UIC Law Review

Volume 21 | Issue 3 Article 7

Spring 1988

Johnson v. Transportation Agency: The United States Supreme Court Weighs Statistical Imbalance in Favor of Affirmative Action, 21 J. Marshall L. Rev. 593 (1988)

Denise C. Hockley-Cann

CASENOTES

JOHNSON v. TRANSPORTATION AGENCY:* THE UNITED STATES SUPREME COURT WEIGHS STATISTICAL IMBALANCE IN FAVOR OF AFFIRMATIVE ACTION

The United States Supreme Court was sharply divided in what is perhaps the most significant affirmative action[1] decision since the controversial and muddy resolution of Allen Bakke's[2] reverse discrimination suit against the University of California in 1978.[3] In *Johnson v. Transportation Agency*,[4] the Court addressed the issue of whether Title VII of the 1964 Civil Rights Act[5] permitted a public

---

* 107 S. Ct. 1442 (1987).

1. Affirmative action involves extending preferential treatment by engaging in "actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." E.E.O.C. Guidelines, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1608.1(c) (1985). For a general discussion of affirmative action, see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 775-870 (2d ed. 1983); Kennedy, *Persuasion and Distrust, A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986).

2. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *See* Stengel, *Balancing Act*, TIME, Apr. 6, 1987, at 18 (most significant affirmative action decision since *Bakke* case).

3. The *Johnson* case drew considerable attention from the legal community prior to the Supreme Court's ruling, as evidenced by the many *amicus curiae* briefs filed in the case. *See Johnson*, 107 S. Ct. at 1476 (Scalia, J., dissenting). Following the decision, the case received national attention from the news media. *See, e.g.*, N.Y. Times, Mar. 27, 1987, at A1, col. 5 (Court gives broad approval to affirmative action plan by rejecting male worker's sex discrimination suit).

4. 107 S. Ct. 1442 (1987).

5. 42 U.S.C. § 2000e to § 2000e-17 (1982). The Act provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1982).

The primary purpose of Title VII of the Civil Rights Act of 1964 [hereinafter Act] was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." International Bhd. of Teamsters v.

employer[6] to voluntarily institute an affirmative action program that authorized the consideration of sex when making employment decisions.[7] The Court resolved this issue in favor of the employer by explicitly upholding the employer's right to voluntarily institute an affirmative action program and rejecting the argument that an employer is required to show proof of prior discrimination in order to justify the program under Title VII.[8]

The circumstances giving rise to the *Johnson* litigation began in December 1978, when the Transportation Agency of the County of Santa Clara ("Agency") voluntarily adopted an affirmative action plan ("Plan").[9] The Plan noted that women were significantly underrepresented in the Agency's work force when compared with the

---

United States, 431 U.S. 324, 348 (1977) (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)). The Act's passage was prompted out of concern over the "slow recognition of Negro equality in American Society." Note, *Civil Rights—Voluntary, Race-Conscious Affirmative Action Plans—United Steelworkers v. Weber and its Impact on Title VII Remedies in the Fourth Circuit*, 16 WAKE FOREST L. REV. 439, 442 (1980). The Act "was the product of an epic legislative struggle." Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1 (1977). This struggle was evidenced by the fact that the Act was amended 87 times and was ultimately passed following consideration and debate by the "House Judiciary Committee [in] 22 days, by the Rules Committee [in] seven days, by the House [in] six days, and by the Senate [in] 83 days. The extended debate in the Senate lasted 534 hours, 1 minute, and 37 seconds." EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964, at 10-11 (1968).

This discussion of the legislative history of Title VII is intended only to point out that the history itself is exhaustive, as is the literature available on the subject. The following represents some of the available textbooks: J. FRIEDMAN & G. STRICKLER, CASES AND MATERIALS ON THE LAW OF EMPLOYMENT DISCRIMINATION (1982); W. MURPHY, J. GETMAN & J. JONES, DISCRIMINATION IN EMPLOYMENT (1979); M. PLAYER, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1984); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (2d ed. 1983); A. SMITH, C. CRAVER & L. CLARK, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS (1982); and M. ZIMMER, C. SULLIVAN & R. RICHARDS, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION (1982). There has been a significant amount of commentary by the academic community as well. For a comprehensive discussion regarding Title VII, see Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

6. *Johnson*, 107 S. Ct. at 1446. The Court noted that although a public employer was involved, there was no constitutional issue before them. *Id.* n.2. The prohibitory scope of Title VII was therefore the only issue before the Court. *Id.*

7. *Johnson*, 107 S. Ct. at 1446.

8. *Id.* at 1457.

9. Two affirmative action plans were at issue in the *Johnson* case. The affirmative action plan of the County of Santa Clara (County-wide Plan), was intended for use by all County government agencies. A second plan (Agency Plan), which the Transportation Agency of the County of Santa Clara adopted, was tailored to the Agency's specific needs. Brief for Respondent Transportation Agency, Santa Clara County, Cal. at 5, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129). The Agency Plan sought to implement the County-wide Plan's commitment to take affirmative steps to remedy the effects of past discriminatory practices and to "permit attainment of an equitable representation of minorities, women and handicapped persons." Joint Appendix at 31, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129).

proportion of women in the Santa Clara County labor force.[10] The Plan observed that female representation was concentrated in job classifications traditionally filled by women[11] and that certain job categories existed where women were particularly underrepresented.[12] Consequently, the Plan's ultimate goal[13] was to achieve a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they were underrepresented.[14]

The Agency recognized several factors[15] that could make attaining the affirmative action employment goals[16] extremely difficult in

---

10. *Johnson*, 107 S. Ct. at 1446. Effective September 30, 1978, the Agency work force totalled 1,252. Joint Appendix at 44, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129). Of that number, only 281 or 22.4% were women. *Id.* at 45. The Plan compared this figure with the percentage of women in the area work force (36.4%). *Id.*

11. *Johnson*, 107 S. Ct. at 1446. The Plan drew specific attention to those categories where significant underrepresentation of women existed: Officials and Administrators—7.1%; Professionals—8.6%; Technicians—9.7%; Skilled Crafts-none; and Road Maintenance Workers—one out of 110 positions. Joint Appendix at 51-52, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129). The Plan noted that part of the reason for this underrepresentation was because women did not have a strong incentive to seek jobs in those areas where they had not been traditionally employed due to limited opportunities to work in these positions. *Id.* at 57.

12. Joint Appendix at 51-52, Johnson v. Transp. Agency, 107 S. Ct. 1447 (1987) (No. 85-1129).

13. The Plan also outlined goals in connection with the underrepresentation of minorities and handicapped persons in the Agency's work force. *Johnson*, 107 S. Ct. at 1447. However, this casenote deals primarily with those portions of the Plan that refer to the underrepresentation of women and the procedures to be implemented in connection with that underrepresentation. The Supreme Court's analysis of this case, however, clearly is applicable to the Agency's Plan as it pertains to the underrepresentation of minorities. *Id.* at 1454 n.13.

14. *Id.* at 1447 (quoting Joint Appendix at 43, *Johnson*, 107 S. Ct. 1442 (no. 85-1129)). In the job classification relevant to this case, Skilled Crafts, there were no women employed out of 238 available positions. See *supra* note 11 for a complete breakdown of those Agency job categories where underrepresentation of women existed.

15. The factors hindering goal attainment included the following: many of the positions required specialized training and experience or involved heavy labor; the Agency's low turnover rate; there was a limited number of entry job classifications leading to the Professional, Technical and Skilled Craft classifications; the job classifications themselves contained few positions; and there were a limited number of minorities and women in the area labor force who possessed the requisite skills. *Johnson*, 107 S. Ct. at 1447 (quoting Joint Appendix at 56-57).

16. In order to evaluate the Plan's progress, the Plan provided that its long-term employment goal was to attain female representation in its work force which was reflective of Santa Clara County's labor force. *Id.* at 1447 (quoting Joint Appendix at 54, *Johnson*, 107 S. Ct. 1442 (No. 85-1129)). The Plan also provided for the establishment of short-range employment goals that would be annually adjusted to serve as a guide when making employment decisions. *Id.* (quoting Joint Appendix at 64, *Johnson*, 107 S. Ct. 1442 (No. 85-1129)). In order to formulate these goals, the Plan indicated the importance of ascertaining area statistics of minorities, women and handicapped persons employed in the major job classifications that corresponded to those of the County and who could meet the level of skill required for placement.

the job classifications where women were underrepresented.[17] Thus, in order to compensate for the factors causing difficulty,[18] the Plan indicated that attainment of the Agency's goals necessitated that Agency personnel give special consideration to affirmative action requirements in every individual hiring action pertaining to positions where minorities, women and handicapped persons continue to be underrepresented.[19] The Plan did not contain quotas[20] or fixed nu-

---

Id. The Plan proposed the Agency hiring personnel would then consider these statistics along with other factors which result in position vacancies. *Id.*

17. See *supra* note 11 for a complete breakdown of those Agency job categories where underrepresentation of women existed.

18. See *supra* note 15 for a list of the factors hindering goal attainment.

19. Joint Appendix at 60, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129); *see also Johnson*, 107 S. Ct. at 1446 ("the Agency is authorized to consider as one factor the sex of a qualified applicant").

20. The United States Supreme Court first reviewed the use of a racial quota system in the context of a reverse discrimination case under Title VII in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). In *Weber*, the Court addressed the issue whether Congress, in enacting Title VII of the Civil Rights Act of 1964, left private employers and unions free to adopt voluntary affirmative action plans "to eliminate manifest racial imbalances in traditionally segregated job categories." *Id.* at 197. In *Weber*, the employer and a union entered into an agreement that included an affirmative action plan to increase the number of blacks in skilled craft jobs in the employer's factories. *Id.* at 198. The plan provided for the establishment of on-the-job training to teach unskilled production workers the skills required of a craft worker. *Id.* The plan dictated that not less than one minority applicant would enter for every non-minority entering until the percentage of black craft workers corresponded to the percentage of blacks in the area's local labor force. *Id.* at 199.

The *Weber* Court examined the legislative history of Title VII and its historical context and reasoned that because Title VII does not *require* racial preferential treatment, the Court could draw the inference that Congress did not intend to prohibit *all* voluntary race-conscious affirmative action. *Id.* at 206 (emphasis added). The Court then held that Title VII does not prohibit all private, voluntary, race-conscious affirmative action plans absent a formal finding of racial discrimination. *Id.* at 208. The Court failed to state what would constitute an impermissible affirmative action plan, stating only that the Kaiser-USWA plan "falls on the permissible side of the line." *Id.* The Court, however, provided some general reasons to support its conclusion. *Id.* First, the Court noted that the plan was "designed to break down old patterns of racial segregation and hierarchy." *Id.* Second, the plan did not "unnecessarily trammel the interests of the white employees." *Id.* Third, the plan did not "create an absolute bar to the advancement of white employees." *Id.* Lastly, the Court observed that the plan was a temporary measure that was not intended to "*maintain* racial balance, but simply to eliminate a manifest racial imbalance." *Id.* (emphasis added).

The Supreme Court also addressed the issue of quotas in an academic admissions policy and reached an entirely different result than in *Weber*. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In *Bakke*, the plaintiff, a white male, was not accepted for two consecutive years to the University of California, Davis Medical School. *Id.* at 276-77. The Regents had in place a regular admissions program and a special admissions program in which only minorities were considered for 16 of the 100 places in the class entering for that year. *Id.* at 273-75. Bakke claimed that because he was white, he could not be considered for the places that had been reserved for minorities. *Id.* at 277. Bakke claimed this admissions procedure denied him equal protection under the law and violated Title VI of the 1965 Civil Rights Act. *Id.* The United States Supreme Court rendered a plurality opinion in which only five members of the Court concluded that race could be considered in future admissions programs to remedy disadvantages caused by past discrimination. *Id.* at 289-320, 357-80. However, five justices agreed that a preference for one person over another on the

merical preferences,[21] but did authorize Agency personnel to consider the sex of a qualified applicant as one factor when making employment decisions.[22]

Paul Johnson, a male employee at the Agency, brought suit in district court[23] when Diane Joyce, a female Agency employee, was promoted to the job of road dispatcher in preference to Johnson.[24] Both employees were designated well-qualified[25] for the position, although Johnson had achieved a marginally higher score[26] during the interviewing process.[27] Johnson asserted that he had suffered discrimination based on his sex in violation of Title VII of the Civil Rights Act of 1964.[28] Johnson claimed that Joyce was a less qualified candidate.[29] Joyce's promotion, Johnson alleged, was based solely on

---

basis of race or ethnic origin was forbidden. *Id.* at 307-08. The factual and legal distinctions between the two cases (*Bakke*—Title VI of the Civil Rights Act of 1964 and equal protection clause of the 14th amendment versus *Weber*—Title VII of the Civil Rights Act of 1964) provide justification for the differing results. *See* Note, *Constitutional Law-Equal Protection-Affirmative Action Plan Upheld Absent Prior Finding of Discrimination.* United Steelworkers v. Weber, 99 S. Ct. 2721 (1979)., 63 MARQ. L. REV. 311, 314 (1979) (results reached in *Bakke* and *Weber* are justifiably conflicting).

21. *See supra* note 20 (discussing quotas and numerical preferences).

22. *Johnson*, 107 S. Ct. at 1446. See also *supra* note 13 for further discussion regarding the plan's goals.

23. The petitioner first filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). *Johnson*, 107 S. Ct. at 1449. The EEOC issued a right-to-sue letter and Johnson filed a complaint in federal court. Johnson v. Transp. Agency, 770 F.2d 752, 754 (9th Cir. 1984). Johnson's complaint charged that he was denied the promotion on the basis of sex in violation of Title VII. *Johnson*, 107 S. Ct. at 1448.

24. *Johnson*, 107 S. Ct. at 1448.

25. Joyce had been a County employee for nine years. *Johnson*, 107 S. Ct. at 1447. She had four years experience as a road maintenance worker and five years experience as an account clerk. *Id.* As a road maintenance worker, she periodically worked out of class as a road dispatcher. *Id.* Johnson had been an employee of the County for 12 years. His previous experience was as a road yard clerk for 10 years and as a road maintenance worker for 2 years. *Id.* at 1448. He worked as a supervisor and dispatcher before his employment with the County. *Id.* He also periodically worked out of class as a dispatcher during his employment as a road maintenance worker. *Id.*

26. *Id.* at 1448-49. The Agency conducted the interviewing process in two stages. *Id.* at 1448. During the first stage, a two-person board interviewed both Johnson and Joyce. *Id.* The board awarded Johnson a score of 75, while Joyce received a score of 73. *Id.* A score above 70 meant both applicants were certified as eligible for selection by the appointing authority. *Id.* A second interview followed, which was conducted by three Agency supervisors. Following this interview, the supervisors recommended Johnson for the position. *Id.* However, the Director of the Agency, James Graebner, determined that the position would go to Joyce. *Id.* Graebner testified that, in reaching his decision, he tried to look at the whole picture, including the applicant's test scores, qualifications, background and affirmative action matters. *Id.*

27. The Agency's interviewing process was not disputed by either party. Johnson, 770 F.2d at 754.

28. *See supra* note 5 (text of the particular provision of Title VII involved). The district court's judgment, findings of fact and conclusions of law are unpublished, but were included in the Appendix to the Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129).

29. Johnson v. Transp. Agency, 770 F.2d 752, 754 (9th Cir. 1984).

her sex.[30] The district court reviewed the examination results and departmental interviews and concluded that *but for* his sex, Johnson would have received the promotion and that *but for* her sex, Joyce would not have received the position.[31]

During the trial, the Agency defended its decision to promote Joyce on the basis of its affirmative action plan.[32] However, the district court found the Agency's Plan invalid because it did not satisfy the criteria set forth by the United States Supreme Court in *United Steelworkers of America v. Weber*: that it be temporary and remedial.[33] The court concluded that as a result, the Agency's decision "unnecessarily trammeled Johnson's interests"[34] and effectively created an "absolute bar to his promotion to the road dispatcher position."[35]

On appeal, the Ninth Circuit reversed the district court's decision.[36] The majority concluded that the Agency's plan was sufficiently temporary,[37] was remedial in its intention to break down entrenched patterns of discrimination,[38] and did not unnecessarily trammel the interests of other employees[39] or create a bar to their advancement.[40] Specifically, the court noted that under the Supreme Court's interpretation of Title VII in *Weber*, the statute did not preclude private employers from voluntarily adopting an affirmative action plan, the purpose of which was to abrogate the effects of past discriminatory practices.[41] The court acknowledged the Supreme Court's previous observance of Title VII's legislative history and historical context, and concluded that the district court had adopted too narrow a view of *Weber*.[42] The Court held the Plan was valid and

---

30. *Id.*

31. *Id.*

32. See *supra* notes 9-12 for a description of the Agency's Plan.

33. *Johnson*, 770 F.2d at 754-55 (citing United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979)). See also note 20 and accompanying text for a full discussion of the criteria announced in *Weber*.

34. *Johnson*, 770 F.2d at 775.

35. *Id.*

36. Johnson v. Transp. Agency, 770 F.2d 752, 759 (9th Cir. 1984). The decision of the Ninth Circuit was not unanimous. Judge Wallace wrote a separate opinion concurring in part and dissenting in part. *Id.* his opinion advocated that the case be vacated and remanded because the district court had not properly allocated the burden of proof between the parties. *Id.* at 759-60 (Wallace, J., concurring in part and dissenting in part).

37. *Id.* at 757 (majority opinion).

38. *Id.* at 758.

39. *Id.*

40. *Id.* at 759.

41. *Id.* at 755. The Court noted that although the Agency was a public employer, Johnson did not challenge the affirmative action plan on an equal protection claim of reverse discrimination. *Id.* at 754 n.1. For a more complete discussion of *Weber*, see *supra* note 20 and accompanying text.

42. *Johnson*, 770 F.2d at 755-56.

that the Agency's selection of Joyce was a lawful effort pursuant to the dictates of that Plan.[43]

In a six-to-three decision, the United States Supreme Court affirmed the appellate court and held that the Agency appropriately took Joyce's sex into consideration when it promoted her to the position of road dispatcher.[44] The Court first addressed the issue of whether the Agency violated Title VII by voluntarily adopting an affirmative action plan that sought to redress a statistical imbalance that reflected an underrepresentation of women in the job classification of Skilled Craft.[45] The Court concluded that because the statute did not completely preclude preferential hiring,[46] and because

---

43. *Id.* at 759. The court observed that affirmative action was necessary and lawful, within *Weber*'s guidelines, as a remedial measure to correct long-standing imbalances in the work place. *Id.*

44. *Johnson*, 107 S. Ct. at 1457. There was a conflict between the circuit courts at the time the Court granted certiorari in *Johnson*. Unlike the Ninth Circuit's decision in *Johnson*, the Seventh Circuit decided that a city employer could not adopt an affirmative action program for its police and fire departments based solely on a finding that a statistical disparity existed between the percentage of minorities in the community and the percentage of minorities in the department. Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984), *vacated and remanded*, 107 S. Ct. 1620 (1987).

45. *Johnson*, 107 S. Ct. at 1452. See *supra* note 14 for information regarding the statistical imbalance in the Skilled Craft classification. The Skilled Craft classification included those occupations where a worker's performance required special manual skill and a thorough and comprehensive knowledge acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Joint Appendix at 127, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129). The classification included the following positions: mechanics and repairmen; electricians; heavy equipment operators; stationary engineers; skilled machinery occupations; carpenters; compositors; and typesetters and kindred workers. *Id.*

The Court noted that because *Weber* guided the resolution of this issue, it was necessary to examine whether the decision to take Joyce's sex into consideration was prompted by concerns similarly faced by those of the employer in *Weber*. *Johnson*, 107 S. Ct. at 1452. The affirmative action plan in *Weber* was developed to eliminate a "manifest imbalance" in "traditionally segregated job categories." *Weber*, 443 U.S. at 195.

46. *See Johnson*, 107 S. Ct. at 1459 (Stevens, J., concurring) (logic of antidiscriminatory legislation requires judicial interpretations of Title VII to leave employers "breathing room"). This conclusion was itself based on a prior interpretation of Title VII's § 703(j) made in *Weber*. *Id.* at 1458-60. According to § 703(j) of Title VII:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1982).

By examining the language and legislative history of § 703(j), the *Weber* Court

Joyce's promotion was undertaken pursuant to the affirmative action plan's goal to rectify a significant underrepresentation of women in traditionally male job categories, the Agency's affirmative action plan was in accord with Title VII.[47] The Court then addressed the issue of whether the effect of the plan "unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement."[48] The Court concluded that the Agency's plan was a "moderate," "flexible" and gradual approach to integrate women into traditionally male-dominated positions and that it would not place an undue burden on men.[49]

---

concluded that Congress did not intend to prohibit voluntary efforts to accomplish Title VII's purpose of eradicating employment discrimination. *Weber*, 443 U.S. at 204-05. In concluding that the use of "require" in § 703(j) implied that "voluntary" race-conscious affirmative action was permitted, the *Weber* Court noted the reasons for § 703(j)'s development. *Id.* at 206. The legislative record, the *Weber* majority indicated, revealed that § 703(j) was created by Congress in response to criticism by Title VII opponents that the Civil Rights Act of 1964 would be interpreted to require employers to institute preferential employment practices. *Id.* at 205. The *Weber* Court indicated that the implication is that had Congress intended to preclude voluntary affirmative action programs, the legislature could have chosen to draft § 703(j) to provide that "Title VII would not require or permit racially preferential integration efforts." *Id.* Therefore, the *Weber* Court concluded that the inference is that Congress made a conscious decision to not draft § 703(j) in a way that would forbid voluntary efforts. *Id.* at 206. Relying on this previous interpretation, Justice Stevens, in his concurring opinion in *Johnson*, stated the legislative history of Title VII indicated that "Congress intended that traditional management prerogatives be left undisturbed to the greatest extent possible." *Johnson*, 107 S. Ct. at 1459 (Stevens, J., concurring). Thus, the Agency's decision to promote Joyce was not prohibited under Title VII because the statute was designed "to protect historically disadvantaged groups *against* discrimination," and not to thwart those efforts by the employer, intended to benefit disadvantaged persons, that are consistent with the purpose of eliminating the effects of employment discrimination. *Id.* at 1459-60 (emphasis in original). *See* Note, *Preferential Relief Under Title VII*, 65 VA. L. REV. 729, 771 n.224 (1979) (Title VII's conservative proponents "were far more concerned to avoid the intrusion into business autonomy that a rigid color-blind standard would entail"); *see also Weber*, 443 U.S. at 207-08 n.7 (quoting remarks of Rep. MacGregor, 110 CONG. REC. 15893 (1964)) (in enacting Title VII Congress was not legislating about "preferential treatment or quotas in employment" because Congress believed that "the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves").

47. *Johnson*, 107 S. Ct. at 1455. This satisfied *Weber's* first requirement.

48. *Id.*

49. *Id.* at 1455-57. *But see* Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1845 (1986) (striking down a voluntary affirmative action plan that included a layoff provision permitting the retention of less experienced minority teachers in favor of more senior white teachers in certain circumstances). The *Wygant* majority held that layoffs imposed too great of a burden on particular individuals in attempting to achieve racial equality. *Id.* at 1851. The Court also concluded that the burden was too intrusive and noted that less intrusive means, such as the creation of hiring goals, were available to facilitate the purpose for which the school board's plan was adopted. *Id.* at 1852. *Compare* Firefighters v. Stotts, 467 U.S. 561, 571, 574-76, 578-79 (1984) (layoff plan conflicted directly with the fire department's bona fide seniority system and imposed too great of a burden on innocent parties) *with Weber*, 443 U.S. at 208 (plan does not require the discharge of white workers and their replacement with new black hirees).

The majority opinion, written by Justice Brennan, initially noted that the plaintiff bore the burden of proving that the Agency's affirmative action plan was invalid.[50] The Court then announced that because the Agency justified its selection decision on the basis of its affirmative action plan, the Court's analysis in *Weber* controlled the ultimate determination of whether the Agency's Plan was lawful.[51] In *Weber*, the Court approved the use of racial quota systems in a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories."[52] The *Weber* Court found that consideration of race was consistent with Title VII's objective of "breaking down old patterns of racial segregation and hierarchy."[53] In *Weber*, the Court had substantially relied on the legislative history of Title VII of the Civil Rights Act of 1964 in reaching its conclusion that the statute did not forbid affirmative action plans.[54] Therefore, the *Johnson* Court reasoned that its prior interpretation of Title VII in *Weber* governed

---

50. *Johnson*, 107 S. Ct. at 1449. Justice Brennan, writing for the Court, stated that the Court did not see any reason to allocate Title VII burden of proof challenges differently from those present in constitutional challenges. *Id.* (citing *Wygant*, 106 S. Ct. at 1848). The Court, relying on McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), held that once a plaintiff establishes a *prima facie* case that the employer's decision included race or sex as a consideration, the burden shifts to the employer to articulate a nondiscriminatory basis for its decision. Once articulated, the plaintiff bears the burden of proving that the employer's justification is a pretext. *Johnson*, 107 S. Ct. at 1449. See also *infra* note 59 for the components of a *prima facie* case under Title VII.

51. *Johnson*, 107 S. Ct. at 1449.

52. *Id.* at 1450 (quoting *Weber*, 443 U.S. at 197).

53. *Id.* (quoting *Weber*, 443 U.S. at 208). In that context the Court stated:

> 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.

Id. at 1450 (quoting remarks of Sen. Humphrey, 110 CONG. REC. 6552 (1964)) *quoted in Weber*, 443 U.S. at 204. Justice Brennan's analysis in *Weber* focused on what he considered to be a conflict between the actual language of the Title VII and its overriding purpose. *See Weber*, 443 U.S. at 204-06; see also *infra* note 109 for a discussion of this conflict. By relying on *Weber*'s interpretation of Title VII, the *Johnson* Court rejected the dissent's argument that the obligations of a public employer under Title VII must be the same as those found in the Constitution. *Johnson*, 107 S. Ct. at 1449 n.6. The Petitioner in *Johnson* had not raised a constitutional issue in the lower court, nor was it addressed in the litigation below. *Id.* at 1446 n.2. Therefore, the *Johnson* majority noted that its decision was only with respect to the scope of Title VII. *Id.* If the constitutional issue had been involved, the Court noted that the public employer would have to have justified its actions under the Equal Protection Clause. *Id.*; *see Wygant*, 106 S. Ct. at 1846 ("[d]ecisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment"); Fullilove v. Klutznick, 448 U.S. 491 (1980) (preferences based on racial or ethnic criteria to receive a searching examination to make sure that do not conflict with constitutional guarantees).

54. *Weber*, 443 U.S. at 202-08. *See supra* note 46 (providing a discussion of the Court's interpretation of Title VII as construed in *Weber*).

the voluntary affirmative action program in *Johnson*.[55]

By declaring the *Weber* analysis controlling, the *Johnson* Court narrowed its inquiry to whether the Agency's affirmative action plan was prompted by "concerns similar to those of the employer in *Weber*."[56] The Court observed that prior cases had approved the use of statistical evidence in establishing when an imbalance in the employer's work force justified taking sex or race into account.[57] The Court rejected Justice O'Connor's concurring opinion in *Johnson* that the manifest imbalance should support a *prima facie* case against the employer.[58] In so doing, the Court recognized that the *prima facie* standard was inconsistent with *Weber*'s statistical imbalance standard.[59] The primary purpose of Title VII, the majority noted, was to serve as a "catalyst" for employers to eliminate discriminatory practices.[60]

---

55. *Johnson*, 107 S. Ct. at 1449-50. The Court also made note that its prior interpretation of Title VII in *Weber* had not received congressional criticism, nor had Congress sought to amend the statute to nullify *Weber*. *Id.* at 1450-51 n.7. By relying on *Weber*, the Court sidestepped the inquiry of whether the Skilled Craft job classification itself was a traditionally segregated job category.

56. *See id.* at 1471. Instead, the Court's initial inquiry was whether the manifest imbalance that reflected underrepresentation of women in traditionally segregated job categories justified using gender as a consideration in an employment decision. *Id.* at 1452. The Court's inquiry, therefore, focused on the *imbalance* and not on whether the employer had engaged in discriminatory practices to justify the adoption of an affirmative action plan. *Id.* at 1451.

57. *Id.* at 1452. The Court previously approved the use of statistical evidence in proving employment discrimination in International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 (1977). In *Teamsters*, statistical evidence comparing the percentage of minorities in the employer's work force with the percentage of minorities in the area labor market was used by the government to show a racial imbalance. *Id.* at 337-38. *See also Weber*, 443 U.S. at 199 (approval of a comparison between the number of blacks working at the plant with the proportion of blacks in the area work force to calculate an imbalance that would justify using race as a criteria for admission into an in-service training program). The Court noted, however, that where specialized skills are required, the appropriate comparison is between the racial composition of the employer's staff and the racial composition of qualified persons in the relevant labor market. *Johnson*, 107 S. Ct. at 1452; *see* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977) (statistical disparity between black teaching staff of 1.8% compared to 5.7% qualified black teachers in surrounding community established a prima facie case of discrimination); *see also* McGuire, *The Use of Statistics in Title VII Cases*, 30 LAB. L.J. 361 (1979) (discussing the use of statistical evidence in certain kinds of Title VII litigation involving illegal discrimination).

58. *Johnson*, 107 S. Ct. at 1452. Justice O'Connor proposed that the employer be required to provide evidence sufficient to establish a *prima facie* case of discrimination in order to justify that affirmative action was valid. *Id.* at 1462-63. The components of a *prima facie* case in an action under Title VII were outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In *McDonnell Douglas*, the Court stated the following factors constitute a *prima facie* case: (1) a showing that the employee belongs to a racial minority; (2) that this employee applied and was qualified for a position that the employer was seeking to fill; (3) that the proposed applicant was rejected; and (4) following rejection, the employer continued to solicit applications from persons who had the complainant's qualifications. *Id.* at 802.

59. *Johnson*, 107 S. Ct. at 1452.

60. *Id.* at 1453. The *Johnson* Court noted that a *prima facie* standard could

The Court recognized that the Agency's Plan sought to be such a catalyst[61] because the Plan acknowledged that women were mainly employed in traditional female jobs and accounted for a smaller percentage in other classifications than would be expected if traditional segregation had not occurred.[62] In addition, the Court noted that the Agency was in the process of developing short-term goals to provide a more realistic guide in determining when it was appropriate to consider sex in making employment decisions.[63] Because the Plan did not dictate mere blind hiring by statistics, the Court was able to conclude that the consideration of sex in Joyce's promotion satisfied *Weber*'s requirement that the decision "was undertaken to further an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories."[64]

The Court next considered whether the Agency Plan "trammeled the rights of male employees or created an absolute bar to their advancement."[65] The Court compared the Agency's Plan to the "Harvard Plan," which Justice Powell approved in *Bakke*,[66] and noted that the Harvard Plan considered race as one factor along with other criteria for admission.[67] The *Johnson* Court reasoned that because the Plan did not exclude any person from consideration, it resembled the Harvard Plan.[68] In addition, because every applicant's qualifications were weighed against each other, the Court

---

defeat this purpose because an employer would be less inclined to adopt a plan that, in order to be valid, would require the employer to compile evidence of past discrimination. *Id. See also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), where the Court stated that Congress intended Title VII to act as a spur or catalyst to lead "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Id.* at 418.

61. *Johnson*, 107 S. Ct. at 1453.

62. *Id.* at 1453; *see also* International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977) ("nondiscriminatory hiring practices 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 employees are hired").

63. *Johnson*, 107 S. Ct. at 1455. See *supra* note 16 and accompanying text for information regarding the short term goals.

64. *Johnson*, 107 S. Ct. at 1454-55. The Court specifically noted that if the Agency Plan had not directed that other factors be taken into consideration, it would have been construed as authorizing blind hiring that would render the plan invalid. *Id.*

65. *Id.* at 1455.

66. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316-19 (1978). In *Bakke*, Justice Powell noted that the Harvard Plan provided an admissions program which did not set target-quotas for specified groups but used race as a plus factor in addition to other admissions criteria. *Id.* at 317.

67. *Johnson*, 107 S. Ct. at 1455. The Court specifically noted that the Plan did not set aside a specific number of positions for women. *Id. But cf.* Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3068 (1986) (fixed number of promotions reserved for minorities); *Weber*, 443 U.S. at 198 (50% of positions held for blacks).

68. *Johnson*, 107 S. Ct. at 1455.

determined that no person had absolute entitlement to the position.[69] The Court therefore concluded that the denial of the job promotion did not frustrate any "legitimate firmly rooted expectation" on Johnson's behalf.[70]

In holding that the Agency Plan was fully consistent with Title VII as interpreted by *Weber*, the Court examined the language of the Plan and the lower court testimony and rejected the Petitioner's argument that the Plan was intended to maintain a balanced work force.[71] In reaching this conclusion, the Court noted that specific assurance that a program is not permanent may be necessary where the plan provides for a certain number of positions to be set aside.[72] Because the Agency Plan did not set aside any positions, the Court was able to conclude that it was a temporary measure to attain an Agency work force which did not reflect a gross underrepresentation of women.[73]

The Supreme Court in *Johnson* correctly held that a public employer can voluntarily implement an affirmative action plan that considers gender as one factor in making employment promotion decisions. This decision was correct for four reasons. First, the legislative history of Title VII and case precedent interpreting that statute establish that voluntary affirmative action programs are not forbidden. Second, the manifest imbalance in the Skilled Craft job classification justified the consideration of sex in the Agency's hiring goals because the imbalance created an inference of past discrimination. Third, when balancing the important societal interest affirmative ac-

---

69. *Id.* The Court pointed out that Johnson was one of seven applicants who had met the eligibility criteria for the position, any one of whom could have been appointed by the Agency Director. *Id.* The Court emphasized that although Johnson temporarily lost a future opportunity, he was not terminated and he retained his salary, seniority and eligibility for other promotions. *Id.* at 1455-56; *accord Weber*, 443 U.S. at 208 (plan did not create an absolute bar to the advancement of white employees because half of those trained would be white); Local 28, Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n, 106 S. Ct., 3019, 3052 (1986) (Court's order does not stand as absolute bar as "majority of new union members have been white"); *cf.* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (layoffs disrupt settled expectations); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (Court modified consent decree providing layoff protection for minority firefighters rejected).

70. *Johnson*, 107 S. Ct. at 1455.

71. *See Johnson*, 107 S. Ct. at 1456. The petitioner argued that the Plan had no discernable end. Brief for Appellant at 43, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129). The petitioner argued further that the Agency Director had testified that the Plan was a permanent part of the Agency's operating philosophy. *Id.* at 44.

72. *Johnson*, 107 S. Ct. at 1456; *see* Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3068 (1986) (Court approved consent decree's fixed period providing specified percentages of promotions to go to non-white firefighters); *Weber*, 443 U.S. at 199 (plan to remain in effect only until the minorities in the employer's work force equalled the percentage in the area work force).

73. *See Johnson*, 107 S. Ct. at 1456.

tion serves against the infringement suffered by Johnson, the Plan did not unnecessarily trammel his rights or create an absolute bar to his advancement. Finally, the evidence supported the finding that the Plan was temporary and not instituted to *maintain* a balanced work force, which would have imposed too great a burden on those employees not benefiting from the Plan.

Where the Court's opinion falls short, however, is in its failure to clarify what the term "traditionally segregated job categories" means. The majority also did not address how much of a statistical imbalance is sufficient to justify an affirmative action plan. Since the majority left these questions unanswered, future litigants will have the task of further defining the reach of the *Johnson* decision. Clearly, the *Johnson* decision sets forth a new standard for employers to follow in developing their affirmative action plans. The Court could have made a much stronger case for the Joyces of the future, however, if it had stated that affirmative action is necessary in order to overcome historical and pervasive discrimination experienced by women and minorities.

The Supreme Court's conclusion in *Johnson* that Title VII's legislative history supports the adoption of a voluntary affirmative action plan was based on a prior interpretation of Title VII reached in *Weber*.[74] The *Weber* Court based its approval of a voluntarily initiated preferential program on the legislature's intent in enacting Title VII.[75] As construed in *Weber*, Congress enacted Title VII to open doors of employment for blacks in those areas from which they had been traditionally excluded.[76] The *Weber* Court also observed that Congress recognized the need for legislation to create an atmosphere that would be "conducive to voluntary or local resolution of other forms of discrimination."[77]

---

74. *Id.* at 1449-50. In *Weber*, the majority approved the use of a voluntarily initiated preferential program designed to correct the complete lack of minorities in traditionally segregated job categories. *Weber*, 443 U.S. at 209. See *supra* note 46 and accompanying text for a discussion of the *Weber* Court's interpretation of Title VII.

75. *See Weber*, 443 U.S. at 204.

76. *Id.* at 203. In discussing the primary concern of Congress in passing the Civil Rights Act of 1964, Senator Humphrey offered the following important remarks:

> The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them. This requires both an end to the discrimination which now prevails and an upgrading of Negro occupational skills through education and training. Neither task can be given priority over the other. They are as interdependent as the chicken and the egg and must be attacked simultaneously. Negroes cannot be expected to train themselves for positions which they know will be denied to them because of their color. Nor can patterns of discrimination be effectively broken down until Negroes in sizeable numbers are available for the jobs to be filled.

110 CONG. REC. 6548 (1964).

77. *See Weber*, 443 U.S. at 204 (quoting H.R. Rep. No. 914, 88th Cong. 1st Sess., pt. 1, at 18 (1963), *reprinted in* 1964 U.S. CODE CONG. & ADMIN. NEWS. 2355, 2393).

The *Johnson* case marked the Court's first opportunity to address the lawfulness of a voluntary affirmative action plan based on gender as well as test the continued vitality of *Weber*.[78] The *Johnson* Court's reliance on the *Weber* analysis is appropriate because the two cases shared the same primary concern. This concern involved the circumstances under which affirmative action is lawful. The reasoning and conclusions in *Weber* are significant to the determination in *Johnson* because women, like minorities, have suffered similar historic and pervasive discrimination in the employment sphere.[79]

The *Johnson* decision represents the Court's first opportunity to address an affirmative action plan enacted on a truly voluntary basis. Although *Weber*'s "voluntary" plan was adopted pursuant to a collective bargaining agreement between Kaiser and the United Steelworkers of America, AFL-CIO (USWA), there has been some question whether the Kaiser training was voluntarily adopted at all. *See, e.g.*, Note, United Steelworkers of America v. Weber: *Title VII Revised*, 57 DEN. L.J. 649, 657 (1980). The district court judge in *Weber* emphasized that the primary motivation of the company—a contractor with the federal government—appears to have been satisfying the Office of Federal Contract Compliance Programs' (OFCCP) requirements and avoiding "vexatious litigation by minority employees." Weber v. Kaiser Aluminum and Chem. Corp., 415 F. Supp. 761, 765 (E.D. La. 1976). The federal contract compliance program under Executive Order No. 11246 requires employers that choose to contract with the federal government to have an affirmative action program in place. U.S. COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980'S: DISMANTLING THE PROCESS OF DISCRIMINATION 22-23 (1980) [hereinafter CIVIL RIGHTS]. Executive Order No. 11246 requires that

> [c]ontractors must undertake an analysis of their patterns of employment of minorities and women in all job categories, comparing their patterns of utilization of minorities and women with the proportion of minorities and women in the available and relevant labor pool, a determination that may vary with the kind of industry and the location of the facility or institution involved.

Id. at 23.

For a comprehensive discussion of the interrelationship between Title VII and Executive Order No. 11246, see Note, *Voluntary Affirmative Action After United Steelworkers of America v. Weber: Constructing a Peaceful Coexistence Between Title VII and Executive Order 11,246*, 27 UCLA L. REV. 1159 (1980).

78. Legal Times, May 25, 1987, at 13. Between *Weber* and *Johnson*, the Court had the occasion to rule on five other significant cases that addressed the legality of affirmative action plans in the work place. None of these rulings, however, involved a voluntarily instituted program. The cases can be summarized as follows: United States v. Paradise, 107 S. Ct. 1053 (1987) (courts may order employers on temporary basis to use strict racial quotas in promotions, as well as hiring, to cure "egregious" past discrimination against blacks); Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986) (broad discretion given to lower federal courts to approve decrees where employers settle discrimination suits by agreeing to preferential hiring or promotion of minority group members); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986) (lower court order approved requiring local union to meet minority membership quota by certain date in order to rectify "egregious" past discrimination by union); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (school board's layoff policy extending preferential treatment to minority-group teachers with less seniority was unconstitutional); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (federal judge powerless under Title VII to modify consent decree to allow for recently hired blacks to keep their jobs while whites with more seniority were being laid off).

79. *See* CIVIL RIGHTS, *supra* note 77, at 4-5. In its brief as *amicus curiae*, the NOW Legal Defense and Education Fund, National Organization for Women, Ameri-

The *Johnson* Court correctly adopted *Weber*'s conclusion that an employer seeking to implement an affirmative action plan should not be required to admit past discrimination. To require employers to admit prior discrimination would frustrate the very purpose of Title VII in redressing discrimination.[80] The Court's prior rulings consistently recognized the need for the employer's voluntary compliance.[81]

The Court was also correct in raising the statistical imbalances in the Agency's work force in order to demonstrate marked gender disparity in certain job classifications.[82] Statistical disparities have been used to demonstrate a pattern or practice of discrimination to justify adoption of a voluntary affirmative action program.[83] There-

---

can Civil Liberties Union, California Women Lawyers, Employment Law Center, Equal Rights Advocates, Federally Employed Women Legal and Education Fund, League of Women Voters of the United States, NAACP Legal Defense and Educational Fund, National Women's Law Center, Northwest Women's Law Center, Women Employed, Women's Equity Action League, Women's Law Project and Women's Legal Defense Fund [hereinafter NOW], argued that sex discrimination against women has operated historically to exclude women from equal employment opportunity. NOW brief at 43, Johnson v. Transp. Agency, 107 S. Ct. 1442 (1987) (No. 85-1129). In tracing the historical struggle women experienced in their attempt to enter the employment world, NOW argued that law and custom prevented women from pursuing occupations outside of their domestic roles. *Id.* at 45. Employment opportunities were additionally limited by "protective" legislation as women entered the work place in the 19th and early 20th centuries. *Id.* at 46 (citing Hill, *Protection of Women Workers and the Courts: A Legal Case History*, 5 FEMINIST STUDIES 247 (1979) and BABCOCK, FREEMAN, NORTON, AND ROSS, SEX DISCRIMINATION AND THE LAW 28 (1975)). Employment discrimination against women persists. *Id.* at 50. Recent statistics reveal that women remain clustered in occupations that are predominantly female, such as clerical workers, service workers and elementary and secondary school teachers. *Id.* (citing WOMEN'S BUREAU U.S. DEPARTMENT OF LABOR, TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS); *see also* Stengel, *Balancing Act*, TIME, Apr. 6, 1987, at 20 (noting that women account for 94.3% of nurses, 85.2% of elementary school teachers, and 68.6% of sales workers).

80. *See Firefighters*, 106 S. Ct. at 3072 ("Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII"); *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring) (courts and Congress have placed consistent emphasis on the value of voluntary efforts to further the objectives of the law); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) (cooperation and voluntary compliance are the preferred means for achieving the goal of equal employment opportunity).

Weber specifically rejected the idea of adopting affirmative action only to redress an employer's discrimination. *See Weber*, 443 U.S. at 209. This ruling in *Weber* was also bolstered by Justice Blackmun's concurring opinion in that case. *Id.* at 212-13 (Blackmun, J., concurring). Although Justice Blackmun questioned the soundness of the majority's interpretation, he concurred on the idea that private employers may voluntarily adopt an affirmative action program in order to redress what he called "arguable violations" of the statute without incurring liability to non-minorities. *Id.* at 212 (Blackmun, J., concurring).

81. *See supra* note 80 (discussing the Court's preference for voluntary compliance).

82. *See supra* note 11 for a statistical breakdown of various Agency classifications.

83. *See supra* note 57 for cases where the Court has, based upon statistical disparities, upheld inferences of prior discrimination by employers.

fore, once an employer has produced sufficient evidence from which it could be inferred that the employer discriminated, the Court has recognized that the employer need not present further evidence to prove actual discrimination in order to justify an affirmative action program.[84]

The Court reasoned that the Agency's Plan was lawful because it sought to remedy a "manifest imbalance" that was related to a "traditionally segregated job category."[85] However, the Court failed to define either of the characteristics of this standard. The Court's failure to offer any guidance or explanation of how a "traditionally segregated job" differs from a nontraditional one will probably prove to be a source of confusion in future litigation.[86] "Traditionally segregated" could relate to a historical context.[87] In that event, it is arguable that almost every job classification in America has been traditionally closed to women. On the other hand, it is uncertain what will happen in a new industry where, because of its new arrival, historical trends of gender preference have not been established. Under a reading of *Johnson,* the employer in a new industry may not have anything to rely on for assurance that his affirmative action program is lawful.

The Court also failed to provide guidance as to how much of a statistical imbalance is sufficient to justify an affirmative action plan.[88] In rejecting Justice O'Connor's *prima facie* case standard,[89]

---

84. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (employer need not point to contemporaneous findings of actual discrimination).

85. *See Johnson,* 107 S. Ct. at 1452.

86. Confusion as to what the phrase "traditionally segregated job" means was already evident in the separate dissent of Justice White who stated:

> 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 1465 (White, J., dissenting).

87. In an entirely different context, the Court concluded that the term "traditional" (in connection with the commerce clause and questions concerning whether the states were performing a "traditional governmental function") was unworkable as a standard. Garcia v. San Antonio Metro. Auth., 469 U.S. 528, 531 (1985). The Court indicated that a determination of which governmental functions were traditional or not depended on changing notions of history. *Id.* at 543-44. Specifically, the Court stated:

> Reliance on history as an organizing principle results in line drawing of the most arbitrary sort; the genesis of state governmental functions stretches over an historical continuum from before the Revolution to the present, and courts would have to decide by fiat precisely how longstanding a pattern of state involvement had to be for federal regulatory authority to be defeated.

Id. at 544.

88. *Johnson,* 107 S. Ct. at 1463 (O'Connor, J., concurring). *Johnson*'s facts also

the Court failed to suggest an alternative. In this regard, the *Johnson* majority stated that although a "manifest imbalance" may give rise to a *prima facie* case of discrimination, an employer is free to adopt a plan even where the disparity is not so striking, as long as there is a "manifest imbalance."[90] The Court's failure to clearly define "manifest imbalance" means that the ultimate scope of *Johnson* will have to await testing by the courts in a variety of factual situations before a workable standard is developed. The Court's vagueness in this area could prove to perpetuate claims of reverse discrimination. In those claims, the inquiry would focus on why a particular imbalance is not sufficiently "manifest" or striking to justify affirmative action.

The majority's overall failure to articulate how a "manifest imbalance" relating to a "traditionally segregated job category" will provide assurance that sex or race will be taken into account in a lawful manner was a crucial gap in the majority's reasoning. The Court's elusiveness, however, did not escape the acidulous dissent of Justice Scalia.[91] In a blistering attack on the Court's decision, Justice Scalia accused the majority of impermissibly utilizing societal discrimination as an affirmative action predicate.[92]

Although unstated, there is some evidence that the majority relied on societal discrimination in upholding the Agency's Plan. The Court's inability to clearly articulate the standard, coupled with the district court's finding that the Agency had not discriminated in the past or present against women or minorities,[93] creates the logical inference that the Court used societal discrimination to uphold the Agency's voluntary affirmative action plan against a Title VII challenge. The Court should have pronounced the standard to follow for deciding future affirmative action issues. The Court's ambivalence toward this point invites further confusion and amounts to another obscure rationalization for future cases to analyze.

In contrast to the preceding portion of the Court's opinion, the

---

do not help in this regard because as one feminist pointed out, "It certainly does not take a microscope to conclude that if not one of more than 200 jobs was held by a woman there was a pattern of discrimination." L.A. Times, Mar. 26, 1987, at 18, col. 1 (quoting feminist writer and activist Betty Friedan).

89. *See supra* note 58 for an explanation of the *prima facie* case approach.

90. *Johnson*, 107 S. Ct. at 1453 n.11.

91. Justice Scalia had publicly criticized affirmative action. *See* Legal Times, May 25, 1987, at 13, col. 4. (citing Scalia, *The Disease as Cure*, 1979 WASH. U.L.Q. 147).

92. *See Johnson*, 107 S. Ct. at 1471 (Scalia, J., dissenting). The Court previously rejected societal discrimination as a justification for implementing an affirmative action plan. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (societal discrimination alone is insufficient to justify a racial classification).

93. *Johnson*, 107 S. Ct. at 1466 (Scalia, J., dissenting). This finding was not disturbed by the Ninth Circuit. *Id.*

remaining analysis undertaken by the majority was decidedly forthright. The Court compared the Agency Plan's characteristics with *Weber*'s general guidelines[94] and concluded that it met *Weber*'s criteria.[95] The Agency Plan, the Court correctly concluded, did not create an absolute preference for women in any job classification.[96] All applicants would be considered for all jobs. Under *Weber*, a plan that does not unnecessarily trammel the interests of male employees, nor create an absolute bar to their advancement, is lawful.[97] The *Johnson* case involved a competition for one job promotion and the impact on the petitioner did not preclude his applying for another promotion. The petitioner remained employed, and his failure to receive the promotion in this one instance did not create an absolute bar to his advancement.

Under the final guideline of the *Weber* analysis, the Court addressed the permanency of the Plan.[98] The Plan, the Court noted, contained ten references to the Agency's desire to *attain* a balanced work force, and no references to *maintaining* one.[99] In this regard, the Court correctly concluded that a plan without a specific ending date does not necessarily mean that it is *intended* to last forever.[100] The Court emphasized that previous case precedent established that an express ending date may be necessary if the program had actually reserved positions according to fixed numbers.[101] The Agency plan did not set aside positions for women. It merely established goals and had built-in factors serving to gauge whether the goals were realistic.[102] This approach, the Court correctly concluded, served to minimize the effect of the Plan on other Agency employees, as well as to ensure that the Plan's goals were not intended, in reality, to *maintain* a balanced work force.[103]

The decision in *Johnson* represents a major victory for women and minorities in an ongoing battle involving affirmative action mea-

---

94. Although the *Weber* Court declined to define in detail the line of demarcation between permissible and impermissible affirmative action plans, the decision provided general guidelines for finding an affirmative action plan that "falls on the permissible side of the line." *Weber*, 443 U.S. at 208.

95. *Johnson*, 107 S. Ct. at 1455-57.

96. *Id.* at 1455.

97. *See Weber*, 443 U.S. at 208-09. The *Johnson* Court acknowledged that previous case precedent had distinguished between the type of burden a layoff situation imposed as compared to a promotion situation. *Johnson*, 107 S. Ct. at 1455; *see, e.g.*, Wygant v. Jackson Bd. of Educ. 476 U.S. 267, 283 (1986) (hiring goals impose diffuse burden on particular individuals).

98. *Johnson*, 107 S. Ct. at 1456.

99. *Id.*

100. *Id.*

101. *Id.* See *supra* note 72 and cases cited therein for authority supporting a requirement of an express ending date.

102. *See supra* note 16 for an explanation of the Plan's built-in factors.

103. *Johnson*, 107 S. Ct. at 1456.

sures that had previously left both sides claiming they had gained ground.[104] The ruling undoubtedly will have a significant impact on future affirmative action litigation because it greatly expands the Court's approval of voluntary affirmative action efforts in *Weber* by specifically rejecting any requirement that an employer show proof of prior discrimination in order to justify the institution of an affirmative action program under Title VII.[105] The Court's actions will also help to clarify what had become a grey area as to what constitutes a lawful affirmative action plan.[106] Until *Johnson*, employers walked a legal tightrope in implementing affirmative action plans.[107] *Johnson* will assist in reducing the risk that employers increasingly faced in adopting an affirmative action plan—being held liable in reverse discrimination suits by men or whites.[108]

The *Johnson* decision clearly reflects the Court's commitment to affirmative action efforts and the "spirit"[109] that moved this coun-

---

104. *See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986) (noting that in its recent treatment of affirmative action cases, the Supreme Court had not permitted either party a decisive victory, nor dealt a decisive defeat to either side). *Id.*

105. *See Johnson*, 107 S. Ct. at 1457 (Plan embodied contribution voluntary employer action can make to eliminate work place discrimination).

106. *See* Wall St. J., Mar. 26, 1987 at 3, col. 1 ("ruling to clarify and support current programs").

107. Justice Blackmun expressed this idea in his separate concurrence in *Weber*, noting the dilemmas faced by employers through a literal reading of Title VII of the Civil Rights Act:

> The broad prohibition against discrimination places the employer and the union on . . . a high tightrope without a net beneath them. If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

Weber, 443 U.S. at 209-10 (Blackmun, J., concurring) (quoting Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting)); *see also* Epstein, *Walking a Tightrope Without a Net: Voluntary Affirmative Action Plans After Weber*, 134 U. PA. L. REV. 457 (1986).

108. Employers and business groups applauded the affirmative action ruling because "it gives them the freedom . . . to voluntarily implement their own affirmative action plans, without fear of a reverse discrimination suit." N.Y. Times, Mar. 27, 1987, at A17, col. 5 (quoting Stephen Bokat, vice-president and general counsel of the Chamber of Commerce of the United States). The reverse discrimination controversy under Title VII began when a white worker, Weber, challenged the affirmative action program at issue in that case when he was passed over for a training program which admitted a black worker with less seniority. *Weber*, 443 U.S. at 199. For a discussion of *Weber*, see *supra* note 20 and accompanying text. In charges of reverse discrimination, the question is always whether employers may lawfully consider race, sex, religion, or national origin when making employment decisions. B. SCHLEI & P. GROSSMAN, *supra* note 5, at 775. *See also* Sullivan, *supra* note 104 (criticizing the Supreme Court's approval of affirmative action only as penance for those employers who have "sinned" in the past).

109. In *Weber*, Justice Brennan found that there was a conflict between what he saw as the overriding purpose of Title VII and the literal language of the statute—"a conflict between legislative spirit and literal terms." Note, *The Impact of United Steelworkers of America v. Weber on Affirmative Action Planning*, 7 OHIO N.U.L. REV. 987, 989 (1980). Justice Brennan concluded that a literal reading of the

try's lawmakers to enact one of the most controversial pieces of legislation of our time. Unfortunately, the Court failed to answer some important questions, which could diminish the decision's impact on future affirmative action litigation. Also, the decision would have provided stronger precedent for future affirmative action disputes involving women and minorities if the Court had justified its holding by expressly stating that societal discrimination constituted a form of discrimination capable of being remedied. Although the Court failed to take this step, the *Johnson* decision is itself a sign that the Court is committed to the concept of affirmative action and is willing to allow substantial flexibility in reviewing such plans.

Denise C. Hockley-Cann

---

statute would contradict its purpose, and, therefore, Title VII should be read against the background of its legislative history and historical background. *Weber*, 443 U.S. at 202-07. In *Johnson*, Justice Scalia's scathing dissent accused the *Weber* majority of rewriting the statute it purported to construe. *Johnson*, 107 S. Ct. at 1472 (Scalia, J., dissenting). Scalia remarked, "*Weber* disregarded the text of the statute, invoking instead its 'spirit.'" *Id.* (quoting *Weber*, 443 U.S. at 201)/(quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)/).