of Chicago*, 441 U.S. 677, 694 & n.16, 695 (1979). Title IX originally was proposed as an amendment to Title VI involving merely the addition of sex to Title VI's list of proscribed classifications. 117 CONG. REC. 9822, 9829 (1971) (remarks of Rep. Green). In fact, the original draft of the Title apparently consisted simply of "marked up" copies of Title VI. See *Romeo Community Schools v. United States Dep't of HEW*, 438 F. Supp. 1021, 1029 n.9 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979). Subsequently, however, Congress chose to enact it as part of a separate statute. See Todd, *supra* note 77, at 105.

from its jurisdiction.<sup>124</sup> In light of the close relationship between these two titles, the absence of an analogous exemption in Title IX strongly suggests that Congress intended this statute to be broader than Title VI and prohibit employment discrimination.

This interpretation of Congress' intent is supported further by the fact that although the original House bill contained such an exclusion,<sup>125</sup> that provision was deleted before a vote was taken.<sup>126</sup> Thus, Congress rejected an opportunity it had seized in connection with another statute to remove employment from the coverage of Title IX. Several courts, nevertheless, have maintained that the deletion of this exclusion is not evidence of a congressional desire to include employment discrimination within the terms of Title IX. They claim that such an exclusion for employment would be inconsistent with the provision in Title IX designed specifically to extend the coverage of Title VII to teachers.<sup>127</sup>

This reasoning, however, overlooks the fact that the Title VII-related portion of the Education Amendments was omitted before the amendments were passed because an identical provision already had been enacted as part of another statute—the Equal Employment Opportunity Act of 1972.<sup>128</sup> Thus, a provision excluding employment from the terms of Title IX would not have created any internal inconsistency within that statute.<sup>129</sup>

Finally, congressional action after Title IX was passed also indicates that this statute was intended to prohibit employment dis-

124. 42 U.S.C. § 2000d-3 provides:

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

125. H.R. 7248, 92d Cong., 1st Sess. § 1004 (1971); 117 CONG. REC. 39,098-99 (1971). The language of this proposed employment exemption was exactly the same as that contained in § 604 of Title VI. See note 124 *supra*.

126. See [1972] U.S. CODE CONG. & ADMIN. NEWS 2671-72.

127. See *Romeo Community Schools v. United States Dep't of HEW*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 428 (1st Cir. 1979). See also Kuhn, *supra* note 77, at 56.

128. See text accompanying notes 115-18 *supra*.

129. Title IX as enacted did contain a provision extending the coverage of the Equal Pay Act to teachers. While an exclusion identical to § 604 of Title VI would be inconsistent with the equal pay portion of Title IX, Congress could have avoided this contradiction by drafting an employment exclusion applicable to all but the equal pay provisions of the Education Amendments. Therefore, Congress' decision to delete entirely the proposed exemption for employment cannot be explained solely as an effort to achieve internal consistency. See *North Haven Bd. of Educ. v. Hufstедler*, 23 Fair Empl. Prac. Cas. 604, 611 (2d Cir. July 24, 1980).

crimination. All regulations promulgated under the authority of Title IX must be submitted to Congress, which then has forty-five days in which to set them aside.<sup>130</sup> If no such veto action is taken during that period, the regulations become effective.<sup>131</sup> During that period, resolutions were offered by members of both houses criticizing, *inter alia*, that portion of the then-HEW regulations governing university employment practices.<sup>132</sup> Nevertheless, Congress took no action during this comment period to modify the regulations, and thus Congress refused another opportunity to exclude employment from the scope of Title IX.<sup>133</sup> This failure to repudiate an unambiguous administrative interpretation of Title IX is strong evidence of Congress' sympathy with the agency's construction of the statute.<sup>134</sup>

Some courts have rejected this conclusion on the ground that the same federal statute<sup>135</sup> also provides that Congress' failure to disapprove a final regulation should not be construed as approval of the regulation or as a finding that the regulation is consistent with the act under whose authority it was promulgated.<sup>136</sup> This provision, however, was enacted after the regulations in question had passed through Congress and become effective.<sup>137</sup> Thus, Congress' refusal to include an employment exclusion within the terms of Title IX or to veto HEW rules specifically regulating university employment policies strongly suggests that Congress intended that

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130. General Education Provisions Act, § 431(d), 20 U.S.C. §§ 1232(d), (f) (1976), as amended by Education Amendments of 1974, Pub. L. No. 93-380, § 509(a)(2), 88 Stat. 567.

131. 20 U.S.C. § 1232(d) (1976).

132. See 121 CONG. REC. 17,301 (1975) (resolution by Sen. Helms condemning the HEW regulations in toto); 121 CONG. REC. 19,209 (1975) (resolution by Rep. Martin rejecting the HEW regulations). A resolution sponsored by Representative Quie and Erlenborn designed specifically to disapprove the employment sections of the regulation also failed. See *North Haven Bd. of Educ. v. Hufstедler*, 23 Fair Empl. Prac. Cas. 604, 612 (2d Cir. July 24, 1980).

133. See generally 1976 B.Y.U. L. REV. 133, 145-48.

134. At least two legislators during debates over the HEW regulations expressly stated that the regulations were consistent with Congress' intent to include employment within the compass of Title IX. See *Sex Discrimination Regulations: Hearings Before the Subcomm. on Post Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 163-64 (1975) (remarks of Rep. Mink); *id.* at 169 (remarks of Sen. Bayh).

135. 20 U.S.C. § 1232(d)(1) (1976).

136. See *Islesboro School Comm. v. Califano*, 593 F.2d 424, 428 n.3 (1st Cir. 1979); *Romeo Community Schools v. United States Dep't of HEW*, 438 F. Supp. 1021, 1030-31 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

137. See *North Haven Bd. of Educ. v. Hufstедler*, 23 Fair Empl. Prac. Cas. 612 (2d Cir. July 24, 1980); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 428 n.3 (1st Cir. 1979). While the *Islesboro* court noted this chronological fact, it apparently attributed no significance to it.



Title IX's basic prohibition apply to employment as well.

#### D. Policy Objectives of the Statute

As a final consideration, it is important to realize that an expansive reading of Title IX to reach employment discrimination is consistent with the broad policy goals underlying the enactment of this statute. Congressional hearings preceding the passage of Title IX are replete with references to and expressions of outrage over the historical pattern of discrimination against women in academic employment.<sup>138</sup> This concern over the pervasive nature of sex discrimination in all aspects of higher education, including employment, was not forgotten when Congress passed the Education Amendments of 1972; indeed, it was the motivating force behind the enactment of this legislation.<sup>139</sup> Consequently, to interpret Title IX narrowly as inapplicable to claims of employment discrimination undercuts Congress' efforts to provide an alternative, effective method of challenging and eliminating what it considered to be a serious national problem—the discriminatory treatment traditionally accorded women seeking a career in academia.

#### IV. CONCLUSION

Congress has attempted to improve the steadily worsening position of women in academia by enacting two separate pieces of legislation. The Equal Employment Opportunity Act of 1972 included an amendment to Title VII extending the protections afforded by that statute to teachers. Since 1972, however, the federal courts have frustrated Congress' efforts by adopting an extremely passive approach to challenges raised against university employment decisions. Emphasizing the subjective nature of the factors

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138. See 118 CONG. REC. 1992 (1972) (remarks of Sen. Williams) ("Perhaps the most extensive discrimination in educational institutions, however, is found in the treatment of women."); 118 CONG. REC. 5804 (1972) (remarks of Sen. Bayh) ("Discrimination against females on faculties and in administration is well documented and widespread abuse is clear."). See generally *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970). For documentation of the extent of sex discrimination in academic employment see, e.g., L. LEWIS, *SCALING THE IVORY TOWER: MERIT AND ITS LIMITS IN ACADEMIC CAREERS* (1975); Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. U.L. REV. 237 (1971).

139. *Sweeney v. Board of Trustees of Keene State College*, 568 F.2d 169, 175 (1st Cir.), *vacated and remanded for reconsideration per curiam*, 439 U.S. 24 (1978); *on remand*, 82 F.R.D. 683 (D.N.H.), *aff'd*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 733 (1980) (dictum); *Piasecik v. Cleveland Museum of Art*, 426 F. Supp. 779, 781 n.1 (N.D. Ohio 1976) (dictum); *Hearings on Section 805, supra* note 138, at 154, 163-64, 168-69.

upon which hiring, promotion, and tenure decisions are based and the interest in avoiding judicial intervention in academic affairs, the courts have refrained from any meaningful review of the substantive correctness of such determinations. In addition, the burden placed upon plaintiffs to prove that these relatively unquantifiable judgments are the result of an intent to discriminate further reduces the likelihood of success for the aggrieved teacher. The combination of these two factors has produced a result that is inconsistent with Congress' clearly articulated desire to provide an effective remedy for faculty job discrimination.

This Article has suggested that such extreme deference is not compelled by the defendants' reliance on subjective criteria. Furthermore, shifting to defendants the burden of persuading the factfinder that their decisions were based on nondiscriminatory factors would strike a more equitable balance between the individual's right to bias-free decisionmaking and the institutions' interest in retaining an appropriate measure of control over their personnel practices.

The courts' interpretation of Title IX of the Education Amendments of 1972 has further undermined Congress' intent to provide relief to victims of sex-based employment discrimination. A majority of the courts addressing this issue have held that Title IX does not prohibit institutions of higher learning from engaging in sex-based job discrimination. These decisions, it has been argued, are based on misguided interpretations of the relevant statutory language, erroneous treatment of the legislative history of this and related statutes, and a lack of consideration of the broad policies underlying the enactment of this statute. The courts' restrictive construction of the act is at odds with Congress' explicit desire to offer an alternative, effective remedy for the clearly perceived evil of sex discrimination in the academic job market. Thus, with respect to both Title VII and Title IX, the judiciary has thwarted the will of Congress and, in so doing, has impeded the ability of many women to pursue a career in academia free from the persistent threat of arbitrary, sex-based discrimination.

