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Voluntary Affirmative Action in Employment for Women and Minorities under Title VII of the Civil Rights Act: Extending Possibilities for Employers to Engage in Preferential Treatment to Achieve Equal Employment Opportunity, 24 J. Marshall L. Rev. 731 (1991)

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VOLUNTARY AFFIRMATIVE ACTION IN EMPLOYMENT FOR WOMEN AND MINORITIES UNDER TITLE VII OF THE CIVIL RIGHTS ACT: EXTENDING POSSIBILITIES FOR EMPLOYERS TO ENGAGE IN PREFERENTIAL TREATMENT TO ACHIEVE EQUAL EMPLOYMENT OPPORTUNITY

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 ("Title VII")[1] prohibits employment discrimination on the basis of race and sex.[2] Frequently, authorities read this prohibition as making race and sex impermissible criteria that employers can never take into account when making employment decisions.[3] Such readings suggest that

1. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982).

2. This analysis deals only with the validity of affirmative action plans under Title VII of the Civil Rights Act ("Title VII"). Limited comparisons with the analysis of the constitutional validity of affirmative action plans under the equal protection clause will be drawn. These references to the equal protection analysis are meant to be merely descriptive, and do not take any position towards its correctness or desirability. Affirmative action by public employers involves state action and is thus subject to the requirements imposed by the equal protection clause. Title VII, however, does not only apply to private employers, but also encompasses public employers. Much of the available case law deals with public employers instituting affirmative action efforts. In as far as the cases dealing with public employers separate the constitutional from the statutory analysis, it is permissible to refer to them in an analysis dealing only with the statutory validity of affirmative action plans under Title VII.

3. *See, e.g.*, Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 657-77 (1987) (Scalia, J., dissenting); United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 216-55 (1979) (Burger, C.J. and Rehnquist, J., dissenting); Abraham, *Some Post-Bakke-and-Weber Reflections on "Reverse Discrimination"*, 14 U. RICH. L. REV. 373 (1979-80); Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429, 508-09 (1985); Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 465 (1980); Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L. J. 995 (1984); Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POL'Y 627, 627-28, 684-86 (1985); Van Alstyne, *Rites of Pas-*

the resulting anti-discrimination principle governs all of the following stages of the employment relationship: hiring, employing, promoting, and firing. However, the purpose of Title VII was not merely to encourage the appearance of neutrality, but to also create equal employment opportunities for all.[4] A mere prohibition of discriminatory practices remains incapable of achieving the goals of either redressing a distorted situtation or leading to a substantial improvement of female and minority participation at all levels of employment.[5]

Affirmative action would be one way to lessen the disparity between aspiration and achievement.[6] To what extent does Title VII allow an employer to follow this road? At what speed may the employer drive his "affirmative action vehicle" on this road? And what are the prerequisites for obtaining an affirmative action "driver's license" in the first place?

The question is whether, under what conditions, and to what extent a private employer under Title VII may voluntarily grant preferential treatment in the allocation of job opportunities to qualified female and minority applicants or employees who are not necessarily victims of prior employment discrimination, in order to overcome the effects of a long history of discrimination, regardless of whether the discrimination stems from a particular employer's own making or was of societal origin.[7]

This article attempts to define the boundries of voluntary affirmative action under Title VII of the Civil Rights Act. The article

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sage: Race, the Supreme Court, and the Constitution, 46 U. CHI. L. REV. 775, 777-78 n.9, 783-86 (1979); Vaughn, *Employment Quotas — Discrimination or Affirmative Action*, 7 EMPLOYEE REL. L. J. 552, 553-58 (1982); Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of* United Steelworkers of America v. Weber *and the Misguided Policy of Numerical Employment*, 21 B.C.L. REV. 1 (1979).

4. Congress recognized that the integration of minorities into the mainstream of American society could not be achieved unless minorities were able to secure jobs "which have a future." *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 202-03 (1979). This was considered a necessary condition for the achievement of equality of treatment more in general. *Id.* at 203.

5. For a discussion regarding the slow progress made in achieving the goal of real equality of employment opportunities for women and ethnic minorities, see Edwards, *The Annual John Randolph Tucker Lecture: The Future of Affirmative Action in Employment*, 44 WASH. & LEE L. REV. 763, 767-68 (1987); Edwards & Zaretski, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1, 3-9 (1975); Comment, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 534 (1990).

6. W GOULD, BLACK WORKERS IN WHITE UNIONS 100-01, 107 (1977).

7. Granting relief to an individualized victim of employer discrimination is not a form of affirmative action. When an employer discriminates on the basis of race or sex, in violation of Title VII, it is required to redress the effects of its own prior wrongdoing, at least when the victim challenges the discriminatory employer practice in due time, and according to the procedures set forth in Title VII.

adopts a broad definition of the concept of *voluntary* affirmative action plans. This concept includes all plans instituted *without any legal requirement* imposed upon the private employer to engage in any kind of preferential treatment.[8]

This article proposes that Title VII, as interpreted by the Supreme Court, allows a private employer to institute affirmative action plans not only to redress the effects of its own prior discriminatory employment practices, but also to remedy the result of prior societal discrimination. The article advocates that the Supreme Court underwrote this idea upon determining the basic condition an employer must fulfill prior to engaging in affirmative action. However, the Court used an overly restrictive, and logically inconsistent test to determine if this basic requirement is satisfied. Based on the analytical framework the Court adopted for "reverse discrimination" law suits by white male employees challenging the validity of affirmative action plans for women and minorities, the employer should be granted much more leeway in determining whether it is justified in instituting an affirmative action plan.

The Supreme Court's acceptance of voluntary affirmative action in compliance with the dictates of Title VII is not unconditional. In order to survive the Court's scrutiny, an affirmative action plan must satisfy several conditions. The Court imposes these conditons as a safeguard for white male employees' rights. Employers must avoid the unnecessary trammeling of the rights and the legitimate, firmly rooted expectations of non-beneficiaries of the affirmative action plan. Yet the Court failed to clearly articulate the particular necessary conditions. Instead, the Court preferred a strategy of labeling particular plans as either satisfying or failing to satisfy these unspecified conditions.

This article argues that differences in the techniques used to create an affirmative action plan (sex or race as a factor to be taken into account, quotas or percentages goals or set asides) do not warrant different treatment in establishing their statutory validity. This article advances a similar argument when dealing with the different "goods" (hiring, promoting, layoffs) implicated by an affirmative action plan. For example, although the Supreme Court clearly held that an affirmative action plan must necessarily be a

8. Voluntary affirmative action plans thus include plans unilaterally instituted by the employer, plans contained in collective bargaining agreements with the union as exclusive bargaining representative for the unit involved, and plans contained in consent decrees. The concept does not include court-ordered affirmative action plans, nor courts' modifications of consent decrees over the objections of the parties involved in the original decree. *See* United States v. Paradise, 480 U.S. 149 (1987); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

temporary measure to overcome the inequities of past discrimination, this requirement must necessarily be interpreted liberally, so that the absence of an explicit end term in the affirmative action plan should never lead to the plan's invalidation. The fact that an affirmative action plan can not create an absolute bar to the advancement of white male employees should not prevent an employer from *accelerating* the effort to undo the effects of prior discrimination, as long as reasonable room is left for white male participation.

The Supreme Court describes its statutory analysis of the conditions for validity of an affirmative action plan as two-pronged. The first prong is referred to as the justification prong of the analysis, while the second prong is referred to as the burden prong. However, a three prong classification of the conditions of validity of an affirmative action plan under Title VII is a more accurate description of the Court's approach. The second prong of the Court's analysis contains elements that, though closely related to the rights of the plan's non-beneficiaries, do not refer to the burden that is being imposed or to the possible infringment of the white male's rights. Instead, these elements refer to the nature and the goals of the plan itself. Thus, without adding any additional requirements that an affirmative action plan must satisfy to pass muster under Title VII, it seems accurate to describe the Court's analysis as a three part inquiry: (1) justification for the plan's institution, (2) the burden imposed upon the white male majority, and (3) the goal and remedial nature of the plan.

I. PERMISSIBLE AFFIRMATIVE ACTION

A. The Principle of Voluntary Affirmative Action

On at least two occasions, the Supreme Court directly addressed the issue of the permissibility of purely private and unilateral affirmative action efforts by employers under Title VII.[9] In *United Steel-Workers of America, AFL-CIO-CLC v. Weber*,[10] the Court explicitly refused to "define in detail, the line of demarcation

9. In *Local Number 93, Int'l Ass'n of Firefighters v. Cleveland*, the Court dealt with the question of whether Title VII imposed greater restrictions on voluntary affirmative action plans contained in consent decrees, as compared to purely private affirmative action efforts. The Supreme Court held that it did not. Local Number 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986). Although the Court confirmed *Weber* and its underlying reasoning, the decision did not reach the question of the conditions of validity of voluntary affirmative action plans. Therefore, an analysis of *Local Number 93* will not shed any further light on the issue of the permissibility of voluntary affirmative action.

10. United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

between permissible and impermissible affirmative action plans."[11] In *Johnson v. Transportation Agency, Santa Clara County, California*,[12] the Supreme Court assessed the legality of the affirmative action effort, using the *Weber* decision as a guide.[13] A detailed analysis of both decisions is necessary to understand the underlying reasoning and to tease out "lines of demarcation" latent in the opinions.

Weber dealt with an affirmative action plan included in a collective bargaining argeement.[14] Kaiser Aluminium & Chemical Corporation and the United Steelworkers of America entered into a bargaining agreement that contained an affirmative action plan aimed at eliminating the imbalance that existed in the plant's then almost exclusively white craft workforce. Because blacks have historically been excluded from craft unions, few skilled black workers were available. To meet the set goals, the company decided to begin a training program to teach the skills necessary to become a craftworker.[15] The program was accessible to both black and white production workers. Fifty percent of the new trainees were to be black until the percentage of skilled black craftworkers in the Gramercy plant approximated the percentage of blacks in the local labor force. The company selected the remaining trainees on the

11. *Id.* at 208.

12. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987).

13. *Id.* at 627.

14. For general discussion of *Weber*, see Allegretti, *Voluntary Racial Goals After* Weber: *How High Is Too High?*, 17 CREIGHTON L. REV. 773 (1984); Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531, 568-75 (1981); Blumrosen, *Affirmative Action in Employment After* Weber, 34 RUTGERS L. REV. 1 (1981); Boyd, *Affirmative Action in Employment — The* Weber *Decision*, 66 IOWA L. REV. 1 (1980); Buckley, *Voluntary Affirmative Action Plans under Title VII and the Equal Protection Clause*, 56 GEO. WASH. L. REV. 711, 714-16 (1988); Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87, 98-104 (1981); Gould, *The Supreme Court and Labor Law: The October 1978 Term*, 21 ARIZ. L. REV. 621, 649-58 (1979); Kilberg & Tallent, *From* Bakke *to* Fullilove: *The Use of Racial and Ethnic Preferences in Employment*, 6 EMPLOYEE REL. L.J. 366-68 (1981); Kreiling & Mercurio, *Beyond* Weber: *The Broadening Scope of Judicial Approval of Affirmative Action*, 88 DICK. L. REV. 46, 54-58 (1983); Meltzer, *supra* note 3, at 437-56; Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 472-74 (1988); Schiff, *supra* note 3, at 656-60; Vaughn, *supra* note 3, at 555-58; Walker, *supra* note 3; Note, Bakke *and* Weber: *The Concept of Societal Discrimination*, 11 LOY. U. CHI. L.J. 297, 307-11 (1980) [hereinafter Note, *Societal Discrimination*]; Note, *Labor Law — Employment Discrimination — Voluntary Affirmative Action Plan with Racial Quota Does Not Violate Title VII of the Civil Rights Act of 1964*, 54 TUL. L. REV. 244 (1979) [hereinafter Note, *Racial Quota*].

15. Prior to 1974, black workers represented only 1.83% of the skilled craftworkers at Kaiser's Gramercy plant. The work force in the area was approximately 39% black. United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 198-99 (1979).

basis of seniority. The company excluded Brian Weber, a white production worker who wanted to participate in the training program, even though he possessed more seniority than several of the black workers selected. Weber challenged the plan as being discriminatory on the basis of race and thus in violation of Title VII.

Both the District Court and the Court of Appeals for the Fifth Circuit considered the plan to be discriminatory in violation of Title VII. The District Court held that all affirmative action was beyond the reach of private employers based upon its reading of sections 703(a) and (d) of Title VII. Only courts possessed the power to fashion this kind of relief.[16] The Court of Appeals affirmed the decision on different grounds. The court would have allowed an employer to institute an affirmative action plan to "restore employees to their rightful place" only upon a showing of its *own* prior employment discrimination.[17] The Supreme Court reversed.[18]

Weber argued that a literal interpretation of Sections 703(a) and (b) of Title VII[19] of the Civil Rights Act prohibits race-conscious affirmative action plans because these sections state:

> (a) it shall be an unlawful employment practice for an employer —
>
> (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national orgin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as employee, because of such individual's race, color, religion, sex, or national origin and that .
>
> (d) It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.[20]

Weber argued that the fact that he was a white male should not change the analysis because Title VII had been interpreted so as to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against

16. Weber v. Kaiser Aluminum & Chem. Corp., 415 F Supp. 761, 767 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

17. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 225 (5th Cir. 1977), *rev'd*, United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

18. United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

19. 42 U.S.C. § 2000e-2 (1982).

20. *Id.*

nonwhites.[21]

The Supreme Court acknowledged that a literal reading of Sections 703(a) and (d) of Title VII might lead to the conclusion that affirmative action efforts such as the one undertaken by Kaiser are in conflict with the anti-discrimination principles of Title VII. However, the Supreme Court noted that "a thing may be within the letter of the statute and yet not within the statute, because [it is] not within [the statute's] spirit nor within the intention of its makers."[22] Justice Brennan, writing for the majority, stressed that these provisions,

> should be read against the background of the legislative history of Title VII and the historical context from which the Act arose. Congress' primary concern was with 'the plight of the Negro in our economy.' . 'The crux of the problem was to open up employment opportunities for Negros in occupations which have been traditionally closed to them.'[23]

Thus, affirmative action, as one of the methods to reach this goal, could not be totally prohibited.

> It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' constituted the first legislative prohibition of all voluntary, private, race conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[24]

After stressing that the spirit of the Act revealed more about the permissiblility of voluntary affirmative action than its literal reading, Justice Brennan went on to interpret Section 703(j) of the Act as reading that a mere statistical imbalance in an employer's work force can not be considered a sufficient condition to require the employer to grant preferential treatment.[25] If Congress had desired to prohibit all voluntary affirmative action, it would have declared not only that an employer is not *required* to engage in affirmative action to balance its work force, but also that Title VII

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21. *Weber*, 443 U.S. at 201. Weber relied on McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279 (1976).

22. *Weber*, 443 U.S. at 201 (1979).

23. *Id.* at 201-03 (citing 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)).

24. *Id.* at 204.

25. The relevant part of § 703(j) reads as follows:

> *nothing* contained in this subchapter shall be interpreted to *require an employer to grant preferential treatment* to any individual or to any group because of race, color or sex on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color or sex employed by any employer in comparison with the total number or percentage of persons of such race, color or sex in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2 (1982) (emphasis added).

would not *permit* an employer to do so.[26] Section 703(j), Justice Brennan explained, was designed to avoid undue interference by the Federal Government with private business.[27] An interpretation of Title VII that prohibits all voluntary affirmative action would disservice this end, diminish traditional management prerogatives, and at the same time impede the attainment of the ultimate statutory goals.[28] Voluntary compliance with the ultimate goals and objectives of Title VII was seen as a desired means to reach the congressional purpose of eliminating the "last" vestiges of discrimination.[29]

In *Johnson*, the Supreme Court addressed the statutory validity of a sex-based affirmative action plan.[30] In reviewing the composition of its work force, the Santa Clara Transportation Agency[31] noted that women were underrepresented in both the agency as a whole and in five of seven job catergories as compared to their proportional share of the county labor force.[32] Women were largely concentrated in "traditional female jobs."[33] The long-term goal of the affirmative action plan was to attain a work force whose compo-

26. United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 205 (1979).

27. *Id.* at 206-07.

28. *Id.* at 207.

29. *Id.* at 204.

30. For a general discussion of *Johnson*, see Belton, *Reflections on Affirmative Action After* Paradise *and* Johnson, 23 HARV. C.R.-C.L. L. REV. 115, 119-21 (1988); Buchanan, Johnson v. Transportation Agency Santa Clara County: *A Paradigm of Affirmative Action*, 26 HOUS. L. REV. 229 (1989); Buckley, *supra* note 14, at 716-20; Rutherglen & Ortiz, *supra* note 14, at 478-83; *1987-1988 Annual Survey of Labor Relations and Employment Discrimination Law*, 30 B.C.L. REV. 99, 271-82 (1988); *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 7, 300-10 (1987); Note, Johnson v. Transportation Agency: *The United States Supreme Court Weighs Statistical Imbalance in Favor of Affirmative Action*, 21 J. MARSHALL L. REV. 593-12 (1988) [hereinafter Note, *Statistical Imbalance in Favor of Affirmative Action*]; Note, *Affirmative Action Affirmed:* Johnson v. Transportation Agency, *Santa Clara County, California*, 33 LOY. L. REV. 1121 (1988); Note, *Civil Rights — Title VII — Public Employer May Consider Gender to Promote Employee Without Violating Title VII of Civil Rights Act of 1964 When Enforcing A Valid Affirmative Action Plan*, 19 ST. MARY'S L.J. 455-68 (1987).

31. The Santa Clara County Transportation Agency is a public employer. A public employer is not only subject to the requirements of Title VII, but is also subject to the requirements of the equal protection clause. The Supreme Court in *Johnson*, however, did not address the constitutional issue because it was not raised or addressed in the litigation below. "Of course, where the issue is properly raised, public employers must justify the adoption and implementation for a voluntary affirmative action plan under the Equal Protection Clause." Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 620 n.2 (1987).

32. Women made up 22.4% of the Agency employees, while they comprised 36.4% of the local labor force. *Id.* at 621.

33. Seventy-six percent of the women were working as office or clerical workers, 7.1% were agency officials and administrators, 8.6% professionals, 9.7% technicians and 22% worked as service and maintenance workers. *Id.*

sition reflected the proportion of women in the area labor force.[34] The Agency acknowledged that it was unrealistic to rely only on long-term goals to provide the desired labor force composition because of the characteristics of its then present labor force, the structure of the Agency, and the availability of a small number of qualified applicants for positions requiring specialized training and experience. The affirmative action plan thus provided short-range goals and annual adjustments. No specific number of positions were set aside for women. The plan only authorized the consideration of sex as a factor to be taken into account when evaluating qualified candidates for jobs in which women were poorly represented.[35]

In December, 1979, the Agency announced a vacancy for the promotional positions of road dispatcher. Twelve employees applied for the promotion, including Ms. Joyce and Mr. Johnson. Both were rated as well-qualified for the job. The Agency awarded scores after reviewing their prior experience and conducting a first interview. Joyce obtained a score of 73, while Johnson obtained a score of 75. Another 5 employees scored above 70 on the interview and were also certified as eligible for selection by the appointing authority. After an intervention of the Agency's Affirmative Action Coordinator and a second interview, the Agency finally selected Joyce over Johnson.[36] Johnson challenged the Agency's decision, alleging that he was denied promotion on the basis of sex, in violation of Title VII.

The District Court held that the County's affirmative action plan was invalid, because the plan did not satisfy the criteria announced in *Weber*. The court found that the Agency failed to show that its plan was temporary and remedial and therefore concluded that the plan unnecessarily trammeled Johnson's interests in addition to creating an absolute bar to his promotion.[37] However, the Court of Appeals for the Ninth Circuit reversed, holding that the affirmative action plan at issue fulfilled the *Weber* requirements.[38] The Supreme Court affirmed.[39]

Again, Justice Brennan wrote for the majority. The opinion reflects a continuing commitment to the underlying rationale of

34. *Id.* at 621-22. The Agency's aspiration was for a 36% female representation for the skilled craft worker positions. *Id.* at 622. The plan provided for affirmative action for ethnic minorities in a similar way. *Id.*

35. *Id.* at 622.

36. See *id.* at 623-24.

37. Johnson v. Transportation Agency, Santa Clara County Cal., 770 F.2d 752, 754-55 (9th Cir. 1984) (explaining the district court's holding), *aff'd*, 480 U.S. 616 (1987).

38. *Johnson*, 770 F.2d at 752.

39. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987).

Weber by the following: its rejection of "plain-language-of-the-statute" arguments; its acceptance of the legislative history indicating Congressional intent that employers play a major role in eliminating vestiges of discrimination; and its reliance on the language of Section 703(j), which reflects a strong desire to preserve managerial prerogatives so that they might be used to combat discrimination.[40]

Furthermore, Congress took no action to amend Title VII to show dissatisfaction with the Court's interpretation in *Weber*. Recognizing that Congressional inaction might not always be an expression of Congressional approval, Justice Brennan nonetheless concluded that the inaction had at least some significance in this situation.

> *Weber* was a widely publicized decision that addressed a prominent issue of public debate. Legislative inattention is thus not a plausible explanation for Congressional inaction. Furthermore, Congress not only passed no contrary legislation in the wake of *Weber*, but not one legislator even proposed a bill to do so. The barriers of the legislative process therefore also seem a poor explanation for failure to act. By contrast, when Congress has been displeased with our interpretation of Title VII, it has not hestitated to amend the statute to tell us so. [41]
>
> Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.[42]

B. Reaction to Weber *and* Johnson

Interpreting the Congressional intent which underlines the enactment of Title VII by reference to specific statements made by

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40. *See id.* at 629 n.7.

41. *Johnson*, 480 U.S. at 629 n.7. Justice Brennan referred to the passing of the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982), in which Congress unambiguously expressed its disapproval with the Supreme Court's holding and reasoning in General Electric v. Gilbert, 429 U.S. 125 (1976). *Johnson*, 480 U.S. at 629 n.7.

42. *Id. See also* Daly, *Some Runs, Some Hits, Some Errors: Keeping Score in the Affirmative Action Ballpark From* Weber *to* Johnson, 30 B.C.L. REV. 1, 82 (1988).

Justice Brennan's argument, in *Johnson*, that Congressional inaction after the Supreme Court's decision in *Weber* is illustrative of Congressional approval of the Court's interpretation of Title VII, gains weight in light of the proposed, but vetoed, Civil Rights Act of 1990. The proposal was a clear rejection of recent Supreme Court decisions which cut "back dramatically on the scope and the effectiveness of civil rights protections." The proposed Act states expressly that one of its purposes is "to respond to the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those decisions." *See* §§ 2(a)(1), (b)(1) of the House Version of the proposed Civil Rights Act 1990, vetoed by President Bush. H.R. 4000, S. 2104, 101st Cong., 2d Sess., 136 Cong. Rec. H9552-55 (daily ed. Oct. 12, 1990).

Justice Brennan made the same argument in Patterson v. McLean Credit Union, 491 U.S. 164, 190-99 (1989). The majority in *Patterson*, however, refused to rely on this argument. Instead, the Court noted that "Congressional inaction cannot amend a duly enacted statute." *Id.* at 175 n.1.

various members of Congress can easily lead to opposing viewpoints.[43] The divergent references to the legislative history in the majority and dissenting opinions in *Weber* and *Johnson* make this clear.[44] "Statutory interpretation," becomes "a tricky business" indeed,[45] especially when one takes into account that the 1964 legislature did not debate "the question of the propriety of affirmative action programs."[46]

The ambiguity is further enhanced by the apparent conflict between the specific requirements imposed on employers and the overarching, ultimate goals of Title VII to improve the economic status of "traditionally disadvantaged groups," including minorities and women.[47] The *Johnson* and *Weber* opinions concentrated on the spirit of the Act and on the ultimate goal Congress wanted to reach.[48] Different theories of interpretation of Title VII can lead to opposite conclusions about the meaning and requirements imposed by Title VII and the latitude granted to employers to engage in affirmative action. The dissenting opinions in *Weber* and *Johnson* focused on a literal reading of the text of Title VII and stressed the incompatibility of purely private voluntary affirmative action with the Act's literal language when there is no proof of prior employer

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43. *See* Boyd, *supra* note 14, at 8.

44. For a discussion of the differing interpretations of Title VII, see Cox, *The Supreme Court, Title VII and "Voluntary" Affirmative Action — A Critique*, 21 IND. L. REV. 767, 852-88 (1988). Then-Justice Rehnquist's dissent in *Weber* is a clear example of the different interpretations of Title VII's legislative history. In his dissent, Rehnquist criticized Justice Brennan's selective reading of the Act's legislative history and stated that "[w]hen read in context, the meaning becomes clear." United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 229 n.11 (1979) (Rehnquest, J., dissenting).

45. Boyd, *supra* note 14, at 7.

46. Gould, *supra* note 14, at 653-54, n.245. *See*, Kreiling & Mercurio, *supra* note 14, at 57; Schatzki, United Steelworkers of America v. Weber: *An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 66-67 (1980); Note, *Racial Quota*, *supra* note 14, at 253. *Contra* Cox, *supra* note 44, at 867-68 (Cox argues that Congress did at least consider the basic features of affirmative action). When debating the 1972 amendments to Title VII, the legislature approved numerous decisions that had provided for court-ordered affirmative action relief. *See* W. GOULD, *supra* note 6, at 99; Gould, *supra* note 14, at 653-54 n.245.

47. *See* Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of* Connecticut v. Teal, 20 HARV. J. ON LEGIS. 99, 119 (1983).

48. *See* Belton, *supra* note 14, at 591; Blumrosen, *supra* note 47, at 117-32; Daly, *supra* note 42, at 81; Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301, 356 (1987); Note, *Statistical Imbalance in Favor of Affirmative Action*, *supra* note 30, at 611-12.

For a general discussion of statutory interpretation and, specifically, about the use of "intent" and "spirit of the Act" in interpreting a statute, see Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 811, 813-15 (1985). *See also* Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 63 U. COLO. L. REV. 37-78 (1991).

discrimination.[49]

Additionally, the *Weber* Court and the *Johnson* majority argued that Title VII intended to leave managerial prerogatives untouched to the greatest extent possible. Congress rooted this policy not in Title VII, but in the National Labor Relations Act (NLRA).[50] Commentators have argued that this policy can not simply be transplanted to Title VII, because Title VII, unlike the NLRA, directly regulates the employment relationship.[51] The *Weber* Court and the *Johnson* majority, however, did not argue for a wholesale transportation of the principles of employer (and union) freedom into Title VII, but rather argued for a selective incorporation to the extent otherwise compatible with the Title VII dictates. Title VII certainly does not leave the employment relationship untouched. Title VII explicitly prohibits the employer from grounding employment decisions and practices on a limited number of forbidden criteria. Title VII does not convert the whole system of employment decisions into a purely merit based system. So long as the employer's decision does not rely overtly or covertly[52] on any of the enumerated criteria, Title VII shields the employer from liabilitity. Although the prohibition on the use of the impermissible criteria should not be construed narrowly,[53] Title VII can not fairly be read as a statute that leaves the employer with no more than that which he is explicitly allowed to do. The employer's freedom of decision making under Title VII is preserved, unless it is taken away.[54]

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49. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 669-77 (1987) (Scalia, J., dissenting); United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 226-30 (1979) (Rehnquist, J., dissenting). *See also* Walker, *supra* note 3.

50. National Labor Relations Act, 29 U.S.C. § 151 (1988). *See* California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980) ("Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representative of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment"). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 249-50 (1989) (plurality opinion); Gould, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TUL. L. REV. 1485, 1500 (1990).

51. *See* Rutherglen & Oritz, *supra* note 14, at 473, 505-06.

52. Here, the term "covert" not only includes intentional decision making, but also includes decision making on the basis of neutral criteria having a disparate impact. Decision making on the basis of disparate impact criteria is the functional equivalent of intentional decision making.

53. Employer liability for discriminatory employment practices under the theory of disparate impact is an example of a broad interpretation of the prohibition on the use of impermissible criteria.

54. An argument could be advanced that the Supreme Court's analytical framework developed to establish Title VII violations itself reduces the scope of the employer's managerial prerogatives. Although the McDonnel Douglas - Burdine framework only asks the employer to "articulate" a legitimate nondiscriminatory reason (burden of production, and not persuasion) to rebut the inference of discrimination created by a plaintiff's *prima facie* case, it

When Congress enacted Title VII, it intended to create employment opportunities for disadvantaged groups.[55] To reach this end, Congress spoke in terms of color- and sex-blindness and equality of treatment.[56] However, these are only means to reach an end. "In the case of a comprehensive statute such as the Civil Rights Act, a court should focus on the overall purpose of the Act."[57] This is not to say that the end always justifies the means used. The Supreme Court's approval of affirmative action as a means to reach the ultimate purpose of Title VII is not an unconditional acceptance of all kinds of affirmative action efforts. Limits and restrictions do exist.

Even opponents of affirmative action should bear in mind that "since 1978 the Court has unambiguously interpreted [Title VII] to permit the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted."[58] In his concurrence in *Johnson*, Justice Stevens stated:

> the only problem for me is whether to adhere to an authoritative construction of the Act that is at odds with my understanding of the actual intent of the authors of the legislation. I conclude without hesitation that I must answer that question in the affirmative
>
> *Bakke* and *Weber* have been decided and are now an *important part of the fabric of our law.* This is sufficiently compelling to adhere to the basic construction of the legislation that the Court adopted in *Bakke* and in *Weber* There is an *undoubted public interest in 'stability and orderly development of the law.'*[59]

Many employers have relied on the Supreme Court's decisions upholding affirmative action plans and have supported the effort to create equal opportunities for disadvantaged groups.[60] Overruling *Weber* and *Johnson* would create great instability in labor-manage-

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nonetheless asks for a justification of the employer's decision. Requiring an employer to articulate a reason when it intends to discharge an employee, a reason that must be both legitimate and nondiscriminatory at the same time, will restrain the employer from exercising its managerial freedom to the fullest extent. Conceivably, a situation may arise where an employer, who did not base its decision on one of the impermissible criteria under Title VII, cannot produce a justification for its decision that sounds credible to the court or that can withstand a plaintiff's "pretext" argument. In this borderline situation (border between clear violations of Title VII and those cases where the existence of a legitimate nondiscriminatory reason is "beyond doubt") the employer's freedom of action will be severely limited by the fear of incurring liability.

55. *See* Cox, *supra* note 44, at 866-67.

56. *See* Blumrosen, *supra* note 47, at 119.

57. Blumrosen, *supra* note 47, at 121.

58. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 644 (1987) (Stevens, J., concurring).

59. *Id.* (emphasis added).

60. *See* Gould, *supra* note 14, at 654. *See also* Note, *Rethinking* Weber: *Business Response to Affirmative Action*, 102 HARV. L. REV. 658-71 (1989) (The author argues that even private businesses resisted the attack by the Reagan Administration on affirmative action. The executives preferred affirmative action as a familiar and useful method of self-evaluation).

ment affairs. Predictability and stability remain important values that the law should pursue.[61]

C. Limitations on Affirmative Action

The Supreme Court's acceptance of voluntary affirmative action plans in *Weber* and *Johnson* was not unconditional. Although the Court explicitly refused to draw a clear line of demarcation between permissible and impermissible affirmative action plans, the Court explained why it considered the particular plans at issue to be permissible under Title VII.[62] Lower courts considering the validity of affirmative action plans should rely on the guidance offered by the two Supreme Court cases.

The *Weber* Court held that the affirmative action plan at issue fell "within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job catergories."[63] The purpose of the plan thus mirrored the purpose of Title VII. At the same time, the Court found that the plan did not put an undue burden on the interests of the white employees at the plant:

> the plan does not *unnecessarily trammel the interest of the white employees.* The plan does not *require the discharge* of white employees *and their replacement* with new black hirees. Nor does the plan create an *absolute bar* to the advancement of white employees. . . Moreover,

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61. The Supreme Court recently underlined the importance of *stare decisis*, especially in the area of statutory construction. In *Patterson v. Mclean Credit Union*, the Court stated:

> Although we have cautioned that '*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision' it is indisputable that *stare decisis* is a basic principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'arbitrary discretion'.
>
> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established Nonetheless, we have held that '*any departure from the doctrine of stare decisis demands special justification.*' We have also said that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. *Considerations of stare decisis have special force in the areas of statutory interpretation,* for here, unlike in the context of constitutional interpretation, the legislative power is implicated and *Congress remains free to alter* what we have done.

491 U.S. 164, 172 (1989) (emphasis added). *See* Daly, *supra* note 42, at 80-87; Selig, *supra* note 48, at 368. *See also* The Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235, 240-41 (1970). For a discussion of *The Boys Markets*, see Gould, *On Labor Injunctions, Unions, and Judges: The* Boys Market Case, 1970 SUP CT. REV. 215, 225-32.

62. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979).

63. *Id.* at 209.

> the plan is a *temporary measure*; it is not intended to *maintain* racial balance, but simply to *eliminate a manifest* racial *imbalance*. Preferential selection will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force.[64]

In *Johnson*, the Supreme Court first examined whether the decision to promote Joyce was "made pursuant to a plan prompted by concerns similar to those of the employer in *Weber*."[65] The manifest imbalance that existed in the employer's work force reflected an underrepresentation of women in traditionally segregated job categories. This manifest imbalance justified why the employer took the sex of the applicant into account for making its promotional decision.[66] The employer made the employment decision pursuant to a plan that was *intended to remedy underrepresentation*.[67]

The Supreme Court then considered whether the plan at issue did *unnecessarily trammel the rights of male employees or created an absolute bar to their advancement*.[68] The plan did not set aside any positions for women. No person was automatically excluded from consideration for the promotion. The *sex* of the applicant was just *one of the numerous factors* taken into account for making the decision.[69] The promotion, made according to the plan, did *not unsettle any legitimate firmly rooted expectations*, because nobody could show an *absolute entitlement* to the promotion. The applicant selected possessed the necessary qualifications for the job and the rejected applicant retained his job with the Agency and remained eligible for other promotions.[70] Furthermore, the Agency intended to attain a balanced work force, not to maintain one. The lack of an explicit end date in the plan did not make the plan invalid. "Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers."[71]

II. THREE PRONG ANALYSIS FOR ASSESSING THE VALIDITY OF AFFIRMATIVE ACTION PLANS

The assessment of the validity of an affirmative action plan under Title VII requires the same inquiry whether dealing with

64. *Id.* at 208-09 (emphasis added).
65. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 631 (1987).
66. *Id.* at 632.
67. *Id.* at 634.
68. *Id.* at 637-38.
69. *Id.* at 638.
70. *Id.*
71. *Id.* at 639-40.

race- or sex-based affirmative action plans.[72] While *Weber* upheld an affirmative action plan for racial minorities, *Johnson* applied the same analysis to a sex-based affirmative action plan.[73]

The Supreme Court appears to describe its analysis as a two part inquiry. First, the Court considers whether the employer has a justification for undertaking an affirmative action effort. Second, the Court then considers the implications or burdens of the plan for the rights of those who are not beneficiaries. When the plan creates an absolute bar to the advancement of the white males, it makes race and/or sex the only factor upon which the exclusion is based, contrary to the provisions of Title VII. The Court also determines whether white males have any absolute entitlements or rights encroached upon by the plan.

Apart from the considerations that deal directly with the rights of the non-beneficiaries of the plan, the Court looks at a number of characteristics of the affirmative action plan itself: such as the plan's goals, temporariness, and remedial nature. Although this last inquiry clearly relates as well to the burden prong as to the justification prong, it seems appropriate to distinguish this inquiry as a separate and third prong. The third prong can not be reduced to either of the other parts of the inquiry.

The Court's inquiry into the legality of an employer's decision to institute an affirmative action plan compares to a medical review

72. The constitutional analysis demands a double inquiry that differs from the statutory analysis. The test to determine the constitutionality of a race-conscious affirmative action plan under the equal protection clause of the fourteenth amendment is the strict scrutiny test. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). The Supreme Court applies the same standard of review for benign or remedial racial classifications as for classifications that are motivated by illegitimate notions of racial inferiority. Strick scrutiny is applied because racial classifications are regarded as inherently suspect across the board. *See* City of Richmond v. J.A. Croson Company, *supra*, at 490-91. Gender-based classifications, however, do not share this characteristic with race-based classifications. Gender-based classifications are not suspect, but only quasi-suspect classifications. *See* Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 468 (1981) (denial of treating gender-based classifications as inherently suspect in prior cases). They are not subject to the strictest level of scrutiny, but to an intermediate level only. Under the middle level of scrutiny, the gender-based classification "must serve an *important governmental interest* and must be *substantially related to the achievement of those objectives.*" Craig v. Boren, 429 U.S. 190, 197 (1976) (emphasis added). The level of scrutiny applied to benign sex classifications, such as affirmative action plans for women should only mirror and definitively not be higher than the level of scrutiny applied to sex-based classifications grounded in overbroad and stereotypical generalizations about the characteristics and abilities of the members of the female sex. A middle level of scrutiny should suffice. *See, e.g.*, L.D. Mattson, Inc. v. Multnomah County, 703 F Supp. 66 (D.C. Or. 1988).

73. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 631. *See also* La Riviere v. EEOC, 682 F.2d 1275, 1278-79 (9th Cir. 1982); Boyd, *supra* note 14, at 55.

board's review of a medical doctor's diagnosis and treatment of a patient. In the first instance the doctor (employer) screens the allegedly sick person (work force) to detect any diseases. A few sore muscles (absence of a manifest imbalance) can not be regarded as a disease for which a cure is appropriate. However, if a more serious malfunction (manifest imbalance) exists, medication might be appropriate. The goal then becomes to cure the patient's problem (creation of balanced work force), even though there might be a slight chance that health might be regained without any medical interference at all (Title VII does not *require* a balanced work force, but *allows* the employer under the appropriate circumstances to engage in affirmative action). The doctor then considers the remedies. While considering the appropriate remedies, the doctor looks at the disease and the implications the proposed medication has for other parts or organs of the body (rights of white male majority that might be implicated). A doctor does not cut off an arm to get rid of a finger injury. Diagnosis (justification prong), remedies (remedial nature prong), and implications (burden prong) remain distinct, but at the same time closely interrelated.

Although Justice Brennan, writing for the majority in *Weber*, explicitly refused to define the line of demarcation between permissible and impermissible affirmative action plans, the Court in *Johnson* refers to the *Weber* requirements as constituting the components of the Title VII inquiry into the vadility of voluntary affirmative action plans.[74] Lower courts uniformly adopted the *Weber* scheme of analysis.[75]

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74. *See Johnson*, 480 U.S. at 628-30.

75. *See, e.g.*, United States v. City & County of San Francisco, 890 F.2d 1438, 1448-49 (9th Cir. 1989); *In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1500 (11th Cir. 1988), *aff'd*, Martin v. Wilks, 490 U.S. 755 (1989); Hammon v. Barry, 826 F.2d 73, 82 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988); Higgins v. City of Vallejo, 823 F.2d 351, 356-58 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); Ledoux v. District of Columbia, 820 F.2d 1293, 1304 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988); Lilly v. City of Beckley, W Va., 797 F.2d 191, 194 (4th Cir. 1986); Bratton v. South Bend Community School Corp., 775 F.2d 794, 802 (7th Cir. 1985), *vacated*, 819 F.2d 766 (7th Cir. 1987); Paradise v. Prescott, 767 F.2d 1514, 1533-34 (11th Cir. 1985), *aff'd*, 480 U.S. 149 (1987); Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); Bratton v. City of Detroit, 704 F.2d 878, 883 (6th Cir. 1983); La Riviere v. EEOC, 682 F.2d 1275, 1278 (9th Cir. 1982); Lehman v. Yellow Freight Sys., 651 F.2d 520, 527 (7th Cir. 1981); Bridgeport Firebird Soc'y v. City of Bridgeport, 686 F Supp. 53, 60 (D. Conn. 1988); Smith v. Harvey, 648 F Supp. 1103, 1107 (M.D. Fla. 1986); United States v. New Jersey, 614 F Supp. 387, 394-95 (D.N.J. 1985); Breschard v. Directors Guild, 34 BNA FEP Cas. 1045, 1049 (C.D. Cal. 1984); Cohen v. Community College, 484 F Supp. 411, 434-35 (E.D. Pa. 1980); Tangren v. Wackenhut Servs., 480 F Supp. 539, 546 (D. Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

In *Johnson*, the Supreme Court emphasized that the Title VII requirements for a valid affirmative action plan are not as stringent as those imposed by the Constitution. Johnson v. Transportation Agency, Santa Clara County,

A. Justification: The Manifest Imbalance Requirement[76]

1. Voluntary Affirmative Action Plans to Redress Societal Discrimination

The affirmative action plan in *Weber* was justifiable because its purpose mirrored the purpose of Title VII. Both were aimed at opening up employment opportunities for blacks "in occupations which have been traditionally closed to them."[77] The plan falls within the area of discretion that Title VII leaves to private employers to voluntarily adopt plans *designed to eliminate conspicuous racial imbalances in traditionally segregated job categories.*[78] *Weber* failed to explicity resolve the question whether and to what extent the employer that started up the affirmative action plan was justified to do so only if it had itself, at least passively — as part of industry wide discriminatory practices — been engaged in employment discrimination. While footnoting the wide-spread racial exclusionary practices in the steel industry,[79] the Court declined to follow

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Cal., 480 U.S. 616, 627 n.6 (1987). *See also* Howard v. McLucas, 871 F.2d 1000, 1011 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 560 (1989); Ledoux v. District of Columbia, 820 F.2d 1293, 1306 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988); Lilly v. City of Beckley, W. Va., 797 F.2d 191, 192 (4th Cir. 1986); Bratton v. City of Detroit, 704 F.2d 878, 888 (6th Cir. 1983); United States v. City & County of San Francisco, 696 F Supp. 1287, 1301 (N.D. Cal. 1988), *modified*, 890 F.2d 1438 (9th Cir. 1989); Dougherty v. Barry, 607 F. Supp. 1271, 1286 (D.C. 1985), *vacated in part*, 869 F.2d 605 (1989); Britton v. South Bend Community School Corp., 593 F Supp. 1223, 1229 (N.D. Ind. 1984), *aff'd*, 775 F.2d 794 (7th Cir. 1985). Some have advanced the argument that the constitutional analysis of affirmative action plans should be governed by the analysis under Title VII. *See* Note, *Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and the Equal Protection Clause*, 56 FORDHAM L. REV. 403-30 (1987) [hereinafter Note, *Disparity in Standards*]. The argument runs that Congress exercised its power under § 5 of the Fourteenth Amendment when it extended the coverage of Title VII to public employers. "The manifest imbalance of Title VII reflects Congress' considered choice; it should be the constitutional standard applied to the states under the equal protection clause." *Id.* at 430. *See also* Buckley, *supra* note 14, at 720; Buchanan, *supra* note 30, at 238; Daly, *supra* note 42, at 88-91. It is highly unlikely that the Supreme Court will follow this route in light of its explicit statement in *Johnson* about the difference between the two standards.

76. The first prong of the constitutional analysis requires "more" a *compelling interest of the governmental actor involved.* The governmental unit that wants to introduce an affirmative action plan must have a strong basis in evidence that remedial action is necessary to remedy the present effects of its own past discrimination. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986). *See also* Buckley, *supra* note 14, at 713-14; Edwards, *supra* note 5, at 777-78 and 783-84; Selig, *supra* note 48, at 347-48; Note, *Disparity in Standards*, *supra* note 75, at 418-19; Note, *Finding a "Manifest Imbalance": The Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII*, 87 MICH. L. REV. 1986, 1992-94 (1989) [hereinafter Note, *Manifest Imbalance*].

77. United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 210 (1979).

78. *Id.* (emphasis added).

79. *Id.* at 200 n.1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial

the "arguable violation" approach suggested by Justice Blackmun's concurrence. Justice Blackmun would have allowed an employer to initiate an affirmative action plan if there was at least some indication that the employer might have engaged in discriminatory practices in violation of Title VII, without requiring the employer to actually produce evidence of a Title VII violation.[80] Justice Blackmun interpreted the majority's approach as considering a job category as traditionally segregated when there has been a societal history of purposeful exclusion of blacks from the job category involved.[81] However, for a number of practical and equitable reasons, Justice Blackmun accepted the broader approach taken by the majority.[82]

Weber failed to clarify what a "manifest imbalance in traditionally segregated job categories" represented. Did the Supreme Court define the first prong of the analysis of the validity of a voluntary affirmative action plan as requiring a double justification? Is the employer forced to show both a manifest imbalance in his work force and also that the job categories implicated by the affirmative action plan reflect an imbalance due to traditional segregation? What does "traditional segregation" mean?

The Supreme Court clarified its position in *Johnson*. The fact that the employer took sex into account in its decision making process remained justifiable by a manifest imbalance in its work force. The manifest imbalance reflected underrepresentation of women in traditionally segregated job categories. The Supreme Court noted that the requirement that a manifest imbalance relate to a traditionally segregated job category provides "assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimina-

notice"). *See also* Buckley, *supra* note 14, at 715-16; Cox, *supra* note 14, at 101; Note, *Societal Discrimination*, *supra* note 14, at 315.

80. Justice Blackmun stressed the fact that, although the Kaiser company had made some efforts to recruit minority employees, its insistence that those hired have five years prior industrial experience might reflect the use of a hiring practice "that arguably was not sufficiently job related to justify under Title VII any discriminatory impact it may have had." United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 212 (1979) (Blackmun, J., concurring). *See also* Belton, *supra* note 14, at 585-586; Meltzer, *supra* note 3, at 443-44, 447-56; Note, *Manifest Imbalance*, *supra* note 76, at 1996-97.

81. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 212 (1979) (Blackmun, J., concurring).

82. Justice Blackmun recognized that none of the parties involved in a voluntary affirmative action plan has any incentive to prove an arguable Title VII violation. To make the standard work, it would have to be set low enough to permit the employer to prove it without obligating himself to pay a damages award. In practice, this would probably lead to an approach that would not differ much from the statistical imbalance approach adopted by the majority. He found an additional advantage in the majority approach as it "would permit private affirmative action to reach where Title VII itself does not." *Id.* at 214-15.

tion, and that the interests of those employees not benefitting from the plan will not be unduly infringed."[83] Although the Supreme Court mentioned the relationship between the imbalance and the traditional segregation requirement, the emphasis clearly focuses on the manifest imbalance. The affirmative action plan must remedy underrepresentation. The employer need not point to its own prior discriminatory practices,[84] nor show any purposeful discriminatory practices in the industry at large. It remains sufficient for the employer to intend to redress an underrepresentation of women caused by strong traditional social pressures against female participation in employment.[85]

The Supreme Court embraced the idea that Title VII empowers a private employer to voluntarily undertake affirmative steps to remedy the effects of societal discrimination.[86] Societal discrimination comprises all forms of discriminatory practices not attributable

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83. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 631 (1987).

84. *Id.*

85. *See id.* at 634 n.12. Arguably, more than just societal pressure was keeping Ms. Joyce from a road dispatcher job, although the Supreme Court did not seem to note it. One member of the three person interview panel that established the scores of the applicants for promotion had earlier described Joyce as a "rebel-rousing, skirt-wearing person." This is precisely the type of sexist remark by a person involved in the decision making process on which a plaintiff can rely to establish that sex might have played a role in the employer's decison. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See also* Becker, *Price Charming: Abstract Equality*, 5 SUP CT. REV. 201, 206 (1987) ("Giving Joyce an edge over Johnson at the end of the promotion process is affirmative action only if Johnson and Joyce were similarly situated. The notion that they might have been similarly situated is fanciful").

86. *See* Allegretti, *supra* note 14, at 789-92; Boyd, *supra* note 14, at 15; Buchanan, *supra* note 30, at 264-65; Daly, *supra* note 42, at 25-26; Kreiling & Mercurio, *supra* note 14, at 63; Meltzer, *supra* note 3, at 462; Selig, *supra* note 48, at 341; *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 1, 307 (1987); Note, *Statistical Imbalance in Favor of Affirmative Action*, *supra* note 30, at 609; Note, *Manifest Imbalance*, *supra* note 76, at 1999-2003; Note, *Societal Discrimination*, *supra* note 14, at 307, 323-24. *Contra* Rutherglen & Oritz, *supra* note 14, at 482-83, 487.

An expression of the view that the Supreme Court in *Johnson* permits an employer to redress the effects of societal discrimination can be found in Justice Scalia's dissenting opinion in *Johnson*:

> The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is *intended to overcome the effect* not of the employer's own discrimination, but of *societal attitudes* that have limited the entry of certain races, or of a particular sex, into certain jobs.

Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 663 (1987) (Scalia, J., dissenting) (emphasis added). Scalia added, "it is the *alteration of social attitudes*, rather than the elimination of discrimination, which today's decision approves as justification for state-enforced discrimination." *Id.* at 666 (emphasis added). *See also* United Steelworkers; AFL-CIO-CLC v. Weber, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring); Breshchard v. Directors Guild, 34 BNA FEP Cas. 1045, 1047 (C.D. Cal. 1984).

to an identified perpetrator.[87] In *Johnson*, the Supreme Court clearly supported the idea that the employer should neither establish proof of its own discriminatory practices, nor try to draw an inference by establishing a *prima facie* violation of Title VII. Nor did the Supreme Court require any specific evidence of "traditional segregation" in the job category concerned. The Court relied on the acknowledgment in the employer's affirmative action plan that "limited opportunities have existed in the past," for women to find employment in certain job classifications "where women have not been traditionally employed in significant numbers."[88]

The traditional segregation characteristic of the job category involved does not seem to be an independent requirement.[89] It may be assumed, pursuant to *Johnson*, that this part of the manifest imbalance test is satisfied whenever an employer shows that the imbalance in its work force is not just a temporary or occassional one, but is a lasting one.[90] An employer willing to redress an ongoing imbalance in its work force should not be foreclosed from doing so merely because it is unable to produce evidence of traditional patterns of occupational race or sex segregation in its workplace.[91] This would be inconsistent with the limited burden of proof both *Weber* and *Johnson* impose on the employer and with the emphasis

87. *See* Note, *Societal Discrimination*, *supra* note 14, at 297-99, 307. *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 287 (1986) (O'Connor, J., concurring in part and concurring in the judgment); W. GOULD, *supra* note 6, at 92.

88. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 633 (1987).

89. As Justice White observed in *Johnson*:

> My understanding of *Weber* was, and is, that the employer's plan did not violate Title VII because it was designed to remedy intentional and systematic exclusion of blacks by the employer and the unions from certain job categories. That is how I understood the phrase "traditionally segregated jobs" we used in that case. The Court now interprets it to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force.

Id. at 657 (White, J., dissenting).

See also Daly, *supra* note 42, at 25 ("To view *Johnson* simply as a reaffirmation of *Weber* in the context of gender discrimination is misleading. The first alteration consisted of the collapsing of the second part of the *Weber* formula, 'in traditionally segregated job categories,' into the first part, 'manifest imbalance.' ").

The "traditional segregated job category" requirement has some bite only if it requires an employer to make comparisons between the composition of the relevant labor market, on the one hand, and the composition of the specific job categories for which it wants to start up an affirmative action plan, on the other. An unspecified comparison with its work force at large might not suffice.

90. *See* Boyd, *supra* note 14, at 13; *1987-1988 Annual Survey of Labor Relations and Employment Discrimination Law*, 30 B.C.L. REV. 99, 271, 273 n.15 (1988).

91. *See* Kreiling & Mercurio, *supra* note 14, at 60 ("The courts have been flexible in not requiring a demonstration of a traditionally segregated job cate-

the Supreme Court put on voluntary pursuit of Title VII's goal of eliminating the last vestiges of employment discrimination in the workplace.[92]

The fact that an imbalance exists in what one can describe as a "traditional white and/or male job category" remains acceptable as a sufficient justification to institute an affirmative action plan,[93] regardless of whether the imbalance results from occupational segregation or is the result of the pressures of society at large.[94]

2. *Identifying the Manifest Imbalance — "The Supreme Court Giveth and the Supreme Court Taketh Away"*[95]. *From* Johnston *to* Johnson

One reason why the Supreme Court upheld the affirmative action plan in *Weber* was that the plan was designed to eliminate a *conspicuous* or *manifest* racial *imbalance* in the employer's work

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gory"); Vaughn, *supra* note 3, at 560 ("failure to demonstrate 'traditional segregation' will not be fatal to an otherwise-valid plan").

"Newer" jobs, such as those in the computer industry, should not be excluded from the field in which voluntary affirmative action can operate. *See* Kreiling & Mercurio, *supra* note 14, at 60. *See also* Meltzer, *supra* note 3, at 459; Note, *Statistical Imbalance In Favor Of Affirmative Action*, *supra* note 30, at 608.

92. *See* Kreiling & Mercurio, *supra* note 14, at 60.

93. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 637 n.14 (1987).

94. *See* Ledoux v. District of Columbia, 820 F.2d 1293, 1304 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988). *See* Boyd, *supra* note 14, at 13; Buchanan, *supra* note 30, at 235; Cox, *supra* note 44, at 794; Daly, *supra* note 42, at 26; Kreiling & Mercurio, *supra* note 14, at 60; Vaughn, *supra* note 3, at 560; *1987-1988 Annual Survey of Labor Relations and Employment Discrimination Law*, 30 B.C.L. REV. 99, 271, 280-81 (1988).

Some courts correctly stress the existence of a manifest imbalance as satisfying the first prong of the Title VII analysis. *See, e.g.*, Shidaker v. Tisch, 833 F.2d 627, 630 n.4 (7th Cir. 1986), *cert. denied*, 487 U.S. 1234 (1988); Higgins v. City of Vallejo, 823 F.2d 351, 356 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); Sester v. Novack Inv. Co., 657 F.2d 962, 968 (8th Cir. 1981); Lehman v. Yellow Freight Sys., 651 F.2d 520, 527 (7th Cir. 1981); EEOC v. CW Transport, Inc., 658 F Supp. 1278 (W.D. Wis 1987); Tangren v. Wackenhut Servs., 480 F Supp. 539, 546-47 (D. Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). Other courts seem to require not only proof of a manifest imbalance, but also independent proof of the "traditional segregation" characteristic of the job categories implicated by the affirmative action plan. *See, e.g.*, Hammon v. Barry, 826 F.2d 73, 75 n.1, 80 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988); Lilly v. City of Beckley, W. Va., 797 F.2d 191, 194 (4th Cir. 1986); La Riviere v. EEOC, 682 F.2d 1275, 1280 (9th Cir. 1982); Hunter v. St. Louis-San Francisco Ry Co., 639 F.2d 424, 426 (8th Cir. 1981); Jurgens v. Thomas, 29 BNA FEP Cas. 1561, 1583 (N.D. Tex. 1982); Reichman v. Bureau of Affirmative Action, 536 F Supp. 1149, 1166-67 n.81 (M.D. Pa. 1982). Also, many opinions simply do not address the "traditional segregation" requirement at all. *See* Vaughn, *supra* note 3, at 560.

95. Title borrowed from Hernandez, *Title VII v. Seniority: "The Supreme Court Giveth and The Supreme Court Taketh Away"*, 35 AM. U.L. REV. 339 (1986).

force.[96] However, the Court failed to clarify how an employer can establish an imbalance sufficient to justify the introduction of an affirmative action plan nor explained how much of an imbalance is required. The Supreme Court's decision in *Johnson* brought some clarification. The Court pointed out the necessary comparisons:

> In determining whether an imbalance exists that would justify taking sex or race into account, a *comparison* of the *percentage of minorities or women* in the employer's work force with the percentages in the *area labor market or general population* is appropriate in analyzing jobs *that require no special expertise* or *training programs* designed to provide expertise Where a job *requires special training*, however, the comparison should be with those in the *labor force who possess the relevant qualifications.*[97]

In order to find out if a manifest imbalance exists, the employer first must determine whether the jobs for which it wants to start up an affirmative action plan are jobs that require special qualification or training.[98] The employer then must compare its actual

96. *See* United Steelworkers, AFL-CIO-CLC V Weber, 443 U.S. 193, 208 (1979).

97. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 631 (1987) (emphasis added).

98. Although the Supreme Court, in *Johnson*, declared that the comparison had to be made with the percentage of minorities or women in the employer's work force, it is safer for the employer intending to institute an affirmative action plan, to compare with the composition of the specific job categories of its work force for which it wants to introduce its plan. In *Weber*, the comparison was made with the percentage of minority employees in the craft labor force alone, and not with the overall percentage of minority employees in Kaiser's work force, which was significantly higher. Of the craft work force, 1.83% was black, United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 198-99 (1979), compared to 14.8% of the total work force, Weber v. Kaiser Aluminium & Chem. Corp., 563 F.2d 216, 228 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd*, United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979). *Johnson* made a comparison both with the specific job category at issue and with the overall composition of the work force. In its conclusion on the justification prong of the analysis, the Supreme Court, however, relied on "the obvious imbalance in the Skilled Craft category" in which the promotion of Ms. Joyce was made. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 637 (1987). Additional support for the comparison with the specific job category can be found in the Supreme Court's reiteration of the "traditional segregated job category" requirement. *See Johnson*, 480 U.S. at 637.

Most lower courts refer to statistical data concerning the job categories implicated by the affirmative action plan. *See* Shidaker v. Tisch, 833 F.2d 627, 631 (7th Cir. 1986) (comparing the percentages of minorities in upper and lower level positions for a promotion from within), *cert. denied*, 487 U.S. 1234 (1988); Hammon v. Barry, 826, F.2d 73, 74-75 (D.C. Cir. 1987) (stress on job categories), *cert. denied*, 486 U.S. 1036 (1988); Higgins v. City of Vallejo, 823 F.2d 351, 356 (9th Cir. 1987) (satisfied with a comparison with the city's work force in general, but added that the required imbalance also existed in the fire department more in specific), *cert. denied*, 489 U.S. 1051 (1989); Ledoux v. District of Columbia, 820 F.2d 1293, 1304 (D.C. Cir. 1987) (comparing the area labor market to the racial and sexual composition of the work force in the higher-level positions at issue), *vacated*, 841 F.2d 400 (D.C. Cir. 1988); United States v. City & County of San Francisco, 696 F Supp. 1287, 1304 n.36 (N.D. Cal. 1988) (would compare imbalances in all job categories to representation in the general population),

work force to the potential work force. If the jobs in question require special skills and training, the employer must compare the percentage of minority or female employees already working in these positions at the company with the percentage of *qualified* minority or female employees in the area labor market.[99] "Potential" employees who lack the required skills to perform the jobs must be exluded from the comparison. When the employer institutes an affirmative action plan for an unskilled position, it is allowed to compare the percentage of minority or female workers in its work force with the minority or female representation in the *general* labor market or the area labor market.[100] Training programs set up to acquire the necessary credentials to perform skilled jobs require the same analysis.[101]

Concerning the imbalance required to justify a voluntary affirmative action plan, the Supreme Court declared only that it need not be sufficient to support a *prima facie* case against the employer.[102] A gross imbalance in the work force sufficient to make out a *prima facie* case allows the inference of direct employment discrimination by a particular employer.[103] As was stated in *Teamster's*,[104] a statistical comparison between an employer's work force and the general population remains highly probative when the jobs involved fail to require any specific skills, or only require skills that are readily acquirable.[105] On the other hand, in *Hazelwood*[106] the Court asserted, "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value."[107] The basis for inferring employer discrimination from statistical imbalances in the work force is the assumption that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which the em-

modified, 890 F.2d 1438 (9th Cir. 1989). *See also* Note, *Manifest Imbalance*, *supra* note 76, at 2007-08 n.85.

99. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 631 (1987).

100. *Id.*

101. *Id.*

102. *Id.*

103. *See, e.g.*, Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 (1988); Dothard, Director Dep't of Pub. Safety v. Rawlinson, 433 U.S. 321 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

104. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

105. *Id.* at 341-42.

106. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

107. *Id.* at 308 n.13.

ployees are hired."[108] Statistical imbalances are "often a telltale sign of purposeful discrimination."[109]

The Supreme Court's distinction of the probative value attached to different comparisons makes sense when the ultimate purpose of the comparisons is to infer employer discrimination. The employer is liable for employment discrimination under Title VII when it discriminates on the basis of race, sex or any other impermissible criterion.[110] However, the employer is not engaging in prohibited discrimination when it excludes unqualified workers from its work force. The statistics from which the inferences of discrimination are drawn should, thus, not comprise of those workers the employer can lawfully refuse to employ because of the absence of the required qualifications to perform the job satifisfactorily.[111]

When the *Johnson* Court established the comparisons employers must use to discover a manifest imbalance for justifying the introduction of an affirmative action plan, the Court relied heavily on statistical data and its probative value in proving specific and direct unlawful employer discrimination. The Supreme Court considered the *Teamster's* approach as controlling when affirmative action plans involve unskilled jobs. However, when skilled jobs are at issue, the *Hazelwood* comparison has to be made.[112] Reliance on the *Hazelwood* comparison with the qualified relevant labor market seems to be inapposite in the context of voluntary affirmative action.

The Johnson Court clearly supported the idea that voluntary affirmative action by private employers must not be discouraged by requiring them to establish a *prima facie* case of discrimination to

108. International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

109. *Id.*

110. *See* 42 U.S.C. § 2000e-2 (1982).

111. *See* Note, *Manifest Imbalance*, *supra* note 76, at 2021. In *Watson v. Fort Worth Bank & Trust*, the Supreme Court required the plaintiff in a disparate impact case to prove more than mere statistical imbalances in an employer's work force in order to prevail. The plaintiff must in the first place identify the specific employment practice that is alleged to have a disproportionate impact on minorities or women. Then the plaintiff has to prove a causal connection between the employment practice and the disparities in the composition of the work force. In addition, the disparities have to be substantial. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988). *See also* Ward Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). The Supreme Court also declared that the inevitable focus on statistics might put undue pressure on employers. An employer cannot be held liable for just any disparity in its work force because "it is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs." *Watson*, 487 U.S. at 992. The Supreme Court thought it equally unrealistic "to suppose that employers can eliminate, or discover and explain, the myriad of [sic] innocent causes that may lead to statistical imbalances in the composition of their work forces." *Id.*

112. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 632 (1987).

justify the plan.[113] It explicitly declared *Weber* to be a case in which the Court failed to concern itself with past discrimination by the employer itself.[114] The Court permitted the company to make a comparison to the general work force, rather than asking for a comparison with the percentage of skilled craft workers in the area labor force. The Supreme Court in *Johnson* explained why:

> Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as minuscule as the proportion in Kaiser's work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those *industries in which discrimination has been most effective* would be precluded from adopting training programs to increase the percentage of qualified minorities.[115]

Therefore, the Supreme Court accepted the idea that the employer should be allowed to address the problem of societal discrimination for which no wrongdoer can be identified.

The Court did not retreat from this position in *Johnson*. The Court allowed the employer to redress an imbalance in its work force caused by *"strong social pressures"* against female participation in traditionally all-male job categories.[116] While the Supreme Court endorsed the principle of voluntary affirmative action to tackle the problem of societal discrimination, the Court severely cut back the principle's application for the kind of jobs where societal pressures accomplish their most efficient results. "The Supreme

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113. *See id.* at 632-33 ("Application of the '*prima facie*' standard in Title VII cases would be inconsistent with *Weber's* focus on statistical imbalance, and could inappropriately create a significant disincentive for employers to adopt an affirmative action plan").

114. *See id.* at 633 n.10.

115. *Id.* at 633 n.10 (emphasis added).

116. *See id.* at 634 n.12. Although the Supreme Court, in *Johnson*, did not directly address the issue of providing female workers with "role models," as an attempt to alleviate the effects of societal discrimination, it surely did not reject this idea. In its conclusion on the manifest imbalance prong, the Court determined that the employer was justified in taking sex into account as a factor in the decision making process. In considering the appropriateness of taking sex into account, the Court seemingly approved a role model theory as an additional justification for the affirmative action plan. The Court stated:

> In addition, the Agency was mindful of the importance of finally hiring a women in a job category that had formerly been all-male. The Director testified that, while the promotion of Joyce 'made a small dent, for sure, in the numbers,' nonetheless 'philosophically' it made a larger impact in that it probably has encouraged other females and minorities to look at the possibility of so-called 'non-traditional' jobs as areas where they and the agency both have samples of a success story.

Id. at 637 n.14.

Under the equal protection analysis, *Wygant* stands for a rejection of the role model theory as a sufficiently compelling reason to institute an affirmative action plan in the employment context. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986). *But see* Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997 (1990).

Court Giveth," allowing the private employer to redress imbalances caused by societal discrimination, "And The Supreme Court Taketh Away," by requiring the employer to draw, for skilled positions, a comparison that is unsympathetic to the fact that the number of qualified minority or female applicants or employees is low due to societal pressures and discrimination.

In light of the broad remedial purpose of Title VII to eliminate the last vestiges of discrimination, an employer should be allowed to institute an affirmative action plan whenever the composition of its work force reflects a manifest imbalance compared to the composition of the general population or the area labor market. The Supreme Court's rejection of this idea is based on the unwarranted fear that a finding of a manifest imbalance based on a comparison with the general population or the general labor market results in a blind hiring by numbers regardless of the qualifications of the minority or female applicants.[117] This fear is completely unsubstantiated.

Affirmative action does not include hiring or promotion of unqualified minority or female workers.[118] When the actual employment decision must be made according to the affirmative action plan, only qualified applicants are considered.[119] The employer, in order to fully address societal discrimination, should be allowed to

117. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 636 (1987). In *Johnson*, the Court stated:

> By contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If the plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would *indicate mere blind hiring by numbers*, for it would hold supervisors to 'achievement of a particular percentage of minority employment or membership *regardless* of circumstances such as economic conditions or the *number of qualified minority applicants*.'

Id. (emphasis added).

118. Buchanan, *supra* note 30, at 241-42.

119. Other ways of eliminating the problem of blind hiring by numbers of unqualified applicants exist, while still allowing the employer to redress the effects of societal discrimination in "skilled jobs." One could allow the employer to start up an affirmative action plan based on a manifest imbalance between the composition of its own labor force and the composition of the general population or the area labor force. After establishing the manifest imbalance, one could requre the employer to draft a second comparison: comparing the percentage of qualified minority or women workers in its work force to the percentage of qualified applicants in the relevant labor market. This is the comparison the Supreme Court forces the employer to make in the first place, as a justification for the institution of its affirmative action plan. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 631-33 (1987). Based on this second comparison, the employer would then be allowed to hire a percentage of minority or female applicants equal to the difference shown by the second comparison. The employer would be allowed to do so even when the

hire or promote qualified minority or women workers up to their respective percentages in the area labor market. When qualified applicants do not exist in sufficient numbers, the employer will not hire or promote unqualified applicants, and it probably can not be forced to do so.

From the economic point of view, the employer has absolutely no incentive to hire incompetent or unqualified workers. Legally, there is no way in which to bind the employer by the figures in its voluntarily adopted affirmative action plan, if no qualified applicants are available. An affirmative action plan that constitutes part of a consent decree remains under the continuing jurisdiction of the approving court. Judicial sanctions enforce the provisions of the consent decree. It remains unlikely, however, that a court will hold an employer in contempt of court for not hiring the number of minority or female workers required by the affirmative action plan if few qualified applicants exist. The court may withhold its assistance in enforcing the decree if it considers any part of the agreement or its enforcement inequitable.[120] If the employer adopts the affirmative action plan unilaterally, the employer's violation of the plan fails to constitute a Title VII violation because no law requires the employer to institute an affirmative action plan in the first place.[121]

3. The Magnitude of the Manifest Imbalance

After explaining the nature of the required comparisons, the Supreme Court in *Johnson* dealt with the problem of the magnitude of the imbalance necessary to establish its manifest nature or

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second comparison only shows a difference of a substantially lesser degree than the one that would make out a manifest imbalance.

A second way of redressing societal discrimination, can be found in an approach that is accepted by the courts to some degree. The finding of a manifest imbalance between the employer's skilled labor force and the skilled area labor market is, however, a prerequisite for following this approach. Once the existence of such a manifest imbalance is established, the employer would be allowed to engage in "accelerated affirmative action," hiring or promoting qualified minority or female applicants at a higher percentage than the percentage of qualified applicants available. This approach certainly finds support in *Weber* Although *Weber* did not deal with skilled jobs, but rather with a training program to require the necessary skills for being hired as a craft worker, the reasoning still holds. The area labor force was found to be only 39% black. The affirmative action plan, nevertheless, reserved 50% of the positions in the training program available to blacks. This clearly is a form of accelerated affirmative action approved by the Supreme Court. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 197-200 (1979).

120. *See* Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 359 (1988).

121. *See, e.g.*, Liao v. Tennessee Valley Auth., 867 F.2d 1366, 1368-69 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1806 (1990); Manoharan, M.D. v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590 (2d Cir. 1988); French v. United States Trust Co., 47 EMPL. PRAC. DEC. (CCH) ¶ 38,382 (S.D.N.Y. 1988).

conspicuousness. The Court stated, "A manifest imbalance *need not* be such that it would support a *prima facie case* against the employer. . "[122] The Court noted, however:

> In some cases, of course, the manifest imbalance may be sufficiently egregious to establish a *prima facie* case. However, as long as there is a manifest imbalance, an employer may adopt a plan even where the disparity is not so striking, without being required to introduce the non-statistical evidence of past discrimination that would be demanded by the *'prima facie'* standard. . Of course, when there is sufficient evidence to meet the more stringent *'prima facie'* standard, be it statistical, non-statistical, or a combination of the two, the employer is free to adopt an affirmative action plan.[123]

The establishment of a *prima facie* case requires a justification for the employer willing to start up an affirmative action plan.

The question remains, however, *how much less* of an imbalance justifies race or sex affirmative action efforts under Title VII.[124] Factually, both *Weber*[125] and *Johnson*[126] were easy cases concerning the existence of a manifest imbalance. In both cases, the manifest imbalance was grossly apparent.[127] Although the Supreme Court denied that an imbalance needs to be sufficient to make out a *prima facie* case of discrimination, the Supreme Court failed to suggest an alternative standard.[128] Employers are left with little guidance, not only because it remains uncertain what degree is necessary to make an imbalance manifest, but also because the Court never clearly described the minimum level of disparity that would satisfy the *prima facie* standard in direct discrimination cases in the first place.[129]

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122. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 632 (1987).

123. *Id.* at 634 n.11 (emphasis added).

124. *See* Edwards, *supra* note 5, at 783.

125. Of the employer's craft workforce, 1.83% was black (5 out of 273), compared to 39% of the local labor force. It was not hard for the Court to find that Kaiser's work force was indeed manifestly imbalanced. United Steelworkers, AFL-CIO-CLC V Weber, 443 U.S. 193, 198-99 (1979).

126. *See Johnson*, 480 U.S. at 636 ("As the Agency Plan recognized, women were egregiously underrepresented in the Skilled Craft job category, since none of the 238 positions was occupied by a women").

Because of the complete absence of female presence in the skilled craft work force, Justice O'Connor treated the case as an "inexorable zero" case in which the statistical imbalance would have been sufficient for a *prima facie* Title VII case brought by unsuccessful women applicants. *Id.* at 656-57 (O'Connor, J., concurring). *See also* Rutherglen & Oritz, *supra* note 14, at 480-81. For a discussion of "inexorable zero," see International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977).

127. *See* Edwards, *supra* note 5, at 782-83.

128. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 654 (1987) (O'Connor, J., concurring).

129. The Supreme Court in *Watson v. Fort Worth Bank & Trust*, stressed that the Court had never "suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a *prima facie* case

The imbalances shown in the cases upholding the affirmative action plans illustrate blatant situations and would probably satisfy a *prima facie* case of discrimination.[130]

The required showing of manifest imbalance is also related to another part of the Courts' analysis of the validity and legality of affirmative action plans. If the established imbalance fails to rise to the level of "manifest," the affirmative action plan runs counter to one of the other requirements imposed both by *Weber*[131] and *Johnson*,[132] namely that the affirmative action plan must be *designed to eliminate* a conspicuous or manifest imbalance and *not* just to *maintain* an already roughly balanced work force.[133]

4. The Employer's Burden of Proof

The comparison the Supreme Court requires an employer to draw when it designs an affirmative action plan for skilled positions transported some of the difficult problems encountered in the field of direct employment discrimination law into the field of voluntary affirmative action. The distribution of the different burdens of proof in reverse discrimination lawsuits challenging the validity of affirmative plans under Title VII, as established in *Johnson*, should prevent these difficulties from inhibiting voluntary affirmative action.[134] To assess the validity of an affirmative action plan, courts

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in the complex area of employment discrimination." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995 n.3 (1988). The Court in *Castaneda v. Partida* previously noted, however, that "as a general rule," a statistical disparity of more than two or three standard deviations may be considered as a gross disparity that allows the inference of discrimination. Castaneda v. Partida, 430 U.S. 482, 497 n.17 (1977). *See also* Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n.14 (1977).

130. *See, e.g.*, United States v. City of Miami, Fla., 614 F.2d 1322, 1339 (5th Cir. 1988) (imbalances of 46.9% to 11% and 44% to 7%); Higgins v. City of Vallejo, 823 F.2d 351, 356 (9th Cir. 1987) (30% to 11.4% and 17% to 7.3%), *cert. denied*, 489 U.S. 1051 (1989); Shidaker v. Tisch, 833 F.2d 627 (7th Cir. 1986) (21.1% to 5%), *cert. denied*, 487 U.S. 1234 (1988); Kirkland v. New York State Dep't Of Correctional Servs., 711 F.2d 1117, 1131 (2d Cir. 1983) (standard deviation of 5.86), *cert. denied*, 465 U.S. 1005 (1984); United States v. City of Alexandria, 614 F.2d 1358, 1364-65 n.14 (5th Cir. 1980) (27.3% to 8.3%, 8.5% and 2.1%; 37% to 11.6%, 2.6% 1.1% and 0%); Detroit Police Officer's Ass'n v. Young, 608 F.2d 671, 688 (6th Cir. 1979) (17.23% to 11%), *cert. denied*, 452 U.S. 938 (1981); Tangren v. Wackenhut Servs., 480 F Supp. 539, 546-47 (D. Nev. 1979) (16% and 14% to 5%), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

131. *See* United Steelworkers, AFL-CIO-CLC V Weber, 443 U.S. 193, 208-09 (1979).

132. *See Johnson*, 480 U.S. at 654.

133. For an application of this principle, see Jurgens v. Thomas, 29 BNA FEP Cas. 1561, 1583-84 (N.D. Tex. 1982). *See also* Hammon v. Barry, 826 F.2d 73, 78 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988).

134. For a discussion of the importance of the distribution of the burden of proof, see Gould, *supra* note 50, at 1496 ("In most Title VII litigation, the critical question centers on which party carries the burden. The same is true whether the burden is one of production or persuasion").

must address a number of difficult factual questions. These questions involve the relevant qualifications for the jobs at issue in the affirmative action plan and the geographical boundaries of the relevant labor market, the composition of which has to be compared to the composition of the employer's own labor force.

The first question determines the kind of comparison that the Court requires the employer to make: Do the job categories for which the employer wants to start up an affimative action plan involve any special skills or qualifications? For jobs that require no special expertise, a comparison with the general population[135] or area labor statistics is appropriate.[136] Based on the Supreme Court's reasoning in *Hazelwood*, on which the *Johnson* Court heavily relied, the same comparison will suffice for jobs that require skills "that many persons possess or can fairly readily acquire."[137] When jobs do require some special expertise, but the expertise is normally acquired through on-the-job training, the same principle holds.[138] If the employment requires preexisting skills for satisfactory job performance, the Supreme Court demands the employer make a comparison to "those in the labor force who possess the relevant qualifications."[139] In practice it is difficult to determine

135. The Supreme Court, in *Johnson*, considered both the comparison to the general population, and the comparison to the area labor force to be appropriate when the affirmative action plan only deals with unskilled jobs. *Johnson*, 480 U.S. at 632 (1987). The Supreme Court's position is probably based on the assumption that the ethnic and sexual composition of the general population is reflected in the composition of the labor market. When substantial deviations exist, however, the comparison to the area labor force might be more appropriate. *See* Edwards, *supra* note 5, at 778 n.57; Note, *Manifest Imbalance*, *supra* note 76, at 2013.

136. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 632 (1987).

137. *See* Hazelwood School District v. United States, 433 U.S. 299, 308 n.13 (1977) (the job of truck driver falls within this category) (citing International Bhd. of Teamsters v. United States, 431 U.S. 324 (1976)).

138. *See Johnson*, 480 U.S. at 632 ("a comparison with the percentage in the area labor market or general population is appropriate in analyzing training programs designed to provide expertise").

The comparison to the general population or area labor market is only appropriate for training programs that do not require any preexisting expertise for satisfactory participation in the training program. For example, an insurance company with a large computer department needs computer programmers. It normally provides its newly hired employees with a two month training program. Due to the specific needs of the company, a training program is of bare necessity, as none of the computer science graduates has ever dealt with the specific programs he or she is facing in the company. If the employer wants to institute an affirmative action plan for its computer department, comparison of its work force with the general population statistics will be considered inappropriate. Although the affirmative action plan involves a training program, special expertise is required for participation in it. *See also* Edwards, *supra* note 5, at 781-82.

139. *See Johnson*, 480 U.S. at 632.

whether a job qualifies as a skilled or an unskilled job.[140] An additional problem exists for jobs requiring special skills. It is not always easy to find those in the general labor market who possess the required qualifications.[141]

The Supreme Court, in *Johnson*, determined that the relevant comparison is with the *area* labor force. The Court failed, however, to specify how to construe the "area" concept. The use of different geographical areas for comparison with the employer's work force leads to different outcomes concerning the existence or absence of a manifest imbalance. This is true when the employer is located in or near neighborhoods with high concentrations of minorities.[142] Courts have considered different geographical areas to be the rele-

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140. Although some courts do not explicitly decide on the nature of the job, their position can be inferred from the comparisons that were used. For examples of what different courts consider to be skilled or unskilled jobs, see Wards Cove Packing Co., Inc. v. Antonio, 490 U.S. 642, 647 n.3 (1989) (skilled positions: noncannery jobs in salmon cannery factory, such as machinist, engineer, quality control personnel, cook, carpenter, store-keeper, bookkeeper, beach gangs for dock yard labor and construction; unskilled position: cannery job on the cannery line); Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977) (non-skilled position: truck driver; skilled position: school teacher); International Bhd. of Teamsters v. United States, 431 U.S. 324, 342 n.23 (1977) (position of truck driver requires comparison to general population); Cygnar v. City of Chicago, 865 F.2d 827, 839 (7th Cir. 1989) (a position in the Office of Municipal Investigation requires the comparison to narrowly focus on those actually qualified), *cert. denied*, 489 U.S. 1051 (1989); Janowiak v. Corporate City of South Bend, 836 F.2d 1034, 1039-40 (7th Cir. 1987) (position of city fireman requires the focus of the comparison to be narrowed to those actually qualified), *cert. denied*, 489 U.S. 1051 (1989); Hammon v. Barry, 826 F.2d 73, 77 (D.C. Cir. 1987) (position of entry-level fire fighter requires comparison to area labor force), *cert. denied*, 486 U.S. 1036 (1988); Higgins v. City of Vallejo, 823 F.2d 351, 356 (9th Cir. 1987) (the position of fire fighter/engineer requires comparison to city population in general), *cert. denied*, 489 U.S. 1051 (1989); Mann v. City of Albany, 687 F Supp. 583, 588 (M.D. Ga. 1988) (the position of assistant chief of police requires comparison with working age population). *See also* Note, *Manifest Imbalance*, *supra* note 76, at 2009-12.

141. *See* Edwards, *supra* note 5, at 779. Edwards gives the following example of an assistant manager in a supermarket:

> [I]t is unclear how one should determine the number of minorities or women in a relevant labor market who 'possess the relevant qualifications' to be an assistant manager of a supermarket. The range of possible qualifications for this type of job is so broad that any effort to quantify the number of minorities or women who possess them may be little more than an exercise in futility.

Id.

Edwards suggests that in such a case, the area labor market may serve as a proxy for the qualified area labor market, save proof to the contrary. *See id.* at 779-80. *See also* Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 984-85 (1982).

142. The geographical boundaries of the relevant area labor market are of less relevance when the affirmative action plan is instituted to the benefit of female workers only. Communities or neighborhoods with an extremely high or low concentration of women will be rare.

vant labor market.[143] Absent any compelling counter indication,[144] a court should consider the area from which the employer normally hires as the appropriate labor market for the comparison.[145]

A white male employee challenging the validity of an affirmative action plan bears the *ultimate burden of establishing its invalidity*.[146] The Supreme Court in *Johnson* held that the analytical framework used in disparate treatment cases (allocating burdens of proof and production) are readily applicable to lawsuits questioning the vadility of an affirmative action plan. The Court thus applied the framework set forth in *McDonnell Douglas Corp. v. Green*.[147] The *plaintiff* must first establish a *prima facie* case that the employer took race or sex into account in making its employment decision. If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the *employer* to *articulate a nondiscriminatory rationale* for its decision. "The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is

143. *See, e.g.*, Hammon v. Barry, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988). In *Hammon*, the court stated,

> There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the *Washington metropolitan area*, not just within the confines of the Nation's capital. The reason is that it is undisputed that approximately half of the District's entry-level fire-fighters have hailed from the suburbs.

Hammon, 826 F.2d at 77-78 (emphasis in original).

See also Mann v. City of Albany, 687 F. Supp. 583, 588 (M.D. Ga. 1988) (comparison to standard metropolitan area); Drayton v. City of St. Petersburg, 477 F Supp. 846, 857 n.20 (M.D. Fla. 1979) (the relevant labor market must be determined on the basis of historical facts and peculiar contemporary conditions, if any, in the labor market itself).

144. The area from which the employer ordinarily recruits may not be the relevant area labor market when it appears that the employer, in the past, directed its hiring efforts to areas such as predominantly white neighborhoods. If this employer feels "remorse" and decides to institute an affirmative action plan, it should not be prevented from doing so merely because the composition of the area from which it "normally" recruited, as compared to the composition of its work force, does not show the required manifest imbalance to justify an affirmative action plan. The relevant labor market area should therefore be the area from which the employer could reasonably be expected to recruit, absent a discriminatory practice. In redressing its former discriminatory practices and choosing the relevant area labor market from which to make its comparisons, the employer should be given a wide latitude.

145. *See* Note, *Manifest Imbalance*, *supra* note 76, at 2015-16; Spencer, *When Preferential Hiring Becomes Reverse Discrimination*, 14 EMPLOYEE REL. L.J. 513, 516 (1989).

146. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 626 (1987). The same is true for the constitutional analysis. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 467 U.S. 267, 277-78 (1986) (burden remains with employees to demonstrate unconstitutionality of affirmative action program).

147. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

invalid."[148]

The second step in the analytical framework requires the employer only to *articulate* a nondiscriminatory rationale for its employment decision.[149] The reliance on the affirmative action plan is, thus, not an affirmative defense that requires the employer to carry the burden of proving the plan's validity. The ultimate burden of persuasion remains with the plaintiff.[150] The employer's burden of proof is a mere burden of production, not of persuasion.[151] As a practical matter, the employer will "produce" more than just the fact that the challenged employment decision was made pursuant to an affirmative action plan.[152] The employer will also attempt to avoid the charge of pretext (the third step in the *McDonnell Douglas* anaylitical framework) by presenting evidence in support of its

148. *Johnson*, 480 U.S. at 626.

149. *Id. See also* Cygnar v. City of Chicago, 865 F.2d 827, 837 (7th Cir. 1989); Janowiak v. Corporate City of South Bend, 836 F.2d 1034, 1036 (7th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); Higgins v. City of Vallejo, 823 F.2d 351, 355 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989).

150. *See Johnson*, 480 U.S. at 627. According to the McDonnell Douglas — Burdine analytical framework, the burden resting on the plaintiff is a burden of proof by preponderance of evidence. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). Because the Supreme Court adopted this analytical framework for reverse discrimination lawsuits, the same standard should govern in affirmative action lawsuits.

151. In *Burdine*, the Court stated:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against plaintiff . If the defendant carries this *burden of production*, the presumption raised by the prima facie case is rebutted.

Burdine, 450 U.S. at 254-55 (emphasis added).

152. The employer must produce evidence that its employment decision was made pursuant to the affirmative action plan it instituted. The mere existence of an affirmative action plan, however, is not a sufficient articulation of a legitimate nondiscriminatory reason. The employer must still produce some evidence that the challenged decision was taken according to the plan. The employer's obligation to produce evidence that its particular employment decision was made pursuant to an affirmative action plan "forces" the employer, at the same time, to produce evidence of the existence of an actual plan. Informal and ad hoc affirmative action decision making, in the absence of a plan, does not satisfy this requirement. *See* Cygnar v. City of Chicago, 865 F.2d 827, 849 (7th Cir. 1989); Lilly v. City of Beckley, W. Va., 797 F.2d 191, 195 (4th Cir. 1986); Lehman v. Yellow Freight Sys., 651 F.2d 520, 527-28 (7th Cir. 1981); Sester v. Novack Inv. Co., 638 F.2d 1137, 1146 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981); Wilmington Firefighters v. City of Wilmington, 632 F Supp. 1177, 1190-91 n.14 (D. Del. 1986); Dougherty v. Barry, 607 F Supp. 1271, 1287 (D.C.D.C. 1985), *vacated in part*, 869 F.2d 605 (D.C. Cir. 1989); Harmon v. San Diego County, 477 F Supp. 1084, 1089 (S.D. Cal. 1979), *aff'd in part, rev'd in part*, 664 F.2d 770 (9th Cir. 1981). *See also* Vaughn, *supra* note 3, at 561-62; Kreiling & Mercurio, *supra* note 14, at 71-76.

plan.[153]

Both the *McDonnell Douglas* analytical framework for establishing an employer's Title VII violation when instituting an affirmative action plan, and the imposition of the ultimate burden of persuasion on the plaintiff challenging the validity of the plan, suggest that the employer retains a large degree of discretion when evaluating the need for instituting an affirmative action plan. The employer's analysis of the composition of its own work force, of the relevant labor market, and of the comparison between the two, should be presumed valid until the plaintiff proves the contrary by carrying the ultimate burden of persuasion. The manifest imbalance proffered by the employer should enjoy a *de facto* presumption of validity.[154] If the employer decides to compare the composition of the job catergories for which it wants to institute an affirmative action plan to the general labor market, the relevant positions should be considered unskilled positions. If a plaintiff challenges the veracity of the employer's determination of the nature of the jobs involved, the plaintiff should introduce convincing evidence that the employer made the wrong determination.[155] The same applies for the employer's geographical delineation of the relevant labor market from which it generally hires employees. Absent convincing evidence to the contrary, a court should not reject an

153. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 626-27 (1987).

154. The reasoning of a federal district court that "once a perpetrator, untrustworthy for the rest of your life," is faulty and is inapplicable when dealing with an employer instituting an affirmative action plan because of a manifest imbalance without the existence of any prior discriminatory employment practices. *See* Detroit Police Officers Ass'n v. Young, 446 F Supp. 979, 1010 (E.D. Mich. 1987), *rev'd*, 608 F.2d 671 (6th Cir. 1979).

155. This approach was followed by the District of Columbia Circuit in Ledoux v. District of Columbia, 820 F.2d 1293 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (1988). The affirmative action plan at issue dealt with higher-level positions in the police department. The employer found a manifest imbalance between the composition of these positions and the composition of the area labor market in general. The Court approved the comparison.

> The appellants vaguely suggest in their brief that there appears to be no manifest racial imbalance if the number of blacks in the Department's higher-level positions are compared with those blacks in the labor force who possess the qualifications for those positions. However, even assuming that this were the appropriate statistical data against which the Department's Plan should be judged the appellants failed at trial to introduce any data that purports to identify those in the District of Columbia labor force who possess the requisite qualifications. Because the ultimate burden of proof in a Title VII case is on the plaintiff the appellant's unsupported contention must fail.

Id. at 1304-05.

See also id. at 1306 n.22; Edwards, *supra* note 5, at 780-81; Note, *Manifest Imbalance*, *supra* note 76, at 2017-18. *But see* Cygnar v. City of Chicago, 865 F.2d 827, 840 (7th Cir. 1989); Janowiak v. Corporate City of South Bend, 836 F.2d 1034, 1039 (7th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); Hammon v. Barry, 826 F.2d 73, 77-78 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988).

employer's reasonable justification for the institution of its affirmative action plan.[156] At all times, the ultimate burden of persuading the trier of fact remains with the plaintiff, the white male challenging the validity of the affirmative action plan in a reverse discrimination lawsuit.[157]

The imposition of a mere burden of production on the employer is consistent with the approach followed in direct employment discrimination cases. The burden is also consistent with the Court's emphasis on voluntary action as the preferred means to achieve the ultimate goal of Title VII, which is to eradicate the last vestiges of employment discrimination. Imposing a high burden of proof on the employer, such as a burden of persuading the court of the ultimate statutory validity of an affirmative action plan, discourages the voluntary institution of affirmative action efforts. The imposition of only a burden of production is also consistent with the Supreme Court's recognition of Title VII's wide managerial prerogatives. Generally, the employer maintains full managerial freedom under Title VII, except for specific exceptions. Similarly, a court should accept the employer's justification for an affirmative action plan unless effectively rebutted. Absent contrary evidence introduced by the plaintiff, courts should accept the reasonable justification proffered by the employer.

B. Burden Prong

The second prong of the Supreme Court's analysis concentrates on the consequences of the affirmative action plan for those who are not its beneficiaries. In a world of limited resources, a benefit to one person inevitably leads to a detriment to another.[158] "It is inev-

156. The plaintiff must come forward with convincing evidence that the employers' justification (nondiscriminatory reason) for the affirmative action plan is pretextual or did not motivate the particular disputed decision. Judge Edwards noted correctly that this should not be an easy burden to overcome:

> For one thing it simply is counter-intuitive to think that an employer would purposely rely on inaccurate statistics to defend an affirmative action plan. Generally, employers adopt affirmative action plans with great reluctance, and are not searching for mischievous ways to justify them. And given the highly visible nature of affirmative action plans, an employer who relies on bogus data would simply be inviting lawsuits.

Edwards, *supra* note 5, at 781.

157. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

158. *See* Germann v. Kipp, 429 F Supp. 1323, 1335 (W.D. Mo. 1977), *vacated*, 572 F.2d 1258 (8th Cir. 1978). Some commentators argue that the burden of instituting an affirmative action plan should not be carried by the innocent white male employees, and that certain forms of affirmative action efforts should thus only be executed through granting benefits from an increased amount of resources: "enlarging the pie to be divided." *See, e.g.*, Burke & Chase, *Resolving the Seniority/Minority Layoffs Conflict: An Employer-Targeted Approach*, 13 HARV. C.R.-C.L. L. REV. 81-116 (1978).

itable that nonminority employees or applicants will be less well off under an affirmative action plan than without it, no matter what form it takes."[159] Understandably, they will be unhappy, but it is "unlikely that all involved will be completely happy with any result."[160] White male employees were "innocent beneficiaries" of past illegal discriminatory practices. Some white male employees will now become "innocent victims" who must share some of the burden that accompanies redressing past wrongs.[161] At what point will this burden be considered an "unnecessarily trammeling of their rights"?

This burden prong of the analysis is directed toward two questions. The first, and most important, question is whether the affirmative action plan leaves sufficient competitive room for the white male majority; or, stated differently, whether the plan creates an *absolute bar* to the white males' participation in the distribution of "employment goods" (hiring, promoting, protection against layoffs). The second question deals directly with the affirmative action plan's possible intrusion upon the rights of the white males.[162]

1. Constitutional and Title VII Burden Analysis Compared

The burden prong of the analysis of the validity of an affirmative action plan under Title VII generally equates to the second prong of the constitutional analysis.[163] However, in both *Johnson* and *Weber*, the Supreme Court declined to use the language of the constitutional "strict scrutiny" analysis. The Supreme Court failed to mention the narrowly tailored requirement of the constitutional analysis. Instead, the Court held that an affirmative action plan would not be valid under Title VII if it *unnecessarily trammeled* the interests of the white male majority. Should "unnecessarily trammeling" be equated with "narrowly tailored"?

The preferential layoff provisions of the collective bargaining

159. Martin v. Wilks, 490 U.S. 754, 791 n.31 (1989).

160. *See* United States v. City of Miami, Fla., 614 F.2d 1322, 1342 (5th Cir. 1980).

161. *See Martin*, 490 U.S. at 791. *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280-81 (1986); Fullilove v. Klutznick, 448 U.S. 448, 484 (1980); Bratton v. City of Detroit, 704 F.2d 878, 891 (6th Cir. 1983); United States v. City of Miami, Fla., 614 F.2d 1322, 1342 (5th Cir. 1980); Van Aken v. Young, 541 F Supp. 448, 455 (E.D. Mich. 1982), *aff'd*, 750 F.2d 43 (6th Cir. 1984).

162. The other conditions the Supreme Court discusses under its burden analysis are more directly related to the nature of the affirmative action plan itself than to the actual burden imposed on the non-beneficiaries of the plan. They are therefore appropriately dealt with under a separate inquiry. *See infra* "II. C. Remedial Nature Prong."

163. *See* Edwards, *supra* note 5, at 777; Note, *Disparity In Standards*, *supra* note 76, at 410 n.62; Buckely, *supra* note 14, at 722.

agreement in *Wygant v. Jackson Board of Education*[164] were not sufficiently narrowly tailored to survive equal protection scrutiny. The Supreme Court advanced two reasons supporting this conclusion. First, the burden imposed by the affirmative action effort on nonminority employees was too intrusive. Second, *"less intrusive means of accomplishing similar purposes"* were available.[165] Under its Title VII analysis, the Supreme Court never requires an employer instituting an affirmative action plan to show that no less restrictive alternatives are available to reach its purpose.[166]

The Supreme Court failed to explain why it uses the term *(un)necessary* trammeling in the context of voluntary affirmative action. When dealing with the Congressional powers under the constitutional "necessary and proper clause,"[167] the Supreme Court interpreted the meaning of the term "necessary". The Court concluded that the term necessary should not always be understood as meaning indispensable. The requirement that means must be necessary to reach an end does not exclude all choice of means. Means that are necessary to reach an end might include means that are

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164. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

165. *Id.* at 283-84.

> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That *burden is too intrusive.* We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is *not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes* — such as the adoption of hiring goals — *are available.* For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose, cannot satisfy the demands of the Equal Protection Clause.

Id. (emphasis added).

166. *But see* Ledoux v. District of Columbia, 820 F.2d 1293 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988).

> It is clear from *Wygant* and *Johnson* that several factors are relevant in determining whether a plan 'unnecessarily trammels' any legitimate interests of nonminority or male employees. Conceptually, there appears to be no reason why these factors should differ depending on whether the plan is analyzed under Title VII or the Constitution; if some affirmative action is warranted, but the *chosen remedy is unnecessarily burdensome, a less intrusive remedy would be required under both the statute and the Constitution.* And in fact, our examination of *Wygant* and *Johnson* suggests that the Supreme Court's analysis under the second prong of the test does not vary in these contexts.

Id. at 1303 (emphasis added).

See also Hammon v. Barry, 826 F.2d 73, 81 (D.C. Cir. 1987) ("because available race-neutral alternatives were not considered the race-based hiring methods were not properly tailored to its remedial purposes"), *cert. denied*, 486 U.S. 1036 (1988). The Supreme Court in *Wygant* never reached the Title VII question. The Trial Court had dismissed the Title VII claim for lack of jurisdiction. *See* Wygant v. Jackson Bd. of Educ., 546 F Supp. 1195, 1203 (E.D. Mich. 1982), *aff'd*, 746 F.2d 1152 (6th Cir. 1984), *rev'd*, 476 U.S. 267 (1986).

167. U.S. CONST. art. I, § 8.

essential, useful or convenient to reach that end, and thus also means that are reasonably related to it.[168]

The means an employer uses to voluntarily reach the ultimate purpose of Title VII, which is the elimination of all forms of employment discrimination, should be considered in conformity with the requirements imposed by Title VII if they are reasonably related to Title VII's goal.[169] An affirmative action plan aimed at reaching real equality of employment opportunities for all should not be confined to the least restrictive alternative available. Imposing the "least restrictive alternative" requirement on the employer willing to institute an affirmative action plan runs against the Supreme Court's emphasis on voluntary action as the preferred means to promote the goal of Title VII.[170] Leaving the employer only with the alternatives of either instituting the least restrictive affirmative action plan possible, or refusing to institute any plan at all, also runs contrary to the Supreme Court's recognition of managerial prerogatives in the area of voluntary affirmative action under Title VII.[171] A reasonable choice of means in the pursuit of a set goal is inherent in the concept of managerial *prerogatives*.[172]

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168. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), where the Court stated:

> Congress is not empowered by it [the necessary and proper clause] to make all laws, which may have relation to the powers conferred on government, but such only as may be 'necessary and proper' for carrying them into execution. The word *'necessary,'* is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.
>
> Is it true, that is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is *convenient*, or *useful*, or *essential to another To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end is entirely unattainable.*

Id. at 413-14 (emphasis added).

The Supreme Court followed the same reasoning when deciding whether governmental restrictions upon commercial speech are invalid if they go beyond the least restrictive means to achieve the desired end. *See* Board of Trustees v. Fox, 492 U.S. 469 (1989).

169. *See* Boyd, *supra* note 14, at 22-23; Kreiling & Mercurio, *supra* note 14, at 65-69. *See also* Sester v. Novack Inv. Co., 657 F.2d 962, 968 (8th Cir. 1981).

170. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 203-04 (1979).

171. *See id.* at 206.

172. *See, e.g., Sester*, 657 F.2d at 970.

While the Supreme Court introduced a "categorical" distinction in its equal protection analysis between affirmative action plans dealing with hiring and promotions on the one hand, and layoffs on the other, no similar distinction is warranted under Title VII. Although the Supreme Court considers it important for an equal protection challenge to distinguish between different affirmative action plans based on the stage of the employment relationship which the plan implicates, no sound legal basis exists to defend this distinction in the context of the statutory validity of affirmative action plans.[173]

2. *Absolute Bar*

Both in *Weber* and *Johnson*, the Supreme Court stressed that the plans at issue failed to create an absolute bar to the advancement of the white male employees. The affirmative action plan approved in *Weber* made sure that "half of those trained in the program [would] be white."[174] The plan instituted by the Transportation Agency in *Johnson* did not set aside any positions for women. "The Plan merely [authorized] that consideration be given to affirmative action concerns when evaluating qualified applicants."[175] Women had to compete with all other qualified applicants. "No persons [were] automatically excluded from consideration; all [were] able to have their qualifications weighed against those of other applicants."[176] Although the Supreme Court speaks in terms of an absolute bar,[177] it is not unlikely that something less than the

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173. *See infra* "II. B. 3. Rights of White Males at Different Stages of the Employment Relationship."

174. *Weber*, 443 U.S. at 208.

175. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 638 (1987).

176. *Id.*

177. *See Johnson*, 480 U.S. at 640; Local 28 of Sheet Metal Worker's Int'l Assoc. v. EEOC, 478 U.S. 421, 479 (1986); United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979). *See also* Davis v. City & County of San Francisco, 890 F.2d 1438, 1448-49 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 248 (1990); Hammon v. Barry, 826 F.2d 73, 81 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988); Paradise v. Prescott, 767 F.2d 1514, 1534 (11th Cir. 1985), *aff'd*, 480 U.S. 149 (1987); Bushey v. New York Civil Serv. Comm'n, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); La Riviere v. EEOC, 682 F.2d 1275, 1279-80 (9th Cir. 1982); Sester v. Novack Inv. Co., 657 F.2d 962, 969 (8th Cir. 1981); Parker v. Baltimore & O.R.R., 652 F.2d 1012, 1016 (D.C. Cir. 1981); Hunter v. St. Louis-San Francisco Ry., 639 F.2d 424, 426 (8th Cir. 1981); Sester v. Novack Inv. Co., 638 F.2d 1137, 1143-44 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981); United States v. City of Alexandria, 614 F.2d 1358, 1366 (5th Cir. 1980); United States v. City of Miami, Fla., 614 F.2d 1322, 1340 (5th Cir. 1980); United States v. City & County of San Francisco, 696 F Supp. 1287, 1310 (N.D. Cal. 1988), *modified*, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 248 (1990); Smith v. Harvey, 648 F Supp. 1103, 1113 (M.D. Fla. 1986); Jones v. Memphis Light, Gas & Water Div., 642 F. Supp. 644, 662 (W.D. Tenn. 1986); Youngblood v. Dalzell, 626 F Supp. 30, 34 (S.D. Ohio 1985); Breshard v. Directors Guild, 34 BNA FEP Cas.

total exclusion of the white male majority might be considered an absolute bar.[178] How much less than a 100% preference to minority and female applicants will be considered as an absolute bar to white male advancement?

The Supreme Court supported the idea that reaching a balanced work force remains a valid goal for an affirmative action plan. Several methods may accomplish this goal: sex and race can be "just a factor" to consider, the plan can use quotas or percentage goals, or it may set aside a specific number of slots for minority or female applicants.[179]

When an affirmative action plan takes race or sex into account as *one of the factors* on which to base the actual employment decision, it does not automatically exclude anyone from consideration and everyone competes for the open slots. Affirmative action plans of this nature do not create an absolute bar to the advancement of white male employees. Instead, they represent a "flexible case-by-case approach to effecting a gradual improvement in the representation of minorities and women" in the employer's work force and remain "fully consistent with Title VII."[180] Affirmative action plans of this nature embody "the contribution that voluntary employer action can make in eliminating the last vestiges of discrimi-

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1045, 1047, 1049 (C.D. Cal. 1984); Kirkland v. The New York State Dep't of Correctional Servs., 552 F Supp. 667, 677 (S.D. N.Y. 1982); Van Aken v. Young, 541 F Supp. 448, 458 (E.D. Mich. 1982); Cohen v. Community College, 484 F Supp. 411, 435 (E.D. Pa. 1980); Harmon v. San Diego County, 477 F Supp. 1084, 1090 (S.D. Cal. 1979). *See also* Kreiling & Mercurio, *supra* note 14, at 65; Vaughn, *supra* note 3, at 563.

178. *See, e.g.*, Kirkland v. The New York State Dep't of Correctional Servs., 711 F.2d 1117, 1134 (2d Cir. 1983) ("non-minorities on the list will not be *unduly* barred from promotion") (emphasis added).

179. The distinction between "set asides," quotas and percentages, is not very clear. When quotas or percentage goals are used, no specific number of positions is set aside. When an affirmative action plan establishes a 20% hiring goal, one fifth of the future openings will go to qualified minorities or women. The number of positions actually obtained by women or minorities is uncertain. The Supreme Court, in *Johnson*, speaks of "program[s] actually set[ting] aside positions according to specific numbers." Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 640 (1987). The reference to "specific numbers" and the fact that the Supreme Court cited *Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland* (providing among other things for a set number of minority promotions), might indicate that set asides differ from the use of quotas or percentages. *See id.* (citing Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986)). The emphasis seems to be on the positions actually filled with minority or female applicants. A plan that sets aside 10 promotions for blacks, would then guarantee that the first ten upcoming promotions would go to black applicants. The term "set aside" will therefore refer to an actual number of positions reserved to minorities or women.

180. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 642 (1987).

nation in the work place."[181] All white male applicants have a chance to compete and to have their qualifications weighed against those of the beneficiaries of the plan. Sex and race are not the sole factors which determine the actual employment decision.[182]

The Supreme Court is reluctant to accept affirmative action plans that use racial or sexual "quotas" as opposed to plans that set a goal and then take race or sex into account only as a factor in its decision making process.[183] The Court considers a quota a goal *"that must be met"*[184] regardless of the availability of qualified minority or female applicants.[185] Opposition toward the use of quotas originated in the Court's fear that affirmative action might lead to the hiring and promoting of unqualified minorities or women.[186]

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181. *Id. See also* Hammon v. Barry, 826 F.2d 73, 79-80 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988); Higgins v. City of Vallejo, 823 F.2d 351, 357 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); United States v. City & County of San Francisco, 696 F. Supp. 1287, 1310 (N.D. Cal. 1988), *modified*, 890 F.2d 1438 (9th Cir. 1989).

182. That is at least the way in which affirmative action plans of this kind are theoretically supposed to work. In practice, there is not much difference between considering race and sex merely as a factor, on the one hand, and setting aside a specific number of slots or "quota goals," on the other.

The Supreme Court, in *Johnson*, noted that Mr. Johnson, who was passed over by Ms. Joyce, was finally promoted a few years later to a newly created position as road dispatcher. *See Johnson*, 480 U.S. at 638 n.15. When Johnson was denied the promotion in 1979 or 1980, he had no guarantee that he would be promoted in the future. The only guarantee Johnson had was that he was not totally barred from consideration. The fact that an affirmative action plan takes sex only into account as a factor, however, does not mean that the affirmative action plan will in practice not work in the same way as a plan setting aside a specific number of positions. The Transportation Agency had a clear number of female promotions in mind, even when its plan provided that sex was only to be taken into account as a factor. *Id.* at 636-37. Is it that unreasonable to think that the Agency would have preferred a female applicant over Johnson every time a promotional position became available and a sufficiently equally qualified women applied for it? Is that assumption really unreasonable, at least until the moment the Agency had made the specific number of female promotions it had in mind?

183. *See Johnson*, 480 U.S. at 638-39.

184. *See id.* at 638. The proposed Civil Rights Act of 1991 would define the term quota as "a fixed number or percentage of persons of a particular race, color, religion, sex, or national origin which must be attained, or which cannot be exceeded, regardless of whether such persons meet necessary qualifications to perform the job." H.R. 1, 102d Cong., 1st Sess., § 111(b) (1991).

185. *See* Bridgeport Firebird Soc'y v. City of Bridgeport, 686 F Supp. 53, 61 n.9 (D. Conn. 1988) ("To label the selection procedure for the nineteen additional Lieutenants as a 'strict racial quota' is a misnomer. Although the race of a candidate is a criterion for promotion, it is not the sole criterion").

186. For a discussion regarding the fear that using quota may result in hiring or promoting unqualified applicants, see Williams v. City of New Orleans, 729 F.2d 1554, 1563 (5th Cir. 1984); Boyd, *supra* note 14, at 19-20. In *Williams*, the Court stated:

> Of critical importance is the recognition that the court may properly take into account the possibility that a fixed quota may well deny the application of a standard requiring qualification for the positions. While the proposed consent decree states that no unqualified person need be hired or pro-

However, affirmative action does not involve hiring and promoting unqualified applicants. Employers who establish quotas or percentage goals in affirmative action plans attempt to achieve those goals without resorting to hiring or promoting unqualified people.[187] If a sufficient number of potential beneficiaries of the voluntary plan does not exist, the quotas and goals will not be met and the employer can not be forced to reach its present goals by filling slots with unqualified applicants.[188] In addition, the employer has absolutely no incentive to do so. The actual employment decisions made pursuant to this kind of affirmative action plan are not based on race and sex alone. Therefore, to receive preferential treatment, minority and female applicants must satisfy the employer's requirements for satisfactory job performance. Only after the applicants satisfy those minimum conditions do race and sex become determining factors in filling the slots the affirmative action plan reserved for its beneficiaries.

In a sense, this was the situation when the Agency promoted Ms. Joyce over Mr. Johnson. The employer regarded both as sufficiently, if not equally, qualified,[189] but it preferred Joyce over Johnson. Although the Agency did not base its decision on sex alone, sex eventually became the determining factor for the actual decision.[190] Therefore, in practice, the method in which the employer makes the an actual employment decision does not differ considera-

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moted, there can be a proper concern that a fixed 50% requirement in promotion could place undue pressure upon qualification requirements.

Williams, 729 F.2d at 1563.

187. The employer determines the qualifications necessary for successful job performance. Some of the applicants will possess more than the required minimum qualifications. The use of quotas and goals might lead the employer to hire or promote a female or minority applicant possessing the minimum required qualifications over a white male who is "overqualified." In this situation, the employer did not hire an unqualified applicant. Moreover, it is highly questionable that "being overqualified" is a quality in itself. One should also bear in mind here, the Supreme Court's observation in *Johnson* that "it is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job." Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 641 n.17 (1987). *See also* W GOULD, *supra* note 6, at 112; Belton, *supra* note 30, at 129-33.

188. *See* Spiegelman, *Court-Ordered Hiring Quotas After* Stotts: *A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 n.1 (1985). Although Spiegelman addresses court-ordered quotas, the article notes that the use of quotas should not be equated with hiring unqualified applicants.

189. *Johnson*, 480 U.S. at 641 n.17. The Court noted that, "Any differences in qualifications between Johnson and Joyce were minimal, to say the least. The selection of Joyce thus belies the dissent's contention that the beneficiaries of the affirmative action program will be those employees who are merely not 'utterly unqualified.' "

190. If Joyce had been a man, it is likely that Joyce would not have been preferred over Johnson. Johnson had scored better on the first interview — although only slightly better.

bly under either type of affirmative action plan. The difference is of a quantitative or numerical nature. The affirmative action plan in *Johnson* "guaranteed" a case-by-case approach. An affirmative action plan working with racial or sexual quotas involves a more aggregated approach. The employer first considers the qualifications of the applicants and then determines more generally the number of cases — with the affirmative action plan as guidance — in which sex or race will be the factor tipping the balance in favor of minority or female applicants.

Any difference in legal treatment between an affirmative action plan such as the *Johnson* plan, and an affirmative action plan establishing a quota can not be justified by the difference in their nature alone.[191] An affirmative action plan using quotas can not be invalidated based solely on that reason.[192] The affirmative action plan the Supreme Court approved in *Weber* established a 50% quota for blacks.[193] The Court upheld the plan because the plan did not create an absolute bar to the advancement of white applicants. White applicants still qualified for half of the open positions.[194] The use of quotas or percentage goals is not *per se* impermissible. However, the validity of an affirmative action plan using quotas remains questionable when the employer sets the percentage goal at a level that may create an absolute bar to the advancement of white male employees. Thus, the more appropriate question is at what level does a percentage goal become an impermissible bar for the advancement of the non-beneficiaries of the affirmative action plan?

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191. *See* Boyd, *supra* note 14, at 21. *See also* Marsh v. Board Of Educ., 581 F Supp. 614, 627 (E.D. Mich. 1984); Note, *Racial Quota*, *supra* note 14, at 248 n.18. The absence of a clear conceptual distinction between goals and quotas is well illustrated in *United States v. City of Miami, Fla.*, where the court stated, "We refuse to engage in any *semantic dispute* over the difference between 'goals' and 'targets' on the one hand and 'quotas' on the other. We will gladly adopt any word proposed, as long as the thrust of affirmative action is not stayed." United States v. City of Miami, Fla., 614 F.2d 1322, 1335 n.26 (5th Cir. 1980) (emphasis added).

192. *See, e.g., City of Miami*, 614 F.2d at 1335 ("It cannot seriously be argued that there is any insurmountable barrier to the use of quotas to eradicate the effects of past discrimination").

193. *See* Allegretti, *supra* note 14, at 773-97; Boyd, *supra* note 14, at 19-21; Buchanan, *supra* note 30, at 236 n.48; Cox, *supra* note 44, at 793; Gould, *supra* note 14, at 649; Kreiling & Mercuro, *supra* note 14, at 65; Sape, *Use of Quotas after* Weber, 6 EMPLOYEE REL. L.J. 239, 240 (1980); Vaughn, *supra* note 3, at 563; *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 252 (1979). *See also* Hammon v. Barry, 826 F.2d 73, 90 (D.C. Cir. 1987) (Mikva, J., dissenting), *cert. denied*, 486 U.S. 1036 (1988); Williams v. City Of New Orleans, 729 F.2d 1554, 1560 (5th Cir. 1984); Cohen v. Community College, 484 F Supp. 411, 434 (E.D. Pa. 1980).

194. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979).

An affirmative action plan can legitimately pursue the attainment of a balanced work force. A percentage goal corresponding to the minority and female representation in the relevant labor market should be considered reasonable and valid under Title VII. Moreover, this level of female and minority participation corresponds to the level one would ordinarily expect if society was not tainted by discriminatory practices.[195]

However, some employers recognize that practical difficulties, such as the availability of a sufficient number of qualified minority or female applicants and the possibility of a low turn-over rate in the employer's work force, prevents the employer from reaching its goal soon after instituting the plan.[196] Therefore, some affirmative action plans include, apart from the ultimate goal of reaching a proportional work force, lower interim goals which are more realistic aspirations.[197]

Other plans, such as those which include the establishment of new training programs without requiring any prerequisite qualifications for admittance, will not encounter the same practical problems. The ultimate goal is to reach a work force with a composition that mirrors the composition of the relevant labor market. To reach this goal in the near future, the plans provide for the hiring of minority and female applicants at a higher percentage rate than their percentage in the local labor market.[198] These plans provide for "accelerated affirmative action." Their purpose is to achieve a balanced work force as soon as possible and then return to sex- and race-neutral employment practices.

Setting an affirmative action plan's interim goals at a lower level than the ultimate goal of proportional representation can not negatively affect the plan's statutory validity. Because the achievement of a balanced work force is a valid goal to pursue, and because the overall concern in the second prong remains directed towards the burden placed upon non-beneficiaries of the plan, lower interim goals will not create additional hurdles for the approval of an af-

195. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

196. *See, e.g,* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 622 (1987).

197. *See* United States v. City of Miami, Fla., 614 F.2d 1322 (5th Cir. 1980). The Fifth Circuit noted,

> The ultimate goal [of the plan] is to obtain percentages of blacks, Spanish-surnamed individuals, and women generally consistent with their percentage in the community. The interim level goals appear to be set below those levels, presumably reflecting the parties' belief that for the immediate future there may be an inadequate supply of qualified minority and female applicants.

Id. at 1339.

198. *See, e.g.*, United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 198-99 (1979).

firmative action plan.[199] The affirmative action plan in *Johnson* presents a perfect example. The plan's long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force. In addition, the plan provided for lower, short-range, goals requiring annual adjustments.[200] In upholding the promotional decision made pursuant to the affirmative action plan, the Supreme Court emphasized that the plan represented a "flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force."[201]

Interim goals can also reflect the employer's willingness to undo the effects of past societal discrimination at a faster, rather than slower, pace. The employer may decide to hire, promote or train minority and/or female applicants or employees at a higher rate than that suggested by their proportion in the labor force.[202] The affirmative action plan then serves as a catch-up remedy.[203] In *Weber*, the Supreme Court approved an affirmative action plan that set an interim goal of 50% minority participation in a training program seeking to reach an ultimate goal of a 39% minority craft work force.[204] Commentators argue that there is no justification for this kind of accelerated affirmative action because "it becomes impossible to identify any limiting principle."[205] Allowing an employer to establish interim goals exceeding the ultimate goal of its affirmative action plan, however, is an advantage because the duration of the affirmative action plan is reduced.[206] An affirmative ac-

199. The fact that a plan with lower interim goals will likely work less efficiently in redressing the effects of societal discrimination can not be challenged by minority and female applicants. Title VII does not require an employer to institute an affirmative action plan, in the absence of any discriminatory practices on its behalf. *See* 42 U.S.C. § 2000e-2 (1982). Therefore, the employer that institutes a plan can not be forced through Title VII to make sure that its plan will be efficient and fast. Efficiency of a voluntary affirmative action plan is not a condition for its statutory validity.

200. *See Johnson*, 480 U.S. at 622.

201. *Id.* at 642.

202. *See, e.g.*, United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980) (27% of population was black, interim goal of hiring 50% blacks).

203. *See* Allegretti, *supra* note 14, at 794 n.128; Boyd, *supra* note 14, at 23 n.174; Meltzer, *supra* note 3, at 462.

204. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 198-99 (1979).

205. *The Supreme Court, 1979 Term*, 93 HARV. L. REV. 1, 252 (1979).

206. Allegretti illustrates that working with higher interim goals will significantly speed up progress toward a proportional representation of minority and female employees or applicants with a mathematical example. Allegretti, *supra* note 14, at 793-94. Allegretti argues that limiting interim goals to the ultimate goal of the affirmative action plan "will require the affirmative action plan to continue for a lengthy, perhaps indefinite, period of time." *Id.* at 794.

See also United States v. Paradise, 480 U.S. 149 (1986). *Paradise* dealt with a court-ordered affirmative action effort. The district court had ordered the

tion plan of a more limited duration also tends to institutionalize the consideration of race and sex to a lesser degree[207] because it operates for a shorter period of time.

The extent to which accelerated affirmative action should be allowed can not be determined in general. However, a 100% interim goal works as an absolute bar, even if instituted only for a limited period of time. Therefore, a total exclusion of white male applicants and employees from consideration is illegal.[208] In considering how high the interim goal may be set, an employer should consider that the Supreme Court spoke in terms of an *absolute* bar, not just a significant bar.[209] Employers should give further consideration to the level of their ultimate goal,[210] the composition of the

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Alabama Department of Public Safety to promote 50% of blacks until 25% of the rank or corporal was composed of blacks. Only 25% of the relevant labor pool was black. *Id.* The Government suggested that the one-for-one promotion requirement was arbitrary "because it bears no relationship to the 25% minority labor pool relevant here." *Id.* Justice Brennan, in announcing the opinion of the Court, answered this contention:

> This argument ignores that the *50% figure is not itself the goal*; rather it *represents the speed* at which the goal of 25% will be achieved. The interim requirement of one-for-one promotion (had it continued) would simply have determined how quickly the Department progressed towards this ultimate goal.

Id. at 179-80 (emphasis added).

The accelerated 50% figure was considered to represent the speed and not the goals to reach. Justice O'Conner, in dissent, criticized the stand taken by Justice Brennan, because this kind of justification "has no stopping point; even a 100% quota could be defended on the ground that it merely 'determined how quickly the Department progressed towards' some ultimate goal." *Id.* at 199 (O'Conner, J., dissenting). Justice Brennan, however, justified the accelerated effort by referring to "the department's failure after almost twelve years to eradicate the continuing effect of its own discrimination and to develop acceptable promotion procedures and in light of the severity of the existing racial imbalances." *Id.* at 181 (quoting the District Court). The accelerated affirmative action effort can thus be seen as reasonable under the circumstances of the case. The speed with which the end goals is reached is not on itself a sufficient justification for accelerated action.

207. *See* Davison, *Preferential Treatment and Equal Opportunity*, 55 OR. L. REV. 53, 80 (1976).

208. *See, e.g.*, Sester v. Novack Inv. Co., 638 F.2d 1137, 1144 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981); Cohen v. Community College, 484 F Supp. 411 (E.D. Pa. 1980).

209. *See* Vaughn, *supra* note 3, at 563. *But see* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 638 n.15 (1987) ("While this degree of employment expansion by an employer is by no way essential to a plan's validity, it underscores the fact the Plan in this case in no way significantly restricts employment prospects of such persons"). In the text of the decision itself, the Court refers to the fact that the plan at issue did not create an absolute bar. *Id.* at 637-38.

210. A 50% interim goal may be excessive with regard to an ultimate goal of 15%, but not with regard to one of 40%.

relevant labor market,[211] and the degree of imbalance the employer's current work force represents.[212] Additional considerations include the size, organization, turnover rate and nature of the employment,[213] the degree of interference with vested rights and legitimate expectations of the white male employees regarding certain positions and benefits, and also the fact that the positions involved in the affirmative action plan may be newly created.[214] The accelerated interim goal the employer wants to adopt has to be *reasonable under all circumstances.* The interim goal should be a reasonable attempt to reach the ultimate goal of eliminating a manifest imbalance in the employer's work force.[215]

In *Johnson*, the Supreme Court stressed that the ultimate burden of proving the invalidity of an affirmative action plan rests on the plaintiff challenging it.[216] The employer only carries a burden of production in a reverse discrimination lawsuit. This article argued above that the analysis established in *Johnson* provides the employer with a *de facto* presumption in favor of the validity of its plan. This presumption should not only apply for the justification prong of the analysis of the validity of the plan. When the em-

211. When the area in which the employer normally recruits has a very high concentration of minority inhabitants, the employer should be allowed to set the ultimate goal, as well as the interim goal, at a higher level.

212. In the case of an "inexorable zero," for instance, interim goals of a higher level should be justified. In *Weber*, 50% of the positions in the training program were reserved to minority applicants. The minorities represented only 39% of the local general population. The training program, however, was only a means to provide minorities with the necessary skills to become craft workers. The 50% goal was an interim goal for the ultimate goal of reaching a proportional craft work force. The almost complete absence (1.83%) of minority craft workers serves as a justification for the accelerated interim goal. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

213. *See* Davidson, *supra* note 207, at 81 ("In positions requiring extensive training and with slow turnover, it may be necessary to extend the preference in time and require hiring a greater proportion of the preferred group").

214. The interim goal in *Weber* concerned slots in a training program that was introduced by the employer to train minority employees in order to enable them to work as skilled workers. The training program was new. No white employee had any vested right or legitimate expectation of participating in it. *See Weber*, 443 U.S. at 198-99. *See also* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987); Kilberg & Tallent, *supra* note 14, at 374; Schatzki, *supra* note 46, at 73 n.56 (1980).

215. Allegretti sees an interim goal of 50% as the presumptive upper limit. "There is the intuitive psychological sense that a 50/50 breakdown of positions is reasonable and fair." Allegretti, *supra* note 14, at 795. Only compelling reasons would allow an employer to transcend this upper limit. *Id.*

The standard that the accelerated interim goal must be reasonable under all circumstances does not only allow the employer to set its interim goals at a higher level than 50%, when justified, but has the supplementary advantage of requiring the employer to establish lower interim targets according to the context in which it is operating.

216. *See* Johnson v. Transportation Agency, Santa Clara Country, Cal., 480 U.S. 616, 626 (1987).

ployer uses accelerated interim goals to eliminate a manifest imbalance in its work force, the burden should rest with the plaintiff to prove that these interim goals are not reasonable under all circumstances and that they create an absolute bar to his advancement.[217] The plaintiff carries the ultimate burden of persuasion.

A third method[218] for eliminating a manifest imbalance in an employer's work force is *setting aside* a specific number of positions for minority and/or female applicants. Based on a prediction of the future fluctuation of its work force and on a study of the composition of its current work force, the employer may decide to reserve a specific number of the presumed amount of positions to minorities or women.

An affirmative action plan using set asides does not necessarily create an absolute bar to the advancement of the white male majority. The following example will demonstrate this point. An employer makes reasonably certain predictions about potential openings in its work force. The employer determines that during the next year its work force will grow from 100 employees to 150. The 50 new employees will be engaged in purely manual labor. No special skills are required. The composition of the employer's work force shows an "inexorable zero" as far as female representation is concerned. The employer decides to institute an affirmative action plan for women and decides to reserve 30 of the 50 new positions for female applicants. Is there any reason why the employer's affirmative action plan should be invalidated? Is it the fact that the employer explicitly reserved a number of positions instead of expressing its affirmative action goals in percentages or quotas? Certainly not. Setting aside a number of positions to be filled with

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217. *See* United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980). The Fifth Circuit dealt with an affirmative action plan establishing accelerated interim goals for blacks. The court stated:

> The extent and velocity of affirmative action is among the most difficult problems facing the judiciary today. Even the Supreme Court has been unable or unwilling to lay down any guidelines concerning the speed with which voluntary affirmative action may proceed. District courts should not have unchallengeable power to slow its pace.

Id. at 1362. The court went on to state:

> For a successful performance on a tightrope, the rope must be sufficiently taut to support the acrobat, yet must have enough play to afford him some control. An affirmative action plan has similar constraints. *The extent of an acceptable plan can not be measured with mathematical exactitude.* The plan must not strangle employees of any race or sex, but with too much play, the leeway for employment decisions based on racial or sexual prejudices becomes too large. *Goals and targets, set at reasonable levels,* can afford this degree of *flexibility.*

Id. at 1366 (emphasis added).

218. The first method consisted of taking race or sex into account as *a factor* in the employment decision making process. The second method consisted of establishing *quotas* or *percentage goals.*

minority or female applicants should not necessarily lead to the invalidation of the affirmative action plan.[219] This method of implementing an affirmative action plan resembles a method using quotas or percentages of goals.[220]

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219. The affirmative action plan contained in the consent decree in *Local Number 93*, required the Cleveland fire department to reserve a certain number of the total proposed promotions for minority applicants who were not themselves actual victims of discrimination. The federal district court's approval of the consent decree was upheld by the Supreme Court. Local Number 93, Int'l Ass'n of Firefighters, AFL-CIO-CLC v. City of Cleveland, 478 U.S. 501 (1986).

The Supreme Court in *Johnson* considered the challenged promotional decision an affirmative action effort in which sex was only a factor in the decision making process. Interestingly, the Agency's affirmative action plan was, to a certain degree, working with set asides. The Court noted that "the Agency's 1982 Plan set a goal of hiring only three women out of the 55 new Skilled Craft Positions projected for that year, a figure of about 6%." Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 638 n.15 (1987).

Thus, the type of affirmative action method used is not decisive regarding the statutory validity of the affirmative action plan. The numerical level of the quotas used or the set asides in the affirmative action plan will be determining. *See, e.g.*, Davis v. City & County of San Francisco, 890 F.2d 1438 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 248 (1990). In *Davis*, the Ninth Circuit stated:

> The Union argues that advancement of nonminorities has been absolutely barred because the decree provides for the mandatory promotion of minorities and precludes competition by nonminorities for the slots set aside for minorities. We disagree.
>
> The mandatory promotion of thirty-three minorities was balanced by the optional promotion of forty-eight additional firefighters, 75% of whom were nonminorities. The Supreme Court in *Weber* held a voluntary affirmative action plan reserving 50% of job openings for Black workers to remedy past discrimination did not create an absolute bar to the advancement of nonminority employees because they could compete for the remaining 50% of job openings. In the present case, only 25% of the forty eight optional openings were reserved for minorities. In addition, preferential selection for promotions of minorities in the future will be based on the percentage of minorities in the relevant labor force — the fire department — allowing nonminorities to continue to compete for a large number of remaining positions.

Id. at 1448-49.

220. The second method is not really different in nature from the first method described, namely the use of race or sex as only one factor taken into account in making the actual employment decisions. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 378 (1978) (Brennan, J., concurring in part and dissenting in part). Justice Brennan stated:

> Finally, the Davis' special admissions program *cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants.* For purposes of constitutional adjudication, there is *no difference between the two approaches.* In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. Furthermore, the extent of the preference inevitably depends on how many minority applicants the particular school is seeking to admit in any particular year so long as the number of qualified minority applicants exceeds that number. There is *no sensible, and certainly no constitutional,*

The same reasoning that applies to affirmative actions plans containing percentage goals should, therefore, apply here. One should consider if the number of slots reserved to the beneficiaries is reasonable under all circumstances. To determine whether the number of slots set aside is reasonable under all circumstances, the same factors should be taken into account, such as: the composition of the employer's labor force and the employer's current degree of imbalance; the size, organizational structure and turnover rate of the company; the degree of interference with the vested rights and legitimate expectations of the white male majority; the time lapse in which the employer sees itself able to realize its plan;[221] and all other factors that might be relevant to the particular circumstances under which the affirmative action plan is introduced.

White males are not absolutely barred from participating in an affirmative action plan such as the one in this example. The fact the employer's predictions might not be completely accurate is no reason to invalidate the plan. Reasonableness under all circumstances is the standard to determine whether the set asides create an absolute bar to the advancement of the white male majority. If the number of positions reserved to the beneficiaries of the affirmative action plan is too high given the circumstances under which the plan is introduced, the plan might be invalidated as foreclosing all advancement of the non-beneficiaries. However, plans using set asides should not automatically be invalidated.

3. *Rights of White Males at Different Stages of the Employment Relationship*

Weber mentioned that one criteria that made the plan fall at the permissible side of the demarcation line between permissible and impermissible affirmative action plans, was that "the plan did not unnecessarily trammel the interests of the white male employees."[222] *Johnson* redefined this part of the analysis to consist of an inquiry into the question of whether the affirmative action plan did unnecessarily trammel the *rights* of the non-beneficiaries.[223] The

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distinction between, for example, *adding a set number of points to the admission rating of disadvantaged minority applicants* as an expression of preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants *and setting a fixed number of places for such applicants* as was done here.

Id.

221. The expected amount of time necessary to implement the plan is important here, but not as an independent requirement. It is one of the factors taken into account to determine whether the employer's affirmative action effort is reasonable under all circumstances.

222. United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979).

223. Johnson v. Transportation Agency, Santa Clara Country, Cal., 480 U.S. 616, 637-38 (1987).

Court determined that, in the absence of an absolute entitlement to the positions in an affirmative action plan, a plan can not unsettle any legitimate firmly rooted expectations.[224]

This part of the analysis of the statutory validity of affirmative action plans requires an assessment of the rights and absolute entitlements of the white male majority at the different stages of the employment relationship that might be implicated by an affirmative action plan.

a. Hiring

Affirmative action plans instituting hiring preferences for female or minority applicants are generally upheld by lower courts if they satisfy the other requirements for statutory validity.[225] To be upheld, none of the applicants for the open positions can possess a vested right or an absolute entitlement to be hired.[226] Neither the qualified white male, nor the qualified minority or female applicant can have legitimate firmly rooted expectations about obtaining a position with the employer instituting an affirmative action plan.[227] These factors are especially true when the affirmative action plan deals with positions such as the newly created training program in *Weber*.[228]

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224. *Id.*

225. *See, e.g., Weber*, 443 U.S. at 208 (Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action); La Riviere v. EEOC, 682 F.2d 1275, 1280 (9th Cir. 1982) (upholding a California Highway Patrol affirmative action program designed to employ women as traffic officers); Hunter v. St. Louis-San Francisco Ry., 639 F.2d 424, 426 (8th Cir. 1981) (upholding a railway's affirmative action plan to hire black engineers); United States v. City of Alexandria 614 F.2d 1358, 1366 (5th Cir. 1980) (upholding consent decree proposal containing hiring and promotional goals); United States v. City of Miami, Fla., 614 F.2d 1322, 1339-40 (5th Cir. 1980) (upholding consent decree designed to obtain percentages of black, Spanish-surnamed, and female employees); Van Aken v. Young, 541 F Supp. 448, 459 (E.D. Mich. 1982) (upholding voluntary affirmative hiring practices of city), *aff'd*, 750 F.2d 43 (6th Cir. 1984).

See also Lilly v. City of Beckley, W. Va., 797 F.2d 191, 195 (4th Cir. 1986) (invalidating the affirmative action hiring goals because of the absence of safeguards — such as express or implied goals or timetables — protecting the interests of the majority applicants). *But see* Hammon v. Barry, 826 F.2d 73, 81 (D.C. Cir. 1987) (invalidating hiring preferences because the affirmative action plan at issue did not consider raceneutral alternatives), *cert. denied*, 486 U.S. 1036 (1988); Harmon v. San Diego County, 477 F Supp. 1084, 1090-91 (S.D. Cal. 1979) (invalidating hiring practices based on consent decree), *aff'd in part, rev'd in part*, 664 F.2d 770 (9th Cir. 1981).

226. *See* Edwards, *supra* note 5, at 770; Edwards & Zaretsky, *supra* note 5, at 39.

227. The term affirmative action does not include hiring or promoting unqualified applicants or employees. *See supra* notes 118-21 and accompanying text.

228. *See* Schatzki, *supra* note 46, at 73 n.56. Schatzki argues that the affirmative action plan in *Weber* did not only not work to the disadvantage of Brian

b. Promotion

Similar to the fact that there is no right to be hired for an open position, even when one is qualified for the position, there is no right to be promoted.[229] The private employer has a statutory obligation to refrain from discriminating on the basis of ethnicity or sex, but the employer remains free to ground its employment decisions on any factor not declared impermissible by Title VII. No statutory obligation exists for an employer to promote an employee who completes a testing process, designed to spot qualified employees for promotions, with the highest score.[230] The fact that one employee is ranked higher than another employee applying for the same promotion might increase one's personal expectations towards the promotion, but it does not create a right or absolute entitlement to the promotion.[231] Personal expectations are, as such, not sanctioned by law.

The Supreme Court, in *Johnson*, recognized that even the highest ranking applicant for a promotion normally does not have *"an*

Weber, but even worked to his advantage. Weber did not possess the skills for working as a craftsman. The affirmative action plan and its training program created a new opportunity for Weber to obtain the necessary skills. Even when he did not get in the first year of its institution, he might apply again for participation and following years and be successful. *Id. See also* La Riviere v. EEOC, 682 F.2d 1275 (1982). *See also* Edwards, *supra* note 5, at 769 n.20; Kilbert & Tallent, *supra* note 14, at 374.

229. The applicant for a position or a promotion has a right not to be rejected or refused promotion because of his/her race, color, sex or national origin, according to § 703(a) of Title VII. 42 U.S.C. § 2000e-2 (1982). As such, the right not to be discriminated against does not create a right to the position involved. *See* Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1128, 1134 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Youngblood v. Dalzell, 625 F Supp. 30, 34 (S.D. Ohio 1985), *aff'd*, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 n.12 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); Baker v. City of Detroit, 483 F Supp. 919, 927 (E.D. Mich. 1979), *aff'd*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

230. *See* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675, 688 (1974) ("We should remember that in any case, the best 'qualified' never had any legal right to employment. The law simply recognized an employer's discretion to hire and promote at will").

231. No right to promotion exists unless, of course, the employer contractually bound itself to promote the employee with the highest score. Under these circumstances, the employee might have a contractual claim. The same may be true when promotions are granted on the sole basis of the seniority provisions of, for example, a collective bargaining agreement. However, collective bargaining agreements establishing promotional procedures based solely on seniority are extremely rare. *See* Stacy, *Title VII Seniority Remedies in a Time of Economic Downtown*, 28 VAND. L. REV. 487, 490 (1975) ("A thorough recent study of some 1,851 major collective bargaining agreements found promotion-on-seniority-only clauses in only three percent of the agreements having seniority provisions").

absolute entitlement" to the position at issue.[232] The employer's interviewing panel recommended Mr. Johnson as the candidate to be promoted. However, the panel also classified six other applicants for the position as qualified and eligible. Because the Agency Director was authorized to promote any of the seven qualified applicants, Johnson had no absolute entitlement to the position at issue. Because Johnson had no *absolute entitlement* to the position, the Supreme Court considered that the denial of a promotion did not unsettle any *legitimate firmly rooted expectations.*[233] The fact that Mr. Johnson might have had personal expectations for a promotion did not make the burden imposed on him by the promotion of the female applicant too intrusive, in the absence of any absolute entitlement.[234]

Absolute entitlements to a promotion are rare, if not completely non-existent. Employers tend to keep a large degree of discretion in selecting the applicant to be promoted among all those considered to be (minimally) qualified for the position.[235] The employee's personal expectations toward a promotion do not control, both because of the employer's discretion concerning the final decision, and also because of the fact that "there is rarely a single, best qualified person for a job."[236]

Because of the absence of any vested right to a promotion for the white male employees, courts rightfully tend to uphold promo-

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232. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 638 (1987).

233. *Id.*

234. *See also* Ledoux v. District of Columbia, 820 F.2d 1293, 1302 (D.C. Cir. 1987) ("expectations of nonminority candidates do not become legitimate merely upon assertion"), *vacated,* 841 F.2d 400 (1988); Higgins v. City of Vallejo, 823 F.2d 351, 357 (9th Cir. 1987) ("each had some hope of promotion, but none had a legitimate expectation"), *cert. denied,* 489 U.S. 1051 (1989); Bridgeport Firebird Soc. v. City of Bridgeport, 686 F Supp. 53, 58 (D. Conn. 1988) (involving a mere expectation of promotion which did not rise to the level of a legally protected interest).

235. For a discussion of an employer's discretion concerning promotion procedures, see *Johnson,* 480 U.S. at 637-38; *Higgins,* 823 F.2d at 357; Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1128 (2d Cir. 1983), *cert. denied,* 465 U.S. 1005 (1984).

236. *Johnson,* 480 U.S. at 641 n.17. Justice Brennan, in delivering the opinion of the court, cited from the Amicus Curiae Brief of the American Society for Personnel Administration:

> It is a standard tenet of personnel administration that *there is rarely a single, 'best qualified' person for a job.* An effective personnel system will bring before the selection official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well qualified candidates are available, *final determinations as to which candidate is 'best qualified' are at best subjective.*

Id. (citing Brief for the American Society for Personnel Administration as Amicus Curiae at 9, Johnson v. Transportation Agency, Santa Clara County, Cal.,

tional affirmative action plans, if the other conditions for their validity are satisfied.[237] It should also be stressed here that affirmative action plans dealing with promotions are (inherently) more likely not to create an absolute bar to the advancement of the white male majority, because white males who are denied a promo-

480 U.S. 616 (1987)) (emphasis added). *See also* Blumrosen, *supra* note 230, at 686-88.

The fact that the minority or female employee, finally promoted over the white male employee and is sufficiently qualified for satisfactorily performing the job at issue, is often mentioned among the factors ensuring that the affirmative action plan does satisfy the second prong of its statutory analysis. *See Johnson*, 480 U.S. at 639-42; Higgins v. City of Vallejo, 823 F.2d 351, 357 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); Bratton v. City of Detroit, 704 F.2d 878, 892 (6th Cir. 1983); United States v. City of Alexandria, 614 F.2d 1358, 1366 (5th Cir. 1980); United States v. City of Miami, Fla., 614 F.2d 1322, 1340 (5th Cir. 1980); United States v. City & County of San Francisco, 696 F Supp. 1287, 1309-10 (N.D. Cal. 1988), *modified*, 890 F.2d 1438 (9th Cir. 1989); Smith v. Harvey, 648 F Supp. 1103, 1113 (M.D. Fla. 1986); Jones v. Memphis Light, Gas & Water Div., 642 F Supp. 644, 662-63 (W.D. Tenn. 1986); Baker v. City of Detroit, 483 F Supp. 930, 986 (E.D. Mich. 1979), *aff'd*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

Some courts also recognize that "small differences between the scores of the candidates indicate very little about the candidates' relative merit and fitness." *See* Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1133 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984). *See also* Paradise v. Prescott, 767 F.2d 1514, 1537 (11th Cir. 1985), *aff'd sub. nom*, United States v. Paradise, 480 U.S. 149 (1987); Zalmen v. City of Cleveland, 686 F Supp. 631, 656 (N.D. Ohio 1988), *aff'd*, 906 F.2d 209 (6th Cir. 1990); Bridgeport Firebird Soc'y v. City of Brideport, 686 F Supp. 53, 57 (D. Conn. 1988); Kirkland v. New York State Dep't of Correctional Servs., 552 F Supp. 667, 671 (S.D.N.Y. 1982), *aff'd*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Germann v. Kipp, 429 F Supp. 1323, 1334 n.20 (W.D. Mo. 1977), *vacated*, 572 F.2d 1258 (8th Cir. 1978).

237. *See, e.g.*, Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 638-40 (1987); Davis v. City & County of San Francisco, 890 F.2d 1438, 1448-49 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 248 (1990); Higgins v. City of Vallejo, 823 F.2d 351, 357 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1133-34 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Bratton v. City of Detroit, 704 F.2d 878, 897 (6th Cir. 1983); United States v. City of Alexandria, 614 F.2d 1358, 1366 (5th Cir. 1980); United States v. City of Miami, Fla., 614 F.2d 1322, 1339-40 (5th Cir. 1980); Mann v. City of Albany, 687 F Supp. 583, 587-88 (M.D. Ga. 1988); Smith v. Harvey, 648 F Supp. 1103, 1114 (M.D. Fla. 1986); Jones v. Memphis Light, Gas & Water Div., 642 F Supp. 644, 662 (W.D. Tenn. 1986); Youngblood v. Dalzell, 625 F Supp. 30, 34 (S.D. Ohio 1985), *aff'd*, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); March v. Board Of Educ., 581 F Supp. 614, 626 (E.D. Mich. 1984); Baker v. Flint, 581 F Supp. 930, 985-86 (E.D. Mich. 1979); Baker v. City of Detroit, 483 F Supp. 919, 927 (E.D. Mich. 1979), *aff'd*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

See also Paradise, 767 F.2d at 1534; Williams v. City of New Orleans, 729 F.2d 1554, 1564 (5th Cir. 1984) (invalidating an affirmative action plan dealing with promotional decisions mainly because of the use of a 50% quota and the long duration — 12 years — of the plan involved). *But see* Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); Parker v. Baltimore & O.R.R., 652 F.2d 1012, 1016 (D.C. Cir. 1981).

tion generally remain eligible for future promotions.[238]

c. Preferential Layoff Provisions

1) Discharge and Replacement v. Layoffs

In *Wygant v. Jackson Board of Education*, the Supreme Court struck down an affirmative action plan instituting preferential layoff provisions.[239] *Wygant*, however, did not address a Title VII challenge. The Court considered the preferential layoff provisions to be in violation of the equal protection clause of the fourteenth amendment instead.[240] The Supreme Court has never ruled on the validity of a voluntary affirmative action plan instituting preferential layoff provisions for female and/or minority employees under Title VII.[241] Some commentators consider it not unlikely, however, that the Court will extend its treatment of preferential layoff provisions under the equal protection clause to the Title VII analysis.[242]

While the *Wygant* Court considered the burden imposed by preferential layoff schemes too intrusive to survive an equal protection challenge, it declared that it had "previously expressed concern over the burden. . .imposed on innocent parties."[243] The Court then identified one of the characteristics of the affirmative action plan in *Weber* that made this plan fall at the permissible side of the "demarcation line": "the plan did not require the discharge of white

238. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 638 n.15 (1987). *See also Higgins*, 823 F.2d at 357; Youngblood v. Dalzell, 625 F Supp. 30, 34 (S.D. Ohio 1985), *aff'd*, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); Kirkland v. New York State Dep't of Correctional Servs., 552 F. Supp. 667, 672 (S.D. N.Y. 1982), *aff'd*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1989).

239. Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

240. *See id.* at 269-70. *See also id.* at 284 (O'Connor, J., concurring in part) ("There is *no issue* here of the interpretation and application of *Title VII* of the Civil Rights Act of 1964; accordingly, we have only the constitutional issue to resolve") (emphasis added).

241. The preferential layoff provisions dealt with in this section are provisions such as the one in *Wygant*. Article XII of the Collective Bargaining agreement, covering layoffs, stated:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board (school board), teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.

Id. at 270-71.

242. *See, e.g.*, Buchannan, *supra* note 30, at 262; Edwards, *supra* note 5, at 770-71; Gould, *The Burger Court and Labor Law: The Beat Goes On — Marcato*, 24 SAN DIEGO L. REV. 51, 55 (1987); Rutherglen & Oritz, *supra* note 14, at 483-90; Spencer, *supra* note 145, at 524.

243. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282 (1986).

workers and their replacement with new black hirees."[244]

An outright discharge of members of the white majority and a replacement of them with minority or female applicants will potentially be a violation of the dictates of Title VII.[245] In *Wygant*, only Justice White expressly noted that no distinction could be made between preferential layoff provisions and an affirmative action plan that requires the discharge of white employees "to make room for blacks, none of whom has been shown to be a victim of any racial discrimination. . ."[246] Justice Powell announced the judgment of the Court, joined by Justices Burger, Rehnquist and O'Conner, in terms that considered the burden imposed by the layoff provisions to be too intrusive, but expressed no opinion, on the equivalence asserted by Justice White. In his dissenting opinion, Justice Marshall, joined by Justices Brennan and Blackmun, clearly rebutted the equation:

> Justice White assumes that respondents' [the school board's] plan is equivalent to one that deliberately seeks to change the racial composition of a staff by firing and hiring members of predetermined races. . . That assumption ignores the fact that the Jackson plan involves only the means for selecting the employees who will be chosen for layoffs already necessitated by external economic conditions. This plan does not seek to supplant whites with blacks, nor does it contribute in any

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244. *Id. See also* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979).

245. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979); Paradise v. Prescott, 767 F.2d 1514, 1534 (11th Cir. 1985), *aff'd sub. nom*, 480 U.S. 149 (1987); La Riviere v. EEOC, 682 F.2d 1275, 1279-80 (9th Cir. 1982); Sester v. Novack Inv. Co., 657 F.2d 962, 969 (8th Cir. 1981); Youngblood v. Dalzell, 625 F Supp. 30, 34 (S.D. Ohio 1985), *aff'd*, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987).

The fact that the functioning of the affirmative action plan did not require the discharge of a white employee is very often taken into account to determine the validity of the plan at issue. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 182 (1987); Higgins v. City of Vallejo, 823 F.2d 351, 357 (9th Cir. 1987), *cert. denied*, 489 U.S. 1051 (1989); Bratton v. City of Detroit, 704 F.2d 878, 897 (6th Cir. 1983); Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117 (1985); Parker v. Baltimore & O.R.R., 652 F.2d 1012, 1016 (D.C. Cir. 1981); Hunter v. St. Louis-San Francisco Ry., 639 F.2d 424, 426 (8th Cir. 1981); Smith v. Harvey, 648 F Supp. 1103, 1113 (M.D. Fla. 1986); Jones v. Memphis Light, Gas & Water Div., 642 F Supp. 644, 662 (W.D. Tenn. 1986); United States v. New Jersey, 614 F Supp. 387, 391 (D.N.J. 1985); Kirkland v. New York State Dep't of Correctional Servs., 552 F Supp. 667, 677 (S.D.N.Y. 1982), *aff'd*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Cohen v. Community College, 484 F Supp. 411, 435 (E.D. Pa. 1980).

The same holds true for the absence of layoffs. *See, e.g.*, United States v. Paradise, 480 U.S. 149, 182 (1987); Local 28 of Sheet Metal Workers' Int'l Assoc. v. EEOC, 478 U.S. 421, 479 (1986); United States v. City & County of San Francisco, 696 F Supp. 1287, 1304 n.38, 1310 (N.D. Cal. 1988), *modified*, 890 F.2d 1438 (1989), *cert. denied*, 111 S. Ct. 248 (1990); Jones v. Memphis Light, Gas & Water Div., 642 F Supp. 644, 662 (W.D. Tenn. 1986).

246. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 295 (1986) (White, J., concurring). *See also* Edwards & Zaretsky, *supra* note 5, at 41; Kreiling & Mercuro, *supra* note 14, at 102; Schatzki, *supra* note 46, at 72.

way to the number of job losses.[247]

Justice Marshall rightfully stressed that nobody lost his job due to the affirmative action effort. Layoff provisions do not determine the number of jobs lost. They only determine the rank order that will be followed in case layoffs become "necessary" due to economic circumstances. Preferential layoff provisions change the rank and order to be followed. Race and/or sex will be taken into account only as *a factor* to determine this order, along with the factors ordinarily taken into account.[248]

The ultimate result of preferential layoff provisions may be that some white males will lose their jobs, in a way comparable to the white males discharged and replaced by the beneficiaries of an affirmative action plan. This similarity, however, should not have any effect on the statutory validity of an affirmative action plan instituting preferential layoff schemes. First of all, as already mentioned, preferential layoff provisions themselves do not cause the loss of any jobs. "Discharge and replacement" affirmative action does cause the loss of jobs. Second, preferential layoff provisions do not attempt to increase minority or female representation, but those provisions merely attempt to preserve the gains of prior affirmative action.[249] Third, there is no reason to distinguish between the different forms of affirmative action based solely on the stage of the employment relationship they deal with. As previously suggested, "discharge and replacement" affirmative action will fail to pass both constitutional and statutory muster. This is not because it might result in the loss of jobs, but instead because sex or ethnicity will become the *one and only factor* taken into account for discharging the white male employees, which thus creates an absolute bar to their advancement.[250] As Justice Marshall mentioned in his

247. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 309 n.5 (1986) (Marshall, J., dissenting). *See also* Tangren v. Wackenhut Servs., Inc., 480 F Supp. 539, 549, (D. Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

248. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 309 (1986) (Marshall, J., dissenting).

Justice Stevens, also dissenting, stated the following:

> Every layoff, like every refusal to a qualified applicant is a grave loss to the affected individual. However, the undisputed facts in this case demonstrate that this serious consequence to petitioners is not based on any lack of respect for their race, or on a blind habit and stereotype. Rather, petitioners have been *laid off for a combination of two reasons*: the *economic conditions* that led Jackson to lay off some teachers, and the *special contractual protections* intended to preserve the newly integrated character of the faculty in the Jackson school.

Id. at 318-19 (Stevens, J., dissenting) (emphasis added).

249. *See id.* at 309 (Marshall, J., dissenting).

250. The Supreme Court cited McDonald v. Santa Fe Trial Transp. Co., 427 U.S. 273 (1976), when mentioning that the plan in *Weber* did not unnecessarily trammel the interests of the white employees because the plan did not require

dissent in *Wygant*, "layoffs are unfair, but unfairness ought not be confused with constitutional injury."[251]

Furthermore, Justice Stevens found Justice Powell's suggestion "that there is a distinction of constitutional significance under the Equal Protection Clause between a racial preference at the time of hiring and an identical preference at the time of discharge" completely unpersuasive. "The fact that the issue arises in a layoff context, rather than a hiring context, has no bearing on the equal protection question."[252]

Title VII seems to bring forward the same principle. It is an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment,[253] or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect a person's status as an employee, because of the individual's race, color or sex.[254] The same holds true for training opportunities.[255] Discrimination by the employer on the basis of race or sex is prohibited at *all* stages of the employment relationship. No distinctions are made between hiring, training, employing or discharging[256] employees or

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the discharge of white workers and their replacement with new black hirees. United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979). The fact that the Court cited *McDonald* might indicate that the Court really was concerned with the situation where race (or sex) becomes the only factor on which the employer bases the differentiation between employees. In *McDonald*, a black and some white employees were involved in misappropriating company property. The black employee was retained, while the white employees were discharged. The only factor distinguishing the retained employee from the discharged employees was the color of their skin. Race was the sole factor that was taken into account for the differentiation of treatment. This was held to be impermissible discrimination.

> Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is negro while petitioners are white. While Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied, alike to members of all races' and Title VII is violated if, as petitioners alleged, it was not.

McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282-83 (1976). *But see*, Schatzki, *supra* note 46, at 72.

251. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 296 (1986) (Marshall, J., dissenting).

252. *See id.* at 319 n.14 (Stevens, J., dissenting). *See also* Schatzki, *supra* note 46, at 71; Selig, *supra* note 48, at 351-53.

253. Civil Rights Act § 703(a)(1), 42 U.S.C. § 2000e-2 (1982).

254. Civil Rights Act § 703(a)(2), 42 U.S.C. § 2000e-2 (1982).

255. Civil Rights Act § 703(d), 42 U.S.C. § 2000e-2 (1982).

256. It is important to keep in mind that, in most jurisdictions, employment at will is still the prevailing principle. Only limited inroads are accepted, such

applicants.

Weber[257] and *Johnson*[258] both express the idea that, under the appropriate circumstances, affirmative action does not run counter to the Title VII dictates of non-discrimination. When an employer aims an affirmative action plan at eliminating a manifest imbalance in its work force, and the affirmative action plan does not create an absolute bar to the participation of the white male majority and does not unnecessarily trammel the *rights* or *absolute entitlements* of its non-beneficiaries, then the plan is in conformity with the prerequisites of Title VII. This is true regardless of the stage of the employment relationship implicated by the plan. Preferential layoff provisions must satisfy the same requirements as other affirmative action efforts to avoid a Title VII violation. The provisions may not intend to maintain an already sufficiently balanced work force. Once the employer's work force has shown a rough balance over a certain period of time, preferential treatment (of any kind) of minority or female employees may run counter to this requirement. Preferential layoff provisions included in an affirmative action plan that is an ongoing effort to eliminate a conspicuous or manifest imbalance do not run counter to Title VII.[259]

To satisfy the requirements of Title VII, an affirmative action plan must not create an absolute bar to the advancement of the white male majority. Preferential layoff provisions that completely prohibit the layoff of minority or female employees create such an absolute bar and erect a categorical distinction based on race or sex.[260] To determine whether preferential layoff provisions create an absolute bar, the same principles should be applied as for any other form of affirmative action. As argued above, an affirmative

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as a prohibition of discharge in violation of public policy, retaliatory discharges, the operation of an implied covenant of good faith and fair dealing. Collective bargaining provisions also may contain a clause in which the employer accepts a restriction on its managerial prerogative to fire at will. Only when the employee can establish that the employer's right to discharge is limited and that he thus has a "right" to his job, can an additional legal argument be found to reject "discharge and replacement" affirmative action. This type of affirmative action is rejected because, under these circumstances, the affirmative action plan will unsettle legitimate fairly rooted expectations based on an absolute entitlement.

257. United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).

258. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616 (1987).

259. *See, e.g.*, Tangren v. Wackenhut Servs., 480 F Supp. 539, 547 (D. Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). Preferential layoff provisions should not be invalidated merely because they cover a reasonable period of time after reaching a rough balance in the employer's work force. This period should be considered as being an integral part of the "elimination effort."

260. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 310 (1986) (Marshall, J., dissenting). *Contra* Britton v. South Bend Community School Corp., 775 F.2d 794, 807 (7th Cir. 1985), *cert. denied*, 484 U.S. 925 (1987).

action goal that corresponds to the minority or female representation in the relevant labor market is a valid aspiration for an affirmative action plan. Layoff provisions attempting to preserve female or minority participation in the employer's work force which are part of a plan with an ultimate, but unreached, goal of proportional representation do not create an absolute bar. Because the goal of proportional representation in the employer's work force is not yet achieved, the percentage goal the preferential layoff provisions institute (such as the one at issue in *Wygant*) will naturally be lower than the ultimate goal the Supreme Court is willing to accept, namely the percentage goals that correspond to the percentage of minority or female applicants in the relevant labor market.[261]

Finally, to pass muster, preferential layoff provisions must not unnecessarily trammel the rights of the white male majority or unsettle legitimate, firmly rooted expectations based on absolute entitlement. This requirement leads to the question of whether the institution of preferential layoff provisions implicates any right or absolute entitlement of the white male employees.

2) Seniority Rights

Increased participation of minorities and women in employment due to the institution of affirmative action plans is still a new phenomenon. Therefore, women and minority employees tend to have less seniority than their male counterparts and tend to occupy jobs situated at lower levels of the company hierarchy. This makes women and minorities particularly vulnerable in economic downturns. Layoffs are often conducted on the basis of seniority, according to the principle "last hired, first fired."[262] In general, therefore, layoffs have a disproportionate impact on those who were beneficiaries of prior affirmative action efforts. Layoffs might have the effect of restoring the imbalance the affirmative action plan intended to remedy.[263] The beneficiaries of an affirmative action plan

261. *See, e.g.*, *Tangren*, 480 F Supp. at 549 n.8.

262. *See* Edwards & Zaretsky, *supra* note 5, at, 40-41; Hernandez, *supra* note 95, at 342; Kreiling & Mercurio, *supra* note 14, at 89; Levine, *The Conflict Between Negotiated Seniority Provisions and Title VII of the Civil Rights Act of 1964: Recent Developments*, 29 LAB. L.J. 352 (1968); Comment, *Title VII And Seniority Systems: Back to the Foot of the Line*, 64 KY. L.J. 114 (1975) [hereinafter Comment, *Title VII and Seniority*]; Comment, *The Inevitable Interplay of Title VII and the National Labor Relations Act: A New Role for the NLRB*, 123 U. PA. L. REV. 158, 159 (1974) [hereinafter Comment, *Inevitable Interplay*]; Note, *Last Hired, First Fired Layoffs and Title VII*, 88 HARV. L. REV. 1544, 1565 (1975) [hereinafter Note, *Last Hired*].

263. *See* Adams, Krislov & Larson, *Plantwide Seniority, Black Employment, and Employer Affirmative Action*, 26 INDUS. & LAB. REL. REV. 686 (1972); Burke & Chase, *supra* note 158, at 82; Edwards & Zaretsky, *supra* note 5, at 45; Fallon & Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP CT. REV. 1, 54; Hernandez, *supra* note 95, at 342-43; Kreiling &

that established hiring goals, for example, can not rely on this plan for continued employment. Voluntary affirmative action plans do not by themselves "create a contract of permanent employment or invalidate or modify a collective bargaining agreement providing for layoffs on the basis of seniority."[264]

To avoid being laid off due to economic circumstances shortly after being hired pursuant to an affirmative action plan, the beneficiaries could challenge the (existing) seniority-based layoff provisions as a violation of Title VII. Although it is clear that seniority systems can be modified, female and minority employees will find it hard to prevail in an action challenging the validity of an "unmodified" seniority system.[265] Section 703(h) of Title VII protects an employer from liability for applying different standards with regard to terms, conditions, and privileges of employment when the differentiation is based on the functioning of a *bona fide* seniority system.[266] The fact that a seniority system tends to preserve the effects of prior discrimination, be it societal discrimination or discrimination by the employer itself, does not establish a Title VII violation.[267] The disparate impact a seniority system might have on

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Mercuro, *supra* note 14, at 89; Levine, *supra* note 262, at 352; Comment, *Title VII and Seniority*, *supra* note 262, at 115; Comment, *Inevitable Interplay*, *supra* note 262, at 159; Note *Last Hired*, *supra* note 262, at 1565.

For an example of the devastating effect of layoffs according to strict seniority on the gains of affirmative action, see Tangren v. Wackenhut Servs., 658 F.2d 705, 706 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). *See also* Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv., 588 F Supp. 732 (D.N.J. 1984), *aff'd*, 770 F.2d 1077 (3d Cir. 1985).

264. N.A.A.C.P Detroit Branch v. Detroit Police Officers Ass'n, 821 F.2d 328, 331 (6th Cir. 1987).

265. *See* Gould, *supra* note 50, at 1511.

266. § 703(h) of the Civil Rights Act provides:

> Notwithstanding any other provision of this subchapter, it shall *not be an unlawful employment practice* for an employer to apply *different standards* of compensation, or different terms, conditions, or privileges of employment *pursuant to a bona fide seniority* or merit *system*, or a system which measures earning by quantity or quality of production or to employees who work in different locations, *provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin.*

42 U.S.C. § 2000e-2 (1982) (emphasis added).

267. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 353-54 (1977). *See also* California Brewers Ass'n v. Bryant, 444 U.S. 598, 600 (1980); Burke & Chase, *supra* note 158, at 88; Hernandez, *supra* note 95, at 351-53.

An additional difficulty for challenging seniority systems is created by the Supreme Court's position taken in *United Airlines, Inc. v. Evans* and affirmed in *Lorance v. AT&T Technologies, Inc.*, where the Court refused to apply the continuing violation theory to facially neutral seniority systems. *See* Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 912 (1989); United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977). A facially neutral system, even when adopted with an unlawful discriminatory motive, can therefore only be challenged within the prescribed period after its adoption. *Lorance, supra*, at 912. *See also* Gould, *supra* note 50, at 1512-13.

women or minorities is not considered sufficient to remove the seniority system from the category of *bona fide* seniority systems protected by the act.[268] To establish the *"mala fide"* character of a seniority system, a plaintiff must prove that the system had its genesis in a discriminatory intent. This requires proof of the fact that the system was bargained for or maintained with the intent to discriminate.[269]

Section 703(h) of Title VII grants *extensive protection* to seniority rights of employees, once an employer grants these rights. Neither an affirmative action plan establishing hiring goals, nor a Title VII challenge of an existing seniority system, will ordinarily be adequate "devices" to prevent layoffs from undoing the gains of prior affirmative action. A change of the existing seniority-based layoff schemes by establishing preferential layoff provisions for women and minorities seems to be the only way to maintain the already achieved progress of the ongoing affirmative action effort. To verify whether an affirmative action plan passes statutory muster, an employer must determine whether the plan unsettles firmly rooted, legitimate expectations of white male employees by encroaching on absolute entitlements. Therefore, an employer must determine whether the white male's seniority rights are really absolute rights or entitlements. This raises the question of whether

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268. In *International Bhd. of Teamsters v. United States*, the Court stated,

> Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees. This disproportionate distribution of advantages does in a very real sense 'operate to "freeze" the status quo of prior discriminatory employment practices.' But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.

431 U.S. 324, 349-50 (1977).

269. *Id.* at 356. In order for the employer to be shielded from liability under Title VII, the system with the disparate impact on minorities and/or women, on which the employer is relying, must be a seniority system. *Id.* The Supreme Court has held that § 703(h) not only protects those components of a seniority scheme "that embody or effectuate the principle that the length of employment will be rewarded," but also protects ancillary rules that accomplish certain necessary functions in the seniority scheme. California Brewers Ass'n v. Bryant, 444 U.S. 598, 607-08 (1980). The Court further acknowledged that "significant freedom must be afforded employers and unions to create differing seniority systems," as long as the rules established do not "depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system." *Id.* at 608. *See also* Graham, *Seniority Systems and Title VII — Reanalysis and Redirection*, 9 EMPLOYEE REL L.J. 81, 85-86 (1983).

Furthermore, section 703 (h) does not make a distinction between seniority systems adopted before its effective date and those adopted after its effective date. American Tobacco Co. v. Patterson, 456 U.S. 63, 76, (1982). *See also* Graham, *supra*, at 83-84; Hernandez, *supra* note 95, at 355-57.

these seniority rights are of a constitutional, statutory or contractual nature.

The Court in *Wygant* recognized that "the *Constitution* does not require layoffs to be based on strict seniority."[270] If an employee possessed a *statutory right* to be laid off only according to strict seniority, neither the employer unilaterally, nor the employer with consent from the union, could change the order to be followed in case of layoffs. Section 703(h) of Title VII grants extensive protection to seniority systems without creating statutory seniority rights for the employees covered by the Act. Unless the employee can rely on a state law which mandates that seniority governs layoffs, seniority rights remain solely contractual in nature.[271]

Seniority rights certainly appear to be contractual rights. Unions tend to bargain for seniority rights and layoff provisions based on seniority[272] because these provisions substitute for the arbitrariness and subjectivity in the employer's decision making process and provide a more objective rule, which relies primarily on the length of the employee's service with the employer.[273] Because collective bargaining agreements do not cover the whole sector of private employment, not all employees can rely on collectively bargained seniority rights. It is not uncommon, however, for a non-unionized employer to institute some kind of seniority system in its company as part of an effort to avoid unionization.[274]

Employers may unilaterally adopt a personnel policy in an employee handbook that establishes a seniority system, including a

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270. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282 n.10 (1986) (emphasis added).

271. *See* Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 907 (1989). *See also* Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534, 1541 (1962).

272. *See* Aaron, *supra* note 271, at 1534; Cerbone & Walsh, *Management Judgement v. Seniority — Grist for the Arbitration Mill*, 14 EMPLOYEE REL. L.J. 429 (1988); Fallon & Weiler, *supra* note 263, at 55; Glendon & Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, 20 B.C.L. REV. 457, 478 (1979); Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1, 1-3 (1967); Gould, *Seniority and the Black Worker: Reflections on Quarles and its Implications*, 47 TEX. L. REV. 1039 (1969); Graham, *supra* note 269, at 81; Hernandez, *supra* note 95, at 343; Stacy, *supra* note 231, at 489; Comment, *Inevitable Interplay*, *supra* note 262, at 162.

273. *See* W GOULD, *supra* note 6, at 68; Aaron, *supra* note 271, at 1535; Edwards, *supra* note 5, at 770; Fallon & Weiler, *supra* note 263, at 56; Glendon & Lev, *supra* note 272, at 478 n.103; Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1, 3 (1967); Levine, *supra* note 262, at 352; Comment, *Inevitable Interplay*, *supra* note 262, at 162; Note, *Title VII, Seniority Discrimination, And The Incumbent Negro*, 80 HARV. L. REV. 1260, 1263 (1967) [hereinafter Note, *The Incumbent Negro*].

274. *See* Fallon & Weiler, *supra* note 258, at 55; Glendon & Lev, *supra* note 272, at 478; Hernandez, *supra* note 95, at 370.

system of layoffs based on seniority. Under certain circumstances, state courts have considered employer personnel policies binding upon the employer as an enforceable *contractual* obligation.[275] If an employer lays off employees in a different order than the one provided for in its employee handbook, the individual employee may have a claim based on the employer's breach of contract.[276] When the employer voluntarily commits itself to two conflicting contractual obligations — one towards its minority or female employees (preferential layoff provisions)[277] and one towards its white male employees (layoffs based on seniority) — the employer should bear the increased costs resulting from these conflicting contractual obligations. The employer should honor both obligations.[278] Honoring both obligations, however, does not mean that the laid off white male employee will get reinstated. A finding of an employer's breach of contract normally results in contract damages only.[279]

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275. A landmark case in this area is Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). *Toussaint* dealt with an employee handbook providing for discharge for cause only. The court held that such a provision can become part of the employee's contract "either by express agreement, oral or written, or as the result of an employee's legitimate expectations based on an employer's policy statements." *Id.* at 598, 292 N.W.2d at 885. *See also* Woolley v. Hoffmann-La Roche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985); Coombe, *Employee Handbooks: Asset or Liability?*, 12 EMPLOYEE REL. L.J. 4 (1986); Hernandez, *supra* note 95, at 370; Johnston & Taylor, *Employee Handbook: A Selective Survey of Emerging Developments*, 11 EMPLOYEE REL. L.J. 225 (1985); Witt & Goldman, *Avoiding Liability in Employee Handbooks*, 14 EMPLOYEE REL. L.J. 5 (1988).

276. *See* Hernandez, *supra* note 95, at 370.

277. When the employer's promises towards its minority or female employees are not part of a unilaterally declared personnel policy, or when the employer explicitly declined not to be bound by the policies declared, the beneficiaries of the affirmative action effort will not be able to establish a breach of contract by the employer. Moreover, because affirmative action is not mandated by Title VII, the employer's violation of its own affirmative action plan is not a Title VII violation.

278. *See* W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 767 (1983). *See also* United States v. The City of Miami, Fla., 614 F.2d 1322, 1342 n.39 (5th Cir. 1980). The Fifth Circuit declared:

> It is possible that under some circumstances an employer who voluntarily adopted an affirmative action plan which causes an employee to be deprived of such a vested right under his employment contract might contractually be liable to the employee in damages, although the plan is perfectably acceptable under the Constitution and laws of the United States.

Id.

279. If the employer's breach of contract is at the same time a Title VII violation, the equitable remedial powers of the court under Title VII would allow it to order reinstatement. When the preferential layoff provisions, however, meet the requirements for the statutory validity of affirmative action plans, no Title VII violation will be established, and the laid off employee will be left with contract damages only.

When a nonunionized employer does not have any provisions concerning layoffs based on seniority in its employee handbook, the employer may exercise its managerial prerogatives to select the employees to lay off.[280] If an employer has an affirmative action layoff plan, and conducts a layoff pursuant to the plan, the employer will not be liable for discrimination in violation of Title VII simply because the plan deals with layoffs.[281]

In a unionized setting, the collective bargaining agreement will most likely contain seniority-based layoff provisions. These provisions raise the question of whether an employer can unilaterally change a collective bargaining agreement in order to enhance employment opportunities for women and minority workers. Some lower courts consider the policies embraced in Title VII to be overriding and therefore hold that, to effectuate these policies, collective bargaining agreements must not be considered "sacrosanct and can and should be modified and revised, even if done unilaterally."[282]

However, the Supreme Court seems to have taken a different stand in *W.R. Grace & Company v. Local Union 759*.[283] There, the employer entered into a conciliation agreement with the Equal Employment Opportunity Commission after a lengthy investigation indicated that there was reasonable cause to believe that the employer violated Title VII by discriminating against blacks and women.[284] The conciliation agreement provided, among other things, for preferential layoff provisions for women. These provisions contradicted the seniority provisions of the collective bargaining agreement between the employer and the union. The employer, desiring to reduce its work force, faced a dilemma: "it could follow the conciliation agreement. . . and risk liability under the collective-bargaining agreement, or it could follow the bargaining agreement

280. *See* Stacy, *supra* note 231, at 508. The employer's selection can not be discriminatory on the basis of any of the impermissible criteria enumerated in § 703(a) of Title VII, 42 U.S.C. § 2000e-2 (1982).

281. The preferential layoff plan has to satisfy the requirements imposed upon every affirmative action plan. Under these circumstances, however, it can not be regarded as unsettling legitimate firmly rooted expectations because there are no employee entitlements to being laid off according to seniority.

282. EEOC v. American Tel. & Tel. Co., 365 F Supp. 1105, 1129 (E.D. Pa. 1973), *aff'd*, 556 F.2d 167 (3d Cir. 1977). *See also* Southbridge Plastics Div., W.R. Grace & Co. v. Local 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 403 F Supp. 1183 (N.D. Miss. 1975), *rev'd*, 565 F.2d 913 (5th Cir. 1978).

283. W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757 (1983). *See also* Southbridge Plastics Div., W.R. Grace Co. v. Local 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 565 F.2d 913 (5th Cir. 1978).

284. *W.R. Grace & Co.*, 461 U.S. at 759.

and risk both a contempt citation and Title VII liability."[285] The Court considered the dilemma to be of the employer's own making.[286]

The Court stated that voluntary compliance with Title VII was an important public policy, but it did not allow the employer to alter the collective bargaining agreement and escape its obligations thereunder without the union's consent. "Permitting such a result would undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored."[287] When an employer voluntarily takes up conflicting obligations, the combined enforcement of which would not violate public policy, the employer should bear the increased cost of complying with both.[288] The Court refused to allow the employer to transfer any part of the burden. The supplementary incentive to comply with Title VII created by allowing the employer to unilaterally change seniority-based collective bargaining provisions and to adopt preferential layoff schemes for women and minorities should not be paid for with the union's rights of enforcement of the provisions of the collective bargaining agreement.[289]

Unilateral change of (seniority-based) collective bargaining provisions by establishing a preferential layoff scheme for women or minorities is thus impermissible, even when it enhances compli-

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285. *Id.* at 759.

286. *Id.* at 767.

287. *Id.* at 771. *See also* Hernandez, *supra* note 95, at 359 n.175.

288. Some commentators have advanced the argument that the employer should carry the brunt of the cost accompanying the institution of affirmative action plans and not the innocent white male employee. They adopt an "employer targeted approach," based on the assumption that the employer is the wrongdoer who must bear the consequences of its own wrongful action. *See, e.g.*, Burke & Chase, *supra* note 158, at 81-116; Fallon & Weiler, *supra* note 263, at 60-64. *See also* Spiegelman, *supra* note 188, at 416-19. In the context of voluntary affirmative action, these consideration are not very convincing. While it may be justifiable to impose the costs solely on the employer when there is evidence of its prior discrimination, the *voluntary* institution of affirmative action plans under Title VII does not require proof of prior employer discrimination. The employer need not be a violator of Title VII to be permitted to engage in affirmative action. A mere showing of a conspicuous or manifest imbalance in the employer's work force is a sufficient justification. An employer may legitimately attempt to redress the effects of societal discrimination. White male employees, as part of society, are as culpable as the employer with regard to societal discrimination.

289. *See* W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 770 (1983). Most collective bargaining agreements provide for a compulsory arbitration procedure and for specific remedies in case the agreement is violated. One of the possible remedies often provided for in the collective bargaining agreement is reinstatement of the employees discharged or laid off in violation of the provisions of the agreement. Arbitral awards, including those granting reinstatement are enforceable in court. *See id.* at 763.

ance with the ultimate goals of Title VII. Unless the employer is in some way bound by the provisions instituting preferential layoffs, minority or female interests are subordinated by seniority rights provided for in collective bargaining agreements. It is important to stress that an employer who violates the provisions of its own affirmative action plan does not necessarily violate the dictates of Title VII, because Title VII does not require the employer to institute affirmative action plans in the first place. When the employer's affirmative action plan is part of a consent decree, a violation of its commands is open to judicial sanctions, including a citation for contempt of court. While it is not unlikely that courts will be sympathetic to employers that do not live up to the goals of an affirmative action plan included in a consent decree when insufficient qualified minority or female applicants are available, courts may not be willing to grant employers the same sympathy in this context. Courts may consider forcing an employer to hire unqualified minority or female applicants over qualified white male applicants more reprehensible than imposing upon the employer the increased cost of retaining a number of employees due to unexecuted layoffs. The Supreme Court in *W.R. Grace & Co.* mentioned that obeying court injunctions is often costly.[290] The Court, however, did not exclude the possibility that the district court might have granted the employer an exemption from the requirements of the conciliation agreement.[291] If the courts are unwilling to grant the employer this exemption, then the employer must bear the increased cost itself.[292]

The Supreme Court in *W.R. Grace & Co.* suggested that the employer might bargain with the union for a change in collective bargaining agreement layoff provisions.[293] Seniority systems and layoff provisions are proper subjects of collective bargaining; they might even be considered mandatory subjects.[294] A collective bargaining agreement that establishes layoff provisions is binding on the employer. Nothing, however, prevents the bargaining representative and the employer from changing provisions of a collective

290. *Id.* at 770.

291. *Id.* at 770 n.12.

292. Of course, the parties to the conflict can always settle their differences. The fact that the Supreme Court is willing to hold the employer to the conflicting obligations it voluntarily took up, increases the employees' and union's chances to obtain an advantageous settlement.

293. W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 770 n.12 (1983).

294. Section 8(d) of the National Labor Relations Act imposes a mutual obligation on the employer and the union as representative of the employees to bargain collectively with respect to wages, hours, and other terms and conditions of employment. National Labor Relations Act, § 8(d), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)). *See also* Rabin, *Fair Representation Constraints in the Voluntary Elimination of Job Discrimination*, 5 EMPLOYEE REL. L.J. 337, 338-39 (1979-80); Stacy, *supra* note 231, at 518.

bargaining agreement in a subsequent bargaining round.[295] While a collective bargaining agreement is in force, the employer is contractually bound to follow the procedures and rank order for conducting layoffs as they are provided for in the agreement. The right to be laid off according to the principle "last in, first out" is not a vested right in perpetuity. These rights do not vest absolutely; they are subject to change by the parties to the collective bargaining agreement.[296] Seniority rights do not guarantee a job[297] and are not vested in the way pension benefit rights are.[298] "If the union determines, as a legislature might, that the interests of the bargaining unit, considered as a whole, would be better served by a different seniority arrangement, there is no impairment of obligations of any contract and no 'vested rights' have been infringed."[299]

The Supreme Court in *Wygant* did not deny that strict seniority layoff schemes can be altered. The Court stressed, however, that when a *state actor* implements a layoff scheme based on race, it

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295. Section 703(h) of Title VII grants extensive protection to seniority systems in force in a company, without, at the same time, converting the contractual rights into statutory rights. The extensive protection granted does not preclude a change of the seniority systems. Civil Rights Act, § 703(h), 42 U.S.C. § 2000e-2. *See* United States v. City of Miami, Fla., 614 F.2d 1322, 1341 (5th Cir. 1980). In *City of Miami*, the Fifth Circuit stated:

> To say that a seniority system is immunized from attack means that the employer cannot be forced against its will to modify the system, not that the employer cannot agree to change it. .[M]ay an employer voluntarily consent to changes in seniority provisions that do not abridge contractual, statutory, or constitutional rights of its employees or their bargaining agent. .?

Id. at 1341.

See also Tangren v. Wackenhut Servs., Inc., 658 F.2d 705, 706 n.1 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982); Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv., 588 F Supp. 732, 734 (D.N.J. 1984), *aff'd*, 770 F.2d 1077 (3d Cir. 1985).

296. *See* Humprey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Aaron, *Some Aspects of the Union's Duty of Fair Representation*, 22 OHIO ST. L.J. 39, 47 (1961); Aaron, *supra* note 271, at 1533-34; Davidson, *supra* note 207, at 60; Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1954*, 13 HOW. L. REV. 1, 29 (1967); Gould, *supra* note 14, at 655; Graham, *supra* note 269, at 82; Comment, *Title VII And Seniority*, *supra* note 262, at 140; Comment, *Inevitable Interplay*, *supra* note 262, at 164; Note, *The Incumbent Negro*, *supra* 273, at 1263, 1269. *See also* Tangren v. Wackenhut Servs., 658 F.2d 705, 707 (9th Cir. 1981) ("It is settled that seniority rights are not vested property rights and that these rules can be altered to the detriment of any employees or group of employees by a good faith agreement between the company and the union"), *cert. denied*, 456 U.S. 916 (1982); Tangren v. Wackenhut Servs., 480 F Supp. 539 (D. Nev. 1979) ("Courts have long recognized that seniority rights are not vested. They are subject to alternation at the adoption of each collective bargaining agreement"), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

297. *See* Comment, *Title VII And Seniority*, *supra* note 262, at 115 n.11.

298. *See* Aaron, *supra* note 271, at 1541.

299. Aaron, *supra* note 296, at 47 (quoting Baker, *Employee Rights Under Collectively Bargained Group Plans* 8 (unpublished paper)).

must meet a heavy burden of justification.[300] It should be noted that preferential layoff schemes are not solely based on race or sex. Race or sex is just one factor taken into account to determine which employee the employer is going to lay off. In addition, the required justification from a *private* employer voluntarily instituting an affirmative action plan under Title VII is lower than the justification under the equal protection clause. The employer does not infringe upon any absolute employee entitlements when a union and an employer voluntarily change existing layoff provisions and adopt a preferential layoff scheme for women and minorities. An affirmative action plan should be upheld, even if dealing with layoffs, when the employer uses preferential treatment based on race or sex to avoid losing the gains of an ongoing affirmative action effort aimed at eliminating a manifest imbalance in the employer's work force, when the employer considers more than race and sex in making the employment decisions, and when the employer does not create an absolute bar to the participation of the white males.

3) Duty of Fair Representation

When an employer is willing to grant extended protection to female and minority employees in case of layoffs, the consent of the union is necessary to change the seniority provisions of an existing collective bargaining agreement. Nothing guarantees, however, that the union, as bargaining representative, shall be willing to cooperate. A flat refusal by the union to bargain over the proposed preferential layoff provisions violates its duty to bargain in good faith and thus constitutes an unfair labor practice.[301] The National Labor Relations Board acts to oversee and referee the process of collective bargaining. It may require the parties to bargain on mandatory subjects of collective bargaining.[302] The Board's authority is, however, limited to supervision of the procedure only, without any official authority over the actual terms of the contract. Therefore, the Board can not compel a party to accept the proposals of the other bargaining party.[303] If the bargaining process reaches an impasse, the employer may, nevertheless, proceed with its plans and implement the preferential layoff provisions. This will not be considered a violation of the employer's duty to bargain in good

300. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 n.10 (1986).

301. *See* National Labor Relations Act, § 8(b)(3), 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)). *See also* W GOULD, *supra* note 6, at 183.

302. For a discussion of bargaining in the context of the elimination of discrimination, see W GOULD, *supra* note 6, at 183, 191-200.

303. *See* H.K. Porter v. NLRB, 397 U.S. 99, 107-08 (1970). *See also* NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 402 (1952).

faith.[304]

A union's refusal to consider the introduction of preferential layoff provisions which attempt to prevent the loss of the gains of prior affirmative action might also violate the union's duty of fair representation.[305] Although the standards for finding a violation of the union's duty are fairly high, an absolute refusal even to consider the introduction of preferential layoff provisions as proposed by the employer should be considered a violation, because the union is required, "in collective bargaining and in the making of contracts. . .to represent nonunion or minority union members. . .without hostile discrimination, fairly, impartially and in good faith."[306] Under these circumstances the union's conduct should at least be considered arbitrary,[307] unless its refusal is based upon reasonable considerations such as the excessive cost affirmative action might impose on the bargaining unit as a whole.[308] The fact that a majority of the

304. *See* Stacy, *supra* note 231, at 518. *See also* NLRB v. Katz, 369 U.S. 736, 745 n.12 (1962).

305. The union's duty of fair representation is derived from its status as exclusive representative for the employees of the bargaining unit:

> The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for all and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf.

Steel v. Louisville & N.R.R., 323 U.S. 192, 202 (1944).

See also W. GOULD, *supra* note 6, at 166-77, 182-91; Aaron, *supra* note 296, at 39; Finkin, *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183, 193-94 (1980); Kopp, *The Duty of Fair Representation Revisited*, 5 EMPLOYEE REL. L.J. 3, 4 (1979); Levine & Hollander, *The Union's Duty of Fair Representation in Contract Administration*, 7 EMPLOYEE REL. L.J. 193, 194-95 (1981); Sculnick, *Westinghouse and East Dayton Tool: The Continuing Evolution of the Duty of Fair Representation*, 5 EMPLOYEE REL. L. J. 494, 497 (1979); Comment, *Inevitable Interplay*, *supra* note 262, at 162, 170-71 (1974); Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702, 708 (1980).

306. Steel v. Louisville & N.R.R., 323 U.S. 192, 204 (1944). *See also* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 64 (1975) ("Third, we have held, by the very nature of the exclusive bargaining representative's status as representative of all unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit").

307. *See* Vaca v. Sipes, 386 U.S. 171, 190 (1967) ("A breach of the statutory duty of fair respresentation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith"). *Vaca* did not deal with the negotiation of collective bargaining agreements, but with the union's refusal to process grievances.

308. *See* Rabin, *supra* note 294, at 345-46; Note, *Making Labor Unions Responsive to Working Women's Needs: Title VII and the Duty of Fair Representation Compared*, 2 HARV WOMEN'S L.J. 141, 161 (1979) [hereinafter Note, *Making Labor Unions Responsive*]. *See also* Voltz & Breitenbeck, *Comparable Worth and the Union's Duty of Fair Representation*, 10 EMPLOYEE REL. L.J. 30, 45-46 (1984) (courts should adopt a standard that would impose on unions an "affirmative, positive obligation under the duty of fair representation and Title VII to become advocates for the rights of their female members").

union's members back the union in its refusal to consider the employer's proposition does not suffice as a justification for the position taken, because the union has a duty to represent all employees in the unit, not only the majority.[309]

Questions concerning a possible violation of the duty of fair representation also arise when the union actively engages in the negotiation of preferential layoff provisions detrimental to the interests of the majority of its members. Commentators argue that the standards for establishing a violation of the union's duty of fair representation should be looser when the union is engaged in collective bargaining than, for example, when dealing with the processing of employee grievances.[310]

The Supreme Court, in *Ford Motor Co. v. Huffman*, dealt with the grant of a seniority credit to employees who spent time in military service and allowed the bargaining representative a "wide range of reasonableness in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[311] The Court also recognized that the ultimate outcome of the bargaining process can hardly be expected to completely satisfy all those represented by the union.[312] The Court was not ready to find a breach of the collective bargaining agent's duty of fair representation merely because the agent took a good faith position contrary to that of some individuals it represents, or because it supported the position of one group of employees against that of another.[313] The cases the Supreme Court dealt with, however, did not involve changes to seniority schemes considering race

309. *See* Kopp, *supra* note 305, at 5. This is not to say that a majority vote does not have any "probative" value in considering a possible violation of the duty of good faith. However, the mere approval by a majority of union members of the trade union officials' decision not to even consider an employer's proposed affirmative action plan in favor of the union's minority or female members is meaningless when determining whether the union fairly represented all its members. *See also* Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L.J. 46, 48 (1969) (emphasizing that the tension between majority and minority employees is especially high where unions are defending seniority systems "that harmed blacks in the past and continue to do so"); Gould, *Non-Governmental Remedies for Employment Discrimination*, 20 SYRACUSE L. REV. 865, 877 (1969).

310. *See* Aaron, *supra* note 296, at 43; Finkin, *supra* note 305, at 197; Note, *The Incumbent Negro*, *supra* note 273, at 1264; Note, *Making Labor Unions Responsive*, *supra* note 308, at 161.

311. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). *See also* California Brewers Ass'n v. Bryant, 444 U.S. 598, 608 (1980) ("Significant freedom must be afforded employers and unions to create differing seniority systems").

312. *See Ford Motor Co.*, 345 U.S. at 338 ("Inevitable differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not makes them invalid"). *See also* Aaron, *supra* note 271, at 1552-53.

313. *See* Humphrey v. Moore, 375 U.S. 335 (1964); *Ford Motor Co.*, 345 U.S. at 349.

or sex.[314]

When a union and employer agree to establish an affirmative action plan that satisfies the statutory requirements, a court should not find a violation of the union's duty of fair representation. An affirmative action plan is valid under Title VII if the plan does not unnecessarily trammel the rights of the white male majority, does not create an absolute bar to the advancement of its non-beneficiaries, and does not base employment decisions solely on race or sex. These requirements guarantee that the rights and interests of the majority are considered and are not neglected in an arbitrary manner.[315] A valid affirmative action plan does not establish a breach of Title VII and should not be considered discriminatory.[316] By consenting to a valid affirmative action plan, the union does not participate in discrimination. A valid affirmative action plan insures that the following competing interests are considered: the enhancement of equality of employment opportunities for women and minority employees, on the one hand, and the absence of an excessive bar to the advancement and participation of the white male employees, on the other.

In addition, the system of collective bargaining and union representation, developed under the National Labor Relations Act, severely restrains the bargaining representative's practical abilities to arbitrarily neglect the interests of the white male majority. A union needs the support of a majority of the employees in the bargaining unit to keep its status as the exclusive bargaining representative. Fear of decertification[317] will severely limit a union's willingness to "overemphasize" the interests of female and minority employees, representing only a minority of the union's membership and electorate.[318] An arbitrary disregard of the interests of the majority of employees is political suicide for the bargaining repre-

314. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282 n.10 (1986).

315. *See, e.g.*, Breshard v. Directors Guild, 34 BNA FEP Cas. 1045 (C.D. Cal. 1984).

> Union efforts to promote lawful affirmative action on behalf of its women and minorities does not violate its duty of fair representation. Any actions by the DGA [union] to promote or even to agree to lawful affirmative action for its racial minority or female members would not violate the DGA's duty of fair representation to its white and male members.

Id. at 1050. It should be noted that the affirmative action plan at issue in *Weber* was part of a collective bargaining agreement. The Court, however, did not address the issue of the union's duty of fair representation.

316. It should also be taken into account that in a reverse discrimination lawsuit, the employer may rebut the inference of discrimination resulting from a plaintiff's *prima facie* case by articulating a legitimate nondiscriminatory reason. A valid affirmative action plan is considered to be such a reason.

317. *See* National Labor Relations Act, § 9(c)(1)(A), 29 U.S.C. § 151-69 (1982).

318. A valid affirmative action plan is intended to remedy a manifest imbalance in the employer's work force. Under these circumstances, minority and

sentative.[319] Most commonly, trade union officials will not sign a collective bargaining agreement, and certainly not one dealing with preferential layoff provisions that might work to the detriment of the majority of their members, without asking for approval or ratification by the membership.

It is unlikely that trade union officials will agree with the provisions of a collective bargaining agreement that fails to carry the support of at least a majority of the trade union members.[320] Therefore, the membership remains indirectly involved in the bargaining process. A majority vote decides the acceptance or rejection of the proposal modifying contractual seniority rights.[321] Not all of the membership will be pleased with the ultimate result, but this is inherent in a democratic system of "government."

The fact that a majority of trade union members voted upon and approved a proposed agreement should be considered a sufficient safeguard for the interest of the white male majority.[322] Without the consent of the "majority of the majority" it is unlikely that a proposed agreement will ever be ratified. The above argument, that a majority vote for the rejection of any favorable action towards minority or female employees is not sufficient to establish the absence of a violation of the union's duty of fair representation, fails to have the same strength in this setting. When a majority of the white males approves the preferential treatment of the minority to their own detriment as a group, a strong argument exists that the interests of the majority were not disregarded in an arbitrary or discriminatory fashion. The bargaining representative's good faith should be presumed.

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female employees are likely to only constitute a minority of the employees in the bargaining unit.

319. *See* Stacy, *supra* note 231, at 517.

320. A trade union's constitutions and by-laws will normally describe the procedure to be followed for approval of a proposed collective bargaining agreement.

321. When the union agrees to institute preferential layoff provisions, it does not — and can not — bargain away a Title VII right. The bargain only involves a contractual seniority right. *See* Tangren v. Wackenhut Servs., 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). In *Tangren*, the Ninth Circuit stated:

> Plainly, rights established under Title VII are not rights which can be bargained away, either by a union, by an employer or by both in concert. In this instance, however, no Title VII rights have been violated. Seniority is merely an economic right which the unions may elect to bargain away.

Id. at 707. *But see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281 n.8 (1986).

322. *See Wygant*, 476 U.S. at 317-18 (Stevens, J., dissenting). *See also id.* at 309-10 (Marshall, J., dissenting).

C. Remedial Nature Prong

The requirement that a valid affirmative action plan should be a remedial measure relates to the first prong of the Court's analysis and is part of the Court's (present) second prong. The manifest imbalance prong, itself, remains an expression of the requirement that the plan be remedial. To avoid liability for discrimination towards white male employees, the employer may only institute an affirmative action plan that responds to a manifest imbalance in the composition of its work force. In the absence of a manifest imbalance, courts strike down the affirmative action plan as a conflict with the dictates of Title VII, as explained in *Weber* and *Johnson*.

The Supreme Court mentioned in both *Weber* and *Johnson*, while dealing with the analysis of the burden prong, that the affirmative action plan at issue was intended to *attain*, not to maintain, a balanced work force. The Court futher mentioned that the plan was not intended to be *permanent*; the plan would end as soon as its *purpose* of proportional representation was reached.[323] Because these conditions are more directly related to the nature of the plan itself than to whether the rights of the white male majority were unnecessarily intruded upon, this part of the inquiry is more accurately considered a separate, and third, prong.

1. Attainment of a Balanced Work Force[324]

According to the first prong of the statutory analysis, the institution of an affirmative action plan is not justified if the employer can not show a manifest imbalance in its work force. Under these circumstances, the purpose of the plan can not be to attain a balanced work force. Absent a manifest imbalance, the composition of the work force of the employer must be considered already "sufficiently balanced." The preferential treatment of minority and/or female applicants or employees under such conditions constitutes a

323. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 639-40 (1987); United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208-09 (1979).

324. Arguments have been advanced to allow employers to institute non-remedial affirmative action to maintain a balanced work force and the benefits that come along with having an integrated work force. *See* Note, *Rethinking* Weber, *supra* note 60, 658-71. *See also* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78-98 (1986). Sullivan argues for a forward looking rationale, as opposed to looking at the past sins of discrimination, as a justification for instituting valid affirmative action plans. The rationale seems now to be at least partly adopted by the Supreme Court. In *Johnson* the Supreme Court did not look backwards to find prior and individualized discrimination as the necessary justification of an affirmative action plan. *See Johnson*, 480 U.S. at 631-37.

Title VII violation.[325] A plan that attempts to freeze proportional representation in "perpetuity" does not remedy the effects of past exclusionary practices and societal discrimination; instead, it institutionalizes the consideration of race and sex.[326] The purpose of Title VII is to eliminate the last vestiges of employment discrimination, and to establish a race- and sex-neutral employment decision making process upon reaching this goal. Permanent consideration of race and sex runs counter to these goals.

This does not mean, however, that an affirmative action plan is immediately invalid merely because its duration extends for a reasonable period beyond attaining a numerical balance in the em-

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325. The action undertaken in an affirmative action plan can be such that it does not infringe on white male rights and interests, even if the plan is maintained for a long period of time. For instance, an increased recruitment effort directed toward minority ghettos when minority applicants, for whatever reason, previously fell outside the employer's application pool, would not infringe on white male rights. When the affirmative recruitment effort succeeds and reaches its goal of increased minority application, white males will confront increased competition for the positions available with the employer. This increased competition can hardly be regarded as a "trammeling" of the white male majority's rights. For an example of an affirmative action effort of this kind, see Schenkel-Savit & Seltzer, *Recruitment as a Successful Means of Affirmative Action*, 13 EMPLOYEE REL. L.J. 465, 472-79 (1987-88).

The institution of plans of such a nature will hardly cause any problems for the employer to overcome, as far as the second prong of the analysis of the statutory validity of the affirmative action plan is concerned. Even maintaining a plan of this kind can not really be seen as a trammeling of the majority's rights. However, problems might arise for the justification prong of the analysis. The justification prong of the analysis requires the plan to be a reaction to a manifest imbalance in the employer's work force. When a plan reaches its purpose and is maintained over a reasonable period of time to ensure that the desired effect of increased minority application will continue, the plan will have no remedial justification any more.

Blumrosen argues that, after a certain period of time, preferential treatment should cease. "There is evidence that when sufficient numbers of minorities and women are employed in a given establishment, the informal process of economic life — for example, the tendency to refer friends and relatives for employment — will help to produce a significant applicant flow for both minorities and women." Blumrosen, *supra* note 230, at 685-86. Blumrosen further suggests that at a certain moment, a " 'take-off point' will be reached where the ordinary process of life will assure fair employment. *Id.* at 686.

> The hope is that once minorities and women are fully integrated into the labor force, the normal operation of the economic system will perpetuate their inclusion, just as historically it perpetuated their exclusion. At that point the law should confine itself to the more modest but very important task of adjudication of specific instances of alleged discrimination.

Id. at 694-95. *See also* Blumrosen, *supra* note 14, at 22-23. Of course, there is no absolute guarantee that fair employment practices will maintain the proportionality reached in the employer's work force. *See* Note, *Rethinking* Weber, *supra* note 60, at 667. The presumption, however, should be that it will maintain the proportionality of the work force. Absent special circumstances, an affirmative action plan should not be maintained after it reached its purpose.

326. *See* Ledoux v. Dist. of Columbia, 820 F.2d 1293, 1302 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988). *See also* Boyd, *supra* note 14, at 23; Buchanan, *supra* note 30, at 237.

ployer's work force. The effects of societal pressures and discrimination exist beyond the moment the employer reaches statistical parity in its work force. The employer should have a reasonable period of time after reaching proportional representation in its work force to determine if the measures adopted really had the intended effect.[327] Reaching a momentary balance is not the ultimate goal of any affirmative action plan. The Supreme Court, in *Johnson*, accepted the affirmative action plan because the plan's purpose mirrored the purpose of Title VII. The purpose of the plan was to eliminate the last vestiges of discrimination in the work place.[328] Insuring that the plan reached its goal is part of the process of eliminating employment discrimination.[329]

Affirmative action plans aimed at maintaining the gains of prior affirmative action efforts are not necessarily to be equated with plans aimed at maintaining a balanced work force. This is especially true for a plan attempting to preserve the success already achieved towards the ultimate goal of a proportional work force when economic circumstances force the employer to reduce its work force. Frequently those last hired are the first ones fired. An employer's effort to preserve difficult affirmative action gains should not be invalidated merely because it does not bring the employer any closer to its ultimate goal. Not sliding back on the steep and difficult path leading to equality of employment opportunities for all is as valuable as taking the next step forward.

The Supreme Court's requirement that an affirmative action plan should be remedial, aimed at attaining a balanced work force, and not aimed at maintaining proportional representation, is further exemplified by the Supreme Court's requirement that a valid affirmative action plan be temporary. An affirmative action plan must be a temporary measure intended to attain a racial and/or sexual balance and not a permanent numerical balancing device.

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327. *See* Note, *Rethinking* Weber, supra note 60, at 671. This author argues that employers should be allowed to "maintain" affirmative action efforts in order "to rationalize human resource management systems, encourage diversity and individual expression." *Id.* The emphasis of a test designed to analyze the statutory validity of an affirmative action plan, it is argued, should be placed on the "unnecessarily trammeling" of the rights of the white male majority.

328. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 642 (1987).

329. *See, e.g.*, United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980). The Fifth Circuit rightfully approved an affirmative action plan contained in a consent decree. One of the provisions of the plan reads as follows: "The interim goal for blacks and women set forth in paragraph 2 shall continue in effect for each department or district until the long term goals for that department or district have been achieved and maintained for a period of a year." *Id.* at 1369.

2. *Liberal Construction of the Temporariness Requirement*

The requirement that a valid affirmative action plan be a temporary measure should be construed liberally. "Temporary" should be understood to mean not perpetual, endless or everlasting.[330] An affirmative action plan in force for a very long period of time is temporary as long as the manifest imbalance it is aimed at eliminating persists.[331]

The Supreme Court, in *Weber*, mentioned the temporary character of the plan at issue in relation to the fact that the plan was not aimed at maintaining a racial balance.[332] In *Johnson*, the Supreme Court upheld an affirmative action plan, in the absence of an explicit end date:

> It is thus unsurprising that the Plan contains *no explicit* end date, for the Agency's flexible, case-by-case approach was not *expected to yield success in a brief period of time*. Express assurance that a program is only temporary *may be necessary* if the program actually *sets aside* positions according to specific numbers.[333]

An affirmative action plan that does not unnecessarily trammel the rights of the white male majority should not be invalidated merely because it does not provide an explicit end date.[334] All affirmative action plans with an ultimate goal of attaining a balanced composition in the work force are "*temporary*."[335] All these plans

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330. *See* Kreiling & Mercurio, *supra* note 14, at 65.

331. The acceptable duration of an affirmative action plan includes the reasonable period of time between the moment a statistical balance is reached and the moment there is reasonable certainty that the plan reached its purpose. *See, e.g.*, Lehman v. Yellow Freight Sys., 651 F.2d 520, 527 (7th Cir. 1981). *See* Boyd, *supra* note 14, at 23; Vaughn, *supra* note 3, at 562.

332. *See* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193, 208 (1979).

333. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 639-40 (1987) (emphasis added).

334. *See, e.g.*, Lilly v. City of Beckley, W Va., 797 F.2d 191, 195 (4th Cir. 1986).

335. *See* Johnson v. Transportation Agency, Santa Clara County, Cal., 770 F 2d 752 (9th Cir. 1984), *aff'd*, 480 U.S. 616 (1987). The Ninth Circuit Court stated:

> Undoubtedly, a plan must end when its remedial function has served. The fact that the plan must end, however, does not necessitate the inclusion of an explicit ending provision. We read *Weber* to require that a plan be temporary in the sense that it must end when its goals of parity are met.

Id. at 757. *See also* Paradise v. Prescott, 767 F.2d 1514, 1534 (11th Cir. 1985), *aff'd sub. nom.*, 480 U.S. 149 (1987); Kirkland v. New York State Dep't of Correctional Servs., 711 F.2d 1117, 1134 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984); Bratton v. City of Detroit, 704 F.2d 878, 892 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); La Riviere v. EEOC, 682 F.2d 1275, 1279-80 (9th Cir. 1982); Sester v. Novack Inv. Co., 657 F.2d 962, 969 (8th Cir. 1981); Smith v. Harvey, 648 F Supp. 1103, 1113-14 (M.D. Fla. 1986); Youngblood v. Dalzell, 625 F Supp. 30, 34 (S.D. Ohio 1985), *aff'd*, 804 F.2d 360 (6th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987); Ende v. Board of Regents, 565 F Supp. 501, 511 (N.D. Ill. 1983), *aff'd*, 757 F.2d 176 (7th Cir. 1985); Van Aken v. Young, 541 F Supp. 448, 458 (E.D. Mich. 1982), *aff'd*, 750 F.2d 43 (6th Cir. 1984); Marshall v. Illinois Educ. Ass'n, 511 F Supp. 144, 149 (C.D. Ill. 1981), *rev'd*, 667 F.2d 638 (7th Cir. 1982); Tangren v.

contain an implicit end date.[336] Therefore, the requirement that an affirmative action plan be temporary is not an independent requirement for the statutory validity of the plan. [337]

At the moment the affirmative action plan remedies the manifest imbalance that justified the initial institution of the affirmative action plan, the plan automatically ends, unless specifically provided otherwise. As argued above, an employer should be allowed to use the preferential treatment provisions of its plan for a reasonable period after reaching the goal of proportional representation. The end date of the plan is the date of reaching statistical parity in the composition of the work force, with an extension for a reasonable period beyond this date as established by the employer in its plan.[338]

The Supreme Court, in *Johnson*, indicated that an explicit end date is not required in an affirmative action plan that considers race or sex as only one factor in the decision making process.[339] The Court mentioned, however, that *an express end date may be necessary* when the affirmative action plan *sets aside a specific number of positions* for female or minority job applicants.[340] There is, however, no need for a specific end date when the plan satisfies the other requirements of the inquiry into its statutory validity, even when it uses set asides.[341] The specific number of positions set aside

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Wackenhut Servs., 480 F Supp. 539, 549 (D. Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). *See also* Ende v. Board of Regents, 565 F Supp. 501, 511 (N.D. Ill. 1983), where the court considers the permanence argument illusory: "Few organizational plans are truly permanent; realistically they are subject to constant change." All affirmative action plans that establish an end goal should thus be presumed to be temporary, since an end date is implied. "The mere speculation that an affirmative action plan would be maintained" is not a sufficient ground for invalidating it. *See* Smith v. Harvey, 648 F Supp. 1103, 1114-15 n.3 (M.D. Fla. 1986).

336. *See, e.g.*, Tangren v. Wackenhut Servs., 480 F Supp. 539, 549 (D. Nev. 1979) ("We must assume that WSI [Wackenhut Services, Inc.] and IGAN [Independent Guard Association of Nevada] will eliminate the preference in favor of minorities when it no longer becomes necessary to artificially insure that minorities are adequately represented in WSI's work force"), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

337. *See* Note, *Rethinking* Weber, *supra* note 60, at 666.

338. *See, e.g.*, United States v. City of Alexandria, 614 F.2d 1358, 1366, 1369 (5th Cir. 1980).

339. Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 639-40 (1987).

340. *Id.*

341. The Supreme Court explained why an explicit end date may be necessary when an affirmative action plan sets aside a specific number of positions for minorities and/or female applicants. "This is necessary both to *minimize the effect of the program on other employees*, and to ensure that the plan's goals 'are not *being used simply to achieve and maintain balance*, but rather as a benchmark against which' the employer may measure its progress in eliminating the underrepresentation of minorities and women." *Id.* at 640 (emphasis added). When a plan satisfies both the requirements mentioned by the Supreme

probably guarantees that the ultimate goal of a balanced work force will be reached in a reasonably short period. Fear that the plan may be in force for an extended period of time should thus be less than in the case-by-case method used in *Johnson*.[342] The requirement that a valid affirmative action plan be temporary is not an additional hurdle for the approval of a plan using set asides.[343]

A court should not invalidate an affirmative action plan that uses quotas or percentages as its method of reaching a balanced work force because of the absence of a specific end date.[344] Concerning the temporariness requirement, these plans can be divided into three groups: the percentages used in the plan can be equal to the ultimate goal (balanced work force), the percentages used can be lower than the ultimate goal, or the percentages can be higher than this goal. All of these plans contain an implicit end date: the date of reaching a balanced work force. When the plan includes accelerated interim goals, the plan achieves the desired balance in a shorter period of time. Lower interim goals are less intrusive, but are less likely to have success in a short period of time. Once the plan reaches the goal, all plans automatically dissolve.[345]

The fact that a collective bargaining agreement that is open to renegotiation after its date of expiration includes an affirmative action plan does not mean that the plan must be characterized as an "ongoing balancing-maintenance-measure."[346] When the plan sets

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Court — minimizing the effect on non-beneficiaries and attaining a balanced work force as ultimate purpose of the plan — the provision of an explicit end date will thus become superfluous.

342. The Supreme Court, in *Johnson*, even mentioned the fact that the Agency's plan might not result in a substantial improvement of female representation in a short period of time, but that only a gradual increase was to be expected. *Johnson*, 480 U.S. at 640.

343. In considering the over-all reasonableness of a plan using set asides, one factor to take into account is the amount of time the employer estimates to be necessary to reach the set goal. This is, however, only one of the several factors that needs to be taken into account.

344. *But see* Johnson v. Transportation Agency Santa Clara County, Cal., 770 F 2d 752, 757 (9th Cir. 1984) ("the requirement that a fixed percentage of openings be filled by minorities necessitated a reasonably explicit deadline"), *aff'd*, 480 U.S. 616 (1987); Ledoux v. District of Columbia, 820 F.2d 1293, 1302 (D.C. Cir. 1987) ("*Johnson* makes clear, however, that the plan itself need not identify an explicit termination point, unless, as was the case in *Weber*, it sets aside positions according to specific numbers"), *vacated*, 841 F.2d 400 (1988); Baker v. City of Detroit, 483 F Supp. 930, 1003 (E.D Mich. 1979) ("some form of terminating period needs to be placed on the affirmative action plan — either a date or a point at which the Department reaches a certain racial balance"), *aff'd*, Bratton v. Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

345. *See* United States v. City of Alexandria, 614 F.2d 1358, 1366 (5th Cir. 1980); United States v. City of Miami, Fla., 614 F.2d 1322, 1340 (5th Cir. 1980).

346. *See, e.g.*, Britton v. South Bend Community School Corp., 775 F.2d 794, 806 (7th Cir. 1985), *cert. denied*, 484 U.S. 925 (1987). *See also* United Steelworkers, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979). The plan at issue in *Weber* was part of a collective bargaining agreement.

a balanced work force as its ultimate goal, it implicitly adopts an end date: the date at which the balance will be reached. Furthermore, the plan only lasts the duration of the collective bargaining agreement.[347] There is no indication, and certainly no proof, that the employer and the (exclusive) bargaining agent will again reach an agreement on the re-institution of the plan. The manifest imbalance in the employer's work force will probably be reflected in the composition of the union that is acting as bargaining representative. Common sense indicates that the white male majority in the bargaining unit is more likely to disapprove than to approve an affirmative action plan that works to the benefit of minorities and women, and thus to their own detriment.

If any of the different methods used in affirmative action plans can be questioned under the independent "temporariness requirement," it is the flexible plan that would be questioned, because this is the type of plan that most likely will not be successful in the short range and will need to exist over a longer period of time. Yet, the Supreme Court explicitly accepted that the absence of an explicit end date is not an obstacle for upholding this kind of plan. Plans that use set asides or percentage goals remain likely to succeed in a shorter period of time and should thus easily satisfy the temporariness requirement. Considering the temporariness requirement as a completely independent requirement leads to an internal contradiction in the analysis of the statutory validity of affirmative action plans. The plans that are likely to be in force over an extended or prolonged period of time are considered less intrusive on the rights of the white male majority. The most burdensome plans probably reap success in a more limited time span. The potential conflict between the requirement that an affirmative action plan not greatly intrude upon the rights of the non-beneficiaries of the plan, on the one hand, and the requirement that a plan be temporary, on the other, should be resolved in favor of the former.

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347. *See* Tangren v. Wackenhut Servs., 480 F Supp. 539, 549 (D. Nev. 1979) (fact that collective bargaining agreement is subject of renegotiation every three years as expression of temporary character of plan), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). *See also* Breshard v. Directors Guild, 34 BNA FEP Cas. 1045, 1047-48 (C.D. Cal. 1984). *Contra* Marsh v. Board of Educ., 581 F Supp. 614, 626 (E.D. Mich. 1984), *aff'd*, 762 F.2d 1009 (6th Cir. 1985). In a similar way, the notice provisions for termination that are often part of a consent decree containing an affirmative action plan can be regarded as a supplementary expression of the affirmative action plan's temporary nature-supplemental to the implicit end date of reaching the goal of the affirmative action plan. *See, e.g.*, United States v. State of New Jersey, 614 F Supp. 387, 395 (D.C.N.J. 1985). The extension of the duration of a consent decree does not change the nature of the affirmative action plan contained in it, from temporary to permanent. *See* Bridgeport Firebird Soc'y v. City of Bridgeport, 686 F Supp. 53, 60 (D. Conn. 1988). The extension of the duration of a consent decree can be compared to the renegotiation of a collective bargaining agreement.

An affirmative action plan should be a temporary measure, indeed. But temporary means nothing more than not permanent. Temporary means attaining a balanced work force and not merely maintaining an already established balance for eternity.

CONCLUSION

The Supreme Court's inquiry into the statutory validity of affirmative action plans under Title VII can appropriately be described as a three stage analysis, colored by an unwarranted fear that preferential treatment might be granted to unqualified minority or female applicants.

The main hurdle for an employer willing to engage in affirmative action is the requirement that the plan can not create an absolute bar to the participation of the white males. The different methods employers use, such as quotas or percentage goals, set asides, or the use of race and sex as a factor, do not justify any difference in the legal treatment of the plan. In practice, these methods appear to function in a highly comparable way. Stressing the voluntary nature of the effort by the private employer and taking into account that profit maximizing intentions are their driving force, one should realize that the methods mentioned here do not place undue pressure on employers to engage in any kind of preferential treatment towards unqualified applicants or employees. Hard and fast rules are inappropriate for determining whether an absolute bar has been created to the participation of white males. Full consideration should be given to the particular circumstances that triggered the institution of the affirmative action effort and to the context in which it operates.

Courts addressing reverse discrimination lawsuits challenging the validity of affirmative action plans should engage in a double, highly fact-specific inquiry, separate from the (three part) inquiry the Supreme Court actually applies now. The first question courts should ask is whether the employer's work force was manifestly imbalanced as compared to the composition of the general area labor market. If so, courts should then determine whether sufficient room is left for the advancement and participation of the non-beneficiaries of the plan. Based on the analytical framework the Supreme Court adopted for reverse discrimination lawsuits, the employer's reasonably proffered justification for its action and the extent to which its action lasts should enjoy a *de facto* presumption of validity. Unless the white male challenger of the plan convinces the court of the plan's invalidity under Title VII, the employer's voluntarily effort to engage in an attempt to eradicate the last vestiges of discrimination in the work place should not be invalidated.