2014

Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection

Cheryl I. Harris
Cheryl.Harris@chicagounbound.edu

Follow this and additional works at: http://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol2014/iss1/1
Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection

Cheryl L. Harris†

INTRODUCTION

Both the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act proscribe discrimination and authorize remedies to address discrimination-related inequality. Yet, constitutional and statutory anti-discrimination protections have been interpreted to differ, both with regard to the conduct or conditions that constitute discrimination as well as the scope of permissible remedies. As one illustration, consider the distinction between Title VII and equal protection that the Court has drawn with respect to disparate impact. *Griggs v Duke Power Co*¹ interpreted Title VII to proscribe an employer’s selection practices that produce disparate impact unless those procedures are necessary or job related. Five years later in *Washington v Davis*,² black applicants challenged a police department’s use of a general civil service test—Test 21—that disproportionately excluded them as an equal protection violation on the assumption that the constitutional definition of unlawful discrimination was coextensive with the Title VII standard under *Griggs*.³

† Rosalinde and Arthur Gilbert Professor in Civil Rights and Civil Liberties, UCLA Law School. My thanks to the journal editors for their assistance and to the expert research staff at UCLA Law Library.

¹ 401 US 424 (1971).
² 426 US 229 (1976).
³ Brief for Respondent, *Washington v Davis*, No 74-1492, *15 (US Dec 19, 1975) (available on Westlaw at 1975 WL 173558) (“Both the professional literature and the legal requirements first articulated by this Court in *Griggs* . . . and developed in an impressive array of lower court decisions, reject the notion that the use of a test can be sustained, in the face of substantial adverse impact, on the basis of speculation as to its
That assumption proved incorrect: the Court declined to adjudicate equal protection claims in accordance with the statutory standard, although lower courts had uniformly done so. Citing concerns that *Griggs* imposed a too onerous burden of proof on the state to justify government operations that routinely produced racially disparate impact, the Court predicted that the test would call for extensive judicial intervention even absent intentional conduct, and would undermine the Court’s authority and legitimacy.\(^4\) Of course, the Court’s anxiety about its institutional limits was not its only concern. The majority was also skeptical that racial disparities were a sufficiently strong signal of racial discrimination to warrant judicial correction.\(^5\) As a consequence, the Court held that Title VII and equal protection standards necessarily diverged.\(^6\)

Now the question presented by *Davis*—whether the disparate impact standard is constitutionally required—has shifted to whether the disparate impact claim is inconsistent with equal protection guarantees. This issue was made salient in *Ricci v DeStefano*,\(^7\) even though the Court as a whole did not specifically address whether the disparate impact cause of action per se offends the constitution. In that case, promotions to supervisory positions on the New Haven Fire Department were halted when the City determined that its assessment procedures had excluded virtually all black and Latino candidates and that, as a consequence, it risked being held liable for disparate impact discrimination.\(^8\) A group of white firefighters challenged the

---

\(^4\) *Davis*, 426 US at 240–248. On an alternate view, the fact that these procedures produced racially disparate results arguably signaled that racial discrimination was systemic rather than episodic, and thus required a doctrinal structure that did not accept inequality as the status quo. Instead, the framework adopted by the Court in *Davis* was bound to skew against remediation. See generally, for example, Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 Mich L Rev 953 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan L Rev 317 (1987) (explaining how the intent standard has turned out to bar minorities’ claims of discrimination).

\(^5\) *Davis*, 426 US at 239 ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact.").

\(^6\) Id at 247–48.

\(^7\) 557 US 557 (2009).

\(^8\) Id at 565–68.
City’s decision to cancel the test results and craft new evaluation methods as racially disparate treatment and asserted they would have been promoted under the initial procedures. While the majority did not join Scalia in openly speculating on the constitutionality of Title VII’s disparate impact provisions, the Court asserted that disparate impact and disparate treatment—the two statutory proof structures—were in conflict. To resolve this perceived tension, the majority borrowed a more stringent proof standard from equal protection doctrine—whether the employer had a “strong basis in evidence” that it would be liable for a disparate impact violation under Title VII—as a predicate for taking action. Effectively, the Court interpreted the statute to conform to the constitutional standard, pushing equal protection and Title VII towards convergence.

Given shifts in the Court personnel over time, and the contentious nature of anti-discrimination law and politics, perhaps it is unsurprising that the Court and individual justices have endorsed differing views of the relationship between the statutory and constitutional standards in evaluating racial discrimination and its remediation. Indeed, the Court’s comparison of Title VII and equal protection has not produced well-defined principles regarding this relationship. Claims that the standards differ as well as the opposing view that they are the same have rested on policy preferences, consequentialist arguments, and normative concerns, but often the Court has simply declared rather than analytically defended its position. At times, as in Davis, the Court’s position has been explicitly stated; at other times, as in Ricci, the Court’s view is implied as

---

9 Id at 594 (Scalia concurring) (“The difficulty is this: Whether or not Title VII’s disparate-treatment provisions forbid ‘remedial’ race-based actions when a disparate-impact violation would not otherwise result—the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively requires such actions when a disparate-impact violation would otherwise result. But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—e.g., employers, whether private, State, or municipal—discriminate on the basis of race. As the facts of these cases illustrate, Title VII’s disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.”) (citations omitted).

10 Id at 579–80.

11 Ricci, 557 US at 582–84.
doctrinal features are transplanted between constitutional and statutory domains.

Beyond the competing arguments, a closer examination of the logic, consequences, and political context of the Court’s comparative analysis of Title VII and constitutional standards yields several insights. First, notwithstanding the prevailing view that Title VII and equal protection standards for establishing discrimination and assessing remedies are distinct, there is a good deal of transference between them. Second, while the Court has advanced various reasons why the standards are similar or different, these competing views have come to cohere in endorsing interpretations that have weakened anti-discrimination protection for non-whites, while enabling whites’ challenges to those same remedial measures. The Court’s comparative reasoning often is not racially neutral: The interplay between Title VII and equal protection has functioned asymmetrically to (re)produce an unequal doctrinal terrain. Third, these doctrinal constraints reflect and legitimate the period’s contested racial politics, which endorsed only a limited version of racial reform.

In Part I, I examine the claim that the standards for defining discrimination and the scope of permissible remedies under Title VII and equal protection are the same. Sometimes this equivalence has been invoked in the context of broadening the basis for remedying racial inequality, but often the comparison has yielded a more narrow conception of racial discrimination that renders legal remedies less available to non-whites. Part II considers the claim that the statutory and constitutional standards differ, focusing particularly on disparate impact and affirmative action case law. The prevailing view is that the equal protection standard is more restrictive than Title VII. In part, this reflects the consolidation of a majority opinion that strict scrutiny is the appropriate equal protection framework applicable to race-conscious affirmative action. What is less clear is why, as a consequence of normative considerations, equal protection standards should impose greater barriers than the statute to those seeking

---

12 See Part II.
13 See Adarand Constructors, Inc v Pena, 515 US 200, 222 (1995) (holding that strict scrutiny is the standard of review applicable to all race conscious affirmative action).
remedial relief from discrimination. Part III proceeds from the observation that the distinction between Title VII and equal protection standards is unstable and porous, as over time aspects of equal protection analysis have been imported into the Title VII cases and vice versa. In some instances, the standards operationally became more similar even as they formally differed. Nevertheless, the overall effect of this transference is to contain the concept of racial discrimination and to limit the range of permissible remediation in claims brought by racial minorities. The convergence and divergence of Title VII and equal protection has functioned as a technology of racial retrenchment.\(^\text{14}\)

**I. TITLE VII AND EQUAL PROTECTION CONVERGE**

The view that Title VII and the Equal Protection Clause define discrimination and remediation in similar terms has been expressed in legal scholarship, in case law, and in the legislative history of the statute. Indeed, fundamental to the claim that the statutory and constitutional standards are the same are the debates over the enactment and amendment of Title VII in which the special relationship between the statute and the Constitution was repeatedly featured. On occasion, courts have followed the implications of this comparison to broaden the meaning of equality. However, the convergence of the statutory and constitutional standards has more often functionally constrained the concept of equality and restricted antidiscrimination remedies for historically disadvantaged groups. This Part explains how.

**A. Scholarly Authority**

Scholars have asserted that Title VII and equal protection embody the same standards. This perspective derives from the sense that from a historical perspective, the meaning of the statute is tethered to the constitutional guarantee of equality. Under Section 5 of the Fourteenth Amendment, Congress is specifically given a role in enforcing the Equal Protection Clause

though implementing legislation, and Title VII—The Civil Rights Act—at least in part rests upon this enforcement power. Thus, it is argued that the purpose of the statute is "to extend the constitutional prohibition against discrimination from the public to the private sphere." In that sense, the statute can be read as an expression of what equal protection means.

In an earlier period, the Court endorsed this view. Katzenbach v Morgan affirmed congressional authority to enact voting rights legislation that contradicted the Court’s interpretation because it read Section 5 of the Fourteenth Amendment to confer on Congress the power to substantively interpret constitutional meaning. While Katzenbach’s holding that Congress has the power to define rights guaranteed in Section 1 has been called into question, arguably the Civil Rights Act should still be understood as a congressional interpretation of equal protection.

---

15 Section 5 provides that “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” US Const Amend XIV, § 5. There has been much debate about the scope of Section 5 power. See, for example, Ruth Colker, The Section Five Quagmire, 47 UCLA L Rev 653, 662-64 (2000) (“[The framers and ratifiers of section five intended to give Congress broad powers to enforce the Equal Protection Clause. … Although commentators disagree about the proper scope of the state action requirement, no one disputes that the framers and ratifiers intended Congress to have broader authority under section five than merely to enforce what the Supreme Court had already decided was unconstitutional under section one.”); Robert C. Post and Reva B. Siegel, Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L J 1943, 1945 (2003) (“How to conceive of the relationship between the legislative power established in Section 5 and the judicial power authorized by Section 1 is one of the deep puzzles of American constitutional law. … The history of Section 5 doctrine has been one of turmoil and revision.”).

16 George Rutherglen and Daniel R. Ortiz, Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence, 35 UCLA L Rev 467, 470 (1988) (“[The main purpose of Title VII is clear enough: like other titles of the Civil Rights Act of 1964, it was designed to extend the constitutional prohibition against discrimination from public to private action.”).


18 Id at 651.

19 See City of Boerne v Flores, 521 US 507, 527-528 (1997) (“There is language in our opinion in Katzenbach v Morgan, which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.”) (citations omitted).

20 See Serena J. Hoy, Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts, 16 J L & Polit 381, 383-84 (2000) (arguing that the Civil Rights Acts that include Title VII were “not ordinary statutes” but were congressional interpretations of the Constitution and should be seen as a source of constitutional
Moreover, in 1972 when Title VII was amended to include state and local government employers, Congress reaffirmed the notion that Title VII implemented the constitutional prohibition of discrimination.\textsuperscript{21} That being so, Title VII and equal protection would presumably converge. Certainly, the legislative history does not suggest that Congress intended to define discrimination under the statute differently than discrimination under the Equal Protection Clause.\textsuperscript{22} As a matter of logic, this position would seem to have considerable appeal. However, in the context of the Court’s jurisprudence it has neither been the dominant view nor has it been one that has aligned with the objective of eliminating racial inequality.

B. Disparate Impact: Before Washington v Davis

The view that the Constitution and Title VII define discrimination and construct remediation in the same terms has been expressed in the context of disparate impact analysis. Indeed, this argument was part of the backdrop to the debate in Davis itself. Congress endorsed Griggs’ disparate impact framework during the debates over the 1972 Equal Employment Opportunity Act that amended Title VII of the Civil Rights Act of 1964.\textsuperscript{23} Moreover, in the five-year period after Griggs was decided in 1971 and prior to Davis, lower federal courts routinely held that the Title VII standard articulated in Griggs applied in equal protection cases. Under this standard, racially disparate impact of routine institutional practices triggered a requirement that the government, like the employer in Griggs,

\textsuperscript{21} The legislative history of the Equal Employment Opportunity Act of 1972, amending the Civil Rights Act of 1964, provided:

The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution. . . . The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth amendments, is to prohibit all forms of discrimination. Legislation to implement this aspect of the Thirteenth amendment is long overdue.


\textsuperscript{22} See David A. Strauss, Discriminatory Intent and the Taming of Brown, 56 U Chi L Rev 935, 950 (1989) (pointing to the legislative history expressing the view that discrimination under the statute and under Equal Protection was perceived to be the same).

justify their continuation. Courts of appeals and district courts in multiple jurisdictions adopted Griggs' burden-shifting framework in evaluating equal protection challenges to facially neutral procedures that produced racial inequality in public employment, urban renewal, zoning, public housing, and municipal services. The plaintiffs in Davis, black applicants to the Washington D.C. police department, challenged the use of Test 21, a general civil service exam, as invalid under equal protection because logically the government should be held to the same standard as a private employer under Title VII. This was why the lower court in Davis held that because Test 21 produced a racially exclusionary effect, the burden shifted to the government to prove that the test was related to job performance and was justified by business necessity. Incorporating the Griggs test into the constitutional analysis, the court of appeals found that this burden had not been met as the proffered validity study showing a correlation between scores on the test and performance in recruit school was insufficient to establish job relatedness.

The Supreme Court ultimately repudiated this line of cases. To justify this reversal, the Court invoked precedent.


25 Davis, 426 US at 432-434.


reading \textit{Palmer v Thompson}\textsuperscript{20} to require invidious motive as an essential part of an equal protection claim.\textsuperscript{30} In fact, \textit{Palmer} treated evidence that the closure of public swimming pools was motivated by racially discriminatory animus as largely irrelevant.\textsuperscript{31} In determining that there was no constitutional violation, \textit{Palmer} asserted that the City’s actions produced no disparate impact, as the pools were closed to everyone.\textsuperscript{32} \textit{Davis} interpreted this language as “dicta” because “[\textit{Palmer}] did not involve, much less invalidate, a statute or [ordinance] having neutral purposes but disproportionate racial consequences.”\textsuperscript{33} In response, the dissent charged that the majority ignored logic and precedent in reaching this conclusion: Instead, the equal protection standard should not differ from that imposed on private actors.\textsuperscript{34}

\textit{Davis} resolved the debate over the relationship between Title VII and equal protection by holding that the constitutional standard for establishing discrimination should be more stringent than the statute. The Court has not since expended much effort in explaining precisely why this should be so, but rather treats the matter as settled. For a brief period, however, the presumption was that with regard to disparate impact, the statute and the Constitution articulated the same standard. The trend of this doctrinal logic was to expand equality for racial minorities by proscribing the use of unnecessary neutral rules that disproportionately disadvantaged them.

Conversely, court decisions have endorsed the view that Title VII and equal protection standards are equivalent in contexts where the reach of anti-discrimination measures and permissible remediation have been restricted rather than expanded. As the Court has articulated the equal protection standard in more stringent terms—requiring proof of specific intent to challenge racially disparate impact and compelling reasons to justify even limited forms of race-conscious

\textsuperscript{20} 403 US 217 (1971).
\textsuperscript{30} \textit{Davis}, 426 US at 242–45.
\textsuperscript{31} \textit{Palmer}, 403 US at 224 (1971) (“[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”).
\textsuperscript{32} Id at 225.
\textsuperscript{33} \textit{Davis}, 426 US at 242–45 (describing \textit{Palmer} as a case in which dicta, but not the holding, indicated the relevance of disproportionate impact).
\textsuperscript{34} Id at 256 (Brennan and Marshall dissenting).
remediation—it has also construed the Title VII standard to conform to this more restrictive constitutional metric. The next section considers this trajectory with respect to disparate treatment as well as affirmative action.

C. Disparate Treatment

A prime example of the conflation of the constitutional and statutory disparate treatment standards involves the issue of pregnancy. In *General Electric Co v Gilbert,* the Court considered whether the exclusion of pregnancy under an employer sponsored disability insurance plan constituted a violation of Title VII's prohibition against sex discrimination. *Gilbert* affirmed the holding and reasoning of an earlier equal protection case, *Geduldig v Aiello,* that pregnancy classifications were not sex discrimination because "pregnant women and non-pregnant persons" involved the former group which is "exclusively female" while the latter is not. Even though in *Gilbert,* the appellate court had considered *Geduldig* and concluded that the statutory and constitutional standards differed, the Court specifically rejected this distinction. Accordingly, the statutory interpretation converged with the constitutional doctrine.

The majority disputed Justice Stevens’ dissent, which argued that the definition of discrimination under the Constitution and Title VII were not the same:

> While there is no necessary inference that Congress, in choosing [Title VII] language, intended to incorporate into Title VII the concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and

---

36 Id at 127.
38 Id at 496–97.
39 *Gilbert,* 429 US at 135.
41 *Gilbert,* 429 US at 160 (Stevens dissenting).
some of those decisions surely indicate that the latter are
useful starting point in interpreting the former.\textsuperscript{42}

In this instance, the connection between Title VII and equal
protection was invoked to justify the exclusion of pregnancy
from sex discrimination and to narrow the scope of anti-
discrimination protection.

\textit{Gilbert} was ultimately overruled by the Pregnancy
Discrimination Act of 1978 under which Congress amended Title
VII to include discrimination because of pregnancy as
discrimination on the basis of sex.\textsuperscript{43} Despite substantial
criticism, \textit{Geduldig} has never been overruled.\textsuperscript{44} Presently, then,
the statutory protection of pregnancy discrimination exceeds the
constitutional standard.\textsuperscript{45}

\textsuperscript{42} Id at 133. The Court further asserted:

\begin{quote}

The concept of "discrimination," of course, was well known at the time of the
enactment of Title VII, having been associated with the Fourteenth
Amendment for nearly a century, and carrying with it a long history of judicial
construction. When Congress makes it unlawful for an employer to "discriminate ... because of ... sex ..." without further explanation of its
meaning, we should not readily infer that it meant something different from
what the concept of discrimination has traditionally meant[.]. There is surely no
reason for any such inference here.

Id at 145 (citations omitted).

\textsuperscript{43} See, for example, Shannon E. Liss, \textit{The Constitutionality of Pregnancy
Discrimination: The Lingering Effects of \textit{Geduldig} and Suggestions for Forcing Its
decisions that challenged the rationale in \textit{Geduldig}); Sylvia A. Law, \textit{Rethinking Sex and the
\textit{Geduldig} has [ ] become a cottage industry," and in 1984 citing "[o]ver two dozen law
review articles [that] condemned both the Court's approach and the result."); Peter
Nicolas, \textit{Gay Rights, Equal Protection, and the Classification-Framing Quandary}, 21 Geo
Mason L Rev 329, 348 (2014) ("However, the Court's equal protection holding in
\textit{Geduldig}—at least for now—remains good law.").

\textsuperscript{44} Pregnancy Discrimination Act, 42 USC § 2000e (2006).

\textsuperscript{45} Ironically then while \textit{Gilbert} relied upon \textit{Geduldig}'s narrow reading of equal
protection, with the passage of the Pregnancy Discrimination Act, Title VII has been
expanded beyond the constitutional constraints. Because Title VII also was amended to
cover governmental actors, this divergence between constitutional and statutory
standards has been less salient. Although this difference may have less practical
significance given that governmental employers now must comply with the statute, the
formalist logic of the case ignores that pregnancy is still intrinsically bound up with
women as a social category even though not all women have been or ever will be
pregnant. In erasing the social meaning and significance of pregnancy to the category
of women, \textit{Geduldig} implicitly legitimates the asymmetric organization of social control
and the exercise of the coercive power of law over women's reproductive lives. See also
Deborah A. Ellis, \textit{Protecting 'Pregnant Persons': Women's Equality and Reproductive
Freedom}, 6 Seton Hall Const L J 967, 969 (1999) ("With regard to pregnancy, the flaw in
the Court's current analysis is that it has refused to recognize that pregnancy
D. Affirmative Action

The Court has equated the scope of Title VII and equal protection in the context of affirmative action, but because that doctrine has been conflicted and unstable, with shifting majorities and dissents, it has not consistently done so. Moreover, distinctions between private and public employers and between voluntary and court imposed race conscious remedial programs have played significant roles in making differences between the statutory and constitutional parameters of affirmative action salient. Nevertheless, explicit claims that Title VII and equal protection standards applicable to affirmative action are equivalent have been advanced, often against the backdrop of narrowing jurisprudential concepts of equality under the constitution. In this section, I consider how the arguments for convergence have been featured in debates over voluntary affirmative action, for both public and private employers.

Voluntary affirmative action plans enacted by private employers have been evaluated under Title VII: public employers’ plans have been tested under the statute or under the Equal Protection Clause. Because of the widely held view that voluntary plans imposed by private employers do not implicate state action, the Court has held that they fall outside the constitutional parameters of equal protection.46 On the other
hand, despite the fact that Title VII also applies to public employers, because plaintiffs have not raised both statutory and equal protection claims within the same case, the Court has not assessed a government employer’s voluntary affirmative plan under both Title VII and equal protection standards.\textsuperscript{47}

Members of the Court and some commentators have embraced the notion that Title VII and equal protection standards governing race sensitive affirmative action impose the same constraints. However, even as the Court has upheld specific voluntary plans, the arguments for convergence often have functioned to narrow the permissible scope of race conscious remediation. This section examines that trajectory.

1. The emergence of convergence under Title VII.

The Court has considered challenges to voluntary affirmative action plans created by private employers under Title VII in \textit{United Steelworkers v Weber}\textsuperscript{48} and by public employers in \textit{Johnson v Transportation Agency of Santa Clara County}.\textsuperscript{49} In neither case did the Court decide the precise question of the constitutionality of the plan: Even against a government employer, the plaintiff in \textit{Johnson} raised only a statutory challenge.\textsuperscript{50} But the debate among the justices over

\begin{tcolorbox}[colback=white]
plaintiffs seeking redress from private affirmative action programs are required to use Title VII.”); \textit{Private Voluntary Affirmative Action Under Title VII}, 93 Harv L Rev 243, 245 n 10 (1979) (stating that the Court’s review of \textit{United Steelworkers of America v Weber}, 443 US 193 (1979) “did not involve an alleged violation of the equal protection clause of the Constitution because no state action was involved”); Roy L. Brooks, \textit{The Affirmative Action Issue: Law, Policy, and Morality}, 22 Conn L Rev 323, 338 (1990) (dividing affirmative action analysis into three categories: “(1) an equal protection standard applicable to public employer affirmative action programs for minorities (strict scrutiny standard); (2) an equal protection standard applicable to public employer affirmative action programs for females (intermediate scrutiny standard), on which the Supreme Court has not yet spoken; and (3) a Title VII standard applicable to public or private affirmative action programs for minorities or females (‘Title VII standard’ or ‘low scrutiny standard’)).

\textsuperscript{47} Timothy N. Tack, \textit{The Supreme Court’s Revenue of Voluntary Affirmative Action by Public Employers: Applying Different Standards Under Title VII and the Constitution}, 26 Willamette L Rev 957, 959 n 7 (1990) (stating that the Court “has only decided cases where \textit{either} a Title VII or equal protection claim was presented for review” and citing both \textit{Johnson v Transportation Agency of Santa Clara County}, 480 US 616 (1987) and \textit{Wygant v Jackson Board of Education}, 476 US 267 (1986) as examples of the Court’s singular analysis because plaintiffs based their claims on either statutory or constitutional grounds).

\textsuperscript{48} 443 US 193 (1979).

\textsuperscript{49} 480 US 616 (1987).

\textsuperscript{50} Id at 620 n 2. Johnson could have raised an Equal Protection challenge, but did
whether Title VII and equal protection imposed the same limits on the use of affirmative action included explicit claims that the standards were the same. This was hardly the prevailing view, however, as several of the plurality opinions argued that the standards were different. Convergence largely functioned at the perimeters of the debate but it ultimately came to have greater traction in authorizing the incorporation of heightened proof standards into equal protection analysis of public employer affirmative action plans. Put another way, the claim that the standards are the same has been deployed in the context of increasing the burden of proof on employers seeking to implement affirmative action. I consider how the arguments for convergence emerged in the context of the leading Title VII cases, Weber and Johnson.

In Weber, the Court sought to define the parameters of the statutory constraints imposed on voluntary affirmative action. The employer in the case, Kaiser Aluminum and Chemical Company, was a major industrial manufacturer whose unionized craft workforce was almost exclusively white. A collective bargaining agreement between Kaiser and the union opened up the job training opportunities for craft positions previously restricted to persons with prior experience—a prerequisite that excluded virtually all black workers as a result of the union’s racially exclusionary practices. To address this imbalance, the parties agreed to goals for minority representation that were set according to the proportion of the minority population in the labor market. Qualified incumbents were ranked by seniority: One minority employee was to be selected for each white employee from the pool until the goals were reached. Because of prior racially discriminatory practices, black candidates selected for the training program had less seniority than some whites, like Brian Weber. He charged that the employer’s action violated Title VII’s prohibition against disparate treatment based on race and further violated the statute’s

not. Id.  
52 Id at 198.  
53 Id at 199.  
54 Id.  
55 Section 703(a) prohibits discrimination “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin . . . .” 42 USC § 2000e-2(a).
Writing for the majority, Brennan’s opinion concluded that the plan did not violate the statute, given the legislative history: Because a primary objective of the act was “to open employment opportunities for Blacks in occupations ... traditionally closed to them,” interpreting the statute to prohibit employers from voluntarily exercising management prerogatives to provide those opportunities would frustrate that purpose. Simply put, notwithstanding the statutory wording, discrimination within the meaning of the statute did not include race conscious decisions made pursuant to a valid affirmative action plan. The dissent vigorously contested the majority’s reading of the legislative history and charged that its holding ignored the plain meaning of the statutory language.

Seven years later, in Johnson, the Court extended Weber’s rationale to public employers, interpreting the statute to permit affirmative action measures designed to address historic and persistent patterns of exclusion. The disappointed white male candidate, Johnson, asserted that the state’s reliance on a voluntary affirmative action program to promote Joyce, a female employee, to a historically all-male position constituted a violation of Title VII. While both candidates met the minimal qualifications, Johnson scored two points higher than Joyce on the relevant test and claimed he was therefore better qualified. However, the government disputed this assertion and argued that the agency’s decision was in furtherance of the long term objective of attaining a work force that better represented the local labor force, as well as short term goals which “set aside no specific number of positions ... but authorized the
consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented.” 62 As Johnson raised no equal protection challenge, the Court did not consider the constitutional issue. 63 Relying on Weber’s reasoning, the majority in Johnson asserted that evidence of a manifest imbalance in the workforce would provide crucial justification for the implementation of an affirmative action plan consistent with Title VII’s objective of “break[ing] down old patterns of racial segregation and hierarchy.” 64 The Court specifically noted that the Title VII standard differed from the constitutional metric, because Title VII “was enacted pursuant to the commerce power to regulate purely private decision making” and was not intended to instantiate constitutional standards. 65

In contrast, Justice Scalia asserted that with respect to a public employer, Title VII and constitutional standards should be considered equivalent. 66 On this view, because under equal protection analysis the Court had rejected societal discrimination as a compelling governmental interest sufficient to justify a race conscious layoff plan, similarly Santa Clara could not rely on societal patterns of inequality as a justification to choose a “less-qualified” female candidate over Johnson. 67 With respect to the relationship between the statute and equal protection, Scalia argued:

62 Id at 622. The agency’s supervisor invoked the plan in making the decision stating that he considered, “the whole picture, the combination of her qualifications and Mr. Johnson’s qualifications, their test scores, their expertise, their background, affirmative action matters, things like that . . . I believe it was a combination of all of those.” Id at 625.


65 Johnson, 480 US at 627 n 6. The Court drew a distinction between Title VI and Title VII: Title VI represented the exercise of federal power over a matter in which the Federal Government was already directly involved—the use of federal funds. Id. In contrast Title VII involved the regulation of private entities and thus was not grounded in equal protection, but in Congress powers to regulate interstate commerce.

66 Id at 664–68 (Scalia dissenting).

67 Scalia was referring to Wygant v Jackson Board of Education, 476 US 267 (1986), which held that societal discrimination was insufficient to justify a school board’s decision to modify seniority rules and retain a less senior black teacher over a white one during layoffs. Id at 276. See Section II for a discussion at greater length of this decision.
While Mr. Johnson does not advance a constitutional claim here, it is most unlikely that Title VII was intended to place a lesser restraint on discrimination by public actors than is established by the Constitution. The Court has already held that the prohibitions on discrimination in Title VI are at least as stringent as those in the Constitution. There is no good reason to think that Title VII, in this regard, is any different from Title VI. Because, therefore, those justifications (e.g., the remediying of past societal wrongs) that are inadequate to insulate discriminatory action from the racial discrimination prohibitions of the Constitution are also inadequate to insulate it from the racial discrimination prohibitions of Title VII; and because the portions of Title VII at issue here treat race and sex equivalently; Wygant, which dealt with race discrimination, is fully applicable precedent, and is squarely inconsistent with today’s decision.68

Although Justice O’Connor differed from Justice Scalia regarding the validity of the plan at issue, she similarly argued that the standards for evaluating voluntary affirmative action plans under Title VII and equal protection are equivalent:

[T]he proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause. In either case, consistent with the congressional intent to provide some measure of protection to the interests of the employer[s’] [white] employees, the employer must have had a firm basis for believing that remedial action was required.69

That firm basis, according to O’Connor, can be established by pointing to a “statistical disparity sufficient to support a prima facie claim under Title VII . . . of a pattern or practice claim of discrimination.”70 On this view, the employer’s decision at issue in Johnson did not violate the statute because the promotion of a qualified woman over a marginally better

68 Johnson, 480 US at 664-65 (Scalia dissenting) (citations omitted).
69 Id at 649 (O’Connor concurring).
70 Id.
qualified man was against the backdrop of evidence of discrimination equivalent to prima facie proof of a pattern or practice violation.

Scalia’s argument was a repudiation of race-conscious remediation more broadly, rendering it permissible only in narrow exceptions, while O’Connor found that the necessary justification for an employer to examine racial impact was satisfied by a firm basis in evidence that remediation was required.\(^7\) Notably, while Scalia and O’Connor held opposing views on whether Joyce’s selection pursuant to the agency’s affirmative action plan was justifiable under the statute, they concurred that the statutory and constitutional standards to evaluate the government’s voluntary affirmative action plan should be the same.

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 by leveling up, towards more limited definitions of discriminatory conduct and more restraints on affirmative action, or whether the more deferential statutory analysis should govern.\(^7\) In important respects, the claim that Title VII and equal protection impose the same limitations on affirmative action rested on an analysis that narrowed the grounds upon which affirmative action could be justified, albeit to differing degrees.

2. Convergence under equal protection.

While Weber and Johnson illustrate the trend towards convergence under Title VII, a similar trajectory emerged under equal protection as illustrated by Wygant v Jackson Board of

\(^7\) Id at 664-65 (Scalia dissenting); id at 649 (O’Connor concurring).

\(^7\) Compare Rothe Development Corp v Department of Defense, 545 F3d 1023, 1040 (Fed Cir 2008) (stating a stricter and less deferential standard requiring that a governmental body must provide a “substantially probative” foundation for the “strong basis in evidence” as a necessary predicate for race conscious action) with Dean v City of Shreveport, 438 F3d 448, 455 (5th Cir 2006) (deferring more to the government, saying: “Thus, to the extent our prior decisions were unclear, we now clarify that when a governmental unit employs a race-conscious remedy, it need not have already made a formal finding of past discrimination. Nevertheless, if the remedy is later challenged, the reviewing court must ensure there was strong evidence of past discrimination warranting the remedy.”). See generally Herman N. (Rusty) Johnson, Jr., The Evolving Strong-Basis-in-Evidence Standard, 32 Berkeley J Empl & Labor L 347 (2011).
At issue in *Wygant* was the constitutionality of race-sensitive seniority based layoffs initiated pursuant to a collective bargaining agreement between the Jackson School Board and the teachers’ union. The complex factual background revealed a fraught racial terrain in which the School Board, under pressure from agency investigations of discriminatory conduct and minority underrepresentation and related social unrest, initiated a plan to hire black teachers that significantly increased their number over a two-year period. However, because the original agreement provided for reverse seniority ordered layoffs, when financial cutbacks were required, the newly hired black teachers were laid off, erasing the recently secured gains. After racial violence erupted in the schools, the teachers union and the Board renegotiated the layoff provision to provide that “at no time will there be a greater percentage of minority personnel laid off than the current percent of minority personnel employed at the time of the layoff.” Subsequently, the Board declined to follow the provision when layoffs were again required. The union and the laid off minority teachers sued and won relief in state court, although the opinion concluded that there was no proof that the Board had engaged in overt discrimination; rather, the absence of minority teachers was the result of “societal discrimination.” In accordance with the contractual formula, the board then laid off some white teachers with greater seniority than their black counterparts. The laid-off white teachers challenged the school board’s decision as racial discrimination proscribed by the Equal Protection Clause.

Justice Powell’s opinion applied strict scrutiny review in holding that the school board’s plan violated equal protection. The Court found that the Board’s goal of remedying societal discrimination was not a compelling governmental interest, nor

---

74 Id at 267.
75 Id at 297–299 (Marshall dissenting).
76 Id at 270. Justice Marshall’s dissent pointed to the significant disruption that had resulted from that lack of black teachers in a school system where so many of the students were black. Id at 299 (Marshall dissenting).
77 *Wygant*, 476 US at 271.
78 Id at 272.
79 Id.
80 Id at 273–74.
was the preservation of positions for black teachers in order to serve as role models for black students: Some showing that the school board had previously engaged in racial discrimination was required before race could be taken into account.\(^8\)

Moreover, the plan did not meet the requirement of narrow tailoring because the layoffs imposed too high a burden on “innocent” third parties.\(^9\)

Powell noted that while the school board had justified the plan as an effort to remedy the racial disparity in the teaching staff, it erroneously compared the percentage of black teachers to the percentage of black students rather than comparing the employer’s workforce to the number of qualified persons in the appropriate labor market as was done in systemic discrimination cases.\(^10\) Further, he criticized the role model theory employed by the Board as “having no logical stopping point.”\(^11\) The board’s assertion that the purpose of the plan was to remedy its own prior discrimination was rejected as untimely, contradicted by prior claims and ultimately, not germane even if proven because the layoff provision was not a legally appropriate means of achieving a compelling governmental interest.\(^12\) Layoffs, Powell contended, “disrupt these settled expectations in a way that general hiring goals do not” and “impose the entire burden of achieving racial equality on particular individuals.”\(^13\)

Vigorously dissenting, Justice Marshall disputed the notion that the layoff provisions were unjustified, noting the prior agency findings that the Board had discriminated, as well as the affirmative vote of the 80 percent white union in favor of the renegotiated compromise agreement.\(^14\) Fundamentally, he argued that while the Court had previously failed to specifically elect between strict scrutiny and intermediate review as the appropriate standard, the plan should pass muster because of Jackson’s recent history as well as the overarching objective of supporting settlements.\(^15\) Justice Stevens also contested the

\(^8\) Wygant, 476 US at 275–76.
\(^9\) Id at 281–83.
\(^10\) Id at 275 (Powell) (plurality).
\(^11\) Id at 275.
\(^12\) Wygant, 476 US at 283.
\(^13\) Id at 283.
\(^14\) Id at 299 (Marshall dissenting).
\(^15\) Id at 302–06 (Marshall dissenting).
majority's framework. In his view, the appropriate question was not whether there was proof that the Board had discriminated in the past in order to establish "some sort of special entitlement to jobs as a remedy for sins [ ] committed in the past;" rather, the question was "whether the Board's action advances the public interest in educating children for the future." 89

Justice O'Connor concurred with the majority in rejecting the Board's justification as insufficient, and advanced an argument that Title VII and equal protection standards to evaluate an employer's voluntary affirmative action plan converged. Her opinion endeavored to bridge the gap between the majority and dissenting opinions, contending that the difference between the strict scrutiny standard advocated by Powell and the less stringent analyses endorsed by the dissenting justices was not significant.90 In her view, there was consensus on the factual predicate to meet the requisite governmental interest—remediation of past or present racial discrimination by the governmental actor.91 Moreover, while she agreed that remedying prior discrimination was a compelling governmental interest, a formal finding of actual discrimination was not "a constitutional prerequisite."92 Indeed, were it so, the value of voluntary compliance would be undermined.93 This value, she argued "is doubly important when it is a public employer that acts, both because of the example its voluntary assumption sets, and because the remediation of governmental discrimination is of unique importance."94

90 Wygant, 476 US at 313 (Stevens dissenting).
91 Id at 286 (O'Connor concurring).
92 Id. Specifically, she stated:

"Remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required."

She also noted that other governmental interests, like diversity, might be considered. Id.
93 Id at 289.
94 Wygant, 476 US at 289 (O'Connor concurring).
95 Id at 290. In support of her contention that correcting governmental discrimination held particular significance, she cited the congressional debates on the extension of Title VII to government employers: "Discrimination by government . . . serves a doubly destructive purpose. The exclusion of minorities from effective participation in the bureaucracy not only promotes ignorance of minority problems in
Moreover, to insist that a government employer make a contemporaneous finding of discrimination to justify an affirmative action plan “would produce the anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, public employers are constitutionally forbidden to do to correct their statutory and constitutional transgressions.” In O’Connor’s view, preserving the space for voluntary compliance argued for congruence and against the notion that the constitutional standard for evaluating a public employer’s race conscious remedial efforts should be higher and more difficult to meet than the standard justifying a private employer’s program under Title VII. In formally rejecting the notion of different standards she reasoned that Wygant, the equal protection case, was consistent with Weber, the Title VII case: Both affirmed that remediating past or present discrimination is sufficient to warrant remedial action but societal discrimination falls short of the requisite predicate.

Relative to Scalia’s position in Johnson, O’Connor’s formulation is less onerous, and would seem to authorize race conscious plans under terms not dissimilar to those imposed by the statute. However, O’Connor’s conflation of the constitutional and statutory standards implicitly authorized considerable constraints on voluntary affirmative action that departed from the Title VII analysis at least as articulated by Weber and Johnson. Notwithstanding O’Connor’s claim that Weber and Wygant imposed the same requirements, the standard she endorsed in Wygant required prima facie evidence of a pattern or practice violation by the employer, while Weber permitted voluntary affirmative action if the employer was seeking to remedy “manifest racial imbalances in traditionally segregated job categories.” Of course, the former could provide evidence of prior discrimination by an employer, but these metrics do not impose the same requirements: A manifest imbalance could arise from the use of neutral practices even absent evidence of

---

95 Id at 291.
96 Id at 290 (O’Connor concurring).
97 Wygant, 476 US at 292 (O’Connor concurring).
the employer’s prior discriminatory conduct or intent. This distance between the statutory and constitutional standards is obscured in O’Connor’s argument. Importantly, in treating the standards as congruent, O’Connor’s opinion effectively raised the bar on employers seeking to justify race conscious remedial plans, directly under equal protection analysis and implicitly under Title VII.

The legislative origins of Title VII of the Civil Rights Act and the historical context out of which it arose have been mobilized to support an argument the statute and the equal protection clause converge in facilitating the elimination of racial inequality, but often the claim the standards are the same has had a different and more restrictive valence. Certainly there are noted instances where the notion of congruency has not served to disable non-white plaintiffs from obtaining relief, but the trend overall is towards greater constraints.

II. TITLE VII AND EQUAL PROTECTION STANDARDS DIVERGE

Often, the assertion that the statutory and constitutional standards converge has been vigorously disputed. More specifically, the general consensus is that the equal protection metric is more stringent than the statute both in assessing whether an employer has engaged in unlawful discrimination and in determining the scope of permissible race conscious remediation. This part examines the claim that the standards diverge in the context of disputes over disparate impact, disparate treatment and affirmative action. Over time the notion that the standards differ has functioned to foreclose more robust conceptions of anti-discrimination measures to address racial inequality.

95 Griggs, 401 US at 432.
A. Scholarly Authority Establishes that the Standards Differ

Scholarly authority has largely concurred that the Equal Protection Clause imposes different and more stringent requirements than Title VII to justify race conscious affirmative action.\textsuperscript{101} Commentators point out that in particular, Title VII, "...does not require an employer to suggest that it may itself be guilty of past discrimination in order to justify the use of affirmative action."\textsuperscript{102} Curiously, this is treated more as settled law than proposition to be defended. The question is why the constitutional standard applied to affirmative action is or should be more stringent than that required under the statute. \textit{Washington v Davis} proffered a rationale—albeit one open to contest—to explain why the burden of proof to establish a disparate impact violation under equal protection should be higher than the burden under the statute.\textsuperscript{103} However, no similar justification has been advanced for the application of a more rigid constitutional standard in this context, where presumably government employers have at least an equal if not stronger interest than private employers in addressing long standing workforce imbalances. As O'Connor noted in \textit{Wygant}, unremedied discrimination by the government has a particularly corrosive effect.\textsuperscript{104}

B. Disparate Impact

In the context of disparate impact, the \textit{Davis} Court explicitly rejected the notion that the statutory and constitutional standards are the same: Assessing a private employer's conduct under Title VII “involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is

\textsuperscript{101} As one example, a leading employment discrimination textbook asserts, "There has yet to be a definitive resolution of the continued vitality of the Weber/Johnson approach because affirmative action plans used by public employers tend to be attacked under the more demanding standards of the equal protection clause." Michael J. Zimmer, Charles A. Sullivan, and Rebecca Harner White, \textit{Cases and Materials on Employment Discrimination} 183 (Aspen 8th ed 2013).


\textsuperscript{103} \textit{Davis}, 426 US at 240.

\textsuperscript{104} \textit{Wygant}, 476 US at 290.
appropriate under the Constitution where special racial impact, without discriminatory purpose, is claimed.” The Court expressed concern that because racial disparity in state institutions was ubiquitous, judicial intervention predicated on disparate impact would be too frequent and all encompassing:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Because Title VII did not apply to public employers until after the Davis case was pending and the plaintiffs did not amend the complaint, the Court avoided the question of whether a public employer would be subject to the Griggs Title VII standard. Were the Court to so hold, effectively the distinction between the statute and the Constitution upon which the Court relied practically would become irrelevant, at least in the realm of employment.

C. Disparate Treatment

In Gilbert, the dissent vigorously opposed the majority’s holding that the statutory and constitutional standards.

---

105 Davis, 426 US at 247.
106 Id at 248.
107 Id at 238 n 10.
108 The bifurcation between Title VII and Equal Protection with respect to disparate impact has created uncertainty about the fate of a public employer charged with a disparate impact case styled as a Griggs Title VII claim. Commentators have noticed and critiqued this consequence of Davis. See, for example, Tack, 26 Willamette L Rev at 969 (cited in note 47) (“In effect, the Court carves out a Title VII exception from its general rule that disparate impact analysis would be ‘far reaching’ and opens a Pandora’s box, but then refuses to apply that exception because the plaintiffs failed to allege a Title VII violation in this particular case. Had the plaintiffs done so, the distinction between Title VII and equal protection in the public employer context presumably would disappear. Unfortunately, the Court has not had another occasion to fuse back together this artificial break it created in Davis.”). One could see Ricci as that opportunity. See Part III(B)(1) (discussing Ricci as an endeavor to limit disparate impact through an equal protection like analysis).
governing pregnancy discrimination were the same.\textsuperscript{109} As the prior section illustrates, Justice Stevens argued that the meaning of discrimination under Title VII and equal protection necessarily differed given that under the Court's precedents, proving a constitutional violation is more difficult than proving a violation of the statute.\textsuperscript{110} Because of the enactment of the Pregnancy Discrimination Act, the Court has not returned to this debate in the context of interpreting the statute, and because of the extension of Title VII to governmental employers, it has not returned to the constitutional issue either.

Beyond the specific issue of pregnancy discrimination, the debate in the cases illustrates a logical tension around the issue of whether the statutory and constitutional standards should or do converge or differ. On the one hand, the Court had clearly demarcated Title VII from equal protection—\textit{Davis} being a prime example—but now determined that the statute and the constitutional prohibition covered, and more relevantly excluded, the same conduct. Despite Stevens' critique, this seeming inconsistency was not one the Court addressed.

D. Affirmative Action

1. Voluntary affirmative action plans are treated differently under Title VII and equal protection.

Leading cases assessing the validity of employers' voluntary affirmative action plans have revealed a distinction between the statutory and constitutional standards. \textit{Weber} did so in the context of a Title VII challenge to a private employer's plan while \textit{Johnson} held the standards were different in evaluating a public employer's plan.

\textit{Weber} has come to stand for the proposition that voluntary affirmative action should not be subjected to stringent proof requirements. Notwithstanding the language of the statute prohibiting any interpretation that "require[s] any employer . . . to grant preferential treatment . . . because of . . . race . . . on

\textsuperscript{109} \textit{Gilbert}, 429 US at 160 (Stevens dissenting).

\textsuperscript{110} Specifically, Stevens noted, "The word "discriminate" does not appear in the Equal Protection Clause. Since the plaintiffs' burden of proving a prima facie violation of that constitutional provision is significantly heavier than the burden of proving a prima facie violation of a statutory prohibition against discrimination, the constitutional holding in \textit{Geduldig v Aiello}, 417 US 484 (1974), does not control the question of statutory interpretation presented by this case." \textit{Gilbert}, 429 US at 160–61.
account of . . . an imbalance,” the majority held that the Company’s race sensitive affirmative action plan was consistent with Title VII’s objective “to eliminate a manifest racial imbalance.” The Court further explained, “[A]n 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. [With respect to the first part of the test] it need only point to a ‘conspicuous . . . imbalance in traditionally segregated job categories.’” As Blackmun’s concurrence noted, Weber’s plan was modeled on a prominent settlement ratified by the courts between the Department of Justice and the steel industry over charges of race and sex discrimination that awarded a multimillion dollar settlement to a class of over 50,000 workers and restructured hiring and promotional practices. The plan was in accord with important examples of key industrial and business sectors resolving discrimination complaints and prospectively reducing liability through negotiated agreements. Thus, the Court endorsed a more relaxed evaluation of voluntary employer prerogatives.

Johnson affirmed that reviewing such plans under the statute was different from the assessment under the Equal Protection Clause. In Johnson the Court explained that the requisite showing of a “manifest imbalance [in the workforce] need not be such that it would support a prima facie case against the employer . . . since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans.” Scalia argued that because Title VI’s constraints are equivalent to the constitutional standard, and Title VI resembles Title VII, so too did Title VII standards converge with equal protection.

113 Weber, 433 US at 215–19 (Blackmun concurring). United States v Allegheny-Ludlum Industries, 517 F2d 826 (5th Cir 1975), was one such example. In that case the district court refused to vacate consent decrees that permanently enjoined the United Steelworkers Union and nine major steel companies from discriminating on the basis of race and required affirmative action plans establishing goals and timetables correcting past discriminatory assignments, and back pay of over $30 million. Id at 833–37.
115 Johnson, 480 US at 632.
116 Id at 627 n 6. This statement by the majority ignores the fact that the legislative history of the 1972 amendments, the Equal Employment Opportunity Act, can be read to
However, the Johnson plurality noted an important distinction raised in Weber: Title VI was an exercise of federal authority over federal money, a subject already within congressional control, while Title VII was an extension of federal power to private conduct and “was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.” Moreover, even considering the extension of Title VII to cover public employers under the 1972 amendments:

"[T]here is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct.... The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.”

Thus, the plurality in Johnson reasoned that affirmative action could be justified under Title VII upon evidence of “manifest imbalance” as distinct from the more stringent equal protection requirement of a prima facie case of pattern or practice discrimination.

2. The statutory and constitutional standards evaluating court-imposed affirmative action are said to differ.

The premise that Title VII and equal protection impose different demands and limitations has appeared in the context of court-mandated affirmative action. In United States v Paradise the Court considered a judicially constructed, race-conscious remedial plan imposed in response to the state’s failure to rectify a pattern of racial exclusion of black applicants from employment and promotion in the Alabama Department of

---

118 Johnson, 480 US at 632 n 6.
119 Id at 632–33 (noting that “[a]pplication of a prima facie standard in Title VII cases would be inconsistent with Weber’s focus on statistical imbalance, and could inappropriately create a disincentive for employers to voluntarily adopt an affirmative action plan”).
The plan ordered that in the event the department had not developed and implemented an acceptable promotion plan, at least 50 percent of the promotions should go to qualified black applicants, if available. Without explicitly deciding the appropriate standard of equal protection review, the Court upheld the plan under a strict scrutiny based analysis: Even applying the most stringent test, remedying past and present discrimination was a compelling state interest in light of the Department's record of egregious discrimination and resistance. Moreover, the plan was narrowly tailored: Alternatives were inadequate, the plan was flexible and temporary, and did not impose an unacceptable burden on innocent third parties.

Justice Powell's concurrence affirmed this analysis, but in a footnote he opined that the standards of analysis under Title VII and equal protection differed. This comment was a rhetorical aside that did not address the specific question of whether the statutory and constitutional standards applicable to court-imposed affirmative action were the same. Powell's possible implication—that something different than strict scrutiny analysis—would be required, seems belied by the prevalence of strict scrutiny discourse in assessing judicially mandated race sensitive remedies under the statute or under equal protection. Indeed, as this next section illustrates, the

121 Id at 153.
122 Id at 163.
123 Id at 167.
124 Paradise, 480 US at 177-79.
125 Id at 186 n 1 (Powell concurring) ("Although we need not resolve the question in this case, I have not thought the standards of analysis in Title VII and equal protection cases—though similar—are identical."). Powell did not elaborate in this context, but the statement could be read as consistent with his position in other cases. See, for example, Davis, 426 US at 239. Justice Powell joined in the opinion written by Justice White which reads, "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." Id.
126 See Part III (discussing the similarities and transference between Title VII and Equal Protection in evaluating court ordered remedial plans). Moreover, commentators have puzzled over Powell's meaning. Rutherglen and Ortiz, 35 UCLA L Rev at 502 (cited in note 16), argue that this statement is particularly perplexing: "This possible divergence should not be totally surprising, but its direction is. If the Constitution really requires something different from Title VII, it does not, under Sheet Metal Workers, require anything stronger than proof of egregious discrimination. Any divergence must be in the direction of a weaker constitutional requirement. This is the opposite of the divergence between the constitutional and statutory standards for voluntary preferences.
relationship between Title VII and equal protection standards has been more symbiotic than might be suggested by any marked or implied difference.

III. DOCTRINAL TRANSFERENCE BETWEEN EQUAL PROTECTION AND TITLE VII

Even when the Courts have marked Title VII and constitutional standards as formally distinct, aspects of equal protection analysis have been imported into Title VII and Title VII doctrine also has been incorporated into the constitutional standard. The result is that the constitutional and statutory standards have become more similar operationally even when they are purportedly different. As governmental employers are regulated both by Title VII and the constitution, equal protection doctrine would necessarily influence the outcomes in cases involving the government. But even with respect to the voluntary actions of private employers, where the constitutional constraints do not apply, equal protection doctrine has exerted considerable influence on the interpretation of the statute.127 This impact is evident in disparate impact and affirmative action doctrine as well. While the cases sometimes distinguish statutory and constitutional standards, the boundaries between

With respect to voluntary preferences, the Constitution requires a "strong basis in evidence" of prior discrimination, whereas Title VII requires only a "manifest imbalance," a somewhat lesser showing. With respect to judicially ordered preferences, on the other hand, Title VII requires egregious discrimination, while the Constitution may require somewhat less. Thus, Title VII requires less than the Constitution in one context and possibly more in the other.127 Id.

127 Others have also argued that the constitutional standards exert greater influence. A leading textbook on employment discrimination notes:

Even where affirmative action plans have been challenged under Title VII alone, the Constitution has been visible in the background, influencing the outcome in a variety of different ways: by providing the standards for evaluating any form of government action involving affirmative action; by defining the fundamental concept of discrimination that ultimately determines the permissible forms of affirmative action; and by limiting the justifications that can be offered for any kind of affirmative action plan. The standards for permissible affirmative action under Title VII are . . . different from but similar to the constitutional standards. How far apart they are as a practical matter remains one of the important open questions in the law of affirmative action. Yet the dominant role of constitutional standards cannot be disputed.

them are quite porous, so that the analysis proceeds from similar premises and produces similar outcomes.

In this part, I explore several examples of the migration of Title VII doctrine in equal protection analysis and then the converse trajectory of equal protection analysis into the interpretation of the statute. However, this doctrinal intermingling has not been neutral in its impact, but rather has skewed towards limiting claims of racial discrimination by racial minorities, constraining the scope of permissible remediation and rendering race conscious remedial measures more vulnerable to attack.

A. Doctrinal Migration From Title VII to Equal Protection: The Example of Voluntary Affirmative Action

While doctrinally distinctions have been drawn between statutory and constitutional standards, aspects of Title VII’s framework regarding proof of discrimination have been imported into the Court’s assessment of affirmative action under the statute and under equal protection. Principally, the proof structure for demonstrating systemic intentional discrimination has been adopted as the factual predicate justifying the employer’s adoption of an affirmative action plan under equal protection:128 The Court compares the percentage of historically underrepresented employees in the workforce to the percentage of those groups available in the relevant labor pool—the pattern and practice violation articulated under Title VII129—to evaluate the constitutionality of affirmative action plans. On the other hand, the Court has drawn upon but modified the Title VII pattern and practice test in setting the standard applied in assessing voluntary race conscious remedial efforts under the statute: Here the Court has required evidence only of a “manifest imbalance.”130

Thus, the standards applied to evaluate voluntary affirmative action plans under Title VII and under equal protection are formally distinct, but draw upon the same interpretive structure of the pattern or practice case. In so

---

128 See Wygant, 476 US at 275–76 (holding a showing of prior discrimination in the practices of a school was necessary to allow the school to adopt an affirmative action plan); Section I.D.2.


130 See Section I.D.1 (discussing Weber and Johnson).
doing, the respective statutory and constitutional standards enact similar analytic limitations on voluntary race conscious affirmative action, albeit to different degrees. Moreover, even to the extent that they differ, the differences have become less significant over time as the equal protection analysis has become more prevalent. In the absence of Supreme Court decisions after Johnson further interpreting Title VII affirmative action law, the continued viability of the Weber and Johnson as Title VII precedent has been questioned. This ambiguity has privileged and made more prominent the equal protection framework applied to employers’ voluntary affirmative action efforts. Under equal protection, such plans require more rigorous justification modeled on the standard developed in systemic discrimination cases. These doctrinal transfers served to legitimate and reify more restrictive interpretations of the statute and the constitution.

In mapping the transference of Title VII standards into equal protection analysis, I begin by analyzing the Court’s constitutional analysis in Wygant and its incorporation of the pattern and practice framework. I consider how that framework sets up barriers to the implementation of voluntary affirmative action that have been insufficiently considered. I next examine the Title VII standard for voluntary affirmative action as articulated by Weber and Johnson, which admittedly is less stringent than the equal protection standard, but also imposes some constraints. Not only are Title VII standards applied in evaluating such plans perceived as more lenient: They have also become less visible and have exerted less influence on the consideration of affirmative action.

1. Wygant incorporates Title VII standards into equal protection analysis and thereby imposes greater restrictions on affirmative action.

Wygant applied strict scrutiny review in striking down the Jackson School Board’s decision to follow the modified collective bargaining agreement that altered the seniority rules in order to preserve recent gains in racially integrating the teaching staff.131 Addressing societal discrimination was not a compelling governmental interest, nor was the disparity between the

relative percentages of black teachers and black students relevant. Instead, the Court called for “a strong basis in evidence” in support of the employer’s conclusion that remedial action was necessary. The requisite proof can be established by evidence of a statistically significant disparity between the number of underrepresented employees in the workforce and the percentage of qualified workers available in the labor pool, the metric O’Connor endorsed in her concurrence. Thus, Title VII doctrine regarding liability for discrimination is transposed into the equal protection analysis.

Wygant’s equal protection test, even as interpreted by O’Connor, imposes nontrivial and arguably unwarranted limitations on voluntary affirmative action. Even setting aside the constraints implied in strict scrutiny review, it is not clear why the standard of proof of a prima facie case of a pattern and practice violation is imposed here. The presumption seems to be that the reasoning is self-evident, that the doctrinal features would and should travel seamlessly.

But not all agree. As one scholar has argued, in evaluating whether a plaintiff can establish systemic intentional discrimination—the gravamen of the “pattern and practice” case—it may be appropriate to require evidence of a statistical disparity between the percentage of underrepresented employees in the relevant job category and the number in the relevant labor market, but it is not clear that this is the correct inquiry in the context of voluntary affirmative action. If the statute was designed to incentivize employers’ voluntary efforts to eliminate past and current disparities in employment opportunities, arguably the doctrinal structure deployed to evaluate voluntary affirmative action should be consistent with that statutory purpose. A comparison between the percentage of qualified underrepresented jobseekers and the percentage of underrepresented workers may not reveal a statistically significant difference even though the paucity of qualified

132 Id at 277.
134 Wygant, 476 US at 284–86 (O’Connor concurring).
136 Id at 1018–21.
minority applicants may have resulted from pervasive discrimination within the industry.\footnote{Johnson} Seen in this light, the pattern and practice test applied in this context may unduly limit the exercise of the employers’ managerial prerogative to expand opportunity where it has been most restricted.

Moreover, while the statistical disparity between the percentage of underrepresented groups in the workforce and the percentage in the local labor market reasonably counts as a relevant factor in establishing proof of discrimination, it is not always an accurate metric and its parameters are not always easily defined. The labor market for a given position may be affected by shifts in the local population, or an employer may draw the workforce from multiple areas, across geographic and governmental boundaries, making the identification of the labor market more complex.\footnote{Johnson} Employers may recruit workers from geographic areas that are racially segregated,\footnote{Johnson} or the

\footnote{Johnson} interpreted Weber to permit the comparison to the general labor market where no specialized skills were needed:

Such an approach reflected the recognition that the proportion of black craft workers in the local labor force was likely as miniscule as the proportion in Kaiser's work force. The [Weber] Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities.

\footnote{Johnson} For an example of how contentious and difficult this can be, see Hazelwood, 433 US at 306-08, where the plaintiff class disputed the employer's definition of the geographical area. See also Wards Cove Packing Co, Inc v Atonio, 490 US 642 (1989), superseded by statute, Civil Rights Act of 1991, Pub L No 102-166, 105 Stat 1074, as recognized in Raytheon Co v Hernandez, 540 US 44 (2003) (disputing the relevant labor market where different markets tied to different jobs in the same firm).

\footnote{Johnson} Thus, for example, if a neighborhood or area has very few black residents—say 2 percent—then an employer's decision to draw a workforce from that geographic area will have a restrictive effect on the numbers in the workplace. For of evidence of how residential segregation affects job discrimination, see generally Douglas S. Massey, Jonathan Rothwell and Thurston Domina, The Changing Bases of Segregation in the United States, 626 Annals Am Acad Pol & Soc Sci 74 (2008) (on residential segregation generally); George Wilson, Racialized Life-Chance Opportunities Across the Class Structure: The Case of African Americans, 609 Annals Am Acad Pol & Soc Sci 215, 217 (2007) (“This article examines the manner in which spheres of employment and residence help to explain the racialization of life-chance opportunities at both the impoverished and the middle-class levels.”). The issue is raised in multiple employment discrimination cases. See, for example, NAACP v North Hudson Regional Fire & Rescue, 665 F3d 464, 469 (3d Cir 2011) (residency requirement caused a disparate impact); NAACP v Town of Harrison, NJ, 940 F2d 792, 812 (3d Cir 1991) (affirming a disparate impact finding where a residency requirement for municipal employment kept jobs from minority groups in neighboring communities).
concentration of one group in certain jobs may be evidence of discrimination.\footnote{Workforces comprised overwhelmingly of women or people of color are those in which workers often receive lower pay, creating what might be described as low wage ghettos. See, for example, \textit{International Union v State of Michigan}, 673 F Supp 893, 897 (1987). See generally Tracy E. Higgins, \textit{Job Segregation, Gender Blindness, and Employee Agency}, 55 Me L Rev 241 (2003); Barbara H. Wootton, \textit{Gender Differences in Occupational Employment}, Monthly Labor Rev 15 (1997).

\footnote{Weber, 443 US at 208–09.}}

In sum, the incorporation of Title VII's pattern and practice analysis into the court’s assessment of a government employer’s affirmative action plan has worked to restrict remedial action designed to address the systemic racial inequality in employment.

2. Comparing \textit{Weber} and \textit{Johnson} in mapping the transference between Title VII and equal protection.

Because the Court in \textit{Weber} was concerned that Title VII not be used to lock in existing inequality, it borrowed from but modified the test in pattern and practice cases that calibrated discrimination by, in part, assessing the statistical disparity between the composition of the workforce and the relevant labor market.\footnote{See, for example, \textit{United States v T.I. M.E.-D.C. Inc}, 517 F2d 289, 315 (5th Cir 1975), vacd by \textit{International Brotherhood of Teamsters v United States}, 431 US 324 (1977) (comparing the number of black workers in the workforce, the “inexorable zero” in that case, to the number in the relevant labor market calculated with reference to the general population.).} Instead of the pure pattern and practice analysis, \textit{Weber} looked to whether there was a manifest imbalance in traditionally segregated job categories—arguably a less stringent standard.

Yet, beneath this seeming consensus about the import of \textit{Weber}, the meaning of the “manifest imbalance” standard is open to debate, as the Court and individual Justices have invoked different formulations. The Court in \textit{Weber} posed the relevant inquiry as whether there was a conspicuous or manifest imbalance in traditionally segregated job categories. This analysis was less specific than contemplated by the pattern and practice cases that compared the number of underrepresented workers and the number of qualified underrepresented persons in the relevant labor market.\footnote{See generally \textit{United States v T.I. M.E.-D.C. Inc}, 517 F2d 289, 315 (5th Cir 1975), vacd by \textit{International Brotherhood of Teamsters v United States}, 431 US 324 (1977) (comparing the number of black workers in the workforce, the “inexorable zero” in that case, to the number in the relevant labor market calculated with reference to the general population.).} Arguably, the Court was aware that the latter comparison might show little or no statistical disparity, not because there was so little discrimination, but
rather because discrimination was so pervasive. In that circumstance, the relevant labor market would be impacted and indeed shaped by discrimination. A paradigm example is Weber itself in which there were few eligible black workers available for the training program because the discriminatory conduct of the union had denied them an opportunity to acquire the necessary preliminary qualifications.

This standard also was less demanding than the “arguable violation” standard that Justice Blackmun initially favored and that both Kaiser and the United States had urged. While the “arguable violation” test is focused on the behavior of the employer, the traditionally segregated job categories test would include disparities not directly connected to the employer’s specific conduct, and would include any pre-Act discrimination. Ultimately, however, Blackmun was persuaded that the traditionally segregated job categories test was appropriate as a private employer’s affirmative action plan should be able to go beyond the minimum requirements of the statute.

Taken together, Weber’s deviation from the prima facie pattern and practice standard and the arguable violation requirement supports the view that the Title VII standard is both less stringent than equal protection analysis and is also less rigorous than the Title VII pattern and practice standard. On one view, this doctrinal framework does not unduly restrict efforts to remove entrenched barriers and reasonably balance competing interests. However, closer analysis of the impact and trajectory of the “manifest imbalance” standard complicates and to some degree qualifies that conclusion. The immediate impact was to set a lower threshold, but the test does not always capture the ways in which inequality is structured into the

---

143 The Court took judicial notice that black workers had been excluded from craft jobs, Weber, 443 US at 198.

144 Weber, 443 US at 211 (O’Connor concurring). This “lowering” of the standard of proof to justify affirmative action has been subject to some critique. See Tack, 26 Willamette L Rev at 975–76 (cited in note 47) (arguing that “[Weber] announced a lower factual predicate in Title VII cases . . . [that] did not require the employer to discover that it might be subject to a prima facie or even an arguable Title VII claim before it embarked on an affirmative action program . . . [that permitted] a plan based largely on societal past discrimination against blacks as a group . . . [and] sanctioned the use of race not only as a ‘plus’ but as the determinative factor in making a particular employment decision”).

workplace nor has it had significant influence on the direction of equality jurisprudence.

Relying on Weber, the Court in Johnson upheld the promotion of a female employee over a male applicant pursuant to a voluntary affirmative action plan. The plan at issue was justified, like Kaiser's plan in Weber, because it was designed to correct a “manifest imbalance reflecting the underrepresentation of women in traditionally segregated job categories.” While the Court acknowledged that under the pattern and practice framework, the relevant comparison is between the number of women in the relevant jobs and the number of available qualified candidates, it allowed the comparison to the general population because there were no special requirements for the feeder positions for the job at issue. Moreover, because of the stark disparity between the gender composition of the work force and general labor pool—no woman had ever held the job—the Court held that the plan was a valid effort to address a manifest imbalance. There was no required showing that the job categories had been traditionally segregated. Citing the Ninth Circuit opinion with approval, the Court noted, “A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation.” Clearly, this standard was not equivalent to or as rigorous as the constitutional standard of strict scrutiny urged by Scalia's dissent. It also differed from and presumably was less precise than the “statistical disparity sufficient to support a prima facie claim . . . of a pattern or practice claim of discrimination” urged by O'Connor in her concurrence.

Johnson allowed employers greater latitude in implementing voluntary affirmative action plans under Title VII: Employers are not required to prove that the plan was adopted to remedy past discrimination nor does they have to show that the imbalance was the consequence of the employers'
exclusionary policies. They merely had to demonstrate a “manifest imbalance.”

3. Reading Title VII and equal protection together.

While formally, private employers do not have to meet the same evidentiary requirements as those imposed by the Equal Protection Clause under Wygant, the line between the statutory and constitutional standards is not so well delineated. Both Johnson and Weber as interpretations of the statute, and Wygant, as an interpretation of equal protection, call for comparison between the percentage of underrepresented groups in the workforce and in the relevant labor pool. The former Title VII cases are more generous in terms of defining the labor pool, but nevertheless, the underlying premise of all three decisions is that justification rests on proof of statistical disparity of some kind. To that extent they do not escape the concerns previously delineated regarding why a statistical disparity between the utilization in the workforce and the labor market—even one more broadly defined than under the Hazelwood standard—may not capture relevant and significant discrimination.

Thus, paradoxically, while the statutory standard has been characterized as less onerous than the constitutional rule, the former may also impose unnecessary and artificial barriers to the implementation of affirmative action plans and to achieving equal opportunity. At least one Justice has expressed the view that proof of a manifest imbalance or statistical disparity may be unwarranted. Justice Stevens’ concurring opinion in Johnson argued:

I see no reason why the employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII. Indeed, in some instances

---

152 This position has been criticized for being insufficiently marked and argued. Mary C. Daly criticizes Johnson for relaxing the standard in this sense, questioning whether it was appropriate for the Court to “recast the Weber formula in a significantly different manner without acknowledging the change.” Daly, 30 BC L Rev at 26 (cited in note 114). Other commentators have also argued that relying on the manifest imbalance standard as articulated in the systemic discrimination context would allow the court to draw upon existing case law. See Rutherglen and Ortiz, 35 UCLA L Rev at 482 (cited in note 16).

the employer may find it more helpful to focus on the future. Instead of retroactively scrutinizing his own or society’s possible exclusions of minorities in the past to determine the outer limits of a valid affirmative action program—or, indeed, any particular affirmative-action decision—in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of under-represented groups.  

These include preventing racial tension, enhancing diversity, providing better services to black citizens, or eliminating a system of racial caste.  

Moreover, some formulations of the manifest imbalance standard incorporate the additional qualifier that this imbalance is assessed with respect to “traditionally segregated job categories.” This seems logical as a descriptive matter in the context of Weber and Johnson where the categories at issue had been severely restricted historically, but outside that context, the addition of the “traditionally segregated jobs” aspect of the test could be problematic from the standpoint of the statutory goal. Rather than encouraging employers to exercise their power over employment procedures to increase the inclusion of previously excluded groups, the “traditionally segregated jobs” requirement can easily be read as requiring that an employer acknowledge its own discrimination before developing a plan to increase the number of underrepresented workers. In fact, some lower courts have interpreted this provision to require proof that the category of jobs had been impacted by past or present discrimination.  

Fundamentally, even assuming a meaningful distinction between the Johnson/Weber “manifest imbalance” standard and Wygant’s test, the latter has exerted greater influence. First, the equal protection analysis has been more broadly applied. For example, in City of Richmond v J.A. Croson, the Court extended the Wygant analysis from the employment sphere to

\[154\] Johnson, 480 US at 646-47 (Stevens concurring).
\[155\] Id at 647, quoting Sullivan, 100 Harv L Rev at 96 (cited in note 102).
\[156\] See Johnson, 480 US at 620; Weber, 443 US at 197.
\[157\] See, for example, Schurr v Resorts International Hotel, Inc, 196 F3d 486, 497–99 (3rd Cir 1999); Lomack v City of Newark, 463 F3d 303, 307 (3d Cir 2006).
government contracts.\textsuperscript{159} It invalidated Richmond’s affirmative action plan to increase minority participation in city government contracting in part because it found the factual predicate invoked by the City—the near total lack of contracts awarded to minority contractors compared to the minority population—to be inadequate. Relying on Title VII’s labor market standards, O’Connor’s opinion challenged the City’s targeted goals of 30 percent\textsuperscript{160} and demanded proof that the percentage of city contracts awarded to minority contractors was substantially less than the percentage of qualified minority contractors. This contrasts with Marshall’s dissent which argued that the standards differed and criticized the majority for conflating Title VII and equal protection standards and effectively making the constitutional validity of an affirmative action plan dependent on a local assessment of whether the conduct constituted discrimination.\textsuperscript{161} O’Connor’s analysis in both \textit{Wygant} and \textit{Croson} reflected the importation of Title VII pattern and practice standards into the equal protection metric and the ratification of a less deferential stance towards even voluntarily adopted plans.

\begin{itemize}
\item \textsuperscript{159} City of Richmond v J.A. Croson Co, 488 US 469, 492–94 (1989).
\item \textsuperscript{160} Id at 488.
\item \textsuperscript{161} Id at 551–56 (Marshall dissenting). In his view, the Court’s holding conflated Title VII and Equal Protection standards by conditioning locally enacted race conscious affirmative action plans on evidence of a prima facie case of the locality’s constitutional or statutory violation:
\begin{quote}
[On the majority’s view] [t]he meaning of “equal protection of the laws” thus turns on the happenstance of whether a state or local body has previously defined illegal discrimination. Indeed, given that racially discriminatory cities may be the ones least likely to have tough antidiscrimination laws on their books, the majority’s constitutional incorporation of state and local statutes has the perverse effect of inhibiting those States or localities with the worst records of official racism from taking remedial action. Similar flaws would inhere in the majority’s standard even if it incorporated only federal antidiscrimination statutes. If Congress tomorrow dramatically expanded Title VII . . . or alternatively, if it repealed that legislation altogether—the meaning of equal protection would change precipitately along with it. Whatever the Framers of the Fourteenth Amendment had in mind in 1868, it certainly was not that the content of their Amendment would turn on the amendments to or the evolving interpretations of a federal statute passed nearly a century later.
\end{quote}
\end{itemize}

Id at 556. Marshall’s contention was that the determination of an equal protection violation should not rest on whether the conduct was prohibited under local, state or federal law. His reasoning reflects a sense that Title VII and the equal protection clause are not necessarily co-extensive in all contexts. This logically follows from the fact that the statute is more readily and frequently amended, and that the meaning of the constitution should not be so easily changed.
Secondly, Weber and Johnson’s more generous standard for justifying voluntary affirmative action has largely been overshadowed by increasingly stringent proof requirements articulated in the context of equal protection analysis. In a certain sense, this is related to the fact that subsequent to Johnson, no Supreme Court case has evaluated an employer’s voluntary affirmative action plan under the statute. Indeed, given the Court’s equal protection jurisprudence, many commentators have questioned the continued viability of Johnson and Weber.

Apart from whether the current court would affirm this precedent, the effect of importing Title VII pattern and practice standards into the equal protection analysis of voluntary affirmative action is to narrow the space for permissible race conscious remediation under the constitution as well as under the statute without expressly overruling or setting precedent. As the Court’s equal protection analysis has become more influential and exercised more hydraulic pressure on the statutory interpretation, the ground for race-sensitive remedial action has narrowed.

B. From Equal Protection to Title VII: The Return

As previously noted, more stringent doctrinal constraints have not only emerged in the way that aspects of Title VII doctrine have been transferred into equal protection analysis:

---

162 Roberto L. Corrada, Ricci’s Dicta: Signaling a New Standard for Affirmative Action Under Title VII?, 46 Wake Forest L Rev 241, 241 (2011) ("The standard for voluntary affirmative action under Title VII has been in question in recent years. The last United States Supreme Court opinion to directly address the matter is over twenty years old.").

163 See Sachin S. Pandya, Detecting the Stealth Erosion of Precedent: Affirmative Action After Ricci, 31 Berkeley J Emp & Labor L 285, 330 (2010) ("[I]n Ricci, the Court likely wrote the majority opinion in such a way as to erode Weber and Johnson by stealth to make it easier to later expressly limit the circumstances under which Title VII permits voluntary affirmative action plans."); Corrada, 46 Wake Forest L Rev at 257 (cited in note 162) (explaining that Weber and Johnson, as precedent for voluntary affirmative action cases, are “dated and likely do not reflect the current thinking of the Court in these matters”); Tracy E. Higgins and Laura A. Rosenberg, Agency, Equality, and Antidiscrimination Law, 85 Cornell L Rev 1194, 1214 (2000) (stating in regards to the Weber and Johnson standards that “notwithstanding the clear language in Johnson, lower courts have increasingly collapsed the two standards, effectively limiting the scope of voluntary affirmative action by private employers under Title VII”).

The return of equal protection analysis into Title VII has similarly constricted the space for racial minorities to secure relief from exclusionary employment practices. This section considers this trajectory in the context of disparate impact, disparate treatment and affirmative action plans.

1. Disparate impact: *Ricci*.

As previously noted, in *Ricci* the Court struck down the City’s decision to cancel its testing and scoring procedures because they operated to disproportionately exclude black and Latino applicants for promotion in the City’s fire department.\(^{165}\) While the City asserted that it acted to avoid creating disparate racial impact by using exclusionary criteria that had not been validated to job performance, the Court held that the City had not established the requisite factual predicate.\(^{166}\) What the City characterized as a race neutral decision—cancelling the results and scores for everyone, the majority asserted was an action driven by the “raw racial results.”\(^{167}\) On this view the two proof structures of Title VII—disparate impact and intentional disparate treatment—were presumably in conflict as the effort to avoid the former produced liability for the latter.\(^{168}\) The City’s action could not be based on the good faith belief that it would be liable for disparate impact: What was required was “a strong basis in evidence”—a standard transplanted from equal protection analysis of affirmative action.\(^{169}\) In part this reflected the Court’s conflation of disparate impact with affirmative action.\(^{170}\) The Court rejected the more lenient standard of good faith belief proposed by New Haven, because it created the risk of incentivizing a “de facto quota” system.\(^{171}\)

While the Court could have drawn on the *Johnson/Weber* Title VII standard of “conspicuous imbalance” in the context of a

\(^{165}\) *Ricci*, 557 US at 579.

\(^{166}\) Id at 592.

\(^{167}\) Id at 593.

\(^{168}\) Id.

\(^{169}\) *Ricci*, 557 US at 593.


\(^{171}\) *Ricci*, 557 US at 581. But this question was purportedly settled by the post-*Watson* statutory amendments enacted in 1991 that reaffirmed and overruled the Court’s interpretation of disparate impact.
Title VII challenge, instead it looked to the equal protection standard of a strong basis in evidence to interpret the statute. According to the majority, the strong basis in evidence standard was necessary to resolve the tension between Title VII's disparate impact and disparate treatment provisions.\textsuperscript{172} The issue of whether the Title VII and equal protection standards are the same was not resolved: potentially the constitutional standard might require something more or different than a strong basis in evidence of disparate impact.


Justice O'Connor's concurring opinion in \textit{Price Waterhouse v Hopkins}\textsuperscript{173} was predicated at least in part on a distinction between what the statute and equal protection required.\textsuperscript{174} In that case Ann Hopkins claimed that her employer's refusal to promote her to partner in a leading accounting firm was sex discrimination prohibited by Title VII because the employer's decision was motivated by the perception that she was insufficiently feminine.\textsuperscript{175} Despite the fact that she excelled at her job, the negative partnership vote included comments that she needed to “walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, [ ] wear jewelry” and attend charm school.\textsuperscript{176} In evaluating Hopkins' charge, O'Connor argued that once evidence was adduced that gender stereotyping played a role in the decision, the burden shifted to the employer to show that the same decision would have been made if based solely on nondiscriminatory considerations.\textsuperscript{177} She further asserted that under Title VII this burden shifting was justified in comparison to equal protection analysis where the burden shifts to the State to show “permissibly race-neutral criteria.”\textsuperscript{178} Notably, while asserting that the standards differ, there seems to be considerable overlap between them.

\begin{thebibliography}{99}
\bibitem{172} \textit{Ricci}, 557 US at 558.
\bibitem{173} 490 US 228 (1989).
\bibitem{175} Id at 261.
\bibitem{176} Id at 235.
\bibitem{177} Id.
\bibitem{178} \textit{Price Waterhouse}, 490 US at 269.
\end{thebibliography}
3. Court ordered affirmative action.

This continuity between the statutory and the constitutional standards is particularly evident in the context of court ordered race conscious remediation. In evaluating judicially imposed affirmative action plans imposed on private and public employers, it has expressly considered whether these measures are valid under Title VII. Moreover, because the remedies are imposed by a court, state action is said to be present and so the Court has also considered whether these orders violate equal protection guarantees. In that sense, these cases foreground constitutional questions that remained submerged in cases involving voluntary affirmative action plans adopted by public employers. Here the court has not expressly declared that the standards for private or public employers are different, nor has it ruled that they are the same. Instead, disclaiming the adoption of a specific constitutional test, the Court has upheld these judicially imposed remedial measures under strict scrutiny or strict scrutiny-like standards. Effectively, the Court has treated the validity of court ordered race conscious remediation under the statute and under the constitution as analytically separate questions but invoked the framework of strict scrutiny analysis under both. As the decisions in these cases are fractured, involving multiple concurring and dissenting opinions, there is little clear consensus, but at the same time, the gravitational pull towards strict scrutiny as the dominant analysis seems evident. Both *Sheet Metal Workers v EEOC* and *Paradise* are leading examples.

In *Sheet Metal Workers*, the Court considered a judicially ordered race-conscious affirmative action plan to remedy a protracted pattern of discriminatory conduct by the union in violation of Title VII. In opposition, the union argued that the remedial plan, which set a goal of 29 percent non-white...
membership, violated Title VII and constituted a denial of equal protection. \(^{182}\) The Court rejected the union’s claim and upheld the plan both under Title VII and constitutional standards. Title VII’s provision that an employer is not required to adopt a quota or preference because of a racial imbalance in the workforce did not deprive the Court of authority to order this remedial measure. \(^{183}\) Moreover, Title VII’s section 706(g) which granted the trial courts broad discretion to order equitable relief, but prohibited an order requiring a union to admit a member for any reason other than discrimination, was interpreted not to limit judicially imposed remedies to those that benefitted only the actual victims of discrimination. \(^{184}\) The statute allows a court to order “affirmative race-conscious relief as a remedy for past discrimination,” particularly in circumstances of flagrant and egregious violations. \(^{185}\) Under Title VII, then, these remedial measures were necessary to address the discriminatory conduct, were applied in a flexible way, were temporary, and did not “unnecessarily trammel the interests of white employees.” \(^{186}\)

With respect to the equal protection question, the plurality declined to adopt any particular standard from among various formulations for judging the constitutionality of the race-conscious affirmative remedies. \(^{187}\) However, the Court held that

---

\(^{182}\) Id at 479–80. In this instance it was the equal protection guarantee that is part the due process clause of the Fifth Amendment.

\(^{183}\) Id at 464. Section 703(g) 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 any 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.

42 USC § 2000e-2(g).

\(^{184}\) Sheet Metal Workers, 478 US at 447; 42 USC § 2000e-5(g).

\(^{185}\) Sheet Metal Workers, 478 US at 476.

\(^{186}\) Id at 476–79.

\(^{187}\) Id at 478: Wygant, 476 US at 274 (noting that means chosen must be “narrowly tailored” to achieve “compelling government interest”); Wygant, 476 US at 313 (Stevens dissenting) (explaining that the public interest served by racial classifications and the
the evidence demonstrating the union’s long standing and egregious discriminatory conduct established a compelling governmental interest. In addition, the measures were narrowly tailored because they were necessary to end the violations, were temporary and had only “a marginal impact on the interests of white workers.” While not deciding that strict scrutiny applied, the Court ruled that in effect the program had met the most stringent standard of review—strict scrutiny—and thus was constitutional.

Notably, even though the Court did not expressly state that the standards under the statute and the constitution were the same and analytically bifurcated the analysis, the standards as applied are minimally, if at all, different. In this context, the distinctions between “egregious discrimination” as the predicate under Title VII, and the compelling governmental interest in remedying past and present discrimination under equal protection seem difficult to discern.

There were concurring and dissenting views. On the constitutional issue, Powell’s concurrence also invoked the language of strict scrutiny to find that where an organization has engaged in an extensive pattern of egregious discriminatory conduct, race targeted remedial goals could be justified. Powell reasoned that without the authority to set a benchmark against which to measure the union’s progress, the district court would have been unable to craft an effective remedy. Echoing strict scrutiny analysis, Powell’s evaluation of the district court’s order identified several factors relevant to the determination that the plan was narrowly drawn and echoed strict scrutiny analysis: the efficacy of alternative remedies, the temporary nature of the plan, the availability of waivers, and the disparity means pursued must justify adverse effects on the disadvantaged group); \textit{Fullilove v Klutznick}, 448 US 448, 491 (1980) (explaining that racial preferences are subject to “a most searching examination”); \textit{Fullilove}, 448 US at 519 (Marshall concurring) (noting that remedial use of race must be substantially related to achievement of important governmental objectives); \textit{Regents of the University of California v Bakke}, 438 US 265, 305 (1978) (explaining that racial classification must be necessary to accomplishment of substantial state interest); \textit{Bakke}, 438 US at 359 (Brennan concurring) (explaining that the remedial use of race must be substantially related to achievement of important governmental objectives).

\begin{enumerate}
\item[188] \textit{Sheet Metal}, 478 US at 480–81.
\item[189] Id at 481.
\item[190] Id at 485.
\item[191] Id at 486–87.
\end{enumerate}
between the number of minority workers employed and the number of available minority members in the relevant population. Notably, while the plan imposed some potential delay to white troopers seeking promotion, the burden was sufficiently diffuse to be permissible. O'Connor, concurring in part and dissenting in part, rejected the Court's judgment with regard to the membership goals and the fund, finding them to effectively impose a racial quota requiring the kind of racial balancing prohibited by the statute.

In *Paradise*, as in *Sheet Metal Workers*, the district court found a pattern of egregious discrimination: The Alabama Department of Public Safety “had systematically excluded Blacks from employment as state troopers in violation of the Fourteenth Amendment.” When a hiring quota and consent decrees altering the department's hiring and promotion practices proved ineffective, the judge ordered that if the Department had not developed a promotion rank, at least 50 percent of those promoted to upper ranks must be black, if qualified black candidates were available. The Government challenged this order as a violation of equal protection.

The plurality in *Paradise* noted that while there was no consensus regarding the appropriate constitutional standard, the order was valid because it would survive even strict scrutiny analysis: Remedying egregious discrimination established a compelling governmental interest and the plan was necessary in the absence of viable alternatives. The Court was also persuaded that the order was narrowly tailored because the plan was flexible, allowed for waivers, was temporary and did not impose “an unacceptable burden on innocent third parties.” The opinion did not consider whether the order violated Title VII as that question was not presented. It relied on *Sheet Metal* and invoked the standards it deployed to evaluate the remedial orders in that case: “the necessity for the relief and the efficacy

---

192 *Sheet Metal*, 478 US at 486.
193 Id at 488.
194 Id at 489.
196 Id at 170.
197 Id at 149–50.
198 Id at 166, 171–72.
199 *Paradise*, 480 US at 178–82.
of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.”

Justice Powell’s concurrence noted the similarity between *Paradise* and *Sheet Metal Workers* in that both cases involved a protracted history of egregious discrimination. He also pointed out the difference in that *Sheet Metal Workers* was analyzed under the provisions of Title VII, *Paradise* was analyzed under the Equal Protection Clause. In a footnote, Justice Powell stated that the statutory and constitutional standards were similar, but not identical. Like the plurality opinion, Justice Powell articulated the constitutional test in terms very similar to the standard in *Sheet Metal Workers*: The constitutionality of judicial orders on either a public and or private employer required proof of a “compelling governmental interest” and narrow tailoring requirements. This effectively circumscribed judicial efforts to address even egregious forms of employment discrimination.

Strict scrutiny frames affirmative action as an exceptional, extraordinary departure from a race neutral baseline. But in the context of *Sheet Metal* and *Paradise*, this framework obscures decades of documented resistance—from the subtle to the flagrant to court-ordered relief for entrenched racial discrimination. Nor was this an unfamiliar pattern in a number of industries and unions, as numerous reported cases attest.

---

200 Id at 171.
201 Id at 186.
202 Id at 186 n 1. See also note 125 and accompanying text.
203 See generally *EEOC v Guardian Pools, Inc*, 828 F2d 1507 (11th Cir 1987) (regarding a class action lawsuit based on gender discrimination resulted in district court ordered affirmative action including an order to actively recruit women in order to decrease the male to female ratio. Defendant failed to perform the court’s orders and was subsequently found to be in contempt of court); *Morrow v Crisler*, 491 F2d 1053 (5th Cir 1974) (noting that nearly two years after the district court’s affirmative action order, the defendant Mississippi Highway Patrol had hired a severely low number of African-American employees: Only six of the ninety-one patrolmen hired in those two years.); *United States v Wood, Wire and Metal Lathers International Union, Local Union No 46*, 471 F2d 408 (2d Cir 1973) (noting that the United States had brought suit against the defendant union for employment discrimination based on race and entered into a consent decree ordered by the court enjoining them from further discrimination and to take affirmative action measures, particularly in the area of permit granting to minority non-union members. Defendant was to submit a plan within six months of the decree. At the end of the six months, defendants submitted a plan which the administrator found to be “trivial,” “superficial,” and “useless.” At that same time, defendant abolished its permit
While arguments for congruence have certainly had traction, the justification for imposing stringent limits on the remedial authority of the judiciary in the form of strict scrutiny in this context seems less than persuasive.

The transference from Title VII to equal protection and the return of equal protection analysis to Title VII demonstrates how the doctrinal boundaries have blurred. At one level, transplanting statutory standards into constitutional analysis and constitutional standards into the statutory analysis comports with a certain logic in that both Title VII and equal protection are measures crafted to address inequality and should be symmetrical. Indeed, the Court at times proceeds from the premise that the justification for these transfers is self-evident. Yet, the overall pattern of these shifts has not been neutral: rather, they have tended to impose greater constraints on remedial measures to address racial inequality.

IV. CONCLUSION

The fact that consideration of the relationship between Title VII and equal protection has produced claims of both divergence and convergence in law and legal scholarship is not wholly unexpected given the fractious nature of both the politics of race and the law of racial reform. In one sense, the debate over the statutory and constitutional standards defining discrimination and the permissible scope of race sensitive remediation reflects disputes over doctrine that are grounded in the shifting racial politics that were constituted through and brought into law. The point is not simply that the divisions among the justices mirror the political divisions within the country regarding racial reform; rather, it is that the law also is a site where racial ideology is constituted, divisions are constructed, and claims are program completely, resulting in a court ordered granting of 100 permits to minority workers); EEOC v Local 580, International Association of Bridge, Structural and Ornamental Ironworkers, 669 F Supp 606 (SDNY 1987) (discussing defendant union’s discriminatory practices based on race and national origin prompted the United States to file suit against them in 1971, resulting in a subsequent consent agreement in 1978 enjoining the union from discriminating and ordering performance of affirmative action measures to increase minority representation. The union failed to perform several provisions and the court held it in contempt of court for failing to comply with the court ordered consent agreement. This same union was subsequently sued for failure to comply with Title VII several times up to as recent as 2011).
legitimated.\textsuperscript{204} This is particularly so when the law is both a focus of racial reform and a target of racial retrenchment.

At a more focused and functional level of analysis, it appears that whether the arguments for convergence or divergence ultimately control in any given case or set of cases, the law is both unstable and asymmetric in its relationship to claims made by racial minorities. Ultimately, convergence and divergence function as a kind of technology or analytic technique through which more stringent requirements are imposed on efforts to remedy racial disparities and inequality.

\textsuperscript{204} Race and law are mutually constitutive. This is one of Critical Race Theory's central insights and stands in contrast to the view that sees law as primarily a reflective of some politics outside. Crenshaw, 101 Harv L Rev at xxv (cited in note 14).