December 1, 1986


Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference
December 1, 1986

85-1129 - Johnson v. Transportation Agency

Dear Bill,

I shall await the dissent.

Sincerely yours,


Justice Brennan

Copies to the Conference
December 2, 1986

Re: No. 85-1129 - Johnson v. Transportation Agency

Dear Bill,

I will be preparing a dissent in the above case.

Sincerely,

Justice Brennan

Copies to the Conference
December 2, 1986

Re: 85-1129 - Johnson v. Transportation Agency

Dear Bill:

Please join me.

Respectfully,

[Signature]

Justice Brennan
Copies to the Conference
Re: 85-1129 - Paul Johnson v. Transportation Agency

Dear Bill:

Although I agree with substantial portions of your proposed opinion in this case, and concur in the judgment, I have one concern about the opinion in its present form. Omitted from the proposed opinion is any discussion of the precise findings necessary before an employer engages in affirmative action.

As it is now written, the proposed opinion suggests that an employer need not point to evidence of even an arguable violation of Title VII on its own part as long the employer can point to a "manifest ... imbalance in traditionally segregated job categories." Op. 9-10 (quoting United Steelworkers of America v. Weber, 443 U.S. 193, 209 (1978)). Although perhaps Weber can be read as requiring nothing more than a statistical imbalance, I do not think it should be so interpreted.

In the Title VII context as in the Equal Protection context, I believe that an employer must have a firm basis for believing that remedial action is required. In particular, in order to provide some measure of protection to the interests of the employer's nonminority employees, the statistical disparity used to justify the affirmative action plan should be sufficient to support a prima facie Title VII pattern or practice claim by minorities or women. Under our case law, for jobs that require particular skills a Title VII prima facie case requires a comparison to the percentage of women in the work force with the relevant qualifications. See Hazelwood School District v. United States, 433 U.S. 299 (1977).

This analysis is not inconsistent with Weber. In Weber, the affirmative action program involved a training program for unskilled production workers. 443 U.S., at 198. In that case, therefore, the "manifest racial imbalance" was powerful evidence of prior race discrimination because the relevant comparison was to the total percentage of blacks in the labor force. In the instant case, however, the number
of women with the qualifications for entry into the relevant job classifications was quite small. A mere statistical imbalance between the percentage of women in the work force and the percentage of women in these jobs, therefore, did not necessarily suggest past discrimination. If instead of no women in the agency's skilled work jobs, women had held 20% of the skilled jobs, in my view an affirmative action plan would not be justified despite the so-called "statistical imbalance." If an employer is already hiring a higher percentage of women than the percentage in the labor force with the necessary qualifications, any affirmative action program is, by definition, "unnecessarily trammel[ing] the interests" of male workers. 443 U.S., at 208 (emphasis added).

In its present form, the opinion already implicitly recognizes the appropriateness of this approach to the statistical imbalance necessary to justify an affirmative action plan, see pages 12-13, but I believe that this same analysis of the use of statistical evidence should apply to the employer's decision to initiate an affirmative action program as well as to the application of the plan in actual employment decisions.

In this case I am satisfied that the respondent had a firm basis for adopting an affirmative action program. The complete absence of women in the skilled jobs would have been sufficient to establish a prima facie case under Title VII. I will circulate something along these lines by way of a partial concurrence as promptly as possible.

Sincerely,

[Signature]

Justice Brennan

Copies to the Conference
CHAMBERS OF JUSTICE HARRY A. BLACKMUN

December 3, 1986

Re: No. 85-1129, Johnson v. Transportation Agency

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

cc: The Conference
MEMORANDUM

To: Justice Powell

From: Leslie

No. 85-1129, Johnson v. Transportation Agency

In Steelworkers v. Weber, 443 U.S. 193, 200 (1979), the Court emphasized "the narrowness of [its] inquiry":

Since the [affirmative action plan at issue] does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. Further, since the ... plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act. The only question before us is the narrow statutory issue of whether Title VII forbids private employers ... from voluntarily [adopting a] bona fide affirmative action plan[].

Ibid. This is the narrow inquiry before the Court in Johnson. Although the employer in this case is a public employer, only the Title VII issue was raised, argued and decided below.
This Court has recognized two principles respecting the intersection of Title VII and the Equal Protection Clause. First, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." Dothard v. Rawlinson, 433 U.S. 321, 331 n. 14 (1977) (emphasis added). Second, "a public employer['s] ... voluntary actions are subject to the strictures of the Fourteenth Amendment as well as to the limitations of ... Title VII." Local No. 93 v. City of Cleveland, 106 S. Ct. 3063, 3075 n. 8 (1986) (citing Weber, supra; Wygant v. Jackson Board of Education, 106 S. Ct. 1842 (1986)) (emphasis added). Just last term, the Court declined "to address the circumstances, if any, in which voluntary action by a public employer that is permissible under [Title VII] would nonetheless be barred by the Fourteenth Amendment."

Ibid.

Justice O'Connor proposes that there should be no distinction between the standards used to assess voluntary employer action under Title VII or under the Equal Protection Clause. She recently stated:

The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance. ... [It would be an] anomalous result that what private employers may voluntarily do to correct apparent violations of Title VII, ... Weber, public employers are ... forbidden to do to correct their statutory and constitutional transgressions.

Wygant, 106 S. Ct. at 1855. But note: Justice O'Connor's theory as to what would justify an affirmative action plan under the
Equal Protection Clause is stated in terms of Title VII principles:

[I]n order to provide some assurance of protection to the interests of its nonminority employees and the employer itself in the event that its affirmative action plan is challenged, the public employer must have a firm basis for determining that affirmative action is warranted. Public employers are not without reliable benchmarks in making this determination. For example, demonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

Wygant, 106 S. Ct. at 1856 (emphasis added). Thus, Justice O'Connor would find a "statistical imbalance sufficient to demonstrate an arguable Title VII violation to be sufficient to justify an affirmative action plan for either a public or private employer.

The Court in Weber specifically rejected this "arguable violation" standard for a private employer under Title VII. Justice Blackmun concurred, stating the reasons why departure from the "arguable violation" standard is justified in the Title VII context. Justice Blackmun noted two ways in which the Court's standard in Weber differed from the "arguable violation" standard. First, under Weber, the individual employer need not have engaged in discrimination in the past. It is enough that there be a manifest imbalance in a traditionally segregated job category. A job category is "traditionally segregated" when there has been "a societal history of purposeful exclusion of [the minority] from the job category, resulting in a persistent disparity..."
between the proportion of [the minority] in the labor force and the proportion of [the minority] among those who hold jobs within the category." 443 U.S., at 212. Second, "in assessing a prima facie case of Title VII liability, the composition of the employer's work force is compared to the composition of the pool of workers who meet valid job qualifications. Hazelwood, ... When a "job category" is traditionally segregated, however, that pool will reflect the effects of segregation, and the Court's approach goes further and permits as comparison with the composition of the labor force as a whole, in which minorities are more heavily represented." Id., at 214.

Justice O'Connor perceives both of these departures from the "arguable violation" standard to be reflected in the Johnson opinion and seeks to have them altered to comport with the "arguable violation" standard. On the second point, Justice Brennan's clerk informs me that he would be willing to change the Johnson opinion to state that the adoption of an affirmative action plan must be based on a comparison of the employer's work force with the qualified work force. This is a very important concession. Requiring an employer to focus on the disparity between his work force and the qualified work force is an important guarantee that the plan will not "unnecessarily trammel" the rights of nonminority employees. It also makes the inference of prior past discrimination more compelling, since any disparity would indicate that the employer had failed to hire a significant percentage of available minority individuals.
This leaves as the only point of dispute between Justice O'Connor and Justice Brennan whether a voluntary affirmative action plan must be justified by a statistical disparity strong enough to support a prima facie Title VII pattern or practice claim by the minorities. On this point, the two sides appear immovable. Justice O'Connor believes that the prima facie case standard is necessary to protect the interests of nonminority employees. Justice Brennan (and the other three Justices who have joined the opinion) believe that the prima facie standard would act as too great of a deterrent to private employers to adopt an affirmative action plan. The argument is that Congress intended to preserve employer prerogatives to the greatest extent possible in Title VII. Private employers are very sensitive to the threat of Title VII liability, and would be very unwilling to admit, even to justify an affirmative action plan, that they might have discriminated in the past. Very strong statistics are required alone to establish a prima facie case, thus employers would often have to supply additional evidence of past discrimination to justify adoption of a plan. This would deter employers from adopting a plan in the first plan and thus frustrate the goal of voluntary compliance with Title VII. The question is not whether Title VII authorizes the plan; only whether the statute affirmatively prohibits it. Thus, it is appropriate to preserve management prerogatives voluntarily to effectuate the purposes of the Act by allowing employers to adopt plans when they can show a "manifest imbalance in a traditionally segregated work force." Moreover, Weber has already crossed this bridge by way of statu-
tory interpretation and so the Court should not now interpret the prohibitions of Title VII more strictly.

This is a very close question. Both Justice O'Connor's view and Justice Brennan's view have points in their favor. On balance, it seems better to retain distinct standards of analysis under Title VII and the Constitution. This view is consistent with the Court's treatment of the standards for violations in Title VII and equal protection cases not involving affirmative action plans. This Court has never stated that the standards for determining a Title VII violation and an Equal Protection violation are the same. In fact, the Court has articulated specifically different standards. In McDonnell Douglas Corp v. Green, 411 U.S. 792, 800 (1973), the Court noted, "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." The Court then articulated the order and burden of proof in a Title VII case. Under Title VII, an employer is only required to articulate a legitimate nondiscriminatory reason for the apparent discrimination. In equal protection cases, an employer is required to justify apparent discrimination with a "compelling" justification and demonstrate that the means are "narrowly tailored" to achieve the end. Thus, the Court has consistently imposed a stricter burden of proof under the Constitution than under Title VII.
It appears to make sense to adopt this distinction in proof when evaluating affirmative action plans as well. Just because the Constitution stands as an independent limitation on public employers does not mean that that limitation should be imposed on private employers as well for the sake of consistency. Private employers may well be more sensitive to economic concerns than public employers and thus more deterred by a prima facie justification standard for an affirmative action plan. It is important to emphasize also that the prima facie standard and the "manifest imbalance" standard are not really that far apart. "Manifest imbalance" seems to contemplate something less than a prima facie case. But, the decision in this case rests on an imbalance of 238:0. Approval of this manifest imbalance will not encourage employers lightly to adopt affirmative action plans. Moreover, the manifest imbalance must be evident in a "traditionally segregated job category." "Traditionally segregated" implicitly means a job category where past discrimination has occurred. The only difference between this standard and the prima facie case standard is thus the link between the discrimination and the particular employer. Arguably, an employer could base an affirmative action plan on a manifest imbalance that reflects someone else's discrimination -- either the union or society in general. But the potential for an employer basing an affirmative action plan on general societal discrimination is greatly reduced by the requirement that any disparity be based on the qualified work force. The fact that an employer has a manifestly fewer minority members than the qualified work force is highly proba-
tive of his own discrimination and looks very much like a prima facie case.

There are a number of possible methods of action at this point. You could write a note to Justice Brennan indicating the changes that you would like to see. First, he should clarify that the adoption of an affirmative action plan as well as its implementation should be based on a comparison of the employer's work force with the qualified work force at large. Second, you may want to ask him to make clearer in footnote 2 that, even though the Court does not reach the issue in this case, a public employer such as the Transportation Agency is also subject to the distinct prohibitions of the Equal Protection Clause. See Wygant. Another option is to await Justice O'Connor's concurrence. Her clerk is very busy and does not expect to start writing until later next week, so it may be a while before the concurrence circulates. Given your position between Justice O'Connor and Justice Brennan, it does not appear wise for you to write before Justice O'Connor does. The problem with waiting for her concurrence is that Justice Brennan will not modify the qualified work force language until he receives a specific request. If he received a request from you before Justice O'Connor writes, the gap between them will not appear as wide and the disagreement in the concurrence will be less pronounced. Given the fractured nature of affirmative action opinions in the past, this result appears desirable.
December 5, 1986

Re: 85-1129 - Johnson v. Transportation Agency

Dear Bill:

I agree in large part with your exceptionally well written opinion in this Title VII case. I do share Sandra's concern that the opinion make clearer that the adoption of a voluntary affirmative action plan, as well as its implementation, should be based upon a reasonable comparison of the percentage of the protected group within the employer's work force with the percentage of qualified members of the protected class in the work force at large. I would appreciate your considering a paragraph along the following lines that could be added prior to the first full paragraph on page 10:

Our decisions have made clear the method by which a "manifest imbalance" should be ascertained in order to justify the adoption of a voluntary affirmative action plan. A comparison of the percentage of minorities or women in the employer's work force with the percentage in the labor market -- or in some circumstances even in the general population -- may be appropriate to determine conspicuous underrepresentation in jobs that require no specialized training or experience. See Weber, supra (comparison between proportion of blacks working at plant and proportion of blacks in area labor force appropriate in calculating imbalance for purposes of establishing craft training program); Teamsters v. United States, 431 U.S. 324 (1977) (comparison between percentage of blacks in employer's work force and in area general population proper in determining extent of imbalance in truck driving positions). Where a job requires special expertise, however, the comparison should be with those in the labor force who possess the relevant qualifications. See Hazelwood School District v. United States, 433 U.S. 299 (1977) (must compare percentage of blacks in employer's work ranks with percentage of qualified black
teachers in area labor force in determining underrepresentation in teaching positions). The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides an additional assurance that the adoption of a voluntary affirmative action plan is based upon a bona fide remedial objective consistent with the purposes of Title VII.

As you will notice, this paragraph consists largely of two sentences from the middle of the paragraph in your opinion beginning at the bottom of page 12 and ending on page 13. It appears that these two sentences can be removed from this paragraph without disrupting the flow of the argument. I have attached a copy of your opinion indicating these proposed changes as well as a few other minor additions.

My only additional suggestion is that a sentence along the following lines be added to footnote 2: "Of course where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. See Wygant v. Jackson Board of Education, ___ U.S. ___ (1986)."

If you prefer not to make these changes I will of course understand. I will join your judgment in any event, and will say in whatever I write that I agree for the most part with your opinion.

Sincerely,

Justice Brennan
SUPREME COURT OF THE UNITED STATES

No. 85–1129

PAUL E. JOHNSON, PETITIONER v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[December ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

Respondent, Transportation Agency of Santa Clara County, California, unilaterally promulgated an Affirmative Action Plan applicable, inter alia, to promotions of employees. In selecting applicants for the promotional position of road dispatcher, the Agency, pursuant to the Plan, passed over petitioner Paul Johnson, a male employee, and promoted a female employee applicant, Diane Joyce. The question for decision is whether in making the promotion the Agency impermissibly took into account the sex of the applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq. The District Court for the Northern District of California, in an action filed by peti-
tioner following receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), held that respondent had violated Title VII. App. to Pet. for Cert. 1a. The Court of Appeals for the Ninth Circuit reversed. 748 F. 2d 1308 (1984); modified, 770 F. 2d 752 (1985). We granted certiorari, 478 U. S. —— (1986). We affirm.2

I

A

In December 1978, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan (Plan) for the County Transportation Agency. The Plan implemented a County Affirmative Action Plan, which had been adopted, declared the County, because "mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." App. 31.3 Relevant to this case, the Agency Plan provides that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant.

In reviewing the composition of its work force, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the county labor force in both the Agency as a whole and in five of seven job categories.

1No constitutional issue was either raised or addressed in the litigation below. See 748 F. 2d 1308, 1310, n. 1 (1984). We therefore decide in this case only the issue of the prohibitory scope of Title VII. Of course, where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. See Wygant v. Jackson Board of Education, —— U. S. —— (1986).

2The Plan reaffirmed earlier County and Agency efforts to address the issue of employment discrimination, dating back to the County's adoption in 1971 of an Equal Employment Opportunity Policy. App. 37–40.
Specifically, while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees. Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women: women made up 76% of Office and Clerical Workers, but only 7.1% of Agency Officials and Administrators, 8.6% of Professionals, 9.7% of Technicians, and 22% of Service and Maintenance workers. As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. \textit{Id.}, at 49. The Plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them “because of the limited opportunities that have existed in the past for them to work in such classifications.” \textit{Id.}, at 57. The Plan also observed that, while the proportion of ethnic minorities in the Agency as a whole exceeded the proportion of such minorities in the county work force, a smaller percentage of minority employees held management, professional, and technical positions.\textsuperscript{4}

The Agency stated that its Plan was intended to achieve “a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are under-represented.” \textit{Id.}, at 43. As a benchmark by which to evaluate progress, the Agency stated that its long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force. \textit{Id.}, at 54. Thus, for the Skilled Craft category in which the road dispatcher position at issue here was classified, the Agency’s aspiration was that eventually about 36% of the jobs would be occupied by women.

\textsuperscript{4}While minorities constituted 19.7% of the county labor force, they represented 7.1% of the Agency’s Officials and Administrators, 19% of its Professionals, and 16.9% of its Technicians. \textit{Id.}, at 48.
The Plan acknowledged that a number of factors might make it unrealistic to rely on the Agency's long-term goals in evaluating the Agency's progress in expanding job opportunities for minorities and women. Among the factors identified were low turnover rates in some classifications, the fact that some jobs involved heavy labor, the small number of positions within some job categories, the limited number of entry positions leading to the Technical and Skilled Craft classifications, and the limited number of minorities and women qualified for positions requiring specialized training and experience. Id., at 56-57. As a result, the Plan counselled that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. Among the tasks identified as important in establishing such short-term goals was the acquisition of data "reflecting the ratio of minorities, women and handicapped persons who are working in the local area in major job classifications relating to those utilized by the County Administration," so as to determine the availability of members of such groups who "possess the desired qualifications or potential for placement." Id., at 64. These data on qualified group members, along with predictions of position vacancies, were to serve as the basis for "realistic yearly employment goals for women, minorities and handicapped persons in each EEOC job category and major job classification." Ibid.

The Agency's Plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented. One such job was the road dispatcher position that is the subject of the dispute in this case.

B

On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher in the Agency's Roads Division. Dispatchers assign road crews, equip-
ment, and materials, and maintain records pertaining to road maintenance jobs. *Id.*, at 23–24. The position requires at minimum four years of dispatch or road maintenance work experience for Santa Clara County. The EEOC job classification scheme designates a road dispatcher as a Skilled Craft worker.

Twelve County employees applied for the promotion, including Joyce and Johnson. Joyce had worked for the County since 1970, serving as an account clerk until 1975. She had applied for a road dispatcher position in 1974, but was deemed ineligible because she had not served as a road maintenance worker. In 1975, Joyce transferred from a senior account clerk position to a road maintenance worker position, becoming the first woman to fill such a job. *Tr.* 83–84. During her four years in that position, she occasionally worked out of class as a road dispatcher.

Petitioner Johnson began with the county in 1967 as a road yard clerk, after private employment that included working as a supervisor and dispatcher. He had also unsuccessfully applied for the road dispatcher opening in 1974. In 1977, his clerical position was downgraded, and he sought and received a transfer to the position of road maintenance worker. *Id.*, at 127. He also occasionally worked out of class as a dispatcher while performing that job.

Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job, and were interviewed by a two-person board. Seven of the applicants scored above 70 on this interview, which meant that they were certified as eligible for selection by the appointing authority. The scores awarded ranged from 70 to 80. Johnson was tied for second with score of 75, while Joyce ranked next with a score of 73. A second interview was conducted by three Agency supervisors, who ultimately recommended that Johnson be promoted. Prior to the second interview, Joyce had contacted the County's Affirmative Action Office because she feared
JOHNSON v. TRANSPORTATION AGENCY

that her application might not receive disinterested review. The Office in turn contacted the Agency's Affirmative Action Coordinator, whom the Agency's Plan makes responsible for, *inter alia*, keeping the Director informed of opportunities for the Agency to accomplish its objectives under the Plan. At the time, the Agency employed no women in any Skilled Craft position, and had never employed a woman as a road dispatcher. The Coordinator recommended to the Director of the Agency, James Graebner, that Joyce be promoted.

Graebner, authorized to choose any of the seven persons deemed eligible, thus had the benefit of suggestions by the second interview panel and by the Agency Coordinator in arriving at his decision. After deliberation, Graebner concluded that the promotion should be given to Joyce. As he testified: “I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirma-

*Joyce testified that she had had disagreements with two of the three members of the second interview panel. One had been her first supervisor when she began work as a road maintenance worker. In performing arduous work in this job, she had not been issued coveralls, although her male co-workers had received them. After ruining her pants, she complained to her supervisor, to no avail. After three other similar incidents, ruining clothes on each occasion, she filed a grievance, and was issued four pair of coveralls the next day. Tr. 89-90. Joyce had dealt with a second member of the panel for a year and a half in her capacity as chair of the Roads Operations Safety Committee, where she and he “had several differences of opinion on how safety should be implemented.” *Id.*, at 90-91. In addition, Joyce testified that she had informed the person responsible for arranging her second interview that she had a disaster preparedness class on a certain day the following week. By this time about ten days had passed since she had notified this person of her availability, and no date had yet been set for the interview. Within a day or two after this conversation, however, she received a notice setting her interview at a time directly in the middle of her disaster preparedness class. *Id.*, at 94-95. This same panel member had earlier described Joyce as a “rebel-rousing, skirt-wearing person,” Tr. 153.
tive action matters, things like that . . . I believe it was a combination of all those.” Id., at 68.

The certification form naming Joyce as the person promoted to the dispatcher position stated that both she and Johnson were rated as well-qualified for the job. The evaluation of Joyce read: “Well qualified by virtue of 18 years of past clerical experience including 3½ years at West Yard plus almost 5 years as a [road maintenance worker].” App. 27. The evaluation of Johnson was as follows: “Well qualified applicant; two years of [road maintenance worker] experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago.” Ibid. Graebner testified that he did not regard as significant the fact that Johnson scored 75 and Joyce 73 when interviewed by the two-person board. Tr. 57-58.

Petitioner Johnson filed a complaint with the EEOC alleging that he had been denied promotion on the basis of sex in violation of Title VII. He received a right-to-sue letter from the agency on March 10, 1981, and on March 20, 1981, filed suit in the United States District Court for the Northern District of California. The District Court found that Johnson was more qualified for the dispatcher position than Joyce, and that the sex of Joyce was the “determining factor in her selection.” App. to Pet. for Cert. 4a (emphasis in original). The court acknowledged that, since the Agency justified its decision on the basis of its Affirmative Action Plan, the criteria announced in Steelworkers v. Weber, 443 U. S. 193 (1979), should be applied. App. to Pet. for Cert. 5a. It then found the Agency’s Plan invalid on the ground that the evidence did not satisfy Weber’s criterion that the Plan be temporary. App. to Pet. for Cert. 6a. The Court of Appeals for the Ninth Circuit reversed, holding that the absence of an express termination date in the Plan was not dispositive, since the Plan repeatedly expressed its objective as the attainment, rather than the maintenance, of a work force mirroring the labor force in the county. 748 F. 2d, at 1312, modified,
770 F. 2d 752 (1985). The Court of Appeals added that the fact that the Plan established no fixed percentage of positions for minorities or women made it less essential that the Plan contain a relatively explicit deadline. 748 F. 2d, at 1312. The Court held further that the Agency's consideration of Joyce's sex in filling the road dispatcher position was lawful. The Agency Plan had been adopted, the court said, to address a conspicuous imbalance in the Agency's work force, and neither unnecessarily trammeled the rights of other employees, nor created an absolute bar to their advancement. Id., at 1313–1314.

II

As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency's Plan. Only last term in Wygant v. Jackson Board of Education, 476 U. S. ——, ——— (1986), we held that "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program," and we see no basis for a different rule regarding a plan's alleged violation of Title VII. This case also fits readily within the analytical framework set forth in McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973). Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the plan is invalid and the employer's justification is pretextual. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving
the validity of the plan. The burden of proving its invalidity remains on the plaintiff.

The assessment of the legality of the Agency Plan must be guided by our decision in Weber, supra. In that case, the Court addressed the question whether the employer violated Title VII by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." Id., at 197. The respondent employee in that case challenged the employer's denial of his application for a position in a newly established craft training program, contending that the employer's selection process impermissibly took into account the race of the applicants. The selection process was guided by an affirmative action plan, which provided that 50% of the new trainees were to be black until the percentage of black skilled craftworkers in the employer's plant approximated the percentage of blacks in the local labor force. Adoption of the plan had been prompted by the fact that only 5 of 273, or 1.83%, of skilled craftworkers at the plant were black, even though the work force in the area was approximately 39% black. Because of the historical exclusion of blacks from craft positions, the employer regarded its former policy of hiring trained outsiders as inadequate to redress the imbalance in its work force.

We upheld the employer's decision to select less senior black applicants over the white respondent, for we found that taking race into account was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." Id., at 208. We noted that the plan did not "unnecessarily trammel the interests of the white employees," since it did not require "the discharge of white workers and their replacement with new black hires." Ibid. Nor did the plan create "an absolute bar to the advancement of white employees," since half of those trained in the new program were to be white. Ibid. Finally, we observed that the plan was a temporary measure, not designed to maintain
racial balance, but to "eliminate a manifest racial imbalance." 

Ibid. As Justice Blackmun's concurrence made clear, Weber held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part. Id., at 212. Rather, it need point only to a "conspicuous ... imbalance in traditionally segregated job categories." Id., at 209. Our decision was grounded on the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts. Id., at 204.

In reviewing the employment decision at issue in this case, we must first examine whether that decision was made pursuant to a plan prompted by concerns similar to those of the employer in Weber. Next, we must determine whether the effect of the plan on males and non-minorities is comparable to the effect of the plan in that case. The first issue is therefore whether consideration of the sex of applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." Id., at 197. In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise, see Teamsters v. United States, 431 U. S. 324 (1977) (comparison between percentage of blacks in employer's work force and in general population proper in determining extent of imbalance in truck driving positions), or training programs designed to provide expertise, see Weber, supra (comparison between proportion of blacks working at plant and proportion of blacks in area labor force appropriate in calculating imbalance for purpose of establishing preferential admission to craft training program). Where a job requires
special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. See Hazelwood School District v. United States, 433 U. S. 299 (1977) (must compare percentage of blacks in employer's work ranks with percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions). The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination.

It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race by taken into account for the purpose of remedying this type of underrepresentation. The Agency Plan acknowledged the "limited opportunities that have existed in the past," App. 57, for women to find employment in certain job classifications "where women have not been traditionally employed in significant numbers." Id., at 51. As a result, observed the Plan, women were concentrated in traditionally female jobs in the Agency, and represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred. Specifically, 9 of the 10 ParaProfessionals and 110 of the 145 Office and Clerical Workers

"For instance, the description of the Skilled Craft Worker category, in which the road dispatcher position is located, is as follows:

"Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the process involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen; electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers." App. 108.

As the Court of Appeals said in its decision below, "A plethora of proof is hardly necessary to show that women are generally underrepresented in such positions and that strong social pressures weigh against their participation." 748 F. 2d, at 1313.
were women. By contrast, women were only 2 of the 28 Officials and Administrators, 5 of the 58 Professionals, 12 of the 124 Technicians, none of the Skilled Craft Workers, and 1—who was Joyce—of the 110 Road Maintenance Workers. Id., at 51-52. The Plan sought to remedy these imbalances through "hiring, training and promotion of . . . women throughout the Agency in all major job classifications where they are underrepresented." Id., at 48.

As an initial matter, the Agency adopted as a benchmark for measuring progress in eliminating underrepresentation the long-term goal of a work force that mirrored in its major job classifications the percentage of women in the area labor market." Even as it did so, however, the Agency acknowledged that such a figure could not itself necessarily justify taking into account the sex of applicants for positions in all job categories. For positions requiring specialized training and experience, the Plan observed that the number of minorities and women "who possess the qualifications required for entry into such job classifications is limited." Id., at 56. The Plan therefore directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions. Id., at 61-64. The Plan stressed that such goals "should not be construed as 'quotas' that must be met," but as reasonable aspirations in correcting the imbalance in the Agency's work force. Id., at 64. These goals were to take into account factors such as "turnover, layoffs, lateral transfers, new job openings, retirements and availability of minorities, women and handicapped persons in the area work force who possess the desired qualifications or potential for placement." Ibid. The Plan specifically directed that, in establishing such goals, the Agency work with the

Because of the employment decision at issue in this case, our discussion henceforth refers primarily to the Plan's provisions to remedy the underrepresentation of women. Our analysis could apply as well, however, to the provisions of the plan pertaining to minorities.
County Planning Department and other sources in attempting to compile data on the percentage of minorities and women in the local labor force that were actually working in the job classifications comprising the Agency work force. Id., at 63-64. From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention.

As the Agency Plan recognized, women were most egregiously underrepresented in the Skilled Craft job category, since none of the 238 positions was occupied by a woman. In mid-1980, when Joyce was selected for the road dispatcher position, the Agency was still in the process of refining its short-term goals for Skilled Craft Workers in accordance with the directive of the Plan. This process did not reach fruition until 1982, when the Agency established a short-term goal for that year of three women for the 55 expected openings in that job category—a modest goal of about 6% for that category.

We reject petitioner's argument that, since only the long-term goal was in place for Skilled Craft positions at the time of Joyce's promotion, it was inappropriate for the Director to take into account affirmative action considerations in filling the road dispatcher position. The Agency's Plan emphasized that the long-term goals were not to be taken as guides for actual hiring decisions, but that supervisors were to consider a host of practical factors in seeking to meet affirmative action objectives, including the fact that in some job categories women were not qualified in numbers comparable to their representation in the labor force.

By contrast, had 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. This is because analysis of a more specialized labor pool normally is necessary in determining underrepre-
sentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of qualified minority applicants . . ." *Sheet Metal Workers' v. EEOC*, 478 U. S. — (1986) (JUSTICE O'CONNOR, concurring in part and dissenting in part).

The Agency's Plan emphatically did *not* authorize such blind hiring. It expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft category in mid-1980, the Agency's management nevertheless had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for this category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard.

Furthermore, in considering the candidates for the road dispatcher position in 1980, the Agency hardly needed to rely on a refined short-term goal to realize that it had a significant problem of underrepresentation that required attention. Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such imbalances, it was plainly not unreasonable for the Agency to determine that it was appropriate to consider as one factor the sex of Ms. Joyce in making its decision. The promotion

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*In addition, the Agency was mindful of the importance of finally hiring a woman in a job category that had formerly been all-male. The Director testified that, while the promotion of Joyce "made a small dent, for sure, in the numbers," nonetheless "philosophically it made a larger impact in that it probably has encouraged other females and minorities to look at the pos-
of Joyce thus satisfies the first requirement enunciated in Weber, since it was undertaken to further an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories.

We next consider whether the Agency Plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement. In contrast to the plan in Weber, which provided that 50% of the positions in the craft training program were exclusively for blacks, and to the consent decree upheld last term in Firefighters v. Cleveland, 478 U. S. — (1986), which required the promotion of specific numbers of minorities, the Plan sets aside no positions for women. The Plan expressly states that “[t]he 'goals' established for each Division should not be construed as 'quotas' that must be met.” App. 64. Rather, the Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants. As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into account in arriving at his decision. Tr. 68. The Plan thus resembles the “Harvard Plan” approvingly noted by JUSTICE POWELL in University of California Regents v. Bakke, 438 U. S. 265, 316–319 (1978), which considers race along with other criteria in determining admission to the college. As JUSTICE POWELL observed, "in such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." Id., at 317. Similarly, the Agency Plan requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants.

In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were clas-
sified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.9

Finally, the Agency's Plan was intended to attain a balanced work force, not to maintain one. The Plan contains ten references to the Agency's desire to "attain" such a balance, but no reference whatsoever to a goal of maintaining it. The Director testified that, while the "broader goal" of affirmative action, defined as "the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis," is something that is "a permanent part" of "the Agency's operating philosophy," that broader goal "is divorced, if you will, from specific numbers or percentages." Tr. 48-49.

The Agency acknowledged the difficulties that it would confront in remedying the imbalance in its work force, and anticipated only gradual increases in the representation of minorities and women.10 It is thus unsurprising that the

9Furthermore, from 1978 to 1982 Skilled Craft jobs in the Agency increased from 238 to 349. The Agency's personnel figures indicate that the Agency fully expected most of these positions to be filled by men. Of the 111 new Skilled Craft jobs during this period, 105, or almost 95%, went to men. As previously noted, the Agency's 1982 Plan set a goal of hiring only three women out of the 55 new Skilled Craft positions projected for that year, a figure of about 6%. While this degree of employment expansion by an employer is by no means essential to a plan's validity, it underscores the fact that the Plan in this case in no way significantly restricts the employment prospects of such persons. Illustrative of this is the fact that an additional road dispatcher position was created in 1983, and petitioner was awarded the job. Brief for Respondent Transportation Agency 36, n. 35.

10As the Agency Plan stated, after noting the limited number of minorities and women qualified in certain categories, as well as other difficulties in remedying underrepresentation:
Plan contains no explicit end date, for the Agency's flexible, case-by-case approach was not expected to yield success in a brief period of time. Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. See, e.g., Firefighters, supra, at —— (four-year duration for consent decree providing for promotion of particular number of minorities); Weber, 443 U.S., at 199 (plan requiring that blacks constitute 50% of new trainees in effect until percentage of employer work force equal to percentage in local labor force). This is necessary both to minimize the effect of the program on other employees, and to ensure that the plan's goals "[are] not being used simply to achieve and maintain . . . balance, but rather as a benchmark against which" the employer may measure its progress in eliminating the underrepresentation of minorities and women. Sheet Metal Workers, supra, at ——. In this case, however, substantial evidence shows that the Agency has sought to take a moderate, gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency's express commitment to "attain" a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance.

"As indicated by the above factors, it will be much easier to attain the Agency's employment goals in some job categories than in others. It is particularly evident that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been greatly underrepresented. Similarly, only gradual increases in the representation of women, minorities or handicapped persons in management and professional positions can realistically be expected due to the low turnover that exists in these positions and the small numbers of persons who can be expected to compete for available openings." App. 58.
In evaluating the compliance of an affirmative action plan with Title VII's prohibition on discrimination, we must be mindful of "this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" Wygant, 476 U. S., at —— (JUSTICE O'CONNOR, concurring in part and concurring in judgment) (quoting Bakke, supra, at 364). The Agency in the case before us has undertaken such a voluntary effort, and has done so in full recognition of both the difficulties and the potential for intrusion on males and non-minorities. The Agency has identified a conspicuous imbalance in job categories traditionally segregated by race and sex. It has made clear from the outset, however, that employment decisions may not be justified solely by reference to this imbalance, but must rest on a multitude of practical, realistic factors. It has therefore committed itself to annual adjustment of goals so as to provide a reasonable guide for actual hiring and promotion decisions. The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position. As both the Plan's language and its manner of operation attest, the Agency has no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards.

We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is

Affirmed.
December 9, 1986

85-1129 Johnson v. Transportation Agency

Dear Bill:

Please join me.

Sincerely,

Justice Brennan

lfp/ss

cc: The Conference
February 24, 1987

Re: 85-1129 - Johnson v. Transportation Agency, Santa Clara County, California

Dear Nino:

Please join me in your dissent.

Sincerely,

Justice Scalia

cc: The Conference
February 26, 1987

Johnson v. Santa Clara County, No. 85-1129

Dear Lewis,

I plan to add the attached in the next day or so as a response to Nino's dissent in this case.

Sincerely,

Justice Powell
85-1129 - Johnson v. Transportation Agency

Dear Nino,

Please join me in Parts I and II of your dissenting opinion. I shall add a few words of my own.

Sincerely yours,

[Signature]

Justice Scalia

Copies to the Conference
CHAMBERS OF
JUSTICE BYRON R. WHITE

February 26, 1987

MEMORANDUM TO THE CONFERENCE

Re: 85-1129 - Johnson v. Transportation Agency

I have sent the following dissent to the printer:

JUSTICE WHITE, dissenting.

I agree with Parts I and II of JUSTICE SCALIA's dissenting opinion. Although I do not join Part III, I also would overrule Weber. My understanding of Weber was, and is, that the employer's plan did not violate Title VII because it was designed to remedy intentional and systematic exclusion of blacks by the employer and the unions from certain job categories. That is how I understood the phrase "traditionally segregated jobs" we referred to in that case. The Court now interprets it to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force. As so interpreted, that case, as well as today's decision, as JUSTICE SCALIA so well demonstrates, is a perversion of Title VII. I would overrule Weber and reverse the judgment below.

[Signature]
Re: No. 85-1129, Johnson v. Transportation Agency

February 27, 1987

Dear Bill:

I have reviewed your proposed additions to the Court opinion in this case and in general they are fine. I would appreciate it, however, if you could remove the discussion of the Birmingham campaign that composes the bulk of new footnote 7. This discussion, based as it is on newspaper references, seems unnecessary and I think it may detract from the strength and persuasiveness of your excellent Court opinion.

Also, I do not read your Court opinion to contradict, in the context of Title VII, the holding of the Court last term in Wygant that "societal discrimination alone" is not "sufficient to justify a racial classification." 106 S. Ct., at 1847. But I am concerned that new footnote 14 might convey this impression. Perhaps you could replace the last two sentences in that footnote with something along the lines of the following:

This simplistic dichotomy requires the unrealistic assumption that "longstanding social attitudes" are somehow apart from and uninfluenced by [employment] discrimination, and that the historical absence of "women eager to shoulder pick and shovel," post, at ___, simply reflects the operation of private unconstrained choices. We do not view "longstanding social attitudes" and "conscious, exclusionary discrimination" as "certainly distinct." Post, at ___. On the contrary, in the context of the workplace they may well coincide. While the dissent focuses on the impact of societal attitudes on "women themselves" as potential job applicants, post, at ___, it ignores the fact that societal attitudes may also be held by employers, and if so, may directly result in discriminatory employment decisions. Although it is true
that general societal discrimination or attitudes do not alone justify the adoption of an affirmative action plan, it is also true that the possibility of their existence does not preclude such a plan. The requirement that a manifest imbalance exist in a traditionally segregated job category is pertinent proof that conscious, exclusionary conduct has occurred and that the adoption of an affirmative action plan may be justified.

Thank you so much, Bill, for your attention to my concerns. This is another "landmark" decision. You can well be proud of both this case and Paradise (except of course for that dreadful picture of you in the Times!).

Sincerely,

[Signature]

Justice Brennan
SUPREME COURT OF THE UNITED STATES

No. 85–1129

PAUL E. JOHNSON, PETITIONER v. TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[March —, 1987]

JUSTICE BRENNAN delivered the opinion of the Court.

Respondent, Transportation Agency of Santa Clara County, California, unilaterally promulgated an Affirmative Action Plan applicable, inter alia, to promotions of employees. In selecting applicants for the promotional position of road dispatcher, the Agency, pursuant to the Plan, passed over petitioner Paul Johnson, a male employee, and promoted a female employee applicant, Diane Joyce. The question for decision is whether in making the promotion the Agency impermissibly took into account the sex of the applicants in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e et seq.1 The District Court for the Northern District of California, in an action filed by peti-
tioner following receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (EEOC), held that respondent had violated Title VII. App. to Pet. for Cert. 1a. The Court of Appeals for the Ninth Circuit reversed. 748 F. 2d 1308 (1984); modified, 770 F. 2d 752 (1985). We granted certiorari, 478 U. S. —— (1986). We affirm. 2

I

A

In December 1978, the Santa Clara County Transit District Board of Supervisors adopted an Affirmative Action Plan (Plan) for the County Transportation Agency. The Plan implemented a County Affirmative Action Plan, which had been adopted, declared the County, because “mere prohibition of discriminatory practices is not enough to remedy the effects of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons.” App. 31. 3 Relevant to this case, the Agency Plan provides that, in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified applicant.

In reviewing the composition of its work force, the Agency noted in its Plan that women were represented in numbers far less than their proportion of the county labor force in both the Agency as a whole and in five of seven job categories.

1 No constitutional issue was either raised or addressed in the litigation below. See 748 F. 2d 1308, 1310, n. 1 (1984). We therefore decide in this case only the issue of the prohibitory scope of Title VII. Of course, where the issue is properly raised, public employers must justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. See Wygant v. Jackson Board of Education, —— U. S. —— (1986).

2 The Plan reaffirmed earlier County and Agency efforts to address the issue of employment discrimination, dating back to the County’s adoption in 1971 of an Equal Employment Opportunity Policy. App. 37–40.
Specifically, while women constituted 36.4% of the area labor market, they composed only 22.4% of Agency employees. Furthermore, women working at the Agency were concentrated largely in EEOC job categories traditionally held by women: women made up 76% of Office and Clerical Workers, but only 7.1% of Agency Officials and Administrators, 8.6% of Professionals, 9.7% of Technicians, and 22% of Service and Maintenance workers. As for the job classification relevant to this case, none of the 238 Skilled Craft Worker positions was held by a woman. *Id.*, at 49. The Plan noted that this underrepresentation of women in part reflected the fact that women had not traditionally been employed in these positions, and that they had not been strongly motivated to seek training or employment in them “because of the limited opportunities that have existed in the past for them to work in such classifications.” *Id.*, at 57. The Plan also observed that, while the proportion of ethnic minorities in the Agency as a whole exceeded the proportion of such minorities in the county work force, a smaller percentage of minority employees held management, professional, and technical positions.4

The Agency stated that its Plan was intended to achieve “a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the Agency in all major job classifications where they are underrepresented.” *Id.*, at 43. As a benchmark by which to evaluate progress, the Agency stated that its long-term goal was to attain a work force whose composition reflected the proportion of minorities and women in the area labor force. *Id.*, at 54. Thus, for the Skilled Craft category in which the road dispatcher position at issue here was classified, the Agency’s aspiration was that eventually about 36% of the jobs would be occupied by women.

4 While minorities constituted 19.7% of the county labor force, they represented 7.1% of the Agency’s Officials and Administrators, 19% of its Professionals, and 16.9% of its Technicians. *Id.*, at 48.
The Plan acknowledged that a number of factors might make it unrealistic to rely on the Agency's long-term goals in evaluating the Agency's progress in expanding job opportunities for minorities and women. Among the factors identified were low turnover rates in some classifications, the fact that some jobs involved heavy labor, the small number of positions within some job categories, the limited number of entry positions leading to the Technical and Skilled Craft classifications, and the limited number of minorities and women qualified for positions requiring specialized training and experience. Id., at 56–57. As a result, the Plan counselled that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. Among the tasks identified as important in establishing such short-term goals was the acquisition of data "reflecting the ratio of minorities, women and handicapped persons who are working in the local area in major job classifications relating to those utilized by the County Administration," so as to determine the availability of members of such groups who "possess the desired qualifications or potential for placement." Id., at 64. These data on qualified group members, along with predictions of position vacancies, were to serve as the basis for "realistic yearly employment goals for women, minorities and handicapped persons in each EEOC job category and major job classification." Ibid.

The Agency's Plan thus set aside no specific number of positions for minorities or women, but authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented. One such job was the road dispatcher position that is the subject of the dispute in this case.

B

On December 12, 1979, the Agency announced a vacancy for the promotional position of road dispatcher in the Agency's Roads Division. Dispatchers assign road crews, equip-
ment, and materials, and maintain records pertaining to road maintenance jobs. *Id.*, at 23–24. The position requires at minimum four years of dispatch or road maintenance work experience for Santa Clara County. The EEOC job classification scheme designates a road dispatcher as a Skilled Craft worker.

Twelve County employees applied for the promotion, including Joyce and Johnson. Joyce had worked for the County since 1970, serving as an account clerk until 1975. She had applied for a road dispatcher position in 1974, but was deemed ineligible because she had not served as a road maintenance worker. In 1975, Joyce transferred from a senior account clerk position to a road maintenance worker position, becoming the first woman to fill such a job. *Tr.* 83–84. During her four years in that position, she occasionally worked out of class as a road dispatcher.

Petitioner Johnson began with the county in 1967 as a road yard clerk, after private employment that included working as a supervisor and dispatcher. He had also unsuccessfully applied for the road dispatcher opening in 1974. In 1977, his clerical position was downgraded, and he sought and received a transfer to the position of road maintenance worker. *Id.*, at 127. He also occasionally worked out of class as a dispatcher while performing that job.

Nine of the applicants, including Joyce and Johnson, were deemed qualified for the job, and were interviewed by a two-person board. Seven of the applicants scored above 70 on this interview, which meant that they were certified as eligible for selection by the appointing authority. The scores awarded ranged from 70 to 80. Johnson was tied for second with score of 75, while Joyce ranked next with a score of 73. A second interview was conducted by three Agency supervisors, who ultimately recommended that Johnson be promoted. Prior to the second interview, Joyce had contacted the County’s Affirmative Action Office because she feared
that her application might not receive disinterested review. The Office in turn contacted the Agency's Affirmative Action Coordinator, whom the Agency's Plan makes responsible for, inter alia, keeping the Director informed of opportunities for the Agency to accomplish its objectives under the Plan. At the time, the Agency employed no women in any Skilled Craft position, and had never employed a woman as a road dispatcher. The Coordinator recommended to the Director of the Agency, James Graebner, that Joyce be promoted.

Graebner, authorized to choose any of the seven persons deemed eligible, thus had the benefit of suggestions by the second interview panel and by the Agency Coordinator in arriving at his decision. After deliberation, Graebner concluded that the promotion should be given to Joyce. As he testified: "I tried to look at the whole picture, the combination of her qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirm-

Joyce testified that she had had disagreements with two of the three members of the second interview panel. One had been her first supervisor when she began work as a road maintenance worker. In performing arduous work in this job, she had not been issued coveralls, although her male co-workers had received them. After ruining her pants, she complained to her supervisor, to no avail. After three other similar incidents, ruining clothes on each occasion, she filed a grievance, and was issued four pair of coveralls the next day. Tr. 89-90. Joyce had dealt with a second member of the panel for a year and a half in her capacity as chair of the Roads Operations Safety Committee, where she and he "had several differences of opinion on how safety should be implemented." Id., at 90-91. In addition, Joyce testified that she had informed the person responsible for arranging her second interview that she had a disaster preparedness class on a certain day the following week. By this time about ten days had passed since she had notified this person of her availability, and no date had yet been set for the interview. Within a day or two after this conversation, however, she received a notice setting her interview at a time directly in the middle of her disaster preparedness class. Id., at 94-95. This same panel member had earlier described Joyce as a "rebel-rousing, skirt-wearing person," Tr. 163.
tive action matters, things like that . . . I believe it was a combination of all those.” *Id.*, at 68.

The certification form naming Joyce as the person promoted to the dispatcher position stated that both she and Johnson were rated as well-qualified for the job. The evaluation of Joyce read: “Well qualified by virtue of 18 years of past clerical experience including 3½ years at West Yard plus almost 5 years as a [road maintenance worker].” App. 27. The evaluation of Johnson was as follows: “Well qualified applicant; two years of [road maintenance worker] experience plus 11 years of Road Yard Clerk. Has had previous outside Dispatch experience but was 13 years ago.” *Ibid.* Graebner testified that he did not regard as significant the fact that Johnson scored 75 and Joyce 73 when interviewed by the two-person board. *Tr.* 57–58.

Petitioner Johnson filed a complaint with the EEOC alleging that he had been denied promotion on the basis of sex in violation of Title VII. He received a right-to-sue letter from the agency on March 10, 1981, and on March 20, 1981, filed suit in the United States District Court for the Northern District of California. The District Court found that Johnson was more qualified for the dispatcher position than Joyce, and that the sex of Joyce was the “determining factor in her selection.” App. to Pet. for Cert. 4a (emphasis in original). The court acknowledged that, since the Agency justified its decision on the basis of its Affirmative Action Plan, the criteria announced in *Steelworkers v. Weber*, 443 U. S. 193 (1979), should be applied. App. to Pet. for Cert. 5a. It then found the Agency’s Plan invalid on the ground that the evidence did not satisfy *Weber’s* criterion that the Plan be temporary. App. to Pet. for Cert. 6a. The Court of Appeals for the Ninth Circuit reversed, holding that the absence of an express termination date in the Plan was not dispositive, since the Plan repeatedly expressed its objective as the attainment, rather than the maintenance, of a work force mirroring the labor force in the county. 748 F. 2d, at 1312, modified,
The Court of Appeals added that the fact that the Plan established no fixed percentage of positions for minorities or women made it less essential that the Plan contain a relatively explicit deadline. 748 F. 2d, at 1312. The Court held further that the Agency's consideration of Joyce's sex in filling the road dispatcher position was lawful. The Agency Plan had been adopted, the court said, to address a conspicuous imbalance in the Agency's work force, and neither unnecessarily trammeled the rights of other employees, nor created an absolute bar to their advancement. Id., at 1313-1314.

II

As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency's Plan. Only last term in Wygant v. Jackson Board of Education, 476 U. S. ——, —— (1986), we held that "[t]he ultimate burden remains with the employees to demonstrate the unconstutitionality of an affirmative-action program," and we see no basis for a different rule regarding a plan's alleged violation of Title VII. This case also fits readily within the analytical framework set forth in McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973). Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the plan is invalid and the employer's justification is pretextual. As a practical matter, of course, an employer will generally seek to avoid a charge of pretext by presenting evidence in support of its plan. That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving
the validity of the plan. The burden of proving its invalidity remains on the plaintiff.

The assessment of the legality of the Agency Plan must be guided by our decision in Weber, supra. In that case, the Court addressed the question whether the employer violated Title VII by adopting a voluntary affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." Id., at 197. The respondent employee in that case challenged the employer's denial of his application for a position in a newly established craft training program, contending that the employer's selection process impermissibly took into account the race of the applicants. The selection process was guided by an affirmative action plan designed to "eliminate manifest racial imbalances in traditionally segregated job categories." Id., at 197.

The dissent maintains that the obligations of a public employer under Title VII must be identical to its obligations under the Constitution, and that a public employer's adoption of an affirmative action plan therefore should be governed by Wygant. This rests on the following logic: Title VI embodies the same constraints as the Constitution; Title VI and Title VII have the same prohibitory scope; therefore, Title VII and the Constitution are coterminous for purposes of this case. The flaw is with the second step of the analysis, for it advances a proposition that we explicitly considered and rejected in Weber. As we noted in that case, Title VI was an exercise of federal power "over a matter in which the Federal Government was already directly involved," since Congress "was legislating to assure federal funds would not be used in an improper manner." 443 U.S. at 206 n. 6. "Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read in pari materia." Ibid. While public employers were not added to the definition of "employer" in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct. Indeed, "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." Dothard v. Rawlinson, 433 U.S. 321, 332 n. 14 (1977). The fact that a public employer must also satisfy the Constitution does not negate the fact that the statutory prohibition with which that employer must contend was not intended to extend as far as that of the Constitution.
action plan, which provided that 50% of the new trainees were to be black until the percentage of black skilled craft-workers in the employer's plant approximated the percentage of blacks in the local labor force. Adoption of the plan had been prompted by the fact that only 5 of 273, or 1.83%, of skilled craftworkers at the plant were black, even though the work force in the area was approximately 39% black. Because of the historical exclusion of blacks from craft positions, the employer regarded its former policy of hiring trained outsiders as inadequate to redress the imbalance in its work force.

We upheld the employer's decision to select less senior black applicants over the white respondent, for we found that taking race into account was consistent with Title VII's objective of "break[ing] down old patterns of racial segregation and hierarchy." Id., at 208. We noted that the plan did not "unnecessarily trammel the interests of the white employees," since it did not require "the discharge of white workers and their replacement with new black hirees." Ibid. Nor did the plan create "an absolute bar to the advancement of white employees," since half of those trained in the new program were to be white. Ibid. Finally, we observed that the plan was a temporary measure, not designed

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7 The dissent maintains that Weber's conclusion that Title VII does not prohibit voluntary affirmative action programs "rewrote the statute it purported to construe." Post, at _._. Weber's decisive rejection of the argument that the "plain language" of the statute prohibits affirmative action rested on (1) legislative history indicating Congress' clear intention that employers play a major role in eliminating the vestiges of discrimination, 443 U. S., at 201-204, and (2) the language and legislative history of § 703(j) of the statute, which reflect a strong desire to preserve managerial prerogatives so that they might be utilized for this purpose. Id., at 204-207. As JUSTICE BLACKMUN said in his concurrence in Weber, "If the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." Id., at 216. Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.
to maintain racial balance, but to "eliminate a manifest racial imbalance." Ibid. As JUSTICE BLACKMUN's concurrence made clear, Weber held that an employer seeking to justify the adoption of a plan need not point to its own prior discriminatory practices, nor even to evidence of an "arguable violation" on its part. Id., at 212. Rather, it need point only to a "conspicuous . . . imbalance in traditionally segregated job categories." Id., at 209. Our decision was grounded on the recognition that voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and that Title VII should not be read to thwart such efforts. Id., at 204.8

8 See also Firefighters v. Cleveland, 478 U. S. ---- (1986) ("We have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII"); Alexander v. Gardner-Denver, 415 U. S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII's] goal"). The dissent's suggestion that an affirmative action program may be adopted only to redress an employer's past discrimination, see post, at ----, was rejected in Steelworkers v. Weber, 443 U. S. 193 (1979), because the prospect of liability created by such an admission would create a significant disincentive for voluntary action. As JUSTICE BLACKMUN's concurrence in that case pointed out, such a standard would "place[] voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the 'tightrope' it creates would be to eschew all forms of voluntary affirmative action." 443 U. S., at 210. Similarly, JUSTICE O'CONNOR has observed in the constitutional context, "[t]he imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations." Wygant, supra, at ---- (O'CONNOR, J., concurring in part and concurring in the judgment).

Contrary to the dissent's contention, post, at ----, our decisions last term in Firefighters, supra, and Sheet Metal Workers v. EEOC, 478 U. S. ---- (1986), provide no support for a standard more restrictive than that enunciated in Weber. Firefighters raised the issue of the conditions under which parties could enter into a consent decree providing for explicit numerical quotas. By contrast, the affirmative action plan in this case sets aside no positions for minorities or women. See infra, at 16-17. In Sheet
In reviewing the employment decision at issue in this case, we must first examine whether that decision was made pursuant to a plan prompted by concerns similar to those of the employer in Weber. Next, we must determine whether the effect of the plan on males and non-minorities is comparable to the effect of the plan in that case.

The first issue is therefore whether consideration of the sex of applicants for skilled craft jobs was justified by the existence of a "manifest imbalance" that reflected underrepresentation of women in "traditionally segregated job categories." Id., at 197. In determining whether an imbalance exists that would justify taking sex or race into account, a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate in analyzing jobs that require no special expertise, see Teamsters v. United States, 431 U. S. 324 (1977) (comparison between percentage of blacks in employer's work force and in general population proper in determining extent of imbalance in truck driving positions), or training programs designed to provide expertise, see Weber, supra (comparison between proportion of blacks working at plant and proportion of blacks in area labor force appropriate in calculating imbalance for purpose of establishing preferential admission to craft training program). Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. See Hazelwood School District v. United States, 433 U. S. 299 (1977) (must compare Metal Workers, the issue we addressed was the scope of judicial remedial authority under Title VII, authority that has not been exercised in this case. The dissent's suggestion that employers should be able to do no more voluntarily than courts can order as remedies, post, at ——, ignores the fundamental difference between volitional private behavior and the exercise of coercion by the state. Plainly, "Congress' concern that federal courts not impose unwanted obligations on employers and unions," Firefighters, supra, at ——, reflects a desire to preserve a relatively large domain for voluntary employer action.
percentage of blacks in employer's work ranks with percentage of qualified black teachers in area labor force in determining underrepresentation in teaching positions). The requirement that the "manifest imbalance" relate to a "traditionally segregated job category" provides assurance that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination.

A manifest imbalance need not be such that it would support a prima facie case against the employer, as suggested in JUSTICE O'CONNOR's concurrence, post, since we do not regard as identical the constraints of Title VII and the federal constitution on voluntarily adopted affirmative action plans. Application of the "prima facie" standard in Title VII cases would be inconsistent with Weber's focus on statistical imbalance, and could inappropriately create a significant disi-
centive for employers to adopt an affirmative action plan. See *Weber*, *supra*, at 204 (Title VII intended as a “catalyst” for employer efforts to eliminate vestiges of discrimination). A corporation concerned with maximizing return on investment, for instance, is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used to subject it to a colorable Title VII suit.¹⁰

It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race by taken into account for the purpose of remedying underrepresentation. The Agency Plan acknowledged the “limited opportunities that have existed in the past,” App. 57, for women to find employment in certain job classifications “where women have not been traditionally employed in significant numbers.” *Id.*, at 51.¹¹ As a result, observed the Plan, women were

the job for which the trainees are being trained, a standard that would have invalidated the plan in *Weber* itself.

¹⁰In some cases, of course, the manifest imbalance may be sufficiently egregious to establish a prima facie case. However, as long as there is a manifest imbalance, an employer may adopt a plan even where the disparity is not so striking, without being required to introduce the non-statistical evidence of past discrimination that would be demanded by the “prima facie” standard. See, e. g., *Teamsters v. United States*, 431 U. S. 324, 339 (1977) (statistics in pattern and practice case supplemented by testimony regarding employment practices). Of course, when there is sufficient evidence to meet the more stringent “prima facie” standard, be it statistical, non-statistical, or a combination of the two, the employer is free to adopt an affirmative action plan.

¹¹For instance, the description of the Skilled Craft Worker category, in which the road dispatcher position is located, is as follows:

“Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the process involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen; electricians, heavy equipment operators, stationary engineers, skilled machining occupations, carpenters, compositors and typesetters and kindred workers.” App. 108.

As the Court of Appeals said in its decision below, “A plethora of proof is hardly necessary to show that women are generally underrepresented in
concentrated in traditionally female jobs in the Agency, and represented a lower percentage in other job classifications than would be expected if such traditional segregation had not occurred. Specifically, 9 of the 10 Para-Professionals and 110 of the 145 Office and Clerical Workers were women. By contrast, women were only 2 of the 28 Officials and Administrators, 5 of the 58 Professionals, 12 of the 124 Technicians, none of the Skilled Craft Workers, and 1—who was Joyce—of the 110 Road Maintenance Workers. *Id.*, at 51–52. The Plan sought to remedy these imbalances through “hiring, training and promotion of . . . women throughout the Agency in all major job classifications where they are underrepresented.” *Id.*, at 43.

As an initial matter, the Agency adopted as a benchmark for measuring progress in eliminating underrepresentation the long-term goal of a work force that mirrored in its major job classifications the percentage of women in the area labor market.12 Even as it did so, however, the Agency acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories. For positions requiring specialized training and experience, the Plan observed that the number of minorities and women “who possess the qualifications required for entry into such job classifications is limited.” *Id.*, at 56. The Plan therefore directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions. *Id.*, at 61–64. The Plan stressed that such goals “should not be construed as ‘quotas’ that must be met,” but as reasonable aspirations in correcting the imbal-

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12 Because of the employment decision at issue in this case, our discussion henceforth refers primarily to the Plan’s provisions to remedy the underrepresentation of women. Our analysis could apply as well, however, to the provisions of the plan pertaining to minorities.
ance in the Agency’s work force. Id., at 64. These goals were to take into account factors such as “turnover, layoffs, lateral transfers, new job openings, retirements and availability of minorities, women and handicapped persons in the area work force who possess the desired qualifications or potential for placement.” Ibid. The Plan specifically directed that, in establishing such goals, the Agency work with the County Planning Department and other sources in attempting to compile data on the percentage of minorities and women in the local labor force that were actually working in the job classifications comprising the Agency work force. Id., at 63–64. From the outset, therefore, the Plan sought annually to develop even more refined measures of the underrepresentation in each job category that required attention.

As the Agency Plan recognized, women were most egregiously underrepresented in the Skilled Craft job category, since none of the 238 positions was occupied by a woman. In mid-1980, when Joyce was selected for the road dispatcher position, the Agency was still in the process of refining its short-term goals for Skilled Craft Workers in accordance with the directive of the Plan. This process did not reach fruition until 1982, when the Agency established a short-term goal for that year of three women for the 55 expected openings in that job category—a modest goal of about 6% for that category.

We reject petitioner’s argument that, since only the long-term goal was in place for Skilled Craft positions at the time of Joyce’s promotion, it was inappropriate for the Director to take into account affirmative action considerations in filling the road dispatcher position. The Agency’s Plan emphasized that the long-term goals were not to be taken as guides for actual hiring decisions, but that supervisors were to consider a host of practical factors in seeking to meet affirmative action objectives, including the fact that in some job categories
women were not qualified in numbers comparable to their representation in the labor force.

By contrast, had 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. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of qualified minority applicants . . ." *Sheet Metal Workers' v. EEOC*, 478 U. S. — (1986) (JUSTICE O'CONNOR, concurring in part and dissenting in part).

The Agency's Plan emphatically did *not* authorize such blind hiring. It expressly directed that numerous factors be taken into account in making hiring decisions, including specifically the qualifications of female applicants for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft category in mid-1980, the Agency's management nevertheless had been clearly instructed that they were not to hire solely by reference to statistics. The fact that only the long-term goal had been established for this category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard.

Furthermore, in considering the candidates for the road dispatcher position in 1980, the Agency hardly needed to rely on a refined short-term goal to realize that it had a significant problem of underrepresentation that required attention. Given the obvious imbalance in the Skilled Craft category, and given the Agency's commitment to eliminating such im-
balances, it was plainly not unreasonable for the Agency to
determine that it was appropriate to consider as one factor
the sex of Ms. Joyce in making its decision.\footnote{In addition, the Agency was mindful of the importance of finally hiring a woman in a job category that had formerly been all-male. The Director testified that, while the promotion of Joyce "made a small dent, for sure, in the numbers," nonetheless "philosophically it made a larger impact in that it probably has encouraged other females and minorities to look at the possibility of so-called 'non-traditional' jobs as areas where they and the agency both have samples of a success story." Tr. 64.} The promotion of Joyce thus satisfies the first requirement enunciated in \textit{Weber}, since it was undertaken to further an affirmative action plan designed to eliminate Agency work force imbalances in traditionally segregated job categories.

We next consider whether the Agency Plan unnecessarily
trammel the rights of male employees or created an abso­
lute bar to their advancement. In contrast to the plan in
\textit{Weber}, which provided that 50\% of the positions in the craft
training program were exclusively for blacks, and to the con­
sent decree upheld last term in \textit{Firefighters v. Cleveland}, 478 U. S. —— (1986), which required the promotion of specific
numbers of minorities, the Plan sets aside no positions for
women. The Plan expressly states that "[t]he 'goals' estab­
lished for each Division should not be construed as 'quotas'
that must be met." App. 64. Rather, the Plan merely au­
thorizes that consideration be given to affirmative action con­
cerns when evaluating qualified applicants. As the Agency
Director testified, the sex of Joyce was but one of numerous
factors he took into account in arriving at his decision. Tr.
68. The Plan thus resembles the "Harvard Plan" approv­
ingly noted by JUSTICE POWELL in \textit{University of California
siders race along with other criteria in determining admission
to the college. As JUSTICE POWELL observed, "In such an
admissions program, race or ethnic background may be
deemed a 'plus' in a particular applicant's file, yet it does not
insulate the individual from comparison with all other candidates for the available seats." *Id.,* at 317. Similarly, the Agency Plan requires women to compete with all other qualified applicants. *No* persons are automatically excluded from consideration; *all* are able to have their qualifications weighed against those of other applicants.

In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectation on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for other promotions.¹⁴

Finally, the Agency’s Plan was intended to *attain* a balanced work force, not to maintain one. The Plan contains ten references to the Agency’s desire to “attain” such a balance, but no reference whatsoever to a goal of maintaining it. The Director testified that, while the “broader goal” of affirmative action, defined as “the desire to hire, to promote, to give opportunity and training on an equitable, non-discriminatory basis,” is something that is “a permanent part” of “the Agency’s operating philosophy,” that broader goal “is di-

¹⁴ Furthermore, from 1978 to 1982 Skilled Craft jobs in the Agency increased from 238 to 349. The Agency’s personnel figures indicate that the Agency fully expected most of these positions to be filled by men. Of the 111 new Skilled Craft jobs during this period, 105, or almost 95%, went to men. As previously noted, the Agency’s 1982 Plan set a goal of hiring only three women out of the 55 new Skilled Craft positions projected for that year, a figure of about 6%. While this degree of employment expansion by an employer is by no means essential to a plan’s validity, it underscores the fact that the Plan in this case in no way significantly restricts the employment prospects of such persons. Illustrative of this is the fact that an additional road dispatcher position was created in 1983, and petitioner was awarded the job. Brief for Respondent Transportation Agency 36, n. 35.
vorced, if you will, from specific numbers or percentages." Tr. 48-49.

The Agency acknowledged the difficulties that it would confront in remedying the imbalance in its work force, and anticipated only gradual increases in the representation of minorities and women. It is thus unsurprising that the Plan contains no explicit end date, for the Agency’s flexible, case-by-case approach was not expected to yield success in a brief period of time. Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. See, e.g., Firefighters, supra, at —— (four-year duration for consent decree providing for promotion of particular number of minorities); Weber, 443 U. S., at 199 (plan requiring that blacks constitute 50% of new trainees in effect until percentage of employer work force equal to percentage in local labor force). This is necessary both to minimize the effect of the program on other employees, and to ensure that the plan’s goals “[are] not being used simply to achieve and maintain . . . balance, but rather as a benchmark against which” the employer may measure its progress in eliminating the underrepresentation of minorities and women. Sheet Metal Workers, supra, at ——. In this case, however, substantial evidence shows that the Agency has sought to take a moderate,

As the Agency Plan stated, after noting the limited number of minorities and women qualified in certain categories, as well as other difficulties in remedying underrepresentation:

“As indicated by the above factors, it will be much easier to attain the Agency’s employment goals in some job categories than in others. It is particularly evident that it will be extremely difficult to significantly increase the representation of women in technical and skilled craft job classifications where they have traditionally been greatly underrepresented. Similarly, only gradual increases in the representation of women, minorities or handicapped persons in management and professional positions can realistically be expected due to the low turnover that exists in these positions and the small numbers of persons who can be expected to compete for available openings.” App. 58.
gradual approach to eliminating the imbalance in its work force, one which establishes realistic guidance for employment decisions, and which visits minimal intrusion on the legitimate expectations of other employees. Given this fact, as well as the Agency’s express commitment to “attain” a balanced work force, there is ample assurance that the Agency does not seek to use its Plan to maintain a permanent racial and sexual balance.

III

In evaluating the compliance of an affirmative action plan with Title VII’s prohibition on discrimination, we must be mindful of “this Court’s and Congress’ consistent emphasis on ‘the value of voluntary efforts to further the objectives of the law.’” Wygant, 476 U. S., at ___ (JUSTICE O’CONNOR, concurring in part and concurring in judgment) (quoting Bakke, supra, at 364). The Agency in the case before us has undertaken such a voluntary effort, and has done so in full recognition of both the difficulties and the potential for intrusion on males and non-minorities. The Agency has identified a conspicuous imbalance in job categories traditionally segregated by race and sex. It has made clear from the outset, however, that employment decisions may not be justified solely by reference to this imbalance, but must rest on a multitude of practical, realistic factors. It has therefore committed itself to annual adjustment of goals so as to provide a reasonable guide for actual hiring and promotion decisions. The Agency earmarks no positions for anyone; sex is but one of several factors that may be taken into account in evaluating qualified applicants for a position. As both the Plan’s lan-

16 The dissent predicts that today’s decision will loose a flood of “less qualified” minorities and women upon the workforce, as employers seek to forestall possible Title VII liability. Post, at ___. The first problem with this projection is that it is by no means certain that employers could in every case necessarily avoid liability for discrimination merely by adopting an affirmative action plan. Indeed, our unwillingness to require an admission of discrimination as the price of adopting a plan has been premised on
guage and its manner of operation attest, the Agency has no intention of establishing a work force whose permanent composition is dictated by rigid numerical standards.

We therefore hold that the Agency appropriately took into account as one factor the sex of Diane Joyce in determining that she should be promoted to the road dispatcher position. The decision to do so was made pursuant to an affirmative action plan that represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities and women in the Agency's work force. Such a plan is fully consistent with Title VII, for it embodies the contribution that voluntary employer action can make in eliminating the vestiges of discrimination in the workplace. Accordingly, the judgment of the Court of Appeals is

_Affirmed._

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cconcern that the potential liability to which such an admission would expose an employer would serve as a disincentive for creating an affirmative action program. See _supra_, n. 6.

A second, and more fundamental, problem with the dissent's speculation is that it ignores the fact that

"[i]t is a standard tenet of personnel administration that there is rarely a single, 'best qualified' person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. Especially where the job is an unexceptional, middle-level craft position, without the need for unique work experience or educational attainment and for which several well-qualified candidates are available, final determinations as to which candidate is 'best qualified' are at best subjective." _Brief for American Society for Personnel Administration as Amicus Curiae._

This case provides an example of precisely this point. Any differences in qualifications between Johnson and Joyce were minimal, to say the least. See _supra_, at 5–7. The selection of Joyce thus belies the dissent's contention that the beneficiaries of affirmative action programs will be those employees who are merely not "utterly unqualified." _Post_, at —.
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