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## NOTES

### VOLUNTARY AFFIRMATIVE ACTION PLANS BY PUBLIC EMPLOYERS: THE DISPARITY IN STANDARDS BETWEEN TITLE VII AND THE EQUAL PROTECTION CLAUSE

#### INTRODUCTION

Nearly ten years after the Supreme Court first attempted to resolve the legality of affirmative action,<sup>1</sup> the issue remains as controversial as ever.<sup>2</sup> Supporters of affirmative action believe it represents a necessary remedy for centuries of segregation.<sup>3</sup> Opponents consider it a new problem, not a solution.<sup>4</sup> The Court has adopted an essentially moderate approach, approving affirmative action generally,<sup>5</sup> but narrowly interpreting the power of courts,<sup>6</sup> legislators,<sup>7</sup> and employers<sup>8</sup> to implement such plans. Thus, even when the Court has rejected a specific plan, it has reaffirmed the general permissibility of some affirmative action.<sup>9</sup>

The goal of Title VII of the Civil Rights Act of 1964<sup>10</sup> is to ensure equal employment opportunity.<sup>11</sup> Originally, Title VII applied only to private employers,<sup>12</sup> but Congress extended its provisions to public employers in 1972.<sup>13</sup> Voluntary<sup>14</sup> affirmative action plans<sup>15</sup> adopted by pub-

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1. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Earlier, in 1973, the Supreme Court had granted certiorari to hear an affirmative action case, see *DeFunis v. Odegaard*, 414 U.S. 1038 (1973), but later declared the case moot, thus failing to reach the merits. See *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974).

2. See, e.g., *N.Y. Times*, Mar. 29, 1987, § 4 at 1, col. 1 (noting the broad spectrum of views on affirmative action).

3. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 406-07 (1978) (Blackmun, J., concurring in part and dissenting in part); Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 *Harv. L. Rev.* 1327, 1329 (1986).

4. See, e.g., *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1475 (1987) (Scalia, J., dissenting); Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 *Harv. L. Rev.* 1312, 1318 (1986).

5. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment); *infra* notes 37-113 and accompanying text.

6. See *United States v. Paradise*, 107 S. Ct. 1053, 1064-65 (1987); *Local No. 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3050 (1986).

7. See *Fullilove v. Klutznick*, 448 U.S. 448, 490-91 (1980).

8. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1454 (1987).

9. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278-80 (1986).

10. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)); see *infra* note 37 (text of § 703(a) of Title VII).

11. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971); *infra* notes 37-40 and accompanying text.

12. See C. Sullivan, M. Zimmer & R. Richards, *Federal Statutory Law of Employment Discrimination* § 2.11, at 203 (1980) [hereinafter Sullivan].

13. See *The Equal Employment Opportunity Act of 1972* ("EEOA"), Pub. L. No. 92-261, 86 Stat. 103 (1972). The EEOA extended Title VII's provisions simply by changing

lic employers<sup>16</sup> are state action,<sup>17</sup> and therefore are subject to attack on both equal protection<sup>18</sup> and Title VII<sup>19</sup> grounds. The Supreme Court's recent decision in *Johnson v. Transportation Agency*,<sup>20</sup> makes it clear that Title VII shields employers adopting such plans from liability when they can demonstrate that they are correcting a manifest racial or gender imbalance in the job category in question.<sup>21</sup> The equal protection standard

the definition of persons covered. See 86 Stat. 103. The law's substantive provisions therefore apply with the same force to public and private employers. See *Dothard v. Rawlinson*, 433 U.S. 321, 332 n.14 (1977); H.R. Rep. No. 238, 92d Cong., 1st Sess. 17 (1971), reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2152; S. Rep. No. 415, 92d Cong., 1st Sess. 9 (1971).

14. Voluntary affirmative action plans are those that are adopted unilaterally by an employer, see, e.g., *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1446-47 (1987), or as part of a collective bargaining agreement, see, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 197-98 (1979), or pursuant to a consent decree, see *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 106 S. Ct. 3063, 3073 (1986). They do not include plans mandated by court order after adjudication of liability. See, e.g., *United States v. Paradise*, 107 S. Ct. 1053, 1065 (1987); *Local No. 28, Sheet Metal Workers v. EEOC*, 106 S. Ct. 3019, 3050 (1986).

15. For purposes of this Note, affirmative action plans are those that use race, sex or ethnicity as one criterion in a hiring or promotion plan. This excludes plans that use such factors as their sole criterion—that is, impose rigid quotas. See, e.g., *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1454 (1987). It also excludes plans that involve layoffs, which the Supreme Court has declared unconstitutional, see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-84 (1986) (plurality), and violative of Title VII, see *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561, 581-83 (1984).

16. Title VII includes in its definition of employers, "governments, governmental agencies, [and] political subdivisions." 42 U.S.C. § 2000e(a) (1982). This definition, however, does not include the personal staffs of elected officials. See 42 U.S.C. § 2000e(f) (1982).

17. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 & n.4 (1986). See generally *The Civil Rights Cases*, 109 U.S. 3, 10-11 (1883) (discussing "state action" within the context of the fourteenth amendment); 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 16.1 (1986) [hereinafter *Rotunda*] (same).

18. See *infra* notes 79-113 and accompanying text.

19. See *infra* notes 46-78 and accompanying text.

20. 107 S. Ct. 1442 (1987).

21. See *id.* at 1452. A manifest imbalance is a significant, statistical, racial or sexual disparity in a workforce or specific job category compared with a relevant segment of the population. See *id.* at 1452; *United Steelworkers v. Weber*, 443 U.S. 193, 208-09 (1979). The definition of the relevant segment depends upon various factors. One factor is the percentage of the population that possesses the skills to perform the job in question. If the job requires no particular skills, "a comparison of the percentage of minorities or women in the employer's work force with the percentage in the [total] area labor market . . . is appropriate." *Johnson*, 107 S. Ct. at 1452. When a job requires particular skills, "the comparison should be with those in the labor force who possess the relevant qualifications." *Id.* The formula may be easier to apply in theory than in practice. Compare *Johnson*, 107 S. Ct. at 1453-54 (implicitly approving agency's long-term goal of matching percentage of women in skilled craft positions within the agency to percentage of women in the area labor force) with *id.* at 1465 (O'Connor, J., concurring in the judgment) (proper benchmark statistic should be percentage of skilled craft workers in the area who are women).

A court must also determine the size of the geographical area to be considered. Compare *Ledoux v. District of Columbia*, 820 F.2d 1293, 1304 n.18 (D.C. Cir. 1987) (using as its benchmark the District of Columbia workforce, despite the fact that the Department

is less clear.<sup>22</sup> Under the guise of strict judicial scrutiny of racial or gender classifications, this standard appears to require a showing of actual past discrimination by the employer or his predecessors.<sup>23</sup>

The resulting ambiguity leaves public employers in a difficult position.<sup>24</sup> As matters now stand, a state or local government agency that wants to correct an obvious racial, ethnic or gender imbalance but cannot prove purposeful past discrimination takes a large risk by instituting an affirmative action plan.<sup>25</sup> Even if the plan is shielded from Title VII liability, it still may be invalid on equal protection grounds.<sup>26</sup> As a result, some courts incorrectly read Title VII out of the analysis of voluntary public affirmative action plans.<sup>27</sup> In light of the broad power granted to Congress by the enforcement clause of the fourteenth amendment,<sup>28</sup> however, the congressional intent that Title VII apply fully to public employers<sup>29</sup> deserves considerable constitutional weight. In fact, this Note will argue that because of this power, the Title VII standard should define the equal protection standard.

The enforcement clause gives Congress the authority to pass laws declaring unconstitutional otherwise constitutional state action.<sup>30</sup> By analogy, the enforcement clause gives Congress the power to declare constitutional certain state actions that might otherwise be unconstitu-

could hire from surrounding Maryland and Virginia suburbs as well) *with Hammon v. Barry*, 826 F.2d 73, 77 (D.C. Cir. 1987) (using metropolitan area figure, which showed a much lower percentage of blacks). See also *infra* notes 119-21 and accompanying text (discussing *Hammon* and *Ledoux*).

22. See *United States v. Paradise*, 107 S. Ct. 1053, 1064 (1987).

23. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality); *infra* notes 101-02 and accompanying text. Some lower court cases indicate that an imbalance in the relevant job category, if large enough, may indicate past discrimination even under the constitutional standard. See, e.g., *Higgins v. City of Vallejo*, 823 F.2d 351, 358 (9th Cir. 1987); *Bratton v. City of Detroit*, 704 F.2d 878, 887 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

24. See Comment, *Walking a Tightrope Without a Net: Voluntary Affirmative Action Plans After Weber*, 134 U. Pa. L. Rev. 457, 458 (1986) (public employers often institute affirmative action plans in response to the threat of a Title VII suit or to settle a suit already filed). One judge described the employer's dilemma as "walk[ing] a high tightrope," because no matter what action he takes, he may be held liable. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting). A clear standard governing affirmative action would relieve this difficulty.

25. See *United Steelworkers v. Weber*, 443 U.S. 193, 210-11 (1979) (Blackmun, J., concurring); Sullivan, *supra* note 12, § 13.4, at 828. An employer may not wish to make an inquiry that might disclose his own past discrimination for fear of opening himself up to liability. See *infra* note 74.

26. See *infra* note 123 and accompanying text.

27. See *Bratton v. City of Detroit*, 704 F.2d 878, 887 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Jones v. Memphis Light, Gas & Water Div.*, 642 F. Supp. 644, 656 (W.D. Tenn. 1986).

28. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). For discussion of the Supreme Court's enforcement clause jurisprudence, see *infra* notes 139-64 and accompanying text.

29. See *supra* note 13.

30. See *infra* notes 150-51 and accompanying text.

tional.<sup>31</sup> This power is limited only by the specific constitutional guarantees of individual rights.<sup>32</sup> Because congressionally authorized state actions become, in effect, congressional actions, courts should review them with the same deference they give acts initiated by Congress.<sup>33</sup> When it passed the Equal Employment Opportunity Act of 1972 ("EEOA"),<sup>34</sup> extending Title VII to public employers, Congress acted within its power to define the relevant equal protection standard.<sup>35</sup> Therefore, public employers acting under the statutory shield provided by Congress in Title VII should receive the same constitutional deference Congress would receive had it instituted a given affirmative action plan itself. Because the Supreme Court has determined that Congress intended a manifest imbalance standard under Title VII,<sup>36</sup> that standard should govern equal protection challenges as well.

This Note addresses the apparent disparity between the Title VII and equal protection standards currently applicable to challenges to voluntary affirmative action plans instituted by public employers. Part I discusses Title VII and the development of the manifest imbalance standard for public affirmative action plans. Part II analyzes the leading Supreme Court cases applying the equal protection clause (or its fifth amendment equivalent) to affirmative action plans and discusses the Court's failure to articulate a clear standard. Part III analyzes some of the lower court cases that review affirmative action plans under both Title VII and the equal protection clause, showing the confusion engendered both by the lack of a majority constitutional standard and the seeming disparity between the two standards. This Note concludes that Congress, by passing the EEOA, exercised its power under the enforcement clause of the fourteenth amendment to give public employers the authority to correct manifest imbalances in their workforces without violating the equal protection clause.

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31. See *infra* notes 151-54 and accompanying text.

32. See Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603, 620 (1975). The methods by which Congress can enforce the equal protection clause are limited by judicial construction of the substantive protections of that clause. Thus, for example, Congress cannot, in light of the judicial bar on school segregation, pass a law seeking to enforce the equal protection clause by mandating school segregation. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); see also Bohrer, Bakke, Weber and Fullilove: *Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 Ind. L.J. 473, 495-96 (1981) (constitutionality of a congressional statute barring school busing in contradiction of a state law depends on whether Supreme Court has declared that equal protection clause guarantees right to be bused); see also *infra* notes 151-53 and accompanying text.

33. See *infra* notes 180-85 and accompanying text.

34. See *supra* note 13.

35. See *infra* notes 155-60 and accompanying text.

36. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1452 (1987); *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979); *supra* note 21.

## I. TITLE VII

In its first comprehensive review of Title VII,<sup>37</sup> *Griggs v. Duke Power Co.*,<sup>38</sup> the Supreme Court held that the statute's objective was "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."<sup>39</sup> To that end, the Court held that Congress meant to bar all employment discrimination, both intentional and unintentional.<sup>40</sup> Accordingly, the Court has developed two standards for establishing a prima facie case of discrimination under Title VII.

Under the disparate treatment test, which addresses intentional discrimination, a plaintiff can establish a prima facie Title VII violation by introducing evidence of discriminatory motive by his or her employer.<sup>41</sup> To combat unintentional employment discrimination—practices that are discriminatory in effect, but without bad motive—as well as intentional discrimination in cases where intent is hard to ascertain, the Court has also held that a plaintiff may prove a Title VII violation by showing that the employment practice in question has an improper disparate impact according to race or sex.<sup>42</sup> Under this test, introduced in *Griggs*,<sup>43</sup> a suf-

37. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)). The heart of the statute is § 703(a), which provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a). The statute aims to assure equal employment opportunity. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971); 2 N. Dorsen, P. Bender, B. Neuborne & S. Law, *Political and Civil Rights in the United States* 905 (4th ed. 1979).

38. 401 U.S. 424 (1971).

39. *Id.* at 429-30. See generally Sullivan, *supra* note 12, at § 1.2 (analyzing *Griggs*).

40. See *Griggs*, 401 U.S. at 431.

41. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

42. See Sullivan, *supra* note 12, § 1.5, at 33. Under disparate impact analysis, the Court does not require proof of motive when it does not exist or would be unreasonably difficult to prove. See *Teamsters*, 431 U.S. at 335 n.15. The Court's finding that Title VII "tolerates no racial discrimination, subtle or otherwise" explains this standard. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (emphasis added); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

Although Title VII contains no explicit reference to disparate impact analysis, the legislative history accompanying passage of the EEOA, which followed *Griggs*, demonstrates the appropriateness of the Court's reasoning. The Senate report accompanying the EEOA stated:

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Experience has shown this view to be false. . . . Experts familiar with the subject now generally describe the prob-

ficient statistical imbalance<sup>44</sup> in a particular job category establishes a prima facie case of past discrimination.<sup>45</sup>

### A. Title VII Applied to Affirmative Action

Title VII numbers among the most common bases of litigation in federal courts.<sup>46</sup> One way that employers attempt to avoid Title VII litigation is by instituting affirmative action plans voluntarily,<sup>47</sup> thereby enabling them to control the process of integration to a greater extent.<sup>48</sup>

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lem in terms of "systems" and "effects" rather than simply intentional wrongs

S. Rep. No. 415, 92d Cong. 1st Sess. 5 (1971). See also H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 (1971), reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2144 (referring favorably to the *Griggs* opinion).

43. See Sullivan, *supra* note 12, § 1.5, at 33-34; see also *Griggs*, 401 U.S. at 431.

44. Statistics suffice as proof in this context because the prima facie test for discriminatory impact is whether "facially neutral qualification standards work in fact disproportionately to exclude [applicants or employees]." *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The Supreme Court has stated that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977).

For examples of numerical disparities that the Court has held are sufficient to make out prima facie cases, see *Dothard*, 433 U.S. at 329-30 (state policy of only hiring prison guards between 5'2", 120 lbs. and 6'10", 300 lbs., thus excluding 41.13% of the female population but less than 1% of the male population); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 303-05 (1977) (blacks comprising 1.8% of teachers in particular district in St. Louis County, Mo., compared to either 5.7% (black teachers in St. Louis County) or 15.4% (black teachers in St. Louis city and county)). See also *Bazemore v. Friday*, 478 U.S. 385, 399-401 (1986) (salary disparity between blacks and whites of \$331 in 1974 and \$395 in 1975).

45. See Sullivan, *supra* note 12, § 1.5, at 33-34. The Supreme Court has developed a three-step process for handling disparate impact claims. In the first step, the plaintiff "need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern." *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). The Court terms this a "prima facie case of discrimination." *Id.*; *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). In the second step, the burden shifts to the employer to show that the challenged standard has a legitimate, nondiscriminatory purpose. See *Dothard*, 433 U.S. at 329; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If the employer meets his burden, the plaintiff has a final chance to "introduce evidence that the proffered justification is merely a pretext for discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978); see also *Dothard*, 433 U.S. at 329; *McDonnell Douglas*, 411 U.S. at 804-05 (giving examples of facts that prove or disprove pretext); Sullivan, *supra* note 12, § 1.5, at 59 (pretext means conduct not justified by reasonable business necessity).

46. See Administrative Office of the United States Courts, Annual Report of the Director 140 (1985) (8,082 out of 118,833 statutory actions filed in federal district courts in the twelve months ending June 30, 1985 were employment discrimination cases). Judge Richard Posner noted that "[i]n the year ending June 30, 1986, more than 9,000 suits charging employment discrimination, the vast majority under Title VII, were brought in federal court." Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. Pa. L. Rev. 513, 514 (1987).

47. See Brief for Petitioner Kaiser Aluminum & Chem. Corp. at 50, *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (No. 78-435).

48. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 230-32 (5th Cir.

Such plans, however, are subject to Title VII challenges by the employees or applicants, typically white males, who are disadvantaged by them.<sup>49</sup> Because the plans necessarily contain explicit race or gender preferences, these plaintiffs have little problem establishing a prima facie case of disparate treatment. Once such a case has been established, the employer has the burden of justifying the discriminatory treatment.<sup>50</sup> At this point, he must demonstrate that he instituted the plan in response to the appropriate finding of past discrimination or current imbalance.<sup>51</sup>

The Supreme Court addressed voluntary affirmative action plans for the first time in *United Steelworkers v. Weber*.<sup>52</sup> The plan at issue in *Weber* was intended to remedy a racial imbalance in the skilled-craft workforce of Kaiser Aluminum's Gramercy, Louisiana plant.<sup>53</sup> Prior to 1974, only 1.83% of the plant's skilled craft workers were black.<sup>54</sup> In contrast, the local workforce was 39% black.<sup>55</sup> The imbalance resulted from Kaiser's policy of hiring only craft workers with prior experience and from the historic exclusion of blacks from craft unions in the area, making it impossible for them to get the experience they needed.<sup>56</sup> Under pressure from both the federal government and private civil rights groups,<sup>57</sup> the United Steelworkers and Kaiser agreed to institute a training program that would supply the plant's new craft workers.<sup>58</sup> The plan mandated that at least 50% of the trainees be black.<sup>59</sup> A class of white

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1977) (Wisdom, J., dissenting), *rev'd sub nom.* *United Steelworkers v. Weber*, 443 U.S. 193 (1979); Brief for Amicus Curiae Equal Employment Advisory Council at 22-23, *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (No. 78-432).

49. See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 199 (1979). Until *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), it was unclear whether Title VII prohibited discrimination against white males. In *McDonald*, three employees, two whites and one black, were caught stealing company property. See *id.* at 276. The company fired the whites and retained the black, seemingly using race as the sole basis for the decision. The Court held that this violated Title VII, as Congress intended the statute to bar all discrimination. See *id.* at 280.

50. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1449 (1987); *supra* note 45.

51. See *Johnson*, 107 S. Ct. at 1449-52.

52. 443 U.S. 193 (1979); see also *Bratton v. City of Detroit*, 704 F.2d 878, 883 (6th Cir. 1983) (calling *Weber* the seminal Title VII case), *cert. denied*, 464 U.S. 1040 (1984). *Weber* explicitly limited its holding to private employers. See *Weber*, 443 U.S. at 200. The Court later extended its holding to public employers. See *Johnson*, 107 S. Ct. at 1449 n.6. This extension corresponds to the legislative history of the EEOA, in which Congress extended the provisions of Title VII, without altering them, to public employers. See *supra* note 13.

53. See *Weber*, 443 U.S. at 198.

54. See *id.* at 198 (5 out of 273).

55. See *id.* at 199.

56. See *id.* at 198.

57. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 228-29 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.* *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

58. See *Weber*, 443 U.S. at 199.

59. See *id.*



workers sued under Title VII.<sup>60</sup>

Because the *Weber* Court held that Title VII allows private employers "to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories"<sup>61</sup> as long as such plans do not "unnecessarily trammel the interests of the white employees,"<sup>62</sup> it found the Kaiser plan permissible. The Court declined, however, to establish a more specific standard separating permissible from impermissible plans.<sup>63</sup>

The *Weber* majority faced a formidable hurdle to its holding since the plain meaning of Title VII appears to forbid *all* discrimination, whatever the form.<sup>64</sup> In addition, the legislative history of Title VII contains much

60. *See id.*

61. *Id.* at 209. This test was later termed the "manifest imbalance" standard. *See Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1452 (1987).

The court of appeals had found the *Weber* plan discriminatory in violation of Title VII. *See Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 227 (5th Cir. 1977), holding that only a prior judicial determination of discrimination could justify reverse discrimination by an employer, *see id.* at 223-24. The Supreme Court reversed, noting that the lower court analysis would make voluntary compliance with Title VII difficult. *See Weber*, 443 U.S. at 207.

62. *Weber*, 443 U.S. at 208. The Supreme Court consistently has held that voluntary affirmative action plans by public or private employers should be analyzed under the same basic two-pronged test, whether attacked on Title VII or equal protection grounds. *See Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1452 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Weber*, 443 U.S. at 208.

The first prong, broadly, requires that the employer make a sufficient factual showing to justify his plan. *See Johnson*, 107 S. Ct. at 1452. This is satisfied, at a minimum, by a current manifest imbalance, but may require actual past discrimination by the employer. *Compare Johnson*, 107 S. Ct. at 1455 (given manifest gender imbalance in job category, consideration by employer of gender as one factor in promotion was reasonable) *with Wygant*, 476 U.S. at 274 (racial classification requires "some showing of prior discrimination").

If the plan passes this first prong, the second prong requires that the plan be "narrowly tailored to the achievement of [the] goal." *Wygant*, 476 U.S. at 274 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)); *see also Johnson*, 107 S. Ct. at 1455-56 (referring to the second prong test as requiring that the plan not "unnecessarily trammel[]" the interests of innocent white or male employees). While most courts appear to agree that the equal protection and Title VII standards for the first prong do not coincide, *see infra* note 123 and accompanying text, some imply that no such distinction exists under the second prong. *See Ledoux v. District of Columbia*, 820 F.2d 1293, 1305 (D.C. Cir. 1987).

The factors that help a plan pass the second prong include: that it consist of a preference, not a quota, *see Johnson*, 107 S. Ct. at 1455; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978); that it harm innocent employees as little as possible, *compare Johnson*, 107 S. Ct. at 1456 (allowing promotions) *and United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (allowing hiring) *with Wygant*, 476 U.S. at 282-84 (forbidding layoffs); that it help attain, not maintain, a racial or sexual balance, *see Johnson*, 107 S. Ct. at 1456; *Weber*, 443 U.S. at 208; and that it be of limited duration, *see Johnson*, 107 S. Ct. at 1456; *Weber*, 443 U.S. at 208-09.

63. *See Weber*, 443 U.S. at 208.

64. *See supra* note 37 (text of § 703(a)). In addition to § 703(a), the *Weber* plan was subject to the provisions of § 703(d), which states that "[i]t shall be an unlawful employment practice for any employer [or] labor organization . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training." 42

evidence that Congress did not intend the law to be a vehicle for race-conscious employment practices.<sup>65</sup> The majority overcame this hurdle in two ways.

First, while acknowledging that the plain language of the statute indeed appears to bar affirmative action,<sup>66</sup> the Court held that the plan in question was in keeping with Title VII's spirit—a desire to integrate blacks into the mainstream of American society,<sup>67</sup> rather than to leave them trapped in the pattern of discrimination that Title VII had declared illegal.<sup>68</sup> The majority found further support for this justification in the express congressional desire to encourage voluntary compliance<sup>69</sup> and to minimize interference in “traditional management prerogatives.”<sup>70</sup>

Second, the majority relied on the language of section 703(j), which bars courts from using Title VII to require preferential treatment to cor-

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U.S.C. § 2000e-2(d) (1982). According to the *Weber* dissent, these provisions clearly “prohibit racial discrimination in employment *simpliciter*.” *Weber*, 443 U.S. at 220 (Rehnquist, J., dissenting).

65. See 110 Cong. Rec. 6564 (1964) (remarks of Sen. Kuchel, Senate sponsor) (under Title VII, “[e]mployers and labor organizations could not discriminate in favor of or against a person because of his race, his religion, or his national origin”); *id.* at 7213 (remarks of Sens. Clark and Case, Senate floor managers of the bill) (“[an employer] would not be obliged—or indeed permitted . . . to prefer Negroes for future vacancies”); *id.* at 11,848 (remarks of Sen. Humphrey, Senate leader of Title VII House-Senate conference committee) (“The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups.”); see also *Weber*, 443 U.S. at 230-32 (Rehnquist, J., dissenting) (arguing that the legislative history of Title VII proved that the Act barred plan at issue).

66. See *Weber*, 443 U.S. at 201.

67. See *id.* at 202. The majority quoted numerous passages from the Congressional Record to the effect that the goal of Title VII was to improve “the plight of the Negro in our economy.” *Weber*, 443 U.S. at 202 (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)). See, e.g., *id.* at 203 (quoting 110 Cong. Rec. 6547 (1964) (remarks of Sen. Humphrey)) (“What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill?”); *id.* (quoting 109 Cong. Rec. 11,159 (1963) (remarks of Pres. Kennedy) (statement urging acceptance of bill that later became Title VII)) (“There is little value in a Negro’s obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job.”).

The *Weber* Court failed to cite the only piece of Title VII’s legislative history that directly supports its approach. A report from Senators Clark and Case, the floor managers of the bill in the Senate, states: “An antidiscrimination law cannot be evaluated simply by an examination of its provisions, ‘for the letter killeth, but the spirit giveth life.’” 110 Cong. Rec. 7214 (1964) (citation omitted in original).

68. See *Weber*, 443 U.S. at 204 (“It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.”). Justice Blackmun noted that the legislative history of Title VII contains no compelling evidence of the desire to “lock-in” segregative results that were legal prior to the passage of the law. See *id.* at 215 (Blackmun, J., concurring).

69. See *id.* at 204 (“national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination”) (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963)) (emphasis added in *Weber*).

70. See *id.* at 207.

rect a racial or gender imbalance.<sup>71</sup> Because that section speaks of not *requiring* preferential treatment, the Court held it could not be read as *prohibiting* such treatment.<sup>72</sup> In addition, because the section's prohibition speaks to the courts, not to employers, the majority's reading of section 703(j) also fits neatly with its holding that Congress intended to interfere with employers' rights as little as possible.<sup>73</sup>

The *Weber* Court left unresolved the question whether the manifest imbalance in traditionally segregated job categories standard required merely a showing of a current imbalance or proof that the "traditional segregation" alleged of the employer in question was created by his own, or his predecessors' past discrimination.<sup>74</sup> In *Johnson v. Transportation Agency*,<sup>75</sup> the Court answered this question by holding that Title VII ex-

71. Section 703(j) states:

Nothing contained in this subchapter shall be interpreted to *require* any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . .

42 U.S.C. § 2000e-2(j) (1982) (emphasis added). See *Weber*, 443 U.S. at 205 n.5.

72. See *Weber*, 443 U.S. at 205.

73. See *id.* at 206; Sullivan, *supra* note 12, § 13.4, at 829.

74. See generally Comment, *supra* note 24, at 474-75. Justice Blackmun stated that the majority's standard was broader than absolutely necessary to achieve its aims. See *Weber*, 443 U.S. at 212-13 (Blackmun, J., concurring). Blackmun noted the employer's dilemma: "If Title VII is read literally, on the one hand [employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks." *Id.* at 210. The solution, he argued, would be to allow employers to adopt *Weber*-type plans if they could show a past "arguable violation" of Title VII in discriminating against women or minorities. See *id.* at 211.

By this "arguable violation" standard, Justice Blackmun meant that Title VII, in effect, empowered employers to make out a statistical prima facie disparate impact case against themselves and to remedy it by voluntary affirmative action. See *id.* at 214 (Blackmun, J., concurring). An employer could use the same statistics a plaintiff would use against the employer to establish a prima facie case. See *id.* at 213; *supra* note 44. This standard, he argued, had the dual benefit of upholding the congressional desire that Title VII disputes be resolved voluntarily and of limiting employers to remedying imbalances arguably of their own making, thus preventing them from correcting mere societal discrimination. See *id.* at 212-13.

75. 107 S. Ct. 1442 (1987). In *Johnson*, the respondent promoted a woman to the position of road dispatcher, a skilled job that previously had been held exclusively by men. See *id.* at 1445-46. The woman was one of seven qualified applicants, but she had scored slightly lower on an eligibility test than the petitioner, a white male. See *id.* at 1448. Despite the difference, she received the promotion pursuant to the agency's affirmative action plan. See *id.*

Looking at the agency's plan in light of the *Weber* requirements, the Supreme Court found the plan was justified by the manifest imbalance between the number of female skilled craft workers and the percentage of women in the relevant local workforce. See *id.* at 1454. Out of 238 skilled craft workers, none were women. See *id.* at 1446. This "inexorable zero," see *id.* at 1465 (O'Connor, J., concurring in the judgment) (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977)), meant that regardless of whether the majority adopted the agency's long-term goal of matching the number of women in the county-wide workforce (36%), as it appeared to do, see *id.* at

pressed the congressional intent that a current manifest imbalance be sufficient to justify a narrowly tailored plan.<sup>76</sup> While this holding made the employer's practical responsibility clear, on a more abstract level the Court failed to establish whether it considered an imbalance remediable per se or simply the basis for a reasonable inference of past discrimination.<sup>77</sup> Subsequent lower court cases interpreting *Johnson* have disagreed on this issue.<sup>78</sup>

Despite this dispute over the meaning of the Title VII manifest imbalance standard after *Johnson*, this standard is a model of clarity compared to that of the equal protection clause.

## II. EQUAL PROTECTION STANDARDS

The equal protection clause of the fourteenth amendment assures all individuals of "equal protection of the laws."<sup>79</sup> Given this vague and sweeping language, it is not surprising that a basic and longstanding conflict continues over the clause's interpretation. On the one hand, some believe the equal protection clause is color blind, barring all discrimination within its scope.<sup>80</sup> On the other hand, others believe it is color conscious, barring invidious discrimination but allowing, under certain

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1446, or limited the agency to matching the percentage of skilled female craftworkers in the area (5%), see *id.* at 1465 (O'Connor, J., concurring in the judgment), it found an imbalance sufficient to justify the plan.

76. See *id.* at 1452.

77. See *Hammon v. Barry*, 826 F.2d 73, 85-87 (Silberman, J., concurring) (D.C. Cir. 1987).

The distinction between viewing a manifest imbalance as evidence of past discrimination or as a wrong remediable of itself could be significant. This is true because despite *Johnson's* rejection, in dictum, of the prima facie standard, see *Johnson*, 107 S. Ct. at 1452 n.10, focus on a manifest imbalance as a vestige of discrimination may well achieve the same result as the prima facie standard, which also uses statistics to show arguable past discrimination. See *id.* at 1462-63 (O'Connor, J., concurring in the judgment); *United Steelworkers v. Weber*, 443 U.S. 193, 212-14 (1979) (Blackmun, J., concurring). Justice O'Connor read *Weber* as permitting affirmative action "only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination." *Johnson*, 107 S. Ct. at 1461. In this light, it is hard to see the difference between the majority holding and Justice O'Connor's concurrence. See *supra* note 75.

78. Compare *Hammon v. Barry*, 826 F.2d 73, 80-81 (D.C. Cir. 1987) (manifest imbalance must show "predicate of discrimination") with *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987) (the imbalance alone justifies the remedy).

79. U.S. Const. amend. XIV, § 1. Rotunda, Nowak & Young state that the framers of the fourteenth amendment had four general goals: to guarantee certain civil liberties against state action; to apply these liberties equally to all citizens, regardless of race; to give Congress wide power to enforce the amendment, and expand civil rights; and, to make the federal government the ultimate guarantor of individual civil rights. These four aspects were intended to, and did, alter the existing balance of federalism. See Rotunda, *supra* note 17, § 18.7, at 378-79.

80. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting); Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 Harv. J.L. & Pub. Pol'y 627, 628 (1985).

circumstances, "benign" discrimination such as affirmative action.<sup>81</sup>

A majority of the Supreme Court, to one extent or another, supports the color conscious view as applied to affirmative action.<sup>82</sup> Although the Court has reached a minimal consensus that some kind of affirmative action is constitutional,<sup>83</sup> it remains divided over what kinds of plans satisfy the equal protection clause.<sup>84</sup> Thus, the Court has failed to produce a single majority opinion in the three major affirmative action cases

81. See, e.g., L. Tribe, *American Constitutional Law* § 16-22, at 1521 (2d ed. 1988) ("Despite the suggestion that our Constitution should be 'colorblind,' it has long been recognized that this is a misleading metaphor." (footnote omitted)).

This conflict dates back as least as far as *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, the Court held that "equal protection of the laws" did not mean equal social protection. Therefore, discrimination in school, public accommodations, and the like, was constitutional. See *id.* at 544-45. But see *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954) (implicitly overruling *Plessy*'s "separate but equal" doctrine). Justice Harlan, in dissent, rejected this argument, stating: "Our Constitution is color-blind . . . . In respect of civil rights, all citizens are equal before the law." See *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Almost one hundred years later, opponents of affirmative action use Justice Harlan's dissent to justify their argument. See, e.g., *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting).

The proponents of affirmative action take a more complex approach. While recognizing that "[o]ur Nation was founded on the principle that 'all Men are created equal,'" *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 326 (1978) (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part), they add that "we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens." *Id.* at 327. Under this view, then, the proper distinction lies between racial preferences that correct inequality, and those that maintain or aggravate it. See *id.* at 407 (Blackmun, J., concurring in part and dissenting in part).

82. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 302 (Marshall, J., dissenting). Justice O'Connor, in an unsuccessful attempt to forge an opinion of the Court on the issue, noted that "[t]he Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in the judgment).

83. See *supra* note 82.

84. Compare *Bakke*, 438 U.S. at 302 (opinion of Powell, J.) (preferential classifications require past statutory or constitutional violations) and *Fullilove*, 448 U.S. at 497 (Powell, J., concurring) (same) with *Bakke*, 438 U.S. at 364 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part) ("requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating"). This inability to agree means observers must look to past cases and the predilections of justices to predict the future. See generally Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying Pieces of the Puzzle*, 72 Iowa L. Rev. 255, 271-74 (1987) (analyzing the views of individual justices). In this context, the views of the newest Supreme Court Justice, Anthony Kennedy, are of vital importance to the future of affirmative action. Unfortunately, Justice Kennedy does not appear to have written a single opinion on this issue in his twelve years on the United States Court of Appeals for the Ninth Circuit. He has, however, indicated in broad terms his support for voluntary affirmative action. At the confirmation hearings, Senator Biden asked then Judge Kennedy: "Do you think that voluntary plans by employers, voluntary affirmative action plans, are permissible?" N.Y. Times, Dec. 16, 1987, at B5, col. 6. Judge Kennedy answered: "Yes." *Id.*

it has decided, *Regents of the University of California v. Bakke*,<sup>85</sup> *Fullilove v. Klutznick*,<sup>86</sup> and *Wygant v. Jackson Board of Education*.<sup>87</sup>

A. *Early Cases: Regents of the University of California v. Bakke and Fullilove v. Klutznick*

Neither *Bakke* nor *Fullilove* deal directly with voluntary affirmative action by employers. The respondent in *Bakke* challenged the legality of a medical school admissions plan that set aside sixteen of one hundred places for minority students.<sup>88</sup> The Court held the plan illegal,<sup>89</sup> but also held that some affirmative action was constitutional.<sup>90</sup> In *Fullilove*, the Court upheld the constitutionality of the Public Works Employment Act of 1977 ("PWEA"), which set aside ten percent of certain federal construction funds for minority business enterprises.<sup>91</sup>

*Bakke* and *Fullilove* demonstrate three distinct positions on the Court.<sup>92</sup> The conservative position maintains that voluntary affirmative action violates the Constitution.<sup>93</sup> The liberal view is equally consistent, approving affirmative action in every case that has come before the Court.<sup>94</sup> The moderate position requires evidence of past discrimination

85. 438 U.S. 265 (1978).

86. 448 U.S. 448 (1980).

87. 476 U.S. 267 (1986).

88. See *Bakke*, 438 U.S. at 275.

89. See *id.* at 320 (opinion of Powell, J.); *id.* at 421 (opinion of Stevens, J., concurring in part and dissenting in part).

90. See *id.* at 315-19 (opinion of Powell, J.); *id.* at 378-79 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part).

91. See *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980); *id.* at 496 (Powell, J., concurring); *id.* at 517 (Marshall, J., concurring in the judgment); see also 42 U.S.C. § 6705(f)(2) (1982).

92. See Choper, *supra* note 84, at 260-62.

93. See *Fullilove v. Klutznick*, 448 U.S. 448, 525 (1980) (Stewart, J., dissenting). Under this view, race- or sex-conscious action is permissible only to benefit identifiable victims of discrimination by the employer in question. See Choper, *supra* note 84, at 272-73.

Technically, the four justices who supported this position in *Bakke* did not reach the constitutional question. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 411-12 (1978) (Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., concurring in part and dissenting in part). They argued that Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1982), which governs all federally-funded programs, constitutes an independent ban on race-conscious affirmative action. See *id.* at 413-14 (Stevens, J., concurring in part and dissenting in part). There is little question that they considered race-conscious affirmative action unconstitutional as well. See *id.* at 416 ("The Act's proponents plainly considered Title VI consistent with their view of the Constitution and they sought to provide an effective weapon to implement that view.").

The two justices taking the conservative position reacted even more emphatically when faced with the 10% congressional set-aside in *Fullilove*. They stated that any legislative race-conscious action was unconstitutional per se. See *Fullilove v. Klutznick*, 448 U.S. 448, 532 (1980) (Stewart, J., joined by Rehnquist, J., dissenting) ("under the Constitution . . . one practice in which government may never engage is the practice of racism—not even 'temporarily' and not even as an 'experiment'").

94. See *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring in the judgment); *Bakke*,

but allows affirmative action that is not victim-specific.<sup>95</sup> The moderate

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438 U.S. at 362 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part); Choper, *supra* note 84, at 267.

The four justices who would have upheld the plan in *Bakke* believed the traditional strict scrutiny standard inappropriate for cases of benign discrimination, such as *Bakke*. See *Bakke*, 438 U.S. at 356-62 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part). See *infra* note 101 (discussion of strict scrutiny). Instead, they advocated borrowing a standard that the Court previously had applied to state laws burdening individuals on the basis of gender or illegitimacy, see *Bakke*, 438 U.S. at 360-61 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part). This standard required the plan to be substantially related to an important state interest. See *id.* at 359 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part). Observers have termed this standard "intermediate scrutiny" of state governmental action. See Rotunda, *supra* note 17, § 18.3, at 326. The four justices taking the liberal view in *Bakke* argued that a quota designed to alleviate societal discrimination met the intermediate scrutiny criteria. See *Bakke*, 438 U.S. at 378-79. See generally Choper, *The Constitutionality of Affirmative Action: Views From the Supreme Court*, 70 Ky. L.J. 1, 1-4 (1981-82) (comparing Powell's and Brennan's views in *Bakke*).

Three justices, Brennan, Blackmun and Marshall, simply applied their *Bakke* analysis to the statute at issue in *Fullilove*. See *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment). They saw little difference between the 16% quota in *Bakke* and the 10% quota imposed by the PWEA, see *id.* at 517-18 & n.3 (Marshall, J., concurring in the judgment), and considered it substantially irrelevant that one plan was enacted by Congress and the other by a state Board of Regents. See *id.* at 517 n.2; see also *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 694 (6th Cir. 1979) (adopting the intermediate scrutiny standard), *cert. denied*, 452 U.S. 938 (1981); *Bratton v. City of Detroit*, 704 F.2d 878, 885-86 (6th Cir. 1983) (same), *cert. denied*, 464 U.S. 1040 (1984).

95. See *Fullilove*, 448 U.S. at 490; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Powell, J.). Victim-specific relief is that which is limited to the identifiable victims of discriminatory practices. See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777-80 (1976). Affirmative action focuses not on identifiable victims of discrimination, but on remedying a manifest imbalance or other residual effects of past discrimination. See Lee, *Missing Pieces: A Commentary on Choper*, 72 Iowa L. Rev. 275, 277-78 (1987). The Supreme Court holds that court-ordered relief must be more limited in the absence of identifiable victims. See *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561, 578-79 (1984).

In *Bakke*, Justice Powell's opinion represented the moderate view. He found the medical school's 16% quota unconstitutional, forming a majority with those justices who found the plan invalid under Title VI. See *Bakke*, 438 U.S. at 320 (opinion of Powell, J.); *supra* note 89 and accompanying text. In his view, the medical school, which had justified the quota as a way of correcting past societal discrimination, see *Bakke*, 438 U.S. at 307 (opinion of Powell, J.), lacked the compelling justification that the Court required from all racial classifications under the traditional "strict scrutiny" standard. See *id.* at 299 (opinion of Powell, J.); *infra* note 101 (discussion of strict scrutiny).

Justice Powell speculated, however, that the plan would have survived strict scrutiny had the school's goal been diversity in the student body, because then the school would have been correcting its own wrong, not that of society, see *id.* at 311-13, and had the plan used a "plus" system—one in which race constituted one of many factors—instead of a rigid quota. See *id.* at 317-18.

The *Fullilove* plurality, authored by Chief Justice Burger, with Justices White and Powell concurring, in upholding the statute, relied on the broad power of Congress to enforce the equal protection clause. See *Fullilove*, 448 U.S. at 483-84; *infra* notes 155-60 and accompanying text. That power appeared to lower the proper level of judicial scrutiny for an act of Congress, even when the act included racial classifications. See *Fullilove*, 448 U.S. at 477, 480, 491 (standard should be "searching examination" instead of strict scrutiny). This "searching examination" allowed a 10% quota, at least a flexible

position, represented by the opinion of Justice Powell in *Bakke* and by the plurality in *Fullilove*,<sup>96</sup> prevailed in both cases, as well as in the Court's most recent affirmative action case, *Wygant v. Jackson Board of Education*.<sup>97</sup>

### B. *Wygant v. Jackson Board of Education*

In *Wygant v. Jackson Board of Education*,<sup>98</sup> the Court finally addressed an equal protection challenge to a public employer's voluntary affirmative action plan.<sup>99</sup> The Court held the race-conscious layoff provision of a school hiring and promotion plan unconstitutional.<sup>100</sup> Applying the strict scrutiny standard,<sup>101</sup> the plurality rejected the school board's reliance on an imbalance between the percentage of minority students and minority teachers to justify the plan.<sup>102</sup>

The school board in *Wygant* denied any discrimination in its hiring policies<sup>103</sup> and offered no proof of an imbalance similar to those that had

one that could be waived if impractical; for example, if there were no minority contractors in a given region. *See id.* at 487-89.

Justice Powell, concurring with the plurality, adhered to his strict scrutiny standard, but he stated that it was met by the special competence of Congress to alleviate discrimination and by the flexibility of the set-aside. *See id.* at 502 (Powell, J., concurring). He contrasted both factors with the limited competence of the Board of Regents and rigid quota in *Bakke*. *See id.* at 498. While Justice Powell restated his view that a valid plan must remedy a past statutory or constitutional violation, *see id.*; *Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.), he added that Congress, unlike the Board of Regents, need not make a detailed finding of such violations, but merely state their occurrence. *See Fullilove*, 448 U.S. at 502-04 (Powell, J., concurring). In fact, the PWEA 10% provision had been passed as a floor amendment to another bill, with no factual findings and little debate. *See id.* at 549-50 (Stevens, J., dissenting).

96. *See Fullilove*, 448 U.S. at 453 (plurality); *Bakke*, 438 U.S. at 271-72 (opinion of Powell, J.).

97. 476 U.S. 267, 269 (1986).

98. 476 U.S. 267 (1986).

99. *See id.* at 273; Comment, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U. Chi. L. Rev. 581, 585 (1986).

100. *See Wygant*, 476 U.S. at 283-84. The plan, agreed to by the teachers' union and the school board, stipulated that in the event of layoffs, the racial composition of the teachers laid off would mirror the existing racial composition of the teaching staff, regardless of the fact that black teachers with less seniority would be retained over white teachers with more seniority. *See id.* at 270-71.

101. *See id.* at 279-80. Under the strict scrutiny standard, a statute "would be upheld only if the state were able to show an overriding purpose requiring proscription of the specified conduct when engaged in by members of different races but not when engaged in by persons of the same race." Rotunda, *supra* note 17, § 18.8, at 401; *see, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (invalidating state anti-miscegenation law); *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964) (invalidating state law forbidding interracial sexual intercourse outside marriage). *See generally* Rotunda, *supra* note 17, § 18.3, at 324-25 (Supreme Court will apply strict scrutiny to any law affecting fundamental rights, whether challenge is brought on due process or equal protection grounds); 3 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 20.11, at 44 (1986) (all state laws impairing first amendment rights are subject to strict judicial scrutiny).

102. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986).

103. *See id.* at 271-72. The school board raised the possibility of its own prior discrim-



justified the *Johnson* and *Weber* plans.<sup>104</sup> The board instead justified the layoffs by asserting the need to provide "role models" for black students,<sup>105</sup> hoping that correcting the imbalance between the percentage of black teachers and black students would improve the students' self-image.<sup>106</sup> The Court ruled that the student-teacher imbalance evinced societal discrimination, not the board's own past discrimination, and therefore was not remediable by affirmative action.<sup>107</sup> This holding is consistent with the pluralities of *Bakke* and *Fullilove*, which suggest that local bodies, unlike Congress, are incompetent to correct societal discrimination.<sup>108</sup>

Despite reaffirming the application of strict scrutiny to affirmative action, *Wygant* appears to lower the degree of discrimination an employer must show to justify his plan. Justice Powell's opinion in *Bakke* and his concurrence with the plurality in *Fullilove* require a finding of discrimination reaching the level of a statutory or constitutional violation.<sup>109</sup> In *Wygant*, Justice Powell, again writing for the plurality, apparently modified the requirement to "a strong basis in evidence" that there had been

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ination for the first time in its Supreme Court brief. The Court refused to consider the argument, or even to remand the case based on this new argument. *See id.* at 277-78 & n.5.

104. *See id.* at 292-93 (O'Connor, J., concurring in part and concurring in the judgment); *see also* *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1446 (1987) (comparing percentages of female skilled craft workers and women in general workforce); *United Steelworkers v. Weber*, 443 U.S. 193, 198-99 (1979) (comparing percentages of black skilled craft workers and blacks in the general workforce).

105. *See* *Wygant*, 476 U.S. at 272.

106. *See id.*; *see also* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78, 96 (1986) (arguing that the *Wygant* plan, motivated by the desire to improve the town's quality of education "whether by improving black students' performance or by dispelling . . . any idea that white supremacy governs our social institutions" did not violate the equal protection clause).

107. *See* *Wygant*, 476 U.S. at 276. The explicit rejection of societal discrimination as a remediable wrong may not command a majority of the Court. Justice O'Connor joined the plurality on this point, *see id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment), but Justice White, the other concurring vote, did not. *See id.* at 294-95 (White, J., concurring in the judgment). Therefore, while two courts of appeals have read *Wygant* as banning the societal discrimination approach *per se*, *see* *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1357 (4th Cir. 1987), *prob. juris. noted*, 108 S. Ct. 1010 (1988); *Britton v. South Bend Community School Corp.*, 819 F.2d 766, 768-69 (7th Cir.) (en banc), *cert. denied*, 108 S. Ct. 288 (1987), room for disagreement exists. *See* *Croson*, 822 F.2d at 1362 n.3 (Sprouse, J., dissenting); *Britton*, 819 F.2d at 779 (Cudahy, J., dissenting).

108. *See supra* note 95. There was no conservative view in *Wygant*. The justices taking the conservative view in *Bakke* and *Fullilove*, most notably Justice Rehnquist, joined the plurality. There is little doubt, however, that such a view still exists. *See* *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1469-70 (1987) (Scalia, J., joined by Rehnquist, C.J. and White, J., dissenting) (implying that the Constitution, as well as Title VII, forbade the agency's plan); Choper, *supra* note 84, at 272-73 ("Even though he joined Justice Powell's opinion in *Wygant*, the reasoning (but not the result) of which goes further [than Rehnquist's earlier position], all indications suggest that Justice Rehnquist would subsequently disclaim that broad language . . .").

109. *See* *Fullilove v. Klutznick*, 448 U.S. 448, 498 (1980) (Powell, J., concurring); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

discrimination in the past.<sup>110</sup>

Because the facts of *Wygant* concern layoffs,<sup>111</sup> lower courts attempting to apply its legal analysis to the more common problem of affirmative action in hiring and promotion, or to any other affirmative action challenged under the equal protection clause, have reached inconsistent results.<sup>112</sup> In *Wygant*, the Supreme Court once again failed to establish a majority view on exactly what proof of discrimination the equal protec-

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110. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). While Justice Powell failed to define this standard further, Justice O'Connor, purporting to concur fully with the plurality's standard, attempted to clarify it. She argued, as had Justice Blackmun in *Weber*, see *supra* note 74, that an employer's introduction of prima facie evidence of a Title VII disparate impact violation, see *supra* notes 44-45 and accompanying text, should suffice to shield the plan from constitutional attack. See *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in the judgment). She based this argument in part on the belief that a higher standard of proof "would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." See *id.* at 290 (O'Connor, J., concurring in part and concurring in the judgment); see also *Youngblood v. Dalzell*, 804 F.2d 360, 365 (6th Cir. 1986) (appearing to apply Justice O'Connor's standard by upholding a plan implemented pursuant to a statistical showing of a pattern of discrimination), *cert. denied*, 107 S. Ct. 1576 (1987).

111. See *Wygant*, 476 U.S. at 282. Layoffs fall under the second prong of the affirmative action analysis—the "narrowly tailored" or "no unnecessary trammeling" requirement. See *supra* note 62. Layoffs, the plurality held, disrupt the lives of those affected to such a great extent that they could never be part of a valid affirmative action plan. See *Wygant*, 476 U.S. at 282-84. A worker has a greater property interest in keeping a job he or she already has than in getting a job to which he or she aspires. See *id.* at 283. Only four justices, however, stated that layoffs were the fatal flaw in the plan. See *id.* at 284 (opinion of Powell, J., joined by Burger, C.J., and Rehnquist, J.); *id.* at 294-95 (White, J., concurring in the judgment). Justice O'Connor might allow layoffs under certain circumstances. See *id.* at 293-94 (O'Connor, J., concurring in part and concurring in the judgment).

112. Compare *Higgins v. City of Vallejo*, 823 F.2d 351, 357-60 (9th Cir. 1987) (distinguishing *Wygant* and relying on *Weber* and *Johnson* to uphold the constitutionality of a promotion plan adopted in response to a manifest imbalance) and *Youngblood v. Dalzell*, 804 F.2d 360, 364-65 (6th Cir. 1986) (distinguishing *Wygant* and instead relying on *Weber* to uphold promotion plan), *cert. denied*, 107 S. Ct. 1576 (1987) with *Ledoux v. District of Columbia*, 820 F.2d 1293, 1305-06 (D.C. Cir. 1987) (relying on *Wygant*, court remanded equal protection challenge to promotion plan because district court had relied solely on manifest imbalance to permit plan).

The legality of legislative set-asides of state money to businesses owned by minorities or women is another common affirmative action issue. *Fullilove v. Klutznick* resolved the issue on the federal level, see *supra* note 91 and accompanying text, but not at the state level. Three courts of appeals have attempted to apply the *Wygant* "strict scrutiny" test to such set-asides and have reached varying results. See *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583, 584, 588 (6th Cir. 1987) (relying on *Wygant* to reject a Michigan set-aside of 7% to minority-owned businesses and 5% to woman-owned businesses); *H.K. Porter Co. v. Metropolitan Dade County*, 825 F.2d 324, 329-32 (11th Cir. 1987) (*per curiam*) (relying on *Fullilove*'s mandate, court approved local 5% set-aside for minority construction companies); *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1357-60 (4th Cir. 1987) (distinguishing *Fullilove* as applicable only to federal action, court relied on *Wygant* to hold a 30% local set-aside unconstitutional), *prob. juris. noted*, 108 S. Ct. 1010 (1988); see also Comment, *supra* note 99, at 613-16 (discussing the appropriate amount of deference courts should give state and local legislatures and administrative agencies).

tion clause requires of an employer to justify a plan.<sup>113</sup> As a result, the case suffers from major flaws as a precedent for challenges to voluntary hiring and promotion plans on equal protection grounds.

### III. THE DISPARITY BETWEEN TITLE VII AND EQUAL PROTECTION STANDARDS

#### A. *The Lower Courts: Confusion Rampant*

The Supreme Court has not yet analyzed an affirmative action plan under both the Title VII and the equal protection standards. Since plaintiffs can raise both issues in the same case, lower courts have been left to resolve such challenges without proper Supreme Court guidance.<sup>114</sup> Three lower court cases decided after *Wygant* and *Johnson* indicate that the combination of those Supreme Court opinions has given lower courts insufficient direction. Given similar manifest imbalances and little other evidence of discrimination, these cases, *Higgins v. City of Vallejo*,<sup>115</sup> *Ledoux v. District of Columbia*,<sup>116</sup> and *Hammon v. Barry*,<sup>117</sup> reach three different conclusions. The *Higgins* court held the plan before it valid under both the Title VII and equal protection standards.<sup>118</sup> The *Ledoux* court held its plan valid under Title VII, but remanded on the constitutional question.<sup>119</sup> The *Hammon* court refused even to find a manifest

113. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284-85 (1986) (O'Connor, J., concurring in part and concurring in the judgment); Choper, *supra* note 84, at 259.

114. See *Britton v. South Bend Community School Corp.*, 775 F.2d 794, 809 (7th Cir. 1985) ("the Court's opinions do not provide the kind of guidance in the constitutional area that its decision in *Weber* does in analyzing Title VII challenges"), *rev'd on other grounds*, 819 F.2d 766 (7th Cir.) (en banc), *cert. denied*, 108 S. Ct. 288 (1987); *Kromnick v. School Dist.*, 739 F.2d 894, 901 (3d Cir. 1984) ("The absence of an Opinion of the Court in either *Bakke* or *Fullilove* . . . makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable."), *cert. denied*, 469 U.S. 1107 (1985); *Bratton v. City of Detroit*, 704 F.2d 878, 885 (6th Cir. 1983) ("The Supreme Court has not provided the kind of guidance in the constitutional context that *Weber* affords under Title VII."), *cert. denied*, 464 U.S. 1040 (1984). For other lower court cases that have faced both Title VII and equal protection challenges to voluntary public affirmative action plans, see *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1040 (7th Cir. 1987); *Hammon v. Barry*, 826 F.2d 73, 81 (D.C. Cir. 1987) (Silberman, J., concurring); *Higgins v. City of Vallejo*, 823 F.2d 351, 358 (9th Cir. 1987); *Ledoux v. District of Columbia*, 820 F.2d 1293, 1306 (D.C. Cir. 1987).

115. 823 F.2d 351 (9th Cir. 1987).

116. 820 F.2d 1293 (D.C. Cir. 1987).

117. 826 F.2d 73 (D.C. Cir. 1987).

118. See *Higgins v. City of Vallejo*, 823 F.2d 351, 358-60 (9th Cir. 1987). The *Higgins* court held that a manifest imbalance between the city government workforce (11.4% minority and 7.3% black) and the city's population (30% minority and 17% black), see *Higgins*, 823 F.2d at 356, provided a sufficient showing to grant summary judgment in favor of the city on both the Title VII, *see id.*, and constitutional issues, *see id.* at 360.

The *Higgins* court found that the racial imbalance offered "abundant evidence" of past discrimination, *id.* at 358, and that the promotion made pursuant to such evidence "satisfies even the most rigorous equal protection requirements," *id.* Thus, the court, in effect, allowed the manifest imbalance standard to govern the constitutional claim.

119. See *Ledoux v. District of Columbia*, 820 F.2d 1293, 1305-07 (D.C. Cir. 1987). *Ledoux* ruled on a promotion plan set up by the District of Columbia Police Department

imbalance,<sup>120</sup> but indicated in dictum that it would limit affirmative action to intentional past discrimination, even under Title VII.<sup>121</sup>

Earlier lower court cases that address both Title VII and the equal protection clause appear to fall into three camps. One view recognizes the disparity and, concluding that the stricter equal protection standard ultimately will govern, subsumes the Title VII standard into its equal protection analysis.<sup>122</sup> A more common view sees the standards as distinct, the equal protection standard being stricter, but no court subscribing to this view has yet found a plan valid under Title VII and invalid under equal protection.<sup>123</sup> Discussing this apparent disparity between

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that was designed to remedy racial and sexual imbalances in upper-level positions. See *Ledoux*, 820 F.2d at 1296. The D.C. workforce was 60% black, yet out of 549 sergeants, for example, only 131 were black and 5 were women. See *id.* at 1298 n.12. Similarly, out of 171 lieutenants, only 30 were black and one was a woman. See *id.* at 1298 & n.12. The *Ledoux* court held that the imbalance shielded the plan from Title VII liability. See *id.* at 1305. Unlike the Ninth Circuit in *Higgins*, 823 F.2d 351 (9th Cir. 1987); see *supra* note 118 (discussion of *Higgins*), however, the D.C. Circuit found the same imbalance unacceptable under the constitutional standard. See *Ledoux*, 820 F.2d at 1305-06. It remanded the case to the district court to find "something more," although it noted that "this something more may be a greater quantum of statistical evidence." *Id.* at 1306 (emphasis in original).

120. See *Hammon v. Barry*, 826 F.2d 73, 78 (D.C. Cir. 1987). The D.C. Fire Department sought to remedy the imbalance between the percentage of blacks on the force (38%) and the percentage of blacks in the D.C. workforce (about 65%). See *Hammon*, 826 F.2d at 92 (Mikva, J., dissenting). Alternatively, the department sought to use as comparison figures the percentage of blacks in the D.C. government (67.4%), see *id.* at 91 (Mikva, J., dissenting), or the percentage of blacks in the applicant pool (about 70%). See *id.* at 78. The *Hammon* court, however, relied on the percentage of blacks in the Washington metropolitan area (29.3%), the area from which the fire department was allowed to hire. See *id.*, 826 F.2d at 77-78 & n.8. In contrast to the *Hammon* court, the *Ledoux* court had used as its bench mark the percentage of blacks in the D.C. workforce. See *Ledoux*, 820 F.2d at 1298 n.12.

This difference between the two cases resulted in the success of the police department plan in *Ledoux*, see *Ledoux*, 820 F.2d at 1304, and the failure of the fire department's plan in *Hammon*, see *Hammon*, 826 F.2d at 78. While the *Hammon* court's use of the metropolitan area figure technically may have been correct, it ignored the question why two-thirds of the D.C. government workforce were black, but only about one-third of the fire department, since the D.C. government also hired from the metropolitan area. See *id.* at 91 (Mikva, J., dissenting).

121. See *Hammon*, 826 F.2d at 80-81.

122. At least two courts have used this approach. See *Bratton v. City of Detroit*, 704 F.2d 878, 887 (6th Cir. 1983), cert. denied, 464 U.S. 1040 (1984); *Jones v. Memphis Light, Gas & Water Div.*, 642 F. Supp. 644, 656 (W.D. Tenn. 1986). In both cases, this approach did not affect the outcome, as the courts found the plans valid under the stricter test. See *Bratton*, 704 F.2d at 887 n.32; *Jones*, 642 F. Supp. at 663.

The Reagan administration takes a similar position, believing that the Supreme Court intends Title VII analysis to apply only to private employers, and equal protection analysis only to public employers. See Address by William Bradford Reynolds, Assistant Attorney General for Civil Rights, Bar Ass'n of the City of New York (Oct. 8, 1987) (tape of speech available at Bar Association of the City of New York).

123. See, e.g., *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034, 1039-42 (7th Cir. 1987) (plan invalid under both Title VII and the equal protection clause); *Hammon v. Barry*, 826 F.2d 73, 85 (D.C. Cir. 1987) (Silberman, J., concurring) (same); *Ledoux v. District of Columbia*, 820 F.2d 1293, 1295 (D.C. Cir. 1987) (plan valid under Title VII,

statutory and constitutional standards, a court of appeals judge stated: "[a]lthough I readily concede that interpreting Title VII to permit personnel practices that the Constitution prohibits seems anomalous, the [Supreme] Court has nevertheless concluded that Congress intended just that state of affairs."<sup>124</sup>

In an attempt to resolve this anomaly, a third view tries to unify the two standards. The most comprehensive attempt came in *Kizas v. Webster*.<sup>125</sup> In *Kizas*, the court held that Title VII offered the sole remedy for a federal employee claiming employment discrimination<sup>126</sup> and that the failure to promote the plaintiffs did not violate the statute.<sup>127</sup> The plaintiffs had argued that such a construction of Title VII failed to vindicate their constitutional civil rights because "the Constitution's equal protection principle entails a stricter restraint on classification by race or sex than does Title VII and would shelter them against 'reverse' discrimination that the statute may permit."<sup>128</sup> The court rejected this argument, stating that "[i]t suffices to point out that if the statute permitted discrimination in government employment that the Constitution prohibits, courts would be obliged to hold the statute invalid to the extent it conflicted with the superior norm."<sup>129</sup> Because the *Kizas* court refused to hold the statute unconstitutional, it found no conflict in upholding the Title VII standard.<sup>130</sup> Despite the efforts of the judges in *Kizas* and other cases to rationalize the two standards,<sup>131</sup> most courts, responding to what they perceive to be a Supreme Court mandate, have treated them as dis-

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but court could not "evaluate the legitimacy of the Plan under the Constitution"); *Britton v. South Bend Community School Corp.*, 775 F.2d 794, 809 (7th Cir. 1985) (plan valid under both Title VII and the equal protection clause), *rev'd on other grounds*, 819 F.2d 766 (7th Cir.) (en banc), *cert. denied*, 108 S. Ct. 288 (1987); *Kromnick v. School Dist.*, 739 F.2d 894, 909 (3d Cir. 1984) (plan valid under both Title VII and the equal protection clause), *cert. denied*, 469 U.S. 1107 (1985).

124. *Hammon v. Barry*, 826 F.2d 73, 86 (D.C. Cir. 1987) (Silberman, J., concurring). Judge Silberman added that this anomaly could be resolved simply by viewing the manifest imbalance, as defined by *Johnson*, as evidence of past discrimination. See *Hammon*, 826 F.2d at 85-86 (Silberman, J., concurring).

125. 707 F.2d 524 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). In *Kizas*, the white, male plaintiffs were passed over for promotion by the FBI and claimed discrimination. See *Kizas*, 707 F.2d at 532. They sued on both Title VII and equal protection grounds. See *id.*

126. See *id.* at 542.

127. See *id.* at 541.

128. *Id.* at 542.

129. *Id.* at 542-43 (emphasis in original).

130. See *id.* at 543.

131. The court in Boston Chapter, NAACP v. Beecher, 679 F.2d 965, 976 (1st Cir. 1982), *vacated on other grounds sub nom.*, Boston Firefighters Union v. Boston Chapter, NAACP, 461 U.S. 477 (1983), held that the *Weber* analysis guided employment discrimination claims brought on equal protection grounds under § 1983; see also *Youngblood v. Dalzell*, 804 F.2d 360, 365 (6th Cir. 1986) ("the same basic considerations apply when a race-conscious [sic] remedy is challenged under the Equal Protection Clause" or under Title VII), *cert. denied*, 107 S. Ct. 1576 (1987); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 967-68 (8th Cir. 1981) (holding that *Weber* guided analysis of § 1981 (guaranteeing equality of economic rights) claims as well).

tinct.<sup>132</sup> The resulting confusion demonstrates that the Supreme Court must clarify its mandate.

### B. *The Disparity Resolved?*

The resolution of the conflict between the equal protection clause and Title VII<sup>133</sup> as applied to voluntary public affirmative action plans lies in two sources. The first is Title VII itself, or more precisely, the Equal Employment Opportunity Act of 1972, which extends Title VII's provisions to public employers.<sup>134</sup> The second is the enforcement clause ("section five") of the fourteenth amendment.<sup>135</sup> The EEOA demonstrates the congressional intent that voluntary public affirmative action plans be shielded from Title VII liability if they are instituted upon a finding of a

132. See *supra* note 123 and accompanying text.

133. Under current Supreme Court analysis, the two standards may be easily reconcilable. Based on *Johnson*, there appear to be "five solid votes" (Justices Brennan, Marshall, Stevens, Blackmun and O'Connor) for upholding a plan similar to the one in *Johnson* against challenge on equal protection grounds. 56 U.S.L.W. 2238 (Oct. 27, 1987) (remarks of Professor Jesse Choper).

Such reconciliation would require adoption of the prima facie disparate impact standard. See *supra* notes 42-43 and accompanying text. This standard was suggested first in the Title VII context by Justice Blackmun, see *United Steelworkers v. Weber*, 443 U.S. 193, 212-14 (1979) (Blackmun, J., concurring), and later restated by Justice O'Connor in both the Title VII, see *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1463 (1987) (O'Connor, J., concurring in the judgment), and constitutional contexts, see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292 (1986) (O'Connor, J., concurring in part and concurring in the judgment). She argued that the prima facie standard was applicable equally in both contexts, noting that "[b]ecause both *Wygant* and *Weber* attempt to reconcile the same competing concerns, I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause." *Johnson*, 107 S. Ct. at 1463 (O'Connor, J., concurring in the judgment).

Two significant problems must be resolved, however, before courts can adopt the prima facie standard under both the equal protection clause and Title VII. First, Justice O'Connor appears to have been speaking only for herself; the plurality in *Wygant* did not posit a clear equal protection standard, but only suggested that an employer could adopt an affirmative action plan if he had a "strong basis in evidence" of past discrimination. See *Wygant*, 476 U.S. at 277. Second, the *Johnson* majority explicitly refused to adopt the prima facie standard for affirmative action under Title VII, see *Johnson*, 107 S. Ct. at 1452 n.10, and stated that the prima facie and manifest imbalance standards are not identical, see *id.* at 1449 n.6.

Assuming the viability of the prima facie standard, however, a resolution is possible under existing analyses. The prima facie and manifest imbalance standards resemble one another to a striking degree. First, the majority called the disparity in *Johnson* a manifest imbalance, see *id.* at 1452, 1455, while Justice O'Connor called the same disparity prima facie evidence of past discrimination. See *id.* at 1465 (O'Connor, J., concurring in the judgment). More abstractly, the two standards may use identical means to reach the same end. Each employs statistical evidence to validate affirmative action plans. Compare *id.* at 1461 (O'Connor, J., concurring in the judgment) (allowing statistics that prove "actual or apparent discrimination, or the lingering effects of this discrimination") with *id.* at 1457 (employer may use manifest imbalance to justify an affirmative action plan that will help to eliminate the "vestiges of discrimination in the workplace").

134. See *supra* note 13.

135. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

manifest imbalance.<sup>136</sup> The EEOA was passed pursuant to the enforcement clause,<sup>137</sup> which gives Congress the power to define and expand the equal protection standard.<sup>138</sup> Thus, by passing the EEOA, Congress intended that the Title VII standard define the equal protection standard.

### 1. Congressional Power Under the Enforcement Clause

A century of Supreme Court analysis demonstrates the unprecedented constitutional power the enforcement clause gives Congress at the expense of the states.<sup>139</sup> The enforcement clause, however, goes further than just subtracting from states' rights.<sup>140</sup> It also gives Congress a voice in the definition of the individual rights covered by the fourteenth amendment. In *Katzenbach v. Morgan*,<sup>141</sup> the Supreme Court elaborated on both of these aspects of Congress' enforcement clause power.

*Katzenbach* held that Congress was within its constitutional authority when it enacted section 4(e) of the Voting Rights Act of 1965 pursuant to its enforcement clause power.<sup>142</sup> Section 4(e) mandates that all citizens with a sixth-grade education from any public school under United States jurisdiction, including those, such as in Puerto Rico, that do not teach in English, be eligible to vote in any American election.<sup>143</sup> This provision directly contradicted a New York State statute that conditioned suffrage upon literacy in English.<sup>144</sup> Under the doctrine of federal preemption,

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136. *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979), and *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1452 (1987), make it clear that the manifest imbalance standard guides judicial scrutiny of voluntary affirmative action plans under Title VII. Title VII's provisions apply equally to all employers within its scope. See *supra* note 13.

137. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 n.9 (1976); S. Rep. No. 415, 92d Cong., 1st Sess. 11 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971), reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2154; 118 Cong. Rec. 1816 (1972) (remarks of Sen. Williams); 118 Cong. Rec. 1840 (1972) (remarks of Sen. Javits); see also Rotunda, *supra* note 17, § 19.31, at 801 & n.4 (listing the extension of Title VII to state and local governments as one example of Congress' use of § 5).

138. See *infra* notes 139-64 and accompanying text.

139. See *Ex parte Virginia*, 100 U.S. 339, 345-48 (1879). See generally Rotunda, *supra* note 17, § 19.4, at 732 (discussing congressional enforcement clause power); Bohrer, *supra* note 32, at 479-84 (1981) (analyzing the legislative history and early jurisprudence of § 5). The Supreme Court has held:

There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty . . . a phenomenon aptly described as a "carv[ing] out."

*Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)).

140. See *infra* note 151 and accompanying text.

141. 384 U.S. 641 (1966).

142. See *id.* at 646 (upholding 42 U.S.C. § 1973b(e) (Supp. I 1965)).

143. See *id.* at 643.

144. See *id.* at 644 n.2. In fact, Congress passed § 4(e) specifically to enfranchise New York's Puerto Rican population. See *id.* at 645 n.3.

section 4(e) superceded the New York statute.<sup>145</sup>

Comparison with an earlier case, *Lassiter v. Northampton County Board of Elections*,<sup>146</sup> demonstrates the significance of *Katzenbach* in the Supreme Court's enforcement clause jurisprudence. In *Lassiter*, which was decided before the passage of the Voting Rights Act, the Court had held a similar North Carolina English literacy requirement constitutional.<sup>147</sup> With section 4(e), therefore, Congress invalidated a statute much like one the Court explicitly had declared constitutional.<sup>148</sup> While the dissent in *Katzenbach* saw section 4(e) as an impermissible intrusion on states' rights and on the federal judiciary's authority to rule on equal protection issues,<sup>149</sup> the majority rejected this view, holding that the enforcement clause does not "confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities' of [section] 1 of the Amendment."<sup>150</sup> In other words, section five of the fourteenth amendment gives Congress the power to interpret, as well as to enforce, the equal protection clause and to render unconstitutional state laws that conflict with the congressional interpretation.<sup>151</sup>

*Katzenbach*, however, limited congressional interpretive power to expanding equal protection, as opposed to diluting it.<sup>152</sup> While this distinction is sometimes hazy, it means that Congress may not, while purporting to enforce equal protection, abrogate an affirmative equal protection right.<sup>153</sup> Assuming a statute passed this test, however, the *Katzen-*

145. See *id.* at 646-47.

146. 360 U.S. 45 (1959).

147. See *id.* at 53-54.

148. See *supra* notes 142-45 and accompanying text. *Katzenbach* did not overrule *Lassiter*. It implicitly held, however, that Congress had the right to supercede the Court's holding in *Lassiter*. See *Katzenbach v. Morgan*, 384 U.S. 641, 649 (1966).

149. See *id.* at 659 (Harlan, J., dissenting).

150. *Id.* at 648-49.

151. See Bohrer, *supra* note 32, at 492; see also *id.* at 493 ("Congress cannot possibly 'enforce' section 1 of the fourteenth amendment without first interpreting the provisions to be enforced."); Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603, 605 (1975) (stating that in *Katzenbach*, the Court gave Congress the latitude to decide that the "denial of voting rights was itself a denial of equal protection"); Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 106 (1966) ("The substance of [*Katzenbach*] is that Congress may decide, within broad limits, how the general principle of equal protection applies to actual conditions.").

152. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966).

153. See *Fullilove v. Klutznick*, 448 U.S. 448, 528 & n.7 (1980) (Stewart, J., dissenting); Rotunda, *supra* note 17, § 19.4 at 734. The *Katzenbach* Court attempted to define the distinction by stating:

[section] 5 does not grant Congress power . . . to enact "statutes so as in effect to dilute equal protection . . . decisions of this Court. . . ." Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be . . . a measure "to enforce" the Equal Protection Clause since that clause of its own force prohibits such state laws.

*Katzenbach*, 384 U.S. at 651 n.10 (quoting *id.* at 668 (Harlan, J., dissenting)).



*bach* Court was willing to give it extremely broad deference.<sup>154</sup>

## 2. Enforcement Clause Authority as Applied to Affirmative Action

Because it is plausible that affirmative action violates the equal protection rights of those it disadvantages, it can be argued that congressional enactment of affirmative action falls on the dilution side of the *Katzenbach* analysis. When the Supreme Court, in *Fullilove v. Klutznick*, analyzed a congressional affirmative action statute in light of the enforcement clause, however, it held, in effect, that affirmative action fell on the permissible side of the dilution/expansion line.<sup>155</sup>

The affirmative action at issue in *Fullilove*, embodied in the Public Works Employment Act of 1977,<sup>156</sup> consisted of a ten percent set-aside of federal funds for minority business enterprises in local construction projects.<sup>157</sup> In upholding the PWEA under the equal protection component of the fifth amendment,<sup>158</sup> the plurality relied heavily on Congress' unique enforcement clause power, stating that the fact "[t]hat the program may press the outer limits of congressional authority affords no basis for striking it down."<sup>159</sup> In other words, the ten percent quota, while perhaps unconstitutional if enacted by a state legislature or imposed by a court, falls within the scope of Congress' section five power.<sup>160</sup>

The congressional action at issue in *Fullilove* differed from that ad-

154. See *Katzenbach*, 384 U.S. at 653 ("It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did."); Cox, *supra* note 151, at 104 (under § 5 analysis, "the Court will eschew reviewing legislative judgments upon the relation of means to ends").

155. See *Fullilove v. Klutznick*, 448 U.S. 448, 490-92 (1980).

156. 42 U.S.C. § 6705(f)(2) (1982).

157. See *Fullilove*, 448 U.S. at 453-54 (discussing 42 U.S.C. § 6705(f)(2) (1982)).

158. This "equal protection component" was first articulated by the Supreme Court in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). *Bolling* noted that federal equal protection, because it is only implicit in federal due process, was a less stringent standard than the equal protection clause of the fourteenth amendment, which applies only to states and their constituent bodies. See *id.*; Bohrer, *supra* note 32, at 476-78.

Subsequently, the Court stated that "[its] approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975). In *Fullilove v. Klutznick*, however, by requiring only "reasonable assurance" of the constitutionality of the PWEA, see 448 U.S. 448, 490 (1980), the Court appeared to return to the looser *Bolling* standard. See Bohrer, *supra* note 32, at 509-10.

This looser standard is necessary if Congress is to be allowed to exercise its full power under the enforcement clause of the fourteenth amendment. See *id.* at 478. Interestingly, it appears to resemble the intermediate standard of review proposed by the liberal position in *Bakke*, see *supra* note 94 and accompanying text, the difference being that the moderate position would reserve it solely for acts of Congress. See *Fullilove*, 448 U.S. at 472-73.

159. *Fullilove*, 448 U.S. at 490.

160. See *id.* at 476. The PWEA implicates the equal protection clause of the fourteenth amendment, which does not apply to congressional actions in general, see *supra* note 158, because many of the federal grants under the Act are channeled through state and local governments, see *Fullilove*, 448 U.S. at 457.

dressed in *Katzenbach*<sup>161</sup> in one significant regard: rather than merely affecting the balance of federalism, it directly implicated the right of individuals (here, white contractors) to be free from invidious discrimination.<sup>162</sup> The *Fullilove* Court nevertheless found *Katzenbach* applicable, relying on that case for the broad proposition that “[c]orrectly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”<sup>163</sup> That power, the *Fullilove* Court held, extended even to race-conscious distinctions.<sup>164</sup>

### 3. Enforcement Clause Authority Applied to Title VII

The congressional intent behind the EEOA,<sup>165</sup> which was passed pursuant to section five,<sup>166</sup> should receive the same judicial deference as the Voting Rights Act<sup>167</sup> and the PWEA.<sup>168</sup> The Supreme Court has held that Congress intended voluntary affirmative action plans instituted by employers covered by Title VII to be shielded from liability<sup>169</sup> if created in response to a manifest imbalance.<sup>170</sup> Congress also intended that the statute’s provisions apply with the same force to public and private employers alike.<sup>171</sup> Therefore, because Title VII’s manifest imbalance standard governs private employers,<sup>172</sup> it should govern public employers as well. The manifest imbalance standard, however, can govern claims against public employers only if it is constitutional under the equal protection clause. Because the manifest imbalance standard allows the use of race or sex as one factor in promotion or hiring decisions as part of a narrowly tailored plan,<sup>173</sup> it is, in light of the more rigid ten-percent quota allowed in *Fullilove*,<sup>174</sup> clearly within Congress’ section five au-

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161. See *supra* notes 141-54 and accompanying text.

162. See Böhrer, *supra* note 32, at 509.

163. *Fullilove*, 448 U.S. at 476 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

164. See *id.* at 482-84.

165. See *supra* notes 13 & 136 (discussing congressional intent behind EEOA).

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

167. See *Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966); *supra* notes 150-51 and accompanying text.

168. See *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); *supra* notes 156-64 and accompanying text.

169. Justice Stevens, concurring in *Johnson*, aptly described the role of Title VII in authorizing voluntary affirmative action plans: “As a shield, an antidiscrimination statute can also help a member of a protected class by assuring decisionmakers in some instances that, when they elect for good reasons of their own to grant a preference of some sort to a minority citizen, they will not violate the law.” *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1458 (1987) (Stevens, J., concurring).

170. See *supra* note 136 and accompanying text.

171. See *supra* note 13 and accompanying text.

172. See *United Steelworkers v. Weber*, 443 U.S. 193, 200, 209 (1979); *supra* text accompanying note 13.

173. See *supra* note 21.

174. See *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980).

thority. It is therefore constitutional.

By telling the courts to apply to the states the same constitutional deference granted to itself, Congress has reversed the usual flow of power under the fourteenth amendment.<sup>175</sup> That this act is unusual, however, does not render it invalid. The Supreme Court has upheld similar delegations in other contexts<sup>176</sup> and has hinted that it might do so in affirmative action cases.<sup>177</sup> *Fullilove*, for example, indicates that the Constitution does not prohibit Congress from encouraging voluntary affirmative action plans by public employers.<sup>178</sup> Professor William Cohen, supporting Congress' right to make such delegations, argues that "[i]n appropriate circumstances, Congress should be able to authorize the states to enact legislation that, in the absence of congressional consent, would run afoul of the due process or equal protection clauses of the fourteenth amendment."<sup>179</sup> Therefore, the existence of congressional approval, through Title VII, should represent the difference between the success or failure of affirmative action plans under the Constitution.

Given the national policy of encouraging locally-adopted affirmative action plans voiced in Title VII<sup>180</sup> and discussed by the Supreme Court in *Weber*<sup>181</sup> and *Johnson*,<sup>182</sup> such plans should receive judicial deference. Realizing that far too many manifest imbalances exist throughout the country for it to handle itself, Congress chose, through Title VII, to leave factual findings to the individual public agencies as employers,<sup>183</sup> grant-

175. The fourteenth amendment clearly was intended to take power from the states and give it to Congress. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-56 (1976); *Ex parte Virginia*, 100 U.S. 339, 345-48 (1879).

176. See, e.g., *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) (Congress may delegate its full commerce clause authority); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 & n.8 (1985) (stating in dictum that had Congress so chosen, it could have shielded states from equal protection challenges to a federal law, delegating to states the power to regulate their insurance industries, to the same extent § 5 shielded Congress); *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655 n.6 (1981) (same); see also 1 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 4.8, at 293 n.3 (1986) (congressional grants of authority to states are limited only by specific constitutional restrictions on congressional action).

177. In *Bakke*, Justice Powell indicated that the admissions plan might not have been struck down had it been enacted pursuant to a Title VII consent decree. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 302 n.41 (1978) (opinion of Powell, J.).

178. See *Fullilove v. Klutznick*, 448 U.S. 448, 484 (1980) ("where Congress has authority to declare certain conduct [such as employment discrimination] unlawful, it may, as here, authorize and induce state action to avoid such conduct.") (emphasis added); see also *Bakke*, 438 U.S. at 373 (Brennan, White, Marshall and Blackmun, JJ., concurring in part and dissenting in part) (Congress' preference of voluntary remedies under Title VI mandates "considerable judicial deference" to voluntary affirmative action plans in education).

179. Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma*, 35 Stan. L. Rev. 387, 388 (1983).

180. See *supra* note 69 and accompanying text.

181. See *United Steelworkers v. Weber*, 443 U.S. 193, 204 (1979).

182. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1452-53 (1987).

183. See *supra* notes 69-74 and accompanying text.

ing them the same broad constitutional authority Congress would have if it had acted directly.<sup>184</sup> By so doing, Congress intended that courts use the same deferential standard of judicial review that the Supreme Court applied to the PWEA in *Fullilove*.<sup>185</sup>

Some Supreme Court and lower federal court decisions, at least in part, appear to have based the legality of a given affirmative action plan on the "competence" of the governmental body that initiated the plan.<sup>186</sup> For example, the plurality in *Bakke*, in part, rejected the Regents' plan because it found educational overseers, charged only with running schools, incompetent to alleviate societal discrimination.<sup>187</sup> The *Fullilove* plurality contrasted that limited competence with the unique competence of Congress to treat national societal problems.<sup>188</sup> The large number of state and local legislative and administrative bodies, however, makes the competence analysis difficult to apply with any consistency, resulting in confusing decisions.<sup>189</sup> The courts can eliminate this problem by simply looking to congressional competence as demonstrated in *Fullilove*.<sup>190</sup>

#### CONCLUSION

Employment discrimination is an issue of national importance and deserves a uniform national policy. Congress stated as much when it passed Title VII in 1964. It reaffirmed this statement by extending the Act's provisions to state and local governments through the EEOA in 1972. An aspect of this implied policy, as courts have recognized, is the desirability of avoiding litigation by allowing employers to remedy manifest racial or gender imbalances by adopting narrowly tailored affirmative

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184. See *supra* notes 155-64 and accompanying text.

185. See *Fullilove v. Klutznick*, 448 U.S. 448, 480, 491 (1980).

186. See *infra* note 189.

187. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-10 (1978).

188. See *Fullilove v. Klutznick*, 448 U.S. 448, 483-84 (1980).

189. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (local school board not competent to remedy societal discrimination); *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1364 (4th Cir. 1987) (Sprouse, J., dissenting) (Richmond City Council as competent in its jurisdiction as Congress, and deserves similar deference), *prob. juris. noted*, 108 S. Ct. 1010 (1988); *Janowiak v. Corporate City of South Bend*, 750 F.2d 557, 561 (7th Cir. 1984) (agency responsible for fire department is competent to make findings of past discrimination and remedy that discrimination), *vacated on other grounds*, 107 S. Ct. 1620 (1987). See generally Comment, *supra* note 99, at 612-23 (arguing for varying degrees of judicial deference—greatest to Congress and state legislatures, less to local elected bodies, least to administrative agencies).

190. See *Fullilove v. Klutznick*, 448 U.S. 448, 483-84 (1980). Congress possesses the constitutional power to mandate even a quota, albeit a flexible one. See *id.* at 454, 492. It has the authority to shield employers from Title VII liability if they seek to correct a manifest imbalance. See *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 1458 (1987) (Stevens, J., concurring). If, in order to make the Title VII shield meaningful, Congress must delegate to local authorities its power under the Constitution, Congress may do that as well. See *supra* note 176 and accompanying text; see also Cohen, *supra* note 179, at 411-12 ("The question to be answered in all cases is whether Congress would have power to make substantive policy choices analogous to those made in the state laws Congress had approved.").

action plans. Consistent with this goal, Congress has authorized public employers to determine when such an imbalance exists and to remedy it.

Many courts have upheld voluntary affirmative action plans under both Title VII and the equal protection clause without relying on a theory of congressional authorization. This congressional authorization analysis, however, unlike the more haphazard approaches generally used, has at least two added benefits: it provides a standard that is uniform and clear to both employers and courts, and, even more compelling, it gives due respect to Congress' enforcement clause powers. Because the national policy of eliminating employment discrimination is set by Congress, the constitutional standard, even as applied to local government actors, should reflect the broad latitude allowed Congress under the fifth amendment equal protection standard and the enforcement clause of the fourteenth amendment. The manifest imbalance standard of Title VII reflects Congress' considered choice; it should also be the constitutional standard applied to the states under the equal protection clause.

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