Golden Gate University Law Review

Volume 18
Issue 3 *Women's Law Forum*

Article 4

January 1988

Johnson v. Santa Clara County Transportation Agency: Affirmative Action Expanded Under Title VII

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NOTE

JOHNSON v. SANTA CLARA COUNTY TRANSPORTATION AGENCY: AFFIRMATIVE ACTION EXPANDED UNDER TITLE VII.

I. INTRODUCTION

In *Johnson v. Santa Clara County Transportation Agency*,[1] the United States Supreme Court upheld a voluntary affirmative action plan that authorized consideration of an employee's sex as one factor in making a promotion determination. Although there was no evidence that the defendant, Santa Clara Transportation Agency, had discriminated on the basis of sex in past or present promotion decisions,[2] the Court found a "manifest imbalance reflecting under-representation of women in a traditionally segregated job category".[3] This statistical imbalance, explained the Court, justified the implementation of a temporary affirmative action plan.[4] According to the Court, the plan neither trammeled the rights of male employees nor created an absolute bar to their advancement.[5] The Court therefore held that the plan did not violate Title VII of the Civil Rights Act of 1964.[6]

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

2. *Id.* at 1466 (Scalia, J., dissenting). The District Court determined the Agency had not discriminated in the past nor was it presently discriminating against women. Additionally, there was no evidence that other employers had discriminated against women in similar fields.

3. *Id.* at 1452-54. This "manifest imbalance in a traditionally segregated job category" was based on 238 positions in the Skilled Craft job category. "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." *Id.* at 1454 (emphasis added).

4. *Id.* at 1455.

5. *Id.*

6. *Id.* at 1457. *See also* § 703(a) of Title VII which provides:

> (a) It shall be an unlawful employment practice for an

The issue of the legality of a gender-based voluntary affirmative action plan implemented by a public employer under Title VII was one of first impression.[7] Although the Court refused to set a rigid formula for testing the validity of such plans, it set forth a two-tiered analysis for determining whether an affirmative action plan complied with the provisions of Title VII.[8]

This note discusses the guidelines established in *Johnson*. It will suggest that under the *Johnson* standards, general societal discrimination may provide a sufficient basis for imposing voluntary, sexually classified remedies under Title VII.[9] It will further suggest that voluntary affirmative action in response to general societal discrimination is consistent with the United States Supreme Court's interpretation of Congress's intent in enacting Title VII.[10] Finally, this note will evaluate the potential benefit the

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> employer-
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> 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
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> 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) (1982).

7. *Johnson*, 107 S. Ct. 1442, 1471 (Scalia, J., dissenting). As Justice Scalia points out in his dissent, prior to *Johnson*, Title VII's effect on public employers remained unknown; prior cases had dealt only with Title VII's effect on private employers.

8. *Johnson*, 107 S. Ct. at 1452. The Court framed the first issue as whether affirmative action was justified by a "manifest imbalance that reflected underrepresentation in a traditionally segregated job category". *Id.* at 1452. This inquiry, according to the Court, determines the sufficiency of the evidence, be it statistical or non-statistical. *Id.* The second issue considers the effect of a plan on males and non-minorities. *Id.* at 1455. Here, the court must determine whether innocent male and non-minority employees are being unduly burdened by the affirmative action plan.) *Id.* at 1455.

9. Last term, in Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986), the Court specifically held that general societal discrimination, as opposed to prior discrimination by an employer, was *not* a sufficient basis for allowing affirmative action under the equal protection clause of the Constitution. *Id.* at 1848. In *Johnson*, however, a constitutional claim was not raised; the only issue decided was that of the prohibitory scope of Title VII. *Id.* at 1446 n.2 (1987).

10. *See* Steelworkers v. Weber, 443 U.S. 193, 202 (1979) (Court described the goals of Title VII as being the integration of blacks into the mainstream of American society). *See also Johnson*, 107 S. Ct. at 1442 (1987). In *Johnson*, the Court stated "Our decision [in *Weber*] was grounded [on] 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

Johnson decision brings to women's rights as well as noting the problems presented by the Court's failure to clearly delineate appropriate standards for affirmative action.

II. LEGISLATIVE HISTORY OF TITLE VII

During the 1960's, Congress became increasingly aware that black Americans were denied employment opportunities because of their race.[11] Blacks suffered from higher rates of unemployment as well as from lower wages.[12]

Congress enacted the Civil Rights Act of 1964 (Act),[13] with hopes of eradicating the racial prejudice and oppression facing blacks in their struggle for equal education and employment.[14] The Act prohibits private employers from discriminating against minorities, and seeks to open employment opportunities for minorities in occupations which traditionally have been closed.[15]

However, the legislative history of Title VII provides little insight into the Congressional intent behind the prohibition against sex discrimination. Added in a cynical attempt to obstruct passage of the entire bill, the sex discrimination provision received scant attention as it was enacted along with the original race discrimination provisions.[16] In an effort to provide equal

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1451.

11. For a complete analysis of the legislative history of Title VII, *see* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966). *See also* 109 CONG. REC. 3245 (1963) (including President Kennedy's Civil Rights Message to the 88th Congress, which stresses that black unemployment in America was a problem that required immediate progress in three areas: creating more jobs through economic growth, raising skills through more education and training and eliminating racial discrimination in employment).

12. *See* Steelworkers v. Weber, 443 U.S. 193, 202 (1979) (citing remarks of Senators Kennedy and Humphrey). The senators report that, in 1962, black unemployment was 124% higher than it had been in 1947. In addition, prior to 1964, blacks were largely relegated to unskilled and semi-skilled jobs.

13. 42 U.S.C. §§ 2000e - 2000e-17 (1982).

14. *Weber*, 443 U.S. at 203. According to the Court, it was clear to Congress that "[t]he crux of the problem [was] to open employment opportunities for blacks in occupations which had been traditionally closed to them, and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed." *Id.*

15. *Id.*

16. Vaas, *supra* note 11, at 441. According to Vaas, Representative Smith offered the provision prohibiting sex discrimination "in a spirit of satire and ironic cajolery, in hopes that the addition would obstruct passage of the bill." *Id.* at 432. However, the

opportunity employment for women as well as minorities, Congress amended the Civil Rights Act with the Equal Opportunity Act in 1972.[17] The amendment also expanded Title VII coverage to include public as well as private employers.[18] It increased the enforcement powers granted the Equal Employment Opportunity Commission (EEOC), and gave the commission a more expansive role in implementing Title VII policy.[19] The EEOC in turn has fashioned many of the policies surrounding affirmative action under Title VII.[20]

A. Affirmative Action Under Title VII

The Supreme Court determined that Congress intended to prohibit employment practices that discriminate against any arbitrary classification of employees.[21] Consequently, an employer

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entire bill passed with the sex discrimination provision intact.

17. Pub. L. 92-261, 86 Stat. 103 (1972), codified as amended at 42 U.S.C. § 2000e-2(a) (1982). *See also* Bureau of National Affairs, Inc., The Equal Employment Opportunity Act of 1972, 423 (1974) (purpose of the Act was to expand Title VII coverage). For a discussion of the legislative history of this amendment, *see also* 29 C.F.R. § 1608.1 n.2 (1985). This rule documents Congressional concern with higher unemployment rate, the lesser occupational status and the consequent lower income levels of minorities and women. This discussion also points out that Congress had become increasingly aware of women's concerns and had addressed these concerns in other legislation, including the Equal Pay Act of 1963, S. Rep. No. 176, 88th Cong., 1st Sess., 1-2 (1963) (codified as amended at 29 U.S.C. § 206 (1982); the Fair Housing Act of 1968, Pub. L. 90-284, Title VII, 82 Stat. 73, 81 (1968) (codified as amended at 42 U.S.C. §360 (1982), and the Educational Opportunity Act (Title IX), Pub. L. 92-318, 86 Stat. 373 (1972), as amended. *See also* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978). In enacting the Equal Opportunity Act, Congress extended protection from discrimination to women as well as to minorities. *Id.* at 709.

18. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977). According to the *Dothard* Court, public employers were added to the definition of "employer" in Title VII in 1972 because "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Id.* at 332 n.14. *See also* McManis, *Racial Discrimination in Government Employment: A Problem of Remedies for Unclean Hands*, 63 Geo. L.J. 1203 (1975). McManis explains that prior to passage of the 1972 Act, various federal agencies had a track record of discriminating against minorities. *Id.* at 1203.

19. *See* 45A Am. Jur. 2d § 1159 (1986). The EEOC is the major federal agency concerned with the elimination of job discrimination. Authorized by the provisions of 42 U.S.C. § 2000e-5(a) (1982), it is responsible for the administration and enforcement of Title VII through conciliation and negotiation. In 1972, Congress gave the EEOC power to litigate Title VII cases as well as carry out general rule-making power.

20. F Weatherspoon, Equal Employment Opportunity and Affirmative Action (1985).

21. *See* McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976). In *McDonald*, the Court held that Title VII protects whites as well as blacks from certain forms of racial

may face charges of unlawful sex discrimination under Title VII for discriminating against men in favor of women.[22] However, many employers recognize 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 and women."[23] In response to this concern, affirmative action plans have been considered valid under Title VII.[24]

1. *EEOC Interpretation of Congressional Intent*

In an effort to clarify the types of voluntary affirmative action appropriate under Title VII, the EEOC established a set of guidelines in 1979.[25] The EEOC determined that Congress intended to encourage voluntary action. It stated that "Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement."[26]

The EEOC guidelines advise employers to conduct a reasonable self-analysis before implementing an affirmative action plan. It advised that employers should take care to observe effects of past employment practices due to their own discrimination as well as the discrimination of other persons or institutions.[27] However, the guidelines make it clear, that the self-analysis need not establish a violation of Title VII to justify implementing a reasonable affirmative action plan.[28] According to the EEOC, voluntary affirmative action is appropriate under the following circumstances: where an adverse effect is unjustified by business necessity; where adverse effects are due to past or present discrimination; and where historic restrictions have lim-

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discrimination. *See also* 45A Am. Jur. 2d § 196: "There is no separate concept of 'reverse discrimination' - the discrimination against a majority in favor of a minority - addressed by Title VII."

22. *McDonald*, 427 U.S. at 284-85.

23. *See, e.g., Johnson*, 107 S. Ct. at 1446 (the Court discusses why the County of Santa Clara thought affirmative action plans were necessary).

24. *See, e.g.*, Steelworkers v. Weber, 443 U.S. 192 (1979); *Johnson*, 107 S. Ct. 1442 (1987).

25. *See* 29 C.F.R. § 1608.1 (1985).

26. *Id.*

27. *Id.*

28. 29 C.F.R. § 1608.1 (1985). The rule's guidelines explain that a reasonable basis for implementing an affirmative action plan can exist without any admission or formal finding of employer discrimination or actual Title VII violations.

ited labor pools.[29]

When a voluntary affirmative action plan conforms to the EEOC's guidelines, an employer's good faith reliance on the guidelines, protects it from a Title VII suit.[30] Moreover, the Supreme Court determined that the EEOC's guidelines, findings and opinions are entitled to great deference.[31]

2. *The Supreme Court's Interpretation of Affirmative Action Under Title VII*

The Supreme Court had its first opportunity to interpret Title VII's effect on affirmative action in *United Steelworkers v. Weber*.[32] The Court expressly rejected the argument that Title VII absolutely prohibited private employers from voluntarily adopting race-conscious affirmative action plans.[33] The Court acknowledged that a literal construction of Title VII would apparently bar any consideration of race in employment decisions. It determined that Title VII had to be examined in light of its legislative history and the historical context from which the Act arose.[34] The Court stated that the primary goal of Title VII was the integration of blacks into the economic mainstream.[35] According to the Court, it was Congress's hope that Title VII

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29. 29 C.F.R. § 1608.3(a)-(c) (1985).

30. 42 U.S.C. § 2000e-12(b) (1982). *See also* 45A Am. Jur. 2d § 198 (1986).

31. Griggs v. Duke Power, 401 U.S. 424, 433-34 (1971). *See also* Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 HASTINGS L.J. 305 (1968). The author points out that "the Commission's investigations, findings and opinions are important, and under some circumstances attain the force of law." *Id.* at 318.

32. 443 U.S. 193 (1979).

33. "We therefore hold that Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans." *Id.* at 208.

34. *Id.* at 202. The Court points out that Title VII was intended to encourage voluntary efforts at eradicating segregation, not to place obstacles in the path of employers trying to achieve that end. *Id.* at 204. The court went on to explain that if Congress had wished to totally proscribe affirmative action, they would have done so; they would have stated that employers were not "required or permitted" to grant preference on the basis of race or sex. *Id.* at 206. Instead, the Act merely stated that employers were not "required" to grant preferences. *Id.* According to the Court, this language demonstrated the Congressional intent to encourage voluntary action on the part of employers. *Id.* at 205-08. *See also Johnson*, 107 S. Ct. at 1460 (O'Connor J., concurring). In *Johnson*, Justice O'Connor points out that Section 703 has been interpreted by *Weber* and succeeding cases to permit what its language read literally would prohibit.

35. *Weber*, 443 U.S. at 202.

would "create an atmosphere conducive to voluntary or local resolution of other forms of discrimination".[36] After taking judicial notice of numerous findings that blacks were excluded from craft unions on racial grounds,[37] the Court looked at the statistical imbalance presented in the case.[38] It determined that a race conscious plan designed to remedy the imbalance was consistent with Title VII's objective of "[breaking] down old patterns of racial segregation and hierarchy".[39]

The Court found the plan legitimate because it did not discharge any whites in order to hire blacks, nor did the plan create an absolute bar to the advancement of whites.[40] In addition, the plan was a temporary measure not intended to maintain racial balance.[41] These factors convinced the Court that the plan did not unnecessarily trammel the rights of the white employees.[42]

The Court refused to define in detail a bright line of demarcation between permissible and impermissible affirmative action plans. However, it held that the *Weber* plan fell on the permissible side of the line.[43]

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36. *Id.* at 204 (quoting H.R. REP. No. 914, 88th Cong., 1st Sess., pt. 1, at 18 (1963)).

37. *Weber*, 443 U.S. at 198 n.1. The court determined that findings of exclusion from crafts on racial grounds were so numerous as to make such exclusion a proper subject for judicial notice. The court then cited over a dozen cases and articles supporting their conclusion. The significance of these finding has been the subject of heated debate. *Id. See* Comment, *Walking a Tightrope without a Net: Voluntary Affirmative Action Plans After Weber*, 134 U. PA. L. REV. 457 (1985). The author notes that by giving import to the judicial notice of historical discrimination, it is possible to read *Weber* as requiring some showing of actual discrimination in the past. *Id.* at 466-67.

38. *Weber*, 443 U.S. at 199 (39% of the general work force was black while only 1.83% of the skilled craftworkers were black).

39. *Id.* at 208. *See also* (remarks of Sen. Humphrey), 110 CONG. REC. 6552 (1964).

> 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 205.

40. *Id.* at 208.

41. *Id.*

42. *Id.* at 208-09.

43. *Id.*

III. THE CASES LEADING TO *JOHNSON v. TRANSPORTATION AGENCY*

Inherently conflicting concerns are raised in affirmative action cases.[44] As a result, the decisions of the Court are often markedly divided.[45] Nevertheless, the following standards have emerged.

The Court consistently distinguishes plans implemented voluntarily from those plans imposed as judicial remedies for Title VII violations. In *Firefighters v. Cleveland*,[46] the Court stated "We have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII."[47] In light of this recognition, the Court has determined that an employer's voluntary measures can be much broader than court enforced

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44. *See Johnson* 107 S. Ct. at 1461 (O'Connor, J., concurring in judgement). In *Johnson*, Justice O'Connor discussed the two conflicting concerns: Congressional intent to root out invidious discrimination against *any* person on the basis of race or gender and the Congressional goal of eliminating the lasting effects of discrimination against minorities. *Id.* at 1461. *See also* Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1848 (1986). The Court observed that a public employer operates under two interrelated constitutional duties: To eliminate every vestige of racial segregation and discrimination and to comply with the Fourteenth Amendment by eliminating all governmentally imposed distinctions based on race. *Id.* at 1848. The Court recognized that these related constitutional duties are not always harmonious. *Id.* These conflicting concerns were apparent from the time the Court first addressed affirmative action. *See* DeFunis v. Odegaard, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting). In *DeFunis*, Justice Brennan noted "Few constitutional questions in recent years have stirred as much debate . . . ."

45. *See Weber*, 443 U.S. 193 (1979) (five Justice majority); Local 28 of the Sheet Metal Workers Int'l Assoc. v. EEOC, 106 S. Ct. 3019 (1986) (only five Justices agreed to allow trial courts to order non-victim specific affirmative relief); Firefighters v. Cleveland, 106 S. Ct. 3063 (1986) (only five Justices agreed that consent decrees were voluntary rather than court ordered remedies); *Johnson*, 107 S. Ct. 1442 (1987) (only five Justices agree with the Majority Opinion and a sixth Justice concurs with the judgement alone). *See also* Regents of the Univ. v. Bakke, 438 U.S. 265 (1978). While five Justices (Powell, Burger, Rehnquist, Stewart and Stevens) held that the University's special admissions plan which set aside sixteen places in each entering class of 100 for qualified minority applicants was unlawful under Title VI, five members of the Court would allow some racial or ethnic criteria to be considered in making decisions regarding admission to public higher education (Justices Powell, Brennan, Marshall, Blackmun and White). *See also*, Fullilove v. Klutznick, 448 U.S. 448, 477-78 (1980) (five Justices agreed that it was constitutional to set aside ten percent of the local public works projects for minority owned business). Although *Bakke* and *Fullilove* did not deal with affirmative action under Title VII, they demonstrate the competing interests in any affirmative action case.

46. 106 S. Ct. 3063 (1986).

47. *Id.* at 3072.

remedies.[48]

In *Local 28 of the Sheet Metal Workers Int'l v. EEOC*,[49] the Court decided that non-victim specific affirmative relief can be ordered when an employer has engaged in persistent or egregious discrimination or when affirmative relief is necessary to dissipate the lingering effects of pervasive discrimination.[50] However, beneficiaries of voluntary affirmative action need not be proven victims of actual discrimination.[51]

The Court has also distinguished claims brought under the Equal Protection Clause of the Fourteenth Amendment[52] from those claims challenged on other grounds. To state a constitutional claim, an employer must demonstrate some evidence of discrimination before it is justified in implementing a race conscious employment plan.[53] In *Wygant v. Jackson Bd. of Education*,[54] the Court decided whether a layoff provision permitting the retention of minority teachers with less seniority and the firing of nonminority teachers violated the Equal Protection Clause of the Constitution.[55] The Court concluded that general societal discrimination alone is not adequate justification for discriminating against males and non-minorities.[56] It held that the

48. In *Firefighters*, the Court determined that consent decrees were to be viewed as voluntary measures and not as court enforced remedies. Their scope, therefore, could be broader than court enforced remedies. *Id.* at 3077.

49. 106 S. Ct. 3019 (1986).

50. *Id.* at 3034. The Court went on to explain that the district court has broad authority to "devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom." *Id.* at 3048 (quoting Teamsters v. United States, 431 U.S. at 364). *See also Cleveland*, 106 S. Ct. at 3072. The Court affirmed its determination that voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination.).

51. *Id.*

52. U.S. CONST. amend. XIV, §1.

53. *See supra* notes 54-57 and accompanying text.

54. 106 S. Ct. 1842 (1986).

55. *Id.* at 1845.

56. *Id.* at 1848 (Powell,J., announcing the judgment of the court in an opinion joined by Burger and Rehnquist and in part by O'Connor). In *Wygant*, the Court stated: "No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive." *Id.* at 1848. *Wygant*, however, involved a claim brought exclusively under the equal protection clause; Title VII was not addressed.

disparity between the percentage of minority students and the percentage of minority faculty presented in *Wygant* [57] was insufficient evidence of past discrimination, because "[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind."[58]

However, the Court is reluctant to force employers to find that they have engaged in illegal discrimination in order to implement voluntary affirmative action plans.[59] In lieu of contemporaneous findings of discrimination, statistics may at times be considered important evidence of discrimination. As the Court explained in *Teamsters v. United States*,[60] "[s]tatistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination".[61] The Court reasoned that over time, non-discriminatory hiring practices should result in a more or less balanced work force.[62] Prior to *Johnson*, it was unresolved whether statistics alone, without any other evidence of employer discrimination, would justify a public employer's implementation of an affirmative action plan under Title VII.[63]

IV. *JOHNSON v. TRANSPORTATION AGENCY*

A. The Transportation Agency's Affirmative Action Plan

Pursuant to a county-wide affirmative action plan, the Transportation Agency of Santa Clara (Agency) adopted its own affirmative action plan in 1978.[64] The Agency reviewed the com-

57. *Id.* at 1842.

58. *Id.* at 1848.

59. *Id.* at 1855 (O'Connor, J., concurring in part and concurring in the judgement). Justice O'Connor explains that to demand contemporaneous findings would undermine public employers' incentive to voluntarily meet their civil rights obligations: "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." *Id.* at 1855.

60. 431 U.S. 324 (1977).

61. *Id.* at 340 n.20.

62. *Id.*

63. *Johnson*, 107 S. Ct. at 1471.

64. *Id.* at 1446. *See also* Respondent's Brief at 5-6, *Johnson* (county-wide plan was intended to apply to all agencies of county government; Agency's plan was tailored, however, to meet the needs of the Transportation Agency).

position of its workforce and found that women were underrepresented.[65] While women composed 36.4% of the area labor market, only 22.4% of the Agency's employees were women.[66] It also found that the women employees were concentrated in job categories traditionally held by women, especially in the office and clerical positions.[67]

As a result of such findings, the Agency's plan authorized consideration of sex as one factor in making promotions to positions where women were significantly underrepresented.[68] The Agency recognized that "mere prohibition of discriminatory practices was not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons."[69]

The Agency's long term goal was to attain a work force whose composition reflected the corresponding proportions of minorities and women in the area labor force.[70] However, they acknowledged that the following factors would make this long term goal unrealistic: the low turnover rates in some job classifications; the heavy labor required by some jobs; the scarcity of positions available 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.[71]

Consequently, the Agency advised that short-range goals be established and annually adjusted to serve as benchmarks for

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

66. *Id.*

67. *Id.* Women made up 76% of the 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. In addition, not one of the 238 skilled craft worker positions was held by a woman. *Id.* at 1446.

68. *Id.* at 1447.

69. *Id.* The Agency also noted that this underrepresentation 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. *Id.* at 1446.

The Plan applied to women, minorities and handicapped persons, but since *Johnson* dealt with gender discrimination, this article addresses the plan only within that context.

70. *Id.* at 1456.

71. *Id.* at 1447.

actual employment decisions.[72] The Plan did not set aside a specific number of positions for women.[73] Instead, it authorized consideration of sex as one factor in making an employment decision.[74]

B. The Agency's Implementation of Its Affirmative Action Plan

On December 12, 1979, the Agency announced a vacancy for the road dispatcher position.[75] Twelve county employees applied for the promotion, including the plaintiff Paul Johnson and a female employee Diane Joyce.[76] Johnson and Joyce were highly experienced road workers and both were deemed qualified for the job.[77] Of the twelve applicants, seven were eligible for the job; the Agency Director was authorized to choose any one of these seven.[78] After considering a variety of factors, including qualifications, test-scores, expertise, background and affirmative action, the Director ultimately hired Diane Joyce.[79]

Johnson filed suit alleging that he had been the victim of unlawful sex discrimination in violation of Title VII.[80] The district court found that Johnson was more qualified for the road dispatcher position and that Joyce's gender had been the determining factor in her selection.[81] It then held that the plan was invalid because it did not satisfy *Weber's* requirement that the

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72. *Id.* The Agency recognized that in order to establish short-term goals, further data was needed reflecting ratios of qualified women in the local labor force. *Id.* at 1447. At the time Joyce was hired, these statistics had not yet been compiled.

73. *Id.* at 1447.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* Johnson had previous Dispatch experience, two years of road maintenance experience and 11 years of Road Yard Clerk experience; he scored 75 on his interview. Joyce had 18 years of past clerical experience and almost five years as a road maintenance worker; in her capacity as road maintenance worker, she occasionally worked out of class as a road dispatcher; she scored 73 on her interview. Both candidates had been recommended for promotion by Agency supervisors, and evaluation forms had deemed both applicants well-qualified. *Id.* at 1447-49.

78. *Id.*

79. *Id.* at 1448.

80. *Id.* at 1449. Petitioner filed suit in the United States District Court for the Northern District of California.

81. *Id.* at 1449.

plan be temporary.[82]

In reversing the trial court, the Ninth Circuit held that the absence of an express termination date in the plan was not dispositive.[83] The plan's objective was the "attainment" rather than the "maintenance" of a work force that mirrored the county labor force.[84] This convinced the court of the plan's temporary nature.[85] The court also explained that an employer need not show any history of purposeful discriminatory patterns or practices; it is sufficient for an employer to show a conspicuous imbalance in its work force.[86]

C. The Supreme Court's Analysis

The Supreme Court first acknowledged that *Weber* must guide the evaluation of any voluntary affirmative action plan under Title II.[87] The Court asked two questions in determining whether an affirmative action plan was justified. First, was there a " 'manifest imbalance' that reflected under-representation of women in a 'traditionally segregated job category'?"[88] The Court explained that where a job requires special training, the proper

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82. *Id.* The district court acknowledged that it was bound by *Weber* since the Agency had justified its decision on the basis of its affirmative action plan. *Id.* at 1449. The court explained how justification of a gender based decision based on affirmative action served to shift the burden of proof. *Id.* at 1449. By convincing the district court that the promotion decision had been based solely on gender, petitioner Johnson established a prima facie case of sex discrimination under Title VII. *Id.* at 1449. The burden of proof, therefore, shifted to the Agency to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provided such a rational. The burden then shifted back to petitioner to prove the employer's justification pretextual and the plan invalid. *Id.* at 1449. The petitioner met his burden, according to the district court, by proving that the Plan did not meet the *Weber* criteria that an affirmative action plan be temporary. *Id.* at 1449.

83. Johnson v. Transportation Agency, 770 F.2d 752, 757 (1985).

84. *Id.* at 756.

85. *Id.* The court noted that the imposition of rigorous drafting technicalities would discourage adoption of voluntary plans and at the same time encourage litigation. *Id.* at 757.

86. *Id.* The court explained that statistics alone were useful to show conspicuous work force imbalances: "We note particularly the difficulty that may confront an employer whose plan is intended to remedy discrimination resulting from societal norms. Some forms of discrimination are so subtle or so accepted as to defy proof other than by statistics." *Id.* at 758.

87. *Johnson*, 107 S. Ct. at 1449. *See also supra* notes 31-41 and accompanying text for a discussion of *Weber*.

88. *Id.* at 1452.

statistical comparison is between the number of women in an employer's work force and the number in the area labor force who possess the relevant skills and qualifications.[89] If a conspicuous statistical imbalance indicates that women are disproportionately underrepresented in the employer's work force, an employer may voluntarily adopt an affirmative action plan even without a non-statistical finding of discrimination.[90] According to the Court, this comparison differs from a "prima facie" standard which is concerned solely with past discrimination by an employer.[91]

Since the road dispatcher position demanded considerable skills, the Agency was required to compare the number of women they employed in that category to the number in the local labor force possessing similar skills and qualifications.[92] However, the Agency was still in the process of refining its short term goals and compiling the relevant statistics at the time the job became available.[93] Because the plan was incomplete, the only available statistics compared the women employed by the Agency to *all* women in the local labor force.[94] However, the

89. *Id.* at 1454. *See also* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). In *Hazelwood*, the court explained that because teaching jobs require certain specific skills, the proper comparison for determining the existence of discrimination must be between the percentage of employed blacks and the percentage of qualified blacks in the area labor force. *But see Johnson* 107 S. Ct. at 1454, in which the Court noted that for jobs requiring no special skills, the relevant statistics compare the percentage of women in the employer's work force with the percentage of women in the local labor pool. *Id.* at 1454. Thus, in *Weber* it was appropriate to compare the employer's minority workforce with the local minority labor force. *Id.* at 1454.

90. "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." *Id.* at 1453 n.11. This is, however, only the first of a two-tiered inquiry; it must also be demonstrated that the plan does not unduly burden other non-minority employees. *Id.* at 1452.

91. "A manifest imbalance need not be such that it would support a prima facie case against the employer . . . ." *Id.* at 1452. The Court points out that the *Weber* Court did not use the "prima facie" standard; had it done so, the plaintiff would have been required to compare the percentage of black skilled workers in the work force with the percentage of black skilled workers in the area labor force, a standard that would have invalidated the plan in *Weber*. *Id.* at 1452-53 n.10.

92. *Id.* The Court explained that had the Plan compared its employees to a general labor pool, its validity could have been called into question. A more specialized labor pool is necessary when determining underrepresentation in skilled job categories. *Id.* at 1454.

93. *Id.* at 1454.

94. *Id.*

Agency instructed their managers not to hire or make promotion decisions solely by reference to the statistics.[95] Rather, the supervisors making the actual employment decisions were advised to consider a host of practical factors. One factor was that in some job categories women were not qualified in numbers comparable to their representation in the labor force.[96]

The Court acknowledged the "limited opportunities that have existed in the past in certain job classifications where women have not been traditionally employed".[97] It focused on the fact that there were *no* women employed in the skilled craft category at the time of Joyce's promotion. The Court recognized that as a practical matter, the Agency hardly needed to rely on a refined short term goal to realize that it had a significant problem of underrepresentation.[98] Under such facts, the Court was satisfied that there was a "manifest imbalance" in a traditionally segregated job category sufficient to warrant the voluntary implementation of affirmative action.[99]

The Court next inquired into the actual nature of the plan. It applied the *Weber*[100] criteria to determine whether the plan unnecessarily trammeled upon or created an absolute bar to the advancement of male employees.[101] The Agency's plan met the *Weber* criteria.[102] The plan set aside no positions for women, nor did it automatically exclude anyone; all applicants had their qualifications weighed against all other applicants.[103] No one lost

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95. *Id.* at 1455.

96. *Id.* The Agency, therefore, did recognize that the proper statistics for comparison would have to compare the women employed with the *qualified* women in the local labor force. Additionally, the Plan emphasized that the long-term goal of attaining a balanced workforce was not to be taken as a guide for actual hiring decisions. *Id.* at 1454.

97. *Id.* at 1453 n.12 (quoting the Ninth Circuit's opinion in *Johnson*). The court found "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."

98. *Id.* Of the 238 positions in the Skilled Craft category of road dispatcher, no women were employed. *Id.* at 1454.

99. *Id.* at 1455.

100. 443 U.S. 193 (1979).

101. The affirmative action plan in *Weber* was satisfactory because it did not require discharge of whites, it did not create an absolute bar to the advancement of whites and it was a temporary measure. *Id.* at 208.

102. *Johnson*, 107 S. Ct. at 1457.

103. *See Regents of the Univ. v. Bakke*, 438 U.S. 265 (1978). The *Johnson* plan was, rather, akin to a model affirmative action plan approved by the Court in *Bakke*. The

their job due to the promotion of another and all applicants maintained their seniority and eligibility for future promotions.[104]

Finally, the Court addressed the issue that caused the district court to strike down the plan: the requirement that the plan be temporary.[105] Although the plan contained no explicit termination date, the Court found that the plan was acceptable because it was designed to take a moderate and gradual approach to eliminating the imbalance in the work force.[106] The gradual approach, as well as the Agency's express commitment to "attaining" a balanced work force, convinced the Court that the Agency did not intend to use its plan to maintain a permanent sexual balance.[107]

D. CONCURRENCES

1. *Justice Stevens*

In his concurring opinion, Justice Stevens emphasized that the majority did not foreclose other voluntary programs undertaken by employers to benefit disadvantaged groups.[108] According to Justice Stevens, there are many legitimate reasons for giving preferences to underrepresented groups. These include providing role-models, improving minority relations and increasing diversity in the work force.[109] Justice Stevens believes it would be more helpful for an employer to focus on the future rather than scrutinizing the past.[110]

"Harvard Plan", approved of in *Bakke*, considered race along with other criteria in determining admission to the university. Race would not be the only factor considered in the admission process but it would be deemed a 'plus'. *Id.* at 316-19.

104. *Johnson*, 107 S. Ct. at 1456. In fact, when an additional road dispatcher position was created in 1983, it was awarded to petitioner Johnson.

105. *Id.* at 1456. *See also Weber*, 443 U.S. at 209.

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

107. *Id.*

108. *Id.* at 1460.

109. *Id. See also Bakke*, 438 U.S. at 272 (Powell, J., for plurality). In *Bakke*, Justice Powell pointed out that achieving diversity in the student body was a "compelling interest, appropriately served by race-conscious measures". *Id.* at 272. *See also*, Sullivan, *The Supreme Court - Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

110. *Johnson*, 107 S. Ct. at 1460.

2. *Justice O'Connor*

According to Justice O'Connor, public entities initiating voluntary affirmative action plans "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 prima facie Title VII case against the employer would satisfy this firm basis requirement."[111] Under the facts of *Johnson*, Justice O'Connor found that the statistical disparity would have been sufficient for a prima facie Title VII case brought by unsuccessful women job applicants.[112] Persuaded by the petitioner's concession that women constituted five percent of the local pool of skilled workers and that the Agency employed no women in this category, Justice O'Conner was satisfied that there was a firm basis for implementing affirmative action.[113]

E. Dissents

1. *Justice Scalia, Joined by Chief Justice Rehnquist*

Absent findings of conscious, exclusionary discrimination, Justice Scalia does not approve of affirmative action under Title VII or the Constitution.[114] The statistics presented in *Johnson*, according to Justice Scalia, were caused by nothing more than "longstanding social attitudes" which caused women themselves to regard such work as undesirable.[115] Consequently, such findings of general societal discrimination were insufficient grounds for implementing affirmative action.[116]

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111. *Id.* at 1461 (O'Connor, J., concurring). Justice O'Conner stated "[T]he 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." *Id.* at 1461.

112. *Id.* at 1465 (O'Connor, J., concurring).

113. *Id.* (O'Connor, J., concurring). Justice O'Connor was persuaded by the fact that the petitioner in *Johnson* had conceded that women constituted approximately 5% of the local labor pool of skilled craft workers in 1970 and by the additional fact that there was not a single woman employed in this category. *Id.* at 1464.

114. *Id.* at 1471.

115. *Id.* (Scalia, J., dissenting). Justice Scalia stated "It is absurd to think that the nation-wide failure of road maintenance crews [to achieve female representation] is attributable . . . to the systematic exclusion of women eager to shoulder pick and shovel." *Id.* at 1471.

116. *Id.* at 1469.

Rather than try to distinguish *Johnson*, Justice Scalia would prefer to take the opportunity to overrule *Weber*[117] completely, stare decisis notwithstanding.[118] According to Justice Scalia, the majority has "not merely repealed but actually inverted [Title VII]."[119]

2. *Justice White*

According to Justice White, *Weber* approved of affirmative action only when it was designed to remedy intentional and systematic exclusion of blacks by employers from certain job categories.[120] Justice White read the majority's interpretation of *Weber* as requiring nothing more than an imbalanced workforce as a prerequisite for affirmative action. Since his understanding was at odds with the majority's, he too would overrule *Weber*.[121]

V. CRITIQUE

Johnson is an important decision for women for several reasons. Although women as a group are currently working outside the home in ever increasing numbers, they earn less money than men and remain segregated in the traditionally female occupations.[122] Recent studies confirm that affirmative action is an effective and necessary tool for women to achieve equal opportunity in employment.[123] Gender-conscious affirmative action

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117. 443 U.S. 193 (1979).

118. *Johnson*, 107 S. Ct. at 1472 (Scalia, J., dissenting). Justice Scalia noted "It is well to keep in mind just how thoroughly *Weber* rewrote the statute it purported to construe."

119. *Id.* at 1476.

120. *Id.* at 1465.

121. *Id.*

122. *See* BUREAU U.S. DEPARTMENT OF LABOR, TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS (1983) (women remain clustered in predominantly "female" occupations such as clerical workers, service workers, health workers and school teachers). *See also* WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, THE UNITED NATIONS DECADE FOR WOMEN, 1976-1985: EMPLOYMENT IN THE UNITED STATES (1985). In 1985, a woman aged 25 or over with four or more years of college who was working full-time earned 64% of the salary of a similarly situated man. For a discussion of gender equality and biological differences between men and women, *see* Comment, *Law, Rethinking Sex and the Constitution*, 132 U. PA. REV. 955 (1984).

123. Brief Amici Curiae for NOW Legal Defense and Education Fund at 56-57, Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987). A 1983 study comparing contractor and noncontractor establishments, found that affirmative action has been successful in promoting the employment of minorities and females. *See also* J. LEONARD,

enables women to gain access to jobs from which they have been previously excluded.[124]

The *Johnson* decision also serves as additional evidence to interested women that non-traditional jobs are an option. Once provided with female role models in non traditional jobs, women become aware of opportunities that they never knew existed.[125] When nontraditional occupations are opened to them, women respond by moving into the new occupations.[126] Gender-conscious measures such as the Transportation Agency's are therefore necessary to ensure that more occupations do become available to women.

This decision has potentially far reaching effects for women because it encourages employers to affirmatively recruit, hire, and promote qualified women.[127] Absent the need for rigorous findings of past or present discrimination, employers are given more freedom to initiate affirmative action programs based on a recognition that a problem exists as demonstrated by a "manifest imbalance" in their work force. Thus, Title VII's goal of encouraging voluntary action and promoting integration of women into the work force will be better served.

THE IMPACT OF AFFIRMATIVE ACTION (1983). Leonard found that the "affirmative action goal is the single best predictor of subsequent employment demographics." *Id.* at 25. In 1984, the Office of Federal Contract Compliance Programs released a study which reached the same conclusion. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EMPLOYMENT PATTERNS OF MINORITIES AND WOMEN IN FEDERAL CONTRACTOR AND NON-CONTRACTOR ESTABLISHMENTS, 1974-1980 (1984).

124. In 1973 there were no women coal miners; by 1980, as a result of affirmative action, 3,295 women had become coal miners. Similarly, the numbers of women workers increased dramatically when the Maritime Administration required shipbuilding contractors to establish goals and timetables for hiring more women. In addition, it was found that as more women were hired, more women applied for positions. *See Examination on Issues Affecting Women in Our Nation's Labor Force: Hearings Before the Senate Committee on Labor and Human Resources*, 97th Cong., 1st. Sess. (1981).

125. *Johnson*, 107 S. Ct. 1455 n.14. The Court noted that the Agency was mindful of the importance of finally hiring a woman in a job category that had formerly been all male; it recognized that philosophically it would encourage women to actively seek out these non-traditional jobs. *See also* Brief Amici Curiae for NOW Legal Defense and Education Fund at 57-58, Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

126. WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, "A WOMAN'S GUIDE TO APPRENTICESHIP" (1980). *See also* Hearings, *supra* note 124 (contractors found that as more women were hired, more applied).

127. *See* Brief Amici Curiae for NOW Legal Defense Fund at 61, Johnson v. Transportation Agency, 107 S. Ct. 1442 (1987).

Unfortunately, the benefits of this decision are jeopardized by the Court's less than unequivocal mandate. Although the Court distinguishes the "manifest imbalance" standard from the "prima facie" standard in the area of unskilled jobs,[128] where a job requires skill, the operative differences between the two standards remain unclear.

The *Johnson* majority demands less of a statistical imbalance than that necessary for a prima facie case of discrimination against women, but the Court does not clearly define this alternative standard.[129] Moreover, the manifest imbalance standard requires the same comparisons in job categories requiring skill as does the prima facie standard.[130]

While it is encouraging that the Court appears to be more concerned with present statistical imbalances as opposed to intentional past conduct, this concern is not articulated.[131] The net effect is that little guidance has been given and there is danger of confusion and inconsistency in the lower courts. Due to the controversial nature of affirmative action, some lower courts seem unwilling to abandon the requirement of a showing of actual discrimination without a more exacting mandate from the Supreme Court. In *Hammmon v. Barry*,[132] for example, the court demanded evidence of past discrimination as a prerequisite to making lawful race-conscious employment decisions.[133]

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128. *Johnson*, 107 S. Ct. 1442, 1452 n.10.

129. *Id.* at 1453 n.11. The Court stated that "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." *But see Id.* at 1462 (O'Connor, J., concurring). Justice O'Connor points out that an employer need not point to any contemporaneous findings of actual discrimination; rather, a statistical imbalance sufficient for a Title VII prima facie case against the employer would provide a firm basis for believing that remedial action is required. *Id.* at 1462.

130. *Id.* at 1452.

131. Only Justice Stevens, in concurrence, suggests an alternative focus away from the past and into the future. *Id.* at 1460.

132. 826 F.2d 73 (D.C. Cir. 1987).

133. In *Hammon*, the court determined that the 'predicate of discrimination' requirement had not been eliminated by *Johnson*. *Id.* at 80. *But see* Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987). Here, the Ninth Circuit followed a broad interpretation of *Johnson* and upheld an affirmative action plan based on statistics alone. *Id.* at 356. *See also* Ledoux v. District of Columbia, 820 F.2d 1293, 1306-07 (D.C. Cir. 1987); Britton v. South Bend Community School Corp., 775 F.2d 794 (7th Cir. 1987); Janowiak v. City of South Bend, 836 F.2d 1034 (7th Cir. 1987); Michigan Road Builders Assoc. v. Milliken, 834 F.2d 583 (6th Cir. 1987).

These factors make the future of *Johnson* uncertain. The Court may be forced to address affirmative action under Title VII again in the near future, but recent changes on the Court make it difficult to predict how expansively *Johnson* will be read.[134]

VII. CONCLUSION

The Court does not exist in a vacuum. It must follow both the letter and the spirit of the law.[135] The Supreme Court and the Equal Opportunity Employment Commission have interpreted the purpose of Title VII as one of integrating women and minorities into the work force and of encouraging voluntary action to achieve this goal. Since *Weber* was decided in 1979, Congress has had an open invitation to legislate in this area if it felt its intent had been misperceived. It has remained silent.[136]

For the present, the *Johnson* Court has expanded an employer's ability to implement voluntary affirmative action plans. In doing so, it has moved women and men a step closer toward the day when, as a balanced society, our judiciary no longer need concern itself with benign discrimination.

*Theresa Marks**

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134. On Feb. 18, 1988, Judge Anthony Kennedy was sworn in as the nation's 104th member of the Supreme Court. Although some Democratic Senators expressed concerns about his sensitivity to women's and minority rights, he was unanimously confirmed by the Senate. *See* San Francisco Chronicle, Feb. 3, 1988 at A-1, col. 2.

There are presently only four Justices who would allow voluntary affirmative action under Title VII to remedy a "manifest imbalance" (Justices Brennan, Marshall, Blackman and Stevens). In addition, there are three Justices who would overrule both *Johnson* and *Weber* (Justices Scalia, White and Rehnquist). While Justice O'Connor would not overrule *Weber*, she would demand a firm basis for concluding that there has been past or present discrimination.

135. 443 U.S. 193, 201 (1979) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)). In *Holy Trinity*, the Court noted it is a "familiar rule, that a thing may be within the letter of the statute and yet not within its spirit, nor within the intention of its makers."

136. *Weber*, 443 U.S. at 216 (Blackmun, J., concurring). Justice Blackmun stated "If 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. Justice Blackmun was quoted approvingly in *Johnson*, 107 S. Ct. at 1450-51 n.7.

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