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WHEEL OF FORTUNE: A CRITIQUE OF THE “MANIFEST IMBALANCE” REQUIREMENT FOR RACE-CONSCIOUS AFFIRMATIVE ACTION UNDER TITLE VII

Kenneth R. Davis*

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* Professor of Legal Studies, Fordham Graduate School of Business Administration; B.A., State University of New York at Binghamton, 1969; M.A., California State University at Long Beach, 1971; J.D., University of Toledo College of Law, 1977. Many thanks to Alexis Teicher for her valuable research assistance. I also wish to express my gratitude and affection to my wife, Jean, the superhero of law librarians who finds obscure sources faster than a speeding bullet.
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I. Introduction

In the struggle for racial equality, voluntary affirmative action stands as a unique remedy. Most efforts to expand civil rights have come as government commands. The post-Civil War constitutional amendments stemmed from the federal policy to provide basic rights to the newly freed slaves. In *Brown v. Board of Education*, the Supreme Court hastened the nation to desegregate its public schools. The Civil Rights Act of 1964 reordered many of the institutions of our society by outlawing racial discrimination in public accommodations and employment.

Affirmative action offers private actors the opportunity to participate in correcting societal injustice. Instead of responding to constitutional mandates, statutory prohibitions, or judicial decrees, citizens may initiate their own measures of social reform.

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1. Unless the context otherwise requires, the term “affirmative action,” as used in this Article, refers to voluntary race-conscious affirmative action. The term “racial preference” is used interchangeably with the term “affirmative action.”


3. See U.S. CONST. amend. XIII, § 1 (prohibiting slavery and involuntary servitude); U.S. CONST. amend. XIV, § 1 (forbidding states to deny any persons equal protection of laws); U.S. CONST. amend. XV, § 1 (guaranteeing voting rights to all citizens regardless of race).

4. See 347 U.S. 483, 495 (holding “separate but equal” educational facilities violate Equal Protection Clause).


6. Id. § 2000e(a).

7. See David A. Brennen, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law’s Public Policy Limitation for Charities*, 5 FLA. TAX. REV. 779, 792 (2002) (“[C]ivil rights statutes permit private actors to be more proactive than government in advancing social justice objectives via methods like race based affirmative action.”).
Scholars have analyzed a substantial body of data, studying the effects of racial preferences in the workplace, educational institutions, and even in sports. The conclusions of these scholars vary as widely as do the opinions of those who support or oppose affirmative action. On balance, however, the weight of opinion recognizes that affirmative action policies have met with at least modest success. A survey of faculty impressions of an affirmative action program conducted at Macalester College, a small, selective institution in St. Paul, Minnesota, showed that diversity in the classroom positively affected faculty views, helped students to develop a willingness to reexamine their own views, and exposed students to perspectives divergent from their own. Roxane Harvey Gudeman, Faculty Experience with Diversity: A Case Study of Macalester College, in Diversity Challenged: Evidence on the Impact of Affirmative Action 251, 258–61 (Gary Orfield & Michal Kurlaender eds., 2001).

Summarizing a wealth of empirical studies, Terry Anderson concludes that affirmative action has resulted in educational benefits to minorities, more minority-owned businesses, and, not surprisingly, higher rates of minority employment among institutions practicing affirmative action. Terry H. Anderson, The Pursuit of Fairness: A History of Affirmative Action 278–80 (2004). Brian Collins argues that the “Rooney Rule,” which requires National Football League teams to interview at least one black candidate for coaching openings, contributed to increasing the number of black head coaches from three to seven in only three years. Brian W. Collins, Note, Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule, 82 N.Y.U. L. REV. 870, 907 (2007). J. Edward Kellough, citing numerous studies, comes to a mixed but overall positive opinion of the effectiveness of affirmative action in the workplace. J. Edward Kellough, Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice 132–38 (2006). He also concludes that affirmative action in higher education has been highly successful in increasing black enrollment, graduation, and professional success. Id. at 138–42. But Thomas Sowell, a critic of affirmative action, debunks the very data that Kellough cites, including the frequently cited findings of William Bowen and Derek Bok in their 1998 book, The Shape of the River. See Thomas Sowell, Affirmative Action Around the World: An Empirical Study 132–59 (2004) (criticizing sampling and statistical methods employed by Bowen and Bok). Sowell refers to other studies that contradict the effectiveness of affirmative action in higher education. See id. at 159–61 (discussing data showing that black student enrollment at state universities in California and Texas increased following bans on racial preferences and quotas in those states). But see Francine D. Blau & Anne E. Winkler, Does Affirmative Action Work, REGIONAL REV., 1st Quarter 2005, at 38, 38 (concluding that consensus of several studies confirms that affirmative action has resulted in at least modest benefits to minorities and women).

See Michael J. Zimmer, Taxman: Affirmative Action Dodges Five Bullets, 1 U. PA. J. LAB. & EMP. L. 229, 239–40 (1998) (noting that one objective of Title VII is to avoid interfering with how employers operate their businesses provided their practices do not result in unlawful discrimination).
plans, often implemented by private citizens. The power of this remedy rests in its source: companies, educational institutions, and individuals who are not compelled to act but who choose to act. Affirmative action thus enables the expansion of liberty through the mechanism of a conscientious marketplace.

The Supreme Court might have interpreted Title VII’s prohibition against racial discrimination in employment as an outright ban of affirmative action. It did not because it recognized the federal policy of encouraging private race-conscious remedies. Nevertheless, the Court placed limits on such remedies, for unregulated affirmative action would threaten to devolve into a license to engage in reverse discrimination.

In *United Steelworkers of America v. Weber* and *Johnson v. Transportation Agency,* the Court established the rules for private, voluntary affirmative action under Title VII. A valid plan must address a manifest imbalance in segregated job categories where minorities have been traditionally underrepresented. The plan must not unnecessarily trammel the rights of nonminority workers, and it must be temporary, because a plan loses its justification once it has eliminated a manifest imbalance.

This Article argues that the Supreme Court or Congress should abandon the manifest imbalance requirement. Inappropriately transplanted from pattern-and-practice cases, which forbid systemic, intentional discrimination in employment, the manifest imbalance requirement is an arbitrary hindrance on an employer’s prerogative to engage in race-conscious remedies. Contrary to pronouncements of the Supreme Court, the manifest imbalance requirement does not advance the goals of Title VII. It frustrates them. The same criticism applies to limiting affirmative action to

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10 See supra note 2 and accompanying text; see also Richard N. Appel, Alison L. Gray & Nilufer Loy, *Affirmative Action in the Workplace: Forty Years Later,* 22 *Hofstra Lab. & Emp. L.J.* 549, 559 (2005) (“Title VII’s literal language imposes liability for discrimination against any person on the basis of race, color, religion, sex, or national origin in which contrasts with Congress’ intent to encourage voluntary action by employers in creating employment opportunities for minorities and women . . .”).


13 *Weber,* 443 U.S. at 197.

14 *Id.* at 208.
segregated job categories where minorities have been traditionally underrepresented. Nor is there any sound reason to require affirmative action plans to be temporary. The only element of the regime adopted in *Weber* and *Johnson* that the law should retain is the prohibition against “unnecessarily trammel[ing]” or violating the rights of nonminority workers.

Part II of this Article discusses the requirements of affirmative action under Title VII. The analysis focuses on the leading Supreme Court cases: *Weber* and *Johnson*. This Part also discusses lower court cases that have followed *Weber* and *Johnson*, some upholding and others invalidating affirmative action plans.

Part III identifies the source of the manifest imbalance requirement: pattern-and-practice cases. In particular, this Part analyses *International Brotherhood Teamsters v. United States*, and *Hazelwood School District v. United States*. Underscoring the differences between the goal of punishing civil rights violations and the goal of encouraging affirmative action plans, this Part argues that the Supreme Court improvidently transposed the statistical comparisons used to find a manifest imbalance from pattern-and-practice cases to affirmative action cases. This Part also criticizes the requirement of limiting affirmative action under Title VII to segregated job categories where minorities have been traditionally underrepresented, and it similarly criticizes the requirement that affirmative action plans be temporary.

Part IV attempts to demonstrate that the manifest imbalance requirement tends to frustrate the very goals that Title VII aspires to achieve. This Part is divided into two sub-parts. The first examines the goals that the Supreme Court articulated when it adopted the manifest imbalance requirement, and the second sub-part examines other goals of Title VII that the Court and Congress have expressed.

The Article concludes that the manifest imbalance requirement serves no legitimate purpose, and that it should be abandoned along with the requirement that affirmative action be limited to

15 *Id.*
traditionally segregated job categories where minorities have been underrepresented.\textsuperscript{18} Similarly, the requirement that affirmative action must be temporary, which follows from the manifest imbalance requirement, should not be imposed on those who wish to engage in voluntary, race-conscious remedies. Only the prohibition against unnecessarily trammeling the rights of nonminority workers should operate as a limitation on private, voluntary efforts to achieve racial equality in the workplace.

II. The Requirements of Affirmative Action Under the Weber and Johnson Cases

In \textit{United Steelworkers of America v. Weber}, the Supreme Court held that voluntary affirmative action plans, if properly structured, comply with Title VII.\textsuperscript{19} \textit{Johnson v. Transportation Agency} refined the requirements prescribed in \textit{Weber}.\textsuperscript{20} Both cases sought to reach a balance between two competing objectives of Title VII. Title VII's prime objective—the very reason it was adopted—is to eradicate discrimination against protected classes, particularly African-Americans, whether the discrimination arises from the effects of past or present practices.\textsuperscript{21} Nevertheless, the Court acknowledged another objective of Title VII: to protect all individuals, regardless of race, from employment discrimination.\textsuperscript{22} These two goals conflict, for the racial preferences granted by any affirmative action plan exact a toll—whether in hiring, promotion, or retention—from nonminority workers.

\textsuperscript{18} This Article uses the terms “minority,” “black,” and “African-American” interchangeably.

\textsuperscript{19} \textit{See 443 U.S. at 209} (finding that voluntary plan fell “within the area of discretion left by Title VII”).


\textsuperscript{21} \textit{See id. at 649} (emphasizing Title VII’s “goal of eliminating the lasting effects of discrimination against minorities”); \textit{Weber, 443 U.S. at 201–02} (stating that primary purpose of Title VII is to reverse pattern of exclusion of blacks from various segments of nation’s workforce).

\textsuperscript{22} \textit{See Johnson, 480 U.S. at 649} (noting that Title VII intends “to root out invidious discrimination against any person on the basis of race of gender”); \textit{Weber, 443 U.S. at 201} (conceding that argument that Title VII’s prohibition against discrimination “because of . . . race” necessarily forbids affirmative action is “not without force”).
A. THE WEBER CASE: OUTLINING THE REQUIREMENTS OF A VALID AFFIRMATIVE ACTION PLAN UNDER TITLE VII

The Court balanced these competing goals in Weber. In that case, Kaiser Aluminum and the United Steelworkers Union entered into a collective bargaining agreement designed to eliminate the racial imbalance in Kaiser’s craft workforce. The agreement established a training program to prepare unskilled, incumbent workers for promotions to craft jobs. To equalize the percentage of craft positions held by blacks with the percentage of black workers in the local labor force, the agreement included an affirmative action plan reserving 50% of the openings in the training program for black workers.

Nothing in the language of Title VII impelled the Court to permit affirmative action in any form. To the contrary, the Court could reasonably have taken the position advocated by Justice Rehnquist, who stated in his dissenting opinion in Weber: “In passing Title VII, Congress outlawed all racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative.”

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24 Id.; see also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 364 (1978) (opinion of Brennan, White, Marshall and Blackmon, J.J., concurring in judgment in part and dissenting in part) (“Our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law.”). In another case involving a collective bargaining agreement extending preferential protection against layoffs to minority employees, Justice O’Connor commented:

The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers’ incentive to meet voluntarily their civil rights obligations.... The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance.

26 Id. at 254 (Rehnquist, J., dissenting). Section 703(a) of the 1964 Civil Rights Act provides:

It shall be an unlawful employment practice for any 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,
The majority conceded that Title VII’s prohibition to “discriminate . . . because of . . . race” in hiring practices and apprenticeship programs raised a significant question about the legality of any race-based affirmative action plan. To interpret Title VII to forbid all race-based affirmative action would be to contradict the very purpose of the statute, which is to end employment practices denying blacks equality of opportunity. Since a majority of the Court recognized the importance of voluntary efforts to eliminate discrimination as well as the congressional intent to encourage voluntary remedial measures, the Court was all the more disposed to find permission for affirmative action in the statute.


See Weber, 443 U.S. at 201 (alterations in original) (“Respondent’s argument [that Title VII prohibits all race-conscious affirmative action plans] is not without force.”).

See id. (arguing that respondent’s reliance on literal interpretation of statute is misplaced).

Id. at 202. The Court further reasoned:

It would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice and intended to improve the lot of those who had ‘been excluded from the American dream for so long,’ constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.

Id. at 204 (citation omitted) (quoting 110 Cong. Rec. 6552 (1964) (statement of Sen. Humphrey)).

See id. at 204 (disagreeing with proposition that Congress “intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve”). The Court quoted a House Report, which stated: “There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.” Id. (quoting H.R. Rep. No. 914, pt. 1, at 18 (1963)). In Johnson, Justice O’Connor noted that “this Court has long emphasized the importance of voluntary efforts to eliminate discrimination.” Johnson v. Transp. Agency, 480 U.S. 616, 652 (1987) (O’Connor, J., concurring in judgment); see also Barbara J. Fick, The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment, 11 Notre Dame J. Ethics & Pub. Pol’y 159, 160 (1997) (observing that Congress intended Title VII to encourage private employers to take proactive measures to prevent discrimination).
Court could have ignored the policy condemning discrimination against any person based on race, and decided to allow employers to adopt race-conscious preferences with few or no restraints. Holding that “Title VII . . . does not condemn all private, voluntary, race-conscious affirmative action plans,” the Court chose a more moderate position, permitting voluntary affirmative action subject to particular limitations. Such limits, though loosely based on perceived legislative intent, were essentially the invention of Justices who, without the benefit of meaningful congressional guidance, wanted to encourage yet control the use of affirmative action.

The Weber Court went on to provide the legal boundaries of voluntary affirmative action under Title VII. A valid plan must promote the statute’s principal purpose: to open employment opportunities that have been traditionally closed to black workers. Taking judicial notice of the traditional exclusion of black workers from craft positions, the Court found that the Kaiser-United

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31 Weber, 443 U.S. at 208. The Weber Court cited Section 703(j) of Title VII to support its holding:

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

Id. at 205 n.5 (quoting 42 U.S.C. § 2000e-2(j) (2000)). The Court noted that those who opposed passage of Title VII feared that the Act would be interpreted to require racial preferences, and, alternatively, that the Act would be interpreted to permit racial preferences. Id. at 205. Section 703(j)’s declaration that the Act does not require racial preferences, along with its silence on the issue of voluntary racial preferences, showed the congressional intent to allow, though not requiring, affirmative action. Id. at 205–06.

32 For a discussion of the limits that Weber and Johnson placed on affirmative action under Title VII, see infra notes 33–44, 61–77 and accompanying text.


34 Weber, 443 U.S. at 198 n.1.
Steelworkers plan promoted this purpose. The Court also stressed that the plan did not “unnecessarily trammel the interests of the white employees.” Focusing on the apprenticeship program, the plan did not result in the discharge of white workers, nor did it create an absolute bar to their advancement. Finally, the Court observed that the plan was a temporary measure. Intended to continue only until the manifest racial imbalance of black workers was eliminated from Kaiser’s craft workforce, the plan would terminate when Kaiser employed approximately the same percentage of black craft workers as the percentage of black workers in the local labor market.

In sum, Weber prescribed a rough approximation of how an affirmative action plan might comply with Title VII. The purposes of a valid plan “mirror those of the statute.” To satisfy this standard, a plan must meet three requirements. First, it must address a manifest imbalance in traditionally segregated job categories. This requirement ostensibly ties an affirmative action plan to the remedial purpose of Title VII, which is to abolish the practices of discrimination that have systemically excluded blacks from desirable jobs and to eliminate the present effects of past discrimination. Second, a plan must not unnecessarily trammel the rights of workers who are not in the protected class. Firing nonminority employees innocent of any misconduct, or establishing an absolute bar to their advancement, would unnecessarily trammel their rights. This requirement limits the scope of affirmative action plans so that they do not result in reverse discrimination, which would violate the secondary goal of Title VII: to protect the rights of those workers disadvantaged by a plan. Third, a plan must be temporary, a requirement that follows from the manifest imbalance requirement. Establishing a plan in perpetuity would

15 Id. at 208.
16 Id.
17 Id.
18 Id. at 208–09.
19 Id. at 208.
20 Id.
21 See id. at 202–03 (discussing legislative history of Title VII).
22 Id. at 208.
23 Id.
permit its operation after it eliminates the very justification for its existence—a manifest imbalance.\footnote{One might contend that the requirement that a plan be temporary also prevents the trammeling of the rights of nonminority workers because a permanent plan arguably imposes unjustifiable burdens on such workers. This contention is tenable only in conjunction with the manifest imbalance requirement. If, as proposed in this Article, having a manifest imbalance were rejected as a necessary element of a valid affirmative action plan, the requirement that a plan terminate once a manifest imbalance is rectified would become senseless. In other words, the requirement that a plan be temporary is inseparable from the requirement that a plan address a manifest imbalance. This Article argues that the endpoint of affirmative action should come with the elimination of disadvantages to black workers in the national labor marketplace. Until these disadvantages are eliminated, voluntary race-conscious affirmative action is not only justified—it is also desirable.}

B. THE JOHNSON CASE: REFINING AND RELAXING THE REQUIREMENTS

\textit{Johnson} clarified and arguably expanded the bounds of permissible affirmative action plans outlined in \textit{Weber}. Most critically, \textit{Johnson}, which involved a challenge to sex-based affirmative action, held that a valid plan may seek to rectify a manifest imbalance resulting from the employment preferences of the applicant group rather than from past discrimination.\footnote{Johnson v. Transp. Agency, 480 U.S. 616, 621 (1987) ("[The] underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them . . . ."); see also id. at 634 n.12 ("[W]omen are generally underrepresented in [Skilled Craft] positions and . . . strong social pressures weigh against their participation." (quoting Johnson v. Transp. Agency, 748 F.2d 1308, 1313 (9th Cir. 1984))). Justice Scalia disagreed that societal pressures justify affirmative action. He complained:

The most significant proposition of law established by today’s decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effects, not of the employer’s own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs. Id. at 664 (Scalia, J., dissenting).} By de-emphasizing purposeful discrimination and focusing instead on imbalances perpetuated by cultural preferences of applicant groups, the Court undermined the rationale for retaining “manifest imbalance” as a requirement for the validity of voluntary affirmative action plans under Title VII. This shift in focus will be discussed more fully in Parts III and IV of this Article.

In \textit{Johnson}, Santa Clara County adopted an affirmative action plan, the purpose of which was to rectify imbalances in the
Transportation Agency’s (the Agency) workforce. The most striking imbalance was that women held none of the Agency’s 238 Skilled Craft Worker positions. To address this imbalance, the plan provided that the Agency could consider gender as one factor in promotion decisions. While the plan established the long-term benchmark of bringing the proportion of women in Skilled Craft jobs into alignment with the proportion of women in the area’s labor force, the plan, rather than fixing rigid quotas, set flexible short-term goals. It acknowledged numerous factors that might hinder the achievement of its stated objectives. The plan noted, for example, that (1) low turnover rates might limit hiring opportunities, (2) women might not apply in substantial numbers for jobs that required heavy labor, and (3) women might not be qualified, by experience or training, for some of the positions that became available. The short-term goals were therefore adjustable subject to data reflecting the availability of qualified women in the local labor force.

When the Agency announced an opening for a promotion to dispatcher, a position classified as a Skilled Craft job, twelve employees applied. Among the applicants were Paul Johnson and Diane Joyce. Nine of the applicants, including Johnson and Joyce, qualified for an interview by a two-person board. Johnson tied for second place with an interview score of seventy-five, and Joyce ranked just below him with a score of seventy-three. Three Agency supervisors then conducted a second interview of the seven most

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46 Id. at 620. The plan sought to address the under-representation of minorities as well as women in various job categories of the Agency’s workforce. Id. at 621.
47 Id.
48 Id. at 620–21.
49 See id. at 622 (“The Plan acknowledged that a number of factors might make it unrealistic to rely on the Agency’s long-term goals . . . . As a result, the Plan counseled that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions.”).
50 Id. Other factors mentioned in the plan were the small number of positions within certain job categories and the low number of entry level positions leading to eligibility for Technical and Skilled Craft classifications. Id.
51 See id. (noting that acquisition of data regarding ratio of women and minorities employed in local labor force would aid in establishment of short-range goals).
52 Id. at 623.
53 Id.
54 Id. at 623–24.
qualified applicants, and the supervisors recommended Johnson for the job.\textsuperscript{55}

Before the second interview, Joyce complained to the County’s Affirmative Action Office that, based on previous incidents, she feared unequal treatment from two of the three supervisors who were to conduct the second interview.\textsuperscript{56} The Affirmative Action Coordinator, in turn, alerted the Director of the Agency, James Graebner, of Joyce’s concerns. Apparently influenced by this information, Graebner awarded the promotion to Joyce.\textsuperscript{57} At trial Graebner testified that he awarded the job to Joyce only after considering the “whole picture,” including background, experience, interview scores, and gender.\textsuperscript{58} Johnson sued the Agency for sex discrimination.\textsuperscript{59}

The Court applied the three-part test announced in Weber\textsuperscript{60} to measure the legality of the Agency’s affirmative action plan. Assessing whether the employer’s workforce reflected a manifest imbalance in traditionally segregated job categories, the Court, as in Weber, did not require proof that the classes of jobs the plan targeted for affirmative action were in traditionally segregated job categories. Rather, the Court simply quoted with approval the Ninth Circuit’s conclusion: “A plethora of proof is hardly necessary to show that women are generally underrepresented in such

\textsuperscript{55} Id. at 624.

\textsuperscript{56} Id. Joyce testified that one of the three members of the second interview panel had been her supervisor when she had worked on a road maintenance crew. The supervisor had refused to issue her overalls, although all her male counterparts had received them. After she filed a grievance, the supervisor relented and issued overalls to her. Another member of the three-person panel had described Joyce as a “rebel-rousing, skirt-wearing person.” Id. at 623 n.5.

\textsuperscript{57} Id. at 624–25 (noting that Graebner’s decision was made with benefit of suggestions of interview panel and Agency Coordinator).

\textsuperscript{58} Id. Justice Scalia concluded, in a dissenting opinion, that Joyce received the promotion only because the Affirmative Action Coordinator intervened on her behalf. See id. at 662 (Scalia, J., dissenting) (noting that absent intervention of Coordinator, promotion decision would have been made by person who recommended Johnson for position). Justice Scalia questioned the legitimacy of Graebner’s decision, given that Graebner had neither reviewed the applications, nor the related examination records of Johnson or Joyce before making his decision. Graebner had also failed to inquire into the results of the interviews. Id. at 662–63. Justice Scalia was therefore not surprised that the trial judge found that gender was “the determining factor” in the promotion decision. Id. at 663.

\textsuperscript{59} Id. at 625 (majority opinion).

\textsuperscript{60} See supra notes 40–44 and accompanying text.
positions and that strong social pressures weigh against their participation. The Court stated that to prove a manifest imbalance, the employer need not have engaged in past discrimination. Nor did the employer have to provide evidence of even an arguable violation of Title VII. All the law required was a “conspicuous” or manifest imbalance in traditionally segregated job categories, a burden which the Agency easily met by showing that none of the 238 Skilled Craft jobs were held by women. By showing a manifest imbalance, the Court explained, an employer demonstrated that the affirmative action plan was consistent with Title VII's dual objectives, which are to eliminate the effects of employment discrimination without unduly infringing on the interests of unprotected workers.

This rationale for the manifest imbalance requirement provides a key to whether it is a sensible element for affirmative action plans. If the manifest imbalance requirement does not promote the goals of Title VII, that requirement should be deleted from the three-part Weber test. This Article will analyze this issue in Part III and more fully in Part IV.

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61 Johnson, 480 U.S. at 634 n.12 (citing Johnson v. Transp. Agency, 748 F.2d 1308, 1313 (9th Cir. 1988)). Such positions include mechanics, repairmen, electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors, and typesetters. Id.

62 See id. at 630 (“[A]n employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices . . . .”).

63 Id. Had the Court required proof of a violation, the Court would have created a disincentive for employers to engage in affirmative action. An employer might invite a potential lawsuit by adopting a plan the legitimacy of which depends on proof that the employer has violated Title VII. Id. at 632–33; see also id. at 652 (O'Connor, J., concurring in judgment) (“A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination.”).

64 Id. at 630 (majority opinion).

65 Id. at 636.

66 Id. at 632. Justice Scalia objected to this formulation because it supports a finding of a manifest imbalance absent even societal discrimination. Rather than arising from employment discrimination, the manifest imbalance in Johnson arose from the preferences of women themselves. Id. at 668 (Scalia, J., dissenting). Scalia criticized the Johnson majority for departing from Weber, which upheld affirmative action under Title VII only in those cases where the manifest imbalance resulted from the exclusion of minority workers from classes of skilled jobs. See id. at 667–68 (citing United Steelworkers of Am. v. Weber, 443 U.S. 193, 197–98 (1979)). Condemning the Johnson Court for engaging in social engineering, he characterized its ruling as “state-enforced discrimination.” Id. at 668.
To explain how an employer may show a manifest imbalance, the Court instructed that an employer must undertake the statistical comparison used in pattern-and-practice cases such as *International Brotherhood of Teamsters v. United States* and *Hazelwood School District v. United States*. The Court stated that where the jobs in question require no special skills, the percentage of minority workers in the employer’s workforce must be compared to the percentage of minority workers in the local labor market. Where a job requires special skills or training, the comparison must be between the proportion of minority workers in the employer’s workforce and the proportion of qualified minority workers in the local labor market.

The *Johnson* Court also concluded that the Agency’s plan did not unnecessarily trammel the rights of male employees or create an absolute bar to their advancement because the plan did not reserve any positions for women. Rather, the plan permitted gender to be one consideration, among many, in the decision making process. The Court also emphasized that Johnson’s injury was minimal because he was not entitled to the promotion awarded to Joyce. Furthermore, he retained his position, and he would be eligible for promotions that became available in the future.

Finally, the Agency’s plan met the requirement that a plan be temporary because its explicit purpose was “to attain,” rather than “to maintain,” a balanced workforce. Unforeseeable circumstances affecting the composition of the applicant pool necessitated

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69 Johnson, 480 U.S. at 633 n.10.
70 Id.
71 See id. at 638 (“[T]he Agency Plan requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants.”).
72 See id. (distinguishing plan from those that require promotion of specific numbers of minorities).
73 Id.
74 Id. at 639.
flexibility of the plan’s goals. The plan’s lack of a specific end date was therefore understandable and not fatal to the plan’s legality.

All three requirements of a valid affirmative action plan having been met, the Court approved Joyce’s promotion. In reaching this conclusion, the Court encouraged voluntary affirmative action: “Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace.”

C. LOWER FEDERAL COURT CASES: FOLLOWING THE WEBER AND JOHNSON STANDARD

Both district courts and circuit courts have faithfully observed the manifest imbalance standard. For example, the Fifth Circuit applied the standard in Sharkey v. Dixie Electric Membership Corp. Dixie Electric announced the availability of a Lineman Helper position. Forty people applied for the job opening, including Harrell Sharkey, a white male. As part of the selection process, Dixie Electric required applicants to take a battery of aptitude tests. Test performance was graded “high,” “medium,” or “low.” Sharkey scored “medium,” which qualified him for an interview, but Dixie Electric chose not to consider him for the job. A black applicant, Theodore McCray, Jr., who also earned a

15 See id. at 639 n.16 (noting that factors such as underrepresentation of women in skilled and technical positions and low turnover in management positions would lead to difficulties in remedying imbalance).
16 See id. (“It is thus unsurprising that the Plan contains no explicit end date, for the Agency’s flexible, case-by-case approach was not expected to yield success in a brief period of time.”).
18 262 Fed. Appx. 598 (5th Cir. 2008).
19 Id. at 599.
20 Id.
21 See id. (explaining that hiring process required applicants to take basic education and aptitude tests).
22 Id.
23 Id.
“medium” score on the aptitude tests, was interviewed and ultimately hired for the Lineman Helper position.\textsuperscript{84} Sharkey commenced an action under Title VII and Louisiana employment discrimination law, alleging that Dixie Electric discriminated against him because of race.\textsuperscript{85}

Dixie Electric opposed the lawsuit on the grounds that, under the terms of an affirmative action plan, it had hired McCray, not because he was black, but rather because of a combination of factors, including experience, background, and race.\textsuperscript{86} To support its argument that its labor force had a manifest imbalance in Lineman Helper jobs, Dixie Electric showed that of eleven persons employed in its Laborers job group, only one was black.\textsuperscript{87} This ratio translated to 9.1%.\textsuperscript{88} Comparing this percentage to the percentage of qualified blacks in the labor market, Dixie Electric calculated that blacks were underutilized by 33.4%, or by three black workers.\textsuperscript{89} To eliminate this manifest imbalance, Dixie Electric, under the terms of its affirmative action plan, projected the hiring of two black workers into its Laborers job group, provided that such positions opened and that qualified black workers applied.\textsuperscript{90}

The Fifth Circuit affirmed the district court’s grant of Dixie Electric’s motion for summary judgment,\textsuperscript{91} rejecting Sharkey’s arguments that the employer’s plan operated as an absolute bar to white workers and that Dixie Electric adopted it as a perpetual measure.\textsuperscript{92} Sharkey conceded, however, and the Fifth Circuit had

\textsuperscript{84} Id.
\textsuperscript{85} Id. at 599–600.
\textsuperscript{86} See id. at 600 (“[Dixie Electric] decided to hire McCray based on his qualifications and background, plus the fact that he is African-American helped [Dixie Electric] achieve projected minority hiring goals set forth in its Affirmative Action Plan.”).
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id. at 608.
\textsuperscript{92} Id. at 604. Sharkey argued that two members of Dixie Electric’s board of directors, Richard Sitman and Joe Self, told him that his application had been futile because the job was reserved for a black applicant. Id. at 604–05. The magistrate judge who initially ruled on the motion for summary judgment found that neither Sitman nor Self had actual or apparent authority to make the statements that Sharkey attributed to them. Id. at 605. Because these alleged statements could not be imputed to Dixie Electric, they could not be used to show that the plan operated as an absolute bar to hiring whites and thereby unnecessarily trammeled
no difficulty in concluding, that the plan met the manifest imbalance standard.\textsuperscript{93} The irony of the \textit{Sharkey} case is that if Dixie Electric had hired only a few more black Lineman Helpers, either before or after adopting the plan, the plan would have been unlawful.

Some courts have held that affirmative action plans violated Title VII because the plans failed to meet the manifest imbalance standard of \textit{Weber} and \textit{Johnson}.\textsuperscript{94} For example, in \textit{Taxman v. Board of Education}, the school board decided to reduce by one the teaching staff in the business department of Piscataway High School.\textsuperscript{95} Two incumbent teachers had equally matched credentials, Sharon Taxman, who was white, and Debra Williams, who was black.\textsuperscript{96} To break the tie, the Board invoked its Affirmative Action Program and
voted to lay off Taxman,97 who then filed a Title VII suit.98 Subsequently, the Board moved for, and Taxman cross-moved for, summary judgment.99 The Third Circuit, sitting en banc, affirmed the district court’s grant of Taxman’s cross-motion.100 In so holding, the court pointed out that a valid affirmative action plan must promote a remedial policy of Title VII.101 The plan must seek either to remedy current discrimination or to eliminate the lingering effects of past discrimination.102 Because the Board failed to provide any evidence of a manifest imbalance in the employment of minorities, the court held that the program failed to meet this requirement.103

Invalidating Piscataway’s plan because the school district had a relatively high number of black teachers on its staff was unfortunate. As discussed more fully in Part IV, employers should be permitted to take steps to remedy the lingering effects of societal discrimination. The Third Circuit, however, also found the plan unlawful because, by laying off Taxman, the plan unnecessarily trammelled her rights.104 The court was right on that score.

The prohibition against unnecessarily trammeling the rights of nonminority workers is the only element of the three-part test of

97 See id. (noting that recommendation was made in recognition that Taxman and Williams had equal seniority, but Williams was only black teacher in her department).
98 Id. at 1552.
99 Id.
100 Id. at 1567.
101 See id. at 1557 (“[U]nless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of [Title VII] . . . .”).
102 Id.
103 Id. at 1563 (citing United States v. Bd. of Educ., 832 F. Supp. 836, 845 (D.N.J. 1993)).
104 See id. (finding that Board’s policy lacked appropriate definitions, benchmarks, and termination provision).
Weber and Johnson that the courts should retain. As the Eleventh Circuit observed in Bennett v. Arrington:\footnote{20 F.3d 1525 (11th Cir. 1994).} “There is no precise formula for determining whether an affirmative action plan unnecessarily trammels the rights of non-beneficiaries.”\footnote{Id. at 1541.} The court noted, nevertheless, that “[t]he Supreme Court has determined that the burden imposed through race-based layoffs is too intrusive.”\footnote{Id. at 1541.} The reason for this per se rule is simply that Title VII will not tolerate the damage inflicted by removing one’s livelihood.\footnote{Id. at 1541.} Restricting promotions, however, does not impose as serious a burden on workers as laying them off.\footnote{Id. at 1542 (characterizing promotion systems’ burden as “somewhere between entry-level hiring and layoffs”).} Yet, the burden of racial preferences for promotions falls only to the discrete populations of those who are eligible for the promotions, so the potential harm is still substantial.\footnote{See Bennett, 20 F.3d at 1542 (characterizing promotion systems’ burden as “somewhere between entry-level hiring and layoffs”).} Thus, as Johnson held, Title VII permits preferences for promotions as long as the preferences are not absolute bars to the advancement of nonminorities.\footnote{See id. (“[I]t is the non-black employees excluded from consideration for half of all promotion opportunities, and not society in general, who bear the entire burden of the remedy for the City’s past discriminatory behavior.”).}

\footnote{20 F.3d 1525 (11th Cir. 1994).}
\footnote{Id. at 1541. In Bennett, the City of Birmingham was a party to a consent degree that reserved half of all promotions to fire lieutenant for black firefighters, provided a sufficient number of qualified blacks applied for the promotions. Id. at 1532. Noting that the “City employed 42 black firefighters and 411 non-black firefighters,” id. at 1542, the court invalidated the set-aside adopted in the consent decree because, among other reasons, the rigid 50% quota was not tied to the proportion of black firefighters in the qualified applicant pool. Id. at 1543.}
\footnote{Id. at 1541. In Wygant v. Jackson Board of Education, the Court explained, in the context of Equal Protection, that “[w]hile hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.” 476 U.S. 267, 283 (1986) (footnote omitted).}
\footnote{See Mary E. Westby, Comment, Taxman v. Board of Education: The Conflation of Equal Protection and Title VII Standards in Affirmative Action, 1998 Utah L. Rev. 331, 355 (interpreting Taxman to hold that any layoff unnecessarily trammels rights of nonminority group because cost of losing one’s job is so severe).}
\footnote{See Bennett, 20 F.3d at 1542 (characterizing promotion systems’ burden as “somewhere between entry-level hiring and layoffs”).}
\footnote{See id. (“[I]t is the non-black employees excluded from consideration for half of all promotion opportunities, and not society in general, who bear the entire burden of the remedy for the City’s past discriminatory behavior.”).}
\footnote{See Johnson v. Transp. Agency, 480 U.S. 616, 638 (1987) (concluding that giving consideration to affirmative action concerns does not unnecessarily trammel rights of nonminority workers); see also Charles A. Sullivan, Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof, 46 Wm. & Mary L. Rev. 1031, 1052 (2004) (stating that “litmus test” for not trammeling rights of nonminority workers has three components: not discharging them, not absolutely barring their advancement, and not creating permanent preferences).}
plan that merely favors the hiring of minorities imposes even less of a burden on nonminority workers than does a plan that favors minorities for promotions because a hiring preference would ordinarily not upset any reasonable expectation of getting a job.\textsuperscript{112} The burden imposed by a hiring preference is diffusely spread over society.\textsuperscript{113} Thus, a plan granting a racial preference for hiring receives the lowest level of judicial examination under Title VII.\textsuperscript{114}

Unfortunately, Johnson and Weber have devised an unnecessary three-part test that anyone wishing to engage in voluntary affirmative action must pass. Part III examines how the misapplication of the statistical standard used in pattern-and-practice cases has unbalanced the courts' approach to affirmative action under Title VII.

III. PATTERN-AND-PRACTICE CASES: THE SOURCE OF THE MANIFEST IMBALANCE REQUIREMENT

Statistical comparisons provide an indispensable form of proof in discrimination cases. To prove discrimination in individual disparate treatment cases and systemic disparate treatment cases, plaintiffs use statistics showing that defendants under-employ members of the protected class.\textsuperscript{115} This showing is made by comparing the actual number of minority hires to the expected number of minority hires, based on either the qualified labor market or the applicant pool.\textsuperscript{116}

Weber and Johnson borrowed the statistical approach endorsed in International Brotherhood of Teamsters v. United States\textsuperscript{117} and Hazelwood School District v. United States\textsuperscript{118} the two leading

\begin{itemize}
  \item See Wygant, 476 U.S. at 283 (contrasting disrupted expectations resulting from failure to promote with those resulting from refusal to hire).
  \item Bennett, 20 F.3d at 1541.
  \item See id. at 1542 (suggesting that entry-level hiring decisions compared to promotion decisions impose less of a burden on nonbeneficiaries of affirmative action policies).
  \item See Susan M. Coler, Laurie A. McCann & Cathy Venrell-Monsees, Handling Class Actions Under the ADEA, 10 EMP. RTS. & EMP. POL'Y J. 553, 594 (2006) (noting importance of statistics in establishing discrimination in disparate treatment and disparate impact cases).
  \item See infra notes 123–27 and accompanying text.
  \item See 431 U.S. 324, 337 (1977) (holding that Government sustained its burden of proving discrimination by showing significant statistical disparities).
  \item See 433 U.S. 299, 313 (1977) (holding that appellate court erred in disregarding hiring
\end{itemize}
Supreme Court pattern-and-practice cases. Although superficially sensible, this transplantation of statistical methodology does not advance any of the goals of Title VII. As shown below, this approach arbitrarily impedes those employers who, out of a sense of social justice, wish to engage in affirmative action. It is an injudicious extrapolation of a legal standard from a circumstance where it makes sense to another circumstance where it has worked perverse consequences.

A. THE TEAMSTERS AND HAZELWOOD CASES

*Teamsters* was a pattern-and-practice case. Such cases involve a charge that an employer regularly and purposefully discriminated against a protected class. In *Teamsters*, the Department of Justice brought a Title VII action against a freight trucking company and union for systemically engaging in a pattern and practice of discrimination against black and Spanish-surnamed workers. The Justice Department alleged that the defendants intentionally excluded these minority workers from line-driver jobs. Hauling freight over long distances, line drivers earned relatively high pay compared to local truck drivers.

Statistical comparisons played a vital role in the case, as they do in all pattern-and-practice cases. The *Teamsters* Court stated: “[I]t is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.” Gross statistical disparities may alone prove the intent to discriminate.
The Justice Department overwhelmed the Teamsters defendants with statistical evidence. The trucking company operated out of Atlanta, where blacks comprised 22.35% of the population of the surrounding metropolitan area.126 Of the fifty-seven line drivers employed at the company’s Atlanta terminal, none was black.127 In addition, although blacks comprised 10.84% of the population of the greater Los Angeles metropolitan area, the company did not employ a single black line driver in either of its two Los Angeles locations, despite employing 374 line drivers in Los Angeles.128 Such statistical comparisons, which inferentially proved intentional discrimination, assured victory for the Justice Department.

Hazelwood, another pattern-and-practice case, evaluated several statistical comparisons that might arguably have been applied to determine whether a school board excluded blacks from teaching jobs.129 The district court inexplicably compared the percentage of black teachers employed in the Hazelwood School District to the percentage of black pupils and found no disparity.130 The Supreme Court rejected the usefulness of this comparison, holding that the appropriate statistic compared the percentage of Hazelwood’s black teachers to the percentage of qualified black teachers in the area labor market.131 Deriving these percentages, however, was a matter of some complexity. The Court noted that in cases such as Teamsters, where most interested applicants could easily acquire the skills necessary to perform the jobs in question, the relevant labor market is the area’s minority population.132 On the other hand, in cases such as Hazelwood, where special qualifications are
required to perform the job, the relevant labor market is comprised of qualified minority workers in the area.132

The Court went on to discuss a further complication. Title VII became applicable to public employers in 1972.133 To judge the Hazelwood School District based on numbers carried forward from pre-1972 hiring practices, as the Eighth Circuit had done, was unfair.134 The Court reasoned that a more appropriate benchmark was the percentage of black teachers that Hazelwood had hired for the 1972 and 1973 school years: the result was 3.7%.135

Pinpointing the relevant labor market was an even more daunting task. The Hazelwood school district was located in St. Louis County. The Justice Department argued that the relevant labor market included teachers working for the school district in the city of St. Louis.136 Hazelwood argued that teachers employed by the city of St. Louis should be excluded from the relevant labor market because the city had a policy of maintaining a 50% black teaching force.137 According to Hazelwood, the city’s policy inflated the number of black teachers it hired and diverted black teachers from applying to Hazelwood for jobs.138 Unable to decide this issue on the record before it, the Court remanded the case to the district court to determine the relevant labor market.139

B. THE MISTAKE OF TRANSPACING PATTERN-AND-PRACTICE METRICS TO AFFIRMATIVE ACTION ANALYSIS

Though indispensable to the analyses undertaken in Teamsters and Hazelwood, statistical metrics comparing the defendant’s actual workforce to the relevant labor market serve no meaningful purpose

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132 Id.
133 Id. at 299.
134 See id. at 309 (“The Court of Appeals totally disregarded the possibility that [pre-1972 statistics] might . . . be rebutted by statistics dealing with Hazelwood’s hiring after it became subject to Title VII.”).
135 See id. at 310 (noting that blacks accounted for 15 of 405 new teachers hired over two-year period).
136 Id.
137 Id. at 310–11.
138 Id. at 317 (Stevens, J., dissenting).
139 Id. at 313 (majority opinion).
in affirmative action cases. Both *Teamsters* and *Hazelwood* were pattern-and-practice cases charging employers with intentional discrimination. Such cases are based on systemic patterns rather than on isolated instances of discrimination. It is fitting, if not necessary, to predicate such cases, at least in part, on statistical evidence. Statistics reveal patterns. Once exposed, discriminatory patterns subject violators to the imposition of a broad range of remedies. Courts may order violators to pay individual victims compensatory and punitive damages, and back pay and front pay, or courts may enjoin violators either to engage in or refrain from specified conduct.

Voluntary affirmative action, by contrast, is a remedial measure adopted by the employer. It is not a category of conduct forbidden by Title VII, and if compliant with legal requirements, it carries no threat of sanctions. If an employer uses affirmative action as a pretext to discriminate unlawfully, the employer is subject to either a pattern-and-practice lawsuit or to an individual disparate treatment lawsuit, which arises from intentional discrimination against an individual rather than against a protected class.

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140 The proper use of statistical analysis is controversial even in pattern-and-practice cases. Allan King points out that the threshold for determining statistical significance in the social sciences is two or three standard deviations from the mean. Allan G. King, "Gross Statistical Disparities" as Evidence of a Pattern and Practice of Discrimination: Statistical Versus Legal Significance, 22 LAB. LAW. 271, 275 (2007). With very large sample sizes, a barely noticeable difference between two groups such as black and white workers may lead to a statistically significant result. *Id.* at 281. Statistical significance in the scientific sense, however, merely indicates a difference between groups; it does not have much to say about the magnitude of the difference. Yet the courts often cling to the scientific standard, despite its questionable utility in discrimination cases. *See id.* at 272 (describing shortcomings of reliance on statistical significance). Thus, a Fortune 500 company with tens of thousands of employees may have committed a pattern-and-practice violation if its percentage of black employees falls only a few percentage points short of the expected value based on the local labor market. A much larger disparity between the percentage of black employees and the percentage of qualified blacks in the local labor market would be required to show a violation for an employer with only twenty or thirty employees. *See id.* at 279–81 (concluding that statistical significance becomes less meaningful with increasing sample sizes). Conflating scientific and legal objectives may hound pattern-and-practice cases. There is no reason to engraft this confusion into the area of affirmative action.


142 *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 197 (1979) (upholding voluntary affirmative action plan as lawful under Title VII).

143 *Compare* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (establishing burdens of proof in individual disparate treatment cases and holding that plaintiff will...
Statistics comparing an employer’s workforce to the local labor market are relevant in either type of case, but statistical evidence used in such cases should not be a precondition for affirmative action. The burden of proof to show an imbalance falls on the plaintiff if he chooses, as he well might, to use such statistics.

A statistical comparison designed to prove the intent to discriminate is fundamental to pattern-and-practice cases because intent is a necessary element of such a claim. No such predicate prevail, as a matter of law, by disproving defendant’s proffered justification for its allegedly discriminatory conduct), and Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (clarifying and confirming McDonnell Douglas), with St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (altering, though claiming to confirm, McDonnell Douglas holding by concluding that disproving defendant’s proffered justification permits but does not compel victory for plaintiff). For a discussion of the Court’s decision establishing that it is the plaintiff’s burden in mixed-motive, individual disparate treatment cases to prove that discriminatory intent was a contributory or motivating factor causing an adverse employment decision, see Price Waterhouse v. Hopkins, 490 U.S. 228, 248–50 (1989) (plurality opinion), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in Langraf v. USI Film Prods., 511 U.S. 244 (1994). Congress codified the motivating factor test in the 1991 Civil Rights Act. 42 U.S.C. § 2000e-2(m) (2004). In Desert Palace, Inc. v. Costa, the Court clarified this statutory section, holding that a plaintiff may offer any evidence—whether direct or circumstantial—to prove discriminatory intent in an individual disparate treatment case. 539 U.S. 90, 99 (2003). These two alternative frameworks for adjudicating individual disparate treatment cases, as originally established by McDonnell Douglas and Price Waterhouse and subsequently modified by Hicks and Costa, exist side by side. See generally Kenneth R. Davis, Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law, 31 Fla. St. U. L. Rev. 859, 886–90 (2004) (analyzing implications of Costa decision on individual disparate treatment law).

See McDonnell Douglas, 411 U.S. at 804–05 (explaining that plaintiff may offer comparative statistics to meet burden of proof in individual disparate treatment case).

See id. at 805 (“[Plaintiff] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.”).

Intent is not an element of a disparate impact case. See Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) (“Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”). Yet, sometimes plaintiffs in such cases use a computation similar to that used in pattern-and-practice cases. For example, in Dothard v. Rawlinson, 433 U.S. 321, 323–24 (1977), Alabama instituted minimum height and weight requirements for prison guards. Excluded by the weight requirement, Dianne Rawlinson commenced a Title VII class action against Alabama, alleging that the height and weight requirements had a disproportionate negative impact on women. Id. The Court found that the exclusionary impact of the height and weight requirements could be determined using the average height and weight of men and women in the U.S. general labor force. Id. at 329–30. By comparing the exclusionary impact that the height and weight requirements had on men and women, the Court determined the extent of the disproportionate effect that those requirements had on women. Id. Though similar to the statistics used to measure whether
is relevant to voluntary affirmative action because the intent to discriminate is not at issue. The Johnson Court highlighted this very difference, suggesting that “[h]ad the Court in [Weber] been concerned with past discrimination by the employer, it would have focused on discrimination in hiring skilled, not unskilled, workers, since only the scarcity of the former in Kaiser’s workforce would have made it vulnerable to a Title VII suit.” 147 Noting that the Weber Court compared Kaiser’s labor force to the general labor market rather than the qualified labor market, the Johnson Court explained why it believed that a comparison to the general labor market was appropriate in cases where an affirmative action plan provided a preference in training for unskilled jobs:

Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as minuscule as the proportion in Kaiser’s workforce. The [Weber] Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities. 148

Discrimination in education, training, and experience may suppress the number of blacks qualified to work in particular industries. An employer in such an industry may not have a manifest imbalance of blacks in its workforce for the very reason that the industry has systematically discriminated against them. In other words, the exclusion of blacks from industries guilty of historical, systemic

an employer has a manifest imbalance in its workforce, the purpose for using population statistics in disparate impact cases in quite dissimilar to the purpose for using population statistics in affirmative action cases. The very essence of a disparate impact case—to demonstrate a deferential effect of an employment practice on two groups—requires a comparative statistic. It is reasonable to derive such a statistic from the relevant labor force. Affirmative action, however, is not a claim requiring proof of a differential effect on two groups. It is a voluntary remedy logically unrelated to whether an employer engaged in unlawful or unfair employment practices.


148 Id.
discrimination is self-perpetuating. Intended to end discrimination, Title VII cannot reasonably be interpreted to lock in the effects that it supposedly seeks to abolish.

Having raised this compelling point, the Court did not follow this line of reasoning to its logical conclusion. The question is why a comparison to the local labor market is a necessary or even relevant consideration. An imbalance in the employer’s workforce compared to the local labor market may have little, if anything, to do with the employer’s practices. Both the Weber and Johnson decisions stressed this very point, noting that a manifest imbalance is too small a statistical discrepancy to establish a violation or even an arguable violation of Title VII. Thus, the manifest imbalance requirement is not intended to force the employer to discard biased decision making criteria. Nor is the goal of this requirement to allow violators to atone for discrimination by granting them the right to adopt preferences that would otherwise be unlawful.

Imagine an employer operating in an industry with a history of rampant racial discrimination. The employer adopts fair employment practices resulting in a workforce that is 12% black. This percentage matches the percentage of qualified blacks in the local labor market. The employer adopts an affirmative action plan, but the court will not stand for it because the numbers game does not work out. Invoking civil rights law, the court denies the employer the right to undertake a program to bolster black employment in an industry where blacks continue to endure discrimination. If an employer without a manifest imbalance in its workforce wishes to consider race as a nondeterminative factor along with work-related qualifications, the law should not interfere.

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149 See United Steelworkers of Am. v. Weber, 443 U.S. 193, 212–13 (1979) (Blackmun, J., concurring) (criticizing majority for adopting manifest imbalance standard and arguing that “[t]raditionally segregated job categories,” where they exist, sweep far more broadly than the class of ‘arguable violations’ of Title VII’); see also Johnson, 480 U.S. at 630 (“As Justice Blackmun’s concurrence made clear, Weber held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an ‘arguable violation’ on its part.”).

Local racial demographics should not determine an employer’s eligibility for affirmative action. How many blacks live within commuting distance of an employer’s place of business may have nothing to do with the employer. A relatively small change in the racial composition of a geographical area may affect an employer’s eligibility to engage in affirmative action, even though the employer has not changed any of its practices. Important public policy should not hinge on a ratio that teeters on the uncertainty of shifting population patterns.

National employment statistics are relevant in determining the lingering effects of past discrimination; the statistics of individual employers may not be. The wrong calling out for redress is the underrepresentation of African-Americans in all quarters of the workforce, from industrial jobs paying relatively low wages to professional and management positions offering top salaries, stock options, and junkets to the Bahamas. Congress enacted Title VII to close the gap between black and white unemployment. In 1962, the black unemployment rate was 124% higher than the white unemployment rate.\footnote{See Weber, 443 U.S. at 202 (quoting 110 Cong. Rec. 6548 (1964) (statement of Sen. Humphrey)).} The black unemployment rate in 2007 was 8.3%, compared to the white unemployment rate of 4.1%.\footnote{BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES 200–01 (2007), ftp://ftp.bls.gov/pub/special.requests/lf/aa2007/pdf/cpsaat3.pdf.} Thus, in 2007 the black unemployment rate was still 104% higher than the white employment rate. Progress falters while present discrimination and the effects of past discrimination fester.

The manifest imbalance requirement is flawed in another way: it hides a self-contradiction. A manifest imbalance is a pre-condition for affirmative action. Yet, once that pre-condition is met, affirmative action may continue until the employer’s workforce reaches parity with the local labor market. In other words, once affirmative action begins, it may continue even after the disparity between the percentage of minorities in the employer’s workforce compared to the percentage of minorities in the labor market falls short of a “manifest imbalance.” One must ask why a manifest
imbalance is required in the first place. One must ask why any imbalance will not do, or why there must be any imbalance at all.

*Jaworski v. Cheney*\textsuperscript{153} illustrates the undesirable consequences of the manifest imbalance requirement. A white chemist working for an agency of the Defense Department located in Philadelphia, Jaworski sought a promotion to a supervisory position.\textsuperscript{154} Under the terms of an affirmative action plan, the agency selected a black applicant for the promotion.\textsuperscript{155} Jaworski brought a Title VII action, arguing that the plan did not meet the manifest imbalance requirement.\textsuperscript{156} The trial court agreed. It noted that, for the plan to meet the standard adopted in *Johnson*, blacks had to have been underrepresented in the series and grade of the open position.\textsuperscript{157} Underrepresentation was impossible to show in the relevant series and grade, however, because no such positions were occupied.\textsuperscript{158} To overcome this conundrum, the court suggested several alternative job categories to measure the relevant percentage of black workers in the agency’s workforce.\textsuperscript{159} A grab bag of possible percentages emerged, varying from 17% to 100%.\textsuperscript{160} Such a divergence of possibilities led to pin-the-tail-on-the-donkey decision making.

Choosing between competing statistical alternatives is admittedly a vexing undertaking, particularly for laymen. As discussed above, *Hazelwood* grappled with such questions to determine if the school district had systemically excluded black teachers from its workforce.\textsuperscript{161} But in an affirmative action case, a statistical disparity is not an element of a violation, as it was in *Hazelwood*. It is a permission slip.

Again following *Johnson*, the *Jaworski* court turned to the issue of which statistic reflected the appropriate labor market. The court

\textsuperscript{154} Id. 109–10.
\textsuperscript{155} Id. at 111.
\textsuperscript{156} See id. at 112 (noting that plaintiff was able to show absence of manifest imbalance).
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} See id. (suggesting that statistics more probative of racial composition of position at issue might include all chemist positions, high-grade occupational positions, or professional positions).
\textsuperscript{160} Id.
\textsuperscript{161} See supra notes 128–39 and accompanying text.
faulted the Equal Employment Opportunity Office for using 18.2%, the percentage of blacks in Philadelphia’s general workforce.\textsuperscript{162} The court preferred using 12.2%, the percentage of blacks in Philadelphia’s professional workforce.\textsuperscript{163} Thus, if Philadelphia had a historical pattern of excluding blacks from professional positions because of disadvantages in education, training, or experience, the Jaworski court, following the Supreme Court’s lead, perpetuated that pattern of exclusion.

David Meyer has challenged the appropriateness of engrafting the pattern-and-practice statistical regime onto affirmative action cases.\textsuperscript{164} He notes correctly that the purpose of affirmative action is to encourage the entry of minorities and women into job categories from which they have been traditionally excluded.\textsuperscript{165} Citing Johnson, he points out that such exclusions may result, not from the improper practices of an employer seeking to adopt an affirmative action plan, but rather from societal influences beyond the employer’s control.\textsuperscript{166} Meyer therefore concludes that the proper comparison is always between an employer’s workforce and the general labor market.\textsuperscript{167} This comparison was used in Teamsters, a case involving the exclusion of minorities from unskilled jobs.\textsuperscript{168} Meyer rejects the comparison used in Hazelwood which instructs that, where skilled jobs are at issue, an employer’s labor force should be compared to the labor market of suitably skilled

\textsuperscript{162} Jaworski, 771 F. Supp. at 110.

\textsuperscript{163} See id. at 113 ("The EEO used the percentage of minorities in the nonprofessional Philadelphia civilian workforce for comparison. The correct statistic would be to examine the professional workforce statistic in Philadelphia, which is 12.2% minority workers.").


\textsuperscript{165} See id. at 2022 (describing aim of Title VII as “integrating minorities and women into the economic mainstream by encouraging their entry into ‘traditionally segregated job categories’ “).

\textsuperscript{166} See id. at 2021 (arguing that Johnson Court’s insistence on statistical comparisons designed to evaluate likelihood of employer’s past discriminatory conduct conflicts with Court’s acceptance of affirmative action plans intended to remedy societal discrimination).

\textsuperscript{167} Id. at 2022.

\textsuperscript{168} See Int’l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977) (explaining significance of comparisons to general labor market when job at issue does not require special training).
workers. This measure is never appropriate in the affirmative action context, says Meyer, because the aim of affirmative action is to harmonize the employment percentages of minorities with the percentage of minorities in society. Although Meyer’s analysis is persuasive, it does not go far enough. A plaintiff’s objective in a pattern-and-practice case is to prove that an employer has intentionally discriminated against a protected class. To prove such a case, a plaintiff must show a disproportion between the employer’s workforce and the relevant labor market. This disproportion is fundamental to demonstrating discriminatory intent. As Meyer recognizes, the purpose of affirmative action is to eliminate the lingering effects of societal discrimination. Any comparison to an employer’s workforce is irrelevant to this goal.

In a society where everything is reduced to numbers it is understandable, if not predictable, that statistical manipulations would work their way into the calculus to determine the validity of affirmative action plans. One has the feeling that statistical analyses must be right. An idea expressed in “multivariate

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169 See Meyer, supra note 164, at 2021 (implying that while Hazelwood’s analysis is appropriate for assessing past employer conduct, it should not be used to evaluate remedial effect of affirmative action plan on societal discrimination).

170 See id. at 2022 (arguing that invalidating affirmative action plans based on comparisons of minorities in employer’s workforce with qualified area labor pool is inconsistent with Title VII’s broad remedial purpose because it ignores reality that disparity between qualified minorities and minorities in general labor market is rooted in “’old patterns of racial segregation and hierarchy’”). To illustrate his point, Meyer offers the following hypothetical: Assume that a law firm employs one hundred attorneys and that five of the one hundred are black. Since lawyers are specially trained, the relevant labor pool under Hazelwood is limited to qualified attorneys. If the relevant labor market of qualified attorneys is less than 5% black, the law firm cannot lawfully adopt an affirmative action plan because it could not meet the manifest imbalance requirement. Past societal discrimination is the very reason that a disproportionately low number of blacks are lawyers. Meyer argues therefore that denying the law firm the right to adopt an affirmative action plan conflicts with the goal of affirmative action, which is to eliminate the lingering effects of societal discrimination. Id. at 2021–22.

171 See Teamsters, 431 U.S. at 336 (“[Plaintiff must] establish by a preponderance of the evidence that racial discrimination [is] the company’s standard operating procedure—the regular rather than the unusual practice.”).


regressions” or “standard deviations” glows with an aura of infallibility. Baseball players arbitrate their worth based on batting averages, politicians stake their campaigns on tracking polls, and educators rest the futures of children on SAT scores. We simply must quantify. A penchant for numbers, however, is not enough to gamble the legality of affirmative action plans on a roulette table of meaningless numbers.

If affirmative action, to find legitimacy, must anchor itself to a statistical comparison, the comparison should simply be between the unemployment rate of minorities and the unemployment rate of nonminorities. As long as black unemployment is substantially higher than white unemployment nationally, private employers should be permitted to engage in voluntary affirmative action. One might question this approach by invoking Wygant v. Jackson Board of Education, in which the Supreme Court stated that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.” Wygant, however, was an equal protection case, where a board of education—a state actor—adopted a racial preference for laying off teachers. Where the weight of government imposes racial preferences, the law should not condone such preferences unless they pass the most critical examination. As the Court stated in Adarand Constructors, Inc. v. Pena, the guarantee of equal protection of the laws “should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.” Private actors, by contrast, do not raise equal protection concerns,

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176 476 U.S. at 270.
177 515 U.S. 200, 227 (1995); see also Loving v. Virginia, 388 U.S. 1, 10–11 (1967) (applying “most rigid scrutiny” to invalidate Virginia criminal miscegenation statute (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)), because “[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States”); McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (applying “most rigid scrutiny” to invalidate Florida statute criminalizing interracial cohabitation, because “the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States”).
and should not be blocked, without substantial cause, from engaging in affirmative action. They should be encouraged. The difference between state and private action explains why governmental racial preferences must meet the demanding strict scrutiny test, while private affirmative action need not.\footnote{See Wygant, 476 U.S. at 290 (O'Connor, J., concurring) ("[C]ompliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool"); see also infra notes 300–04 and accompanying text (explaining that strict scrutiny test under Equal Protection Clause of Fourteenth Amendment and Due Process Clause of Fifth Amendment is more demanding than standard under Title VII).}

C. TRADITIONALLY SEGREGATED JOB CATEGORIES

The Supreme Court compounded its error by tying the manifest imbalance requirement to minority underrepresentation in traditionally segregated job categories.\footnote{Johnson, 480 U.S. at 632.} Once having created this rule, the Court did not seem to take it seriously. Weber took judicial notice that blacks had been underrepresented in craft positions,\footnote{United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n.1 (1979).} and Johnson simply assumed that the same was true of women.\footnote{Johnson, 480 U.S. at 634 n.12.} Tying the validity of an affirmative action plan to minority underrepresentation in a particular industry hampers the goal of affirmative action. The goal is to eliminate the gap between black and white unemployment nationwide. Assume, for example, that an employer in the shoemaking industry adopts an affirmative action plan. Assume also that blacks are, and have been, proportionately represented in this industry nationally because, let us say, trade unions in this industry have, for many decades, aggressively protected minority rights. It defies common sense to foreclose the implementation of affirmative action for shoemakers, given the national rate of unemployment for blacks, which is double the national unemployment rate for whites.

Although Weber and Johnson did not stress the “traditionally segregated” requirement, a failure to meet this requirement may

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\item \footnote{See Wygant, 476 U.S. at 290 (O'Connor, J., concurring) ("[C]ompliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool"); see also infra notes 300–04 and accompanying text (explaining that strict scrutiny test under Equal Protection Clause of Fourteenth Amendment and Due Process Clause of Fifth Amendment is more demanding than standard under Title VII).}
\item \footnote{Johnson, 480 U.S. at 632.}
\item \footnote{United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n.1 (1979).}
\item \footnote{Johnson, 480 U.S. at 634 n.12.}
\end{itemize}
\end{footnotesize}
doom an affirmative action plan. In *Schurr v. Resorts International Hotel, Inc.*,\(^\text{182}\) for example, Resorts International Hotel adopted an affirmative action plan to comply with regulations of the New Jersey Casino Control Commission.\(^\text{183}\) Both the plan and the regulations sought to remedy minority underrepresentation in numerous job categories.\(^\text{184}\) In determining the lawfulness of the plan, the Third Circuit stressed that a manifest imbalance, under Title VII, must relate to “a traditionally segregated job category.”\(^\text{185}\) The court interpreted this term to mean a job category tainted by past or present discrimination.\(^\text{186}\) Because neither the plan nor the regulations was put into place “in response to a finding that any relevant job category was or ever had been affected by segregation,” the court invalidated the plan.\(^\text{187}\) The Commission argued that Atlantic City had become “blighted,” and that the legislature sought to ensure that the burgeoning casino industry would benefit the beleaguered minority population.\(^\text{188}\) It is bewildering that such a compelling reason was insufficient to justify affirmative action, and ironic that Resorts International Hotel lost the case because of a casino-like game of chance.

D. TEMPORARY V. PERMANENT PLANS

The final element of a valid plan under the *Weber* and *Johnson* scheme is that the plan must be temporary. The plan may not “maintain a racial balance,” it may only “eliminate a manifest racial

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\(^{182}\) 196 F.3d 486 (3d Cir. 1999). The Commission set its goals by analyzing the composition of Atlantic City and Atlantic County’s workforces to determine the percentage of minority workers qualified for positions offered by casino licensees. *Id.* at 489.

\(^{183}\) *Id.* at 488–90.

\(^{184}\) *Id.* at 497.

\(^{185}\) *Id.* at 497–98.

\(^{186}\) *Id.* at 498. The Commission argued:

The Legislature recognized that a once renowned tourist area had become blighted and had been largely abandoned by tourists. The Legislature was also aware Atlantic City had and has a large minority population, and sought to ensure that the job creation which would accompany casino developments would benefit all segments of the population.

\(^{187}\) *Id.*
imbalance.” Thus, the Court sustained the Agency’s plan in *Johnson* because the plan “was intended to attain a balanced workforce, not to maintain one.” This element flows from the manifest imbalance requirement. If a plan is valid only as long as it addresses a manifest imbalance, then the plan may not be permanent, for a permanent plan would last even after a manifest imbalance had been eliminated. If, on the other hand, a manifest imbalance is removed from the list of preconditions of a valid plan, then the corollary to that requirement—lack of permanence—must also be scratched from the list.

The Third Circuit in *Taxman* condemned a policy that was “an established fixture of unlimited duration, to be resurrected from time to time whenever the Board believe[d] that the ratio between Blacks and Whites in any Piscataway School [was] skewed.” It is hard to understand the court’s objection. Provided that the plan had not violated Taxman’s rights by enforcing a preferential layoff, the Board should have been permitted to use its policy to boost black applicants from time to time, at any time, or all the time.

In *Frost v. Chrysler Motor Corp.*, Chrysler instituted a Marketing Investment program, providing financing for certain dealerships with the understanding that over time the operators would buy Chrysler out. The program reserved prime dealerships for black investors by offering them a right of first refusal. Frost,
a white woman who was denied a dealership in favor of a black man, sued for racial discrimination.\footnote{196}{Id. at 1291–92.} Chrysler showed that the overall percentage of black-owned dealerships was lower than the percentage of blacks in the general population.\footnote{197}{Id. at 1296.} The court was not persuaded. It held that the proper comparison was between the percentage of black-owned dealerships in the Marketing Investment program and the percentage of blacks in the general population.\footnote{198}{Id. at 1297.} Finding that 55% of the program’s dealers were black but only 12% of the general population was black, the court held that Chrysler’s program violated Title VII.\footnote{199}{Id. at 1297.} The program was unlawfully attempting “to maintain rather than achieve” a balanced workforce.\footnote{200}{Id. at 1296.}

The court should not have been surprised that a high percentage of black businessmen participated in the program. Minority participation was the program’s purpose.\footnote{201}{Id. at 1297, 1299.} But the goal of easing the unfairness of a racially lopsided industry was not the point as far as the court was concerned.\footnote{202}{Id. at 1297.} The court was condemning any program that specifically targeted minorities and proved successful. Such plans, which dared to address systemic discrimination, went too far. A company wielding enormous economic clout, Chrysler could have done more than any court decree to counter the systemic disadvantages of minorities seeking an entrée into entrepreneurship. Had the court approved Chrysler’s effort, Chrysler might have developed other programs based on the same model, and other companies might have copied its initiatives.
Private industry might have accomplished more than a thousand court decrees. None of that will happen.

E. CONCLUSION CONCERNING THE HARM CAUSED BY MISUSING STATISTICS

The manifest imbalance requirement brings about destructive consequences. It discourages employers whose workforce has no manifest imbalance from adopting beneficial affirmative action initiatives, and it dooms initiatives undertaken by socially responsible employers who cannot muster the statistics to meet the standard. This effect is all the more harmful because it is likely that a company that has employed minorities in substantial numbers in the past is the very company most likely to implement an affirmative action plan. It is precisely such an employer that cannot meet the manifest imbalance requirement. A company with no interest in promoting civil rights may well have a low rate of minority employment. Although the law would allow that company to engage in affirmative action, that company is unlikely to take an interest in race-based initiatives, unless it faces the real or potential threat of a civil rights lawsuit. The manifest imbalance requirement therefore works against one of the policies of Title VII, which is to encourage voluntary employer remedies. Part IV of this Article will show that, contrary to the aspirations of Weber and Johnson, the manifest imbalance requirement does not promote any of the goals of Title VII.

IV. THE FAILURE OF THE MANIFEST IMBALANCE REQUIREMENT TO PROMOTE THE GOALS OF TITLE VII

Weber stated that the purposes of an affirmative action plan “mirror those of the statute.” Johnson confirmed this observation, stressing that the manifest imbalance requirement assures that affirmative action plans will take race and sex into account “in a manner consistent with Title VII’s purpose[s].” These

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pronouncements provide a framework for evaluating the appropriateness of the manifest imbalance requirement because, as the Court has stated, the requirements of affirmative action are supposed to promote, rather than clash with, the purposes of Title VII. The propriety of the manifest imbalance requirement must be questioned if it thwarts achieving the goals of the civil rights law. The next section of this Part will show that the manifest imbalance requirement does not support and even conflicts with the goals of Title VII expressed in Johnson and Weber. The final section of this Part will show that the manifest imbalance requirement frustrates the other purposes that Congress has assigned to or that the Supreme Court has extracted from the statute.

A. THE GOALS SET FORTH IN WEBER AND JOHNSON

Congress enacted Title VII “to break down old patterns of racial segregation and hierarchy,” and “to ‘open employment opportunities for Negroes in occupations which have been traditionally closed to them.’” As Johnson instructed, the manifest imbalance requirement assures “both that sex or race will be taken into account in a manner consistent with Title VII’s purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed.” Thus, the Court in Weber and Johnson enumerated two purposes of Title VII: (1) to eliminate the lingering effects of historical discrimination by opening to protected classes employment opportunities traditionally denied them, and (2) to protect the rights of workers disadvantaged by an affirmative action plan. These goals will be discussed below.

1. Eliminating the Lingering Effects of Historical Discrimination.
The manifest imbalance requirement prevents employers from working to eradicate the enduring stain of past discrimination. Many employers who cannot satisfy the manifest imbalance requirement might want to implement affirmative action plans.

206 Johnson, 480 U.S. at 632.
Only a subset of employers, namely those whose workforces are manifestly imbalanced, may do so. Affirmative action’s primary goal, however, is to eliminate the lingering effects of historical discrimination that still infest our society. By limiting the number of employers qualified to engage in affirmative action, the law hinders the achievement of affirmative action’s prime objective.

The manifest imbalance requirement discourages affirmative action in another way. Employers may hesitate to adopt a plan if their fate may be defending against a lawsuit. An employer’s belief that it qualifies to institute affirmative action will not deter disgruntled white employees from arguing for a metric that would disqualify the employer from adopting a plan. The threat of a costly lawsuit is a powerful disincentive. Even if the employer prevails, the legal fees may be prohibitive—Jaworski is instructive on this point.\(^{207}\) Several alternative metrics also vied for court approval.\(^ {208}\) Rather than testing their luck in court, employers in this position may leave efforts at social justice to those who do not have a business to run.

It has been noted that a manifest imbalance is less than even an arguable violation of Title VII,\(^ {209}\) and that such an imbalance may occur for reasons outside an employer’s control.\(^ {210}\) Given that the prime objective of Title VII is to eliminate present discrimination and the effects of past discrimination, one might ask how, absent even a hint of wrongdoing on the part of the employer implementing a plan, the manifest imbalance requirement helps achieve this goal. The answer is simply that it does not. An affirmative action plan helps eradicate discrimination, not by correcting a manifest imbalance, but by seeking to remedy societal discrimination.

2. Protecting the Rights of Nonminority Workers. The second judicially declared purpose of the manifest imbalance requirement is to protect the right of those workers disadvantaged by an

\(^{207}\) See supra notes 153–60 and accompanying text.

\(^{208}\) See supra notes 153–60 and accompanying text.

\(^{209}\) See supra notes 63–66, 149 and accompanying text (discussing view of Supreme Court that manifest imbalance need not constitute either violation of Title VII or even arguable violation).

\(^{210}\) See Johnson, 480 U.S. at 630 (“[A]n employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices . . . .”).
affirmative action plan.\textsuperscript{211} To put the proposition another way, a valid affirmative action plan may not unnecessarily trammel the rights of workers who are not in the protected class. This requirement is fundamental to any valid affirmative action plan and was expressly required by \textit{Weber} and \textit{Johnson}.\textsuperscript{212} The manifest imbalance requirement is not necessary to protect the rights of workers not in the protected class because the Supreme Court has already ensured the protection of such rights by incorporating the no-trammeling-of-rights requirement into its analysis.

In approving Kaiser's plan, the \textit{Weber} Court held that the plan did "not unnecessarily trammel the interests of the white employees."\textsuperscript{213} The Court pointed out that the plan required neither the discharge of white workers nor their replacement with black workers.\textsuperscript{214} Nor did the plan establish an absolute bar to the advancement of white workers since 50\% of the slots in the training program were reserved for whites.\textsuperscript{215}

The \textit{Johnson} Court detailed numerous features of the Agency's plan that minimized the risk that the plan "unnecessarily trammelled the rights of male employees or created an absolute bar to their advancement."\textsuperscript{216} For example, the Court praised the plan for instituting flexible goals that could adjust to the availability of new job openings, to the number of qualified women and minority applicants, and to the number of lateral transfers, retirements, and layoffs.\textsuperscript{217} At the same time, the Court criticized using fixed quotas that locked qualified men or nonminority workers out of the hiring

\begin{footnotes}
\item[211] See supra notes 205–06 and accompanying text.
\item[212] See \textit{Johnson}, 480 U.S. at 630 (noting "plan did not "unnecessarily trammel the interests of the white employees"); United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979) ("[T]he plan does not unnecessarily trammel the interests of the white employees.").
\item[213] \textit{Weber}, 443 U.S. at 208.
\item[214] Id.
\item[215] Id.
\item[216] \textit{Johnson}, 480 U.S. at 637–38.
\item[217] Id. at 635. The Court included part of its discussion of flexible goals in its analysis of whether the agency's plan complied with the manifest imbalance requirement. \textit{Id.} at 668. As noted above, a plan's flexibility and avoidance of quotas does not depend on whether the company's workforce has a manifest imbalance reflecting the underemployment of workers in a protected class. Flexibility and manifest imbalance are wholly independent considerations.
\end{footnotes}
Race or gender, although a plus, was only one factor, but not the decisive factor, among all relevant qualifications that an employer might consider.\footnote{Id. at 635 (noting with approval that agency’s goals did not involve quotas).}

Avoiding unfair quotas does not require applying the manifest imbalance test. A company with no manifest imbalance can institute a plan that sets flexible goals thereby assuring fairness in the hiring process.

The Court also stressed that Johnson had no absolute entitlement to the dispatcher position.\footnote{Id. at 638.} He was only one of seven qualified applicants.\footnote{Id.} Furthermore, Johnson retained his position at the same salary and with the same seniority, and he remained eligible for future promotions.\footnote{Id.} These considerations had no connection to whether the Agency’s workforce was manifestly imbalanced.

\textit{Taxman} provides a useful contrast to \textit{Weber} and \textit{Johnson} because in \textit{Taxman} the Third Circuit held that the school board’s affirmative action policy unnecessarily trammeled Taxman’s rights.\footnote{Taxman v. Bd. of Educ., 91 F.3d 1547, 1564 (3d Cir. 1996).} The court based this conclusion on the policy’s “lack of definition and structure,” which was “devoid of goals and standards” and was “governed entirely by the Board’s whim.”\footnote{Id.} Most importantly, the court found the implementation of the plan inconsistent with Title VII because it laid Taxman off causing an injury that breached the bounds permissible under Title VII.\footnote{Id.} \textit{Taxman} shows that, irrespective of the manifest imbalance requirement, the framework established in \textit{Weber} and \textit{Johnson} protects the rights of nonminority workers.

The manifest imbalance requirement does nothing to protect the rights of workers who are not in the protected class. The requirement merely disqualifies certain employers from engaging in affirmative action. Rather than a fairness consideration, the manifest imbalance requirement is a mere formality. Once an

\footnote{See id. at 635 (noting with approval that agency’s goals did not involve quotas).}
\footnote{Id. at 638.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
employer meets the threshold of underrepresentation, the employer becomes eligible to adopt a plan. Whether the plan operates in a fair way depends on whether it unnecessarily trammels anyone's rights.

The fairness argument is more of a broadside assault on affirmative action than a reason to support the manifest imbalance requirement. A worker who is not in the class benefiting from an affirmative action plan may not get a job that he would otherwise have gotten were the plan not in effect. The consequence on that worker, however, is the same regardless of whether the employer had or did not have a manifest imbalance in its workforce.

One might seek to justify the manifest imbalance requirement as a retributive measure directed against an employer that has discriminated in the past. The law must allow such an employer to atone by instituting an affirmative action plan. Such a plan would arguably be fair to incumbent nonminority workers because, as beneficiaries of the employer's discriminatory practices, they were, in a sense, complicit in those practices. The argument fails, however, for two reasons. First, it applies only to incumbent workers, such as Johnson, seeking promotion.²²⁶ It does not apply to nonincumbent workers applying for training or entry-level positions. Second, a manifest imbalance may arise although an employer has never engaged in any discriminatory conduct. A manifest imbalance does not necessarily support even an arguable violation of Title VII.²²⁷ As was the case in Johnson, societal forces may be the culprits that brought about the imbalance. As long as the black unemployment rate is double the white unemployment rate, it is arbitrary to allow employers to engage in affirmative action only if their workforces happen to show a manifest imbalance. This eligibility requirement has nothing to do with fairness and everything to do with chance.

²²⁶ Johnson, 480 U.S. at 623.
²²⁷ See supra notes 63–66, 149 and accompanying text (discussing view of Supreme Court that manifest imbalance need not constitute either violation of Title VII or even arguable violation).
Aside from the goals expressed in *Weber* and *Johnson*, the Supreme Court and Congress have articulated other goals of Title VII. This Article will explore below whether the manifest imbalance requirement furthers any of these goals.

1. **Equality of Opportunity and Meritocracy.** The Supreme Court has identified equality of opportunity and meritocracy as goals of Title VII. Because equality of opportunity rather than equality of result supports awarding jobs to the most deserving candidates, these two goals are interrelated. In *Griggs v. Duke Power Co.*, the Court articulated these objectives when creating the legal standard for disparate impact cases. Beginning in 1955 and continuing through the 1960s, Duke Power required a high school diploma as a condition for hiring to entry-level jobs and for promotion to higher paying positions. In 1965, it added a requirement of minimum scores on standard aptitude tests. These requirements, which Duke Power did not link to job performance, had a

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228 401 U.S. 424 (1971).
229 Id. at 427–28.
230 Id. at 427. The two tests used were the Wonderlic Personnel Test, which purportedly measured intelligence, and the Bennett Mechanical Comprehension Test. The scores that Duke Power required approximated the national median for high school graduates. Id. at 428.
231 Id. at 431. Duke Power did not perform any meaningful studies to link these criteria to job performance. A vice-president of the company testified that in the company’s judgment enforcing these criteria would improve the quality of the company’s workforce. Id. The efficacy of the criteria Duke Power used was also questionable because white workers, who were hired before Duke Power adopted these criteria, performed satisfactorily on their jobs and earned promotions. Id. at 427. Griggs thus established that in disparate impact cases employers must correlate challenged employment practices with job performance. Id. at 431. Subsequent cases have applied this rule strictly. In *Albemarle Paper Co. v. Moody*, the employer used two general ability tests: the Beta Examination, a test of nonverbal intelligence, and the Wonderlic Test to screen applicants for entry-level jobs. 422 U.S. 405, 427 (1975). Albemarle argued that the tests were valid predictors of job performance, based on a validation study conducted by an industrial psychologist. Id. at 429–30. The Court rejected Albemarle’s argument for several reasons. First, because Albemarle had engaged the psychologist only four months before trial, the Court found Albemarle’s motive to validate the tests suspect. Id. at 429. Second, the validation study had supervisors subjectively evaluate incumbent workers, and the evaluations were then correlated with the test scores of those workers. Id. at 432–33. The Court found that the supervisors were not guided by a uniform standard in arriving at their subjective evaluations. Id. Third, the Court questioned the validity of correlating job performance for top line positions with job performance for entry-level line positions. Id. at 433–34.
disproportionate negative impact on African-Americans, who on average had less formal education than whites.232 Blacks rejected for hiring or promotion alleged that Duke Power had violated Title VII.233

The Supreme Court held that Title VII did not merely prohibit intentional discrimination. It also forbade practices that were neutral in form but discriminatory in effect.234 Congress sought to redress the consequences of discriminatory employment practices regardless of the motivations.235 The Court pointed out that Title VII seeks to achieve equality of opportunity; it does not guarantee equality of result.236 “Congress,” the Court stated, “did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.”237

To promote equality of opportunity without sacrificing legitimate employer prerogatives to hire the most qualified workers, the Court adopted the “business necessity” test.238 The Court explained, “If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”239

By adopting the business necessity test, the Court protected the rights of employers to hire, retain, and promote the most qualified workers. The business necessity test reconciles equality of opportunity with meritocracy. The test ensures that federal discrimination law will not blunt the efficiency and productivity of the workplace. Those who deserve jobs should get them, regardless of race or gender.

The manifest imbalance requirement does not advance the goal of equality of opportunity because it imposes an artificial barrier to affirmative action. The requirement therefore slows the progress

232 See Griggs, 401 U.S. at 430 n.6 (citing 1960 census statistics demonstrating education gap between African-Americans and whites).
233 Id. at 426.
234 Id. at 429–30.
235 Id. at 432.
236 Id. at 430–31.
237 Id.
238 Id. at 431.
239 Id.
that affirmative action could have on American society. Nor does the manifest imbalance requirement prevent those who would misuse affirmative action from fostering equality of result at the expense of merit. If an employer engaging in affirmative action wishes to award a job or promotion to an undeserving minority worker in place of a more qualified white worker, the manifest imbalance requirement will not deter him.

The Supreme Court’s prohibition against unnecessarily trammeling rights does safeguard the meritocracy principle. As Johnson stressed in upholding the Agency’s selection of Joyce over Johnson, “No persons [were] automatically excluded from consideration; all [were] able to have their qualifications weighed against those of other applicants.” Gender, in the Johnson case, was a “plus” factor, not the determinative factor. In Weber, Kaiser’s plan set aside half of the slots in the apprenticeship program for incumbent black workers, while Kaiser reserved the other half for incumbent white workers. Kaiser’s apprenticeship program did not seriously implicate the meritocracy principle because the qualifications for participating in the training program were undoubtedly hard to pinpoint and measure. Selection as an apprentice signifies an opportunity to acquire skills and experience, whereas selection as an employee depends in large part on an applicant’s previously acquired skills, experience, and other credentials. Nor did acceptance into Kaiser’s program guarantee a promotion. Merit selection would come into play after participants completed their training. Thus, the Weber court rightly allowed Kaiser substantial leeway in structuring the program. Nevertheless, the program had to be fair. It undoubtedly was since all of Kaiser’s employees could apply to participate, and applicants were evaluated based on their qualifications.

2. Racial Diversity. This Article calls for the elimination of the manifest imbalance requirement because applying that requirement

241 Id.
243 See id. at 208 (noting Kaiser’s plan did not require discharge of white workers and replacement with new black hires).
244 Id. at 199.
The general term “diversity” is sometimes conflated with the more specific term “racial diversity.” If a company has 100 employees, ten of whom are black and none of whom are Swedish, the goal of diversity would favor the hiring of a Swede over the hiring of another black. Seeking racial diversity is a valid purpose of affirmative action, and that purpose should not be clouded with doubletalk. As Cohen and Sterba point out:

[T]he term “diversity” (as commonly used in this arena) does not actually mean variety of viewpoint and opinion; in practice it means variety among the races in their proper proportions. Colleges and universities that could greatly enrich their intellectual diversity do not work very hard at that, except so far as the variety they claim to seek is associated with minority ethnic groups.

Although Cohen and Sterba oppose affirmative action, which is a view not shared by the author of this Article, their point is fair. Id. at 3. Affirmative action programs should declare their purposes. Piscataway, which employed many black teachers, could not reasonably argue that its plan sought diversity. If, however, a university has a low black student population, racial diversity may well be a valid purpose of the program. See Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (“[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.”).

Stressing “operational needs,” some courts have held that diversity is a compelling state interest in employment. See Patrolmen’s Benevolent Ass’n v. City of New York, 310 F.3d 43, 54 (2d Cir. 2002) (recognizing, before Grutter was decided, that diversity in police department is compelling state interest for purposes of Equal Protection Clause because diversity promotes operational need of facilitating cooperation and respect of community that police department serves); Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981) (upholding constitutionality of race-influenced promotion of black captain to major because having diverse police force engenders community cooperation and trust facilitating law enforcement and crime prevention); Detroit Police Officers’ Ass’n v. Young, 608 F.2d 671, 679, 695–96 (6th Cir. 1979) (deciding that, under Equal Protection Clause, operational needs of police department may support affirmative action plan that resulted in promotion of black officers in preference to white officers ranking higher on eligibility list). Some pre-Grutter decisions held that the state has a compelling state interest in having a diverse student population. See, e.g., Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1197 (9th Cir. 2000) (holding that diversity, including ethnic diversity, of university student body, is compelling state interest under Equal

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The Pre-Grutter Case Law. The Third Circuit in Taxman rejected the legality of an affirmative action plan that Piscataway attempted to justify based on the goal of racial diversity. Chief

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245 The general term “diversity” is sometimes conflated with the more specific term “racial diversity.” If a company has 100 employees, ten of whom are black and none of whom are Swedish, the goal of diversity would favor the hiring of a Swede over the hiring of another black. Seeking racial diversity is a valid purpose of affirmative action, and that purpose should not be clouded with doubletalk. As Cohen and Sterba point out:

[T]he term “diversity” (as commonly used in this arena) does not actually mean variety of viewpoint and opinion; in practice it means variety among the races in their proper proportions. Colleges and universities that could greatly enrich their intellectual diversity do not work very hard at that, except so far as the variety they claim to seek is associated with minority ethnic groups.

CARM COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCES 37 (2003). Although Cohen and Sterba oppose affirmative action, which is a view not shared by the author of this Article, their point is fair. Id. at 3. Affirmative action programs should declare their purposes. Piscataway, which employed many black teachers, could not reasonably argue that its plan sought diversity. If, however, a university has a low black student population, racial diversity may well be a valid purpose of the program. See Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (“[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.”).

246 Taxman v. Bd. of Educ., 91 F.3d 1547, 1550 (3d Cir. 1996). Stressing “operational needs,” some courts have held that diversity is a compelling state interest in employment. See Patrolmen’s Benevolent Ass’n v. City of New York, 310 F.3d 43, 54 (2d Cir. 2002) (recognizing, before Grutter was decided, that diversity in police department is compelling state interest for purposes of Equal Protection Clause because diversity promotes operational need of facilitating cooperation and respect of community that police department serves); Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981) (upholding constitutionality of race-influenced promotion of black captain to major because having diverse police force engenders community cooperation and trust facilitating law enforcement and crime prevention); Detroit Police Officers’ Ass’n v. Young, 608 F.2d 671, 679, 695–96 (6th Cir. 1979) (deciding that, under Equal Protection Clause, operational needs of police department may support affirmative action plan that resulted in promotion of black officers in preference to white officers ranking higher on eligibility list). Some pre-Grutter decisions held that the state has a compelling state interest in having a diverse student population. See, e.g., Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1197 (9th Cir. 2000) (holding that diversity, including ethnic diversity, of university student body, is compelling state interest under Equal
Judge Sloviter, joined by Judges Lewis and McKee, dissented.\textsuperscript{247} He argued that \textit{Weber} and \textit{Johnson} did not hold that a valid affirmative action plan must address a manifest imbalance. \textit{Weber} and \textit{Johnson} merely held that rectifying a manifest imbalance was one permissible way for a plan to comply with Title VII.\textsuperscript{248} Chief Judge Sloviter supported his position, quoting Justice Blackmun who, in a concurring opinion in \textit{Weber}, wrote that “the Court’s opinion does not foreclose other forms of affirmative action.”\textsuperscript{249} Expanding on Justice Blackmun’s comment, Chief Judge Sloviter observed that Congress intended Title VII, not only to eradicate the effects of past discrimination, but also to prevent future discrimination.\textsuperscript{250} Achieving racial diversity among faculties in educational institutions was a means of preventing future discrimination because attitudes of white superiority are discredited when white students have black teachers. In such an atmosphere, white
students learn respect rather than disdain. Chief Judge Sloviter concluded that, by deterring future discrimination, racial diversity advanced a goal of Title VII and therefore an affirmative action plan seeking to achieve racial diversity among its faculty complied with the requirements of the statute.

After Taxman, the Supreme Court in Grutter v. Bollinger sustained racial diversity as a valid basis for affirmative action under the Equal Protection Clause of the Fourteenth Amendment when the plan was adopted by a public institution of higher education. To determine whether this holding might apply to affirmative action under Title VII, a brief review of affirmative action jurisprudence under the Equal Protection Clause would be helpful.

In Regents of the University of California v. Bakke, Justice Powell, writing for a plurality of the Court, invalidated a quota system of the medical school of the University of California at Davis. The quota system reserved a number of seats in its entering classes for minority students. Rejecting the argument that strict scrutiny applied only to minorities, Justice Powell found that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” He reasoned that

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251 See id. at 1571–72 (Sloviter, C.J., dissenting) (noting that racial diversity in the classroom can combat old racial attitudes). Chief Justice Sloviter distinguished the goal of diversity, as sought in the Piscataway plan, from the goal of providing role models for minority students, which the Supreme Court in Wygant had held invalid. Id. at 1573–74 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 272 (1986)); see also Wygant, 476 U.S. at 287–88 (O'Connor, J., concurring in part and concurring in the judgment) (noting that Jackson school board argued it was correcting prior employment discrimination and did not rely on racial diversity to defend its plan). He concluded that the goal of diversity supported the Piscataway plan. Taxman, 91 F.3d at 1574 (Sloviter, C.J., dissenting). His conclusion seems flimsy because minority teachers were amply represented in the Piscataway school system. See id. at 1563 (majority opinion) (“Blacks are not underrepresented in [Piscataway’s] teaching workforce.”). Piscataway made no showing that the faculty needed to shore up its racial diversity. Id. The goal of achieving a diverse teaching staff does not reasonably imply that minority teachers should receive a preference regardless of the racial makeup of the teaching staff.

252 Wygant, 91 F.3d at 1574 (Sloviter, C.J., dissenting).


255 Id. at 290.

256 Id. at 291. In Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205 (1995), a government program granted federal contractors a bonus for hiring minority subcontractors.
societal discrimination does not justify a system that burdens persons not responsible for harming the beneficiaries of the program.\textsuperscript{257} Attaining a diverse student body, on the other hand, was a goal that might justify racial preferences for institutions of higher learning.\textsuperscript{258} Justice Powell underscored his view that academic freedom heightened the university’s interest to foster a diverse student population.\textsuperscript{259} Diversity, he believed, would enhance the robust exchange of ideas in the university setting and would likely result in better trained and therefore better qualified physicians.\textsuperscript{260} He concluded, however, that the medical school’s quota system was an impermissible means of reaching that goal.\textsuperscript{261} Race may be a “plus” factor, but it may not operate to the exclusion of all other factors.\textsuperscript{262}

Again writing for a plurality of the Court in \textit{Wygant v. Jackson Board of Education}, Justice Powell applied strict scrutiny analysis to a school board’s policy granting a racial preference to minority teachers.\textsuperscript{263} The school board and teachers’ union entered into a collective bargaining agreement providing that, in the event of a

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The Court extended the reach of the strict scrutiny test to a federally conferred racial preference, which was tested under the Due Process Clause of the Fifth Amendment. See id. at 224 (noting that equal protection analysis is identical under Fifth and Fourteenth Amendments). Thus, the Court applied the strict scrutiny test to racial classifications disadvantaging whites. Id. Rubenfeld challenges the doctrinal consistency of \textit{Adarand}, comparing its holding to holdings of cases where the government conferred benefits on non-racial minorities. See Jed Rubenfeld, \textit{The Anti-Antidiscrimination Agenda}, 111 Yale L.J. 1141, 1169–70 (2002) (challenging \textit{Adarand}’s reasoning). He argues that virtually any minority group other than blacks may benefit, without strict constitutional examination, from a preferential law. Id. at 1170. Government programs provide financial subsidies, for example, to farmers, oil companies, veterans, and poor people. Id. All these preferences are measured against the rational relationship test. Rubenfeld unmasks the irony that blacks, for whom the Equal Protection Clause was passed, receive less constitutional protection than any other minority group. Id.\textsuperscript{257} \textit{Bakke}, 438 U.S. at 310.\textsuperscript{258} Id. at 311–12.\textsuperscript{259} Id. at 312–13.\textsuperscript{260} Id. at 313–14.\textsuperscript{261} Id. at 316. The Board of Regents also sought to justify its quota system, arguing that it would reduce the under-representation of minorities in medical schools and the medical profession. Id. at 306. Justice Powell found this argument constitutionally invalid on its face. Id. at 307. The Board of Regents further argued that its program would increase the number of physicians who would practice in minority communities. Id. at 306. Justice Powell found no support in the record for this proposition. Id. at 311.\textsuperscript{262} Id. at 318.\textsuperscript{263} 476 U.S. 267, 273 (1986).
layoff, the school board would not reduce the percentage of minority teachers compared to their pre-layoff percentage.\textsuperscript{264} The school board followed this policy during the 1976–1977 and 1981–1982 school years, laying-off non-minority teachers with more seniority than minority teachers.\textsuperscript{265}

Justice Powell noted that strict scrutiny analysis has two components. First, a compelling state interest must justify the racial classification, and second the means chosen to achieve the compelling state interest must be narrowly tailored.\textsuperscript{266} As he had stated in \textit{Bakke}, Justice Powell explained that to demonstrate a compelling state interest, the state actor must show more than societal discrimination.\textsuperscript{267} The \textit{Bakke} Court, he noted, had insisted on a showing of past or present discrimination by the state actor itself.\textsuperscript{268} The school board attempted to demonstrate a compelling state interest by asserting that minority teachers were role models for minority students.\textsuperscript{269} Providing role models to students, however, was not a compelling state interest in Justice Powell’s view because the role-model theory provided no logical stopping point, continuing preferential treatment without any remedial purpose.\textsuperscript{270} Since the school board had made no showing of its own past or present discrimination, the Court invalidated the school board’s layoff policy.\textsuperscript{271}

Justice O’Connor commented, in a concurring opinion, that the \textit{Wygant} decision did not necessarily foreclose the possibility that the Court might recognize compelling state interests other than a state

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\item \textsuperscript{264} \textit{Id.} at 270.
\item \textsuperscript{265} \textit{Id.} at 272.
\item \textsuperscript{266} \textit{Id.} at 274. Six years before \textit{Wygant}, the Court in \textit{Fullilove v. Klutznick} upheld a 10% set-aside of federal public works contracts for minority-owned businesses. 448 U.S. 448, 491–92 (1980) Writing for a plurality of the Court, Chief Justice Burger suggested, without adopting any particular constitutional standard, that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.” \textit{Id.} at 491.
\item \textsuperscript{267} \textit{Wygant v. Jackson Bd. of Educ.}, 476 U.S. 267, 274 (1986) (plurality opinion).
\item \textsuperscript{268} \textit{Id.} Justice Stevens dissented, arguing that past discrimination should not be required to support the school board’s policy. \textit{Id.} at 313 (Stevens, J., dissenting). He asserted that the prime consideration should be whether the policy advanced the public interest in educating children. \textit{Id.}
\item \textsuperscript{269} \textit{Id.} at 274 (plurality opinion).
\item \textsuperscript{270} \textit{Id.} at 275.
\item \textsuperscript{271} \textit{Id.} at 278.
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actor's past or present discrimination.\footnote{Id. at 286 (O'Connor, J., concurring in part and concurring in the judgment).} Although she agreed that the goal of providing minority-teacher role models did not establish a compelling state interest, she echoed Justice Powell's view in \textit{Bakke} that the goal of achieving racial diversity among the faculty might.\footnote{Id. at 288.} The school board, however, did not argue, and the \textit{Wygant} Court did not address, whether racial diversity might be a compelling state interest.\footnote{Id.}

\textit{City of Richmond v. J.A. Croson Co.} cast doubt on the view that diversity might be a compelling state interest under the Equal Protection Clause.\footnote{Id. at 477.} In \textit{Croson}, Richmond adopted a set-aside plan requiring prime contractors to award at least 30% of subcontracts to minority-owned businesses.\footnote{See id. at 493 (discussing purpose of strict scrutiny). See also generally Kenneth R. Davis, \textit{Undo Hardship: An Argument for Affirmative Action as a Mandatory Remedy in Systemic Racial Discrimination Cases}, 107 DICK. L. REV. 503, 543–50 (2003) (discussing strict scrutiny standard and arguing that affirmative action should be mandatory remedy for employers who commit systemic violations of Title VII).} Finally adopting the strict scrutiny test as the constitutional standard that applies to discrimination against any race under the Equal Protection Clause of the Fourteenth Amendment,\footnote{Id. at 488 U.S. 469–70 (1989).} the Court implied, if not held, that a state actor may justify remedial race-conscious action only if it engaged or passively participated in past discrimination.\footnote{Id. at 477.} The Court found no such compelling state interest in \textit{Croson} because the record did not show that the city had discriminated against

\footnote{See \textit{Croson}, 488 U.S. at 492 (noting that passive participation in race-exclusion practiced by local industry would be sufficient for city to take "affirmative steps to dismantle such a system"). Appalled by the majority's requirement of past discrimination, Justice Marshall, joined by Justices Brennan and Blackmun, argued that the constitutional test for race-based affirmative action should not require a prima facie constitutional violation. Id. at 555 (Marshall, J., dissenting). Suggesting that the well-documented national record of discrimination in the construction industry rendered the Richmond plan constitutional, Justice Marshall would have approved Richmond's affirmative action initiative. Id. at 529–47. Justice Stevens disagreed with the majority's view that a public employer's affirmative action is permissible only when that employer has committed past acts of discrimination. He agreed, however, that in the case at bar, Richmond had not offered sufficient evidence of past discrimination or of any other basis to justify its plan. Id. at 511–12 (Stevens, J., concurring in part and concurring in the judgment).}
minority-owned businesses or that it had passively allowed local contractors to discriminate.\footnote{Id. at 480 (majority opinion).}

\textit{b. The Grutter Decision.} After considerable dithering in previous cases, the Court in \textit{Grutter v. Bollinger} addressed whether diversity may be a compelling state interest.\footnote{539 U.S. 306, 322 (2003).} The specific question in \textit{Grutter} concerned the constitutionality of the University of Michigan Law School’s admission policy, which considered race as a plus factor.\footnote{Id. at 311, 315.} This admissions policy weighed numerous factors including the applicant’s undergraduate grade point average, LSAT score, letters of recommendation, and personal essay.\footnote{Id. at 315.} A goal of the policy was to reach a “critical mass” in the diversity of the student population.\footnote{Id. at 316.} In pursuing this goal, the law school emphasized “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.”\footnote{Id. at 316–17.} Barbara Grutter, a qualified white student who applied for and was denied admission to the law school, alleged that the racial preference incorporated into the admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.\footnote{Id. at 325. In \textit{Gratz v. Bollinger}, 539 U.S. 244, 275 (2003), the Court found the University of Michigan’s undergraduate race-based affirmative action policy unconstitutional. The university’s policy awarded twenty points to underrepresented minorities under an admissions system where an applicant could garner a maximum of 150 points based on factors such as undergraduate grades, test scores, and recommendations. \textit{Id.} at 255. The Court found that this system, although promoting the compelling state interest of diversity, was not narrowly tailored because it did not take an individualized approach to applicants seeking admission. \textit{Id.} at 275.}

Endorsing the view that Justice Powell had expressed in \textit{Bakke}, the Court upheld the law school’s admissions policy, declaring that “student body diversity is a compelling state interest that can justify the use of race in university admissions.”\footnote{Id. at 325.} Thus, the Court
rejected what it had implied in Wygant and Croson—that the only possible compelling state interest to justify race-conscious affirmative action is remedying the past discrimination of the state actor adopting the affirmative action policy.\textsuperscript{287}

The Grutter Court identified educational autonomy as a unique derivative of the First Amendment’s freedom of speech.\textsuperscript{288} Universities may exercise this freedom by adopting admission programs that foster racial diversity.\textsuperscript{289} The Court reasoned that, by attaining a critical mass of minority students, such programs shattered racial stereotypes, promoted cross-racial understanding, and enlivened the classroom experience with a variety of viewpoints.\textsuperscript{290} The Court grounded its view on data, showing that diverse student populations improved learning outcomes and prepared students for the diversity that they would encounter in their professions and in society.\textsuperscript{291} “Nowhere,” the Court observed, “is the importance of such openness more acute than in the context

\textsuperscript{287} See Grutter, 539 U.S. at 328 (observing that Court has “never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination”).

\textsuperscript{288} Id. at 329.

\textsuperscript{289} See id. (citing educational autonomy as one reason law school had compelling interest in achieving diverse student body).

\textsuperscript{290} Id. at 330. The Court provided no guidance as to what it meant by a “critical mass.” See id. (“[T]he Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.”). Estlund interprets “critical mass” to mean something more than “token representation.” Cynthia L. Estlund, Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace, 26 BERKELEY J. EMP. & LAB. L. 1, 36–37 (2005). A critical mass signals a sufficient number of minority students to facilitate frequent, comfortable interactions with other racial groups. Id. The Court’s emphasis on cross-racial interaction and understanding leads Estlund to observe a shift away from the Court’s focus on racial differences. See id. at 17 (noting “the shift of focus from difference and variety to integration and connectedness”). She notes that in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Justice Powell, who announced the judgment of the Court, approved the use of race-conscious admissions policies to achieve diversity. Id. at 15. Justice Powell believed that a diverse student population would expose students to a broad range of ideas and mores. Bakke, 438 U.S. at 313; Estlund, supra at 15. Grutter recognized racial diversity as a compelling state interest, not only because it provides a platform for minority students to express their diverse viewpoints, but also because it helps to achieve racial integration. Estlund, supra at 17. Sowell disputes the view that diversity aids cross-racial understanding. See Sowell, supra note 8, at 182 (asserting “[d]iversity has added nothing” to promoting good relations between groups). Based primarily on anecdotal evidence drawn from around the world, he argues that diversity instigates conflict between groups differing in race, ethnicity, and religion. Id.

\textsuperscript{291} Grutter, 539 U.S. at 330 (citing study claiming diversity helps students prepare for diverse workforce).
of higher education." Exposure to diverse student bodies was beneficial in preparing law students for their profession as attorneys in a diverse workforce. Furthermore, data showed that graduates of elite law schools accounted for a disproportionately high number of United States Senators and federal court judges. Since these law schools train many of our nation’s leaders, the Court applauded Michigan Law School’s efforts to include talented minority students in its student body.

Nevertheless, any admissions program had to be narrowly tailored to comport with the Equal Protection Clause. The law school’s program met this test because the program was flexible, race operating not as a quota but merely as a plus factor among numerous other admissions criteria.

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292 Id. at 332 (quoting Brief for United States as Amicus Curiae at 13). A critical race theorist, Charles Lawrence characterizes diversity as a “liberal defense” of affirmative action. Charles R. Lawrence III, Two Views of the River: A Critique of the Liberal Defense of Affirmative Action, 101 COLUM. L. REV. 928, 946 (2001). Although conceding that diversity brings about some benefits to blacks, he argues that focusing on the goal of diversity causes pernicious effects. He criticizes the “diversity defense” because it perpetuates reliance on metrics such as SAT scores and performance in advanced placement courses, which are not even offered in most minority-neighborhood schools. Id. at 946–47. These metrics tilt the selection process toward white favoritism. Rather than merely achieving cross-racial understanding among the elites who attend prestigious universities and law schools, he prefers an approach that will serve the black community as a whole and dismantle the structural underpinnings of racism. Id. at 951. Peter Schuck also criticizes diversity as a rationale for affirmative action, but for different reasons. Peter H. Schuck, Affirmative Action: Past, Present, and Future, 20 YALE L. & POL’Y REV. 1 (2002). He is not persuaded that racially diverse student populations heighten cross-racial understanding or facilitate cross-racial bonding. See id. at 43 (citing study demonstrating no positive effect from ethnic diversity). Unlike Lawrence, Schuck argues that discarding traditional university admissions criteria results in admitting ill-equipped students. Id. at 77. He warns:

[This well-intentioned tactic will lower academic standards, disserve and stigmatize those minority students who are unprepared for the schools they attend, engender deep resentment on all sides, encourage subterfuge and dissimulation, have perverse effects at the high school level, and eventually bring a once-great university system into disrepute.

293 See Grutter, 539 U.S. at 330 (describing benefits of preparing students to enter diverse workforce as professionals).
294 Id. at 332.
295 See id. (noting importance of making leadership positions available “to talented and qualified individuals of every race and ethnicity”).
296 Id. at 333.
297 Id. at 335–36. The Court also pointed out that the program gave substantial weight to diversity factors other than race. Id. at 338. The law school accepted nonminority applicants whose grades and test scores were lower than underrepresented minority
c. The Implications of Grutter. Grutter held that diversity, for purposes of the Equal Protection Clause, is a compelling state interest in institutions of higher learning. Although the Court did not clarify the magnitude of the “critical mass” needed to meet the goal of a diverse student population, it is clear nonetheless that a critical mass is independent of comparisons to the pool of qualified individuals. A critical mass has nothing to do with a manifest imbalance. The holding of Grutter, however, does not necessarily apply to affirmative action under Title VII. Two issues touch on whether such an extension of Grutter is plausible. First, the standards under the Equal Protection Clause differ from the standards under Title VII. Second, Grutter addressed affirmative action in education, while Title VII applies to affirmative action in employment. These two issues will be discussed below.

The difference between the constitutional and statutory standards argues for recognizing diversity as a justification for affirmative action under Title VII. The strict scrutiny test under the Equal Protection Clause requires a state actor to demonstrate that race-based inequalities are supported by a compelling state interest. This constitutional standard is more restrictive than Title VII’s manifest imbalance standard. It reasonably follows that any compelling state interest justifying differential treatment under the Equal Protection Clause must likewise serve as a valid basis for differential treatment under Title VII. A compelling state interest for constitutional purposes, diversity would seem to meet the

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applicants. Id.

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Jessica Bulman-Pozen argues, to the contrary, that Grutter’s goal of integration implies using a standard like the manifest imbalance requirement to provide guidance as to the appropriate magnitude of a “critical mass.” She believes that the “critical mass” of minority students attending a college or university should reflect the percentage of the minorities in the general population. See Jessica Bulman-Pozen, Note, Grutter at Work: A Title VII Critique of Constitutional Affirmative Action, 115 YALE L.J. 1408, 1435 (2006) (finding “close connection between integration and . . . manifest imbalance”).

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See Johnson v. Transp. Agency, 480 U.S. 616, 627–28 n.6 (1987) (noting in gender discrimination case that “[t]he fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution”); Taxman v. Bd. of Educ., 91 F.3d 1547, 1568 (3d Cir. 1996) (explaining in race discrimination case that “we must measure the Board’s action under the restraints imposed by Title VII rather than the more demanding ones imposed on government action by the Equal Protection Clause”).
One writer questions this analysis. He argues that the Court has consistently differentiated between the standards for affirmative action under the Equal Protection Clause and Title VII. Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. Pa. J. Lab. & Emp. L. 451, 462 (2004). Unlike the Equal Protection Clause, which requires a compelling state interest, Title VII requires past discrimination or a manifest imbalance. *Id.* The Court’s acceptance of diversity as a compelling state interest under the Equal Protection Clause may not signal an acceptance of diversity as a justification of affirmative action under Title VII because seeking to achieve diversity does not address past discrimination or a manifest imbalance. *Id.*

The tougher standard that the Equal Protection clause, compared to Title VII, sets for whether discriminatory conduct is a precondition for affirmative action does not imply a tougher standard for whether diversity is an acceptable alternative justification for affirmative action. The Third Circuit in *Taxman* adopted this view, stating that references to the more demanding constitutional standard relate “to the factual predicate that employers must offer to prove the need for remedial efforts in Title VII as contrasted with Equal Protection affirmative action cases.”

One might argue, however, that the Equal Protection Clause is more demanding than Title VII only to the extent that such cases as *Wygant* and *Croson* required a history of discrimination by the state actor seeking to implement affirmative action. To meet the manifest imbalance requirement of Title VII, an employer need not have engaged in discrimination. The tougher standard that the Equal Protection clause, compared to Title VII, sets for whether discriminatory conduct is a precondition for affirmative action does not imply a tougher standard for whether diversity is an acceptable alternative justification for affirmative action. The Third Circuit in *Taxman* adopted this view, stating that references to the more demanding constitutional standard relate “to the factual predicate that employers must offer to prove the need for remedial efforts in Title VII as contrasted with Equal Protection affirmative action cases.”

__301__ *Taxman*, 91 F.3d at 1568. One writer questions this analysis. He argues that the Court has consistently differentiated between the standards for affirmative action under the Equal Protection Clause and Title VII. Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. Pa. J. Lab. & Emp. L. 451, 462 (2004). Unlike the Equal Protection Clause, which requires a compelling state interest, Title VII requires past discrimination or a manifest imbalance. *Id.* The Court’s acceptance of diversity as a compelling state interest under the Equal Protection Clause may not signal an acceptance of diversity as a justification of affirmative action under Title VII because seeking to achieve diversity does not address past discrimination or a manifest imbalance. *Id.*

__302__ *Taxman*, 91 F.3d at 1559; see also Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 Cornell L. Rev. 1194, 1214 (2000) (arguing that *Taxman*, by rejecting diversity rationale, moved toward strict scrutiny analysis that had been reserved for Equal Protection cases and joined trend to narrow range of permissible affirmative action under Title VII). Now that the Supreme Court, in *Grutter*, has recognized diversity as a compelling state interest in higher education, 539 U.S. at 325, a convergence of the Title VII standard and Equal Protection standard would, ironically in light of Higgins and Rosenbury’s argument, imply that diversity meets the requirements of the statute as well as the Constitution.
diversity, however, may simply not apply to Title VII because diversity is arguably not one of its goals.\textsuperscript{303} Courts, such as the Third Circuit, might insist that the only goal of Title VII is to end the effects of past and present discrimination in the workplace, and that such remediation necessitates addressing manifest imbalances rather than promoting racial diversity.\textsuperscript{304}

The second issue that might limit the extension of \textit{Grutter} to Title VII affirmative action cases is the specificity of the Court’s rationale for recognizing diversity as a compelling state interest in higher education, including the Court’s emphasis on the First Amendment. This rationale would not seem to apply to the workplace. One might argue, however, that a diverse workforce fosters cross-racial understanding and even enhanced productivity, and therefore the \textit{Grutter} rationale applies with equal force to employment cases.\textsuperscript{305}

The \textit{Grutter} Court focused on the importance of diversity in law schools because a high percentage of judges and senators are lawyers.\textsuperscript{306} Since leaders in areas such as industry, finance, law enforcement, and education occupy positions with analogous power and influence, the \textit{Grutter} rationale might argue for diversity in those employment categories. Furthermore, the Court discussed the importance of diversity of the American workforce in gaining competitiveness in the global marketplace.\textsuperscript{307}

More generally, \textit{Grutter} emphasized that diversity advanced the mission of Michigan Law School. A court might similarly find that

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\item \textsuperscript{303} Taxman, 91 F.3d at 1559.
\item \textsuperscript{304} See id. at 1557 ("[U]nless an affirmative action plan has a remedial purpose, it cannot be said to mirror the purposes of the statute, and, therefore, cannot satisfy the first prong of the Weber test."); see also Schurr v. Resorts Int’l Hotel, Inc., 196 F.3d 486, 497 (3d Cir. 1999) (concluding that Title VII permits only remedial affirmative action); Tilles, supra note 301, at 462 ("Under Title VII, an employer may only act to redress past discrimination or a manifest imbalance in its work force.").
\item \textsuperscript{305} One writer, while acknowledging that \textit{Grutter} appears to concentrate on the state interest of promoting education, notes that some aspects of \textit{Grutter} might apply to the public workplace. Kellough, supra note 8, at 127. He points out that one aspect of \textit{Grutter’s} rationale was that diversity helped Michigan Law School perform its educational mission. Diversity might similarly help public employers perform their missions to deliver public services or to represent diverse interests in the decision making process. Id.
\item \textsuperscript{306} \textit{Grutter}, 539 U.S. at 332.
\item \textsuperscript{307} Id. at 330. The Court also discussed the importance of diversity in the military’s officer corps to the nation’s security, and commented that university ROTC programs are the source for many talented officers. Id. at 331.
\end{itemize}
\end{footnotesize}
diversity advances the goals or missions of particular employers even though their goals are not educational per se.\textsuperscript{308} The Seventh Circuit took this approach in \textit{Petit v. City of Chicago}.\textsuperscript{309} In \textit{Petit}, the Chicago police department boosted the raw scores of black patrolmen who took an examination for promotion to sergeant.\textsuperscript{310} Reasoning that promoting black police officers to the rank of sergeant would advance cross-racial understanding within the police force and would even aid in effective law enforcement by engendering trust in the community,\textsuperscript{311} the Seventh Circuit found this preference constitutional under the Equal Protection Clause.\textsuperscript{312} Diversity among the leadership of the police department furthered the compelling “operational need” to serve the ethnically divided city of Chicago.\textsuperscript{313}

The Third Circuit came to a different result when confronting a similar issue in \textit{Lomack v. City of Newark}.\textsuperscript{314} Newark, relying on

\begin{footnotesize}
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\item See Robert K. Robinson, Geralyn McClure Franklin & Karen Epermanis, \textit{The Supreme Court Rulings in Grutter v. Bollinger and Gratz v. Bollinger: The Brave New World of Affirmative Action in the 21st Century}, 36 PUB. PERS. MGMT. 33, 44 (2007) (proposing that affirmative action could apply to private employers). Predicting that courts may extend the \textit{Grutter} rationale to Title VII affirmative action cases, the authors quote a sarcastic passage from Justice Scalia’s dissent in \textit{Grutter}. Justice Scalia ridiculed the majority, stating:  
\begin{quote}
If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a “critical mass” that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate — indeed, particularly appropriate — for the civil service system of the State of Michigan to do so. There, also, those exposed to “critical masses” of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized — indeed, should be praised — if they also “teach” good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring.
\end{quote}
539 U.S. at 347–48 (Scalia, J., dissenting).
\item 352 F.3d 1111 (7th Cir. 2003); see also Alexander v. City of Milwaukee, 474 F.3d 437, 441, 445–46 (7th Cir. 2007) (rejecting preferential race-based policy for promotion from police lieutenant to captain, and finding that, although supported by compelling state interest of diversity, this policy, which was administered on an ad hoc basis, was not narrowly tailored).
\item 310 \textit{Petit}, 352 F.3d at 1112.
\item Id. at 1115.
\item Id. at 1114.
\item Id.
\item 463 F.3d 303 (3d Cir. 2006); see also Dietz v. Baker, 523 F. Supp. 2d 407 (D. Del. 2007). In \textit{Dietz}, Wilmington adopted an affirmative action policy to achieve diversity in the leadership of its police force by taking race into account in decisions to promote officers to police inspector. \textit{Id.} at 412–13. The court invalidated the policy, citing \textit{Lomack} for the
\end{enumerate}
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Grutter, argued that achieving diversity was a compelling state interest justifying the race-based transfer policy of Newark’s fire department. The purpose of this policy was to balance the racial composition of Newark’s fire stations.\textsuperscript{315} The district court found that “educational,” “sociological” and “job performance” enhancements flowed from Newark’s diversity policy,\textsuperscript{316} but the Third Circuit reversed the trial court’s judgment.\textsuperscript{317} The rationale of Grutter did not apply because the mission of a school is education, while the mission of a fire department is firefighting.\textsuperscript{318} The court distinguished Petit, noting that the Seventh Circuit had found a compelling “operational need” in achieving racial diversity in the leadership of the police department of a racially divided metropolitan area.\textsuperscript{319} No operational need justified Newark’s policy.\textsuperscript{320}

Regardless of whether the courts ultimately allow diversity to justify affirmative action under Title VII, the fundamental point is that affirmative action under Title VII needs no such justification. African-Americans are disadvantaged nationwide in pay, job opportunities, and by a high unemployment rate. These disadvantages provide the overarching justification, which is both necessary and sufficient, to support affirmative action. They are the lingering effects of slavery, Jim Crowe laws, and workplace discrimination. These are the effects that Title VII seeks to eradicate. Some courts have accepted the premise that affirmative action is permissible, absent a manifest imbalance, but only if another rationale like diversity fills the void. These courts are wrong because there is no void. Eliminating the manifest imbalance requirement rids affirmative action of an arbitrary hurdle. Diversity is a goal of Title VII, but it should not operate as a precondition to affirmative action.

\textsuperscript{315} Lomack, 463 F.3d at 309.
\textsuperscript{316} Id.
\textsuperscript{317} Id. at 312.
\textsuperscript{318} Id. at 309–10.
\textsuperscript{319} Id. at 310 n.8.
\textsuperscript{320} Id.
3. Integration. Although Grutter makes clear that achieving diversity is related to integrating both the workplace and society, the goal of racial integration deserves separate discussion. Eradicating segregation in the workplace is an express objective of Title VII. The statute provides that it is an unlawful employment practice “to limit, segregate, or classify” workers because of race, religion, sex, or national origin if such classification deprives workers of workplace opportunities.\(^{321}\) The Supreme Court in Weber recognized Congress’s intent to facilitate “the integration of blacks into the mainstream of American society.”\(^{322}\) Integration is perhaps the most ambitious goal of Title VII because it promises to unify a nation divided by racial stereotypes, frustrations, and distrust.

As Professor Estlund points out, the workplace provides a fertile environment for achieving integration through communication, cooperation, and joint decision making.\(^{323}\) Simply by doing their jobs, workers experience “solidarity and connectedness across racial and ethnic lines.”\(^{324}\) The workplace offers a unique setting to advance integration, because workers spend so much time on the job and because the law regulates the workplace more than it regulates most other venues.\(^{325}\)

The manifest imbalance requirement impedes integration by forbidding willing employers to adopt affirmative action plans. Only those who can show a manifest, statistical imbalance may take proactive steps to achieve an integrated workplace. It follows that an employer must dismantle a plan once the imbalance has been rectified, even if de facto segregation, on a societal basis, still puts blacks and whites in different neighborhoods, and on average treats whites to educations in better schools and higher paying jobs in preferable working environments. Professor Anderson observes that allowing affirmative action only when an employer’s workforce

\(^{322}\) United Steelworkers of Am. v. Weber, 443 U.S. 193, 202 (1979). In approving the Kaiser-USWA plan, the Weber Court stated that both the statute and the plan “were designed to break down old patterns of racial segregation and hierarchy.” Id. at 208.
\(^{324}\) Id. at 48.
\(^{325}\) Id.
shows a manifest imbalance thwarts integration. She criticizes the requirements that an employer’s workforce must be “sufficiently unrepresentative to amount to a prima facie violation of the law,” and that “an employer may aim to ‘attain’ but not to ‘maintain’ a racial balance in the workforce.”

The Supreme Court has turned the path to affirmative action into an obstacle course. The Court’s restrictive view of Title VII misreads the statute’s broad, remedial purpose. Title VII’s goal of integration addresses past societal injustices imposed over centuries. The solution is not a numbers game that doles out jobs to black workers in isolated cases. Title VII is not an accounting statute that seeks to reconcile columns of demographic employment figures. Its goal is to end segregation and to establish a racially integrated society with all the benefits—economic, social, and political—that would flow to African-Americans.

V. Conclusion

Private, voluntary affirmative action is a means of achieving equality in the workplace through the exercise of freedom in the marketplace. It is a means through which the private sector seeks to correct racial injustice. The aggregate effect of such efforts may help to transform society. The courts therefore should not

326 See Elizabeth S. Anderson, Integration, Affirmative Action, and Strict Scrutiny, 77 N.Y.U. L. Rev. 1195, 1202–06 (2002) (arguing segregation denies equal economic opportunities and “undermines democratic values”). Anderson faults the law for favoring the compensatory model of affirmative action. This conception of affirmative action waits for injuries to occur and seeks to compensate victims for past discrimination. She urges the Court to adopt the integrative model. This model blames segregation for racial inequality and injustice and sees affirmative action as a forward-looking means of restructuring a more integrated and consequently more just society. Id. at 1197. She criticizes the compensatory model for impugning the moral legitimacy of affirmative action because affirmative action often fails to satisfy that model: innocent white workers may lose jobs or promotions to black workers who have never been victimized by discrimination. Such results would seem more acceptable if affirmative action were conceived as a means of integrating society rather than as a means of compensating victims of discrimination. See id. at 1211 (noting that affirmative action results in excess compensation, which is “crude model of group justice” from compensatory viewpoint); see also Estlund, supra note 290, at 36–37 (discussing importance of racial integration under Title VII).

327 Anderson, supra note 326, at 1215.

328 Id. (citing Johnson v. Transp. Agency, 480 U.S. 616, 639 (1987)).
arbitrarily constrain the use of this remedy. Yet the Supreme Court has devised a system that has converted affirmative action into a wheel of fortune where jobs are won and lost.

Employers may consider race as a factor in hires and promotions, but only within limits that don’t add up. The Supreme Court praises the virtues of voluntary remedial action, and then it stymies employers who would contribute to equality in the workplace. The irony is dazzling. Only those who can show a manifest or conspicuous imbalance between their workforces and the so-called relevant labor market may engage in affirmative action. Having demonstrated such an imbalance, the employer may seek to elevate the number of its minority workforce only until that percentage matches the percentage of minority workers in that all-important local labor market. Then, the plan must stop. The employer may not promote equality in the workplace until, perhaps, another manifest imbalance crops up, and the employer gets another permission slip. Although societal forces, rather than any actions of the employer, may account for the imbalances, the employer must wait passively for the vagaries of the marketplace to tip its minority labor force into negative territory.

These are the imponderable results of the clash of two competing ideologies. Opponents of affirmative action argue that it is a pretty name for reverse discrimination. They denounce affirmative action as a euphemism for a practice that inflicts harm on innocent workers who are simply trying to earn the best living they can. Critics believe that Title VII does not tolerate racial preferences, no matter how laudatory the motives. Supporters defend affirmative action as an effective means to combat workplace inequality, a form of racial discrimination that has proven intractable. They believe that relying on lawsuits to combat discrimination is like trying to defeat an army by fighting it one soldier at a time; the struggle will never end. The current regime for affirmative action under Title VII represents a flawed compromise between these conflicting viewpoints.

Statistical comparisons between workforces and labor markets are indispensable in pattern-and-practice cases. Such calculations should have no place in the law of affirmative action. By requiring employers to show a manifest imbalance, the Supreme Court does
not advance the purposes of Title VII. The manifest imbalance requirement does not promote equality in the workplace. It does not help eradicate present discrimination or the effects of past discrimination. Nor does it protect the rights of non-minority workers. The goals of meritocracy and equality of opportunity in the workplace are not advanced by the manifest imbalance requirement. Retaining the requirement will not move the country closer to diversity or racial integration. Despite a high-minded reliance on statistical comparisons wrought by psychometricians, the manifest imbalance requirement confounds voluntary, private efforts to bring about progressive change. The Supreme Court believes that employment discrimination on a national scale, no matter how pervasive or tenacious, does not justify the voluntary actions of individual employers to consider race in decisions to hire or to promote. The manifest imbalance standard is the Court’s contorted effort to justify a measure that finds its true justification elsewhere. The bloated level of minority unemployment is the present effect of a history of racism and discrimination. Ending minority underemployment and integrating the workplace are all the justification that affirmative action needs. This is all the justification that Title VII requires.

Affirmative action plans must not unnecessarily trammel the rights of nonminority workers. The Supreme Court has repeatedly issued this injunction, and the Court is right. Once the rights of such workers are safeguarded, an employer should be free to adopt voluntary, race-conscious policies. Imbalances in the employer’s workforce are irrelevant. So are traditionally segregated job categories. Inequality in the job market operates on a societal level. The problem is not limited to particular companies or even to particular industries. When an employer adopts a plan, the plan should not have to specify an end point. Affirmative action will end when African-Americans have attained equality in the workplace.