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Affirmative Action or the Same Sin?

AFFIRMATIVE ACTION¹ OR THE SAME SIN²?

KEN FEAGINS*

I. INTRODUCTION

*Though all things foul would wear the brows of grace,
yet grace must still look so.*³

Some advocates view affirmative action as a valid part of this na-

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I thank Robert Belton, Professor of Law, Vanderbilt University School of Law, who taught me by example the true meaning of exchange of ideas. His guidance, infinite patience, and encouragement are very much appreciated. I would also like to thank A. Darby Dickerson, an associate at Locke Purnell Rain Harrell in Dallas, for her review of earlier drafts of this article. The views contained herein, however, are solely my own.

1. "Affirmative action" is a policy designed to remedy the present effects of past discrimination. Affirmative action plans expressly take race and sex into account. There are two basic kinds of affirmative action. The first type restructures the recruitment process to include minorities in the applicant pool. I have no problem with this type of affirmative action plan.

The second form of affirmative action, however, establishes goals, quotas, and timetables, and relies on race or sex as the dispositive factor in awarding jobs and promotions, see Belton, *Reflections on Affirmative Action After Paradise and Johnson*, 23 HARV. C.R.-C.L. L. REV. 115-16 n.1 (1988). Consequently, minority candidates are preferred over better qualified nonminority candidates. This article focuses on the second type of affirmative action.

A nonexhaustive list of benefits and opportunities subject to affirmative action includes: gaining employment or promotions; not being terminated from employment; gaining admission into training programs, professional schools, or graduate programs.

2. In the text, I have coined the term "samesin" to describe the "same sin" of continuing race- and sex-consciousness. Samesin is discrimination based on race or sex that occurs under the euphemistic guise of "affirmative action."

"Samesin" refers to the "original sin" of discrimination, historically directed toward blacks and women. The overt racism and sexism inherent in the implementation of voluntary affirmative action plans is virtually identical to the overt racism and sexism that have plagued our nation from its birth. "Benign" discrimination on the basis of race or sex is a myth. Any discrimination based solely on race or sex is inherently wrong and destructive to society, even if dressed in the euphemistic clothing of affirmative action. Affirmative action results in segregation rather than integration.

As Chief Justice William Rehnquist stated in *United Steelworkers v. Weber*, 443 U.S. 193, 228 n.10 (1979) (Rehnquist, J., dissenting):

I see no irony in a law that prohibits *all* voluntary racial (or sexual) discrimination, even discrimination directed at whites in favor of blacks. The evil inherent in discrimination against Negroes is that it is based on an immutable characteristic The characteristic becomes no less immutable and irrelevant, and discrimination based thereon becomes no less evil, simply because the person excluded is a member of one race rather than another. Far from ironic, I find a prohibition on all preferential treatment based on race (or sex) as elementary and fundamental as the principal that "two wrongs do not make a right."

But see Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

Although I oppose voluntary affirmative action plans insofar as they operate to discriminate overtly on the basis of race or sex, I recognize that egregious situations exist and raise different issues concerning court ordered remedies. *E.g.*, *United States v. Paradise*, 480 U.S. 149 (1987).

3. W. SHAKESPEARE, *MACBETH*, Act IV, scene iii.

tion's desire to build "a racially integrated society for the future,"⁴ while others endorse it as an appropriate remedy for past discrimination.⁵ Despite such euphemisms, public⁶ discrimination on the basis of race or sex is *unconstitutional* because it violates the equal protection clause of the fourteenth amendment⁷ and is not the least intrusive means available for the state to achieve its goal of an equal opportunity society;⁸ *illegal* because it violates the express provisions of Title VII of the Civil Rights Act of 1964;⁹ *immoral* because it is inherently wrong; and *destructive* because it sows seeds of resentment in innocent victims.¹⁰ "Affirmative action" is the "samesin"¹¹—the continuation and propagation of "separate but equal" race- and sex-consciousness. It is *Plessy v. Ferguson*¹² in reverse.¹³

As a result of affirmative action programs, marginally qualified white males rapidly are replacing black females as the group most frequently discriminated against in American society. Whether directed against blacks or whites, men or women, racism and sexism remain racism and sexism. Our society will never achieve the dream of equality until, as a matter of public policy, it becomes completely blind¹⁴ to both race and sex. My quarrel, therefore, is not with the ends of affirmative action plans, but with the means.

The concept of voluntary affirmative action as a weapon to combat discrimination by employers was sanctioned as early as 1961. In that year, President John F. Kennedy issued an executive order¹⁵ which established the President's Committee on Equal Employment Opportunity and announced that the federal government, as employer, would not discriminate on the basis of race, sex, or national origin.¹⁶ Twenty-eight

4. Sullivan, *supra* note 2, at 98.

5. *Id.* at 97.

6. Although private discrimination on the basis of race or sex raises first amendment concerns, such as the freedom to choose those with whom one associates, that discussion is beyond the scope of this article.

7. U.S. CONST. amend. XIV, § 1.

8. I am referring to the "narrowly tailored" prong of the analysis. See Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 n.6 (1986).

9. 42 U.S.C. §§ 2000e - 2000e-17 (1986).

10. See, e.g., Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 779 (1979) (quoting A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).

11. The word "samesin" is coined. See *supra* note 2.

12. 163 U.S. 537 (1896).

13. If discrimination on the basis of race or sex is wrong, it should make no difference "who" is discriminated against. The evil itself is not dependent upon the popularity or vulnerability of the victim. Nor is discrimination any less evil merely because the Court is clever enough to substitute the term "affirmative action" for the term "discrimination."

14. See, e.g., Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986) (discussing different views on affirmative action).

15. Executive Order No. 10,925, 3 C.F.R. 448 (1959-63 Compilation); accord Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, N.C.L. REV. 531, 533 n.9 (1981).

16. 3 C.F.R. 448 (1959-63 Compilation). The President stated:

WHEREAS it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; . . .

years later, affirmative action remains one of the most "starkly divisive"¹⁷ issues in our country. Its proponents wage an all-out war in favor of "preferential treatment" for minorities and women,¹⁸ while its opponents insist that choices must be "color-blind."¹⁹ The debate within the United States Supreme Court is as heated as that among various factions of the general public. Recently, the Court upheld voluntary affirmative action plans in *United Steelworkers v. Weber*²⁰ and *Johnson v. Transportation Agency*,²¹ while striking down affirmative action plans in *Wygant v. Jackson Board of Education*²² and *City of Richmond v. J.A. Croson Co.*²³

The question to be answered, therefore, is: Under what circumstances, if any, is it appropriate to consider race or sex when conferring benefits²⁴ in either the public or private sector? There are three options.²⁵ First, race or sex *always*²⁶ should be considered. Second, race or sex *never* should be considered.²⁷ Or third, race or sex should *sometimes* be considered.²⁸

The choice is dependent upon four factors: (1) the extent to which our national policy, as interpreted by the United States Supreme Court, is color-blind; (2) the extent to which our national policy should be color-blind; (3) the extent to which laws prohibiting discrimination actually protect individuals rather than groups; and (4) the extent to which laws prohibiting discrimination should protect individuals rather than groups.²⁹

This article discusses the Supreme Court's stance on affirmative action plans in light of *Weber*, *Wygant*, *Johnson*, and *Croson*, and focuses primarily on plans promulgated under the equal protection clause of the fourteenth amendment³⁰ and Title VII of the Civil Rights Act of 1964.³¹

[t]here is hereby established the President's Committee on Equal Employment Opportunity.

Id.

17. Sullivan, *supra* note 2, at 78.

18. *Id.*

19. *E.g.*, Reynolds, *Individualism v. Group Rights: The Legacy of Brown*, 93 YALE L. J. 995, 998 (1984).

20. 443 U.S. 193 (1979).

21. 480 U.S. 616 (1987).

22. 476 U.S. 267 (1986).

23. 109 S. Ct. 706 (1989).

24. Belton, *supra* note 1, at 115-16.

25. *Id.* at 116.

26. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). As Professor Belton notes, however, "there appears to be little, if any, support for the proposition that race or sex should always be taken into account in the allocation process." Belton, *supra* note 1, at 116.

27. Belton, *supra* note 1, at 116 n.2.

28. *Id.* at 116 n.3.

29. This article is limited to a discussion of the equal protection clause of the fourteenth amendment of the United States Constitution and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-17 (1986). Although the cases discussed herein deal primarily with race, their principles also apply to other immutable characteristics, such as sex, color, and national origin.

30. U.S. CONST. amend. XIV.

31. 42 U.S.C. §§ 2000e - 2000e-17 (1986).

Part II reviews the affirmative action debate and summarizes the legal background. The discussion treats seriatim the "always," "never," and "sometimes" responses to the fundamental policy question of when benefits should be conferred on the basis of immutable characteristics, first in the equal protection context,³² and then under Title VII.³³ Part III analyzes the Court's current standards for determining whether voluntary public plans are legitimate under equal protection and Title VII.³⁴ Part IV suggests various alternatives to current affirmative action plans,³⁵ and explains why *Weber* and *Johnson* should be overruled.³⁶ Part V illustrates why the operation of voluntary affirmative action plans is virtually identical to the *Plessy* "separate but equal" doctrine.³⁷ Part VI concludes by stressing the urgent need to adopt Justice Harlan's "color-blind" approach³⁸ so that we may build a racially integrated, not segregated, society.³⁹

II. AFFIRMATIVE ACTION SURVEY

A. Equal Protection—The "Always" Response

The legal evolution of affirmative action has seen support for all of the policy options. *Plessy v. Ferguson*⁴⁰ represents the Supreme Court's "always" response under the equal protection clause.

The primary issue in *Plessy* was whether a Louisiana state law requiring "equal but separate"⁴¹ accommodations for whites and blacks riding on passenger trains violated the equal protection clause of the federal Constitution. Mr. Plessy, who was seven-eighths white and one-eighth black, refused to obey the conductor's orders to vacate a seat reserved for whites and occupy one set aside for blacks. As a result of his disobedience, he was forcibly ejected from his seat, and incarcerated in a New Orleans jail. With only Justice Harlan dissenting, the Court upheld the law,⁴² commenting that the fourteenth amendment "could not have been intended to abolish [legal] distinctions based upon color."⁴³

By sustaining Louisiana's "separate but equal" law, the Court en-

32. See *infra* notes 40-90 and accompanying text.

33. See *infra* notes 91-133 and accompanying text.

34. See *infra* notes 134-83 and accompanying text.

35. See *infra* notes 184-246 and accompanying text.

36. See *infra* notes 184-221 and accompanying text.

37. See *infra* notes 247-70 and accompanying text.

38. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). In opposition to the majority's "separate but equal" holding, Justice Harlan stated that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." *Id.* at 559.

39. See *infra* notes 271-82 and accompanying text.

40. 163 U.S. 537 (1896).

41. *Id.* at 540.

42. The *Plessy* majority stated:

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races . . .

Id. at 543.

43. *Id.* at 544.

dorsed overt racism. With this holding, the Court effectively announced that, under the equal protection clause, discrimination on the basis of race is "always" appropriate.⁴⁴ Legal distinctions based on race, concluded the Court, "[have] no tendency to destroy the legal equality of the two races."⁴⁵

The Court's "always" response prevailed for over fifty years. In 1954, however, the Court acknowledged the evil inherent in the sin of racial discrimination, and adopted the "never" response.

B. Equal Protection—The "Never" Response

*Brown v. Board of Education*⁴⁶ established an individual's right "never" to be disadvantaged by law due to his or her race.⁴⁷ This reading of *Brown* reflects the "color-blind" view of the Constitution, enunciated by Justice Harlan in *Plessy*.⁴⁸ The burning issue in *Brown* was whether a Kansas statute,⁴⁹ which permitted but did not require separate schools for blacks and whites, violated equal protection.⁵⁰

Under the guise of statutory authority, the Kansas school board denied blacks admission to public schools attended by whites. After concluding that "in the field of public education the doctrine of 'separate but equal' has no place,"⁵¹ the Court held that separate treatment on the basis of race did indeed violate equal protection.⁵²

Although an "activist reading"⁵³ of *Brown* interprets the Court's holding as the quintessential "never" response, some of the Court's post-*Brown* opinions retreated from this hard-line position and construed the equal protection clause to mean that race "sometimes" may be considered.⁵⁴

44. Although *Plessy* dealt only with race, the underlying rationale of "separate but equal" is applicable to the other immutable characteristics.

45. 163 U.S. at 543.

46. 347 U.S. 483 (1954).

47. *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1525-58 (2d ed. 1988), in which Professor Tribe suggests that an "activist reading" of *Brown* "creates a right that the fourteenth amendment's language does not really suggest and that the fourteenth amendment's authors—authors who did not regard even racial segregation in public schools as offensive to the amendment—would certainly not have endorsed." *Id.* at 1526.

48. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

49. KAN. STAT. ANN. § 72-1724 (1949).

50. *Compare Brown*, 347 U.S. at 486 n.1 with *Weber*, 443 U.S. at 205-07 (interpreting Title VII to permit, but not require preferential treatment on the basis of race). Under a narrow reading of *Weber*, the Court's interpretation of Title VII, which permits but does not require voluntary racial discrimination to correct racial imbalances, is arguably unconstitutional. In other words, the *Weber* construction of Title VII violates the fifth amendment in the same way the Kansas statute failed to protect the equal protection guarantees of the fourteenth in *Brown*.

51. *Brown*, 347 U.S. at 495.

52. *Id.*

53. *See* L. TRIBE, *supra* note 47, at 1526; Tribe, *In What Vision of the Constitution Must the Law Be Color-blind?*, 20 J. MARSHALL L. REV. 201, 204-05 (1986).

54. *See, e.g., Wygant*, 476 U.S. at 280-84 (1986) (striking down a voluntary race-conscious affirmative action plan under the equal protection clause because it was "not sufficiently narrowly tailored," but clearly indicating that other race-conscious plans which satisfied certain criteria would be constitutional); *Regents of the Univ. of Cal. v. Bakke*,

C. *Equal Protection—The “Sometimes” Response*

1. *Regents of the University of California v. Bakke*

*Regents of the University of California v. Bakke*⁵⁵ is representative of the Court's “sometimes” response in the equal protection context. *Bakke* addressed whether the voluntary affirmative action plan at the University of California-Davis Medical School, which reserved sixteen out of one hundred available spaces in an entering class for disadvantaged and minority students, violated equal protection.

Allan Bakke, a white male, applied for admission to the Medical School in 1973 and again in 1974. He was rejected both times. Each year, however, the school admitted minority applicants with qualifications significantly lower than Bakke's. Following his second rejection, Bakke filed suit alleging that the school's affirmative action plan violated his rights under Title VI⁵⁶ and the equal protection clause of the fourteenth amendment.

Bakke won his suit, and was admitted to the Medical School. Yet, the Court was unwilling to hold that discrimination on the basis of sex was “always” illegal. Justice Powell supported the adoption of standards of the Harvard College Admission Program, which used race as one factor among many in the admissions process.⁵⁷

The Court's “sometimes” approach to equal protection is embodied in Justice Powell's endorsement of Harvard's Admission Program: “In such an admissions program, race or ethnic background may be deemed a ‘plus’ in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates.”⁵⁸ Justice Powell, therefore, approved the use of race as a factor as long as a plan did not operate as a “cover for the functional equivalent of a quota system.”⁵⁹

2. *Wygant v. Jackson Board of Education*

*Wygant v. Jackson Board of Education*⁶⁰ is a recent illustration of the “sometimes” response in the equal protection setting. In *Wygant*, the Jackson Board of Education entered a collective-bargaining agreement which provided that layoffs of teachers would be governed by seniority, “[e]xcept that at no time will there be a greater percentage of minority personal laid off than the current percentage of minority personnel em-

438 U.S. 265, 323 (1978) (Justice Powell supporting the Harvard College Admission Program, which uses race as a factor in the admissions process).

55. 438 U.S. 265 (1978).

56. Title VI, 42 U.S.C. §§ 2000d *et seq.*, provides for nondiscrimination based on race, color, or national origin in federally assisted programs. Under Title VI, any program receiving federal financial aid may not discriminate on the grounds of race, color, or national origin.

57. *Bakke*, 438 U.S. at 323 (indicating support for the use of race as a factor among many in admissions programs as applied in the Harvard College Admissions Program).

58. *Id.* at 317.

59. *Id.* at 318.

60. 476 U.S. 267 (1986).

ployed at the time of the layoff."⁶¹ When senior nonminority teachers were released before more junior minority teachers, the displaced nonminority teachers brought suit under the equal protection clause.⁶²

The district court held that the preferential layoffs did not violate equal protection because the policy attempted to provide minority teachers as role models for minority students,⁶³ and because the plan was an attempt to remedy past "societal discrimination."⁶⁴ The Sixth Circuit Court of Appeals affirmed the decision of the trial court, only to be reversed by the Supreme Court.⁶⁵

In nullifying the affirmative action plan, which was both public and voluntary, the *Wygant* Court adhered to its "sometimes" approach to equal protection. The plurality, led by Justice Powell, employed a burden-sharing approach and emphasized "that in order to remedy the effects of prior discrimination, it may be necessary to take race into account."⁶⁶ Under this policy, innocent individuals would be forced to "bear some of the burden of the remedy."⁶⁷ However, the plurality insisted that a two-pronged strict scrutiny test must be satisfied before any plan could discriminate in favor of minorities: "There are two prongs to the examination. First, any racial classification 'must be justified by a compelling governmental interest'."⁶⁸ "Second, the means chosen by the [s]tate to effectuate its purpose must be 'narrowly tailored to the achievement of that goal'."⁶⁹ The first prong demands that the government have a compelling interest in discriminating on the basis of race,⁷⁰ and the second requires that the means chosen by the government be narrowly tailored to achieving its goal.⁷¹

The plurality held that the *Wygant* plan violated equal protection. It was not "sufficiently narrowly tailored"⁷² because the race-based layoffs imposed an unreasonable burden upon innocent individuals. At the same time, however, the Court clearly indicated that hiring plans that discriminate on the basis of race are less intrusive and would be

61. *Id.* at 270.

62. *Id.* at 272.

63. *Id.*

64. *Id.*

65. *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1199-1201 (E.D. Mich. 1982), *aff'd*, 746 F.2d 1152 (6th Cir. 1984), *rev'd*, 476 U.S. 267 (1986).

66. *Wygant*, 476 U.S. at 280.

67. *Id.* at 280-81 (stating that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy").

68. *Wygant*, 476 U.S. at 274 (quoting *Palmore v. Didoti*, 446 U.S. 429, 432 (1984)).

69. *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980)).

70. *Id.* Discrimination on the basis of sex receives only mid-level scrutiny. *Craig v. Boren*, 429 U.S. 190 (1976).

71. The term "narrowly tailored" means that no less intrusive means are available to the government. In other words, if lawful, less restrictive alternatives could have been used by the government to accomplish the same compelling interest, a plan that discriminates on the basis of race is unconstitutional. *Wygant*, 476 U.S. at 280 n.6.

72. *Id.* at 283.

upheld.⁷³

Bakke and *Wygant* suggested that the Court, through the concept of burden sharing,⁷⁴ had adopted the "sometimes" response. However, a logical deduction after *Bakke* and *Wygant* was that under the equal protection clause, race- and sex-conscious plans that expressly applied "separate but equal" criteria to minorities and whites,⁷⁵ women and men,⁷⁶ minority women and men, or minority women and white men sometimes would be upheld.⁷⁷ The Court apparently had rejected the spirit of *Brown* and was on the verge of resurrecting the "always" response of *Plessy*.

D. Equal Protection—*De Ja Vu*: The "Never" Response

On January 23, 1989, the Court took a giant step forward, moving closer to the "never" response. In *City of Richmond v. J.A. Croson*,⁷⁸ the majority recognized that supporting any type of public discrimination based solely on race, "benign" or not, "assures that race will always be relevant in American life."⁷⁹ Using a modified version of the two-pronged strict scrutiny analysis articulated in *Wygant*, the Court struck down Richmond's Minority Business Utilization Plan.⁸⁰

The Richmond plan required general contractors awarded city construction contracts to hire minority subcontractors for at least 30% of the dollar amount of each project.⁸¹ The plan failed the first prong (known as the legitimate factual predicate prong) of the equal protection test for the same reasons that the *Wygant* plan failed.⁸² First, the city's justification for the plan was no more than a "generalized assertion" that minorities had suffered discrimination in the past. However, the city was unable to substantiate the scope of the injury the plan sought to redress. Thus, like the minority teacher as role model theory rejected in *Wygant*, the Richmond plan had no "logical stopping point."⁸³

73. *Id.* at 283-84 (indicating that "[o]ther, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—are available").

74. *See* *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

75. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978).

76. *See* *Johnson v. Transportation Agency*, 480 U.S. 616, 652 (1987) (O'Connor, J., concurring). Although *Johnson* approved an affirmative action plan that discriminated on the basis of sex under Title VII, Justice O'Connor stated, "I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause." *Id.*

77. These categories are based on a logical extension of the principles enunciated in *Wygant* and *Johnson*.

78. 109 S. Ct. 706 (1989).

79. *Id.* at 722 (emphasizing that "[t]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme" (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975))).

80. *Id.* at 716-17. The plan was struck down under both prongs of the test. *Id.* at 723-24.

81. *Id.* at 713. Minority firms, known as Minority Business Enterprises, included a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens.

82. *Id.* at 723.

83. *Id.* (quoting *Wygant*, 476 U.S. at 275).

Second, the city's "sheer speculation" about the number of minority firms that would have been located in Richmond but for "past societal discrimination" did not amount to identifiable discrimination under the equal protection clause.⁸⁴ In other words, the city had no strong basis in evidence for its conclusion that remedial action was necessary.⁸⁵ Accordingly, the Court rejected the argument that past societal discrimination alone can serve as an adequate factual predicate for affirmative action plans based on race.⁸⁶

The Court also held that the Richmond plan was not "narrowly tailored." The city failed to consider alternative, race-neutral ways to increase minority participation in government construction projects, and the rigid 30% quota was not narrowly tailored to fit the flexible goal of encouraging minority businesses.⁸⁷ Instead, the quota was based on the completely unrealistic assumption that "minorities will choose a particular trade in lockstep proportion to their representation in the local population."⁸⁸ The Court stated that the "administrative convenience" of a quota system is not sufficient to make a plan constitutional.⁸⁹ Thus, *Croson* suggests that the Court is returning to the "never" spirit of *Brown*, at least in the context of equal protection.⁹⁰

E. Title VII—The "Always" Response

Title VII of the Civil Rights Act of 1964⁹¹ expressly prohibits employers from discriminating on the basis of race, color, religion, sex, or

84. *Id.* at 724.

85. *Id.* at 727 (observing that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry").

86. The Court stated:

To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.

Id.

87. *Id.* at 728.

88. *Id.*; accord *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part) (commenting that "[i]t is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination").

89. *Croson*, 109 S. Ct. at 729 (stating that "the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. '[W]hen we enter the realm of strict judicial scrutiny, there can be no doubt that administrative convenience is not a shibboleth, the mere recitation of which dictates constitutionality'" (quoting *Frontiers v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion))).

90. The Court expressly stated that it agreed with Justice Powell's analysis that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Id.* at 721 (quoting *Bakke*, 438 U.S. at 289-90).

91. 42 U.S.C. §§ 2000e - 2000e-17 (1986).

national origin.⁹² Congress's objective in passing Title VII "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."⁹³ The first major Supreme Court case interpreting Title VII was *Griggs v. Duke Power Co.*⁹⁴

Prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, Duke Power Company openly discriminated against blacks in employment decisions. Although Duke Power hired blacks, it assigned all black workers to the labor department, where the highest paying jobs were less lucrative than the lowest paying jobs in all of the other departments. When Title VII became effective, Duke Power abandoned its policy of restricting blacks to the labor department. In order to transfer out of the labor department, however, employees either had to possess a high school diploma or pass two professionally developed ability tests. Because a higher percentage of whites had high school diplomas, and because whites tended to score better on the tests, these requirements, although facially neutral, adversely affected blacks as a group.⁹⁵

The disgruntled blacks challenged the new transfer requirements under Title VII, contending that the requirements operated as "built-in headwinds"⁹⁶ against them.⁹⁷ The *Griggs* Court agreed, and held that Duke Power's educational requirements and testing practices disadvantaged blacks as a group.⁹⁸

With the Court's unanimous decision, the foundations for the disparate impact theory were laid, and the debate over the legality of race-conscious voluntary affirmative action plans was begun. On one hand, the Court stated that "preference for any group, minority or majority, is precisely . . . what Congress proscribed."⁹⁹ But, on the other hand, the Court stated:

The objective of Congress in the enactment of Title VII is plain from the language of the statute. It 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. Under the Act, practices,

92. *Id.* at § 2000e-2(a)(1), (d).

93. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

94. *Id.*

95. *Id.* at 430 n.6; see also Belton, *supra* note 15, at 542.

96. *Griggs*, 401 U.S. at 432.

97. The issue for the *Griggs* Court was:

[W]hether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites.

Id. at 425-26.

98. *Griggs*, 401 U.S. at 436. Today, this theory of discrimination is commonly referred to as "disparate impact." See *infra* note 105.

99. *Griggs*, 401 U.S. at 431.

procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.¹⁰⁰

Because *Griggs* prohibits both disparate impact and disparate treatment, it plays an important role in the debate over whether antidiscrimination laws protect individuals¹⁰¹ or groups.¹⁰²

There are three notable differences between the disparate treatment and disparate impact theories of discrimination. First, disparate treatment is based on a statutory construction of Title VII, § 703(a)(1),¹⁰³ while disparate impact is based on a construction of § 703(a)(2).¹⁰⁴ Second, a plaintiff can prevail under disparate treatment only if he or she proves that the defendant intended to discriminate against him or her. Under disparate impact, the defendant's intent is irrelevant. Instead, a plaintiff must show that a particular employment practice results in injury to a group because of race, color, religion, sex, or national origin, and that the practice is not related to business necessity.¹⁰⁵ Finally, disparate treatment is premised on the concept that individuals should be treated equally. It protects people on an individual

100. *Id.* at 429-30.

101. *See, e.g., Reynolds, Individualism vs. Group Rights: The Legacy of Brown*, 93 *Yale L.J.* 995 (1984).

102. Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 *HARV. J. ON LEGIS.* 99 (1983).

103. 42 U.S.C. § 2000e-2(a)(1) (1986) 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 or employment, because of such individual's race, color, religion, sex, or national origin.

104. 42 U.S.C. § 2000e-2(a)(2) provides:

It shall be an unlawful employment practice for an employer 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 in any way adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

105. The disparate treatment theory of discrimination is easily distinguished from disparate impact on the basis of intent. In order to impose liability under Title VII, the former requires an intent to discriminate on the basis of race or sex. The latter does not.

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. *See, e.g.,* 110 *Cong. Rec.* 13088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.").

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. . . . Either theory may, of course, be applied to a particular set of facts.

basis, and looks forward to a blind society in which all persons, regardless of race or sex, compete equally for benefits and opportunities.¹⁰⁶ Disparate impact, on the other hand, protects groups, and is designed to eliminate the present effects of past discrimination.¹⁰⁷

F. Title VII—The “Never” Response

The “never” response in Title VII cases was conceived in *Griggs* when the Court stated that “[d]iscriminatory preference for any group . . . is precisely . . . what Congress has proscribed.”¹⁰⁸ It was born in *McDonnell Douglas Corp. v. Green*¹⁰⁹ when the Court employed the disparate treatment test to find the possibility that a black plaintiff had not been discriminated against on the basis of race. It matured in *McDonald v. Santa Fe Trail Transportation Co.*¹¹⁰ when the Court held that Title VII protected whites as well as blacks, and it died in *United Steelworkers v. Weber*¹¹¹ when the Court engaged in judicial legislation and interpreted Title VII to permit overt discrimination against whites.

1. McDonnell Douglas Corp. v. Green

*McDonnell Douglas Corp. v. Green*¹¹² differed from *Griggs* in that it did not involve standardized tests that excluded capable blacks. In *McDonnell*, a black plaintiff sued his employer on grounds that he had been denied re-employment due to his race and persistent involvement in the civil rights movement. After analyzing the facts, the Court determined that the plaintiff may have been rejected not because of race, but because of prior unlawful behavior and remanded the case for resolution of this issue.¹¹³ Thus, McDonnell Douglas may not have constructed

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

Under the disparate impact theory of discrimination, employment practices and policies that have an adverse impact or effect on the employment opportunities of any group, e.g., blacks and women, are unlawful under Title VII, unless they are job-related and mandated by business necessity. The *Griggs* Court stated that whenever “an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited” under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

106. See *Connecticut v. Teal*, 457 U.S. 440 (1982) (illustrating the Court’s struggle with the individual/group problem).

107. The disparate treatment theory may be analogized to a footrace in which everyone lines up at the starting line and then races for the finish, separated only by their competitive abilities rather than by immutable characteristics such as race or sex. Disparate impact, on the other hand, is concerned more with redressing past societal discrimination against blacks and women as groups. Proponents argue that even if everyone is lined up equally at the starting line, the race still is inherently unfair. Blacks and women remain handicapped due to the ball and chain effects of societal discrimination. Thus, there is not a true race if some of the competitors (blacks and women) must run with ankle weights (societal discrimination) while others in the same race (whites, males, and white males) are allowed to run free. Belton, *supra* note 15, at 541 n.38.

108. *Griggs*, 401 U.S. at 431.

109. 411 U.S. 792 (1973).

110. 427 U.S. 273 (1976).

111. 443 U.S. 193 (1979).

112. 411 U.S. 792 (1973).

113. *Id.* at 806.

arbitrary barriers like those the Court had criticized in *Griggs*. Instead, it may have merely denied an undeserving plaintiff employment, a decision supported by the Court. The Court based its decision on § 703 (a)(1), the disparate treatment provision, rather than the disparate impact theory advanced in *Griggs*. The concept of disparate treatment, however, matured in *McDonald v. Santa Fe Trail Transportation Co.*¹¹⁴

2. McDonald v. Santa Fe Trail

In *McDonald*, three individuals, two whites and a black, were charged with misappropriating cans of antifreeze. The whites were fired, but the black was retained. The whites sued under Title VII, only to have their case dismissed by the district court. The Supreme Court, however, reversed on grounds that Title VII prohibits *all* racial discrimination.¹¹⁵ Employing disparate treatment rather than disparate impact, the Court held that Title VII protects whites as well as blacks—the “never” response.¹¹⁶

Currently, there are two competing theories of protection under Title VII—disparate impact and disparate treatment. The former protects groups, the latter individuals. Unfortunately, employers face a dilemma under both. They risk potential liability from minority groups, women’s groups, and minority women’s groups under disparate impact if they do not receive preferential treatment. Yet, they may be sued by whites, males, or white male individuals under the disparate treatment theory if preferential treatment is given to minority groups. Consequently, the Court adopted a compromise position—the “sometimes” response.

114. 427 U.S. 273 (1976).

115. The Court stated that the “act prohibits *all* racial discrimination in employment without exception for *any* group of particular employees.” *Id.* at 283 (emphasis added).

116. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), however, is a more recent example of the Court’s “never” response under Title VII. In *Stotts*, the issue before the Court was whether the district court erred when it enjoined the City of Memphis from laying off black employees pursuant to the seniority principle of “last hired, first fired.” The city fire department previously had been sued for racial discrimination by a class of black firefighters. To settle the suit, the city entered into a consent decree designed to “remedy the hiring and promotion practices ‘of the department with respect to blacks.’” The decree, however, did not address layoffs.

Approximately one year later, due to “projected budget deficits,” the city was forced to layoff several employees. At the request of black employees, the district court enjoined the city from adhering to the “last hired, first fired” principle insofar as it would decrease the percentage of blacks already employed. The district court, relying on the *Griggs* disparate impact theory, held that the city could not adhere to the seniority principle of layoffs because it would result in a discriminatory effect on black employees who had recently been hired under the consent decree. Pursuant to the injunction, the city either (1) laid off white employees with more seniority than black employees or (2) demoted them in rank.

The Supreme Court rejected the *Griggs* argument and invalidated the injunction under § 703(h) of Title VII which protects bona fide seniority systems if they do not intentionally “discriminate because of race, color, religion, sex, or national origin.” The *Stotts* holding can be interpreted to prohibit all preferential treatment on the basis of race to nonvictims of discrimination. It “never” allows discrimination on the basis of race in favor of any individual who is not an “actual victim” of racial discrimination.

G. Title VII - The "Sometimes" Response

1. Private Employers

*United Steelworkers v. Weber*¹¹⁷ is representative of the era of civil rights jurisprudence under Title VII during which the Court tried to harmonize individual and group concerns. In *Weber*, a white employee who had been passed over for an in-plant training program in favor of a black with less seniority, initiated a class action reverse discrimination suit under §§ 703(a)¹¹⁸ and 703(d)¹¹⁹ of Title VII.

Kaiser Aluminum, Weber's employer, and the United Steelworkers of America, Weber's union, implemented a voluntary affirmative action plan which included a dual seniority selection process. The plan allowed minority and female employees to attend craft training programs before white males with more seniority. Kaiser implemented the plan because it feared possible Title VII disparate impact actions due to the underrepresentation of blacks in its workforce.¹²⁰

In *Weber*, the Court had to determine whether, in a collective bargaining agreement freely entered into by a private employer, a race-conscious employment plan with remedial purposes constituted legal "affirmative action"¹²¹ or illegal "reverse discrimination."¹²² The district court and the Fifth Circuit invalidated the plan as reverse discrimination under §§ 703(a)(1) and (d).

The Supreme Court, however, reversed and reinstated the plan. Justice Blackmun praised the wisdom of the court of appeals dissent, which characterized the employer's predicament after *Griggs* and *McDonald* as walking a "high tightrope without a net beneath them."¹²³ The analogy recognized the employer's potential liability to minorities under the disparate impact (group) theory if race-conscious plans were not implemented, as well as the potential liability to whites under disparate treatment (individual) theory if race-conscious plans were adopted.

In holding that Title VII "does not condemn all private voluntary, race-conscious affirmative action plans,"¹²⁴ the *Weber* Court chose to invoke the "spirit" of Title VII and congressional emphasis on voluntary

117. 443 U.S. 193 (1979).

118. See *supra* notes 103-04 and accompanying text.

119. 42 U.S.C. § 2000e-2(d) (1986) provides:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs 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.

120. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 228-29 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

121. See Executive Order No. 11,246, 3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. § 2000e notes (1981).

122. See *Weber*, 563 F.2d at 218-21. For purposes of this article, "reverse discrimination" means discrimination based on race or sex which would be illegal if directed against minorities and women, but legal if directed against whites and males.

123. *Weber*, 443 U.S. at 209-10 (1979) (Blackmun, J., concurring).

124. *Id.* at 208.

compliance, rather than adhere to the statute's actual wording.¹²⁵ Thus, for all practical purposes, the Court announced that the very sin which had been expressly prohibited by Title VII—racial discrimination—is sometimes an appropriate policy for private employers. Accordingly, the Court rejected both the “always” (color-conscious) response of group protection¹²⁶ and the “never” (colorblind) response of individual protection.¹²⁷

In *Weber*, the Court held that race could be considered when a plan (1) is designed to “break down old patterns of racial segregation and hierarchy;” (2) “does not unnecessarily trammel the interests of the white employees;” (3) does not “create an absolute bar to the advancement of white employees;” and (4) is a temporary measure designed to eliminate a manifest racial imbalance rather than maintain a racial balance.¹²⁸ In *Weber*, the Court did not address whether race-conscious affirmative action plans would violate Title VII if adopted by public employers.¹²⁹

2. Public Employers

In *Johnson v. Transportation Agency*,¹³⁰ the Court addressed the question of whether a public employer could “always,” “never,” or “sometimes” adopt a voluntary race- or sex-conscious affirmative action plan without violating Title VII. The Santa Clara Transportation Agency, a public employer, voluntarily adopted an affirmative action plan for hiring and promoting minorities and women. The plan provided that the agency could consider the sex or race of qualified applicants when making promotions to positions within traditionally segregated job categories. When petitioner Johnson, a white male, was passed over for a promotion to the position of road dispatcher, a skilled crafts position, in favor of Joyce, a woman who had scored slightly lower in the job interview, he challenged the plan under Title VII, alleging that he had been denied the promotion on the basis of sex.¹³¹

The Court upheld the plan by concluding that it was voluntary, temporary, and implemented to eliminate a manifest imbalance (rather than to maintain a balance) of qualified women in skilled craft positions, a traditionally segregated job category. Thus, in *Johnson* the Court extended *Weber* to public employers sued under Title VII.

After *Weber* and *Johnson*, both private and public employers “sometimes” may adopt voluntarily race- or sex-conscious affirmative action

125. *Id.* at 201-08.

126. By employing restrictive guidelines in its analysis, in *Weber* the Court indicated that it would not accept all race-conscious forms of group protection at the expense of individual rights. The Court, however, did not define the outer limits of permissible voluntary race-conscious plans.

127. If the Court in *Weber* had responded “never” to the fundamental policy question, it would have upheld Brian Weber’s reverse discrimination claim under § 703 (a)(1).

128. 443 U.S. at 208.

129. *Id.* at 200.

130. 480 U.S. 616 (1987).

131. *Id.* at 620 n.2.

plans under Title VII. The plans, however, must (1) be designed to break down old patterns of race- or sex-based segregation; (2) not unnecessarily trammel the interests of other employees by requiring their discharge or creating an absolute bar to their advancement; and (3) be temporary.¹³² In *Johnson* the Court, however, did not have the opportunity to address whether race- or sex-conscious voluntary affirmative action plans adopted by public entities would violate equal protection.¹³³

III. ANALYSIS IN LIGHT OF *WEBER*, *WYGANT*, *JOHNSON*, AND *CROSON*

A. *Factual Predicate*

The "sometimes" response is prevalent in both equal protection¹³⁴ and Title VII jurisprudence.¹³⁵ It is a manifestation of the Court's desire to harmonize the competing interests of individuals and groups. The standards of the "sometimes" response, however, are still developing.

Regardless of whether the legitimacy of a public plan is scrutinized under the equal protection clause, as in *Wygant* and *Croson*, or under Title VII, as in *Weber* and *Johnson*, the Court employs two criteria: First, there must be a "legitimate factual predicate"¹³⁶ for adopting the plan. Second, the plan must be "narrowly tailored" to fit the specific goals of the plan¹³⁷ so that it does not "unnecessarily trammel"¹³⁸ the interests of innocent third parties.¹³⁹

In *Wygant* and *Johnson*, the Court applied different factual predicate tests to the equal protection clause and Title VII.¹⁴⁰ The majority in *Johnson*, for example, indicated that under Title VII, "societal discrimination"¹⁴¹ alone is a legitimate factual predicate justifying a public vol-

132. *Id.* at 630; *Weber*, 443 U.S. at 208.

133. *Johnson*, 480 U.S. at 620 n.2.

134. *E.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

135. *E.g.*, *Johnson v. Transportation Agency*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

136. *Wygant*, 476 U.S. at 278 n.5 (1986); *see Johnson*, 480 U.S. at 637; *Ledoux v. District of Columbia*, 820 F.2d 1293, 1302-04 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988).

137. *Johnson*, 480 U.S. at 637-38; *Wygant*, 476 U.S. at 274.

138. *Johnson*, 480 U.S. at 637-38.

139. *Id.* at 637-38; *Wygant*, 476 U.S. at 279-84.

140. *Compare Wygant*, 476 U.S. at 277 (using terms such as "convincing evidence" and "strong basis in evidence" of prior discrimination to describe the proper circumstances in which a voluntary affirmative action plan would be justified) *with Johnson*, 480 U.S. at 631 (describing the proper factual predicate as one in which a "[m]anifest imbalance" that reflect[s] underrepresentation of women [and minorities] in 'traditionally segregated job categories' " (quoting *Weber*, 443 U.S. at 199)).

141. Belton, *supra* note 1, at 122 n.46 (" 'Societal discrimination' is a phrase used to help explain, for example, the differences in the economic and educational status of blacks and whites, the residential housing patterns based on race, the racially stratified job hierarchy in the work place, and the imbalance in positions of power of blacks" (quoting Sedler, *The Constitution and the Consequences of Social History of Racism*, 40 *ARK. L. REV.* 677-87 (1987))).

untary affirmative action plan.¹⁴² The public employer did not have to show a history of discriminatory practices¹⁴³ or even an "arguable violation"¹⁴⁴ to promote qualified women to skilled craft positions. Rather, it merely had to demonstrate a "manifest imbalance" in a traditionally segregated job category.¹⁴⁵ The evidence did not need to support a prima facie case of intentional discrimination.¹⁴⁶

Wygant, however, consistent with strict scrutiny under the equal protection clause,¹⁴⁷ suggested that a much higher standard of proof is required under the Constitution.¹⁴⁸ The plurality opinion emphasized societal discrimination, without more, is not a legitimate factual predicate for race-based state action.¹⁴⁹ Rather, "convincing evidence that remedial action is warranted" or "sufficient evidence to justify the conclusion that there has been prior discrimination" by the governmental unit involved is required.¹⁵⁰ Thus, after *Wygant* and *Johnson*, lower courts were forced to employ a different analysis for affirmative action plans challenged under equal protection and Title VII.¹⁵¹

On January 23, 1989, however, the Court decided *Croson*, in which the majority implicitly rejected both *Wygant*'s "strong basis" and Justice O'Connor's "firm basis"¹⁵² factual predicate standard.¹⁵³ The firm ba-

142. Compare *Johnson*, 480 U.S. at 630-33; *Hammon v. Barry*, 826 F.2d 73, 81 (D.C. Cir. 1987); *Higgins v. City of Vallejo*, 823 F.2d 351, 356 (9th Cir. 1987), cert. denied, 109 S. Ct. 1310 (1989) with *Wygant*, 476 U.S. at 276 (concluding that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy"). But see *Johnson*, 480 U.S. at 652 (O'Connor, J., concurring) (advocating use of the same analysis under both equal protection and Title VII).

143. *Johnson*, 480 U.S. at 627-30. But see *id.* at 649-53 (O'Connor, J., concurring) (indicating that before public employers implement an affirmative action plan they must have a "firm basis for believing that remedial action was required").

144. *Id.* at 630.

145. *Id.* at 633 n.10.

146. *Id.* at 632. But see *id.* at 649 (O'Connor, J., concurring) (stating that "[t]he employer must have had a firm basis for believing that remedial action was required. An employer would have such a firm basis if it can point to a statistical disparity sufficient to support a prima facie claim").

147. Under the fourteenth amendment, any racial distinction is inherently suspect and receives strict judicial scrutiny. The level of scrutiny does not change merely because the challenged classification operates against whites and in favor of blacks. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant*, 476 U.S. at 273 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980)).

148. *Id.* at 274; accord *Johnson*, 480 U.S. at 627 n.6.

149. *Wygant*, 476 U.S. at 276 (emphasizing that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" under the Constitution).

150. *Id.* at 277.

151. *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583, 585 n.3 (6th Cir. 1987), aff'd, 109 S. Ct. 1333 (1989); *Hammon v. Barry*, 826 F.2d 73, 84-88 (D.C. Cir. 1987) (Silberman, J., concurring); *Higgins v. City of Vallejo*, 823 F.2d 351, 356-60 (9th Cir. 1987), cert. denied, 109 S. Ct. 1310 (1989); *Ledoux v. District of Columbia*, 820 F.2d 1293, 1304-06 (D.C. Cir. 1987), vacated, 841 F.2d 400 (D.C. Cir. 1988); *Britton v. South Bend Community School Corp.*, 819 F.2d 766, 779 n.2 (7th Cir. 1987).

152. Justice O'Connor's "firm basis" test requires a statistical disparity between the percentage of qualified minorities given the benefit and the percentage of qualified minorities in the relevant market "sufficient to support a prima facie Title VII pattern or practice claim" by minorities. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and in judgment); see *Croson*, 109 S. Ct. at 725. The *Croson* majority purportedly adhered to *Wy-*

sis standard, introduced in Justice O'Connor's *Wygant* concurrence, required a "strong basis in evidence for [the] conclusion that remedial action was necessary."¹⁵⁴ For example, a gross statistical disparity alone could, under the proper circumstances, constitute the firm basis supporting affirmative action.¹⁵⁵ But, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to a smaller group of individuals who possess the necessary qualifications) may have little probative value."¹⁵⁶ In *Croson* the Court, however, by holding that past societal discrimination alone cannot serve as an adequate factual predicate for affirmative action plans based on race, adopted a more rigid standard.¹⁵⁷ The lower courts now must decide whether this equal protection holding governs Title VII cases.¹⁵⁸

B. *Narrowly Tailored*

Prior to *Croson*,¹⁵⁹ a public employer satisfied the legitimate factual predicate by demonstrating either a manifest imbalance in a traditionally segregated job category under Title VII¹⁶⁰ or by presenting credible evidence of prior discrimination by a public entity under the equal protection clause.¹⁶¹ In addition, the employer must show that the plan did not "unnecessarily trammel the interests of (innocent) white employees."¹⁶² In other words, the plan must be "narrowly tailored,"¹⁶³ and its impact on innocent third parties not unduly burdensome. Fortunately, the current "narrowly tailored" test is identical under the Constitution and Title VII;¹⁶⁴ both ask whether a less restrictive means could

gant's "convincing evidence" of prior discrimination factual predicate. *Croson*, 109 S. Ct. at 730. *But see id.* at 754 n.12 (Marshall, J., dissenting). It is consistent with *Washington v. Davis*, 426 U.S. 229 (1976), which does not allow disparate impact claims under the fourteenth amendment. *Id.* at 239 (stating that the "central purpose of the equal protection clause of the fourteenth amendment is the prevention of official conduct discriminating on the basis of race").

153. *Croson*, 109 S. Ct. at 754 n.12 (Marshall, J., dissenting).

154. *Id.* (quoting *Wygant*, 476 U.S. at 277).

155. *Id.* at 725.

156. *Id.* (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977)).

157. As Justice Marshall points out, *Croson* rejects the *Wygant* standard, which equates a prima facie pattern and practice violation of Title VII as equivalent to a prima facie violation of equal protection. *Id.* at 754 n.12 (Marshall, J., dissenting).

158. Although in *Croson* the Court hinted strongly that its answer was yes, the question remains whether societal discrimination alone is a legitimate factual predicate under Title VII.

159. After *Croson*, the standard under equal protection is closer to the *Washington v. Davis* intentional standard. *See Croson*, 109 S. Ct. at 754 n.12 (Marshall, J., dissenting).

160. *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 631.

161. *Wygant*, 476 U.S. at 277.

162. *Johnson*, 480 U.S. at 637; *Weber*, 443 U.S. at 208.

163. *Wygant*, 476 U.S. 280 n.6 (explaining that "the term [narrowly tailored] may be used to require consideration whether lawful alternative[s] and less restrictive means could have been used").

164. *Ledoux v. District of Columbia*, 820 F.2d 1293, 1301 (D.C. Cir. 1987) (stating that "[c]onceptually, there appears to be no reason why . . . [this test] should differ depending on whether the plan is analyzed under Title VII or the Constitution"), *vacated*, 841 F.2d 400 (D.C. Cir. 1988). In *Croson*, the Court did not discuss "narrowly tailored" under Title VII.

have been employed.

In *Wygant* and *Johnson*, the Court distinguished layoffs from hiring goals.¹⁶⁵ Both cases indicated that preferential layoffs based on race or sex were unduly burdensome on innocent individuals. Plans employing discriminatory layoffs were not "narrowly tailored" under equal protection¹⁶⁶ or Title VII.¹⁶⁷ Race- or sex-based hiring and promotions, however, are considered to be narrowly tailored under both equal protection¹⁶⁸ and Title VII,¹⁶⁹ because hiring goals impose only a "diffuse burden" upon innocent third parties.¹⁷⁰

In its analysis of whether preferential promotions unnecessarily trampled on the rights of innocent third parties, in *Johnson* the Court examined several factors,¹⁷¹ such as (1) whether the promoted employee was "qualified" for the promotion;¹⁷² (2) whether the plan created goals¹⁷³ or quotas;¹⁷⁴ (3) whether the promotion uprooted legitimate expectations;¹⁷⁵ and (4) whether the plan intended to attain rather than maintain a balanced work force.¹⁷⁶ Because the promotion to a skilled crafts position was given to a qualified (albeit less qualified) recipient; did not cause the innocent victim to lose his job, suffer a decrease in salary, seniority, or cause him to become ineligible for future promotions; was intended to attain the goals of the remedial plan rather than maintain a balanced workforce by quotas; and did not uproot any of the innocent male victim's "legitimate firmly rooted expectation[s],"¹⁷⁷ the Court upheld the plan.¹⁷⁸ After *Johnson*, lower courts held that preferential promotions were even less intrusive than hiring goals.¹⁷⁹ *Croson*, however, with its more stringent standard, indicates that the Court would reject this analysis under equal protection.¹⁸⁰

Although *Croson* brings the Court's historical circle of post-*Brown*

165. *Wygant*, 476 U.S. at 283-84; see *Johnson*, 480 U.S. at 638.

166. *Wygant*, 476 U.S. at 283-84.

167. See *Johnson*, 480 U.S. at 637-38.

168. See *Wygant*, 476 U.S. at 283-84.

169. *Johnson*, 480 U.S. 639-40.

170. *Wygant*, 476 U.S. at 283.

171. *Johnson*, 480 U.S. at 637-40.

172. *Id.* at 638.

173. *Id.* at 639. Although in the real world the operational distinction between goals and quotas may be insignificant, the theoretical difference applied in legal analysis of affirmative action plans is significant. Goals are merely "statement[s] of aspiration" that do not have to be met. *Id.* at 654 (O'Connor, J., concurring).

174. The plan in this case cautioned that goals should not be construed as quotas that must be met. *Id.* at 654 (O'Connor, J., concurring).

175. *Id.* at 638.

176. *Id.* at 639.

177. *Id.* at 638.

178. *Id.* at 642.

179. *E.g.*, *Higgins v. City of Vallejo*, 823 F.2d 351, 359-60 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989).

180. After *Croson*, hiring goals and promotions based solely on race are not narrowly tailored. See *Croson*, 109 S. Ct. at 729 (declaring that "[u]nder Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur . . . enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination").

equal protection analysis closer to the "never" response, there are still several alternatives to be considered. First, the Court should expressly overrule *Weber* and *Johnson*, and unequivocally adopt the *Croson* strict scrutiny factual predicate standard for both Title VII and equal protection cases. In addition, Congress should consider amending Title VII to permit discriminating on the basis of race and sex in favor of minorities and women,¹⁸¹ enacting an "Affirmative Action Relief Act,"¹⁸² or both.¹⁸³

IV. ALTERNATIVES

A. Overrule *Weber* and *Johnson*

The Supreme Court should overrule *Weber*¹⁸⁴ and *Johnson*.¹⁸⁵ Members of Congress could not have drafted a clearer prohibition against any type of discrimination based on race or sex than when they drafted §§ 703(a), (d), and (j) of Title VII.¹⁸⁶ The provisions proscribe discrimination against *any individual*; classification of employees in a manner that would deprive or tend to deprive "any individual from employment opportunities or in any way adversely affect his status as an employee"; and mandatory "preferential treatment to any individual or to any group because of race . . . or imbalance which may exist."¹⁸⁷ Whether analyzed alone or in conjunction with its legislative history, the

181. Congress has authority under § 5 of the fourteenth amendment to amend Title VII to permit discrimination on the basis of race and sex in favor of minorities and women. *See Croson*, 109 S. Ct. at 719.

182. *But see* N. ESKRIDGE & P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY* 831 (1988) [hereinafter "LEGISLATION"] (the LEGISLATION authors do not recommend this option).

183. I do not advocate either option.

184. Chief Justice Rehnquist and Justices White and Scalia have expressed a desire to overrule *Weber*. *Johnson*, 480 U.S. at 657 (White, J., dissenting); *id.* at 669-75 (Scalia, J., dissenting); *Weber*, 443 U.S. at 219 (Rehnquist, C.J., dissenting). Their understanding of *Weber* is that the employment plan at issue did not violate Title VII because "it was designed to remedy intentional and systematic exclusion of blacks by the employer and the unions from certain job categories." *Johnson*, 480 U.S. at 457. After *Johnson*, however, the phrase at issue in *Weber*, "traditionally segregated jobs," is interpreted to mean nothing more than "a manifest imbalance between one identifiable group and another in an employer's labor force." *Id.* at 657. According to the Justices, this interpretation is a perversion of Title VII. *Id.*

185. *Johnson* should be overruled on the same grounds as *Weber*.

186. 42 U.S.C. § 2000e-2(j) (1976) provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter 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, referred or classified for employment by an employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

187. *See supra* notes 103-04, 119, 186 and accompanying text.

words and spirit of Title VII are clear.¹⁸⁸ Discrimination based on race or sex, whether employed for or against minorities, is illegal.

The Supreme Court in *Weber* had neither the duty nor the authority to legislate judicially and to ignore the plain words and legislative history of the statute.¹⁸⁹ In a single stroke, the Court effectively rewrote Title VII and violated the separation of powers doctrine.¹⁹⁰ Although the result may have been desirable, the method was intellectually dishonest. Judge Benjamin Cardozo warned about this type of judicial activism when he wrote:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to value and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the "primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.¹⁹¹

Weber served as express precedent for *Johnson*, *Wygant*, and *Croson*.¹⁹² Rather than continuing to sanction the race- and sex-based policy of robbing Peter to pay Paul (and Paula),¹⁹³ the Court should gracefully and immediately acknowledge its mistake. Three Justices in *Johnson* openly advocated overruling *Weber*.¹⁹⁴ Two other Justices have

188. *But see* Connecticut v. Teal, 457 U.S. 440 (1982) (majority and dissent debate whether the disparate impact theory under § 703(a)(2) of Title VII protects groups or individuals).

189. *Weber*, 443 U.S. at 228-29 n.9 (Rehnquist, J., dissenting):

If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning. ". . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source." (quoting *Caminetti v. United States*, 242 U.S. 470, 490 (1917)).

190. The *Weber* dissent, 443 U.S. at 216 (Burger, C.J., dissenting), states:

The Court reaches a result I would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by means wholly incompatible with long-established principles of separation of powers. Under the guise of statutory "construction," the Court effectively rewrites Title VII to achieve what it regards as a desirable result. It "amends" the statute to do precisely what both its sponsors and its opponents agreed the statute was not intended to do.

See also Johnson, 480 U.S. at 644 (Stevens, J., concurring) (stating that "the only problem for me is whether to adhere to an authoritative construction of the Act that is at odds with my understanding of actual intent of the authors of the legislation"); *id.* at 670 (Scalia, J., dissenting) (indicating that "[i]t is well to keep in mind just how thoroughly *Weber* rewrote the statute it purported to construe").

191. *Weber*, 443 U.S. at 218-19 (Burger, C.J., dissenting) (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921)).

192. *Weber* and *Johnson* were decided under Title VII; *Wygant* and *Croson* under the Constitution.

193. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 781 (1976) (Burger, C.J., dissenting).

194. *See supra* note 184.

indicated a willingness to overrule *Weber* but for *stare decisis*.¹⁹⁵

Overruling *Weber* would tackle the discrimination problem head-on. Admitting that *Weber* was a good idea that made bad law would open the door to a new national policy that recognizes that distinctions based solely on race or sex are wrong and undesirable.¹⁹⁶

The argument that *Weber* must be followed due to *stare decisis*, even if it contains an erroneous interpretation of Title VII, sidesteps the issue of whether the result was correct. *Stare decisis* is generally a wise policy.¹⁹⁷ But, it is just that, a policy, not a strict rule of law.¹⁹⁸ As stated in *Monell v. New York City Department of Social Services*: "Although . . . *stare decisis* has more force in statutory analysis than in constitutional adjudication because, in the former situation, Congress can correct our mistakes through legislation, we have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes."¹⁹⁹ In fact, the Court has on numerous occasions overruled one of its prior decisions, even though the correction might have been made legislatively.²⁰⁰ The Court often "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate."²⁰¹

The majority in *Johnson* stated that congressional silence following the widely publicized *Weber* decision could be interpreted as acquiescence. If Congress had been displeased with the Court's construction of Title VII, it could have amended the statute to expressly prohibit discrimination against whites.²⁰²

195. See *Johnson*, 480 U.S. at 644 (Stevens, J., concurring) (insisting that "*Bakke* and *Weber* have been decided and are now an important part of the fabric of our law"); *id.* at 648 (O'Connor, J., concurring) (asserting that "[i]f the Court is faithful to . . . [s]tare decisis we must address once again the propriety of an affirmative action plan . . . in light of our precedents").

196. *Wygant*, 476 U.S. at 273.

197. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

198. *Helvering v. Hallock*, 309 U.S. 106, 119 (1940).

199. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 695 (1978) (citations omitted).

200. See, e.g., *Burnet*, 285 U.S. at 406 n.1 (1932), which states:

This Court has, in matters deemed important, occasionally overruled its earlier decisions although correction might have been secured by legislation. See *Chicago & Eastern Illinois R. Co. v. Industrial Commission of Illinois*, 284 U.S. 296, overruling *Erie R. Co. v. Collins*, 253 U.S. 77, and *Erie R. Co. v. Szary*, 253 U.S. 86; *Gleason v. Seaboard Air Line Ry. Co.*, 278 U.S. 349, 357, in part overruling *Friedlander v. Texas & Pacific Ry. Co.*, 130 U.S. 416; *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 659, overruling *Ex parte Wisner*, 203 U.S. 449; and qualifying *In re Moore*, 209 U.S. 490; *Boston Store v. American Graphophone Co.*, 246 U.S. 8, 25, and *Motion Picture Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518, overruling *Henry v. A. B. Dick Co.*, 224 U.S. 1; *Rosen v. United States*, 245 U.S. 467, 470, overruling *United States v. Ried*, 12 How. 361 (Compare *Green v. United States* 245 U.S. 559, 561).

Id.

201. *Burnet*, 285 U.S. at 407-08 (footnotes omitted).

202. As an example, Justice Brennan cited *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). In *Gilbert*, the Court had concluded that an employer's insurance plan which excluded pregnancy-related benefits was nondiscriminatory. Congress expressed its displeasure with *Gilbert* by passing the Pregnancy Discrimination Act of 1978, 42 U.S.C.

The Court itself, however, has cautioned against relying solely on congressional silence as a signal for adopting a controlling rule of law.²⁰³ Furthermore, the Court occasionally has altered its initial construction of a statute when Congress refused to act.²⁰⁴ For example, in *Monroe v. Pape*,²⁰⁵ the Court held that § 1983²⁰⁶ did not reach municipalities. Although Congress remained silent for seventeen years, the Court overruled *Monroe* in *Monell v. New York City Department of Social Services*.²⁰⁷ Thus, Congress's post-*Weber* silence should not be interpreted as approval of the Court's decisions.

Justice Scalia has advanced several persuasive reasons for overruling *Weber*.²⁰⁸ These reasons apply equally to *Johnson*. First, the Court traditionally has adhered less rigidly to the doctrine of *stare decisis* when interpreting civil rights statutes.²⁰⁹ For example, *stare decisis* did not prevent the Court from overruling *Plessy*. Second, inherent in the *stare decisis* doctrine is the notion that the public interest lies in stability and the orderly development of the law.²¹⁰ *Weber* was a radical departure from Title VII precedents.²¹¹ *McDonald*, for example, intended "to eliminate all practices which operate to disadvantage the employment opportunities of any group."²¹² Even *Griggs*²¹³ stated that: "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, . . . and sex become irrelevant."²¹⁴ Currently, however, race and sex not only are relevant under Title VII, but after *Weber* and *Johnson*, "the failure to engage in reverse discrimination is economic folly, and arguably a breach of duty."²¹⁵

§ 2000e(k) (1978), and amending Title VII "to prohibit sex discrimination on the basis of pregnancy." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

203. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241 (1970) (cautioning "that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law'" (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)); *Boys Market*, 398 U.S. at 255 (Stewart, J., concurring) (observing that "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late" (quoting *Henslee v. Union Planters Bank*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting))).

204. *See, e.g., Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978). Even though Congress had been urged and had failed to overrule the Court's interpretation of 42 U.S.C. § 1983 in *Monroe v. Pape*, 365 U.S. 167 (1961), which precluded municipalities from coverage under the statute, the Court overruled *Monroe* in *Monell*.

205. 365 U.S. 167 (1961).

206. 42 U.S.C. § 1983 (1982) is a federal civil rights statute that allows private citizens to sue for the deprivation of a federal right caused by a state representative acting under color of authority law.

207. 436 U.S. 658 (1978).

208. *Johnson*, 480 U.S. at 669-77 (Scalia, J., dissenting).

209. *Id.* at 672-73.

210. *See id.* at 644 (Stevens, J., concurring).

211. *Id.*

212. *Id.* at 643 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976)).

213. *See supra* notes 94-107 and accompanying text.

214. *Griggs*, 401 U.S. at 436.

215. *Johnson*, 480 U.S. at 676 (Scalia, J., dissenting).

By focusing on Congress's decision to emphasize the word "require" in § 703(j), rather than the phrase "require or permit," the *Weber* Court misinterpreted the statute's intent. The Court thought that "Congress chose not to forbid all voluntary race conscious affirmative action,"²¹⁶ and interpreted Title VII to permit voluntary race- or sex-conscious discrimination against whites and males.²¹⁷

The intellectual dishonesty underlying the *Weber* holding manifests itself in equivocation and semantics. The Court, in effect, called a horse a cow. It substituted the words "affirmative action" for "discrimination" to circumvent §§ 703(a) and (d). These provisions expressly prohibit discrimination against *any* individual on account of race or sex. The Court's interpretation of § 703(j) was not only "outlandish" in the light of §§ 703(a) and (d), but was contradicted by Title VII's legislative history.²¹⁸ For all practical purposes, the Court drafted legislation, an Article I function.²¹⁹

Weber is also inconsistent with *Griggs*. The *Griggs* Court held that "discriminatory preference for any group, minority or majority, is precisely . . . what Congress has proscribed [in Title VII]."²²⁰ *Johnson* should be overruled for the same reasons *Weber* should be overruled.²²¹ At a minimum, the Court should expressly adopt and apply a single affirmative action analysis to both Title VII and the Constitution.

B. *Expressly Adopt a Uniform Analysis for Challenges of Equal Protection and Title VII*

Using separate factual predicate standards under the Constitution and Title VII is confusing. It is incredible to think that a single fact pattern could yield different legal results depending on whether a plaintiff sued under the Constitution or Title VII.²²² In *Johnson*, for example, had the plaintiff sought relief under the equal protection clause rather than under Title VII, the Court would have decided the case differently.²²³ The same voluntary affirmative action plan that survived scrutiny under Title VII would have failed the more stringent factual

216. *Weber*, 443 U.S. at 206.

217. The problem with this construct is that it does not eliminate all race- or sex-based discrimination, the articulated goal of the Civil Rights Act of 1964; it merely turns Title VII into "a two-edged sword that must demean one [race or sex] in order to prefer another." *Id.* at 254 (Rehnquist, J., dissenting).

218. *Weber*, 443 U.S. at 226-30; *id.* at 230-55 (Rehnquist, J., dissenting).

219. U.S. CONST. art. I.

220. *Griggs*, 401 U.S. at 431. *Griggs* is capable of being read as consistent with the Title VII drafters' intention to eliminate all race- and sex-based discrimination. It should not be overruled.

221. On the other hand, Congress may desire to amend Title VII to be consistent with the *Weber* holding.

222. *Johnson*, 480 U.S. at 632 (stating that "[w]e do not regard as identical the constraints of Title VII and the federal Constitution on voluntarily adopted affirmative action plans"); see also *Ledoux v. District of Columbia*, 820 F.2d 1293, 1306-07 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988) (holding that appellants did not demonstrate that the affirmative action plan was invalid under Title VII, yet remanding to determine whether the plan satisfied the requirements under the Constitution).

223. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

predicate standard employed under the equal protection clause. The better qualified candidate would have received the promotion based on merit, regardless of sex.

In order to provide the public with an orderly development of the law, the Court should immediately adopt a uniform factual predicate analysis.²²⁴ Public employers and the general public should not be kept guessing. They should know at the outset whether a plan will be struck down or upheld under the Constitution and Title VII. Moreover, plaintiffs should not have to waste time and expense guessing whether to litigate under equal protection, Title VII, or both.

The question then becomes: Which legitimate factual predicate standard should the Court adopt? Should it adopt the lenient *Johnson* standard, the more stringent *Wygant* standard, or some other factual predicate standard?

Croson, an equal protection case, suggests that if the Court were to adopt a uniform analysis, a modification of the *Wygant* standard could be used.²²⁵ To achieve the goal of an equal opportunity society, however, the Court should adopt the more stringent *Croson* standard, which does not permit affirmative action plans based solely on past societal discrimination. *Croson* tips the balance of competing concerns in favor of the individual, thus reflecting our nation's desire to eradicate invidious discrimination against all individuals.

In *Wygant* and *Johnson*, Justice O'Connor cautioned against requiring public employers to admit prior illegal discrimination.²²⁶ She was concerned that such requirements would seriously undermine the value of voluntary compliance. Justice O'Connor's warning is valid only if discrimination on the basis of race or sex is an acceptable means to achieve equality.²²⁷

The Court's message in *Croson* announced that our society is not going to tolerate a resurrection of the *Plessy* "separate but equal" doctrine. Our national goal is "equal opportunity for *all* our citizens."²²⁸ The Court affirmed *Wygant's* rejection of the "manifest imbalance" fac-

224. Four members of the *Johnson* Court suggested that a uniform approach be used to analyze claims brought under the Constitution and Title VII. *Johnson*, 480 U.S. at 652 (O'Connor, J., concurring); see *id.* at 664 (Scalia, J., dissenting).

225. *Croson*, 109 S. Ct. at 754 n.12 (Marshall, J., dissenting). The Court rejected Justice O'Connor's "firm basis" approach articulated in *Wygant*, 476 U.S. at 292, and *Johnson*, 480 U.S. at 650-51. Although Justice O'Connor stated in *Johnson*, brought under Title VII, that she could "see little justification for the adoption of different standards for affirmative action under Title VII and the [e]qual [p]rotection [c]lause," a plausible argument can be made that the Court still has separate factual predicate standards under Title VII and the Constitution. *Croson*, 109 S. Ct. at 724 (commenting that "[t]here is nothing approaching a prima facie case of a constitutional or statutory violation").

226. *Wygant*, 476 U.S. at 289-90 (O'Connor, J., concurring in part and concurring in judgment); *Johnson*, 480 U.S. at 651-53 (O'Connor, J., concurring).

227. I vehemently disagree in principle with the proposition that "[i]n order to get beyond racism, we must first take account of race." *Bakke*, 438 U.S. at 407 (Blackmun, J., dissenting).

228. *Croson*, 109 S. Ct. at 730 (Stevens, J., concurring in part and in judgment) (emphasis added).

tual predicate standard under equal protection. The manifest imbalance factual predicate standard undermines the "core purpose of the fourteenth amendment which is to do away with all governmentally imposed discrimination based on race."²²⁹ This less stringent factual predicate standard sanctions the same sin of overt racism that Justice Harlan found abhorrent in *Plessy*.²³⁰

Equality does not exist, nor can it be achieved, when equal protection under the law is applied unequally. The degree of equality an individual is afforded should not depend on the fortuitous circumstance of one's race or sex.²³¹ Prohibiting preferential treatment on the basis of race or sex should be as fundamental as "two wrongs do not make a right."²³² Voluntary public affirmative action plans that call for race- or sex-based promotions, admissions, or hiring, should be stricken from the "narrowly tailored" list.²³³ The Court's pre-*Croson* logic supporting preferential promotions and hiring goals was not convincing. It beckoned to a dangerous new era of "separate but equal."²³⁴ Lower courts

229. *Wygant*, 476 U.S. at 277 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

230. *Croson* also rejects Justice O'Connor's "firm basis" standard. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and concurring in judgment); *Johnson*, 480 U.S. at 652 (O'Connor, J., concurring). Under her approach, prior to adopting a voluntary plan, a public employer must have a firm basis for determining that affirmative action is warranted. Under the proper circumstances, a statistical imbalance is sufficient to establish a Title VII pattern or practice prima facie case, Note, *Standards of Proof in Section 274B of the Immigration Reform and Control Act of 1986*, 41 VAND. L. REV. 1323, 1343 (1988) (noting that "[t]he phrase 'pattern or practice' has been construed by the courts as encompassing activities that are 'repeated, routine, or of a generalized nature'"), would satisfy the firm basis under both Title VII, *Johnson*, 480 U.S. at 650-51, or equal protection. *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring in part and in judgment).

231. In *Croson*, the Court adopted Justice Powell's view in *Bakke* that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Croson*, 109 S. Ct. at 721 (quoting *Bakke*, 438 U.S. at 289-90).

232. *Weber*, 443 U.S. at 228 n.10 (Rehnquist, J., dissenting). In *Croson*, the Court recognized this truth when it stated:

To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.

109 S. Ct. at 727. *But see id.* at 740 (Marshall, J., dissenting) (stating that "today's decision marks a deliberate and giant step backward in this Court's affirmative action jurisprudence").

233. Although the *Croson* opinion comes close, it falls short in this regard. An excellent articulation of the applicable reasoning is found in Justice Stewart's dissent in *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 128 (1981):

So far as the Constitution goes, a private person may engage in any racial discrimination he wants . . . but under the [e]qual [p]rotection [c]lause of the [f]ourteenth [a]mendment a sovereign State may never do so. And it is wholly irrelevant whether the State gives a "plus" or "minus" value to a person's race whether the discrimination occurs in a decision to hire or fire or promote, or whether the discrimination is called "affirmative action" or by some less euphemistic term.

234. Although the Court's sanction of overt discrimination on the basis of race (*Weber*) or sex (*Johnson*) is based on a benevolent desire to realize a fully integrated society, the legal principle underlying the analysis is no different than that used in the *Plessy* majority. When the dust settles, all that remains is "outcome determinative" constitutional law rather than sound legal analysis. "Separate but equal" legal doctrines are the same legal

were sensitized to this issue.²³⁵

In principle, it does not matter whether discrimination occurs in the form of a hiring quota, promotion, job offer, or admissions seat; or whether the lost benefit comes in the form of a layoff, decrease in salary, or disregard of seniority. Race or sex may, in theory, be "but one of numerous factors," but in reality, it often is the dispositive factor.²³⁶ The illegality of an act should not change merely because the outcome is supposedly beneficial. All persons in our society have "legitimate firmly rooted expectations"²³⁷ to be treated equally by government. A government that bases decisions on immutable characteristics breeds contempt.

Although *Wygant* held that layoffs were not sufficiently narrowly tailored, the Court hinted that hiring goals would be.²³⁸ It implied that a person not hired because of race or sex is better off financially and psychologically than a person fired for the same reason.²³⁹ Realistically, a person not hired due to race or sex is worse off than one fired for similar reasons. Whether the discrimination occurs like a headwind²⁴⁰ or like a whirlpool,²⁴¹ the force of discrimination is the same. Financially, for example, the person's income is still zero. Psychologically, the victim must deal with having been discriminated against.

A person not hired due to race or sex is arguably in a worse position than one laid off. For example, a woman who is not hired because she is black does not have income to pay the bills or feed her family. Unlike a black woman fired because of race, the black woman not hired in the first place does not have the opportunity to build an emergency savings account while she is employed. Furthermore, a black woman not hired is deprived of the opportunity to develop on-the-job training skills that increase her marketability. Thus, for the woman not hired, unlike the

animal, regardless of where they fall on the discriminatory spectrum. Discrimination on the basis of race or sex does not shed its skin merely because the name is changed from "separate but equal" to "affirmative action." Discrimination is discrimination. Regardless of the underlying motives, the person discriminated against is harmed.

235. *Hammon v. Barry*, 826 F.2d 73, 87-88 (D.C. Cir. 1987) ("But does not its hiring plan . . . suggest the very evil that infected the *Plessy* doctrine?").

236. *E.g., Johnson*, 480 U.S. at 663 (Scalia, J., dissenting) (stating that the district court "concluded that Diane Joyce's gender was 'the determining factor'").

237. *But see Johnson*, 480 U.S. at 638-40 (holding that men have no firmly rooted expectations to be promoted over less-qualified females).

238. *Wygant*, 475 U.S. at 282-84.

239. *Id.* at 283.

240. Discrimination based on race or sex in the form of preferential hiring goals, admission seats, and promotions is analogous to an Oklahoma headwind. It, like a headwind, slows a person's progress by pushing against an individual trying to go forward. Under these circumstances, two results are inevitable. First, even the strongest person eventually will tire of fighting the wind and cease progressing forward. Second, the person fighting the headwind will not advance as far as he or she would have, had the wind been at his or her back or had there been no wind at all.

241. Discrimination in the form of layoffs, loss of seniority, or decreases in salary is analogous to a whirlpool. Like a whirlpool whisking innocent animals down to unknown depths, simply because they had the misfortune of falling into it, discrimination pulls innocent individuals down by lowering their status quo.

woman who was hired but later fired, the door of opportunity is never opened. It is slammed shut before she ever steps through.

In *Wygant*, the Court implied that the burden of a hiring quota would be sufficiently narrowly tailored because, if a person did not receive a particular position due to race or sex discrimination, she could be hired when the next job opportunity came along.²⁴² The plurality cited the "school admissions" cases as conceptually analogous to those in which the affirmative action plans contained preferential hiring goals.²⁴³ Citing *DeFumis v. Odegaard*,²⁴⁴ the Court insinuated that everyone rejected from a professional or graduate school on the basis of race or sex, or not hired by a particular employer, would be accepted or hired somewhere else.²⁴⁵

This logic casually embraces the notion that "only one of several opportunities" is foreclosed.²⁴⁶ The realistic possibility of a marginally qualified applicant being rejected by all public schools or not being hired by any public employer was callously dismissed. Moreover, the financial and psychological burden imposed on individuals denied any opportunity on the basis of race or sex could not possibly be as diffuse as *Wygant* suggests.

V. SAMESIN

Discrimination against blacks was the original sin²⁴⁷ sanctioned by the United States,²⁴⁸ its Constitution,²⁴⁹ and the Supreme Court.²⁵⁰ Reflecting on *Dred Scott v. Sandford*,²⁵¹ one wonders how a "Nation Under God" ever tolerated such inhumanity. Yet ours not only tolerated it, but our highest Court nodded approvingly. Whether the articulated motive is cloaked in humanity, or prejudice,²⁵² the principle is no different. The odor of discrimination against people based on skin color or sex is foul. Whether against blacks or whites, males or females, the stench is the same—sin.

As currently implemented, affirmative action embodies the notion of preferential treatment of minorities and women as groups, rather than equal opportunity for all individuals.²⁵³ Erroneous assumptions implicit in affirmative action plans erode their credibility. Plans incor-

242. *Wygant*, 476 U.S. at 283 (declaring that "hiring goals impose a diffuse burden [on an innocent victim], often foreclosing only one of several opportunities").

243. *Id.* at 283 n.11.

244. 416 U.S. 312 (1974).

245. *Wygant*, 476 U.S. at 283 n.11.

246. *Id.* at 283.

247. See, e.g., Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 5 nn.1-2, 6 nn.4-7, 7 nn.9-10 (1985).

248. T. SOWELL, *ETHNIC AMERICA* (1981).

249. Bell, *supra* note 247, at 7 n.9.

250. See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

251. 60 U.S. (19 How.) 393 (1857).

252. See, e.g., Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Debate*, 99 HARV. L. REV. 1327, 1345 (1986) ("SPONGE" meaning The Society for the Prevention of Niggers Getting Everything).

253. See *supra* notes 55-76, 117-33 and accompanying text.

rectly assume that each individual within a protected group is systematically disadvantaged.²⁵⁴ The presumption is that every minority or woman is disadvantaged due to "societal discrimination."²⁵⁵ In our society, however, minorities, like white males, occupy a wide-range of socio-economic levels.²⁵⁶

Furthermore, underlying the assumption that every minority is disadvantaged is the erroneous presumption that every white or male has access to the "spoils" of the majority.²⁵⁷ Should an aristocratic black female, for example, be treated preferentially because she happens to be black? Should an indigent white male be treated less favorably because he happens to be white?²⁵⁸ Obviously not.²⁵⁹ The overt discrimination against whites, males, and white males that flows from the operation of voluntary affirmative action plans results in a modern "separate but equal" society. The discrimination inherent in "separate but equal" and samesin affirmative action plans is identical. It matters not whether discrimination on the basis of race or sex is directed against blacks, or whites, women or men. The sin is the same. Our nation's laws should be blind.²⁶⁰

Two categories of people participate in the affirmative action debate—"social redeemers"²⁶¹ and "samesinners."²⁶² Social redeemers stress that immutable characteristics, *i.e.*, race, sex, and national origin, are irrelevant. Samesinners advocate the exact opposite. Social redeemers urge equal treatment and opportunity for all individuals. Because they recognize the erroneous assumptions inherent in group protection, social redeemers advocate blind rather than color-conscious laws—the "never" approach. Social redeemers helped secure passage of the thirteenth,²⁶³ fourteenth,²⁶⁴ and fifteenth²⁶⁵ amendments to the

254. Sullivan, *supra*, note 2, at 93 (articulating that the Court could have held that "because American racism has left blacks an underclass, still systematically disadvantaged as a group . . . no black is not a 'victim' of past discrimination").

255. Belton, *supra* note 15.

256. See, *e.g.*, T. SOWELL, *supra* note 248.

257. *Id.*

258. In *Croson*, the Court clearly indicated that this kind of result would not survive the narrowly tailored prong of equal protection analysis. *Croson*, 109 S. Ct. at 729 (explaining that "[u]nder Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination").

259. Judge Posner articulates the problem well: "[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1 SUP. CT. REV. 1, 12 (1974).

260. See *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting) (stating that "[o]ur Constitution is colorblind"). Justice Harlan's logic should be extended to other immutable characteristics.

261. The term "social redeemer" is analogous to Morris B. Abram's "Fair Shaker." Abram, *supra* note 14.

262. The term "samesinner" is analogous to Morris B. Abram's "social engineer." See *id.* at 1313.

263. U.S. CONST. amend. XIII (outlawing slavery).

Constitution.²⁶⁶ It makes no difference to social redeemers whether *Plessy* discriminated against blacks and *Weber* against whites.²⁶⁷ The principle of discrimination on the basis of race or sex is the same—sin.

Samesinners, on the other hand, argue that this nation's civil rights laws protect groups rather than individuals.²⁶⁸ They advocate that "in order to treat some persons equally, we must treat them differently."²⁶⁹ Samesinners apply color-conscious constructions to colorblind statutes in order to realize colorful results.²⁷⁰

VI. CONCLUSION

The United States Supreme Court has made a debacle of defining a proper test for determining the legitimacy of public, voluntary affirmative action plans. Prior to *Croson*, the Court employed separate two-pronged tests to evaluate affirmative action plans, one under the Constitution²⁷¹ and another under Title VII.²⁷² The separate tests created the possibility of conflicting legal outcomes under identical fact patterns. The factual predicate prong was more stringent under the equal protection clause, requiring "convincing evidence"²⁷³ of prior discrimination rather than a "manifest imbalance."²⁷⁴ This dichotomy forced the courts to apply multiple standards.²⁷⁵ Society was left to speculate on how to tailor its behavior. Although in *Croson* the Court kept separate

264. U.S. CONST. amend. XIV (guaranteeing equal protection under the law).

265. U.S. CONST. amend. XV (extending the franchise).

266. Abram, *supra* note 14, at 1314 n.5.

267. Social redeemers, for example, litigated *Brown v. Board of Educ.*, 347 U.S. 483 (1954). However, social redeemers also would overrule *Weber* and *Johnson* because their holdings sanction overt discrimination against whites and males, respectively.

268. Blumrosen, *supra* note 102.

269. *Bakke*, 438 U.S. at 407 (Blackmun, J., dissenting). Samesinners would be in favor of helping the black children in *Brown*, but they would not be sympathetic to white Webers nor male Johnsons. They would favor overt discrimination on the basis of race or sex in favor of minorities and women. This type of sin-sanctioning is inconsistent with the notion of a truly integrated society.

The underlying principle of sometimes sanctioning racism and sexism is dangerous because it is governed by the subjective whims of whoever is in control—the majority. Did Hitler think that he was benefitting society by his "affirmative action?" Currently, the concept of race and sex-conscious affirmative action is used in a humanitarian way—to help blacks and women achieve their rightful place in society. But, it would be naive to ignore the fact that the principle can be twisted and perverted. I am not labelling supporters of voluntary affirmative action as persecutors. I am, however, throwing out food for thought.

270. Justice Stevens is a good example:

[C]ongress intended to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII including Caucasians. If the Court had adhered to that construction of the Act, petitioner would unquestionably prevail in this case. . . . [T]he only problem for me is whether to adhere to an authoritative construction of the Act that is at odds with my understanding of the actual intent of the authors of the legislation. I conclude without hesitation that I must answer that question in the affirmative

Johnson, 480 U.S. at 643-44 (Stevens, J., concurring).

271. See *supra* notes 140-51 and accompanying text.

272. *Id.*

273. See *supra* notes 147-50 and accompanying text.

274. See *supra* notes 140-46 and accompanying text.

275. See *supra* note 151.

standards, it adopted a more stringent equal protection test.²⁷⁶

Croson marks the beginning of a new era. Voluntary public affirmative action plans based solely on race have fallen from grace.²⁷⁷ In *Croson* the Court threw them into the abyss.²⁷⁸ Now, as a matter of law, public plans that discriminate on the basis of race are presumed unconstitutional.²⁷⁹ To overcome the presumption of unconstitutionality, the racial preferences must be "narrowly tailored remedies of last resort for particular acts of identified prior discrimination."²⁸⁰ *Croson* indicates that the Court is returning to the "never" race- or sex-conscious approach. It is taking a step toward the future—a future in which the degree of equal opportunity afforded our individual citizens is not chained to misguided policies of group entitlements.²⁸¹

Affirmative action in its purest form is a noble concept.²⁸² It is necessary to achieve the dream of an integrated society—one that offers equal opportunity to all. Our society, however, should reject any form of "racial spoils system." Condoning affirmative action plans that require preferential treatment based solely on immutable characteristics such as race or sex resurrects the separate but equal era. Current race- and sex-conscious plans operate no differently than the state law in *Plessy*. They are discriminatory plans dressed in affirmative action clothing. Except in the most compelling circumstances, the inherent discrimination that accompanies samesin affirmative action plans has no place in our society.

276. *Croson* suggests that proof of specific victims is required under equal protection. *Croson*, 109 S. Ct. at 727; *id.* at 754-55 n.12 (Marshall, J., dissenting).

277. See *supra* notes 78-90 and accompanying text.

278. *Revelations* 20:3.

279. W. Reynolds, *The Reagan Administration's Civil Rights Policy: The Challenge for the Future* (rev. transcript Feb. 17, 1989) (unpublished manuscript).

280. *Id.*

281. *Id.*

282. Affirmative action in its purest form exists without any discrimination on the basis of race or sex. Educating our youth, providing adequate shelter for the homeless, and attacking our nation's drug problem are only a few examples of unequivocal "affirmative action." True affirmative action, unlike "samesin" affirmative action, builds toward a future society where governmental decisions are indifferent to race and sex. See, e.g., *id.*

