Before 1984, the Supreme Court's decisions on affirmative action were as notable for what they failed to decide as for what they did decide. The Court had reviewed only a handful of cases, it had reached the merits in less than half of these, and it had been able to muster a majority for an opinion of the Court in only one. The Court had been reluctant, or unable, to engage in any systematic exposition of the law of affirmative action. According to some scholars, the divisions among the justices reflect the divisions within American society over affirmative action, making any imme-
diate, clear-cut resolution of this issue as undesirable as it is difficult. 3

Since 1984, the Court has decided a series of cases on affirmative action in employment. Although its internal divisions over affirmative action remain as deep as ever, the Court has answered a number of specific questions under the Constitution and under Title VII of the Civil Rights Act of 1964. 4 It has held that preferences in promotions can be imposed by consent decree or adopted by voluntary action of a public employer consistently with Title VII; 5 that preferences that bump whites out of their jobs are permitted neither by Title VII nor by the Constitution; 6 but that other preferences can be imposed as judicial remedies for egregious discrimination. 7 In reaching these decisions, the Court has moved uneasily to questions of detail and implementation without resolving fundamental questions of principle.

In doing so, most of the justices have settled upon a general, but seldom decisive, framework of analysis. Almost from the start, the justices have agreed that both the statutory and constitutional analyses of preferences should focus on two factors: the burden that a preference places on innocent employees, usually white, and the justification for a preference as a remedy for past discrimination. 8 As ex-


Justice Antonin Scalia, the only law professor recently appointed to the Supreme Court, entertained no such doubts. Scalia, The Disease as Cure, 1979 WASH. U.L.Q. 147.


8. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), for example, five justices considered these factors highly relevant. Id. at 307–15, 319–20 (opinion of Powell, J.); id. at 356–62, 373–78 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). In Fullilove v. Klutznick, 448 U.S. 448 (1980), the two plurality opinions focused primarily on these factors. Id. 473–75, 477–78, 480–92 (Burger, C.J., joined by White and Powell, JJ.); id. at 517–21 (Marshall, J., concurring, joined by Brennan
pressed in the Court's latest decisions, the permissible burden depends on the necessity, duration, degree, and form of the preference, while the required justification concerns the evidence of prior discrimination necessary to support it. A preference must meet both requirements to be valid.

Such abstract and open-ended requirements have elicited broad support only because they mean different things to different justices, as the continued and often bitter dissents in affirmative action cases reveal. The uncertain and shifting meaning of these requirements has become both more apparent and more significant as the composition of the Court has begun to change. Justice Scalia, for example, appears to be a more outspoken critic of affirmative action than Chief Justice Burger, whose retirement led to Scalia's appointment. The expectation that Judge Bork would have taken a similar position added to the controversy over his nomination. The standards articulated by the Court, even in its most recent decisions, are likely to be reexamined soon by a Court with changing membership.

One of the features most likely to be reexamined is also one of the most troubling: the unexplained divergence between Title VII and constitutional standards. Preferences voluntarily adopted by private employers fall outside the constitutional restrictions on affirmative action because they do not involve government action of any kind. They are neither adopted by public employers, required by government regulations, nor imposed or approved by judges. For that reason, they do not constitute state action within the scope of the Equal Protection Clause of the Fourteenth Amendment or federal action within the scope of the corresponding "equal protection component" of the Fifth Amendment. They are subject only to Title VII. On the

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and Blackmun, J.J.). Justice Powell's concurrence formalized the inquiry more clearly along these lines. Id. at 495-99 (Powell, J., concurring). In United Steelworkers v. Weber, 443 U.S. 193 (1979), the Court looked to two factors closely related to these standards: whether the preference "unnecessarily trammel[s] the interests of the white employees" and whether there was "a manifest racial imbalance" in the composition of the work force suggesting prior discrimination. Id. at 208.

other hand, preferences voluntarily adopted by public employers, as well as preferences imposed or approved by courts, are subject to both Title VII and the Constitution. This difference in coverage explains some of the doctrinal confusion. To the extent that constitutional standards are stricter than those of Title VII, voluntary preferences adopted by private employers will be treated differently from all the others.

Still, this difference in coverage is not the greatest source of confusion. It is in those cases subject to both statutory and constitutional requirements that the divergence becomes most troubling. A public employer adopting a voluntary preference or a court imposing or approving a preference must comply with whichever requirements are stricter. This overlap in coverage causes confusion because the constitutional and statutory standards not only diverge but diverge differently in different contexts. Sometimes the Title VII standard will be stricter than the constitutional one and sometimes weaker. And at no point are they ever certain to be exactly the same.

Although much has been written about the justification in law and policy for affirmative action, the divergence between the Supreme Court’s treatment of the statutory and constitutional issues has largely escaped notice. This divergence is all the more puzzling because both the statutory and the constitutional standards for affirmative action have the same basis in specific prohibitions against discrimination and in general principles of racial and sexual equality. Despite the complexity of its provisions, the main purpose of Title VII is clear enough: like other titles of the Civil Rights Act of 1964, it was designed to extend the constitutional prohibition against discrimination from public to private action.\(^\text{10}\) As it was subsequently interpreted, Title VII extended the constitutional prohibition in other directions as well: most significantly, from intentional discrimination to neutral practices with disparate impact.\(^\text{11}\) It is just this dif-


ference between Title VII and the Constitution, however, which provides the most promising means of linking them together as they apply to voluntary preferences. If, as we argue, the evidence necessary to support voluntary affirmative action under Title VII must approximate a prima facie case of disparate impact, then it would also support voluntary government action under the Constitution to remedy past discrimination. It would support similar treatment of voluntary private and public preferences under both Title VII and the Constitution.

Parts I, II, and III of this Article develop the existing standards for particular forms of affirmative action from the most recent decisions of the Supreme Court. Part I discusses the extension of United States Steelworkers v. Weber\(^1\) to consent decrees and to voluntary affirmative action by public employers; Part II examines the statutory and constitutional limits on the burdens that can be imposed on white employees; and Part III compares the evidence of past discrimination necessary to support court-ordered preferences under both Title VII and the Constitution. As this exposition will show, the permissible burden on white employees is uniform for both voluntary and court-ordered preferences under both Title VII and the Constitution. By contrast, the required justification differs depending on both of these variables. The evidence of prior discrimination necessary to support a preference varies for voluntary and court-ordered preferences and, at least in some situations, under Title VII and the Constitution. In Part IV, we identify and discuss the underlying reasons that might explain these variations. By itself, no single reason fully explains, let alone justifies, all the differences between the statutory and constitutional standards. We argue instead that the distinction between statutory and constitutional standards should be supplanted by a distinction between voluntary and court-ordered preferences. This argument preserves the central insight in Weber, into the need for special standards for voluntary affirmative action, but without endorsing the artificial statutory purpose which that decision attributes to Congress. We conclude with a brief discussion of the prospects for convergence of

\(^1\) 443 U.S. 193 (1979).
the existing standards in a unified approach to affirmative action in employment.

I. THE EVOLUTION OF UNITED STEELWORKERS V. WEBER

The decision in Weber was controversial, and remains controversial, because of its novel interpretation of Title VII. The Court held that a private, voluntary affirmative action plan fell outside the anti-quota provision of Title VII, which provides that "[n]othing in this title shall be interpreted to require" preferential treatment on the basis of race, national origin, sex, or religion. The Court also concluded that the plan fell outside the general prohibitions in Title VII against considering race, national origin, sex, or religion in employment. The Court held, in words that are now familiar, that Title VII permits preferences which are "designed to break down old patterns of racial segregation and hierarchy" and which do not "unnecessarily trammel the interests of the white employees." The affirmative action plan in Weber, an apprenticeship program in which half of the positions were reserved for blacks, met these requirements. It was designed to increase the proportion of blacks among the employers' skilled craft workers, which stood at less than 2% despite the fact that 39% of the workers in the local labor force were black. The Court took judicial no-


Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter 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, 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.

15. 443 U.S. at 208.
16. Id. at 198-99.
tice of pervasive discrimination against blacks in admission to skilled craft positions, but without relying on any evidence of discrimination by either the employer or the union which had agreed upon the affirmative action plan.\textsuperscript{17} The Court also found that the plan did not unduly burden white employees because it would terminate when the proportion of blacks among skilled craft workers approximated the proportion of blacks in the local labor force, because white employees remained eligible for half of the positions in the apprenticeship program, and because no white employees were to be discharged and replaced by black employees.\textsuperscript{18}

The Court based its holding on a controversial policy against interference with the decisions of private employers and labor unions. This policy has its roots, not in Title VII, but in the National Labor Relations Act,\textsuperscript{19} which creates a structure for collective bargaining but leaves the parties to set the terms and conditions of employment in negotiations largely free from government interference.\textsuperscript{20} Contrary to the Court’s reasoning, this policy cannot be simply transplanted to a statute, like Title VII, which directly regulates the employment relationship. Title VII contains, to the point of redundancy, three separate prohibitions against discrimination: by employers, by labor organizations, and by joint labor-management committees.\textsuperscript{21} These are the central prohibitions in Title VII. They stand in the way of any attempt to reason, as the Court tried to do in Weber, from statements in the legislative history to the conclusion that Title VII gives priority to preserving the autonomy of labor and management.\textsuperscript{22}

An alternative rationale for the decision in Weber, proposed by Justice Blackmun in his concurring opinion,\textsuperscript{23} is that employers and unions must be allowed some leeway for affirmative action in order to avoid liability under the theory of disparate impact under Title VII. According to this theory of liability, a plaintiff need only prove that a disputed

\begin{thebibliography}{9}
\bibitem{17} \textit{Id.} at 198 n.1, 208-09, nn.8, 9.
\bibitem{18} \textit{Id.} at 208-09.
\bibitem{20} \textit{See infra} note 154 and accompanying text.
\bibitem{21} § 703(a), (c), (d). 42 U.S.C. § 2000e-2(a), (c), (d) (1982).
\bibitem{22} 443 U.S. at 206-07.
\bibitem{23} \textit{Id.} at 209-11 (Blackmun, J., concurring).
\end{thebibliography}
employment practice has an adverse impact upon members of a racial or sexual group. If the plaintiff carries this burden, then the burden shifts back to the employer to prove that the disputed practice is related to the job for which it is used.24 Employers usually carry this burden through validation studies, but these studies are often so costly that employers can avoid liability only by eliminating the adverse impact of the disputed employment practice through affirmative action. Justice Blackmun further argued that employers must be allowed to engage in affirmative action without proving that they are guilty of past discrimination.25 Otherwise, if they submitted proof of discrimination, they would be liable to the victims of discrimination, but if they submitted no such proof, they would be liable to white employees for reverse discrimination.

Without resolving the problems surrounding the decision in Weber, the Court extended it from preferences adopted by private employers to preferences adopted by public employers in two recent cases, Local No. 93, International Association of Firefighters v. Cleveland26 and Johnson v. Transportation Agency.27 In both cases, the Court confined its decision to the statutory question whether the preferences violated Title VII, but it avoided the corresponding constitutional question only because the parties attacking the preferences inexplicably failed to raise it. Like Weber, these cases were decided by an opinion for the Court written by Justice Brennan. Although the Court succeeded in fitting these cases into the narrow statutory mold of Weber, it may have done so only by diminishing their eventual significance. Preferences adopted by public employers will inevitably be attacked and must finally be judged on constitutional grounds.

A. Firefighters v. Cleveland

*Firefighters v. Cleveland* concerned a consent decree in which a public employer agreed to a preference in promotions. The Court held that the general remedial provisions of Title VII, in section 706(g), authorized the district court’s approval of the consent decree, even assuming that section 706(g) would not have authorized the district court to order a preference over the employer’s objections. The consent decree settled an action brought by the Vanguards of Cleveland, an organization of black and Hispanic firefighters, against the City of Cleveland alleging racial discrimination by the Fire Department, primarily in promotions. The union which represented the city’s firefighters, Local No. 93 of the International Association of Firefighters, intervened to object to preferential relief in any form. At the district court’s urging, settlement negotiations between the city, the Vanguards, and the union eventually resulted in a proposed consent decree to which counsel for all three parties agreed. The proposed decree increased both the number of minority firefighters promoted and the number of promotions open to all firefighters, so that minority firefighters could be promoted without reducing the promotions originally open to whites. The membership of the union, however, rejected the revised proposed decree by a vote of 660 to 89. The union then changed its position to oppose the consent decree, objecting that the use of racial quotas “must by their very nature cause serious racial polarization in the Fire Service.” Despite this objection, the district court approved the consent decree. This decision was affirmed by the Sixth Circuit.

The Supreme Court also affirmed, reasoning that judicial approval of the consent decree was consistent with Title VII as interpreted in *Weber.* The preference was designed to correct underrepresentation of minorities in the higher

28. 106 S. Ct. at 3068-70.
29. *Id.* at 3071-72. Section 706(g) is codified at 42 U.S.C. § 2000e-5(g) (1982).
30. 106 S. Ct. at 3067-68.
31. *Id.* at 3070. The union framed its objection as an “absolute and total objection to the use of racial quotas which must by their very nature cause serious racial polarization in the Fire Service.” *Id.*
32. Vanguards of Cleveland v. Cleveland, 753 F.2d 479 (6th Cir. 1985).
33. Firefighters v. Cleveland, 106 S. Ct. at 3072-73.
ranks of the fire department and it did so in a way that re-
duced the opportunities for promotion of whites as little as
possible. It was also consistent with the congressional policy
of avoiding judicial interference with the power of manage-
ment to set the terms and conditions of employment. This
policy, according to the Court, was embodied in the provi-
sions limiting judicial remedies in section 706(g), particu-
larly the prohibition against reinstatement and similar
remedies on behalf of employees discharged for reasons not
prohibited by Title VII.34 The Court also relied on the pol-
icy favoring settlement of Title VII claims, expressed in the
statutory procedures for conciliation by the Equal Employ-
ment Opportunity Commission (EEOC) and in the EEOC
Guidelines on Affirmative Action.35

Altogether, these reasons make a persuasive case for ju-
dicial approval of voluntarily established preferences that
meet the requirements of Weber, but only on the Court’s un-
realistic assumption that the consent decree could be effec-
tive by binding only the parties to the decree itself, but not
the union or the white employees whom it represented. As
Justice O’Connor emphasized in her concurring opinion, the
crucial question in this case—the preclusive effect of the
consent decree on the union and the white employees whom
it represented—was left for consideration on remand.36 If
the affirmative action plan was permissible under Weber, then
it was already binding on the Vanguards and the city as a
contract. From this conclusion, it was only a short step to
the Court’s holding that the affirmative action plan should
be made binding on the same parties as a judgment. The
crucial difference in this case between a private settlement
binding as a contract and a consent decree binding as a
judgment was in its effects on third parties.

By reserving this question, the Court narrowed its hold-
ing almost to the vanishing point. It made the consent de-

34. Id. at 3073-79. This provision appears in the last sentence of section
706(g), 42 U.S.C. § 2000e-5(g) (1982). This section is quoted in full infra note 112.
35. 106 S. Ct. at 3072-73. The EEOC is required to engage in conciliation of
charges for which it finds good cause. § 706(b), 42 U.S.C. § 2000e-5(b) (1982).
The EEOC Guidelines on Affirmative Action appear at 29 C.F.R. §§ 1608.1-12
36. 106 S. Ct. at 3080 (O’Connor, J., concurring).
represented only to the extent of precluding them from objecting to the decree as if it had been imposed over the defendant’s objections.\textsuperscript{37} An earlier decision, \textit{W.R. Grace \& Co. v. Local Union 759},\textsuperscript{38} almost compelled this limitation on the consent decree’s preclusive effect. \textit{W.R. Grace} held that a conciliation agreement between an employer and employees who had filed charges with the EEOC was not binding on a union that represented employees adversely affected by the agreement. Nevertheless, on the facts of \textit{Firefighters v. Cleveland}, the union might well be barred from raising any further objections to the consent decree because it objected to the fairness of the preference only in conclusory terms, even after the district court explicitly warned it of the inadequacy of such an objection.\textsuperscript{39} The union’s actions might also preclude any objections by individual white employees, although that is a complicated question now pending before the Supreme Court.\textsuperscript{40}

Even so, in subsequent cases, opponents of preferential treatment are likely to object to similar consent decrees on constitutional grounds. The actions of a public employer in agreeing to a consent decree and of a court in approving it constitute obvious forms of government action subject to constitutional standards. If these standards are stricter than

\textsuperscript{37} Id. at 3079–80.


\textsuperscript{39} 106 S. Ct. at 3068.

\textsuperscript{40} The individual employees might seek to intervene, but in order to intervene as of right, they would have to show that their application was still timely and that they were not adequately represented by the union. \textit{Fed. R. Civ. P. 24(a)}; Marino v. Ortiz, 806 F.2d 1144 (2d Cir. 1986), \textit{cert. granted}, 107 S. Ct. 2177 (1987). In order to intervene permissively, they would also have to establish timeliness and, in addition, obtain the discretionary approval of the district judge. \textit{Fed. R. Civ. P. 24(b)}.

Alternatively, they could collaterally attack the consent decree in a separate action. They could argue that they were not in privity with the union because it had authority to represent them only in collective bargaining, not in litigation. They could also argue that the union did not adequately represent them in framing its objections to the consent decree. \textit{Hansberry v. Lee}, 311 U.S. 32, 41 (1940). Technically, these arguments have some force, but they ignore the reality that the union represented the white employees opposed to preferential relief. In effect, it acted as their uncertified class representative. Its action should have some similar preclusive effect, if not in precluding their objections entirely, at least in requiring the preference to be judged by more lenient standards. \textit{See} Rutherglen, \textit{supra} note 38, at 102–03.
those in Weber, they effectively limit Weber to its original context: preferences established voluntarily, outside of litigation, by a private employer. 41

B. Johnson v. Transportation Agency

Johnson v. Transportation Agency closely resembles Firefighters v. Cleveland. It differs in only two respects, neither of which seemed to affect the Supreme Court's decision. It was the first case in which the Court considered a preference on the basis of sex 42 and it involved a straightforward affirmative action plan instead of a consent decree. Thus, it raised no problems of preclusion. The Court again upheld an affirmative action plan for promotions by a public employer, again applying the standards from Weber, and again without reaching the constitutional question.

The Transportation Agency of Santa Clara County, defendant in Johnson, had adopted an affirmative action plan for promoting women and members of minority groups in five job categories in which they were underrepresented. Among these was the category of "Skilled Craft Worker" which included no women at all. The plan established a long-term goal of employment of each group in each category equal to its representation in the local labor market, which for women was 36.4%. The plan also provided for short-term goals to be set at different percentages, but none had been established when the promotion in dispute was

41. The constitutional standards also limit the effectiveness of the EEOC's attempt, in its Guidelines on Affirmative Action, to immunize affirmative action plans from claims of reverse discrimination. 29 C.F.R. §§ 1608.1–12 (1986). The EEOC has made these guidelines one of its few authoritative pronouncements giving rise to an absolute defense of good faith compliance with official interpretations of Title VII. Id. at 1608.1(d), .2, .4(d), .5(b), .6(b), .7(b), 10, 11. Although the Supreme Court cited the Guidelines with approval in Firefighters v. Cleveland, it cited them only for the policy favoring settlement of Title VII claims and it pointedly remarked that they "do not have the force of law." 106 S. Ct. at 3072–73. Whatever force they have under Title VII—and it does not appear to be great—they are powerless to affect constitutional objections to affirmative action.

42. The Court had upheld the constitutionality of various forms of preferential treatment of women, but none preferring women for jobs in competition with men. Califano v. Webster, 430 U.S. 313 (1977) (per curiam) (higher old-age benefits for women than for men); Schlesinger v. Ballard, 419 U.S. 498 (1975) (longer promotion schedule for female naval officers before mandatory discharge because of limited assignments open to them), reh'g denied, 420 U.S. 966 (1975); Kahn v. Shevin, 416 U.S. 351 (1974) (property tax exemption for women).
made. After an initial round of interviews, seven employees were found eligible for promotion to the position, among them Paul Johnson, the plaintiff, and Diane Joyce, the woman who was eventually promoted. Johnson ranked slightly higher than Joyce according to scores from the first round of interviews and he was recommended by three supervisors after a second round of interviews, but Joyce was recommended by the agency's affirmative action coordinator. Weighing this last factor with the others, the agency's director eventually selected Joyce.

Johnson then filed a claim of reverse discrimination under Title VII. The district court found in his favor, reasoning that the affirmative action plan was not temporary, as was the plan in Weber. The Ninth Circuit, however, reversed, with one judge dissenting. The majority assumed that the preference would terminate when the long-term goals for employment of women and minorities were met. It concluded that the flexibility of these goals compensated for the absence of an explicit deadline for termination of the plan.

The Supreme Court affirmed the decision of the Ninth Circuit, agreeing with its reasoning that the affirmative action plan was valid despite the absence of a deadline. The Court applied Weber to uphold the plan over two bitter dissents. Justice White abandoned his support for Weber, in which he had joined, because it had been interpreted too leniently in subsequent cases. Justice Scalia, joined by Chief Justice Rehnquist and in part by Justice White, attacked the decision in Weber directly. He would have equated the statutory standard with the constitutional standard of strict scrutiny. The dissenting justices succeeded in reopening the debate over Weber, or more precisely, they confirmed that it had never been closed. With it, they reopened the question of the relationship between the statutory and constitutional standards for affirmative action.

44. Id. at 1447-49.
46. 107 S. Ct. at 1455-56.
47. Id. at 1465 (White, J., dissenting).
48. Id. at 1471-76 (Scalia, J., dissenting).
The Court, of course, relied on the precedential force of *Weber*, strengthened by the failure of Congress to amend Title VII to prohibit preferences.\(^49\) The argument from congressional inaction, as Justice Scalia pointed out, gives little additional support to *Weber* because it can be explained entirely as the result of legislative inertia,\(^50\) enhanced by the power of organized legislative minorities to block unfavorable changes in the status quo. Legislative inaction is not equivalent to legislative ratification. Justice Stevens also relied on the precedential force of *Weber* in his concurrence, although he expressed disagreement with the decision as an initial matter.\(^51\)

In applying *Weber*, the Court first distinguished between the evidence of "manifest imbalance" in an employer's work force sufficient to support an affirmative action plan and the statistical evidence sufficient for a prima facie case of discrimination in violation of Title VII. It recognized that a prima facie case would require statistical evidence of the sexual composition of the relevant labor market and that the labor market for skilled craft workers extended only to applicants with the relevant skills. By contrast, it allowed proof of manifest imbalance by comparing the employer's skilled craft workers with the general labor force, at least for preferences in training programs as in *Weber*.\(^52\) The Court, however, failed to follow this approach in *Johnson*. Instead it finally concluded that a comparison with the general labor force would have made the affirmative action plan suspect: "[H]ad the Plan simply calculated imbalances in all categories according to the proportion of women in the area labor pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question."\(^53\)

This tortuous line of reasoning was all the more unjustified for being unnecessary. The Court was confronted in *Johnson* with what it has elsewhere called the "inexorable zero": no representation of women at all in skilled craft posi-

\(^{49}\) Id. at 1450-51 & n.7.  
\(^{50}\) Id. at 1472-73 (Scalia, J., dissenting).  
\(^{51}\) Id. at 1458-59 (Stevens, J., concurring).  
\(^{52}\) Id. at 1452-53 & n. 10.  
\(^{53}\) Id. at 1453-54.
Even the affirmative action plan recognized the need for more precise statistics in setting goals for particular jobs, although none had yet been set when the single promotion in this case was made. And indeed, the Court eventually seized on this aspect of the plan to argue that it established a flexible goal instead of a rigid quota.55

The Court's distinction between "manifest imbalance" and a prima facie case presupposes a clear account of a prima facie case. Returning to an argument made by Justice Blackmun in Weber, the Court argued that employers would be deterred from adopting affirmative action plans if they were required to assemble evidence of their own liability under Title VII.56 The degree of deterrence, however, depends upon the degree of evidence necessary to make out a prima facie case. Neither the Court, nor Justice O'Connor, who suggested that manifest imbalance was equivalent to a prima facie case,57 made clear what they meant by this ambiguous term. It might refer to a prima facie case of class-wide intentional discrimination under the theory of disparate treatment or the less demanding prima facie case of disproportionate adverse impact under the theory of disparate impact.58 In combination with these alternatives, it might also refer either to evidence from which a reasonable inference might be drawn in the plaintiff's favor or to an actual finding by the court in the plaintiff's favor. It is doubtful that the weakest of the four possible interpretations of prima facie case, evidence from which a reasonable inference of disproportionate adverse impact can be drawn, would significantly deter employers from adopting affirmative action plans for fear of liability to the victims of past discrimination. Many of them are already covered by regulations that re-

57. 107 S. Ct. at 1462-63 (O'Connor, J., concurring in the judgment).
58. Page v. U.S. Indus., Inc., 726 F.2d 1038, 1053-54 (5th Cir. 1984); Gay v. Waiters' Union Local 30, 694 F.2d 531, 552 (9th Cir. 1982).
quire record-keeping and reporting of much the same evidence.59

Tying the definition of "manifest imbalance" to a prima facie case would also allow the Court to rely on existing case law governing statistical evidence to prove adverse impact, and in particular to avoid the contradictory definitions of the relevant labor market that it used in Johnson. The use of voluntary affirmative action plans to remedy prior discrimination presupposes some definition of the discrimination to be remedied. Title VII defines discrimination as disparate treatment or disparate impact by a covered defendant. As applied to affirmative action, this definition would require evidence of a past violation of the statute by the employer or union which instituted the affirmative action plan, but no more than necessary to give rise to a reasonable inference of adverse impact. It would also allow questions about the appropriate labor market, the degree of adverse impact, and the appropriate forms of statistical evidence to be resolved by reference to the body of law that has developed on these issues under the theory of disparate impact.60

Ironically, this definition of past discrimination closely resembles the standard that the Court has adopted in its constitutional decisions on voluntary affirmative action: it has required evidence of a constitutional or statutory violation by the union or employer which engaged in affirmative action. It has rejected general societal discrimination, not attributable to the employer or union, as a justification for affirmative action.61

Even in Johnson, the Court did not endorse such a broad definition of "manifest imbalance." It confined itself to holding

59. The Uniform Guidelines on Employee Selection Procedures require users of tests and other selection procedures to maintain evidence of adverse impact. 29 C.F.R. § 1607.15A (1986). Employers with more than 100 employees must also file an Employer Information Report EEO-1 every year. Id. at § 1602.7. Certain joint labor-management committees are also subject to a similar requirement. Id. § 1602.15. Federal prime contractors and first tier subcontractors are subject to a separate set of reporting requirements if they have at least 50 employees and contracts of at least $50,000 with the federal government or if they meet certain other requirements. 41 C.F.R. §§ 60-1.7, -1.40, -2.1, -2.11 (1986).

60. For an extensive discussion of these issues, see Rutherglen, supra note 25, at 1330–35. In theory, the degree of proof can be distinguished from the extent of the statistical disparity. But in practice, the two are usually correlated: stronger evidence usually shows more egregious discrimination, particularly when it takes the form of statistical evidence.

61. See infra subpart II.B.
that “manifest imbalance” was something less than a prima facie case under Title VII. As the Court recognized, tying evidence of “manifest imbalance” to evidence of adverse impact would also tie the statutory standard for affirmative action to the constitutional standard. Yet the Court refused to take this step, or at least to admit that it was taking it. Instead, it took the paradoxical position that the constitutional standard for affirmative action required evidence of at least a past statutory violation, but that the statutory standard itself did not. Just to state this position is to reveal its weakness.

II. Preferences in Layoffs

When the Court has moved from considering evidence of past discrimination to considering the burden that a preference can permissibly place on individual white employees, it has reached almost identical results under Title VII and the Constitution. Although the Court has not acknowledged the similarity between the statutory and constitutional standards in this respect, it has relied on essentially the same reasoning under either standard. In Firefighters Local Union No. 1784 v. Stotts, it held that Title VII prohibited judicial modification of a consent decree to require layoffs of white employees, and, in Wygant v. Jackson Board of Education, it held that the Constitution prohibited a public employer and a union from agreeing to a preference in layoffs.

A. Firefighters Local Union No. 1784 v. Stotts

The decision in Stotts can be summarized briefly because the broadest and most controversial ground for the decision was subsequently disavowed by the Supreme Court. In language seemingly applicable to any judicially imposed preference, the Court stated that individual relief could be conferred only on identified victims of discrimination. Almost by definition, preferences extend benefits to members of a disadvantaged group who are not proven victims of discrimination. The Court later abandoned this general restrict-

64. 106 S. Ct. 1842 (1986).
65. 467 U.S. at 578–83.
tion on remedies under Title VII in a case upholding a judicially ordered preference, to be discussed in the next section of this Article.\footnote{Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC, 106 S. Ct. 3019, 3047-50 (1986). \textit{See infra} subpart III.A.} Even Justice White, the author of the opinion in \textit{Stotts}, agreed with this conclusion.\footnote{106 S. Ct. at 3062 (White, J., dissenting).}

The continuing significance of \textit{Stotts} lies in the narrower grounds offered by the Court. These, in turn, depend upon the facts of the case. The consent decree in \textit{Stotts} settled a class action alleging racial discrimination in hiring and promotions in the Memphis Fire Department. It established preferences in hiring and promotion, but not in layoffs. When the city attempted to make layoffs in the fire department in reverse order of seniority, according to the usual rule of “last hired, first fired,” the plaintiffs obtained an injunction against any layoffs that would reduce the proportion of blacks employed by the fire department. This injunction required whites with greater seniority to be laid off to preserve the jobs of blacks with less seniority. The Sixth Circuit affirmed this injunction, but the Supreme Court reversed.

The Court first considered the power of a court to modify a consent decree over the objection of one of the parties to it. The Court found no basis for the modification in the consent decree itself. Instead, it found some indication that the consent decree was supposed to be consistent with an earlier city-wide consent decree that provided for seniority according to length of employment with the city. It was also supposed to be consistent with an agreement between the city and the firefighters’ union establishing the seniority system in the fire department.\footnote{467 U.S. at 573-76.}

The Court then considered a second, broader ground for reversing the injunction, derived from the general principles governing awards of remedial seniority under Title VII. A bona fide seniority system, as in \textit{Stotts}, is protected by the seniority clause of section 703(h) of Title VII.\footnote{42 U.S.C. § 2000e-2(h) (1982).} Although this clause principally exempts employers and unions from
liability for seniority systems with adverse impact, it also restricts awards of remedial seniority. The restriction does not concern who may receive awards of remedial seniority, but rather how the recipients may use it. For instance, in Weber, blacks in effect received remedial seniority because they were preferred over more senior whites for admission to a craft training program. Unlike the preference in Stotts, however, the preference in Weber did not bump whites out of their jobs. So, too, section 703(h) limits the award of remedial seniority to “rightful place” seniority: insofar as it is used by employees to compete for promotions, transfers, and protection from layoffs, it allows them to move to a different job only after a vacancy has arisen in it. Even proven victims of discrimination, entitled to awards of remedial seniority to put them in the place they would otherwise have occupied, cannot use it to bump whites out of their jobs. It comes as no surprise, then, that Stotts held that the beneficiaries of a preference in hiring, who are not proven victims of discrimination and therefore not entitled to an award of remedial seniority, cannot receive any greater protections from layoffs than the victims themselves. What is surprising is the similarity between this reasoning, derived from the statutory provision in Title VII protecting bona fide seniority systems, and the Court’s reasoning in its constitutional decision in Wygant.

B. Wygant v. Jackson Board of Education

In Wygant, the Supreme Court brought the statutory and constitutional standards closer together at two points, both in defining the permissible burdens on white employees and in requiring similar evidence of past discrimination. It held unconstitutional a collective bargaining agreement between a local school board and a teachers’ union which partially protected minority teachers from layoff in the event of cutbacks in the school system. When the cutbacks came, the

73. Under terms of the collective bargaining agreement, the board was to lay off teachers in reverse order of seniority unless the percentage of minority personnel thus laid off would exceed the percentage of minorities employed at that
The school board eventually laid off white teachers with more seniority than some minority teachers it retained. Several laid off white teachers then brought suit in federal court. The district court dismissed all their claims, and, in particular, it rejected their argument that findings of prior discrimination were necessary to support preferences under the equal protection clause. Instead, it held that the preference in layoffs was a constitutionally permissible attempt to remedy societal discrimination by providing role models to minority schoolchildren. The Sixth Circuit affirmed in an opinion largely adopting the language and reasoning of the district court.\(^\text{74}\)

The Supreme Court reversed without a majority opinion. The five justices voting to reverse did so for three different reasons advanced in three separate opinions. In an opinion consisting of a single paragraph, Justice White found the preference to be equivalent to a rule requiring the discharge of whites and the hiring of blacks until blacks comprised a suitable percentage of the work force.\(^\text{75}\) Under any approach ever suggested by any member of the Court, such a rule would be invalid.

Justice O'Connor viewed the preference as a straightforward attempt to remedy employment discrimination by the school district. In her view, the preference fell because it was keyed to a hiring goal that itself had no relationship to the injury it sought to remedy.\(^\text{76}\) The school district's justification in terms of role models led to a hiring goal equal to the percentage of minorities in the student body, not to those in the local work force. Only this second figure, however, could have any relevance to employment discrimination.

Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, and, in part, by Justice O'Connor, also treated the preference as an attempt to remedy employment discrimination. To him, the role model rationale was simply

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75. 106 S. Ct. at 1857 (White, J., concurring in the judgment).
76. Id. at 1852 (O'Connor, J., concurring in part and concurring in the judgment).
invalid. It too closely resembled the goal of remedying general societal discrimination, which he had rejected earlier in *Regents of the University of California v. Bakke.*\(^7\) As in *Johnson,* some evidence of a past statutory or constitutional violation by the employer itself was necessary to support the preference. The only question was how much. Although it was clear from an earlier state court opinion in the litigation that the school board had never discriminated in violation of state or federal law,\(^7\) Justice Powell still discussed this question at great length. In a part of his opinion joined by three other justices, he decided that a trial court must find "a strong basis in evidence" of prior illegal discrimination in order to uphold a voluntary preference under the Equal Protection Clause.\(^7\)

Justice Powell's requirement of a "strong basis in evidence" echoes the requirement of an "arguable violation" proposed by Justice Blackmun in *Weber.*\(^8\) Justice Powell did not give any reasons for adopting this position, but the reasons favoring it were well articulated by Justice Blackmun in *Weber* and by Justice O'Connor in her concurrence in *Wygant.*\(^9\) Both argued that requiring an admission of illegal discrimination before an employer can adopt a remedial preference puts the employer in an untenable position. The employer must either allow discrimination against minorities to go unremedied or expose itself to claims based on its admission of past discrimination. In order to encourage voluntary affirmative action by employers, it is necessary to allow something less than an admission to justify adoption of a preference.

On this issue, as in *Bakke,*\(^8\) Justice Powell's position was decisive. The four dissenting justices in *Wygant* believed that the broader goal of integrating the public schools was suffi-

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78. 106 S. Ct. at 1849 (opinion of Powell, J.).
79. *Id.* at 1848.
cient to justify the preference. The four justices who took Justice Powell’s position required a “strong basis in evidence” of the employer’s past discrimination. The remaining two, Justices White and Scalia, would probably take at least as strict a position. Although only two of the four justices who took Justice Powell’s position now remain on the Court, the vote of at least one of these justices appears to be necessary to uphold any preference. Thus, in order to comply with the Equal Protection Clause, a voluntary preference must be justified by at least a “strong basis in evidence” of past discrimination by the institution adopting the preference. This requirement can be met by evidence of a past violation of Title VII, thereby making the constitutional standard for affirmative action partially dependent on the statutory standard for liability.

Although the school board argued that it could meet this test on remand, Justice Powell thought a remand unnecessary. He believed that the preference in layoffs was unconstitutional for another reason: it placed an unacceptably large burden on whites who were themselves innocent of discrimination. Joined by two other justices, he distinguished the prior cases in which the Court had upheld preferences in employment because none of them had involved layoffs. Instead, expressly invoking Stotts, he distinguished between preferences in hiring, contracting, and admission to educational programs and preferences in layoffs. The difference is between failing to get a position or benefit one hopes to receive and losing a position one already has. Justice Powell thought the difference critical: “Though hiring goals may burden some innocent individuals, they simply do not

83. 106 S. Ct. at 1862–63 (Marshall, J., dissenting) (joined by Brennan and Blackmun, JJ.); id. at 1867–71 (Stevens, J., dissenting).
84. They took a stricter position than Justice Powell on judicially ordered preferences for constitutional violations, as did Chief Justice Rehnquist and Justice O’Connor. United States v. Paradise, 107 S. Ct. 1053, 1080 (1987) (O’Connor, J., dissenting) (joined by Chief Justice Rehnquist and Justice Scalia); id. at 1080–82 (White, J., dissenting).
85. Chief Justice Burger joined in Justice Powell’s opinion. He was replaced by Justice Rehnquist who was, in turn, replaced by Justice Scalia. Justice Powell himself retired on June 26, 1987.
86. Justice O’Connor did not join this part of Justice Powell’s analysis. She expressly declined to consider “the troubling questions of whether any layoff provision could survive strict scrutiny . . . .” 106 S. Ct. at 1857 (O’Connor, J., concurring in part and concurring in the judgment).
impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job. 87

Justice Powell found this difference to be significant for two reasons. First, hiring goals generally diffuse the burden borne by innocent individuals while layoff preferences do not. 88 Diffusion is important because it spreads the costs and thereby reduces the burden that any one individual must bear. It also reinforces the notion of group responsibility. By spreading its burden over more whites, a preference in hiring emphasizes that it is the group, not the individual, who appropriately bears responsibility for the sins of the past. Such cost-spreading recognizes, if only implicitly, that the individual whites who would be disadvantaged by a preference are no more responsible for past discrimination than are many others.

The second reason, as Justice Powell put it, is that “layoffs disrupt . . . settled expectations in a way that general hiring goals do not.” 89 The more certain one’s expectations concerning a position or benefit, the more likely one is to feel a deprivation when those expectations are defeated. For example, an individual is certain to feel less keenly the loss of some chance of gaining a particular job than the loss of the job itself. Moreover, prohibiting preferences that overturn settled expectations imposes a kind of limit on the cost of the remedy to innocent individuals. As Justice Powell noted, an individual who has received on-the-job training and experience, and who has made other personal and eco-

87. Id. at 1851 (opinion of Powell, J.).

88. “In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally.” Id. In Local 28, Sheet Metal Workers’ Int’l Ass’n v. EEOC, Justice Powell suggested that this was the most important difference:

Of course, it is too simplistic to conclude . . . that hiring goals withstand constitutional muster whereas layoff goals and fixed quotas do not. There may be cases, for example, where a hiring goal in a particularly specialized area of employment would have the same pernicious effect as the layoff goal in Wygant. The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent non-minorities, not on the label applied to the particular employment plan at issue.

106 S. Ct. 3019, 3057 n.3 (1986) (Powell, J., concurring in part and concurring in the judgment).

89. 106 S. Ct. at 1851 (opinion of Powell, J.).
nomic investments in a particular job, loses these investments temporarily, and perhaps permanently, through a layoff in violation of seniority rights. By contrast, someone denied a job because of a hiring preference will lose no such investment in the job. In general, then, protecting expectancies, particularly in employment, sets a kind of ceiling on the burden that any particular individual must bear under a preference. Individual whites, even if they themselves are innocent of prior discrimination, can be required to pay in order to remedy its effects, but not too much.

Wygant thus reaches the same result as Stotts, but by a different route. In Stotts, the Court relied on the protection of bona fide seniority systems in section 703(h) of Title VII. In Wygant, it used equitable principles to develop a constitutional rule to the same effect. Although these rules differ in their immediate basis in statutory and constitutional law, they share a common underlying principle: that remedies for discrimination should not fall too harshly on innocent employees. Protecting the expectations generated by bona fide seniority systems, especially expectations of continued employment, is just one way of minimizing the adverse consequences of attempts to remedy employment discrimination. A similar common principle underlies the Court's decisions on judicially ordered preferences.

III. JUDICIALLY ORDERED PREFERENCES

The Court has analyzed judicially ordered preferences somewhat differently than voluntary ones. Although it has applied a similar standard in determining the burdens that can be placed on innocent whites, it has applied a stricter standard of justification. Under both Title VII and the Constitution, the Court has required more evidence of prior discrimination, although it has not made clear whether precisely the same evidence is required under both sources of law. The Court has discussed the standards for judicially ordered preferences in two cases. In Local 28, Sheet Metal

90. In fact, Justice Powell believed that a worker's accumulated experience in his job might well be "the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Id. (quoting Fallon & Weiler, Conflicting Models of Racial Justice, 1984 Sup. Ct. Rev. 1, 58).

91. See Fallon & Weiler, supra note 90, at 55–60.
Workers' International Association v. EEOC, the Court upheld a preference in gaining union membership under both Title VII and the Constitution and, in United States v. Paradise, it upheld a preference in promotions under the Constitution alone.

A. Local 28, Sheet Metal Workers' International Association v. EEOC

Sheet Metal Workers concerned a judicially ordered preference designed to remedy persistent discrimination. State proceedings against Local 28 began in 1964, even before the effective date of Title VII, and federal proceedings began in 1971. Like the New York State Commission for Human Rights and the New York state courts, the federal district court found that the union and its apprenticeship committee had illegally denied membership to minorities. Among other remedies, it imposed a 29% minority membership goal to be met by 1981. The Second Circuit largely affirmed this decision, and on remand, the district court gave the union an additional year to meet the 29% goal.

Several years later, in 1982, the district court held the union and committee in civil contempt for violation of its previous orders. In 1983, the district court once again found the union and committee in civil contempt and, among other remedies, imposed another minority membership goal of 29.23%, to be met by August 31, 1987. The

92. 106 S. Ct. 3019 (1986).
96. 532 F.2d 821 (2d Cir. 1976).
97. The Second Circuit affirmed this new order in its entirety. 565 F.2d 31 (2d Cir. 1977).
98. The court found that they had underutilized the apprenticeship program to avoid bringing minority workers into the union, provided job protection for older workers at the expense of minority workers, issued work permits to whites from sister locals, failed to publicize membership opportunities for minority workers, and failed to maintain and submit required reports and records. 106 S. Ct. at 3028-29 (opinion of Brennan, J.).
99. Id. at 3029-30.
Second Circuit modified the district court's judgment and order in some respects but upheld most of its findings of contempt, the 29.23% membership goal, and the August 31, 1987 deadline. It was this decision of the Second Circuit, its third in the case, that the Supreme Court reviewed—fifteen years after the case was originally filed in federal court and twenty-two years after charges were originally filed with the New York State Commission for Human Rights.

The central issue in *Sheet Metal Workers* concerned the 29.23% membership goal: did the district court have authority to order it under Title VII, and if so, was it constitutional? Following the usual pattern in affirmative action cases, the Supreme Court failed to decide either the statutory or the constitutional question by an opinion of the Court. Justice Powell joined the opinion of Justice Brennan, which otherwise represented a plurality of four justices, on only a few subsidiary issues which were not even addressed in the dissenting opinions.

On the statutory issue, the Court divided along two different lines. The first concerned the burden imposed by the preference. This line divided the majority, represented by Justice Brennan's plurality opinion and Justice Powell's sep-

100. 753 F.2d 1172 (2d Cir. 1985).

101. Justice Brennan spoke for the Court only in holding that the sanctions imposed by the district court were for civil, as opposed to criminal, contempt because they sought to compel future compliance with its decrees and to compensate for past violations; that the statistical evidence used by the district court in setting the 29.23% goal and in finding that the apprenticeship program had been underutilized was correct in all significant respects; and that the district court did not unduly interfere in the union's internal affairs by appointing an administrator to supervise the union's compliance with its decree. 106 S. Ct. at 3024, 3031-33, 3053-54 (opinion of Brennan, J.). The other major issue the Court considered was whether the district court could order the union and the joint apprenticeship committee to create a fund to be used to remedy discrimination, in particular, to pay for nonwhite union members to serve as liaisons to schools with sheet metal programs; to create part-time and summer sheet metal jobs for qualified nonwhite youths; to grant counseling, educational services, and financial aid to needy apprentices; and to increase employment for all apprentices, by providing support to employers and job training programs. Interestingly, although the fund did not impose nearly the same kind of burden on whites that the membership goal did and, in fact, made some of its benefits available to whites on an equal basis, it proved just as divisive as the membership goal. In fact, it split the justices along the very same lines. Compare id. at 3050-53 and id. at 3054 (Powell, J., concurring in part and concurring in the judgment) with id. at 3061 (O'Connor, J., concurring in part and dissenting in part) and id. at 3062-63 (White, J., dissenting) and id. at 3063 (Rehnquist, J., dissenting).
arate opinion, from the dissenting opinions of Justices O'Connor and White. Both Justice Brennan and Justice Powell looked to several equitable factors in order to determine whether the preference imposed an improper burden. In particular, Justice Brennan believed that other remedies must be inadequate; the preference must be flexible and temporary; and it must not "unnecessarily trammel the interests of white workers." Justice Powell agreed that the inquiry should turn on these factors although he expressed them somewhat differently. The major factor causing disagreement among members of the Court concerned the flexibility of the 29.23% goal. Relying largely on the district court's application of the goal, Justices Brennan and Powell found it to be flexible and did not believe that it would require any white employees to be laid off. Looking at the goal's hundredth-of-a-percentage-point precision and its fixed deadline, Justices O'Connor and White found the opposite. They relied primarily on Judge Winter's dissenting opinion in the court of appeals.

Judge Winter had argued that the goal could not realistically be met by August 31, 1987, without denying jobs to incumbent members of the union. Since 1971, when the action was first filed, the union had faced a long-term decline in demand for journeymen sheet metal workers in the New York metropolitan area. The district court, however, had already taken this decline into account by repeatedly extending the deadline for meeting its earlier goals—from 1981 in the original order, to 1982, and finally to 1987—and by relying on grounds other than failure to meet this goal whenever it found the union and committee in contempt. The issue, then, concerned not so much the flexibility of the preference as how large a burden it would place on innocent

102. Id. at 3050-52.
103. Id. at 3055 (Powell, J., concurring). The major difference between Justice Powell's and Justice Brennan's formulations is that Justice Powell expressly listed "the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force" as a factor, id., while Justice Brennan did not. In a subsequent opinion, however, Justice Brennan made clear that this factor is relevant. United States v. Paradise, 107 S. Ct. 1053, 1067 (1987) (opinion of Brennan, J.).
104. 106 S. Ct. 3019, 3061-62 (O'Connor, J., concurring in part and dissenting in part); id. at 3062-63 (White, J., dissenting).
105. 753 F.2d at 1189-95 (Winter, J., dissenting).
106. Id. at 1192-93.
white employers. In particular, would it have the same effect as the preference in *Stotts*?\(^{107}\) The majority avoided this question by the simple expedient of flexibly interpreting the district court’s order to take account of labor conditions in the construction industry. The decisive reason for taking the goal to be flexible was that five justices said that it was.

The second, and generally more significant, division among the justices concerned the situations in which Title VII authorizes the award of preferential relief, and in particular, the evidence of past discrimination required to justify such relief. On one side of this line was Justice Brennan, who would have allowed such relief in a narrow range of cases, Justice Powell, who would have allowed it in a still narrower range of cases, “involving particularly egregious conduct,”\(^ {108}\) and, surprisingly, Justice White, who expressed general agreement with Justice Brennan’s discussion of this issue.\(^ {109}\) Justice White apparently disavowed the statements to the contrary in his opinion for the Court in *Stotts*.\(^ {110}\) On the opposite side was Justice Rehnquist, joined by Chief Justice Burger, who would have allowed preferential relief to be awarded only to identified victims of discrimination.\(^ {111}\)

As Justice Brennan noted, section 706(g) vests courts with broad discretion to award equitable relief for violations of Title VII.\(^ {112}\) It grants courts the power to order “such

\(^{107}\) 106 S. Ct. at 3057 n.4 (Powell, J., concurring); id. at 3062 (O’Connor, J., concurring in part and dissenting in part); id. at 3062-63 (White, J., dissenting). The injunction overturned in *Stotts* required whites with greater seniority to be laid off to preserve the jobs of blacks with less seniority. See supra subpart II.A.

\(^{108}\) 106 S. Ct. at 3054 (Powell, J., concurring in part and concurring in the judgment).

\(^{109}\) Id. at 3062 (White, J., dissenting).

\(^{110}\) 467 U.S. at 579-83.

\(^{111}\) 106 S. Ct. 3019, 3063 (Rehnquist, J., dissenting). Although she did discuss it at some length, Justice O’Connor did not decide this issue because she found the membership goal to be unacceptably rigid. Id. at 3057-62 (O’Connor, J., concurring in part and dissenting in part).

\(^{112}\) 42 U.S.C. § 2000e-5(g) (1982). Section 706(g) reads in full:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems
affirmative action as may be appropriate," which includes "but is not limited to" compensatory relief, such as reinstatement and back pay, and which extends to "any other equitable relief as the court deems appropriate." The last two of these quoted phrases were added to section 706(g) by the 1972 amendments to Title VII to confirm the broad remedial authority already exercised by the federal courts under the statute as originally enacted. Congress ratified the general power of the federal courts, as applied under Title VII, to devise remedies that extend beyond a simple prohibition against future discrimination or compensation for past discrimination. Structural injunctions are now the standard example of such affirmative remedies, endorsed by the Supreme Court in a variety of civil rights cases, ranging from school desegregation to housing discrimination to prison conditions.

The broad remedial discretion granted by section 706(g) is limited by several specific provisions of that section, all concerned with compensatory relief. Among

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\text{id. 113. Id.}\n\]

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\text{id. 116. Awards of back pay must be reduced by the amount of interim earnings or the amount that could have been earned with reasonable diligence, and they cannot extend to periods more than two years before a charge was filed with the}\n\]
these is the section’s last sentence, which prohibits awards of compensatory relief to any individual denied a job or union membership for any reason not prohibited by Title VII. As we have already seen, this sentence was interpreted in Stotts to authorize the award of relief only to actual victims of discrimination. As Justice Brennan pointed out, however, this sentence literally prohibits only awards of compensatory relief to individuals who would have been denied a job or denied union membership for entirely legitimate reasons. It applies, for example, when an employer denies an individual a job because of his race but can later show that the individual did not possess the legitimate qualifications for the job anyway. Nevertheless, several supporters of Title VII interpreted this sentence as a prohibition against judicially ordered “racial quotas,” in statements prominently quoted in Stotts. They did so during the congressional debate over racial preferences which culminated in the compromise adding section 703(j) to the statute on the floor of the Senate. It is doubtful, however, that any such legislative history, attached to a provision concerned with compensatory relief, could effectively limit the relief authorized by section 706(g) to injunctions against future discrimination and compensation for past discrimination. The literal terms of section 706(g), quoted earlier, make clear precisely that it was not limited to these forms of relief.

Section 703(j) contains a more explicit limitation on judicially ordered preferences under Title VII. In terms that seemingly extend to preferences ordered under section 706(g), it states that “[n]othing contained in this subchapter shall be interpreted to require” racial balance.

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EEOC. § 706(g), 42 U.S.C. § 2000e-5(g) (1982). For the full text of section 706(g), see supra note 112.
117. Id.
118. 467 U.S. at 578-83. See supra subpart II.A.
121. 467 U.S. at 578-82.
123. See supra note 112.
lative history demonstrates that this subsection was added to dispel fears that Title VII would require employers to grant preferences in order to avoid liability. In this view, section 703(j) means only that an employer's failure to confer preferences cannot result in liability; it does not affect a court's remedial powers at all.

This argument is essentially correct, although its conclusion is overstated. Like the exception for bona fide seniority systems under Title VII, section 703(j) does not deprive the courts of authority to order preferential relief, it only affects how the court should exercise that authority. The same general principles apply both to preferential relief and to remedial seniority: substantive law usually determines the scope of the remedy because it determines the scope of the wrong, but in unusual cases, the scope of the remedy can go beyond the scope of the wrong. *Sheet Metal Workers* was one such case. As Justice Brennan's lengthy discussion of the legislative history demonstrates, the focus of section 703(j) was on preferences required as a matter of substantive law, not on preferences designed to remedy independent, egregious violations of Title VII.

Nevertheless, the same concerns that led Congress to disavow any interpretation of Title VII that required racial balance as a matter of substantive law should also limit the award of preferential relief. Justice Brennan acknowledged as much by limiting preferential relief to extraordinary situations. In his view, preferential remedies are only justified when a defendant has engaged in "particularly longstanding or egregious discrimination," when "informal mechanisms may obstruct equal employment opportunities," or when interim goals are necessary "pending the development of nondiscriminatory hiring or promotion procedures." Justice Powell agreed with the need for preferences in only the first of these situations, without mentioning the other two. His vote, which was necessary for the decision of the case, thus effectively limits the situations in which a court can or-

126. 106 S. Ct. at 3038–44.
127. Id. at 3036–37.
128. Id. at 3054 (Powell, J., concurring in part and concurring in the judgment).
under a preference under Title VII to only those involving, in
his words, "particularly egregious conduct."\textsuperscript{129}

The Court disposed of the constitutional question much
more quickly. Both Justice Brennan and Justice Powell gen-
ernally recapitulated their analysis under Title VII of the bur-
den that the preference placed on whites and its overall
appropriateness as a remedy.\textsuperscript{130} The more interesting
strand of their analysis concerned the degree of justification
required for the preference: whether the proof of prior dis-
crimination by the union was sufficient to support it. All five
of the justices voting to affirm agreed that this standard had
been met but none actually discussed what the constitutional
standard was. Egregious discrimination, they noted, was suf-
ficient to support a judicially-ordered preference, but they
never discussed whether it was required, or whether some
lesser showing was sufficient.\textsuperscript{131} This question was left open
in \textit{Sheet Metal Workers}, and, as we shall see, in \textit{United States v.
Paradise} as well.

B. United States v. Paradise

\textit{United States v. Paradise}\textsuperscript{132} resembled \textit{Sheet Metal Workers}
in several respects: it concerned egregious discrimination,
court orders and consent decrees which had resulted in par-
tial and delayed compliance, and a judicially ordered prefer-
ence that did not deprive any white employees of their jobs.
The Court upheld the preference for many of the same rea-
sons, despite the fact that the case involved only constitu-
tional issues because it was filed in 1972 before Title VII was
extended to public employers.

The NAACP sued the Alabama Department of Public
Safety for its longstanding practice of refusing to hire blacks
as state troopers. The district court found discrimination
and ordered a temporary one-for-one hiring quota,\textsuperscript{133} which
the court of appeals upheld.\textsuperscript{134} Subsequently, the district

\textsuperscript{129} Id.
\textsuperscript{130} Id. at 3053 (opinion of Brennan, J.); id. at 3056-57 (Powell, J., concurring
in part and concurring in the judgment).
\textsuperscript{131} Id. at 3053 (opinion of Brennan, J.); id. at 3055 (Powell, J., concurring in
part and concurring in the judgment).
\textsuperscript{132} 107 S. Ct. 1053 (1987).
\textsuperscript{134} NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974).
court found that the department had tried to frustrate this order by artificially restricting the number of new troopers hired and by discriminating against black troopers during their probationary period.\textsuperscript{135}

In 1977, the plaintiffs returned to the district court seeking relief for continued discrimination in promotions. At the time, no blacks had ever been employed at the rank of corporal or above. The district court approved a consent decree under which the department agreed to develop a promotion procedure that would be fair to all and have minimal adverse impact upon blacks. When the department failed to do so after several years, the parties agreed to a second consent decree, which again resulted in no promotions because the test developed by the department had an adverse impact on blacks.

In 1983, the plaintiffs sought to enforce the two consent decrees. In particular, they asked the court to order the department to promote one black to the rank of corporal for each white so promoted. After requesting promotion plans from the department, all of which it found unsatisfactory, the district court imposed a one-for-one hiring requirement on all upper ranks, but only if (i) there were qualified black applicants, (ii) the rank was less than 25\% black, and (iii) the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank.\textsuperscript{136}

After contesting the order in district court, the department promoted eight blacks and eight whites to corporal. Four months later, the department submitted new proposed procedures for promotion to corporal and the district court suspended the one-for-one requirement for this rank. On appeal, the Eleventh Circuit affirmed the court's one-for-one preference in promotions to all the higher ranks. It concluded that the relief extended no further than necessary to remedy the "'egregious' and long-standing racial imbalances in the . . . Department."\textsuperscript{137}

\textsuperscript{135} The district court found that the department had not selected the best qualified blacks from the eligibility rosters, had discriminated against black trainees at the trooper academy, had treated whites less harshly than blacks in training and testing, and had disciplined blacks more harshly than whites for the same misconduct while on the force. \textit{Paradise}, 107 S. Ct. at 1059.


\textsuperscript{137} \textit{Paradise v. Prescott}, 767 F.2d 1514, 1533 (11th Cir. 1985).
The Supreme Court affirmed this decision over two dis- 
sents. Justice O'Connor, joined by Chief Justice Rehnquist 
and Justice Scalia, would have reversed because she believed 
that the district court had not adequately considered alterna-
tives to the one-for-one promotion quota. Justice White, 
in his own two-sentence dissenting opinion, simply stated 
that the district court had exceeded its equitable powers in 
imposing the promotion quota. The remaining five jus-
tices supported the reasoning of Justice Brennan, except for 
Justice Stevens, who concurred only in the judgment. Citing 
the Court's busing decisions, Justice Stevens would have de-
cided the case on the ground of burden of proof. He be-
lieved that "[a] party who has been found guilty of repeated 
and persistent violations of the law bears the burden of demon-
strating that the chancellor's efforts to fashion effective 
relief exceed the bounds of 'reasonableness,'" a burden 
which he thought the Department had not even begun to 
meet in this case.

Justice Brennan, writing for the plurality, analyzed the 
case in more familiar terms and found both that the remedy 
was sufficiently narrowly tailored and that there was ade-
quate evidence of prior discrimination to justify the prefer-
ence. The first requirement took up the major part of his 
opinion. In finding that the preference was narrowly tai-
lored, Justice Brennan considered several factors recognize-
able from Sheet Metal Workers: the need for a preference and 
the efficacy of alternative remedies; the flexibility, waivability 
and duration of the preference; the relationship between its 
numerical goals and the relevant labor market; and its im-
 pact on the rights of third parties. The remedy was neces-
sary and the alternatives inadequate, he found, because only 
a promotion preference could further all three of the district 
court's remedial goals: eliminating the effects of past dis-
 crimination, creating incentives for the department to de-
velop an acceptable promotion procedure, and eliminating 
the effects of the department's foot-dragging. The prefer-
ence was sufficiently flexible and temporary because it was 
conditioned on the availability of qualified black candidates

139. Id. at 1080 (White, J., dissenting).
140. Id. at 1078 (Stevens, J., concurring).
141. Id. at 1066–74 (opinion of Brennan, J.).
and would be suspended whenever the department developed its own acceptable promotion procedures.

The preference also passed the hurdles that the preference in layoffs in *Wygant* had stumbled on. First, even though the preference required 50% of the promotions to be of black candidates, while the local labor pool contained only 25% blacks, the promotion ratio was sufficiently related to the composition of the relevant labor market. Justice Brennan argued that the one-for-one promotion ratio regulated only the speed with which the eventual target of 25% overall minority representation would be reached and that it did not unduly exclude whites. He therefore concluded that it was constitutionally permissible as a means of "compensat[ing] for past delay and prevent[ing] future recalcitrance."\(^{142}\) Second, Justice Brennan believed that the one-for-one quota was sufficiently diffuse in impact to impose no unacceptable burden on whites. Because it was of limited duration and because whites who were passed over would be eligible for promotion later, Justice Brennan believed that the only burden it imposed was one of postponement. Compared to loss of an existing job, as in *Stotts* and *Wygant*, or even denial of a future employment opportunity, as in *Johnson*, this was a "lesser burden."\(^{143}\)

The most interesting part of Justice Brennan's analysis was not his application of these factors, but their source. In selecting the factors to consider, Justice Brennan conflated standards approved by seven members of the Court in different cases—some involving Title VII and others the Constitution, some involving voluntary preferences and others court-ordered ones.\(^{144}\) The conflation of these standards strongly confirms the conclusion suggested by *Stotts* and *Wygant*. Whether the case involves a voluntary or court-ordered preference or a Title VII or equal protection claim, this part of the test remains the same: the preference must be necessary and the alternatives ineffective; it must be flexible and temporary and not place an undue burden on innocent whites; and its ultimate numerical goals must bear a

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142. *Id.* at 1072.

143. *Id.* at 1073.

144. *Id.* at 1067. The justices are Justices Brennan, White, Marshall, Blackmun, Powell, Stevens, and O'Connor.
reasonable relationship to the composition of the relevant labor market.

On the issue of justification, Justice Brennan believed that "the pervasive, systematic, and obstinate discriminatory conduct of the Department" furnished the necessary evidentiary predicate for racially conscious relief.\textsuperscript{145} And every other member of the Court, with the possible exception of Justice White, appeared to agree with this conclusion.\textsuperscript{146} While Justice Brennan and the other justices made clear that such blatantly discriminatory actions are \textit{sufficient} to support a judicially-ordered preference, they did not imply that proof of such discriminatory actions is \textit{necessary} to support one. Like the opinions in \textit{Sheet Metal Workers}, the opinions in \textit{Paradise} assume without any real discussion that persistent and egregious discrimination satisfies the constitutional standard—whatever it might be.

Only Justice Powell went on to suggest that the burden of justification under Title VII and the Equal Protection Clause might be different.\textsuperscript{147} This possible divergence should not be totally surprising, but its direction is. If the Constitution really requires something different from Title VII, it does not, under \textit{Sheet Metal Workers}, require anything stronger than proof of egregious discrimination. Any divergence must be in the direction of a weaker constitutional requirement. This is the opposite of the divergence between the constitutional and statutory standards for voluntary preferences. With respect to voluntary preferences, the Constitution requires a "strong basis in evidence" of prior discrimination, whereas Title VII requires only a "manifest imbalance," a somewhat lesser showing. With respect to judicially ordered preferences, on the other hand, Title VII requires egregious discrimination, while the Constitution may require somewhat less. Thus, Title VII requires less than the Constitution in one context and possibly more in the other.

The possible difference in these standards should not, however, obscure the fundamental similarity between them.

\textsuperscript{145} \textit{Id.} at 1065.

\textsuperscript{146} \textit{Id.} at 1075 (Powell, J., concurring); \textit{id.} at 1077 (Stevens, J., concurring); \textit{id.} at 1080 (O'Connor, J., dissenting).

\textsuperscript{147} Justice Powell stated that he believed the Title VII and equal protection standards were different. \textit{Id.} at 1075 n.1 (Powell, J., concurring).
The statutory standards in *Sheet Metal Workers* are derived from the same general remedial principles as the constitutional standards applied, but not fully articulated, in *Paradise*. Title VII incorporates these principles by granting the courts broad equitable authority to remedy discrimination. In constitutional law, these principles bear upon the remedies available under the general civil rights statutes, chiefly sections 1983 and 1988.\textsuperscript{148} The detailed legal rules derived from these different sources of law are not likely to be exactly equivalent, if only because the relevant statutory language and judicial precedent are likely to differ. But conversely, they are likely to yield only residual variation in the law of affirmative action. The scope of sections 1983 and 1988 depends primarily upon the substantive constitutional rights that they are used to enforce. They create defenses mainly by way of various immunities, limitation periods, and restrictions on injunctions against state proceedings, none of which directly affects affirmative action.\textsuperscript{149} The same underlying principles should yield generally similar results, at least in cases concerned with the same remedy—preferences—for the same problem—discrimination in employment—and within the same body of federal civil rights law.

### IV. Reasons for Divergence

Despite the Court's disclaimers in *Johnson*, the statutory and constitutional standards for affirmative action already converge at several points. Both afford nearly identical protection to white employees from excessive individual burdens, as *Stotts* and *Wygant* illustrate. This element of the Court's analysis is the same for voluntarily adopted and judicially imposed preferences, whether they are adopted under Title VII or the Constitution. It requires that the preference be necessary and the alternatives inadequate; that it be temporary and flexible; that its numerical goals bear a reasonable relationship to the composition of the relevant labor market; and that it not place an undue burden on innocent

\begin{itemize}
\item \textsuperscript{149} See generally T. Eisenberg, Civil Rights Legislation: Cases and Materials chs. 5, 6 (2 ed. 1987); Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988, 128 U. Pa. L. Rev. 499 (1980); Whitman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980).
\end{itemize}
whites. These four factors regulate respectively the necessity, duration, degree, and form of preferences. Of these four factors, the first three depend on the facts of each case. In *Paradise*, for example, the adequacy of alternative remedies and the reasonableness of the goal both turned largely on the history of footdragging and bad faith by the Alabama Department of Public Safety. Without this history, the Court might well have held the preference invalid. The fourth factor, by contrast, turns on the general form of the preference. It bars preferences in layoffs but permits preferences in hiring and promotion, provided, of course, that they are otherwise permissible. If nothing else, *Weber, Stotts, Wygant, Sheet Metal Workers*, and *Paradise* have settled the validity of these general forms of preferential relief.

The divergence among the various standards applied by the Court arises primarily from the second element of the Court’s analysis: the evidence of past discrimination necessary to justify a preference. But even here, both the statutory and the constitutional standards authorize the judiciary to grant preferential relief to remedy egregious discrimination, as *Sheet Metal Workers* and *Paradise* hold. Moreover, the standards also overlap in coverage to a great extent, in effect making the stricter of the two standards decisive in any case involving government action. Both the statutory and constitutional standards apply to any case in which a court approves a consent decree or orders a preference in an action under Title VII or in which a public employer voluntarily adopts a preference. The Court’s constitutional decisions, especially in *Wygant*, thus effectively confine *Weber* to its original scope: to preferences established by private employers without judicial compulsion or approval.

A. The Difference Between The Statutory and Constitutional Standards

The principal remaining disparity between *Wygant* and *Weber* is in the evidence of past discrimination required to support a preference. In *Johnson*, the Court insisted that the statutory standard for voluntary preferences requires somewhat less evidence than the constitutional standard, although it failed to make clear how much less. Voluntary preferences must have a “strong basis in evidence” of prior
discrimination under the Constitution but only evidence of a "manifest imbalance" under Title VII. Judicially imposed preferences, on the other hand, must be supported by evidence of egregious discrimination under Title VII and a similar, but perhaps less extreme, showing under the Constitution. There are two, or possibly three, differences to be explained. The first, and most important, is the difference between the constitutional and statutory standards for voluntary preferences. The second is the higher standard applied to judicially imposed preferences under both Title VII and the Constitution. The third difference, suggested by Justice Powell in *Paradise*, is that the statutory standard for judicially imposed preferences may be stricter than the constitutional standard, exactly the opposite of their ordering for voluntary preferences.

Most of these differences can plausibly be explained by the reasoning of *Weber*: that Title VII did not simply impose a prohibition against discrimination by private employers, but also sought to restrain government interference with the prerogatives of private employers and unions. In the absence of a corresponding constitutional principle against interference with the public employment relationship, this statutory policy explains both the more lenient treatment of voluntary preferences and the stricter treatment of judicially imposed preferences under Title VII than under the Constitution. Under Title VII alone, it also explains the stricter standards for judicially imposed preferences than for voluntary preferences. The existing case law can therefore be largely explained by the statutory policy identified in *Weber*, but only on the doubtful assumption that this policy can actually be found in Title VII.

A general policy against interference with private employers and unions has little basis in the structure or function of Title VII, as a comparison with the National Labor Relations Act demonstrates. Unlike Title VII, the NLRA generally prohibits administrative or judicial regulation of
collective bargaining agreements, except as specifically authorized by Congress. Its basic purpose was to establish a structure of collective bargaining in which employers and unions could work out the terms and conditions of employment free from government interference. By contrast, Title VII was intended to regulate the employment relationship directly. Consistently with its basic purpose, Title VII prohibits discrimination in all aspects of employment and it contains no general restraint on government interference with the employment relationship. The only disclaimers in Title VII are specific, not general, exempting narrowly defined employment practices such as bona fide seniority systems.

Among these specific disclaimers is section 703(j), which disavows any interpretation of Title VII that "requires" preference. As we have seen, section 703(j) received an even narrower interpretation in Sheet Metal Workers: it forbids preferences required as a matter of substantive law, but not preferences required by judicial order for independent violations of Title VII. By itself, section 703(j) establishes a policy only against government regulation that requires preferences, not against any form of government regulation at all. This limited policy, against requiring preferences as a matter of substantive law, is perfectly consistent with constitutional law, which has never been interpreted to require preferences except as judicial remedies for constitutional or statutory violations, as in Paradise. It is also perfectly consistent with Title VII, which has in effect extended the constitutional prohibition against discrimination from public to private employment. And, of course, as it was interpreted in Griggs v. Duke Power Co., Title VII has done far more than simply extend the constitutional prohibition. It

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has also prohibited neutral employment practices with discriminatory effects. Because Title VII does so much more in regulating employment than the Constitution, it is difficult to agree with the conclusion in Weber that it does less in regulating preferences.

Moreover, any general policy, outside of Title VII, against regulation of privately adopted preferences proves too little because it fails to justify the distinction between the statutory and constitutional standards for voluntary preferences. Any policy, for example, of deferring to private attempts to remedy past discrimination applies equally well to public employers, so that the constitutional and statutory standards for affirmative action are difficult to distinguish on this ground. Nor can it be claimed that preferences adopted by public employers are more suspect than preferences adopted by private ones. If anything, they appear less suspect because most public employers are subject, however indirectly, to public pressure to avoid placing burdens on majority groups. As several commentators have argued, government preferences for the benefit of minorities should not be closely scrutinized because there is no need for the judiciary to protect the majority from itself.

A similar argument could be made for preferences in favor of women, either because they are effectively a political minority or because classifications on the basis of sex are subject to reduced judicial scrutiny in the first place. Even if public employers are subject to political pressure from minority and feminist interest groups, they must still satisfy the demands of other interest groups to avoid preferences that impose unacceptable burdens upon white males. By contrast, private employers are more likely to use preferences to avoid liability to individual victims of discrimination. When they use preferences to avoid litigation, private employers may not give much weight to the interests of the employees.

and applicants for employment who bear the cost of the preference, because they are displacing the cost of liability onto them. If this is true, voluntary preferences under Title VII should be subject to a higher, not a lower, standard of justification than voluntary preferences under the Constitution.

In his concurrence in Weber, Justice Blackmun suggested an entirely different basis for distinguishing between the statutory and constitutional standards. He argued that employers and unions must be allowed some leeway to adopt affirmative action plans because otherwise they would be caught between liability under the theory of disparate impact and liability for reverse discrimination.161 His approach suggests that the difference between the statutory and constitutional standards arises from the theory of disparate impact, which is available under Title VII but not under the Constitution.162 Under this theory, a plaintiff can establish a violation of Title VII by proving that an employment practice has an adverse impact upon minorities. If the plaintiff carries this burden, then the burden shifts to the defendant to prove that the employment practice is justified by "business necessity" or "related to job performance."163 If the theory is interpreted to place a heavy burden on the defendant—to prove business necessity, as opposed to job relationship—then proof of racial imbalance would effectively establish a violation of Title VII. Employers would rarely, if ever, be able to prove that the disputed employment practice was a matter of business necessity, particularly if elaborate social science proof in the form of criterion validation were required.164 Employers could comply with Title VII only by adopting employment practices that resulted in racial balance.

This interpretation of the theory of disparate impact, however, provides no independent basis for allowing affirmative action. It only raises in a roundabout way the same

questions raised by section 703(j). If Congress rejected any interpretation of Title VII that requires racial and sexual balance in an employer's work force, then it also rejected any interpretation of the theory of disparate impact that effectively requires such balance. In this view, the theory is designed primarily to prevent pretextual discrimination. It allows the plaintiff to make out a prima facie case by proving adverse impact instead of intentional discrimination and it then requires the defendant to carry the burden of justifying the employment practices in dispute. In this form, the theory relieves the plaintiff of the difficult task of finding direct evidence of intentional discrimination, a task which is especially difficult in cases involving institutional defendants who act only through their officials, employees, and agents.165

Even apart from these controversies, the theory of disparate impact does not succeed in distinguishing the statutory and constitutional standards as they have developed since Weber. The Constitution does not require evidence of a constitutional violation by the employer or union to justify a preference. As the constitutional standard was applied in Wygant and Sheet Metal Workers, and as it was formulated in Wygant, evidence of a statutory violation is sufficient. In Sheet Metal Workers, the Court upheld the constitutionality of a judicially ordered preference based on discrimination by a union which, because it was a private organization, had violated only Title VII.166 In his plurality opinion in Wygant, Justice Powell required strong evidence of "discrimination."167 This term, as his discussion of statistical evidence under Title VII illustrates,168 refers to discrimination in violation of Title VII in addition to discrimination in violation of the Constitution. Moreover, in her separate opinion in Wygant, Justice O'Connor referred even more explicitly to statutory and constitutional violations.169 In addition, three

165. For a fuller statement of this argument, see Rutherglen, supra note 25, at 1312-16.
166. 106 S. Ct. at 3052-54 (opinion of Brennan, J.); id. at 3054-57 (Powell, J., concurring in part and concurring in the judgment). Justice White also generally agreed with the plurality approach but dissented from its application in this case. Id. at 3062 (White, J., dissenting).
167. 106 S. Ct. at 1848-49 (opinion of Powell, J.).
168. Id. at 1847-48.
169. Id. at 1855-57 (O'Connor, J., concurring in part and concurring in the judgment).
of the dissenting justices in that case also would have found evidence of disparate impact sufficient. Because evidence of disparate impact satisfies the constitutional as well as the statutory standard of justification, Justice Blackmun's approach argues for convergence of the statutory and constitutional standards, not against it.

B. The Difference Between Voluntary and Judicially Ordered Preferences

Justice Blackmun's approach does not justify the first, but rather the second of the differences mentioned earlier: the difference between the standards for voluntarily adopted and judicially imposed preferences, regardless of their source in Title VII or the Constitution. Preferences adopted by agreement early in litigation, as in Firefighters v. Cleveland, or outside of litigation entirely, as in Weber, Johnson, and Wygant, should be subject to a more lenient standard than preferences adopted after trial. As a theoretical matter, the Court itself has made this distinction in marking "the fundamental difference between volitional private behavior and the exercise of coercion by the state." In doing so, it has followed liberal political theory, which distinguishes between private action undertaken voluntarily and action required by the government, and liberal constitutional theory, which distinguishes between public action taken by politically responsible government officials and judicially co-

170. Id. at 1862-65 (Marshall, J., dissenting) (joined by Brennan and Blackmun, JJ.).


172. A wide range of liberal and libertarian political theories distinguish between private action and government action in order to limit government interference with private choice. Classical liberals restricted government to the role of preventing individual actions that caused harm to others. See, e.g., J.S. MILL, On Liberty ch. IV, in 18 Collect ed Works of John Stuart Mill (J. Robson ed. 1977). Modern libertarians have imposed stricter restraints on the role of government action, limiting it to preventing or correcting violations of individual rights, determined entirely by just acquisition or transfer of such rights. See, e.g., R. NOZICK, Anarchy, State, and Utopia ch. 3 (1974). Modern liberals, such as Ronald Dworkin, maintain the distinction between government action and private action, but in a quite different form. They require government to maintain equality by allocating resources equally among individuals, and within that constraint, treating different conceptions of the good life held by different individuals with equal respect. See R. DWORKIN, Liberalism, in A Matter of Principle 181 (1985).
In both cases, the latter alternative requires a stronger justification than the former. Voluntary preferences should receive more lenient treatment under both Title VII and the Constitution, not because of any distinctive policy against regulation of private employers and unions unique to Title VII, but because both sources of law embody fundamental principles of government that favor voluntary resolution of disputes over government coercion and litigation. In Title VII, these principles are reflected in the procedures for conciliation by the EEOC. In constitutional law, they are reflected in the need for a special justification of judicial decisions invalidating the action of representative branches of government, as well as in general policies favoring settlement of litigation.

As a practical matter, this difference also reflects the different amounts of evidence available before and after litigation. In the absence of trial, less evidence is likely to be available to prove a constitutional or statutory violation. As several justices have now pointed out, following Justice Blackmun’s concurrence in Weber, an employer or union has little incentive to prove its own past violations of Title VII. Even in Wygant, a majority of the Court required neither admission of past discrimination when a preference is voluntarily adopted nor conclusive evidence of past discriminations.

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173. The prevailing theories of constitutional law generally allow the legislative and executive branches of government, as the democratically elected representatives of the people, to determine broad questions of policy. They restrict the role of the courts to preventing democratic majorities from infringing upon individual rights. See J. Choper, Judicial Review and the National Political Process chs. 1, 2 (1980); R. Dworkin, Taking Rights Seriously chs. 4, 5 (1977); J. Ely, Democracy and Distrust ch. 4 (1980).

174. A charge under Title VII must be filed with the EEOC to allow it to engage in investigation and conciliation. § 706(b)–(d), (f)(1), 42 U.S.C. § 2000e-5(b)–(d), (f)(1) (1982).

175. E.g., J. Ely, supra note 159, at 5–9; J. Choper, supra note 173, at 4–59.


crimination when its validity is challenged. To require the defendant to produce such evidence would expose him to liability for the employment practices that preceded adoption of the preference.

Similarly, in this view, a preference resulting from a full trial on the issue of liability and remedies, as in *Sheet Metal Workers* and *Paradise*, requires more evidence partly because more is available, both on the extent and nature of the defendant’s past discrimination and on the alternative remedies for it. A higher standard of justification does not mean that preferences ordered by courts are less trustworthy than those voluntarily adopted by employers and unions. It means only that courts have better evidence available to them. A preference ordered by a court after trial is necessarily based on a finding of past discrimination because, without such a finding, a court cannot order any relief at all.

The procedural context in which preferential relief is ordered explains why the justification for such relief must be stronger than the justification for voluntarily adopted preferences, but it does not explain why it must be so much stronger. It does not explain why a finding of egregious discrimination is required, not just a finding of past discrimination. In part, this high standard may be attributable to the equitable discretion of the district judge. To impose an effective limit on the district judge’s authority to order injunctive relief, the Court must announce even a moderately restrictive standard in fairly strong terms. As Justice Stevens pointed out in *Paradise*, substantial discretion to formulate effective remedies for past discrimination must be left to the district judge. The basic choice is between preferences as a routine form of relief or as an extraordinary remedy. Even the justices most sympathetic to affirmative action, who joined Justice Brennan’s opinions in *Sheet Metal Workers* and *Paradise*, have chosen the latter alternative.

In this respect, judicially ordered preferences bear a closer resemblance to voluntarily adopted preferences than

178. 106 S. Ct. at 1848-49 (opinion of Powell, J.); id. at 1854-57 (O’Connor, J., concurring in part and concurring in the judgment); id. at 1862-65 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

179. 107 S. Ct. at 1076-79 (Stevens, J., concurring in the judgment).

at first appears. Both kinds of preferences are subject to greater restrictions than the ordinary terms of a judicial order, on the one hand, or a consent decree, settlement, or unilateral change in employment practices, on the other. In both situations, the usual remedies for past discrimination, such as prospective injunctions, back pay, and remedial seniority, or voluntary modification of employment practices are liberally allowed, and indeed, under Title VII, they are likely to be found inadequate only if they are not generous enough. Preferences are subject to more searching review, whether they are judicially imposed or voluntarily adopted. More searching review of both kinds of preferences results in a stricter standard for judicially ordered preferences because it begins from a higher base line. Voluntary action by employers and unions ordinarily requires no evidence of past discrimination at all, while judicial remedies require a finding of a past illegal act.

The wide range of alternative remedies available after trial also supports the stricter standard for judicially imposed preferences. If these alternatives are adequate to compensate for past discrimination and to prevent future discrimination, then preferential relief unnecessarily burdens the interests of white employees. The compensatory remedies routinely imposed by a court after trial are not likely to be as available or as attractive to employers and unions before trial. Individual awards of back pay and remedial seniority cannot be computed before a finding of liability and, in the case of back pay, they require employers to pay twice for work which is performed only once. Requiring employers and unions to exhaust these individualized forms of relief before adopting a preference is tantamount to requiring them to admit liability for past discrimination. Judicial awards of back pay and remedial seniority, on the other hand, are routine consequences of a judicial finding of past discrimination, as are prospective injunctions against future discrimination and against specific practices found to

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be discriminatory.\textsuperscript{182} Only if a district court finds these remedies to be inadequate, usually after trying them first, can it impose a preference. The distinction between judicially imposed and voluntarily adopted preferences partly reflects the different context of remedies which can only be imposed after trial and voluntary action which need not be preceded by any litigation at all.

C. The Difference Between the Statutory and Constitutional Standards for Judicially Ordered Preferences

The third difference in standards has only been left open as a possibility. In \textit{Sheet Metal Workers} and \textit{Paradise}, the Court did not decide whether egregious discrimination was necessary to support a court-ordered preference under the Constitution but only that it was sufficient to do so.\textsuperscript{183} Furthermore, in \textit{Paradise}, Justice Powell explicitly noted that the constitutional standard of justification for court-ordered preferences might be different than the statutory standard.\textsuperscript{184} As we have already pointed out, only the statutory policy against government interference in private employment, purportedly identified in \textit{Weber}, explains why the statutory standard for court-ordered preferences might be higher than the constitutional standard. Just as this policy makes it easier to approve privately adopted preferences, it makes it more difficult for courts to impose preferences on private actors. As we have already argued, however, the reasoning of \textit{Weber} may explain these differences, but it does not justify them.\textsuperscript{185}

This last difference is all the more puzzling because it would have little effect, at least in cases of employment discrimination. Since all court orders constitute government action, they must always satisfy equal protection standards, even when, as in \textit{Sheet Metal Workers}, they control private behavior. The only cases in which a court-ordered preference will be reviewed only under the constitutional standard are


\textsuperscript{183} \textit{Sheet Metal Workers}, 106 S. Ct. at 3053; \textit{id.} at 3055 (Powell, J., concurring in part and concurring in the judgment); \textit{Paradise}, 107 S. Ct. at 1065–66; \textit{id.} at 1077 (Stevens, J., concurring in the judgment).

\textsuperscript{184} \textit{Paradise}, 107 S. Ct. at 1075 n.1 (Powell, J., concurring).

\textsuperscript{185} \textit{See supra} text accompanying notes 153–160.
those in which the underlying action contains no Title VII claim. There are likely to be few such actions because it is generally easier to establish liability under Title VII than under the Constitution or the Reconstruction civil rights acts, all of which require proof of intentional discrimination.\footnote{186} Such actions are likely to be brought only against employers outside the coverage of Title VII, usually because they fall below its requirement of fifteen or more employees\footnote{187} or because they are agencies of the federal government that fall outside the special section of Title VII concerned with federal employment.\footnote{188} If nearly all court-ordered preferences must satisfy both statutory and constitutional standards, the higher standard will almost always be controlling.

Why then did the Court leave open, and Justice Powell emphasize, the possibility of different standards? The answer may lie in the broader coverage of the Equal Protection Clause. Although Title VII reaches private, as well as public, employment, the Equal Protection Clause reaches all government action, whether or not it concerns employment. For instance, it prohibits discrimination in public housing, public education, and public contracting, all outside the coverage of Title VII. The Court may be justifiably reluctant to insist upon strict uniformity between a statutory standard closely tied to employment and a general constitutional standard applicable to the whole range of government action. Standards appropriate for preferences in employment may not fit, for instance, preferences in school desegregation and housing, which may confront other, more intractable problems.\footnote{189} The constitutional standard must be flexible enough to approximate the statutory standard in employment but to depart from it when applied to the dis-
tinctive problems posed by other forms of government action.

CONCLUSION

None of the reasons for allowing preferences in employment supports the marked distinction now drawn by the Court between the statutory and constitutional standards for judging these preferences. The overall congruence of the two standards makes the major, outstanding distinction between them all the more untenable: the constitutional standard for voluntary preferences requires evidence of past discrimination that conforms to Title VII standards of proof, but the standard under Title VII itself does not. *Weber,* and now *Johnson,* have defended this distinction by attributing to Congress a policy against interference with private employers and unions. We have argued that this policy has little basis in Title VII and hence provides no convincing reason to distinguish between the statutory and constitutional standards.

The deferential treatment accorded to voluntary preferences is instead largely an artifact of the doctrinal developments and shifting majorities on the Supreme Court. It has been the work of justices, notably Justice Brennan, who have also insisted upon a lenient constitutional standard, but who have prevailed only in cases decided under Title VII. Conversely, the distinction between the constitutional and statutory standards has been attacked by dissenting justices, like Justice Scalia, who insist upon a strict constitutional standard. There is no logical connection, however, between the equivalence of the two standards and a strict view of affirmative action. It could as well be associated with a liberal view of affirmative action or with the middle position expressed in the separate opinions of Justice Powell.


192. *Wygant,* 106 S. Ct. at 1846-47 (opinion of Powell, J.); *Fullilove,* 448 U.S. at 497-99 (Powell, J., concurring); *Bakke,* 438 U.S. at 305-10 (opinion of Powell, J.).
question of the relationship between the two standards is separate from the question of what the standards should be.

If anything, the abstract and open-ended language of the Equal Protection Clause appears to be more flexible than the specific prohibitions against employment discrimination in Title VII. And indeed, equal protection doctrine applies to the Federal Government only through the even more general due process clause of the fifth amendment. The abstract constitutional language of both provisions cannot be easily reduced to a concrete rule barring all consideration of race or sex in government decisions. Whatever the scope of the rule, it was developed in constitutional decisions, not formulated in the constitutional text, and it is correspondingly open to judicial interpretation. The constitutional principle against discrimination, as many cases have now held, does not require a strict prohibition against remedies that take account of race or sex. The statutory prohibitions should receive a similar interpretation, despite the more concrete statutory language, because they were enacted against the background of judicial decisions in establishing and interpreting the constitutional principle. Even their wording reveals their dependence upon constitutional law. They define prohibited conduct in terms borrowed directly from constitutional law, such as “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual” or “to limit, segregate, or classify his employees or applicants for employment.” The reasons for allowing preferences, as well as the reasons for restricting them, have the same basis in the principle against discrimination.

This common source of the statutory and constitutional standards for affirmative action, even more than their increasing similarity in detail and their substantial overlap in coverage, provides the strongest argument for the eventual convergence of the two standards for voluntary preferences. The contrast between them represents only the latest phase

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in the struggle between a lenient and a strict view of affirmative action. While the association between Title VII and a lenient view and between the Constitution and a moderate view resulted partly from chance in the sequence of cases and shifting majorities, it may still prove resistant to change. The possibility of eventual convergence is not the same as the prospects for immediate uniformity. In the constitutional cases, the justices have rarely achieved a majority for a single opinion of the Court, and in the statutory cases, they have done so only by narrowing the grounds for decisions, as in *Firefighters v. Cleveland* and in *Sheet Metal Workers*, or by equivocating on what the statutory standard requires, as in *Johnson*. They have yet to achieve agreement on a consistent, determinate approach that informs an entire line of decisions. Instead of oscillating between extreme opinions, such as *Weber* and *Stotts*, they should acknowledge the intermediate position that they have collectively taken through their numerous separate opinions in different cases. They should begin the task of transforming these isolated and fragmentary decisions into a coherent body of law.