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Commentary

*841 LEGAL STANDARDS REGARDING **GENDER** EQUITY AND AFFIRMATIVE ACTION [FNa]

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Public educational institutions and entities have an affirmative duty under federal law to eliminate the pernicious vestiges of racial and sexual discrimination in every aspect of their programs, including the area of employment. This duty stems from Title VII of the Civil Rights Act of 1964 [FN1] and from decisions of the United States Supreme Court. [FN2] Under appropriate circumstances, public educational entities may legally implement affirmative action employment programs in order to fulfill their affirmative duty to eliminate vestiges of unlawful discrimination. Indeed, applicable state law may affirmatively *require* public educational entities to adopt hiring goals and other types of affirmative action programs. [FN3] However, officials also should be aware of the possibility that an ill-designed program may lead to impermissible "reverse discrimination."

In employment law, the term "affirmative action program" signifies a package of hiring, layoff, recruitment and promotional rules designed to remedy the effects of past or present work-place discrimination based on race, ethnicity, **gender** or other protected status. Affirmative action programs invariably require employers to base employment decisions, at least in part, on racial or **gender** categories. Thus, some view such programs, despite their remedial purposes, to be another form of racial or **gender** discrimination.

In the sphere of public employment, affirmative action programs require governmental entities to act in a race-conscious and/or **gender**-conscious manner. Therefore, public employers' affirmative action programs may be challenged under both Title VII and the Equal Protection Clause of the ***842** Fourteenth Amendment to the United States Constitution. [FN4] However, the standard of review by which courts examine the appropriateness of an affirmative action plan depends on whether the underlying legal challenge alleges that the plan violates the Equal Protection Clause or Title VII. Generally, the standard of review employed by courts in equal protection challenges is more stringent than the standard used in Title VII cases. [FN5] Thus, the applicable standard determines how difficult it will be for a public educational institution to justify its affirmative action program.

TITLE VII STANDARD OF JUDICIAL REVIEW

When non-minority or male plaintiffs challenge affirmative action plans under Title VII, courts employ a "burden-shifting" analysis to determine if the employer has engaged in intentional, unlawful discrimination. The burden-shifting analysis was first articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green*[FN6] to

"... sharpen the inquiry into the elusive factual question of intentional discrimination." [FN7]

According to the Court, employers who voluntarily adopt affirmative action plans have not committed illegal "reverse discrimination" under Title VII if they possess sufficient and legitimate reasons for adopting the plan. "Sufficient reasons" include *manifest racial imbalances* in traditionally segregated job categories. [FN8] The Court's emphasis on "manifest racial imbalances" implies that, under Title VII, statistical evidence establishing traditional racial imbalances in particular job categories may alone be sufficient to justify an employer's voluntary adoption of affirmative action plan. [FN9]

***843** EQUAL PROTECTION STANDARDS OF REVIEW

Unlike in Title VII cases, the Supreme Court had substantial difficulties in reaching a consensus on the test that should be used to examine the legality of affirmative action plans adopted by public entities when challenged under the Equal Protection Clause of the U.S. Constitution. [FN10]

In other contexts, the Supreme Court has recognized three different levels of scrutiny that can apply in Equal Protection Clause challenges, depending upon the nature of the challenged governmental practice or classification. Cases involving race, alienage or national origin traditionally receive strict scrutiny: to past constitutional muster, the challenged law must be *narrowly-tailored to serve a compelling government interest.* In cases challenging a **gender**-based practice or classification, a mid-level heightened standard of review traditionally applies: the challenged practice must be *substantially-related to a legitimate state interest.* Finally, the lowest level of scrutiny applies where no classification based on race, **gender** or other specially protected status is at issue; in such cases the governmental action must be *rationally related to a legitimate state interest.*[FN11]

In the late 1980's, a majority of Supreme Court Justices finally agreed to apply a "strict scrutiny" standard in race-based affirmative action cases under the Equal Protection Clause. [FN12] Thus, in order for a race-based affirmative action plan to survive an Equal Protection Clause challenge, the plan must be narrowly-tailored to serve a compelling government interest. [FN13] The eventual "resolution" of this question mirrored changes in the Court's composition during the 1980's.

In contrast, an "intermediate" level of judicial scrutiny generally measures the lawfulness of **gender**-based affirmative action programs instituted by public employers. Under intermediate scrutiny, courts will uphold the legality of the public employer's plan only if the relevant **gender** classifications are *substantially related to important governmental objectives.*[FN14] This formulation of the intermediate level of judicial scrutiny is more severe than the "rational basis" standard courts use to decide the legality of alleged violations of the equal protection clause by a public entity where no protected class is involved. [FN15] However, it is less stringent than the "strict ***844** scrutiny" standard which requires governmental entities to show that they have narrowly tailored their race-based classification schemes to achieve a compelling state interest. [FN16]

Given this Supreme Court precedent, the legality of any **gender**-based affirmative action program, if challenged under the Fourteenth Amendment's Equal Protection Clause, will most likely be evaluated according to the "intermediate" judicial yardstick. Hence, the United States Court Of Appeals for the Ninth Circuit has expressly adopted the intermediate scrutiny standard in these cases. [FN17]

Surprisingly, however, not all Circuit Courts of Appeals have uniformly employed the intermediate standard in cases involving the constitutionality of **gender**-based affirmative action programs. In particular, the Sixth Circuit [FN18] held that **gender**-based affirmative action programs should be evaluated by the *strict scrutiny* standard of judicial review. [FN19]

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***845** APPLYING THE INTERMEDIATE JUDICIAL SCRUTINY STANDARD TO **GENDER**-BASED AFFIRMATIVE ACTION PROGRAMS

In order to minimize possible risks of liability, prudent public education employers should formulate any affirmative action plan according to the requirements of the Equal Protection Clause. An affirmative action plan that complies with the stricter demands of the Equal Protection Clause will invariably comport with Title VII's requirements.

As previously noted, except in the Sixth Circuit, **gender**-based affirmative action programs are evaluated in accordance with the intermediate equal protection yardstick. That is, **gender** affirmative action plans are constitutional if they are substantially related to important governmental interests.

Important Government Interests

While it is clear that a district's desire to remedy *societal* discrimination encountered by women will not pass the strict scrutiny standard applied to race-based affirmative action plans, it is an open question whether such a desire to remedy societal discrimination is a sufficiently "important" state interest for the district to institute a **gender**-based affirmative action program under the intermediate scrutiny standard. [FN20] The Supreme Court has stated that " r education in the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective." [FN21]

Of course, mere recitation by a public entity that it intends its affirmative action plan to compensate women for societal discrimination clearly would be inadequate to insulate the entity from a constitutional equal protection claim. Rather public educational entities would need to be prepared to offer evidence that women have suffered active or passive societal discrimination in the relevant industries that are located in their areas. A district might be able to satisfy this evidentiary burden in part by introducing affidavits from individuals who have suffered such discrimination in the past. [FN22]

A public educational institution will unlikely justify a **gender**-based affirmative action program on the ground that such programs are necessary in order to provide female "role models" for its students. Although few, if any, Supreme Court cases address the "role model" theory in the context of **gender**-based affirmative action programs, several members of the existing Court do not view this theory with favor. In *Wygant,* Justice Powell, speaking for Justices Rehnquist, Burger, and O'Connor, criticized the "role model" theory:

> "... the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to ***846** engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.... Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students." [FN23]

The above criticism is directed at the scope and possible harm posed by any affirmative action program based on the "role model" theory; thus, several members of the existing Court appear unlikely to rule in favor of the "role model" theory, even in cases involving **gender**-based affirmative action plans.

Is the **Gender**-Based Plan "Substantially Related" to the Important Government Interest?

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Under the intermediate judicial scrutiny, a **gender**-based affirmative action plan also must be "substantially related" to the identified important governmental interest. The criteria often used by courts to measure whether a plan is "substantially" related to the identified goal include the *scope* of the advantage given to women (e.g., whether an advantage is given to women even in those areas where they do not have a disadvantage) and the degree of burden placed upon qualified men. [FN24] As demonstrated by the two cases discussed below that arise in the context of contract preference programs, these criteria are not insurmountable.

In *Associated General Contractors,* the Ninth Circuit held that a **gender**-based contractors preference program in favor of women-owned businesses instituted by the City and County of San Francisco survived a challenge even though officials extended the preference to virtually every industry in which San Francisco contracted with outside bidders. The Court noted that "(a)lthough the city's program may extend preferences to some fields where women are not disadvantaged, experience suggests that these are still the exceptions." [FN25] In this case, however, the Court suggested that its ruling might have been different if the challenger offered credible evidence that women received preference even in fields where they have not been disadvantaged.

In *Coral Construction Co.,* another contractor set-aside program decided by the Ninth Circuit, the Court held that the State of Washington's system for awarding contracts to women-owned businesses is a *legitimate* means to further its objective of remedying past and present societal discrimination against women contractors. [FN26] The court ruling is based upon the flexible nature of Washington's **gender**-affirmative action plan. Under Washington's plan, for contracts less than $10,000, women-owned businesses receive preferences if their bids are within 5% of the lowest bid. On contracts more than $10,000, the plan requires a successful contractor to use women-owned ***847** businesses for a prescribed percentage of the work performed on the contract, while the actual percentage is determined on an *ad hoc* basis according to the availability of qualified women-owned businesses. The affirmative action plan also permits a reduction in the amount of the subcontractor set-aside levels for a given contract if meeting higher levels is not feasible, qualified women-owned businesses are unavailable, or their prices are not competitive.

CONCLUSION

Public educational institutions have a duty under federal law to eliminate vestiges of any past discrimination against women in their employment practices. One way to achieve this goal is to implement a **gender**-affirmative action program. However, public employers in particular must exercise extreme care in formulating any affirmative action plans as an ill-devised plan may subject the public employer to liability for "reverse discrimination" under either Title VII or the Equal Protection Clause.

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[FN1]. 42 U.S.C. § 2000e *et seq.* (1982).

[FN2]. *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 275-277, 106 S.Ct. 1842, 1848, 90 L.Ed.2d 260 (1986); *see* *Green v. New Kent County Sch. Bd.,* 391 U.S. 430, 435-439, 88 S.Ct. 1689, 1693-1694, 20 L.Ed.2d 716 (1968); *see also* *Brown v. Board of Educ.,* 349 U.S. 294, 296-299, 75 S.Ct. 753, 755, 99 L.Ed. 1083 (1955) (Brown II). Under Title VI of the Civil Rights Act of 1964, educational institutions which receive federal funds also have a duty not to practice unlawful employment discrimination when they select individuals for internships and for work-study

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positions. 42 U.S.C. § 2000d, 34 C.F.R. § 100.3(b)(vi)(c).

[FN3]. *See, e.g.,*California Education Code, section 44100, *et seq.*, and section 87100, *et seq.*

[FN4]. Originally, Title VII's anti-discrimination provisions were not applicable to public employers. However, in 1972, Congress enacted the Equal Employment Opportunity Act which amended Title VII by extending its coverage to public sector employers such as state governments and their subdivisions. 42 U.S.C. § 2000e; *see Dothard v. Rawlinson,* 433 U.S. 321, 323, n. 1, 97 S.Ct. 2720, 2724, n. 1, 53 L.Ed.2d 786 (1977).

[FN5]. *See Johnson v. Transportation Agency,* 480 U.S. 616, 626-629, 107 S.Ct. 1442, 1449, 94 L.Ed.2d 615 (1987); *cf. Wygant, supra,* 476 U.S. at 272-275, 106 S.Ct. at 1846-1847. Prior to 1979, the Supreme Court interpreted Title VII to constitute a blanket prohibition against all types of racial employment preferences, including programs that give preference to minorities and to women. Since the 1979 case of *Steelworkers v. Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Court has endorsed voluntary affirmative action programs which favor women and members of racial minorities as a means to *protect* historically disadvantaged groups *against* discrimination. *Weber,* and cases decided under it, have since become "a important part of the fabric of our law." *Johnson, supra,* 480 U.S. at 644, 107 S.Ct. at 1457-1459 (Stevens, J., concurring).

[FN6]. 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Justice Scalia, however, argues that legal analyses of affirmative action plans should proceed under the strict scrutiny standard articulated in *Wygant* even where the cause of action arises under Title VII. *Johnson, supra,* 480 U.S. at 662-666, 107 S.Ct. 1468-1469.

[FN7]. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 255, n. 8, 101 S.Ct. 1089, 1094, n. 8, 67 L.Ed.2d 207 (1981).

[FN8]. *See Johnson, supra,* 480 U.S. at 626-631, 107 S.Ct. at 1449-1451. Thus, *Johnson* indicated that private employers need *not* show that they have perpetuated discriminatory employment practices in the past before they can voluntarily adopt affirmative action programs in compliance with the purposes of Title VII.

[FN9]. The statistical evidence should show gross disparities in the number of racial minorities and women who are employed by a public entity and the number of such individuals who are present in the pool of all qualified workers.

[FN10]. The Equal Protection Clause is application to public employers because it is intended to govern solely the actions of governmental entities.

[FN11]. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439-440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

[FN12]. *Wygant, supra,* 476 U.S. at 273-275, 106 S.Ct. at 1847.

[FN13]. *Id.*

[FN14]. *Craig v. Boren,* 429 U.S. 190, 197-199, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976); *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 723-725, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982), *see Cleburne, supra,* 473 U.S. at 440-442, 105 S.Ct. at 3255. Note that the "intermediate" standard is identical to the old "substantial relation" test set forth in *Regents of University of California v. Bakke, supra,* 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

[FN15]. Under the "traditional" standard, courts presume the validity of the relevant governmental classification and would uphold its legality so long as the governmental entity can establish that the classification is rationally related to a legitimate state interest. *Schweiker v. Wilson,* 450 U.S. 221, 228-230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186

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(1981); *see* Cleburne, *supra,* 473 U.S. at 439-440, 105 S.Ct. at 3254. However, the "traditional" equal protection standard is abandoned if the relevant classification is considered "suspect" due to various reasons which usually have historical underpinnings. Suspect classifications generally involve race, national origin, or alienage. The Supreme Court also abandoned the traditional equal protection yardstick in cases involving government-imposed **gender** classifications because **gender** "... generally provides no sensible ground for differential treatment ... (r)ather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways likely reflect outmoded notions of the relative capabilities of men and women." *Cleburne, supra,* 473 U.S. at 439-442, 105 S.Ct. at 3254-3255. However, it is interesting to note that the Supreme Court (except in an outdated plurality opinion by Justice Brennan) did not expressly find **gender** to be a "suspect" classification.

[FN16]. This standard is applicable to classifications based upon race, national origin, or alienage. *Frontiero v. Richardson,* 411 U.S. 677, 685-687, 93 S.Ct. 1764, 1770, 36 L.Ed.2d 583 (1973). In *Frontiero,* a plurality of the Justices held that **gender** classifications must also be subject to "strict judicial scrutiny." However, subsequent Supreme Court cases refused to address the question of whether **gender** classifications are also "suspect"; ensuing cases simply stated that **gender** classifications demand a heightened level of judicial examination which would require public entities to establish that such classifications are substantially related to important governmental interests. This latter standard came to be known as the "intermediate" judicial standard for examining alleged equal protection violations by public entities. *See* Stanton v. Stanton, 421 U.S. 7, 12-14, 95 S.Ct. 1373, 1377, 43 L.Ed.2d 688 (1975).

[FN17]. *Coral Const. Co. v. King County,* 941 F.2d 910, 931 (9th Cir.1991), *citing* *Associated Gen. Contractors v. City and County of San Francisco,* 813 F.2d 922, 932 (9th Cir.1987).

[FN18]. In the Sixth Circuit, there may be a distinction between a "**gender**-conscious" affirmative action plan and a plan which perpetuates a "**gender** preference." The former may be subject to the intermediate level of scrutiny while the latter is subject to strict judicial scrutiny. (*Generally* *Brunet v. City of Columbus,* 1 F.3d 390, 404 (6th Cir.1993).) However, in the Sixth Circuit, an affirmative action plan which requires the hiring of less qualified women before better qualified men will always be characterized as a "**gender** preference" plan. *Id.*

[FN19]. *Brunet v. City of Columbus,* 1 F.3d 390, 403-404 (6th Cir.1993); *see* *Conlin v. Blanchard,* 890 F.2d 811, 816 (6th Cir.1989); *but see* *F. Buddie Contracting Co. v. City of Elyria, Ohio,* 773 F.Supp. 1018, 1031 (N.D.Ohio 1991) (where a District Court Judge in the Sixth Circuit used the "intermediate standard" to examine **gender**-based affirmative action program). Such a result may be explained by the perception that to employ intermediate scrutiny to measure **gender**-based affirmative action programs will produce the anomalous result of making it easier for legislatures to enact such programs, even though African-Americans have suffered more egregious discrimination over time. *Contractors Ass'n of Eastern Pennsylvania v. City of Philadelphia,* 735 F.Supp. 1274, 1302 (E.D.Pa.1990).

[FN20]. *Associated Gen. Contractors, supra,* 813 F.2d at 941. Societal discrimination, however, is not sufficiently "compelling" to justify a public employer's voluntary adoption of a race-based affirmative action program.

[FN21]. *Califano v. Webster,* 430 U.S. 313, 314-317, 97 S.Ct. 1192, 1194, 51 L.Ed.2d 360 (1977).

[FN22]. *See* *Coral Construction Co.,* 941 F.2d at 932-933.

[FN23]. *Wygant, supra,* 476 U.S. at 273-277, 106 S.Ct. at 1847-1848.

[FN24]. *See* *Coral Construction Co. v. King County,* 941 F.2d at 932;*see also* *Associated Gen. Contractors,* 813 F.2d at 941.

[FN25]. *Associated Gen. Contractors,* 813 F.2d at 941.

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[FN26]. *Coral Construction Co.*, 941 F.2d at 914, 932.

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