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Standard-less Intermediate Scrutiny of Gender-Based Affirmative Action Programs: The Right Man for the Job?

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I. INTRODUCTION

A circuit split exists between the Sixth and Eleventh Circuits regarding the correct level of constitutional scrutiny to be applied to Equal Protection challenges of gender-based affirmative action programs in the context of employment.[1] Although the cases forming the split date back to more than twenty years ago, this issue is still important and relevant, as women have not yet obtained total equality in the employment arena. Since the 1960s, affirmative action programs have been implemented in an attempt to rectify the gender disparity, but the Supreme Court has yet to establish a defined method of appraising such programs.

In *Brunet v. City of Columbus*, the Sixth Circuit interpreted the Supreme Court's holding in *Richmond v. J.A. Croson Corporation* to mean that gender-based preferences are subject to the same standard of strict scrutiny as race-based programs.[2] In *Ensley Branch, NAACP v. Seibels*, the Eleventh Circuit rejected that reading of *Croson* and maintained that "intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases."[3]

This comment argues for a more scrupulous analysis—one that provides specific factors that would help to reduce the possibility of judicial bias making its way into affirmative action decisions—a more defined application of intermediate scrutiny. Such an analysis borrows from the test set forth in *United Steelworkers v. Weber*, a case in which the Supreme Court established criteria for assessing a Title VII challenge of a race-based affirmative action plan.[4] While the

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[1] Brunet v. City of Columbus, 1 F.3d 390 (6th Cir. 1993); Ensley Branch, NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994).
[2] *Brunet*, 1 F.3d at 403.
[3] *Ensely Branch*, 31 F.3d at 1580.
[4] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

Weber analysis was statutory and race-based and therefore different in kind, the factors it set forth are equally workable in a constitutional, gender-based analysis. The *Weber* Court held: An affirmative action plan must: (1) aim to correct a conspicuous imbalance in traditionally segregated job categories, (2) not unnecessarily trammel the interests of non-minority employees or result in an absolute bar to hiring non-minority people, and (3) be temporary, with an end date or goal.[5] By simply switching out "non-minority" for "male" in the second factor, the test easily functions in the gender context.

This comment does not argue for a disregard of the precedent that applies intermediate scrutiny as the proper level of constitutional review of gender-based discrimination.[6] Rather, it argues for an application of the thoughtful decision in *Weber*, which provides a different lens through which to view the development of intermediate scrutiny in Equal Protection contexts involving gender issues. As Justice O'Connor once averred in a concurrence, the Court's assessment of affirmative action plans "attempt[s] to reconcile the same competing concerns"[7] under both Title VII and the Equal Protection Clause. Since the Court has found the *Weber* analysis competent to assess federal affirmative action plans, the same test could be just as functional in assessing similar plans challenged on equal protection grounds. In fact, the constitutional and statutory inquiries already mirror each other in several ways, which will be illustrated in the analysis below and furthers the argument that the two should be comparably judged.

Part II will give a brief historical background of affirmative action and introduce the case law relevant in the circuit split. Part III will provide evidence regarding the way in which the

[5] *Weber*, 443 U.S. at 208.
[6] Craig v. Boren, 429 U.S. 190, 218 (1976).
[7] Johnson v. Transportation Agency, 480 U.S. 616, 652 (1987).

constitutional and statutory analyses have converged and the reasons that the Court should formally recognize the same standards for both assessments. Part IV discusses the constraints of the current Equal Protection analysis, the gendered barriers it has erected, and the need for a more discerning standard so as to more effectively eliminate discrimination. Part V concludes.

II. BACKGROUND

A. Purpose of Affirmative Action

1. History

An accepted definition of affirmative action is "[t]he use of recruitment, incentives, and preferences in hiring and advancement to promote members of historically disadvantaged groups in education, the workplace, and the award of government contracts" . . . "to remedy the effects of generations of discrimination in education, employment, and commercial opportunities, particularly on the bases of race and of gender."[8] It was first employed in President John F. Kennedy's 1961 Executive Order, which instructed federal contractors to take "affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex, or national origin."[9] Three years later, Title VII the Civil Rights Act of 1964 established a prohibition on employment discrimination by employers of over fifteen employees, whether or not they have government contracts.[10] Following Kennedy's lead, President Lyndon B. Johnson issued an Executive Order in 1965, prohibiting employment discrimination based on race, color, religion, and national origin by organizations receiving federal contracts and subcontracts.[11] In

[8] *Affirmative Action*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012).
[9] Exec. Order No. 10925, 26 Fed. Reg. 1977 (March 6, 1961).
[10] Civil Rights Act of 1964, Pub.L. 88–352, 78 Stat. 241 (1964).
[11] Exec. Order No. 11246, 30 Fed. Reg. 12319 (September 24, 1965).

1967, Johnson amended the list to include sex, requiring federal contractors to make good-faith efforts to expand employment opportunities for women and minorities.[12]

2. How Cases Arise

State and federal laws authorize diversity efforts that are implemented in an effort to avoid discrimination and open up career opportunities to all classes of individuals.[13] However, these laws do not typically require educational institutions or employers to establish programs in order to create diversity.[14] The voluntary implementation of such programs and the decisions made as a result are often what leads to affirmative action.[15] Affirmative action cases are generally brought in two instances: (1) Where an applicant is rejected from an institution of higher education, only to subsequently learn that an individual with inferior qualifications was admitted; or (2) Where an employee is either not hired or dismissed due to preferences in the area of diversity. The legal claims brought on behalf of the complaining individuals are typically Fourteenth Amendment Equal Protection or Due Process claims. When assessing the legitimacy of a gender-based affirmative action plan, the Supreme Court has not required extensive proof of a specific factual predicate, but focuses instead on whether reliance on a stereotype could be discerned from the statute's language and legislative history.[16]

In the employment context, affirmative action programs often take the form of recruitment and outreach efforts to include qualified women in the potential hiring pool and training programs that afford all employees a fair shot at promotions.[17] As large companies

[12] Exec. Order No. 11375, 32 Fed. Reg. 14303 (October 13, 1967).
[13] Edward Easterly, *Diversity Recruiting: How Does Fisher Impact Affirmative Action in Employment?* National Association of Colleges and Employers Journal (2016).
[14] *Id.*
[15] *Id.*
[16] AJMEL QUERESHI, THE FORGOTTEN REMEDY: A LEGAL AND THEORETICAL DEFENSE OF INTERMEDIATE SCRUTINY FOR GENDER-BASED AFFIRMATIVE ACTION PROGRAMS, AM. U. J. OF GENDER & L. 21, no. 4 (2013): 797-836, 828.
[17] Frank Dobbin, Alexandra Kalev, and Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies,* 71 *American Sociological Review* 589 (2006).

realize that a workforce trained in a diverse environment is critical to corporate success, more big businesses have begun to understand and appreciate the impact of affirmative action.[18]

B. A Test for Affirmative Action Plans: United Steelworkers v. Weber

In 1979, a challenge to an affirmative action program reached the Supreme Court in *United Steelworkers v. Weber*.[19] The United Steelworkers of America entered into a collective-bargaining agreement with Kaiser Aluminum & Chemical Corporation, wherein the parties agreed to implement an affirmative action-based training program "to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces."[20] This plan reserved half of the total openings in the new program for black employees.[21] One Brian Weber, a white production worker in a Louisiana Kaiser plant, requested admission to the training program but was passed over, while blacks with more seniority were admitted.[22] Claiming that he was the victim of reverse discrimination, Weber brought an action alleging that the affirmative action program had resulted in black employees with less seniority receiving training in preference to more senior white employees, thus discriminating against him and other white employees in violation of Title VII of the Civil Rights Act.[23] Both the District Court and the Fifth Circuit Court of Appeals held that all race-based employment preferences, including those resulting from affirmative action plans, violated Title VII's prohibition against race-based employment discrimination.[24] The United States Supreme Court granted certiorari.[25]

[18] Roger Parloff, "Big Business Asks Supreme Court to Save Affirmative Action," *Fortune Magazine*, (2015).
[19] *Weber*, 443 U.S. at 197.
[20] *Id.*
[21] *Id.* at 198.
[22] *Id.*
[23] *Weber*, 443 U.S. at 199.
[24] *Id.* at 200.
[25] *Id.*

Writing for the majority, Justice Brennan held that "Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans."[26] An assessment of the plan used at the Kaiser plants led the Court to conclude that it did not "unnecessarily trammel" white employees' interests or require their discharge to make room for black hires.[27] In addition, it did not create an "absolute bar" to white employee advancement.[28] Finally, the Court emphasized the temporary nature of the plan: It was set to end as soon as the percentage of black skilled craftworkers in the plant corresponded to the percentage of blacks in the local labor force.[29] The purpose was to eliminate a manifest racial imbalance rather than maintain that balance.[30] Consequently, the Court upheld the affirmative action plan.[31]

The Supreme Court's review of the plan in *Weber* gave birth to what is now referred to as the *Weber* test.[32] Although the holding in *Weber* was confined to affirmative action plans voluntarily entered into by private organizations, the Court's decision a decade later in *Johnson v. Transportation Agency* extended *Weber*'s reasoning to apply to public affirmative action plans.[33]

C. The Unclear Precedent: Richmond v. J.A. Croson Co.

In 1983, the City Council of Richmond, Virginia adopted the Minority Business

[26] *Id.* at 208.
[27] *Id.*
[28] *Id.*
[29] *Weber*, 443 U.S. at 208.
[30] *Id.*
[31] *Id.* at 209.
[32] *See, e.g.*, GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY- FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 73 (2000); WILLIAM E. KAPLAN AND BARBARA AL LEE, THE LAW OF HIGHER EDUCATION 171 (2007).
[33] *Johnson*, 480 U.S. at 669.

Utilization Plan, which required prime contractors who received construction contracts from the city to subcontract at least thirty percent of their business to Minority Business Enterprises (MBEs).[34] The plan contained a definition of an MBE: A business at least fifty-one percent of which is owned and controlled by minority group members, which includes American citizens of who are Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut.[35] J.A. Croson Co., a primary contractor, failed to designate thirty percent of the value of its contract to MBEs and subsequently lost its contract with the city.[36]

In response, J.A. brought suit against Richmond, alleging that the ordinance was unconstitutional on its face and a violation of the Fourteenth Amendment.[37] Justice O'Connor delivered the opinion of the Court, fully acknowledging the country's history of discrimination in both the public and private spheres but declining to allow "generalized assertions" of such discrimination justify the city's strict racial quota.[38] The Court noted that the thirty percent quota could not be tied to any particular injury suffered by anyone.[39] However, the Court's holding did not entirely foreclose the imposition of race-based regulations: Justice O'Connor explained that evidence of systematic exclusion of minority businesses from subcontracting opportunities could have given Richmond the authority to take steps to end that exclusion, and that occasionally, some form of narrowly tailored racial preference might be necessary to break down patterns of extreme deliberate exclusion.[40]

[34] Richmond v. J. A. Croson Co., 488 U.S. 469, 477 (1989).
[35] *Id.* at 478.
[36] *Id.* at 483.
[37] *Id.*
[38] *Id.* at 499.
[39] *Id.* at 552.
[40] *Weber*, 443 U.S. at 509.

D. Creation of the Split: Differing Interpretations of Croson

1. *Brunet v. City of Columbus*

In both 1980 and 1984, petitioner Brunet took the Columbus firefighter examination and was not selected as a firefighter either time.[41] The examination consisted of a physical capability test (PCT) and a cognitive ability test (CAT), which was a written examination that included a mechanical reasoning test.[42] In 1984, Brunet and three other women sued the city, claiming that the PCT and the mechanical reasoning portion of the CAT violated Title VII because they had a disparate impact on female candidates and were not job related.[43] The plaintiffs included an Equal Protection claim in their complaint, alleging that the city intentionally discriminated against female firefighter candidates.[44]

The District Court held that Brunet did not satisfy her burden of proof on the Equal Protection claim and did not find that the mechanical reasoning test had had a disparate impact on female candidates.[45] Nevertheless, the court agreed that the PCT did have such an impact, and held that the city failed to successfully demonstrate that the physical portion was job related.[46]

The firefighters appealed, resulting in a settlement between the women and the City in the form of a consent decree.[47] The decree provided that the for the next twenty years, City Safety Director would appoint male and female applicants in proportion to the relative number of males and females receiving passing scores on the firefighter entry level test as a whole.[48] In

[41] *Brunet* at 393.
[42] *Id.* at 393.
[43] *Id.* at 394.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Brunet* at 395.
[48] *Id.*

response, three male firefighters filed an Equal Protection challenge to the hiring process, alleging discrimination on the basis of their gender.[49]

After determining that the consent decree violated the Equal Protection Clause by discriminating against the male firefighters on the basis of their gender, the District Court set it aside and ordered that the City could no longer select firefighters in the manner provided for by the decree.[50] In assessing whether the District Court erred in their Equal Protection determination, the Sixth Circuit cited the *Croson* Court's conclusion that race-based set aside programs undertaken by municipalities are subject to strict scrutiny and must be narrowly tailored to remedy prior discrimination in order to satisfy the Equal Protection Clause.[51] Pulling from that authority, the Sixth Circuit then decided: "Gender based preferences are likewise subject to strict scrutiny under the Equal Protection Clause."[52]

In some cases, this court's decision to level up and place gender on the same playing field as race might seem like a victory for women historically discriminated against, but not in this case. The court's application of strict scrutiny led it to look carefully for the alleged disparity of women in the position of firefighter, but the court did not find such disparity.[53] The Sixth Circuit reiterated that had disparity been found, "mere statistical imbalance alone would not suffice."[54] Thus, the District Court reasoned that the City, in agreeing to the consent order, intentionally discriminated against and violated the Equal Protection rights of male applicants because it was not narrowly tailored to remedy the prior discrimination found in *Brunet*.[55]

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[49] *Id.*
[50] *Id.*
[51] *Id.* at 403.
[52] *Id.*
[53] *Brunet* at 403.
[54] *Id.* at 403 (quoting *Croson*, 488 U.S. at 501).
[55] *Brunet* at 403.

2. *Ensley Branch, NAACP v. Seibels*

The City of Birmingham, Alabama, and the Personnel Board of Jefferson County were both tasked with the hiring and promotion of local government employees.[56] In accordance with state law, the Board administered, among other job selection procedures, written tests that produced a pool of certified candidates for any particular position.[57] After ranking the passing applicants, the Board sent a list of the most qualified candidates to the City to conduct a final selection.[58]

Litigation in response to this system began two decades ago, when the United States and private parties alleged that the Board violated the Equal Protection Clause by using discriminatory means in determining hiring and promotion eligibility and using similar means when picking individuals from the lists sent to it by the Board.[59] Two consent decrees were negotiated by the original parties, which required the City and the Board to "certify blacks and women either according to racial and gender quotas set forth in the decree or in proportion to their representation in the applicant pool, whichever was higher."[60] Once the proportion of blacks and women employed by the City in any given job classification "approximated the respective percentages of blacks and women in the civilian labor force of Jefferson County," the Board agreed to end the certification procedure delineated in the decree.[61]

The two decrees settled the issues between the original parties, but they were soon challenged—the new plaintiffs contending that the decrees would negatively impact their employment opportunities.[62] After conducting an analysis of the race-based gender preferences,

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[56] *Ensley Branch*, 31 F.3d at 1552.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Ensley Branch*, 31 F.3d at 1556.
[61] *Id.*
[62] *Id.* at 1557.

the court moved on to consider whether the gender preferences in the decrees required modification to comport with existing constitutional standards.[63] The Eleventh Circuit acknowledged the suggestion in recent cases that "*Croson* changed the rule," making gender-based affirmative action now subject to strict scrutiny.[64] Although the court noted the following of that rule in several cases, it maintained, "Nothing in *Croson* suggests that the Supreme Court intended *sub silentio* to strike down its own decisions applying intermediate scrutiny to gender classifications."[65] Here, the court was referring to *Califano v. Webster*, a case that involved a gender-based system for the allocation of Social Security old-age insurance.[66] The court interpreted *Califano* as controlling precedent and maintained that, in gender discrimination cases, intermediate scrutiny undoubtedly remains the applicable constitutional standard.[67] However, the *Califano* case did not discuss gender-based preferences in hiring or employment, as is the issue here, and a gender-based system allocating insurance benefits arguably does not fall under the definition of affirmative action, as it does not promote individuals in education, the workplace, or in the award of government contracts. Moreover, the Sixth Circuit's ruling in *Brunet* made it clear that it did not interpret *Califano* in the same way, which demonstrates that the *Califano* decision was not as clear cut as the *Ensley Branch* Court suggested.

3. Other Circuits Involved in the Split

In *Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, the Third Circuit sided with the Eleventh Circuit's position on the proper level of scrutiny to be applied to

[63] *Id.* at 1579.
[64] *Id.*
[65] *Id.*
[66] *Califano v. Webster*, 430 U.S. 313, 314 (1997).
[67] *Ensley Branch*, 31 F.3d at 1580.

gender-based affirmative action in the employment context.[68] The court heard an Equal Protection challenge by a group of construction contractors against a Philadelphia ordinance that created preferences in city contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons.[69] The ordinance provided that businesses owned by racial minorities and women are rebuttably presumed to be disadvantaged.[70] In determining which level of constitutional scrutiny to apply to the challenge, the Third Circuit decided on intermediate scrutiny, stating that it "follow[ed] logically from *Croson*."[71]

E. Continuing Relevance

This circuit split was created more than two decades ago. Nevertheless, it is still as relevant as it was in 1994, when the Eleventh Circuit decided *Ensley Branch* and established a split with the Sixth Circuit. While society has seen increasing efforts to eliminate sex discrimination in the workplace, it was not until quite recently in our nation's history that gender-based discrimination began to be seen as a pressing issue in need of remediation.

The official recognition of that need came in the form of a 1976 Supreme Court case, *Craig. v. Boren*.[72] The *Craig* case, which had the court scrutinize a gender-based age differential for the purchase of alcohol, ultimately set the precedent that gender-based classification would be subject to a type of intermediate scrutiny, meaning that in order to pass muster, a challenged law must further an important government interest by means that are substantially related to that

[68] Contractors' Ass'n of E. Pa. v. City of Phila., 6 F.3d 990, 993 (3d. Cir. 1993).
[69] *Id.*
[70] *Id.* at 994.
[71] *Id.* at 1001.
[72] Craig, *supra*, 429 U.S 190 (This decision ultimately found that the age limit discriminated not against women, but against men).

interest.[73] In 1982, in *Mississippi University for Women v. Hogan*, the Court supplemented that standard by requiring the party seeking to uphold a gender-based classification to shoulder the burden of showing an "exceedingly persuasive justification" for the classification.[74] These cases came several years after strict scrutiny was established as the proper standard for race-based classifications.[75] Despite the wait, *Craig* and *MUW* emphasized that gender-based classifications were a reality, and that the court felt the need to offer them a special sort of protection, even if not in as heightened a form as strict scrutiny.

However, courts still struggle with the application of intermediate scrutiny. Critics of the standard call it unworkable and cite the trouble that lower courts have had with applying it.[76]

> It is a little difficult for judges to determine whether a state interest is important enough to satisfy intermediate scrutiny. It is even more difficult for judges to determine whether the gender classification is substantially related to that important governmental interest.[77]

Indeed, Justice Rehnquist drove that point home in his dissent in *Craig v. Boren*, deeming intermediate scrutiny "so diaphanous and elastic as to invite subjective judicial preferences or prejudices."[78] Although this is not the only common criticism of intermediate scrutiny,[79] it is a

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[73] *Craig*, 429 U.S. at 197.
[74] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).
[75] *See* Korematsu v. United States, 323 U.S. 214 (1944) (In a now overruled case, the Supreme Court held that classifications based on suspect classes, in this case race, would only be upheld if found to serve a compelling governmental interest in a way that is narrowly tailored to achieve that goal or interest. While the decision is now infamous, the standard itself has remained intact since).
[76] ELIZABETH M. SCHNEIDER, TWO DECADES OF INTERMEDIATE SCRUTINY: EVALUATING EQUAL PROTECTION FOR WOMEN CENTENNIAL PANEL, 6 AM. U. J. GENDER & L. 1, 11 (1997-1998).
[77] *Id.* at 14.
[78] *Craig*, 429 U.S. at 221.
[79] QUERESHI, THE FORGOTTEN REMEDY, AM. U. J. OF GENDER & L. 21, 822 (Categorical criticism in the form of doctrinal arguments that strict scrutiny is the correct approach based on the Supreme Court's jurisprudence; insufficient protection arguments that intermediate scrutiny is insufficient to guard against invidious or discriminatory statutes; stigmatic arguments that a lower level of scrutiny implicitly delivers a message that women are less important than other minority groups; and inconsistency arguments that the Court's jurisprudence with regard to racial and gender-based affirmative action is theoretically inconsistent based on the Equal Protection Clause's original intention to aid African-Americans. These criticisms, however, are commonly followed by a push

material one that could be effectively remedied with the application of the *Weber* test. Justice Rehniquist's concerns about the imposition of judicial predispositions would be easily assuaged with an application of the clearly defined *Weber* factors.

III. CORRECTIVE CONVERGENCE

A. "The Same Competing Concerns:" Title VII and Equal Protection

At the outset of the Court's decision in *Weber*, Justice Brennan clarified that because the affirmative action plan at issue did not involve state action, the case did not involve a potential violation of the Equal Protection Clause of the Fourteenth Amendment.[80] This clarification disposed of the need for the application of any level of constitutional scrutiny that the Court would normally apply in the face of an equal protection challenge. However, that distinction does mean that statutory challenges are shielded from adhering to constitutional ramifications.[81] Nor does it mean that constitutional assessment cannot and has not borrowed from similar statutory assessments.[82] Justice O'Connor said it best in her *Johnson* concurrence when, upon noticing the similar aims sought by courts operating under the two different laws, she averred: "I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause."[83]

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toward applying strict scrutiny to gender-based affirmative action programs, which this note does not advocate for) (internal citations omitted).

[80] *Weber*, 443 U.S. at 200.

[81] *See Johnson*, 480 U.S. at 664 ([I]t is most unlikely that Title VII was intended to place a lesser restraint on discrimination by public actors than is established by the Constitution) (White J., dissenting).

[82] WILLIAM E. KAPLAN AND BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 527 (2007) ("Although the Court in *Grutter* did not explicitly apply the *Weber* test to the admissions procedure at the University of Michigan Law school, it stated that narrow tailoring requires that there be no undue harm to non-minorities, and that the affirmative action plan be limited in time—two of the *Weber* criteria").

[83] *Johnson*, 480 U.S. at 652.

The decision in *Weber* did not address whether an affirmative action plan like the one in *Weber* would violate the Equal Protection Clause if adopted by a state or the federal government. Before the decision in *Johnson v. Transportation Agency* was handed down, one scholar referred to Justice Brennan's confinement of the issue to statutory grounds and hypothesized:

> This method of avoiding the constitutional question would be unavailable, however, if a unit of the federal or a state government, now subject to Title VII, adopted a Kaiser-type preference. Plainly, the Court's reliance on the state action point is at best a delaying action.[84]

This hypothesis proved predictive, as *Johnson* soon settled the question left open in *Weber* and extended the ability to establish affirmative action plans to public employers as well as private. However, the Court did not come to this conclusion on Equal Protection grounds, as the plaintiff chose instead to assert a statutory claim.[85] Thus, *Johnson* left yet another question open: Would the Court have come to the same conclusion had it not applied the *Weber* test, but rather applied intermediate scrutiny to assess the claim? The answer is unclear, but Justice Brennan might have been attempting to quash that possibility by countering Justice O'Connor's concurrence, stating: "[W]e do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans."[86] While this may be Justice Brennan's view, O'Connor's aforementioned concurrence and Scalia's dissent advocated for a convergence of the statutory and constitutional standards with which to evaluate the government's voluntary affirmative action plan.[87] In his dissent, Justice Scalia averred: "It is most unlikely that Title VII was intended to place a lesser restraint on discrimination by public

[84] BERNARD D. MELTZER, THE WEBER CASE: THE JUDICIAL ABROGATION OF THE ANTIDISCRIMINATION STANDARD IN EMPLOYMENT, 47 UNIVERSITY OF CHICAGO L. REV. 423, 443, n.98 (1980).
[85] *Johnson*, 480 U.S. at 619.
[86] *Id.* at 632.
[87] *Id.* at 664.

actors than is established by the Constitution."[88] The mere fact that two justices could hold opposing views on the merits but agree on the conditions by which they should be judged is telling. Nevertheless, Justices Scalia and O'Connor left unanswered what precisely that converged standard should entail. As one scholar noted: "What remained unresolved is precisely where the evidentiary bar is or should be: As the debate in subsequent cases revealed, the dispute persisted over whether the proof standards under Title VII and equal protection should be harmonized."[89]

B. The Evidentiary Enigma

This subsection will consider each part of the *Weber* test and explain how all three prongs can be applied to challenges to affirmative action plans under the Equal Protection Clause as functionally as they have been applied to Title VII claims. Indeed, it will show that courts have already applied the three statutory factors in their constitutional analyses without explicitly saying so.

1. Conspicuous imbalance in traditionally segregated job categories

The first prong of the *Weber* test is a middle ground. In *Johnson*, the Court reiterated, "*Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part."[90] Alternatively, while a public employer may not attempt to justify an affirmative action plan on generalized assertions of historical discrimination, the employer need only point to a

[88] *Id.*
[89] CHERYL I. HARRIS, LIMITING EQUALITY: THE DIVERGENCE AND CONVERGENCE OF TITLE VII AND EQUAL PROTECTION, *University of Chicago Legal Forum*: Vol. 2014: Iss. 1, Article 1., 112 (2014).
[90] *Johnson*, 480 U.S. at 630.

"conspicuous . . . imbalance in traditionally segregated job categories" to give reason for its remedial action.[91]

The Equal Protection analysis has similar requirements. The Supreme Court has held, "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[92] Rather, a public employer seeking to defend its affirmative action plan need only show that it has a "strong basis in evidence for its conclusion that remedial action was necessary."[93]

Some scholars have held that the Equal Protection analysis is more difficult to meet,[94] yet it would seem that this first *Weber* criterion simply gives more definition to the showing that must be made to pass muster under an Equal Protection analysis. Under Title VII, any employer who wishes to adopt an affirmative action plan must be a part of a traditionally segregated job category, which the Court has defined as one in which exclusion is conscious, systematic, and intentional.[95] Surely this type of exclusion would constitute a "strong basis in evidence" needed in the constitutional assessment. Here, the Title VII *Weber* test imparts clearer guidelines to the Court that can be utilized to ensure more objective decisions in response to Equal Protection challenges. The test is practical and workable, and functions more effectively than a "wholly standardless approach to affirmative action."[96]

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[91] *Id.*
[92] Wygant v. Jackson Bd. of Education, 476 U.S. 276 (1986) (A collective bargaining agreement in a school district resulted in layoffs of tenured nonminority teachers while minority teachers were retained).
[93] *Ensley Branch*, 31 F.3d at 1566.
[94] *See, e.g.*, WILLIAM E. KAPLAN AND BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 173 (2007); ROY L. BROOKS, THE AFFIRMATIVE ACTION ISSUE: LAW, POLICY, AND MORALITY, 22 CONN L. REV. 323, 338 (1990)
[95] *Johnson*, 480 U.S. at 668.
[96] *Id.* at 650 ("Instead of a wholly standardless approach to affirmative action, the Court determined in Weber that Congress intended to permit affirmative action only if the employer could point to a "manifest . . . [imbalance] in traditionally segregated job categories") (O'Connor J., concurring).

2. No unnecessary trammeling or absolute bar to non-minorities

One critique of the statutory test is that it allows private employers to make use of explicit quotas within an affirmative action plan, while the Equal Protection Clause prohibits that practice.[97] It is true that in *Weber*, the affirmative action plan set aside half of the spots in the training program for blacks, and the Court upheld this racial set-aside method, holding that the interests of white employees were not "unnecessarily trammeled" because the plan did not require their discharge or their replacement with black employees.[98] Moreover, since half of the steelworkers in the program would be white, the Court ruled that the plan did not create an absolute bar to the advancement of white employees.[99]

While the decision regarding quotas in *Weber* is inconsistent with Equal Protection cases that subsequently invalidated the use of quotas,[100] the *Johnson* Court explicitly indicated that the Transportation Agency's plan was unlike the one in *Weber* because it does not impose a quota system.[101] The Court's determination about whether the plan unnecessarily trammeled the interests of non-minorities turned on the fact that the plan did not set aside positions for women, and led the Court to conclude that it met the requirement on *Weber*'s second prong.[102] Therefore, the Court added a restriction to this second prong, which illustrates that difference pointed out in the aforementioned critique is not so much of a difference after all.

In addition, the *Weber* test is also in line with the level of scrutiny traditionally afforded to gender-based preferences. Intermediate scrutiny requires a substantial relation to an important government interest, and mandates the use of gender-neutral selection procedures to achieve

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[97] WILLIAM E. KAPLAN AND BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 210 (2007)
[98] *Weber*, 443 U.S. at 208.
[99] *Id.*
[100] *See, e.g., Croson* ,488 U.S. at 499.
[101] *Johnson*, 480 U.S. at 638.
[102] *Id.*

those interests.[103] The requirement that the interests of non-minorities not be trammeled in the process of that achievement ensures that the goal of an affirmative action plan will be substantially related to an important interest. If a plan that was meant to be remedial functioned as an absolute bar to non-minorities, such a bar would amount to an impairment of the government's interest in the equal protection of the laws. Fortunately, the second prong of the *Weber* test prevents that impairment by setting a clear standard, one that gives more teeth to the current requirements under the applicable level of scrutiny.

3. Eliminating imbalance, not maintaining balance

The final prong of the *Weber* test requires that an affirmative action plan be temporary, with a stated end plan or goal.[104] In upholding the disputed affirmative action plan, the *Weber* Court reasoned that the plan was a temporary measure, because the preferential selection of black trainees would terminate as soon as the percentage of black craftworkers at the Kaiser plant approximated the percentage of blacks in the local labor force.[105] The Court sanctioned the plan's intention not to maintain racial balance, but simply to eliminate a manifest racial imbalance.[106] In *Johnson*, the Supreme Court upheld the remedial plan even in the absence of a specified end goal.[107] The Court cited the Transportation Agency's express commitment to attaining a balanced work force, which led the Court to conclude that it did not have an ultimate goal to maintain a permanent racial and sexual balance.[108]

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[103] *Craig*, 429 U.S. at 197.
[104] *Weber*, 443 U.S. at 208.
[105] *Id.* at 208-09.
[106] *Id.* at 208.
[107] *Johnson*, 480 U.S. at 625-26 (The Court of Appeals for the Ninth Circuit held that the absence of an express termination date in the Plan was not dispositive, since the Plan repeatedly expressed its objective as the attainment, rather than the maintenance, of a work force mirroring the labor force in the County. The Supreme Court affirmed).
[108] *Id.* at 640.

Although the Eleventh Circuit did not explicitly conduct an analysis in line with the *Weber* test, its consideration of the affirmative action plan in *Ensley Branch* mirrored the third prong set forth in *Weber*. The Personnel Board was required to annually certify blacks and women either according to racial and gender quotas set forth in the consent decree or in proportion to their representation in the applicant pool, whichever was higher.[109] The court noted that the Board "agreed to continue to certify according to these annual 'goals' until satisfaction of the long-term 'goal,'" which would be realized when the proportion of blacks and women employed by the City in any given job classification "approximated the respective percentages of blacks and women in the civilian labor force of Jefferson County."[110] Nevertheless, the court struck down the decree because it did not state that the race- and gender-conscious certification requirements would terminate with the development of lawful selection procedures.[111] Therefore, the court observed, the certification method "could potentially have continued forever."[112]

Notwithstanding the difference in outcomes between the *Weber* and *Ensley Branch* decisions, the Eleventh Circuit still took a prong of the *Weber* test into account in its analysis of the challenged plan. Thus, *Ensley Branch* was yet another illustration of the *Weber* test's functionality in the Equal Protection context, and further justified Justice O'Connor's sensible assertion that both the constitutional and statutory assessments deal with the "same competing concerns."

4. Further Support for Combining the Two Analyses

[109] *Ensley Branch*, 31 F.3d at 1556.
[110] *Id.*
[111] *Id.*
[112] *Id.*

One case out of the Eighth Circuit lends further backing to the proposition of combining the statutory and constitutional assessments. In *Valentine v. Smith,* Valentine was a rejected white job applicant who brought an Equal Protection action in response to the affirmative action program in place Arkansas State University.[113] The faculty hiring program had been implemented as part of a court-ordered desegregation plan for the Arkansas state college and university system.[114] Interestingly, the court did not apply strict scrutiny in its analysis of the affirmative action plan. Instead, it focused on the existence of racial imbalance in the relevant job category, the temporary character of the affirmative action plan, and on the absence of unnecessary trammeling on white employees' interests.[115] The Supreme Court's use of strict scrutiny in several subsequent affirmative action cases suggest that this analysis did not might not have met the standards of an equal protection clause analysis.[116] However, as one scholar noted, "the outcome of the case might have been the same because of the remedial nature of the affirmative action plan."[117]

IV. WHERE EQUAL PROTECTON FAILS

1. Same Concerns, Different Standards?

Many scholars, and even several appellate courts at one time, saw reason to apply Title VII disparate impact standards to an equal protection analysis.[118] A violation of Title VII of the 1964 Civil Rights Act may be proven by showing that an employment practice or policy has a disproportionately adverse effect on members of the protected class as compared with non-

[113] Valentine v. Smith, 654 F.2d 503, 505 (8th Cir. 1981).
[114] *Id.* at 506.
[115] *Id.* at 510.
[116] *See Wygant, supra;* Adarand Constructors v. Pena, 515 U.S. 200 (1995); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).
[117] KAPLAN AND LEE, LAW OF HIGHER EDUCATION 171, 523 (2007).
[118] *See* Washington v. Davis, 426 U.S. 229, 244-45 & n.12 (1976).

members of the protected class.[119] Thus, once a disparate impact is illustrated, a plaintiff is able to prevail without being required to show intentional discrimination, unless the defendant-employer proves that the practice or policy in question has a demonstrable relationship to the requirements of the job.[120] In contrast, the Supreme Court has established that laws that have a racially-discriminatory effect are not unconstitutional so long as they were not adopted to advance a racially-discriminatory purpose.[121] The Title VII standard is a plaintiff-friendly one, but the Supreme Court has affirmatively refused to allow plaintiffs bringing Equal Protection claims to apply it.

In *Washington v. Davis*, the District of Columbia police department utilized an employment exam that excluded four times as many African-American applicants as white applicants.[122] African American applicants who had been denied admission onto the police force sued the department, alleging a Fifth Amendment Equal Protection violation. The Court found no violation, and acknowledged its difficulty with understanding how a racially neutral law could be deemed racially discriminatory simply because a greater proportion of the members of one race fail to qualify as opposed to members of another race:[123]

> [V]arious Courts of Appeals have held in several contexts, including public employment, that the substantially disproportionate racial impact of a statute . . . standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause absent some justification going substantially beyond what would be necessary to validate most other legislative classifications. [T]o to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement.[124]

[119] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1977)
[120] *Id.*
[121] *Davis*, 426 U.S. at 240.
[122] *Id.* at 237.
[123] *Id.* at 245.
[124] *Id.* at 244.

Understandably, the Supreme Court likely does not want it to be easy to prove an Equal Protection violation. Indeed, in *Personnel Administrator v. Feeney*, a sex discrimination case decided three years after *Davis*, the Court held that plaintiffs must prove that legislators adopting a policy that would foreseeably injure women or minorities had acted with the express purpose of doing just that.[125] Reva B. Siegel, the author of *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, likened that legislative state of mind to malice.[126]

This sort of evidentiary burden, where a plaintiff must establish that the defendant acted with almost criminal intent, serves only to dispose of countless cases brought by deserving individuals who have little chance of succeeding without the ability to climb into the brain of their adversary. Thus, many plaintiffs who have truly been the victim of discrimination, may slip through the cracks solely because the courts demand proof that is almost impossible to put forth. In *Feeney*, the Court cited it its own "settled rule" that the Fourteenth Amendment guarantees equal laws, not equal results.[127] But if the result of a law disproportionately impacts one class of people, whether they be of a different race or a different gender, is the law really equal?

Thus far in this section, it may seem that I am definitively advocating for the use of the Title VII disparate impact standard in all constitutional cases. This is not the case. Instead, *Davis* and *Feeney* were used to demonstrate the limitations on the extremely heightened standard in Equal Protection cases—a standard that would benefit from more specific analytical guidelines.

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[125] Personnel Administrator v. Feeney, 442 U.S. 256, 274 (1979).
[126] Reva B. Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action," (1997). *Faculty Scholarship Series.* Paper 1091 at 1135.
[127] *Feeney*, 442 U.S. at 273.

Notable, however, is that the aims underlying both the Equal Protection Clause and Title VII are the same. The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.[128] In addition, the equal protection component implicit in the Due Process Clause of the Fifth Amendment prohibits the United States from invidiously discriminating between individuals or groups.[129] Meanwhile, the goal of Title VII is to eliminate the effects of employment discrimination by eliminating discrimination in employment practices.[130] Motivating both is the goal of eradicating discrimination. Therefore, applying a workable test to the constitutional inquiry, one that would be effective in eliminating discrimination, would help both the courts and potential plaintiffs. Plaintiffs would understand just what they need to prove in their case, and the courts would have definitive factors to focus on in their assessment. Otherwise, the current standard-less approach may continue to prevent justice from being served.

V. CONCLUSION

Affirmative action is undoubtedly still necessary to continue to aid women and minorities in obtaining opportunities in areas where they have been historically disadvantaged. The employment realm is one of those areas where an unfortunate disparity still exists. However, there is a continuing need for checks on affirmative action programs that aim to assist disadvantaged individuals, and without a clear test, employers that want to implement remedial programs have no firm guidelines other than the subjective words used in the definition of intermediate scrutiny. The Supreme Court needs a test that can give clarity to its Equal

[128] *Davis*, 426 U.S. at 239.
[129] *Id*.
[130] *Johnson*, 480 U.S. at 632.

Protection analysis of gender-based preferences, and the *Weber* test can provide that precision. Without it, judges are free to impose their own judicial preferences on case by case bases, because they, too, have little to guide them in their assessments. The circuit split at issue should not be decided in favor of the Sixth Circuit nor the Eleventh Circuit. Rather, the Supreme Court should use the *Weber* test to inform its Equal Protection analysis in order to ensure that affirmative action plans are in place for the right reasons, the right individuals, and the right amount of time.