AFTER AFFIRMATIVE ACTION: CONDITIONS AND CONSEQUENCES OF ENDING PREFERENCES IN EMPLOYMENT

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The last few years have seen a number of important changes in the areas of civil rights and affirmative action. Included among these changes are the appointment of conservative Justices to the Supreme Court and the recent passage of the Civil Rights Act of 1991. In his article, Professor Rutherford cites these developments as requiring a critical reappraisal of affirmative action. Specifically, the author addresses two questions concerning affirmative action: What has affirmative action accomplished, and should it be abandoned? In analyzing these questions, Professor Rutherford develops four conclusions: even the most liberal evidence of sexual segregation supports a stronger case for employment preferences for women; and the determination of whether employment preferences should continue depends on the nature and the content of the preference. In light of these conclusions, the author argues that the important issue is how affirmative action affects all employees; thus, the courts should create a remedy that eliminates the effects of past discrimination, whatever its form, and imposes a minimal burden on other employees.

From its inception, affirmative action has provoked fundamental disputes over the nature of the legal prohibitions against discrimination. Its supporters have insisted that affirmative action is necessary to remedy the pervasive effects of past discrimination and to achieve genuine equality of opportunity. In Justice Blackmun’s words, “In order to get beyond racism, we must first take account of race.” Its opponents have argued equally strongly that affirmative action violates the laws against discrimi-

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nation because it requires precisely what they forbid: the consideration of race, national origin, or sex in any form. As Justice Scalia said, in his former role as a law professor, affirmative action represents "the disease as cure."\(^2\)

The debate over affirmative action soon may be resolved, if only by the continued appointment of conservative Justices to the Supreme Court. An increasingly conservative Court is likely to limit affirmative action to progressively narrower circumstances, and perhaps, to prohibit it entirely. The prospect of legislation to overrule such decisions, to the extent that they are based on statutory grounds, also appears to be dim.\(^3\) The broad and largely inaccurate charge that the Civil Rights Act of 1990 would foster quotas led President Bush to veto that legislation, a veto that narrowly was upheld by the Senate.\(^4\) The same charge also complicated efforts to enact the Civil Rights Act of 1991.\(^5\) Supporters of both bills, like supporters of the original Civil Rights Act of 1964, felt compelled to disclaim any intent to require or encourage quotas.\(^6\) A critical reappraisal of affirmative action is therefore imminent.

A purely doctrinal approach to the continued vitality of affirmative action would repeat arguments that long have been familiar. Critics on the right have insisted that all, or almost all, forms of affirmative action should be prohibited. For these critics, the question of when preferences should be dismantled does not arise, because no preferences should have been adopted in the first place. Critics on the left also would avoid this question, but by allowing existing preferences to continue indefinitely. They would impose few, if any, restrictions on preferences for the benefit of minority groups, such as African Americans or Native Americans, that historically have been the victims of discrimination. In their view, if affirmative action threatens dominant groups, those groups can always form a majority coalition to dismantle existing preferences and to prevent new preferences from being adopted.\(^7\) The courts need not address the


question of when preferences should be dismantled because it can be left safely to other branches of government or to private employers and institutions. Both of these views have much to be said for them—and much against.

This article does not rehearse these arguments, which have dominated the debate over affirmative action. Instead, it examines two narrower questions concerned with affirmative action in employment: What has it accomplished? And should it be abandoned, either in general, or through a reevaluation of particular preferences? The legal debate over affirmative action largely has excluded such questions. It particularly has neglected empirical studies of affirmative action. What empirical evidence do we have that preferences in employment have been effective in remedying past discrimination? Conversely, what evidence do we have that these preferences have imposed significant burdens on innocent employees? A related question is what to do with the preferences in employment that have grown up in the wake of the Supreme Court's decisions. The duration of existing preferences should depend in part on how effective or burdensome they have been. How long should these preferences remain in effect? And what legal standards, if any, should govern the decision to dismantle such preferences?

An analysis of these questions yields four conclusions. First, even the most liberal decisions of the Supreme Court have assumed that particular preferences in employment would come to an end. Second, both supporters and opponents of affirmative action erroneously have assumed that preferences in employment have more dramatic effects, both good and bad, than they in fact do. Third, evidence of sexual segregation in the work place supports a stronger case for preferences in favor of women than usually has been made. And fourth, the legal standards for continuing existing preferences depend mainly on whether the preference was judicially ordered or voluntarily adopted and on the need for training, the rate of turnover, and the degree of segregation in the job covered by the preference. This article addresses these conclusions in succession.

I. CURRENT STANDARDS FOR EXISTING PREFERENCES

Despite decisions generally favorable to preferences, such as Regents of the University of California v. Bakke and United Steelworkers v.

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9. See infra notes 13-34 and accompanying text.
10. See infra notes 35-70 and accompanying text.
11. See infra notes 71-91 and accompanying text.
12. See infra notes 92-127 and accompanying text.
Weber, the Supreme Court has sustained fundamental doubts about the wisdom and legality of affirmative action. These doubts crystallized most recently in City of Richmond v. J.A. Croson Co., which held unconstitutional a local ordinance setting aside a fixed proportion of government contracts for minority-owned businesses. For the first time, a majority of Justices held that benign preferences on the basis of race are subject to "strict scrutiny," and so, presumably, rarely would be held valid. Nevertheless, the Court immediately changed course in its very next decision on affirmative action. In Metro Broadcasting, Inc. v. FCC, the Court upheld a congressionally authorized preference for minority-owned firms in the award of broadcast licenses by the Federal Communications Commission. Metro Broadcasting can be reconciled with Croson on the principle that Congress has broad power to require affirmative action under the Enforcement Clause of the Fourteenth Amendment. This principle, however, does not reflect the difference in overall approach between the Justices who generally vote to uphold affirmative action and those who do not. In any event, Justice Brennan's opinion in Metro Broadcasting, for a bare five-to-four majority, is likely to be eroded by conservative Justices subsequently appointed to the Court.

It comes as no surprise that a change in membership or viewpoint of the Supreme Court, perhaps exemplified by Croson, might affect existing preferences. What often is neglected is that the most liberal of the decisions on affirmative action, United Steelworkers v. Weber, also written by Justice Brennan, requires existing preferences to come to an end eventually, even without any change in the law. In Weber, the Court upheld a preference for admission to a craft-training program under Title VII of the Civil Rights Act of 1964. In doing so, it emphasized that the preference was temporary and concluded, partly for that reason, that it did not impose an undue burden upon white employees:

[T]he plan is a temporary measure; it is not intended to maintain

16. Id. at 492-97 (opinion of O'Connor, J.); id. at 519-20 (Scalia, J., concurring in the judgment). Justice Stevens did not endorse any standard for review of preferences on the basis of race, but found the ordinance to be unconstitutional because it represented "the type of stereotypical analysis that is the hallmark of a violation of the Equal Protection Clause." Id. at 514 (Stevens, J., concurring in part and concurring in the judgment).
racial balance, but simply to eliminate a manifest racial imbalance. Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force.\textsuperscript{21}

For the same reason, the Court also distinguished statements in the legislative history of Title VII indicating that preferences designed to preserve racial balance were prohibited. Those statements, according to the Court, did not concern preferences intended only to achieve, but not to maintain, racial balance.\textsuperscript{22} Although the Court disclaimed any attempt to lay down a definite set of standards for permissible affirmative action,\textsuperscript{23} the lower federal courts have interpreted these passages to require preferences to be temporary.\textsuperscript{24} Other opinions on affirmative action\textsuperscript{25} (and academic commentary\textsuperscript{26}) have echoed this sentiment.

Of course, the word “temporary” means different things to different people. Under \textit{Weber}, a preference must expire when it eliminates the manifest racial imbalance justifying the preference. No definite deadline is required and, indeed, in \textit{Weber} itself, counsel for the employer later estimated that it would take thirty years for the preference in craft training to achieve racial balance.\textsuperscript{27} Having adopted a broad definition of “manifest imbalance,” provable by evidence of general discrimination in the skilled construction trades, the liberal majority in \textit{Weber} might well have been content to allow the preference at issue to last for several decades. The Court may have taken termination of the preference to be a serious question, but one that need not be confronted for some time. To have postponed the question, however, is not to have answered it.

Most affirmative action plans are framed as a long-term goal to be achieved according to a short-term ratio. The long-term goal usually is to increase the proportion of workers from a specified minority group in a particular job until it matches the proportion of those workers in the

\begin{itemize}
\item\textsuperscript{21} \textit{Id.} at 208-09.
\item\textsuperscript{22} \textit{Id.} at 207 n.7.
\item\textsuperscript{23} \textit{Id.} at 208.
\item\textsuperscript{25} The most recent example is Metro Broadcasting, Inc. \textit{v.} FCC, 110 S. Ct. 2997, 3022 (1990). \textit{Accord} Local 28, Sheet Metal Workers' Int'l Ass'n \textit{v.} EEOC, 478 U.S. 211, 478 (1986); \textit{id.} at 496 (O'Connor, J., concurring in part and dissenting in part); Wygant \textit{v.} Jackson Bd. of Educ., 476 U.S. 267, 276 (1986); United Steelworkers \textit{v.} Weber, 443 U.S. 193, 208 (1979) (Blackmun, J., concurring).
\item\textsuperscript{27} Thompson Powers, \textit{Implications of Weber—'A Net Beneath'?}, 5 EMPLOYEE REL. L.J. 325, 329 (1979-80).
\end{itemize}
relevant labor market. A typical goal might be to increase the proportion of black workers in a particular job until it reaches twenty percent. Such long-term goals usually are achieved by hiring or promoting black workers over the short term in some higher proportion, for instance, fifty percent. The employer implements the short-term ratio immediately and maintains it until the long-term goal is achieved. Given the typical structure of affirmative action plans, determining whether an affirmative action plan has achieved its goal appears to be a simple matter: it is only necessary to compare the proportion of blacks in the relevant job with the long-term goal set by the plan.

Some, perhaps many, preferences might terminate because they have achieved their long-term goals. Not all preferences will be terminated so simply, however. Some preferences might not meet their long-term goals, or, if they do, they may satisfy them only over the short term. As soon as the employer abandons the preference, the proportion of blacks in its work force may again fall below the long-term goal. In other cases, the parties may disagree over whether the long-term goal has been met or over whether it needs to be increased or decreased. In still others, particularly those concerned with preferences adopted outside of litigation, there may be no forum in which all the parties affected by a preference can participate. Preferences voluntarily adopted by an employer may be terminated just as voluntarily, without the participation of any employees. The employer may be inclined to consult with one group of employees in establishing a preference and another in abandoning it, but, in the absence of a union, it is required to do neither.

Disputes over whether preferences must end raise, in a different form and at a later time, questions about what preferences are supposed to accomplish when they are created. The decision to terminate a preference depends on whether it has succeeded in accomplishing its original objectives. The decision also depends on whether other means that impose fewer burdens on other employees can now accomplish the same objectives. These questions correspond to the two requirements for adoption of a valid preference: first, evidence of past discrimination that has resulted in an imbalance in the employer’s work force; and second, proof that the preference does not place undue burdens on other employees.28 *Weber*, for instance, requires preferences under Title VII to be supported by evidence of “manifest imbalance” and not to “unnecessarily trammel” the interests of white employees.29 Likewise, the plurality opinion in *Wygant v. Jackson Board of Education*,30 requires preferences

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30. 476 U.S 267, 274-76, 282-84 (1986) (opinion of Powell, J.); accord *City of Richmond v.*
under the Constitution to have a "strong basis in evidence" and to be narrowly tailored to impose minimal burdens upon white employees.

These requirements plainly are designed to distinguish permissible remedial preferences for one group from prohibited discrimination against other groups. Whether they succeed in doing so, or whether entirely different standards might be more appropriate, has formed the substance of the legal debate over affirmative action. The extreme positions, for or against all forms of affirmative action, have the virtues of simplicity and consistency. But for just that reason, they fail to explain the Supreme Court's wavering commitment to affirmative action. The Court's past decisions presuppose that some forms of affirmative action are permissible and some are not and that, therefore, some plans can continue and some cannot.

Limits on the duration of affirmative action plans serve other purposes as well. In particular, they allow plans to be terminated because of problems that were not foreseen when they were first adopted. A simple way, for instance, to prevent future preferences from multiplying is to require existing preferences to end. Like more general "sunset laws," limits on the duration of preferences prevent them from becoming entrenched through the ability of interest groups to block their repeal. Such limits allow employers to gradually phase out plans that were a good idea at their creation but since have become ineffective. Under this approach, an employer can abandon an affirmative action plan that has proved to be ineffective, or that, conversely, has succeeded in accomplishing its stated goals, in favor of alternatives that are now more effective or appropriate.

The complexities of such a piecemeal approach would be swept away if the Supreme Court adopted a general prohibition against all forms of affirmative action, or less plausibly, generally allowed most forms of affirmative action. Much else also would be swept away, including many of the Court's past decisions. A general prohibition against considering race, national origin, and sex has all the attractions and all the problems of any legal formalism. It does away with the need to inquire into the facts of each case, but at the cost of abandoning any flexibility in considering the need for different preferences in different circumstances. A formal prohibition also has enormous symbolic significance, not just in appealing to the familiar metaphor of color blindness, but in emphatically rejecting one of the legacies of "The Civil Rights

31. AMERICAN BAR ASS'N COMM'N ON LAW & THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 105-08 (1979).
32. A drastic change in the law similarly can uproot entrenched preferences. Such a drastic change occurred when the Supreme Court overruled the many lower court decisions that held that departmental seniority systems violated Title VII. International Bhd. of Teamsters v. United States, 431 U.S. 324, 348-56 (1977); see Alfred W. Blumrosen, The Law Transmission System and Southern Jurisprudence of Employment Discrimination, 6 INDUS. REL. L.J. 313, 324-26 (1984).
The first Reconstruction also ended with a similar appeal to legal formalism:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen and ceases to be the special favorite of the laws.34

A declaration that affirmative action is no longer needed should depend upon more than the doctrinal simplicity of an absolute prohibition. It requires an examination of the effects that affirmative action actually has had. This general inquiry is the subject of the next part of this article.

II. THE EFFECTS OF AFFIRMATIVE ACTION ON THE BASIS OF RACE

Empirical studies of the effects of affirmative action have been enmeshed in the controversy over the general effects of laws against discrimination in employment. The controversy has two parts: first, whether laws against discrimination in employment, including those that require affirmative action, have had any effect at all on the employment of minorities; and second, whether these effects have been on the whole beneficial or, on the contrary, have been offset by adverse consequences for the groups that they were intended to benefit.35

The difficulty of designing studies and obtaining data that exclude alternative explanations for increased wages or employment of minorities has hampered investigation of the first question. Increases in the employment of blacks in various industries since 1965, when Title VII became effective, could be attributed to various causes other than enforcement of Title VII: a general improvement in the economic status of black workers that predated the enactment of laws against discrimination; tight labor markets that increased the cost of discrimination; improvements in the education and qualifications of black workers; or changes in other social welfare policies that altered the pool of black workers in the labor market.36 Economists also have disagreed over the net effect of laws against employment discrimination—in particular, whether increased employment of a group might lead to decreased wages for its members,37 or conversely, whether increased pay might lead to decreased employment.38

34. The Civil Rights Cases, 109 U.S. 25 (1883).
37. Butler & Heckman, supra note 35, at 262.
Despite such disagreements, recent and increasingly sophisticated empirical studies have found that federal regulation generally has succeeded in reducing discrimination in employment. In addition to Title VII, which simply prohibits discrimination in private employment, Executive Order 11,246 also requires affirmative action, by federal contractors, on the basis of race, national origin, and sex.39 A careful study of the textile industry in South Carolina has found that enforcement of both sources of law led to a steady increase in the employment and pay of black workers after 1965.40 This study, by Heckman and Payner, rejected a variety of other explanations for the improvement in status of black workers: decreased black employment in agriculture, the improved education of black workers, and labor markets of differing tightness in different counties in South Carolina.41 A regression analysis that took into account several different measures of economic activity in the textile industry left unexplained seventy to eighty percent of the increased employment of blacks after 1965. The authors argue that federal enforcement of laws against employment discrimination, although taking place against the background of other factors, such as the interest of employers in reducing their overall wage bill by hiring from a larger pool of workers, most plausibly explained the residual increase.42

This study provides convincing evidence that federal law as a whole succeeded in reducing employment discrimination, at least in the South, but it provides only limited evidence of the effectiveness of affirmative action as one form of regulation. The effect of defense contracts as an independent variable, although it triggered coverage of the executive orders and the obligation to engage in affirmative action, was nevertheless quite small, resulting in only a .1% increase in black employment.43 Even the validity of this finding is doubtful, because the authors were not concerned with separating the effects of affirmative action from the effects of prohibitions against discrimination found in both Title VII and Executive Order 11,246. Likewise, one must cautiously evaluate the external validity of the study for industries and regions other than textiles in South Carolina. The authors find the same general trends in employment of blacks in the textile industry in the South as a whole, but they are cautious about generalizing to other industries and particularly to other regions.44

A broader study, by Burstein, examined the general effect of laws

40. Heckman & Payner, supra note 36, at 167-68.
41. Id. at 148-67.
42. Id. at 170-72.
43. Id.
requiring equal employment opportunity throughout the economy.\textsuperscript{45} Although this study has greater external validity, because it is based on overall group earnings and income, it also has less internal validity, because it fails to control for many of the alternative explanations for the changes in these measures of economic status. Even so, Burstein found only limited and ambiguous improvement in the status of nonwhites and women. Over the period from 1965 to 1978, he estimated that laws requiring equal opportunity in employment increased the earnings of minority men, relative to white men, by 13.6\% and those of minority women by 18.6\%, but decreased the relative earnings of white women by 1.2\%.\textsuperscript{46} Using a broader measure of economic status, applied to all members of a group, not just those who are employed, and including all forms of income, not just earnings, he found that the group share of income of minority men was unaffected, but that the group share of minority women increased by 7.6\% and that of white women by 8.8\%.\textsuperscript{47} The discrepancies between these two sets of figures can be explained by the decreased proportion of minority men who participated in the labor market, which decreased the share of income going to minority men without reducing the earnings of those who did participate, and the increased participation of white women, which had the opposite effect.\textsuperscript{48} Again, however, this study does not separate the effects of affirmative action plans from other laws requiring equal opportunity in employment.

Studies of Executive Order 11,246 have tried to isolate the effects of affirmative action upon patterns of employment, but with only limited success. The Office of Federal Contract Compliance Programs (OFCCP) enforces the executive order, administering a system of reporting and compliance reviews with the ultimate sanction of termination of federal contracts. Studies of the executive order do not separate the effects of required affirmative action from the effects of administrative enforcement. These studies also are limited to periods before 1980, when the executive order was enforced more vigorously than during the Reagan administration.\textsuperscript{49} Moreover, the executive order concerns only required, not voluntary, affirmative action. The effects of voluntary affirmative action have not been studied independently but have been subsumed in the effects of compliance with Title VII.

Most studies of the executive order are limited in another way as well: they are cross-sectional studies that compare federal contractors to

\textsuperscript{45} Paul Burstein, Discrimination, Jobs, Politics 125-54 (1985).
\textsuperscript{46} Id. at 149-50. In particular, the relative earnings of working white women decreased by 1.2\%, but the group share of total income of white women, whether they worked or not, increased by 8.8\%, because the proportion of women in the labor force increased.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
other firms reporting to the Equal Employment Opportunity Commission. The internal validity of using noncontractors as controls might be compromised for several reasons: noncontractors might imitate the employment practices of contractors or might improve their employment practices in order to become contractors, leading investigators to underestimate the effect of the executive order; the enforcement of prohibitions against discrimination might be targeted on federal contractors, confounding the effects of Title VII and the executive order; and even if contractors are found to employ a higher proportion of minorities than noncontractors, such a finding simply might represent a shift of minority workers from noncontractors to contractors without any increase in overall minority employment.

A series of studies by Jonathan Leonard has concluded that the executive order and, especially, compliance reviews by the OFCCP have increased the employment of both minorities and women. Based on a study of over 68,000 establishments between 1974 and 1980, he found that the employment of minorities and women grew faster among contractors than among noncontractors. The annual rate for black men was .84% greater; for other minority men, 1.69% greater; for black women, 2.13% greater; and for white women, .37% greater. By contrast, for white men, the annual rate of growth was .2% smaller among contractors than among noncontractors. The percentages for black men and black women roughly were doubled for contractors who were subject to compliance reviews. These percentages also were dependent on the growth of overall employment by contractors, which enhanced employment of minorities and women. Contrary to earlier studies, Leonard also found an improvement in the occupational status of black men and other minority men among contractors, and again especially among those contractors subject to compliance reviews. The employment of black men and other minority men in most higher level occupations grew at a greater rate among contractors than among noncontractors, and faster still among reviewed contractors. He found, however, no corresponding improvement in the occupational status of white women.

50. See infra notes 53, 57, 63.
52. See supra note 51 and infra notes 53, 57, 63.
54. Id.
55. Id. at 328-29.
56. Id. at 331.
57. Id. at 331-32. Another of his studies reached the same conclusion: that employment of minorities in skilled positions increased among federal contractors, but that employment of women
These studies eliminated some, but not all, of the alternative explanations by controlling for establishment size, growth, region, industry, and occupational and corporate structure. In particular, they did not eliminate the possibility that the employment of minorities and women simply shifted to contractors from noncontractors, without increasing in overall amount. These studies, like others of the executive order, support the conclusion that increased enforcement results in increased compliance. Nevertheless, the effects reported are not large, no more than two percent for contractors generally, and only in the rate of growth of employment and only compared to the rate for noncontractors.

The percentages reported by Leonard must be interpreted with some care. Because these percentages compare rates of growth, they do not reflect the overall level of employment of blacks and women. For example, between 1974 and 1980, the percentage of black men among all employees of noncontractors grew from 5.3% to 5.9%, for an annual rate of growth of approximately .1% of all such employees. Over the same period, the corresponding percentage for contractors grew from 5.8% to 6.7%, for an annual rate of approximately .15%. At the same time, the employment of white males by contractors declined in absolute terms.

From this perspective, the gains from affirmative action appear to be small, but still significant over the long term. Sustained over an entire decade, these gains would have resulted in an increase of a little over half a percentage point, .55%, in the proportion of blacks among all employees of contractors as compared to noncontractors.

A variety of reasons could explain the limited effects of affirmative action: the controversy that has surrounded preferences under the executive order, inefficient enforcement by the OFCCP, or inadequate funding of enforcement efforts. More generally, these limited effects may reflect the limited political support for any program of mandatory affirmative action. On the other hand, studies of the executive order also reveal none of the problems of proliferating or outmoded affirmative action plans discussed in part I of this article. There is no evidence that there


59. Gunderson, supra note 38, at 63.

60. Leonard, supra note 53, at 326. In a table, Leonard gives the figures for the entire six-year period. During this period, the mean percentage of black men employed by noncontractors grew from 5.3% to 5.9%, for an increase of .6%. The mean percentage for contractors grew from 5.8% to 6.7%, for an increase of .9%. The sixth root of the mean increase for the entire period gives the mean increase for each year, which is approximately .1% for noncontractors and .15% for contractors.

61. Id. at 326, 336. From 1974 to 1980, white males, as a percentage of all employees of contractors, declined from an average of 58.4% to 53.3%, for a decline for the entire period of 5.1%. Total employment by contractors grew only slightly, from an average of 271 employees to 276 employees. The slight increase in the total number of employees did not offset the decreasing percentage of white males, resulting in an absolute decrease in the employment of white males.

62. Id. at 334-41; see Thomas Byrne Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics 186-87 (1991).
are too many affirmative action plans on behalf of too many different groups. Another study by Leonard found that neither Title VII nor the executive order has any significant effect on productivity; in particular, the relative productivity of minorities and women has not decreased in comparison with white men.\textsuperscript{63} There is some evidence of the burden of affirmative action, both on white men and, ironically, on white women.\textsuperscript{64} Thus, the studies of the executive order discussed earlier show a slight decrease in the growth of employment of white men and, in some cases, a slight decrease in the absolute level of employment of white men.\textsuperscript{65}

The limited success of the executive order is consistent with studies of the overall economic status of minorities in the work force. The status of young, educated black men most closely approximates that of white men. An examination of census data found that, in 1979, young black men who had graduated from high school earned eighty-five percent, and young black men who had graduated from college ninety-one percent, of what comparably educated white men earned.\textsuperscript{66} Nevertheless, the improved status of young black men exceeded the long-term trends attributable to education and migration only for college graduates.\textsuperscript{67} A later study supports this conclusion, finding that the status of young, educated black men declined over the decade from 1979 to 1989, when affirmative action was less vigorously pursued.\textsuperscript{68} Such evidence confirms the importance of training and education as complementary alternatives to affirmative action in employment.

Much of the difficulty in assessing the effects of laws against discrimination in employment arises from the concurrent effects of improvements in the education of minorities and changing attitudes and

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  \item In yet another study, he has found that federal contractors have not resorted to numerical balancing to fulfill their obligation to engage in affirmative action. Jonathon Leonard, \textit{Anti-Discrimination or Numerical Balancing: Evidence on Quotas Under Title VII}, 1978-84, reprinted in \textit{The Civil Rights Act of 1991, Hearings on H.R. 1 Before the House Comm. on Education and Labor, 102d Cong., 1st Sess. 861, 885-86 (1991)}.
  
  \item \textsuperscript{64} See supra notes 46-48 and 57 and accompanying text.
  
  \item \textsuperscript{65} Leonard, supra note 53, at 328, 336.
  
  \item \textsuperscript{66} JAMES P. SMITH & FINIS R. WELCH, CLOSING THE GAP: FORTY YEARS OF ECONOMIC PROGRESS FOR BLACKS 94 (1986).
  
  \item \textsuperscript{67} \textit{Id.} at 95. The authors have reached the same conclusion in a more recently published study. James P. Smith & Finis R. Welch, \textit{Black Economic Progress After Myrdal}, 27 J. ECON. LITERATURE 519, 556-57 (1989). A still more recent report confirms this conclusion, with the important qualification that the gap between black and white college graduates is not closing. CLAUDETTE E. BENNETT, U.S. DEPT' OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, NO. 448, \textit{THE BLACK POPULATION IN THE UNITED STATES: MARCH 1990 AND 1989 11-13 (1991)}.
  
  \item \textsuperscript{68} In particular, the median weekly earnings of black men aged 25 to 34 who had graduated from college decreased relative to the median earnings of similar white men. Joseph R. Meisenheimer II, \textit{Black College Graduates in the Labor Market, 1979 and 1989}, MONTHLY LAB. REV., Nov. 1990, at 13, 17; see also John Bound & Richard B. Freeman, \textit{Black Economic Progress: Erosion of the Post-1965 Gains in the 1980s}, in \textit{The Question of Discrimination: Racial Inequality in the U.S. Labor Market}, supra note 44, at 32, 33-34.
\end{itemize}
expectations about the role of minorities and women in our society. Federal laws have had the greatest effects on minorities and women in skilled positions, perhaps because these positions were the ones from which they were most effectively excluded. Indeed, some authors have attributed the seemingly general gains of minorities and women almost entirely to the effects on skilled workers. The confusion among these causes may be dismaying as a matter of theory, but it is also evidence of the effectiveness of a broad-based strategy for achieving equal opportunity. Affirmative action figures as one element in such a strategy. It confers modest benefits upon blacks and other minority groups, while it imposes modest burdens on whites. It cannot be implemented without considering the alternative remedies for discrimination, and it cannot succeed unless these alternatives are implemented as well.

III. AFFIRMATIVE ACTION IN FAVOR OF WOMEN

Both employers and commentators have treated affirmative action in favor of women as a minor corollary of affirmative action in favor of minority groups. Courts have judged it according to the same standards, but without the same degree of controversy. Perhaps because of the history of discredited protective legislation, which actually limited the opportunities of women, employers have not widely implemented genuine affirmative action on the basis of gender. Employers also might have been reluctant to adopt such plans because they can remedy sexual discrimination directly, for instance, by extending medical benefits or leave policies to cover pregnancy or by abandoning height and weight requirements with an adverse impact upon women. They also might have focussed their affirmative action programs on blacks or hispanics, instead of spreading them out over several different groups. Whatever the explanation, the limited scope and frequency of preferences in favor of women stands in marked contrast to the continuing and pervasive sexual segregation of the work force, which provides a powerful justification for affirmative action.

At least in theory, constitutional law should treat preferences in favor of women more leniently than preferences in favor of minority groups. Under City of Richmond v. J.A. Croson Co., preferences on the basis of race must be justified by evidence of past discrimination strong enough to constitute proof of a compelling state interest. Preferences in

69. BURSTEIN, supra note 45, at 139-41.
70. SMITH & WELCH, supra note 66, at 93-95; Gunderson, supra note 38, at 63. For criticism and revision of this view, emphasizing the importance of school desegregation, see Heckman, supra note 44, at 72-77; Donohue & Heckman, supra note 51, at 618-30.
favor of women, by contrast, might be justified by somewhat weaker evidence, sufficient to establish an "important governmental objective" for classification on the basis of gender.\textsuperscript{74} On the other hand, under Title VII, courts have treated preferences on the basis of gender just like preferences on the basis of race.\textsuperscript{75} Any difference in treatment between gender-based and race-based preferences is less likely to result from simple doctrinal formulas than from the different situations and problems confronted by women.

Empirical studies confirm that women have received only limited benefits from affirmative action. (Of course, women of color have benefited from preferences in favor of minority groups.\textsuperscript{76}) In fact, studies of the executive order reveal that compliance reviews have an adverse effect on white women, who receive the least benefit from the executive order.\textsuperscript{77} These findings may reflect the general increase in the employment of white women throughout the economy,\textsuperscript{78} but they also reveal that affirmative action has done little to change the economic status of women. In 1980, women earned fifty to seventy-five percent of what men did, depending upon the effects of greater part-time work for women and greater overtime work for men.\textsuperscript{79} Three recent reviews of the economic literature attribute thirty-five to forty percent of this difference to the predominance of women in lower paying occupations.\textsuperscript{80} Occupational segregation on the basis of gender, in the sense of concentration of men and women in occupations dominated by one sex, appears to be declining much less rapidly than occupational segregation on the basis of race.\textsuperscript{81} Even the occupational segregation of younger women is only slightly less

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\item\textsuperscript{74} Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-26 (1982).
\item\textsuperscript{77} Based on existing precedent, Native Americans are the only group likely to benefit from a distinctively lenient legal standard for evaluating preferences adopted to favor them. Morton v. Mancari, 417 U.S. 535, 553-54 & n.24 (1974).
\item\textsuperscript{76} See supra note 46 and accompanying text.
\item\textsuperscript{77} See supra notes 46-47 and accompanying text.
\item\textsuperscript{79} Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 HARV. L. REV. 1728, 1779-82 (1986).
\item\textsuperscript{81} NATIONAL RESEARCH COUNCIL, supra note 80, at 19-25.
\end{itemize}
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severe than that for older women.\textsuperscript{82} In general, minorities and women remain underrepresented in the highest paying occupations.\textsuperscript{83}

The empirical studies of affirmative action suggest that preferences on the basis of gender raise different questions than preferences on the basis of race or national origin. Preferences in favor of women are distinctive in three respects: first, sexual balance in an employer's work force, if it were based on general labor market statistics, would require a large proportion, over forty percent, of employees to be women; second, alternative employment practices, such as pregnancy leaves or other policies that recognize the obligations of parents to their children, may be more effective and less burdensome than affirmative action in hiring or promotions; but third, occupational segregation on the basis of sex is more severe than occupational segregation on the basis of race.\textsuperscript{84} These factors reflect the basic differences between gender and race as social roles in American society. On the one hand, the fact that each sex makes up about half the electorate supports decreased judicial scrutiny of preferences in favor of women. On the other hand, broader changes in employment practices may be more effective in breaking down sexual segregation in employment.

In 1989, almost forty-five percent of all employees were women.\textsuperscript{85} If sexual balance were defined by this figure, it could be achieved only through preferences that required over fifty percent of all newly hired or promoted employees to be women. Few courts have upheld preferences that exceed fifty percent. Indeed, in \textit{Johnson v. Transportation Agency},\textsuperscript{86} the Supreme Court warned that the preference there would have been unduly burdensome if it had been based on the proportion of women in the general labor market. Few employers have adopted such burdensome preferences, probably because there are other ways to encourage women to apply for jobs from which they have been excluded. These include pregnancy benefits, child care, and flexible schedules for working mothers.\textsuperscript{87} Moreover, apart from tests of physical ability, women are likely to do as well as men on most employment tests.\textsuperscript{88} The educational achievement of women is virtually the same as that of men, but it is—or until recently, was—concentrated in different fields. These patterns have

\textsuperscript{82} \textit{Id. at} 25-26.


\textsuperscript{85} \textit{Id.}

\textsuperscript{86} 480 U.S. 616, 636 (1987).

\textsuperscript{87} The last two of these benefits could be made available without regard to sex.

begun to break down, but they account for some of the existing sexual segregation of older workers.\textsuperscript{89}

Yet, it remains true that many occupations, employers, and establishments are segregated into jobs that are occupied either predominantly by women or predominantly by men. Sexual segregation intensifies as occupations are defined more narrowly. For instance, women make up forty-two percent of managerial and professional employees, but only twelve percent of managers.\textsuperscript{90} Moreover, we can attribute much of the disparity in pay between women and men to the low proportion of women in higher paying jobs. Affirmative action in hiring and promotions is one obvious way of breaking down the pervasive patterns of sexual segregation in employment. By providing role models for younger women, affirmative action encourages them to gain the training or experience necessary for higher level jobs, and it counteracts other forms of subtle discrimination and not-so-subtle harassment.

These considerations are offsetting to some degree, the first arguing for greater care in devising preferences in favor of women, and the second arguing for more preferences with more ambitious goals. Neither of these arguments, however, suggest any reason for terminating preferences in favor of women. Employers have been cautious in designing and adopting preferences on the basis of gender. Instead of emphasizing affirmative action, the law of gender discrimination has focused directly on the obstacles to equal employment of women, such as discriminatory education and training, unnecessary requirements of physical ability and prior experience, the denial of equal pay for equal work, discrimination on the basis of pregnancy, and sexual harassment.\textsuperscript{91}

These alternatives do not exclude the use of affirmative action and, indeed, they are likely to be more effective if accompanied by some form of affirmative action. For preferences in favor of women, the emphasis should be not on which of the limited number of existing preferences should continue, but whether new preferences are necessary to break down the remarkable degree of sexual segregation still found in the work place.

\textbf{IV. Standards for Terminating Affirmative Action Plans}

The available evidence lends qualified support to the conclusion that affirmative action has enhanced the effectiveness of prohibitions against discrimination. It also reveals that few of the risks of continued affirmative action have materialized. Just as it is too much to hope that affirmative action will eliminate all vestiges of past discrimination, it is too little

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\textsuperscript{89} National Research Council, supra note 80, at 65.

\textsuperscript{90} Id. at 6, 21.

to expect that it will cure only the effects of past discrimination attributable to a particular employer. The empirical evidence suggests that the question of terminating affirmative action plans should not be framed in general terms, as a question of whether affirmative action is an idea whose time has come and gone. Instead, it should be framed specifically and selectively, as a question of whether particular preferences should be abandoned in favor of more effective and less onerous remedies for past discrimination.

The law on this question has developed almost entirely in decisions concerned with judicially ordered plans or judicially approved consent decrees. These decisions follow the general principle that injunctions should be dissolved when the violations that gave rise to them have been cured. Although they resemble decisions to terminate school desegregation decrees because the effects of past de jure segregation have been eliminated, courts have allowed preferences in employment to expire more quickly than most desegregation decrees. Integration of an employer's work force encounters fewer obstacles than desegregation of a school district, especially obstacles arising from residential segregation and "white flight." Affirmative action also is ordered far less frequently than school desegregation, so that termination of judicially ordered preferences does not pose nearly as large a problem as termination of school desegregation decrees. Court-ordered busing has been a common remedy; court-ordered preferences have not.

The step from judicially enforced decrees to voluntary affirmative action crosses any of several overlapping distinctions: between government action and action by private employers; between affirmative action under the Constitution and under Title VII; and between employment practices required under threat of government penalties and those voluntarily undertaken by an employer. Neither of the first two distinctions deserve decisive weight: the constitutional and statutory prohibitions against discrimination are fundamentally similar; and the standards applied to affirmative action by public employers and private employers, under either the Constitution or Title VII, should be essentially the same. Only the third of these distinctions, between coerced and voluntary action, should be important. Judicial intervention to require preferential relief represents an extraordinary remedy for egregious discrimination.


93. See infra note 108.


95. Rutherhelen & Ortiz, supra note 28, at 503-18.
By contrast, employers adopt voluntary affirmative action plans without extensive judicial supervision. These plans therefore should be allowed to expire under legal rules that do not encourage judicial intervention.

Other forms of affirmative action result from a combination of government pressure and voluntary agreement: consent decrees and affirmative action plans adopted by federal contractors. Both of these forms of affirmative action should be assimilated largely to voluntarily adopted plans. Plans contained in consent decrees, which are voluntarily adopted but judicially enforced, should be treated like purely voluntary plans, so long as the parties to the consent decree continue to agree that it should remain in effect. Ideally, of course, such plans would contain their own provisions for termination, which would require the proponents of affirmative action to establish the need for a new plan when the old plan expired. In the absence of such provisions, or in the absence of voluntary termination, however, it is necessary for the law to supply the conditions under which affirmative action plans should end.

A. Judicially Ordered Preferences

Courts can order preferential relief over the defendant’s objection only in exceptional circumstances. The Supreme Court has upheld judicially ordered preferences only when they were supported by findings of “particularly longstanding or egregious” discrimination and only when they were “narrowly tailored” to minimize the burden on other employees. Just as in Weber, the second of these factors requires the preference to be temporary: it must terminate when proportional representation has been achieved. Does this requirement have a distinctive meaning for judicially ordered preferences?

The stringent conditions for imposing such preferences support equally stringent conditions for dissolving them. Only the clearest proof that the defendant will not discriminate in the future can overcome a finding of “persistent and egregious discrimination.” A finding of discrimination ordinarily shifts the burden of proof to the defendant to avoid possible court-ordered compensatory or preventive relief. General remedial principles also require a showing by the defendant of a significant change in factual conditions or in governing law before an injunction may be terminated.


97. Paradise, 480 U.S. at 171; Sheet Metal Workers, 478 U.S. at 476-79 (opinion of Brennan, J.); id. at 486-89 (Powell, J., concurring in part and concurring in the judgment).

98. Paradise, 480 U.S. at 171; Sheet Metal Workers, 478 U.S. at 479 (opinion of Brennan, J.); id. at 487 (Powell, J., concurring in part and concurring in the judgment).


Of course, the central problem with preferences, judicially ordered or otherwise, is that they impose burdens on innocent employees, not just on defendants who have violated the law. Nevertheless, these burdens do not require judicially ordered preferences to be terminated prematurely. Because courts can order these preferences only when no less drastic remedy is likely to be effective, they serve as the sole means of preventing future discrimination. It follows that the beneficiaries of preferential relief, if they would otherwise have sought the job in question, also are likely to have been victims of discrimination. More than any other beneficiaries of affirmative action, they approximate the status of proven victims of discrimination, who are entitled to compensatory relief, even awards of competitive seniority, at the expense of other employees.\textsuperscript{101}

A judicially ordered preference should terminate only when the defendant proves that it has achieved a stable racial balance, one that will not be eroded immediately by future discrimination. The defendant must do more than achieve racial balance for a single year; it also must demonstrate that it will not return to its past practice of discrimination. In an exceptional case, a defendant might be able to prove that a judicially ordered preference can end before it has achieved its long-term goal, for instance, because of a change in leadership and a demonstrated commitment to remedying past discrimination by other means.\textsuperscript{102} The court's primary task is to ensure that the defendant will not engage in future discrimination, and only when that is done, to ensure that preferential relief does not continue any longer than necessary.

B. Consent Decrees

Consent decrees are far more important than injunctions as a source of preferences in hiring and promotions. They constitute a form of voluntary affirmative action, but, because they require judicial approval, they also share some of the characteristics of an injunction. The Supreme Court found that the first of these aspects predominated in \textit{Local No. 93, International Association of Firefighters v. Cleveland}.\textsuperscript{103} In that case, in which a union intervened to challenge approval of a consent decree, the Court applied the same standards to consent decrees that it had applied to entirely voluntary affirmative action in \textit{Weber}.\textsuperscript{104}


\textsuperscript{102} \textit{Cf.} \textit{Rufo}, 112 S. Ct. at 760-61 (modifications of consent decree allowed for unanticipated conditions).

\textsuperscript{103} 478 U.S. 501, 519 (1986).

\textsuperscript{104} \textit{Id.} at 515-24.
Consent decrees differ from purely private contracts of settlement in that they receive judicial approval when they are adopted and they require judicial approval when they are modified or dissolved. They stand midway between a contract between the parties and a judgment entered by the court. When they are attacked by employees and unions who were not joined in the original action, their aspect as a contract should predominate, and they should be subject to the same lenient standards as entirely voluntary affirmative action plans. They differ from voluntary plans only in being based on a fuller record, developed in the lawsuit leading to the consent decree, and in being embodied in a more formal document. Otherwise, courts should evaluate them as voluntary plans.

When an employer or union that was a party to the original action seeks to modify or terminate the consent decree, its aspect as a judgment should predominate. Of course, if the decree itself contains a definite termination date, as some do, that may preempt disputes between the parties over termination. Likewise, the voluntary origins of a consent decree also may lead to its voluntary termination by all the parties who originally agreed to it. To take a notable example, the massive steel industry consent decree, which provided for a variety of affirmative action plans, was voluntarily terminated at the instance of the plaintiffs. When the parties do not agree, then the defendant should bear the burden of persuading the court to terminate the consent decree.

The burden upon the defendant to terminate a consent decree should be lighter than the burden on the defendant to terminate an injunction. Approval of a consent decree need not be accompanied by any of the findings of persistent and egregious discrimination necessary for judicially ordered preferences. The defendant should only need to show that it has achieved a racial balance in its work force, not that the balance is likely to persist indefinitely. Alternatively, the court should allow the defendant to prove that other, neutral employment practices

106. See Firefighters, 478 U.S. at 528-30.
107. See infra notes 119-26 and accompanying text.
108. Akers v. Ohio Dep't of Liquor Control, 902 F.2d 477, 480 (6th Cir. 1990) (two years to accomplish goal in consent decree); Davis v. City & County of San Francisco, 890 F.2d 1438, 1447-48 (9th Cir. 1989) (seven years or earlier if long-term goals are met); Sanders v. Shell Oil Co., 678 F.2d 614, 615 (5th Cir. 1982) (five years); Chicago Firefighters v. Washington, 736 F. Supp. 923, 932 (N.D. Ill. 1990) (three years); United States v. City and County of San Francisco, 696 F. Supp. 1287 (N.D. Cal. 1988) (seven years); Bridgeport Firebird Soc'y v. City of Bridgeport, 52 Fair Empl. Prac. Cas. 1362, 1367 (D. Conn. 1988) (less than three years); Black Grievance Comm. v. Philadelphia Elec. Co., 41 Fair Empl. Prac. Cas. (BNA) 1801, 1804 (E.D. Pa. 1984) (five years).
can replace the preference as a remedy for the discrimination alleged by the plaintiff.111 In order to prevent the defendant from reneging on its obligations under the consent decree, the court should terminate the decree gradually, retaining provisions that do not require affirmative action and also retaining jurisdiction over the entire case. Such steps minimize the burden upon other employees without undermining the effectiveness of the consent decree as a compromise in settlement of the plaintiff’s underlying claims.

Plans adopted by federal contractors should receive essentially the same treatment, although these plans raise distinctive problems about the validity and enforcement of Executive Order 11,246112 and its implementing regulations.113 In theory, a federal contractor must adopt an affirmative action plan or forego contracts with the federal government. In practice, however, the enforcement of the executive order is subject to political control. During the Reagan administration, the OFCCP did not insist, or insist very strongly, that federal contractors establish preferences in hiring and promotions.114 (More recently, the regulations requiring affirmative action were almost repealed in a bizarre combination of opportunism and indecision by the Bush administration.115) Like employers subject to consent decrees, federal contractors have acquiesced in affirmative action as the least onerous of the alternatives that they faced. That was, in fact, precisely the situation in United Steelworkers v. Weber: the employer in that case was a federal contractor who adopted an affirmative action plan only after a compliance review.116

If the OFCCP ever vigorously enforces the executive order again,117 the Supreme Court might find such affirmative action to be unconstitutional. Like the Richmond ordinance in Croson, the regulations under the executive order require affirmative action as an adjunct to government spending, and unlike the federal regulations upheld in Metro Broadcasting, Congress has never approved them explicitly.118 Even if

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111. Courts have imposed short-term preferences that remain in effect only until the defendant has developed a valid test. E.g., Berkman v. City of New York, 705 F.2d 584, 594-97 (2d Cir. 1983); Guardians' Ass'n v. Civil Serv. Comm'n, 630 F.2d 79, 109 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); see Stuart v. Roache, 951 F.2d 446, 454-55 (1st Cir. 1991).
114. See supra note 49.
118. The Supreme Court has already cast doubt on the regulations under the executive order because they lack explicit congressional authorization. Chrysler Corp. v. Brown, 441 U.S. 281, 303-08 (1979); see also Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164 (4th Cir. 1981).

On the other hand, the federal courts of appeals have almost uniformly upheld the executive
such a challenge to the executive order proved to be successful, however, it would only return federal contractors to the choice faced by noncontractors between risking an injunction, agreeing to a consent decree, or engaging in voluntary affirmative action. A holding that the executive order was invalid would not require federal contractors to terminate affirmative action plans that they had adopted to comply with its requirements. Croson may revive litigation over this question, but it would raise no distinctive problems of terminating or modifying existing affirmative action plans.

C. Voluntary Affirmative Action

Voluntarily adopted affirmative action plans are more broadly allowed and therefore more commonly found than other forms of affirmative action.¹¹⁹ For these reasons, termination of such plans raises more significant problems than termination of other plans. A lenient approach to voluntary affirmative action necessarily leaves most of the decisions about particular preferences to employers or unions. The duration of preferences should be among those decisions. Having allowed preferences to be adopted on a large scale, the federal judiciary cannot engage in close supervision of decisions about when to bring them to an end. In many cases, of course, there may be no need for judicial intervention, either because the preference itself provides for a specific expiration date or because the employer or union has abandoned it before its continued existence could be challenged.

The leeway that must be given to voluntary affirmative action, or at least that has been given under existing law, does not argue against all restraints on the duration of preferences. On the contrary, as we have seen, there is widespread agreement on the need for preferences to terminate at some time. The leeway given to voluntary plans instead affects the kind of restraints that the courts should impose. These restraints should be concerned primarily with how employers can formulate or voluntarily terminate preferences, and only secondarily with resolving termination disputes.

The last of these alternatives is the least desirable, and judging from the reported cases, it is also the least frequently adopted. No cases, apart perhaps from a few belated challenges to the approval of consent decrees,¹²⁰ have even raised the question of whether a voluntarily adopted


preference has lasted too long. As a practical matter, of course, the risk of liability for reverse discrimination will determine the degree of freedom of employers and unions to continue existing affirmative action plans. The courts should frame the standards for liability, however, to allow employers and unions to decide when to terminate voluntary plans, or what amounts to the same thing, to anticipate this issue by including provisions for termination in the plans themselves.

These standards should depend upon three factors: the kind of benefit conferred by the preference, in particular, whether it concerns a job for which extensive prior training is required; the rate of turnover of employees in that job, which determines both the rate at which racial balance is achieved and, potentially, lost; and the degree of segregation in the job for which the preference is granted. The first two of these factors determine the burden imposed by the preference. Most claims of reverse discrimination concern preferences in promotions or in skilled jobs. These claims are brought by employees or applicants for employment who have made long-term commitments to education or training—especially experience in lower-level jobs—for the job covered by the preference. The third factor determines the need for the preference in order to eliminate long-standing patterns of segregation.

The first two factors should reduce the burden of proof upon a plaintiff challenging a voluntary affirmative action plan. The plaintiff’s burden of proof should be reduced if the plaintiff seeks to terminate a preference for a skilled job and if the turnover in that job is relatively low. The plaintiff’s burden should be reduced, not in the sense of requiring proof by something less than a preponderance of the evidence, but by reducing what the plaintiff must prove. The plaintiff should bear a reduced burden in two respects: in proving what constitutes a racially balanced work force and in proving how long the employer must sustain that balance. In considering a preference for a skilled job, the relevant labor market should be defined narrowly to include only skilled workers, so long as a preference in training or in lower level jobs has been, or could have been, established by the employer. Likewise, if the turnover in the job covered by the preference is low, the balance in the employer’s work force should also be defined narrowly, as achieving balance for a

121. Under Johnson v. Transportation Agency, 480 U.S. 616, 626-27 (1987), a reverse discrimination plaintiff bears the burden of production and persuasion on the issue of whether an affirmative action plan is valid. Accord Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431, 436 (10th Cir. 1990). If the Court’s opinion is taken literally, the plaintiff is in the difficult position of proving a negative, at least on the issue of past discrimination. The employer seems to be in a better position than the plaintiff to produce evidence on the composition of its work force and the absence of less burdensome alternatives. Moreover, as a practical matter, employers usually present such evidence in defending their affirmative action plans.

For this reason, the Court may not have meant what it said. Alternatively, it was just following a more general trend, evident in its recent decisions on the theory of disparate impact, of requiring all plaintiffs to bear the burden of persuasion on the issue of unlawful discrimination. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977, 996-97 (1988) (opinion of O’Connor, J.).
short period, as short as a single year, instead of maintaining it over a longer period.

A preference in skilled jobs places a greater burden on other employees than a preference in unskilled or entry-level jobs. This burden is clearest when the preference concerns promotions which are, by definition, confined to an internal labor market of employees who have already demonstrated their commitment to the employer. These employees have limited mobility in seeking equally good jobs from other employers.\textsuperscript{122} Applicants who must complete a long course of education or training face similar limitations. Both types of employees have relied upon the existence of skilled jobs in making earlier commitments to their careers, much more so than applicants for unskilled or entry-level jobs. For skilled jobs, the degree of segregation in the employer’s work force should be judged by the skilled labor market, which reflects the effect of preferences at lower levels, but not the proportion of minorities or women in the general labor market. Doing so reduces the burden on other employees both directly, by terminating preferences for skilled jobs sooner, and indirectly, by encouraging less burdensome preferences in unskilled jobs and in training programs. If the employer has not, but could have, adopted a preference in training or unskilled jobs, the labor market should be narrowly defined. A requirement of this kind does not obligate employers always to adopt the least burdensome forms of affirmative action, but it does restrict the duration of more burdensome plans.

Encouraging affirmative action in education and training also accords with the general conclusions of the empirical studies of affirmative action. Even the studies most favorable to affirmative action in employment have found that its effects are difficult to detect and, even when detected, relatively small. Of course, more vigorous and widespread forms of affirmative action might make a greater difference. In deciding whether to terminate affirmative action plans, however, the choice is not just between more or less affirmative action, but also over the kind of affirmative action. Programs that emphasize education and jobs in which employees obtain on-the-job training should receive priority over programs that concern skilled jobs or promotions alone. This priority also responds to concerns about the emergence of a minority underclass of unemployed workers with few skills.\textsuperscript{123}

The degree of turnover in the job covered by a preference should


\textsuperscript{123} Michael H. Gottesman, Twelve Topics to Consider Before Opting for Racial Quotas, 79 Geo. L.J. 1713, 1748-58 (1991); Smith & Welch, supra note 67, at 549-50. In some cases, however, employers may be unable to separate a training program from the hiring decision. In these cases, the general labor market should define segregation. In Weber, for instance, the affirmative action plan was for on-the-job training in skilled craft positions. Weber, 443 U.S. at 198-99.
determine not what constitutes a balanced work force, but when it has been achieved. Preferences for jobs in which turnover is high impose a smaller burden upon other employees. If they are passed over through the operation of an affirmative action plan, they need wait only a short time before another position becomes open. Preferences in jobs with high turnover also achieve a less stable balance than preferences in jobs with low turnover. For instance, a preference that required one black to be hired for every white in a job with twenty percent turnover every year would transform a work force that was entirely white into one that was ten percent black after one year and eighteen percent black after two years. If the preference were then dismantled and no blacks were hired the percentage would fall to 14.4% in one year and to just over eleven percent in two years. By contrast, a job with low turnover would result in a preference that achieved balance much more slowly but resulted in a balance that was much more stable after the employer dismantled the preference.

Opposed to considerations of training and turnover is the need to abolish long-standing patterns of racial segregation, rightly emphasized in Weber. If anything, the degree of sexual segregation of the work force is even more severe than the degree of racial segregation. Such patterns of segregation are most likely to occur in precisely those jobs which require skill and training and in which turnover is low. They are epitomized by high-level jobs from which minorities, and particularly women, are excluded by a "glass ceiling" that prevents them from advancing further in the firm. Where manifest imbalance or the effects of past discrimination persist despite affirmative action, these factors justify a continued preference for the excluded groups. Training and turnover should determine not whether the preference should continue, but the rate at which minorities or women are preferred. For instance, the rate at which blacks or women are promoted to high-level jobs might be set at the level reflecting their representation in the pool of qualified applicants, instead of some higher rate, such as fifty percent. An employer or union which establishes continued manifest imbalance would then retain the freedom to decide how long a preference remains in effect. The findings on this issue depend upon an analysis of the relevant labor market, and hence the effects of skills and training discussed earlier, but a

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124. For simplicity, these figures are based on the assumption that turnover is random among present employees. This assumption is plausible in jobs with high turnover, but even if it were modified to take account of seniority, it would have to consider two opposing tendencies: greater turnover among both new employees, who discover they do not like or cannot do the job, and old employees, who grow tired of the job.


127. See supra notes 121-23 and accompanying text.
finding of manifest imbalance or the persistent effects of past discrimination usually should be decisive. It does not, of course, require an employer or union to engage in affirmative action, but it should leave the decision in their hands. Just as they decided to adopt the plan, they should be free to decide when to terminate it.

A decision that manifest imbalance or the effects of past discrimination have been eliminated from an employer's work force—or a decision that they have not—should resolve the question for the foreseeable future. Once dismantled, a preference should not be renewed unless new evidence of discrimination or the effects of past discrimination comes to light. Conversely, once a preference has been reviewed and found necessary, it should not be reexamined for some time. It makes little sense to allow affirmative action in an on-off cycle as racial balance is achieved and then lost. Although employers and unions remain free to modify voluntary affirmative action plans as they see fit, the legal regulation of voluntary affirmative action cannot be as variable as the decisions of employers and unions themselves. If it were, it would give them virtually no guidance about what the law required, and, conceivably, it could result in inconsistent decisions over a short period of time. When a balanced work force has been achieved is inevitably a question of degree, one that cannot be resolved simply by finding a moment when mathematical proportions have been equalized. To the extent possible, the law should leave employers and unions free to make this decision for themselves, mainly by requiring a stable racial balance before a preference must end.

V. CONCLUSION

Affirmative action should not be taken, by either its supporters or its opponents, as the only remedy for ongoing discrimination or for the continuing effects of past discrimination. Its supporters should not insist that preferences in employment continue indefinitely. Conversely, opponents of affirmative action should not interpret termination of preferences as a declaration that equal employment opportunity has been achieved. For all the controversy over affirmative action in employment, it is surprising how limited its effects have been, particularly its adverse effects on other employees. Their opportunities generally have not been diminished. Instead, preferences have proved to be most controversial only when they have concentrated a large burden upon a small number of employees. The question of whether to terminate a particular affirmative action plan is not an all-or-nothing decision. It is a question of selecting the least burdensome remedy for past discrimination.

The remedies for past discrimination must not be divided formalisti-

cally into those that take account of race and sex and those that do not. Such a division may be conceptually clear, but it excites exactly the kind of controversy that has proved to be most damaging to the achievement of equal opportunity. It distracts the courts—not to mention the political process—from the most important practical issue: the extent to which any remedy, whether or not it takes account of race or sex, succeeds in eliminating the effects of past discrimination, while imposing a minimal burden upon other employees. What is really at stake is both more complex and more detailed, but at the same time less controversial, than the abstract claims of both the supporters and opponents of affirmative action. It is how affirmative action actually affects all employees in the workplace, regardless of race, national origin, or gender.