JUSTIFYING AFFIRMATIVE ACTION IN K-12 PRIVATE SCHOOLS

Sharon Hsin-Yi Lee

In this Comment, the author examines the consequences of using identical rules to govern the affirmative action policies of both private employers and private schools. The author explores accepted legal justifications for private affirmative action, focusing on whether these justifications are internal or external to the defendant. The author contends that the Supreme Court's dicta in *Johnson v. Transportation Agency* weigh in favor of using external imbalances to justify private affirmative action when viewed in light of developments in Equal Protection Clause jurisprudence. The author demonstrates that departing from the affirmative-action rule for private employers – by allowing private schools to use external racial imbalances as justifications for their affirmative action policies – results in the most effective allocation of incentives and means for private schools to remedy racial disparities. In contrast to private employers and private colleges, the author proposes that K-12 private schools be able to use external imbalances to justify their affirmative action policies because such affirmative action benefits society more than currently permitted forms of affirmative action.

INTRODUCTION

Is it legal for a private school to have the mission of improving a racial group's educational status when that group academically underachieves? If so, is it legal for the school to exclusively or primarily admit students of that racial group to better achieve its mission? In reality, the answer to the second question determines the answer to the first question because a school that cannot exclusively or primarily admit students of a particular racial group would be severely limited in its efforts to improve that group's educational achievement.

Although the case is now being decided *en banc* by the Ninth Circuit,[1] the opinion of a three-judge panel in *Doe* v. *Kamehameha Schools*[2] is significant in setting forth an approach to answering the above questions. The panel essentially held that a private school, the Kamehameha Schools, can never use a racial preference, a Native Hawaiian[3] preference, to *exclusively* admit students of a particular racial group, even if that group significantly underperforms in school.

The Kamehameha Schools have operated since 1887 as the charitable legacy of Princess Bernice Pauahi Bishop, the last direct descendant of King Kamehameha I.[4] Private and

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[1] Doe v. Kamehameha Schs., 2006 U.S. App. LEXIS 4167 at *1.

[2] Doe v. Kamehameha Schs., 416 F.3d 1025 (9th Cir. 2005).

[3] Although there is general controversy as to whether Native Hawaiians should be treated as a race by law, the Kamehameha Schools conceded that their Native Hawaiian preference was a racial preference. *Kamehameha*, 416 F.3d at 1047. Congress has found that Native Hawaiians academically underperform. *See, e.g.*, Native Hawaiian Education Act of 2002, 20 U.S.C. §§ 7511-7517 (2005).

[4] *Id.* at 1027.

nonsectarian,[5] the Kamehameha Schools' mission is "to fulfill Pauahi's desire to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry."[6] To further its mission, the Kamehameha Schools have an 118-year-old policy of offering admissions preference to applicants of Hawaiian ancestry.[7] For its K-12 schools, the Kamehameha Schools' admissions policy is implemented in a two-part process: the applicant first demonstrates his academic qualifications and then completes the Ethnic Ancestry Survey.[8]

John Doe had sought to be admitted but was denied admission to the Kamehameha Schools twice. Each time he had met the academic standards and acknowledged that he possessed no aboriginal blood.[9] Doe consequently filed suit against the Kamehameha Schools.[10] He alleged that the Schools' admissions policy violated 42 U.S.C. § 1981,[11] the relevant part of

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[5] This Comment addresses the legality of affirmative action under 42 U.S.C. § 1981 in private nonsectarian schools but not private sectarian schools, to which different rules apply. *See, e.g.*, EEOC v. Kamehameha Schs., 848 F. Supp. 899 (D. Haw. 1993).

[6] KAMEHAMEHA SCHOOLS STRATEGIC PLAN 2000-2015, at 19, *available at* http://www.ksbe.edu/osp/StratPlan/EntireDocument.pdf.

[7] Thomas Yoshida, *Appeals Court to Rehear Admissions Policy Challenge*, http://www.ksbe.edu/article.php?story=20060222115646371.

[8] Doe v. Kamehameha Schs., 416 F.3d 1025, 1029 (9th Cir. 2005).

[9] *Id.*

[10] *Id.*

[11] *Id.*

which protects a person's "right to make and enforce contracts" from racial discrimination.[12] The district court, however, granted summary judgment in favor of the Schools and other defendants because "the admissions policy constituted a valid race-conscious remedial affirmative action program."[13] Doe appealed.[14]

Because the Kamehameha Schools "employ[ed] an express racial classification," the Ninth Circuit panel determined that its admissions policy constituted a prima facie case of intentional race discrimination.[15] In response,[16] the Kamehameha Schools argued "that its policy constitute[d] a valid affirmative action plan rationally related to redressing present imbalances in the socioeconomic and educational achievement of native Hawaiians, producing native Hawaiian

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[12] 42 U.S.C. § 1981 (2006) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[13] *Kamehameha*, 416 F.3d at 1029.

[14] *Kamehameha*, 416 F.3d at1027.

[15] *Kamehameha*, 416 F.3d at 1039. In *Runyon v. McCray*, 427 U.S. 160 (1876), the Supreme Court determined that the right of admission to a private school falls under § 1981's "right to make and enforce contracts."

[16] The prima facie case of intentional race discrimination created a presumption that the Kamehameha Schools had engaged in intentional discrimination. *Kamehameha*, 416 F.3d at 1039.

leadership for community involvement, and revitalizing native Hawaiian culture."[17] However, the panel reasoned that an affirmative action policy can justify a racial preference only when it satisfies three requirements advanced by the Supreme Court in *United Steelworkers of America v. Weber*.[18] Under the Ninth Circuit's interpretation of *Weber*, affirmative action policies in the employment context must: 1) "respond to a manifest imbalance in its work force," 2) not create an absolute bar to the advancement of the non-preferred race or unnecessarily trammel the rights of the non-preferred race, and 3) do no more than is necessary to achieve a balance.[19]

Seeing "no basis for a different rule regarding a plan's alleged violation of § 1981 in the context of private education," the panel determined that the Kamehameha Schools' racial preference was designed to deny admission to all students possessing no aboriginal blood so long as a sufficient number of qualified Native Hawaiians sought admission.[20] It reasoned that the Schools' policy effectively created an absolute bar to the attendance of those not descended from the Hawaiian race[21] and consequently failed the second prong of the Ninth Circuit's *Weber* rule.[22]

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[17] Doe v. Kamehameha Schs., 416 F.3d 1025, 1039-40 (9th Cir. 2005).

[18] 443 U.S. 193 (1979).

[19] *Kamehameha*, 416 F.3d at 1040-41.

[20] *Id.* ("We see no basis for a different rule regarding a plan's alleged violation of § 1981 in the context of private education."); *cf. id.* ("We are persuaded that these general principles [for testing the validity of an affirmative action plan] may be rationally applied in the context of private education, with certain modifications to account for the differences of context.").

[21] Although a student not of Native Hawaiian ancestry was admitted in 2003, the Ninth Circuit determined that his admission was by accident rather than by design. *Id.* at 1040 n.8.

Although the panel did not make this clear, it effectively provided that a private school's affirmative action policy must: 1) respond to a manifest imbalance in its student population, 2) not create an absolute bar to the admission of the non-preferred race or unnecessarily trammel the rights of the non-preferred race, and 3) do no more than is necessary to achieve a balance in its student population. Caselaw in the private employment context has established that a manifest imbalance can be shown if there is a much smaller percentage of the preferred racial group in the private employer's population than the surrounding population.[23] Extending the panel's logic of identically treating affirmative action policies in private employers and private schools, a manifest imbalance for the purpose of justifying private-school affirmative action should be established if there is a much smaller percentage of the preferred racial group in the private school population than the surrounding population.

The Ninth Circuit panel did not address whether the Kamehameha Schools' admission policy would have been valid if it had created a significant rather than an absolute bar to the attendance of people who are not partly Native Hawaiian.[24] However, the consequence of the

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[22] *See Kamehameha*, 416 F.3d at 1041.

[23] *See* Johnson v. Transp. Agency, 480 U.S. 646, 631-32 (1987) (reasoning that a manifest imbalance can be determined through "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 . . . in analyzing jobs that require no special expertise").

[24] Doe v. Kamehameha Schs., 416 F.3d 1025, 1041-42 (9th Cir. 2005) ("Even if we assumed that some, limited racial preferences might be appropriate in order for the Schools to advance its mission, an absolute bar on the basis of race alone exceeds any reasonable application of Weber, Rudebush, and the cases that followed in their wake.").

panel's decision to import the *Weber* rule from the private employment context to the private education context, without change, is that the Kamehameha Schools almost certainly cannot use *any* Native Hawaiian admissions preference.

Under the rule imported from *Weber*, the Kamehameha Schools would almost certainly not be able to use a Native Hawaiian admissions preference because there is no manifest internal imbalance to justify it: the percentage of Native Hawaiians in the Kamehameha Schools' population is virtually 100 percent,[25] whereas the percentage of Native Hawaiians in Hawaii is 9.4 percent.[26] Thus, one specific consequence of applying identical rules to determine the legality of affirmative action in both private employers and private schools is to handicap the Kamehameha Schools' ability "to fulfill Pauahi's desire to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry."

Of significance is that this result is not logically limited to the Ninth Circuit. Other circuits have not had the opportunity to decide what rule governs the legality of affirmative action in private education. However, almost every circuit's rule for affirmative action in private employers is like the Ninth Circuit's in that they require an affirmative action policy to be justified by an imbalance within the employer's workforce, in other words, an "internal

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[25] A student not of Native Hawaiian ancestry was admitted in 2003. *Kamehameha*, 416 F.3d at 1040 n.8.

[26] *See* U.S. Census Bureau: State & County Quickfacts, http://quickfacts.census.gov/qfd/states/15000.html.

imbalance."[27] Some circuits, however, have indicated a willingness to justify affirmative action policies with imbalances external to the employer.[28]

This Comment sets aside the question of whether a private school should be able to use a racial preference to *exclusively* admit students of an academically underachieving racial group.[29] Instead, this Comment contends that K-12 private schools, including the Kamehameha Schools, should be able to *primarily* admit students of an academically underachieving racial group through its affirmative action policy. Such affirmative action most effectively allocates

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[27] *See infra* Part I.B. More precisely, this Comment defines internal-imbalance justifications as those that logically cease justifying an affirmative action policy once the percentage of the preferred race in the private entity approximates that in the local area. Under this definition, past discrimination towards blacks or a manifest lack of Asian Americans would be internal-imbalance justifications because the private entity has arguably made up for the past discrimination towards blacks or the manifest lack of Asian Americans once the percentage of the preferred race in the entity's population approximates that in the local area. On the other hand, the justifications of diversity and improving services to black constituencies are external-imbalance justifications because the private entity may continue to reap the benefits of diversity and improving services to black constituencies, which result from its affirmative action policy, even when the percentage of the preferred race in the private entity's population approximates that in the local area.

[28] *See infra* Part I.B.

[29] For a piece that addresses this question, see *RECENT CASE: Civil Rights – Section 1981 – Ninth Circuit Holds That Private School's Remedial Admissions Policy Violates 1981. – Doe v. Kamehameha Schools, 416 F.3d 1025 (9th Cir. 2005)*, 119 Harv. L. Rev. 661 (2005).

incentives and means to remedy racial disparities. It also confers greater benefits and fewer burdens on society than forms of affirmative action that are presently permitted. Toward these ends, external imbalances should legitimately justify the use of admissions preferences for academically underachieving racial groups in K-12 private schools.

Part I of this Comment provides an overview of law governing affirmative action policies under 42 U.S.C. § 1981, with a focus on currently accepted affirmative action justifications. In Part II, I present my thesis: that both precedent and policy support the use of external imbalances to justify admissions preferences for academically underachieving racial groups in K-12 private schools.

I. AN OVERVIEW OF LAW GOVERNING AFFIRMATIVE ACTION POLICIES UNDER § 1981

A. Supreme Court Cases

Two Supreme Court cases, *United Steelworkers of America v. Weber*[30] and *Johnson v. Transportation Agency*,[31] are the most significant precedents when considering the legality of an affirmative action policy under § 1981.[32] Although *Weber* and *Johnson* deal with the legality of affirmative action policies under Title VII, these two cases are still on point because every

[30] 443 U.S. 193 (1979).

[31] 480 U.S. 616 (1987).

[32] Constitutional claims are often present in § 1981 cases involving government defendants. *See* LEX K. LARSON, EMPLOYMENT DISCRIMINATION 62.01 (2005), *available at* LEXIS, 3-62 EMPLOYMENT DISCRIMINATION 62.01.

jurisdiction either explicitly[33] or implicitly[34] treats affirmative action policies identically under both Title VII[35] and § 1981.

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[33] For jurisdictions that explicitly treat affirmative action policies identically under Title VII and § 1981, *see* Doe v. Kamehameha Schs., 416 F.3d 1025, 1040 (9th Cir. 2005); Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 499 (3d Cir. 1999); Setser v. Novack Inv. Co., 657 F.2d 962, 966-68 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981); McNamara v. City of Chicago, 867 F. Supp. 739, 752 (N.D. Ill. 1994); Baker v. City of Detroit, 483 F. Supp. 930, 980 (E.D. Mich. 1979), *aff'd sub nom.* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1982).

[34] For jurisdictions that implicitly treat affirmative action policies identically under both Title VII and § 1981, *see* Ferrill v. Parker Group, Inc., 168 F.3d 468, 472 (11th Cir. 1999) (for discrimination against a black woman); Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1284 n.7 (5th Cir. 1994) (for discrimination against blacks), *cert. denied*, 513 U.S. 1149 (1995); Local 35, Int'l Bhd. of Elec. Workers v. City of Hartford, 625 F.2d 416, 425 (2d Cir. 1980) (holding that any claim under 42 U.S.C. § 1981 presupposes a violation of the Equal Protection Clause or Title VII), *cert. denied*, 453 U.S. 913 (1981); Chance v. Bd. of Examiners, 534 F.2d 993, 998 (2d Cir. 1976) ("'[H]aving passed scrutiny under the substantive requirements of Title VII, the employment seniority system . . . is not violative of 42 U.S.C. § 1981.'"), *cert. denied sub nom*, Council of Supervisors & Adm'rs v. Chance, 431 U.S. 965 (1977); Frost v. Chrysler Motor Corp., 826 F. Supp. 1290, 1296-97 (W.D. Okl. 1993) (simultaneous analysis of affirmative action plan's validity under Title VII and § 1981); Dougherty v. Barry, 607 F. Supp. 1271, 1285-88 (D.C. 1985) (simultaneous analysis of affirmative action plan's validity under Title VII and § 1981), *rev'd on other grounds*, 869 F.2d 605 (D.C. Cir. 1989); Banerjee v. Bd. of Trustees, 495 F. Supp. 1148, 1156 (D. Mass. 1980) (reasoning that "the court may treat

In *Weber*, Kaiser Aluminum & Chemical Corporation's plant in Gramercy, Louisiana had a skilled craftworker population that was 1.83% black and a local labor force that was 39% black.[36] The Gramercy plant agreed to select new craft trainees on a seniority basis, with the proviso that at least 50% of new craft trainees were to be black until the percentage of its black

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plaintiff's § 1981 claim and Title VII claim as coextensive" in the subject case where the defendant allegedly discriminated against minority plaintiff because "the same factual predicate is alleged to constitute a violation of both, and no suggestion has been made that the requirements for establishing a violation of § 1981 are different in any manner from the requirements for establishing a violation of Title VII"), *aff'd*, 648 F.2d 61 (1st Cir. 1981). The Fourth Circuit would likely evaluate the validity of an affirmative action plan identically under both § 1981 and Title VII, *see* Lewis v. Cent. Piedmont Cmty. Coll., 689 F.2d 1207, 1209 n.3 (4th Cir. 1982) (holding "that the McDonnell Douglas criteria apply equally to cases arising under Title VII or § 1981"), *cert. denied*, 460 U.S. 1040 (1983).

[35] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The most relevant section for the issue at hand is 42 U.S.C. § 2000e-2(a), which provides that it "shall be an unlawful employment practice for an employer –

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, be-cause of such individual's race, color, religion, sex, or national origin."

[36] United Steelworkers v. Weber, 443 U.S. 193, 198 (1979).

skilled craftworkers commensurated with the percentage of blacks in the local labor force.[37] The most senior black trainee had less seniority than several white production workers whose bids for admission were rejected, including the plaintiff who instituted the action.[38]

The Supreme Court did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans" but concluded "that the adoption of the Kaiser-USWA plan . . . falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[39] In reaching this conclusion, the Court reasoned that "the purposes of the [affirmative action] plan mirror those of [Title VII]."[40] These purposes were "to break down old patterns of racial segregation and hierarchy" and "to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'"[41] The court's second reason for upholding the Kaiser-USWA plan was that "the plan does not unnecessarily trammel the interests of the white employees" because the plan: 1) does not require the discharge of white workers and their replacement with new black hirees, 2) does not create an absolute bar to the advancement of white employees, and 3) is a temporary measure.[42]

In *Johnson*, the Santa Clara County Transportation Agency voluntarily adopted an affirmative action plan with the long-term goal of attaining a work force whose composition

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[37] *Id.* at 198-99.

[38] *Id.* at 199.

[39] *Id.* at 208.

[40] *Id.*

[41] United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

[42] *Id.*

reflected the proportion of minorities and women in the area labor force.[43] Towards this end, the plan permitted the consideration of gender as a factor when promoting qualified applicants within a traditionally segregated job classification in which women had been significantly underrepresented.[44] The plan did not set aside a specific number of positions for minorities or women but required that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions.[45] A female employee, Diane Joyce, was promoted to a Skilled Craft Worker job classification over a male employee, Paul Johnson. Both employees had been rated as well qualified for the job, but Johnson had received a 75 on his interview and Joyce had received a 73.[46]

In reviewing the employment decision at issue in this case, the Supreme Court first examined whether the decision was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber* and then determined whether the effect of the plan on males and whites was comparable to the effect of the plan in *Weber*.[47] The Supreme Court upheld the validity of the Agency's plan under Title VII because, first, the "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'" and, second,

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[43] Johnson v. Transp. Agency, 480 U.S. 616, 621-22 (1987).

[44] *Id.* at 620-21.

[45] *Id.* at 622.

[46] *Id.* at 623-24.

[47] *Id.* at 631.

the Agency Plan "did not unnecessarily trammel[] the rights of male employees or create[] an absolute bar to their advancement."[48]

B. Proper Justifications for Private Affirmative Action[49]

Using *Weber* and *Johnson*, lower courts have not crafted identically-phrased rules for determining whether an affirmative action plan is legal under 42 U.S.C. § 1981 in the employment context. However, they have essentially focused on examining whether the affirmative action plan has proper justifications and limitations.[50]

Virtually every circuit requires affirmative action to be justified as a response to a racial imbalance within the employer's workforce, but does not permit affirmative action to be justified as a response to a racial imbalance existing outside of the employer's workforce.[51] This is

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[48] Johnson v. Transp. Agency, 480 U.S. 616, 637-38, 642 (1987).

[49] While many cases and articles have focused on categorizing justifications for affirmative action plans as either remedial or non-remedial, the categories of "external" and "internal" are more appropriate for this Comment.

[50] *See infra* Appendix: Survey of Rules Governing Affirmative Action Plans.

[51] The Eighth and Ninth Circuits' rules clearly indicate the requirement of an internal imbalance, *see infra* Appendix. *See, e.g.*, Davis v. City of S.F., 890 F.2d 1438, 1448 (9th Cir. 1989) (finding a manifest imbalance by "compar[ing] the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population"); Maitland v. Univ. of Minn., 155 F.3d 1013, 1016-17 (8th Cir. 1998) (considering whether there was a manifest imbalance in the salaries of male and female faculty members at the University to validate an "affirmative action salary plan"). The Second Circuit's rule sets forth the internal imbalance requirement more vaguely than the Eighth and Ninth Circuits' rules but also requires

usually true even when the face of the circuit's rule fails to indicate that the imbalance must be within the employer's workforce.[52]

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an imbalance in that particular defendant's workforce. *See e.g.*, Honadle v. Univ. of Va., 56 F. Supp. 2d 419, 426 (D. Va. 1999) ("In determining whether a manifest imbalance exists for a job requiring specialized skills, a comparison should be made between the percentage of minorities or women in the employer's work force with those in the labor market.").

[52] The stated rules for the First, Fourth, Fifth, Sixth, Seventh, Eleventh, and DC Circuits fail to indicate that the racial imbalance must be internal to the employer, *see infra* Appendix, but caselaw in these circuits have set forth this requirement. *See e.g.*, Dallas Fire Fighters Ass'n v. City of Dallas, 150 F.3d 438, 442 (5th Cir. 1998) (reasoning that manifest imbalance in the employer's rank of deputy chief satisfied the first prong of *Weber*); Bennett v. Arrington, 20 F.3d 1525, 1537 (11th Cir. 1994) ("determining whether a manifest imbalance exists that would justify race-conscious decisionmaking by the employer involves a comparison of the percentage of minority employees in that job" with either "the percentage of minorities in the general area labor market" or "the labor market who possess that special skill or training"); Aiken v. City of Memphis, 9 F.3d 461, 473 (9th Cir. 1993) (reasoning that statistics comparing defendant's labor force with county population and defendant's job categories with defendant's other job categories established a manifest imbalance for Title VII); Hammon v. Barry, 264 U.S. App. D.C. 1, 77-78 (D.C. Cir. 1987) (finding no manifest imbalance by comparing the percentage of blacks in the employer's relevant department with the percentage of blacks in the area labor force); Janowiak v. Corp. City of South Bend, 836 F.2d 1034, 1039 (7th Cir. 1987) (finding no manifest imbalance established where employer did not proffer any evidence of past discrimination nor a statistical comparison "between the relevant qualified area labor pool and

Although the majority of cases in the Third Circuit require an internal imbalance,[53] the Third Circuit's analysis in *Schurr v. Resorts International Hotel, Inc.*[54] implies that the required manifest imbalance may exist within the employer's workforce, the general industry, or the job category. In *Schurr*, the defendant was Resorts, a casino licensee in Atlantic City, New Jersey.[55] As a casino licensee, defendant was regulated by the state's Casino Control Commission pursuant to the Casino Control Act.[56] The Casino Control Act required casino licensees to improve the representation of "women and minorities in . . . EEOC job categories in which the casino licensee is below the applicable employment goals" set by the Commission.[57] In addition, casino licensees were required to develop an Equal Employment and Business Opportunity Plan to meet applicable employment goals set by the Commission and as a prerequisite to obtaining a

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the employer's workforce"); Stock v. Universal Foods Corp., 817 F. Supp. 1300, 1306-07 (D. Md. 1993) (racial imbalance in the workforce tends to establish that the affirmative action plan is substantially related to a remedial purpose); Bertoncini v. City of Providence, 767 F. Supp. 1194, 1202 (D. R.I. 1991) ("In deciding whether the kind of imbalance that exists justifies taking race or gender 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.'").

[53] *See e.g.*, Jaworski v. Cheney, 771 F. Supp. 109, 112 (E.D. Pa. 1991) (referring to a manifest imbalance as a comparison between the employer's jobs and the labor market).

[54] Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486 (3d Cir. 1999).

[55] *Id.* at 490.

[56] *Id.* at 488.

[57] *Id.* at 489.

casino license.[58] The Commission stated that the purpose underlying the Casino Control Act and similar regulations was "to ensure that the job creation which would accompany casino developments would benefit all segments of the population" in Atlantic City, which had a large minority population.[59]

Karl Schurr, a white male, sought a position as a light and sound technician at Resorts.[60] Resorts' Director of Show Operations and Stage Manager ("Director") narrowed those under consideration to Schurr and Ronald Boykin, a black male.[61] The Director viewed the two as equally qualified but believed he was generally obligated to hire the minority applicant if there were two equally qualified applicants for a job category in which the percentage of minorities was less than the goal established by the Commission regulations, as the technician job category was.[62] As a result, the Director hired Boykin.[63]

Schurr claimed that the Chairman of the Commission violated the Equal Protection Clause by enforcing the Commission's regulations establishing minority employment goals against Schurr.[64] This claim was rejected for Schurr's lack of standing.[65] Schurr also filed suit against Resorts for violating his rights under Title VII.[66]

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[58] *Id.*

[59] Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 498 (3d Cir. 1999).

[60] *Id.* at 490.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 488.

[64] Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 490 (3d Cir. 1999).

[65] *Id.* at 496.

The Third Circuit held that the affirmative action plan was invalid because it was not designed to correct a manifest imbalance in traditionally segregated job categories.[67] In reaching this holding, the Third Circuit noted the justification behind both the plan and the regulations mandating the plan:

> The plan itself and the regulations which mandate the plan were not based on any finding of historical or then-current discrimination in the casino industry or in the technician job category; the plan was not put in place as a result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation.[68]

The Third Circuit concluded that the "absence of any reference to or showing of past or present discrimination in the casino industry [was] fatal [to the validity of the affirmative action plan]."[69] The court's reasoning suggests that even if there had been no discrimination within the Resorts' technician jobs, a manifest imbalance may have existed if there had been discrimination in the casino industry or in the technician job category generally.

In *Frost v. Chrysler Motor Corporation*,[70] a Tenth Circuit district court explicitly provided that an employer "may justify the adoption of an affirmative action plan without showing a conspicuous imbalance among its own employees."[71] Chrysler had "adopted a Marketing Investment [P]rogram [("MIP")] to enable it to place dealerships in those areas in

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66 *Id.*

67 *Id.* at 497.

68 *Id.* at 497-98.

69 *See id.* at 498.

70 826 F. Supp. 1290 (W.D. Okla. 1993).

71 *Id.* at 1296.

which it ha[d] found no private investors with sufficient capital to open a dealership."[72] Mary Frost, a white female, applied for the Edmond Dodge dealership that was part of MIP but was rejected at a time when she was the only qualified applicant.[73] The dealership was managed by an interim manager until a black male was selected as the dealer six months later.[74] Frost filed suit against Chrysler, claiming racial discrimination under § 1981.[75] Chrysler contended that it rejected Frost's application for the Edmond Doge dealership pursuant to its affirmative action policy but failed to produce evidence showing that a racial imbalance existed with respect to people qualified for MIP.[76] Consequently, the court held that Chrysler's affirmative action plan was invalid:

> While it is true that [an employer] may justify the adoption of an affirmative action plan without showing a conspicuous imbalance among its own employees, [the employer] must show a conspicuous imbalance in the particular job category. In this case, Chrysler is attempting to remedy a conspicuous imbalance in one job category (privately capitalized dealership owners) by implementing an affirmative action plan in another (MIP dealers)."[77]

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[72] *Id.* at 1291.

[73] *Id.* at 1292, 1294.

[74] *Id.*

[75] *Id.* at 1294.

[76] Frost v. Chrysler Motor Corp., 826 F. Supp. 1290, 1296 (W.D. Okla. 1993).

[77] *Id.* at 1296-97 (citations omitted).

II. USING EXTERNAL IMBALANCES TO JUSTIFY AFFIRMATIVE ACTION IN PRIVATE SCHOOLS

A. The Supreme Court's Position

The Third and Tenth Circuits' receptiveness to justifying *private-employer* affirmative action with external imbalances supports justifying *private-school* affirmative action with external imbalances. A more fundamental inquiry, however, is whether the Supreme Court has definitively spoken on the issue of external imbalances in private affirmative action, regardless of its context.[78] In this subpart, I argue that the Supreme Court has not definitively resolved this issue, even in the private employment context, because the presence of internal imbalances in both *Weber* and *Johnson* rendered any such discussion unnecessary. I further argue that, when viewed in light of Equal Protection caselaw, the Supreme Court dicta in *Johnson* weigh in favor of using external racial imbalances to justify affirmative action by private actors, including K-12 private schools.

1. No Definitive Resolution by the Supreme Court

The only time that the Supreme Court has even spoken on how § 1981 applies to a private nonsectarian school is in *Runyon v. McCray*.[79] However, *Runyon* provides little guidance to the issue at hand because it did not address how § 1981 applies to affirmative action but addressed how § 1981 applies to traditional racial discrimination.

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[78] See United States v. Estate of Romani, 523 U.S. 517, 529-30 (1998) (determining initially that a basic question of interpretation had not been definitively resolved by the Supreme Court).

[79] 427 U.S. 160, 163-64 (1976).

First and foremost, the Supreme Court has left open the possibility of justifying private affirmative action with external imbalances by having discussed only internal-imbalance justifications for private affirmative action. The particular plans approved in *Johnson* and *Weber* were each justified by an internal imbalance. In *Weber*, the defendant's relevant plant had a skilled craftworker population that was 1.83% black and a local labor force that was 39% black.[80] In *Johnson*, "none of the 238 Skilled Craftworker positions was held by a woman."[81]

The *Weber* majority's understanding of "racial imbalance" as "racial imbalance in the employer's work force" further indicates that it only spoke to the validity of internal-imbalance justifications for private affirmative action.[82] The *Johnson* majority, likewise, used the phrase "racial imbalance" to mean "racial imbalance in the employer's work force."

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[80] United Steelworkers v. Weber, 443 U.S. 193, 198-99 (1979).

[81] Johnson v. Transp. Agency, 480 U.S. 616, 621 (1987).

[82] The *Weber* majority used the phrase "racial imbalance" or a variation of it in essentially one of three ways: 1) alone, 2) within the larger phrase of "racial imbalance in the employer's work force," and 3) within its standard of "conspicuous racial imbalances in traditionally segregated job categories."

The first time that the *Weber* majority uses the phrase "racial imbalance" alone is after stating that § 703(j) of Title VII "provides that nothing contained in Title VII 'shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of' a *de facto* racial imbalance in the employer's work force." United Steelworkers v. Weber, 443 U.S. 193, 205-06 (1979). In support of its inference "that Congress chose not to forbid all voluntary race-conscious affirmative action," the *Weber* majority then reasoned that § 703(j) of Title VII "does *not* state that 'nothing in Title VII

shall be interpreted to *permit*' voluntary affirmative efforts to correct racial imbalances." *Id.* at 206. By contrasting its hypothetical phrasing of § 703(j) of Title VII with the actual phrasing, and by only emphasizing the words "require" and "permit" in the actual and hypothetical phrasing, respectively, the *Weber* majority signals that the only meaningful difference between its hypothetical phrasing and the actual phrasing the difference between the meanings of "require" and "permit." However, that was not the only difference between the *Weber* majority's hypothetical phrasing and the actual phrasing of § 703(j) of Title VII. The *Weber* majority also used the phrase "racial imbalances" in its hypothetical provision instead of the phrase "racial imbalance in the employer's work force" from the actual provision. The Court's failure to highlight this distinction suggests that the *Weber* majority understands "racial imbalances" to mean "racial imbalances in the employer's work force."

The *Weber* majority again uses "racial imbalance" and "racial imbalance in the employer's work force" interchangeably in footnote 5, which states: "Section 703(j) speaks to substantive liability under Title VII, but it does not preclude courts from considering racial imbalance as evidence of a Title VII violation. See *Teamsters v. United States*, 431 U.S. 324, 339-340, n. 20 (1977)." *Id.* at 206 n.5. Determining what the *Weber* majority meant this time by "racial imbalance" can be achieved by inspecting footnote 20 of *Teamsters v. United States*. Footnote 20 reasons that statistics "comparing the racial composition of an employer's work force to the composition of the population at large" should be considered as evidence of a Title VII violation. Thus, the *Weber* majority apparently also equated racial imbalance with an internal imbalance: the imbalance in the employer's work force as compared to the general population.

Third, the *Weber* Court desired to leave itself room to fill in the details of its affirmative action rule: "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged . . . affirmative

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In demonstrating that Kaiser's plan "does not unnecessarily trammel the interests of the white employees," the *Weber* majority observes that Kaiser's plan "is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." United Steelworkers v. Weber, 443 U.S. 193, 208 (1979). To clarify this statement, the *Weber* majority explains that "[p]referential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craftworkers in the Gramercy plant approximates the percentage of blacks in the local labor force." *Id.* at 208-09. It is clear that by "manifest racial imbalance" the *Weber* majority again meant the internal imbalance of the employer's work force in comparison to the general population.

Lastly, the *Weber* majority uses "racial imbalance" alone in quoting from the Congressional Record of Title VII. *Id.* at 206. Given that this is a quote from the Congressional Record of Title VII, the meaning of "racial imbalance" here is presumably the same as its meaning in Title VII, which, by its text, refers to an internal imbalance.

Thus, in designating manifest or conspicuous "racial imbalances in traditionally segregated job categories" as proper justifications for affirmative action policies, the *Weber* majority signaled approval only for racial imbalances that are both in traditionally segregated job categories and in the employer's workforce and not for racial imbalances in traditionally segregated job categories regardless of whether this imbalance exists in the employer's workforce.

action plan falls on the permissible side of the line."[83] The *Weber* majority and concurrence even both emphasized that the plan in *Weber* does not represent the outer bound of what affirmative action plans can do.[84]

One of the Court's reasons for upholding the *Weber* affirmative action policy further buttresses the assertion that it has left open the possibility of justifying private affirmative action with external imbalances. In *Weber*, the Court upheld the affirmative action policy in dispute partially because its purposes mirror those of Title VII, which are "[breaking] down old patterns of racial segregation and hierarchy" and "[opening] employment opportunities for minorities which have been traditionally closed to them."[85] The purpose of justifying affirmative action with external imbalances also mirror those of Title VII. If the Court validates particular affirmative action policies partially for this reason, then the Court should likewise validate particular types of affirmative action partially for the same reason.

In both *Weber* and *Johnson*, the Court had approved of the temporary nature of the subject affirmative action plans: the plans were not meant to maintain racial balances but simply to eliminate racial imbalances.[86] This characteristic would not necessarily be lacking in a plan

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[83] *Weber*, 443 U.S. at 208.

[84] The concurrence stated that "the Court's opinion does not foreclose other forms of affirmative action." *Id.* at 215.

[85] *Id.* at 208-09. The Johnson majority, however, decreased the precedential weight of this reasoning by the Weber court by equating Title VII's purpose to finding "a manifest imbalance in traditionally segregated job categories." Johnson v. Transp. Agency, 480 U.S. 616, 631 (1987).

[86] *See Weber*, 443 U.S. at 209; *Johnson*, 480 U.S. at 639.

justified by an external imbalance. In the private employment context, an affirmative action plan that is justified by an external imbalance should not logically end when the percentage of the target racial group in the employer's labor force approximates that in the local labor force. However, the plan should end when the external imbalance is not manifest. From this perspective, an external-imbalance justification is not intended to maintain racial balance but simply to eliminate a manifest racial imbalance.[87]

2. Supreme Court Dicta in *Johnson* Weighed Against Equal Protection Caselaw

Although the Supreme Court has not resolved the issue of using external imbalances to justify affirmative action in private entities, the Supreme Court dicta in *Johnson* weigh in favor of such justifications when viewed in light of Equal Protection caselaw.

Unlike the majority in *Johnson*, Justices Stevens and O'Connor comment on the scope of approved affirmative-action justifications in their concurrences, and in fact, take opposing stances on the very issue. Justice Stevens' concurrence opened the door for external imbalances. Like the Court in *Weber*, he "emphasize[d] that the [*Johnson*] opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit

[87] Given the Native Hawaiian focus of this Comment, it is of interest to understand how the Ninth Circuit developed its *Weber* rule. The face of the Ninth Circuit's rule clearly indicates that the imbalance justifying an affirmative action plan must be internal to the employer. *See infra* Appendix. In adopting this rule, however, the Ninth Circuit has not clearly faced the question of whether or not external imbalances may justify an affirmative action plan.

disadvantaged groups."[88] Justice Stevens even went so far as to suggest other possible justifications for affirmative action plans:

> Instead of retroactively scrutinizing his own or society's possible exclusions of minorities in the past to determine the outer limits of a valid affirmative-action program . . . in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of underrepresented groups. Statutes enacted for the benefit of minority groups should not block these forward-looking considerations.[89]

Most notably, Justice Stevens suggested that employers might advance the forward-looking reason of "improving their services to black constituencies" or "averting racial tension over the allocation of jobs in a community'" to justify their affirmative action plans.[90] These justifications are not internal to the employer because they logically can continue justifying an employer's affirmative action plan even after the percentage of the target racial group in the employer's workforce approximates that in the local workforce.[91]

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[88] *Johnson*, 480 U.S. at 642.

[89] *Id.* at 646.

[90] Johnson v. Transp. Agency, 480 U.S. 616, 647 (1987).

[91] As mentioned earlier, this Comment defines internal-imbalance justifications as those that logically cease justifying an affirmative action policy once the percentage of the preferred race in the private entity approximates that in the local area. Under this definition, past discrimination towards blacks or a manifest lack of Asian Americans would be internal-imbalance justifications because the private entity has arguably made up for the past discrimination towards blacks or the manifest lack of Asian Americans once the percentage of the preferred race in the entity's population approximates that in the local area. On the other hand, the justifications of diversity and improving services to black constituencies are external-

Justice O'Connor's concurrence directly opposed Justice Stevens' concurrence: "Contrary to the intimations in Justice Stevens' concurrence, this Court does not approve preferences for minorities 'for any reason that might seem sensible from a business or a social point of view.'"[92] O'Connor pointed out that in *Wygant v. Jackson Board of Education*,[93] the Court had concluded societal discrimination without more was too amorphous a basis for imposing a racially classified remedy: "Instead, we determined that affirmative action was valid if it was crafted to remedy past or present discrimination by the employer."[94] In fact, "because both *Wygant* and *Weber* attempt[ed] to reconcile the same competing concerns," O'Connor saw little justification to adopt different standards for affirmative action under Title VII and the Equal Protection Clause.[95]

Viewed in isolation, it is difficult to determine whether these concurrences together weigh in favor of or against permitting external imbalances to justify affirmative action in private schools. Aside from the concurrences opposing each other on the scope of proper affirmative-action justifications, they were both singular and unnecessary to uphold the Court's majority opinion. The Court also has not squarely confronted a private affirmative action case under

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imbalance justifications because the private entity may continue to reap the benefits of diversity and improving services to black constituencies, which result from its affirmative action policy, even when the percentage of the preferred race in the private entity's population approximates that in the local area.

[92] *Id.* at 649.

[93] Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

[94] *Johnson*, 480 U.S. at 650.

[95] *Id.* at 652.

either Title VII or § 1981 since *Johnson*. Given this dearth of Supreme Court guidance in private affirmative action, it is helpful to view the concurrences of Justice Stevens and O'Connor in light of topical, jurisprudential developments in the Equal Protection Clause, § 1981's governmental counterpart.

These concurrences together weigh in favor of permitting external imbalances to justify affirmative action in private schools because the Court has not adopted O'Connor's position that affirmative action by private and government actors should be subject to the same standard. In addition, courts have approved of a wider variety of affirmative-action justifications for government actors.

The Court not adopting the same standard for affirmative action by both private and government actors lessens the significance of O'Connor's observation in *Wygant v. Jackson Board of Education* that the Court previously had asserted only past or present discrimination by the employer could justify affirmative action but societal discrimination could not.[96]

Although some of Justice Stevens' views in *Johnson* either have not been confirmed[97] or have not been embraced,[98] his suggestion of using forward-looking reasons as justifications for

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[96] Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

[97] Justice Stevens' position that *Johnson* does not establish the outer limits of affirmative action plans by private employers has not been confirmed because the Court has not heard any private affirmative action case under either Title VII or § 1981 since *Johnson*.

[98] Justice Stevens' suggestion of using forward-looking justifications for affirmative action policies has not been embraced by the lower courts. His suggestion was not discussed in *Schurr* or *Frost*, the cases discussed in Part I.B. that appeared to accept external imbalances as legitimate justifications of affirmative action in private employers. Justice Stevens' suggestion

affirmative action policies has grown firm roots in the Equal Protection context. For example, in the companion cases of *Grutter v. Bollinger*[99] and *Gratz v. Bollinger*,[100] the Supreme Court used diversity to justify affirmative action in public higher education. In *Reynolds v. City of Chicago*,[101] the Seventh Circuit accepted compelling public safety concerns as legitimate justifications for affirmative action in law enforcement. Further, in *Hunter v. Regents of the University of California*,[102] the Ninth Circuit held that improving the quality of education in urban public schools justified affirmative action in a public, research-oriented elementary school.[103]

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was even rejected by the Third Circuit in *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1995), a case that was decided prior to *Grutter v. Bollinger*, 539 U.S. 306 (2003). The Third Circuit in *Taxman* determined that an employer could not use race as a factor in selecting which of two equally qualified employees to lay off because racial diversity did not properly justify affirmative action under Title VII.

[99] 539 U.S. 306 (2003).

[100] 539 U.S. 244 (2003).

[101] 1 F.3d 390 (6th Cir. 1993).

[102] 190 F.3d 1061 (1999).

[103] Similarly, O'Connor's position that the Court does not approve minority preferences for any sensible business or social perspective but only for remedying past or present discrimination is true insofar as most Circuits require a manifest internal imbalance to justify an affirmative action plan under § 1981. (A manifest imbalance may be thought of as non-incriminating evidence of past discrimination.) In turn, this position has not held true in the Equal Protection context, as evidenced by the array of proper affirmative-action justifications noted earlier.

The Court's decision to treat affirmative action by private and government actors differently also supports the assertion, made by many courts, that a private actor has more leeway to use affirmative action than a government actor.[104] Giving private actors greater ability to use affirmative action strongly implies that private actors should be able to justify their affirmative action policies with reasons at least as broad as those used in the Equal Protection context. Thus, private actors should be able to justify their affirmative action policies with reasons even broader than diversity, public safety, and improving the quality of public education. In light of these Equal Protection Clause developments, the concurrences in *Johnson* weigh in favor of permitting private schools to justify their affirmative action policies with external racial imbalances.

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[104] *See, e.g.,* Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) ("In the area of affirmative action, Title VII apparently is viewed as somewhat less restrictive than the Equal Protection Clause at least insofar as voluntary affirmative action plans are concerned."); Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) (holding that plaintiff's § 1981 claim must fail where the remedial plan passed strict scrutiny); Kromnick v. Sch. Dist., 739 F.2d 894 (3d Cir. 1984) ("The scope of Title VII is broader than that of the Constitution."); Shuford v. Ala. State Bd. of Educ., 846 F. Supp. 1511 (M.D. Ala. 1994) ("Because strict scrutiny is the 'more restrictive' standard and because the court concludes that the proposed decree passes strict-scrutiny analysis, the court need not analyze the decree separately under the standard of Title VII."); *cf.* Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996) ("While the Supreme Court may indeed at some future date hold that an affirmative action purpose that satisfies the Constitution must necessarily satisfy Title VII, it has yet to do so.").

B. Policy in Support of Using External Imbalances to Justify Affirmative Action in K-12 Private Schools

Although policy considerations do not support using external imbalances to justify affirmative action at all private schools, they do weigh in favor of such a use at K-12 private schools, including the Kamehameha Schools.

1. Most Effective Allocation of Incentives and Means to Remedy Social Disparities

The consequence of allowing private schools to justify their affirmative action policies only with manifest imbalances in their own student populations is the curtailment of contributions that private schools desire to make toward remedying racial disparities.

To illustrate, consider six hypothetical private schools that are located in an area where the academically underachieving racial group constitutes 30 percent of the population. All six schools have been in existence for 20 years, but each has had a different admission policy, as provided in the table below. The result of the schools having had different admission policies is that the schools have correspondingly different student-body compositions.

School	Mission	Admissions Policy	Percentage of Students That Are of the Target Racial Group	Percentage of Students That Are *Not* of the Target Racial Group
A	No relevant mission	Discrimination against the target racial group until three years ago Now strictly academic	2%	98%
B	No relevant mission	Discrimination against the target racial group until three years ago	4%	96%

		Now strictly geographic		
C	No relevant mission	Strictly academic	4%	96%
D	No relevant mission	Academic with preference for target racial group	22%	78%
E	Mission of helping the target racial group's academic achievement	Academic with preference for target racial group	85%	15%
F	Mission of helping the target racial group's academic achievement	Academic with preference for target racial group	15%	85%

Schools A, B, and C have engaged in "traditional" discrimination, have admissions criteria with traditionally discriminatory effects, or both. Schools A, B, and C consequently have far smaller percentages of the target racial group in their student bodies than the percentage in the surrounding population. In other words, schools A, B, and C have manifest imbalances in their student bodies that could justify the use of admissions preferences for the targeted racial group under the imported *Weber* rule. However, given that none of these three schools has the mission of helping the target racial group, these schools would likely use a racial preference only to the extent that they believe such a use would help them for other reasons, like enriching their students' educational experience, increasing their revenue, or increasing their prestige.

The percentage of the target racial group in school D is comparable to that in the surrounding population because school D has used a racial admissions preference to increase diversity in its student population. The percentage of the target racial group in school E is actually significantly greater than that in the surrounding population because school E has used

its racial admissions preference to better achieve its mission of helping the target racial group's academic achievement. Under the imported *Weber* rule, schools D and E would have to stop using their racial preference because manifest imbalances do not exist in their student bodies. Since these two schools would no longer be able to use a racial admissions preference, the percentage of the target racial group in each of their student bodies likely would decrease. If school D's academic admissions criteria are as strict as those of school C, the percentage of the target racial group in school D's population could decrease as much as 18 percent, from its current 22 percent to four percent – the percentage of the target racial group in school C's population.

Since the mission of school E is to help the target racial group's academic achievement, school E likely would attempt to maintain the percentage of the target racial group in its population, even without the use of its racial admissions preference. School E may try using an alternative admissions preference, like a low income-level admissions preference, as a proxy for its invalidated racial admissions preference. Even so, the percentage of the target racial group in school E's population likely would decrease because the alternative admissions preference likely would be an imperfect proxy for race. If this were not true and school E was a rational actor, school E should have no problem using the alternative admissions preference in place of its invalid racial admissions preference.

School F illustrates circumstances in which a school with the mission of helping the target racial group's academic achievement may have a chance of being able to continue using its racial admissions preference under the imported *Weber* rule. However, school F also illustrates how unlikely it is that such a school exists: a rational school with the mission of helping the target racial group's academic achievement and with the ability to use a racial

admissions preference would have a much higher percentage of the target racial group in its student body than school F does.

These six hypothetical schools show how, under the imported *Weber* rule, private schools with the greatest incentive to remedy a racial disparity are not able to use a racial admissions preference to maximize their contributions to remedying the disparity.[105] The failure to allocate the most effective means of remedying a racial disparity to those with the greatest motivation to do so that results from the imported *Weber* rule reflects the *Weber* rule's origination in cases where the defendant private employers were like schools A, B, and C: they had engaged in "traditional" discrimination, had a hiring process with traditionally discriminatory effects, or both. As explained earlier, the Court simply was not faced with a private entity that existed for the purpose of remedying a racial disparity when it decided either *Weber* or *Johnson*. Consequently, the rule resulting from these two cases does not sensibly deal with affirmative action in private entities existing for the purpose of remedying a racial disparity.

If, in addition to internal imbalances, private schools are permitted to justify their affirmative action policies with external imbalances, the results described above would change only in that schools D and E would be able to continue using their racial admissions preferences. In effect, school E would be permitted to most effectively achieve its mission of helping the target racial group's academic underachievement by admitting primarily or exclusively students of that racial group.

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[105] Despite the Third Circuit's pre-*Grutter* decision in *Taxman*, it is very likely that school D would be able to continue using its racial preference on the basis of diversity given the Supreme Court's approval of diversity as a justification for affirmative action in public higher education under the Equal Protection Clause.

2. Basis for Treating Private K-12 Schools Differently Than Other Private Entities Under § 1981

In this subpart, I argue that K-12 private schools should be treated differently than other private actors under § 1981 by having the ability to use external imbalances as proper justifications for their affirmative action policies because society benefits from more affirmative action in K-12 private schools. Not only does such affirmative action result in more benefits than burdens, its benefits and burdens also compare favorably to the benefits and burdens of currently permitted forms of affirmative action.

To reach these conclusions, I assume that giving K-12 private schools the ability to use external imbalances as proper justifications will increase the availability of K-12 private education for academically underachieving racial groups, and I assume that K-12 private schools are of good quality.

a. Comparing the Benefits and Burdens of Affirmative Action in K-12 Private Schools

> If one thinks in terms of the familiar foot-race metaphor, it was not enough to say: "From now on, everyone may compete on equal terms, and may the race go to the swiftest." If, as a result of centuries of illegal discrimination, one large class of contestants is fifty yards behind the other contestants' starting line when the gun is fired, the race cannot be considered fair merely because from now on no further special handicaps are imposed. Equality has not been achieved until something has been done to bring the disadvantaged contestants up to the starting line. In short, it is not enough for those who have discriminated illegally to stop what they are doing – they must also undo the effects of their past discrimination.[106]

[106] LEX K. LARSON, EMPLOYMENT DISCRIMINATION 62.01 (2005), available at LEXIS, 3-62 EMPLOYMENT DISCRIMINATION 62.02.

That some types of affirmative action policies have been sanctioned essentially represents a policy judgment that, in some cases, the benefit to society of bringing "the disadvantaged contestants up to the starting line" outweighs the burden to society of "trammeling" the "majority" racial group or gender.[107] I contend that the benefits of affirmative action in Kamehameha Schools and other private K-12 schools outweigh its burdens.

The primary benefit of permitting K-12 private schools to justify their affirmative action policies with external imbalances is to increase or to encourage increased availability of good K-12 education for academically underachieving racial groups. In turn, so long as children of academically underachieving racial groups can take advantage of any increased availability[108] of good K-12 education,[109] more of these children will have obtained a good K-12 education than would otherwise have been able to. The quality of a person's K-12 education significantly

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[107] *See* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. Rev. 1195, 1269 (2002) ("[T]he divisive effects of undoing injustice must be weighed against the divisive effects of leaving it intact.").

[108] When there exists schools with the mission of remedying a racial disparity, like the Kamehameha Schools, increased availability rather than an encouraged increase of availability would result from permitting K-12 private schools to justify their affirmative action policies with external imbalances.

[109] At least with the Kamehameha Schools, Native Hawaiians' ability to afford attending the Schools is not a significant issue. Backed by "one of the world's wealthiest charities," the "Schools subsidize much of the educational costs [of their students] through funds held in trust." *See* Doe v. Kamehameha Schs., 416 F.3d 1025, 1028 (9th Cir. 2005).

influences her ability to undertake and succeed in higher education:[110] even by as early as the end of third grade, "[b]oth U.S. . . . and cross-national data . . . suggest that, children are launched into achievement trajectories that they follow the rest of their school years."[111] With increased educational attainment, the beneficiaries of affirmative action in K-12 private schools likely will have greater earnings,[112] a healthier life,[113] and a longer life[114] than they would have had if only internal imbalances legitimately justified affirmative action in K-12 private schools.

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[110] Laura W. Perna, *The Key to College Access: Rigorous Academic Preparation*, *in* PREPARING FOR COLLEGE: NINE ELEMENTS OF EFFECTIVE OUTREACH 113, 131 (William G. Tierney, et al. eds., 2005) ("[T]he process of becoming academically qualified to enroll in college begins as early as eighth grade," and "[r]esearch shows the benefits of promoting high-quality academic preparation prior to the high school years" in preparing for college.); Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705, 706 (2004) ([T]he path to leadership begins . . . in high-quality elementary and secondary schools that are too rarely found in communities where minority students live."); *see* Plyler v. Doe, 457 U.S. 202, 221 (1981) (Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction [of education from other forms of social welfare legislation]."); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

[111] KARL L. ALEXANDER & DORIS R. ENTWISLE, ACHIEVEMENT IN THE FIRST 2 YEARS OF SCHOOL: PATTERNS AND PROCESSES 1 (1988).

[112] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS STATISTICAL BRIEF: MORE EDUCATION MEANS HIGHER CAREER EARNINGS 1 (1994), *available at*

The burdens of using external imbalances to justify affirmative action in private schools are minimal. As discussed earlier, the significant consequence of allowing external-imbalance justifications, in addition to internal-imbalance justifications, is that private schools with the mission of remedying a racial disparity can continue using their racial preferences to achieve their mission. Whether the racial preferences result in exclusive or primary admission of the preferred racial group, the burden on the non-preferred racial group remains having either little or no chance of attending private schools with the mission of remedying a racial disparity. Denial of admissions would unsettle no legitimate, firmly rooted expectation on the part of the applicant of attending that private school.[115] In addition, the applicant would still be virtually guaranteed admittance to a K-12 school, as provided by the government.[116]

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http://www.census.gov/apsd/www/statbrief/sb94_17.pdf ("[M]ore education means greater earnings over a year's time.").

[113] *See* Eileen M. Crimmins & Yasuhiko Saito, *Trends in Healthy Life Expectancy in the United States,1970–1990: Gender, Racial ,and Educational Differences*, 52 Social Science & Medicine 1629, 1636 (2001) (providing data that demonstrates a positive correlation between years of school completed with both total life expectancy and healthy life expectancy for whites and blacks of both genders).

[114] *Id.*

[115] *See* Johnson v. Transp. Agency, 480 U.S. 616, 638 (1987).

[116] *See* Pherabe Kolb, Comment: Reaching for the Silver Lining: Constructing a Nonremedial yet "Exceedingly Persuasive" Rationale for Single-Sex Educational Programs in Public Schools, 96 NW. U.L. REV. 367, 378-81 (2001) ("[T]he laws governing colleges and

Although classifying people solely on the basis of race may "threaten to stigmatize individuals by reason of their membership in a racial group," threaten "to incite racial hostility," and exacerbate the very conditions that the policy is intended to counteract, racial classifications are nonetheless currently permitted, albeit only in certain circumstances.[117] Thus, as noted earlier, that racial classifications are permitted in certain circumstances reflects a judgment that, in those circumstances, the benefits to society of the racial classification outweighs its burdens, including the potential stigma, hostility, and exacerbation that may result. Furthermore, "rejecting an affirmative action policy for fear of racial stigmatization and hostility implies a judgment that existing types of stigmatization and hostility in society are more tolerable."[118] Academically underachieving racial groups "could argue that they are already stigmatized by the . . . group's high rate of poverty and unemployment and low level of educational and professional attainment."[119]

In sum, the benefit of smaller racial disparities in education, income, quality and length of life that results from increasing the ability of academically underachieving racial groups to obtain good K-12 education outweighs the burden of the non-preferred race's unchanged expectations as to their chances of admittance to private schools with the mission of remedying racial disparities and the burden of continuing racial stigma and hostility, which may be of a different nature but not necessarily of a different strength than would otherwise be present.

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universities should not be applied without amendment to the elementary or secondary school context.").

[117] Doe v. Kamehameha Schs., 416 F.3d 1025, 1042.

[118] RECENT CASE, *supra* note 28, at 667-68.

[119] *Id.*

b. Comparing Affirmative Action in K-12 Private Schools to Currently-Permitted Forms of Affirmative Action

I contend that society enjoys greater benefits from having more affirmative action in K-12 private schools and correspondingly less affirmative action in higher education and employment because affirmative action in K-12 private schools results in relatively greater benefits and lesser burdens. This rests on the assumption that there will not be an increase in the total quantity of affirmative action as a result of permitting external balances to justify affirmative action in K-12 private schools. In other words, any increased amount of affirmative action in private K-12 schools will be offset by an equal or greater decrease of affirmative action in employment and higher education.

The benefits of affirmative action in K-12 private schools are greater than affirmative action in higher education and employment because the advantage conferred by affirmative action in K-12 private schools, by definition, occurs earlier in a person's life. Thus, beneficiaries of affirmative action in K-12 private schools have a longer period in which to reap the benefits of the conferred advantage. In addition, whereas affirmative action in higher education and employment arguably gives the beneficiary the advantage of slightly lowered admittance or hiring standards, affirmative action in K-12 private schools gives the beneficiary the advantage of fundamental skills and knowledge.

Affirmative action in private K-12 schools is less burdensome than affirmative action in higher education and employment because the government has undertaken the responsibility to educate children in grades K-12.[120] Whereas, there may not be another university, graduate

[120] *See* Kolb, *supra* note 111, at 378-381 ("[S]tates are required to provide an intangible amount of education to all public school children."); *cf.* Plyler v. Doe, 457 U.S. 202, 221 (1981)

school, or workplace to which a person burdened by a currently permitted affirmative action policy may turn, the government virtually guarantees a school for which children burdened by a private school's affirmative action policy may attend.[121]

Lastly, because the advantage conferred by affirmative action in K-12 private schools is not a "double standard" but fundamental skills and knowledge and because a child will always have a K-12 school that she can attend, people of the non-preferred race are likely to feel less trammeled by affirmative action in K-12 private schools than in higher education or employment.

IV. CONCLUSION

K-12 private schools, including the Kamehameha Schools, should be able to *primarily* admit students of an academically underperforming racial group because this is the most effective allocation of incentives and means for remedying racial disparities. Such affirmative action better remedies racial disparities than presently-permitted forms of affirmative action because it confers greater benefits and lesser burdens on society. As a consequence, society would benefit from encouraging affirmative action policies in K-12 private schools by giving these schools the ability to justify their policies with external imbalances.

("Public education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation.") (citation omitted).

[121] *See* Kolb, *supra* note 111, at 378-381 ("[T]he laws governing colleges and universities should not be applied without amendment to the elementary or secondary school context.").

APPENDIX: SURVEY OF RULES GOVERNING AFFIRMATIVE ACTION PLANS

	Rule	Plan's Justifications	Plan's Limitations
First Circuit	First, it must be a temporary measure, not designed to maintain racial balance but to eliminate a manifest racial imbalance.[122] Second, it must not unnecessarily trammel the interests of the white employees nor create an absolute bar to the advancement of white employees.[123]	▪ Eliminating a manifest racial imbalance	▪ Being a temporary measure ▪ Not maintaining racial balance ▪ Being designed to achieve its goal ▪ Not unnecessarily trammeling the interests of the white employees ▪ Not creating an absolute bar to the advancement of white employees
Second Circuit	The court looks to whether there is a history of discrimination resulting in a workforce imbalance, whether the plan is temporary in nature, whether it is narrowly tailored to correct the imbalance, and	▪ "[R]emedy[ing] a history of discrimination resulting in a workforce imbalance"[125]	▪ Being temporary in nature ▪ Being narrowly tailored to achieve its goal ▪ Not unnecessarily trammeling the

[122] Bertoncini v. City of Providence, 767 F. Supp. 1194, 1201 (D.R.I. 1991).

[123] *Id.*; *cf.* Petitti v. New England Tel. & Tel. Co., 47 Fair Empl. Prac. Cas. (BNA) 816, at *13-14 (D. Mass. 1988) ("[T]he validity of such a plan turns on three issues: (1) whether the plan was 'justified by a manifest imbalance that reflected under-representation of women in traditionally segregated job categories,'; (2) 'whether the . . . [p]lan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement,'; and (3) whether the plan was intended to attain, rather than maintain, a balanced work force.") (citations omitted).

	the extent to which it affects the rights of third parties.[124]		rights of third parties[126]
Third Circuit	Title VII's prohibition against racial discrimination is not violated by affirmative action plans which, first, have purposes that mirror those of the statute and second, do not unnecessarily trammel the interests of the non-minority employees.[127] For an affirmative action plan to have purposes that mirror those of the statute, the purpose must be remedial, like remedying the segregation and	▪ Correcting a manifest imbalance in traditionally segregated job categories, which in turn, is a remedial purpose that mirrors those of the statute	▪ Being designed to achieve its goal ▪ Not unnecessarily trammeling the interest of the non-minority employee

[124] Patrolmen's Benevolent Ass'n v. City of New York, 74 F. Supp. 2d 321, 338 (S.D.N.Y. 1999), aff'd 310 F.3d 43 (2d Cir. 2002); *see also* Bushey v. N.Y. State Civil Serv. Comm'n, 733 F.2d 220, 227-28 (2d Cir. 1984), *cert. denied* 469 U.S. 1117 (permitting affirmative action plan under Title VII "when[] the job category in question is traditionally segregated" and when the plan does not unnecessarily trammel the interests of the nonminority employees) (1985); *cf.* Honadle v. Univ. of Vt. & State Agric. Coll., 56 F. Supp. 2d 419, 425 (D. Va. 1999) ("[A]n employer could lawfully make race-conscious employment decisions to eliminate manifest racial imbalances in traditionally segregated job categories, as long as the plan does not unnecessarily trammel the interests of the white employees.").

[125] Patrolmen's, 74 F. Supp. 2d at 338.

[126] Bushey, 773 F.2d at 228.

[127] Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 497 (3d Cir. 1999); Taxman v. Board of Educ., 91 F.3d 1547, 1554-55 (3d Cir. 1996).

	underrepresentation of minorities that discrimination has caused in the nation's workforce.[128] However, for an affirmative action to be remedial, it must be designed to correct a manifest imbalance in traditionally segregated job categories.[129]		
Fourth and Fifth Circuits	An employer's voluntary affirmative action plan is not a violation of Title VII if (1) its purpose is similar to that of Title VII, namely to "break down old patterns" of discrimination; (2) the plan does not "unnecessarily trammel" the rights of those outside the group that it is designed to protect; and (3) it is designed to eliminate a manifest racial or sexual imbalance.[130]	▪ Breaking down old patterns of discrimination[131] ▪ Eliminating a manifest racial or sexual imbalance	▪ Not unnecessarily trammeling the rights of those outside the group that it is designed to protect ▪ Being designed to eliminate a manifest racial or sexual imbalance

[128] Schurr, 196 F.3d at 497; Taxman, 91 F.3d at 1557.

[129] Schurr, 196 F.3d at 497; Taxman, 91 F.3d at 1556.

[130] Smith v. Va. Commonwealth Univ., 84 F.3d 672, 676 (4th Cir. 1996); Messer v. Meno, 936 F. Supp. 1280, 1293 (W.D. Texas 1996), *rev'd on other grounds*, 130 F.3d 130 (5th Cir. 1997); *cf.* Lilly v. Beckley, 797 F.2d 191, 194 (4th Cir. 1986) ("[Test drawn from Weber] inquires whether the plan contains safeguards necessary to avoid trammelling the rights of non-minorities, whether the plan is designed to remedy past discrimination, and whether the plan is temporary.").

[131] This is considered to be a purpose similar to that of Title VII in the Fifth Circuit. *See* Messer, 936 F. Supp. at 1293.

Sixth Circuit	"Weber stands for the general proposition that voluntary affirmative action is proper if it is designed to eliminate reasonable under all of the circumstances."[132] A plan is reasonable if it is like the plan in Weber in that it: 1) is temporary; 2) is not intended to maintain racial balance but simply to eliminate a conspicuous racial imbalance in traditionally segregated job categories; and 3) does not "unnecessarily trammel" the interests of white employees because it does not cause any whites to be dismissed and does not absolutely bar whites from advancement.[133]	▪ Reasonable goal under all the circumstances ▪ Eliminating a manifest racial imbalance	▪ Reasonable limitations under all the circumstances ▪ Being temporary ▪ Not maintaining a racial balance ▪ Not unnecessarily trammeling the interests of white employees by causing whites to be dismissed or absolutely barring white from advancement
Seventh Circuit	"An affirmative action plan is valid under Title VII if it (1) is adopted and designed to correct 'manifest racial imbalances in traditionally segregated job categories,' and (2) does not 'unnecessarily trammel the interests of white employees.'"[134] The Seventh Circuit interprets a manifest racial imbalance in	▪ Correcting a manifest racial disparity in some part of the employer's workforce	▪ Being designed to achieve its goal ▪ Not unduly trammeling the interests of white employees

[132] Baker v. City of Detroit, 483 F. Supp. 930, 983 (E.D. Mich. 1979), *aff'd sub nom*. Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1982).

[133] *Id.* at 983, 986; *cf.* Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 (6th Cir. 1979) ("The test under Title VII of voluntary affirmative action is whether the action is consistent with the anti-discrimination policy of the statute."), *cert. denied*, 452 U.S. 938 (1981).

[134] McNamara v. City of Chicago, 867 F. Supp. 739, 749 (N.D. Ill. 1994).

	traditionally segregated job categories to mean a manifest racial disparity in some part of the employer's workforce.[135]		
Eighth Circuit	"The first burden on the employer in a reverse discrimination suit is to produce some evidence that its affirmative action program was a response to a conspicuous racial imbalance in its work force and is remedial."[136] "The second burden on the employer in a reverse discrimination suit	▪ Responding to a conspicuous racial imbalance in its work force ▪ Being remedial ▪ Being reasonably related to such considerations as the racial imbalance of the	▪ Being remedial ▪ Being reasonably related to the plan's remedial purpose

[135] *Id.* at 752.

[136] Setser v. Novack Inv. Co., 657 F.2d 962, 968 (8th Cir. 1981), *cert. denied*, 454 U.S. 1064 (1981); *cf.* Maitland v. Univ. of Minn., 155 F.3d 1013, 1016 (8th Cir. 1998) (reasoning that an affirmative action hiring plan may not be successfully challenged as a violation of Title VII, if the consideration of an otherwise improper factor was justified by the existence of a manifest imbalance that reflected underrepresentation of the minority in traditionally segregated job categories, if the employment plan did not unnecessarily trammel the rights of male employees, and if the employment plan was intended to attain a balance, not to maintain one), *cert. denied*, 535 U.S. 929 (2002); Sisco v. J. S. Alberici Constr. Co., 655 F.2d 146, 149 (8th Cir. 1981) ("[A]n employer who in good faith applies an affirmative-action plan to remedy past discrimination is not in violation of either Title VII or Section 1981, so long as the plan lasts no longer than necessary 'to eliminate a manifest racial imbalance,' 'does not unnecessarily trammel the interests of the white employees,' 'does not require the discharge of white workers and their replacement with new black hirees,' and does not 'create an absolute bar to the advancement of white employees.'"), *cert. denied*, 455 U.S. 976 (1982).

	is to produce some evidence that its affirmative action plan is reasonably related to the plan's remedial purpose."[137]	work force, the availability of qualified applicants, and the number of employment opportunities available	
Ninth Circuit	An affirmative action plan must: 1) respond to a manifest imbalance in its work force, 2) not create an absolute bar to the advancement of the non-preferred race or unnecessarily trammel their rights, and 3) do no more than is necessary to achieve a balance.[138]	▪ Responding to a manifest imbalance in its work force.	▪ Not creating an absolute bar to the advancement of the non-preferred race ▪ Not unnecessarily trammeling their rights ▪ Doing no more than is necessary to achieve a balance.

[137] Setser, 657 F.2d at 968-69.

[138] Rudebusch v. Hughes, 313 F.3d 506, 520-21 (9th Cir. 2002); Doe v. Kamehameha, 416 F.3d 1025, 1041 (9th Cir. 2005); *cf.* Davis v. City and County of San Francisco, 890 F.2d 1438, 1448 (9th Cir. 1989) ("Where a finding of manifest imbalance justifies a consent decree's affirmative relief, the decree may be approved provided it does not 'unnecessarily trammel the interests of the White employees' or create an 'absolute bar to the advancement of White employees.'"); Higgins v. City of Vallejo, 823 F.2d 351, 356-57 (9th Cir. 1987) (analyzing whether affirmative action plan complied with Title VII depended on 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 and whether the Agency Plan unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement"), *cert. denied*, 489 U.S. 1051 (1989).

Tenth and Eleventh Circuits	First, the plan must be justified by a conspicuous or manifest imbalance in traditionally segregated job categories; [139] and second, the plan must not unnecessarily trammel the rights of the non-minority or create an absolute bar to their advancement.[140]	▪ Responding to a conspicuous or manifest imbalance in traditionally segregated job categories, which must reflect the underrepresentation of women or minorities in the Eleventh Circuit	▪ Not unnecessarily trammeling the rights of the nonminority ▪ Not creating an absolute bar to their advancement.
DC Circuit	Title VII will permit private-sector voluntary affirmative action under the following circumstances, and perhaps others: The plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their re-placement with new black hirees. Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial	▪ Eliminating a manifest racial imbalance	▪ Not unnecessarily trammeling the interests of the white employees ▪ Not requiring the discharge of white workers and their re-placement with new black hirees ▪ Not creating an absolute bar to the advancement of white employees ▪ Being a temporary measure ▪ Not maintaining a racial balance

[139] The imbalance must reflect the underrepresentation of women or minorities in the Eleventh Circuit. *See In re* Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492, 1500 (11th Cir. 1987).

[140] *See id.* at 1500; Frost v. Chrysler Motor Corp., 826 F. Supp. 1290, 1296 (W.D. Okl. 1993); Cunico v. Pueblo Sch. Dist. No. 60, 917 F.2d 431, 437 (10th Cir. 1990).

	balance but simply to eliminate a manifest racial imbalance.[141]		

[141] Dougherty v. Barry, 607 F. Supp. 1271, 1286 (D.C. 1985), *rev'd on other grounds*, 869 F.2d 605 (D.C. Cir. 1989).