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Finding a "Manifest Imbalance": The Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII

Twenty-five years have passed since Congress enacted the Civil Rights Act of 1964, and yet stark disparities continue to exist between whites and blacks, and often men and women, in income, housing, health care, and education.¹ Some of the most striking of these disparities can be found in employment, where, despite Title VII's prohibition of race and sex discrimination,² large segments of the American work force remain distinctly segregated along racial and gender lines.³ The occupational segregation that once was enforced by overt discrimination is today perpetuated by more subtle forms of discrimination and, perhaps more decisively, by the continuing disparities in education, family background, and other indicators of life chances.⁴

1. See generally Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 673-86 (1985).

2. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1982). Section 703(a) of the Act, 78 Stat. 255 (1964), as amended by 86 Stat. 109 (codified as amended at 42 U.S.C. § 2000e-2(a)), provides that "it shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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

3. Blacks in 1980, for example, comprised only 2.6% of all engineers, 2.7% of all lawyers, 3.1% of all physicians, and just more than 5% of all carpenters and electricians; at the same time, blacks made up nearly 35% of all garbage collectors and more than 40% of all household servants. See Pettigrew, *supra* note 1, at 677-78. Occupational segregation according to sex also remains striking. See SEX SEGREGATION IN THE WORKPLACE (B. Reskin ed. 1984); WOMEN AND THE WORKPLACE (M. Blaxall & B. Reskin eds. 1976); WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB (B. Reskin & H. Hartman eds. 1986); Blau & Ferber, *Occupations and Earnings of Women Workers*, in WORKING WOMEN: PAST, PRESENT, FUTURE 37-68 (K. Koziara, M. Moskow & L. Tanner eds. 1987); Rhode, *Occupational Inequality*, 1988 DUKE L. J. 1207, 1208-12; Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397, 1397-98 & nn.3-5 (1988).

Generally, the statistics show measurable but uneven progress toward integrating many occupational categories. Compare Blumrosen, *Expanding the Concept of Affirmative Action to Address Contemporary Conditions*, 13 N.Y.U. REV. L. & SOC. CHANGE 297 (1984-1985) (noting affirmative action's contribution toward ending occupational segregation) with Seymour, *Response*, 13 N.Y.U. REV. L. & SOC. CHANGE 321 (1984-1985) (arguing that Blumrosen's statistics do not adequately reflect the extent of continuing occupational segregation). See generally R. FARLEY & W. ALLEN, *THE COLOR LINE AND THE QUALITY OF LIFE IN AMERICA* 256-82 (1987).

4. A report by the U.S. Commission on Civil Rights recently described this effect:

Discrimination has become a process that builds the discriminatory attitudes and actions of individuals into the operations or organizations and social structures (such as education, employment, housing and government). Perpetuating past injustices into the present, and

Although some observers have insisted upon attributing these disparities to the differing "interests," "skills," or "choices" of various racial or gender groups,⁵ the Supreme Court has generally been less reluctant to admit the role played by a long national history of race and sex discrimination.⁶

manifesting itself through statistically measurable inequalities that are longstanding and widespread, this discriminatory process produces unequal results along the lines of race, sex, and national origin, which in turn reinforce existing practices and breed damaging stereotypes which then promote existing inequalities that set the process in motion in the first place.

U.S. COMM. ON CIVIL RIGHTS, *AFFIRMATIVE ACTION IN THE 1980S: DISMANTLING THE PROCESS OF DISCRIMINATION* 5 (1981). See generally Rhode, *supra* note 3 (analyzing the complex role of past discrimination in perpetuating current sex segregation in employment).

5. See, e.g., Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1315 (1986):

Because groups — black, white, Hispanic, male, and female — do not necessarily have the same distribution of, among other characteristics, skills, interest, motivation, and age, a fair shake system may not produce proportional representation across occupations and professions, and certainly not at any given time. This uneven distribution, however, is not necessarily the result of discrimination.

and Loury, *Why Should We Care About Group Inequality?*, 5 SOC. PHIL. & POLY. 249, 249-50 (1987):

Why should the mere existence of group disparities evidence the oppressive treatment of individuals? There is little support in the historical record for the notion that, in the absence of oppression based upon group membership, all socially relevant aggregates of persons would achieve roughly the same distribution of economic rewards. Indeed, to hold this view is to deny the economic relevance of historically determined and culturally reinforced beliefs, values, interests, and attitudes which constitute the defining features of distinct ethnicities. Distinct cultures will necessarily produce distinct patterns of interest and work among their adherents.

See also T. SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 42-46 (1984); Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 821, 825 (1989) (reviewing arguments that women's underrepresentation in certain job categories and overall sex-based wage disparities can be explained by women's career interests rather than discrimination).

6. Compare, e.g., Professor Loury's statement, *supra* note 5, with *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) ("[A]bsent explanation, it 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 of the community from which employees are hired.").

See also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 370-71 (1978) (Brennan, J., concurring in part and dissenting in part) ("Davis clearly could conclude that the serious and persistent underrepresentation of minorities in medicine depicted by these statistics is the result of handicaps under which minority applicants labor as a consequence of a background of deliberate, purposeful discrimination against minorities in education and in society generally . . ."); 438 U.S. at 395-96 (Marshall, J., concurring in part and dissenting in part):

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment.

The relationship between those figures [outlining modern occupational segregation] and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death the impact of the past is reflected in the still disfavored position of the Negro.

Justice Powell, writing for the plurality, did not dispute the inference of societal discrimination, but instead rejected societal discrimination as an adequate predicate for affirmative action under the equal protection clause. See 438 U.S. at 307.

But see *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 726 (1989) ("There are numerous explanations for this dearth of minority participation [in Richmond's construction industry], including past societal discrimination in education and economic opportunities as well as both

In the past twenty years, the use of hiring or promotional preferences favoring traditionally disadvantaged groups has become one of the most frequent and effective tools for ending occupational segregation.⁷ Affirmative action plans are now said to number, by one estimate, in the "hundreds of thousands" and members of the business community have become some of their most enthusiastic proponents.⁸ Throughout this period, however, there has often been uncertainty over the circumstances under which an employer could voluntarily adopt such a plan without risking Title VII liability to majority employees. Before the Court's 1979 opinion in *United Steelworkers of America v. Weber*,⁹ it was not at all clear that private employers could ever voluntarily adopt affirmative action.¹⁰ *Weber* settled at least that much, holding that an employer could use affirmative action without violating Title VII if the plan was justified by "manifest racial imbalances in traditionally segregated job categories."¹¹ Such a "manifest

black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.").

The Court's recent rulings in *Crosby* and *Wards Cove Packing Co. v. Atonio*, 57 U.S.L.W. 4583 (1989) (rejecting a claim of disparate-impact discrimination under Title VII based on intra-work force statistical comparisons and requiring Title VII plaintiffs to carry the burden of proving absence of "business necessity" of challenged employment practices) may fairly be taken as a signal, however, of a growing reluctance on the Court to infer discrimination from the existence of racial or gender group inequalities. See Greenhouse, *The Court's Shift to Right*, N.Y. Times, June 7, 1989, at A1, col. 1. Those rulings led Justice Blackmun, in a short, stinging dissent to *Atonio*, to "wonder[] whether the majority still believes that race discrimination — or, more accurately, race discrimination against nonwhites — is a problem in our society, or even remembers that it ever was." 57 U.S.L.W. at 4593 (Blackmun, J., dissenting).

7. See Blumrosen, *supra* note 3 (attributing progress in ending occupational segregation to affirmative action programs); Goldner, *Affirmative Action: Passing the Test?*, AM. LAW., Oct. 1987, at 29 (case study of affirmative action admissions program at UCLA Law School); Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524, 572-73 (1987) (citing studies and concluding that "few other remedies work as well or as quickly"); Smith, *Review: Affirmative Action*, 27 HOW. L. J. 495, 516-17 (1984).

8. BUREAU OF NATL. AFFAIRS, *AFFIRMATIVE ACTION TODAY* 101-43 (1986); Norton, *Equal Employment Law: Crisis in Interpretation — Survival Against the Odds*, 62 TUL. L. REV. 681, 686 n.17, 713-14 (1988); Schwartz, *supra* note 7, at 525 & n.11 ("The 1987 decisions [upholding affirmative action] were . . . enthusiastically received by the business community."); Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 661-62 (1989).

9. 443 U.S. 193 (1979).

10. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 302 (1978) (opinion of Powell, J.) ("[W]e have never approved preferential classifications in the absence of proved constitutional or statutory violations.").

11. 443 U.S. at 197. There is also a second prong to *Weber's* test of voluntary affirmative action: Once the employer has shown the requisite "manifest imbalance" predicate, it must then be able to demonstrate that its plan "does not unnecessarily trammel the interests of [majority] employees." 443 U.S. at 208. Among the factors considered relevant to the *Weber* Court in making this second determination were the plan's temporary nature; the fact that the plan did not "create an absolute bar to the advancement of [majority] employees," nor require their discharge; and that the plan "is not intended to maintain racial balance, but simply to eliminate a racial imbalance." 443 U.S. at 208. The relevance of these factors, and of the second prong itself, was reaffirmed in *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 637-40 (1987) (discussed more fully *infra* at Section I.C).

imbalance," the Court held, was sufficient to ensure that affirmative action was being used remedially as a cure for past discrimination.¹² What has remained disputed, however, is whether an employer is free to use affirmative action aimed at remedying a manifest imbalance in its work force caused not by its own prior discrimination, but by wider societal discrimination.¹³

The waters have been muddied by the recent line of equal protection cases culminating in *City of Richmond v. J.A. Croson Co.* in which the Court seems to have rejected societal discrimination as a compelling governmental interest sufficient to justify a public affirmative action plan under a strict-scrutiny analysis.¹⁴ These constitutional cases led some courts to conclude that the Court meant to require a showing of past discrimination by any employer, public or private, wishing to adopt affirmative action, regardless of whether the plan was challenged under Title VII or the equal protection clause of the fourteenth amendment.¹⁵ Even after the Court's recent ruling in *Johnson v.*

12. See 443 U.S. at 208; 443 U.S. at 216 (Blackmun, J., concurring); *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 632 (1987); see also *infra* note 19 and accompanying text.

13. "Societal discrimination" is used here simply to connote discriminatory acts not directly attributable to the employer seeking to adopt affirmative action. Such acts might include, *inter alia*, the exclusion of women or minorities from craft unions, job training programs, or other educational facilities essential to effective competition in the employment market.

14. See *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (majority applying strict scrutiny to benign racial classification in set-aside program for city contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality holding unconstitutional city's collective bargaining agreement provision granting limited preference to minority teachers in layoff decisions); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plurality striking down inflexible racial quota in admissions to state university medical school).

15. Eight years after *Weber*, for example, the Court of Appeals for the District of Columbia Circuit relied heavily on the Supreme Court's constitutional analysis to find that a race-conscious hiring plan voluntarily adopted by the Washington, D.C., fire department violated Title VII. *Hammon v. Barry*, 813 F.2d 412 (*Hammon I*), reh'g denied, 826 F.2d 73 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 2023 (1988). *Hammon I* perhaps epitomizes the confusion that has beset some courts over the appropriate standards to be applied depending upon whether the disputed plan was voluntarily adopted or ordered by a court, and whether it is challenged under Title VII or the equal protection clause. In *Hammon I*, the court of appeals noted that the Supreme Court had ruled in *Wygant* that affirmative action programs adopted by public employers are constitutional only if the plans are necessary to remedy past discrimination by the employer itself. It also looked to *Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), in which the Court suggested that affirmative action plans should be imposed by a court order only where the employer itself is guilty of past discrimination. The court then reasoned that *Weber*, read in the light of *Wygant* and *Sheet Metal Workers*, meant to validate affirmative action only in cases in which it was employed to remedy past discrimination by the employer; if there were insufficient evidence to suggest that the employer had itself engaged in discriminatory practices, then affirmative action would violate Title VII and, if the employer were a governmental unit, the fourteenth amendment as well. See 813 F.2d at 420-25. Under this approach, which was clearly rejected in *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616 (1987), the restraints placed upon private affirmative action by Title VII would run essentially parallel to the restraints imposed by the fourteenth amendment upon state actors, and affirmative action would be permissible voluntarily only where it could likely be ordered by a court after trial, *i.e.*, where the employer has violated Title VII or the fourteenth amendment by past discrimination. The Court in *Johnson* made clear, however, that the restraints imposed by Title VII fall short of

Transportation Agency, Santa Clara County, California,¹⁶ in which the Court unequivocally distinguished Title VII from constitutional constraints on affirmative action, some observers insist that the Court's equal protection cases imply a requirement of past employer discrimination as a predicate for voluntary affirmative action under Title VII as well.¹⁷

The question of whether a private employer may adopt affirmative action aimed at remedying societal discrimination rather than merely its own discriminatory acts has significant implications for the reach of affirmative action in the private sector. The answer will determine whether newer private employers that could be shown conclusively never to have discriminated may nonetheless use affirmative action to remedy manifest imbalances in their work forces caused by past societal discrimination. More importantly, if employers *are* permitted to use affirmative action to reach societal discrimination alone, that calls into question the usefulness of the statistical formulation endorsed by the Court in *Johnson* for determining when the requisite "manifest imbalance" exists. Reforming the statistical test around a more explicit societal discrimination predicate would allow private employers to remedy voluntarily a broader range of racial and gender imbalances, turning affirmative action into a more effective vehicle for breaking down traditional patterns of occupational segregation, a driving purpose of Title VII.¹⁸

those imposed by the Constitution, and also that voluntary programs are to be judged more leniently than those involuntarily imposed. 480 U.S. at 627 n.6, 630 n.8.

16. 480 U.S. 616 (1987).

17. See, e.g., *Hammon v. Barry*, 826 F.2d 73, 80-81 (D.C. Cir. 1987) (*Hammon II*), cert. denied, 108 S. Ct. 2023 (1988) (*Johnson* did not alter required predicate of past discrimination by employer adopting remedy); D. McDOWELL, AFFIRMATIVE ACTION AFTER THE *JOHNSON* DECISION 105 (1987) ("Plans designed to meet the effects of 'Societal Discrimination' . . . are extremely suspect.").

Some other observers have adopted a more agnostic point of view. See, e.g., Kirp & Weston, *The Political Jurisprudence of Affirmative Action*, 5 SOC. PHIL. & POLY. 223, 243-44 (1987) (raising the question, "What showing of past discrimination — either by the institution or in society at large — is required before race consciousness is warranted . . . ?," and treating it as one of the "fundamental legal questions" left unresolved after *Johnson*).

The relationship between the constitutional and statutory limitations on affirmative action has long puzzled a number of lower courts. See generally Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988); Note, *Voluntary Public Employer Affirmative Action: Reconciling Title VII Consent Decrees with the Equal Protection Claims of Majority Employees*, 28 B.C. L. REV. 1007, 1030-34 (1987) (reviewing the confusion faced by some lower courts during the interval between *Weber* and *Johnson*).

Even after the Court's explicit insistence in *Johnson* that the statutory and constitutional tests for affirmative action are not the same, the analyses continue to be occasionally intermingled. See, e.g., *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) (applying *Johnson*'s "manifest imbalance" test to determine constitutionality of City's affirmative action plan).

18. See *Weber*, 443 U.S. at 208 (Title VII was "designed to break down old patterns of racial segregation and hierarchy. [It was] structured to 'open employment opportunities for Negroes in occupations which have traditionally been closed to them.'" (quoting Sen. Humphrey, 110 CONG. REC. 6548 (1964))).

This Note analyzes the “manifest imbalance” standard developed in *Weber* and *Johnson* and the various approaches the lower courts have taken in trying to apply the test. Part I examines the *Weber* and *Johnson* opinions in some detail, and argues that the Court intended to permit affirmative action aimed at remedying the evident effects of past discrimination, regardless of whether the employer or society at large is to blame. Section I.A describes the diverging constitutional and statutory standards for evaluating voluntary affirmative action programs, and the policies behind the divergence. Sections I.B and I.C take a closer look at the opinions in *Weber* and *Johnson* and Section I.D concludes that the Court has developed a Title VII standard that permits affirmative action aimed at remedying the lingering effects of societal discrimination. Part II focuses on the specific statistical formulation prescribed by *Johnson* for determining the existence of a “manifest imbalance” in an employer’s work force. It traces the components of the *Johnson* test back to their roots in earlier Title VII jurisprudence, in which the test was used to detect illegal discrimination by a particular employer. Part III considers how the *Johnson* “manifest imbalance” test has worked in practice. It describes the varying and sometimes conflicting approaches taken by the lower courts in searching for the appropriate statistical work force comparisons, and suggests that *Johnson*’s two-track test forces courts to undertake hair-splitting analyses of job qualifications and labor pools without giving them the criteria by which to make the necessary assessments. Finally, Part IV argues that the distinctions between skilled and unskilled job categories drawn by *Johnson*’s two-track statistical test are unnecessary and, in fact, undesirable. The Note concludes by proposing a unified standard by which an employer’s work force would, in all cases, be compared to the local general labor market to determine whether the requisite “manifest imbalance” exists. This section argues that such a unified standard is designed to reveal the continued impact of past societal discrimination, rather than evaluate a particular employer’s culpability, and is therefore more consistent with Title VII’s broad allowance for voluntary remedial measures, emphasized by the Court in *Johnson* and *Weber*. The unified test would also enable courts to sidestep most of the vexing questions of work force and labor pool analysis now required by *Johnson* and presented in Part III.

I. “MANIFEST IMBALANCE” UNDER *WEBER* AND *JOHNSON*

All courts agree that voluntary affirmative action in any employment context must be remedial.¹⁹ The disagreement typically con-

19. *But see* Note, *supra* note 8 (arguing that *Weber* and *Johnson* can be read to allow voluntary affirmative action based on nonremedial business objectives). Whatever virtues there might be to wholly nonremedial affirmative action in employment, it is clear that the courts have moved beyond this point in the debate and that the remedial purpose requirement is now settled. *See, e.g., Johnson*, 480 U.S. at 632 (“The requirement that the ‘manifest imbalance’ relate to a ‘tradi-

cerns whether, for purposes of Title VII, the required predicate of discrimination can be satisfied without employer guilt. Although the freedom of public employers to remedy societal discrimination through affirmative action seems increasingly constrained by the fourteenth amendment, the freedom of private employers to do so under Title VII seems increasingly certain. A close look at the Court's opinions in *Weber* and *Johnson* suggests that, regardless of the Constitution's constraints upon public employers, Title VII permits an employer to adopt affirmative action targeted at remedying society's discrimination rather than its own unlawful practices.

A. *Diverging Statutory and Constitutional Standards*

After *Johnson*, there can be no doubt that the standards for evaluating voluntary affirmative action programs are different under Title VII and the equal protection clause of the fourteenth amendment. To survive constitutional scrutiny, an affirmative action plan adopted voluntarily by a public employer must be designed to remedy past discrimination traceable in some way to the employer itself.²⁰ A desire to

nationally segregated job category' provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of *eliminating the effects of employment discrimination . . .*") (emphasis added); 480 U.S. at 650 (O'Connor, J., concurring in judgment) ("[T]he employer must point to evidence sufficient to establish a firm basis for believing that remedial action is required . . .") (emphasis added); *Ledoux v. District of Colum.*, 820 F.2d 1293, 1299 (D.C. Cir.) ("Under [the *Weber* Court's] framework, a court must answer the following two questions: *first, was adoption of the plan justified as a remedial measure*, and, second, does the plan unnecessarily trammel the legitimate interests of nonminority employees.") (emphasis added), *rehg. granted*, 833 F.2d 368 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988); *Hammon v. Barry*, 826 F.2d 73, 74, 80-81 (D.C. Cir. 1987) ("[A] predicate of discrimination is required before an employer may lawfully employ a race-conscious hiring [plan]."), *cert. denied*, 108 S. Ct. 2023 (1988).

It is possible, of course, to be sympathetic to the concept of nonremedial affirmative action and yet to acknowledge that the courts have been decidedly less so. See Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1987) (advocating the merits of nonremedial affirmative action while conceding that "the Court has approved affirmative action only as a precise penance for the specific sins of racism a government, union, or employer has committed in the past"). It is best to admit, however, as Professor Sullivan does, that allowing nonremedial affirmative action would entail a *change* in the law, not merely consistent application of existing law.

20. A majority of the Justices in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), agreed that a public employer would have a sufficiently compelling interest in remedying either (1) the present effects of its own past discriminatory employment practices or (2) the present effects of private employment discrimination if the public employer's spending decisions had reinforced or perpetuated that private discrimination. See 109 S. Ct. at 719-20, 729 (plurality); 109 S. Ct. at 734-35 (Kennedy, J., concurring in judgment); 109 S. Ct. at 743-44 (Marshall, J., dissenting). Justice O'Connor suggested, for example, that even if the City of Richmond could not show that it had itself discriminated against black contractors in the awarding of contracts, it could still justify the use of affirmative action "if the city could show that it had essentially become a 'passive participant' [through its award of prime contracts] in a system of racial exclusion practiced by elements of the local construction industry." 109 S. Ct. at 720. Justice O'Connor insisted that this allowance for a limited reach toward curing private discrimination exceeded the interpretation frequently given *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), that would permit public affirmative action to remedy only direct governmental discrimination. See 109 S. Ct. at 717; see also *Wygant*, 476 U.S. at 269-84 (plurality opinion); Michigan

remedy the general effects of societal discrimination will almost certainly be found not to be a compelling governmental purpose sufficient to survive strict scrutiny.²¹ While the Court has been careful not to require a public employer actually to prove itself guilty of past constitutional or statutory violations in order to employ affirmative action, it has required that the employer have a "firm basis" for believing there has been employment discrimination requiring remedy.²²

The majority in *Johnson* made clear that Title VII analysis is something quite different. The defendant in *Johnson* was a public employer, but the plaintiff in *Johnson* did not raise a constitutional challenge, alleging instead only that the affirmative action plan violated Title VII.²³ This enabled the Court to focus exclusively on the duties established by Title VII, setting aside what it held were the quite separate requirements of the fourteenth amendment. After considering Title VII's legislative history, the Court held that the restraints placed by the statute upon an employer's freedom to adopt voluntarily an affirmative action plan fall short of those imposed by the Constitution: "The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution."²⁴ Just how far short the demands of Title VII fall is not entirely settled, but after *Johnson* at least one critical difference between the two standards seems clear: Title VII, unlike the fourteenth amendment, does not require an employer to suggest that it may itself be guilty of past discrimination in order to justify the

Road Builders Assn. v. Milliken, 834 F.2d 583, 589-90 (6th Cir. 1987) (applying *Wygant* and reviewing other lower court interpretations requiring a predicate of past discrimination by the governmental unit itself), *affd. per curiam*, 109 S. Ct. 1333 (1989).

21. See *Croson*, 109 S. Ct. at 724; *Wygant*, 476 U.S. at 274, 276 ("This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."); 476 U.S. at 288 (O'Connor, J., concurring) ("I agree with the plurality that a governmental agency's interest in remedying 'societal' discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 310 (1978) (rejecting societal discrimination as an adequate factual predicate for voluntary affirmative action in the equal protection context); see also Jones, *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 408 (1988); Schwartz, *supra* note 7, at 553-61 (1987) (criticizing the Court's rejection of societal discrimination as an adequate predicate for affirmative action by public employers under equal protection analysis).

22. See *Wygant*, 476 U.S. at 286, 292 (O'Connor, J., concurring) ("This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required."); 476 U.S. at 277 (opinion of Powell, J.) ("[T]he trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."); *Johnson*, 480 U.S. at 650-51 (O'Connor, J., concurring in the judgment).

23. 480 U.S. at 620 n.2.

24. 480 U.S. at 628 n.6 (emphasis in original).

use of affirmative action. Although there remain some dissenters,²⁵ the standards that have emerged from *Johnson* and *Weber* appear to hold that an employer is free to adopt race- or gender-conscious remedies designed to undo harm lingering from a history of discrimination by society at large.

The current standards for Title VII analysis of voluntary affirmative action programs, including the allowance for extending their reach to remedy societal discrimination, are best understood by tracing their development from their roots in *Weber*.

B. *Steelworkers v. Weber*

The controversy that eventually reached the Supreme Court in *Weber* originated at the Kaiser Aluminum & Chemical Corporation plant in Gramercy, Louisiana. The work force at the Gramercy plant, and fourteen other Kaiser facilities elsewhere, was overwhelmingly white. Although thirty-nine percent of the Gramercy area labor force was black at the time the affirmative action plan was adopted, Kaiser's Gramercy plant work force at that time was less than two percent

25. Justice O'Connor, for example, in her separate opinion concurring with the Court's judgment in *Johnson*, rejected the wedge driven by the Court between constitutional and statutory analysis and insisted that an employer's duty under Title VII is the same as under the fourteenth amendment: in each case, the employer may adopt affirmative action only if it has "a firm basis for believing that remedial action was required"; statistical disparities provide such a "firm basis" only if they are stark enough to make out a Title VII prima facie case of past discrimination by the employer. See 480 U.S. at 649 (O'Connor, J., concurring in judgment).

Her insistence that the employer have a "firm basis" for believing that it does have such legal obligations is designed to ensure that affirmative action is not used by an employer that has never discriminated but which desires to ameliorate the effects of societal discrimination reflected in its work force. "Evidence sufficient for a prima facie Title VII [case] against the employer itself," she wrote in *Johnson*, "suggests that the absence of women or minorities in a work force cannot be explained by general societal discrimination alone and that remedial action is appropriate." 480 U.S. at 653 (O'Connor, J., concurring in the judgment). Earlier, in her *Wygant* opinion, she had explained her view in criticizing the lower court rulings upholding the Jackson school board's affirmative action plan:

The courts below ruled that a particularized, contemporaneous finding of discrimination was not necessary and upheld the plan as a remedy for "societal" discrimination, apparently on the assumption that in the absence of a specific, contemporaneous finding, any discrimination addressed by an affirmative action plan could only be termed "societal." I believe that this assumption is false . . .

476 U.S. at 289 (citation omitted). Thus, Justice O'Connor would allow voluntary affirmative action only where (1) there exists a formal finding that the employer has engaged in past illegal discrimination, or (2) past illegal discrimination by the employer is reasonably suspected, although not yet officially proven. This allowance does not seem well calculated to encourage voluntary employer action since it still would apparently require an employer to produce, at the least, evidence sufficient or nearly sufficient to establish a prima facie Title VII case against itself. Justice O'Connor's approach was also clearly rejected by the majority in *Johnson*. 480 U.S. at 632-33.

Besides Justice O'Connor, another dissenter is former Judge Starr of the Court of Appeals for the District of Columbia Circuit. Evaluating a voluntary affirmative action plan after *Johnson*, Judge Starr found support in *Johnson* for the circuit court's earlier holding that "a predicate of discrimination is required before an employer may lawfully employ a race-conscious remedial device." *Hammon v. Barry*, 826 F.2d 73, 80-81 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 2023 (1988).

black.²⁶ Yet this disparity was not attributed to discrimination by Kaiser,²⁷ but rather to the historical exclusion of blacks from the craft unions from which Kaiser hired its employees.²⁸ Until 1974, Kaiser's policy was to hire only employees with prior craft experience; since the unions discriminated against blacks, few blacks were able to gain the experience required by Kaiser. Fearing a possible lawsuit by black employees alleging discrimination and under pressure from the Office of Federal Contract Compliance,²⁹ Kaiser decided to change its policy and to train more black workers itself. In February 1974, Kaiser and the United Steelworkers union agreed to institute a program to train new craftworkers and to train one black worker for every white worker admitted to the program. Brian Weber, a white employee hired six years earlier, was denied a spot in the training program and brought suit under Title VII.³⁰

The Fifth Circuit sustained Weber's challenge and held that the training program's racial preferences violated Title VII because they were not founded upon a finding of past discrimination by Kaiser.³¹ Kaiser was not free, the court held, to employ affirmative action to remedy past *societal* discrimination, only its own.³² Judge Wisdom dissented to the Fifth Circuit's conclusion and argued that it was unrealistic to require an employer to convict itself of past illegal discrimination before allowing it to adopt voluntary remedial measures. Such a requirement would force employers to expose themselves to liability under Title VII to minority or female employees and would be a pow-

26. 443 U.S. at 198-99.

27. According to the fact findings of the lower courts — findings that were not disturbed by the Supreme Court — Kaiser itself was never guilty of any discriminatory practice since it opened its Gramercy plant in 1958. See 563 F.2d 216, 224 (5th Cir. 1977), *revd. sub nom.* United Steelworkers of America v. Weber, 443 U.S. 193 (1979). Judge Wisdom, in his dissent, averred that this finding was "highly questionable," see 563 F.2d at 229 n.7 (Wisdom, J., dissenting), but all legal analysis of the affirmative action plan was based upon the assumption that Kaiser itself had never discriminated. Judge Wisdom suggested that "[i]n spite of the district court's finding that the defendants had not discriminated against blacks at Gramercy, there were arguable violations" sufficient to justify voluntary affirmative action under his proposed "arguable violation" standard. 563 F.2d at 231 (Wisdom, J., dissenting).

28. See 443 U.S. at 198; see also 443 U.S. at 212 n.* (Blackmun, J., concurring).

29. Kaiser had sought to justify its affirmative action program on the alternative ground that its prior conduct amounted to an "arguable violation" of Title VII's prohibition of racial discrimination. But because the *Weber* majority held that Title VII does not require an employer to show an actual or "arguable" violation of its own, but merely to point to a "conspicuous racial imbalance in traditionally segregated job categories," the Court found it unnecessary to consider Kaiser's argument. 443 U.S. at 209 n.9 and accompanying text; see also 443 U.S. at 208 n.8 ("This is not to suggest that the freedom of an employer to undertake race-conscious affirmative action efforts depends on whether or not his effort is motivated by fear of liability under Title VII.").

As for the pressure Kaiser felt to institute affirmative action, see 443 U.S. at 222-23 (Rehnquist, J., dissenting); 563 F.2d at 228-29 (Wisdom, J., dissenting).

30. 443 U.S. at 199.

31. See 563 F.2d at 225.

32. 563 F.2d at 224-25.

erful disincentive to voluntary efforts to achieve the driving aim of the Civil Rights Act of 1964: the integration of blacks into the economic mainstream.³³ Judge Wisdom urged instead the use of an "arguable violation" standard, requiring an employer to show only that a violation of Title VII may have occurred in the past without requiring that the employer actually produce evidence sufficient to prove a violation.³⁴

Judge Wisdom also offered an alternative ground upon which to uphold the Kaiser plan: remedying societal discrimination.³⁵ He acknowledged that such a "societal discrimination justification" for voluntary affirmative action was somewhat novel, but found that it served the policy of Title VII.³⁶ He concluded:

[I]n spite of our newly adopted equality, the pervasive effects of centuries of societal discrimination still haunt us. Kaiser and the United Steelworkers sought in a reasonable manner to remedy some of those effects in employment practices. Their actions may or may not be just to all its employees; they may or may not be wise; but I believe they are legal.³⁷

The Supreme Court reversed the Fifth Circuit and also declined to adopt Judge Wisdom's more flexible "arguable violation" standard. Instead, in upholding the Kaiser affirmative action plan, it adopted a test more liberal than the "arguable violation" standard Judge Wisdom proposed and much closer, if not identical, to the "societal discrimination" predicate he had alternatively suggested.³⁸ The Court reviewed Title VII's legislative history and concluded that Congress intended the statute to serve as a broad remedial tool for tearing down social and economic barriers that were keeping many blacks poor and unemployed. "Congress' primary concern," the Court wrote, "in enacting the prohibition against racial discrimination in Title VII of the Civil Rights Act of 1964 was with 'the plight of the Negro in our economy.'"³⁹ The Court found that Congress had aimed especially to encourage voluntary private efforts "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."⁴⁰ It stated:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who

33. See 563 F.2d at 230-31 (Wisdom, J., dissenting).

34. See 563 F.2d at 230-34 (Wisdom, J., dissenting).

35. 563 F.2d at 234 (Wisdom, J., dissenting).

36. See 563 F.2d at 235-36 (Wisdom, J., dissenting).

37. 563 F.2d at 239 (Wisdom, J., dissenting).

38. Justice Blackmun, for instance, in his concurring opinion in *Weber* was inclined to embrace Judge Wisdom's "arguable violation" test. He wrote, however, that he was persuaded to go along with the majority's more "expansive" allowance for voluntary affirmative action, one that "sweep[s] far more broadly than the class of 'arguable violations' of Title VII." See 443 U.S. at 211-13 (Blackmun, J., concurring).

39. 443 U.S. at 202 (quoting remarks of Sen. Humphrey, 110 CONG. REC. 6548 (1964)).

40. 443 U.S. at 204 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)).

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.⁴¹

The Court’s emphasis on “centuries of racial injustice” and “traditional patterns of racial segregation and hierarchy” suggests that it was looking beyond merely isolated and discrete instances of illegal discrimination by particular employers. The “societal discrimination” which the Court rejected as a basis for affirmative action under its constitutional standards⁴² looms large as an apparently acceptable basis for the affirmative action in *Weber*. The *Weber* Court noted that Title VII did not *require* employers to address “de facto racial imbalance[s],” but neither did it forbid them from doing so.⁴³ It is significant that the Court chose to speak in terms of “de facto imbalance” — a term that implies something broader than only imbalances created by identifiable instances of illegal discrimination on the part of employers. Clearly, Justice Blackmun took the *Weber* majority to mean that any predicate of discrimination by the employer had been abandoned under Title VII analysis. He noted in his concurring opinion that *Weber* “measures an individual employer’s capacity for affirmative action solely in terms of a statistical disparity. The individual employer need not have engaged in discriminatory practices in the past.”⁴⁴

41. 443 U.S. at 204 (citation omitted).

42. See *supra* note 21.

43. 443 U.S. at 205-06.

44. 443 U.S. at 213 (Blackmun, J., concurring). Justice Stevens reached a similar conclusion about *Weber*: “If Title VII had never been enacted, a private employer would be free to hire members of minority groups for any reason that might seem sensible from a business or social point of view. The Court’s opinion in *Weber* reflects the same approach.” *Johnson*, 480 U.S. at 645 (Stevens, J., concurring). But see 480 U.S. at 649 (O’Connor, J., concurring in judgment) (criticizing Justice Stevens’ characterization of *Weber*).

See also *Tangren v. Wackenhut Servs., Inc.*, 658 F.2d 705 (9th Cir. 1981) (Title VII does not prohibit an employer with no history of race discrimination from employing voluntary affirmative action to correct *de facto* racial imbalances in its work force); *Cohen v. Community College of Philadelphia*, 484 F. Supp. 411, 434 (E.D. Pa. 1980) (“[U]nder *Weber*, an employer’s affirmative action plan can be justified by the existence of a history of racial discrimination in the relevant occupation or profession at large,” even where the employer itself has never discriminated.). See generally *Cohen, Voluntary Affirmative Action After Weber*, 34 LABOR L.J. 138 (1983) (reviewing lower court interpretations of the remedial purpose requirement set out in *Weber*); Kreiling & Mercurio, *Beyond Weber: The Broadening Scope of Judicial Approval of Affirmative Action*, 88 DICK. L. REV. 46 (1983) (same).

Some observers off the bench also read *Weber* to allow voluntary affirmative action even when the employer has never itself discriminated. *Weber*, one wrote, “encourag[es] employers to voluntarily adopt affirmative action programs . . . for whatever purposes: . . . [including] a good faith effort to remedy the effects of societal discrimination.” D. BELL, RACE, RACISM, AND AMERICAN LAW 651 (1980).

See also *Boyd, Affirmative Action in Employment — The Weber Decision*, 66 IOWA L. REV. 1, 10-18 (1980) (exploring the *Weber* majority’s use of the phrase “traditionally segregated job categories” and urging a broad reading allowing affirmative action aimed at remedying societal discrimination); Allegretti, *Voluntary Racial Goals After Weber: How High Is Too High?*, 17 CREIGHTON L. REV. 773, 789-91 (1984) (accepting Professor Boyd’s interpretation of “tradition-

C. *Johnson v. Transportation Agency*

In *Johnson*, the Court upheld an affirmative action plan voluntarily adopted by a California county government against a Title VII challenge brought by a white male employee. Santa Clara County had adopted the plan in December 1978, for the hiring and promotion of women and minorities. The plan was designed to erase a statistical underrepresentation of women in nonclerical positions and blacks in management positions.⁴⁵ The plan was upheld by the Court even though the gender disparity was expressly attributed not to sex discrimination by the County but to a social history that discouraged female entry into the male-dominated road crew and dispatcher positions at stake.⁴⁶

When *Johnson* came before the Court, eight years had passed since Kaiser's affirmative action plan had been upheld in *Weber*. In the in-

ally segregated job categories"); Kreiling & Mercurio, *supra*, at 64 ("Weber suggests that the employer should be allowed considerable latitude in remedying discrimination upon a demonstration of societal discrimination in the relevant labor market and reflection of that societal discrimination in its work force."); Note, Bakke and Weber: *The Concept of Societal Discrimination*, 11 LOY. U. CHI. L.J. 297, 323 (1980) ("Societal discrimination was found in *Weber* to be a sufficient basis to justify a racially preferential program."). But see Morris, *New Light on Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 250 (1987) (*Weber*, reinterpreted in the light of dictum from Local 93, Intl. Assn. of Firefighters v. City of Cleveland, 478 U.S. 501 (1986), "indicates that an employer must demonstrate a factual predicate 'concerning prior discrimination on its part against minorities.'").

Another author has gone even farther, calling the *Weber* majority's formulation a "societal discrimination approach" that contains a certain "schizophrenia" by limiting employers from fully attacking societal discrimination. Why, Professor Schatzki asked, should the Court permit employers to correct voluntarily *de facto* racial imbalances in their own work forces while preventing them from deliberately hiring a disproportionately high number of minorities in order to mitigate societal discrimination in the nation's work force? Schatzki, *United Steelworkers of America v. Weber: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 53, 68-69 (1980). The Court, however, would be almost certain to invalidate an affirmative action plan that favored minorities or women beyond their representation in the population. Such disproportionate preferences would very likely be found to "unnecessarily trammel" the rights of majority employees, the second prong of the *Johnson* test, *see supra* note 11, by constricting so sharply their ability to compete for job openings and promotions. *See Johnson*, 480 U.S. at 640 (noting the virtues of the affirmative action plan's "moderate, gradual approach to eliminating the imbalance in [the employer's] work force, one . . . which visits minimal intrusion upon the legitimate expectations of other employees"); *see also* Allegretti, *supra* at 791-92 (rebutting Professor Schatzki's argument).

45. 480 U.S. at 621. Although women constituted 36.4% of the Santa Clara area labor market, they made up only 22.4% of the County Transportation Agency's employees, and those women were heavily concentrated in "EEOC job categories traditionally held by women." The plan's minority hiring and promotion goals were similarly justified by an overconcentration of blacks in lower-level job categories. "[W]hile the proportion of ethnic minorities in the Agency as a whole exceeds the proportion of such minorities in the county work force, a smaller percentage of minority employees held management, professional, and technical positions." 480 U.S. at 621. Minorities constituted 19.7% of the county labor market, but only 7.1% of the Agency's officials and administrators. Nineteen percent of the Agency's professionals were minorities, as were 16.9% of its technicians. 480 U.S. at 621 n.4.

46. 480 U.S. at 621, 634 n.12; *see also* 480 U.S. at 668 (Scalia, J., dissenting); D. McDowell, *supra* note 17, at 43 ("No past discrimination against women was admitted, alleged, or proven" in *Johnson*.).

terim, the Court had struck down voluntary affirmative action by public employers grounded in "societal discrimination" as unconstitutional in *Wygant v. Jackson Board of Education*.⁴⁷ Its consideration of *Johnson* the following Term thus provided the opportunity to apply the same rules in Title VII analysis. The Court, however, declined the invitation. Instead it rejected the application of constitutional doctrines to Title VII analysis⁴⁸ and elaborated on the broader Title VII allowances it had begun to construct in *Weber*. The majority in *Johnson* emphasized again the "crucial role" played by voluntary employer action in achieving Title VII's broad remedial aims and appeared to approve of Justice Blackmun's earlier reading of *Weber*:

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. Rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories."⁴⁹

Furthermore, the Court wrote, "JUSTICE SCALIA's suggestion that an affirmative action program may be adopted only to redress an employer's past discrimination was rejected in *Steelworkers v. Weber* . . ."⁵⁰ Instead, voluntary affirmative action will be upheld under Title VII so long as it is "justified by the existence of a 'manifest imbalance' that reflect[s] underrepresentation of women [or minorities] in 'traditionally segregated job categories.'"⁵¹

D. *Societal Discrimination as a Predicate for Voluntary Affirmative Action Under Title VII*

Johnson established clearly that an employer need not suggest that it is guilty of past illegal discrimination in order to employ voluntary affirmative remedies. *Johnson* did not, however, explicitly hold that an employer could still use affirmative action if it were proven never to have discriminated. In an examination of the Supreme Court's recent affirmative action cases, Judge Edwards of the Court of Appeals for the District of Columbia Circuit wrote, "Indeed, a comparison of *Johnson* and *Wygant* reveals that the critical distinction lies in the *quantum of evidence* needed to demonstrate that the plan was adopted for a remedial purpose."⁵² That is certainly true, but the crucial ques-

47. 476 U.S. 267 (1986) (plurality holding unconstitutional city's collective bargaining agreement provision granting limited preference to minority teachers in layoff decisions).

48. See 480 U.S. at 627 n.6.

49. 480 U.S. at 630 (citation omitted).

50. 480 U.S. at 630 n.8 (citation omitted).

51. 480 U.S. at 631. The employer must also be able to demonstrate that the plan satisfies the second prong of the *Johnson-Weber* test, i.e., that it does not "unnecessarily trammel" the interests of majority employees. *Johnson*, 480 U.S. at 630-31; see also *supra* note 11.

52. Edwards, *The Future of Affirmative Action in Employment*, 44 WASH. & LEE L. REV. 763, 777 (1987) (emphasis in original).

tion is, *why* did the Court demand a smaller quantum of evidence in Title VII cases? Did it adopt the more lenient standard because it acknowledged the permissibility of a different sort of remedial purpose under Title VII — *i.e.*, curing societal discrimination? Or, did it adopt the lesser standard merely to strike a compromise with employers who feared establishing their liability to minority or women employees, allowing them to remedy their own past discrimination without having to admit what they were doing?⁵³

The *Johnson* Court itself did not give a definitive answer, holding only that a sufficient predicate for affirmative action would be made out wherever there existed “a ‘manifest imbalance’ . . . in ‘traditionally segregated job categories.’”⁵⁴ Exactly what the Court meant by the phrase “traditionally segregated” has been disputed since it was first used in *Weber*. Some judges have taken it to mean a long-standing pattern of discrimination by the employer.⁵⁵ These judges, therefore, will permit voluntary affirmative action only upon a sufficient showing that the employer seeking to adopt the remedy has itself created the segregation through discriminatory practices.⁵⁶ This narrow reading of the Court’s language is contrasted with an interpretation that takes “traditionally segregated job categories” to mean occupations in which there is generally a history of widespread discrimination.⁵⁷ This broader view would permit, for example, an employer of unionized skilled labor whose work force was overwhelmingly white and male, to adopt voluntarily an affirmative action plan for the hiring of minorities and women even if the employer had never itself discriminated. Since the Court has already accepted as obvious the history of discrimination in the craft unions,⁵⁸ the employer would only have to show the manifest imbalance in its work force. In fact, this was essentially the situation in *Weber*.⁵⁹

53. This latter view is essentially the tack taken by Justice O'Connor in her “firm basis” approach, rejected by the majority in *Johnson*. See *supra* note 25.

54. 480 U.S. at 631.

55. Proponents of this narrow interpretation include Justices Scalia, see *infra* note 64 and accompanying text, and White, see *infra* note 66 and accompanying text.

56. See *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2023 (1988); *Johnson*, 770 F.2d 752, 764 (9th Cir. 1984) (Wallace, J., dissenting in part) (“[T]he employer must be able to point to past or present discriminatory patterns and practices that created the traditional segregation of the job categories in question.”), *aff'd.*, 480 U.S. 616 (1987).

57. This reading seems consistent with the purpose of Title VII, as interpreted by the *Weber* Court. There, the Court wrote: “The purposes of the [Kaiser] plan mirror those of the statute. . . . Both were structured to ‘open employment opportunities for Negroes in occupations which have been traditionally closed to them.’” 443 U.S. at 208 (quoting remarks of Sen. Humphrey, 110 CONG. REC. 6548 (1964)).

58. See *Weber*, 443 U.S. at 198 n.1 (“Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.”).

59. The only way in which *Weber* might be distinguished from this fact situation is by arguing that in *Weber*, although Kaiser had not been shown guilty of past discrimination, neither had it been conclusively vindicated. By this view, *Weber*’s allowance for affirmative action would extend only to this nether world of doubt over the employer’s past conduct; if it could be proven

There is substantial evidence that the Court intended the phrase “traditionally segregated” to reach societal discrimination as well as identifiable employer acts.⁶⁰ One of the most striking indications is that the Court did not look to identifiable employer acts or policies in either *Weber* or *Johnson*.⁶¹

Further support for this broad reading is found in *Johnson*’s history in the Court of Appeals for the Ninth Circuit. There, Judge Wallace wrote a pointed dissent to the majority’s holding that Santa Clara’s plan was justified by a showing of a stark gender imbalance alone:

By using the term “traditionally segregated job categories,” the [*Weber*] Court incorporated a requirement that a showing of past discrimination must be made. . . . [T]o the extent that the majority opinion holds that a mere statistical disparity suffices to show that a job category was “traditionally segregated,” it is contrary to both *Weber* and *Janowiak*. . . . [T]he ratio alone is insufficient to show a pattern of traditional sex-based segregation.⁶²

The Supreme Court, however, affirmed the majority’s interpretation. In his concurring opinion to *Weber*, Justice Blackmun joined the issue and tried to explain the Court’s phraseology. The Court’s opinion in *Weber*, he wrote, “permits affirmative action by an employer whenever the job category in question is ‘traditionally segregated.’ The sources cited suggest that the Court considers a job category to be ‘traditionally segregated’ when there has been a societal history of purposeful exclusion of blacks from the job category”⁶³

Finally, the conclusion that the Court in *Johnson* interpreted Title VII to allow voluntary affirmative action aimed solely at societal discrimination is also reinforced by the views taken by the *Johnson* dissenters. Justice Scalia bristled at the wedge driven by the majority between constitutional and statutory analysis and argued that the ma-

(for example, as with a newly established employer) that the employer had never engaged in illegal discrimination, then affirmative action would be forbidden. (This is apparently Justice O’Connor’s view, see *supra* note 25.)

Yet this distinction is not persuasive because, whatever the actual history of Kaiser’s employment practices, the courts treated Kaiser as if it had never discriminated. See *supra* note 27.

60. A number of courts and commentators, writing both before and after *Johnson* and interpreting the “traditionally segregated job categories” phrase, have reached this conclusion. See *supra* note 44; Buchanan, *Johnson v. Transportation Agency, Santa Clara County: A Paradigm of Affirmative Action*, 26 HOUS. L. REV. 229, 262-65 (1989) (urging that *Johnson* and *Weber* be read to permit voluntary affirmative action that “advances the goal of ‘remedying the effects of past societal discrimination’”); Selig, *Affirmative Action in Employment: The Legacy of a Supreme Court Majority*, 63 IND. L.J. 301, 341 (1987) (reviewing the Court’s holding in *Johnson* and concluding: “In other words, ‘societal discrimination’ can be a sufficient justification for voluntary affirmative action so far as Title VII is concerned, even though it probably would not be a sufficient justification under the fourteenth amendment.”).

61. See *supra* notes 27 and 46.

62. 770 F.2d at 764 n.1 (Wallace, J., dissenting in part) (citations omitted; emphasis in original).

63. 443 U.S. at 212 (Blackmun, J., concurring) (citations omitted; emphasis added).

jority's opinion in *Johnson* contradicted the plurality's holding in *Wygant*:

The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs.

...
... The majority often uses the phrase "traditionally segregated job category" to describe the evil against which the plan is legitimately (according to the majority) directed. As originally used in *Steelworkers v. Weber*, that phrase described skilled jobs from which employers and unions had systematically and intentionally excluded black workers — traditionally segregated jobs, that is, in the sense of conscious, exclusionary discrimination. But that is assuredly not the sense in which the phrase is used here. ... [The job at stake in *Johnson*] is a "traditionally segregated job category" *not* in the *Weber* sense, but in the sense that, because of longstanding social attitudes, it has not been regarded by *women themselves* as desirable work.⁶⁴

Scalia concluded by arguing that *Weber* itself should be overruled⁶⁵ and that the Court should return to an earlier view of Title VII as a barrier to affirmative action based merely upon the lingering effects of past societal discrimination. Justice White agreed, and made equally clear that *Johnson* had rejected the narrow reading of the "traditionally segregated" phrase:

... I also would overrule *Weber*. My understanding of *Weber* was, and is, that the employer's plan did not violate Title VII because it was designed to remedy intentional and systematic exclusion of blacks by the employer and the unions from certain job categories. That is how I understood the phrase "traditionally segregated jobs" that we used in that case. The Court now interprets it to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force.⁶⁶

The majority opinion in *Johnson* took issue with several observations made by the dissenters and by Justice O'Connor in her separate opinion concurring in the judgment.⁶⁷ While it is by no means conclusive,

64. 480 U.S. at 664, 667-68 (Scalia, J., dissenting) (emphasis in original). For a rejoinder to the argument that discrimination cannot exist if women themselves "choose" to work in female-dominated job categories, see Williams, *supra* note 5, at 822-36 (arguing that such "choices" merely reflect the pervasive success of systemic discrimination in encouraging women to internalize sex-role stereotypes).

65. 480 U.S. at 673 (Scalia, J., dissenting).

66. 480 U.S. at 657 (White, J., dissenting).

67. See, e.g., 480 U.S. at 627 n.6 (disputing Justice Scalia's equation of statutory and constitutional analysis); at 629 n.7 (defending against attack by Justice Scalia the probative value of congressional failure to modify the Court's decision in *Weber*); at 630 n.8 (disputing the dissent's suggestion that voluntary affirmative action must be aimed at redressing an employer's past discrimination and the dissent's assertion that employers should be able to accomplish no more through voluntary affirmative action than courts can achieve through compulsory remedies); at

it is nonetheless interesting to note that the majority did *not* dispute the characterizations of its holding offered by Justices Scalia or White regarding the phrase “traditionally segregated” jobs.

II. THE ROOTS OF *JOHNSON*’S STATISTICAL TEST

Having established that an employer may rely upon a statistical imbalance in traditionally segregated job categories as a sufficient predicate for adopting an affirmative action plan, the Court in *Johnson* went on to offer some direction to future courts about just how to determine whether an employer has shown the requisite “manifest imbalance.” In doing so, it simply borrowed the statistical formulation that had been developed in Title VII’s earlier case law, even though that test had been designed for a very different purpose: to detect unlawful discrimination by the employer whose work force was being scrutinized. The Court’s application of this test in *Johnson* to the voluntary affirmative action setting has caused two significant problems: first, it has needlessly restricted the permissible scope of voluntary affirmative action in contravention of the Court’s own insistence that an employer need not show its own discrimination before employing race- or gender-conscious remedies; second, it forces courts to wade deeply into the morass of complex work force and labor pool analysis that has proved so difficult in earlier Title VII jurisprudence.⁶⁸ This Part traces the origins of *Johnson*’s statistical test back to those early discrimination cases.

In *Johnson*, the Court set up a two-track test. If an affirmative action plan applies to unskilled jobs or entry-level training programs, courts are to compare the employer’s work force with either the local general population or the local area labor market. If, however, the program applies to skilled jobs, courts are to compare the employer’s work force to the smaller pool of persons in the area labor market who possess the special skills required for the job.⁶⁹ Despite this relatively straightforward instruction, several lower courts faced with Title VII challenges to affirmative action plans have disagreed about how to apply *Johnson*’s “manifest imbalance” test. Several have reached opposite conclusions about whether the proper comparison for a given job category is to the general labor market or to a specialized pool, and others have differed over whether the comparative pool should be confined to the city limits within which the employer is located or should

632 (refuting Justice O’Connor’s assertion that the “manifest imbalance” that employers must show need be stark enough to support a prima facie case for a Title VII action against the employer); and at 641 n.17 (disputing the dissent’s argument that too great an allowance for voluntary affirmative action “will loose a flood of ‘less qualified’ minorities and women upon the work force”).

68. See *infra* Part III.

69. 480 U.S. at 631-32.

extend outward to encompass neighboring suburbs.⁷⁰ Since the racial composition of these different pools may vary significantly,⁷¹ the choice may well determine whether a "manifest imbalance" appears and, therefore, whether voluntary affirmative action is permissible.

Of course, neither *Johnson* nor *Weber* was the first Title VII case to make central use of statistical analysis of an employer's work force. Before *Weber*, however, statistics were typically not used as an employer's shield, to justify the voluntary undertaking of race-conscious remedies, but rather as a plaintiff's sword, to prove the employer's practice of unlawful discrimination. Statistical evidence was first employed in Title VII's original context — minority plaintiffs suing employers based on employer conduct that was alleged to discriminate against minorities. This context might be labeled one of "direct" (as opposed to "reverse") discrimination. To prevail in a Title VII case alleging direct discrimination, a plaintiff must prove either that the employer-defendant has intentionally discriminated against protected employees or that it has engaged in practices that have an unjustifiable disproportionate impact on a racial or gender class.⁷²

A claim of discrimination under Title VII may be substantiated by statistical data concerning the employer's work force.⁷³ The usefulness of statistical data is apparent. If, as an extreme example, seventy-five percent of doctors in a given local area are black, but the area's largest employer of doctors has never hired a black in its 100-year history, those statistics would likely support a very reasonable inference that the employer has discriminated against blacks, even in the absence of other evidence regarding the employer's intentions. The Supreme Court recognized the probative value of statistical analysis of an employer's work force in Title VII suits as early as 1977 in *International Brotherhood of Teamsters v. United States*.⁷⁴ And it is from *Teamsters* and subsequent direct discrimination cases that the *Johnson* manifest imbalance test arose. To understand the mechanics of the *Johnson* test in the affirmative action context, it is therefore important to trace its components back to their roots in the direct discrimination suits. The Court's rulings in those earlier cases shed valuable light on how to construct the proper statistical comparison; they also help to

70. See generally *infra* Part III.

71. While it is less likely that the gender compositions of these different reference pools will vary so widely, in some cases the variations may nonetheless be sufficient to determine whether a "manifest imbalance" exists.

72. See, e.g., *Wards Cove Packing Co. v. Atonio*, 57 U.S.L.W. 4583 (1989) (reviewing alternative Title VII theories of disparate-treatment and disparate-impact discrimination).

73. See, e.g., D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* (1980 & Supp. 1987); Corbett, *Proving and Defending Employment Discrimination Claims*, 47 MONT. L. REV. 217 (1986).

74. 431 U.S. 324 (1977) (finding discrimination by Teamsters in violation of Title VII based in part on gross underrepresentation of minorities in defendant's truck-driver ranks).

point out ultimately why the statistical comparisons that were appropriate in revealing direct discrimination are inappropriate in determining whether Title VII permits an employer to adopt voluntary affirmative action.⁷⁵

In *Teamsters*, the Court explained the value of statistics in the direct discrimination context:

[A]bsent explanation, it 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. Evidence of long-lasting and gross disparity between the composition of the work force and that of the general population thus may be significant [in showing discrimination in violation of Title VII].⁷⁶

Only one month later, the Court refined the recommended comparison in another Title VII action alleging employer discrimination against minorities. In *Hazelwood School District v. United States*,⁷⁷ the Court accepted the suggestion of the court of appeals below that, in cases involving skilled job categories, the proper comparison should be between the employer's work force and only that pool of the local labor market qualified for the job, *not*, as *Teamsters* had suggested, the local general population. Thus, to infer whether or not the defendant, a suburban St. Louis school district, had discriminated in the hiring of teachers, the Court held that the "proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."⁷⁸ The Court explained its modification of the *Teamsters* rule:

In *Teamsters*, the comparison between the percentage of Negroes on the employer's work force and the percentage in the general area-wide population was highly probative, because the job skill there involved — the ability to drive a truck — is one that many persons possess or can fairly readily acquire. When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.⁷⁹

This is because societal discrimination may cause "long-lasting and gross [statistical] disparity" between an employer's skilled work force and the racial composition of the area's general population despite the employer's nondiscriminatory conduct. A simple hypothetical illustrates the soundness of the Court's approach. Suppose that because of a long history of discrimination in a given community, few blacks have

75. See *infra* Part IV.

76. 431 U.S. at 340 n.20.

77. 433 U.S. 299 (1977).

78. 433 U.S. at 308.

79. 433 U.S. at 308 n.13.

had the opportunity to train as mechanical engineers. Although 40% of the community's general population is black, only .5% of its mechanical engineers are black. A mechanical engineering firm moves to town and begins hiring its staff. It aggressively seeks out black candidates, but because of their limited availability, the firm's work force ends up with only 5% black representation. If the unmodified *Teamsters* test were applied, and the firm's work force were compared to the community's general population, a prima facie Title VII case of discrimination might be made out against the employer.⁸⁰ This might seem unfair since in the direct discrimination context, an employer violates Title VII only if it is itself guilty of discrimination; it is *not* liable under the statute if its work force simply reflects a history of societal discrimination,⁸¹ as in the case of the hypothetical engineering firm. The refined *Hazelwood* test would properly vindicate the employer from Title VII liability, and spare it even the burden of defending against a prima facie case, because — since the position of mechanical engineer is a skilled job category — the firm's work force would be compared to the racial composition of that "smaller group of individuals who possess the necessary qualifications." In that case, the employer's work force would actually have ten times greater black representation than the community's general pool of mechanical engineers, and it could not be inferred that the employer had discriminated in hiring. In this hypothetical, a comparison between the employer's labor force and the general population would reveal the lingering ef-

80. After the Supreme Court's recent rulings in *Wards Cove Packing Co. v. Atonio*, 57 U.S.L.W. 4583 (1989), however, a plaintiff in such a case would face significant new hurdles. First, the plaintiff would have to tie the statistical imbalance causally to some hiring standard or employment practice of the employer. "[A] Title VII plaintiff," the Court wrote, "does not make out a case of disparate impact simply by showing that, 'at the bottom line,' there is a racial imbalance in the work force. As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." 57 U.S.L.W. at 4587 (emphasis in original). Moreover, after *Wards Cove*, the plaintiff would have to go one step further and prove that the challenged employment practice was not a "business necessity." 57 U.S.L.W. at 4588.

81. See, e.g., *Wards Cove*, 57 U.S.L.W. at 4586 ("If the absence of minorities holding such skilled positions [on petitioner-employer's staff] is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioner's fault), petitioner's selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites.") (footnote omitted).

In *Weber*, the Court held that § 703(j) of Title VII expressly exempts from liability employers who simply fail to address "de facto racial imbalance[s]" in their work forces. 443 U.S. at 205-06. Section 703(j), 78 Stat. 257, 42 U.S.C. § 2000e-2(j), provides:

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.

fects of the community's discriminatory history which discouraged or prevented blacks from training to become mechanical engineers; a comparison between the employer's labor force and the pool of mechanical engineers in the area, however, would test the actual hiring practices of the employer against the actual availability of candidates. A "gross disparity" in the latter comparison, if it could be tied to "a specific or particular employment practice,"⁸² could fairly suggest discrimination by the particular employer regardless of the community's history. This is the heart of Title VII liability in the direct discrimination context.

The Court's use of statistical evidence in the affirmative action context grew out of its experience with such evidence in the direct discrimination suits, and was gradually refined in much the same fashion. The affirmative action plan in *Weber* was justified by a comparison much like the one drawn in *Teamsters*: the racial composition of the employer's work force was compared to the racial composition of the area's general labor market without taking qualifications into account.⁸³ The Court then refined that test in *Johnson*, just as the *Hazelwood* Court had done earlier, to take qualifications into account. Consequently, the two-track test that emerged in *Johnson* was expressly founded upon the direct-discrimination case law:

In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise, see *Teamsters*, or training programs designed to provide expertise, see *Weber*. Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. See *Hazelwood*.⁸⁴

III. APPLYING *JOHNSON*'S STATISTICAL TEST: DIFFICULT DISTINCTIONS AND INEVITABLE CONFUSION

The "manifest imbalance" test set out in *Johnson* appears relatively straightforward. It instructs the judicial factfinder to look first to the job categories to which the contested affirmative action plan applies. Depending upon the nature of the job categories at stake, the composition of the employer's work force⁸⁵ is then to be compared to the com-

82. *Wards Cove*, 57 U.S.L.W. at 4587; see *supra* note 80.

83. See 443 U.S. at 198-99.

84. 480 U.S. at 631-32 (full citations and parenthetical references omitted).

85. Some confusion exists regarding whether it is appropriate to use for this purpose the employer's work force as a whole or only those of its employees in the particular job category to which the affirmative action plan applies. When the *Johnson* Court articulated the general test, it directed that the comparison be between the relevant area labor market and "the percentage of minorities or women in the employer's work force," without narrowing that class to particular job categories. See 480 U.S. at 632. Yet the Court also characterized the aim of the inquiry as the identification of "manifest imbalance[s] . . . 'in traditionally segregated job categories.'" 480

position of the area's general population or labor market, or, alternatively, to the smaller pool of persons in the area qualified to do the job.⁸⁶

In practice, however, the test has led to a good deal of confusion. Uncertainties about how to apply the test have emerged on several fronts, including:

(1) how should a court decide whether a particular job category does or does not require "special training";

(2) for those jobs that do require special skills, how should a court identify the pool of persons in the relevant labor market who possess those qualifications;

(3) for those jobs that do not require special skills, should a court compare the employer's work force to the area's general population or its general labor market;

(4) once the appropriate labor pool is identified, what is the proper geographic scope of the pool;

(5) once the proper statistical pools are identified and compared, how "manifest" must the racial or gender imbalance be to justify voluntary use of class-conscious relief; and

(6) which party should bear the burden of producing the necessary statistical evidence.

U.S. at 631 (quoting *Weber*) (emphasis added). When the Court followed its own instruction to determine whether the requisite "manifest imbalance" existed in Santa Clara County's work force, it looked, at different points in its opinion, both to the county's total work force and to imbalances in specific job categories. For example, early in the opinion it noted that "while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees." 480 U.S. at 621. Later in its opinion, however, the Court seemed to place greater emphasis on a more detailed statistical breakdown that identified gender imbalances in each of several job categories affected by the county's affirmative action plan. See 480 U.S. at 634. The Court also noted approvingly that the county's plan "sought annually to develop even more refined measures of the underrepresentation in each job category." 480 U.S. at 635 (emphasis added). See also 480 U.S. at 637 (gender-conscious plan reasonable "[g]iven the obvious imbalance in the Skilled Craft category"). These references might suggest that, despite its more generalized instruction, the Court considered a comparison focusing on the racial or gender composition within specific job categories to be highly relevant, if not determinative, in detecting a manifest imbalance.

In the months since *Johnson*, several lower courts have varied in their application of the test. The Court of Appeals for the Ninth Circuit, for example, in *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), cert. denied, 109 S. Ct. 1310 (1989), upheld a voluntary affirmative action plan applied to upper-level jobs within the defendant-city's fire department on the basis of a comparison between the city's population and the municipal work force as a whole. The court then covered the bases by going on to note that "[t]he record also shows a racial imbalance within the City fire department," and then pointing out imbalances within each of three job categories within the fire department. 823 F.2d at 356.

The Court of Appeals for the District of Columbia Circuit, in considering an affirmative action plan in hiring and promotions adopted by the District of Columbia police department, found the requisite "manifest imbalance" by comparing the racial composition of the District's labor market with the racial composition of specific upper-level job classifications within the police department. See *Ledoux v. District of Colum.*, 820 F.2d 1293, 1298 n.12, 1304 (D.C. Cir., reh'g. granted, 833 F.2d 368 (D.C. Cir. 1987), vacated, 841 F.2d 400 (D.C. Cir. 1988).

86. See *supra* note 84 and accompanying text.

Many of these questions are identical to those which courts have previously confronted in Title VII's direct discrimination context, and courts faced with Title VII challenges to affirmative action plans have naturally looked for guidance to those earlier cases. That familiarity makes finding answers to these questions no less difficult, however, since, despite many years of direct-discrimination case law, the courts have yet to discover a reliable method for handling the difficult factual determinations required. In the affirmative action context, lower courts have differed similarly in their resolution of these questions, and the differences have revealed just how complicated application of the "manifest imbalance" test can be.

This Part examines each of these problem areas and the ways in which the courts have tried to resolve them. The examination suggests that although principled answers exist for questions (3) and (6) above, many of the factual determinations that courts are required to make by *Johnson's* two-track statistical test are extraordinarily fine and may well be incapable of consistent resolution. This Part concludes by pointing out that the most troublesome of these questions, numbered (1) and (2) above, could be avoided altogether by application of the unified statistical test proposed in Part IV.

A. *The Nature of the Job*

According to *Johnson*, the first question a court must answer in determining whether a manifest imbalance exists is whether the job categories involved require "special training" or "no special expertise."⁸⁷ The Court has given only limited guidance in distinguishing skilled positions from unskilled. It has, for example, held that the position of truck driver requires no special qualifications because "the job skill there involved . . . is one that many persons possess or can fairly readily acquire."⁸⁸ Similarly, the Court has held that entry-level spots in a job training program require no special prior abilities because they are, in fact, "designed to provide expertise."⁸⁹ Public school teachers, on the other hand, do work in a profession requiring special expertise, according to the Court.⁹⁰

The opinions of several lower courts faced with Title VII challenges to voluntary affirmative action plans after *Johnson* suggest that it is not always easy to make the call when it comes to certain jobs.⁹¹ The D.C. Circuit, for example, expended little effort in finding that

87. 480 U.S. at 632.

88. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977) (explaining the Court's decision in *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977)).

89. *Johnson*, 480 U.S. at 632 (explaining the Court's decision in *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979)).

90. *Hazelwood*, 433 U.S. 299.

91. This problem has also, of course, confronted courts dealing with Title VII "direct discrimination" suits. See Smith & Abram, *Quantitative Analysis and Proof of Employment Dis-*

entry-level firefighter positions required no special expertise and therefore compared the employer's work force to the area labor market, following *Johnson's* instructions.⁹² The Seventh Circuit, by contrast, looked at a similar entry-level job in the South Bend, Indiana, fire department and held that it was one requiring special qualifications.⁹³ It therefore rejected the city's finding of a manifest imbalance based on a comparison of the racial composition of the city's fire department with its general population. The court justified this application by a curious and significant rephrasing of the *Johnson* test:

The ax falls [on the city's affirmative action program] because the statistical comparison upon which the city based its plan focused not on the relevant qualified area labor pool but on general population statistics. If a job category requires that applicants *possess minimum qualifications*, the City's proffered statistical comparison must narrow its focus to those actually qualified for the position.⁹⁴

The Seventh Circuit, by rejecting a comparison to general population statistics, implicitly found that the job skill required of entry-level firefighters was not "one that many persons possess or can fairly readily acquire,"⁹⁵ but was rather one that required a "special expertise."⁹⁶

crimination, 1981 U. ILL. L. REV. 33, 56 n.98 (comparing lower court opinions reaching opposite conclusions about seemingly identical job categories).

92. *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2023 (1988). This conclusion must be inferred from the court's conclusion that "[u]nder *Johnson's* teaching, the percentage of blacks in the District's Fire Department is to be compared with the percentage of blacks in the area labor force." 826 F.2d at 77. Although the court narrowed the labor force to only persons between the ages of 20 to 28, it did not attempt to identify a smaller pool within that group possessing any special qualifications for the job. The court rejected a comparison proffered by the city which held the district's fire department up against the D.C. general population. But the only objection expressed by the court was to the geographic area used by the city; no objection was raised to the use of general population statistics. *See* 826 F.2d at 78. This suggests that the court believed that the entry-level firefighter positions in question did not require the sort of "special training" that would dictate a comparison to a more specialized labor pool of persons "who possess the relevant qualifications." *Johnson*, 480 U.S. at 632.

93. *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989). The Seventh Circuit suggested that its finding was consistent with *Hammon*, which it read as drawing "a statistical comparison between the percentage of blacks in the District's fire department and the relevant *qualified* area labor pool." 836 F.2d at 1039 (emphasis added). *Hammon* did not, however, expressly refer to any special qualifications required of entry-level firefighters and restricted the general area labor pool it used only by age. *See supra* note 92.

94. 836 F.2d at 1039-40 (emphasis added). *Johnson* held that reference to a special qualified labor pool is necessary "[w]here a job requires special training." 480 U.S. at 632. The Seventh Circuit's application of that standard whenever a job requires "minimum qualifications" would seem to broaden its scope considerably. The Supreme Court held that the job of a truck driver, for example, does not require the "special expertise" intended by the *Johnson* test, although it surely requires certain "minimum qualifications." *See Johnson*, 480 U.S. at 632 (citing *Teamsters*).

95. *Hazelwood*, 433 U.S. at 308 n.13.

96. *Johnson*, 480 U.S. at 632. This finding is implicit because the Seventh Circuit, by rejecting a comparison to the general population, effectively distinguished its case from *Teamsters*, in which the Supreme Court accepted the use of general population statistics to find an imbalance among Teamster truck drivers.

The Seventh Circuit would apparently permit reference to an area's general population or generalized labor market only when the job category at stake required no minimum qualifications at all; such job categories will become rare indeed in America's increasingly complex and technological job market.

In sharp contrast to the narrow view taken by the Seventh Circuit, two other circuit courts of appeals have accepted the use of more generalized statistics in upholding affirmative action plans that applied to non-entry level job categories. The Ninth Circuit upheld a voluntary affirmative action plan as it applied to the upper ranks of a municipal fire department based upon reference to the city's general population in *Higgins v. City of Vallejo*.⁹⁷ Similarly, the D.C. Circuit upheld an affirmative action plan as it applied to detective positions within the D.C. police department in *Ledoux v. District of Columbia* based upon reference to the District's generalized labor market.⁹⁸ Neither court demanded a comparison to a more specialized pool of area workers qualified to do the jobs, even though both positions quite arguably required "special training."⁹⁹

These different approaches among the circuit courts may reveal either how unclear it sometimes is whether a job category requires "special training," or how easy it is for a court to vary the classification it applies depending on whether it is inclined to uphold or to strike down the contested plan. In either case, the inherent difficulties involved in deciding whether it requires "special skills" to work as a firefighter, a frycook, a launderer, or any of a thousand other job categories suggest that it would be preferable to avoid having to make the calculation at all, if that could be done consistently with the dictates of Title VII.

B. Identifying the Proper Skilled Labor Pool

If a court determines that the job category at stake is one requiring special skills, it may be an even more difficult matter to determine the

97. 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989).

98. 820 F.2d 1293 (D.C. Cir.), *rehg. granted*, 833 F.2d 368 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988).

99. The job category in *Higgins* was "firefighter-engineer," a rank higher than entry-level firefighters in the Vallejo fire department. The job category in *Ledoux* was "Detective Grade I," which the court described as "an upper-level position within the Department substantially equivalent to the rank of Sergeant" and two promotional ranks above entry-level. 820 F.2d at 1294 & n.2.

The *Ledoux* court acknowledged the plaintiffs' argument that reference should have been made to a more specialized *qualified* labor pool, but brushed it aside because, in the court's view, the burden was on the plaintiffs to produce such statistics. Plaintiffs' failure to do so at trial, the court held, meant that the court was free to base its comparison upon the generalized labor pool identified by the defendant-District. See 820 F.2d at 1304-05. This distribution of production burdens is the opposite of that imposed by the Seventh Circuit in *Janowiak*. See *infra* section III.F (discussing production burdens under the *Johnson* test).

pool of workers who possess the necessary qualifications. Judge Edwards, who wrote the D.C. Circuit's opinion in *Ledoux*, recently described the problem:

In the few cases where a job qualification is easily identifiable, this analysis should not be difficult to perform. If, for example, the disputed job category requires employees to have a Ph.D. in biochemistry, it should be possible to ascertain the number of minorities or women in the relevant labor market who possess that qualification. . . .

The analysis does not end here, however, for in many cases involving skilled positions, the employer may not have such a specific and easily identifiable job requirement. For instance, it is unclear how one should determine the number of minorities or women in a relevant labor market who "possess the relevant qualifications" to be an assistant manager of a supermarket, to give but one example. The range of possible qualifications for this type of position is so broad that any effort to quantify the number of minorities or women who possess them may be little more than an exercise in futility.¹⁰⁰

Even when the job qualifications are relatively explicit, courts may be tempted to take shortcuts in defining the pool of qualified persons. The Supreme Court appears to have taken such a shortcut in *Hazelwood*, where it had to define the pool of persons qualified to work as teachers in the defendant's public school district. Instead of calculating the total pool of persons qualified to do the work (such as the total number of persons in the relevant geographic area holding state teaching certificates), the Court simply looked to the pool of all persons *then working* as public school teachers in the larger metropolitan region, without attempting to take into account, as Judge Edwards apparently would, additional persons not then working as teachers but qualified to do so.¹⁰¹ Since the pool of persons already employed in a "traditionally segregated" job category is likely to reflect past discriminatory hiring practices, such a shortcut approach to calculating the qualified pool has properly been criticized for its effect of "locking in" existing underrepresentations caused by earlier discrimination.¹⁰²

The problems of identifying a pool of persons possessing "special qualifications" — skills which an employer itself may be hard put to quantify — are formidable. A court forced to identify such a pool might turn to a convenient proxy; such proxies, as the *Hazelwood* case illustrates, may seriously skew the fact-finding effort, and yet there may not always be a readily available alternative. These problems, too, highlight the undesirable choices demanded by *Johnson's* two-track test.

100. Edwards, *supra* note 52, at 779. Judge Edwards' solution to this problem is to put the burden on plaintiffs to produce data on such specialized statistical pools. See *infra* note 126 and accompanying text.

101. See *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308, 310 (1977).

102. See *Smith & Abram*, *supra* note 91, at 57.

C. Identifying the Proper Unskilled Labor Pool

Some uncertainty also remains if a court concludes that the job category in question does not demand special skills. When the Supreme Court has faced such situations, it has compared the employer's work force both to the area's general population¹⁰³ and to the area's generalized labor market.¹⁰⁴ In *Johnson*, the Court reaffirmed both comparisons and suggested that either would be appropriate, expressing no preference between the alternative pools.¹⁰⁵ The choice may not make a difference in many cases so long as the racial or gender composition of the area's general labor force mirrors that of the general population. If for some reason, however, those two pools vary, the choice may determine whether a manifest imbalance appears.¹⁰⁶ In these cases, it is preferable to refer to the area's labor market rather than its general population, because a sharp imbalance in the former comparison will reflect the lingering effects of past discrimination, whereas an imbalance in the latter comparison may reveal nothing at all about past discrimination.¹⁰⁷

103. *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

104. *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

105. 480 U.S. at 631-32 ("In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise . . . or training programs designed to provide expertise.") (citing *Teamsters*, 431 U.S. 324, and *Weber*, 443 U.S. 193) (emphasis added).

106. See *Edwards*, *supra* note 52, at 778 n.57 (citing B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1351 n.240 (2d ed. 1983)); Rosenblum, *The Use of Labor Statistics and Analysis in Title VII Cases: Rios, Chicago, and Beyond*, 1 INDUS. REL. L.J. 685, 699-700 (1977).

107. As an illustration, suppose that in a particular community, the normal gender gap in longevity is especially wide: 80% of persons of retirement age are women. And, because this community is a popular retirement center with an attractive climate, half of the general population is of retirement age. Consequently, although this community's population of working age persons is 50% female, the community's general population has a much higher representation of women, in the neighborhood of 65%. Now suppose a particular employer in this community has a work force in which half of the employees are women evenly dispersed throughout its several job categories. A comparison of this employer's work force with the area's general labor force would show no imbalance and would offer no suggestion of discrimination by the employer. A comparison to the general population would, however, show a disparity and might be enough to justify adoption of a voluntary affirmative action plan by the employer. The disparity revealed by the latter comparison suggests nothing more than the community's gender gap in longevity, however, and that should hardly be a sufficient basis for use of remedial gender-conscious preferences by the employer. A comparison to the area's general labor force, on the other hand, would exclude such variables as longevity and possible variations in fertility which are unrelated to discrimination. It is therefore a more reliable basis of comparison. See also *supra* note 106; D. BALDUS & J. COLE, *supra* note 73, at 116.

An additional reason for relying on general labor force statistics rather than population data is that the former tend to be more current, whereas population data may be as much as 10 years old. Using the former data, therefore, may take into account possible alterations of the pool's composition due to intervening migration, thereby providing a more reliable reflection of the community. See Rosenblum, *supra* note 106, at 699-700.

D. *The Proper Geographic Scope*

Even when courts and the parties can agree on the appropriate labor pool, disagreements may arise over the proper geographic measure of that pool. The issue was presented most sharply in two cases decided before the Court of Appeals for the District of Columbia Circuit. *Hammon v. Barry*¹⁰⁸ involved a Title VII challenge to an affirmative action program adopted by the District of Columbia fire department. In *Ledoux v. District of Columbia*,¹⁰⁹ plaintiffs challenged a similar plan employed by the D.C. police department. The two cases were heard by different panels of the D.C. Circuit, each of which decided to compare the employers' work forces to the area labor market. In *Ledoux*, one panel, in an opinion written by Judge Edwards, relied primarily upon a labor pool confined to the geographic borders of the District of Columbia to find manifest racial and gender imbalances in the D.C. police force.¹¹⁰ In *Hammon*, however, another panel, in an opinion written by former Judge Starr, insisted that looking only to the labor force of the District itself provided "an entirely artificial comparison"¹¹¹ and that the relevant labor market extended into the D.C. suburbs in Maryland and Virginia. The larger geographical pool was the relevant measure, Judge Starr wrote, because it was the area from which the District recruited its new firefighters.¹¹²

Judge Starr's reasoning would seem to find support from the juris-

108. 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2023 (1988).

109. 820 F.2d 1293 (D.C. Cir.), *rehg. granted*, 833 F.2d 368 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988).

110. The *Ledoux* court acknowledged the dispute over the proper geographic boundaries, but declined to rule on the issue conclusively:

In concluding that there was a conspicuous imbalance in the Department's upper echelons, the trial court relied on the District of Columbia as the applicable labor market, rejecting the appellants' contention that the relevant labor market was the Standard Metropolitan Statistical Area ("SMSA"), which includes the nearby suburbs of Maryland and Virginia. The record makes clear, however, that there was a manifest imbalance in the Department's labor force under either measure. Therefore, we need not decide whether the trial court erred in rejecting the SMSA as the relevant labor market.

820 F.2d at 1304 n.18 (citation omitted).

111. 826 F.2d at 78.

112. The court explained:

There should be no mistaking the correct benchmark in this case: the relevant labor force consists of persons 20 to 28 years of age in the *Washington metropolitan area*, not just within the confines of the Nation's capital. The reason is that it is undisputed that approximately half of the District's entry-level firefighters have hailed from the suburbs.

826 F.2d at 77 (emphasis in original). Later, Judge Starr elaborated:

Indeed, at last report, both traffic and commerce were moving freely between the District of Columbia and the thriving suburbs of Maryland and Virginia. To our knowledge, no Brandenburg Gate has yet been erected to prevent suburbanites from Silver Spring, Oxen Hill, or Alexandria from seeking employment in the D.C. Fire Department. And the much ballyhoed six-month residency requirement requires new hires to quit their former haunts and move into the District within six months *after* being hired. Until conditions change, we will not bury our heads in the sand, ostrich-like, by ignoring the metropolitan area whence the entry-level firefighters actually come.

826 F.2d at 78 n.8 (emphasis in original).

prudence in Title VII's "direct discrimination"¹¹³ context. The Supreme Court justified its reliance on a statistical disparity in *Teamsters*, for example, by noting that "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial or ethnic composition of the population in the community *from which employees are hired*."¹¹⁴

This leaves open the possibility, of course, that the proper geographic scope for some job categories may extend well beyond the city in which the employer is located. For job categories that demand highly specialized skills, the employer's recruiting field may well be national. In those cases, the employer's work force should be compared to the racial or gender composition of the national labor market of qualified job candidates.¹¹⁵

The Court, however, has not yet given definitive guidance about precisely how to identify the appropriate geographic limits to a labor pool, and the question remains open to manipulation. Litigation in Title VII direct discrimination suits has similarly produced a wide variety of geographical references, but no clear standard.¹¹⁶ In most cases, a court may be left to rely upon the recruiting zone actually used by an employer, unless it suspects that the selection of the zone

113. "Direct discrimination" is meant to denote suits in which minority or female plaintiffs sue an employer, as distinguished from suits brought by white or male plaintiffs alleging "reverse discrimination." See *supra* Part II.

114. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (emphasis added); see also *Hazelwood School Dist. v. United States*, 433 U.S. 299, 315 & n.2 (1977) (Stevens, J., dissenting) ("The relevant labor market area is that area from which the employer draws its employees.") (quoting the court of appeals below, 534 F.2d 805, 811-12 n.7 (1976)); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952, 969 (D.D.C. 1980) ("The proper geographic area for determining the relevant labor pool is where most of the applications originate."); *Maehren v. City of Seattle*, 92 Wash.2d 480, 599 P.2d 1255, 1264-66 (1979) (upholding City's affirmative action plan by using Seattle city limits as proper geographical labor pool; rejecting reference to the Seattle-Everett SMSA after finding that "the majority of the City's employees reside in Seattle and the City draws most of its work force from Seattle," even though some City employees lived in neighboring suburbs). See generally D. BALDUS & J. COLE, *supra* note 73, at 117-19.

One commentator has proposed a detailed, five-point formula for defining the proper geographic scope of an employer's labor market based largely on "the area from which the current employees are drawn." See Dorsaneo, *Statistical Evidence in Employment Discrimination Litigation: Selection of the Available Population, Problems, and Proposals*, 29 Sw. L.J. 859, 868-69 (1975). But see Note, *Voluntary Affirmative Action Under Title VII and the Equal Protection Clause*, 56 GEO. WASH. L. REV. 711, 735 (1988) (arguing that employers be free to rely on city limits rather than larger metropolitan areas because otherwise "most affirmative action plans would not be able to be implemented").

115. See, e.g., Rosenblum, *supra* note 106, at 694; Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614, 1626-27 (1973).

116. See, e.g., F. MORRIS, *CURRENT TRENDS IN THE USE (AND MISUSE) OF STATISTICS IN EMPLOYMENT DISCRIMINATION LITIGATION* 72-81 (1977) (surveying conflicting approaches and finding only "limited cohesion in the decisions of the courts as to the appropriate geographic boundaries"); Dorsaneo, *supra* note 114, at 866-69; Rosenblum, *supra* note 106, at 698-99; Smith & Abram, *supra* note 91, at 59-62; Note, *Judicial Refinement of Statistical Evidence in Title VII Cases*, 13 CONN. L. REV. 515, 529-31 (1981).

has itself been affected by discrimination.¹¹⁷

E. *The Degree of Imbalance*

After *Johnson*, it also remains unclear just how much of an imbalance is required before an employer may voluntarily adopt racial or gender preferences. Some clues can, however, be deduced. We know, for example, from past Court rulings what sort of statistical disparity is required to make out a prima facie case of direct discrimination against an employer. The "general rule" is that the disparity must be "greater than two or three standard deviations" before it can be inferred that the employer has engaged in illegal discrimination under Title VII.¹¹⁸ The Court has called that sort of imbalance a "gross statistical disparit[y]."¹¹⁹ We know also from *Johnson* that in the voluntary affirmative action context the required "manifest imbalance need *not* be such that it would support a prima facie case against the employer."¹²⁰ An employer after *Johnson*, therefore, can still show a sufficient imbalance to adopt an affirmative action plan even if the imbalance in its work force is *less than* "two or three standard deviations."¹²¹ The Court has not gone further, however, in defining a floor

117. It is, of course, possible that an employer's customary recruiting zone, *i.e.*, the area from which most of its employees are drawn, is itself discriminatory. An employer could, for example, deliberately recruit in distant suburbs as a device for avoiding hiring qualified minority candidates within the employer's own city limits. Alternatively, an employer might set a particularly narrow recruiting zone for the purpose of avoiding recruiting in a nearby city with a large minority population, even though residents of that city would be interested in applying for jobs with the employer. Courts should, therefore, scrutinize an employer's recruiting practices before relying on them to define the proper geographic scope of the relevant labor market. See D. BALDUS & J. COLE, *supra* note 73, at 119; Note, *supra* note 115, at 1626-27.

The Supreme Court seemed to acknowledge this obligation of scrutiny in *Wards Cove Packing Co. v. Atonio*, 57 U.S.L.W. 4583 (1989). There, it noted that an employer could not be held liable under a Title VII disparate impact theory if racial imbalance in its work force merely reflected "a dearth of qualified nonwhite applicants" in the community. 57 U.S.L.W. at 4586. It then added as an aside: "Obviously, the analysis would be different if it were found that the dearth of qualified nonwhite applicants was due to practices on [the employer's] part which — expressly or implicitly — deterred minority group members from applying . . ." 57 U.S.L.W. 4586 n.7. Justice Stevens, in his dissent, also suggested that the employer's practice of "recruit[ing] employees for [upper-level] at-issue jobs from outside the work force rather than from lower-paying, overwhelmingly nonwhite, cannery worker positions" in the lower ranks of its work force might indicate discrimination. See 57 U.S.L.W. at 4593 (Stevens, J., dissenting).

118. *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1977); see also *Hazelwood*, 433 U.S. at 308 n.14.

119. *Hazelwood*, 433 U.S. at 307.

120. *Johnson v. Transportation Agency, Santa Clara County*, Cal., 480 U.S. 616, 632 (1987) (emphasis added).

121. There is reason to argue that voluntary affirmative action should be permitted even if the imbalance is *substantially* less than two or three standard deviations. Some statisticians have pointed out that the degree of imbalance required to make out a prima facie Title VII violation, *i.e.*, two or three standard deviations, is exceedingly exacting and "seems better suited to a criminal or quasi-criminal standard of proof" than to a simple preponderance test. See Dawson, *Are Statisticians Being Fair to Employment Discrimination Plaintiffs?*, 21 JURIMETRICS J. 1 (1980); Henkel & McKeown, *Unlawful Discrimination and Statistical Proof: An Analysis*, 22 JURIMETRICS J. 34, 58 (1981). If it is true that the *Hazelwood* formulation tends to exculpate

beneath which an imbalance will not be considered sufficiently "manifest."¹²²

F. *The Proper Burdens of Production*

Lower courts applying the *Johnson* "manifest imbalance" test have also differed over how to assign the burden of producing the statistical evidence. The Court of Appeals for the Seventh Circuit, for example, has placed that burden directly on employers who seek to justify their voluntary use of race or gender preferences. In the Seventh Circuit case of *Janowiak v. Corporate City of South Bend*,¹²³ the defendant-city had produced evidence comparing the racial composition of its fire department to the city's general population. The court, however, held that the city was required to identify a more narrow statistical pool of city residents who were qualified to work as entry-level firefighters.¹²⁴ The city's failure to produce the desired statistics resulted in the invalidation of its affirmative action program.

One panel of the Court of Appeals for the District of Columbia Circuit, however, took precisely the opposite approach in *Ledoux v. District of Columbia*. There the court was presented with much the same situation as the court in *Janowiak*: the defendant had presented statistics regarding the general area labor market, while the plaintiffs insisted that the proper reference was to a specialized *qualified* labor pool. Instead of invalidating the District's affirmative action plan based on defendant's failure to offer more focused statistics, however, the D.C. Circuit upheld the plan based on *plaintiffs'* failure to do so.¹²⁵ Judge Edwards, who wrote the court's opinion in *Ledoux*, later explained his approach more fully: if the job category to which an affirmative action plan applies clearly does involve "specific and identifiable qualifications," the employer should proffer statistical evidence regarding the labor pool of persons qualified to do the job; if, however, the qualifications are not "specific and identifiable," making it difficult to determine the relevant labor pool, the employer may rely on reference to the general area labor pool and the burden shifts to plaintiffs to offer more precise statistical pools if warranted:

[I]t is probably sufficient in cases where job qualifications are difficult to define to use the total number of minorities or women in the relevant

even employers who have in fact discriminated illegally, and if it is also true that employers need not show evidence of their own discrimination in order to adopt voluntary affirmative action, then it would seem inappropriate to require them to show anything close to the stringent degree of imbalance required in *Hazelwood*.

122. See also Edwards, *supra* note 52, at 782-83 (acknowledging uncertainty in measuring the degree of imbalance required by *Johnson*).

123. 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989).

124. 836 F.2d at 1039-40.

125. *Ledoux v. District of Colum.*, 820 F.2d 1293, 1304-05 (D.C. Cir.), *rehg. granted*, 833 F.2d 368 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988).

labor market as a proxy for qualified candidates in measuring manifest imbalance, *unless* the nonminority or male plaintiffs can demonstrate that a narrower, more accurate measure can be devised. In other words the ultimate burden of proof should rest with the party seeking to employ a more refined statistical analysis.

....

... If a plan covers assistant supermarket managers, for example, or other jobs whose qualifications are difficult to identify, the burden of producing refined statistical evidence reasonably should rest on the party who seeks their introduction — the nonminority or male employees in this instance. This approach is consistent with that taken in disparate impact cases.¹²⁶

Judge Edwards has defended his approach to production burdens based on “practical considerations” concerning the difficulty of identifying such refined pools for many job categories.¹²⁷ He also argues that it is consistent with statements in *Johnson* and *Wygant* stressing that the ultimate burden of proof rests on plaintiffs seeking to invalidate voluntary affirmative action plans.¹²⁸

At any rate, the Seventh Circuit clearly seems to be misapplying *Johnson* in its continued willingness to invalidate affirmative action in cases where both plaintiff and defendant fail to produce sufficiently refined statistical evidence.¹²⁹ That approach flies in the face of *Johnson*’s explicit instruction that an affirmative action plan is *not* to be treated as an affirmative defense in which the defending party is required to prove not only the existence of an affirmative action plan but the plan’s validity as well.¹³⁰

126. Edwards, *supra* note 52, at 779-81 (emphasis in original).

127. *Id.* at 779, 781.

128. *Id.* at 781 (citing *Wygant*, 476 U.S. 267, 277-78 (1986) (plurality opinion) and *Johnson*, 480 U.S. 616, 626 (1987)).

129. See *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989); *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989).

130. The Court held:

As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency’s Plan. Only last Term in *Wygant v. Jackson Board of Education*, we held that “[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program,” and we see no basis for a different rule regarding a plan’s alleged violation of Title VII. . . . Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer’s employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer’s decision, the burden shifts to the plaintiff to prove that the employer’s justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.

480 U.S. at 626-27 (citations omitted).

IV. THE NEED FOR A NEW STATISTICAL TEST

Many of the difficulties discovered by the lower courts in applying the *Johnson* “manifest imbalance” test have confronted them before in analyzing statistical evidence presented in Title VII “direct discrimination” suits.¹³¹ It should not be surprising, therefore, that some lower courts have turned to the direct discrimination case law in trying to resolve these challenges in the use of statistics.¹³² The two-track *Johnson* test is itself, after all, rooted directly in cases like *Teamsters* and *Hazelwood*, which sought to prove racial discrimination by employers against black employees or job candidates.¹³³ In light of the wider tolerance of voluntary affirmative action which has emerged from the Court’s opinions in *Weber* and *Johnson*, however, it is reasonable to inquire whether the tests developed in *Teamsters* and *Hazelwood* fit so neatly into the voluntary affirmative action context.

This Part begins by reviewing the Court’s findings in *Weber* about the central emphasis Congress placed on voluntary remedial efforts when it drafted Title VII. Section IV.B then argues that the two-track statistical test required by *Johnson* serves to defeat a wide range of the voluntary efforts desired by Congress and lauded by the Court. Section IV.C proposes a unified statistical test that would, regardless of the job skills involved, always compare the composition of an employer’s work force with that of the area’s general labor market in determining whether the requisite “manifest imbalance” exists — a test that would avoid many of the difficult problems outlined in Part III while better serving Congress’ aim of encouraging private remedial efforts.

A. *The Importance of Voluntary Solutions*

Two findings made by the Court about the legislative history of Title VII are especially relevant in setting the legal boundaries for voluntary affirmative action programs. First, the Court has stressed Congress’ broad remedial purpose in enacting the law.¹³⁴ Second, the Court has found that Congress intended to encourage voluntary efforts to achieve the Act’s social aims.¹³⁵ When the Court described in *Weber* the congressional concerns animating Title VII, it did not speak in terms of combatting specific acts of employer discrimination.

131. For sources reviewing the complexities of statistical analysis in Title VII direct discrimination suits and the often conflicting approaches taken by the lower courts, see *supra* note 116. See generally D. BALDUS & J. COLE, *supra* note 73.

132. Judge Edwards, for example, relied explicitly on Title VII’s disparate impact case law in developing his approach to assigning the respective burdens of production and proof. See Edwards, *supra* note 52, at 780-81.

133. See *supra* Part II.

134. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 202-03 (1979).

135. See *Weber*, 443 U.S. at 204-06; *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 630 & n.8, 640-42 (1987).

Rather, it emphasized the institutional economic barriers that perpetuated the concentration of black workers in the lower echelons of the American work force: "centuries of racial injustice"¹³⁶ were keeping black workers in the bottom ranks of the economy; automation was replacing these jobs, worsening the gap between black and white unemployment rates.¹³⁷ The evils identified by Congress and emphasized by the Court went beyond overt racist acts to include structural economic disadvantage. While Title VII certainly and necessarily aimed at outlawing individual instances of employment discrimination, its ultimate purpose went further: to tear down barriers of historical and entrenched disadvantage that perpetuate a *de facto* segregated job market.¹³⁸ Congress' and the Court's emphatic embrace of voluntary efforts to achieve that end reaffirms that voluntary affirmative action is permissible if grounded in an effort to cure that "social malaise"¹³⁹ by remedying the lingering effects of more than 250 years of race and sex discrimination. Affirmative action, of course, must be remedial — it must still be aimed at undoing the effects of discrimination.¹⁴⁰ But in the voluntary context, the Court does not insist upon evidence that the employer itself has discriminated.¹⁴¹ Instead, the discrimination which may provide the remedial basis here is described by the Court in terms of "traditional patterns of racial segregation,"¹⁴² "old patterns of racial segregation and hierarchy,"¹⁴³ or "the . . . vestiges of an unfortunate and ignominious page in this country's history."¹⁴⁴ In the context of voluntarily adopted measures, it is sufficient that an affirmative action plan be designed "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."¹⁴⁵ The Court found in Congress' actions "a desire to preserve a relatively large domain for voluntary employer action," to permit a wider latitude for voluntary race- or gender-conscious preferences than that allowed to courts in ordering such remedies.¹⁴⁶

136. *Weber*, 443 U.S. at 204.

137. *See* 443 U.S. at 202.

138. The Court held in *Weber*, for example, that Congress did not intend Title VII to prohibit employers from voluntarily seeking to remedy "*de facto* racial imbalance[s]" in their work forces. 443 U.S. at 205-06 (*italics in original*).

139. 443 U.S. at 202 (quoting remarks of Sen. Clark, 110 CONG. REC. 7220 (1964)).

140. *See supra* note 19 and accompanying text.

141. *Johnson*, 480 U.S. at 630; *see supra* section II.D.

142. *Weber*, 443 U.S. at 201.

143. 443 U.S. at 208; *Johnson*, 480 U.S. at 628 (citing *Weber*).

144. 443 U.S. at 204.

145. 443 U.S. at 203 (quoting remarks of Sen. Humphrey regarding Title VII's purpose and finding voluntary employer action consistent with that purpose, 110 CONG. REC. 6548 (1964)).

146. *Johnson*, 480 U.S. at 631 n.8.

B. *From Hazelwood to Johnson*

Yet, the two-track test for finding manifest imbalance adopted in *Johnson* is ill-suited to preserve the wider latitude for voluntary remedies emphasized by the Court. That test — requiring reference to a specialized qualified labor market when a job category demands special skills — was designed in *Hazelwood* for the explicit purpose of calculating whether an employer is guilty of past discrimination. The test is engineered to compare the number of minorities or women hired to the number of minorities or women available to do the job. The *Hazelwood* test excludes *unqualified* minorities or women from the comparative pool because the employer cannot be faulted for failing to hire unqualified candidates; illegal discrimination can be inferred only if it appears that the employer has systematically failed to hire *qualified* minorities or women. For this reason, the test devised in *Hazelwood* is perfectly suited to its purpose in that setting: evaluating past employer conduct.

The purpose of the manifest imbalance test in *Johnson* is *not*, however, the evaluation of employer conduct. Because of the broad remedial purpose of Title VII and the wider latitude for voluntary action identified by the Court, voluntary affirmative action need not be grounded in past discrimination by the employer adopting the remedy.¹⁴⁷ Yet *Johnson*, after insisting 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,”¹⁴⁸ goes on to require that the employer draw a statistical comparison that is designed to evaluate the likelihood of prior discriminatory practices by the employer. That result seems to conflict squarely with the rule which has emerged from *Weber* and *Johnson* allowing voluntary affirmative action even when the employer is merely trying to remedy *de facto* imbalances in its work force that may have resulted from a societal history of race or sex discrimination, rather than invidious practices by the employer itself.

The contrariness of the result can be illustrated by a hypothetical. Suppose that five of the attorneys working at a 100-member law firm are black. Although the general labor market of the community in which the firm is located is forty-percent black, its labor market of attorneys is also only five-percent black. Under the two-track *Johnson* test, the employer would not be permitted to adopt an affirmative action plan to promote the hiring of new black attorneys. Since the job

147. See, e.g., *Ledoux v. District of Colum.*, 820 F.2d 1293, 1304 n.18 (D.C. Cir.) (“The Court made clear in *Johnson*, however, that the first prong of the test [finding a “manifest imbalance”] may be satisfied by an adequate statistical showing; the trial court need not venture into the thicket of determining the root causes of the existing imbalance.”), *rehg. granted*, 833 F.2d 368 (D.C. Cir. 1987), *vacated*, 841 F.2d 400 (D.C. Cir. 1988); see also *supra* Part I.

148. 480 U.S. at 630.

category involved requires "special training," the employer would be required to compare the racial composition of its attorney staff to the area's pool of attorneys. No imbalance would appear, and racial preferences, therefore, could not be used. Yet it does not seem entirely consistent with the Court's reading of Title VII's broad remedial purpose, nor with its emphasis on a wider latitude for voluntary action, to strike down affirmative action in this situation. The disparity between the percentage of blacks in the general labor market and the percentage of blacks working as attorneys would clearly be rooted in "old patterns of racial segregation and hierarchy." The gap obviously would reflect "the fact that [blacks] had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them 'because of the limited opportunities that have existed in the past for them to work in such classifications.'"¹⁴⁹ Furthermore, it would reflect a history of even more overt discrimination that has denied blacks admission to law schools and employment in white-owned law firms. Given Title VII's purpose of seeking to "break down old patterns of racial segregation and hierarchy" and "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history,"¹⁵⁰ and given the Court's emphasis on the "crucial role"¹⁵¹ of voluntary efforts to that end, it would seem desirable to permit just the sort of affirmative action proposed by the hypothetical law firm above. A voluntary affirmative action plan adopted in such a setting could serve very well Title VII's aim of integrating minorities and women into the economic mainstream by encouraging their entry into "traditionally segregated job categories."

C. *Toward a Unified Statistical Test*

The *Johnson* "manifest imbalance" test, as currently constituted, can subvert this purpose. A unification of its two-track approach — eliminating the need to refer to narrower qualified labor pools when evaluating skilled job categories — could, however, cure this defect. Under such a test, the composition of the employer's work force would in all cases be compared to the composition of the area's general labor pool. Job qualifications would not be taken into account. Such a unified test would detect the presence of the only predicate *Johnson* requires: the lingering impact of past discrimination. It would not go the next step, as the two-track test currently does, by analyzing, in effect, whether that discrimination can be traced to the individual employer. This unified standard would permit voluntary affirmative ac-

149. *Johnson*, 480 U.S. at 621 (explaining the historical basis for the manifest gender imbalance found in that case).

150. See *supra* notes 143-44.

151. 480 U.S. at 630.

tion whenever a manifest imbalance exists between an employer's work force and the area's general labor market, as in the case of the hypothetical law firm. Under the allocation of burdens of proof adopted by *Johnson*, the plaintiffs would still have the opportunity to prove that the imbalance can be explained by factors other than discrimination by the employer or society at large.¹⁵² But if the plaintiffs cannot offer a convincing nondiscriminatory explanation, it could be reasonably inferred that the imbalance reflects the lingering impact of a history of discrimination in the community.¹⁵³

A unified "manifest imbalance" test would have several advantages. First, it would allow employers to use affirmative action to eliminate effects of discrimination that presently are beyond their reach. In that respect, it would better serve the broad remedial purpose of Title VII identified by the Court in *Weber* and *Johnson*. Second, a unified standard would eliminate many of the difficulties related to applying *Johnson*'s two-track test.¹⁵⁴ The confusion that has confronted lower courts in deciding whether a given job category demands "special expertise," in identifying specialized pools of "qualified" workers, and in assigning the burden of producing more refined statistical evidence could be avoided entirely. Although parties might continue to disagree over the proper geographic boundaries, identifying an area's general labor market presents none of the more vexing complications. A unified test would, therefore, not only be better tailored to the policies animating Title VII scrutiny of voluntary affirmative action programs, it would also be significantly more practical to apply.

V. CONCLUSION

Ever since 1979, when the Supreme Court first made clear that private employers may voluntarily adopt affirmative action under at least some circumstances without violating the Title VII protections of majority employees or job candidates,¹⁵⁵ litigants and judges have struggled to define exactly what those circumstances are. Eight years later, the Court provided added clarity in *Johnson v. Transportation Agency, Santa Clara County, California*,¹⁵⁶ in which it held that employers have wider freedom under Title VII to use affirmative action than they do under the equal protection clause of the fourteenth amendment.¹⁵⁷ An employer may use affirmative action without running afoul of Title VII, the Court held, if "justified by the existence of

152. See *supra* section III.F.

153. See *supra* note 76 and accompanying text.

154. See *supra* Part III.

155. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

156. 480 U.S. 616 (1987).

157. See *supra* Part I.A.

a 'manifest imbalance' that reflect[s] underrepresentation of women [or minorities] in 'traditionally segregated job categories,' "¹⁵⁸ and so long as application of the plan does not "unnecessarily trammel" the rights of majority employees.¹⁵⁹

The Court's insistence in *Johnson* that employers subject to Title VII have greater leeway in employing race- or gender-conscious remedial preferences than do employers subject to the fourteenth amendment suggests that the remedial scope permitted private employers is larger than that allowed public employers. While the Court has been consistent in demanding that public employers may act to remedy only discrimination traceable to their own practices,¹⁶⁰ it has consistently and explicitly demanded less of private employers.¹⁶¹ A careful review of the Court's holdings in *Weber* and *Johnson* strongly suggests that the Court has interpreted Title VII to permit private employers¹⁶² to use affirmative action even when it is designed to remedy, not the employer's own discriminatory acts, but those of society at large that have affected the composition of the employer's work force.

Unfortunately, however, the precise statistical test directed by the *Johnson* Court for detecting the existence of the requisite "manifest imbalance" has led to considerably less clarity in subsequent application. The Court's requirement that the racial or gender composition of the employer's work force be compared to different outside reference pools depending upon whether the job categories at issue demand "special training"¹⁶³ has resulted in varying and often confused application, as lower courts have struggled to pigeonhole different job categories and devise proxy pools of local populations possessing the requisite skills.¹⁶⁴ Moreover, *Johnson*'s two-track statistical test centering on job skills can block employers from voluntarily adopting the sort of wide-ranging remedial measures that the Court has suggested they are entitled to employ, frustrating what has been identified as the driving purpose of Title VII.

A unified statistical test, which disregards job skills and in all cases compares the employer's work force to the local general labor market, would detect the existence of discrimination in the employer's work force without necessarily attributing that discrimination to the employer itself. Such a test "provides assurance . . . that sex or race will be taken into account in a manner consistent with Title VII's purpose

158. 480 U.S. at 631.

159. 480 U.S. at 637; see *supra* note 11.

160. See *supra* note 20.

161. See *Johnson*, 480 U.S. at 630 & n. 8; *Weber*, 443 U.S. 193.

162. Or public employers who, like the defendant-county in *Johnson*, are for whatever reason not faced with constitutional challenges.

163. See *supra* text accompanying note 84.

164. See *supra* Part III.

of eliminating the effects of employment discrimination”;¹⁶⁵ at the same time, however, a unified test would spare courts from having to decide the fine-drawn questions about whether a given job category requires “special training” and, if so, how to define the pool of persons possessing the necessary skills. More important, a unified test would permit employers voluntarily to undertake efforts to remedy one of the most vexing and pressing of national problems: the legacy of more than three centuries of far-reaching, systematic societal discrimination now imbedded in stubborn inequalities of wealth, employment, and overall quality of life.

— *David D. Meyer*

165. *Johnson*, 480 U.S. at 632.