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Civil Rights - Title VII - Public Employer May Consider Gender to Promote Employee without Violating Title VII of Civil Rights Act of 1964 When Enforcing a Valid Affirmative Action Plan Case Note.

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CIVIL RIGHTS—Title VII—Public Employer May Consider Gender To Promote Employee Without Violating Title VII Of Civil Rights Act Of 1964 When Enforcing A Valid Affirmative Action Plan

Johnson v. Transportation Agency, Santa Clara County, California
__ U.S. __, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987)

Paul Johnson and Diane Joyce, employees of the Santa Clara Transportation Agency ("Agency"), sought promotion to the position of road dispatcher in 1979.[1] Both Johnson and Joyce were qualified candidates as they had more than the requisite work experience[2] and both scored above the minimum interview points required for selection.[3] Although Mr. Johnson scored higher during his interview than did Ms. Joyce, and arguably was more qualified,[4] the Agency's director promoted Ms. Joyce.[5] In reaching his decision, the director considered not only the candidates' qualifications, but also the Agency's Affirmative Action Plan (the "Plan")[6] which authorized

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1. *See* Johnson v. Transp. Agency, __ U.S. __, __, 107 S. Ct. 1442, 1447-48, 94 L. Ed. 2d 615, 625 (1987).

2. *Id.* at __, 107 S. Ct. at 1447, 94 L. Ed. 2d at 625-26. To qualify for the road dispatcher position, the applicant must have had at least four years experience in dispatch or road maintenance work with Santa Clara County. *Id.* Nine employees met the experience requirement and qualified to interview for the position. *Id.* at __, 107 S. Ct. at 1448, 94 L. Ed. 2d at 626. Johnson had over eleven years experience as a road yard clerk, two years experience as a road maintenance worker, and previous outside experience as a dispatcher. Joyce's eighteen years of clerical experience included three and one half years at "West Yard" as well as nearly five years road maintenance experience. During the interviews seven employees, including Joyce and Johnson, scored above the 70 point minimum required for selection. *Id.*

3. *Id.* at __, 107 S. Ct. at 1448, 94 L. Ed. 2d at 626. Each applicant must have scored at least 70 points during the interview to qualify for selection. *Id.* Johnson scored 75 and Joyce scored 73. *Id.* at __, 107 S. Ct. at 1448-49, 94 L. Ed. 2d at 626.

4. *See id.* at __, 107 S. Ct. at 1468-69, 94 L. Ed. 2d at __ (Scalia, J., dissenting)(noting Johnson's full-time assignment to the position for nine months and lower court's finding that Johnson was best qualified).

5. *Id.* The Agency director did not place significance on the two point difference between Johnson's and Joyce's scores. *Id.*

6. *Id.* at __, 107 S. Ct. at 1446, 94 L. Ed. 2d at 623-24. The Agency's Plan was based on a county plan which recognized that more than a mere prohibition of discrimination would be necessary to remedy the present effects of past discrimination. *Id.* The Plan's stated objective was to "achieve a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are underrepresented." *Id.* at __, 107 S. Ct. at 1447, 94 L. Ed. 2d at 624 (quoting Appellate Record of *Johnson v. Transp. Agency* at 43). The Plan stated that women were represented within the Agency at a far lower proportion than in the county labor force. Women

consideration of gender in promoting qualified employees to traditionally segregated job classifications.[7] Johnson filed a complaint with the Equal Employment Opportunity Commission (EEOC),[8] alleging the Agency violated Title VII of the Civil Rights Act of 1964[9] by denying him the promotion. After receiving a right-to-sue letter from the EEOC,[10] Johnson filed suit against the Agency in federal district court.[11] The Agency defended its consideration of gender in promotions upon the grounds that it was acting pursuant to a valid affirmative action plan.[12] Finding the Agency's affirmative action plan invalid because it was not proven to be temporary,[13] the district court concluded that the Agency's use of gender as a factor in choosing Joyce was unlawful.[14] On appeal, the United States Court of Appeals for the Ninth Circuit declared that the Plan's express goal of attaining, rather than maintaining, a work force reflective of the labor force, as well as its lack of fixed quotas, was sufficient proof that the Plan was temporary.[15] The court of appeals also noted that the Plan had been adopted to remedy an obvious imbalance in the work force[16] and that the Plan did not "trammel" other employees' rights nor create an obstacle to their advancement.[17] As a

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comprised 22.4% of Agency personnel versus 36.4% of the area work force. *Id.* at __, 107 S. Ct. at 1446, 94 L. Ed. 2d at 624.

7. *Id.* The road dispatcher position was classified as a "Skilled Craft Worker" position. Of the Agency's 238 Skilled Craft Worker positions, not one was held by a woman. The Plan stated that the underrepresentation of women in this job category resulted from women being discouraged from seeking training and employment in this type of work due to limited opportunities in the past. *Id.*

8. *Id.* at __, 107 S. Ct. at 1449, 94 L. Ed. 2d at 626-27.

9. *See id.*; *see also* 42 U.S.C. §§ 2000e to 2000e-17 (1982). The statute makes it unlawful for an employer to consider race, national orgin, sex, religion or color in determining employment. *See id.* § 2000e-2(a) (unlawful to consider such factors in hiring, promoting, determining "terms, conditions, or privileges of employment").

10. Johnson, __ U.S. at __, 107 S. Ct. at 1449, 94 L. Ed. 2d at 627.

11. *Id.*

12. Johnson v. Transp. Agency, 748 F.2d 1308, 1310 (9th Cir. 1984), *modified*, 770 F.2d 752 (9th Cir. 1985).

13. *See id.* It was necessary for the court to apply the criteria set out in *United Steelworkers of America v. Weber*, because the Agency justified its discriminatory conduct on the basis of enforcing an affirmative action plan. *Id.*; *see also* United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979)(justifying affirmative action under Title VII). *Weber*, while reviewing a racial affirmative action plan, held that the plan must be temporary and not designed to maintain a specific representation. The Court in *Weber* noted that to be permissible, an affirmative action plan must not unnecessarily obstruct or absolutely bar the rights of employees not being advantaged by the plan. Moreover, it must be intended to eradicate a manifest racial imbalance in the work force. *See id.*

14. Johnson, 748 F.2d at 1310 (district court emphasized that holding based on Agency's failure to prove Plan temporary).

15. *Id.* at 1312.

16. *Id.* at 1313-14.

17. *Id.* at 1314.

result, the ninth circuit reversed and held the Agency's consideration of gender in filling the dispatcher position lawful.[18] The United States Supreme Court granted certiorari to determine whether the Agency, as a public employer, impermissibly considered the sex of the job applicants in violation of Title VII.[19] Held—*Affirmed*. A public employer may consider gender to promote an employee without violating Title VII of the Civil Rights Act of 1964 when enforcing a valid affirmative action plan.[20]

The fourteenth amendment of the United States Constitution[21] provides that similarly situated people shall receive equal protection under the law from state governments.[22] This protection becomes significant, inter alia, when the government, without sufficient justification, places burdens on or denies benefits to individuals based on "immutable" characteristics which are not shared by all persons.[23] In determining the possible justifications for disparate treatment, the United States Supreme Court holds governmental discriminatory action based on race[24] or national origin[25] inherently suspect, and will uphold such discrimination only when the government proves a

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18. *Id.*

19. Johnson v. Transp. Agency, __ U.S. __, 106 S. Ct. 3331, 92 L. Ed. 2d 737 (1986).

20. Johnson v. Transp. Agency, __ U.S. __, __, 107 S. Ct. 1442, 1457, 94 L. Ed 2d 615, 637 (1987).

21. U.S. CONST. amend. XIV § 1. The equal protection clause states: "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws." *Id.*

22. *Id.* The fourteenth amendment's equal protection clause was enacted to prevent racial discrimination by government officials. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). The amendment's prohibition against discrimination applies specifically to "state sources of invidious discrimination." Loving v. Virginia, 388 U.S. 1, 10 (1966). While there is no equal protection clause in the Constitution expressly applicable to the federal government, similar protection is implied from the due process clause of the fifth amendment, which states: "nor [shall any person] be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.; *see also* Shapiro v. Thompson, 394 U.S. 618, 642 (1968)(waiting-period requirement unconstitutional exercise of Congressional power); Schneider v. Rusk, 377 U.S. 163, 168 (1963)(federal statute eradicating citizenship status unconstitutional denial of due process); Bolling v. Sharpe, 347 U.S. 497, 499 (1954)(equal protection and due process not mutually exclusive).

23. *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 438-39 (1985)(equal protection clause requires states to treat similarly situated people in same manner); Southern Ry. Co. v. Greene, 216 U.S. 400, 412 (1909)(individual entitled to rights no less and burdens no greater than those of similarly situated persons under fourteenth amendment); Tinsley v. Anderson, 171 U.S. 101, 106 (1898)(no denial of equal protection where law applied to plaintiff would have been applied to any person under same circumstances).

24. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984)(state court may not divest custody of child from natural mother merely because she is white and married black man); Loving v. Virginia, 388 U.S. 1, 12 (1967)(racial classifications chilling right to marry violate inherent meaning of equal protection); Bolling v. Sharpe, 347 U.S. 497, 500 (1954)(racial segregation in schools tantamount to due process denial); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)(racial segregation in schools unconstitutional denial of equal rights). *See generally* Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L. J. 829, 837-52 (1983)(tracing nexus

compelling need for its action and that the means chosen are narrowly-tailored to achieve the end sought.[26] Gender-based discrimination, on the other hand, is not as strictly scrutinized, and will be upheld where the Court finds it bears a substantial relation to an important governmental interest.[27]

While the practice of discrimination traditionally excludes certain groups from particular activities,[28] discriminatory classifications have been used to bestow benefits rather than place burdens on particular groups.[29] The Supreme Court has reviewed the constitutionality of such "benign" discrimi-

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between race and equal protection clause from framer's original intent to modern segregation cases).

25. *See, e.g.*, Cleburne, 473 U.S. at 440 (as race, alienage and national origin classifications are deemed suspect, statute must be suitably tailored to achieve a compelling state need); Bernal v. Fainter, 467 U.S. 216, 219 (1984)(state law which discriminates based on alienage inherently suspect and must be supported by compelling state interest using least restrictive means available); Graham v. Richardson, 403 U.S. 365, 372 (1971)(classifications based on alienage inherently suspect).

26. *See, e.g.*, Cleburne, 473 U.S. at 440 (gender based classifications require heightened scrutiny); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)(means must be narrowly tailored to achieve constitutional goal); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 627 (1969)(voting limitations must be necessary to further compelling state need). *See generally* Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L. J. 829, 835-36 (1983)(correllating level of scrutiny with powerlessness of class).

27. *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)(requiring that discrimination serve important governmental objectives with means substantially related to achieving objectives); *see also* Craig v. Boren, 429 U.S. 190, 198-200 (1976)(failing both prongs of gender-based scrutiny because insufficient governmental objective, and gender-based discrimination not substantially related to traffic safety). Where the classes are not similarly situated, gender-based classifications are upheld under a standard less rigorous than the "substantially related" test. *See* Michael M. v. Superior Court, 450 U.S. 464, 472-73 (1981)(government objective to prevent teenage pregnancies considered sufficiently related to discrimination against females); *see also* Rostker v. Goldberg, 453 U.S. 57, 78-79 (1981)(exclusion of women from draft upheld as closely related to governmental purpose). Early cases apply inconsistent standards. *Compare* Frontiero v. Richardson, 411 U.S. 677, 688 (1973)(gender-based discrimination inherently suspect calling for strict scrutiny) *with* Reed v. Reed, 404 U.S. 71, 76 (1971)(rational basis test applied to gender-based discrimination regarding selection criteria for estate administrator). It has been suggested that the lack of "bright line" rules is due, in part, to the Justices' difficulty in molding equal protection to current social conditions without exceeding constitutional parameters. *See* Dittfurth, *A Theory of Equal Protection*, 14 ST. MARY'S L. J. 829, 837 (1983).

28. *See, e.g.*, Palmore, 466 U.S. at 432-33 (racial classification used to deprive parent of child custody); Loving, 388 U.S. at 12 (classification prohibiting interracial marriage); Brown, 347 U.S. at 493 (racial classification used to deny integrated education).

29. *See, e.g.*, Wygant v. Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1846, 90 L. Ed. 2d 260, 268, (preferential treatment given to blacks in lay-off plan); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 727-30 (1982)(school admission policy favoring women); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978)(plurality opinion)(admission policy allowing blacks preference).

nation primarily through analysis of affirmative action programs.[30] In order to be classified as benign, the Court requires the affirmative action plan's goal be to remedy the current effect of previous discrimination against the class being advantaged by the plan.[31] Generally, the level of scrutiny applied to affirmative action plans depends on the classifications involved.[32] Where an affirmative action program benefits a racial group, strict scrutiny is applied;[33] similarly, intermediate scrutiny is utilized to review affirmative action challenges based on sex.[34]

In *Wygant v. Jackson Board of Education*,[35] the Supreme Court examined the constitutionality of a school board's lay-off policy which extended preferential protection to certain employees based on their race or national origin.[36] Using an equal protection analysis, the Court subjected the policy to strict scrutiny[37] and found that while the school board's purpose of sheltering certain employees from lay-offs might otherwise be legitimate, the lay-off plan was not narrowly tailored.[38] In addition to requiring that the means chosen be narrowly tailored to achieve the desired result,[39] the Court re-

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30. *See, e.g.*, Wygant, __ U.S. at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268 (reviewing racial affirmative action plan favoring blacks); Hogan, 458 U.S. at 727-30 (reviewing school's affirmative action admission policy favoring women); Bakke, 438 U.S. at 320 (affirmative action plan allowing preference to blacks). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 603-26 (3d ed. 1986)(providing historical overview of landmark Supreme Court cases regarding affirmative action).

31. *See* Wygant, __ U.S. at __, 106 S. Ct. at 1847, 90 L. Ed. 2d at 269 (requiring evidence of past discriminatory practice by governmental agency involved); *see also* Fullilove, 448 U.S. at 480 (Congress may employ racial classification to remedy present effects of past discrimination). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 607 (3d ed. 1986)(purpose of benign racial classification to remedy present effects of previous discrimination, not stigmatize members of class).

32. *Compare* Wygant, __ U.S. at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268 (strict scrutiny applied to racial classifications) *and* Bakke, 438 U.S. at 290-91 (strict scrutiny necessary where classification based on race) *with* Hogan, 458 U.S. at 724 (intermediate scrutiny applied to gender based discrimination).

33. *See* Wygant, __ U.S. at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268 (racial classification must be justified by compelling interest with means narrowly tailored to achieve goal); *see also* Bakke, 438 U.S. at 290-91 (racial distinctions inherently suspect and require exacting judicial scrutiny). *But cf.* Fullilove, 448 U.S. at 482 (rejecting requirement that Congress act in wholly color-blind manner).

34. *See* Hogan, 458 U.S. at 724 (gender classification must serve important governmental objectives and be substantially related to achieving objectives); *see also* Califano v. Webster, 430 U.S. 313, 316-17 (1977)(retirement benefits formula advantaging female wage earners subject to intermediate scrutiny).

35. __ U.S. __, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986).

36. *See* Wygant, __ U.S. at __, 106 S. Ct. at 1844, 90 L. Ed. 2d at 266.

37. *See id.* at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268.

38. *Id.* at __, 106 S. Ct. at 1852, 90 L. Ed. 2d at 274-75.

39. *See id.* at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268. The Court concluded that the Board's lay-off plan was not adequately tailored because it placed too intrusive a burden on

quired that the discriminatory effects being remedied were in fact caused by the party implementing the program.[40] Additionally, there must exist no obvious, less harmful methods of achieving the goal.[41]

While the Constitution prohibits the government from engaging in discriminatory conduct,[42] Title VII of the Civil Rights Act of 1964[43] prohibits discriminatory practices by any employer, public or private, whose industry affects commerce.[44] Therefore, even private employers whose industry substantially affects commerce may not discriminate against employees based on race, color, religion, sex, or national origin without incurring legal liability.[45] Despite Title VII's seemingly absolute prohibition of discrimination in employment practices,[46] the Supreme Court in *United Steelworkers v. Weber*[47]

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one group while attempting to achieve racial equality. *See id.* at __, 106 S. Ct. at 1851-52, 90 L. Ed. 2d at 274-75; *see also* Palmore v. Sidoti, 466 U.S. 429, 432 (1984)(requiring discrimination be necessary to achieve legitimate goal); Fullilove, 448 U.S. at 480 (requiring program which attempts to remedy present effects of previous discrimination be narrowly tailored).

40. Wygant, __ U.S. at __, 106 S. Ct. at 1847, 90 L. Ed. 2d at 269. The Court stated that a reference to societal discrimination alone would not justify racial classifications. *Id.*

41. *Id.* at __ n.6, 106 S. Ct. at 1850 n.6, 90 L. Ed. 2d at 272 n.6 (means will be narrowly tailored if less restrictive means sought but unavailable).

42. *See* U.S. CONST. amend. V (equal protection component of due process clause prohibits federal employer from unconstitutional discriminatory practices); *see also* U.S. CONST. amend. XIV (prohibiting state employers from unconstitutional discriminatory action).

43. 42 U.S.C. §§ 2000e to 2000e-17 (1982).

44. *Id.* § 2000e-2(a). Section 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. By amendment, Congress included state and local governments in its definition of "employer" under Title VII. *See id.* § 2000e(b) (originally enacted as Pub. L. No. 92-261, 86 Stat. 103, 103).

45. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)(liability for backpay allowed when private employer action frustrates Title VII intent to eliminate discrimination and make injured party whole); *see also* 42 U.S.C. § 2000e-5(g) (1982). Section 2000e-5(g) states:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice . . . .

Id.

46. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 209-10 (1979)(Blackmun, J.,

held that Title VII did not automatically prohibit voluntary affirmative action programs.[48] *Weber* involved a training program which reserved fifty percent of its openings to blacks.[49] The Supreme Court analyzed Title VII's legislative history[50] and found Title VII's purpose is to curtail the effects of discrimination and does not proscribe all voluntary affirmative action pro-

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concurring). Justice Blackmun noted in *Weber* that a literal interpretation of Title VII absolutely prohibits employers from discriminating and therefore places employers in a precarious dilemma. While they are liable to blacks for past discrimination, employers become liable to whites when remedying the previous discrimination. *Id.* Blackmun favored as a solution the "arguable violations" theory proposed by Judge Wisdom's dissent in *Weber v. Kaiser Aluminum & Chem. Corp. See id.*; *see also* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977)(Wisdom, J., dissenting), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979); Comment, *Affirmative Action: The Employer's Enigma*, 54 U. CIN. L. REV. 969, 983 (1986)(affirmative action plans must be well-defined and easy to implement to avoid employer inaction). *See generally* Comment, *Walking a Tightrope Without a Net: Voluntary Affirmative Action Plans After* Weber, 134 U. PA. L. REV. 457, 458 (1986)(suggesting Supreme Court must resolve question of what evidence is sufficient to protect employers from Title VII attack when implementing affirmative action plans).

47. 443 U.S. 193 (1979). The *Weber* decision was the first majority opinion by the Supreme Court to consider whether an affirmative action plan violated Title VII. *See* Comment, *Walking a Tightrope Without a Net: Voluntary Affirmative Action Plans After* Weber, 134 U. PA. L. REV. 457, 457 (1986); *see also* Comment, *Affirmative Action: The Employer's Enigma*, 54 U. CIN. L. REV. 969, 971 n. 17 (1986)(Court considered affirmative action previously but *Weber* first majority opinion).

48. *See* Weber, 443 U.S. at 197 (Title VII does not prohibit all affirmative action plans which are private, voluntary and race-conscious). The Court in *Weber* emphasized the narrowness of its holding. *See id.* at 200. The Court also declined to define what differentiates permissible from impermissible affirmative action plans. *See id.* at 208. Despite the Court's intent to avoid setting standards, lower courts have applied *Weber* criteria for permissible affirmative action. *See, e.g.*, La Riviere v. Equal Employment Opportunity Comm'n, 682 F.2d 1275, 1279 (9th Cir. 1982)(highway patrol's affirmative action program permissible under Title VII); Setser v. Novack Inv. Co., 657 F.2d 962, 968-69 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981); Tangren v. Wackenhut Serv., 480 F. Supp. 539, 548-49 (D. Nev. 1979)(collective bargaining seniority override valid under Title VII), *aff'd*, 658 F.2d 705 (9th Cir. 1981)(equality of rights statute permits affirmative action), *cert. denied*, 456 U.S. 916 (1982). *See generally* Comment, *The Distorted Adversarial Posture of Title VII Affirmative Action Challenges*, 128 U. PA. L. REV. 1543, 1543-44 (1980)(noting six areas involving affirmative action left unanswered by *Weber* and asserting inadequacy of judicial forum for resolving affirmative action disputes).

49. Weber, 443 U.S. at 199. While trainees were selected by seniority, the program provided that at least half of all trainees must be black until the percentage of black workers matched that in the local work force. Brian Weber, a white employee whose admission to the training program was rejected, filed a class action suit against his employer. *See id.* Weber filed suit alleging Title VII proscribed all race-conscious affirmative action programs. *See id.* at 201. Weber's argument relied on a literal reading of Sections 703(a) and (d) of Title VII, forbidding racial discrimination. *See id.*

50. *Id.* at 203-07. The Court concluded that "the very statutory words intended as a spur or catalyst to" self-examination by employers regarding their employment practices "cannot be interpreted as an absolute prohibition against all private, voluntary race conscious affirmative action efforts . . . ." *Id.* at 204.

grams.[51] Rather, the Court held that plans of private employers, like that in *Weber*,[52] which are designed to halt patterns of racial discrimination,[53] which neither violate the rights of nor bar opportunities for non-advantaged classes,[54] and which are temporary in nature[55] will be deemed consistent with Title VII because they further the policy behind the Act.[56]

In *Johnson v. Transportation Agency*,[57] the United States Supreme Court determined that the Santa Clara Transportation Agency, a public employer, did not violate Title VII when it regarded sex in promoting Diane Joyce because the consideration was made pursuant to an affirmative action plan that satisfied *Weber*'s criteria.[58] Specifically, the Court determined that the Plan was designed to remedy imbalances among traditionally segregated job

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51. *Id.* at 208.

52. *See id.* at 197-99. The affirmative action plan under review in *Weber* was part of a master collective-bargaining agreement designed to eradicate "conspicuous racial imbalances in . . . almost exclusively white craftwork forces." *Id.* at 198. The plan set hiring goals designed to match the percentage of blacks in respective local work forces. To achieve the goal, Kaiser established on-site training programs to teach both black and white unskilled laborers necessary craftwork skills. The plan reserved 50 percent of the openings in the training programs for blacks. *Id.*

53. *Id.* at 208 (purpose of plan reflects Title VII's intent to eradicate racial segregation and hierarchy); *see also* Comment, *Walking a Tightrope Without a Net: Affirmative Action Plans After* Weber, 134 U. PA. L. REV. 457, 459 (1986)(suggesting employer may offer statistics to prove manifest discrimination in work force). *See generally* Comment, *Affirmative Action: The Employer's Enigma*, 54 U. CIN. L. REV. 969, 972 (1986)(noting *Weber*'s use of judicial findings and statistics to prove discrimination).

54. Weber, 443 U.S. at 208 (noting plan did not require white workers to be fired and replaced by blacks nor that half of trainees be white).

55. *Id.* The *Weber* Court explained that "the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.*

56. *Id.* at 201-06. Congress was primarily concerned with the economic plight of black people and sought through Title VII to open occupational doors traditionally closed to blacks. *See* 110 CONG. REC. 6548 (1964)(remarks of Sen. Humphrey). The *Weber* Court noted that Congress did not intend to proscribe private, voluntary affirmative action. Weber, 443 U.S. at 203-04. The language of Title VII has been interpretated as encouraging self-examination on the part of employers to eliminate vestiges of discrimination. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). In addition, the Court has noted that if Congress intended to forbid affirmative action, it could have amended Title VII to say the statute did not permit racially preferential efforts. *See* Weber at 205; *see also* Local No. 93 v. City of Cleveland, __ U.S. __, __, 106 S. Ct. 3063, 3072, 92 L. Ed. 2d 405, 419 (1986)(legal precedent recognizes Congressional intent that voluntary compliance be preferred method of achieving Title VII goals). *But see* Johnson, __ U.S. at __ n.2, 107 S. Ct. at 1458 n.2, 94 L. Ed. 2d at 638 n.2 (Stevens, J., concurring)(EEOC interprets Title VII to prohibit racial discrimination by private employers against whites as well as non-whites).

57. __ U.S. __, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987).

58. Johnson v. Transp. Agency, __ U.S. __, __, 107 S. Ct. 1442, 1455, 94 L. Ed. 2d 615, 634 (1987).

categories,[59] neither trammeled nor barred opportunities for male employees,[60] and was flexible in its method of accomplishing greater female representation.[61] The Court reasoned that in requiring a manifest imbalance in relation to traditionally segregated employment categories, any consideration of gender and race would be consistent with Title VII's intent to eliminate discrimination in the workplace.[62] Moreover, the rights of employees not advantaged by the affirmative action plan would not be unnecessarily infringed.[63] The Court emphasized the flexibility of the Agency's Plan by noting that, while the Agency adopted a long term goal of attaining a work force reflective of the local labor market,[64] the Plan required the Agency to formulate short term goals to realistically indicate the extent to which gender should be a consideration in filling certain positions.[65]

Despite Johnson's failure to raise a constitutional issue in his suit,[66] Justice O'Connor noted in her concurrence that little justification exists for adopting separate standards to evaluate affirmative action under Title VII, from those applicable under the Constitution when the respondent is a public employer.[67] O'Connor reasoned that both *Wygant* and *Weber* attempted to resolve similar concerns in that both involved racial affirmative action plans.[68] Justice O'Connor further found that the standard established by the Court in *Weber* was in conformity with the equal protection analysis used in

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59. *Id.* The Agency was aware of the significance of finally promoting a female to an all male job category. *Id.* at __ n.14, 107 S. Ct. at 1455 n.14, 94 L. Ed. 2d at 634 n.14.

60. *Id.* at __, 107 S. Ct. at 1455, 94 L. Ed. 2d at 634. The Plan neither set fixed quotas nor automatically excluded qualified male applicants. Further, denying Johnson the promotion did not unsettle a legitimate expectation on his part. Finally, Johnson retained his position and seniority and continued to be eligible for later promotion. *Id.* at __, 107 S. Ct. at 1455-56, 94 L. Ed. 2d at 635.

61. *Id.* at __, 107 S. Ct. at 1456, 94 L. Ed. 2d at 636. The Plan was intended to attain, not maintain, a balanced work force. The Court noted: "[T]he Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which established realistic guidance for employment decisions . . . ." *Id.* The Court concluded that, as a result of the Plan's moderate approach, it was sufficiently temporary to satisfy *Weber*. *Id.*

62. *Id.* at __, 107 S. Ct. at 1452, 94 L. Ed. 2d at 631. The Court noted that the manifest imbalance need not be so great as a prima facie suit against the Agency. *Id.*

63. *Id.* at __, 107 S. Ct. at 1455-56, 94 L. Ed. 2d at 635 (plan did not call for elimination of any male employees from promotion consideration).

64. *Id.* at __, 107 S. Ct. at 1453-54, 94 L. Ed. 2d at 632.

65. *Id.* at __, 107 S. Ct. at 1454, 94 L. Ed. 2d at 633. The Agency formulated short term goals because it recognized that the number of women who qualified for positions requiring special expertise would be limited. *Id.*

66. *Id.* at __ n.2, 107 S. Ct. at 1446 n.2, 94 L. Ed. 2d at 623 n.2.

67. *Id.* at __, 107 S. Ct. at 1461, 1463, 94 L. Ed. 2d at 641, 644 (O'Connor, J., concurring)(asserting Title VII actions against public employers must conform with equal protection standards).

68. *Id.* at __, 107 S. Ct. at 1463, 94 L. Ed. 2d at 644.

Wygant.[69] Therefore, the Court should apply the same factors to analyze *Johnson* under Title VII as it would under the equal protection clause.[70]

Dissenting, Justice Scalia urged the Court to overrule *Weber*[71] on the grounds that the case disregarded the text and misconstrued the intent of Title VII.[72] In addition, Justice Scalia found that the Agency's discriminatory employment practices violated not only Title VII, but also the constitutional standards of *Wygant*[73] in that the Plan was an attempt to remedy the general effects of societal attitudes against women, rather than the Agency's own discrimination in the work force.[74]

Although *Johnson* seems to indicate that Title VII applies to public employers enforcing affirmative action plans,[75] the Court's reasoning raises doubts about the significance of its holding.[76] The majority asserted it is unlikely that Title VII was intended to place more restrictions on public

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69. *See id.*

70. *Id. But see id.* at __, 107 S. Ct. at 1460, 94 L. Ed. 2d at 640 (Stevens, J., concurring)(disagreeing that *Wygant's* requirement of past discrimination is prerequisite to granting minority preference).

71. *Id.* at __, 107 S. Ct. at 1472, 1474, 94 L. Ed. 2d at 655, 657 (Scalia, J., dissenting). Justice Scalia urged the Court to abandon *Weber* as it: "held that the legality of intentional discrimination by private employers against certain disfavored groups or individuals is to be judged not by Title VII but by a judicially crafted code of conduct, the contours of which are determined by no discernable standard, aside from . . . the divination of congressional 'purposes' belied by the face of the statute and by its legislative history." *Id.* at __, 107 S. Ct. at 1472, 94 L. Ed. 2d at 655-56. Justice White, although joining Justice Scalia's dissent urging the overruling of *Weber*, wrote separately to emphasize that the Court's interpretation of "traditionally segregated jobs" applied in *Johnson* is far different than that used in *Weber* and as a result perverts Title VII. *See id.* at __, 107 S. Ct. at 1465, 94 L. Ed. 2d at 647 (White, J., dissenting). Justice White explained that "traditionally segregated jobs" as applied in *Weber* meant an "intentional and systematic exclusion" of a class of persons; however, the Court's application in *Johnson* indicates a remedy is available whenever there is "a manifest imbalance between . . . group[s] . . . in an employer's labor force." *Id.*

72. *Id.* at __, 107 S. Ct. at 1472, 94 L. Ed. 2d at 655. The statute unambiguously prohibits discrimination in the employment arena. *Id.*; *see also id.* at __, 107 S. Ct. at 1475, 94 L. Ed. 2d at 659 (by allowing affirmative action plan to stand, *Johnson* decision accomplishes de facto what is forbidden de jure).

73. __ U.S. __, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986).

74. Johnson, __ U.S. at __, 107 S. Ct. at 1469, 94 L. Ed. 2d at 651.

75. *See id.* at __ n.6, 107 S. Ct. at 1449-50 n.6, 94 L. Ed. 2d at 628 n.6. Congress intended that Title VII apply to governmental employers. *See* Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977); *see also* Johnson, __ U.S. at __, 107 S. Ct. at 1461, 94 L. Ed. 2d at 641 (O'Connor, J., concurring)(*Johnson* poses question of Title VII application to public employers); *id.* at __, 107 S. Ct. at 1475, 94 L. Ed. 2d at 659 (Scalia, J., dissenting)(majority opinion extends *Weber* to public entities). *But cf.* Comment, *Affirmative Action After* Bakke, 32 CLEV. ST. L. REV. 681, 709-10 (1983-84)(where affirmative action initiated by public entity, *Bakke* applies instead of *Weber*).

76. *See* Johnson, __ U.S. at __, 107 S. Ct. at 1457, 94 L. Ed. 2d at 637 (Stevens, J., concurring)(decision fails to set outer parameters of Title VII application); *see also id.* at __,

employers than does the Constitution.[77] Further, the majority disagreed with Justice O'Connor's assertion that a public employer's obligations are identical under Title VII and the Constitution.[78] Therefore, it can only be concluded that the majority believes Title VII polices public employers less restrictively than does the Constitution.[79]

The Court's analysis is inappropriate for two reasons. First, a federal statute cannot validate governmental conduct which the Constitution forbids.[80] As a result, if a public employer's affirmative action program and the discriminatory practices authorized therein are permissible under Title VII, according to *Weber*, yet impermissible under the Constitution, according to *Wygant*,[81] the program must fail.[82] Second, while the majority did not assert that Title VII allows public employers to act unconstitutionally,[83] and

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107 S. Ct at 1461, 1463, 94 L. Ed. 2d at 641, 644 (O'Connor, J., concurring)(Court's opinion ill-defined, offers little guidance).

77. *See* Johnson, __ U.S. at __ n.6, 107 S. Ct. at 1450 n.6, 94 L. Ed. 2d at 628 n.6 (statutory proscription not intended to reach that of Constitution). *Compare id.* at __, 107 S. Ct. at 1460-65, 94 L. Ed. 2d at 641-47 (Title VII coterminous with equal protection clause) *with id.* at __, 107 S. Ct. at 1465-76, 94 L. Ed. 2d at 647-60 (Title VII more restrictive than equal protection clause).

78. *See id.* at __, 107 S. Ct. at 1452, 94 L. Ed. 2d at 631. As a result, the Court applied *Weber* rather than *Wygant* to assess the legality of the affirmative action plan. *Id.* at __, 107 S. Ct. at 1449, 94 L. Ed. 2d at 627-28.

79. *Id.* at __, 107 S. Ct. at 1452, 94 L. Ed. 2d at 631; *see also id.* at __ n.3, 107 S. Ct. at 1469 n.3, 94 L. Ed. 2d at 652 n.3 (Scalia, J., dissenting)(majority cites unpersuasive dictum for reasoning that Title VII narrower than Title VI and therefore not coterminous with Constitution).

80. *See* U.S. CONST. art. VI § 2 (Constitution supreme law of land superseding all contrary laws); *see also* Marbury v. Madison, 1 Cranch 49, 68-70 (1803)(laws in opposition to Constitution void). The Constitution's supremacy mandate is so strong it requires a "statute . . . be read with the presumption that Congress did not intend to authorize conduct that is prohibited by the Constitution." Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220 (2d Cir.), *cert. denied*, 469 U.S. 1117, 1121 (1985)(Rehnquist, J., dissenting), *reh'g denied*, 470 U.S. 1024 (1985)(citing NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500-01 (1979)); *see also, e.g.*, Reynolds v. Sims, 377 U.S. 533, 584 (1964)(Federal Constitution prevails when in conflict with state constitution); Southern Ry. Co. v. Greene, 216 U.S. 400, 412 (1909)(Federal Constitution not to be violated by state legislation).

81. *Compare* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979)(plan must halt patterns of racial discrimination without barring opportunities for nondisadvantaged and must be temporary) *with* Wygant v. Bd. of Educ., __ U.S. __, __, 106 S. Ct. 1842, 1847, 90 L. Ed. 2d 260, 269 (1986)(discrimination must be attributable to party implementing program and program must be narrowly tailored).

82. *See* U.S. CONST. art. VI § 2 (Constitution supersedes contrary law). Where otherwise impermissible discrimination is upheld because pursuant to a valid affirmative action program, the converse must be that if the program is not valid, the discrimination will be impermissible. *See* Wygant, __ U.S. at __, 106 S. Ct. at 1853-54, 90 L. Ed. 2d at 277 (O'Connor, J., concurring)(public employer may implement affirmative action plan consistent with Constitution, designed to effectuate legitimate purpose if no unnecessary harm to nonadvantaged).

83. *See* Johnson v. Transp. Agency, __ U.S. __, __ n.6, 107 S. Ct. 1442, 1449 n.6, 94 L.

noted that the Agency's Plan would be subject to constitutional scrutiny were the issue properly raised,[84] analysis of a public employer's conduct using only a statute allegedly less restrictive than the Constitution serves little precedential purpose since a public employer must always satisfy constitutional requirements.[85] The reasoning chosen by the majority offers no guidance to public employers as to the level of review for their affirmative action plans.[86] Two alternate approaches, suggested respectively by Justice O'Connor in her concurrence and Justice Scalia in his dissent, could have been applied more successfully and provide the guidance lacking in the majority's opinion.[87]

Justice O'Connor asserted that *Weber* and *Wygant* seek to resolve the same conflicting concerns, implying not only that the Constitution and Title VII are equally restrictive of public employers but also that when a public employer's discriminatory practices are justified by an affirmative action plan that plan would be analyzed most efficiently using the criteria of *Wygant*.[88] Had the majority applied this analysis, any affirmative action plan would necessarily comport with the Constitution[89] as well as Title VII.

Ed. 2d 615, 628 n.6 (1987)(Title VII extends as far as Constitution allows). *Contra id.* at __, 107 S. Ct. at 1472, 94 L. Ed. 2d at 655 (Scalia, J., dissenting)(implying majority construes Title VII to allow what Constitution forbids); *see also id.* at __, 107 S. Ct. at 1466, 1469, 1475, 94 L. Ed. 2d at 647, 651, 659.

84. *Id.* at __ n.2, 107 S. Ct. at 1446 n.2, 94 L. Ed. 2d at 623 n.2.

85. *See* Dodge v. Woolsey, 59 U.S. 331, 347-48 (1856)(Constitution supreme over departments of government). A basic concept of the supremacy clause is that "the establishment or reduction of constitutional rights cannot be accomplished either by congressional action or executive fiat." Clark v. Bd. of Educ., 374 F.2d 569, 570 (8th Cir. 1967).

86. *See* Johnson, __ U.S. at __, 107 S. Ct. at 1457, 94 L. Ed. 2d at 637 (Stevens, J., concurring)(Court's decision does not set outer parameters); *see also id.* at __, 107 S. Ct at 1461, 1463, 94 L. Ed. 2d at 641, 644 (O'Connor, J., concurring)(reasoning not well-defined and offers minimal guidance).

87. *Compare id.* at __, 107 S. Ct. at 1460-65, 94 L. Ed. 2d at 641-47 (Title VII coterminous with equal protection clause) *with id.* at __, 107 S. Ct. at 1465-76, 94 L. Ed. 2d at 647-60 (Title VII more restrictive than equal protection clause).

88. *See* Johnson, __ U.S. at __, 107 S. Ct. at 1462, 94 L. Ed. 2d at 642-43 (O'Connor, J., concurring)(*Wygant* wholly consistent with *Weber*). Justice O'Connor concluded that a prima facie case under Title VII would satisfy *Wygant*'s firm basis requirement to justify affirmative action. *Id.* As a result, Justice O'Connor suggested there is no reason to apply different standards under Title VII from those applied under equal protection. *See id.* at __, 107 S. Ct. at 1463, 94 L. Ed. 2d at 644; *cf. id.* at __, 107 S. Ct. at 1469-70, 94 L. Ed. 2d at 652 (Scalia, J., dissenting)(discrimination not insulated from constitutional nor Title VII attack). Even Justice Scalia found *Wygant*, not *Weber*, the proper precedent for analysis in this case. *See id.* at __, 107 S. Ct. at 1470, 94 L. Ed. 2d at 652.

89. *See* U.S. CONST. art. VI § 2; *see also* Marbury v. Madison, 1 Cranch 49, 68-70 (1803)(any law that opposes Constitution invalid). *Compare* Weber, 443 U.S. at 200 (Title VII analysis) *with* Wygant, __ U.S. at __, 106 S. Ct. at 1846-47, 90 L. Ed. 2d at 268 (equal protection analysis). However, Justice O'Connor noted that the Agency's affirmative action plan

Justice Scalia's dissent suggested another analysis which the Court might have applied to the case. Scalia suggested that Title VII places a greater restriction on public actors than does the Constitution.[90] Justice Scalia would overrule the Court's decision in *Weber* and require the Court to apply more restrictive standards by which discriminatory conduct must be scrutinized.[91] Rather than apply this reasoning, the Court relied on *Weber*, a case involving a private employer and whose holding was limited to its facts,[92] to decide *Johnson*, a case also decided narrowly but involving a public employer,[93] and thus extended the confusion surrounding affirmative action.[94]

Because the majority chose the least effective of several possible approaches to the question raised in *Johnson*, the case provides no concrete guidelines by which public employers may avoid Title VII liability when implementing affirmative action programs. The majority could have adopted Justice O'Connor's view that Title VII and the Constitution are coterminous and thereby determine that *Wygant* standards will apply to future affirmative action programs implemented by public employers. Or, the majority could have agreed with Justice Scalia's assertion that Title VII is more restrictive than the Constitution and create more restrictive guidelines than

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nonetheless satisfied the criteria of both Title VII and equal protection analysis. *See* Johnson, __ U.S. at __, 107 S. Ct. at 1465, 94 L. Ed. 2d at 647.

90. *See* Johnson, __ U.S. at __, 107 S. Ct. at 1469, 94 L. Ed. 2d at 651 (Scalia, J., dissenting). Justice Scalia found Title VII to be at least as restrictive as the Constitution and that Title VII's plain language unambiguously prohibits any discrimination in employment practices. *Id.* at __, 107 S. Ct. at 1472, 94 L. Ed. 2d at 655. Since the Constitution allows affirmative action that passes muster under strict scrutiny, *see Wygant*, __ U.S. at __, 106 S. Ct. at 1846, 90 L. Ed. 2d at 268, it would seem Justice Scalia found Title VII to be the more proscriptive of the two. *See* Johnson, __ U.S. at __, 107 S. Ct. at 1472, 94 L. Ed. 2d at 655 (Title VII absolutely prohibits discrimination in workplace).

91. *See* Johnson, __ U.S. at __, 107 S. Ct. at 1472, 94 L. Ed. 2d at 655 (Scalia, J., dissenting)(advocating overruling *Weber* and following the strict wording of Title VII).

92. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979)(declining to define difference between permissible and impermissible affirmative action programs); *see also id.* at 200 (emphasizing limited inquiry). Justice Stevens did not understand *Weber* to offer guidelines that every race-oriented affirmative action plan must satisfy. *See* Johnson, __ U.S. at __ n.3, 107 S. Ct. at 1458 n.3, 94 L. Ed. 2d at 638 n.3 (Stevens, J., concurring). Justice Scalia urged that *Weber* was and should remain limited to private employers. *See id.* at __, 107 S. Ct. at 1472, 94 L. Ed. 2d at 655 (Scalia, J., dissenting). *See generally* Comment, *Affirmative Action: The Employer's Enigma*, 54 U. CIN. L. REV. 969, 970 n.7 (1986)(admonishing Court for failing to establish adequate affirmative action plan implementation guidelines).

93. Johnson, __ U.S. at __ n.2, 107 S. Ct. at 1446 n.2, 94 L. Ed. 2d at 623 n.2 (case decides only issue of Title VII prohibitory scope, not equal protection).

94. *See id.* at __, 107 S. Ct. at 1457, 94 L. Ed. 2d at 637 (Stevens, J., concurring)(emphasizing decision does not establish outer parameters). Justice O'Connor also criticized the majority's reasoning on affirmative action as "expansive and ill-defined" and "offering little guidance." *Id.* at __, 107 S. Ct. at 1461, 1463, 94 L. Ed. 2d at 641, 644 (O'Connor, J., concurring).

Wygant's by which future government employers might survive Title VII attack. Instead, the majority sets limited standards which are useful only to public employers whose problems and programs closely match those in *Johnson*. Until the Court delineates Title VII's scope as applied to public employers and generates appropriate criteria for evaluating their affirmative action plans, the Constitution, Congress, and the Supreme Court will remain irreconciled regarding the issue, to the detriment of government employers and employees alike.

Marianne Malouf