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Affirmative Action, Reverse Discrimination Bratton v. City of Detroit

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CONSTITUTIONAL LAW

Affirmative Action • Reverse Discrimination

Bratton v. City of Detroit

704 F.2d. 878 (6th Cir. 1983), *modified* 712 F.2d 222 (6th Cir. 1983)

IN *BRATTON V. CITY OF DETROIT,*[1] the United States Sixth Circuit Court of Appeals examined charges of reverse discrimination[2] arising from a voluntary[3] affirmative action plan adopted by the City of Detroit. These reverse discrimination claims were presented as alleged violations of Title VII[4] and the fourteenth amendment.[5] The *Bratton* court reviewed the leading Title VII reverse discrimination case, *United Steelworkers of America v. Weber,*[6] and the leading fourteenth amendment reverse discrimination case, *Regents of University of California v. Bakke.*[7] From these cases, the court in *Bratton* extracted the major guidelines of each, comingled them, and developed a single test to resolve both the constitutional and the statutory claim. In developing this test, the *Bratton* court may have shown that the fourteenth amendment requirements for permissible affirmative action are identical to those under Title VII, especially when Title VII is applied to a public employer.

I. FACTS

In 1974, the Board of Police Commissioners of the City of Detroit adopted a voluntary affirmative action plan to remedy what it perceived as a history of discriminatory practices in the hiring and promotion of blacks in the Detroit Police Department.[8] The Board set as its goal a fifty-fifty ratio of blacks to

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[1]704 F.2d 878 (6th Cir. 1983), *modified* 712 F.2d 222 (6th Cir. 1983). The modification of this case is not relevant to the discussion in this casenote. At the time of this writing, an appeal to the United States Supreme Court is pending.

[2]The court also addressed the right to monetary damages under 42 U.S.C. § 1983 (Supp. V 1981), the right to jury trial, and the propriety of incorporation of the affirmative action plan into the district court's decree. These issues are not covered in this casenote.

[3]"Voluntary", as it is used here, indicates that the plan was adopted through the employer's own initiative rather than by court order or administrative consent decree. See Note, *United Steelworkers of America v. Weber: An Answer to Claims of Reverse Discrimination in the Private Sector,* 16 WILLAMETTE L. REV. 725, 735-36 (1980) for problems with defining "voluntary".

[4]Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 State. 241, 253-66 (codified as amended in scattered sections of 42 U.S.C.). *See infra* notes 15 and 18 for text of the applicable sections.

[5]U.S. CONST. amend. XIV. Violations of Michigan law were also alleged, but the court found them to be without merit. 704 F.2d at 882 n.8.

[6]443 U.S. 193 (1979).

[7]438 U.S. 265 (1978).

[8]For the Board of Police Commissioner's resolution, see Baker v. City of Detroit, 458 F. Supp. 379, 380-81 (E.D. Mich. 1978).

whites for staffing in all levels.[9] Under Detroit's affirmative action plan, two promotion lists were established, one for black officers and one for white officers. Promotions were made alternately from one list and then the other, thereby guaranteeing that fifty percent of subsequent promotees would be black.

The appeal in *Bratton* was from several judgments of the district court on various aspects of the litigation.[10] The court of appeals held that "the plan which called for equal promotion of white and black officers from separate racially based promotion list, with end goal of a 50/50 staffing ratio was constitutional and that jury trial was not required."[11]

In *Bratton v. City of Detroit,* the court of appeals reviewed charges that the Detroit Police Department's voluntary affirmative action plan discriminated against white police sergeants. The white sergeants claimed that if all candidates for promotion to lieutenant had been on a single promotion list, that they would have ranked higher than some or all of the blacks who were promoted.[12] The white sergeants claimed that the preference for black candidates, based solely on race, was a discriminatory practice in violation of Title VII, the fourteenth amendment, and § 1983.[13] On appeal,[14] the sergeants did not argue that affirmative action plans were per se illegal.[15] They claimed that "this *particular* affirmative action plan over-stepped the bounds of statutory and constitutional validity.[16]

II. Title VII

The *Bratton* court first addressed the white sergeants' contention that Detroit's voluntary affirmative action plan exceeded the bounds permitted by Title VII.[17] For guidance in addressing this claim, the court looked to the United

[9]There are three basic job levels in the Detroit Police Department: patrolman, sergeant, and lieutenant. 704 F.2d at 882.

[10]*Id.* at 878-79.

[11]*Id.* at 879.

[12]This same voluntary affirmative action plan was the subject of another case heard earlier by the Sixth Circuit. In that case, white Detroit patrolmen had made similar charges regarding promotions from patrolman to sergeant. That case held the Detroit plan to be valid under Title VII, but was remanded for further consideration of the fourteenth amendment challenge. *See* Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied* 452 U.S. 938 (1981).

[13]704 F.2d at 883 n.15. The court noted that the liability analysis under 42 U.S.C. § 1983 (Supp. V 1981) is identical to the fourteenth amendment analysis.

[14]Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983) is an appeal from a series of decisions: Baker v. City of Detroit, 458 F. Supp. 379 (E.D. Mich. 1978); Baker v. City of Detroit, 483 F. Supp. 930 (E.D. Mich. 1979); Baker v. City of Detroit, 504 F. Supp. 841 (E.D. Mich. 1980).

[15]At trial, the sergeant conceded that a federal court has authority to order an employer to establish an affirmative action program. The sergeants, however, argued that an employer has no right to voluntarily initiate affirmative action. 483 F. Supp. at 981.

The court cites numerous cases holding that affirmative action plans are per se legal. 704 F.2d at 883.

[16]704 F. 2d at 883.

[17]42 U.S.C. § 2000e-2(a) (1976) provides:

(a) It shall be an unlawful employment practice to an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of

States Supreme Court decision in *United Steelworkers of America v. Weber.*[18] In *Weber,* Kaiser Aluminum and Chemical Company had adopted an affirmative action plan as part of a bargaining agreement with the United Steelworkers of America. Kaiser's plan included a goal that fifty percent of the openings in a newly-created, in-plant craft-training program would be filled by black employees. The most junior black employee accepted into the program had less seniority than several white applicants not accepted for the opening.[19] One of the rejected white applicants filed a class action suit alleging that Kaiser's voluntary affirmative action plan discriminated against the rejected senior white applicants and violated Title VII.[20] Deciding that the Kaiser plan was legal under Title VII, the Supreme Court reached the conclusion that Title VII "does not condemn all private, voluntary, race-conscious affirmative aciton plans."[21] The *Weber* Court refused to "define in detail the line of demarcation between permissible and impermissible affirmative action plans,[22] but did proceed to indicate three features of the Kaiser plan which put it in the realm of Title VII permissibility. The three features were: 1) the plan was "designed to break down old patterns of racial segregation and hierarchy";[23] 2) "the plan [did] not unnecessarily trammel the interests of the white employees";[24] and 3) "the plan [was] a temporary measure."[25]

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employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[18]443 U.S. 193.

[19]*See generally* Marinelli, *Seniority Systems and Title VII,* 14 AKRON L. REV. 253 (1980). Marinelli discusses the history and effect of Title VII decisions on seniority systems. His discussion includes cases dealing with charges of discrimination against minorities and cases of reverse discrimination.

[20]The alleged violation in *Weber* related § 703(a) and (d) of Title VII. For the text of § 703(a), see *supra,* note 15. 42 U.S.C. § 2000e-2(d) (1976) provides:

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

[21]443 U.S. at 208. Rather than relying on the plain meaning of 42 U.S.C. § 2000e-2(a,d), the Court in *Weber* chose to rely on the legislative history of Title VII to reach this conclusion. *Id.*

Commentators have criticized the *Weber* Court's interpretation as being against the weight of Title VII legislative history *See, e.g.,* Note, *Abrogation of the Principle of Nondiscriminaton - The Advent of Voluntary, Race-Dependent, Preferential Treatment in Employment,* 40 LA. L. REV. 1061 (1980). This article characterizes the Supreme Court's analysis as "an extremely selective reading of the legislative history of Title VII." *Id.* at 1070. *See also* Note, *Affirmative Action Plans: Reverse Discrimination or A Justifiable Remedy?,* 48 UMKC L. REV. 280 (1980). That casenote also suggests that the Court's reasoning was strained. The author hypothesizes that the concept of discrimination against the white majority never occurred to Congress as it considered the Civil Rights Act. *Id.* at 289. The discussion suggests that the Court could have avoided its legislative history analysis and the criticism accompanying it by basing its decision on the employer's interest in avoiding Title VII liability. *Id.* at 287.

[22]443 U.S. at 208.

[23]*Id.*

[24]*Id.*

[25]*Id.*

The three features highlighted in *Weber* were accepted by the Sixth Circuit in *Bratton* as the foundation of a Title VII test of permissibility for affirmative action plans.[26] Citing an amendment which extended Title VII to include public employers,[27] the *Bratton* court concluded that the *Weber* analysis was applicable to a public employer, even though *Weber* had dealt with a private employer.[28]

The court did not make an independent Title VII examination of the Detroit Police Department plan. Instead, it analyzed the fourteenth amendment requirements for affirmative action and then examined the Detroit Plan under a test integrated from both Title VII and fourteenth amendment requirements.

III. Fourteenth Amendment

The *Bratton* court indicated that the Supreme Court had chosen to keep its constitutional analysis separate from the *Weber* Title VII analysis,[29] and that the Supreme Court's fourteenth amendment analysis of affirmative action was not as concise as its Title VII analysis.[30] The court stated that the Brennan-White-Marshall-Blackmun opinion in *Regents of University of California v. Bakke*[31] provided the most reasonable guidance for this constitutional analysis.[32]

Bakke addressed the validity of a special admissions plan implemented by the Medical School of the University of California at Davis. The University Board of Regents set aside sixteen of its one hundred medical school openings for minority applicants. The admission requirements for these sixteen positions were not as stringent as those for the remaining positions. A white applicant to the medical school was rejected in two consecutive years while minority applicants with lower admission credentials were accepted into the special openings. After his second rejection, he instituted a suit claiming that the special admissions program violated the equal protection clause of the fourteenth amendment.[33] The Supreme Court invalidated the University's affirmative action plan but held that the University could not be prohibited from taking race into account when formulating future admissions plans.[34] The decision that the

[26] 704 F.2d at 884.

[27] *See* The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 2(1), (5), 86 Stat. 103, 103.

[28] 704 F.2d at 884.

[29] *Id.* The court's basis for this conclusion arises from the fact that Supreme Court cases subsequent to *Weber* which addressed the permissible bounds of constitutional affirmative action did not rely on *Weber*. *Id.* at 884 n.19.

[30] *Id.* at 885.

[31] 438 U.S. 265. Three views were expressed in *Bakke:* one by Justice Powell, a second by Justices Stewart, Burger, Rehnquist and Stevens, and a third by Justices Brennan, White, Marshall and Blackmun. For an explanation of positions taken under each opinion, *see infra* note 34.

[32] 704 F.2d at 885.

[33] *Bakke* also involved alleged violations of California law and Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 252-253 (codifieid as 42 U.S.C. § 2000d-d-4 (1976)).

[34] Justice Powell, basing his decision on the fourteenth amendment, decided that race could be a factor in admissions planning, but that the University's plan did not meet the "strict scrutiny" standard of review. Justice Powell noted that the Board's reasoning for instituting the special admissions plan was to remedy

University's plan was invalid was not representative of the Supreme Court's position regarding the fourteenth amendment. Only five members of the *Bakke* Court reached the constitutional issue.[35] Of them, four held that the University of California's affirmative action plan did not violate the fourteenth amendment.[36]

The *Bratton* court summarized the Supreme Court's view on constitutionally permissible affirmative action as requiring that: "(1) some governmental interest must be served, and (2) the program must somehow be directed toward the achievement of that objective."[37]

IV. The Bratton Test

The *Bratton* court thus had two sets of guidelines upon which it could rely. The *Weber* Title VII guidelines did not meet the "strict scrutiny" standard required for application to the constitutional claim.[38] The *Bakke* fourteenth amendment guidelines were not as concise as the *Weber* guidelines. The court therefore proceeded to combine the two sets of guidelines, using the *Bakke*

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societal discrimination. In his opinion, the University's admission plan was invalid because the Board of Regents was not a competent body to evaluate this societal discrimination. 438 U.S. at 269-320.

Justices Brennan, White, Marshall and Blackmun concurred with Justice Powell's finding that race could be used as a factor in such plans. Relying on a less stringent standard of review than Justice Powell, they concluded that the University's admission plan was permissible under the fourteenth amendment.

The third opinion, by Justices Stewart, Burger, Rehnquist and Stevens, concurred with Justice Powell's finding that the University's plan was invalid, but would also have prohibited the use of race as a factor in admission programs. This opinion, however, was based on a Title VI claim and never reached the fourteenth amendment issue.

[35] *See supra* note 34.

[36] *See supra* note 34. *See also* Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court,* 70 Ky. L.J. 1 (1982). In discussing *Bakke* and the subsequent Supreme Court case of Fullilove v. Klutznick, 448 U.S. 448 (1980), Choper examines the positions of the Justices regarding affirmative action, and attempts to project future Supreme Court votes on affirmative action issues.

[37] 704 F.2d at 885. The court noted that this was the same analysis that it had devised in Detroit Police Officers Ass'n v. Young, 608 F.2d 671. The *Bratton* court held that this analysis remains valid, even though the Supreme Court subsequently considered affirmative action in the *Fullilove* case. The court's arguments that *Fullilove* does not affect the law in *Young* are as follows:

1) the *Fullilove* judgment was entered by an equally divided court and is therefore of little precedential value. 704 F.2d at 885 n.24,
2) *Fullilove* considered the constitutionality of a congressional decision to implement a ten percent set-aside in favor of minority contractors, a materially distinguishable context. *Id.* at 884 n.25,
3) Justice Marshall's concurring opinion in *Fullilove* reaffirms the analysis in *Young. Id.*

[38] The *Bratton* court accepted a "strict scrutiny" standard as explained in Detroit Police Officers Ass'n v. Young:

> [A] case involving a claim of discrimination against members of the white majority is not a simple mirror image of a case involving claims of discrimination against minorities. One analysis is required when those for whose benefit the Constitution was amended or a statute enacted claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effects of past discrimination moves against the grain . . . .

704 F.2d at 886 (quoting 608 F.2d at 697). Although Justice Powell's analysis in *Bakke* is generally referred to as involving the "strict scrutiny" standard, the *Bratton* court's standard is more closely aligned with the Brennan-White-Marshall-Blackmun standard of review.

See Choper, *supra* note 36, at 1-4. Choper discusses the standards of review, including "strict scrutiny," proposed to the Supreme Court in *Bakke.*

standards as the framework with the *Weber* standards further defining the *Bakke* criteria. The court justified this construction by stating: "We find that to the extent that the constitutional standard may be more exacting than that employed in *Weber,* the Title VII challenge . . . is necessarily subsumed into that made here under the Fourteenth Amendment; what is valid under the latter will certainly pass muster under Title VII."[39]

The first step in the test established by the *Bratton* court required a determination of whether a valid governmental interest existed which required the implementation of an affirmative action plan.[40] The court explained, "it is uncontested that the government has a significant interest in ameliorating the disabling effects of identified discrimination."[41]

The court then stated guidelines for determining whether the alleged discrimination actually existed: 1) the findings should be made by a body competent to act in this area,[42] and 2) those findings should reveal "a sound basis for concluding that minority under-representation is substantial and chronic, and that the handicap of past discrimination is impeding access [and promotion] of minorities."[43] The *Bratton* court held that the Board of Police Commissioners of the City of Detroit was competent to make determinations as to the existence of past discriminatory practices.[44] The court relied on the powers given to the Board, which included, inter alia, the power to establish policies, and to receive and resolve complaints about the operation of the police department.[45] The court reviewed the discriminatory employment practices described by the Police Board as presented in *Young* and *Baker.*[46] This evidence included historical percentages of blacks on the police force, and testimony of discriminatory practices such as denying blacks the use of squad cars, segregating black and white officers, and assigning blacks to less desirable details. The *Bratton* court held that this evidence established both employement and promotion discrimination.

The court next sought to resolve whether the method of achieving the goal

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[39]704 F.2d at 887.

[40]The *Bratton* court uses the first guideline from the *Bakke* fourteenth amendment anslysis.

[41]704 F.2d at 886 (quoting 448 U.S. at 497 (Powell J., ,concurring)).

[42]Although the sixth circuit followed the *Bakke* opinion of Justices Brennan, White, Marshall and Blackmun opinion, this requirement was actually voiced by Justice Powell. *See id.* at 886, n.29.

[43]608 F.2d at 694 (quoting 438 U.S. at 362).

[44]*Id.* at 888.

[45]*See Id.* at 888 n.33 for a full list of powers given to the Board by the 1974 Detroit City Charter. The *Bratton* court distinguished the Detroit Board's authority to institute this affirmative action plan from the authority of the Board of Regents which *Bakke* had held to be insufficient to enact affirmative action. The court noted that the Detroit Board acted to remedy discrimination within an area of its control, the Detroit Police Department. The Board of Regents, however, attempted to remedy discrimination in society-at-large.

[46]483 F. Supp. 930.

of remediation was reasonable.[47] "[T]his entails a determination of whether the white police officers were *unduly* stigmatized by the program and whether the particular program applies the use of racial classifications reasonably."[48] The court said that an affirmative action plan "is not invalid merely because some individuals not in any way culpable with respect to past discriminatory acts must bear the brunt of the racial preference."[49] The court relied on the fact that the promotees were as well-qualified as the white officers[50] to determine that no group was stigmatized.

Finally, the court sought to determine if the fifty-fifty ratio adopted by the Board was reasonable.[51] The court outlined four considerations that the affirmative action plan must meet in order to be reasonable:[52] (1) the plan must be substantially related to the objective of remediation of prior discrimination;[53] 2) the use of racial classification must be the only legitimate method for achieving those objectives considering practical limits, such as urgency;[54] 3) the plan must be temporary;[55] 4) the plan must not "unnecessarily trammel" the interests of white candidates.[56] The *Bratton* court noted, as had the Supreme Court in *Weber,* that these guidelines were merely for the purpose of analyzing these facts and were not to be interpreted as an all-encompassing test of

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[47]704 F.2d at 890. Here the determination is made as to "whether the remedy adopted in response to the perceived governmental interest was sufficiently reasonable in light of those objectives." *Id.*

Cf. Judge Merritt's concurring and dissenting opinion in *Bratton.* Although Judge Merritt states that the court effectively applied the correct standard, he would identify the standard as more than "reasonableness." His statement of the standard would be:

> 1. *Procedural standard.* — After rational and deliberative consideration, a governmental agency competent to make findings concerning racial discrimination by the governmental institution in question must make valid and supportable findings of prior discrimination, and it must make valid findings concerning the percentage of minority members who would have been employed by the governmental institution in question in the absence of discrimination.
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> 2. *Substantive standard.* - These findings by a competent governmental agency must fully justify the percentage of minority members to be given preference under the affirmative action plan and the duration of the program, and the remedy incorporated in the affirmative action plan must not unduly burden or harm innocent parties in light of other available remedies.

Id. at 902.

[48]*Id.* at 890 (emphasis added). The *Bratton* court fitted the Supreme Court test from *Bakke* to the facts before it by replacing "any discrete group or individual" with "the white police officers." *See* 438 U.S. at 373-74. The court, by requiring that the officers not by *unduly* stigmatized, indicated that the level of stigma must amount to more than that of mere inconvenience. For the court's discussion of this stigma, see 704 F.2d at 890-92.

[49]704 F.2d at 891 (quoting Valentine v. Smith, 654 F.2d 503, 511 (8th Cir. 1981).

[50]*Id.* at 892.

[51]Here, the court examined the reasonableness of the specific ratio chosen. This should be distinguished from the court's earlier evaluation of the reasonableness of using a promotional system based on classification by race. *Id.* at 890.

[52]704 F.2d at 892.

[53]*See* 608 F.2d at 696 (quoting 438 U.S. at 359). Note that this is also similar to the *Weber* requirement that the plan be "designed to break down old patterns of racial segregation and hierarchy." 443 U.S. at 208.

[54]704 F.2d at 892.

[55]This requirement is taken directly from *Weber,* 443 U.S. at 208.

[56]704 F.2d at 892. Note that this requirement parallels the *Bakke* requirement for determining if the affirmative action plan is generally reasonable, i.e., that the program did not stigmatize any discrete group or individual. *See* 438 U.S. at 373-74.

permissibility.[57] The court then held that the Detroit Police Department's plan met these requirements.

Discrimination against blacks in hiring and promotion on the Detroit Police force was the identifiable source of discrimination requiring a remedy. The plan, by its stated purpose[58] and its effect, was substantially related to the remediation of this discrimination. Since the identified discrimination was based on racial classifications, the use of these racial classifications was the most direct means of redress. Also, the only alternative open to the Board would be to replace white lieutenants with black.[59] This would "unnecessarily trammel" the interests of the white lieutenants. Since whites were still being promoted and since black promotees were well-qualified,[60] the Detroit plan did not "unnecessarily trammel" the interests of the white police sergeants.[61] Finally, the court concluded that the Detroit plan, which would terminate when fifty percent of the force was black, was a reasonable temporary measure.[62]

In its effort to simultaneously resolve both the Title VII and the fourteenth amendment claims, the *Bratton* court may have uncovered the link between the two analyses which has been unarticulated by the Supreme Court to date. A comparative analysis of the two sets of guidelines reveals that they are similar, and probably interchangeable.[63] This may mean that the requirements for permissible affirmative action are the same under both Title VII and the fourteenth amendment, thus leaving only the standard of review to vary.[64] The *Bratton* court may have inferred such a result when it said that the two tests could be combined but that the fourteenth analysis would be more exacting.[65] Finally, it should be noted that even this difference between the Title VII standard and the fourteenth amendment standard may be imperceptible when the constitutional and the statutory claims are considered simultaneously

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[57]704 F.2d at 892.

[58]The Resolution of the Detroit Board of Police Commissioners to institute the affirmative action plan stated its purpose as being to remedy past discrimination which had resulted in unequal staffing and promotion of blacks and minorities. *See* 458 F. Supp. at 380-81.

[59]704 F.2d at 896.

[60]See 608 F.2d at 681 for the criteria which were used to determine eligibility of promotion.

[61]704 F.2d at 897. Note that this was the same reasoning that the court used to hold that the plan did not stigmatize the white officers.

[62]The *Bratton* court also addressed a contention by the white sergeants that the 50% quota was unreasonable in view of their statistics that the population was less than 50% black. The court examined the 50/50 quota and found it to have a reasonable basis in fact, but further stated: "Even the use of a guideline which exceeds the percentage of minorities in the population would be justifiable as a temporary measure for attaining an appropriate end goal." *Id.* at 895.

[63]*See, e.g., supra* notes 53, 56, and 61.

[64]*See* Note, *Fullilove v. Flutznick: An Initial Victory for Congressional Affirmative Action,* 8 OHIO N.U.L. REV. 377 (1981). This note discusses the Supreme Court's continued inability to agree on a level of review for affirmative action cases. *Id.* at 382-84.

[65]704 F.2d at 882.

against a public employer, as in *Bratton.*[66]

V. CONCLUSION

In *Bratton v. City of Detroit,* the Sixth Circuit Court of Appeals held that a voluntary affirmative action plan instituted by the Detroit Board of Police Commissioners was not reverse discrimination in violation of Title VII and the fourteenth amendment. In addressing these two alleged violations, the court constructed a test using factors from the Supreme Court's analyses in *United Steelworkers of America v. Weber* and *Regents of University of California v. Bakke.* The resulting analysis exposed the striking similarity between the Title VII and the fourteenth amendment analyses of liability and possibly indicated that the two analyses are identical in regard to a public employer.

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[66] *See* Note, *Insights on Weber: Its Implications and Applications in Public and Private Affirmative Action Programs, Labor Unions and Educational Institutions,* 23 HOW. L.J. 521, 535-38 (1980). This article projects the future application of *Weber* to a factually similar case involving a public employer. *See generally* Note, *The Presence of State Action in United Steelworkers v. Weber,* 1980 DUKE L.J. 1172 (1980). This note suggests reasons why the *Weber* facts actually amounted to state action. The article notes that the Supreme Court has not established a precise test for determining the existence of state action. It lists several situations which give rise to state action, and concludes that a *Weber*-type fact situation should require constitutional analysis. *Id.*