Washington and Lee Law Review

Volume 44 | Issue 3 Article 2

Summer 6-1-1987

The Future Of Affirmative Action In Employment

Harry T. Edwards

WASHINGTON AND LEE
LAW REVIEW

VOLUME 44 SUMMER 1987 NUMBER 3

THE ANNUAL JOHN RANDOLPH TUCKER LECTURE

THE FUTURE OF AFFIRMATIVE ACTION IN EMPLOYMENT

HARRY T. EDWARDS*

I. INTRODUCTION

Some years ago, Langston Hughes wrote eloquently of a "Dream of Freedom." His words are a fitting prelude to any consideration of the future of affirmative action:

> There is a dream in the land
> With its back against the wall
> By muddled names and strange
> Sometimes the dream is called.
>
> There are those who claim
> This dream for theirs alone—
> A sin for which, we know,
> They must atone.
>
> Unless shared in common
> Like sunlight and like air,
> The dream will die for lack
> Of substance anywhere
>
> The dream knows no frontier or tongue,
> The dream no class or race.
> The dream cannot be kept secure
> In any one locked place.

* Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. B.S. 1962, Cornell University; J.D. 1965, University of Michigan. This paper was prepared in connection with Judge Edwards' presentation of the John Randolph Tucker Lecture at Washington & Lee Law School on October 9, 1987.

> This dream today embattled,
> with its back against the wall—
> To save the dream for one
> It must be saved for all.[1]

There is a prophetic note in Langston Hughes' poem. It does not purport to cite a legal principle—it is much more profound than that. Hughes is talking about equality, fairness and justice . . . he is seeking the eradication of the racial caste system that traps the young black man in Ralph Ellison's novel *The Invisible Man* . . . and he is pursuing the fulfillment of Dr. Martin Luther King's "dream" for America. But Hughes knew—as we have come to learn—that "to save the dream for one it must be saved for all."

"Affirmative action" is about the *American dream.* It is about the convergence of legal principles with principles of equality, fairness and justice. It recognizes that, in order to eliminate "caste systems" in our society, we must eradicate the barriers of race and sex—barriers which have been designed and still function to prevent true equality for persons in this country.

It is somewhat ironic that we are still "dreaming" of equality as we celebrate the Bicentennial of the American Constitution; but the goal of eliminating the effects of over two hundred years of inequality still eludes us, even as we have enacted laws to abrogate long-standing patterns of racial discrimination. Over thirty years ago, the Supreme Court struck down the doctrine of "separate but equal" and declared that the law must be "color blind" in dealing with people of different races.[2] In the abstract, this principle of color blindness is extremely attractive. It is the cardinal principle underlying our quest for true equality among all people. But in the decades since *Brown v. Board of Education,* we have come to understand that the ultimate goal of equality will not be achieved solely through adherence to this neutral principle.

This point is most easily understood in connection with employment discrimination (which will be the focus of this commentary).[3] Affirmative action and preferential remedies in employment are designed to *foster* equality in employment opportunity. This characteristic distinguishes preferential remedies from the traditional patterns of overt discrimination in favor of nonminorities in our society; preferential remedies only temporarily favor one group in order to place all individuals on par. This is not to say that blacks or women must be thrust into positions for which they are not qualified. However, when the choice is between *qualified* nonminorities and

---

1. Poem written for the NAACP by Langston Hughes (Apr. 1, 1964) (unpublished).

2. Brown v. Board of Educ., 347 U.S. 483 (1954).

3. I have previously written on affirmative action and preferential remedies in employment. *See* Edwards, *Race Discrimination in Employment: What Price Equality?* 1976 U. ILL. L.F. 572; Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination,* 74 MICH. L. REV. 1 (1975).

other *qualified* individuals, the remedial principle of affirmative action militates in favor of opening the available positions to those who formerly could not occupy them.

We now know that, because of pervasive patterns of segregation and bias in America, some nonminorities in the job market have been conditioned to expect and receive preferences over equally well qualified blacks and women. This cycle can only be broken by reversing the preference temporarily until people learn to work with completely neutral criteria. In this way, affirmative action paves the way for achievement of the *American dream.*

II. WHY DOES THE STRUGGLE CONTINUE?

In reflecting on this subject, it is sometimes difficult to comprehend the fervor of the ongoing debate over affirmative action in employment. When Congress passed Title VII of the Civil Rights Act[4]—over twenty years ago—it established a national goal of equal employment opportunity. To effectuate this goal, the courts and various federal agencies developed the notion of affirmative action. Efforts to implement a policy of equal employment opportunity through the use of preferential remedies generally received great support throughout society. It was not until some people realized that equal rights for minority members and women would mean increased competition for limited job opportunities that we heard cries of reverse discrimination in response to affirmative action.

Nevertheless, beginning with the Eighth Circuit's decision in *Carter v. Gallagher*[5] and the Third Circuit's decision in *Contractors Association v. Secretary of Labor,*[6] both of which were handed down in 1971, through the Supreme Court's decisions in *United States v. Paradise*[7] and *Johnson v. Transportation Agency*[8] last Term, the Supreme Court and the lower federal courts have consistently reaffirmed the legitimacy of affirmative class-conscious remedies under Title VII and the equal protection clause of the Fourteenth Amendment. It is therefore somewhat perplexing, at this late date, to hear charges of "reverse discrimination" from litigants who seek the eradication of affirmative action *in the name of equal employment opportunity.*

Despite the judiciary's long-standing and consistent approval of affirmative action, claims of reverse discrimination recently have reappeared. In the *Wygant v. Jackson Board of Education,*[9] *Local 28 of Sheet Metal Workers' International Association v. EEOC,*[10] and *Local No. 93, Inter-*

4. 42 U.S.C. §§ 2000e-2000e-17 (1982).
5. 452 F.2d 315 (8th Cir. 1971), *cert. denied,* 406 U.S. 950 (1972).
6. 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).
7. 107 S.Ct. 1053 (1987) (plurality opinion).
8. 107 S.Ct. 1442 (1987).
9. 106 S.Ct. 1842 (1986) (plurality opinion).
10. 106 S.Ct. 3019 (1986).

national Association of Firefighters v. City of Cleveland[11] cases before the Supreme Court during the 1985 Term, and in *Paradise* last Term, opponents of affirmative action took the position that Title VII and the equal protection clause forbid the use of preferential relief except as a make-whole remedy for identified victims of discrimination. The Court flatly rejected this argument, thereby reaffirming the principle that, to end discriminatory employment practices, it will sometimes be necessary to extend affirmative class-conscious relief *beyond* the group of individuals adjudicated as victims of unlawful discrimination. The opponents of affirmative action, however, have not accepted defeat. In the recent case of *Marino v. Ortiz*[12] white police officers in New York City challenged a promotion plan set forth in a consent decree entered in a Title VII case brought by black and hispanic police officers.[13]

The explanation for these attacks on affirmative action simply may be a matter of politics. Some members of the current administration argue that color blindness is the *only* path to equality; not surprisingly, this assertion has been met with unabated cynicism among civil rights advocates. William Raspberry, the nationally-known columnist, summed up the views of these critics when he wrote:

> President Reagan insists that all of us must expect to share in the economic sacrifice it will take to get America going again. It sounds like elementary fairness when he says it. But the more I hear of his proposals, the more I am reminded of the joke that has a hen proposing to a pig that they undertake the sacrifices necessary to produce a breakfast of ham and eggs.[14]

Another reason that the debate over affirmative action has persisted is because a great many legal scholars and practitioners harbor the view that the law in this area is in a state of disarray. For example, in a recent article in the *Harvard Law Review,* Professor Kathleen Sullivan argues that the Supreme Court missed the chance during the 1985 Term to truly legitimate affirmative action by moving the concept from the remedial paradigm to a more forward-looking justification of preferential treatment as a means to integrate future generations in our society.[15] Attorney Zachary Fasman, a highly-respected authority on employment discrimination law, goes much further than Professor Sullivan in his critique of the Supreme Court:

> No subject in the employment discrimination field has generated as much fruitless controversy as "reverse discrimination." A series

---

11. 106 S.Ct. 3063 (1986).

12. 806 F.2d 1144 (2d Cir. 1986), *aff'd,* 108 S.Ct. 586 (1988) (per curiam).

13. The Supreme Court affirmed the Second Circuit's decision on procedural grounds and, thus, did not reach the merits of the petitioners' challenge to the promotional plan.

14. Washington Post, Mar. 13, 1981, at A15, col. 5.

15. *See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases,* 100 HARV. L. REV. 78 (1986). At least one member of the Court has explicitly endorsed Professor Sullivan's approach. *See* Johnson, 107 S.Ct. at 1460 (Stevens, J., concurring).

> of muddled Supreme Court decisions addressing preferential treatment in general, and employment issues in particular, has resolved little. Indeed, the High Court's failure to issue anything approaching a definitive ruling on these issues, and its penchant for a multiplicity of split opinions and apparent reversals of course, testifies not so much to the difficulties of these issues as to some bizarre judicial need to keep the "reverse discrimination" controversy alive. Employers, unions and public officials desiring practical guidance with regard to affirmative action will find precious little in recent Supreme Court law.[16]

There is much to be said for the views of Professor Sullivan and Mr. Fasman. In my opinion, however, there *are* some coherent legal principles governing affirmative action and preferential remedies in employment, especially after the Court's decision in *Johnson* last Term. Moreover, I think that if we focus on the legitimacy of affirmative action and the coherence and limited nature of the legal precepts underlying preferential remedies, it is fairly easy to dismiss the many overblown claims of "reverse discrimination" that have been voiced in recent years.

III. THE CONTINUING NEED FOR AFFIRMATIVE ACTION TO END EMPLOYMENT DISCRIMINATION

In considering the issues surrounding the legitimacy of affirmative action we must begin by facing some very disturbing hard facts. Since the passage of Title VII in 1964, the gap in unemployment rates for blacks and whites has *actually widened.* Recent studies from the Department of Labor confirm this and other sad realities of the job market.[17] In 1973, for example, the black unemployment rate of 9.4 percent was slightly more than twice the unemployment rate for whites. By 1979, the ratio had expanded to nearly 2 1/2 to 1. Despite some narrowing during the recessions of the early 1980s, the black-to-white jobless rate ratio again stood at about 2 1/2 to 1 in 1985, with the black unemployment rate averaging 15.1 percent.

In addition to this greater incidence of unemployment, blacks experience longer jobless periods, as reflected in a higher average duration and a greater proportion of long-term unemployment. And black men are twice as likely as white men to end a period of unemployment by withdrawing from the labor force. These figures are made even worse when one recognizes that about twice the proportion of black men as white men work part-time involuntarily. And, significantly, even when working full-time, black men earn only about 73 percent of the median earnings of white men.

Education and level of occupation have always been strongly linked. In 1985, just one-sixth of all black workers, compared with one-fourth of all

---

16. Z. Fasman, Remarks at the Meeting of the National Employment Law Institute 44 (Mar. 2, 1987) (on file with the author).

17. The economic data cited in this section has been taken from: BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT CONDITIONS AMONG BLACK AMERICANS (1986).

white workers, had completed four years or more of college. Moreover, black college graduates are substantially less likely than whites to be in managerial, professional, or precision production jobs, and, instead, are more likely to be in lower paying and lower status service occupations. The same is true for blacks and whites who have completed one to three years of college. Among workers who did not continue their education after earning a high school diploma, blacks are twice as likely as whites to be in lower paying jobs. Given this incredible disparity in earning power between *similarly* educated blacks and whites, it is not surprising that in 1984 the median family income of blacks was only 55 percent of that of white families.

Considerable disparity also exists between the economic status of women and that of white males. Although the labor force participation rate for women has steadily increased since 1964, women are twice as likely as white men to work only part-time because they cannot secure full-time employment. In addition, even though it was found that the proportion of women looking for work was three times greater than that for white men, the unemployment rate for women is still significantly greater than that for white men. Not surprisingly, therefore, almost twice as many women as white men were found to be "discouraged workers," that is, workers who think that they cannot get a job.

Even when women do find a job, they earn substantially less than their male counterparts. Although this disparity in large part reflects the fact that women hold lower level jobs within most general occupation groups, women also tend to lag in earnings when compared to men employed in the *same jobs.* Moreover, the failure of women to enter higher paying jobs in many occupational groups may be attributable to lack of opportunity caused by sex discrimination.

Despite this and other equally disturbing evidence of a continuing, severe disparity in equal employment opportunities, opponents of affirmative action claim that preferential remedies are not only illogical, but also manifestly unjust. They argue that nonminorities should not suffer in today's job market merely because certain employers consciously discriminated in the past. They also claim that blacks and women who are not identified victims of discrimination should not be rewarded for the wrongs of a prior generation, nor should blacks or women ever benefit when there exists only a general statistical imbalance in a particular employer's work force.

These arguments, however, fail to place the preferential remedy in its proper perspective. We must not forget an obvious, but crucial point: preferential remedies are designed to foster, not inhibit, equal employment opportunities. The key concept is "remedy"—a *temporary* and *corrective* measure. These important characteristics obviate the apparent inconsistency in the argument that in order to end one preference (in favor of nonminorities) other preferences (in favor of minorities and women) must be introduced. At first the idea may seem illogical. But the remedial principle is sound; and, of course, if the goal of equal employment opportunity is to be achieved, then we must find remedies that work.

IV. MEASURING THE LEGITIMACY OF THE EXPECTATIONS OF NONMINORITY EMPLOYEES

In assessing the legality of any affirmative action plan, it is very important to recognize that "the *expectations* of nonminority candidates do not become *legitimate* merely upon assertion."[18] In cases of so-called "reverse discrimination" it is usually true that the complaining white male employee can show that he would have been hired or promoted *but for* the implementation of the affirmative action plan that is under challenge. But this fact alone tells you very little because all too often nonminority candidates have been awarded jobs principally because of their race or sex (or, alternatively, a minority or female person has been denied the job because of his or her race or sex).

The relevant inquiry should be whether the nonminority person would have gotten the job *apart from his white, male characteristics.* When the white, male worker in the *United Steelworkers v. Weber*[19] case claimed that he should have been admitted to the company's apprenticeship program over competing black candidates, his complaint was *not* based on proven superior qualifications, nor was it based on some legitimate job expectation arising under a valid seniority agreement. A point that is often lost is that the complainant in *Weber* had no greater entitlement to the apprenticeship position than did the competing black workers.[20] The real issue in *Weber,* then, was not the disappointed "expectations" of white job applicants, but, rather, the legitimacy of the *remedial* aspects of the disputed affirmative action plan.

In judging the legality of preferential remedies, the courts routinely have required that a distinction be made between lawful and unlawful expectations. Bona fide seniority rules, for example, implicate lawful expectations, while exclusionary seniority rules, either *de facto* or *de jure,* do not. Likewise, the courts have distinguished expectations based on job-related skills from expectations based on stereotypes or arbitrary bias. Obviously, when an affirmative action plan covers unskilled or semi-skilled positions, and seniority is not a factor, separating lawful from unlawful skill-related expectations becomes easier. Unskilled and semi-skilled workers

---

18. Ledoux v. District of Columbia, 820 F.2d 1293, 1302, *reh'g en banc granted,* 833 F.2d 368 (D.C. Cir. 1987) (emphasis in original).

19. 443 U.S. 193 (1979). Brian Weber instituted a class action challenge on behalf of the white production workers under section 703 of Title VII, 42 U.S.C. § 2000e-2 (1982).

20. While the plan at issue in *Weber* did "tamper[ ] with the expectations attendant to seniority," Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842, 1864 (1986) (Marshall, J., dissenting), it did not abrogate any *preexisting* seniority rights. Because the employer in *Weber* created the apprenticeship program at the same time that it mandated the preference, the white workers had no long-standing expectations in admission to the apprenticeship program. Nor were whites barred from the program; in fact, the plan permitted up to fifty percent white participation. Moreover, the disadvantage in terms of admission to the program was only temporary and, while in operation, the program did not displace any white workers from their jobs. *See* United Steelworkers v. Weber, 443 U.S. 193, 199 (1979).

are more fungible and interchangeable. Nonminority employees, therefore, have a far less legitimate argument that they possess skills superior to those of minorities or women.

While the courts have permitted promotion as well as hiring preferences, they distinguish between the two in terms of identifying and balancing lawful expectations. Although a racial preference in *initial hiring* does tend to aid one applicant at the expense of another, neither has a vested right to be hired, and there is a less legitimate expectation on the part of the nonminority worker than in other situations such as when promotions are based on seniority. *Promotion* cases pose more difficult balancing problems because nonminority males often have long-held expectations, but these expectations are not always well founded. Indeed, this is evident from the Court's decision last Term in *Johnson,* in which a male employee was "ranked" marginally higher than the competing female job applicant who eventually received the road dispatcher job at issue. The Court upheld the promotion plan, in part, because the female applicant was found *qualified* to perform the job.[21] *Johnson* makes clear that where minority or female candidates for a position are qualified, the nonminority candidate's legitimate expectations are necessarily lower than they would be in a situation where the minority or female candidates are unqualified, regardless of the fact that an employer's rating system may somehow deem one candidate "more qualified" than the next. In certain situations, therefore, a *legitimate* expectation of promotion will not exist. And it is of no moment that some individuals may feel disappointed or cheated—especially if the employer had created an expectation of promotion that had no basis in anything other than favoritism not related to job performance or seniority.

Layoffs present the most difficult balancing problems. It is one thing to use affirmative action to *hire* minorities or women formerly excluded from the work place; it is quite another thing to grant these same persons "fictional" seniority to give them protection against layoffs. Workers who have earned seniority through years of work, with a promise that seniority will determine job security during layoffs, have a strong and legitimate expectation as against those persons who claim job protection under an affirmative action plan. In addition, although seniority systems are not infallible, the seniority principle has long served the interests of large segments of the working class in this country and has protected many employees, including minorities and women, from arbitrary employer actions. Thus, any attack on seniority systems must consider the consequential losses to *all* employees (versus employers) stemming from an erosion of the seniority principle.

While the Supreme Court has never gone so far as to say that layoffs may never be used as an instrument of remedial action, the Court in

---

21. *See* Johnson v. Transp. Agency, 107 S.Ct. 1442 1455 (1987); *see also* United States v. Paradise, 107 S.Ct. 1053, 1073 (1987).

Firefighters Local Union No. 1784 v. Stotts[22] did rule that non-identified victims of discrimination may not be awarded "fictional seniority." And in *Wygant v. Jackson Board of Education,*[23] the Court strongly suggested that an affirmative action plan may never prefer minorities over nonminority workers in any situation involving job displacement.

Apart from these general considerations regarding the expectations of nonminority employees, it is critical to remember that affirmative action is necessarily *more* than a make-whole remedy. The Supreme Court has refused to limit preferences to "identified" victims of discrimination. Likewise, the Court has thus far refused to require, as a predicate to voluntary affirmative action, formal findings of discrimination by the particular employer or governmental unit involved.

However, just what constitutes a sufficient predicate to either a court-ordered or a voluntary affirmative action plan by either a public or a private employer remains somewhat unsettled. Rather than parse the law case-by-case, it will be useful to present a series of scenarios that raise the question of what purpose may justify affirmative action by an employer. The preceding comments about lawful versus unlawful expectations of nonminority employees will provide the overall framework for the succeeding analysis.

V. PREDICATES TO AFFIRMATIVE ACTION

A. Identified "Victims" of Discrimination

The easiest case scenario involves an identified victim of discrimination. For example, suppose that two years ago, an employer refused to hire a minority person or a woman for a particular job because of his or her race or sex, and a court ordered the employer to hire the individual and to give him or her back pay for the two year period. Suppose further that a few months later, the employer, using a "last hired, first fired" seniority system, decides to layoff some workers. The minority person or woman who was recently hired, but who should have been hired two years earlier, has no seniority and is therefore the first to go. In a case like this one, where the specific discriminatee has been identified, a court must grant retroactive seniority. Otherwise, the effects of a proven instance of discrimination will not be completely eradicated.

While such affirmative relief may disadvantage nonminority workers (or for that matter minority or women workers if there are any), it does not thwart any *legitimate* expectations because the workers will be in the very same position that they would have been in *but for* the unlawful discrimination, that is, if the discriminatee had been hired two years earlier. Even if one believes that the nonminority workers should not be prejudiced

22. 467 U.S. 561 (1984).
23. 106 S.Ct. 1842 (1986) (plurality opinion).

by their employer's past discrimination, this is *not* a reason why they should retain an unearned advantage. Besides, a remedy of retroactive seniority given to an identifiable discriminatee has no effect on most employees since the basic seniority system is left intact. The balance in such a case weighs decisively in favor of the preferential seniority remedy. Indeed, in *Franks v. Bowman Transportation Co.*,[24] the Supreme Court recognized this when it held that "identified victims" of discrimination *must* be awarded retroactive seniority as a make-whole remedy under Title VII.

A related situation arises when an employer refuses to promote a minority person or a women because of his or her race or sex. No reason exists in the case of identified victims to distinguish between hiring and promotion. The equitable considerations are the same. The affirmative order puts both parties—the identified victim and the non-minority workers—in the same position that each would have been in *but for* the proven discrimination. It remedies fully the unlawful discrimination suffered by the particular minority or woman employee, but, at the same time, it does not trammel any *legitimate* expectations in promotion that the nonminority employees might have, that is, expectations based on job performance or seniority as opposed to expectations that result from stereotypes or arbitrary bias.

B. Proven Unlawful Discrimination Without Identifiable Victims

A somewhat more difficult situation arises where a court finds that a particular employer discriminated against minorities and women in the past, but no victims of the unlawful discrimination are identified. In such a case, affirmative relief will not always be appropriate. Rather, a court must consider whether affirmative action is necessary to remedy past discrimination in the particular case and then take care to tailor its order to fit the nature of the violation it seeks to correct. It should be remembered, however, that in some cases, a court may have to resort to affirmative action because ordering an offender to discontinue a discriminatory practice will simply not be enough.

In *Sheet Metal Workers'*,[25] the Supreme Court recognized that such relief will be necessary, for instance, "when [a court is] confronted with an employer . . . that has engaged in persistent or egregious discrimination."[26] The Court stated further that "such relief may [also] be necessary to dissipate the lingering effects of pervasive discrimination."[27] Yet, the Court declined in *Sheet Metal Workers'* to limit preferential remedies to these situations, leaving open the question "[w]hether there might be other circumstances that justify the use of court-ordered affirmative action."[28]

---

24. 424 U.S. 747 (1976).
25. Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S.Ct. 3019 (1986).
26. *Id.* at 3050 (plurality opinion).
27. *Id.*
28. *Id.*

Fashioning a class-conscious preferential order to remedy past discrimination by a particular employer involves the "equitable discretion" of the district court. The court must, therefore, consider the impact that any preferential remedy for violations of Title VII or the Constitution will have on the nonminority workers. This requires the court to identify the lawful expectations of the nonminority workers and to balance such expectations against the utility of the preferential remedy. Necessarily, this is a discretionary and fact-specific inquiry; yet, certain fundamental considerations adhere in almost every case.

When a court-ordered affirmative action plan sets a percentage or numerical hiring goal, it will certainly have an impact on nonminority persons by aiding one applicant at the expense of another. Nevertheless, in such a case, nonminority applicants will usually have no vested right to be hired—especially for a particular job. Much of the disappointment of the nonminority applicants may stem from the fact that they have been conditioned to expect and receive a preference over equally well qualified minorities and women. And, in any event, the nonminority applicants will only suffer a temporary disadvantage, as the affirmative relief will cease once the effects of the past discrimination are eliminated. Since there may be no other way to eradicate discrimination by the particular employer, the balance often may weigh in favor of the affirmative hiring remedy in spite of its impact on nonminority applicants. Indeed, it should not be forgotten that without such affirmative relief, the employer may continue to discriminate. In the *Sheet Metal Workers'* case, for example, the union developed internal mechanisms to circumvent a district court's order that set a minority membership goal, thereby perpetuating the effects of its "consistent and egregious" past discrimination.[29] The Supreme Court upheld the district court's order holding the union in contempt for this behavior.

A court-ordered affirmative action plan that gives a preference to minorities and women with respect to promotions raises different issues. Where, for example, the employer traditionally promotes through a bona fide seniority system, the expectations of nonminority employees will weigh strongly in the balance. In this kind of case, the legality of the preferential promotion remedy will probably hinge on the predicate for the affirmative action plan. If the employer has engaged in *persistent or egregious discrimination,* a promotion preference may be the only way to correct completely the effects of this unlawful behavior. On the other hand, if the employer engaged in less pervasive forms of discrimination, then alternative remedies should be considered.[30]

The Supreme Court has not definitively resolved the issue of whether a court may order preferential promotions as a remedy for past discrimi-

---

29. *See id.* at 3029, 3050.

30. *See, e.g.,* Segar v. Smith, 738 F.2d 1249, 1293-95 (D.C. Cir. 1984), *cert. denied,* 471 U.S. 1115 (1985); Thompson v. Sawyer, 678 F.2d 257, 294-96 (D.C. Cir. 1982); United States v. City of Chicago, 663 F.2d 1354, 1362-63 (7th Cir. 1981).

nation. In *International Association of Firefighters,*[31] the Court held that a consent decree setting goals for the promotion of minorities did *not* discriminate against whites in violation of section 706(g) of Title VII.[32] And, last Term, in *Paradise,*[33] the Court held, in the face of an equal protection challenge, that a district court may modify an existing consent decree to impose a one black for one white promotion requirement to remedy the effects of past and continuing forms of egregious discrimination by the Alabama State Police Department. However, the Court has not yet decided whether a district court *itself* may order preferential promotions as a remedy under section 706(g) of Title VII,[34] nor has it squarely addressed the question whether court-ordered promotions outside the context of a consent decree would violate the equal protection clause. Logic would suggest that if such preferences are permissible in the case of consent decrees—where it is alleged that the employer has discriminated in the past, but where such discrimination has been neither proven nor disproven in a formal trial in the district court—then such preferences should be permissible where unlawful discrimination by the employer has been actually proven through a formal trial.

C. *Voluntary Affirmative Action*

1. *The Various Types of "Voluntary" Programs*

Probably the most difficult cases involving affirmative action arise in connection with *voluntary* programs. Often, in such cases, there has been no *formal* demonstration that the particular employer previously engaged in unlawful discrimination against women or minorities. The critical issue, therefore, is to determine what purposes may justify affirmative action by an employer in the absence of a judicial finding of unlawful discrimination. So far, the Supreme Court has identified at least three situations where an employer may voluntarily adopt an affirmative action plan, and one situation where it may not do so.

The least controversial situation supporting voluntary affirmative action arises in connection with hiring and promotion "goals" adopted by government contractors pursuant to various federal regulations designed to ensure equal opportunity.[35] These plans have survived most legal challenges because the goals that are established for minority and female hiring usually do not afford a preference based on race or sex. In reality the employment goals represent nothing more than an employer's promise to make a good

---

31. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S.Ct. 3063 (1986). As discussed *infra*, there had been no formal adjudication to determine whether the City of Cleveland had engaged in discrimination. *See infra* note 80 and accompanying text.

32. 42 U.S.C. § 2000e-5(g) (1982).

33. United States v. Paradise, 107 S.Ct. 1053 (1987) (plurality opinion).

34. *See supra* note 32 and accompanying text.

35. *See, e.g.,* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

faith effort to hire persons who formerly have been excluded from employment opportunities.

A second situation in which voluntary affirmative action has been upheld is when an employer enters into a consent decree to settle a claim of unlawful discrimination. As already noted the Supreme Court recently upheld such a "voluntary"[36] plan in *International Association of Firefighters,*[37] even though there had been no formal adjudication of liability. In *International Association of Firefighters,* the Court may have been influenced by the fact that the race-conscious relief embodied in the consent decree was designed to eradicate what the district court referred to as the present effects of "a historical pattern of racial discrimination."[38] What is particularly noteworthy about the opinion, however, is that the Court held that a district court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court itself could have awarded after trial.[39]

International Association of Firefighters is expressly predicated on the Supreme Court's seminal opinion in *Weber,*[40] which depicts the third situation in which voluntary affirmative action plans have been approved. In *Weber,* the Supreme Court upheld a purely voluntary affirmative action plan adopted by a private employer to eliminate conspicuous racial imbalances in traditionally segregated job categories. Notably, it was not shown that the employer in *Weber* had engaged in *any* unlawful discrimination. Rather, the employer had opened a factory and hired as craftworkers for that plant only persons who had prior experience. Because blacks had long been excluded from craft unions, few blacks were able to present such credentials. As a consequence, prior to the employer's institution of the in-plant preferential training program, less than two percent of the skilled craftworkers at the plant were black, even though the area work force was thirty-nine percent black. This "conspicuous racial imbalance,"[41] which was born of racial segregation in employment, was found to justify the employer's affirmative action plan.

2. *The Supreme Court's Recent Endorsement of Voluntary Affirmative Action Plans*

The Court's decision last Term in *Johnson*[42] strongly reaffirms *Weber.*[43] In *Johnson* the Court upheld a county transportation agency's promotion

---

36. Affirmative action plans developed in a consent decree are properly viewed as a hybrid between a purely voluntary plan and a court-ordered plan. These plans are voluntary in the sense that they are implemented by the employer without judicial compulsion; however, because consent decrees dispose of discrimination charges, they must receive court approval. *See* Ledoux v. District of Columbia, 820 F.2d 1293, 1298 n.13, *reh'g en banc granted,* 833 F.2d 368 (D.C. Cir. 1987).

37. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S.Ct. 3063 (1986).

38. *Id.* at 3070.

39. *Id.* at 3077.

40. United Steelworkers v. Weber, 443 U.S. 193 (1979).

41. *Id.* at 209.

42. Johnson v. Transp. Agency, 107 S.Ct. 1442 (1987).

43. The *Johnson* Court did not consider the constitutional implications of the employer's

of a *qualified* female over a marginally better qualified male pursuant to a voluntary affirmative action plan. Significantly, there was no showing whatsoever that the agency had ever discriminated against women. Instead, the agency recognized that women were grossly under-represented in certain traditionally segregated job categories, and therefore chose to consider the sex of an otherwise qualified applicant *as one factor* in making promotions. The Court emphasized that the male who was passed over had "no legitimate firmly rooted expectation" that he would receive the position at issue.[44]

Weber and *Johnson* are different from *International Association of Firefighters* in that the latter involved a judicially approved consent decree, presumably based on the employer's historical pattern of discrimination. However, the three cases bear certain critical similarities. In each case, the Supreme Court upheld voluntary affirmative action plans despite the absence of any adjudicated findings that the employer had engaged in unlawful discrimination, and despite the absence of any identified victims of discrimination.[45] And in each case the Court indicated that race- or sex-conscious preferences may be permissible to remedy discrimination in hiring and promotion.

3. *The Limits of Voluntary Affirmative Action*

Voluntary affirmative action is not without its limits, however, as the Supreme Court made clear in the *Wygant* case.[46] *Wygant* involved a collective bargaining agreement that required *layoffs* to be executed in reverse order of seniority, except that nonwhite teachers had preferences to ensure that at no time would there be a greater percentage of minority personnel laid off than the current percentage of minority personnel. There was no apparent time limit to the affirmative action plan. The public employer argued (and the trial court found) that the plan did not violate equal protection because it was designed to preserve the presence of minority teachers as "role models" for minority students, and because the plan ameliorated "societal discrimination."[47] In a 5-4 decision the Court found the affirmative action plan in *Wygant* at odds with the Fourteenth Amendment. A plurality of the Court rejected the "role model" justification out of hand,[48] and it also rejected the "societal discrimination" argument as "over expansive."[49] Moreover, the plurality believed that preferential pro-

---

43. The *Johnson* Court did not consider the constitutional implications of the employer's voluntary affirmative action program because the issue was not ligitated below. *See id.* at 1446 n.2.

44. *Id.* at 1455.

45. A requirement that an employer admit to past discrimination before a voluntary affirmative action plan would be justified would "create a significant disincentive for voluntary action" because of the prospect of liability due to the admission. *Id.* at 1451 n.8.

46. Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842 (1986) (plurality opinion).

47. *Id.* at 1846.

48. *Id.* at 1847-48.

49. *Id.* at 1848.

tection from *layoffs* was too much of a burden on innocent white employees.[50]

Nevertheless, as the post-*Wygant* decisions indicate, the Court has plainly embraced the idea that affirmative action, in a carefully circumscribed form, is a legitimate and vitally important instrument for the achievement of equal employment opportunity, especially in the context of hiring and promotions. Of course, voluntary affirmative action plans involving hiring and promotions will be subject to an "elevated level of scrutiny."[51] In particular an affirmative action plan must be remedial, in the sense that it seeks either to eradicate the present effects of past discrimination or to eliminate traditional patterns of segregation that have resulted in conspicuous racial imbalances. Indeed, the Court's decisions in *Weber, International Association of Firefighters,* and *Johnson* demonstrate that it would be ironic, and indefensible, to hold that Title VII, which was enacted to eliminate racial injustice in employment, actually bars voluntary, race-conscious efforts to achieve that very goal.

4. *The Factual Predicate Needed to Justify Voluntary Affirmative Action*

Several important questions remain unanswered, however.[52] In *Wygant* and *Johnson,* the Court established that, under *both* Title VII and the Constitution, the validity of an affirmative action plan must be judged by two factors. First, a court must determine whether there was an adequate factual predicate justifying the use of affirmative action. If the court finds that remedial efforts were justified, it must then decide whether the affirmative action plan unnecessarily trammels the legitimate interests of nonminority or male employees.

Although application of the second prong of this test does not appear to vary in the statutory and Constitutional contexts, the Court explicitly stated in *Johnson* that the Constitution imposes greater restraints on voluntary affirmative action plans than does Title VII.[53] It necessarily follows, then, that the Constitution is more demanding in the application of the first prong of the test, under which a court must determine whether the employer had a sufficient factual predicate for adopting a voluntary plan. Indeed, a comparison of *Johnson* and *Wygant* reveals that the critical distinction lies in the *quantum of evidence* needed to demonstrate that the plan was adopted for a remedial purpose. *Johnson* established that the relevant inquiry under Title VII is whether there is a " 'manifest imbal-

---

50. *Id.* at 1851-52.

51. United States v. Paradise, 107 S.Ct. 1053, 1064 (1987) (plurality opinion).

52. The discussion in part V.C.4 is taken from my panel majority opinion in Ledoux v. District of Columbia, 820 F.2d 1293, *reh'g en banc granted,* 833 F.2d 368 (D.C. Cir. 1987).

53. Johnson v. Transp. Agency, 107 S.Ct. 1442, 1449-50, n.6, 1452 (1987).

ance' " in " 'traditionally segregated job categories.'"[54] Under *Wygant,* by contrast, the test in the constitutional context is whether the employer has a "strong basis in evidence" for concluding that affirmative action is necessary to remedy the present effects of prior discrimination in the work place.[55]

5. *"Manifest Imbalance" Under Title VII: Determining the Relevant Labor Market and Assigning Burdens of Proof*

In any Title VII case challenging the legality of a voluntary affirmative action plan, it is now clear that, under the "manifest imbalance" test enunciated in *Weber* and *Johnson,* there need not be any showing that the employer was guilty of past or present discrimination. Instead, the Court in *Johnson* held that an affirmative action plan designed to overcome a manifest *statistical* imbalance in a workforce is sufficient to meet the Title VII requirements of a remedial purpose.[56]

Johnson also gives some guidance on the necessary statistical analysis to be performed under Title VII. For unskilled jobs the relevant inquiry involves 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."[57] In broad terms this test is not controversial, but in specific cases the parties may be unable to agree on the geographic scope of the relevant market.[58]

---

54. *Id.* at 1452 (quoting *United Steelworkers v. Weber,* 443 U.S. 193, 197 (1979)). In *Local No. 93, International Association of Firefighters v. City of Cleveland,* although the Court expressly predicated its judgment on *Weber* in approving a consent decree embodying preferential remedies, it did not require any specific showing of "manifest imbalance." Rather, the Court in *International Association of Firefighters* appeared to focus on whether the race-conscious relief was designed to eradicate the present effects of a "historical pattern of racial discrimination." 106 S.Ct. 3063, 3070 (1986). The plan in *International Association of Firefighters* was "voluntary" in the sense that it was developed and implemented willingly by the employer without judicial compulsion; however, because it was incorporated in a consent decree that disposed of the discrimination charges, it was approved by the court. Nonetheless, the Supreme Court in *International Association of Firefighters* indicated that, "absent some contrary indication," the validity of such plans under Title VII and the Constitution is to be judged under the same substantive criteria applicable to purely voluntary plans. *See id.* at 3073.

55. Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842, 1848 (1986) (plurality opinion).

56. *See Johnson,* 107 S.Ct. at 1452, 1453 n.11.

57. *Id.* at 1452. Since the proportion of children or retired persons in a population varies substantially in different places and at different times, it is not always advisable to look at the number of minorities or women in the *total* population. Where possible, a more precise measure, the number of *work-age* minorities or women in the relevant geographical area, should be employed. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1353 n.240 (2d ed. 1983).

58. *Compare* Ledoux v. District of Columbia, 820 F.2d 1293, 1298 n.12, 1304 n.18 (D.C. Cir. 1987) (percentage of blacks in the District of Columbia in case involving District of Columbia police officers) *with* Hammon v. Barry, 826 F.2d 73, 77-78 (D.C. Cir. 1987) (percentage of blacks in the District of Columbia and the nearby suburbs in Maryland and Virginia in case involving District of Columbia firefighters). Both *Ledoux* and *Hammon* have been set for rehearing *en banc* on May 4, 1988. *See* 833 F.2d 367, 367-69 (D.C. Cir. 1987).

More significant problems may arise in cases involving skilled positions. In *Johnson* the Court noted that, in any assessment of manifest imbalance with respect to skilled jobs, the relevant inquiry should focus on the percentage of minorities or women in the labor market who "possess the relevant qualifications."[59] In the few cases where a job qualification is easily identifiable, this analysis should not be difficult to perform. If, for example, the disputed job category requires employees to have a Ph.D. in biochemistry, it should be possible to ascertain the number of minorities or women in the relevant labor market who possess that qualification. Thus, if minorities or women comprise one percent of the employer's workforce in the disputed job category, but only one percent of the minorities or women in the labor market have Ph.D.s in biochemistry, it could not be said that a manifest imbalance exists with respect to this job category.[60]

The analysis does not end here, however, for in many cases involving skilled positions, the employer may not have such a specific and easily identifiable job requirement. For instance, it is unclear how one should determine the number of minorities or women in a relevant labor market who "possess the relevant qualifications" to be an assistant manager of a supermarket, to give but one example. The range of possible qualifications for this type of position is so broad that any effort to quantify the number of minorities or women who possess them may be little more than an exercise in futility.

Moreover, even if one could devise a method to ascertain the number of minorities or women who are currently qualified to work as assistant supermarket managers, or the like, employers often do not look solely to these individuals in making hiring decisions. Many employers will *also* hire persons who can be trained to perform these jobs. By looking past the pool of minorities or women who currently "possess the relevant qualifications" to those who could potentially possess them as well, the range of conceivable qualifications becomes so loose and flexible that a requirement that an employer defend its affirmative action plan by reference to the specific number of currently qualified members of the relevant labor market will be nearly impossible to meet.

In light of these practical considerations, it is probably sufficient in cases where job qualifications are difficult to define to use the total number of minorities or women in the relevant labor market as a proxy for qualified candidates in measuring manifest imbalance, *unless* the nonminority or male

---

59. *Johnson*, 107 S.Ct. at 1452 (citing *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977)); *see also* Valentino v. United States Postal Serv., 674 F.2d 56, 68 (D.C. Cir. 1982) ("When the job qualifications involved are ones that relatively few possess or can acquire, statistical presentations that fail to focus on those qualifications will not have large probative value.").

60. In this example, the relevant labor market may encompass the entire nation. This approach often is taken in cases involving professionals, or when the employer otherwise recruits nationwide. *See* B. SCHLEI & P. GROSSMAN, *supra* note 57, at 1362 & n.281, 1363 & n.289.

plaintiffs can demonstrate that a narrower, more accurate measure can be devised. In other words the ultimate burden of proof should rest with the party seeking to employ a more refined statistical analysis. Such an approach is the accepted course in Title VII *disparate impact* suits brought by minority or female plaintiffs.[61]

Of course a Title VII challenge to an affirmative action plan is more akin to a *disparate treatment* case, since the nonminority or male plaintiff's basic claim is that the employer intentionally discriminated against him or her on account of his or her race or sex. In a disparate treatment case, after the plaintiff makes out a *prima facie* case of discrimination[62] and the defendant articulates a "legitimate, nondiscriminatory reason for the [plaintiff's] rejection,"[63] the plaintiff must then demonstrate that the employer's purported reason was pretextual. "As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its [actions]."[64] In the affirmative action context, the employer will introduce evidence that demonstrates that its plan has an adequate factual predicate, and that it is narrowly tailored.[65] In satisfying this burden of production, *Johnson* permits employers to rely upon statistical analyses that are virtually identical to those found in disparate impact cases. Thus, it seems appropriate to look to disparate impact cases for guidance in defining relevant job markets in affirmative action cases.

Where the job in question clearly does *not* involve special qualifications, the nonminority or female plaintiffs in disparate impact cases need only produce evidence reflecting the percentage of minorities or women in the area labor market.[66] In cases where it is equally manifest that specific and identifiable qualifications *do* exist, the plaintiffs "may safely rely only upon specially qualified market statistics."[67] But when the qualifications for a disputed job category are not readily apparent, the employer in a disparate impact case who seeks to use narrower statistics bears the "burden [of] establish[ing] that generalized statistics do not adequately reflect the pool of presumptively qualified individuals."[68]

---

61. *See, e.g.*, Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 483 (9th Cir. 1983).

62. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Court set forth a four-part *prima facie* case that a complainant must meet in a disparate treatment case: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."

63. *Id.*

64. *Johnson*, 107 S.Ct. at 1449; *see* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

65. *See* Ledoux v. District of Columbia, 820 F.2d 1293, 1301, *reh'g en banc granted*, 833 F.2d 368 (D.C. Cir. 1987).

66. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308 n.13 (1977).

67. EEOC v. Radiator Speciality Co., 610 F.2d 178, 185 (4th Cir. 1979).

68. Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 483 (9th Cir. 1983); *accord* EEOC

The same approach can be easily followed in disparate treatment cases in the affirmative action context. If a plan covers assistant supermarket managers, for example, or other jobs whose qualifications are difficult to identify, the burden of producing refined statistical evidence reasonably should rest on the party who seeks their introduction—the nonminority or male employees in this instance. This approach is consistent with that taken in disparate impact cases. Moreover, it is consistent with established principles in disparate treatment cases, where the plaintiff bears the burden of demonstrating that the employer's articulated justifications for its actions are merely pretextual.[69] In an affirmative action case, the plaintiff could attempt to meet this burden in part by proving that the employer relied on inaccurate generalized statistics when more refined data were appropriate.[70]

It would seem that, in many cases, the plaintiff's burden of proving pretext in the affirmative action context will not be easily met. For one thing it simply is counter-intuitive to think that an employer would purposely rely on inaccurate statistics to defend an affirmative action plan. Generally, employers adopt affirmative action plans with great reluctance, and are not searching for mischievous ways to justify them. And given the highly visible nature of affirmative action plans, an employer who relies on bogus data would simply be inviting lawsuits. Moreover, common sense suggests that a rational employer would not try to justify an affirmative action plan by reference to a generalized market when, in reality, it only hires from a specialized market. For these practical reasons, it seems reasonable to place the burden on the plaintiffs. But most significantly, *Johnson*[71] and *Wygant*[72] hold that, in both the statutory and constitutional contexts, the plaintiffs in affirmative action cases must shoulder the ultimate burden of proving a plan's alleged invalidity.

6. *Voluntary Affirmative Action Involving Skilled, Non-Entry-Level Positions*

There is one additional noteworthy problem with statistics measuring the number of *qualified* minorities or females in a relevant labor market. The problem arises in promotion cases, when an employer seeks to rectify a severe imbalance in the representation of minorities or women in a *skilled, non*-entry-level position. In many instances there may be few minorities or women in the labor market who "possess the relevant qualifications" for

---

v. Rath Packing Co., 787 F.2d 318, 336 (8th Cir.), *cert. denied,* 107 S.Ct. 307 (1986); Chrisner v. Complete Auto Transit Inc., 645 F.2d 1251, 1259 n.5 (6th Cir. 1981); *Radiator Speciality Co.,* 610 F.2d at 185.

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

70. Even if the plaintiffs prove that the use of generalized population data is improper, the employer should have the opportunity to defend its affirmative action plan by "adjust[ing] his statistical proof to reflect a labor pool base with the special qualifications found required." *Radiator Speciality Co.,* 610 F.2d at 185.

71. Johnson v. Transp. Agency, 107 S.Ct. 1442, 1449 (1987).

72. Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842, 1848 (1986) (plurality opinion).

what is undoubtedly a skilled position. At first blush, then, one might be tempted to conclude that there is no "manifest imbalance" in the employer's work force that would justify a preferential promotion remedy.

As the Supreme Court recognized in *Weber,* however, this superficial analysis ignores the fact that there may be few qualified minorities or women in the relevant labor market because traditional patterns of exclusion prevented them from gaining access to *entry-level* positions which would have provided the training and experience necessary before they could qualify for the skilled, non-entry-level positions.[73] Thus, instead of measuring the number of minorities or women in the labor market who *currently* possess the requisite qualifications to perform the skilled job, the employer may properly consider the number of minority or women employees in the labor market who possess the relevant qualifications to perform the job *from which* employees are selected to fill the skilled non-entry-level position.[74]

This was the approach taken in *Weber.* After recognizing that it employed very few blacks in its skilled craft positions, the employer instituted a voluntary affirmative action plan for persons entering a training program that was designed to provide workers with the skills necessary to function in the non-entry-level craft positions.[75] In upholding this plan the Court did not compare the percentage of blacks in the skilled craft positions to the number of qualified blacks in the area labor market. Certainly this stemmed from the Court's recognition "that the proportion of black craft workers in the local labor force was likely as minuscule as the proportion in [the employer's] work force."[76] Rather, the proper comparison was to the percentage of all blacks in the area since that was the pool *from which* the employer would select individuals for its training program.[77]

7. *Measuring "Manifest Imbalance"*

Throughout the foregoing discussion of relevant labor markets, it has been assumed that the determination of a "manifest imbalance" was not

---

73. *See* Fisher v. Proctor & Gamble Mfg. Co., 613 F.2d 527, 544 (5th Cir. 1980), *cert. denied,* 449 U.S. 1115 (1981) ("When a company adopts a policy and practice of hiring in at low level, unskilled jobs and promoting to upper-level positions based upon training received and skills developed at the plant itself, it cannot convincingly challenge the prima facie showing under the *Hazelwood* 'qualifications' dicta.").

74. *See Johnson,* 107 S.Ct. at 1453 n.10 ("[W]here 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.").

75. Any suggestion that the employer should have placed unskilled blacks directly into the skilled craft positions is simply ludicrous.

76. *Johnson,* 107 S.Ct. at 1453 n.10. The Court in *United Steelworkers v. Weber* also recognized "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." *Id.*

77. United Steelworkers v. Weber, 443 U.S. 193, 198-99 (1979). *Johnson* presented a different situation. In that case there were women in the labor market who were qualified to fill the skilled craft position at issue, and it was possible to measure their numbers. Thus, the Court commended the employer for setting hiring goals which approximated the percentage of *qualified* women in the area labor market. *Johnson,* 107 S.Ct. at 1454.

at issue. In extreme cases like *Johnson,* where *no* minorities or women occupy the disputed job category, it will be undisputed that a "manifest imbalance" exists. But given the amorphous nature of the "manifest imbalance" test, this will not always be the case when some minorities or women are already employed. The Supreme Court has not yet found occasion to flesh out the contours of the "manifest imbalance" test, although we know from *Weber* and *Johnson* that it obtains when there is a "conspicuous . . . imbalance in traditionally segregated job categories."[78]

As noted earlier, *Johnson* explicitly holds that an employer need not produce evidence of past discrimination in order to sustain its plan under Title VII, since such a requirement would increase the prospect of liability.[79] This is *not* to say, however, that an affirmative action plan cannot also be justified by reference to evidence of past discrimination; indeed, such evidence is often adduced in Title VII suits that result in consent decrees which contain preferential remedies.[80] Thus, it appears reasonable to believe that if an employer comes forth with evidence of past or present discrimination, it need not, in addition, *fully* demonstrate a statistical imbalance in "traditionally segregated job categories" in order to satisfy Title VII. However, absent a showing of past or present discrimination, it still remains unclear how much is enough to find "manifest imbalance."

8. *The Legality of Voluntary Affirmative Action Under the Constitution*

The last piece in the voluntary affirmative action puzzle concerns claims arising under the Constitution. The constitutional analysis will be the same as the one suggested for Title VII cases in most critical respects, save one. In the Constitutional area, the factual predicate for an affirmative action plan is not "manifest imbalance," the test articulated in *Weber* and *Johnson,* but a "strong basis in evidence," the test set forth in *Wygant.*[81]

Unfortunately, the plurality in *Wygant* did not enunciate the factors a district court should consider in determining whether an employer had a

---

78. *Weber,* 443 U.S. at 209, *quoted in Johnson,* 107 S.Ct. at 1451.

79. *See Johnson,* 107 S.Ct. at 1451 n.8, 1457 n.17.

80. In *Local No. 93, International Association of Firefighters v. City of Cleveland,* for example, the Supreme Court noted that the Sixth Circuit had sustained the promotion plan set forth in a consent decree because of the statistical evidence presented to the district court *and* because the public employer had expressly admitted that it had engaged in discrimination. 106 S. Ct. 3063, 3070 (1986) (citing *Vanguards of Cleveland v. City of Cleveland,* 753 F.2d 479, 485 (6th Cir. 1985)).

81. Wygant v. Jackson Bd. of Educ., 106 S.Ct. 1842, 1848 (1986) (plurality opinion). The sharply divided Court in *Wygant* was unable to formulate a single "test" applicable to affirmative action plans challenged under the Constitution. However, the Court in *Johnson* made clear that *Wygant* was the relevant precedent for equal protection challenges. *See Johnson,* 107 S.Ct. at 1446 n.2, 1449-50 n.6. Therefore, until the Court indicates otherwise, it must be presumed that the factual predicate necessary in the constitutional context is the relatively more stringent one identified by the plurality in *Wygant.*

"strong basis" for believing that remedial action was required. This much is clear, however, from *Wygant* and *Johnson.* Because the Constitutional standard is somewhat stricter than the statutory standard,[82] a "strong basis in evidence" must be *something more* than a "manifest imbalance." It would appear that this something more may be a greater quantum of statistical evidence, evidence of prior discriminatory practices, or some combination of the two.

Only Justice O'Connor, writing separately in both *Wygant* and *Johnson,* has attempted to elucidate the "strong basis" test. Justice O'Connor believes that this test would be satisfied by evidence of a statistical disparity sufficient to support a *prima facie* claim of discrimination under Title VII.[83] However, this view was rejected by five Justices in *Johnson* because it would require the employer "to compile evidence that could be used to subject it to a colorable Title VII suit," a requirement that would "create a significant disincentive for employers to adopt an affirmative action plan."[84] Even though *Johnson* is a Title VII case, there is no reason to believe that this concern is any less real when an affirmative action plan is challenged under the Constitution. Moreover, even the plurality in *Wygant* did not suggest that there must be a *prima facie* case of present discrimination in order to justify a voluntary affirmative action plan; therefore, it seems that a "strong basis" test is something less than a *prima facie* case.

While the Court has not yet described the amount or type of evidence that will satisfy the "strong basis" test, *Wygant* suggests that the evidence must be "sufficient . . . to justify the conclusion that there has been prior discrimination."[85] A test of *past discrimination* surely would be a telltale difference between the Constitutional and statutory standards, since *Weber* and *Johnson* make clear that there need be *no* showing of either prior or present discrimination to sustain a plan under Title VII. Whether or not this is the sole basis for distinguishing between the "manifest imbalance" and "strong basis" tests, it seems clear that in any case brought under the Constitution, "evidence of actual discriminatory practices engaged in by the public employer in the past . . . will be highly relevant to the determination of whether the employer had a strong basis for believing that remedial action was justified."[86]

---

82. *See Johnson,* 107 S.Ct. at 1449-50 n.6, 1452.

83. Justice O'Connor would apply this test to any voluntary affirmative action plan, regardless of whether the plan was challenged under Title VII or the Constitution. *See Johnson,* 107 S.Ct. at 1461-62 (O'Connor, J., concurring in the judgment); *Wygant,* 106 S.Ct. at 1856 (O'Connor, J., concurring in part and concurring in the judgment).

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

85. *Wygant,* 106 S.Ct. at 1848.

86. Ledoux v. District of Columbia, 820 F.2d 1293, 1303-04, *reh'g en banc granted,* 833 F.2d 368 (D.C. Cir. 1987). This is not to say that evidence of past discrimination will always be required to satisfy the "strong basis" test. In *Johnson,* the Court suggested that a *prima facie* case of discrimination could be made out if there were a "sufficiently egregious" statistical disparity. *Johnson,* 107 S.Ct. at 1453 n.11. Since the "strong basis" test is something

In considering the factual predicates in both the statutory and Constitutional settings, it must be borne in mind that the nonminority or male plaintiffs carry the ultimate burden of proof in demonstrating the invalidity of an employer's affirmative action plan. While this burden might be somewhat easier to shoulder in the Constitutional context because of the more stringent "strong basis" test, it would be ironic indeed if public employers, having been brought belatedly under the strictures of Title VII, could invoke the Constitution to avoid the remedial considerations prompted by Title VII that have led to the creation of affirmative action plans in the private sector. Moreover, it seems sensible to assume that government agencies, as the entities charged with enforcing equal employment opportunity laws, ought to be free to lead the way in voluntary initiatives designed to ensure equal employment opportunity. Indeed, the Court in *International Association of Firefighters* appears to acknowledge these points when it expressly notes that "there may be instances in which a public employer, consistent with both the Fourteenth Amendment as interpreted in *Wygant*, and [Title VII] as interpreted in *Weber*, could voluntarily agree to take race-conscious measures in pursuance of a legitimate remedial purpose."[87]

VI. CONCLUSION

More than fifteen years ago, in *Carter v. Gallagher*,[88] the Eighth Circuit, sitting *en banc*, rejected an absolute hiring preference for minorities but upheld a preferential remedy requiring the Minneapolis Fire Department to hire minorities on a one-to-two ratio until 20 qualified minority persons were hired. The court found that the order was necessary to eradicate the effects of past discrimination in a fire department employing 535 men, none of whom were minorities, in a city with a minority population of nearly seven percent of the total population. In approving the preferential remedy, the court recognized that the need for affirmative action to achieve a societal goal of equal employment opportunity conflicted to some extent with our societal goal of color blindness in governmental action. On this point, the court said:

> To accommodate these conflicting considerations, we think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area. Such a procedure does not constitute a "quota" system because as soon

---

less than a *prima facie* case, it must be that such a showing would suffice in the constitutional context. Indeed, Justice O'Connor found that the glaring statistical imbalance in the employer's workforce in *Johnson* made out a *prima facie* case. *See id.* at 1464-65 (O'Connor, J., concurring in the judgment).

87. Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S.Ct. 3063, 3073 n.8 (1986).

88. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

> as the trial court's order is fully implemented, all hirings will be on a racially nondiscriminatory basis . . . . However, as a method of presently eliminating the effects of past racial discriminatory practices and in making meaningful in the immediate future the constitutional guarantees against racial discrimination, more than a token representation should be afforded. For these reasons we believe the trial court is possessed of the authority to order the hiring of 20 qualified minority persons, but this should be done without denying the constitutional rights of others by granting an absolute preference.
>
> . . . .
>
> Given the past discriminatory hiring policies of the Minneapolis Fire Department, which were well known in the minority community, it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis.[89]

Carter is a fundamentally sound judgment. It recognizes that the goal of equal employment opportunity cannot be implemented effectively solely through neutral employment practices. Even if all employers hereafter hired on a truly nondiscriminatory basis, it would still be years before blacks and women reached a status in the job market comparable to that of white males. Thus, if the pattern of exclusion is to be broken, the present effects of past segregation and discrimination must be eliminated *now;* a mere resolve by an employer to adopt neutral principles will *not* do. And the soundness of the *remedial* principle underlying *Carter* has been clearly proven in literally scores of cities throughout this nation where blacks are now successfully employed in formerly all-white police and fire departments.

It is important to understand, however, that decisions like *Carter* are not merely sound in terms of remedial concepts—they are also fair in dealing with the rights and concerns of minority, nonminority, male and female persons, alike. Preferential remedies are only temporary; they seek to serve a remedial purpose, not to impose fixed quotas; they do not cause the displacement of white workers; they do not abrogate valid seniority agreements; they do not exclude participation by nonminority workers; they do not require the hiring or promotion of unqualified persons; and they do not purport to cure all of the ills of society.

Last spring Justice Marshall delivered a thoughtful speech on the Bicentennial of the Constitution. In reflecting on the "momentous social transformation[s]"[90] that have affected minority rights in the United States, he said:

> What is striking is the role legal principles have played throughout America's history in determining the condition of Negroes. They

89. *Id.* at 330-31.

90. Legal Times, May 11, 1987, at 15, col. 1.

> were enslaved by law, emancipated by law, disenfranchised and segregated by law; and finally, they have *begun* to win equality by law. Along the way, new constitutional principles have emerged to meet the challenges of a changing society. The progress has been dramatic, and it will continue.[91]

Affirmative action seeks to achieve "equality by law" of which Justice Marshall speaks. It represents a profound effort by our citizenry to secure a truly color blind society. It is about our striving to make the *American dream* a reality. The point of it all is, as Langston Hughes said many years ago, that "To save the dream for one it must be saved for all."

91. *Id.* (emphasis added).