

Fighting Minority Underrepresentation in Publicly Funded Construction Projects After *Croson*: A Title VI Litigation Strategy

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In the 1989 case *City of Richmond v. J.A. Croson Co.*,¹ the Supreme Court held that minority business set-aside programs² established by state and local governments are subject to strict judicial scrutiny and so are constitutionally permissible only in limited circumstances.³ *Croson's* impact has been devastating. Lower courts have already declared invalid the set-aside plans of a number of cities, counties, and states. Many other state and local governments have abandoned their plans rather than attempt to defend or restructure them.⁴ Civil rights advocates fear this trend will leave minority business enterprises (MBE's) and minority workers even more severely underrepresented among those

1. 488 U.S. 469 (1989).

2. A "set-aside" is an affirmative action program under which a designated share of government-sponsored contracts is reserved for business enterprises owned by socially disadvantaged groups, usually racial or ethnic minorities or women. This Note focuses only on programs aimed at aiding racial and ethnic minorities. See *infra* note 9.

Most set-asides are established in terms of contracts, not jobs. They require that a certain percentage of government contracts go to minority-owned firms, but impose no requirements as to the racial composition of the work forces such contractors employ. However, reserving contracts for minority-owned businesses generally results as well in increased job opportunities for people of color. This is because while the work forces of most white-owned firms are disproportionately white, minority workers tend to be better represented among the employees of minority-owned companies. Timothy Bates, *Do Black-Owned Businesses Employ Minority Workers? New Evidence*, REV. BLACK POL. ECON., Spring 1988, at 51, 53 (while 86% of minority business enterprises employ over 50% minority workers, 81.2% of white-owned firms employ no minorities at all); ROBERT W. GLOVER, MINORITY ENTERPRISE IN CONSTRUCTION 27 (1977).

3. Writing for a four-Justice plurality in *Croson*, Justice O'Connor found that even though adopted for "benign" or "remedial" purposes, set-aside programs nonetheless constitute suspect racial classifications, triggering strict constitutional scrutiny. 488 U.S. at 493-95. This proposition constituted a holding of the case since it was also endorsed by Justice Scalia, who concurred in judgment only. *Id.* at 520 (Scalia, J., concurring in judgment). O'Connor, joined by four Justices, went on to declare that only those set-aside programs instituted to remedy the effects of identified past discrimination in a particular jurisdiction would serve "a compelling [state] interest" and so survive strict scrutiny. *Id.* at 504-05.

4. According to the Minority Business Enterprise Legal Defense and Education Fund, as of March 1990, 20 city, county, and state governmental entities had voluntarily terminated or suspended their set-aside programs. The programs of 46 others were being reevaluated. Nine jurisdictions had been enjoined from enforcing their set-aside laws after their plans failed to withstand *Croson*-type scrutiny. Litigation was pending against 37 other jurisdictions. See Memorandum from Anthony W. Robinson, President, Minority Business Enterprise Legal Defense and Education Fund, to Members of Congress (Mar. 30, 1990) (on file with author).

benefiting from public works spending, thus exacerbating two already critical problems: underemployment among people of color and slow MBE business development.⁵

Most experts believe that with appropriate studies documenting the past incidence and present persistence of discrimination in the construction trades, in most parts of the country set-aside programs can still be fashioned in accordance with the dictates of *Croson*.⁶ Still, states and municipalities are now less likely to act voluntarily to ensure greater minority participation in public contracting, and so advocates must search for alternative strategies to combat this underrepresentation. This Note argues that Title VI of the 1964 Civil Rights Act⁷ provides a basis for challenging in court many government practices that hamper greater minority participation in public contracting. The argument is this: Title VI—the provision of the 1964 Civil Rights Act banning racial discrimination in federally funded programs—incorporates the “disparate impact” definition of discrimination.⁸ Many seemingly neutral public contracting practices have the effect of disproportionately excluding people of color from participation in public works projects. Such procedures violate the disparate impact standard and thus are prohibited by Title VI except where shown to be necessary.⁹

Set-asides attempt to combat present discrimination and to counteract the effects of past discrimination by requiring that public contracts be distributed so as to achieve certain bottom-line results. A Title VI claim would attempt to eradicate discrimination, not by mandating certain *results*, but by policing the *process* whereby contracts are let. *Croson* in no way limited the legality of efforts aimed at identifying and prohibiting discriminatory processes; indeed,

5. See Michael D. Hinds, *Court Rulings Put Minority Businesses in Trouble; When Racially Based Set-Asides Were Found Unconstitutional, Many Companies Failed*, N.Y. TIMES, Dec. 23, 1991, at A1.

6. See Anthony W. Robinson, *Satisfying the Croson Standard*, in HOUSE COMM. ON THE JUDICIARY, 101ST CONG., 1ST SESS., MINORITY BUSINESS SET-ASIDE PROGRAMS: THE CITY OF RICHMOND V. J.A. CROSON—A COLLECTION OF ARTICLES BY CONSTITUTIONAL SCHOLARS AND ECONOMISTS, SERIAL NO. 11, at 56 (Comm. Print 1990) [hereinafter CROSON COLLECTION]; Barry Goldstein, *Set-Asides After City of Richmond v. Croson*, in *id.* at 35; San Francisco Lawyers Comm. for Urban Affairs & Equal Rights Advocates, *Affirmative Action Handbook*, 3 YALE J.L. & LIB. (forthcoming 1992); see also Associated Gen. Contractors v. City & County of S.F., 748 F. Supp. 1443 (N.D. Cal. 1990), *aff'd*, 950 F.2d 1401 (9th Cir. 1991) (refusing to enjoin post-*Croson* set-aside).

7. 42 U.S.C. §§ 2000d to 2000d-4a (1988), quoted *infra* text accompanying note 17.

8. Under the disparate impact definition, practices having a disproportionate adverse impact on protected groups are deemed discriminatory regardless of whether the practices are motivated by invidious racial animus. Title VI itself bans only intentional discrimination, but the agency regulations implementing the statute prohibit practices yielding a discriminatory effect. See *infra* text accompanying notes 21-26; regulations cited *infra* note 25.

9. The strategy proposed in this Note is not available as a means for combating the underrepresentation of women workers and female-owned firms in public contracting because there exists no federal law imposing a general ban on sex discrimination in programs receiving federal aid. Title VI only forbids discrimination on account of race, color, or national origin. Although Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (1988), prohibits sex discrimination, that statute applies only to federally funded educational institutions.

the *Croson* standard does not even apply to acts of Congress such as Title VI.¹⁰ Thus, even after *Croson*, Title VI offers a way to hold contracting states and municipalities accountable for the way they distribute the benefits flowing from taxpayer-funded development.¹¹

The Title VI limits outlined in this Note apply to all types of government contracting and, indeed, to the distribution of all other categories of benefits by governmental entities. However, this Note uses the example of publicly funded construction work for two reasons. First, explication using one concrete context as a point of reference best illustrates the mechanics and practical import of this proposed application of Title VI. Second, public works projects administered by state and local governments are one of the most important means by which public dollars are injected into local economies. The way these funds are distributed is therefore of critical economic and social significance.

Part I of this Note explains the scope of the problem facing civil rights advocates after *Croson* and clarifies why Title VI provides a promising basis on which to challenge minority underrepresentation. Part II confronts two potential obstacles to such a Title VI claim. There the Note explains that on account of the changes in Title VI effected by the Civil Rights Restoration Act of 1987 (CRRRA),¹² the first of these no longer poses a problem. As for the second, the Note argues that, properly understood, it should never have been seen as an obstacle at all. Having established that Title VI does indeed reach discrimination in governmental contracting, the Note proceeds in Part III to discuss how the disparate impact definition of discrimination is applied under Title VI and explains what particular sorts of contracting practices are susceptible to challenge under the statute.

I. BACKGROUND

A. *The Scope of the Problem*

Even after *Croson*, not all set-asides are subject to strict scrutiny. *Croson* did not overrule *Fullilove v. Klutznick*,¹³ the 1980 decision in which the Supreme Court sanctioned *federally* imposed set-asides.¹⁴ *Croson* and *Fullilove*

10. See discussion *infra* text accompanying notes 13-14.

11. This Note does not argue that Title VI requires federal funds recipients to adopt set-asides. A Title VI suit would, however, provide a means of establishing a record documenting the exclusion of people of color from public contracting through discriminatory government practices. Since that record might then be invoked by the defendant government were it to seek later to defend or establish a set-aside plan, Title VI actions brought against sympathetic cities or states might play a useful role in laying the groundwork for defensible post-*Croson* set-asides.

12. Pub. L. No. 100-259, 102 Stat. 28 (1988).

13. 448 U.S. 448 (1980).

14. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486-91 (1989). One year after *Croson*, the Court reaffirmed *Fullilove's* vitality when it held in *Metro Broadcasting v. FCC*, 110 S. Ct. 2997, 3008-09 (1990), that federal race-based preferences are subject only to intermediate tier scrutiny—not the strict scrutiny applied to state plans under *Croson*.

together establish a bifurcated constitutional standard under which federally mandated set-asides are generally permitted while city- and state-imposed plans are tolerated only in limited circumstances.

Many federal statutes providing funds to states¹⁵ for public works programs currently include set-aside provisions. These requirements apply, however, only to state-administered projects that are "primarily federally funded."¹⁶ They therefore leave untouched the underrepresentation of minorities in jointly financed projects not deemed "primarily federal" and in other state-run projects funded entirely with nonfederal money. The proposed Title VI claim would provide a means of reaching these categories of construction jobs, which otherwise are not subject to federal regulation.

B. *Applicability of Title VI*

Title VI provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁷ A great many public works projects are beyond the reach of federal set-asides. Most such projects are covered by the nondiscrimination requirements of Title VI, however, on account of the Civil Rights Restoration Act. That law defines expansively the term "program or activity receiving Federal financial assistance"—the statutory provision demarcating Title VI's reach. After the CRRA, receipt of even a small amount of federal aid by any part of a state agency is sufficient to impose Title VI's nondiscrimination requirements on all of the institution's operations.¹⁸ Since almost all state agencies that sponsor construction projects receive at least a little federal aid,¹⁹ Title VI provides grounds for attacking minority

15. For simplicity's sake, this Note speaks mostly of states when discussing the nonfederal political subdivisions whose contracting practices the contemplated litigation seeks to challenge. The analysis that follows, however, applies equally to projects run by county and municipal governments.

16. *Milwaukee County Pavers Ass'n v. Fiedler*, 710 F. Supp. 1532, 1551 (W.D. Wis. 1990). *Fiedler* found that a project 70-75% financed with federal money qualified as "primarily federally funded." *Id.* at 1544 n.6.

17. Title VI, § 601, 42 U.S.C. § 2000d (1988).

18. Civil Rights Restoration Act, § 6, 42 U.S.C. § 2000d-4a (1988). Note that in order for Title VI limits to attach, federal funds must go to the particular program or activity funded. Receipt of funds by one agency within a state government is not sufficient to extend Title VI coverage to activities of other agencies, even when all are subdivisions of the same chartered governmental unit.

The proposition that the CRRA imposed an institution-wide scope on Title VI is uncontroversial because effecting such coverage was the basic purpose of the Restoration Act. *See infra* text accompanying notes 63-70. The subtly different issue addressed below concerns not *whether* Title VI applies to the operations of federally funded state agencies, but rather *what* constitutes the scope of its prohibition. *See infra* Part II.

19. For catalogs of the various sorts of federal aid currently extended to state and local governments, see ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, A CATALOG OF FEDERAL GRANT-IN-AID PROGRAMS TO STATE AND LOCAL GOVERNMENTS: GRANTS FUNDED FY 1989 (1989); OFFICE OF MANAGEMENT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT & U.S. GEN. SERVICES ADMIN., 1991 CATALOG OF FEDERAL DOMESTIC ASSISTANCE (1991).

underrepresentation, even in an agency's entirely state-funded projects.²⁰

Title VI holds promise as a tool for counteracting the consequences of *Croson* because it allows plaintiffs to challenge contracting practices under the disparate impact definition of discrimination. This was established in 1983 in *Guardians Association v. Civil Service Commission*.²¹ There the Supreme Court held that while Title VI itself requires a showing of discriminatory intent to prove a violation, the statute delegates to federal agencies the discretion to incorporate effects-based definitions of discrimination into their regulations implementing the statute.²² Because *Guardians'* bifurcated holding did not reflect the views of any single Court majority, and because of changes in Court personnel over the past nine years, some observers doubt that *Guardians* will survive when the Court next examines Title VI.²³ For the time being, however, *Guardians* is the law, and Congress' strong reaffirmation of the disparate impact doctrine in the Civil Rights Act of 1991²⁴ may lead the Court to hesitate before overruling the *Guardians* holding.

Current Title VI regulations include effects-based definitions in their rules detailing the nondiscrimination duties imposed on institutions choosing to accept federal aid.²⁵ Since *Guardians* held that private litigants may sue state

20. The proposed Title VI claim would not target the practices of the federal government itself. In part this is because the problem there is less dire: many statutes funding the construction of federal facilities still require set-asides; additionally, federally run projects are governed by the stronger affirmative action requirements of Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), reprinted in 42 U.S.C. § 2000e app. at 398 (1988). Another reason for excluding federal agencies, however, is that it is unsettled whether Title VI suits may be brought against the federal government. Compare *Young v. Pierce*, 628 F. Supp. 1037, 1057 (E.D. Tex. 1985) and *Little Earth of United Tribes v. U.S. Dep't of Hous. & Urban Dev.*, 584 F. Supp. 1292, 1297 (D. Minn. 1983) with *NAACP v. Medical Ctr., Inc.*, 599 F.2d 1247, 1254 n.27 (3d Cir. 1979) and *Community Bhd. v. Lynn Redevel. Auth.*, 523 F. Supp. 779, 782 & n.2 (D. Mass. 1981).

21. 463 U.S. 582 (1983).

22. *Guardians* elicited six separate opinions from a fragmented Court. The case's two-part holding on this issue was supported in its entirety by only three members. *Guardians*, 463 U.S. at 643-45 (Stevens, J., joined by Brennan & Blackmun, JJ., dissenting). Two other Justices endorsed the broader view that both the implementing regulations and the statute itself properly incorporate the disparate impact definition of discrimination. *Id.* at 589-93 (White, J.); *id.* at 616-24 (Marshall, J., dissenting). A majority of five Justices thus agreed that at least the Title VI effects test regulations were valid. *Id.* at 584 n.2 (White, J.); *id.* at 608 n.1 (Powell, J., concurring in judgment) (each summarizing case's holding). Two years later in a unanimous opinion, the Court restated—although only in dicta—the rule of *Guardians*, reaffirming that the case stands for the proposition described above. See *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985); see also *Latinos Unidos de Chelsea en Accion (LUCHA) v. Secretary of Hous. & Urban Dev.*, 799 F.2d 774, 785 n.20 (1st Cir. 1986); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969, 981-82 (9th Cir. 1984) (all applying *Guardians* standard).

23. Telephone Interview with David Tatel, former Director, Office for Civil Rights, U.S. Dep't of Health, Educ. & Welfare, 1977-79 (Oct. 30, 1990).

24. Pub. L. No. 102-166, 105 Stat. 1071. See discussion *infra* text accompanying notes 93-95.

25. See, e.g., 7 C.F.R. § 15.3(b)(2) (1991) (Agriculture); 10 C.F.R. § 1040.13(c)-(d) (1991) (Energy); 15 C.F.R. § 8.4(b)(2)-(3) (1991) (Commerce); 22 C.F.R. § 141.3(b)(2) (1991) (State); 24 C.F.R. § 1.4(b)(2)(i), (3) (1991) (Housing & Urban Development); 28 C.F.R. § 42.104(b)(2)-(3) (1991) (Justice); 29 C.F.R. § 31.3(b)(2)-(3) (1991) (Labor); 31 C.F.R. § 51.52(b)(1)(vi), (3)-(4) (1991) (Treasury); 32 C.F.R. § 300.4(b)(2) (1991) (Defense); 34 C.F.R. § 100.3(b)(2)-(3) (1991) (Education); 38 C.F.R. § 18.3(b)(2)-(3) (1991) (Veterans Affairs); 43 C.F.R. § 17.3(b)(2)-(3) (1991) (Interior); 45 C.F.R. § 80.3(b)(2)-(3) (1991) (Health & Human Services); 49 C.F.R. § 21.5(b)(2)-(3) (1991) (Transportation). For the regulations of agencies beneath cabinet rank, see C.F.R. INDEX 103-09 (1991).

government recipients of federal funds directly under the Title VI effects test regulations,²⁶ Title VI provides a means for challenging the public contracting practices of state agencies so long as the defendant agencies receive aid under some federal program.

C. *Mechanics of a Title VI Claim*

The demise of state set-asides in the wake of *Croson* will result both in fewer public works contracts going to MBE's and in fewer jobs in public construction projects going to minority workers.²⁷ Title VI litigation seeking to address these problems would therefore concern itself with the interests of two aggrieved groups: minority construction firm owners and minority employees of construction contractors and subcontractors.

1. *Contracting*

In an effort to combat the underrepresentation of MBE's among contractors working on public projects, Title VI litigants would examine the methods by which sponsoring state agencies distribute construction contracts. Such a challenge would focus on the procedures and criteria used to select prime contractors. When a particular factor or element of a selection process, though neutral on its face, disproportionately excludes qualified MBE's from eligibility for public contracts, plaintiffs would challenge the practice as violating Title VI. Although a showing of disparate impact establishes a prima facie case of liability under Title VI, state defendants may counter with a variety of affirmative defenses. Generally, plaintiffs will prevail only when courts reject such defenses as unconvincing or when plaintiffs demonstrate the availability of alternative contracting practices that are less discriminatory in their effect but still serve the state's legitimate needs.²⁸

2. *Subcontracting*

Title VI litigation would also challenge the manner in which states permit subcontracts to be distributed under public works projects. This claim would focus on the procedures and requirements (if any) states impose on prime

26. As the editors of the *Harvard Law Review* wrote, "In *Guardians*, six Justices recognized a private right to enforce title VI and its regulations against state and local agencies receiving federal funds. They failed to make clear, though, whether the source of this right is title VI itself or 42 U.S.C. § 1983. Thus it remains uncertain whether title VI may also be enforced against *private* entities that receive federal funds." *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70, 250-51 (1983) (footnotes omitted). Since the contemplated litigation would target state and local governmental entities, the availability to plaintiffs of a private right of action is settled.

27. See discussion *supra* note 2 and text accompanying notes 1-5.

28. See *infra* Part III.A.2.b-c.

contractors, governing the way those contractors farm out subcontracts for the projects they oversee. In most circumstances, states leave the subcontracting process entirely unregulated. Such a policy makes no difference, however, for the applicability of Title VI. A state's decision not to regulate subcontracting—thereby delegating unfettered authority to prime contractors to distribute subcontracts—is as much a policy choice as is a decision to regulate.²⁹ Title VI limits the way states may distribute benefits like contracts, and states cannot evade responsibility for compliance simply by ceding decisionmaking authority to a prime contractor.

A prime contractor's subcontracting procedures count as policies of the sponsoring state for Title VI purposes and so may be challenged in a Title VI subcontracting claim *brought against the state as defendant*. The agency rules implementing Title VI support this proposition. Most of these regulations prohibit recipients of federal funds from “directly or through contractual or other arrangements, utiliz[ing] criteria or methods of administration which have the effect of subjecting persons to discrimination.”³⁰ This language clarifies that Title VI holds federal funds recipients responsible for “acts of racial discrimination carried out through third parties.”³¹ Subcontracting policies are thus subject to Title VI limits. When such practices have a disproportionate adverse impact on MBE's, they are subject to challenge in the same way that practices of prime contractors are, and such claims can be brought directly against the sponsoring state agency.³²

29. Cf. *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (for purposes of constitutional takings analysis, state decision not to regulate a given subject constitutes state policy choice no less than decision to regulate); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 881 (1987) (discussing *Miller*).

30. Department of Transportation Title VI Regulations, 49 C.F.R. § 21.5(b)(2) (1991) (emphasis added). For similar language in other agencies' Title VI rules, see regulations cited *supra* note 25.

31. 3 RICHARD CAPPALLI, *FEDERAL GRANTS & COOPERATIVE AGREEMENTS* § 19:37, at 131 (1982).

32. One commentator has argued that *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986), prevents Title VI from reaching discrimination against subcontractors. Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257, 1271-72 (1991). *Paralyzed Veterans* held that even though federal aid to public airport authorities benefits private airlines, such indirect aid does not count as “federal financial assistance” to the airlines, and so the federal funding-linked antidiscrimination laws do not apply to the airlines of their own force. That holding does not, however, limit the availability of the Title VI claims proposed in this Note. As Justice Marshall's dissent in *Paralyzed Veterans* noted, even if parties receiving federal funds indirectly cannot be sued under Title VI, *the funds recipient* can be held liable for the discriminatory practices of indirectly funded third parties. 477 U.S. at 618 (Marshall, J., dissenting). In the *Paralyzed Veterans* context, the discriminatory conduct of the private airlines, while not violating any duty imposed on *the airlines* by federal law, might nonetheless constitute a violation on the part of the federally funded *airport operator*. Similarly, in publicly funded construction work, discrimination by contractors against subcontractors may not be actionable under Title VI in lawsuits brought against contractors, but such behavior violates the Title VI obligations of the federally funded sponsoring state agency and so can be challenged in a suit brought against the state as defendant.

Moreover, the precedential vitality of *Paralyzed Veterans* is in doubt since the *Paralyzed Veterans* Court relied on *Grove City College v. Bell*, 465 U.S. 555 (1984), the narrowing Supreme Court interpretation that Congress statutorily overruled with the Civil Rights Restoration Act. See *infra* text accompanying notes 63-70.

3. *Job Distribution*

Another important social good flowing from public works spending is the creation of jobs for construction workers. By selecting a particular contractor for a job, a state in effect selects a group of workers to benefit from that public project. Title VI litigation would seek to ensure that public prime contractor and subcontractor selection practices distribute employment opportunities equitably by examining the racial composition of the work forces of firms selected for public projects.³³ Where particular methods or criteria serve systematically to steer contracts toward firms with disproportionately white work forces, they are subject to Title VI challenge.

D. *Preferability of Title VI to Title VII as a Cause of Action*

Most public contracting rules and procedures are neutral on their face and cannot easily be shown to have been adopted for the purpose of discriminating against people of color. The discriminatory consequences of such practices can therefore only be challenged under an effects-based definition of discrimination. While Title VII of the 1964 Civil Rights Act³⁴ extends liability for employment practices yielding a disparate racial impact,³⁵ Title VI is in several respects a superior tool for combating minority underrepresentation in public contracting.

Title VII only prohibits discriminatory *employment* practices³⁶ and so does not reach discrimination in the letting of prime contracts and subcontracts to construction firms. While Title VII renders discriminatory employee selection practices actionable, the provision does not provide a basis for challenging such policies at the state governmental level. The proposed litigation would seek to hold *states* responsible for the way they distribute the benefits flowing from public works projects. In most circumstances minority construction workers employed by construction contractors and subcontractors do not qualify as "employees" of the contracting state for Title VII purposes,³⁷ and so do not

33. As noted above, the exercise of delegated discretion by prime contractors in selecting subcontractors counts as a policy of the state for Title VI purposes. *See supra* notes 30-32 and accompanying text. Therefore, a state violates its Title VI obligations when it distributes either prime contracts or subcontracts in a way that systematically favors firms that do not employ people of color.

34. 42 U.S.C. §§ 2000e to 2000e-6 (1988).

35. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (weakening *Griggs* standard); Civil Rights Act of 1991, Pub. L. No. 102-166, § 105(a), 105 Stat. 1071, 1074-75 (to be codified at 42 U.S.C. § 2000e-2(k)) (restoring *Griggs* standard). *See infra* text accompanying notes 93-95.

36. 42 U.S.C. § 2000e-2 (1988) (titled "Unlawful Employment Practices").

37. Although federal labor laws such as the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988), the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1988), and Title VII define employment in broader terms than do common law agency principles, even by this standard construction workers rarely qualify as "employees" of the state. *See* BARBARA L. SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1000-03 (2d ed. 1983).

have a cause of action against the state under that statute.

By suing individual contractors and subcontractors directly, employment discrimination claims attacking the practices of particular employers can be brought under Title VII. Such suits do not, however, allow workers to challenge a state's selection of a particular construction firm—the “meta-employment” decision—because a state's decision to contract with a particular employer does not constitute an “employment practice”³⁸ of that employer within the meaning of Title VII. Thus, only Title VI provides a means for challenging the discriminatory effects on workers of decisions made by states further “upstream” in the job distribution process.

II. POTENTIAL OBSTACLES TO A TITLE VI CLAIM: THE IBD AND SECTION 604

A. *The Potential Limits to Title VI*

Any attempt to use Title VI in the manner described must first confront two limiting doctrines which arguably prevent Title VI from reaching most discrimination in public contracting. The first is the “intended beneficiary” doctrine (IBD). If it governed Title VI, this doctrine would pose an obstacle to both the contract and job distribution claims outlined above. The IBD holds that Title VI does not require recipients of federal funds to stop engaging in all types of discrimination. Rather, on this view, Title VI bans discrimination only against the “intended beneficiaries” of the particular federal aid in question. Since MBE owners and minority laborers are not the intended beneficiaries of the vast majority of federal aid received by state agencies, the IBD would preclude most attempts to use Title VI to target discrimination in public contracting.³⁹

This Note argues that though it was unclear whether the IBD properly applied under Title VI in its original form,⁴⁰ the possibility that an IBD limit

38. 42 U.S.C. § 2000e-2 (1988).

39. Even if the IBD did appropriately govern Title VI, some job and contract distribution claims would still be available because minority construction workers and MBE's are among the intended beneficiaries of some federal grant statutes. For instance, the very pieces of Title VI's legislative history in which the IBD was first articulated cited construction workers whose jobs are created under federal public works programs as classic examples of intended beneficiaries. See 110 CONG. REC. 10,075-76 (1964) (reprinting Letter from Attorney General Kennedy to Senator Cooper (Apr. 29, 1964)); 110 CONG. REC. 6545 (1964) (remarks of Sen. Humphrey). As for MBE's, any federal statute requiring set-asides would include among its intended beneficiaries those categories of firms targeted by the set-aside requirement. Therefore, even under the IBD, Title VI would reach contracting discrimination by state agencies so long as the agencies receive at least some aid under federal statutes that either mandate MBE set-asides or else are aimed at creating jobs for construction workers.

Although in some circumstances Title VI would therefore afford plaintiffs a cause of action in spite of the IBD, many state agencies receive no such aid, and so contracting discrimination by them would not be actionable under Title VI.

40. See *infra* Part II.B-C.

might currently govern Title VI was foreclosed when Congress amended the statute in the Civil Rights Restoration Act. Not only is the legislative intent behind the CRRA incompatible with the IBD,⁴¹ but the fact that Congress codified another limiting doctrine—a narrower “ultimate beneficiary” restriction—in the CRRA ought to be viewed as a congressional decision to substitute that constraint for the broader IBD.⁴²

The IBD demarcates the scope of Title VI with reference to *the plaintiff*⁴³ *class protected by the statute*. It restricts Title VI coverage to just one category of behavior by federal funds recipients: discrimination *against intended beneficiaries* of federal aid in the distribution of goods and benefits. The IBD thus sharply limits the types of plaintiffs who may bring Title VI suits. In contrast, the ultimate beneficiary doctrine imposes no categorical limits on the *types* of discrimination by federal funds recipients prohibited under Title VI. Instead, this doctrine carves out a limited exception to Title VI liability defined with reference to *the defendant class subject to liability under the statute*. Under this theory, discrimination *by* private citizens receiving certain specified types of federal aid is excluded from Title VI’s scope. Because the ultimate beneficiary exception only immunizes certain private citizens from Title VI liability, it would pose no obstacle to a Title VI public contracting claim brought against a state governmental defendant.

The second potential obstacle to the proposed use of Title VI is found in section 604, which excludes from Title VI’s scope “the employment practice[s] of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment.”⁴⁴ This provision simply constitutes a subset of the broader IBD restriction, codifying the IBD with respect to one subcategory of discrimination by federal funds recipients: discrimination *against intended beneficiary employees*. This Note argues that, properly understood, section 604 does not limit the availability of the Title VI claims proposed in this Note. Because section 604 applies only to employment practices, at most it poses a problem only for a Title VI *job* distribution claim. Thus, even if this Note’s argument against the applicability of this constraint is ultimately unpersuasive, a Title VI *contract* distribution claim would still be available.

B. *The Legislative History of Title VI*

In order to understand the debate over the validity of the IBD and over the meaning of Section 604, it is first necessary to examine the congressional

41. See *infra* Part II.D.1.

42. See *infra* Part II.D.2.

43. This Note’s use of the terms “plaintiff” and “defendant” when discussing the purposes of the 1964 Civil Rights Act is somewhat ahistorical since it was not clear in 1964 whether Titles VI and VII would be subject to private enforcement. The Note uses the terms for the sake of clarity.

44. 42 U.S.C. § 2000d-3 (1988).

debates on Title VI.⁴⁵ When the Eighty-eighth Congress considered the Johnson administration's civil rights bill, Title VI of the draft legislation engendered substantial controversy. Some members of Congress feared the provision would threaten small farmers receiving federal crop subsidies and pensioners receiving social security or veterans' benefits with the loss of their payments if they discriminated in hiring agricultural laborers or domestic workers.⁴⁶ Since employers with fewer than twenty-five⁴⁷ workers had already been exempted from Title VII's ban on employment discrimination, it was important to know whether such employment relationships were exempt from Title VI as well.

In opening the debate on the civil rights bill in March 1964, Senator Hubert Humphrey attempted to allay those fears by explaining that Title VI would not reach such situations.⁴⁸ Although Humphrey stated unequivocally that this sort of discrimination was beyond the scope of Title VI, he offered two seemingly contradictory rationales in his explanation. Humphrey first explained that Title VI did not cover such farmers and pensioners because they were the "ultimate beneficiaries" of the farm support and social security programs.⁴⁹ The understanding behind this view, the ultimate beneficiary doctrine, is that Title VI was meant to ban discrimination by federally funded institutions, but that simple receipt of government social insurance benefits by private persons was not meant to carry with it an elaborate array of statutory conditions. Since Title VI's prohibition incorporates the far-reaching disparate impact standard, such a limitation is sensible. Without this limit, many of the actions of private citizens would be subject to unwieldy Title VI restrictions since most citizens today receive federally financed benefits of some sort.

In the same speech, however, Humphrey went on to offer a slightly different rationale for the exclusion. He explained that Title VI would not reach employment discrimination by farmers because "[t]he various Federal programs of assistance to farmers . . . were not *intended* to deal with problems of farm employment and farm employees are generally not participants in or

45. Since the section 604 exclusion constitutes a subset of the broader IBD, reading an implied IBD limit into Title VI would render section 604 redundant. Because canons of statutory interpretation strongly disfavor such constructions, *see infra* text accompanying note 83, the plain language of the statute militates against recognition of a nontextual IBD limit. Proponents of the "plain meaning" approach to statutory interpretation should reject the IBD on this basis alone since they maintain that it is improper to consult legislative history except when statutory language is ambiguous.

46. *See, e.g.*, 110 CONG. REC. 11,615 (1964) (Sen. Cooper).

47. The original Title VII excluded employers of fewer than 25 from the provision's obligations. Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 103 (codified at 42 U.S.C. § 2000e(b) (1988)), reduced that number to 15.

48. Senator Humphrey's views provide important indications of the legislative intent behind Title VI because he was a major sponsor of the 1964 Civil Rights Act, and his remarks on Title VI are among the only detailed contemporaneous explications of the provision's function.

49. 110 CONG. REC. 6545 (1964).

beneficiaries of such programs."⁵⁰ This explanation—the IBD—is subtly but significantly different from the ultimate beneficiary doctrine. Instead of just *excluding* discrimination by certain ultimate beneficiary private citizen defendants from Title VI's otherwise broad scope, the IBD *only includes* within Title VI's ban discrimination *against* intended beneficiary plaintiffs. The IBD thus results in a much narrower statutory prohibition.

In the months following Humphrey's remarks, disagreement and confusion persisted as to the intended scope of Title VI. Seeking clarification, Senator John Sherman Cooper wrote to Attorney General Robert Kennedy. Kennedy's response, however, relied on Senator Humphrey's earlier remarks and so repeated Humphrey's confused presentation of the conflicting ultimate beneficiary and intended beneficiary theories.⁵¹

In order to settle this dispute with respect to the chief subject of contention—employment—Senator Cooper proposed section 604, the employment exception clause, as an amendment to the bill. It reads: "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."⁵² Section 604 largely settled the debate over the circumstances under which Title VI might reach employment discrimination.⁵³ The terms used by the various members of Congress in presenting and discussing the amendment revealed, however, lingering disagreement over whether, section 604 notwithstanding, Title VI incorporated a general, nontextual IBD limitation.⁵⁴

C. *The Unresolved Question of the IBD: 1964-1988*

During the 1970's and 1980's, federal courts disagreed as to whether Congress had meant for Title VI or for its statutory analogues, Title IX of the

50. *Id.* (emphasis added).

51. Letter from Attorney General Kennedy to Senator Cooper (Apr. 29, 1964), *reprinted in* 110 CONG. REC. 10,075-76 (1964) (citing remarks of Sen. Humphrey).

52. 42 U.S.C. § 2000d-3 (1988).

53. While section 604 laid down a rule, it by no means made clear when the rule ought to apply. The provision offers little guidance as to how to define the section's terms. Depending on who qualifies as an "employer," what counts as an "employment practice," and how one identifies the "primary objective" of a federal grant statute, Title VI may or may not apply to a given situation. This ambiguity may cause some critics to argue that section 604 prohibits the Title VI claims on behalf of unintended beneficiary construction workers proposed in this Note. For an explanation why section 604 should properly be read to permit such a claim, see *infra* Part I.E.

54. Those believing a general IBD limit governed Title VI viewed section 604 as a simple clarification of the broader restriction. Those rejecting the IBD, however, regarded section 604 as effecting a substantive change in Title VI's scope. *Compare* 110 CONG. REC. 12,714 (1964) ("We have made no changes of substance in Title VI . . .") (Sen. Humphrey) *with* 110 CONG. REC. 14,220 (1964) ("Substantive changes are made in section[] . . . 604.") (Sen. Holland).

Education Amendments of 1972⁵⁵ and section 504 of the Rehabilitation Act of 1973,⁵⁶ to be limited by the IBD. Because Title IX and the Rehabilitation Act were modeled after Title VI,⁵⁷ courts look to Title VI's legislative history for guidance when attempting to divine the legislative intents of the Ninety-second and Ninety-third Congresses in enacting the later statutes.

Eventually, the Supreme Court resolved the issue for Title IX and the Rehabilitation Act, ruling that no IBD limit obtains under those laws.⁵⁸ These holdings rested, however, not on the legislative history of Title VI, but on those of the two later-enacted statutes. The decisions thus offered no comment on the existence of an intended beneficiary limitation under Title VI.⁵⁹

During the 1980's, a handful of courts hearing Title VI cases held that the IBD did indeed apply under that statute and on that basis dismissed suits brought by unintended beneficiary plaintiffs.⁶⁰ All of these decisions cite as authority two circuit court Rehabilitation Act opinions in which courts of appeals, citing Senator Humphrey's remarks, concluded that the IBD properly governed Title VI and thus also limited the subsequently enacted Rehabilitation Act.⁶¹ Because these decisions considered Title VI only for the purpose of assessing the scope of protection offered by the Rehabilitation Act, their statements with respect to Title VI are arguably dicta. Even more importantly, the cases' holdings with respect to the Rehabilitation Act were subsequently overruled by the Supreme Court.⁶²

D. *The Civil Rights Restoration Act: The IBD Question Settled*

Before the Supreme Court had the opportunity to rule on the appropriate-

55. 20 U.S.C. §§ 1681-1688 (1988). Title IX prohibits sex discrimination by educational institutions receiving federal funds.

56. 29 U.S.C. § 794 (1988). Section 504 of the Rehabilitation Act bans discrimination against the handicapped in federally funded programs.

57. U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 600 & n.4 (1986) (section 504 modeled after Title VI); Cannon v. University of Chicago, 441 U.S. 677, 694-95 & n.16 (1979) (Title IX modeled after Title VI).

58. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 529-30 & n.20 (1982) (Title IX); Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632-35 (1984) (section 504). These cases presented the question of whether employment discrimination against unintended beneficiary workers was actionable under Title IX and section 504. Because neither statute includes an employment exception clause like Title VI's section 604, each case turned on whether a nontextual, general IBD limit governed the statute in question.

59. Writing for the Court in *North Haven*, Justice Blackmun flagged as unresolved the question of whether Title VI incorporated an IBD limit. Although he criticized the petitioners' assertion that Title VI's legislative history unequivocally supports the IBD, Blackmun found it unnecessary to decide the issue at that time. *North Haven*, 456 U.S. at 529-30 & n.20.

60. Doe v. Saint Joseph's Hosp., 788 F.2d 411, 418-21 (7th Cir. 1986); Laramore v. Illinois Sports Facilities Auth., 722 F. Supp. 443, 452 (N.D. Ill. 1989); Coalition of Bedford-Stuyvesant Block Ass'n v. Cuomo, 651 F. Supp. 1202, 1208-09 & n.2 (E.D.N.Y. 1987); Griggs v. Lexington Police Dep't, 672 F. Supp. 36, 39 & n.2 (D. Mass. 1987); Vucicevic v. MacNeal Memorial Hosp., 572 F. Supp. 1424, 1429-30 (N.D. Ill. 1983).

61. Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1235-36 n.17 (7th Cir. 1980); Carmi v. Metro. St. Louis Sewer Dist., 620 F.2d 672, 674-75 n.4 (8th Cir.), cert. denied, 449 U.S. 892 (1980).

62. *Consolidated Rail Corp.*, 465 U.S. at 632-35.

ness of the IBD under Title VI, Congress passed the Civil Rights Restoration Act of 1987.⁶³ In clarifying that Title VI's prohibition is institution-wide in scope, the CRRA amendments foreclosed the possibility that the statute might be governed by an intended beneficiary limitation. An IBD limit is incompatible with the basic logic and purpose of the Restoration Act. Moreover, the past Title VI interpretations singled out for approval and disapproval by the CRRA's sponsors, the understanding of Title VI evinced at the CRRA hearings, and the codification of the narrower ultimate beneficiary exception in section 7 of the CRRA all compel this conclusion. These arguments will be developed in the subsections that follow.

1. *Institution-Wide Application of Title VI*

The CRRA reversed *Grove City College v. Bell*,⁶⁴ a 1984 decision in which the Supreme Court construed narrowly the protective scope of the three statutes banning discrimination by federal funds recipients. *Grove City* held that Title IX's ban on sex discrimination "under any education program or activity receiving Federal financial assistance"⁶⁵ meant that federal aid received by a subunit of a larger institution triggers a nondiscrimination duty only with respect to that particular subunit. Because the three statutes prohibiting discrimination by federal funds recipients are interpreted in parallel fashion, *Grove City's* holding applied to Title VI as well.⁶⁶

The Restoration Act gave Title VI an extraordinarily broad, institution-wide scope. In the process, the possibility that Title VI might admit an intended beneficiary limitation was necessarily foreclosed. The Restoration Act clarifies Title VI's scope by inserting a broad definition for the term "program or activity" as it appears in the statute's main provision, section 601.⁶⁷ As a result, Title VI's ban on "discrimination . . . under any program or activity receiving Federal financial assistance"⁶⁸ applies on an "institution-wide"⁶⁹ basis to "all of the operations"⁷⁰ of a recipient entity.

Consideration of the statute's inherent logic reveals the incompatibility of the Restoration Act with the IBD. The purpose of the Act was to broaden the applicability of Title VI's nondiscrimination duty to include subunits of federally funded institutions that do not themselves receive federal aid. Since these subunits are not federally funded, participants in their activities are by

63. Pub. L. No. 100-259, 102 Stat. 28 (1988). Those provisions of the Restoration Act amending Title VI are codified at 42 U.S.C. § 2000d-4a (1988), and 20 U.S.C. § 1687 (1988).

64. 465 U.S. 555 (1984).

65. Title IX, 20 U.S.C. § 1681 (1988).

66. *United States v. Alabama*, 828 F.2d 1532, 1548 (11th Cir. 1987) (per curiam), cert. denied, 487 U.S. 1210 (1988) (applying *Grove City* to Title VI).

67. 42 U.S.C. § 2000d (1988), quoted *supra* text accompanying note 17.

68. Title VI, § 601, 42 U.S.C. § 2000d (1988).

69. Civil Rights Restoration Act of 1987, § 2(2), 20 U.S.C. § 1687 (1988).

70. *Id.* § 6, 42 U.S.C. § 2000d-4a.

definition not the intended beneficiaries of the federal aid at issue. The mission of the Restoration Act was therefore to extend Title VI's protections to persons not qualifying as intended beneficiaries. To read the IBD back into the amended statute would render the CRRA meaningless.

The Restoration Act's own preamble supports this view. It declares the Act's aim of "restor[ing] [Title VI's] prior consistent and long-standing executive branch interpretation."⁷¹ The report of the Senate Labor and Human Resources Committee, the statute's official legislative history, cites testimony of J. Stanley Pottinger, the former Assistant Attorney General for Civil Rights in the Nixon and Ford Administrations, as evincing that prior prevailing interpretation.⁷² In that testimony, Pottinger described past federal enforcement practice in terms incompatible with the IBD.⁷³ As one of the "prior . . . executive branch interpretation[s]" the CRRA sought to restore, Pottinger's view bolsters the conclusion that the amended Title VI was not meant to include an IBD limit.

Congressional hearings on the bill provide further evidence that the Restoration Act was understood as banning all discrimination in covered institutions—not just that against intended beneficiaries. In those hearings, a variety of Reagan Administration officials, offering examples of the practices the new bill would reach, showed that they understood the amended Title VI as not subject to an IBD limit.⁷⁴

71. *Id.* § 2(2), 20 U.S.C. § 1687.

72. S. REP. NO. 64, 100th Cong., 2d Sess. 9 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 11 (citing *Civil Rights Act of 1984: Joint Hearings on H.R. 5490 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 98th Cong., 2d Sess. 258 (1984) [hereinafter *1984 House Hearings*] (statement of J. Stanley Pottinger)).

73. "Prior to the educational amendments of 1972, approximately 90 percent of Federal aid to higher education was categorical money, primarily for research and development. No one in the Nixon administration ever suggested that title VI applied to just to [sic] the physics laboratory of a major university or to some other individual program of the university and not to the admissions program." *1984 House Hearings*, supra note 72, at 257 (statement of J. Stanley Pottinger). In such situations, the intended beneficiaries of the federal research grants would be the physics department faculty or some anticipated end-user of the research. The Nixon Administration nevertheless interpreted such aid as triggering a Title VI ban on discrimination against unintended beneficiaries such as student applicants for admission to the university.

74. Linda Chavez, then-Staff Director of the U.S. Commission on Civil Rights, testified: "[The bill] establishes coverage of the non-educational commercial activities of institutions of higher education, even when those activities do not serve students, faculty, or other educational functions. . . . Indeed, even the investment policies of an institution might be subjected to coverage under these four statutes for the first time." *Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the Comm. on Education and Labor and the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 99th Cong., 1st Sess. 1242 (1985) [hereinafter *1985 House Hearings*].

Harry M. Singleton, then-Assistant Secretary for Civil Rights in the U.S. Department of Education, stated similarly: "[U]nder [the bill], financial assistance flowing to only one 'part' of a university—one department, building, college or graduate school—would create jurisdiction . . . in non-educational 'operations' in which the university might be engaged such as broadcasting, rental of non-student housing or even the management of its endowment fund." *Id.* at 289-90. Such nonstudent customers or tenants discriminated against in the noneducational, commercial operations of a university would by no means qualify as the intended beneficiaries of any federal aid received by the institution.

Another witness, William Bradford Reynolds, then-Assistant Attorney General for Civil Rights, confirmed that the bill would allow Title VI to reach discrimination in public accommodations and

The Senate report also went out of its way to criticize *Simpson v. Reynolds*, one of the very few cases finding that Title VI (and section 504 of the Rehabilitation Act) incorporate IBD limits.⁷⁵ Terming it one of the “few exceptions” to the courts’ previous practice of interpreting the antidiscrimination statutes broadly,⁷⁶ the Senate report singled out *Simpson* as one of the past interpretations the CRRA was not intended to restore.

2. *The Ultimate Beneficiary Exception*

The Restoration Act’s rejection of the IBD is also evident from section 7 of the Act, which exempts from coverage under the amended statutes those “ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of [the CRRA].”⁷⁷ The Senate report shows that the Restoration Act’s drafters understood that the Eighty-eighth Congress in 1964 had sought to exclude from Title VI coverage “farmers receiving crop subsidies,” “persons receiving social security benefits, persons that receive Medicare and Medicaid benefits, and individual recipients of food stamps.”⁷⁸ The Senate report cites from the portions of Title VI’s legislative history that articulate the contradictory IBD and ultimate beneficiary views of the scope of Title VI.⁷⁹ The report reads that inconsistent legislative history, however, as mandating only the narrower ultimate beneficiary exception to Title VI.⁸⁰ Quoting testimony from one of the hearings on the Restoration Act, the report explains: “Congress was not concerned with regulating the activities of the tens of millions of Americans who are the ultimate beneficiaries of the federal financial assistance, but who in no sense operate a federally-financed program or activity. Rather, Congress was concerned with the state agencies, the educational institutions and others who operate programs”⁸¹ Neither the Senate report nor the CRRA itself ever acknowledges any IBD limit.

Section 7 ought to be viewed as the 100th Congress’ interpretation of the intended scope of Title VI based on its appraisal of the legislative history of

employment in a university cafeteria. *Id.* at 246. Since he did not claim the statute would apply only in those instances where the customers or employees discriminated against in the cafeteria were students, Reynolds’ example would extend Title VI protection to persons other than intended beneficiaries of the university’s federal aid.

75. See discussion *supra* notes 61-62 and accompanying text.

76. S. REP. NO. 64, *supra* note 72, at 10, *reprinted in* 1988 U.S.C.C.A.N. at 12 (distinguishing *Simpson*).

77. Civil Rights Restoration Act of 1987, § 7, 20 U.S.C. § 1687 (1988) (emphasis added).

78. S. REP. NO. 64, *supra* note 72, at 24, 25, *reprinted in* 1988 U.S.C.C.A.N. at 26, 27.

79. *Id.* at 24-25, *reprinted in* 1988 U.S.C.C.A.N. at 26-27 (quoting Letter from Attorney General Kennedy to Senator Cooper (Apr. 29, 1964), *reprinted in* 110 CONG. REC. 10,075-76 (1964)). For a discussion of the Kennedy letter, see *supra* text accompanying note 51.

80. *Id.* at 24-25, *reprinted in* 1988 U.S.C.C.A.N. at 26-27.

81. *Id.* at 25, *reprinted in* 1988 U.S.C.C.A.N. at 27 (quoting 1985 House Hearings, *supra* note 74, at 1182 (statement of Daniel Marcus, former Deputy General Counsel, U.S. Dep’t of Health, Educ. & Welfare, 1977-79, and former General Counsel, U.S. Dep’t of Agric., 1979-80)).

the 1964 Civil Rights Act. Though congressional constructions of statutes are not usually binding on the courts, the ultimate beneficiary interpretation is authoritative because it was codified into a subsequent law: the CRRRA. To read the IBD back into the amended Title VI would render section 7 superfluous since ultimate beneficiaries would then already have been excluded from Title VI coverage under the broader IBD exception.⁸² In light of “the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant,”⁸³ the Restoration Act must be interpreted as implicitly rejecting the IBD. While it agreed that small farmers and pensioners were meant to be excluded from Title VI liability, the 100th Congress decided that this goal should be achieved through a mechanism much less sweeping than the IBD.

E. *Section 604: The Rule-of-Decision Reading*

After the Restoration Act, the IBD is no longer a potential obstacle to the Title VI claims this Note proposes. Title VI thus provides MBE’s grounds for challenging discriminatory state contracting and subcontracting practices, regardless of whether plaintiff firms qualify as intended beneficiaries of any federal aid received by defendant states. However, minority construction workers who target states’ job distribution practices will still face an additional hurdle in the form of section 604.⁸⁴

A Title VI job distribution claim would examine the racial composition of the work forces employed by firms awarded public contracts and subcontracts. Title VI suits would be brought against states employing contracting procedures or criteria that systematically steer contracts toward firms employing few people of color. The plaintiff class in these actions would consist of minority construction workers employed by firms with less disproportionately white work forces which have been excluded from public contracting as a result of the challenged practices.

Some might argue that because such a claim relates to employment, it falls within the preclusive scope of section 604. This conclusion is mistaken, however, because it flies in the face of both the plain meaning of section 604’s text and the historical understanding of the provision within the structure of the 1964 Civil Rights Act. Section 604 prohibits “action under [Title VI] . . . with respect to any employment practice of any employer.”⁸⁵ A Title VI jobs claim,

82. In all circumstances where defendants qualify as ultimate beneficiaries, plaintiffs then by definition cannot qualify as intended beneficiaries. Thus, all suits against which defendants would be immunized by the ultimate beneficiary doctrine, plaintiffs would also be barred from bringing by the broader IBD.

83. *Kungys v. United States*, 485 U.S. 759, 778 (1988); *see also* *Arcadia v. Ohio Power Co.*, 111 S. Ct. 415, 419 (1990); *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986).

84. This problem with section 604 would only arise where plaintiffs could not show that “the primary objective of the Federal financial assistance is to provide employment.” *See supra* note 39.

85. 42 U.S.C. § 2000d-3 (1988).

however, is an action with respect to contracting practices. Moreover, the challenged practices are not those of the plaintiffs' employer or of a firm with which the plaintiffs seek employment; rather, they are the practices of *the sponsoring state agency* in distributing construction contracts or in permitting prime contractors to distribute subcontracts that are at issue in such a suit.

The selection of a contractor or subcontractor for a job does more than direct profitable business toward that firm. It causes another benefit, paid hourly work for laborers, to flow to the firm's work force. The fact that workers are thus affected by contracting decisions and can challenge their distributional consequences under Title VI does not, however, convert those contracting decisions into employment practices.

An understanding of the role section 604 was meant to play in the larger structure of the 1964 Civil Rights Act reinforces this conclusion. Title VII was meant to be the principal legal apparatus regulating employment discrimination. That provision renders discrimination actionable only where the relationship between plaintiff and defendant is one of employee-employer.⁸⁶

Title VI, however, establishes a general ban on discrimination in federally funded programs that does not depend on the existence of any particular legal relationship between the plaintiff and defendant. Had Title VI been permitted to duplicate Title VII's coverage of discrimination in employment, it would have rendered moot the carefully crafted exceptions to Title VII's prohibition which, as compromises, had been necessary to build a coalition sufficient to win passage of the statute.⁸⁷

Section 604 was introduced by Senator Cooper in order to avoid precisely this problem—to clarify “that it was not intended that title VI would impinge on title VII.”⁸⁸ In light of this purpose, the best way to understand section 604 is as a rule of decision, demarcating the boundary between the spheres regulated by Titles VI and VII on the basis of the *relationship* existing between plaintiff and defendant. If the relationship is one of employee-employer, then plaintiffs' claims can only be asserted under Title VII (except where the “primary objective” condition is satisfied); if the relationship is not, then the acts in question are not “employment practice[s]” within the meaning of section 604 and so a Title VI cause of action may lie against federal funds recipients who

86. Although Title VII and the other federal labor laws have been construed as defining the employment relationship in terms somewhat broader than those of the traditional common law agency doctrine, *see supra* note 37, this subtle distinction is of no relevance to the discussion above.

87. For example, employees of state and local governments were deliberately excluded from the protections of the original Title VII. Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253-54 (1964). Had Title VI been permitted to reach the employment relationship, discrimination against such workers would then have been actionable under Title VI, thus defeating the very purpose of the Title VII exception. This would have occurred since most state and local governments receive federal funding and are thus covered by Title VI. The Equal Employment Opportunity Act of 1972 eliminated this exception. Pub. L. No. 92-261, § 2(5), 86 Stat. 103, 103 (1972).

88. 110 CONG. REC. 11,615 (1964) (Sen. Cooper). Under section 604, the Title VI regime overlaps with that of Title VII only where the federal aid involved is for the purpose of creating jobs. Title VI, § 604, 42 U.S.C. § 2000d-3 (1988).

discriminate in distributing benefits.

In circumstances like the Title VI claim outlined above, the benefits at issue are jobs, and the purpose of the suit is to challenge the way employment opportunities are ultimately distributed between minority and white workers. Nevertheless, because state contracting decisions are not employment practices, the claim falls outside the scope of section 604's prohibition.

III. APPLICATION OF A TITLE VI DISPARATE IMPACT CLAIM TO DISCRIMINATION IN PUBLIC CONTRACTING

Since no IBD limitation applies under Title VI and section 604 serves only a rule-of-decision function, there are no doctrinal obstacles to the proposed Title VI challenge to the contract and job distribution practices of state public works programs.⁸⁹ The argument up to this point has, however, only established the threshold proposition that Title VI limits do indeed apply to the public contracting policies of state agencies receiving federal aid. The next task is to show that enforcement of Title VI prohibitions would indeed reduce minority underrepresentation in public contracting. The final part of this Note first describes how the disparate impact standard of proof functions under Title VI and then details what practical changes might be achieved by pursuing a Title VI claim on behalf of minority prime contractors, subcontractors, and construction workers.

A. *Disparate Impact Under Title VI*

1. *The Title VII Disparate Impact Standard and Title VI*

Although the Supreme Court in *Guardians*⁹⁰ affirmed the validity of the Title VI regulations incorporating the disparate impact definition of discrimination, the Court did not address the issue of the parties' evidentiary burdens in a Title VI disparate impact suit. Lower courts adjudicating Title VI disparate impact cases have all held that the evidentiary methodology developed under Title VII is appropriately applied under Title VI as well.⁹¹ These decisions

89. The narrower ultimate beneficiary exclusion codified in section 7 of the Restoration Act poses no problem for a Title VI public contracting claim since the defendant in the proposed suit—a state agency—does not fall within section 7's exception. *See supra* text accompanying note 49; Parts II.A, II.D.2.

90. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983); *see also supra* notes 21-26 and accompanying text.

91. *See* *Latinos Unidos de Chelsea en Accion (LUCHA) v. Secretary of Hous. & Urban Dev.*, 799 F.2d 774, 785-87 (1st Cir. 1986); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969, 982 & n.9 (9th Cir. 1984); *NAACP v. Medical Ctr.*, 657 F.2d 1322, 1333-35 (3d Cir. 1981) (en banc); *Bryan v. Koch*, 627 F.2d 612, 617-19 (2d Cir. 1980); *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1523 (M.D. Ala. 1991); *Committee for a Better N. Phila. v. Southeastern Pa. Transp. Auth.*, CIV.A.88-1275, 1990 WL 121177, at *2 (E.D. Pa. Aug. 14, 1990); *Coalition of Bedford-Stuyvesant Block Ass'n v. Cuomo*, 651 F. Supp. 1202, 1209 (E.D.N.Y. 1987); *cf. Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 361-62 (S.D.N.Y. 1989) (Title IX case).

have offered little explanation for why this should be so. Were it not for this case law one might otherwise have presumed, in light of Title VI's structure and purpose, that a disparate impact standard more demanding for defendants than the Title VII variant would properly have applied under Title VI.⁹²

The courts have instead appeared to treat the disparate impact methodology developed under Title VII as a federal common law definition of discrimination generally applicable under the modern civil rights acts. This standard apparently functions as a conceptual overlay, defining the terms "discrimination" and "because of race" as used by Congress in the different provisions of the 1964 Civil Rights Act.

The Title VII disparate impact mechanism emerged from a series of Supreme Court decisions during the 1970's, beginning with *Griggs v. Duke Power Co.*⁹³ The Court substantially altered and weakened the standard in 1989 in *Wards Cove Packing Co. v. Atonio*.⁹⁴ The recently enacted Civil Rights Act of 1991 (1991 CRA)⁹⁵ reversed the *Wards Cove* modifications.

In light of the fact that the Title VII disparate impact model has been treated as a federal common law definition of discrimination, the new Civil Rights Act's restoration of the *Griggs* standard must govern Title VI as well. This is true even though the new law amends only Title VII and makes no mention of Title VI. When the Supreme Court cut back on *Griggs* in *Wards*

92. Normally, such statutory mechanics are controlled by the text, history, and purposes of each individual law. Close examination of Title VI suggests that it imposes a more stringent disparate impact prohibition than Title VII does. Title VI coverage extends only to parties who have elected to subject themselves to the statute's requirements by accepting federal aid. In contrast, Title VII applies to all employers—as that term is defined under the statute—and the law was enacted in the face of a strong contrary common law presumption of "employment at will." See Sydney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 *FORDHAM L. REV.* 939, 972 (1990). Because Title VI is not coercive and does not fly in the face of any contrary common law presumption, it need not defer as much as Title VII does to the convenience and economic needs of federal funds recipients. As one Tennessee lawyer put it recently, "If you take the king's coin, you dance the king's dance."

Indeed, the fact that Title VI-covered institutions enjoy benefits flowing from the federal fisc creates even more compelling quasi-constitutional grounds for application of an especially strong nondiscrimination standard under the statute. While Congress was under no constitutional obligation to ban private discrimination in employment, toleration of discrimination in the use and distribution of federal revenues violates the government's duty to secure for all citizens the equal protection of the laws. See *Ethridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967) (extension of public contracts to construction firms discriminating in employment violates equal protection).

In addition, the architecture of Title VII compelled acknowledgment of the availability to defendants of affirmative defenses against liability for at least some practices yielding disparate racial impacts. (For a discussion of affirmative defenses under Title VII, see *infra* text accompanying notes 104-106.) This is because a proviso to the statute explains that Title VII does not require that minorities or women be hired in numbers reflecting their representation in the local population. Title VII, § 703(j), 42 U.S.C. § 2000e-2(j) (1988). To not recognize some sort of affirmative defense under Title VII for practices yielding disparate impacts would be to read this provision out of the statute. In contrast, Title VI's structure imposes no such requirement and so one might argue that the appropriate Title VI justification burden on defendants ought to be more demanding. See Watson, *supra*, at 971-77.

93. 401 U.S. 424 (1971).

94. 490 U.S. 642 (1989).

95. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

Cove, courts understood that construction as applying to Title VI too, even though the Court's decision did not mention that statutory provision.⁹⁶ Congress' rejection of *Wards Cove* and its restoration of *Griggs* in the Civil Rights Act of 1991—the first detailed statutory exposition of the disparate impact doctrine—thus must apply to Title VI as well.

2. *Adapting the Standard for Application Under Title VI*

a. *Prima Facie Case*

Under current disparate impact doctrine as clarified by the 1991 CRA, a plaintiff, in order to prove a prima facie case of discrimination, must “demonstrate that [a] *particular* . . . practice”⁹⁷ serves to disqualify disproportionately members of a protected class from eligibility for the benefit at issue. Generally, plaintiffs cannot simply point to the bottom-line results of a complicated selection process and challenge the process's overall discriminatory effect. However, when “the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one . . . practice.”⁹⁸

The critical question at the prima facie case stage concerns the relevant benchmark against which the challenged practice's impact is measured. Title VI disparate impact suits generally challenge the manner of distribution of a class of public benefits. The public goods at issue in most cases—educational opportunity,⁹⁹ health care,¹⁰⁰ subsidized public transport,¹⁰¹ etc.¹⁰²—are

96. See *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1523 (M.D. Ala. 1991); *Committee for a Better N. Phila. v. Southeastern Pa. Transp. Auth.*, CIV.A.88-1275, 1990 WL 121177, at *2 (E.D. Pa. Aug. 14, 1990); cf. *Recent Case*, 103 HARV. L. REV. 806, 810 (1990) (assuming applicability of *Wards Cove* standard under Title IX).

97. Civil Rights Act of 1991, § 105(a), 105 Stat. at 1074 (to be codified at 42 U.S.C. § 2000e-2(k)(1)(B)(i)) (emphasis added).

98. *Id.*

99. *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985) (assignment to regular elementary school classes as opposed to classes for mentally retarded); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984) (same); *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518 (M.D. Ala. 1991) (college student access to teacher training program); cf. *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989) (Title IX challenge to state system for distributing college scholarships).

100. *NAACP v. Medical Ctr.*, 657 F.2d 1322 (3d Cir. 1981) (en banc) (access to public hospital); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (access to public hospital); *Linton v. Tennessee Comm'r of Health & Env't*, No. 3-87-0941, 1990 WL 314311 (M.D. Tenn. Apr. 23, 1990) (access to medicaid-funded nursing home care).

101. *Committee for a Better N. Phila. v. Southeastern Pa. Transp. Auth.*, CIV.A.88-1275, 1990 WL 121177 (E.D. Pa. Aug. 14, 1990) (distribution of subsidies among components of public transportation system).

102. *Laramore v. Illinois Sports Facilities Auth.*, 722 F. Supp. 443 (N.D. Ill. 1989) (freedom from discriminatory siting of athletic stadium in minority community); *Coalition of Bedford-Stuyvesant Block Ass'n v. Cuomo*, 651 F. Supp. 1202 (E.D.N.Y. 1987) (freedom from concentration of homeless shelters in minority communities).

ones that, barring discrimination, one would expect would be distributed on a uniform basis when provided by the government. In such cases, disparate impact is measured by comparing the resulting access or distribution patterns with overall population figures. However, for some public goods such as government contracts, the courts unfortunately have held that no such presumption of democratic distribution obtains. Instead they have required that the pool of *qualified* MBE's in the jurisdiction—not general population figures—serve as the standard for gauging adverse impact.¹⁰³

b. *Affirmative Defenses*

Once a Title VII plaintiff makes out a *prima facie* case of disparate impact, the defendant may still avoid liability if it can “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”¹⁰⁴ When hearing Title VI claims, courts have similarly allocated to defendants at this stage the burden of affirmatively defending the challenged practice, at the risk of nonpersuasion.¹⁰⁵

Importing the affirmative “necessity” defense into Title VI law has, however, required some modification of the Title VII standard. Abstracted from the employment context, the necessity defense essentially requires that the challenged practice be significantly related to some institutional concern at the core of the enterprise in question. For example, in Title VI education cases, the courts have restyled the defense as one of “educational necessity.”¹⁰⁶ There are, however, few reported decisions showing how the necessity standard is applied in Title VI litigation involving other institutional settings.¹⁰⁷

103. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501-02 (1989); *Latinos Unidos de Chelsea en Accion (LUCHA) v. Secretary of Hous. & Urban Dev.*, 799 F.2d 774, 790-91 (1st Cir. 1986) (“It is not sufficient to allege disparity between the number of minority *residents* and the number of contracts awarded to minority businesses.”) (Title VI case challenging contract distribution practices).

104. Civil Rights Act of 1991, § 105(a), 105 Stat. at 1074 (to be codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)). The verb “demonstrate” is statutorily defined as meaning “[to] meet[] the burdens of production and persuasion.” *Id.* § 104, 105 Stat. at 1073 (to be codified at 42 U.S.C. § 2000e(m)); *see also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

105. *See Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969, 982-83 n.10 (9th Cir. 1984). One pre-*Wards Cove* Title VI opinion held that the burden of persuasion did not shift to defendant at the justification stage, but rather always remained with the plaintiff. *NAACP v. Medical Ctr.*, 657 F.2d 1322, 1335 (3d Cir. 1981) (en banc). This holding was not, however, based on any claim that the Title VI disparate impact standard is weaker than that of Title VII. Rather, the Third Circuit—alone among the courts of appeals—had held even prior to *Wards Cove* that such was the proper burden allocation under Title VII as well. *See Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (en banc). Since *Croker* has been overruled by the 1991 CRA, *Medical Center's* holding as to the Title VI burden allocation is also no longer good law.

106. *See, e.g., Georgia State Conference of Branches of NAACP*, 775 F.2d at 1417-18; *Larry P.*, 793 F.2d at 982-83 & nn.9-10; *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1529-30 (M.D. Ala. 1991); *cf. Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 361 (S.D.N.Y. 1989) (Title IX case).

107. In several of the noneducation cases, the plaintiffs failed to make out a *prima facie* case and so the justification stage was never reached. *Latinos Unidos de Chelsea en Accion*, 799 F.2d at 790-91; *Coalition of Bedford-Stuyvesant Block Ass'n v. Cuomo*, 651 F. Supp. 1202, 1209-10 (E.D.N.Y. 1987). In

In spite of this paucity of case law, it seems likely that in many suits challenging the way public institutions distribute other sorts of benefits, some interest like “fiscal necessity” will be invoked in defense of challenged practices.¹⁰⁸ Prohibiting facially neutral benefits distribution practices that result in a disparate impact against minorities—unless accomplished by restructuring the challenged program so as to reduce expenditures elsewhere—will often require increasing total program spending.¹⁰⁹ It is hard to deny the reality and importance of budgetary constraints on government agencies today. Therefore, where it can be shown that flatly prohibiting a challenged practice would have such a costly consequence, the focus of the suit will then shift, and disposition of the challenge will depend on plaintiffs’ ability to show the availability of a less discriminatory, but comparably cost-effective, alternative.

c. *Less Discriminatory Alternatives*

If a Title VII defendant carries its burden of establishing a business justification for a challenged practice, the plaintiff may still prevail if she can “show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest in ‘efficient and trustworthy workmanship.’”¹¹⁰ This rebuttal is known as a showing of a less

another, once the plaintiff stated a prima facie case, the defendant capitulated, never attempting to advance an affirmative defense. *Linton v. Tennessee Comm’r of Health & Env’t*, No. 3-87-0941, 1990 WL 314311 (M.D. Tenn. Apr. 23, 1990).

108. See *Bryan v. Koch*, 627 F.2d 612, 617-18 (2d Cir. 1980); *Committee for a Better N. Phila. v. Southeastern Pa. Transp. Auth.*, CIV.A.88-1275, 1990 WL 121177, at *2 (E.D. Pa. Aug. 14, 1990). These cases invoke fiscal necessity interests in finding the challenged practices to be justified. Although these decisions illustrate the relevance of fiscal constraints to public institution decisionmaking, much of their analysis is mistaken. *Committee for a Better North Philadelphia* applies the inappropriately weak version of the disparate impact test which long prevailed in the Third Circuit but which was definitively rejected by the 1991 CRA. See *supra* note 105. The logic of the Second Circuit’s *Bryan* opinion is similarly flawed because it accepts without analysis the conclusion that closing a public hospital was the appropriate response to budgetary problems, ignoring the availability of a variety of other cost-saving measures. Exhibiting deference more typical of mere rationality review than of disparate impact scrutiny under a civil rights statute, *Bryan* was wrongly decided at the time and probably has not survived the 1991 CRA’s clarification of the necessity defense’s appropriate weight. See *Watson*, *supra* note 92, at 966-71.

109. For example, the *Bryan* plaintiffs challenged a city decision to close a public hospital serving a largely minority community. Though the closure plainly reduced health-care access disproportionately for people of color, an order requiring the hospital to remain open would—unless accompanied by other provisions for effecting cost savings elsewhere—have prevented the city from implementing fiscally necessitated budget reductions. See *Bryan*, 627 F.2d at 614-17.

110. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). The new statute restored the law to its pre-*Wards Cove* state on this point: “The demonstration . . . shall be in accordance with the law as it existed on June 4, 1989, [the day before *Wards Cove* was decided] . . . with respect to the concept of ‘alternative employment practice’.” Civil Rights Act of 1991, § 105(a), 105 Stat. at 1074 (to be codified at 42 U.S.C. § 2000e-2(k)(1)(C)). The statute also provides, however, that defendant must “refuse[] to adopt [the] alternative employment practice.” *Id.* § 105(a), 105 Stat. at 1074 (to be codified at 42 U.S.C. § 2000e-2(k)(1)(A)(ii)). Courts may interpret this language as requiring that any alternatives be proposed *prior* to the lawsuit in order to give the defendant an opportunity to adopt or reject them.

discriminatory alternative. Courts hearing Title VI cases similarly should permit plaintiffs to overcome defendants' affirmative necessity defenses by showing the availability of less discriminatory alternatives that still serve the important institutional needs of the defendant.¹¹¹

This is a critical stage in a disparate impact case, because governmental defendants usually advance various necessity defenses. Courts are generally unlikely to reject a government's affirmative defense unless plaintiffs have shown the availability of a reasonable and less discriminatory alternative.¹¹²

B. Application

1. Contracting

Application of Title VI to the process for selecting the prime contractor on a major public works project probably would not make much of a difference. The position of prime contractor for a large construction job usually requires the resources of a multimillion dollar firm. Since there are very few minority-owned construction companies of this size,¹¹³ and since Title VI only prohibits processes that exclude otherwise qualified firms from public contracting,¹¹⁴ Title VI imposes few limits on the procedures used to select prime contractors for such projects. For smaller projects for which there do exist eligible MBE bidders, however, a Title VI action might indeed be able to facilitate greater participation by people of color.

The contracting rules of most government bodies require that contractors, when bidding on construction jobs, post surety bonds guaranteeing that the state will be compensated for its lost time and additional administrative expense in

111. Cf. *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345, 362-63 (S.D.N.Y. 1989) (Title IX case) (government's affirmative defense rebutted by showing of less discriminatory alternative). In *Bryan*, the Second Circuit refused to consider plaintiffs' proposed alternatives, holding that the opportunity to rebut a necessity defense through a showing of a less discriminatory alternative applied only to a limited extent under Title VI. *Bryan*, 627 F.2d at 619. Given the 1991 CRA's rejection of *Wards Cove's* weakening of the less-discriminatory-alternative prong of disparate impact analysis, see *supra* note 110, *Bryan's* treatment of this issue would appear to be erroneous. See also *Watson*, *supra* note 92, at 976-77.

112. But see *Groves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1530-31 (M.D. Ala. 1991) (rejecting government's affirmative justification even without plaintiffs' proposing any less discriminatory alternative).

113. In 1987, of the 83,897 American construction firms with annual receipts of \$1 million or more, only 730 (fewer than 1%) were owned by people of color. Of the 4547 construction companies that employed at least 100 workers, only 21 (fewer than 0.5%) were minority owned. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. ES87-3, 1987 ENTERPRISE STATISTICS: COMPANY SUMMARY 14 tbl. 2, 56 tbl. 4 (1991); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. MB87-1, 1987 ECONOMIC CENSUSES: SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES—BLACK 59 tbl. 8, 61 tbl. 9 (1990); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. MB87-2, 1987 ECONOMIC CENSUSES: SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES—HISPANIC 85 tbl. 11, 87 tbl. 12 (1991); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, PUB. NO. MB87-3, 1987 ECONOMIC CENSUSES: SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES—ASIAN AMERICANS, AMERICAN INDIANS, AND OTHER MINORITIES 105 tbl. 11, 107 tbl. 12 (1991).

114. See *supra* text accompanying note 103.

the event a firm selected for a project reneges on its bid.¹¹⁵ Similarly, firms selected for public contracts are required by most cities and states to post performance and payment bonds. Performance bonds protect the contracting state in the event of contractor nonperformance.¹¹⁶ Payment bonds ensure that persons supplying labor or materials to the prime contractor or its subcontractors will be paid in the event the prime contractor does not make good on its obligations.¹¹⁷ Contractors selected for public projects are also often required to obtain substantial liability insurance.

These requirements have a disparate impact on MBE's since MBE's often have trouble obtaining bonding and insurance or must pay higher rates than white-owned firms for comparable coverage.¹¹⁸ This disparity stems from market discrimination¹¹⁹ and the fact that MBE's are on average smaller, younger, and less well capitalized than white-owned firms,¹²⁰ and so may constitute worse credit risks. If bonding requirements can be shown to be either unnecessary or replaceable by less discriminatory alternatives, they are susceptible to a Title VI challenge.

A Title VI suit could be brought by individual MBE's or a class of such firms against the state agency imposing such burdensome requirements. Individual MBE plaintiffs might begin by submitting bids for a given project but without posting bid bonds in the amounts required. When their bids are rejected as nonresponsive, the firms might then sue, charging a violation of Title VI's requirement that public benefits be distributed through nondiscriminatory processes. If an individual MBE were selected for a contract but the

115. See MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS § 5-301 (ABA Section of Pub. Contract Law & Section of Urban, State & Local Gov't Law 1979) [hereinafter MODEL PROCUREMENT CODE] (requiring bid security bond); ANNOTATIONS TO THE MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS 89-93 (2d Supp. 1990) [hereinafter ANNOTATIONS TO MODEL PROCUREMENT CODE] (cataloging bid security bonding requirements of various states; bond usually must equal 5 or 10% of total bid); AILEEN C. HERNANDEZ ASSOC., REPORT TO THE SAN FRANCISCO HUMAN RIGHTS COMMISSION: BETWEEN A ROCK AND A HARD PLACE—A STUDY, WITH RECOMMENDATIONS, OF THE IMPACTS ON MINORITY-OWNED, WOMEN-OWNED AND SMALL BUSINESSES OF BONDING, INSURANCE, AND OTHER FEE-RELATED REQUIREMENTS OF DEPARTMENTS AND AGENCIES OF THE CITY AND COUNTY OF SAN FRANCISCO FOR BUSINESSES ENTERING INTO CONTRACTS WITH SUCH AGENCIES 67 (Sept. 30, 1985) [hereinafter HERNANDEZ] (cataloging same for San Francisco city and county agencies; 10% bond generally required).

116. See MODEL PROCUREMENT CODE, *supra* note 115, § 5-302(1)(a) (requiring performance bond); ANNOTATIONS TO MODEL PROCUREMENT CODE, *supra* note 115, at 89-93 (cataloging contract performance bonding requirements of various states; bond usually must equal 50 or 100% of contract price); HERNANDEZ, *supra* note 115, at 67 (cataloging same for San Francisco city and county agencies; 50 or 100% bonds generally required).

117. See MODEL PROCUREMENT CODE, *supra* note 115, § 5-302(1)(b) (requiring payment bond); ANNOTATIONS TO MODEL PROCUREMENT CODE, *supra* note 115, at 89-93 (cataloging contract payment bonding requirements of various states; bond usually must equal 50 or 100% of contract price).

118. See HERNANDEZ, *supra* note 115, at 30 (finding adverse impact of bonding and insurance requirements on MBE's).

119. See GLOVER, *supra* note 2, at 57-60 (discussing discrimination in the bonding industry); see also Gavin M. Chen & John A. Cole, *The Myths, Facts and Theories of Ethnic, Small-Scale Enterprise Financing*, REV. BLACK POL. ECON., Spring 1988, at 111, 119-23 (describing discrimination against Black-owned firms in commercial lending).

120. See data cited *supra* note 113.

offer was then rescinded when the firm failed to post performance and payment bonds for the stipulated amounts or to obtain insurance in the amounts required, it might then mount a similar Title VI challenge to those requirements.

States would probably attempt to defend these practices as necessary to protect the state against the costs of contractor default or job-site accident. If, however, plaintiffs can show that the bonding levels required exceed that necessary to provide a sufficient deterrent against contractor default and fully compensate the state for the costs it would suffer in that event, then a court might find such regulations impermissibly stringent.¹²¹ Similarly, liability insurance requirements might be unnecessary, particularly when applied to small construction projects.¹²² In such situations, the government's affirmative "necessity" defense would fail.

If the government carried its burden at the defense stage, the court might still invalidate bonding requirements if plaintiffs then demonstrated the availability of a less discriminatory alternative. Even if it were proven necessary to require contractors to post substantial performance and payment bonds at the start of a contract, it does not follow that those requirements must remain in effect for the duration of the contract. A less discriminatory alternative that would lessen the burden of bonding requirements would be to reduce the size of the bonds as work is completed on the project. This arrangement would minimize the economic burden on contractors while still providing the state with adequate indemnification against contractor default.

One of the reasons bonding and insurance requirements disproportionately exclude MBE's from public contracting is that MBE's tend to have less capital than white-owned firms. Rules that increase the debt a contractor must carry over the course of a contract thus have a disparate impact on MBE's. Although under most public contracts the project price is paid out to the contractor periodically under a progress payment system, a portion of the contract price is usually withheld by the state until the project is completed.¹²³ Such a policy might be challenged under Title VI and could be invalidated where shown to

121. Even Justice O'Connor's plurality opinion in *Croson* recognized that [s]implification of bidding procedures [and] relaxation of bonding requirements . . . would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509-10 (1989).

122. See Margaret C. Simms, *Governmental Regulations as an Obstacle to Minority Participation in Government Contracting: Implications for Meeting the Croson Standard*, in *CROSON COLLECTION*, *supra* note 6, at 116, 118 [hereinafter Simms, *Governmental Regulations*] (noting problem of unnecessarily stringent contractor liability insurance requirements); MARGARET C. SIMMS, *THE IMPACT OF STATE AND LOCAL REGULATION ON MINORITY BUSINESS DEVELOPMENT* 34 (Urban Institute Project Report 1987) [hereinafter SIMMS, *STATE AND LOCAL REGULATION*] (reporting that Chicago imposes \$10 million liability insurance requirement for all public contracts regardless of size).

123. Telephone Interview with James J. Petersen, Bonding Industry Consultant (Feb. 2, 1992).

be unnecessary. Because contractors are already required to post performance bonds, withholding payment of an extra portion of the contract price until project completion may not be necessary to protect the state against contractor nonperformance. Minimizing the period of time that contractors must carry part of a project's cost would reduce the adverse effects of MBE undercapitalization.

In addition to setting bonding and insurance requirements, public entities frequently take into account factors such as the number of years a firm has been in business when selecting among bidders for public contracts.¹²⁴ This practice has a disparate impact on MBE's because, on average, such firms are younger than white-owned companies.¹²⁵ Though they have often formed their firms only recently, many MBE owners have extensive experience in their fields, gained through years of work as employees.¹²⁶ Substituting an evaluation that takes into account total years of experience would constitute a less discriminatory alternative that would still satisfy the state's interest in ensuring that bidders are qualified for the work.

Using past experience with a specific category of work as a bidder evaluation criterion also tends to disadvantage MBE's. Some states define relevant prior experience very narrowly, asking for background in specific subspecialty areas or experience with government contracts.¹²⁷ Because MBE's tend to have less overall experience than white-owned firms, they are less likely to have done work in a particular subspecialty or with a public client. Use of such restrictive experience requirements perpetuates MBE exclusion from the network of firms regularly awarded public contracts because it makes eligibility for current contracts depend in part on whether a firm has been able to win such contracts in the past.¹²⁸ Insofar as relevant experience is defined unnecessarily narrowly, use of such criteria might be rejected under Title VI in favor of broader, less discriminatory substitutes.¹²⁹

A final bidder selection practice susceptible to Title VI challenge is the use of subjective "overall evaluations" in assessing bid proposals.¹³⁰ Where it can

124. Use of such criteria is especially common in public contracting for professional services related to construction work. *See, e.g.*, San Francisco International Airport, Request for Proposals for Architectural/Engineering Services for Construction of New Firehouse No. 2, Firm Selection Qualifications Point System [hereinafter Fire Station RFP] (on file with author) (evaluation based in part on years of experience).

125. TIMOTHY BATES, *THE ROLE OF BLACK ENTERPRISE IN URBAN DEVELOPMENT* (forthcoming 1992); *see also* Simms, *Governmental Regulations*, *supra* note 122, at 118 (discussing problem of unnecessarily stringent bidder experience requirements).

126. GLOVER, *supra* note 2, at 15, 20; Letter from Theodore H. Wang, General Counsel, Coalition for Economic Equity, to Dennis P. Bouey, Deputy Director, San Francisco International Airport 1 (Nov. 13, 1991) [hereinafter Fire Station Letter] (on file with author).

127. *See, e.g.*, Fire Station RFP, *supra* note 124, at 2 (evaluation based in part on prior experience building firehouses).

128. SIMMS, *STATE AND LOCAL REGULATION*, *supra* note 122, at 41.

129. *Id.*; *see also* Fire Station Letter, *supra* note 126, at 2 (experience building firehouses demanded where background working on any type of public safety or emergency service building would suffice).

130. *See, e.g.*, Fine Arts Museum of San Francisco, Request for Proposals for Architectural/Engineering Services for Renovation of and Addition to California Palace of the Legion of Honor 5 (Dec. 6, 1990) (on

be shown that MBE's consistently receive worse ratings than majority firms in such evaluations, their use in the bid evaluation process can be banned under Title VI unless the state can show that they are necessary.¹³¹

2. *Subcontracting*

With respect to subcontracting, Title VI litigation might well be able to effect real change. The potential here is large because there is a lot of money at stake and there are qualified MBE's available to take on most subcontract-size projects.¹³²

The subcontracting problem is significant because while cities and states closely regulate the letting of prime contracts, subcontracting remains almost entirely unregulated. Except where MBE set-asides are required, prime contractors are generally allowed unfettered discretion in selecting subcontractors.¹³³ Prime contractors usually do not publicly solicit subcontracting bids, but instead simply funnel jobs to firms with which they are familiar and feel comfortable working.¹³⁴ This practice severely disadvantages MBE's since minority owners are usually excluded from the "old boy" contracting network. The discretionary nature of this selection process leaves MBE's highly vulnerable to discrimination by white prime contractors.

Unless state failure to regulate subcontracting is challenged, public contracting becomes a winner-take-all game played with a stacked deck. MBE's should not be denied the opportunity to compete on an equal basis for smaller subcontracting jobs just because few MBE's are qualified to bid for contracts as primes. Refusing to regulate subcontracting surrenders the privilege of doling out plum subcontracting jobs to those relatively few firms large enough to bid for prime contracts. Where this discretion is consistently exercised in a discriminatory fashion, the policy of nonregulation violates Title VI.

To mount a Title VI challenge to such practices, a group of plaintiff MBE's qualified to do the subcontracting work in question would have to assemble statistics showing that the subcontractor selection processes employed by prime contractors on recent state projects have yielded an MBE participation level

file with author) (assessment based in part on "overall evaluation").

131. Under Title VII, use of subjective evaluations as a basis for hiring and promotion decisions can be challenged under the disparate impact standard. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988); *Green v. USX Corp.*, 843 F.2d 1511, 1525 (3d Cir. 1988), *vacated*, 490 U.S. 1103 (1989), *reaff'd on remand*, 896 F.2d 801, 805 (3d Cir.), *cert. denied*, 111 S. Ct. 53 (1990). Such evaluations have been found illegal where they have been conducted in a way that disproportionately disadvantages women or racial minorities and where their use has not otherwise been shown to be necessary. *EEOC v. Rath Packing Co.*, 787 F.2d 318 (8th Cir.), *cert. denied*, 479 U.S. 910 (1986).

132. See sources cited *supra* note 113.

133. See, e.g., MODEL PROCUREMENT CODE, *supra* note 115 (imposing no selection procedures or criteria regulating subcontracting). Even California, one of the very few states that have recently established rules governing some aspects of subcontracting, imposes no limits on subcontractor selection. See CAL. PUB. CONTRACT CODE §§ 4100-4114 (West Supp. 1992).

134. GLOVER, *supra* note 2, at 55-56.

below those firms' representation in the pool of eligible potential contractors. The challenged practice would be the state's policy of not regulating subcontracting. Plaintiffs would propose as a less discriminatory alternative that the availability of such work be advertised and that subcontractor selection be conducted on the basis of publicly stipulated criteria.

Title VI requires that when federal funds recipients delegate decisionmaking authority to third parties, those parties exercise that authority in a nondiscriminatory fashion.¹³⁵ Courts have held under Title VII that filling job openings through nepotism or through limited recruitment from among the friends of current workers violates Title VII where such practices disproportionately exclude women or people of color.¹³⁶ Because doctrine developed in Title VII cases also governs disparate impact claims brought under Title VI,¹³⁷ delegation of subcontracting discretion to prime contractors who then distribute those subcontracts through a nonpublic process is susceptible to challenge. States that allow unregulated subcontracting violate Title VI where prime contractors exercise such delegated discretion with discriminatory effect.

Once plaintiffs had made out a prima facie case in such a suit, the defendant state would bear the burden of defending the challenged practices. Such a defense would be difficult since the advantages achieved by permitting primes to give all their work to handpicked subs—perhaps an incremental improvement in efficiency due to familiarity—are not urgent public concerns. Indeed, unregulated subcontracting seems geared more towards perpetuating nepotism and cronyism than serving any compelling public purpose.

3. *Job Distribution*

A job distribution claim would be brought by minority construction workers employed by bidder firms with racially integrated work forces. It would challenge government contracting practices that serve systematically to steer public contracts toward firms that fail to hire people of color. The problem, however, is that almost all of the factors that influence contracting decisions are linked in some way to characteristics of bidder firms. It is difficult to identify contracting practices or criteria that, independent of the nature of the contractor, correlate with characteristics of *work forces* of bidder firms.

A suit brought by workers could, however, still challenge those contracting practices that serve disproportionately to exclude MBE's.¹³⁸ This is possible because work force composition correlates with firm status: MBE's tend to hire

135. See *supra* Part I.C.2.

136. *EEOC v. Local 798, United Ass'n of Journeymen*, 646 F. Supp. 318, 325-26 (N.D. Okla. 1986); *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 435-36 (W.D. Wash. 1977), *aff'd*, 727 F.2d 1429 (9th Cir.), *modified*, 742 F.2d 520 (9th Cir. 1984).

137. See cases cited *supra* note 91.

138. For a catalog of such practices, see *supra* text accompanying notes 113-136.

many people of color while white-owned firms do not.¹³⁹ Thus, the same contracting practices that disadvantage MBE's—excessive bonding requirements and failure to regulate subcontracting, for example—also steer employment opportunities away from minority workers employed in the construction trades.

A Title VI suit filed by workers would thus only duplicate the sorts of claims that MBE contractors and subcontractors could already bring and so, formally speaking, would hold no greater potential for increasing minority participation in public contracting. Framing a Title VI claim in terms of jobs, however, would highlight that what is at issue is not just the way profitable contracts are doled out among businesses, but also the way government subsidizes economic opportunity at the community level. Because courts may have more sympathy for workers than for contractors, a suit that included employees as an additional plaintiff class might enjoy greater success than one brought by MBE owners alone challenging the same categories of practices.

A suit focusing on the employment opportunity consequences of contracting practices would be brought by a class composed of people of color employed in the work forces of different MBE contractors. Plaintiffs would gather statistics showing (1) the correlation in that region between firm status (MBE/non-MBE) and work force composition, and (2) that particular practices selected for challenge have served disproportionately to disqualify the plaintiffs' MBE employers from eligibility for recent public contracts. Combined, these two sets of statistics would establish that the defendant state's contractor and subcontractor selection processes cause a disparate impact in the distribution of job opportunities between white and minority workers. Once plaintiffs had stated a prima facie case, consideration of the relevant affirmative defenses and less discriminatory alternatives for the challenged practices would follow.

IV. CONCLUSION

Many of the problems suffered disproportionately by people of color stem from the radically unequal distribution of wealth in this country. Because there are very few MBE's large enough to take on major construction projects, enforcement of antidiscrimination laws—even those incorporating the effects test—cannot remedy their underrepresentation among prime contractors for such jobs. Substantial numbers of MBE's are qualified, however, to perform smaller scale contracting and subcontracting. The exclusion of such firms from publicly funded work as a result of discriminatory contracting practices can therefore be challenged under Title VI. With the disappearance of many set-aside programs in the wake of *Croson*, Title VI provides an alternative legal tool for people of color in their fight for a greater share of the benefits flowing from publicly funded development.

139. See *supra* note 2.