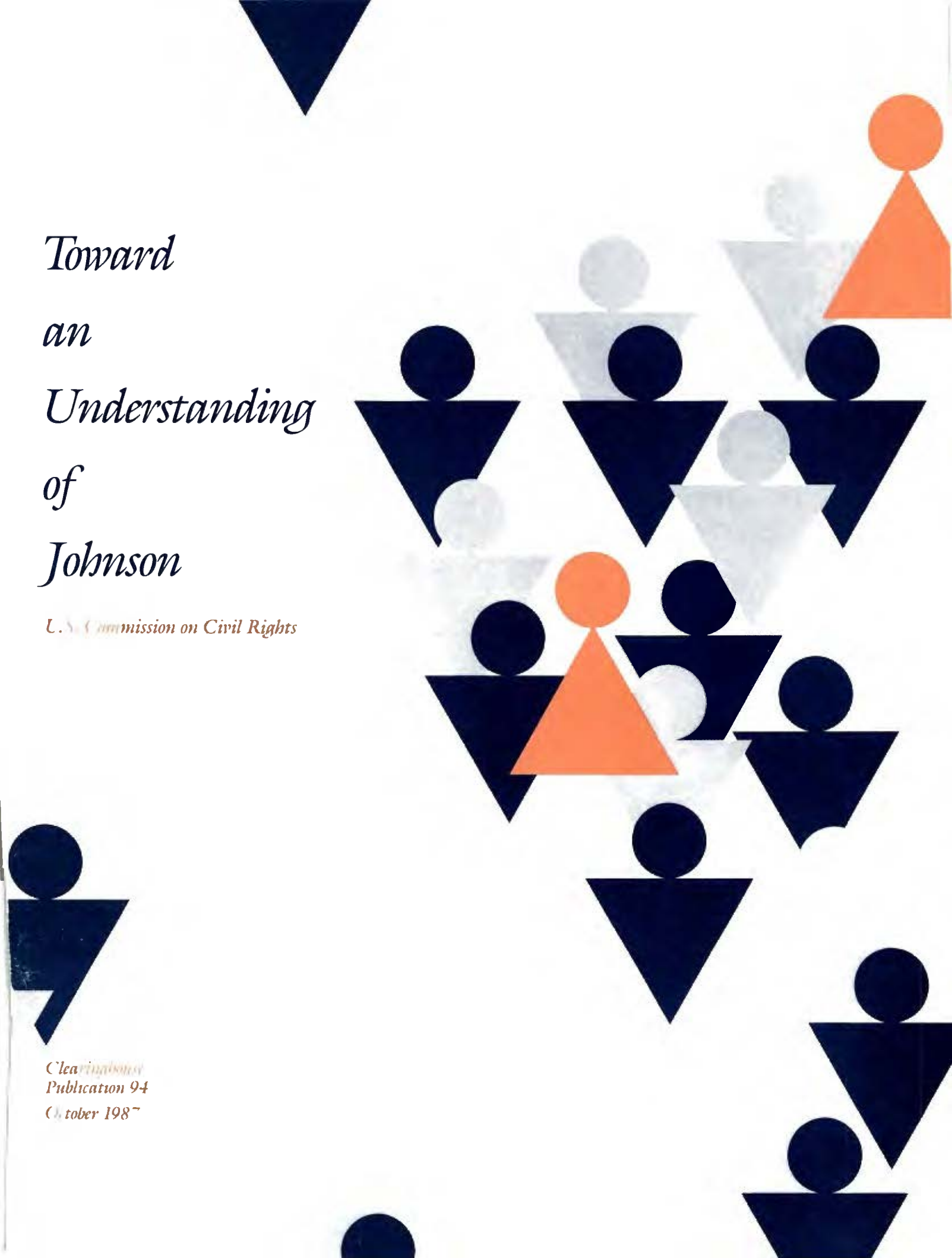
Toward an Understanding of Johnson

U.S. Commission on Civil Rights



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U.S. COMMISSION ON CIVIL RIGHTS

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- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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CONTENTS

Statement of Chairman Clarence M. Pendleton, Jr.

Preface

In April of this year, the Commissioners requested that staff provide them with a written analysis of the Supreme Court's opinion in *Johnson* v. *Transportation Agency, Santa Clara County, California.*[1] The Court there held that Title VII of the Civil Rights Act of 1964 does not prohibit a public agency from taking the sex of a female applicant into account in promoting that applicant. The request for the analysis followed defeat of a motion made by Commissioner Mary Frances Berry that the Commission go on record as looking with approval at the *Johnson* decision.[2]

The staff provided the analysis to the Commissioners for discussion at their May meeting. At the close of that discussion, the Commissioners voted five to three against a motion to accept the analysis. Commissioners Berry, Ramirez, Guess, Destro, and Buckley voted against the analysis; and Vice Chairman Friedman, Commissioner Allen, and I voted in support of it. The Commissioners now write separate statements setting forth their reasons for supporting or opposing *Johnson.* Although I fully support Commissioner Allen's statement, I write separately as well to highlight some additional concerns.

The analysis provided to the Commissioners at their request was superbly done and convincingly defended against the objections voiced by some of the Commissioners who voted against it. I, therefore, adopt it as part of my statement. No one may question my respect for the Supreme Court as an institution. But when the Court errs as it did in *Johnson,* the oath that I took as Chairman to uphold the Constitution, and the duties that accompany responsible citizenship, require that I speak my mind. I will, then, present the analysis of *Johnson,* which I relied upon in forming my view of that decision, before turning to a discussion of the decision in broader terms.

Introduction

In *Johnson* v. *Transportation Agency, Santa Clara County, California,* the United States Supreme Court affirmed a Ninth Circuit Court of Appeals ruling[3] that Title VII of the 1964 Civil Rights Act[4] does not prohibit affirmative action plans voluntarily adopted by a public employer. Specifically, the Court upheld a plan that authorized consideration of the sex of qualified applicants for openings in traditionally segregated job categories. In so ruling, *Johnson* approved Santa Clara County's decision to promote Diane Joyce, a qualified female applicant, to the position of road dispatcher over Paul Johnson, a better qualified male applicant.

[1] 107 S. Ct. 1442 (1987).

[2] Commission meeting transcript, Apr. 16, 1987, p. 10. The motion was defeated, at least in part, to give the Commissioners additional time to formulate their views on the decision.

[3] Johnson v. Transp. Agcy., Santa Clara County, Cal., 770 F.2d 752 (9th Cir. 1985).

[4] 42 U.S.C. §2000e *et seq.* (1982).

The Court found controlling its 1979 opinion in *United Steelworkers of America* v. *Weber*,[5] a case that upheld—on Title VII grounds—a private employer's voluntary efforts to eliminate manifest racial imbalances in traditionally segregated job categories. *Weber* is controversial for its holding that Title VII's prohibition of discrimination in employment does not necessarily extend to a private employer's out-of-turn race-conscious promotions.[6]

The fact that, unlike *Weber*, a public employer—subject to constitutional strictures—was involved was considered irrelevant by the *Johnson* Court. Rather, according to the majority, since the constitutional issue was not previously "raised or addressed," the only issue before the Court was "the prohibitory scope of Title VII."[7] By viewing as distinct the constitutional and statutory issues, the Court recognized that Title VII might countenance conduct otherwise prohibited by the Constitution.[8] The Court, therefore, did not consider analytically significant its 1986 decision in *Wygant* v. *Jackson Board of Education*,[9] a case that set forth constitutional criteria for evaluating affirmative action plans undertaken by public actors.

Johnson also considered irrelevant the fact that the affirmative action plan in *Weber* was premised on a "manifest imbalance" sufficient to constitute judicial notice of past discrimination.[10] In contrast, the county's affirmative action plan was primarily premised on statistical disparities.[11] The trial court, moreover, found that discrimination played no part in the creation or maintenance of these disparities.[12]

By extending *Weber* to public employers and finding statistical imbalance alone a satisfactory predicate for voluntary affirmative action, *Johnson* provides employers with great latitude to craft affirmative action plans. Indeed, Justice Stevens' concurring opinion went so far as to characterize *Johnson* as approving preferences for minorities "for any reason that might seem sensible from a business or social point of view."[13]

This analysis is divided into two sections. The first describes Justice Brennan's majority opinion (joined by Justices Powell, Blackmun, Marshall, and Stevens), Justice O'Connor's concurrence in the result, and Justice Scalia's dissent (joined by Justice White and Chief Justice Rehnquist). The second section evaluates the majority opinion, arguing that the Court's reasoning is incorrect on three counts. First, Title VII—when applied to public actors—must be interpreted in a manner consistent with the Constitution. Second, because discrimination was not found to have been the cause of the statistical disparities between men and women in the road dispatcher and other skilled craft positions, *Johnson* improperly extended the *Weber* Court's requirement that voluntary affirmative action plans remedy a "manifest imbalance" in traditionally segregated job categories caused by past discrimination. Third, like *Weber*, *Johnson* is improperly grounded in a reading of Title VII that misconstrues congressional efforts to eradicate all discrimination in employment as a license for certain types of "benign" discrimination.

I. Case Summary

Background

In 1978 an affirmative action plan for hiring and promoting minorities and women was voluntarily adopted by the Santa Clara Transportation Agency. The plan was designed both to "remedy the effects of past practices" and "to permit attainment of an equitable representation of minorities, women, and handicapped persons."[14] Although not specifying numerically based hiring practices, its long term goal was to "attain a work force whose composition reflected the proportion of minorities and women in the area labor force."[15] Since women constituted 36.4 percent of the area labor force,[16] the plan then would remain in force until 36.4 percent of each job category was, at one time, filled by women. Specifically, the plan was designed to achieve a "statistical-

[5] 443 U.S. 193 (1979).

[6] *See, e.g.*, Kitch, *The Return of Color-Consciousness to the Constitution*, 1979 Sup. Ct. Rev. 1; Belton, *Discrimination Competing Theories of Equality and Weber*, 59 N.C. L. Rev. 531 (1981); R. Dworkin, *How to Read the Civil Rights Act*, 37, N.Y. Rev. of Books, Dec. 20, 1979.

[7] 107 S. Ct. at 1446 n.2.

[8] *See id.* at 1449–50 n.6.

[9] 106 S. Ct. 1842 (1986).

[10] 443 U.S. at 198 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.")

[11] 107 S. Ct. at 1446–47.

[12] *See id.* at 1468 (Scalia, dissenting).

[13] *Id.* at 1459 (Stevens, concurring).

[14] *Id.* at 1446.

[15] *Id.* at 1447.

[16] *Id.* at 1446.

ly measurable yearly improvement in hiring, training and promotion of minorities and women. . . ."[17] In attaining this goal, the plan authorized employers to take into account the sex or race of a qualified applicant in hiring and promotion decisions.

The agency, pursuant to this plan, promoted Diane Joyce over Paul Johnson to a road dispatcher position. Joyce, with 18 years of experience with the county, was ranked fourth by an interviewing board.[18] Johnson, with 17 years of earlier road dispatcher experience and 13 additional years of experience with the county, was ranked second by the board.[19] Johnson also was the first choice of the road operations division director, the individual normally responsible for such promotion decisions.[20]

Indeed, from September 1979 until June 1980, Johnson was assigned to work as interim dispatcher.[21] The director of the agency, however, elected to hire Joyce after county officials told his office that the Joyce promotion represented an opportunity for the agency to accomplish its objectives under the affirmative action plan.[22]

Johnson then sued the agency for violating Title VII nondiscrimination in employment protections. Although the agency is a public employer and thus subject to constitutional strictures,[23] Johnson did not challenge the plan on constitutional grounds. Nevertheless, the United States District Court for the Northern District of California ruled that, under Title VII, the Joyce promotion was illegal. Crucial to this ruling was the district court's holding that Joyce's gender was the determining factor in her selection for the position.[24]

In reversing the district court, the Ninth Circuit Court of Appeals did not challenge this conclusion. Instead, it held that, under *United Steelworkers of America* v. *Weber,* such group-conscious hiring decisions are enforceable.[25]

In *Weber* the Supreme Court approved a collective bargaining agreement guaranteeing one-black for one-white selections into an on-the-job training program to fill skilled craft openings. This arrangement was to remain in effect until the percentage of black skilled craft workers at Kaiser's Gramercy, Louisiana, plant approximated the percentage of blacks in the local work force. Brian Weber, a white worker whose admission to the program was delayed under the agreement, challenged the program as violating Title VII.

In approving this arrangement, the *Weber* Court ruled that a literal interpretation of Title VII was inappropriate.[26] Section 703(a) makes it unlawful to discriminate against any individual because of race, sex, and other specified criteria;[27] section 703(d) prohibits discrimination in selecting apprentices for training programs.[28] Contending that a narrow reading of these provisions would "'bring about an end completely at variance with the purpose of the statute,'"[29] the Court validated the Kaiser plan because it advanced "the goals of the Civil Rights Act,"[30] namely, "the integration of blacks into the mainstream of American society."[31]

In speaking of integration, however, *Weber* recognized that Title VII would only countenance affirmative action plans that "abolish traditional patterns of racial segregation and hierarchy."[32] At the time of the agreement, less than 2 percent of Kaiser's skilled craft workers were black, compared to a

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[17] *Id.* at 1447.

[18] *Id.* at 1448.

[19] *Id. See also id.* at 1468 (Scalia, dissenting).

[20] *Id.* (Scalia, dissenting).

[21] *Id.* (Scalia, dissenting). Moreover, in 1974 Johnson had applied for a road dispatcher position, coming in second. *Id.*

[22] *Id.* at 1448. Specifically, the county's affirmative action office contacted the agency's affirmative action coordinator, who in turn recommended to the director of the agency that Joyce be promoted. *Id.*

[23] *See id.* at 1446 n.2.

[24] *See id.* at 1468 (Scalia, dissenting).

[25] 770 F.2d at 753.

[26] For the Court, "'a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of the makers.'" 443 U.S. at 201 (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

[27] 42 U.S.C. §2000e-2(a) (1982). This statutory provision provides:

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

[28] 42 U.S.C. §2000e-2(d) (1982).

[29] 443 U.S. 202 *(quoting* United States v. Public Utilities Comm'n, 345 U.S. 295, 315 (1952)).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 204.

work force that was 39 percent black. This disparity proved to be a key element in *Weber*;[33] although there was no showing that discrimination caused this imbalance, the Court emphasized that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."[34] Indeed, the impetus behind the Kaiser plan was the company's fear that—if it did not adopt an affirmative action plan—black employees would bring suit under Title VII.[35]

Although the *Weber* Court emphasized that the Kaiser plan addressed purposeful discrimination in the crafts occupations, the Court did not require that the Kaiser plan respond to discrimination by Kaiser itself.[36] In this way, *Weber* can be distinguished from Supreme Court standards governing the constitutionality of affirmative action plans undertaken by public employers. As the Supreme Court ruled in *Wygant* v. *Jackson Board of Education,* group-conscious hiring and promotion plans must be "narrowly tailored" to address perceived actual discrimination by the public employer, not societal discrimination.[37]

The *Weber* Court, moreover, "emphasized" the "narrowness" of its holding.[38] The Court stressed that its ruling was limited to: (a) "voluntary," (b) "private" affirmative action undertaken to address (c) "manifest racial imbalances in traditionally segregated job categories" that (d) did not "unnecessarily trammel the interests of white employees."[39]

Since Santa Clara County is a public employer and since its affirmative action plan was principally based on statistical imbalances not necessarily caused by discrimination, the *Johnson* case presented the Supreme Court with two significant issues previously unaddressed by the Court. First, the Court would have to determine whether, in the case of public employers, Title VII incorporates constitutional standards set forth in *Wygant* or statutory criteria specified in *Weber.* Second, if the Court used *Weber* criteria rather than constitutional standards, it would have to determine whether a statistical disparity could satisfy the "manifest imbalance" standard of *Weber.*

Justice Brennan's Majority Opinion

The *Johnson* Court, in upholding the Santa Clara plan, concluded that *Weber* criteria should be used and that affirmative action plans based on statistical disparities satisfied these criteria.

Noting that "[n]o constitutional issue was either raised or addressed in the litigation below," the *Johnson* Court concluded that, like *Weber,* the only issue before it was "the prohibitory scope of Title VII."[40] In reaching this conclusion, the majority rejected the proposition that "the obligations of a public employer under Title VII must be identical to its obligations under the Constitution."[41] For the majority, since Title VII of the 1964 act was "'enacted pursuant to the Commerce power to regulate purely private decisionmaking,'"[42] an interpretation of the statute should not incorporate constitutional standards. The fact that the 1972 amendments to Title VII—extending Title VII to public employers—were grounded in the 14th amendment was not mentioned in *Johnson.*[43] Consequently, under *Johnson* a public employer may voluntarily adopt constitutionally infirm affirmative action procedures without violating Title VII.

In concluding that the *Weber* criteria were applicable, the *Johnson* Court found it unnecessary to reconsider its decision in *Weber.*[44] Claiming that when Congress is displeased with a judicial interpretation it amends the statute, the majority simply noted that "Congress has not amended the statute to reject our construction [in *Weber*], nor have any such amendments ever been proposed, and we

[33] *Id.* at 197–99.
[34] *Id.* at 198 n.1.
[35] *Id.* at 209 n.9.
[36] *See id.*
[37] 106 S. Ct. at 1856.
[38] 443 U.S. at 200.
[39] *Id.* at 197, 200, 208–09.
[40] 107 S. Ct. at 1446 n.2.
[41] *Id.* at 1449 n.6.
[42] *Id. (quoting* Weber, 443 U.S. at 206 n.6).
[43] *See* Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, p. 1173 (Comm. Print 1972).

[44] Justice Stevens wrote separately to emphasize his understanding of the Court's opinion in *Weber,* namely, that there is "no reason why the employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII." 107 S. Ct. at 1460 (Stevens, concurring). This understanding was crucial to Justice Stevens, for it was also his view that "[*Weber* is] an authoritative construction of [Title VII] that is at odds with. . .the actual intent of the authors of the legislation." *Id.* at 1459 (Stevens, concurring). Consequently, were it not for the *Weber* Court's misconstruction of Title VII, Johnson "would unquestionably prevail in this case." *Id.* at 1458 (Stevens, concurring).

therefore may assume that our interpretation was correct."[45] The *Johnson* Court then turned to what it considered the two decisive factual issues raised by the case, namely, the existence of a "manifest imbalance" in traditionally segregated job categories and the effect of the plan on innocent whites.

Pointing to "*Weber*'s focus on statistical imbalance,"[46] the majority concluded that "[a] manifest imbalance need not be such that it would support a prima facie case [of purposeful discrimination] against the employer. . .[for an affirmative action plan need only require] that sex or race be taken into account for the purpose of *remedying* [*statistical*] *underrepresentation.*"[47] Since none of the 238 skilled craft positions was filled by a woman prior to the plan's adoption, the *Johnson* majority concluded that the plan appropriately responded to a severe underrepresentation of women.

With this issue resolved, the *Johnson* majority considered the question whether the Santa Clara plan "unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement."[48] The Court first concluded that Johnson had "no absolute entitlement to the road dispatcher position"[49] since he was but one of seven qualified applicants. The majority also found significant that the plan—rather than establishing hiring quotas—"merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants."[50] The Court, moreover, found "unsurprising that the Plan contains no explicit end date,"[51] noting that affirmative action would terminate once the agency "attain[ed]"[52] its objective of proportional representation. Based on these findings, the Court held that the plan was not unduly burdensome to nonminority interests.

Characterizing the agency plan as a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's workforce," the Court concluded that the plan satisfied the *Weber* criteria and was therefore "fully consistent with Title VII."[53]

Justice O'Connor's Concurrence

Concluding that the majority ignored the "limitations imposed by the Constitution and by the provisions of Title VII"[54] and instead "has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers,"[55] Justice O'Connor wrote separately. In her view the facts of *Weber, Wygant* v. *Jackson Board of Education,* and *Johnson* all supported the conclusion that affirmative action is permitted "only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of the discrimination."[56]

Noting that the discrimination which occurred at entry into the craft union was the "manifest imbalance" referred to in *Weber,* Justice O'Connor claimed that this *Weber* requirement ensured that "sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination."[57] Justice O'Connor similarly argued that the Constitution limits public affirmative action to remedying the effects of perceived discrimination committed by a public employer, emphasizing *Wygant*'s conclusion that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[58] Justice O'Connor then claimed that the Santa Clara County plan conformed to *Wygant* and *Weber.* Viewing the long range goal of proportional representation as "a statement of aspiration wholly without operational significance,"[59] she characterized the agency's consideration of Joyce's sex as "remedying past apparent discrimination."[60] Crucial to this determination was Justice O'Connor's apparent rejection of the district court's determination that neither the county nor the agency was guilty of discrimination against women. In support of this conclusion, Justice O'Connor noted that at the time

[45] *Id.* at 1450, 1451 n.7.
[46] *Id.* at 1452.
[47] *Id.* (emphasis supplied).
[48] *Id.* at 1455.
[49] *Id.*
[50] *Id.* The majority argued that an affirmative action plan would be illegal if it "failed to take distinctions in qualifications into account in providing guidance for actual employment decisions." *Id.* at 1454.
[51] *Id.* at 1456.
[52] *Id.* For the majority, had the plan specified a definite target date, it might have authorized—in contravention of Title VII—group-conscious blind hiring. *Id.*
[53] *Id.* at 1457.
[54] *Id.* at 1461 (O'Connor, concurring).
[55] *Id.* (O'Connor, concurring).
[56] *Id.* (O'Connor, concurring).
[57] *Id.* at 1462 (O'Connor, concurring).
[58] *Id.* (O'Connor, concurring).
[59] *Id.* at 1464 (O'Connor, concurring).
[60] *Id.* (O'Connor, concurring).

of the plan's adoption, no woman filled any of the agency's 238 skilled craft positions.[61]

Justice Scalia's Dissent

The dissent launched two principal attacks against the majority opinion. First, the dissent argued that interpretations of Title VII cannot ignore constitutional strictures, particularly when a public employer is involved. Second, the dissent advocated the reversal of *Weber*.

In arguing that Title VII incorporates constitutional norms, the dissent made the commonsense observation that "it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution."[62] The dissent next disputed Justice O'Connor's suggestion that the Santa Clara plan conformed with constitutional criteria set forth in *Wygant*. Noting both the district court's finding of no discrimination and the agency's emphasis on social problems in its list of factors hindering goal attainment,[63] the dissent concluded that the plan—rather than remedy perceived discrimination—sought only to achieve the agency's platonic ideal of a work force.[64]

The dissent also contended that *Weber* should either be limited to private actions or overruled altogether. Pointing to *Weber*'s emphasis on the sanctity of private employment decisions,[65] the dissent claimed that *Weber* should not be extended to public sector employment. The dissent, moreover, reiterated its view that public actors are obligated to follow constitutional norms.[66] The dissent next advocated that *Weber* should be overruled as patently inconsistent with the clear "commands of the statute," pointing to provisions of Title VII that appear to prohibit all discrimination in employment.[67] With respect to the majority's argument that *Weber* was conclusive because Congress failed to overturn the decision, the dissent claimed that this assertion was based on the "patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant."[68]

The dissent concluded its opinion by arguing that the majority's approach was inequitable:

> It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers. . .for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases. . . . In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.[69]

II. Analysis

Johnson is wrong because it extends *Weber* well beyond its limited moorings. First, since Santa Clara is a public employer, it is inexplicable that constitutional requirements played no part in the Court's Title VII analysis of the county plan. Second, county efforts to eradicate statistical underrepresentation are impermissible under both *Wygant*'s constitutional requirements and *Weber*'s statutory criteria. *Johnson*, moreover, falters because it misinterprets Title VII's universal demand for nondiscrimination in employment. In direct contradiction of *Johnson*, Congress intended that Title VII prohibit all discrimination in employment, including so-called "benign" discrimination.[70] Each of these concerns will be considered in turn.

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[61] *Id.* at 1463 (O'Connor, concurring).

[62] *Id.* at 1469 (Scalia, dissenting).

[63] *Id.* at 1468–69 (Scalia, dissenting). This list of factors specified that women lacked appropriate training, were not well suited for jobs involving heavy labor, and were disinterested in traditionally segregated job categories. *See id.* at 1467 (Scalia, dissenting).

[64] *Id.* (Scalia, dissenting).

[65] *Id.* at 1471 (Scalia, dissenting).

[66] *Id.* at 1472 (Scalia, dissenting).

[67] *Id.* at 1474 (Scalia, dissenting).

[68] *Id.* at 1472–73 (Scalia, dissenting).

[69] *Id.* at 1475–76 (Scalia, dissenting).

[70] Remarkably, six of the Justices have admitted that the 1964 Congress intended that Title VII prohibitions extend to "benign" discrimination. *See id.* at 1466 (Scalia, dissenting) (expressing the opinions of Rehnquist, Scalia, and White that *Johnson* converts Title VII "from a guarantee that race or sex will *not* be the basis for employment discrimination, to a guarantee that it often *will*); *id.* at 1461 (O'Connor, concurring) ("consistent with the congressional intent to provide some measure of protection to the interest of the employer's nonminority employees, the employer must have a firm basis for believing that remedial action was required"); *id.* at 1458 (Stevens, concurring) ("[*Weber* misinterpreted Title VII, for] Congress intended 'to eliminate all practices which operate to disadvantage the employment opportunities of any group'"); Steelworkers v. Weber, 443 U.S. 193, 213 (1979) (Blackmun, concurring) ("the Congress that passed Title VII

Relationship of Title VII to the U.S. Constitution

The *Johnson* Court claimed that "the prohibitory scope of Title VII" as applied to public employers was defined by *Weber*. In support of this conclusion, the Court simply noted that Paul Johnson failed to raise constitutional objections to the county plan. This is nonsense. *Weber* recognizes that public and private employers are subject to distinct Title VII obligations. Furthermore, amendments extending Title VII to public employers were grounded in the 14th amendment and, therefore, must conform to the mandates of that amendment.

In *Weber* the Court on at least 11 different occasions mentioned that its decision was limited to private affirmative action.[71] *Weber* thought this important for two reasons. First, it perceived that Congress wanted to ensure beneficial flexibility in private employment decisions.[72] Second, *Weber* recognized that public actors are subject to 14th amendment demands.[73] This recognition did not merely mean that public employers' actions are subject to separate constitutional attack; instead, by suggesting that its explication of Title VII extends only to private employers, *Weber* acknowledged that public employers are subject to more stringent Title VII review.

Aside from misreading *Weber*, the *Johnson* majority cannot answer Justice Scalia's claim that it "is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution."[74] This commonsense proposition, moreover, is supported by the legislative history of the 1972 amendment extending Title VII to State and local government. As stated by amendment sponsor Senator Jacob Javits:

> [I]t is very important, as we are about to vote on this amendment, that we recognize that of all the provisions in this bill, this has the most solemn congressional sanction, because it is based not on the commerce clause,. . . but is based on the 14th amendment. This is a paramount right which is created for all Americans.[75]

The majority, therefore, is incorrect when it argues that Title VII and constitutional standards are distinct because Title VII "'was enacted [in 1964] pursuant to the commerce power. . . .'"[76]

Statistical Imbalance as a Predicate for Affirmative Action

Johnson's reliance on statistics deviates substantially from both *Weber* and *Wygant*. Although both of those decisions emphasized that a nexus must exist between discriminatory conduct and an affirmative action plan, *Johnson* validates an affirmative action plan premised solely on statistical imbalance and whose aspiration is to attain numerical proportionality.

The *Johnson* Court's claim that, like *Weber*, the plan responds to a "'manifest imbalance... .[in] traditionally segregated job categories'"[77] is unconvincing. *Weber* concerned a "manifest imbalance" in the crafts occupations, which had engaged in repeated egregious discrimination against blacks.[78] Indeed, in his concurring opinion, Justice Blackmun—pointing to sources cited in the majority opinion—claimed that *Weber* only concerned job categories in which "a societal history of purposeful exclusion of blacks [or other minorities] from the job category, result[ed] in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category."[79] The Kaiser plan, therefore, responded to known persistent discrimination in a job category used by Kaiser.

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probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike").

[71] *See* Williams v. City of New Orleans, 729 F.2d 1554, 1565 (5th Cir. 1984) (en banc) (discussing *Weber.)*

[72] *See* 443 U.S. at 206–07.

[73] *See* 443 U.S. at 200.

[74] 107 S. Ct. at 1469 (Scalia, dissenting) *(quoting Weber,* 443 U.S. at 206 n.6.

[75] Subcomm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92nd Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, p. 1173 (Comm. Print 1972).

[76] 107 S. Ct. at 1449, 1450 n.6 *(quoting Weber,* 443 U.S. at 206 n.6.)

[77] *Id.* at 1452 *(quoting Weber,* 443 U.S. at 197).

[78] The *Johnson* majority improperly downplays the significance of this difference. Arguing that "[a]pplication of the 'prima facie' standard in Title VII cases [to voluntary affirmative action] would be inconsistent with *Weber's* focus on statistical imbalance," *id.* at 1452, the majority claims that: "Had [*Weber*]. . .been concerned with past discrimination. . ., it would have focused on discrimination in hiring skilled, not unskilled, workers." *Id.* at 1452 n.10. This claim is misleading. In understanding whether Kaiser excluded unskilled blacks from participating in its training program, an examination of black representation in the area labor force would be far more appropriate than black representation in only the skilled labor force. Consequently, gross disparities between skilled black workers and black representation in the labor force support the view that the Kaiser plan was fundamentally remedial in character. See 443 U.S. at 209–12 (Blackmun, concurring). *See also* 107 S. Ct. at 1461–62 (O'Connor, concurring).

[79] 443 U.S. at 212 (Blackmun, concurring).

Johnson cannot be squared with these facts. No evidence was offered to refute the district court's conclusion that the county had not discriminated against women or other minorities. In fact, the majority recognized that the underrepresentation of women was caused, in part, by factors unrelated to discrimination, namely, "that some jobs involved heavy labor. . .and the limited number of minorities and women qualified for positions requiring specialized training and experience."[80]

Johnson also cannot be squared with *Wygant,* where the Court held that voluntary affirmative action plans must address perceived actual discrimination by a public employer. The county, if it was responding to discrimination at all, was responding to societal discrimination.[81] In light of the county's consideration of factors unrelated to discrimination, it appears that a principal purpose of the plan was to advance the county's notion of social good.

Title VII and Nondiscrimination

Johnson, like *Weber,* is premised on the view that Title VII does not apply equally to minorities and nonminorities. By permitting voluntary efforts to attack minority underrepresentation without evidence of culpable discriminatory conduct, both cases allow public and private employers to grant preferences to blacks, women, and other minorities at the expense of innocent whites. In *Weber,* in order for a private employer to engage in such "benign" discrimination against whites, underrepresentation needed to be linked to "traditional patterns of racial segregation and hierarchy."[82] In *Johnson,* mere underrepresentation appears an adequate basis for such "benign" discrimination.

An employer, therefore, need not respond to imbalance caused by its own perceived misconduct. According to the Court, requiring that an employer be subject to possible liability—although apparently mandated by the language of Title VII[83] —would undercut the principal statutory aim of voluntary compliance. As the *Johnson* majority put it:

> A corporation concerned with maximizing return on investment, for instance, is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used to subject it to a credible Title VII suit.[84]

This reasoning is incorrect. As this Commission said in its July 1984 *Firefighters* v. *Stotts* statement: "[T]he legislative history of the 1964 Civil Rights Act is a reaffirmation of the principle that race and gender are not the proper bases to reward and penalize any person."[85] Had *Johnson* conformed with this principle of nondiscrimination for all, it would have invalidated the Santa Clara County plan. Instead, the Court disregarded this principle, thereby encouraging discrimination to secure statistical balance.[86]

The Public Policy Implications of *Johnson*

As the preceding staff analysis makes abundantly clear, there is ample reason to believe that the Court in *Johnson* exceeded its constitutional role as interpreter of the law. Indeed, faced with the plain language of Title VII mandating nondiscrimination, the Court somehow found a way around it to uphold a promotion that would be viewed as clearly discriminatory by anyone who objectively examines the trial transcript concerning the relative qualifications of Johnson and Joyce.[87]

The chorus of praise from the civil rights lobbies that greeted *Johnson* would have us believe that it was justly decided. Whether these lobbies are at odds with the constituencies whose interests they purport to advance, however, has been called into question by at least one recent survey.[88] There is good reason to suspect that the same is true of their reaction to *Johnson.*

According to a Gallup Poll conducted soon after *Johnson* was handed down, "[m]ore than six in ten Americans disapprove of [the *Johnson*] ruling that

[80] 107 S. Ct. at 1447.

[81] Justice O'Connor's suggestion that the Joyce promotion be viewed as a remedy for past apparent discrimination, *id.* at 4380 (O'Connor, concurring), cannot be reconciled with either the stated goals of the plan or the district court's finding of no discrimination. *See also id.* at 1470 n.4 (Scalia, dissenting).

[82] 443 U.S. at 204.

[83] *See id.* at 201–02.

[84] 107 S. Ct. at 1453.

[85] *See* statement of the United States Commission on Civil Rights concerning *Firefighters* v. *Stotts, reprinted in* U.S. Comm'n on Civil Rights, *Towards an Understanding of Stotts,* p. 56 (1985).

[86] *See* 107 S. Ct. at 1452–53 (application of Title VII prima facie standard could "inappropriately create a significant disincentive for employers to adopt an affirmative action plan").

[87] For a full discussion of these qualifications, see the appendix accompanying the statement of Vice Chairman Murray Friedman, below.

[88] Lichter, *Who Speaks for Black America?* Public Opinion Magazine 41 (1985).

employers may promote women and minorities ahead of better qualified men and whites."[89] Added George Gallup, Jr., "[b]y margins of eight to one or more, the public consistently has felt that ability, rather than reparative treatment, should be the main consideration for placement in jobs and colleges."[90] The results of this poll are not surprising: what the average American wants is the freedom and opportunity to compete. What is surprising is the extent to which professional advocates of race-conscious policies ignore the clearly expressed preference of their constituents, and engage in fierce polemical attacks against those more truly aligned with these constituents who hold to the bedrock constitutional principle of individual rather than group rights.

This year America celebrates the 200th year of its Constitution. We would do well to bear in mind that the extent to which that document endures henceforth requires foremost that we labor to understand it, and acquire as our own the insights provided us by the Framers in the debates of the Constitutional Convention and in *The Federalist Papers.* If we understand the Constitution, we cannot but recognize that it is to be treasured. If we do not understand it, the danger that it will be abused is only too real.

One occasionally hears of surveys indicating that there is reason to fear that the Constitution is understood by fewer Americans than ever before.[91] Only recently, for example, a poll revealed that 45 percent of the Americans surveyed attributed to the Constitution the phrase, "From each according to his ability, to each according to his need."[92] The phrase is nowhere in the Constitution, but in the *Communist Manifesto* of Karl Marx.

That the Constitution could suffer abuse is no less a possibility in the area of civil rights. The rule of *Johnson,* which I believe to be unambiguous, was enunciated by the *Wall Street Journal* the day following the decision: "Discriminate if you want to, so long as the victims are white males. We won't stop you, and we'll dismiss any court challenges to your employment or employee-promotion policies."[93] That is hardly equal protection.

No discussion of *Johnson* would be complete if it did not address the theory upon which it is based, namely, that underrepresentation of women or minorities in the workplace, in and of itself and without proof of discrimination, justifies race- or sex-conscious hiring or promotions. The theory of underrepresentation, in turn, is based on the assumption that persons are equal in their abilities and motivations and that, therefore, if women or minorities are underrepresented in any given job category or occupation, it must be as the result of discrimination.

This theory stands in stark contrast to the words of James Madison, often referred to as the Father of our Constitution, who wrote in *Federalist* Ten:

> The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.

The view expressed by Madison is directly opposed to the theory of underrepresentation. It was Madison's view that our faculties and interests are naturally unequal; the theory of underrepresentation holds, in contrast, that they are equal. For Madison, the first object of government is to protect these faculties, even though they be unequal and even though they naturally give rise to inequalities in property. In contrast, those who advance the underrepresentation theory appear to believe that it is the duty of government to eliminate income disparities among the citizenry in spite of where their faculties and interests would otherwise lead them.

It was further the view of Madison that inequalities in property give rise to faction. To extinguish factionalism among the citizens, he said, one may either extinguish their liberty or render them equal in their opinions, passions, and interests. The former, he said, is a cure worse than the disease; the latter is impossible. Rather, for him, the solution was to

[89] *Washington Post,* June 29, 1987 (national weekly ed.), p. 37.

[90] *Id.*

[91] For an excellent discussion on this theme, see J. Combee, *Democracy at Risk: The Rising Tide of Political Illiteracy and Ignorance of the Constitution* (1984) (available from the Center for Judicial Studies, Washington, D.C.)

[92] *A Hearst Report: The American Public's Knowledge of the U.S. Constitution* (1987) (sponsored by the Hearst Corporation, conducted by Research and Forecast, Inc.), p. 13.

[93] Editorial, *The Big Lie,* Wall St. J., Mar. 27, 1987.

control its effects by adopting a republican, or representative, form of government.

I suggest that Madison's wisdom is of great relevance as we debate the soundness of affirmative action. What was true then will always be true. Though we may possess equal rights, we will differ in our possessions, opinions, and interests because we differ in our natural faculties. Affirmative action plans designed to effect proportional representation in employment according to race, gender, national origin, whatever, are the worst sort of government policy and fly in the face of Madison's remonstrance. The business of government is to ensure that we have equality of opportunity, nothing more, nothing less.

Statement of Vice Chairman Murray Friedman

I wish to express my personal as well as official concern as a Commissioner about the position taken by the United States Supreme Court in *Johnson* v. *Transportation Agency, Santa Clara, California,* which upholds job preferences for women and minority-group employees.

In effect, what the High Court has done can only be seen, as Justice White has expressed it, as a perversion of Title VII of the Civil Rights Act of 1964. As I understand the intent of this original legislation, ours was to be a "colorblind" society. That is, in both the public and private sectors, neither employers nor schools could discriminate "on the grounds of race, color, religion, or national origin." The language of the Civil Rights Act was clearly molded after the 13th, 14th, and 15th amendments. It referred to "citizens," "individuals," and "persons,"-not to blacks, Hispanics, or Asians. During the debate on the bill, Senator Hubert H. Humphrey (D.–Minn.), the acknowledged preeminent civil rights conscience of the Senate, was prompted to assure his colleagues that it did not "require hiring, firing or promotion of employees to meet a racial 'quota' or achieve a certain racial balance." The bill provided protection to all groups, even to whites.

Other legislation was adopted soon after, and government agencies were created, the EEOC most importantly. The President then added his voice to the movement with an Executive order banning discrimination among Federal contractors and requiring "affirmative action" to broaden opportunities for hitherto-excluded groups in American life.

What we have witnessed over the last 20 years or so has been the growing institutionalization of measures that "require" public authorities, private employers, colleges, and any institution that receives Federal aid to pay strict attention to race and ethnicity. It has become more and more necessary to count by the numbers, to keep track of just how many blacks, Hispanics, Asians, and women are interviewed, hired, promoted, or admitted.

During the 1970s, the term "affirmative action," which was introduced for, and meant to be applied specifically to, the hiring practices of government contractors, was used to define admissions policies for colleges, as well as to justify certain educational courses, like the establishment of women's studies programs. It was astonishing how, in such a short time, we had traveled such a long way from the heady days of 1964. (I am indebted to Nathan Glazer's book, *Ethnic Dilemmas,* for this summary.)

The *Johnson* decision adds to the confusing picture of what civil rights remedies mean today. The ruling goes beyond *United Steelworkers* v. *Weber* of 1979, which stated that "private" employers may initiate voluntary affirmative action plans to bring more blacks into the work force where blacks have been virtually absent. Now public and private employers may initiate voluntary affirmative action plans in order to correct sex bias as well. By doing this, to quote Justice Scalia in his dissent, "We effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace."

However, the ruling's most troubling feature is that in a case where no discrimination was found, measures meant to combat discrimination were utilized. The Justices would have us believe that what is being eradicated here is not active, verifiable, employer-initiated discrimination, but rather "societal discrimination," a vague term meant to imply that all women and minorities—no matter the nature of the incident—are victims of discrimination and in need of preferential treatment. Plain commonsense should suggest that certain fields of work have tended to attract people as a result of voluntary or personal choice rather than discrimination.

For this reason, I would agree with the three dissenting Justices, who noted that the original civil rights law has "been converted into a powerful engine of racism and sexism." For the first time, the Supreme Court has explicitly ruled that preferential treatment is permissible in the absence of discrimination and that all that need be proven is a "manifest imbalance" (in traditionally segregated jobs in categories), in the number of women or minorities holding the jobs in question.

Even Justice O'Connor, who concurred with the majority (though she wrote separately), understood that the decision might be unnecessarily expansive. She said:

> I concur in the judgment of the Court in light of our precedents. I write separately, however, because the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers despite the limitations imposed by the Constitution and by the provisions of Tile VII, and because the dissent rejects the Court's precedents and addresses the question of how Title VII should be interpreted as if the Court were writing on a clean slate. The former course of action gives insufficient guidance to courts and litigants; the latter course of action serves as a useful point of academic discussion, but fails to reckon with the reality of the course that the majority of the Court has determined to follow.

The issue here is the matter of insufficient guidance. I would argue that if the dimensions of an affirmative action program were carefully laid out by the High Court and were truly temporary in nature, then few Americans would be alarmed. But, as Michael Kinsley has written, no such program has ever claimed success and shut down operation. We are an important step closer to creating a society in which one's place is not based on individual achievement, but on sexual and racial balance, and this according to the personal and shifting views of the High Court on how such balance is defined.

If one looks at the lower court records in the *Johnson* case, one is immediately aware of the tortuous, quite extraordinary logic that the officials in Santa Clara County used to justify their special version of an affirmative action plan. They ignored the fact that Johnson was significantly rather than peripherally more qualified as was widely reported; disregarded crucial information necessary to evaluate the oral examinations of the two candidates; and to achieve the agency's purpose, reclassified the road dispatcher post from a clerical position, in which it is normally classified and where 76 percent of the workers were females, to a skilled post that had no women. (For further information, please see the appendix attached to this statement.)

I would argue also that the ruling lessens the value of the individual and ignores such widely cherished virtues as individual merit and hard work. Certain commentators have voiced the fear that employers will be less interested in increasing their recruitment and training of women and will instead resort to hiring plans that would hurt men unnecessarily. Bruce Fein of the Heritage Foundation believes that "the message to women and minorities is that entreaties to employers to fashion gender- or race-preference programs may yield larger bonuses than unflagging devotion to upgrading job skills to a level equal or superior to those of their white male colleagues." He fears that communities will become polarized, that passions will be inflamed, and that there will be an increase in antagonisms along social lines.

Stephen Bokat, general counsel of the U.S. Chamber of Commerce, in an attempt to praise the decision, inadvertently pointed to its most dangerous consequence. He wrote that *Johnson* now "allows businesses to do what *'they'* [emphasis added] believe is right," thereby dealing a powerful blow to reverse discrimination suits.

This was the theme sounded in Justice Scalia's dissent. Even before his appointment last year, Scalia often spoke of hardships that reverse discrimination visited on innocent victims. He concludes his opinion similarly: "The only losers in the process are the Johnsons of the country for whom [civil rights law] has not been merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice in the hands of a court fond of thinking itself the champion of the politically impotent." The interests of

white male employees may not have been "unnecessarily trammeled" but trammeled they have been. It would seem that from this moment forward the Supreme Court's current version of affirmative action merely allows injustice to continue, provided it is not at a women's or blacks' expense.

But there are other issues to discuss in light of the decision. In a recent issue of *Fortune* magazine, several interesting points were made. In Santa Clara County, women were underrepresented in most job categories, but blacks were overrepresented in five out of the seven job categories in which the county was hiring. If we were to follow the logic of the Court's decision, whites should be given preference over blacks in these positions.

Fortune also pointed to a fact that many writers seem to ignore: "[I]f imbalances betoken bias, and if the underrepresentation of various ethnic groups is a big social problem, what shall we do about the scandalous underrepresentation of whites in most big-league sports?" (This is true of all sports except hockey, where whites are overrepresented.)

"Although whites represent 87 percent of the U.S. population, they have only around 70 percent of the player jobs in major league baseball, not much more than 40 percent of such jobs in the National Football League, and less than 30 percent in the National Basketball Association. It is perhaps unnecessary to add that all these jobs are highly paid, enormously desirable, and filled only after intense competition among applicants."

In essence, what the Supreme Court majority has done in *Johnson* is to engage in policy formation and social engineering of a dangerous sort. The ruling appears to reflect the personal views of the Justices rather than an interpretation of what the Congress, elected by the people, strove for in 1964—i.e., the elimination of all forms of racial and sexual discrimination or preferment.

Remedies for discrimination unfortunately are still very necessary. It may be that we should exact harsher penalties for discrimination, including jail sentences. But officially recognizing the concept of group rights is a dangerous road to follow. I would agree with Nathan Glazer, the noted sociologist, who has written eloquently on the subject:

> I do not believe that there is only one democratic and decent path to a multiethnic society, the one for which I have argued in the United States. I would place individual rights at the center, and groups would then exist only as the result of the free choice of individuals, and the existence of a group would derive no advantage in public law for its members.

The *Johnson* decision is clearly an indication of the current mood of a majority on the High Court. It is also the law of the land and, despite our differences of opinion, we must act, of course, to implement it accordingly even as we should seek to create a social climate that can reverse this misguided effort to achieve equal rights.

Appendix

The following is a summation I have prepared based on the lower court record and exhibits.

Any careful reading of the district court records and exhibits reveals just how completely the decision in *Johnson* reflected the personal views of the Justices. Here one finds a wealth of information concerning the qualifications of the candidates, the results of the two oral examinations, the manner in which Diane Joyce was ultimately selected, and the rationale for invoking the affirmative action plan—all of it damaging to Joyce and all of which the Supreme Court apparently ignored.

The position of road dispatcher is an office job, involving the assignment of road crews, equipment, and materials, as well as the maintenance of records. The job vacancy announcement of December 1979 stated that applicants needed a minimum of 4 years in dispatching trucks, or dispatching construction equipment in a related field, or 4 years of road maintenance work in Santa Clara County.

Johnson worked for the transportation agency for 12 years before the vacancy announcement was made. For 17 years prior to that, he had been a dispatcher, and then a dispatcher/supervisor, with the Pacific Cement and Aggregate Switches Company, which furnished road materials for the city of San Jose and Santa Clara County (see transcript, pp. 126, 142). Because Pacific Cement wanted to transfer him to Oakland, he took the job with the county so as not to uproot his family (transcript, p. 126). For the county, he worked as a road yard clerk II.

In 1974 one of the two road dispatcher positions became available. Johnson competed and placed second after Ronald Neal, who was given the job. When road yard clerk was eliminated as a separate job category and was merged with the lower paying account clerk II position, Johnson transferred to the job of road maintenance worker II in order to prepare himself for either the next road dispatcher opening or

for a promotion to road maintenance worker III. When Ronald Neal was promoted and the road dispatcher position was vacated, Johnson was appointed acting road dispatcher, "working out of class," where he served for nearly 10 months—that is, until Joyce was appointed to the job. Johnson estimated that, over the years, he had filled in as a dispatcher for other ill or vacationing employees for a period of 2½ to 3 years (transcript, p. 140).

Diane Joyce had been working at the transportation agency for 7 years before the dispatcher vacancy was announced. Before that time, she had worked for 10 years as a bookkeeper outside of the State (1960–70), and for 2 years as an account clerk in the county's education office. For the transportation agency, she worked first as an account clerk and then was promoted to a senior account clerk. In 1974 Joyce tried for the road dispatcher position but was rejected due to lack of qualifications.

In 1975 she became a road maintenance worker to improve her credentials. She worked there until her appointment to the dispatcher's post in 1980 (transcript, p. 107). Joyce had worked 2 weeks "out of class" as road dispatcher (transcript, p. 94). In addition, when she was an account clerk (1972–75), she often filled in for the dispatcher during his lunch hour (transcript, p. 106). This amounted to one-third of a year in toto, over the 3-year period.

Perhaps the most controversial element in the whole case is the matter of the examination results for the 1979 opening for road dispatcher. On April 24, 1980, an oral board consisting of Mr. Estruth and Ms. Barnes interviewed the nine applicants who met the minimum experience requirements. Johnson tied for second with 75; Joyce was fourth with 72.5 (exhibit 8).

According to the rating scale, a score between 70 and 74 means "would appoint with hesitation"; a score of 75–84 means "would appoint without hesitation." So, despite the seeming smallness of the numerical score difference, there remains a significant difference, in a substantive sense, between Joyce's and Johnson's scores.

It is also noteworthy that Ms. Barnes wrote a comment across her sheet when she rated Ms. Joyce. After she checked "yes" to the question, "Would you hire this person as a road dispatcher?" she then wrote "but marginal" (with marginal underlined for emphasis). Ms. Barnes was disturbed by Joyce's answer to the "critical question number 4," which tested judgment. (Ironically, Joyce stated that she thought this first oral interview was fair "because there was a women on the interview board" [transcript, p. 99]. Yet the female interviewer had a lower opinion of Joyce than the male interviewer!) Johnson, by contrast, was given an unqualified "yes" by both evaluators.

The second examination was an oral interview of the seven applicants who met the minimum score cutoff in the first exam. It was conducted by three supervisors from the road operation division. In this exam, Johnson placed first and Joyce placed third, behind Richard Jadrich. Johnson was unanimously recommended by the board as the best qualified.

However, these are not the evaluations cited in Justice Brennan's opinion (opinion, p. 7). The evaluations made by the road division were removed after the selection of Joyce and replaced by comments written by Myra Beals, the affirmative action coordinator (transcript, p. 213).

Ms. Beals also testified that she did not use any of the information from the two examinations for her appraisal but simply looked at Johnson's and Joyce's applications (transcript, pp. 225, 226). In preparing her comments, Ms. Beals failed to note that Johnson had successfully acted in the dispatcher job for the past 10 months. Instead, she wrote that he had previous outside dispatcher experience, but noted that it occurred "13 years ago."

Although the county claimed that the dispatcher job was a skilled craft, Beals put forward Joyce's 18 years of clerical experience as her first qualification. Johnson also had considerable clerical experience, which was directly relevant to the job, considering the fact that he had been a road yard clerk for 11 years.

Just what was the rationale for invoking the affirmative action plan? The ambitious goal of both Santa Clara County and its transportation agency has been to employ protected minorities in accordance with their share of the overall area's work force, both public and private.

Based on the 1970 census data, the goal for female employment (in 1979) was a 36.5 percent share. According to this goal, women should occupy 36.5 percent of each EEOC job category in the transportation agency. In 1978, although the transportation agency exceeded by a wide margin its goal for minority employment—the minority share was 32 percent compared to a 20 percent goal—it was deficient in its female share, which was 22.4 percent (exhibit 1).

The job in question, road dispatcher, had never been held by a woman. However, the position had only two slots at the time and was a job with low turnover.

Moreover, the job had not existed formally for that many years, as it had been done informally in the past, by either road maintenance or clerical personnel (transcript, pp. 167, 168).

Recognizing that it is not feasible to establish affirmative action requirements for a job class containing only two slots, the agency defended its decision largely by emphasizing the broader category to which it said the road dispatcher job belonged—skilled craft. This category had what Justice O'Connor referred to as the "inexorable zero"—no women at all.

Two questions can be raised. The first, which was addressed by plaintiff's counsel, is whether the road dispatcher job was legitimately a skilled craft job as opposed to another category, such as "clerical" or "service and maintenance." The other question is whether even zero percent female is evidence of discrimination.

There is some indication that the road dispatcher job does not fit into the skilled craft category. The job description clearly refers to office work. In the county, all dispatchers other than road dispatchers (and including other agency dispatchers) were counted in the "office and clerical" category, which had no shortage of women, since 76 percent of the transportation agency workers were females.

Other evidence suggests that road dispatchers were misclassified at the time of the Johnson trial. First, the transportation agency has changed the way it classifies road dispatchers; they are now counted as "service and maintenance" (this is based on communications with the county personnel office). In 1978, 22 percent of service and maintenance workers were female—below the goal of 36.5 percent, but also far from the "inexorable zero." It should be noted that the broad category, dispatchers, was 20 percent female.

Outside of Santa Clara County, it appears that road dispatchers are classified as clerical workers. The Standard Occupational Classification System, on which EEOC classifications are usually based, considers road dispatchers (which belong to the category "dispatcher, traffic or system") a clerical occupation.

In light of this evidence, there would have been little reason for affirmative action to be involved had road dispatchers been classified as clerical—or even as service and maintenance workers.

It is also an open question whether the absence of women in such jobs reflects discrimination. Women have simply not flocked to the type of construction and maintenance jobs that arise in road work, as they have to other nontraditional jobs (e.g., lawyers, doctors, computer programmers). In 1970 women made up 1.7 percent of construction crafts and in 1980, 2.1 percent. One could attribute this low percentage to discrimination. But it may also be that most women have no interest in dirty, heavy outdoor work.

Statement of Commissioner William B. Allen

Preface

Argument alone cannot dislodge the presumption in favor of officeholders who speak authoritatively concerning the meaning of our laws and Constitution. For that reason the following critique of the Supreme Court's opinion and judgment in the case, *Johnson* v. *Transportation Agency, Santa Clara County,* addresses rather more our general understanding than any action agenda. Place matters in their proper context and the necessity of this approach will be readily apparent.

The critique does not shrink from demonstrations that the Justices do not deserve our attention on the basis of any intrinsic merit in their reasonings and judgment. They reason poorly and decide unwisely (as, for example, in denying the palpable demonstrations that petitioner Johnson had in fact been constructively hired for the position in question but subsequently denied it solely on the basis of his gender). It is rather their office that commands our attention. For whether they reason well or ill, we gauge the range of our conduct by their judgments.

We can demonstrate how awkwardly circumstanced we are because of this relationship. We know today that not only Justices but many high officeholders are not only ignorant of but ill-disposed toward our Constitution and the attendant conditions of its development. We pledge allegiance to the republic created by that Constitution, while the general perception of it is forged by voices altogether antagonistic to it and which also misrepresent it. Can a pledge of allegiance make any sense in that context, any more than a spirit of law abidingness when that law is being shaped by lawless judicial interpretation? I believe the answer is yes and shall try to explain why.

Put affirmative action aside for the moment and consider only the diverse statements about the imperfections of the American founding coming from high officials in this bicentennial season. According to their voices, American founding history is a sham and a delusion. Yet, the evidences they offer are all false! In a court of law we could not admit them as experts because we may so easily demonstrate that they do not tell the truth when they say the founders favored slavery, did not include blacks and women in the Declaration, and, the ultimate charge, regarded a black person as only three-fifths of a human being.

All of these charges are refuted, I say, not by me but by the very surface of the founding documents and their circumstances. The compromise over slavery in the Constitution, for example, actually represented a movement away from the absolute protection for slavery that a threat from South Carolina had introduced in the convention. The Declaration does not only speak of men when it declares "all men are created equal." It also affirms that governments "are instituted among men." It would be hard to insist that women were thought to be ungoverned! But beyond that, Jefferson protested that nefarious practice of keeping "open a market

where MEN should be bought and sold." That these MEN were black and male and female no sophist would deny and, one may say, was a fact of which Jefferson was intimately aware. Thus, the usage of the Declaration excluded none and was self-consciously universal. So, too, with the three-fifths clause both in its original form (Confederation Congress, 1783) and in the Constitution. Not only did the framers not depreciate the value of a black man per se, they specifically counted free blacks and whites, including indentured servants, as whole persons. The three-fifths calculation applied only to the credit for representation and taxation to be granted to slaveowners in States permitting slaves. The slaves were black, to be sure, but the fundamental distinction the calculation was based on was between free and slave. No negative aspersions were involved in this particular provision.

Is it not then wonderful, despite this record, that authoritative opinion inculcates the opposite view at every point? Are we to suspect high officeholders of lying, of intentionally seeking to subvert the foundations of this republican order? I think not. I think we rather behold the effects of meager study and blind submission to a reigning orthodoxy. The general opinion that is represented here certainly had a particular origin, but that is not important here. What does count is the fact that, on the basis of this general opinion in the name of which Justices and others act, we must expect decisions and expressions unfriendly to the Constitution.

To return to affirmative action, this helps to explain not only how such decisions are made but what their force is in our society. The situation of affirmative action today is not unlike that of slavery 200 years ago. The first constitutional debate in Congress was over slavery; it ended with the House asserting that Congress had some power over slavery but declining to exercise it. Although the greater and better part of the citizens of the United States found slavery incompatible with the principles of and their hopes for the republic, they could undertake no remedial steps that did not also prevail over the opinion of the slaveholders.

Thus a powerful minority, not otherwise dominating the Nation, held the key to this problem—a key, as we know, of which no use was made. Similarly with affirmative action, even its supporters acknowledge an *ultimate* loyalty to the notion of a colorblind Constitution, just as slaveholders had conceded that slavery was incompatible with the Declaration. But, just as slaveholders could not find the practical expedient to free themselves immediately from their contradiction, so, too, supporters of affirmative action insist that it is for the moment practically impossible to forgo race- and class-conscious law.

In the United States of 200 years ago, there were practical expedients untried, because they could not win the prior consent of the slaveholders. Today those who oppose affirmative action insist that there are superior modes to realize the promises of American institutions and principles, but our expedients cannot operate in the presence of affirmative action. Thus, they are excluded while affirmative action is the law. Many factors and interests sustain affirmative action. Doubtless one of the most significant, however, is the preponderance of support among American blacks. It may fairly be said that, whatever else happens, no important change of American law is possible in this regard that does not at the same time prevail over the opinions of American blacks. Hence, a powerful minority, not otherwise dominating national life, holds the key to the solution of this problem.

When we speak of the opinions of Justices, therefore, and whether they are learned or mere repetitions of stale, uncritical formulas, we do not pretend thereby to have eliminated the exigent character of Court judgments. How far we can follow a Court—and therefore a public opinion—hostile to fundamental conceptions of liberty will remain a most intriguing question. In the assessment that follows, however, we assume not only a commitment to carry out the law to the farthest extent but also the obligation to seek to alter opinion in such a manner as to obviate the recourse to questions more fundamental.

Part I: *Johnson* as Reason

I divide this statement into two parts in order to signal that the analytical portion makes no pretense of showing any regard for the artificiality of legal reasoning. Legal reasoning today is significant only insofar as it permits us to say what is the latest expression of the law, not what is right or wrong. On that impoverished view, one might liken it to the directions that guide a scavenger hunt. Accordingly, the second portion of this statement is merely an approximation (a first order approximation) of the legal obligations imposed by *Johnson.*

I concur in the statement of Chairman Pendleton. In addition, I wish to add some direct reflections on

the Court's judgments in two respects, first with regard to the character of the opinion, and then in respect to the obligations of the law.

* * *

The majority opinion written by Justice Brennan stretches our powers of imagination beyond the reasonable. Something called "The Plan" springs to life and assumes reflective and commanding postures. The Plan "notes." The Plan "observes." The Plan "implements." And so on. Indeed, everything that occurred, according to the majority, happened "pursuant to the Plan" (the affirmative action plan of Santa Clara County, California).

Thus arises a paradox, on the stated facts of the case. Petitioner Paul Johnson competed against Diane Joyce and seven other applicants for the position of road dispatcher. Johnson and Joyce were both presumably well known to the appointing authority, since both were already employed within the Santa Clara County Transportation Agency. Johnson received preferment based on testing/interview performance, prevailing not alone over Joyce but over five other applicants deemed qualified. All of this took place under the existing authority of "The Plan." When, then, the county affirmative action coordinator intervened (at the request of Joyce) to overturn the constructive hiring of Johnson, the intervention gave rise to the question of whether "The Plan" was being followed. Without any showing whatever that the transportation agency did not follow "The Plan" in selecting Johnson, the agency was directed to appoint Joyce, in accord with "The Plan."

In the absence of a positive contrary showing, we must assume that all who live by the "The Plan" also live in conformity with "The Plan." Thus, according to the majority's reading of the facts of this case, the Santa Clara County affirmative action plan could produce either of two exactly opposite results. It could produce appointments with respect for gender distinctions but not on that basis; or it could squarely discriminate on the basis of gender. Either would be acceptable, on the majority's reading.

The reason that either of the opposites—nondiscrimination against males or discrimination against males—seems acceptable is that the Court conceded the title to the county to act arbitrarily and to judge summarily where these, and these only, were the allowable options. Commissioners Berry, Guess, and Ramirez seek to minimize the impact of this conclusion through the declaration that the differences between Johnson and Joyce were minimal. They rely on the Court's belief that "any difference in qualifications between Johnson and Joyce were minimal, to say the least." But here lies a problem: the two-point difference between Johnson and Joyce must appear insignificant on a colloquial or nonexpert reading. To say the least, neither we nor the Court have any idea what to make of such raw scores. On the other hand, we do have a conversion instrument that would make those raw scores commensurable with other human performance—and thus say much to us about qualifications. We know that, of seven qualified applicants, a two-point difference placed Joyce below, and Johnson above, the 50th percentile. That is certainly no minimal difference. It may even signal the distinction between "barely qualified" and "qualified." This, in turn, amplifies our understanding of the Court's grant of arbitrary authority to the County of Santa Clara.

With this result from a reading of the facts of the case and the Court's reasoning, we are forced to ask why. How does the Court justify such a counterintuitive result? The answer: not easily! nor well! According to the Court, the question being judged was not whether gender had been taken into account but whether it had "impermissibly" been taken into account in violation of Title VII of the Civil Rights Act, as amended. The relevant amendments prohibit discrimination or adverse categorization on the basis of gender and several other factors. In addressing the question, the majority announced an exclusive concern with the "scope" of Title VII, severing the law from any questions of constitutionality since, purportedly, no constitutional questions had been raised. (This, abstracting from the fact that the relevant amendments to Title VII had explicitly injected the constitutional question relative to public employers. Needless to add, it never occurred to the majority to recur to the axiom of the Declaration of Independence that vouchsafed the rights of all.)

The significance of the decision not to confront the constitutional question lies in the effect of that decision on the majority's reading of the facts. The Court's prior affirmative action history would have been relevant in trying the constitutional question but not, according to the logic, to trying the scope of the statute. The opinion is not informed, therefore, by the evidence that the present "Plan" represents a reaction in Santa Clara County, not to a tradition of

segregation but to the county's own frustration with the results of equal employment opportunity.

The county mandated in its "Plan" work force adjustments in harmony with demographic representations of identified population subgroups. Thus, if 10 percent of the population were black, so too should the work force be. If 50 percent were women, so too should the work force be. If 3 percent were Asian, so too should the work force be. The mandate applied not merely across the board, but through specified job categories. In the transportation agency's "Plan," the goals of the county mandate were to be attained by means of annual statistical improvements in the "representation" of the designated subgroups. The concentration was to be on the "underrepresented" as opposed to the "overrepresented" subgroups.

The transportation agency made the transition from vague, long term social objectives to concrete, short term goals by means of a specific action plan—namely, to locate qualified applicants in the relevant geographical area and then to distribute them actuarially relative to anticipated vacancies. The number identified at each actuarial increment would become the short term goal. A less complicated way to state this bureaucratese is to say that they guessed at probable job openings (firings, retirings, etc.) and made a judgment about the availability of members of the subgroups to fill them. Whatever number of availables they came up with, up to the number of vacancies, became the short term goal. It is, therefore, almost a conscious lie, when the Court declares that the "Agency's Plan thus set aside no specific number of positions for minorities or women." They set aside a specific percentage of each group on a long term basis and specific numbers year by year, up to the number prescribed by the long term goal operating as an arithmetic factor.

The Court's sleight of hand may be captured as follows. It is possible to describe the dynamics of a Supreme Court judgment without ever mentioning the number nine or any number. Doing so, however, will not alter the fact that a determinant number of opinions alone will and must decide in any given case. The pretense that Santa Clara County's goal is not a quota merely because the county forswears an immediate declaration as to a number is either intellectual duplicity or stupidity. Although reasoning on that order may determine the law, we can take comfort that the disease need not be catching.

A last word on the "overrepresented," such as female clericals: although the quota system mentioned here would be harmless in a perfectly elastic, evenly distributed labor market, a different story unfolds to the extent that humans form their ambitions and career objectives differentially (however subject to evolution). In the latter case, a necessary deduction would be substantial, legally imposed unemployment or misemployment in certain categories. It does not apply immediately only because the Court and the county forswear any intention to do anything about overrepresentation. On the other hand, the warning lights have already lit for the future of Asians in American higher education!

The two primary notions, the calculation of work force representativeness and nonapplicability of equal employment considerations, go to the heart of the Court's reasoning. It does, however, distinguish itself by other feats of legerdemain. According to past opinions, for example, such a "Plan" would be flawed if it were permanent as opposed to temporary. The lower court concluded from the absence of a termination date that the "Plan" was permanent. The High Court majority ruled, however, that the "Plan" only spoke explicitly of "attaining," not "maintaining a work force mirroring the labor force in the County." Thus, though acknowledging that the "Plan" called for an open-ended attainment of work force quotas, the majority pretended that the absence of one word, maintenance, meant that the county would have ended the "Plan" as soon as it reached its goal (which, by the way, was not supposed to be a real goal!). This is rather like arguing that a person who buys a car without a service contract really doesn't mean to keep the car, for we all know that cars require maintenance to be kept. Yet, to the extent that it is common knowledge that maintenance is the means to provide permanence, why should we have to make it explicit?

The Court's reasoning on the temporal character of the "Plan" resembles its reasoning on the facts of the case touching Johnson's rights—namely, the Court denied that Johnson was denied anything to which he had a right. The Court must be wrong here (as any good common law jury would surely find), and it tacitly acknowledges this by focusing on Johnson and not the other candidates over whom Joyce had been selected. Why does Johnson stand out? Because the selection process had narrowed to a choice of Johnson! On the facts presented even in the majority's opinion, it is plausible to assume that

the decision to appoint Johnson had been made through normal channels, and that in an atmosphere which had indeed raised at least an expectation of Johnson's constructive title to the job. What happened next, then, was not a simple decision to appoint Joyce, but a decision to override the process (which already included affirmative action criteria) and on the basis of gender alone to appoint Joyce over Johnson. [N.B.: This is the source of the entire fallacy of Justice O'Connor's concurrence. She failed to note that gender was considered twice, not once, and therefore considered inappropriately the second time. Insofar as she wished only to defend some consideration of gender, it had been provided for already. Had she noticed that, she would have dissented.] It was a decision to deny Johnson what he had earned (a form of title with which the Court is no longer conversant but one that will ever be morally compelling). The decision of the appointing official—under the direction of the county affirmative action officer—was effectively that the county would not be harmed by appointing Joyce (which appears correct on narrow grounds), without regard for what befell Johnson. This is what the Court has shown us, though it has not the courage or the art to say it.

Johnson is not alone. Every use of race or gender operates as an exclusion. Where the exclusion of certain designated minorities, by race or ethnicity, or the exclusion of females, may result, the Court holds it is insupportable and by no stronger argument today than what can be wrung from the expression, "traditionally segregated." The exclusion of the combined class of white males—a minority by race plus gender—is the mandate of the law and the necessary inference of the Court's reasoning.

This enormous transition in American principles (this abandonment of American principles) stands on an argument in behalf of "effecting a gradual improvement in the representation of minorities and women" in the key centers of social and political life. Thus, the question ceases to be a matter of individual rights and becomes instead a matter of social symbolism. Nowhere in this or any other opinion, however, does the Court undertake to state cogently the sources and content of this symbolism, conveyed by the sole word, "representation." The gravamen of this consideration will become clear if we contrast the word "representation" with the word "presence." If the Court's goal were gradually to effect an improvement in the presence of minorities and women in key centers of social and political life, there would be implied named individuals whose rights and fates were at stake. Their presence would answer to their unmerited absence. Presence, replacing absence, would terminate the cycle. But what is representation? Is it political, as where many choose few to speak on their behalf? If so, how can the choice of the spokesman be placed in the hands of the persons to whom the many are represented rather than in the hands of the persons represented? Is it artistic, as in the theatre we regard a play as a representation? If so, who is the artist, and on what just grounds do we limit his expression? Is it merely statistical, as in a representative sample? If so, must we not impose scientifically precise conditions of randomness to achieve the stated end? We behold in these reflections the massive evidence of the Court's confusion. The fact is, the Court's majority simply has no very firm conception of what it is talking about. It is out of its league.

There is a perverseness involved in considering one laborer in any given industry the "representative" of others who have their own rights to vindicate irrespective of what happens to people who "look like them." They may very well prefer to hold that job themselves rather than be "represented" through the accident of race or gender. Their wishes, other factors not intervening, ought to be the law's command. In what way, then, does one laborer thus represent others? He doesn't share out his pay among them. His tax obligations do not discharge them from like obligations. Nor can they even be sued for liability when he screws up! This metaphorical style of reasoning, upon which the Court relies, obscures an ill-disguised contempt for ordinary souls (the Johnsons of the world) and the notion that their individual claims and desires deserve no particular respect. They are counted en masse, by noses, and thus only do they count.

This analysis raises an urgent question: given the insufficiency and inferiority of the Court's reasoning, what are the obligations of the Commission on Civil Rights in regard to the ruling? Let it be affirmed at once: the Court's ruling is absolutely binding on the Commission, just as it is practically binding on the people as a whole, its pernicious effects to the contrary notwithstanding. The Court's ruling may be distinguished from its argument, however. We, whether at the Commission or the people at large, are under no obligation to conform our opinions to the dim lights of the Justices. This is

especially true where Court opinions are manifestly inferior as logical and moral arguments. There has been much debate about the notion of original intent. It can admit of no debate, however, that the founders clearly intended Supreme Court Justices to be more accomplished reasoners than majorities of late have been—not only legally but morally, philosophically, historically, and religiously.

I have offered a cursory examination of the Court's reasoning, relying on no outside authority. I could, of course, have developed the perspective of the dissenting opinion. I could as well have recurred to the strirring language of a colorblind Constitution from the Harlan dissent in *Plessy,* language that wended its way into the heart of the people's Constitution in spite of Supreme Court and entrenched political inertia. I conceive it as important, however, that we take the full measure of what serves us as law today. I do not conceal that I foresee ruinous consequences proceeding from the Court's ruling, not all of them traceable to the Court itself. Much of the difficulty begins with the Court's giving too great credit to Congress' hyperbolic intention to "eliminate the lasting effects of discrimination." This exceeds their power to realize. Although Congress can assure and safeguard the opportunity for the people of this country to accomplish that goal, Congress can never provide for it directly. And it is by now clear that their exerting themselves on behalf of extreme pretensions is an immediate cause rather of decline than of progress in civil rights. It is regrettable that the Court has enlisted as a handmaiden in their demarche.

Part II: *Johnson* as Law

The *Johnson* decision imposes upon this Commission and the society in general (including public agencies) efforts to improve gradually the representation of women and minorities in work forces. This is an extrapolation from the strict decision, approving the affirmative action plan of Santa Clara County, read by way of the existing obligation to enforce Title VII of the Civil Rights Act in light of this authoritative interpretation. The specific statistical plan of quotas and decisions based squarely on gender or race in *Johnson* is not the sole recourse for affirmative action purposes, nor was it presented as such by the Court. On the other hand, insofar as it effectively attains the mandated condition, "representativeness," and does so comparatively more effectively than other recourses, it acquires a legal and moral priority. In particular, for this Commission it would take a strong justification to defend devoting time to other measures, under pressure of the ruling in *Johnson.*

The consequences of this reading of the law are manifest. The myriad statutory and regulatory provisions that mandate affirmative action would now have renewed life and vigor. Heretofore, compliance efforts throughout some governmental agencies and the private marketplace, from churches and schools to multinational corporations, have been little more than demonstration projects in comparison with what the law demands. Worse, these efforts may be characterized as a mere form of paper compliance, burdening the society with noxious reports, producing the occasional show case, like Diane Joyce, but otherwise neither being carried out in good faith nor producing any markedly discernible impact on the society.

The law is the law. Our voices are not estopped. We may tell the truth about the law: it is bad law. It may well destroy this society if fully enforced. Yet, it is the law. Accordingly, it is in my view the immediate and urgent task of this Commission to demand that it be fully and effectively enforced. It is not clear where the Court discovered the mandate of gradualness in the law. We can take no comfort in its presence, however, for we know not what pace of accomplishment will qualify as gradual. A timeline of 20 years will be short to some and long to others. For this Commission, then, which has no direct enforcement authority, I believe that the idea of gradualness should be subsumed under the notion of immediacy. We would then demand the immediate, full, and effective enforcement of the law.

There will remain ambiguity about the objective of correcting "imbalances" in the work force and elsewhere. The law, according to the Court, requires correcting imbalances. An imbalance, however, is not per se an asymmetrical or nonanalogical distribution vis-a-vis the general population. Therefore, it requires prior, authoritative determination just what kind of imbalance is meant. The Court has been content to resign that power into the hands of individual agencies, public and private. That, however, invites the abuse of interpreting as imbalance whatever "appears to us an imbalance." Such concepts are far from manifest, though the Court spoke of "manifest imbalance." They would be manifest only if supported by an equilibrium argument, of

which I know none. Accordingly, believing it critical that this lacuna be filled, I ask that the Commission apply to Congress and the President for an authoritative determination, a statute fixing standards of imbalances, whereby we could more effectively pursue the task of monitoring and encouraging the enforcement of the law.

Statement of Commissioners Mary Frances Berry, Francis S. Guess, and Blandina Cardenas Ramirez

In this case, the majority opinion upheld a rather modest affirmative action plan designed to begin the inclusion of women in jobs that had been traditionally sex segregated. Women were 34.6 percent of the area labor market and only 22.4 percent of the agency's employees. The women were concentrated in traditional female jobs. None of the 238 skilled craft worker positions was held by a woman. The agency's long term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area work force. The agency knew that a long term goal of 36 percent for women in jobs where they had not been before or even on career ladders for promotion was unrealistic. So, a series of short term realistic goals was to be established based on possible availability in the area labor force of persons in the specific category. No goals had been set when Ms. Joyce applied for promotion, but in 1982 a short term goal of 3 women for the 55 expected openings in the job category for that year, about 6 percent, was set. What we are discussing is an effort to make some modest improvements in the employment of qualified women in the Santa Clara Transportation Agency.

The majority opinion in *Johnson* follows *Weber* in relying on a manifest imbalance in traditionally segregated job categories as a basis for upholding, under Title VII, a modest voluntary affirmative action plan. The majority does not decide the issue based on the 14th amendment because the petitioner did not ask for a decision on that issue. However, Justice O'Connor, who was with the majority in *Wygant,* a constitutional case, concludes that the county's plan comports with *Weber* and *Wygant.*

The majority opinion does not address the issue of whether the county intentionally discriminated against Diane Joyce or any other woman. No intentional discrimination requirement exists for a Title VII case involving a voluntary affirmative action plan. A manifest statistical imbalance in a traditionally segregated job category is a sufficient basis for a plan.

This case does not involve a less qualified woman being promoted over a man. As the majority opinion states: "Any differences in qualifications between Johnson and Joyce were minimal to say the least." (Fn. 17.) The much heralded "test" Johnson and Joyce took was not a test at all. On an oral interview, which was one part of the qualifying procedure, Johnson was given a score of 75, tying him for second on this part, and Joyce was given 73.

The majority opinion gives careful approval to much-needed voluntary efforts to improve the employment status of women in a gradual way. Mr. Johnson was among seven qualified, eligible applicants, any one of whom could have been legitimately given the job. The other five persons were male. It is difficult to see how the selection of Joyce unsettled a legitimate expectation of promotion by Mr. Johnson unless one believes if any of the five men had been hired, Johnson would have been similarly legally unsettled. We believe the Court has provided additional necessary guidance to employers on a difficult issue. We can only hope the

decision will encourage employers voluntarily to implement carefully crafted affirmative action plans with all deliberate speed.

Statement of Commissioners Robert A. Destro, Esther Gonzalez-Arroyo Buckley, William B. Allen,* and Vice Chairman Murray Friedman†

Introduction

The Supreme Court's recent decision in *Johnson* v. *Transportation Agency, Santa Clara County, California,*[1] was a clear victory for "affirmative action," as that term is commonly understood. Whether it will be a victory for equal employment opportunity remains to be seen.

In keeping with Congress' command that the Commission "[a]ppraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap or national origin or in the administration of justice,"[2] it is our responsibility to study and report our views on the effect of *Johnson.* Since the case is, in our view, a legal development that may "constitut[e] discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin or in the administration of justice,"[3] we are compelled to reaffirm that the basic principle at stake in the debate over *Johnson*—and affirmative action generally—is equal opportunity for *individuals.*

The starting point of our analysis is Title VII's command that:

> 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; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a).

Taken as a whole, the statutory requirement is a simple one. Each individual applicant or employee is entitled to equal treatment in the workplace. Employers must make their judgments based on *business*-related factors, and they should be free to do so as long as they do not discriminate or make employment decisions on the basis of race, color, religion, sex, or national origin.[4]

* Commissioner Allen occurs in this statement to the extent that it is consistent with the views set out in his separate statement above.

† Vice Chairman Friedman has set out his own views in a separate statement above.

[1] 107 S. Ct. 1442, 43 Fair Empl. Prac. Cas. (BNA) 411; 42 Empl. Prac. Dec. (CCH) ¶36,831 (1987) [hereinafter cited as Johnson].

[2] 42 U.S.C. §1975c(3).

[3] 42 U.S.C. §1975c(2).

[4] There is no question that the plaintiff, Paul Johnson, was a victim of discrimination on the basis of sex: the facts of the case leave little doubt that, but for her sex, Diane Joyce would not have been promoted over Paul Johnson. The district court so found, and that finding was not disturbed on appeal. Though reasonable minds can differ in their interpretation of the facts that led to the promotion of Diane Joyce over Paul Johnson, *compare* Johnson, 107 S. Ct. at 1461, 1464 (O'Connor J. concurring in the result) *with id.,* 107 S. Ct. at 1468–69 (Scalia and White, JJ. and Rehnquist, C.J.,

Examination of the constitutional law governing the interpretation of the equal protection clause as well as the language and legislative history of Title VII of the Civil Rights Act of 1964,[5] thus leads us to conclude that neither a statistically balanced work force, nor the encouragement of race- or sex-based decisionmaking on the part of employers can legitimately be described as goals of Title VII. The language of the statute says as much on its face:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title 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, admitted to membership or classified by any 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.[6]

The Supreme Court's decision in *Johnson,* however, is based on a very different interpretation of Title VII. After *Johnson,* an employer which seeks to avoid potential Title VII liability because it or potential Title VII plaintiffs can point to "a conspicuous. . .imbalance in traditionally segregated job categories"[7] can "voluntarily" take race, color, religion, sex, or national origin into account as "the *determining factor*"[8] in making employment decisions. "[A]n employer seeking to justify the adoption of [such] a plan need not point to its own prior discriminatory practices, nor even to evidence of an 'arguable violation' on its part."[9] The existence of a "conspicuous imbalance" is enough to provide effective insulation of such affirmative action plans from Title VII suits filed by employees who are not members of the preferred racial, color, religious, or national origin groups.[10]

Phrased another way, the holding in *Johnson* is that private or public employers which can find a long-standing and conspicuous statistical imbalance in

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dissenting), we believe that there is no need for this Commission to engage in an independent analysis of the specific facts of the case. When the Supreme Court issued its ruling, the case came to a close. For our purpose, it is sufficient to note that sex discrimination did, in fact, take place in *Johnson.* Our task is to appraise the Supreme Court's rationale for permitting it. That rationale is one of the "laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the laws" to which our jurisdiction extends. 42 U.S.C. §1975c(3). *See also* 42 U.S.C. §1975c(2).

[5] 42 U.S.C. §§2000e *et seq.*

[6] 42 U.S.C. §2000e-2(j).

[7] Johnson, 107 S. Ct. *citing* Steelworkers v. Weber, 443 U.S. 193, 209, 212 (Blackman, J. concurring).

[8] Johnson, 107 S. Ct. at 149, citing the district court's finding that "the sex of Joyce was the *'determining factor* in her selection'" (emphasis in original).

[9] *Id.* at 1451, *citing* Steelworkers v. Weber, 443 U.S. 193, 212 (Blackman, J. concurring).

[10] Johnson, 107 S. Ct. at 1449. Since the majority opinion holds that a voluntary affirmative action plan of the type involved in *Johnson* is valid, there is, in reality, no way for the ineligible employee to challenge employment practices based on race, sex, religion, or national origin under such a plan. Once the employer pleads that its action was based on its desire to remedy "a conspicuous. . .imbalance in traditionally segregated job categories," the plaintiff's burden of proof is insurmountable whenever such a statistical imbalance exists.

> Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, 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 invalid. . . . That does not mean, however,. . .that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving invalidity remains on the plaintiff. *Id.* (emphasis added).

Part III of Justice Scalia's dissenting opinion, which was joined by Chief Justice Rehnquist, makes the same point:

> It is impossible not to be aware that the practical effect of our holding is to accomplish de facto what the law—in language even plainer than that ignored in Weber, see 42 U.S.C. 2000e-2(j)—forbids anyone from accomplishing *de jure:* in many contexts it effectively *requires* employers, public as well as private, to engage in intentional discrimination on the basis of race or sex. This Court's prior interpretations of Title VII, especially the decision in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer's work force. Even the employer who is confident of ultimately prevailing in such a suit must contemplate the expense and adverse publicity of a trial, because the extent of the imbalance, and the "job relatedness" of his selection criteria, are questions of fact to be explored through rebuttal and counter-rebuttal of a "prima facie case" consisting of no more than the showing that the employer's selection process "selects those from the protected class at a 'significantly' lesser rate than their counterparts." [citation omitted] If, however, employers are free to discriminate through affirmative action, without fear of "reverse discrimination" suits by their nonminority or male victims, they are offered a threshold defense against Title VII liability premised on numerical disparities.

Johnson, 107 S. Ct. at 1475.

certain job categories are now permitted to do what the plain language of Title VII prohibits.[11] Preferences based on race[12] and sex[13] may now be granted solely "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 [an] employer. . .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."[14] In short, the Court has effectively rewritten Title VII itself. Justice Stevens' concurring opinion in *Johnson* concedes the point:

> Prior to 1978 the Court construed the Civil Rights Act of 1964 as an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory preferences for any group, minority or majority. . . . In the *[University of California Regents* v.] *Bakke* case in 1978 and again in *Steelworkers v. Weber* [citation omitted], a majority of the Court interpreted the anti-discrimination strategy of the statute in a fundamentally different way. . . . Neither the "same standards" language used in *McDonald* [v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976)], nor the "color-blind" rhetoric used by the Senators and Congressman who enacted the bill, is now controlling.[15]

Because it appears to permit discrimination in employment decisions for the purpose of remedying statistical imbalances over which the employer had no control,[16] we believe that the holding in *Johnson* constitutes a significant legal development which is deserving of careful congressional and public scrutiny. Without statutory or constitutional warrant for doing so,[17] the Supreme Court has recast Title VII in a manner that comports with its view of the statute's purpose rather than with the language Congress wrote.

Our criticism of the Court's rationale and holding notwithstanding, the Court's ruling authoritatively states the law. It must be enforced vigorously unless and until changed or modified by Congress or a subsequent ruling of the Court.[18]

II

We believe that the Court's interpretation of Title VII in *Johnson* is an unfortunate development in the law of affirmative action for two reasons: first, it misconceives the reasons why employers should be encouraged to adopt and implement affirmative action plans; second, and more important, it sends employers a mixed message. What might have been a resounding statement favoring equality in the workplace is, on closer examination, an invitation to "give preference to members of under-represented groups."[19]

In our view, the majority and concurring opinions in *Johnson* give insufficient weight to the principle of equality articulated in Title VII and in the 14th amendment.[20] Given the thrust of the Court's prior

[11] *See* Johnson, 107 S. Ct. at 1465 (White, J. dissenting); *id.,* 107 S. Ct. at 1475 (Scalia, J. dissenting). *But see* Johnson, 107 S. Ct. at 1461 (O'Connor, J. concurring in the judgment) ("This time the question posed is whether a public employer violates Title VII by promoting a qualified woman rather than a marginally better qualified man when there is a statistical imbalance sufficient to support a claim of a pattern or practice of discrimination against women under Title VII.")

[12] Steelworkers v. Weber, 443 U.S. 193 (1979).

[13] Johnson, 107 S. Ct. 1442 (1987).

[14] 42 U.S.C. §2000e-2(j).

[15] Johnson, 107 S. Ct. at 1458 (Stevens, J. concurring). The issue, for him, "[was] whether to adhere to an authoritative construction of the Act [Title VII] that is at odds with [his] understanding of the actual intent of the authors of the legislation."

[16] See Johnson, *supra* 107 S. Ct. at 1452–53. Writing for the majority, Justice Brennan stated:

> A manifest imbalance need not be such that it would support a prima facie case against the employer,. . ., since we do not regard as identical the constraints of Title VII and the federal constitution on voluntarily adopted affirmative action plans. 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. (footnotes omitted)

Compare Johnson, 107 S. Ct. at 1463 (O'Connor, J. concurring in the judgment). ("Evidence sufficient for a prima facie Title VII pattern or practice claim against the employer itself suggests that the absence of women or minorities in a workforce cannot be explained by general societal discrimination alone and that remedial action is appropriate.")

[17] See *infra,* n.18.

[18] U.S. Const. Art, III, Sec. 2, clause 1; Art. VI, Sec. 2 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (". . .it is emphatically the province and duty of the judicial department to say what the law is.")

[19] Johnson, 107 S. Ct. at 1458 (Stevens, J. concurring).

[20] Justice Brennan's opinion for the majority misreads the legislative history of Congress' decision to extend Title VII to public employers. Johnson, 107 S. Ct. at 1449–50 n.6. It is the equal protection clause of the 14th amendment, not the commerce clause, which forms the basis for Congress' extension of that statute to public employers. *See* Sub. Comm. on Labor of the Sen. Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972, at 1173 (Comm. Print, 1972). Even if the legislative history of the act did, in fact, support the proposition that the commerce clause was the basis for Title VII's proscription of discrimination by *public* (as opposed to private) employers, it is doubtful that Congress could relieve public employers from the independent duty imposed on them by the 14th amendment. *See* Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641, 651–52 and n.10 (1966). *See generally* Cox, *The Role of Congress in Constitutional Determination,* 40 U. Cinn. L. Rev. 199, 253 (1971). Justices Scalia, O'Connor, and White and Chief Justice Rehnquist are certainly correct when

opinions in *Regents of the University of California* v. *Bakke*[21] and *Steelworkers* v. *Weber*,[22] it is not surprising that the majority in *Johnson* appears to be far more concerned with ensuring the integrity of affirmative action plans designed to attain a demographically balanced work force than it is with reaffirming our nation's commitment to equal employment opportunity through nondiscrimination. Such a result is the logical outcome of an approach that supplants Congress' statutory and constitutional commitment to *individual* freedom with a judicially sanctioned focus on membership in a historically disadvantaged group.

We wholeheartedly agree with the Court's statement of the unexceptionable proposition "that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts."[23] We also agree that nondiscriminatory "special programs to benefit members of the minority groups for whose protection the statute was enacted"[24] are necessary to remedy both present and past discrimination in the workplace. We emphatically do not agree, however, that either the desirability of voluntary action, or the need for special programs justifies either the rationale or the result in *Johnson*.

Johnson turns on the proposition that the sex or race of an arguably "qualified" applicant can be taken into account without running afoul of Title VII, but it does not give any guidance as to just how much weight otherwise prohibited criteria may be given in employment decisions before a violation is found. Much will depend on the manner in which the case is interpreted by employers and lower courts.

In most discussions concerning the legality of specific affirmative action plans, the central question appears to be whether race or sex was "the" factor or merely "a consideration" that influenced, but did not determine, the final outcome. After *Johnson*, it is arguable that this formulation of the question no longer applies.

If the lower courts follow Justice Stevens' admonition that managerial discretion should be respected in any case where preferences for members of "historically disadvantaged groups"[25] can be defended "for any reason that might seem sensible from a business or social point of view,"[26] the nondiscrimination principle of Title VII has been gutted. If the same rationale is followed for public employers, the equal protection clause has been gutted as well. Justice Stevens virtually concedes the point in frank admission that "*Steelworkers* v. *Weber*. . .interpreted the anti-discrimination strategy of [Title VII] in a fundamentally different way" than its congressional proponents had urged, and that "the 'color-blind' rhetoric used by the Senators and Congressman who enacted the bill is [no longer] controlling."[27]

If, on the other hand, the lower courts follow Justice O'Connor's view that Title VII is not violated where race or sex is "simply used as a plus factor,"[28] it

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they argue that there is no reason to assume that Title VII "was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution." Johnson, 107 S. Ct. at 1469 (Scalia, J. in a dissenting opinion in which Chief Justice Rehnquist concurred in full, and in which Justice White concurred in relevant part) (emphasis in original). Justice O'Connor's concurring opinion was equally forthright on this point: she "[saw] little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause." *Id.*, 107 S. Ct. at 1463.

[21] 438 U.S. 265 (1978).

[22] 443 U.S. 193 (1979).

[23] Johnson, 107 S. Ct. at 1458–59 and n.4, *citing* Steelworkers v. Weber, 443 U.S. 193, 204.

[24] *Id.*

[25] The question of which groups qualify as "historically disadvantaged" is an interesting one that has only been partially addressed in the Court's opinions. *See* St. Francis College v. Al-Khazraji, 107 S. Ct. 2022, 2028 (1987) (definition of "race discrimination" under 42 U.S.C. §1981); Shaare Tefila Congregation v. Cobb, 107 S. Ct. 2019, 2021–22 (1987) (same, 42 U.S.C. §§1981–82). *See also* Fullilove v. Klutznick, 448, 552–53 and n.30 (1980), in which Justice Stevens' dissent raised the same question with regard to minority set-asides:

> [W]hy were these six racial classifications, and no others, included in the preferred class? Why are aliens excluded from the preference although they are not otherwise ineligible for public contracts? What percentage of Oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class? How does the legacy of slavery and the history of discrimination against the descendants of its victims support a preference for Spanish-speaking citizens who may be directly competing with black citizens in some overpopulated communities? Why is a preference given only to owners of business enterprises and why is that preference unaccompanied by any requirement concerning the employment of disadvantaged persons? Is the preference limited to a subclass of persons who can prove that they are subject to a special disability caused by past discrimination, as the Court's opinion indicates? Or is every member of the racial class entitled to a preference as the statutory language seems plainly to indicate?

[26] Johnson, 107 S. Ct. at 1459 (Stevens, J. concurring).

[27] *Id.* (citation omitted). *See* Steelworkers v. Weber, 443 U.S. 193 (1979).

[28] Johnson, 107 S. Ct. at 1465 (O'Connor, J. concurring in the judgment). Justice Stevens' opinion in *Johnson* indicates that *stare decisis* was his major reason for adopting the majority's views on this point. *Stare decisis* would not, however, support his argument that there might be "other legitimate reasons to give preference to members of underrepresented groups." 107 S. Ct. at 1460 *(quoting* Sullivan, *The Supreme Court—Comment, Sins of Discrimination:*

is arguable that future cases will turn—as *Johnson* did not in Justice O'Connor's view[29] —on the facts of each complaint. Although a "plus factor test" is not the ideal formulation of a Title VII standard based on nondiscrimination, it certainly is preferable to the majority's focus on statistical imbalance within job categories as the justification for preferential treatment on the basis of characteristics made legally irrelevant to most employment decisions.[30] Difficult choices must often be made between otherwise qualified candidates: the question here is whether they should be made on the basis of sex, race, religion, color, or national origin.

In our view, a majority of the Supreme Court is now prepared to hold that the statutory and constitutional requirement of nondiscrimination is satisfied whenever a perfectly legitimate *measure* of overall progress (statistical imbalance) is the basis for sanctioning the use of an unconstitutional or illegal *means* (preferences based on race, sex, color, national origin, or religion) to correct those imbalances. We do not believe this to be a legitimate reading of either Title VII or the Constitution. In the absence of some showing or admission that the employer is arguably responsible for the imbalance (i.e., a prima facie case of discrimination), the Court's ruling cannot be justified on the basis of either the Constitution or the statutory nondiscrimination principles on which it relied. Unless the Court reverses itself, Congress alone can correct the error. We believe it should do so.

III

Our preference is for a standard that is unequivocally based on the initial premise of Title VII: nondiscrimination.[31] Race, color, sex, religion, and national origin are often taken into account in employment decisions, either consciously as in *Johnson,* or unconsciously. The question is: for what purpose?[32]

Where an employer desires to utilize a factor otherwise prohibited by law, the record should reflect precisely when and how it was considered, and for what precise purpose. Even then, the employer should not be able to defend the use of illegal characteristics without taking the additional step required by Title VII itself: the exercise of nondiscriminatory managerial discretion to choose the candidate best qualified for the position. If an employer is unable to prove that it actually *made a judgment concerning the relative merits of the qualified candidates being considered,* its statutory obligation has not been met. If an employer cannot state that, "all things considered," the person chosen was "best" for the job, the courts should hold, as Justice Scalia urged in *Johnson,*[33] that Title VII has been violated.

Our concern is that *Johnson* will be taken as a green light for sex and race preferences in hiring and promotion plans devised with a view toward protecting employers against Title VII actions by members of "historically disadvantaged groups."[34] If so, the case will have been a net loss for the principle of equal employment opportunity; for the statute will cease to provide equal protection for all workers. If, on the other hand, the concerns expressed by Justices O'Connor, White, and Scalia are taken into account by either Congress or the lower courts, the result will have been to move the law closer to its goal of equal employment opportunity.

Conclusion

In sum, we urge all employers to carry out the requirements of Title VII with due concern for the rights of all members of the work force, and with special attention to the goal of eliminating the effects of past discrimination, in every aspect of the employment relationship, whatever the source. We would, at the same time, strongly urge the Congress to reaffirm its historic commitment to nondiscrimination in the

Last Term's Affirmative Action Cases, 100 Harv. L. Rev. 78, 96 (1986) for the proposition that "improving. . .services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force. . .or simply to eliminate from their operations all de facto embodiment of a system of racial caste" might be among the "other legitimate reasons" he has in mind.) Such a view is a clear extension of prior case law. *See* United States v. Paradise, 107 S. Ct. 1053 (1987); Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986); Local No. 93 v. Cleveland, 106 S. Ct. 3065 (1986); Wygant v. Jackson Board of Education, 106 S. Ct. 1842 (1986); Firefighters Local Union No. 1784 v. Scotts, 467 U.S. 561 (1984); Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[29] Johnson, 107 S. Ct. at 1461, 1464 (O'Connor, J. concurring in the judgment).

[30] *Id.,* 107 S. Ct. at 1450–57 (majority opinion per Brennan, J.)

[31] See also statement of Vice Chairman Murray Friedman, above.

[32] *Cf.,* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862, 97 L.Ed.2d 273 (1987).

[33] *See,* Johnson, 107 S. Ct. at 1467, 1474–75 (Scalia, J. and Rehnquist, C.J. dissenting).

[34] Johnson, 107 S. Ct. at 1463 (O'Connor, J. concurring in the judgment) ("Unfortunately the Court today gives little guidance for what statistical balance is sufficient to support an affirmative action plan. Although the Court denies that the statistical imbalance need be sufficient to make out a prima facie case of discrimination against women, [citation omitted], the Court fails to suggest an alternative standard.").

workplace by making it clear, through whatever statutory modifications of Title VII as may be necessary, to place the focus of the law once again on the employer's duty to *individual* workers. The Constitution and simple justice require it.

Opinions: Johnson v. Transportation Agency, Santa Clara County, California

Paul E. JOHNSON, Petitioner

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, et al.

No. 85–1129.

Argued Nov. 12, 1986.

Decided March 25, 1987.

Male employee who was passed over for promotion in favor of female employee brought Title VII suit against county transportation agency. The United States District Court for the Northern District of California found that the county agency violated Title VII, and the Court of Appeals for the Ninth Circuit reversed, 770 F.2d 752, superseding 748 F.2d 1308. Certiorari was granted. The Supreme Court, Justice Brennan, held that county agency did not violate Title VII by taking female employee's sex into account and promoting her over male employee with higher test score, as decision was made pursuant to affirmative action plan directing that sex or race be considered for purpose of remedying underrepresentation of women and minorities in traditionally segregated job categories, and did not unnecessarily trammel rights of male employees or create an absolute bar to their advancement.

Affirmed.

Justice Stevens filed concurring opinion.

Justice O'Connor filed opinion concurring in judgment.

Justice White filed dissenting opinion.

Justice Scalia filed dissenting opinion in which Chief Justice Rehnquist joined, and in parts I and II of which Justice White joined.

1. Civil Rights ⇐43

Where issue is properly raised, public employers must justify adoption and implementation of voluntary affirmative action plan under equal protection clause. U.S.C.A. Const.Amend. 14.

2. Civil Rights ⇐43

Employee bears burden of establishing that affirmative-action program violates Title VII. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⇐43

Once Title VII plaintiff establishes prima facie case that race or sex has been taken into account in employment decision, employer may meet its burden of articulating nondiscriminatory rationale for its decision by proof of existence of affirmative action plan, at which point burden shifts to plaintiff to prove that plan is invalid and that employer's justification is pretextual. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Civil Rights ⇐43

Employer seeking in Title VII suit to justify adoption of affirmative-action plan need not point to its own prior discriminatory practices, but only to conspicuous imbalance in traditionally segregated job categories. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Civil Rights ⇐9.10, 9.14

In determining whether there is an imbalance reflecting underrepresentation of women and minorities in traditionally segregated job categories that would allow employer, without violating Title VII, to adopt affirmative action plan and take sex or race into account in making employment decision, comparison of percentage of minorities or women in employer's work force with percentage in area labor market or general population is appropriate for jobs requiring no special expertise or training programs designed to provide expertise. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Civil Rights ⇐9.10, 9.14

Where job requires special training, comparison which employer must make in determining whether there is an imbalance reflecting underrepresentation of women or minorities in traditionally segregated job categories that would allow employer to adopt affirmative action plan and take sex or race into account without violating Title VII, should be with those in labor force who possess the relevant qualifications. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Civil Rights ⇐9.10, 9.14

Manifest imbalance reflecting underrepresentation of women or minorities in traditionally segregated job categories, which would allow employer to adopt affirmative action plan and take sex or race into account without violating Title VII, need not be such that it would support prima facie case against employer, as constraints of Title VII and Constitution on voluntarily adopted affirmative action plans are not identical. U.S.C.A. Const. Amend. 14; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐9.14

County transportation agency did not violate Title VII by taking female employee's sex into account and promoting her over male employee with higher test score, as decision was made pursuant to affirmative action plan directing that sex or race be considered for purpose of remedying underrepresentation of women and minorities in traditionally segregated job categories, and did not unnecessarily trammel

rights of male employees or create an absolute bar to their advancement. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⇐9.10

If affirmative action plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers in violation of Title VII, as it would hold supervisors to achievement of particular percentage of minority employment or membership regardless of circumstances such as economic conditions or number of qualified minority applicants. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Syllabus *

In 1978, an affirmative-action plan (Plan) for hiring and promoting minorities and women was voluntarily adopted by respondent Santa Clara County Transportation Agency (Agency). The Plan provides, *inter alia*, that in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant. The Plan is intended to achieve a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they are underrepresented, and the long-term goal is to attain a work force whose composition reflects the proportion of minorities and women in the area labor force. The Plan sets aside no specific number of positions for minorities or women, but requires that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. When the Agency announced a vacancy for the promotional position of road dispatcher, none of the 238 positions in the pertinent Skilled Craft Worker job classification, which included the dispatcher position, was held by a woman. The qualified applicants for the position were interviewed and the Agency, pursuant to the Plan, ultimately passed over petitioner, a male employee, and promoted a female, Diane Joyce, both of whom were rated as well-qualified for the job. After receiving a right-to-sue letter from the Equal Employment Opportunity Commission, petitioner filed suit in Federal District Court, which held that the Agency had violated Title VII of the Civil Rights Act of 1964. The court found that Joyce's sex was the determining factor in her selection and that the Agency's Plan was invalid under the criterion announced in *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 that the Plan be temporary. The Court of Appeals reversed.

Held: The Agency appropriately took into account Joyce's sex as one factor in determining that she should be promoted. The Agency's Plan represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force, and is fully consistent with Title VII. Pp. 1449–1456.

(a) Petitioner bears the burden of proving that the Agency's Plan violates Title VII. Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision, such as the existence of an affirmative-action plan. The burden then shifts to the plaintiff to prove that the plan is invalid and that the employer's justification is pretextual. Pp. 1449–1450.

(b) Assessment of the legality of the Agency's Plan must be guided by the decision in *Weber*. An employer seeking to justify the adoption of an affirmative-action plan need not point to its own prior discriminatory practices, but need point

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

only to a conspicuous imbalance in traditionally segregated job categories. Voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts. Pp. 1449–1451.

(c) The employment decision here was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber, supra.* Consideration of the sex of applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." *Id.*, at 197, 99 S.Ct., at 2724. Where a job requires special training, the comparison for determining whether an imbalance exists should be between the employer's work force and those in the area labor force who possess the relevant qualifications. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would improperly dictate mere blind hiring by the numbers. However, the Agency's Plan did not authorize such blind hiring, but expressly directed that numerous factors be taken into account in making employment decisions, including specifically the number of female applicants qualified for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft Worker job category when Joyce was promoted, the Agency's management had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for the job category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard. Pp. 1451–1455.

(d) The Agency Plan did not unnecessarily trammel male employees' rights or create an absolute bar to their advancement. The Plan sets aside no positions for women, and expressly states that its goals should not be construed as "quotas" that must be met. Denial of the promotion to petitioner unsettled no legitimate firmly rooted expectation on his part, since the Agency director was authorized to select any of the seven applicants deemed qualified for the job. Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. However, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to "maintain" a permanent racial and sexual balance. Pp. 1455–1456.

770 F.2d 752, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion. O'CONNOR, J., filed an opinion concurring in the judgment. WHITE, J., filed a dissenting opinion. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., joined, and in Parts I and II of which WHITE, J., joined.

Constance E. Brooks, Washington, D.C., for petitioner.

Steven Woodside, San Jose, Cal., for respondents.

Justice BRENNAN delivered the opinion of the Court.

Respondent, Transportation Agency of Santa Clara County, California, unilaterally promulgated an Affirmative Action Plan applicable, *inter alia,* to promotions of employees. In selecting applicants for the promotional position of road dispatcher, the Agency, pursuant to the Plan, passed over petitioner Paul Johnson, a male employee, and promoted a female employee applicant,

Diane Joyce. The question for decision is whether in making the promotion the Agency impermissibly took into account the sex of the applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[1] The District Court for the Northern District of California, in an action filed by petitioner following receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), held that respondent had violated Title VII. App. to Pet. for Cert. 1a. The Court of Appeals for the Ninth Circuit reversed. 748 F.2d 1308 (1984); modified, 770 F.2d 752 (1985). We granted certiorari, 478 U.S. ——, 106 S.Ct. 3331, 92 L.Ed.2d 737 (1986). We affirm.[2]

I

A

[1] In December 1978, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan (Plan) for the County Transportation Agency. The Plan implemented a County Affirmative Action Plan, which had been adopted, declared the County, because "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." App. 31.[3] Relevant to this case, the Agency Plan provides that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant.

In reviewing the composition of its work force, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the county labor force in both the Agency as a whole and in five of seven job categories. Specifically, while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees. Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women: women made up 76% of Office and Clerical Workers, but only 7.1% of Agency Officials and Administrators, 8.6% of Professionals, 9.7% of Technicians, and 22% of Service and Maintenance workers. As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. *Id.*, at 49. The Plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them "because of the limited opportunities that have existed in the past for them to work in such classifications." *Id.*, at 57. The Plan also observed that, while the proportion of ethnic minorities in the Agency as a whole exceeded the proportion of such

1. Section 703(a) of the Act, 78 Stat. 255, as amended, 86 Stat. 109, 42 U.S.C. § 2000e–2(a), provides that 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; or

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

2. No constitutional issue was either raised or addressed in the litigation below. See 748 F.2d 1308, 1310, n. 1 (1984). We therefore decide in this case only the issue of the prohibitory scope of Title VII. Of course, where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. See *Wygant v. Jackson Board of Education*, — U.S. ——, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).

3. The Plan reaffirmed earlier County and Agency efforts to address the issue of employment discrimination, dating back to the County's adoption in 1971 of an Equal Employment Opportunity Policy. App. 37–40.

minorities in the county work force, a smaller percentage of minority employees held management, professional, and technical positions.[4]

The Agency stated that its Plan was intended 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 are underrepresented." *Id.*, at 43. As a benchmark by which to evaluate progress, the Agency stated that its long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force. *Id.*, at 54. Thus, for the Skilled Craft category in which the road dispatcher position at issue here was classified, the Agency's aspiration was that eventually about 36% of the jobs would be occupied by women.

The Plan acknowledged that a number of factors might make it unrealistic to rely on the Agency's long-term goals in evaluating the Agency's progress in expanding job opportunities for minorities and women. Among the factors identified were low turnover rates in some classifications, the fact that some jobs involved heavy labor, the small number of positions within some job categories, the limited number of entry positions leading to the Technical and Skilled Craft classifications, and the limited number of minorities and women qualified for positions requiring specialized training and experience. *Id.*, at 56–57. As a result, the Plan counselled that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. Among the tasks identified as important in establishing such short-term goals was the acquisition of data "reflecting the ratio of minorities, women and handicapped persons who are working in the local area in major job classifications relating to those utilized by the County Administration," so as to determine the availability of members of such groups who "possess the desired qualifications or potential for placement." *Id.*, at 64. These data on qualified group members, along with predictions of position vacancies, were to serve as the basis for "realistic yearly employment goals for women, minorities and handicapped persons in each EEOC job category and major job classification." *Ibid.*

The Agency's Plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented. One such job was the road dispatcher position that is the subject of the dispute in this case.

B

On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher in the Agency's Roads Division. Dispatchers assign road crews, equipment, and materials, and maintain records pertaining to road maintenance jobs. *Id.*, at 23–24. The position requires at minimum four years of dispatch or road maintenance work experience for Santa Clara County. The EEOC job classification scheme designates a road dispatcher as a Skilled Craft worker.

Twelve County employees applied for the promotion, including Joyce and Johnson. Joyce had worked for the County since 1970, serving as an account clerk until 1975. She had applied for a road dispatcher position in 1974, but was deemed ineligible because she had not served as a road maintenance worker. In 1975, Joyce transferred from a senior account clerk position to a road maintenance worker position, becoming the first woman to fill such a job. Tr. 83–84. During her four years in that

4. While minorities constituted 19.7% of the county labor force, they represented 7.1% of the Agency's Officials and Administrators, 19% of its Professionals, and 16.9% of its Technicians. *Id.*, at 48.

position, she occasionally worked out of class as a road dispatcher.

Petitioner Johnson began with the county in 1967 as a road yard clerk, after private employment that included working as a supervisor and dispatcher. He had also unsuccessfully applied for the road dispatcher opening in 1974. In 1977, his clerical position was downgraded, and he sought and received a transfer to the position of road maintenance worker. *Id.*, at 127. He also occasionally worked out of class as a dispatcher while performing that job.

Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job, and were interviewed by a two-person board. Seven of the applicants scored above 70 on this interview, which meant that they were certified as eligible for selection by the appointing authority. The scores awarded ranged from 70 to 80. Johnson was tied for second with score of 75, while Joyce ranked next with a score of 73. A second interview was conducted by three Agency supervisors, who ultimately recommended that Johnson be promoted. Prior to the second interview, Joyce had contacted the County's Affirmative Action Office because she feared that her application might not receive disinterested review.[5] The Office in turn contacted the Agency's Affirmative Action Coordinator, whom the Agency's Plan makes responsible for, *inter alia*, keeping the Director informed of opportunities for the Agency to accomplish its objectives under the Plan. At the time, the Agency employed no women in any Skilled Craft position, and had never employed a woman as a road dispatcher. The Coordinator recommended to the Director of the Agency, James Graebner, that Joyce be promoted.

Graebner, authorized to choose any of the seven persons deemed eligible, thus had the benefit of suggestions by the second interview panel and by the Agency Coordinator in arriving at his decision. After deliberation, Graebner concluded that the promotion should be given to Joyce. As he testified: "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that ... I believe it was a combination of all those." *Id.*, at 68.

The certification form naming Joyce as the person promoted to the dispatcher position stated that both she and Johnson were rated as well-qualified for the job. The evaluation of Joyce read: "Well qualified by virtue of 18 years of past clerical experience including 3½ years at West Yard plus almost 5 years as a [road maintenance worker]." App. 27. The evaluation of Johnson was as follows: "Well qualified applicant; two years of [road maintenance worker] experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago." *Ibid.* Graebner testified that he did not regard as significant the fact that Johnson

5. Joyce testified that she had had disagreements with two of the three members of the second interview panel. One had been her first supervisor when she began work as a road maintenance worker. In performing arduous work in this job, she had not been issued coveralls, although her male co-workers had received them. After ruining her pants, she complained to her supervisor, to no avail. After three other similar incidents, ruining clothes on each occasion, she filed a grievance, and was issued four pair of coveralls the next day. Tr. 89–90. Joyce had dealt with a second member of the panel for a year and a half in her capacity as chair of the Roads Operations Safety Committee, where she and he "had several differences of opinion on how safety should be implemented." *Id.*, at 90–91. In addition, Joyce testified that she had informed the person responsible for arranging her second interview that she had a disaster preparedness class on a certain day the following week. By this time about ten days had passed since she had notified this person of her availability, and no date had yet been set for the interview. Within a day or two after this conversation, however, she received a notice setting her interview at a time directly in the middle of her disaster preparedness class. *Id.*, at 94–95. This same panel member had earlier described Joyce as a "rebel-rousing, skirt-wearing person," Tr. 153.

scored 75 and Joyce 73 when interviewed by the two-person board. Tr. 57–58.

Petitioner Johnson filed a complaint with the EEOC alleging that he had been denied promotion on the basis of sex in violation of Title VII. He received a right-to-sue letter from the agency on March 10, 1981, and on March 20, 1981, filed suit in the United States District Court for the Northern District of California. The District Court found that Johnson was more qualified for the dispatcher position than Joyce, and that the sex of Joyce was the *"determining factor* in her selection." App. to Pet. for Cert. 4a (emphasis in original). The court acknowledged that, since the Agency justified its decision on the basis of its Affirmative Action Plan, the criteria announced in *Steelworkers v. Weber,* 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), should be applied in evaluating the validity of the plan. App. to Pet. for Cert. 5a. It then found the Agency's Plan invalid on the ground that the evidence did not satisfy *Weber's* criterion that the Plan be temporary. *Id.,* at 6a. The Court of Appeals for the Ninth Circuit reversed, holding that the absence of an express termination date in the Plan was not dispositive, since the Plan repeatedly expressed its objective as the attainment, rather than the maintenance, of a work force mirroring the labor force in the county. 748 F.2d, at 1312, modified, 770 F.2d 752 (1985). The Court of Appeals added that the fact that the Plan established no fixed percentage of positions for minorities or women made it less essential that the Plan contain a relatively explicit deadline. 748 F.2d, at 1312. The Court held further that the Agency's consideration of Joyce's sex in filling the road dispatcher position was lawful. The Agency Plan had been adopted, the court said, to address a conspicuous imbalance in the Agency's work force, and neither unnecessarily trammeled the rights of other employees, nor created an absolute bar to their advancement. *Id.,* at 1313–1314.

II

[2, 3] As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency's Plan. Only last term in *Wygant v. Jackson Board of Education,* 476 U.S. ——, ——, 106 S.Ct. 1842, 1848, 90 L.Ed.2d 260 (1986), we held that "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program," and we see no basis for a different rule regarding a plan's alleged violation of Title VII. This case also fits readily within the analytical framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, 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 invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.

The assessment of the legality of the Agency Plan must be guided by our decision in *Weber, supra.*[6] In that case, the

6. The dissent maintains that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, and that a public employer's adoption of an affirmative action plan therefore should be governed by *Wygant.* This rests on the following logic: Title VI embodies the same constraints as the Constitution; Title VI and Title VII have the same prohibitory scope; therefore, Title VII and the Constitution are coterminous for purposes of

Court addressed the question whether the employer violated Title VII by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." *Id.*, 443 U.S., at 197, 99 S.Ct. at 2724. The respondent employee in that case challenged the employer's denial of his application for a position in a newly established craft training program, contending that the employer's selection process impermissibly took into account the race of the applicants. The selection process was guided by an affirmative action plan, which provided that 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the employer's plant approximated the percentage of blacks in the local labor force. Adoption of the plan had been prompted by the fact that only 5 of 273, or 1.83%, of skilled craftworkers at the plant were black, even though the work force in the area was approximately 39% black. Because of the historical exclusion of blacks from craft positions, the employer regarded its former policy of hiring trained outsiders as inadequate to redress the imbalance in its work force.

We upheld the employer's decision to select less senior black applicants over the white respondent, for we found that taking race into account was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." *Id.*, at 208, 99 S.Ct., at 2730. As we 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 204, 99 S.Ct., at 2728 (quoting remarks of Sen. Humphrey, 110 Cong.Rec. 6552 (1964)).[7]

this case. The flaw is with the second step of the analysis, for it advances a proposition that we explicitly considered and rejected in *Weber*. As we noted in that case, Title VI was an exercise of federal power "over a matter in which the Federal Government was already directly involved," since Congress "was legislating to assure federal funds would not be used in an improper manner." 443 U.S., at 206 n. 6, 99 S.Ct., at 2729 n. 6. "Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*." *Ibid.* This point is underscored by Congress' concern that the receipt of any form of financial assistance might render an employer subject to the commands of Title VI rather than Title VII. As a result, Congress added § 604 to Title VI, 42 U.S.C. § 2000d–3, which provides:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

The sponsor of this section, Senator Cooper, stated that it was designed to clarify that "it was not intended that [T]itle VI would impinge on [T]itle VII." 110 Cong.Rec. 11615 (1964).

While public employers were not added to the definition of "employer" in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct. Indeed, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard v. Rawlinson*, 433 U.S. 321, 332 n. 14, 97 S.Ct. 2720, 2728 n. 14, 53 L.Ed.2d 786 (1977). The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.

7. The dissent maintains that *Weber*'s conclusion that Title VII does not prohibit voluntary affirmative action programs "rewrote the statute it purported to construe." *Post*, at 1472. *Weber*'s decisive rejection of the argument that the "plain language" of the statute prohibits affirmative action rested on (1) legislative history indicating Congress' clear intention that employers play a major role in eliminating the vestiges of discrimination, 443 U.S., at 201–204, 99 S.Ct., at 2726–28, and (2) the language and legislative history of § 703(j) of the statute, which reflect a strong desire to preserve managerial prerogatives so that they might be utilized for this purpose. *Id.*, at 204–207, 99 S.Ct. at 2727–29. As Justice BLACKMUN said in his

[4] We noted that the plan did not "unnecessarily trammel the interests of the white employees," since it did not require "the discharge of white workers and their replacement with new black hirees." *Ibid.* Nor did the plan create "an absolute bar to the advancement of white employees," since half of those trained in the new program were to be white. *Ibid.* Finally, we observed that the plan was a temporary measure, not designed to maintain racial balance, but to "eliminate a manifest racial imbalance." *Ibid.* As Justice BLACKMUN's concurrence made clear, *Weber* held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part. *Id.*, at 212, 99 S.Ct., at 2731. Rather, it need point only to a "conspicuous ... imbalance in traditionally segregated job categories." *Id.*, at 209, 99 S.Ct., at 2730. Our decision was grounded in the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts. *Id.*, at 204, 99 S.Ct. at 2727–28.[8]

concurrence in *Weber*, "[I]f the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." *Id.*, at 216, 99 S.Ct., at 2734. Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.

The dissent faults the fact that we take note of the absence of Congressional efforts to amend the statute to nullify *Weber*. It suggests that Congressional inaction cannot be regarded as acquiescence under all circumstances, but then draws from that unexceptional point the conclusion that *any* reliance on Congressional failure to act is necessarily a "canard." *Post*, at ——. The fact that inaction may not always provide crystalline revelation, however, should not obscure the fact that it may be probative to varying degrees. *Weber*, for instance, was a widely-publicized decision that addressed a prominent issue of public debate. Legislative inattention thus is 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 hesitated to amend the statute to tell us so. For instance, when Congress passed the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), "it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in [*General Electric v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976)]." *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 678, 103 S.Ct. 2622, 2628, 77 L.Ed.2d 89 (1983). Surely, it is appropriate to find some probative value in such radically different Congressional reactions to this Court's interpretations of the same statute.

As one scholar has put it, "When a court says to a legislature: 'You (or your predecessor) meant X,' it almost invites the legislature to answer: 'We did not.'" G. Calabresi, A Common Law for the Age of Statutes 31–32 (1982). 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.

8. See also *Firefighters v. Cleveland*, 478 U.S. ——, ——, 106 S.Ct. 3063, 3072, 92 L.Ed.2d 405 (1986) ("We have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII"); *Alexander v. Gardner-Denver*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal"). The dissent's suggestion that an affirmative action program may be adopted only to redress an employer's past discrimination, see *post*, at ——, was rejected in *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), because the prospect of liability created by such an admission would create a significant disincentive for voluntary action. As Justice BLACKMUN's concurrence in that case pointed out, such a standard would "plac[e] voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the 'tightrope' it creates would be to eschew all forms of voluntary affirmative action." 443 U.S., at 210, 99 S.Ct., at 2731. Similarly, Justice O'CONNOR has observed in the constitutional context that "[t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." *Wygant, supra*, at ——, 106 S.Ct., at 1855 (O'CON-

In reviewing the employment decision at issue in this case, we must first examine whether that decision was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber*. Next, we must determine whether the effect of the plan on males and non-minorities is comparable to the effect of the plan in that case.

[5, 6] The first issue is therefore whether consideration of the sex of applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." *Id.*, at 197, 99 S.Ct., at 2724. 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 percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise, see *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (comparison between percentage of blacks in employer's work force and in general population proper in determining extent of imbalance in truck driving positions), or training programs designed to provide expertise, see *Weber, supra* (comparison between proportion of blacks working at plant and proportion of blacks in area labor force appropriate in calculating imbalance for purpose of establishing preferential admission to craft training program). Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. See *Hazelwood School District v. United States*, 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977) (must compare percentage of blacks in employer's work ranks with percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions). The requirement that the "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 discrimination, and that the interests of those employees not benefitting from the plan will not be unduly infringed.

[7] A manifest imbalance need not be such that it would support a prima facie case against the employer, as suggested in Justice O'CONNOR's concurrence, *post*, since we do not regard as identical the constraints of Title VII and the federal constitution on voluntarily adopted affirmative action plans.[9] Application of the "prima facie" standard in Title VII cases would be inconsistent with *Weber*'s focus on statistical imbalance,[10] and could inappropri-

NOR, J., concurring in part and concurring in the judgment).

Contrary to the dissent's contention, *post*, at ——, our decisions last term in *Firefighters, supra*, and *Sheet Metal Workers v. EEOC*, 478 U.S. ——, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986), provide no support for a standard more restrictive than that enunciated in *Weber*. *Firefighters* raised the issue of the conditions under which parties could enter into a consent decree providing for explicit numerical quotas. By contrast, the affirmative action plan in this case sets aside no positions for minorities or women. See *infra*, at ——-——. In *Sheet Metal Workers*, the issue we addressed was the scope of judicial remedial authority under Title VII, authority that has not been exercised in this case. The dissent's suggestion that employers should be able to do no more voluntarily than courts can order as remedies, *post*, at ——, ignores the fundamental difference between volitional private behavior and the exercise of coercion by the state. Plainly, "Congress' concern that federal courts not impose unwanted obligations on employers and unions," *Firefighters, supra*, 478 U.S., at ——, 106 S.Ct., at 3077, reflects a desire to preserve a relatively large domain for voluntary employer action.

9. See *supra*, n. 6.

10. The difference between the "manifest imbalance" and "prima facie" standards is illuminated by *Weber*. Had the Court in that case been concerned with past discrimination by the employer, it would have focused on discrimination in hiring skilled, not unskilled, workers, since only the scarcity of the former in Kaiser's work force would have made it vulnerable to a Title VII suit. In order to make out a prima facie case on such a claim, a plaintiff would be required to compare the percentage of black

ately create a significant disincentive for employers to adopt an affirmative action plan. See *Weber, supra,* 443 U.S., at 204, 99 S.Ct., at 2727–28 (Title VII intended as a "catalyst" for employer efforts to eliminate vestiges of discrimination). A corporation concerned with maximizing return on investment, for instance, is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used to subject it to a colorable Title VII suit.[11]

[8] It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race be taken into account for the purpose of remedying underrepresentation. The Agency Plan acknowledged the "limited opportunities that have existed in the past," App. 57, for women to find employment in certain job classifications "where women have not been traditionally employed in significant numbers." *Id.,* at 51.[12] As a result, observed the Plan, women were concentrated in traditionally female jobs in the Agency, and represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred. Specifically, 9 of the 10 Para-Professionals and 110 of the 145 Office and Clerical Workers were women. By contrast, women were only 2 of the 28 Officials and Administrators, 5 of the 58 Professionals, 12 of the 124 Technicians, none of the Skilled Craft Workers, and 1—who was Joyce—of the 110 Road Maintenance Workers. *Id.,* at 51–52. The Plan sought to remedy these imbalances through "hiring, training and promotion of ... women throughout the Agency in all major job classifications where they are underrepresented." *Id.,* at 43.

As an initial matter, the Agency adopted as a benchmark for measuring progress in eliminating underrepresentation the long-

skilled workers in the Kaiser work force with the percentage of black skilled craft workers in the area labor market.

Weber obviously did not make such a comparison. Instead, it focused on the disparity between the percentage of black skilled craft workers in Kaiser's ranks and the percentage of blacks in the area labor force. 443 U.S., at 198–199, 99 S.Ct., at 2724–2725. Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as miniscule 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. Thus, in cases such as *Weber,* where the employment decision at issue involves the selection of unskilled persons for a training program, the "manifest imbalance" standard permits comparison with the general labor force. By contrast, the "prima facie" standard would require comparison with the percentage of minorities or women qualified for the job for which the trainees are being trained, a standard that would have invalidated the plan in *Weber* itself.

11. 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. See, *e.g., Teamsters v. United States,* 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) (statistics in pattern and practice case supplemented by testimony regarding employment practices). 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.

12. For instance, the description of the Skilled Craft Worker category, in which the road dispatcher position is located, is as follows:

"Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the process involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen; electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers." App. 108.

As the Court of Appeals said in its decision below, "A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation." 748 F.2d, at 1313.

term goal of a work force that mirrored in its major job classifications the percentage of women in the area labor market.[13] Even as it did so, however, the Agency acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories. For positions requiring specialized training and experience, the Plan observed that the number of minorities and women "who possess the qualifications required for entry into such job classifications is limited." *Id.*, at 56. The Plan therefore directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions. *Id.*, at 61–64. The Plan stressed that such goals "should not be construed as 'quotas' that must be met," but as reasonable aspirations in correcting the imbalance in the Agency's work force. *Id.*, at 64. These goals were to take into account factors such as "turnover, layoffs, lateral transfers, new job openings, retirements and availability of minorities, women and handicapped persons in the area work force who possess the desired qualifications or potential for placement." *Ibid.* The Plan specifically directed that, in establishing such goals, the Agency work with the County Planning Department and other sources in attempting to compile data on the percentage of minorities and women in the local labor force that were actually working in the job classifications comprising the Agency work force. *Id.*, at 63–64. From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention.

As the Agency Plan recognized, women were most egregiously underrepresented in the Skilled Craft job category, since *none* of the 238 positions was occupied by a woman. In mid–1980, when Joyce was selected for the road dispatcher position, the Agency was still in the process of refining its short-term goals for Skilled Craft Workers in accordance with the directive of the Plan. This process did not reach fruition until 1982, when the Agency established a short-term goal for that year of three women for the 55 expected openings in that job category—a modest goal of about 6% for that category.

We reject petitioner's argument that, since only the long-term goal was in place for Skilled Craft positions at the time of Joyce's promotion, it was inappropriate for the Director to take into account affirmative action considerations in filling the road dispatcher position. The Agency's Plan emphasized that the long-term goals were not to be taken as guides for actual hiring decisions, but that supervisors were to consider a host of practical factors in seeking to meet affirmative action objectives, including the fact that in some job categories women were not qualified in numbers comparable to their representation in the labor force.

[9] 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 a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the 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 ..." *Sheet Metal Workers' v. EEOC*, 478 U.S. ——, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986)

13. Because of the employment decision at issue in this case, our discussion henceforth refers primarily to the Plan's provisions to remedy the underrepresentation of women. Our analysis could apply as well, however, to the provisions of the plan pertaining to minorities.

(O'CONNOR, J., concurring in part and dissenting in part).

The Agency's Plan emphatically did *not* authorize such blind hiring. It expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft category in mid–1980, the Agency's management nevertheless had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for this category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard.

Furthermore, in considering the candidates for the road dispatcher position in 1980, the Agency hardly needed to rely on a refined short-term goal to realize that it had a significant problem of underrepresentation that required attention. Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision.[14] The promotion of Joyce thus satisfies the first requirement enunciated in *Weber*, since it was undertaken to further an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories.

We next consider whether the Agency Plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement. In contrast to the plan in *Weber*, which provided that 50% of the positions in the craft training program were exclusively for blacks, and to the consent decree upheld last term in *Firefighters v. Cleveland*, 478 U.S. ——, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), which required the promotion of specific numbers of minorities, the Plan sets aside no positions for women. The Plan expressly states that "[t]he 'goals' established for each Division should not be construed as 'quotas' that must be met." App. 64. Rather, the Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants. As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into account in arriving at his decision. Tr. 68. The Plan thus resembles the "Harvard Plan" approvingly noted by Justice POWELL in *University of California Regents v. Bakke*, 438 U.S. 265, 316–319, 98 S.Ct. 2733, 2761–63, 57 L.Ed.2d 750 (1978), which considers race along with other criteria in determining admission to the college. As Justice POWELL observed, "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.*, at 317, 98 S.Ct., at 2762. Similarly, the Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants.

In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case

14. In addition, the Agency was mindful of the importance of finally hiring a woman 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." Tr. 64.

was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.[15]

Finally, the Agency's Plan was intended to *attain* a balanced work force, not to maintain one. The Plan contains ten references to the Agency's desire to "attain" such a balance, but no reference whatsoever to a goal of maintaining it. The Director testified that, while the "broader goal" of affirmative action, defined as "the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis," is something that is "a permanent part" of "the Agency's operating philosophy," that broader goal "is divorced, if you will, from specific numbers or percentages." Tr. 48–49.

The Agency acknowledged the difficulties that it would confront in remedying the imbalance in its work force, and it anticipated only gradual increases in the representation of minorities and women.[16] 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. See, *e.g.*, *Firefighters*, *supra*, 478 U.S., at ——, 106 S.Ct., at —— (four-year duration for consent decree providing for promotion of particular number of minorities); *Weber*, 443 U.S., at 199, 99 S.Ct., at 2725 (plan requiring that blacks constitute 50% of new trainees in effect until percentage of employer work force equal to percentage in local labor force). 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. *Sheet Metal Workers*, *supra*, 478 U.S., at ——, 106 S.Ct., at 3051. In this case, however, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance.

III

In evaluating the compliance of an affirmative action plan with Title VII's prohi-

15. Furthermore, from 1978 to 1982 Skilled Craft jobs in the Agency increased from 238 to 349. The Agency's personnel figures indicate that the Agency fully expected most of these positions to be filled by men. Of the 111 new Skilled Craft jobs during this period, 105, or almost 95%, went to men. As previously noted, 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%. While this degree of employment expansion by an employer is by no means essential to a plan's validity, it underscores the fact that the Plan in this case in no way significantly restricts the employment prospects of such persons. Illustrative of this is the fact that an additional road dispatcher position was created in 1983, and petitioner was awarded the job. Brief for Respondent Transportation Agency 36, n. 35.

16. As the Agency Plan stated, after noting the limited number of minorities and women qualified in certain categories, as well as other difficulties in remedying underrepresentation:

"As indicated by the above factors, it will be much easier to attain the Agency's employment goals in some job categories than in others. It is particularly evident that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been greatly underrepresented. Similarly, only gradual increases in the representation of women, minorities or handicapped persons in management and professional positions can realistically be expected due to the low turnover that exists in these positions and the small numbers of persons who can be expected to compete for available openings." App. 58.

bition on discrimination, we must be mindful of "this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" *Wygant*, 476 U.S., at ——, 106 S.Ct., at 1855 (O'CONNOR, J., concurring in part and concurring in judgment) (quoting *Bakke, supra*, 438 U.S., at 364, 98 S.Ct., at 2785–86). The Agency in the case before us has undertaken such a voluntary effort, and has done so in full recognition of both the difficulties and the potential for intrusion on males and non-minorities. The Agency has identified a conspicuous imbalance in job categories traditionally segregated by race and sex. It has made clear from the outset, however, that employment decisions may not be justified solely by reference to this imbalance, but must rest on a multitude of practical, realistic factors. It has therefore committed itself to annual adjustment of goals so as to provide a reasonable guide for actual hiring and promotion decisions. The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position.[17] As both the Plan's language and its manner of operation attest, the Agency has no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards.

We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice STEVENS, concurring.

While I join the Court's opinion, I write separately to explain my view of this case's position in our evolving antidiscrimination law and to emphasize that the opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups.

I

Antidiscrimination measures may benefit protected groups in two distinct ways. As a sword, such measures may confer benefits by specifying that a person's member-

17. The dissent predicts that today's decision will loose a flood of "less qualified" minorities and women upon the workforce, as employers seek to forestall possible Title VII liability. *Post*, at ——. The first problem with this projection is that it is by no means certain that employers could in every case necessarily avoid liability for discrimination merely by adopting an affirmative action plan. Indeed, our unwillingness to require an admission of discrimination as the price of adopting a plan has been premised on concern that the potential liability to which such an admission would expose an employer would serve as a disincentive for creating an affirmative action program. See *supra*, n. 6.

A second, and more fundamental, problem with the dissent's speculation is that it ignores the fact that

"[i]t 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 selecting 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." Brief for American Society for Personnel Administration as *Amicus Curiae* 9.

This case provides an example of precisely this point. Any differences in qualifications between Johnson and Joyce were minimal, to say the least. See *supra*, at 1447–1449. The selection of Joyce thus belies the dissent's contention that the beneficiaries of affirmative action programs will be those employees who are merely not "utterly unqualified." *Post*, at ——.

ship in a disadvantaged group must be a neutral, irrelevant factor in governmental or private decisionmaking or, alternatively, by compelling decisionmakers to give favorable consideration to disadvantaged group status. As a shield, an antidiscrimination statute can also help a member of a protected class by assuring decisionmakers in some instances that, when they elect for good reasons of their own to grant a preference of some sort to a minority citizen, they will not violate the law. The Court properly holds that the statutory shield allowed respondent to take Diane Joyce's sex into account in promoting her to the road dispatcher position.

Prior to 1978 the Court construed the Civil Rights Act of 1964 as an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory preferences for any group, minority, or majority. The Court unambiguously endorsed the neutral approach, first in the context of gender discrimination [1] and then in the context of racial discrimination against a white person.[2] As I explained in my separate opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 412–418, 98 S.Ct. 2733, 2810–2813, 57 L.Ed.2d 750 (1978), and as the Court forcefully stated in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 280, 96 S.Ct. 2574, 2578, 49 L.Ed.2d 493 (1976), Congress intended " 'to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII including Caucasians.' " (citations omitted). If the Court had adhered to that construction of the Act, petitioner would unquestionably prevail in this case. But it has not done so.

In the *Bakke* case in 1978 and again in *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), a majority of the Court interpreted the antidiscriminatory strategy of the statute in a fundamentally different way. The Court held in the *Weber* case that an employer's program designed to increase the number of black craftworkers in an aluminum plant did not violate Title VII.[3] It remains clear that the Act does not *require* any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to *permit* the voluntary adoption of special programs to benefit members of the minor-

1. "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

2. "Similarly the EEOC, whose interpretations are entitled to great deference, [401 U.S.,] at 433–434, 91 S.Ct., at 854–55, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would

'constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians.' EEOC Decision No. 74–31, 7 FEP Cases 1326, 1328, CCH EEOC Decisions ¶ 6404, p. 4084 (1973)."

"This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' 110 Cong.Rec. 2578 (1964) (remarks of Rep. Celler), and create an 'obligation not to discriminate against whites,' *id.*, at 7218 (memorandum of Sen. Clark). See also *id.*, at 7213 (memorandum of Sens. Clark and Case); *id.*, at 8912 (remarks of Sen. Williams). We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279–280, 96 S.Ct. 2574, 2578–2579, 49 L.Ed.2d 493 (1976) (footnotes omitted).

3. Toward the end of its opinion, the Court mentioned certain reasons why the plan did not impose a special hardship on white employees or white applicants for employment. *Steelworkers v. Weber*, 443 U.S. 193, 208, 99 S.Ct. 2721, 2729, 61 L.Ed.2d 480 (1979). I have never understood those comments to constitute a set of conditions that every race-conscious plan must satisfy in order to comply with Title VII.

ity groups for whose protection the statute was enacted. Neither the "same standards" language used in *McDonald*, nor the "color blind" rhetoric used by the Senators and Congressmen who enacted the bill, is now controlling. Thus, as was true in *Runyon v. McCrary*, 427 U.S. 160, 189, 96 S.Ct. 2586, 2603, 49 L.Ed.2d 415 (1976) (STEVENS, J., concurring), 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, just as I did in *Runyon*. *Id.*, at 191–192, 96 S.Ct., at 2604–05.

Bakke and *Weber* have been decided and are now an important part of the fabric of our law. This consideration is sufficiently compelling for me to adhere to the basic construction of this legislation that the Court adopted in *Bakke* and in *Weber*. There is an undoubted public interest in "stability and orderly development of the law." 427 U.S., at 190, 96 S.Ct., at 2604.[4]

The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave "breathing room" for employer initiatives to benefit members of minority groups. If Title VII had never been enacted, a private employer would be free to hire members of minority groups for any reason that might seem sensible from a business or a social point of view. The Court's opinion in *Weber* reflects the same approach; the opinion relied heavily on legislative history indicating that Congress intended that traditional management prerogatives be left undisturbed to the greatest extent possible. See 443 U.S., at 206–207, 99 S.Ct., at 2728–2729. As we observed Last Term, "'[i]t 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.'" *Firefighters v. Cleveland*, 478 U.S. ——, ——, 106 S.Ct. 3063, 3072, 92 L.Ed.2d 405 (1986) (citing *Weber*, 443 U.S., at 204, 99 S.Ct., at 2727). In *Firefighters*, we again acknowledged Congress' concern in Title VII to avoid "undue federal interference with managerial discretion." 478 U.S., at ——, 106 S.Ct., at 3074.[5]

As construed in *Weber* and in *Firefighters*, the statute does not absolutely prohibit preferential hiring in favor of minorities; it was merely intended to protect historically

4. "As Mr. Justice Cardozo remarked, with respect to the routine work of the judiciary: 'The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.' Turning to the exceptional case, Mr. Justice Cardozo noted: '[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.... If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.' In this case, those admonitions favor adherence to, rather than departure from, precedent." *Id.*, at 190–192, 96 S.Ct., at 2604–2605. For even while writing in dissent in the *Weber* case, Chief Justice Burger observed that the result reached by the majority was one that he "would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII." 443 U.S., at 216, 99 S.Ct., at 2734.

5. As Justice BLACKMUN observed in *Weber*, 443 U.S., at 209, 214–215, 99 S.Ct., at 2732–33 (BLACKMUN, J., concurring):

"Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief.... Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of 'locking in' the effects of discrimination for which Title VII provides no remedy."

disadvantaged groups *against* discrimination and not to hamper managerial efforts to benefit members of disadvantaged groups that are consistent with that paramount purpose. The preference granted by respondent in this case does not violate the statute as so construed; the record amply supports the conclusion that the challenged employment decision served the legitimate purpose of creating diversity in a category of employment that had been almost an exclusive province of males in the past. Respondent's voluntary decision is surely not prohibited by Title VII as construed in *Weber*.

II

Whether a voluntary decision of the kind made by respondent would ever be prohibited by Title VII is a question we need not answer until it is squarely presented. Given the interpretation of the statute the Court adopted in *Weber*, I see no reason why the employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII. Indeed, in some instances the employer may find it more helpful to focus on the future. Instead of retroactively scrutinizing his own or society's possible exclusions of minorities in the past to determine the outer limits of a valid affirmative-action program—or indeed, any particular affirmative-action decision—in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of underrepresented groups. Statutes enacted for the benefit of minority groups should not block these forward-looking considerations.

> "Public and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination. The Jackson school board, for example, said it had done so in part to improve the quality of education in Jackson—whether by improving black students' performance or by dispelling for black and white students alike any idea that white supremacy governs our social institutions. Other employers might advance different forward-looking reasons for affirmative action: improving their services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force, to name but a few examples. Or they might adopt affirmative action simply to eliminate from their operations all de facto embodiment of a system of racial caste. All of these reasons aspire to a racially integrated future, but none reduces to 'racial balancing for its own sake.'" Sullivan, The Supreme Court—Comment, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 Harv.L.Rev. 78, 96 (1986).

The Court today does not foreclose other voluntary decisions based in part on a qualified employee's membership in a disadvantaged group. Accordingly, I concur.

Justice O'CONNOR, concurring in the judgment.

In *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), this Court held that § 703(d) of Title VII does not prohibit voluntary affirmative action efforts if the employer sought to remedy a "manifest ... imbalanc[e] in traditionally segregated job categories." *Id.*, at 197, 99 S.Ct., at 2724. As Justice SCALIA illuminates with excruciating clarity, § 703 has been interpreted by *Weber* and succeeding cases to permit what its language read literally would prohibit. *Post*, at 1465; see also *ante*, at 1457 (STEVENS, J., concurring). Section 703(d) prohibits employment discrimination "against *any individual* because of his race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(d) (emphasis added). The *Weber* Court, however, concluded that voluntary affirmative action was permissible in some circumstances because a prohibition of every type of affirmative action would "'bring about an end completely at variance with the purpose of the statute.'" 443 U.S., at 202,

99 S.Ct., at 2726 (quoting *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315, 73 S.Ct. 706, 717, 97 L.Ed. 1020 (1953)). This purpose, according to the Court, was to open employment opportunities for blacks in occupations that had been traditionally closed to them.

None of the parties in this case have suggested that we overrule *Weber* and that question was not raised, briefed, or argued in this Court or in the courts below. If the Court is faithful to its normal prudential restraints and to the principle of *stare decisis* we must address once again the propriety of an affirmative action plan under Title VII in light of our precedents, precedents that have upheld affirmative action in a variety of circumstances. This time the question posed is whether a public employer violates Title VII by promoting a qualified woman rather than a marginally better qualified man when there is a statistical imbalance sufficient to support a claim of a pattern or practice of discrimination against women under Title VII.

I concur in the judgment of the Court in light of our precedents. I write separately, however, because the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers despite the limitations imposed by the Constitution and by the provisions of Title VII, and because the dissent rejects the Court's precedents and addresses the question of how Title VII should be interpreted as if the Court were writing on a clean slate. The former course of action gives insufficient guidance to courts and litigants; the latter course of action serves as a useful point of academic discussion, but fails to reckon with the reality of the course that the majority of the Court has determined to follow.

In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause. In either case, consistent with the congressional intent to provide some measure of protection to the interests of the employer's nonminority employees, the employer must have had a firm basis for believing that remedial action was required. An employer would have such a firm basis if it can point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination.

In *Weber*, this Court balanced two conflicting concerns in construing § 703(d): Congress' intent to root out invidious discrimination against *any* person on the basis of race or gender, *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976), and its goal of eliminating the lasting effects of discrimination against minorities. Given these conflicting concerns, the Court concluded that it would be inconsistent with the background and purpose of Title VII to prohibit affirmative action in all cases. As I read *Weber*, however, the Court also determined that Congress had balanced these two competing concerns by permitting affirmative action only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.

Contrary to the intimations in Justice STEVENS' concurrence, this Court did not approve preferences for minorities "for any reason that might seem sensible from a business or a social point of view." *Ante*, at 1459. Indeed, such an approach would have been wholly at odds with this Court's holding in *McDonald* that Congress intended to prohibit practices that operate to discriminate against the employment opportunities of nonminorities as well as minorities. Moreover, in *Weber* the Court was careful to consider the effects of the affirmative action plan for black employees on the employment opportunities of white employees. 443 U.S., at 208, 99 S.Ct., at 2729–30. Instead of a wholly standardless approach to affirmative action, the Court determined in *Weber* that Congress intended to permit affirmative action only if the employer could point to a "manifest ...

imbalanc[e] in traditionally segregated job categories." *Id.*, at 197, 99 S.Ct., at 2724. This requirement both "provides assurance that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination," *ante*, at 1452, and is consistent with this Court's and Congress' consistent emphasis on the value of voluntary efforts to further the antidiscrimination purposes of Title VII. *Wygant v. Jackson Board of Education*, 476 U.S. ——, ——, 106 S.Ct. 1842, ——, 90 L.Ed.2d 260 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

The *Weber* view of Congress' resolution of the conflicting concerns of minority and nonminority workers in Title VII appears substantially similar to this Court's resolution of these same concerns in *Wygant v. Jackson Board of Education, supra*, which involved the claim that an affirmative action plan by a public employer violated the Equal Protection Clause. In *Wygant*, the Court was in agreement that remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action plan. The Court also concluded, however, that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.*, at ——, 106 S.Ct., at 1848. Instead, we determined that affirmative action was valid if it was crafted to remedy past or present discrimination by the employer. Although the employer need not point to any contemporaneous findings of actual discrimination, I concluded in *Wygant* that the employer must point to evidence sufficient to establish a firm basis for believing that remedial action is required, and that a statistical imbalance sufficient for a Title VII prima facie case against the employer would satisfy this firm basis requirement:

> "Public employers are not without reliable benchmarks in making this determination. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination." *Id.*, at ——-——, 106 S.Ct., at 1856.

The *Wygant* analysis is entirely consistent with *Weber*. In *Weber*, the affirmative action plan involved a training program for unskilled production workers. There was little doubt that the absence of black craft workers was the result of the exclusion of blacks from craft unions. *Steelworkers v. Weber*, 443 U.S., at 198, n. 1, 99 S.Ct., at 2725, n. 1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). The employer in *Weber* had previously hired as craftworkers only persons with prior craft experience, and craft unions provided the sole avenue for obtaining this experience. Because the discrimination occurred at entry into the craft union, the "manifest racial imbalance" was powerful evidence of prior race discrimination. Under our case law, the relevant comparison for a Title VII prima facie case in those circumstances—discrimination in admission to entry-level positions such as membership in craft unions—is to the total percentage of blacks in the labor force. See *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977); cf. *Sheet Metal Workers v. EEOC*, 478 U.S. ——, ——, 106 S.Ct. 3019, ——, 92 L.Ed.2d 344 (1986) (observing that lower courts had relied on comparison to general labor force in finding Title VII violation by union). Here, however, the evidence of past discrimination is more complex. The number of women with the qualifications for entry into the relevant job classification was quite small. A statis-

tical imbalance between the percentage of women in the work force generally and the percentage of women in the particular specialized job classification, therefore, does not suggest past discrimination for purposes of proving a Title VII prima facie case. See *Hazelwood School District v. United States*, 433 U.S. 299, 308, and n. 13, 97 S.Ct. 2736, 2742, and n. 13, 53 L.Ed.2d 768 (1977).

Unfortunately, the Court today gives little guidance for what statistical imbalance is sufficient to support an affirmative action plan. Although the Court denies that the statistical imbalance need be sufficient to make out a prima facie case of discrimination against women, *ante*, at ——, the Court fails to suggest an alternative standard. Because both *Wygant* and *Weber* attempt to reconcile the same competing concerns, I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause.

While employers must have a firm basis for concluding that remedial action is necessary, neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities. Employers are "trapped between the competing hazards of liability to minorities if affirmative action is *not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken." *Wygant v. Jackson Board of Education*, 476 U.S., at ——, 106 S.Ct., at 1855 (O'CONNOR, J., concurring in part and concurring in judgment). Moreover, this Court has long emphasized the importance of voluntary efforts to eliminate discrimination. *Id.*, at ——, 106 S.Ct., at ——. Thus, I concluded in *Wygant* that a contemporaneous finding of discrimination should not be required because it would discourage voluntary efforts to remedy apparent discrimination. A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination. As I emphasized in *Wygant*, a challenge to an affirmative action plan "does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld." *Id.*, at ——, 106 S.Ct., at 1856. Evidence sufficient for a prima facie Title VII pattern or practice claim against the employer itself suggests that the absence of women or minorities in a work force cannot be explained by general societal discrimination alone and that remedial action is appropriate.

In applying these principles to this case, it is important to pay close attention to both the affirmative action plan, and the manner in which that plan was applied to the specific promotion decision at issue in this case. In December 1978, the Santa Clara Transit District Board of Supervisors adopted an affirmative action plan for the Santa Clara County Transportation Agency (Agency). At the time the plan was adopted, not one woman was employed in respondents' 238 skilled craft positions, and the plan recognized that women "are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." App. 57. Additionally, the plan stated that respondents "recognize[d] that mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons," *id.*, at 31, and that "the selection and appointment processes are areas where hidden discrimination frequently occurs." *Id.*, at 71. Thus, the respondents had the expectation that plan "should result in improved personnel practices that will benefit all Agency employees who may have been subjected

to discriminatory personnel practices in the past." *Id.*, at 35.

The long-term goal of the plan was "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women ... in the Santa Clara County work force." *Id.*, at 54. If this long-term goal had been applied to the hiring decisions made by the Agency, in my view, the affirmative action plan would violate Title VII. "[I]t is completely unrealistic to assume that individuals of each [sex] will gravitate with mathematical exactitude to each employer ... absent unlawful discrimination." *Sheet Metal Workers, supra*, 478 U.S., at ——, 106 S.Ct., at 3060 (O'CONNOR, J., concurring in part and dissenting in part). Thus, a goal that makes such an assumption, and simplistically focuses on the proportion of women and minorities in the work force without more, is not remedial. Only a goal that takes into account the number of women and minorities qualified for the relevant position could satisfy the requirement that an affirmative action plan be remedial. This long-range goal, however, was never used as a guide for actual hiring decisions. Instead, the goal was merely a statement of aspiration wholly without operational significance. The affirmative action plan itself recognized the host of reasons why this goal was extremely unrealistic, App. 56–57, and as I read the record, the long-term goal was not applied in the promotion decision challenged in this case. Instead, the plan provided for the development of short-term goals, which alone were to guide the respondents, *id.*, at 61, and the plan cautioned that even these goals "should not be construed as 'quotas' that must be met." *Id.*, at 64. Instead, these short-term goals were to be focused on remedying past apparent discrimination, and would "[p]rovide an objective standard for use in determining if the representation of minorities, women and handicapped persons in particular job classifications is at a reasonable level in comparison with estimates of the numbers of persons from these groups in the area work force who can meet the educational and experience requirements for employment." *Id.*, at 61.

At the time of the promotion at issue in this case, the short-term goals had not been fully developed. Nevertheless, the Agency had already recognized that the long-range goal was unrealistic, and had determined that the progress of the Agency should be judged by a comparison to the *qualified* women in the area work force. As I view the record, the promotion decision in this case was entirely consistent with the philosophy underlying the development of the short-term goals.

The Agency announced a vacancy for the position of road dispatcher in the Agency's Roads Division on December 12, 1979. Twelve employees applied for this position, including Diane Joyce and petitioner. Nine of these employees were interviewed for the position by a two-person board. Seven applicants—including Joyce and petitioner—scored above 70 on this interview, and were certified as eligible for selection for the promotion. Petitioner scored 75 on the interview, while Joyce scored 73. After a second interview, a committee of three agency employees recommended that petitioner be selected for the promotion to road dispatcher. The County's Affirmative Action Officer, on the other hand, urged that Joyce be selected for the position.

The ultimate decision to promote Joyce rather than petitioner was made by James Graebner, the Director of the Agency. As Justice SCALIA views the record in this case, the Agency Director made the decision to promote Joyce rather than petitioner solely on the basis of sex and with indifference to the relative merits of the two applicants. See *post*, at 1465, ——. In my view, however, the record simply fails to substantiate the picture painted by Justice SCALIA. The Agency Director testified that he "tried to look at the whole picture, the combination of [Joyce's] qualification's and Mr. Johnson's qualifications, their test scores, their experience, their background, affirmative action matters,

things like that." Tr. 68. Contrary to Justice SCALIA's suggestion, *post*, at ——, the Agency Director knew far more than merely the sex of the candidates and that they appeared on a list of candidates eligible for the job. The Director had spoken to individuals familiar with the qualifications of both applicants for the promotion, and was aware that their scores were rather close. Moreover, he testified that over a period of weeks he had spent several hours making the promotion decision, suggesting that Joyce was not selected solely on the basis of her sex. Tr. 63. Additionally, the Director stated that had Joyce's experience been less than that of petitioner by a larger margin, petitioner might have received the promotion. *Id.*, at 69–70. As the Director summarized his decision to promote Joyce, the underrepresentation of women in skilled craft positions was only one element of a number of considerations that led to the promotion of Ms. Joyce. *Ibid.* While I agree with the dissent that an affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category, or that can be equated with a permanent plan of "proportionate representation by race and sex" would violate Title VII, I cannot agree that this is such a case. Rather, as the Court demonstrates, Joyce's sex was simply used as a "plus" factor. *Ante*, at ——.

In this case, I am also satisfied that the respondent had a firm basis for adopting an affirmative action program. Although the District Court found no discrimination against women in fact, at the time the affirmative action plan was adopted, there were *no* women in its skilled craft positions. The petitioner concedes that women constituted approximately 5% of the local labor pool of skilled craft workers in 1970. Reply Brief for Petitioner 9. Thus, when compared to the percentage of women in the qualified work force, the statistical disparity would have been sufficient for a prima facie Title VII case brought by unsuccessful women job applicants. See *Teamsters*, 431 U.S., at 342, n. 23, 97 S.Ct., at 1858, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers.... [T]he company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero' ").

In sum, I agree that the respondents' affirmative action plan as implemented in this instance with respect to skilled craft positions satisfies the requirements of *Weber* and of *Wygant*. Accordingly, I concur in the judgment of the Court.

Justice WHITE, dissenting.

I agree with Parts I and II of Justice SCALIA's dissenting opinion. Although I do not join Part III, I also would overrule *Weber*. 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. As so interpreted, that case, as well as today's decision, as Justice SCALIA so well demonstrates, is a perversion of Title VII. I would overrule *Weber* and reverse the judgment below.

Justice SCALIA, with whom THE CHIEF JUSTICE joins, and with whom Justice WHITE joins in Parts I and II, dissenting.

With a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship, Title VII of the Civil Rights Act of 1964 declares:

"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, con-

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

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a).

The Court today completes the process of converting this from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often *will*. Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace. Part I of this dissent will describe the nature of the plan that the Court approves, and its effect upon this petitioner. Part II will discuss prior holdings that are tacitly overruled, and prior distinctions that are disregarded. Part III will describe the engine of discrimination we have finally completed.

I

On October 16, 1979, the County of Santa Clara adopted an Affirmative Action Program (County plan) which sought the "attainment of a County work force whose composition ... includes women, disabled persons and ethnic minorities in a ratio in all job categories that reflects their distribution in the Santa Clara County area work force." App. 113. In order to comply with the County plan and various requirements imposed by federal and state agencies, the Transportation Agency adopted, effective December 18, 1978, the Equal Employment Opportunity Affirmative Action Plan (Agency plan or plan) at issue here. Its stated long-range goal was the same as the County plan's: "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County work force." *Id.*, at 54. The plan called for the establishment of a procedure by which Division Directors would review the ethnic and sexual composition of their work forces whenever they sought to fill a vacancy, which procedure was expected to include "a requirement that Division Directors indicate why they did *not* select minorities, women and handicapped persons if such persons were on the list of eligibles considered and if the Division had an underrepresentation of such persons in the job classification being filled." *Id.*, at 75 (emphasis in original).

Several salient features of the plan should be noted. Most importantly, the plan's purpose was assuredly not to remedy prior sex discrimination by the Agency. It could not have been, because there was no prior sex discrimination to remedy. The majority, in cataloguing the Agency's alleged misdeeds, *ante*, at 1448, n. 5, neglects to mention the District Court's finding that the Agency "has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular." App. to Pet. for Cert. 13a. This finding was not disturbed by the Ninth Circuit.

Not only was the plan not directed at the results of past sex discrimination by the Agency, but its objective was not to achieve the state of affairs that this Court has dubiously assumed would result from an absence of discrimination—an overall work force "more or less representative of the racial and ethnic composition of the population in the community." *Teamsters v. United States*, 431 U.S. 324, 340, n. 20, 97 S.Ct. 1843, 1856, n. 20, 52 L.Ed.2d 396 (1977). Rather, the oft-stated goal was to mirror the racial and sexual composition of the entire county labor force, not merely in the Agency work force as a whole, but in each and every individual job category at

the Agency. In a discrimination-free world, it would obviously be a statistical oddity for every job category to match the racial and sexual composition of even that portion of the county work force *qualified* for that job; it would be utterly miraculous for each of them to match, as the plan expected, the composition of the *entire* work force. Quite obviously, the plan did not seek to replicate what a lack of discrimination would produce, but rather imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined "proper" proportion of each job category.

That the plan was not directed at remedying or eliminating the effects of past discrimination is most clearly illustrated by its description of what it regarded as the *"Factors Hindering Goal Attainment"*—*i.e.*, the existing impediments to the racially and sexually representative work force that it pursued. The plan noted that it would be "difficult," App. 55, to attain its objective of across-the-board statistical parity in at least some job categories, because:

> "a. Most of the positions require specialized training and experience. Until recently, relatively few minorities, women and handicapped persons sought entry into these positions. Consequently, the number of persons from these groups in the area labor force who possess the qualifications required for entry into such job classifications is limited.
>
> . . . . .
>
> "c. Many of the Agency positions where women are underrepresented involve heavy labor; e.g., Road Maintenance Worker. Consequently, few women seek entry into these positions.
>
> . . . . .
>
> "f. Many women are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." *Id.*, at 56–57.

That is, the qualifications and desires of women may fail to match the Agency's Platonic ideal of a work force. The plan concluded from this, of course, not that the ideal should be reconsidered, but that its attainment could not be immediate. *Id.*, at 58–60. It would, in any event, be rigorously pursued, by giving "special consideration to Affirmative Action requirements in every individual hiring action pertaining to positions where minorities, women and handicapped persons continue to be underrepresented." *Id.*, at 60.[1]

Finally, the one message that the plan unmistakably communicated was that concrete results were expected, and supervisory personnel would be evaluated on the basis of the affirmative-action numbers they produced. The plan's implementation was expected to "result in a statistically measurable yearly improvement in the hiring, training and promotion of minorities, women and handicapped persons in the major job classifications utilized by the Agency where these groups are underrepresented." *Id.*, at 35. Its Preface declared that "[t]he degree to which each Agency Division *attains the Plan's objectives* will provide a direct measure of that Division Director's personal commitment to the EEO Policy," *ibid.* (emphasis added), and the plan itself repeated that "[t]he degree to which each Division *attains the Agency Affirmative Action employment goals* will provide a measure of that Director's commitment and effectiveness in carrying out the Division's EEO Affirmative Action requirements." *Id.*, at 44 (emphasis added). As noted earlier, supervisors were reminded of the need to give attention to affirmative action in every employment decision, and to explain their reasons for *fail-*

1. This renders utterly incomprehensible the majority's assertion that "the Agency acknowledged that [its long-term goal] could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories." *Ante*, at 1454.

ing to hire women and minorities whenever there was an opportunity to do so.

The petitioner in the present case, Paul E. Johnson, had been an employee of the Agency since 1967, coming there from a private company where he had been a road dispatcher for seventeen years. He had first applied for the position of Road Dispatcher at the Agency in 1974, coming in second. Several years later, after a reorganization resulted in a downgrading of his Road Yard Clerk II position, in which Johnson "could see no future," Tr. 127, he requested and received a voluntary demotion from Road Yard Clerk II to Road Maintenance Worker, to increase his experience and thus improve his chances for future promotion. When the Road Dispatcher job next became vacant, in 1979, he was the leading candidate—and indeed was assigned to work out of class full-time in the vacancy, from September of 1979 until June of 1980. There is no question why he did not get the job.

The fact of discrimination against Johnson is much clearer, and its degree more shocking, than the majority and Justice O'CONNOR's concurring opinion would suggest—largely because neither of them recites a single one of the District Court findings that govern this appeal, relying instead upon portions of the transcript which those findings implicitly rejected, and even upon a document (favorably comparing Joyce to Johnson), *ante*, at 1448, that was prepared *after* Joyce was selected. See App. 27–28; Tr. 223–227. It is worth mentioning, for example, the trier of fact's determination that, if the Affirmative Action Coordinator had not intervened, "the decision as to whom to promote ... would have been made by [the Road Operations Division Director]," App. to Pet. for Cert. 12a, who had recommended that Johnson be appointed to the position. *Ibid.*[2] Likewise, the even more extraordinary findings that James Graebner, the Agency Director who made the appointment, "did not inspect the applications and related examination records of either [Paul Johnson] or Diane Joyce before making his decision," *ibid.*, and indeed "did little or nothing to inquire into the results of the interview process and conclusions which [were] described as of critical importance to the selection process." *Id.*, at 3a. In light of these determinations, it is impossible to believe (or to think that the District Court believed) Graebner's self-serving statements relied upon by the majority and concurrence, such as the assertion that he "tried to look at the whole picture, the combination of [Joyce's] qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that," Tr. 68 (quoted *ante*, at 1448–1449; *ante*, at 1449 (O'CONNOR, J., concurring in judgment)). It was evidently enough for Graebner to know that both candidates (in the words of Johnson's counsel, to which Graebner assented) "met the M.Q.'s, the minimum. Both were minimally qualified." Tr. 25. When asked whether he had "any basis," *ibid.*, for determining whether one of the candidates was more qualified than the other, Graebner candidly answered,

2. The character of this intervention, and the reasoning behind it, was described by the Agency Director in his testimony at trial:

"Q. How did you happen to become involved in this particular promotional opportunity?

"A. I ... became aware that there was a difference of opinion between specifically the Road Operations people [Mr. Shields] and the Affirmative Action Director [Mr. Morton] as to the desirability of certain of the individuals to be promoted.

. . . . . .

"... Mr. Shields felt that Mr. Johnson should be appointed to that position.

"Q. Mr. Morton felt that Diane Joyce should be appointed?

"A. Mr. Morton was less interested in the particular individual; he felt that this was an opportunity for us to take a step toward meeting our affirmative action goals, and because there was only one person on the [eligibility] list who was one of the protected groups, he felt that this afforded us an opportunity to meet those goals through the appointment of that member of a protected group." Tr. 16–18.

"No.... As I've said, they both appeared, and my conversations with people tended to corroborate, that they were both capable of performing the work." *Ibid.*

After a two-day trial, the District Court concluded that Diane Joyce's gender was "*the determining factor*," *id.*, at 4a, in her selection for the position. Specifically, it found that "[b]ased upon the examination results and the departmental interview, [Mr. Johnson] was more qualified for the position of Road Dispatcher than Diane Joyce," *id.*, at 12a; that "[b]ut for [Mr. Johnson's] sex, male, he would have been promoted to the position of Road Dispatcher," *id.*, at 13a; and that "[b]ut for Diane Joyce's sex, female, she would not have been appointed to the position...." *Ibid.* The Ninth Circuit did not reject these factual findings as clearly erroneous, nor could it have done so on the record before us. We are bound by those findings under Federal Rule of Civil Procedure 52(a).

II

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. Even if the societal attitudes in question consisted exclusively of conscious discrimination by other employers, this holding would contradict a decision of this Court rendered only last Term. *Wygant v. Jackson Board of Education*, 476 U.S. ——, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), held that the objective of remedying societal discrimination cannot prevent remedial affirmative action from violating the Equal Protection Clause. See *id.*, at ——, 106 S.Ct., at ——, *id.*, at ——, 106 S.Ct., at —— (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at ——, 106 S.Ct., at ——, (WHITE, J., concurring in judgment). While Mr. Johnson does not advance a constitutional claim here, it is most unlikely that Title VII was intended to place a *lesser* restraint on discrimination by public actors than is established by the Constitution. The Court has already held that the prohibitions on discrimination in Title VI, 42 U.S.C. § 2000d, are at least as stringent as those in the Constitution. See *Regents of the University of California v. Bakke*, 438 U.S. 265, 286–287, 98 S.Ct. 2733, 2746–2747, 57 L.Ed.2d 750 (1978) (opinion of POWELL, J.) (Title VI embodies constitutional restraints on discrimination); *id.*, at 329–340, 98 S.Ct. at 2768 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (same); *id.*, at 416, 98 S.Ct., at 2812 (opinion of STEVENS, J., joined by Burger, C.J., and Stewart and REHNQUIST, JJ.) (Title VI "has independent force, with language and emphasis *in addition to* that found in the Constitution") (emphasis added). There is no good reason to think that Title VII, in this regard, is any different from Title VI.[3] Because, therefore, those justifications (*e.g.*, the remedying of past societal wrongs) that are inadequate to insulate discriminatory action from the racial discrimination prohibitions of the Constitu-

3. To support the proposition that Title VII is more narrow than Title VI, the majority repeats the reasons for the dictum to that effect set forth in *Steelworkers v. Weber*, 443 U.S. 193, 206, n. 6, 99 S.Ct. 2721, 2729, n. 6, 61 L.Ed.2d 480 (1979)—a case which, as Justice O'CONNOR points out, *ante*, at 1462, could reasonably be read as consistent with the constitutional standards of *Wygant*. Those reasons are unpersuasive, consisting only of the existence in Title VII of 42 U.S.C. § 2000e–2(j) (the implausibility of which, as a *restriction* upon the scope of Title VII, was demonstrated by Chief Justice REHNQUIST's literally unanswered *Weber* dissent) and the fact that Title VI pertains to recipients of federal funds while Title VII pertains to employers generally. The latter fact, while true and perhaps interesting, is not conceivably a reason for giving to virtually identical categorical language the interpretation, in one case, that intentional discrimination is forbidden, and, in the other case, that it is not. Compare 42 U.S.C. § 2000d ("No person ... shall, on the ground of race, color, or national origin, be ... subjected to discrimination"), with § 2000e–2(a)(1) (no employer shall "discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin").

tion are also inadequate to insulate it from the racial discrimination prohibitions of Title VII; and because the portions of Title VII at issue here treat race and sex equivalently; *Wygant*, which dealt with race discrimination, is fully applicable precedent, and is squarely inconsistent with today's decision.[4]

Likewise on the assumption that the societal attitudes relied upon by the majority consist of conscious discrimination by employers, today's decision also disregards the limitations carefully expressed in last Term's opinions in *Sheet Metal Workers v. EEOC*, 478 U.S. ——, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986). While those limitations were dicta, it is remarkable to see them so readily (and so silently) swept away. The question in *Sheet Metal Workers* was whether the remedial provision of Title VII, 42 U.S.C. § 2000e–5(g), empowers courts to order race-conscious relief for persons who were not identifiable victims of discrimination. Six members of this Court concluded that it does, *under narrowly confined circumstances*. The plurality opinion for four justices found that race-conscious relief could be ordered at least when "an employer or labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." 478 U.S., at ——, 106 S.Ct., at 3034 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). See also *id.*, at ——, 106 S.Ct., at ——. Justice POWELL concluded that race-conscious relief can be ordered "in cases involving particularly egregious conduct," *id.*, at ——, 106 S.Ct., at 3054 (concurring in part and concurring in judgment), and Justice WHITE similarly limited his approval of race-conscious remedies to "unusual cases." *Id.*, at ——, 106 S.Ct., at 3062 (dissenting). See also *Firefighters v. Cleveland*, 478 U.S., at ——, 106 S.Ct., at —— (WHITE, J., dissenting) ("I also agree with Justice BRENNAN's opinion in *Sheet Metal Workers* ... that in Title VII cases enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for non-victims being reserved for particularly egregious conduct"). There is no sensible basis for construing Title VII to permit employers to engage in race- or sex-conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination. As Justice WHITE noted last Term:

> "There is no statutory authority for concluding that if an employer desires to discriminate against a white applicant or employee on racial grounds he may do so without violating Title VII but may not be ordered to do so if he objects. In either case, the harm to the discriminatee

4. Justice O'CONNOR's concurrence at least makes an attempt to bring this term into accord with last. Under her reading of Title VII, an employer may discriminate affirmatively, so to speak, if he has a "firm basis" for believing that he might be guilty of (nonaffirmative) discrimination under the Act, and if his action is designed to remedy that suspected prior discrimination. *Ante*, at 1461. This is something of a half-way house between leaving employers scot-free to discriminate against disfavored groups, as the majority opinion does, and prohibiting discrimination, as do the words of Title VII. In the present case, although the District Court found that in fact no sex discrimination existed, Justice O'CONNOR would find a "firm basis" for the agency's *belief* that sex discrimination existed in the "inexorable zero": the complete absence, prior to Diane Joyce, of any women in the Agency's skilled positions. There are two problems with this: First, even positing a "firm basis" for the Agency's belief in prior discrimination, as I have discussed above the plan was patently not *designed to remedy* that prior discrimination, but rather to establish a sexually representative work force. Second, even an absolute zero is not "inexorable." While it may inexorably provide "firm basis" for belief in the mind of an outside observer, it cannot conclusively establish such a belief *on the employer's part*, since he may be aware of the particular reasons that account for the zero. That is quite likely to be the case here, given the nature of the jobs we are talking about, and the list of "*Factors Hindering Goal Attainment*" recited by the Agency plan. See *supra*, at 1467. The question is in any event one of fact, which, if it were indeed relevant to the outcome, would require a remand to the District Court rather than an affirmance.

is the same, and there is no justification for such conduct other than as a permissible remedy for prior racial discrimination practiced by the employer involved." *Id.*, at ——, 106 S.Ct. at 3081.

The Agency here was not seeking to remedy discrimination—much less "unusual" or "egregious" discrimination. *Firefighters*, like *Wygant*, is given only the most cursory consideration by the majority opinion.

In fact, however, today's decision goes well beyond merely allowing racial or sexual discrimination in order to eliminate the effects of prior societal *discrimination*. The majority opinion often uses the phrase "traditionally segregated job category" to describe the evil against which the plan is legitimately (according to the majority) directed. As originally used in *Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), that phrase described skilled jobs from which employers and unions had systematically and intentionally excluded black workers—traditionally segregated jobs, that is, in the sense of conscious, exclusionary discrimination. See *id.*, at 197–198, 99 S.Ct., at 2724–2725. But that is assuredly not the sense in which the phrase is used here. It is absurd to think that the nationwide failure of road maintenance crews, for example, to achieve the Agency's ambition of 36.4% female representation is attributable primarily, if even substantially, to systematic exclusion of women eager to shoulder pick and shovel. It is a "traditionally segregated job category" *not* in the *Weber* sense, but in the sense that, because of longstanding social attitudes, it has not been regarded *by women themselves* as desirable work. Or as the majority opinion puts the point, quoting approvingly the Court of Appeals: " 'A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation.' " *Ante*, at 1453, n. 12 (quoting 748 F.2d 1308, 1313 (CA9 1984)). Given this meaning of the phrase, it is patently false to say that "[t]he requirement that the 'manifest imbalance' relate to a 'traditionally segregated job category' provides assurance that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination." *Ante*, at 1452. There are, of course, those who believe that the social attitudes which cause women themselves to avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination. Whether or not that is so (and there is assuredly no consensus on the point equivalent to our national consensus against intentional discrimination), the two phenomena are certainly distinct. And it is the alteration of social attitudes, rather than the elimination of discrimination, which today's decision approves as justification for state-enforced discrimination. This is an enormous expansion, undertaken without the slightest justification or analysis.

III

I have omitted from the foregoing discussion the most obvious respect in which today's decision o'erleaps, without analysis, a barrier that was thought still to be overcome. In *Weber*, this Court held that a private-sector affirmative-action training program that overtly discriminated against white applicants did not violate Title VII. However, although the majority does not advert to the fact, until today the applicability of *Weber* to public employers remained an open question. In *Weber* itself, see 443 U.S., at 200, 204, 99 S.Ct., at 2725, 2727–28, and in later decisions, see *Firefighters v. Cleveland*, 478 U.S., at ——, 106 S.Ct., at ——; *Wygant*, 476 U.S., at ——, 106 S.Ct., at —— (opinion of POWELL, J.), this Court has repeatedly emphasized that *Weber* involved only a private employer. See *Williams v. City of New Orleans*, 729 F.2d 1554, 1565 (CA5 1984) (en banc) (Gee, J., concurring) ("Writing for the Court in *Weber*, Justice Brennan went out of his way, on at least eleven different occasions, to point out that what was there before the Court was *private* affirmative action")

(footnote omitted). This distinction between public and private employers has several possible justifications. *Weber* rested in part on the assertion that the 88th Congress did not wish to intrude too deeply into private employment decisions. See 443 U.S., at 206–207, 99 S.Ct., at 2728–2729. See also *Firefighters v. Cleveland, supra*, at ——, 106 S.Ct., at ——. Whatever validity that assertion may have with respect to private employers (and I think it negligible), it has none with respect to public employers or to the 92d Congress that brought them within Title VII. See Equal Employment Opportunity Act of 1972, Pub.L. 92–261, § 2, 86 Stat. 103, 42 U.S.C. § 2000e(a). Another reason for limiting *Weber* to private employers is that state agencies, unlike private actors, are subject to the Fourteenth Amendment. As noted earlier, it would be strange to construe Title VII to permit discrimination by public actors that the Constitution forbids.

In truth, however, the language of 42 U.S.C. § 2000e–2 draws no distinction between private and public employers, and the only good reason for creating such a distinction would be to limit the damage of *Weber*. It would be better, in my view, to acknowledge that case as fully applicable precedent, and to use the Fourteenth Amendment ramifications—which *Weber* did not address and which are implicated for the first time here—as the occasion for reconsidering and overruling it. It is well to keep in mind just how thoroughly *Weber* rewrote the statute it purported to construe. The language of that statute, as quoted at the outset of this dissent, is unambiguous: it is an unlawful employment practice "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). *Weber* disregarded the text of the statute, invoking instead its " 'spirit,' " 443 U.S., at 201, 99 S.Ct., at 2726 (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S.Ct. 511, 512, 36 L.Ed. 226 (1892)), and "practical and equitable [considerations] only partially perceived, if perceived at all, by the 88th Congress," 443 U.S., at 209, 99 S.Ct., at 2730 (BLACKMUN, J., concurring). It concluded, on the basis of these intangible guides, that Title VII's prohibition of intentional discrimination on the basis of race and sex does not prohibit intentional discrimination on the basis of race and sex, so long as it is "designed to break down old patterns of racial [or sexual] segregation and hierarchy," "does not unnecessarily trammel the interests of the white [or male] employees," "does not require the discharge of white [or male] workers and their replacement with new black [or female] hirees," "does [not] create an absolute bar to the advancement of white [or male] employees," and "is a temporary measure ... not intended to maintain racial [or sexual] balance, but simply to eliminate a manifest racial [or sexual] imbalance." *Id.*, at 208, 99 S.Ct., at 2730. In effect, *Weber* held that the legality of intentional discrimination by private employers against certain disfavored groups or individuals is to be judged not by Title VII but by a judicially crafted code of conduct, the contours of which are determined by no discernible standard, aside from (as the dissent convincingly demonstrated) the divination of congressional "purposes" belied by the face of the statute and by its legislative history. We have been recasting that self-promulgated code of conduct ever since—and what it has led us to today adds to the reasons for abandoning it.

The majority's response to this criticism of *Weber, ante*, at 1450, n. 7, asserts that, since "Congress has not amended the statute to reject our construction, ... we ... may assume that our interpretation was correct." This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured

by what the current Congress desires, rather than by what the law as enacted meant. To make matters worse, it assays the current Congress' desires *with respect to the particular provision in isolation*, rather than (the way the provision was originally enacted) as part of a total legislative package containing many *quids pro quo*. Whereas the statute as originally proposed may have presented to the enacting Congress a question such as "Should hospitals be required to provide medical care for indigent patients, with federal subsidies to offset the cost?," the question theoretically asked of the later Congress, in order to establish the "correctness" of a judicial interpretation that the statute provides no subsidies, is simply "Should the medical care that hospitals are required to provide for indigent patients be federally subsidized?" Hardly the same question—and many of those legislators who accepted the subsidy provisions in order to gain the votes necessary for enactment of the care requirement would not vote for the subsidy in isolation, now that an unsubsidized care requirement is, thanks to the judicial opinion, safely on the books. But even accepting the flawed premise that the intent of the current Congress, with respect to the provision in isolation, is determinative, one must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice. It is interesting to speculate on how the principle that congressional inaction proves judicial correctness would apply to another issue in the civil rights field, the liability of municipal corporations under § 1983. In 1961, we held that that statute did not reach municipalities. See *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 484, 5 L.Ed.2d 492 (1961). Congress took no action to overturn our decision, but we ourselves did, in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 663, 98 S.Ct. 2018, 2021–22, 56 L.Ed.2d 611 (1978). On the majority's logic, *Monell* was wrongly decided, since Congress' seventeen years of silence established that *Monroe* had not "misperceived the political will," and one could therefore "assume that [*Monroe's*] interpretation was correct." On the other hand, nine years have now gone by since *Monell*, and Congress *again* has not amended § 1983. Should we now "assume that [*Monell's*] interpretation was correct"? Rather, I think we should admit that vindication by congressional inaction is a canard.

Justice STEVENS' concurring opinion emphasizes "the underlying public interest in 'stability and orderly development of the law,'" *ante*, at 1459 (citation omitted), that often requires adherence to an erroneous decision. As I have described above, however, today's decision is a demonstration not of stability and order but of the instability and unpredictable expansion which the substitution of judicial improvisation for statutory text has produced. For a number of reasons, *stare decisis* ought not to save *Weber*. First, this Court has applied the doctrine of *stare decisis* to civil rights statutes less rigorously than to other laws. See *Maine v. Thiboutot*, 448 U.S. 1, 33, 100 S.Ct. 2502, 2519, 65 L.Ed.2d 555 (1980) (POWELL, J., dissenting); *Monroe v. Pape, supra*, 365 U.S., at 221–222, 81 S.Ct., at 502–503 (Frankfurter, J., dissenting in part). Second, as Justice STEVENS acknowledges in his concurrence, *ante*, at 1458, *Weber* was itself a dramatic departure from the Court's prior Title VII precedents, and can scarcely be said to be "so consistent with the warp and woof of civil rights law as to be beyond question." *Monell v. New York City Dept. of Social Services, supra*, 436 U.S., at 696, 98 S.Ct., at 2039. Third, *Weber* was decided a mere

seven years ago, and has provided little guidance to persons seeking to conform their conduct to the law, beyond the proposition that Title VII does not mean what it says. Finally, "even under the most stringent test for the propriety of overruling a statutory decision ...—'that it appear beyond doubt ... that [the decision] misapprehended the meaning of the controlling provision,' " 436 U.S., at 700, 98 S.Ct., at 2040 (quoting *Monroe v. Pape*, 365 U.S., at 192, 81 S.Ct., at 486–87 (Harlan, J., concurring)), *Weber* should be overruled.

In addition to complying with the commands of the statute, abandoning *Weber* would have the desirable side-effect of eliminating the requirement of willing suspension of disbelief that is currently a credential for reading our opinions in the affirmative action field—from *Weber* itself, which demanded belief that the corporate employer adopted the affirmative action program "voluntarily," rather than under practical compulsion from government contracting agencies, see 443 U.S., at 204, 99 S.Ct., at 2727–28; to *Bakke*, a Title VI case cited as authority by the majority here, *ante*, at 1455, which demanded belief that the University of California took race into account as merely one of the many diversities to which it felt it was educationally important to expose its medical students, see 438 U.S., at 311–315, 98 S.Ct., at 2759–61, to today's opinion, which—in the face of a plan obviously designed to force promoting officials to prefer candidates from the favored racial and sexual classes, warning them that their "personal commitment" will be determined by how successfully they "attain" certain numerical goals, and in the face of a particular promotion awarded to the less qualified applicant by an official who "did little or nothing" to inquire into sources "critical" to determining the final candidates' relative qualifications other than their sex—in the face of all this, demands belief that we are dealing here with no more than a program that "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants." *Ante*, at 1455. Any line of decisions rooted so firmly in naivete must be wrong.

The majority emphasizes, as though it is meaningful, that "*No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants." *Ibid.* One is reminded of the exchange from Shakespeare's King Henry the Fourth, Part I: "GLENDOWER: I can call Spirits from the vasty Deep. HOTSPUR: Why, so can I, or so can any man. But will they come when you do call for them?" Act III, Scene I, lines 53–55. Johnson was indeed entitled to have his qualifications weighed against those of other applicants—but more to the point, he was virtually assured that, after the weighing, if there was any minimally qualified applicant from one of the favored groups, he would be rejected.

Similarly hollow is the Court's assurance that we would strike this plan down if it "failed to take distinctions in qualifications into account," because that "would dictate mere blind hiring by the numbers." *Ante*, at 1454. For what the Court means by "taking distinctions in qualifications into account" consists of no more than eliminating from the applicant pool those who are not even *minimally qualified* for the job. Once that has been done, once the promoting officer assures himself that all the candidates before him are "M.Q.s" (minimally qualifieds), he can then ignore, as the Agency Director did here, how much better than minimally qualified some of the candidates may be, and can proceed to appoint from the pool solely on the basis of race or sex, until the affirmative action "goals" have been reached. The requirement that the employer "take distinctions in qualifications into account" thus turns out to be an assurance, not that candidates' comparative merits will always be considered, but only that none of the successful candidates selected over the others solely on the basis of their race or sex will be utterly unqualified. That may be of great comfort to those concerned with American productivi-

ty; and it is undoubtedly effective in reducing the effect of affirmative-action discrimination upon those in the upper strata of society, who (unlike road maintenance workers, for example) compete for employment in professional and semiprofessional fields where, for many reasons, including most notably the effects of past discrimination, the numbers of "M.Q." applicants from the favored groups are substantially less. But I fail to see how it has any relevance to whether selecting among final candidates solely on the basis of race or sex is permissible under Title VII, which prohibits discrimination on the basis of race or sex.[5]

Today's decision does more, however, than merely reaffirm *Weber*, and more than merely extend it to public actors. It is impossible not to be aware that the practical effect of our holding is to accomplish *de facto* what the law—in language even plainer than that ignored in *Weber*, see 42 U.S.C. § 2000e–2(j)—forbids anyone from accomplishing *de jure:* in many contexts it effectively *requires* employers, public as well as private, to engage in intentional discrimination on the basis of race or sex. This Court's prior interpretations of Title VII, especially the decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer's work force. Even the employer who is confident of ultimately prevailing in such a suit must contemplate the expense and adverse publicity of a trial, because the extent of the imbalance, and the "job relatedness" of his selection criteria, are questions of fact to be explored through rebuttal and counter-rebuttal of a "prima facie case" consisting of no more than the showing that the employer's selection process "selects those from the protected class at a 'significantly' lesser rate than their counterparts." B. Schlei & P. Grossman, Employment Discrimination Law 91 (2d ed. 1983). If, however, employers are free to discriminate through affirmative action, without fear of "reverse discrimination" suits by their nonminority or male victims, they are offered a threshold defense against Title VII liability premised on numerical disparities. Thus, after today's decision the *failure* to engage in reverse discrimination is economic folly, and arguably a breach of duty to shareholders or taxpayers, wherever the cost of anticipated Title VII litigation exceeds the cost of hiring less capable (though still minimally capable) workers. (This situation is more likely to obtain, of course, with respect to the least skilled jobs—perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past.) It is predictable, moreover, that this incentive will be greatly magnified by economic pressures brought to bear by government contracting agencies upon employers who refuse to discriminate in the fashion we have now approved. A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.

It is unlikely that today's result will be displeasing to politically elected officials, to

5. In a footnote purporting to respond to this dissent's (nonexistent) "predict[ion] that today's decision will loose a flood of 'less qualified' minorities and women upon the workforce," *ante*, at 1457, n. 17, the majority accepts the contention of the American Society for Personnel Administration that there is no way to determine who is the best qualified candidate for a job such as Road Dispatcher. This effectively constitutes appellate reversal of a finding of fact by the District Court in the present case ("plaintiff was more qualified for the position of Road Dispatcher than Diane Joyce," App. to Pet. for Cert. 12a). More importantly, it has staggering implications for future Title VII litigation, since the most common reason advanced for failing to hire a member of a protected group is the superior qualification of the hired individual. I am confident, however, that the Court considers this argument no more enduring than I do.

whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers (many of whom have filed briefs as *amici* in the present case, all on the side of Santa Clara) for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent. I dissent.

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