

No. 93-1272

In the Supreme Court of the United States

OCTOBER TERM, 1994

PRISCILLA M. GARCIA, et al. PETITIONERS

SPIN STEAK COMPANY

ON PETITION FOR A WRIT OF HABEAS CORPUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JAMES R. NEEL, JR.
Deputy General Counsel

GWENDOLYN ADAMS REAVIS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

JENNIFER S. GOLDSTEIN
Attorney
Equal Employment
Opportunity Commission
Washington, D.C. 20507

DREW S. DAVIS III
Solicitor General

DEVAKE PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

IRVING GORNSTEIN
Assistant to the Solicitor
General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, as the Equal Employment Opportunity Commission has concluded, an English-only work rule has a discriminatory impact on the terms and conditions of employment of national origin minorities and therefore violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), unless justified by business necessity.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Discussion	6
Conclusion	16

TABLE OF AUTHORITIES

Cases:

<i>EEOC v. Arabian Am. Oil Co.</i> , 499 U.S. 244 (1991)	10
<i>Garcia v. Gloor</i> , 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981)	15, 16
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971) ...	10, 12
<i>Hernandez v. New York</i> , 111 S. Ct. 1859 (1991) ...	14
<i>Hishon v. King & Spaulding</i> , 467 U.S. 69 (1984) ...	12
<i>Mississippi University for Women v. Hogan</i> , 458 U.S. 718 (1982)	13
<i>Papasan v. Allain</i> , 478 U.S. 265 (1986)	13
<i>United States v. Rutherford</i> , 442 U.S. 544 (1979)	10
<i>Watson v. Fort Worth Bank & Trust</i> , 487 U.S. 977 (1988)	14

Constitution, statutes and regulations:

U.S. Const. Amend. XIV	13
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e <i>et seq.</i> :	
42 U.S.C. 2000e-2(a)(1)	10
42 U.S.C. 2000e-2(k)(1)(A)(i)	9
29 C.F.R.:	
Section 1606.7	5
Section 1606.7(a) (1993)	7
Section 1606.7(b)	7

IV

Miscellaneous:

Page

1990 Census of Population, Social and Economic Characteristics 15

137 Cong. Rec. 15,489 (daily ed. Oct. 30, 1981) ... 9

2 EEOC Compliance Manual (Aug. 6, 1984) 8

EEOC Dec. 71446, 2 Fair Empl. Prac. Cas. (BNA) 1127 (1970) 6-7

EEOC Dec. 72-0281, 1973 CCH EEOC Dec. (CCH) ¶ 6293 (1971) 7

EEOC Dec. 73-0479, 19 Fair Empl. Prac. Cas. (BNA) 1788 (1973) 7

EEOC Dec. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1823 (1981) 9

EEOC Dec. 83-7, 31 Fair Empl. Prac. Cas. (BNA) 1861 (1963) 9

45 Fed. Reg. (1980):

 p. 51,229 8

 p. 51,231 8

 p. 62,728 7, 8, 15

 p. 85,532 8

 pp. 85,634-85,635 8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1222

PRISCILLA M. GARCIA, ET AL., PETITIONERS

v.

SPUN STEAK COMPANY

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 998 F.2d 1480.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1993. An order denying a petition for rehearing and suggestion for rehearing en banc was entered on October 29, 1993. The petition for a writ of certiorari was filed on January 24, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Spun Steak is a poultry and meat producer. Pet. App. 2a. It employs thirty-three workers, twenty-four of whom are Hispanic. *Ibid.* Spun Steak's Hispanic employees speak with varying degrees of English proficiency. *Ibid.* Petitioners Garcia and Buitrago are two of Spun Steak's employees. *Ibid.* Both are bilingual.

For many years, the Hispanic employees of Spun Steak conversed freely in Spanish. *Id.* at 3a. In September, 1990, petitioners Garcia and Buitrago allegedly taunted a non-Hispanic employee in both English and Spanish. *Ibid.* The next day, company president Ken Bertelsen issued a letter stating (*ibid.*):

only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish.

Spun Steak later modified its policy to permit its clean-up crew, its foreman, and those authorized by its foreman to speak Spanish. Pet. App. 4a. The rule was strictly enforced, however, against petitioners Garcia and Buitrago. *Ibid.* Both were reprimanded for violating the English-only policy and, for a period of two months, they were not permitted to work next to each other. *Ibid.*

Petitioner Garcia contacted Local 115, which requested that Spun Steak rescind its rule. Spun Steak refused to do so, and petitioners Garcia, Buitrago, and Local 115 filed a charge of discrimination with the EEOC. Pet. App. 4a. The EEOC found reasonable cause to believe that respondent had violated Title VII. *Ibid.*

Thereafter, petitioners filed suit against respondent alleging that its English-only rule violated Title VII. *Ibid.* Petitioners Garcia and Buitrago filed suit on behalf of

themselves; Local 115 represents all Spanish-speaking employees at Spun-Steak. Pet. App. 5a.

2. The district court granted summary judgment in favor of petitioners. Pet. App. 35a. As a remedy, the court enjoined respondent from enforcing its English-only rule. *Id.* at 38a.

In comments from the bench, the court explained the basis for its ruling. The court found that respondent's English-only rule had a discriminatory impact on Hispanics. C.A. Rec. 227. The court reasoned that "You are telling [Hispanics] that they cannot make little jokes in their own language when you don't tell English speaking people that they can't do it in their own language. So it is clearly directed at Hispanics in this case." *Id.* at 226-227. The court further found that respondent had failed to demonstrate a sufficient business justification for the rule. *Id.* at 227. The court explained that respondent had other "adequate remedies" to deal with the kind of conduct that had prompted the rule. *Ibid.* The English-only rule, the court concluded, was like "hitting a flea with a sledge hammer. You have gone on far beyond the force that is needed for these circumstances." *Id.* at 224.

3. A panel of the Ninth Circuit reversed. It held that petitioners had failed to establish a prima facie case of discriminatory impact. The court first rejected petitioner's claim that the English-only policy had an adverse impact on Hispanics because it prevented them from expressing their cultural heritage and identity. The court concluded that while "an individual's primary language can be an important link to his ethnic culture and identity[,] Title VII * * * does not protect the ability of workers to express their cultural heritage at the workplace." Pet. App. 11a.

The court next rejected petitioner's claim that the English-only policy adversely affected Hispanic workers because it deprives them of the privilege of conversing in

the language they speak most comfortably. Pet. App. 11a. The court concluded that an employer has the right to define the "contours" of a privilege, and in this case, the employer has defined the privilege narrowly as "merely the ability to speak on the job." *Id.* at 11a-12a. When the privilege is defined in this way, the court concluded, bilingual employees are not adversely affected since they can engage in conversation on the job. *Id.* at 12a. The court also concluded that there was no disparate impact because "the bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job." *Ibid.* Even if bilingual employees unconsciously switch from one language to another, the court added, requiring them "to catch [themselves] from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity." *Id.* at 12a-13a.

The court held that employees who speak no English might state a prima facie case. Pet. App. 13a. The court noted that there is one such employee at Spun Steak, and the court remanded for a consideration of her claim. *Ibid.* The court held that a prima facie case might also exist for employees "who have such limited proficiency in English that they are effectively denied the privilege of speaking on the job." *Ibid.* The court concluded that it was unclear from the record whether there are such employees and that a remand was necessary to resolve that issue. *Ibid.*

Finally, the court rejected petitioners' claim that respondent's English-only rule created an atmosphere of "inferiority, isolation, and intimidation." Pet. App. 14a. The court held that "[w]hether a working environment is infused with discrimination is a factual question, one for which a per se rule is particularly inappropriate." *Id.* at 15a. In this case, the court found, petitioners had introduced "no evidence other than conclusory statements

that the policy had contributed to an atmosphere of 'isolation, inferiority, or intimidation.' " *Ibid.* For that reason, the court concluded, "the bilingual employees ha[d] not raised a genuine issue of material fact that the effect is so pronounced as to amount to a hostile environment." *Ibid.*

The court acknowledged that its decision was at odds with the EEOC's longstanding position currently set forth in an EEOC Guideline (29 C.F.R. 1606.7) that an employer must provide a business justification for an English-only policy. *Id.* at 16a. The court concluded, however, that there were "compelling indications" that the EEOC had improperly interpreted Title VII. *Id.* at 16a-17a. In particular, the court concluded that the EEOC's Guideline is inconsistent with the policy of Title VII because it "presum[es] that an English-only policy has a disparate impact in the absence of proof." *Id.* at 17a.

Judge Boochever dissented in part. He would have deferred to the EEOC Guideline and held that "an employee establishes a prima facie case * * * by proving the existence of an English-only policy, thereby shifting the burden to the employer to show a business necessity." *Id.* at 18a. Judge Boochever would have remanded this case for a trial on the issue of business necessity. *Id.* at 19a. With Judge Boochever dissenting, the panel denied a petition for rehearing. *Id.* at 21a.

4. The full court rejected petitioners' suggestion for rehearing en banc. Pet. App. 21a. Judge Reinhardt dissented. He specifically took issue with the majority's view that English-only rules do not have a discriminatory effect because bilingual employees can easily comply with them. That conclusion, Judge Reinhardt stated, "demonstrated a remarkable insensitivity to the facts and history of discrimination." *Id.* at 24a. He explained that "[s]ome of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: being required

to sit in the back of a bus, for example." *Ibid.* Judge Reinhardt further concluded that the suppression of a person's primary language cannot be dismissed as a "mere inconvenience." *Ibid.* Judge Reinhardt explained that "English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." *Id.* at 24a-25a. Thus, "being forbidden under penalty of discharge to speak one's native tongue generally has a pernicious effect on national origin minorities." *Id.* at 25a.

DISCUSSION

The court of appeals has rejected the EEOC's longstanding view that English-only work rules have a discriminatory impact on national origin minorities and therefore must be justified by business necessity. The court of appeals' decision is wrong. It fails to accord appropriate deference to the EEOC's longstanding view and is premised on several fundamental misunderstandings about what plaintiffs must prove in order to establish a discriminatory impact under Title VII. The decision also resolves an issue of great importance to national origin minorities and prevents the EEOC from administering a single nationwide standard for judging the validity of English-only work rules. Review by this Court is therefore warranted.

1. In 1970, the EEOC issued its first published decision on English-only rules. In that decision, the EEOC communicated its position (first taken in an unpublished decision in 1967) that such rules have "the obvious and clear effect of denying [national origin minority] employees * * * a term, condition, or privilege of employment enjoyed by other employees: to converse in a familiar language with which they are most comfortable." EEOC

Dec. 71446, 2 Fair Empl. Prac. Cas. (BNA) 1127, 1128 (1970). Accordingly, the EEOC explained, such rules must be justified by business necessity. *Ibid.* Later EEOC decisions adhered to that view. *E.g.*, EEOC Dec. 72-0281, 1973 CCH EEOC Dec. (CCH) ¶ 6293 (1971); EEOC Dec. 73-0479, 19 Fair Empl. Prac. Cas. (BNA) 1788, 1804 (1973).

In 1980, the EEOC adopted a Guideline that "reaffirm[ed] the Commission's position" on English-only work rules. Proposed Revision to Guidelines on Discrimination Because of National Origin, 45 Fed. Reg. 62,728 (1980). The Guideline states that "[a] rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment." 29 C.F.R. 1606.7(a) (1993). Because "[t]he primary language of an individual is often an essential national origin characteristic," the Guideline explains, "[p]rohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin." *Ibid.* In addition, the Guideline explains that such rules "may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." *Ibid.* Based on those considerations, the Guideline provides that if an English-only rule is applied at all times, "the Commission will presume that such a rule violates title VII and will closely scrutinize it." *Ibid.* In a separate subsection, the Guideline further provides that "[a]n employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity." 29 C.F.R. 1606.7(b). Both subsections of the Guideline are premised on the conclu-

sion that English-only rules have a discriminatory impact on national origin minorities and therefore must be justified by a business necessity.

Before issuing its Guideline, the EEOC sought comments from federal agencies and the public. 45 Fed. Reg. 51,229, 51,231 (1980); *id.* at 62,728. The EEOC received over 250 comments, and the final Guideline sought to accommodate some of the concerns expressed in those comments. *Id.* at 85,632, 85,634-85,635.

Following the promulgation of its English-only Guideline, the EEOC adopted a Compliance Manual Section to assist in the investigation of claims that English-only work rules violate Title VII. 2 EEOC Compliance Manual (BNA) 623 (Aug. 6, 1984). That Section thoroughly discusses possible business justifications for an English-only rule. For instance, the Manual suggests that an English-only rule would be appropriate in jobs in which the failure to maintain close communication among employees could result in injury to persons or property. Manual § 623.0012. The Manual lists as examples the performance of surgery or the drilling of an oil well. *Ibid.* On the other hand, the Manual suggests that the principal justification offered by respondent ordinarily would not justify an English-only rule. Manual § 623.0015. Thus, the Manual notes that while co-workers commonly express fears that employees speaking in a language other than English are making fun of them, those beliefs are often unfounded. *Ibid.* And even when an employee has a legitimate basis for complaint, the Manual explains, the problem can almost always be worked out informally. *Ibid.* If informal resolution fails, the Manual concludes, the employer can discipline the offending party. *Ibid.*

Since its adoption, the EEOC has consistently applied its Guideline in determining whether English-only work

rules violate Title VII. The EEOC has published several decisions that implement the Guideline. See, e.g., EEOC Dec. 81-25, 27 Fair Empl. Prac. Cas. (BNA) 1820, 1822 (1981); EEOC Dec. 83-7, 31 Fair Empl. Prac. Cas. (BNA) 1861, 1862 (1983). It has also filed suit to enforce its interpretation. In the last eight years, the EEOC has filed suit to challenge English-only rules in nine cases. Eight of those cases have now been settled, with the employer in each agreeing to eliminate the English-only rule.¹

When Congress amended Title VII in 1991 and altered the standards for proving disparate impact discrimination (see 42 U.S.C. 2000e-2(k)(1)(A)(i)), the EEOC's Guideline on English-only work rules was discussed on the floor of the Senate. Senator DeConcini stated that many of his constituents had complained about the use of English-only work rules and he asked Senator Kennedy, a sponsor of the legislation amending Title VII, whether the EEOC's Guideline would continue to apply to such rules. Senator Kennedy responded that the EEOC's Guideline had worked well during the prior eleven years and that nothing in the new legislation would affect the validity of that Guideline. 137 Cong. Rec. 15,489 (daily ed. Oct. 30, 1991).

¹ See *EEOC v. Lewis & Son d/b/a/ Comet and Qwik Cleaners*, No. CIV-92-1072 JP/LFG (D.N.M. filed Sept. 28, 1992); *EEOC v. The Brown Derby Restaurant*, No. 90-5004-RJK (C.D. Cal. filed Sept. 19, 1990); *EEOC v. Mansfield Business Sch.*, No. EP90-CA-390H (W.D. Tex. filed Sept. 27, 1990); *EEOC v. Sears, Roebuck & Co.*, No. 90-3037-WPG (C.D. Cal. filed June 13, 1990); *Dimaranan & EEOC v. Pomona Valley Medical Ctr.*, No. 89-4299 ER (C.D. Cal. filed Apr. 2, 1990); *EEOC v. Volunteers of Am. Care Facilities*, No. 89-1586 (D. Ariz. filed Sept. 27, 1989); *EEOC v. Salvation Army*, No. 87-07846 (C.D. Cal. filed Nov. 20, 1987); *EEOC v. Motel 6—Yuma*, No. CIV86-1170-PHX-EHC (D. Ariz. filed July 17, 1986). In *EEOC v. Wynell, Inc., d/b/a A & B Nursery Sch.*, No. H-92-3938 (S.D. Tex. filed Dec. 21, 1992), the district court recently upheld the employer's English-only rule.

2. In *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991), this Court held that the level of deference afforded an EEOC interpretation of Title VII "will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 257. This Court has also indicated that an agency interpretation is entitled to greater deference when Congress is aware of the interpretation and does not change it, but amends the statute in other respects. *United States v. Rutherford*, 442 U.S. 544, 554 (1979).

Measured against those criteria, the EEOC's position on English-only rules is entitled to substantial deference. The EEOC adopted its position three years after Title VII was enacted and has followed it ever since. The EEOC's position has been subjected to full notice and comment review and thoroughly tested by experience. The EEOC's English-only Guideline and the Compliance Manual Section implementing it set forth a reasoned and careful analysis of the issue. And when Congress adopted recent amendments to Title VII on disparate impact discrimination, it left EEOC's approach intact.

Most important, the EEOC's interpretation reflects a sound application of established Title VII principles. Title VII flatly prohibits all discrimination in the "terms, conditions, or privileges of employment" because of national origin. 42 U.S.C. 2000e-2(a)(1). Discrimination within the meaning of Title VII includes practices that disproportionately impose adverse impact on members of a protected group and that cannot be justified by business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The EEOC's position on English-only rules follows directly from these principles. English-only rules plainly impose a

term or condition of employment. And while English-only rules may perhaps be seen as facially neutral, they disproportionately burden national origin minorities because they preclude many members of national origin minority groups from speaking the language in which they are best able to communicate, while rarely, if ever, having that effect on non-minority employees. Accordingly, under established Title VII jurisprudence, such rules must be justified by business necessity.

3. The Ninth Circuit held that the EEOC's interpretation is not entitled to deference. In the Ninth Circuit's view, the EEOC's Guideline is inconsistent with the policy of Title VII because it "presum[es] that an English-only policy has a disparate impact in the absence of proof." Pet. App. 17a. That criticism is incorrect. The EEOC has soundly concluded, based on logic and experience, that English-only rules invariably have a disparate impact on national origin minority groups. It is certainly true that many members of national origin minority groups feel completely comfortable speaking English in all circumstances; it is also true that some employees who do not belong to such a group may sometimes be more comfortable speaking a language other than English. But there can be no doubt that, in a workplace with a substantial number of national origin minority group employees, English-only work rules will necessarily preclude disproportionately more national origin minority employees than others from conversing in the language in which they are most comfortable and best able to communicate. The EEOC therefore properly adopted a categorical approach to the issue of the disparate impact of English-only rules, rather than requiring proof of the obvious on a case-by-case basis.

The court of appeals appeared to understand that English-only rules invariably preclude disproportionately

more national origin minority employees than others from conversing in their primary language. Pet. App. 10a. It held nevertheless that this effect was insufficient to support a Title VII disparate impact claim. Pet. App. 11a-13a. That conclusion is based on several serious misconceptions about what plaintiffs must prove to establish a disparate impact under Title VII.

First, the court held that since a privilege of employment "is by definition given at the employer's discretion," respondent was free to define the privilege "narrowly" as "merely the ability to speak on the job." Pet. App. 11a-12a. Because bilingual Hispanic employees enjoy that narrow privilege to the same extent as non-Hispanic employees, the court reasoned, bilingual employees could not state a disparate impact claim. *Id.* at 12a. As this Court has held, however, "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free * * * not to provide the benefit at all." *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984). Title VII, as we have noted, is not concerned solely with rules that have been defined in discriminatory terms. It also prohibits rules that are "discriminatory in operation." *Griggs*, 401 U.S. at 431. No matter how narrowly respondent has defined the privilege to speak on the job, the consequence of respondent's English-only rule is that its non-Hispanic employees are able to converse in the language in which they are best able to communicate, while many of its Hispanic employees are not. That discriminatory consequence violates Title VII unless it is justified by a business necessity.

Second, the court of appeals held that respondent's English-only rule did not have a disparate impact on bilingual Hispanic employees because they can comply with the rule. Pet. App. 12a. However, as Judge Reinhardt ex-

plained, history reveals that “[s]ome of the most objectionable discriminatory rules are the least obtrusive in terms of one’s ability to comply: being required to sit in the back of a bus, for example.” *Id.* at 24a. Under the court of appeals’ analysis, a black employee could not challenge a rule requiring black employees to use separate bathrooms and drinking fountains; an Orthodox Jew could not challenge a rule forbidding the wearing of head coverings; and bilingual members of a national origin minority group could not challenge a rule requiring employees to speak only English at all times on the employer’s premises, including at lunch and at breaks (even though respondent in this case thought it obvious that employees should be able to speak their language of choice on their own time). Those examples illustrate that the court of appeals seriously erred in focusing on the physical difficulty of complying with respondent’s English-only rule, rather than on the discriminatory impact of that rule upon Hispanic employees.

Finally, the court of appeals held that plaintiffs in a Title VII case must demonstrate that they have suffered a “significant” adverse impact. Pet. App. 12a. In the court’s judgment, moreover, English-only rules do not impose a significant adverse impact on bilingual employees. *Id.* at 12a-13a. This Court, however, has rejected the view that the Equal Protection Clause requires a plaintiff who is subjected to discriminatory treatment to prove some minimum level of adverse effects. *Papasan v. Allain*, 478 U.S. 265, 288 n.17 (1986). Indeed, even when a difference in treatment causes nothing more than “inconvenience,” that difference must be justified. *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 n.8 (1982). The same is true of Title VII.²

² To establish the element of causation under Title VII, a plaintiff must show that a rule has adversely affected significantly more

In any event, English-only rules have a significant adverse impact on bilingual members of national origin minorities for at least two reasons. First, such rules significantly handicap the ability of bilingual employees to communicate on the job. Bilingual persons have a wide range of English-speaking ability, from minimally proficient to fully fluent. For those who have minimal or less than average English-speaking ability, an English-only rule can dramatically limit their range of expression and communication. And even bilingual persons who speak English very well can ordinarily speak their primary language with more "precision and power." *Hernandez v. New York*, 111 S. Ct. 1859, 1868 (1991). Depriving persons of the opportunity to use the language in which they communicate most effectively cannot be characterized as a *de minimis* injury.

English-only rules also do more than limit an employee's range of expression. "Language permits an individual to express both a personal identity and membership in a community." *Hernandez*, 111 S. Ct. at 1872. It is "used to define the self." *Id.* at 1868. Accordingly, as Judge Reinhardt stated, to banish a person's primary language from the workplace not only communicates "a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality." Pet. App. 24a-25a. That serious imposition requires a business justification under Title VII.

members of one group than another. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994-995 (1988) (plurality opinion). There is no requirement, however, that plaintiffs prove that the discriminatory harm they have suffered because of national origin satisfies some threshold standard of "significance."

4. The question whether English-only rules must be justified by business necessity is an important and recurring one. There are indications that there has been a recent upsurge of such rules in the workplace. The EEOC currently has approximately 120 active charges against 67 different employers who have imposed English-only rules.

The Ninth Circuit's decision is also especially troubling because of the composition of the population in that Circuit. About one-third of the people in the United States who speak a language other than English at home live in the states included in the Ninth Circuit.³ That large group is now precluded from relying on the EEOC's Guideline in seeking protection from English-only rules.

The decision in this case also interferes with the EEOC's ability to administer a uniform nationwide policy on English-only workplace rules. If the Ninth Circuit's decision is left unreviewed, the EEOC must either renounce its longstanding policy on English-only work rules, or it must develop one enforcement policy for cases in the Ninth Circuit and another for cases in the remaining circuits. The EEOC should not be forced to make that choice.⁴

³ The nine states that make up the Ninth Circuit contain over ten million people who speak a language other than English at home. 1990 Census of Population, Social and Economic Characteristics, Nos. 1990 CP-2-3 (Alaska); 1990 CP-2-4 (Ariz.); 1990 CP-2-6 (Cal.); 1990 CP-2-13 (Haw.); 1990 CP-2-14 (Idaho); 1990 CP-2-28 (Mont.); 1990 CP-2-30 (Nev.); 1990 CP-2-39 (Or.); 1990 CP-2-49 (Wash.), Table 18. Close to 32 million people in the United States speak a language other than English at home. 1990 Census of Population, Social and Economic Characteristics, No. 1990 CP-2-1 (United States), Table 15.

⁴ Only one other Circuit has addressed the validity of English-only work rules, and that decision preceded the adoption of EEOC's Guideline. See *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113 (1981). The scope of that decision is not entirely clear. See 45 Fed. Reg. 62,728 (1980) (viewing it as limited to bilingual employees who fail to show that their primary language is one other

16

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

JAMES R. NEELY, JR.
Deputy General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

CAROLYN L. WHEELER
Assistant General Counsel

JENNIFER S. GOLDSTEIN
Attorney
Equal Employment
Opportunity Commission

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

IRVING GORNSTEIN
Assistant to the Solicitor
General

JUNE 1994

(than English). The Fifth Circuit expressly noted the absence of an EEOC Guideline as a factor in its decision. 618 F.2d at 268 n.1.

998 F.2d 1480 printed in FULL format.

PRISCILLA GARCIA; MARICELA BUITRAGO; UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,
Plaintiffs-Appellees, v. SPUN STEAK COMPANY, a California
corporation, Defendant-Appellant.

GARCIA v. SPUN STEAK CO.

No. 91-16733

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

998 F.2d 1480; 1993 U.S. App. LEXIS 17599; 62 Fair Empl.
Prac. Cas. (BNA) 525; 62 Empl. Prac. Dec. (CCH) P42,456; 93
Cal. Daily Op. Service 5408; 93 Daily Journal DAR 9191

November 3, 1992, Argued, Submitted, San Francisco,
California
July 16, 1993, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the
Northern District of California. D.C. No. CV-91-01949-RHS. Robert H. Schnacke,
Senior Judge, Presiding.

COUNSEL:

James A. Carter, Hendrickson, Higbie & Carter, San Francisco, California, for
the defendant-appellant.

Edward M. Chen, American Civil Liberties Union Foundation of Northern
California, San Francisco, California, for the plaintiffs-appellees.

Jennifer S. Goldstein, Equal Employment Opportunity Commission, Washington,
D.C., for the amicus.

JUDGES: Before: Robert Boochever, John T. Noonan, Jr., and Diarmuid F.
O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain; Dissent by Judge Boochever.

OPINIONBY: O'SCANNLAIN

OPINION: [*1483] OPINION

O'SCANNLAIN, Circuit Judge:

We are called upon to decide whether an employer violates Title VII of the
Civil Rights Act of 1964 in requiring its bilingual workers to speak only
English while working on the job.

I

Spun Steak Company ("Spun Steak") is a California corporation that produces
poultry and meat products in South San Francisco for wholesale distribution.
Spun Steak employs thirty-three workers, twenty-four of whom are
Spanish-speaking. Virtually all of the Spanish-speaking employees are

Hispanic. While two employees [**2] speak no English, the others have varying degrees of proficiency in English. Spun Steak has never required job applicants to speak or to understand English as a condition of employment.

Approximately two-thirds of Spun Steak's employees are production line workers or otherwise involved in the production process. Appellees Garcia and Buitrago are production line workers; they stand before a conveyor belt, remove poultry or other meat products from the belt and place the product into cases or trays for resale. Their work is done individually. Both Garcia and Buitrago are fully bilingual, speaking both English and Spanish.

Appellee Local 115, United Food and Commercial Workers International Union, AFL-CIO ("Local 115"), is the collective bargaining agent representing the employees at Spun Steak.

Prior to September 1990, these Spun Steak employees spoke Spanish freely to their co-workers during work hours. After receiving complaints that some workers were using their bilingual capabilities to harass and to insult other workers in a language they could not understand, Spun Steak began to investigate the possibility of requiring its employees to speak only English in the workplace. Specifically, [**3] Spun Steak received complaints that Garcia and Buitrago made derogatory, racist comments in Spanish about two co-workers, one of whom is African-American and the other Chinese-American.

The company's president, Kenneth Bertelson, concluded that an English-only rule would promote racial harmony in the workplace. In addition, he concluded that the English-only rule would enhance worker safety because some employees who did not understand Spanish claimed that the use of Spanish distracted them while they were operating machinery, and would enhance product quality because the U.S.D.A. inspector in the plant spoke only English and thus could not understand if a product-related concern was raised in Spanish. Accordingly, the following rule was adopted:

It is hereafter the policy of this Company that only English will be spoken in connection with work. During lunch, breaks, and employees' own time, they are obviously free to speak Spanish if they wish. However, we urge all of you not to use your fluency in Spanish in a fashion which may lead other employees to suffer humiliation.

In addition to the English-only policy, Spun Steak adopted a rule forbidding offensive racial, sexual, [**4] or personal remarks of any kind.

It is unclear from the record whether Spun Steak strictly enforced the English-only rule. According to the plaintiffs-appellees, some workers continued to speak Spanish without incident. Spun Steak issued written exceptions to the policy allowing its clean-up crew to speak Spanish, allowing its foreman to speak Spanish, and authorizing certain workers to speak Spanish to the foreman at the foreman's discretion. One of the two employees who speak only Spanish is a member of the clean-up crew and thus is unaffected by the policy.

In November 1990, Garcia and Buitrago received warning letters for speaking Spanish during working hours. For approximately two months thereafter, they were not permitted to work next to each other. Local 115 protested the English-only policy and requested that it be rescinded but to no avail.

On May 6, 1991, Garcia, Buitrago, and Local 115 filed charges of discrimination against Spun Steak with the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC conducted an investigation and determined that "there is reasonable [*1484] cause to believe [Spun Steak] violated Title VII of the Civil Rights Act of 1964, as amended, with [**5] respect to its adoption of an English-only rule and with respect to retaliation when [Garcia, Buitrago, and Local 115] complained."

Garcia, Buitrago, and Local 115, on behalf of all Spanish-speaking employees of Spun Steak, (collectively, "the Spanish-speaking employees") filed suit, alleging that the English-only policy violated Title VII. On September 6, 1991, the parties filed cross-motions for summary judgment. The district court denied Spun Steak's motion and granted the Spanish-speaking employees' motion for summary judgment, concluding that the English-only policy disparately impacted Hispanic workers without sufficient business justification, and thus violated Title VII. Spun Steak filed this timely appeal and the EEOC filed a brief amicus curiae and participated in oral argument.

II

As a preliminary matter, we must consider whether Local 115 has standing to sue on behalf of the Spanish-speaking employees at Spun Steak. If Local 115 does not have standing, we will consider the application of the policy only to Garcia and Buitrago, both of whom speak English fluently.

"An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have [**6] standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977).

Here, it is clear that the Spanish-speaking employees would have standing to sue in their own right because they could claim injury from the application of the policy to them. Further, it is clear that the employees' interest in the conditions of the workplace is germane to Local 115's purpose as the collective bargaining agent of the employees. Finally, the claim asserted and the relief requested do not require the participation of individual members. Local 115 claims that the policy has a per se discriminatory impact on all Spanish-speaking employees. Further, the union is seeking only injunctive relief on behalf of its members, not damages.

In short, Local 115 has standing.

III

Sections 703(a)(1) and (2) of Title VII provide:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge [**7] any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

individual's race, color, religion, sex or national origin; or

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

42 U.S.C. @ 2000e-2(a). It is well-settled that Title VII is concerned not only with intentional discrimination, but also with employment practices and policies that lead to disparities in the treatment of classes of workers. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1970). Thus, a plaintiff alleging discrimination under Title VII may proceed under two theories of liability: disparate treatment or disparate impact. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-87, 101 L. Ed. 2d 827, 108 S. Ct. 2777 (1987). While the disparate treatment theory requires proof of discriminatory [**8] intent, intent is irrelevant to a disparate impact theory. *Id.* at 988. "Impact analysis is designed to implement Congressional concern with 'the consequences of employment practices, not simply the motivation.'" *Rose v. Wells Fargo & [*1485] Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990) (citations omitted).

A

The Spanish-speaking employees do not contend that Spun Steak intentionally discriminated against them in enacting the English-only policy. Rather, they contend that the policy had a discriminatory impact on them because it imposes a burdensome term or condition of employment exclusively upon Hispanic workers and denies them a privilege of employment that non-Spanish-speaking workers enjoy. Because their claim focuses on disparities in the terms, conditions, and privileges of employment, and not on barriers to hiring or promotion, it is outside the mainstream of disparate impact cases decided thus far. As a threshold matter, therefore, we must determine whether the disparate impact theory can be made applicable at all.

The disparate impact cause of action developed out of the language in section 703(a)(2) prohibiting discrimination [**9] based on deprivation of employment opportunities, such as the opportunity to be hired or promoted. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 448-50, 73 L. Ed. 2d 130, 102 S. Ct. 2525 (1981). Our court's disparate impact cases fall squarely within the language of section 703(a)(2). The cases in which we have concluded that the plaintiff has proved discrimination based on a disparate impact theory have all involved plaintiffs who claimed that they were denied employment opportunities as the result of artificial, arbitrary, and unnecessary barriers that excluded members of a protected group from being hired or promoted, see, e.g., *Bouman v. Block*, 940 F.2d 1211, 1224-26 (9th Cir.), cert. denied, 116 L. Ed. 2d 658, 112 S. Ct. 640 (1991), not plaintiffs contending that they were subjected to harsher working conditions than the general employee population.

This case, by contrast, does not fall within the language of section 703(a)(2). While policies that serve as barriers to hiring or promotion clearly deprive applicants of employment opportunities, we cannot conclude that a burdensome term or condition of employment or the denial of a privilege [**10] would "limit, segregate, or classify" employees in a way that would "deprive any individual of employment opportunities" or "otherwise adversely

affect his status as an employee" in violation of section 703(a)(2). See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144, 54 L. Ed. 2d 356, 98 S. Ct. 347 (1977) (deprivation of benefits does not fall under @ 703(a)(2)). Such claims, therefore, must be brought directly under section 703(a)(1). We have never expressly considered, however, whether disparate impact theory applies to claims under section 703(a)(1), and the Supreme Court has explicitly reserved the issue. Id.

Nevertheless, we are called upon to decide the issue in this case notwithstanding the parties' failure to brief it. Our decision is simple: we see no reason to restrict the application of the disparate impact theory to the denial of employment opportunities under section 703(a)(2). The Supreme Court has instructed that the language of section 703(a)(1) is to be interpreted broadly. "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment," *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1985) [**11] (internal quotations and citations omitted), even when the differences in treatment are not the result of intentional discrimination. See also *Lynch v. Freeman*, 817 F.2d 380, 387 (6th Cir. 1987) ("The language of section 703(a)(2) is . . . broad enough to include working conditions that have an adverse impact on a protected group of employees."). Regardless whether a company's decisions about whom to hire or to promote are infected with discrimination, policies or practices that impose significantly harsher burdens on a protected group than on the employee population in general may operate as barriers to equality in the workplace and, if unsupported by a business justification, may be considered "discriminatory." Id.; cf. *Meritor Sav. Bank*, 477 U.S. at 57 (sexual harassment can be arbitrary barrier to equality in the marketplace). We are satisfied that a disparate impact claim may be based upon a challenge to a practice or policy that has a significant [*1486] adverse impact on the "terms, conditions, or privileges" of the employment of a protected group under section 703(a)(1).

B

To make out a prima facie case of discriminatory [**12] impact, a plaintiff must identify a specific, seemingly neutral practice or policy that has a significantly adverse impact on persons of a protected class. *Teal*, 457 U.S. at 446. If the prima facie case is established, the burden shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity." 42 U.S.C.A. @ 2000e-2(k)(1)(A) (Supp. 1992). In this case, the district court granted summary judgment in favor of the Spanish-speaking employees, concluding that, as a matter of law, the employees had made out the prima facie case and the justifications offered by the employer were inadequate.

1

We first consider whether the Spanish-speaking employees have made out the prima facie case. "The requirements of a prima facie disparate impact case . . . are in some respects more exacting than those of a disparate treatment case." *Spaulding v. University of Washington*, 740 F.2d 686, 705 (9th Cir.) (citation omitted), cert. denied, 469 U.S. 1036, 83 L. Ed. 2d 401, 105 S. Ct. 511 (1984). In the disparate treatment [**13] context, a plaintiff can make out a prima facie case merely by presenting evidence sufficient to give rise to an

inference of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-06, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). In a disparate impact case, by contrast, plaintiffs must do more than merely raise an inference of discrimination before the burden shifts; they "must actually prove the discriminatory impact at issue." Rose, 902 F.2d at 1421. In the typical disparate impact case, in which the plaintiff argues that a selection criterion excludes protected applicants from jobs or promotions, the plaintiff proves discriminatory impact by showing statistical disparities between the number of protected class members in the qualified applicant group and those in the relevant segment of the workforce. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1988). While such statistics are often difficult to compile, whether the protected group has been disadvantaged turns on quantifiable data. When the alleged disparate impact is on the conditions, terms, or privileges of employment, however, determining whether the [**14] protected group has been adversely affected may depend on subjective factors not easily quantified. The fact that the alleged effects are subjective, however, does not relieve the plaintiff of the burden of proving disparate impact. The plaintiff may not merely assert that the policy has harmed members of the group to which he or she belongs. Instead, the plaintiff must prove the existence of adverse effects of the policy, must prove that the impact of the policy is on terms, conditions, or privileges of employment of the protected class, must prove that the adverse effects are significant, and must prove that the employee population in general is not affected by the policy to the same degree.

It is beyond dispute that, in this case, if the English-only policy causes any adverse effects, those effects will be suffered disproportionately by those of Hispanic origin. The vast majority of those workers at Spun Steak who speak a language other than English - and virtually all those employees for whom English is not a first language - are Hispanic. It is of no consequence that not all Hispanic employees of Spun Steak speak Spanish; nor is it relevant that some non-Hispanic workers may [**15] speak Spanish. If the adverse effects are proved, it is enough under Title VII that Hispanics are disproportionately impacted.

The crux of the dispute between Spun Steak and the Spanish-speaking employees, however, is not over whether Hispanic workers will disproportionately bear any adverse effects of the policy; rather, the dispute centers on whether the policy causes any adverse effects at all, and if it does, whether the effects are significant. The Spanish-speaking employees argue that the policy adversely affects them in the following ways: (1) it denies them the ability to express [*1487] their cultural heritage on the job; (2) it denies them a privilege of employment that is enjoyed by monolingual speakers of English; and (3) it creates an atmosphere of inferiority, isolation, and intimidation. We discuss each of these contentions in turn. n1

-----Footnotes-----

n1 The Spanish-speaking employees rely on the reasoning in Gutierrez v. Municipal Court, 838 F.2d 1031 (9th Cir. 1988), vacated as moot, 490 U.S. 1016, 104 L. Ed. 2d 174, 109 S. Ct. 1736 (1989), which held that English-only policies adversely impact Spanish-speaking employees. The case has no precedential authority, however, because it was vacated as moot by the Supreme Court. We are in no way bound by its reasoning.

-----End Footnotes-----

[**16]

a

The employees argue that denying them the ability to speak Spanish on the job denies them the right to cultural expression. It cannot be gainsaid that an individual's primary language can be an important link to his ethnic culture and identity. Title VII, however, does not protect the ability of workers to express their cultural heritage at the workplace. Title VII is concerned only with disparities in the treatment of workers; it does not confer substantive privileges. See, e.g., *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980), cert. denied, 449 U.S. 1113, 66 L. Ed. 2d 842, 101 S. Ct. 923 (1981). It is axiomatic that an employee must often sacrifice individual self-expression during working hours. Just as a private employer is not required to allow other types of self-expression, there is nothing in Title VII which requires an employer to allow employees to express their cultural identity.

b

Next, the Spanish-speaking employees argue that the English-only policy has a disparate impact on them because it deprives them of a privilege given by the employer to native-English speakers: the ability to converse on the job in the language with which they [**17] feel most comfortable. It is undisputed that Spun Steak allows its employees to converse on the job. The ability to converse - especially to make small talk - is a privilege of employment, and may in fact be a significant privilege of employment in an assembly-line job. It is inaccurate, however, to describe the privilege as broadly as the Spanish-speaking employees urge us to do.

The employees have attempted to define the privilege as the ability to speak in the language of their choice. A privilege, however, is by definition given at the employer's discretion; an employer has the right to define its contours. Thus, an employer may allow employees to converse on the job, but only during certain times of the day or during the performance of certain tasks. The employer may proscribe certain topics as inappropriate during working hours or may even forbid the use of certain words, such as profanity.

Here, as is its prerogative, the employer has defined the privilege narrowly. When the privilege is defined at its narrowest (as merely the ability to speak on the job), we cannot conclude that those employees fluent in both English and Spanish are adversely impacted by the policy. Because [**18] they are able to speak English, bilingual employees can engage in conversation on the job. It is axiomatic that "the language a person who is multi-lingual elects to speak at a particular time is . . . a matter of choice." *Garcia*, 618 F.2d at 270. The bilingual employee can readily comply with the English-only rule and still enjoy the privilege of speaking on the job. "There is no disparate impact" with respect to a privilege of employment "if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference." *Id.*

This analysis is consistent with our decision in *Jurado v. Eleven-Fifty Corporation*, 813 F.2d 1406, 1412 (9th Cir. 1987). In *Jurado*, a bilingual disc

jockey was fired for disobeying a rule forbidding him from using an occasional Spanish word or phrase on the air. We concluded that Jurado's disparate impact claim failed "because Jurado was fluently bilingual and could easily comply with the order" and thus could not have been adversely affected. Id.

The Spanish-speaking employees argue that fully bilingual employees are hampered in the enjoyment of [**19] the privilege because [**1488] for them, switching from one language to another is not fully volitional. Whether a bilingual speaker can control which language is used in a given circumstance is a factual issue that cannot be resolved at the summary judgment stage. However, we fail to see the relevance of the assertion, even assuming that it can be proved. Title VII is not meant to protect against rules that merely inconvenience some employees, even if the inconvenience falls regularly on a protected class. Rather, Title VII protects against only those policies that have a significant impact. The fact that an employee may have to catch himself or herself from occasionally slipping into Spanish does not impose a burden significant enough to amount to the denial of equal opportunity. This is not a case in which the employees have alleged that the company is enforcing the policy in such a way as to impose penalties for minor slips of the tongue. The fact that a bilingual employee may, on occasion, unconsciously substitute a Spanish word in the place of an English one does not override our conclusion that the bilingual employee can easily comply with the rule. In short, we conclude that a [**20] bilingual employee is not denied a privilege of employment by the English-only policy.

By contrast, non-English speakers cannot enjoy the privilege of conversing on the job if conversation is limited to a language they cannot speak. As applied "to a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home," an English-only rule might well have an adverse impact. Garcia, 618 F.2d at 270. Indeed, counsel for Spun Steak conceded at oral argument that the policy would have an adverse impact on an employee unable to speak English. There is only one employee at Spun Steak affected by the policy who is unable to speak any English. Even with regard to her, however, summary judgment was improper because a genuine issue of material fact exists as to whether she has been adversely affected by the policy. She stated in her deposition that she was not bothered by the rule because she preferred not to make small talk on the job, but rather preferred to work in peace. Furthermore, there is some evidence suggesting that she is not required to comply with the policy when she chooses to speak. For example, [**21] she is allowed to speak Spanish to her supervisor. Remand is necessary to determine whether she has suffered adverse effects from the policy. It is unclear from the record whether there are any other employees who have such limited proficiency in English that they are effectively denied the privilege of speaking on the job. Whether an employee speaks such little English as to be effectively denied the privilege is a question of fact for which summary judgment is improper.

c

Finally, the Spanish-speaking employees argue that the policy creates an atmosphere of inferiority, isolation, and intimidation. Under this theory, the employees do not assert that the policy directly affects a term, condition, or privilege of employment. Instead, the argument must be that the policy causes the work environment to become infused with ethnic tensions. The tense environment, the argument goes, itself amounts to a condition of employment.

THE WHITE HOUSE

i

WASHINGTON

The Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. at 66, held that an abusive work environment may, in some circumstances, amount to a condition of employment giving rise to a violation of Title VII. The Court quoted [**22] with approval the decision in *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957, 32 L. Ed. 2d 343, 92 S. Ct. 2058 (1972):

The phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.

Although *Vinson* is a sexual harassment case in which the individual incidents involved behavior that was arguably intentionally discriminatory, its rationale applies equally to [*1489] cases in which seemingly neutral policies of a company infuse the atmosphere of the workplace with discrimination. The *Vinson* Court emphasized, however, that discriminatory practices must be pervasive before an employee has a Title VII claim under a hostile environment theory.

Here, the employees urge us to adopt a per se rule that English-only policies always infect the working environment to such a [**23] degree as to amount to a hostile or abusive work environment. This we cannot do. Whether a working environment is infused with discrimination is a factual question, one for which a per se rule is particularly inappropriate. The dynamics of an individual workplace are enormously complex; we cannot conclude, as a matter of law, that the introduction of an English-only policy, in every workplace, will always have the same effect.

The Spanish-speaking employees in this case have presented no evidence other than conclusory statements that the policy has contributed to an atmosphere of "isolation, inferiority or intimidation." The bilingual employees are able to comply with the rule, and there is no evidence to show that the atmosphere at Spun Steak in general is infused with hostility toward Hispanic workers. Indeed, there is substantial evidence in the record demonstrating that the policy was enacted to prevent the employees from intentionally using their fluency in Spanish to isolate and to intimidate members of other ethnic groups. In light of the specific factual context of this case, we conclude that the bilingual employees have not raised a genuine issue of material fact that the [**24] effect is so pronounced as to amount to a hostile environment. See generally *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986).

ii

We do not foreclose the prospect that in some circumstances English-only rules can exacerbate existing tensions, or, when combined with other discriminatory behavior, contribute to an overall environment of discrimination. Likewise, we can envision a case in which such rules are enforced in such a draconian manner that the enforcement itself amounts to harassment. In evaluating such a claim, however, a court must look to the totality of the circumstances in the particular factual context in which the claim arises.

THE WHITE HOUSE

In holding that the enactment of an English-only while working policy does not inexorably lead to an abusive environment for those whose primary language is not English, we reach a conclusion opposite to the EEOC's long standing position. The EEOC Guidelines provide that an employee meets the prima facie case in a disparate impact cause of action merely by proving the existence of the English-only policy. See 29 C.F.R. @ 1606.7 (a) & (b) (1991). Under the EEOC's scheme, an employer must always provide [**25] a business justification for such a rule. Id. The EEOC enacted this scheme in part because of its conclusion that English-only rules may "create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment." 29 C.F.R. @ 1606.7(a).

We do not reject the English-only rule Guideline lightly. We recognize that "as an administrative interpretation of the Act by the enforcing agency, these Guidelines . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Sav. Bank, 477 U.S. 57 at 65, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (internal quotations and citations omitted). But we are not bound by the Guidelines. See Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 94, 38 L. Ed. 2d 287, 94 S. Ct. 334 (1973). We will not defer to "an administrative construction of a statute where there are 'compelling indications that it is wrong.'" Id.

We have been impressed by Judge Rubin's pre-Guidelines analysis for the Fifth Circuit in Garcia, which we follow today. Garcia, 618 F.2d 264. Nothing in the plain language of section [**26] 703(a)(1) supports EEOC's English-only rule Guideline. "Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business." United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 61 L. Ed. 2d 480, 99 S. Ct. 2721 (1979). "Those legislators demanded as a price for their support that," id.,

[*1490] management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices.

Statement of William M. McCulloch, et al., H.R. Rep. No. 914, 88 Cong., 2d Sess (1964), reprinted in 1964 U.S.C.C.A.N. 2516 (quoted in part in Steelworkers, 443 U.S. at 206). It is clear that Congress intended a balance to be struck in preventing discrimination and preserving the independence of the employer. In striking that balance, the Supreme Court has held that a plaintiff in a disparate impact case must prove the alleged discriminatory effect before the burden shifts [**27] to the employer. The EEOC Guideline at issue here contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof. We are not aware of, nor has counsel shown us, anything in the legislative history to Title VII that indicates that English-only policies are to be presumed discriminatory. Indeed, nowhere in the legislative history is there a discussion of English-only policies at all.

Because the bilingual employees have failed to make out a prima facie case, we need not consider the business justifications offered for the policy as applied to them. On remand, if Local 115 is able to make out a prima facie case with

THE WHITE HOUSE

regard to employees with limited proficiency in English, the district court could then consider any business justification offered by Spun Steak.

IV

In sum, we conclude that the bilingual employees have not made out a prima facie case and that Spun Steak has not violated Title VII in adopting an English-only rule as to them. Thus, we reverse the grant of summary judgment in favor of Garcia, Buitrago, and Local 115 to the extent it represents the bilingual employees, and remand with instructions to grant summary judgment [**28] in favor of Spun Steak on their claims. A genuine issue of material fact exists as to whether there are one or more employees represented by Local 115 with limited proficiency in English who were adversely impacted by the policy. As to such employee or employees, we reverse the grant of summary judgment in favor of Local 115, and remand for further proceedings.

REVERSED and REMANDED.

DISSENTBY: BOOCHEVER (In Part)

DISSENT: Boochever, Circuit Judge, dissenting in part:

I agree with most of the majority's carefully crafted opinion. I dissent, however, from the majority's rejection of the EEOC guidelines. The guidelines provide that an employee establishes a prima facie case in a disparate impact claim by proving the existence of an English-only policy, thereby shifting the burden to the employer to show a business necessity for the rule. See 29 C.F.R. @ 1606.7(b) (1991) ("An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity."). I would defer to the Commission's expertise in construing the Act, by virtue of which it concluded that English-only rules may "create an atmosphere of inferiority, [**29] isolation and intimidation based on national origin which could result in a discriminatory working environment." Id. @ 1606.7(a).

As the majority indicates, proof of such an effect of English-only rules requires analysis of subjective factors. It is hard to envision how the burden of proving such an effect would be met other than by conclusory self-serving statements of the Spanish-speaking employees or possibly by expert testimony of psychologists. The difficulty of meeting such a burden may well have been one of the reasons for the promulgation of the guideline. On the other hand, it should not be difficult for an employer to give specific reasons for the policy, - such as the safety reasons advanced in this case.

It is true that EEOC regulations are entitled to somewhat less weight than those promulgated by an agency with Congressionally delegated rulemaking authority. General Elec. Co. v. Gilbert, 429 U.S. 125, 141, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976). Nevertheless, the EEOC guideline is entitled to "great deference" in the absence of "compelling indications that it is wrong." Espinoza [*1491] v. Farah Mfg. Co., 414 U.S. 86, 94-95, 38 L. Ed. 2d 287, 94 S. Ct. 334 (1973). While one [**30] may reasonably differ with the EEOC's position as a matter of policy, I can find no such "compelling indications" in this case. The lack of directly supporting language in @ 703(a)(1) or the legislative history of Title VII, relied on by the majority, does not in my opinion make the

THE WHITE HOUSE

guideline "inconsistent with an obvious congressional intent not to reach the employment practice in question." Id. at 94.

I conclude that if appropriate deference is given to the administrative interpretation of the Act, we should follow the guideline and uphold the district court's decision that a prima facie case was established. I believe, however, that triable issues were presented whether Spun Steak established a business justification for the rule, and I would remand for trial of that issue.

20TH CASE of Level 1 printed in FULL format.

PRISCILLA GARCIA; MARICELA BUITRAGO; UNITED FOOD AND
COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO,
Plaintiffs-Appellees, v. SPUN STEAK COMPANY, a California
corporation, Defendant-Appellant.

GARCIA v. SPUN STEAK CO.

No. 91-16733

*U.S. Northern
District of
CA*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

13 F.3d 296; 1993 U.S. App. LEXIS 33530; 63 Fair Empl. Prac.
Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814; 93 Cal.
Daily Op. Service 9586; 93 Daily Journal DAR 16601

December 27, 1993, Filed

PRIOR HISTORY: [**1] D.C. No. CV-91-01949-RHS.

JUDGES: Before: Robert Boochever, John T. Noonan, Jr., and Diarmuid F.
O'Scannlain, Circuit Judges.

OPINION: [*296] ORDER

The order filed October 29, 1993, with dissent, is ordered published.

ORDER

The panel, with Judge Boochever dissenting, has voted to deny appellees' petition for rehearing. Judges Noonan and O'Scannlain have voted to reject the suggestion for rehearing en banc and Judge Boochever has recommended acceptance of the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Reinhardt, Circuit Judge, dissenting from denial of rehearing en banc:

Once again, a civil rights principle is the loser at the hands of an unsympathetic court. In this case, by a divided vote, a three-judge panel invalidated an Equal Employment Opportunity Commission (EEOC) Guideline of national scope, upheld an employment rule [**2] that discriminates against national-origin minorities without requiring any showing of business justification, and challenged the EEOC's ability to enact rules codifying its findings regarding specific discriminatory practices. See Garcia v. Spun Steak Co., No. 91-16733 (July 16, 1993). The two judges in the majority were able to do so only by improperly substituting their policy judgments for those of the EEOC and by misconstruing, or, in one instance, completely disregarding, prior case law.

13 F.3d 296, *296; 1993 U.S. App. LEXIS 33530, **2;
63 Fair Empl. Prac. Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814

-----Footnotes-----

n1 In one recent period, five major decisions hostile to civil rights were handed down by the Supreme Court only to be overturned by Congress in the Civil Rights Restoration Act of 1991. See Patterson v. McLean Credit Union, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 104 L. Ed. 2d 961, 109 S. Ct. 2261 (1989); Martin v. Wilks, 490 U.S. 755, 104 L. Ed. 2d 835, 109 S. Ct. 2180 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989).

-----End Footnotes-----

[**3]

This circuit, with its enormous immigrant population, a large proportion of whom arrived here only recently, is now the only circuit in the nation in which an employer may adopt a discriminatory English-only rule without even articulating a business justification to support it. Unfortunately, the growth of the immigrant population and the present mood of anti-immigrant backlash mean that English-only rules are likely to become more prevalent. In overriding the EEOC's determination that such rules are generally discriminatory, the Spun Steak panel subverted one of the basic goals of Title VII of the Civil Rights Act of 1964, the elimination of discrimination [*297] on the basis of national origin. Accordingly, I dissent from the court's refusal to rehear Spun Steak en banc.

I. Background.

Plaintiffs Priscilla Garcia and Maricela Buitrago are production line workers at Spun Steak Company ("Spun Steak"), a California corporation that produces poultry and meat products for wholesale distribution. Plaintiff Local 115, United Food and Commercial Workers International Union ("Local 115"), is the collective bargaining agent representing Spun Steak employees.

Of the thirty-three workers [*4] employed at Spun Steak, twenty-four are Spanish-speaking. Virtually all of Spun Steak's Spanish-speaking employees are Hispanic. Their command of English varies greatly: two employees speak no English, others have limited English proficiency, while some such as Garcia and Buitrago speak English fluently.

In September 1990, an English-only rule was instituted at Spun Steak. The rule prohibited employees from speaking Spanish on the job except during lunch and other breaks. Both Garcia and Buitrago were subsequently reprimanded for violating the English-only rule. Local 115 protested the rule and unsuccessfully requested that it be rescinded.

After investigating discrimination charges filed by Garcia, Buitrago, and Local 115, the Equal Employment Opportunity Commission found that there was reasonable cause to believe that Spun Steak violated Title VII of the Civil Rights Act of 1964 in adopting its English-only rule. In accordance with the EEOC finding, Garcia, Buitrago, and Local 115, on behalf of all Spanish-speaking employees of Spun Steak (collectively, the "Spanish-speaking

13 F.3d 296, *297; 1993 U.S. App. LEXIS 33530, **4;
63 Fair Empl. Prac. Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814

employees"), filed suit in federal district court alleging a violation of Title VII and requesting injunctive [**5] relief. The Spanish-speaking employees, in accordance with the EEOC Guideline pertaining to English-only rules, made out a prima facie case of national-origin discrimination by demonstrating that Spun Steak had instituted an English-only rule, while Spun Steak attempted to rebut their showing by demonstrating a business justification for the rule. The opposing sides filed cross-motions for summary judgment, and the district court ruled in favor of the employees. The court found that Spun Steak's English-only policy had a disparate impact on Hispanic workers without sufficient business justification, in violation of Title VII.

Spun Steak appealed the ruling to this court. The EEOC, as the federal agency charged with the interpretation and enforcement of Title VII, filed an amicus curiae brief arguing that Spun Steak's English-only policy violated Title VII, and urging that the district court judgment be affirmed. The arguments of plaintiffs and the EEOC were rejected, however, by a majority of the Spun Steak panel. The majority did not reach the question of whether there was a business justification for the rule. Rather, over the dissent of Judge Boochever, it invalidated the applicable [**6] EEOC Guideline and held that English-only rules are permissible with respect to bilingual employees.

II. The Adverse Impact of English-Only Rules.

Title VII prohibits discrimination in employment based on race, color, sex, religion and national origin, 42 U.S.C. @ 2000e-2. The close relationship between language and national origin led the EEOC to classify discrimination based on "linguistic characteristics" as unlawful under Title VII (29 C.F.R. @ 1606.1), a classification which the Spun Steak panel does not challenge. See *Fragante v. City and County of Honolulu*, 888 F. 2d 591, 595 (9th Cir. 1989), cert. denied, 494 U.S. 1081, 108 L. Ed. 2d 942, 110 S. Ct. 1811 (1990) (approving @ 1606.1).

The EEOC Guideline at issue in Spun Steak applies Title VII to English-only rules. 29 C.F.R. @ 1606.7 (1991). It permits the use of such rules only where a business justification exists. The Guideline reflects the EEOC's determination that rules prohibiting the use of foreign languages generally have an adverse impact on protected groups. As the Guideline explains, "the primary language of an individual is often an essential [**7] national origin characteristic," so that an English-only rule may "create an atmosphere of [*298] inferiority, isolation and intimidation." 29 C.F.R. @ 1606.7(a).

The Spun Steak majority disagrees with the EEOC's determination. My colleagues have in their wisdom concluded that bilingual employees do not suffer significant adverse effects from an English-only rule because they have the "choice" of which language to employ, and can thus "readily comply" with the rule. Slip op. at 7538. This analysis demonstrates a remarkable insensitivity to the facts and history of discrimination. Whether or not the employees can readily comply with a discriminatory rule is by no means the measure of whether they suffer significant adverse consequences. Some of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: being required to sit in the back of a bus, for example; or being relegated during one's law school career to a portion of the classroom dedicated to one's exclusive use. See *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L. Ed. 1149 (1950). Nonetheless, the majority focuses narrowly

13 F.3d 296, *298; 1993 U.S. App. LEXIS 33530, **7;
63 Fair Empl. Prac. Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814

upon the [**8] ability to comply, substituting its own unenlightened conception of discriminatory impact for that adopted by the EEOC on the basis of its store of knowledge, wisdom and experience in the field of employment discrimination.

Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as an "inconvenience" to the affected employees, as Spun Steak asserts. See generally Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. Rev. 885, 894-98 (1986) (discussing relationship between language and culture); Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. Rev. 303, 351-57 (1986). Even when an individual learns English and becomes assimilated into American society, his native language remains an important manifestation of his ethnic identity and a means of affirming links to his original culture. See Karst, *supra*, at 351-57. English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality. n2

- - - - -Footnotes- - - - -

n2 As one commentator observed: "Language is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity." Comment, *Native-Born Acadians and the Equality Ideal*, 46 La. L. Rev. 1151, 1167 (1986).

- - - - -End Footnotes- - - - -

[**9]

Thus, the Spun Steak majority's emphasis on the practical effects of English-only rules is misplaced. Whether or not an individual is, in practice, capable of speaking only English is not the important consideration here by any means. What is far more important is the impact of the prohibition itself. As the EEOC correctly determined, being forbidden under penalty of discharge to speak one's native tongue generally has a pernicious effect on national origin minorities.

Finally, it should be noted that the imposition of an English-only rule may mask intentional discrimination on the basis of national origin. See Gutierrez, 838 at 1040 (citing authorities). Even those who support the majority's view acknowledge that "language can be a potent source of racial and ethnic discrimination." *Gutierrez v. Municipal Court*, 861 F. 2d 1187, 1192 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing en banc). History is replete with language conflicts that attest, not only to the crucial importance of language to its speakers, but also to the widespread tactic of using language as a surrogate for attacks on ethnic identity. n3 As these [*299] examples [**10] reveal, the urge to repress another's language is rarely, if ever, driven by benevolent impulses.

- - - - -Footnotes- - - - -

n3 The harsh repression of Catalan and the Basque language in Spain under the dictatorship of Francisco Franco is one obvious example. See *Basques Are Waging A Difficult Battle to Preserve Language*, *Dallas Morning News*, Apr. 3, 1993, at 25A (Franco dictatorship "banned public use of Basque and other regional

13 F.3d 296, *299; 1993 U.S. App. LEXIS 33530, **10;
63 Fair Empl. Prac. Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814

languages"). Other more current examples include the repression of the Ukrainian, Georgian and Belorussian languages by the former Soviet government; the current repression of the Albanian language in Kosovo (formerly part of Yugoslavia); and the extended repression of the Kurdish language in Turkey. See, e.g., Shiller, *Albanian Students Defy Serb Rule*, *Toronto Star*, Nov. 2, 1992, at A14; Robinson, *Restless Ukraine Strains at the Bonds of Soviet Empire*, *Fin. Times*, Sept. 4, 1990, at 6 (citing "Moscow's systematic repression of the Ukrainian language"); *Turkish-Kurdish Agonies*, *Wash. Post*, July 3, 1993, at A22 (discussing cultural repression of Kurds and the denial of Kurdish language rights).

-----End Footnotes-----
[**11]

Recognizing the discriminatory potential inherent in rules prohibiting the use of foreign languages, the EEOC has attempted to provide victims with legal rights. Spun Steak's misguided removal of that protection, based largely on two judges' subjective judgment that the discriminatory impact of English-only rules is "not significant," seriously undermines one of the basic goals of Title VII.

III. "Compelling" Reasons for Invalidating the EEOC Guideline.

The EEOC Guideline at issue in Spun Steak provides that an employee makes out a prima facie case of national origin discrimination by proving that the employer has adopted an English-only rule. See 29 C.F.R. @ 1606.7(b) (1991). The resulting presumption of discrimination is rebuttable, however. An English-only rule will be upheld if the employer shows that it is supported by a business justification. *Id.* Thus, instead of imposing a more onerous per se rule, the Guideline creates a framework of shifting burdens. Given the history of national origin discrimination in this country, the rule is surely a moderate and reasonable one.

In invalidating the EEOC Guideline, the Spun Steak majority virtually ignores the [**12] long-standing rule that EEOC Guidelines "constitute 'the administrative interpretation of [Title VII] by the enforcing agency,' and [that] consequently they are 'entitled to great deference.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975), quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971). See also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 94, 38 L. Ed. 2d 287, 94 S. Ct. 334 (1973) (EEOC Guideline entitled to deference unless "there are 'compelling indications that it is wrong'"); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115, 100 L. Ed. 2d 96, 108 S. Ct. 1666 (1988) ("EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference"). Though acknowledging that only "compelling indications" that the Guideline was erroneous would justify rejecting it, the majority makes only a token effort to abide by this standard, dedicating less than a page to describing its "compelling" reasons for invalidating the Guideline. n4

-----Footnotes-----

n4 Spun Steak's dismissive treatment of the EEOC rule is unprecedented within the Ninth Circuit. This Court has always cited the Guidelines with approval. See *Fragante v. City and County of Honolulu*, 888 F. 2d 591, 595 (9th Cir.

13 F.3d 296, *299; 1993 U.S. App. LEXIS 33530, **12;
63 Fair Empl. Prac. Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814

1989), cert. denied, 494 U.S. 1081, 108 L. Ed. 2d 942, 110 S. Ct. 1811 (1990);
Jurado v. Eleven-Fifty Corp., 813 F. 2d 1406, 1411 (9th Cir. 1987).

----- -End Footnotes-----
[**13]

In its short discussion of the topic, the Spun Steak majority lists four justifications for rejecting the Guideline, none of which is persuasive, let alone compelling. Slip op. at 7542-43. First, the majority claims to follow Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980), cert. denied, 449 U.S. 1113, 66 L. Ed. 2d 842, 101 S. Ct. 923 (1981) [hereinafter "Gloor"], in which the Fifth Circuit did not even consider the EEOC Guideline (since none existed at the time), but only described how a court would rule in the absence of agency construction of Title VII. n5 Second, unable to find specific evidence that the Guideline was erroneous, the majority contents itself with quoting general observations indicating Congress' disinclination to infringe on the independence of employers and unions except to correct discriminatory practices. Slip op. at 7542-43 (quoting United Steelworkers of America, AFL-CIO v. Weber, 443 U.S. 193, 206, 61 L. Ed. 2d 480, 99 S. Ct. 2721 (1979)). Here, the majority ignores the obvious fact that correcting a discriminatory practice is precisely what the EEOC was trying do. In any event, if such self-evident and general statements are [**14] sufficient to override the deference due EEOC Guidelines, then every Guideline is in grave jeopardy.

----- -Footnotes-----
n5 In fact, the Guideline at issue here was enacted shortly after Gloor, probably in order to reverse the effect of that decision. The majority simply ignores this history.

----- -End Footnotes-----

Third, and most incomprehensible, the majority objects to the presumption of disparate [**300] impact contained in the EEOC Guideline. It does so not on the merits of the presumption, but on the basis of the uncontroversial and irrelevant proposition that in disparate impact cases plaintiffs have the burden of proving the discriminatory effect of the challenged policies. The panel's "reasoning" constitutes a total non-sequitur. n6 There is simply no connection between the elementary proposition stated by the majority - that plaintiffs have the burden of proof - and the majority's deduction therefrom that the EEOC is barred from (1) making generalized findings regarding the effects of particular discriminatory policies, and (2) codifying those [**15] findings in a rule that such policies are unlawful unless justification exists in particular cases. In effect, the majority holds that the agency is without authority to determine that English-only rules and similar discriminatory practices are invalid generally. n7 The majority apparently believes that the question of the validity of a widespread discriminatory practice must be decided over and over again on a case by case basis in a private lawsuit each time a new employer adopts it. The majority's remarkably narrow view of the EEOC's authority is reminiscent of courts of the 1930s which refused to accept agency findings regarding labor and food standards. n8 It is a particularly odd view for the 1990s given the broad authority that courts have allowed agencies to exercise in recent years.

----- -Footnotes-----

13 F.3d 296, *300; 1993 U.S. App. LEXIS 33530, **15;
63 Fair Empl. Prac. Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814

n6 The majority states that "the Supreme Court has held that a plaintiff must prove the alleged discriminatory effect before the burden shifts to the employer. The EEOC Guideline at issue here contravenes that policy by presuming that an English-only policy has a disparate impact in the absence of proof." Slip op. at 7543. [**16]

n7 Under the majority's unique approach, an EEOC Guideline stating, for example, that rules requiring employees to be at least six feet tall are presumed to have a disparate impact on women would be held invalid even though the Supreme Court had held that height and weight requirements have a disparate impact on women and the factual or statistical issue is the same in all cases. See *Dothard v. Rawlinson*, 433 U.S. 321, 329-31, 53 L. Ed. 2d 786, 97 S. Ct. 2720 (1977) (finding that Alabama prison system's height and weight requirements disparately impact women solely on the basis of statistical evidence).

It is clear that the real basis of the majority's objection to the EEOC presumption is that the majority does not agree with the Guideline on the merits. This substantive disagreement is at least rational (though the majority's view is wrong), but it should not be transformed into a wholly baseless attack on agency authority to promulgate general rules.

n8 Any concern for an employer's right to a fair hearing and individualized consideration is satisfied by the business justification provision of the EEOC rule, which allows the employer to articulate the specific reasons supporting an English-only policy. See Slip op. at 7544-45 (Boochever, J., dissenting in part).

----- -End Footnotes- -----
[**17]

Finally, the Spun Steak majority cites as a reason for its decision the absence of legislative history regarding Title VII's applicability to English-only rules. Slip op. at 7543. With this argument, the majority elevates legislative history to a new height. Those who believe that even affirmative legislative history is, in general, not compelling may be surprised to learn that its absence can be so crucial as to constitute a basis for invalidating an agency rule. See, e.g., *United States v. Thompson/Center Arms Co.*, 119 L. Ed. 2d 308, 112 S.Ct. 2102, 2111 (1992) (Scalia, J., concurring in judgment) (describing legislative history as "that last hope of lost interpretative causes, that St. Jude of the hagiology of statutory construction").

IV. Related Cases.

The Spun Steak majority contends that its analysis is "consistent" with *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987), and that it "follows" *Gloor*. Slip op. at 7538, 7542. In contrast, the majority dismisses *Gutierrez v. Municipal Court*, 832 F.2d 1031 (9th Cir. 1988), reh'g en banc denied, 861 F.2d 1187 (1988), [**18] vacated as moot, 490 U.S. 1016 (1989), in a footnote, without pretending to counter, or even examine, the case's reasoning. Slip op. at 7536 n. 1. In none of the three instances does the majority deal fairly with the case cited. *Gutierrez*, as a unanimous Ninth

13 F.3d 296, *300; 1993 U.S. App. LEXIS 33530, **18;
63 Fair Empl. Prac. Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814

Circuit decision on precisely the same issue as faced the Spun Steak panel, merited examination for its reasoning and persuasive value. Jurado and Gloor, [*301] while not spurned as is Gutierrez, are misused through selective reference.

Five years ago, this court in Gutierrez unanimously upheld the EEOC Guideline at issue in Spun Steak, holding that English-only employment rules generally have an adverse impact on national origin groups. See 861 F.2d at 1040. The plaintiff in Gutierrez, however, quit her job before her employer's appeal reached the Supreme Court. As a result, the Court vacated our decision as moot. Gutierrez, 490 U.S. 1016, 104 L. Ed. 2d 174, 109 S. Ct. 1736 (1989). Unconstrained by precedential considerations, the Spun Steak majority wrongly declined even to consider Gutierrez's reasoning. While it is true that Gutierrez [*19] lacks binding precedential value, it still represented the thinking of this court. As such, it was deserving of consideration. Gutierrez not only constituted a decision of a three-judge panel, but it had survived an en banc call. See Gutierrez, 861 F.2d 1187 (Kozinski, J., dissenting from denial of rehearing en banc) (joined by Judge Thompson and Judge O'Scannlain). Gutierrez was binding precedent within this circuit and might well have remained so, but for the happenstance of an employee's job decision. n9 As far as our court is concerned, Gutierrez represented its official position, following completion of all our review proceedings. As such, it merited more than a dismissive footnote in Spun Steak.

-----Footnotes-----

n9 Of course, the Supreme Court might have granted certiorari and affirmed or reversed - we will never know.

-----End Footnotes-----

As the Spun Steak majority should have known, the validity of a case's reasoning is unaffected when it is vacated as moot. See Wright, 13A Federal Practice [*20] & Procedure @ 3533.10 (1984). The Spun Steak majority cites no new caselaw to justify its different result, making it clear that the only significant change since Gutierrez is that of panel composition: a Gutierrez en banc dissenter, assigned to Spun Steak and having by luck of the draw picked up a second vote, was thereby transformed into the author of a two-judge majority opinion. Moreover, Gutierrez has proved persuasive to other courts: it was cited with approval in Smothers v. Benitez, 806 F. Supp. 299, 307-08 (D.P.R. 1992), Pemberthy v. Beyer, 800 F. Supp. 144, 159 (D.N.J. 1992), and Asian Am. Business Group v. City of Pomona, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989). These three cases involved issues related to the question decided in Gutierrez; Spun Steak, ruling on the identical issue as Gutierrez, should at least have accorded it fair consideration.

Spun Steak's use of the Fifth Circuit's Gloor decision is equally unacceptable. In discussing its reasons for invalidating the EEOC Guideline, the majority professes to be guided by Gloor. [*21] That decision, however, pre-dated the Guideline at issue. It is disingenuous for the Spun Steak majority to profess to follow a case which did not and could not have ruled on the validity of the affected Guideline. The Gloor court, in fact, specifically noted the absence of any controlling EEOC Guideline in justifying its ruling. Gloor, 618 F.2d at 268 n. 1. n10 Rather than following Gloor, it should be clear that

Spun

Steak's rejection of the EEOC Guideline represents a radical recasting of Gloor in disregard of Gloor's own express self-imposed limitations and of the deference due EEOC Guidelines.

-----Footnotes-----

n10 The Fifth Circuit took care to point out that:

[The EEOC] has adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute, prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.

Gloor, 618 F.2d at 268 n. 1.

-----End Footnotes-----

[**22]

Finally, there is Spun Steak's reliance on Jurado. Before discussing Jurado in detail, though, one should first note something that the Spun Steak majority fails to mention: the Jurado court cites with approval the exact EEOC Guideline which Spun Steak rejects. See Jurado, 813 F.2d at 1411. An examination of Jurado's facts shows why this is so.

Jurado involved a bilingual radio announcer, Valentine Jurado, whose show was in English, with Spanish words and phrases occasionally added. A consultant hired by the station determined that this sprinkling of Spanish hurt the station's ratings because it confused listeners about the station's programming. Accordingly, the station program director asked Jurado to stop using [*302] Spanish in his broadcasts. Jurado refused, the radio station fired him, and he brought suit under Title VII.

No reasonable person would suggest that Title VII requires the operator of an English language radio station to permit a hired broadcaster to broadcast in whole or in part in another language, contrary to the radio station's policies. As the Jurado court recognized, the radio station's limited English-only [*23] rule "was a programming decision motivated by marketing, ratings, and demographic concerns." 813 F.2d at 1410. As such, it easily passed the business justification requirement. See Gutierrez, 838 F.2d at 1041. There is no analogy or comparison that can legitimately be drawn between the situation in Jurado and that in Spun Steak. For example, Spun Steak has never required its employees to speak or even understand English as a condition of employment, and it makes no claim that the ability to speak or understand English is a bona fide occupational qualification (BFOQ). In Jurado, by contrast, the employer would without question have refused to employ a non-English-speaker, or even a person who spoke English with a marked foreign accent; such a job refusals would not have constituted national origin discrimination but simply the implementation of an appropriate job qualification. Cf. Fragante v. City of Honolulu, 888 F.2d 591, 596 (9th Cir. 1989) ("an adverse employment decision may be predicated upon an individual's accent when - but only when - it interferes materially with job performance"). [*24] n11

13 F.3d 296, *302; 1993 U.S. App. LEXIS 33530, **24;
63 Fair Empl. Prac. Cas. (BNA) 1162; 63 Empl. Prac. Dec. (CCH) P42,814

-----Footnotes-----

n11 Similarly, a commentator who supports the reasoning in both Gutierrez and Jurado explains that the right to speak one's native language is:

bounded by the actual requirements of the job and business at issue. In certain situations, it is clearly inappropriate for someone to speak a language other than English in the workplace. . . . [A] bilingual stage actor cast in the role of Hamlet would not have a right to deliver the soliloquy in Spanish. . . . [The actor's use of Spanish] would constitute poor performance, and the employer could properly discipline or discharge a poorly performing employee.

Perea, English-Only Rules and the Right To Speak One's Primary Language in the Workplace, 23 J. L. Ref. 265, 299 (1990).

-----End Footnotes-----

Spun Steak fails to discuss these aspects of Jurado, even though Jurado is clearly the principal Ninth Circuit precedent on English-only rules. By not mentioning that Jurado specifically applies to the adoption of a "business-related English-only rule," 813 F.2d at 1411, [**25] or that it relies on the EEOC Guideline, the Spun Steak majority renders Jurado unrecognizable.

Conclusion.

By failing to take this case en banc, this court disrupts the uniform national application of an important EEOC Guideline, drastically handicaps the agency's ability to adopt other Guidelines, distorts or ignores Ninth Circuit caselaw in a highly sensitive area, and allows two of its judges to substitute their policy views regarding the subject of national-origin discrimination for the EEOC's experienced, reasoned and expert judgment. As a result, we rack up one more judicial defeat for those who most need and deserve the protection of the courts. I therefore respectfully dissent.

The decision of the Court of Appeals is accordingly affirmed in part and reversed in part.

So ordered.

JUSTICE MARSHALL would grant the petition for writ of certiorari because of the conflict among the Circuits and set the cases for plenary consideration.

Syllabus

COUNTY OF WASHINGTON, OREGON, ET AL. v.
GUNTHER ET AL.

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

No. 80-429. Argued March 23, 1981—Decided June 8, 1981

While Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate in his employment practices on the basis of sex, the last sentence of § 703 (h) of Title VII (Bennett Amendment) provides that it shall not be an unlawful employment practice for any employer to differentiate upon the basis of sex in determining the amount of its employees' wages if such differentiation is "authorized" by the Equal Pay Act of 1963. The latter Act, 29 U. S. C. § 206 (d), prohibits employers from discriminating on the basis of sex by paying lower wages to employees of one sex than to employees of the other for performing equal work, "except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." Respondents, women who were employed as guards in the female section of petitioner county's jail until this section was closed, filed suit under Title VII for backpay and other relief, alleging, *inter alia*, that they had been paid lower wages than male guards in the male section of the jail and that part of this differential was attributable to intentional sex discrimination, since the county set the pay scale for female guards, but not for male guards, at a level lower than that warranted by its own survey of outside markets and the worth of the jobs. The District Court rejected this claim, ruling as a matter of law that a sex-based wage discrimination claim cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act. The Court of Appeals reversed.

Held: The Bennett Amendment does not restrict Title VII's prohibition of sex-based wage discrimination to claims for equal pay for "equal work." Rather, claims for sex-based wage discrimination can also be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not exempted under the Equal Pay Act's affirmative defenses as to wage differentials attributable to seniority, merit, quantity or quality of production, or any other factor other than sex. Pp. 167-181.

(a) The language of the Bennett Amendment—barring sex-based wage discrimination claims under Title VII where the pay differential is “authorized” by the Equal Pay Act—suggests an intention to incorporate into Title VII only the affirmative defenses of the Equal Pay Act, not its prohibitory language requiring equal pay for equal work, which language does not “authorize” anything at all. Nor does this construction of the Amendment render it superfluous. Although the first three affirmative defenses are redundant of provisions elsewhere in § 703 (h) of Title VII, the Bennett Amendment guarantees a consistent interpretation of like provisions in both statutes. More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Pp. 168–171.

(b) The Bennett Amendment’s legislative background is fully consistent with this interpretation, and does not support an alternative ruling. Pp. 171–176.

(c) Although some of the earlier interpretations of the Bennett Amendment by the Equal Employment Opportunity Commission may have supported the view that no claim of sex discrimination in compensation may be brought under Title VII except where the Equal Pay Act’s “equal work” standard is met, other Commission interpretations frequently adopted the opposite position. And the Commission, in its capacity as *amicus curiae*, now supports respondents’ position. Pp. 177–178.

(d) Interpretation of the Bennett Amendment as incorporating only the affirmative defenses of the Equal Pay Act draws additional support from the remedial purposes of the statutes, and interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate, must be avoided. Pp. 178–180.

(e) The contention that respondents’ interpretation of the Bennett Amendment places the pay structure of virtually every employer and the entire economy at risk and subject to scrutiny by the federal courts, is inapplicable here: Respondents contend that the county evaluated the worth of their jobs and determined that they should be paid approximately 95% as much as the male officers; that it paid them only about 70% as much, while paying the male officers the full evaluated worth of their jobs; and that the failure of the county to pay respondents the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination. Thus, the suit does not require a court to make its own subjective assessment of the value of the jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates. Pp. 180–181.

602 F. 2d 882 and 623 F. 2d 1303, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and POWELL, JJ., joined, *post*, p. 181.

Lawrence R. Derr argued the cause and filed a brief for petitioners.

Carol A. Hewitt argued the cause and filed a brief for respondents.

Barry Sullivan argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Acting Assistant Attorney General Turner, Deputy Solicitor General Wallace, Walter W. Barnett, Neil H. Cogan, and Leroy D. Clark.**

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is whether § 703 (h) of Title VII of the Civil Rights Act of 1964, 78 Stat. 257, 42 U. S. C. § 2000e–2 (h), restricts Title VII’s prohibition of sex-based wage discrimination to claims of equal pay for equal work.

I

This case arises over the payment by petitioner County of Washington, Ore., of substantially lower wages to female

*Briefs of *amici curiae* urging affirmance were filed by *Bruce J. Ennis, Jr., Isabelle Katz Pinzler, E. Richard Larson, and Joan E. Bertin* for the American Civil Liberties Union et al.; by *Richard B. Sobol, Michael B. Trister, Laurence Gold, J. Albert Woll, Winn Newman, Carole Wilson, John Fillion, Susan Silber, and Catherine Waelder* for the American Federation of Labor and Congress of Industrial Organizations et al.; and by *Norman Redlich, William L. Robinson, Norman J. Chachkin, Beatrice Rosenberg, and Richard T. Seymour* for the Lawyer’s Committee for Civil Rights Under Law et al.

Briefs of *amici curiae* were filed by *Kenneth C. McGuinness, Robert E. Williams, and Douglas S. McDowell* for the Equal Employment Advisory Council et al.; and by *Lawrence Z. Lorber and Robin M. Schachter* for the American Society for Personnel Administration.

guards in the female section of the county jail than it paid to male guards in the male section of the jail.¹ Respondents are four women who were employed to guard female prisoners and to carry out certain other functions in the jail.² In January 1974, the county eliminated the female section of the jail, transferred the female prisoners to the jail of a nearby county, and discharged respondents. 20 FEP Cases 788, 790 (Ore. 1976).

Respondents filed suit against petitioners in Federal District Court under Title VII, 42 U. S. C. § 2000e *et seq.*, seeking backpay and other relief.³ They alleged that they were paid unequal wages for work substantially equal to that performed by male guards, and in the alternative, that part of the pay differential was attributable to intentional sex discrimination.⁴ The latter allegation was based on a claim

¹ Prior to February 1, 1973, the female guards were paid between \$476 and \$606 per month, while the male guards were paid between \$668 and \$853. Effective February 1, 1973, the female guards were paid between \$525 and \$668, while salaries for male guards ranged from \$701 to \$940. 20 FEP Cases 788, 789 (Ore. 1976).

² Oregon requires that female inmates be guarded solely by women, Ore. Rev. Stat. §§ 137.350, 137.360 (1979), and the District Court opinion indicates that women had not been employed to guard male prisoners. 20 FEP Cases, at 789, 792, nn. 8, 9. For purposes of this litigation, respondents concede that gender is a bona fide occupational qualification for some of the female guard positions. See 42 U. S. C. § 2000e-2 (e)(1); *Dothard v. Rawlinson*, 433 U. S. 321 (1977).

³ Respondents could not sue under the Equal Pay Act because the Equal Pay Act did not apply to municipal employees until passage of the Fair Labor Standards Amendments of 1974, 88 Stat. 55, 58-62. Title VII has applied to such employees since passage of the Equal Employment Opportunity Act of 1972, § 2 (1), 86 Stat. 103.

⁴ Respondents also contended that they were discharged and not rehired in retaliation for their demands for equal pay. Respondent Vander Zanden also contended that she was denied medical leave in retaliation for such demands. The District Court rejected those contentions, and the Court of Appeals affirmed. Those claims are not before this Court.

that, because of intentional discrimination, the county set the pay scale for female guards, but not for male guards, at a level lower than that warranted by its own survey of outside markets and the worth of the jobs.

After trial, the District Court found that the male guards supervised more than 10 times as many prisoners per guard as did the female guards, and that the females devoted much of their time to less valuable clerical duties. It therefore held that respondents' jobs were not substantially equal to those of the male guards, and that respondents were thus not entitled to equal pay. 20 FEP Cases, at 791. The Court of Appeals affirmed on that issue, and respondents do not seek review of the ruling.

The District Court also dismissed respondents' claim that the discrepancy in pay between the male and female guards was attributable in part to intentional sex discrimination. It held as a matter of law that a sex-based wage discrimination claim cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act of 1963, 29 U. S. C. § 206 (d).⁵ 20 FEP Cases, at 791. The court therefore permitted no additional evidence on this claim, and made no findings on whether petitioner county's pay scales for female guards resulted from intentional sex discrimination.

The Court of Appeals reversed, holding that persons alleging sex discrimination "are not precluded from suing under Title VII to protest . . . discriminatory compensation practices" merely because their jobs were not equal to higher paying jobs held by members of the opposite sex. 602 F. 2d 882, 891 (CA9 1979), supplemental opinion on denial of rehearing, 623 F. 2d 1303, 1313, 1317 (1980). The court remanded to the District Court with instructions to take evidence on respondents' claim that part of the difference between their rate of pay and that of the male guards is attributable to sex

⁵ See *infra*, at 168.

discrimination. We granted certiorari, 449 U. S. 950 (1980), and now affirm.

We emphasize at the outset the narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of "comparable worth,"⁶ under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.⁷ Rather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted. The narrow question in this case is whether such a claim is precluded by the last sentence of § 703 (h) of Title VII, called the "Bennett Amendment."⁸

⁶ The concept of "comparable worth" has been the subject of much scholarly debate, as to both its elements and its merits as a legal or economic principle. See, e. g., E. Livernash, *Comparable Worth: Issues and Alternatives* (1980); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. Mich. J. L. Ref. 397 (1979); Nelson, Opton, & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J. L. Ref. 231 (1980). The Equal Employment Opportunity Commission has conducted hearings on the question, see BNA Daily Labor Report Nos. 83-85 (Apr. 28-30, 1980), and has commissioned a study of job evaluation systems, see D. Treiman, *Job Evaluation: An Analytic Review* (1979) (interim report).

⁷ Respondents thus distinguish *Lemons v. City and County of Denver*, 620 F. 2d 228 (CA10), cert. denied, 449 U. S. 888 (1980), on the ground that the plaintiffs, nurses employed by a public hospital, sought increased compensation on the basis of a comparison with compensation paid to employees of comparable value—other than nurses—in the community, without direct proof of intentional discrimination.

⁸ We are not called upon in this case to decide whether respondents have stated a prima facie case of sex discrimination under Title VII, cf. *Christensen v. Iowa*, 563 F. 2d 353 (CA8 1977), or to lay down standards for the further conduct of this litigation. The sole issue we decide is whether respondents' failure to satisfy the equal work standard of the Equal Pay Act in itself precludes their proceeding under Title VII.

II

Title VII makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." 42 U. S. C. § 2000e-2 (a). The Bennett Amendment to Title VII, however, provides:

"It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of title 29." 42 U. S. C. § 2000e-2 (h).

To discover what practices are exempted from Title VII's prohibitions by the Bennett Amendment, we must turn to § 206 (d)—the Equal Pay Act—which provides in relevant part:

"No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 77 Stat. 56, 29 U. S. C. § 206 (d)(1).

On its face, the Equal Pay Act contains three restrictions pertinent to this case. First, its coverage is limited to those

factor other than sex"—is implicit in Title VII's general prohibition of sex-based discrimination.

We cannot agree. The Bennett Amendment was offered as a "technical amendment" designed to resolve any potential conflicts between Title VII and the Equal Pay Act. See *infra*, at 173. Thus, with respect to the first three defenses, the Bennett Amendment has the effect of guaranteeing that courts and administrative agencies adopt a consistent interpretation of like provisions in both statutes. Otherwise, they might develop inconsistent bodies of case law interpreting two sets of nearly identical language.

More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. H. R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963). Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."¹¹ Under the Equal

standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production . . . provided that such differences are not the result of an intention to discriminate because of . . . sex . . ." (Emphasis added.)

¹¹ The legislative history of the Equal Pay Act was examined by this Court in *Corning Glass Works v. Brennan*, 417 U. S. 188, 198-201 (1974). The Court observed that earlier versions of the Equal Pay bill were

Pay Act, the courts and administrative agencies are not permitted to "substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell, principal exponent of the Act). Although we do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act, see n. 8, *supra*, we consider it clear that the Bennett Amendment, under this interpretation, is not rendered superfluous.

We therefore conclude that only differentials attributable to the four affirmative defenses of the Equal Pay Act are "authorized" by that Act within the meaning of § 703 (h) of Title VII.

B

The legislative background of the Bennett Amendment is fully consistent with this interpretation.

Title VII was the second bill relating to employment discrimination to be enacted by the 88th Congress. Earlier, the same Congress passed the Equal Pay Act "to remedy what was perceived to be a serious and endemic problem of [sex-based] employment discrimination in private industry," *Corning Glass Works v. Brennan*, 417 U. S. 188, 195 (1974). Any possible inconsistency between the Equal Pay

amended to define equal work and to add the fourth affirmative defense because of a concern that bona fide job-evaluation systems used by American businesses would otherwise be disrupted. *Id.*, at 199-201. This concern is evident in the remarks of many legislators. Representative Griffin, for example, explained that the fourth affirmative defense is a "broad principle," which "makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate this legislation." 109 Cong. Rec. 9203 (1963). See also *id.*, at 9196 (remarks of Rep. Frelinghuysen); *id.*, at 9197-9198 (remarks of Rep. Griffin); *ibid.*, (remarks of Rep. Thompson); *id.*, at 9198 (remarks of Rep. Goodell); *id.*, at 9202 (remarks of Rep. Kelly); *id.*, at 9209 (remarks of Rep. Goodell); *id.*, at 9217 (remarks of Reps. Pucinski and Thompson).

Act and Title VII did not surface until late in the debate over Title VII in the House of Representatives, because, until then, Title VII extended only to discrimination based on race, color, religion, or national origin, see H. R. Rep. No. 914, 88th Cong., 1st Sess., 10 (1963), while the Equal Pay Act applied only to sex discrimination. Just two days before voting on Title VII, the House of Representatives amended the bill to proscribe sex discrimination, but did not discuss the implications of the overlapping jurisdiction of Title VII, as amended, and the Equal Pay Act. See 110 Cong. Rec. 2577-2584 (1964). The Senate took up consideration of the House version of the Civil Rights bill without reference to any committee. Thus, neither House of Congress had the opportunity to undertake formal analysis of the relation between the two statutes.¹²

¹² To answer certain objections raised by Senators concerning the House version of the Civil Rights bill, Senator Clark, principal Senate spokesman for Title VII, drafted a memorandum, printed in the Congressional Record. One such objection and answer concerned the relation between Title VII and the Equal Pay Act:

"Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.

"Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII." 110 Cong. Rec. 7217 (1964).

This memorandum constitutes the only formal discussion of the relation between the statutes prior to consideration of the Bennett Amendment. It need not concern us here, because it relates to Title VII before it was

Several Senators expressed concern that insufficient attention had been paid to possible inconsistencies between the statutes. See *id.*, at 7217 (statement of Sen. Clark); *id.*, at 13647 (statement of Sen. Bennett). In an attempt to rectify the problem, Senator Bennett proposed his amendment. *Id.*, at 13310. The Senate leadership approved the proposal as a "technical amendment" to the Civil Rights bill, and it was taken up on the floor on June 12, 1964, after cloture had been invoked. The Amendment engendered no controversy, and passed without recorded vote. The entire discussion comprised a few short statements:

"Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

"By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.

"The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

"I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [*sic*], I shall ask that the amendment be voted on without asking for the yeas and nays.

amended by the Bennett Amendment. The memorandum obviously has no bearing on the meaning of the terms of the Bennett Amendment itself.

"Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

"Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

"We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

"All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

"Therefore, this amendment is necessary, in the interest of clarification." *Id.*, at 13647.

As this discussion shows, Senator Bennett proposed the Amendment because of a general concern that insufficient attention had been paid to the relation between the Equal Pay Act and Title VII, rather than because of a *specific* potential conflict between the statutes.¹³ His explanation that the Amendment assured that the provisions of the Equal Pay Act "shall not be nullified" in the event of conflict with Title VII may be read as referring to the affirmative defenses of the Act. Indeed, his emphasis on the "technical" nature of the Amendment and his concern for not disrupting the "ef-

¹³ The dissent finds it "obvious" that the "principal way" the Equal Pay Act might have been "nullified" by enactment of Title VII is that the "equal pay for equal work standard" would not apply under Title VII. *Post*, at 193. There is, however, no support for this conclusion in the legislative history: not one Senator or Congressman discussing the Bennett Amendment during the debates over Title VII so much as mentioned the "equal pay for equal work" standard. Rather, Senator Bennett's expressed concern was for preserving the "programs" that had "been established for the effective administration" of the Equal Pay Act. 110 Cong. Rec. 13647 (1964). This suggests that the focus of congressional concern was on administrative interpretation and enforcement procedures, rather than on the "equal work" limitation.

fective administration" of the Equal Pay Act are more compatible with an interpretation of the Amendment as incorporating the Act's affirmative defenses, as administratively interpreted, than as engrafting all the restrictive features of the Equal Pay Act onto Title VII.¹⁴

Senator Dirksen's comment that all that the Bennett Amendment does is to "recognize" the exceptions carried in the Fair Labor Standards Act, suggests that the Bennett Amendment was necessary because of the exceptions to coverage in the Fair Labor Standards Act, which made the Equal Pay Act applicable to a narrower class of employers than was Title VII. See *supra*, at 167-168. The Bennett Amendment clarified that the standards of the Equal Pay Act would govern even those wage discrimination cases where only Title VII would otherwise apply. So understood, Senator Dirksen's remarks are not inconsistent with our interpretation.¹⁵

¹⁴ The argument in the dissent that under our interpretation, the Equal Pay Act would be impliedly repealed and rendered a nullity, *post*, at 193, is mistaken. Not only might the substantive provisions of the Equal Pay Act's affirmative defenses affect the outcome of some Title VII sex-based wage discrimination cases; see *supra*, at 170-171, but the procedural characteristics of the Equal Pay Act also remain significant. For example, the statute of limitations for backpay relief is more generous under the Equal Pay Act than under Title VII, and the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts. Given these advantages, many plaintiffs will prefer to sue under the Equal Pay Act rather than Title VII. See B. Babcock, A. Freedman, E. Norton, & S. Ross, *Sex Discrimination and the Law 507* (1975).

¹⁵ In an exchange during the debate on Title VII, Senator Randolph asked Senator Humphrey whether certain differences in treatment in industrial retirement plans, including earlier retirement options for women, would be permissible. Senator Humphrey responded: "Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it." 110 Cong. Rec. 13663-13664 (1964). Apparently, Senator Humphrey believed that the discriminatory provisions to which Senator Randolph referred were authorized by the Equal Pay Act. His answer does not reveal whether he

Although there was no debate on the Bennett Amendment in the House of Representatives when the Senate version of the Act returned for final approval, Representative Celler explained each of the Senate's amendments immediately prior to the vote. He stated that the Bennett Amendment "[p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex . . ." 110 Cong. Rec. 15896 (1964). If taken literally, this explanation would restrict Title VII's coverage of sex discrimination more severely than even petitioners suggest: not only would it confine *wage discrimination* claims to those actionable under the Equal Pay Act, but it would block *all other sex* discrimination claims as well. We can only conclude that Representative Celler's explanation was not intended to be precise, and does not provide a solution to the present problem.¹⁶

Thus, although the few references by Members of Congress to the Bennett Amendment do not explicitly confirm that its purpose was to incorporate into Title VII the four affirmative defenses of the Equal Pay Act in sex-based wage discrimination cases, they are broadly consistent with such a reading, and do not support an alternative reading.

believed such plans to fall within one of the affirmative defenses of the Act, or whether they simply did not violate the Act.

¹⁶The parties also direct our attention to several comments by Members and Committees of Congress made after passage of Title VII. See 111 Cong. Rec. 13359 (1965) (statement by Senator Bennett that "compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act"); *id.*, at 18263 (statement by Senator Clark criticizing Senator Bennett's attempt to create *post hoc* legislative history and adding his own interpretation); S. Rep. No. 95-331, p. 7 (1977) (stating that the Bennett Amendment authorizes only those practices within the four affirmative defenses of the Equal Pay Act).

We are normally hesitant to attach much weight to comments made after the passage of legislation. See *Teamsters v. United States*, 431 U.S. 324, 354, n. 39 (1977). In view of the contradictory nature of these cited statements, we give them no weight at all.

C

The interpretations of the Bennett Amendment by the agency entrusted with administration of Title VII—the Equal Employment Opportunity Commission—do not provide much guidance in this case. Cf. *Griggs v. Duke Power Co.*, 401 U.S., at 433-434. The Commission's 1965 Guidelines on Discrimination Because of Sex stated that "the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." 29 CFR § 1604.7 (a) (1966). In 1972, the EEOC deleted this portion of the Guideline, see 37 Fed. Reg. 6837 (1972). Although the original Guideline may be read to support petitioners' argument that no claim of sex discrimination in compensation may be brought under Title VII except where the Equal Pay Act's "equal work" standard is met, EEOC practice under this Guideline was considerably less than steadfast.

The restrictive interpretation suggested by the 1965 Guideline was followed in several opinion letters in the following years.¹⁷ During the same period, however, EEOC decisions frequently adopted the opposite position. For example, a reasonable-cause determination issued by the Commission in 1968 stated that "the existence of separate and different wage rate schedules for male employees on the one hand, and female employees on the other doing reasonably comparable work, establishes discriminatory wage rates based solely on the sex of the workers." *Harrington v. Picadilly Cafeteria*, Case No. AU-7-3-173 (Apr. 25, 1968).¹⁸

¹⁷ See General Counsel's opinion of December 29, 1965, App. to Brief for Petitioners 7a; General Counsel's opinion of May 4, 1966, *id.*, at 11a-13a; Commissioner's opinion of July 23, 1966, *id.*, at 16a, BNA Daily Labor Report No. 171, pp. A-3 to A-4 (Sept. 1, 1966); Acting General Counsel's Memorandum of June 6, 1967, App. to Brief for Petitioners 21a-22a.

¹⁸ See also Dec. No. 6-6-5762, CCH EEOC Decisions (1973) ¶ 6001,

The current Guideline does not purport to explain whether the equal work standard of the Equal Pay Act has any application to Title VII, see 29 CFR § 1604.8 (1980), but the EEOC now supports respondents' position in its capacity as *amicus curiae*. In light of this history, we feel no hesitation in adopting what seems to us the most persuasive interpretation of the Amendment, in lieu of that once espoused, but not consistently followed, by the Commission.

D

Our interpretation of the Bennett Amendment draws additional support from the remedial purposes of Title VII and the Equal Pay Act. Section 703 (a) of Title VII makes it unlawful for an employer "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 sex. 42 U.S.C. § 2000e-2 (a) (emphasis added). As Congress itself has indicated, a "broad approach" to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. S. Rep. No. 867, 88th Cong., 2d Sess., 12 (1964). We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.

Under petitioners' reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if

pp. 4008-4009, n. 22 (1968); Dec. No. 71-2629, CCH EEOC Decisions (1973) ¶ 6300, pp. 4538-4539 (1971).

an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation. Similarly, if an employer used a transparently sex-biased system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination. Moreover, to cite an example arising from a recent case, *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), if the employer required its female workers to pay more into its pension program than male workers were required to pay, the only women who could bring a Title VII action under petitioners' interpretation would be those who could establish that a man performed equal work: a female auditor thus might have a cause of action while a female secretary might not. Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII.¹⁹

Moreover, petitioners' interpretation would have other far-reaching consequences. Since it rests on the proposition that any wage differentials not prohibited by the Equal Pay Act are "authorized" by it, petitioners' interpretation would lead to the conclusion that discriminatory compensation by employers not covered by the Fair Labor Standards Act is "authorized"—since not prohibited—by the Equal Pay Act. Thus it would deny Title VII protection against sex-based wage discrimination by those employers not subject to the Fair Labor Standards Act but covered by Title VII. See *supra*, at 167-168. There is no persuasive evidence that Con-

¹⁹ The dissent attempts to minimize the significance of the Title VII remedy in these cases on the ground that the Equal Pay Act already provides an action for sex-based wage discrimination by women who hold jobs not currently held by men. *Post*, at 201-202. But the dissent's position would still leave remediless all victims of discrimination who hold jobs never held by men.

gress intended such a result, and the EEOC has rejected it since at least 1965. See 29 CFR § 1604.7 (1966). Indeed, petitioners themselves apparently acknowledge that Congress intended Title VII's broader coverage to apply to equal pay claims under Title VII, thus impliedly admitting the fallacy in their own argument. Brief for Petitioners 48.

Petitioners' reading is thus flatly inconsistent with our past interpretations of Title VII as "prohibit[ing] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin." *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 763 (1976). As we said in *Los Angeles Dept. of Water & Power v. Manhart, supra*, at 707, n. 13: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." (Emphasis added.) We must therefore reject petitioners' interpretation of the Bennett Amendment.

III

Petitioners argue strenuously that the approach of the Court of Appeals places "the pay structure of virtually every employer and the entire economy . . . at risk and subject to scrutiny by the federal courts." Brief for Petitioners 99-100. They raise the specter that "Title VII plaintiffs could draw any type of comparison imaginable concerning job duties and pay between any job predominantly performed by women and any job predominantly performed by men." *Id.*, at 101. But whatever the merit of petitioners' arguments in other contexts, they are inapplicable here, for claims based on the type of job comparisons petitioners describe are manifestly different from respondents' claim. Respondents contend that the County of Washington evaluated the worth of their jobs; that the county determined that they should be paid approximately 95% as much as the male correctional officers; that it paid them only about 70% as much, while paying the male

officers the full evaluated worth of their jobs; and that the failure of the county to pay respondents the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination. Thus, respondents' suit does not require a court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.²⁰

We do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII. It is sufficient to note that respondents' claims of discriminatory undercompensation are not barred by § 703 (h) of Title VII merely because respondents do not perform work equal to that of male jail guards. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE STEWART, and JUSTICE POWELL join, dissenting.

The Court today holds a plaintiff may state a claim of sex-based wage discrimination under Title VII without even establishing that she has performed "equal or substantially equal work" to that of males as defined in the Equal Pay Act. Because I believe that the legislative history of both the Equal Pay Act of 1963 and Title VII clearly establish that there can be no Title VII claim of sex-based wage discrimination without proof of "equal work," I dissent.

I

Because the Court never comes to grips with petitioners' argument, it is necessary to restate it here. Petitioners argue

²⁰ See Treiman, *supra* n. 6, at 35-36 (interim report to the EEOC); Fisher, Multiple Regression in Legal Proceedings, 80 Colum. L. Rev. 702, 721-725 (1980); Nelson, Opton, & Wilson, *supra* n. 6, at 278-288; Schwab, Job Evaluation and Pay Setting: Concepts and Practices, in Livernash, *supra* n. 6, at 49, 52-70.

that Congress in adopting the Equal Pay Act specifically addressed the problem of sex-based wage discrimination and determined that there should be a remedy for claims of unequal pay for equal work, but not for "comparable" work. Petitioners further observe that nothing in the legislative history of Title VII, enacted just one year later in 1964, reveals an intent to overrule that determination. Quite the contrary, petitioners note that the legislative history of Title VII, including the adoption of the so-called Bennett Amendment, demonstrates Congress' intent to require all sex-based wage discrimination claims, whether brought under the Equal Pay Act or under Title VII, to satisfy the "equal work" standard. Because respondents have not satisfied the "equal work" standard, petitioners conclude that they have not stated a claim under Title VII.

In rejecting that argument, the Court ignores traditional canons of statutory construction and relevant legislative history. Although I had thought it well settled that the legislative history of a statute is a useful guide to the intent of Congress, the Court today claims that the legislative history "has no bearing on the meaning of the [Act]," *ante*, at 173, n. 12, "does not provide a solution to the present problem," *ante*, at 176, and is simply of "no weight." *Ante*, at 176, n. 16. Instead, the Court rests its decision on its unshakable belief that any other result would be unsound public policy. It insists that there simply *must* be a remedy for wage discrimination *beyond* that provided in the Equal Pay Act. The Court does not explain *why* that must be so, nor does it explain *what* that remedy might be. And, of course, the Court cannot explain why it and not Congress is charged with determining what is and what is not sound public policy.

The closest the Court can come in giving a reason for its decision is its belief that interpretations of Title VII which "deprive victims of discrimination of a remedy, without clear congressional mandate" must be avoided. *Ante*, at 178. But that analysis turns traditional canons of statutory construc-

tion on their head. It has long been the rule that when a legislature enacts a statute to protect a class of persons, the burden is on the plaintiff to show statutory coverage, not on the defendant to show that there is a "clear congressional mandate" for *excluding* the plaintiff from coverage. Such a departure from traditional rules is particularly unwarranted in this case, where the doctrine of *in pari materia* suggests that all claims of sex-based wage discrimination are governed by the substantive standards of the previously enacted and more specific legislation, the Equal Pay Act.

Because the decision does not rest on any reasoned statement of logic or principle, it provides little guidance to employers or lower courts as to what types of compensation practices might now violate Title VII. The Court correctly emphasizes that its decision is narrow, and indeed one searches the Court's opinion in vain for a hint as to what pleadings or proof other than that adduced in this particular case, see *ante*, at 180-181, would be sufficient to state a claim of sex-based wage discrimination under Title VII. To paraphrase Justice Jackson, the Court today does not and apparently cannot enunciate any legal criteria by which suits under Title VII will be adjudicated and it lays "down no rule other than our passing impression to guide ourselves or our successors." *Bob-Lo Excursion Co. v. Michigan*, 333 U. S. 28, 45 (1948). All we know is that Title VII provides a remedy when, as here, plaintiffs seek to show by *direct* evidence that their employer *intentionally* depressed their wages. And, for reasons that go largely unexplained, we also know that a Title VII remedy may not be available to plaintiffs who allege theories different than that alleged here, such as the so-called "comparable worth" theory. One has the sense that the decision today will be treated like a restricted railroad ticket, "good for this day and train only." *Smith v. Allwright*, 321 U. S. 649, 669 (1944) (Roberts, J., dissenting).

In the end, however, the flaw with today's decision is not so much that it is so narrowly written as to be virtually

meaningless, but rather that its legal analysis is wrong. The Court is obviously more interested in the consequences of its decision than in discerning the intention of Congress. In reaching its desired result, the Court conveniently and persistently ignores relevant legislative history and instead relies wholly on what it believes Congress *should* have enacted.

II

The Equal Pay Act

The starting point for any discussion of sex-based wage discrimination claims must be the Equal Pay Act of 1963, enacted as an amendment to the Fair Labor Standards Act of 1938, 29 U. S. C. §§ 201-219 (1976 ed., Supp. III). It was there that Congress, after 18 months of careful and exhaustive study, specifically addressed the problem of sex-based wage discrimination. The Equal Pay Act states that employers shall not discriminate on the basis of sex by paying different wages for jobs that require equal skill, effort, and responsibility. In adopting the "equal pay for equal work" formula, Congress carefully considered and ultimately rejected the "equal pay for comparable worth" standard advanced by respondents and several *amici*. As the legislative history of the Equal Pay Act amply demonstrates, Congress realized that the adoption of the comparable-worth doctrine would ignore the economic realities of supply and demand and would involve both governmental agencies and courts in the impossible task of ascertaining the worth of comparable work, an area in which they have little expertise.

The legislative history of the Equal Pay Act begins in 1962 when Representatives Green and Zelenko introduced two identical bills, H. R. 8898 and H. R. 10226 respectively, representing the Kennedy administration's proposal for equal pay legislation. Both bills stated in pertinent part:

"SEC. 4. No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to

any employee at a rate less than the rate at which he pays wages to any employee of the opposite sex for work of comparable character on jobs the performance of which requires comparable skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." H. R. 8898, 87th Cong., 1st Sess. (1961); H. R. 10226, 87th Cong., 2d Sess. (1962) (emphasis supplied).¹

During the extensive hearings on the proposal, the administration strenuously urged that Congress adopt the "comparable" language, noting that the comparability of different jobs could be determined through job evaluation procedures. Hearings on H. R. 8898, H. R. 10226 before the Select Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess., 16, 27 (1962) (testimony of Secretary of Labor Arthur Goldberg and Assistant Secretary of Labor Esther Peterson). A bill containing the comparable-work formula, then denominated H. R. 11677, was reported out of the House Committee on Education and Labor and reached the full House. Once there, Representative St. George objected to the "comparable work" language of the bill and offered an amendment which limited equal pay claims to those "for equal work on jobs, the performance of which requires equal skills." 108 Cong. Rec. 14767 (1962). As she explained, her purpose was to limit wage discrimination claims

¹ Comparable work was not a new idea. During World War II the regulations of the National War Labor Board (NWLB) required equal pay for "comparable work." Under these regulations, the Board made job evaluations to determine whether pay inequities existed within a plant between dissimilar jobs. See *General Electric Co.*, 28 War Lab. Rep. 666 (1945). As a result, in every Congress since 1945, bills had been introduced mandating equal pay for "comparable work." In substituting the term "equal work" for "comparable work," Congress clearly rejected the approach taken by the NWLB.

to the situation where men and women were paid differently for performing the same job.

"What we want to do in this bill is to make it exactly what it says. It is called equal pay for equal work in some of the committee hearings. *There is a great difference between the word 'comparable' and the word 'equal.'*

"The word 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes." *Ibid.* (Emphasis supplied.)

Representative Landrum echoed those remarks. He stressed that the St. George amendment would prevent "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States." *Id.*, at 14768. The administration, represented by Representatives Zelenko and Green, vigorously urged the House to reject the St. George amendment. They observed that the "equal work" standard was narrower than the existing "equal pay for comparable work" language and cited correspondence from Secretary of Labor Goldberg that "comparable is a key word in our proposal." *Id.*, at 14768-14769. The House, however, rejected that advice and adopted the St. George amendment. When the Senate considered the bill, it too rejected the "comparable work" theory in favor of the "equal work" standard.

Because the Conference Committee failed to report a bill out of Committee, enactment of equal pay legislation was delayed until 1963. Equal pay legislation, containing the St. George amendment, was reintroduced at the beginning of the session. The congressional debate on that legislation leaves no doubt that Congress clearly rejected the entire notion of "comparable worth." For example, Representative

Goodell, a cosponsor of the Act, stressed the significance of the change from "comparable work" to "equal work."²

"I think it is important that we have clear legislative history at this point. *Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, that they would be very much alike or closely related to each other.*

"We do not expect the Labor Department to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so that they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal." 109 Cong. Rec. 9197 (1963) (emphasis supplied).

Representative Frelinghuysen agreed with those remarks.

"[W]e can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek to insure, where men and women are doing the same job under the same working conditions[,] that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses.

"... [The EPA] is not intended to compare unrelated jobs, or jobs that have been historically and normally considered by the industry to be different." *Id.*, at 9196 (emphasis supplied).³

² Statements made by the sponsors of legislation "deserv[e] to be accorded substantial weight in interpreting the statute." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951).

³ Representative Goodell rejected any type of wage comparisons between

Thus, the legislative history of the Equal Pay Act clearly reveals that Congress was unwilling to give either the Federal Government or the courts broad authority to determine comparable wage rates. Congress recognized that the adoption of such a theory would ignore economic realities and would result in major restructuring of the American economy. Instead, Congress concluded that governmental intervention to equalize wage differentials was to be undertaken only within one circumstance: when men's and women's jobs were identical or nearly so, hence unarguably of equal worth. It defies common sense to believe that the same Congress—which, after 18 months of hearings and debates, had decided in 1963 upon the extent of federal involvement it desired in the area of wage rate claims—intended *sub silentio* to reject all of this work and to abandon the limitations of the equal work approach just one year later, when it enacted Title VII.

Title VII

Congress enacted the Civil Rights Act of 1964, 42 U. S. C. § 2000a *et seq.*, one year after passing the Equal Pay Act. Title VII prohibits discrimination in employment on the basis of race, color, national origin, religion, and sex. 42 U. S. C. § 2000e-2 (a)(1). The question is whether Congress intended to completely turn its back on the "equal work" standard enacted in the Equal Pay Act of 1963 when it adopted Title VII only one year later.

men and women as the basis for relief. He stated: "We do not have in mind the Secretary of Labor's going into an establishment and saying, 'Look you are paying the women here \$1.75 and the men \$2.10. Come on in here, Mr. Employer, and you prove that you are not discriminating on the basis of sex.' That would be just the opposite of what we are doing." 109 Cong. Rec. 9208 (1963). Similarly, Representative Griffin noted that the "equal work" standard meant that the jobs of inspector and assembler could not be compared, nor could inspectors who inspect complicated parts be compared to inspectors making simple cursory inspections. *Id.*, at 9197. Representative Thompson, one of the original sponsors of the equal pay legislation, agreed with Representative Griffin's examples. *Id.*, at 9198.

The Court answers that question in the affirmative, concluding that Title VII must be read more broadly than the Equal Pay Act. In so holding, the majority wholly ignores this Court's repeated adherence to the doctrine of *in pari materia*, namely, that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Radzanower v. Touche Ross & Co.*, 426 U. S. 148, 153 (1976), citing *Morton v. Mancari*, 417 U. S. 535, 550-551 (1974); *United States v. United Continental Tuna Corp.*, 425 U. S. 164, 169 (1976). In *Continental Tuna*, for example, the lower court held that an amendment to the Suits in Admiralty Act allowed plaintiffs to sue the United States under that Act and ignore the applicable and more stringent provisions of the previously enacted Public Vessels Act. We rejected that construction because it amounted to a repeal of the Public Vessels Act by implication. We recognized that such an evasion of the congressional purpose reflected in the restrictive provisions would not be permitted absent some clear statement by Congress that such was intended by the later statute. Similarly, in *Train v. Colorado Public Interest Research Group*, 426 U. S. 1 (1976), this Court rejected a construction of the Federal Water Control Act which would have substantially altered the regulation scheme established under the Atomic Energy Act, without a "clear indication of legislative intent." *Id.*, at 24.

When those principles are applied to this case, there can be no doubt that the Equal Pay Act and Title VII should be construed *in pari materia*. The Equal Pay Act is the more specific piece of legislation, dealing solely with sex-based wage discrimination, and was the product of exhaustive congressional study. Title VII, by contrast, is a general antidiscrimination provision, passed with virtually no consideration of the specific problem of sex-based wage discrimination. See *General Electric Co. v. Gilbert*, 429 U. S. 25, 143 (1976) (the legislative history of the sex discrimination amendment

is "notable primarily for its brevity").⁴ Most significantly, there is absolutely nothing in the legislative history of Title VII which reveals an intent by Congress to repeal by implication the provisions of the Equal Pay Act. Quite the contrary, what little legislative history there is on the subject—such as the comments of Senators Clark and Bennett and Representative Celler, and the contemporaneous interpretation of the EEOC—indicates that Congress intended to incorporate the substantive standards of the Equal Pay Act into Title VII so that sex-based wage discrimination claims would be governed by the equal work standard of the Equal Pay Act and by that standard alone. See discussion *infra*, at 190–197.

In order to reach the result it so desperately desires, the Court neatly solves the problem of this contrary legislative history by simply giving it "no weight." *Ante*, at 172, n. 12, 176, and n. 16. But it cannot be doubted that Chief Justice Marshall stated the correct rule: that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . ." *United States v. Fisher*, 2 Cranch 358, 386 (1805). In this case, when all of the pieces of legislative history are considered *in toto*, the Court's version of the legislative history of Title VII is barely plausible, say nothing of convincing.

Title VII was first considered by the House, where the prohibition against sex discrimination was added on the House floor. When the bill reached the Senate it bypassed the

⁴ Indeed, Title VII was originally intended to protect the rights of Negroes. On the final day of consideration by the entire House, Representative Smith added an amendment to prohibit sex discrimination. It has been speculated that the amendment was added as an attempt to thwart passage of Title VII. The amendment was passed by the House that same day, and the entire bill was approved two days later and sent to the Senate without any consideration of the effect of the amendment on the Equal Pay Act. The attenuated history of the sex amendment to Title VII makes it difficult to believe that Congress thereby intended to wholly abandon the carefully crafted equal work standard of the Equal Pay Act.

Senate Committee system and was presented directly to the full Senate. It was there that concern was expressed about the relation of the Title VII sex discrimination ban to the Equal Pay Act. In response to questions by Senator Dirksen, Senator Clark, the floor manager for the bill, prepared a memorandum in which he attempted to put to rest certain objections which he believed to be unfounded. Senator Clark's answer to Senator Dirksen reveals that Senator Clark believed that all cases of wage discrimination under Title VII would be treated under the standards of the Equal Pay Act:

"Objection. The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. *They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.*

"Answer. The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.*" 110 Cong. Rec. 7217 (1964) (emphasis added).

In this passage, Senator Clark asserted that the sex discrimination provisions of Title VII were necessary, notwithstanding the Equal Pay Act, because (a) the Equal Pay Act had numerous exemptions for various types of businesses, and (b) Title VII covered discrimination in access (*e. g.*, assignment and promotion) to jobs, not just compensation. In addition, Senator Clark made clear that in the compensation area the equal work standard would continue to be the ap-

plicable standard. He explained, in answer to Senator Dirksen's concern, that when *different jobs* were at issue, the Equal Pay Act's legal standard—the “equal work” standard—would apply to limit the reach of Title VII. Thus Senator Clark rejected as unfounded the objections that the sex provisions of Title VII were unnecessary on the one hand or extended beyond the equal work standard on the other.

Notwithstanding Senator Clark's explanation, Senator Bennett remained concerned that, absent an explicit cross-reference to the Equal Pay Act, the “wholesale insertion” of the word “sex” in Title VII could nullify the carefully conceived Equal Pay Act standard. 110 Cong. Rec. 13647 (1964). Accordingly, he offered, and the Senate accepted, the following amendment to Title VII:

“It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [§ 6 (d) of the Equal Pay Act].”

Although the language of the Bennett Amendment is ambiguous, the most plausible interpretation of the Amendment is that it incorporates the substantive standard of the Equal Pay Act—the equal pay for equal work standard—into Title VII. A number of considerations support that view. In the first place, that interpretation is wholly consistent with, and in fact confirms, Senator Clark's earlier explanation of Title VII. Second, in the limited time available to Senator Bennett when he offered his amendment—the time for debate having been limited by cloture—he explained the Amendment's purpose.⁵

“Mr. President, after many years of yearning by mem-

⁵ The Court makes far too much of the fact that Senator Bennett's Amendment was designated a “technical amendment.” It is apparently

bers of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

“By this time, programs have been established for the effective administration of this act. Now when the civil rights bill is under consideration, in which the word ‘sex’ has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word ‘sex’ in the bill and in the Equal Pay Act.

“*The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.*” 110 Cong. Rec. 13647 (1964) (emphasis supplied).

It is obvious that the principal way in which the Equal Pay Act could be “nullified” would be to allow plaintiffs unable to meet the “equal pay for equal work” standard to proceed under Title VII asserting some other theory of wage discrimination, such as “comparable worth.” If plaintiffs can proceed under Title VII without showing that they satisfy the “equal work” criterion of the Equal Pay Act, one would expect all plaintiffs to file suit under the “broader” Title VII standard. Such a result would, for all practical purposes, constitute an implied repeal of the equal work standard of the Equal Pay Act and render that Act a nullity. This was precisely the result Congress sought to avert when it adopted the Bennett Amendment, and the result the Court today embraces.

the Court's belief that a “technical amendment” is an insignificant one. The Amendment, however, was so designated simply because (1) the Amendment confirmed the general intention of the Senate evinced by Senator Clark's earlier explanation of Title VII, and (2) the time for debate had been limited by the invocation of cloture, leaving a “technical amendment” as the most expeditious way of introducing an amendment. Senator Bennett later explained all of this. 111 Cong. Rec. 13359 (1965).

Senator Bennett confirmed this interpretation just one year later. The Senator expressed concern as to the proper interpretation of his Amendment and offered his written understanding of the Amendment.

"The Amendment therefore means that it is not an unlawful employment practice: . . . (b) to have different standards of compensation for nonexempt employees, where such differentiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.

"Simply stated, *the [Bennett] amendment means that discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act.*" 111 Cong. Rec. 13359 (1965) (emphasis supplied).

Senator Dirksen agreed that this interpretation was "precisely" the one that he, Senator Humphrey, and their staffs had in mind when the Senate adopted the Bennett Amendment. *Id.*, at 13360. He added: "I trust that that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted." *Ibid.*⁹

⁹ There is undoubtedly some danger in relying on subsequent legislative history. But that does not mean that such subsequent legislative history is wholly irrelevant, particularly where, as here, the sponsor of the legislation makes a clarifying statement which is not inconsistent with the prior ambiguous legislative history. See *Galvan v. Press*, 347 U. S. 522, 526-527 (1954). (Court relied on a 1951 memorandum by Senator McCarran in interpreting the meaning of a 1950 statute he sponsored).

The Court suggests Senator Bennett's 1965 comments should be discounted because Senator Clark criticized them. *Ante*, at 176, n. 16. Senator Clark did indeed criticize Senator Bennett, but only because Senator Clark read Senator Bennett's explanation as suggesting that Title VII protection would not be available to those employees not within the Equal Pay Act's coverage. Senator Clark's view was that employees not covered by the Equal Pay Act could still bring Title VII claims. He did not dispute, however, the proposition that the "equal work" standard of the Equal Pay Act was incorporated into Title VII claims. Quite the con-

We can glean further insight into the proper interpretation of the Bennett Amendment from the comments of Representative Celler, the Chairman of the House Judiciary Committee and sponsor of Title VII. After the Senate added the Bennett Amendment to Title VII and sent the bill to the House, Representative Celler set out in the record the understanding of the House that sex-based compensation claims would not satisfy Title VII unless they met the equal work standards of the Equal Pay Act. He explained that the Bennett Amendment "[p]rovides that compliance with the [EPA] satisfies the requirement of the title barring discrimination because of sex—[§ 703 (h)]." 110 Cong. Rec. 15896 (1964). The majority discounts this statement because it is somewhat "imprecise." *Ante*, at 176. I find it difficult to believe that a comment to the full House made by the sponsor of Title VII, who obviously understood its provisions, including its amendments, is of no aid whatsoever to the inquiry before us.⁷

Finally, the contemporaneous interpretations of the Bennett Amendment by the EEOC, which are entitled to great

weight, Senator Clark placed into the record a letter from the Chairman of the National Committee for Equal Pay which stated:

"Our best understanding of the implications of the [Bennett Amendment] at the time it was adopted was that its intent and effect was to make sure that equal pay would be applied and interpreted under the Civil Rights Act in the same way as under the earlier statute, the Equal Pay Act. *That is, the Equal Pay Act standards requiring equal work . . . would also be applied under the Civil Rights Act.*" 111 Cong. Rec. 18263 (1965) (emphasis supplied).

Senator Clark then commended to the EEOC the reasoning set forth in the letter. *Ibid.*

⁷ In light of the foregoing, the Court's statement that no Senator or Congressman mentioned the "equal work" standard is mystifying. *Ante*, at 174, n. 13. Senator Clark, for example, discussed it twice. See *supra*, at 191-192; n. 6, *supra*. Indeed, it is the Court's theory—that only the affirmative defenses are incorporated into Title VII—that is not "so much as mentioned" by any "Senator or Congressman." See *infra*, at 198-199.

weight since they were issued while the intent of Congress was still fresh in the administrator's mind, further buttresses petitioners' interpretation of the Amendment. *Udall v. Tallman*, 380 U. S. 1, 16 (1965); *General Electric Co. v. Gilbert*, 429 U. S., at 142. The EEOC interpretations clearly state that the Equal Pay Act's equal work standard is incorporated into Title VII as the standard which must be met by plaintiffs alleging sex-based compensation claims under Title VII. The Commission's 1965 Guidelines on Discrimination Because of Sex explain:

"Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6 (d) of the Fair Labor Standards Act of 1938, 29 U. S. C. § 206 (d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703 (h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibitions in section 703, and is not limited by § 703 (h) to those employees covered by the Fair Labor Standards Act." 29 CFR § 1604.7 (1966). (Emphasis supplied.)

Three weeks after the EEOC issued its Guidelines, the General Counsel explained the Guidelines in an official opinion letter.⁸ He explained:

"The Commission, as indicated in § 1604.7 of the

⁸ Other opinion letters issued by the EEOC General Counsel during the 1960's confirmed that Title VII would not be violated unless equal work was performed. The General Counsel's opinion of May 4, 1966, explains:

"It follows that an employer covered by Title VII may not pay a male less than the California minimum wage while paying the statutory rate

Guidelines issued November 24, 1965, 30 F. R. 14928, has decided that section 703 (h), Title VII of the Civil Rights Act of 1964 incorporates the definition of discrimination in compensation found in the Equal Pay Act, including the four enumerated exceptions. . . . General Counsel's opinion of December 29, 1965, App. to Brief for Petitioners 7a. (Emphasis supplied.)

Thus EEOC's contemporaneous interpretation of the Bennett Amendment leaves no room for doubt: The Bennett Amendment incorporates the equal work standard of discrimination into Title VII.⁹

to a woman for the same job. . . . [W]hatever the general rule may be under Title VII, the Bennett Amendment compels us to apply the same test for differences in compensation based on sex. 29 CFR 1604.7." App. to Brief for Petitioners 11a-13a.

The General Counsel's opinion of February 28, 1966, stresses that "where an employer pays a certain wage to employees of one sex in order to comply with such a law, he must also pay the same rate to employees of the opposite sex for equal work [under Title VII]." *Id.*, at 9a-10a. The Commissioner's opinion of July 23, 1966, states that "[a]ssuming that male and female laborers perform the same functions . . . a wage differential would violate [Title VII]." *Id.*, at 16a.

And the Acting General Counsel's Memorandum of June 6, 1967, made clear that the Equal Pay Act's equal work standard, *i. e.*, equal skill, effort, responsibility, and working conditions, as well as the Equal Pay Act's affirmative defenses, *i. e.*, seniority systems, merit systems, etc., were incorporated by the phrase "authorize" in the Bennett Amendment. As he interpreted the word "authorize":

"Differentiations which are authorized under said section [703 (h)] are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.

"It is the interpretation of these provisions that requires harmonization between Title VII and the Equal Pay [Act] because these are the provisions which, within the meaning of § 70[3] (h), 'authorize' differentiations." *Id.*, at 21a-22a. (Emphasis supplied.)

⁹ The EEOC has since changed its mind as to the relationship between Title VII and the Equal Pay Act. But this Court has recognized that

The Court blithely ignores all of this legislative history and chooses to interpret the Bennett Amendment as incorporating only the Equal Pay Act's four affirmative defenses, and not the equal work requirement.¹⁰ That argument does not survive scrutiny. In the first place, the language of the Amendment draws no distinction between the Equal Pay Act's standard for liability—equal pay for equal work—and the Act's defenses. Nor does any Senator or Congressman

"an EEOC guideline is not entitled to great weight where . . . it varies from prior EEOC policy and no new legislative history has been introduced in support of the change". *Trans World Airlines, Inc. v. Hudson*, 432 U. S. 63, 76, n. 11 (1977). See *General Electric Co. v. Gilbert*, 429 U. S. 125, 142 (1976) (Court discounted weight to be given to the 1972 Title VII regulations addressing pregnancy benefits because they were inconsistent with the 1965 regulations).

¹⁰In reaching this conclusion, the Court relies far too heavily on a definition of the word "authorize." Rather than "make a fortress out of the dictionary," *Cabell v. Markham*, 148 F. 2d 737, 739 (CA2), aff'd, 326 U. S. 404 (1945), the Court should instead attempt to implement the legislative intent of Congress. Even if dictionary definitions were to be our guide, the word "authorized" has been defined to mean exactly what petitioners contend. *Black's Law Dictionary* 169 (4th ed. 1968) defines "authorized" to mean "[t]o permit a thing to be done in the future." Accordingly, the language of the Bennett Amendment suggests that those differentiations which are authorized under the Equal Pay Act—and thus Title VII—are those based on "skill, effort, responsibility and working conditions" and those related to the four affirmative defenses. See n. 7, *supra*.

Respondents also rely on Senator Dirksen's brief reference to "exceptions to the basic Act . . ." That statement is highly ambiguous and is too thin a reed to support their conclusion that Congress intended to incorporate only the Equal Pay Act's affirmative defenses. First, as even the Court concedes, *ante*, at 175, the reference to the "exceptions" probably refers to the exemptions from coverage of the Fair Labor Standards Act, not to the Equal Pay Act's four defenses. Second, it was Senator Dirksen who first raised the objection, answered by Senator Clark, that Title VII would reject the equal work requirement. And third, in 1965 Senator Dirksen explicitly agreed with Senator Bennett's interpretation of the Amendment. See *supra*, at 194. It thus is highly unlikely that Senator Dirksen would have been interested in preserving either the exceptions or the affirmative defenses, but not the "equal work" standard.

even come close to suggesting that the Amendment incorporates the Equal Pay Act's affirmative defenses into Title VII, but not the equal work standard itself. Quite the contrary, the concern was that Title VII would render the Equal Pay Act a nullity. It is only too obvious that reading just the four affirmative defenses of the Equal Pay Act into Title VII does not protect the careful draftsmanship of the Equal Pay Act. We must examine statutory words in a manner that "reconstitute[s] the gamut of values current at the time when the words were uttered." *National Woodwork Manufacturers Assn. v. NLRB*, 386 U. S. 612, 620 (1967) (quoting L. Hand, J.). In this case, it stands Congress' concern on its head to suppose that Congress sought to incorporate the affirmative defenses, but not the equal work standard. It would be surprising if Congress in 1964 sought to reverse its decision in 1963 to require a showing of "equal work" as a predicate to an equal pay claim and at the same time carefully preserve the four affirmative defenses.

Moreover, even on its own terms the Court's argument is unpersuasive. The Equal Pay Act contains four statutory defenses: different compensation is permissible if the differential is made by way of (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) is based on any other factor other than sex. 29 U. S. C. § 206 (d)(1). The flaw in interpreting the Bennett Amendment as incorporating only the four defenses of the Equal Pay Act into Title VII is that Title VII, even without the Bennett Amendment, contains those very same defenses.¹¹ The opening sentence of

¹¹Under the Court's analysis, § 703 (h) consists of two redundant sentences:

"[1] Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations . . . [2] [The Bennett Amendment] It shall not be an unlawful employment

§ 703 (h) protects differentials and compensation based on seniority, merit, or quantity or quality of production. These are three of the four EPA defenses. The fourth EPA defense, "a factor other than sex," is already implicit in Title VII because the statute's prohibition of sex discrimination applies only if there is discrimination on the basis of sex. Under the Court's interpretation, the Bennett Amendment, the second sentence of § 703 (h), is mere surplusage. *United States v. Menasche*, 348 U. S. 528, 538-539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' *Montclair v. Ramsdell*, 107 U. S. 147, 152, rather than emasculate an entire section").¹² The Court's answer to this argument is curious. It suggests that repetition ensures that the provisions would be consistently interpreted by the courts. *Ante*, at 170. But that answer only speaks to the purpose for incorporating the defenses in each statute, not for stating the defenses twice in the same statute. Courts are not quite as dense as the majority assumes.

In sum, Title VII and the Equal Pay Act, read together, provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assures that men and women performing the same work will be paid equally. Congress intended to remedy wage discrimination through the Equal Pay Act standards, whether suit is brought under that statute or under Title

practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . [except pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex]."

¹² In 1965, Senator Bennett himself made this point. He stressed that "[the language setting out the defenses] is merely clarifying language similar to that which was already in section 703 (h). If the Bennett amendment was simply intended to incorporate by reference these exceptions into subsection (h), the amendment would have no substantive effect." 111 Cong. Rec. 13359 (1965).

VII. What emerges is that Title VII would have been construed *in pari materia* even without the Bennett Amendment, and that the Amendment serves simply to insure that the equal work standard would be the standard by which all wage compensation claims would be judged.

III

Perhaps recognizing that there is virtually no support for its position in the legislative history, the Court rests its holding on its belief that any other holding would be unacceptable public policy. *Ante*, at 178-180. It argues that there must be a remedy for wage discrimination beyond that provided for in the Equal Pay Act. Quite apart from the fact that that is an issue properly left to Congress and not the Court, the Court is wrong even as a policy matter. The Court's parade of horrors that would occur absent a distinct Title VII remedy simply does not support the result it reaches.

First, the Court contends that a separate Title VII remedy is necessary to remedy the situation where an employer admits to a female worker, hired for a unique position, that her compensation would have been higher had she been male. *Ante*, at 178-179. Stated differently, the Court insists that an employer could isolate a predominantly female job category and arbitrarily cut its wages because no men currently perform equal or substantially equal work. But a Title VII remedy is unnecessary in these cases because an Equal Pay Act remedy is available. Under the Equal Pay Act, it is not necessary that every Equal Pay Act violation be established through proof that members of the opposite sex are *currently* performing equal work for greater pay. However unlikely such an admission might be in the bullpen of litigation, an employer's statement that "if my female employees performing a particular job were males, I would pay them more simply because they are males" would be admissible in a suit under that Act. Overt discrimination does not go unremedied by the Equal Pay Act. See *Bourque v. Powell Elec-*

trical Manufacturing Co., 617 F. 2d 61 (CA5 1980); *Peltier v. City of Fargo*, 533 F. 2d 374 (CA8 1976); *International Union of Electrical Workers v. Westinghouse Electric Corp.*, 631 F. 2d 1094, 1108, n. 2 (CA3 1980) (Van Dusen, J., dissenting). In addition, insofar as hiring or placement discrimination caused the isolated job category, Title VII already provides numerous remedies (such as backpay, transfer, and constructive seniority) without resort to job comparisons. In short, if women are limited to low paying jobs against their will, they have adequate remedies under Title VII for denial of job opportunities even under what I believe is the correct construction of the Bennett Amendment.

The Court next contends that absent a Title VII remedy, women who work for employers exempted from coverage of the Equal Pay Act would be wholly without a remedy for wage discrimination. *Ante*, at 179-180. The Court misapprehends petitioners' argument. As Senator Clark explained in his memorandum, see *supra*, at 191-192, Congress sought to incorporate into Title VII the substantive standard of the Equal Pay Act—the “equal work” standard—not the employee coverage provisions. See *supra*, at 194-195, n. 6. Thus, to say that the “equal pay for equal work” standard is incorporated into Title VII does not mean that employees are precluded from bringing compensation discrimination claims under Title VII. It means only that if employees choose to proceed under Title VII, they must show that they have been deprived of “equal pay for equal work.”

There is of course a situation in which petitioners' position would deny women a remedy for claims of sex-based wage discrimination. A remedy would not be available where a lower paying job held primarily by women is “comparable,” but not substantially equal to, a higher paying job performed by men. That is, plaintiffs would be foreclosed from showing that they received unequal pay for work of “comparable worth” or that dissimilar jobs are of “equal worth.” The short, and best, answer to that contention is that Congress

in 1963 explicitly chose not to provide a remedy in such cases. And contrary to the suggestion of the Court, it is by no means clear that Title VII was enacted to remedy all forms of alleged discrimination. We recently emphasized for example, that “Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that ‘management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible.’” *Steelworkers v. Weber*, 443 U.S. 193, 206 (1979). See *Mohasco Corp. v. Silver*, 447 U.S. 807, 820 (1980) (a 90-day statute of limitations may have “represented a necessary sacrifice of the rights of some victims of discrimination in order that a civil rights bill could be enacted”); Congress balanced the need for a remedy for wage discrimination against its desire to avoid the burdens associated with governmental intervention into wage structures. The Equal Pay Act’s “equal pay for equal work” formula reflects the outcome of this legislative balancing. In construing Title VII, therefore, the courts cannot be indifferent to this sort of political compromise.

IV

Even though today’s opinion reaches what I believe to be the wrong result, its narrow holding is, perhaps its saving feature. The opinion does not endorse the so-called “comparable worth” theory: though the Court does not indicate how a plaintiff might establish a prima facie case under Title VII, the Court does suggest that allegations of unequal pay for unequal, but comparable, work will not state a claim on which relief may be granted. The Court, for example, repeatedly emphasizes that this is not a case where plaintiffs ask the court to compare the value of dissimilar jobs or to quantify the effect of sex discrimination on wage rates. *Ante*, at 166, 180-181. Indeed, the Court relates, without criticism, respondents’ contention that *Lemons v. City and County of*

Denver, 620 F. 2d 228 (CA10), cert. denied, 449 U. S. 888 (1980), is distinguishable. *Ante*, at 166, n. 7. There the court found that Title VII did not provide a remedy to nurses who sought increased compensation based on a comparison of their jobs to dissimilar jobs of "comparable" value in the community. See also *Christensen v. Iowa*, 563 F. 2d 353 (CA8 1977) (no prima facie case under Title VII when plaintiffs, women clerical employees of a university, sought to compare their wages to the employees in the physical plant).

Given that implied repeals of legislation are disfavored, *TVA v. Hill*, 437 U. S. 153, 189 (1978), we should not be surprised that the Court disassociates itself from the entire notion of "comparable worth." In enacting the Equal Pay Act in 1963, Congress specifically prohibited the courts from comparing the wage rates of dissimilar jobs: there can only be a comparison of wage rates where jobs are "equal or substantially equal." Because the legislative history of Title VII does not reveal an intent to overrule that determination, the courts should strive to harmonize the intent of Congress in enacting the Equal Pay Act with its intent in enacting Title VII. Where, as here, the policy of prior legislation is clearly expressed, the Court should not "transfuse the successor statute with a gloss of its own choosing." *De Sylva v. Ballentine*, 351 U. S. 570, 579 (1956).

Because there are no logical underpinnings to the Court's opinion, all we may conclude is that even absent a showing of equal work, there is a cause of action under Title VII where there is direct evidence that an employer has *intentionally* depressed a woman's salary because she is a woman. The decision today does not approve a cause of action based on a *comparison* of the wage rates of dissimilar jobs.

For the foregoing reasons, however, I believe that even that narrow holding cannot be supported by the legislative history of the Equal Pay Act and Title VII. This is simply a case where the Court has superimposed upon Title VII a "gloss of its own choosing."

ANDERSON BROS. FORD ET AL. v. VALENCIA ET AL.
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

No. 80-84. Argued March 23, 1981—Decided June 8, 1981

Section 128 (a) (10) of the Truth in Lending Act (TILA) provides that in connection with closed-end consumer credit transactions, the creditor must disclose "any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates." Regulation Z of the Federal Reserve Board (Board), promulgated pursuant to the Board's authority under the TILA, essentially repeats the statute's disclosure requirement, defines "security interest" and "security" as "any interest in property which secures payment or performance of an obligation," and sets forth a nonexhaustive list of interests included in the terms. In 1977, respondents purchased an automobile from petitioner dealer under a retail installment contract that was assigned to petitioner Ford Motor Credit Co. A provision on the face of the contract disclosed that the seller retained a security interest in the automobile but did not refer to a provision on the back of the contract whereby the buyers, who were required to purchase physical damage insurance on the automobile protecting the interests of both the buyers and the seller, assigned to the seller any unearned insurance premiums that might be returned if the policy were canceled. Before making any payments on the contract or the insurance policy, respondents returned the automobile to the dealer and filed suit in federal court, alleging that the contract violated the TILA for failure to disclose on its face that the seller had acquired a "security interest" in unearned insurance premiums, and seeking statutory damages, attorney's fees, and costs. The District Court granted summary judgment for respondents, holding that the assignment of unearned insurance premiums created a "security interest" within the meaning of § 128 (a) (10); and the Court of Appeals affirmed.

Held: Such an assignment of unearned insurance premiums does not create a "security interest" that must be disclosed pursuant to the TILA. Pp. 211-223.

(a) In a proposed official staff interpretation, the Board has expressly stated that Regulation Z does not require a creditor to disclose as a security interest its right to receive insurance proceeds or unearned pre-

CONNECTICUT ET AL. v. TEAL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 80-2147. Argued March 29, 1982—Decided June 21, 1982

Respondent black employees of a Connecticut state agency were promoted provisionally to supervisors. To attain permanent status as supervisors, they had to participate in a selection process that required, as a first step, a passing score on a written examination. Subsequently, an examination was given to 48 black and 259 white candidates. Fifty-four percent of the black candidates passed, this being approximately 68 percent of the passing rate for the white candidates. Respondent black employees failed the examination and were thus excluded from further consideration for permanent supervisory positions. They then brought an action in Federal District Court against petitioners (the State of Connecticut and certain state agencies and officials), alleging that petitioners had violated Title VII of the Civil Rights Act of 1964 by requiring, as an absolute condition for consideration for promotion, that applicants pass a written test that disproportionately excluded blacks and was not job related. In the meantime, before trial, petitioners made promotions from the eligibility list, the overall result being that 22.9 percent of the black candidates were promoted but only 13.5 percent of the white candidates. Petitioners urged that this "bottom-line" result, more favorable to blacks than to whites, was a complete defense to the suit. The District Court agreed and entered judgment for petitioners, holding that the "bottom line" percentages precluded the finding of a Title VII violation and that petitioners were not required to demonstrate that the promotional examination was job related. The Court of Appeals reversed, holding that the District Court erred in ruling that the examination results alone were insufficient to support a prima facie case of disparate impact in violation of Title VII.

Held: Petitioners' nondiscriminatory "bottom line" does not preclude respondents from establishing a prima facie case nor does it provide petitioners with a defense to such a case. Pp. 445-456.

(a) Despite petitioners' nondiscriminatory "bottom line," respondents' claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, states a prima facie case of employment discrimination under § 703(a)(2) of Title VII, which makes it an unlawful employment practice for an employer to "limit, segregate, or classify his employees" in any way which would deprive "any individual of employ-

ment opportunities" because of race, color, religion, sex, or national origin. To measure disparate impact only at the "bottom line" ignores the fact that Title VII guarantees these individual black respondents the opportunity to compete equally with white workers on the basis of job-related criteria. Respondents' rights under § 703(a)(2) have been violated unless petitioners can demonstrate that the examination in question was not an artificial, arbitrary, or unnecessary barrier but measured skills related to effective performance as a supervisor. Pp. 445-451.

(b) No special haven for discriminatory tests is offered by § 703(h) of Title VII, which provides that it shall not be an unlawful employment practice for an employer to act upon results of an ability test if such test is "not designed, intended, or used to discriminate" because of race, color, religion, sex, or national origin. A non-job-related test that has a disparate impact and is used to "limit" or "classify" employees is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect. Pp. 451-452.

(c) The principal focus of § 703(a)(2) is the protection of the individual employee, rather than the protection of the minority group as a whole. To suggest that the "bottom line" may be a defense to a claim of discrimination against an individual employee confuses unlawful discrimination with discriminatory intent. Resolution of the factual question of intent is not what is at issue in this case, but rather petitioners seek to justify discrimination against the black respondents on the basis of petitioners' favorable treatment of other members of these respondents' racial group. Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. Pp. 452-456.

645 F. 2d 133, affirmed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 456.

Bernard F. McGovern, Jr., Assistant Attorney General of Connecticut, argued the cause for petitioners. With him on the briefs were *Carl R. Ajello*, Attorney General, *Peter W. Gillies*, Deputy Attorney General, and *Robert E. Walsh*, *Sidney D. Giber*, and *Thomas P. Clifford III*, Assistant Attorneys General.

Thomas W. Bucci argued the cause for respondents. With him on the brief was *Sidney L. Dworkin*.*

JUSTICE BRENNAN delivered the opinion of the Court.

We consider here whether an employer sued for violation of Title VII of the Civil Rights Act of 1964¹ may assert a "bottom-line" theory of defense. Under that theory, as asserted in this case, an employer's acts of racial discrimination in promotions—effected by an examination having disparate impact—would not render the employer liable for the racial discrimination suffered by employees barred from promotion if the "bottom-line" result of the promotional process was an appropriate racial balance. We hold that the "bottom line" does not preclude respondent employees from establishing a prima facie case, nor does it provide petitioner employer with a defense to such a case.

I

Four of the respondents, Winnie Teal, Rose Walker, Edith Latney, and Grace Clark, are black employees of the Department of Income Maintenance of the State of Connecticut.²

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Harriet S. Shapiro*, *Brian K. Landsberg*, *David L. Rose*, and *Joan A. Magagna* for the United States; by *Robert E. Williams* and *Douglas S. McDowell* for the Equal Employment Advisory Council et al.; and by *Leonard S. Janofsky* and *Paul Grossman* for the National League of Cities et al.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll*, *Robert M. Weinberg*, *Michael H. Gottesman*, and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *Richard C. Dinkelspiel*, *William L. Robinson*, *Norman J. Chachkin*, and *Beatrice Rosenberg* for the Lawyers' Committee for Civil Rights Under Law.

¹Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV).

²The black respondents were joined as plaintiffs by four white employees on a pendent claim that the written test violated provisions of state law that require promotional exams to be job related. That claim is not before us. See 645 F. 2d 133, 135, n. 3 (CA2 1981).

Each was promoted provisionally to the position of Welfare Eligibility Supervisor and served in that capacity for almost two years. To attain permanent status as supervisors, however, respondents had to participate in a selection process that required, as the first step, a passing score on a written examination. This written test was administered on December 2, 1978, to 329 candidates. Of these candidates, 48 identified themselves as black and 259 identified themselves as white. The results of the examination were announced in March 1979. With the passing score set at 65,³ 54.17 percent of the identified black candidates passed. This was approximately 68 percent of the passing rate for the identified white candidates.⁴ The four respondents were among the blacks who failed the examination, and they were thus excluded

³The mean score on the examination was 70.4 percent. However, because the black candidates had a mean score 6.7 percentage points lower than the white candidates, the passing score was set at 65, apparently in an attempt to lessen the disparate impact of the examination. See *id.*, at 135, and n. 4.

⁴The following table shows the passing rates of various candidate groups:

Candidate Group	Number	No. Receiving Passing Score	Passing Rate (%)
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.54
Unidentified	15	9	60.00
Total	329	246	74.77

Petitioners do not contest the District Court's implicit finding that the examination itself resulted in disparate impact under the "eighty percent rule" of the Uniform Guidelines on Employee Selection Procedures adopted by the Equal Employment Opportunity Commission. See App. to Pet. for Cert. 18a, 23a, and n. 2. Those guidelines provide that a selection rate that "is less than [80 percent] of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact." 29 CFR § 1607.4D (1981).

from further consideration for permanent supervisory positions. In April 1979, respondents instituted this action in the United States District Court for the District of Connecticut against petitioners, the State of Connecticut, two state agencies, and two state officials. Respondents alleged, *inter alia*, that petitioners violated Title VII by imposing, as an absolute condition for consideration for promotion, that applicants pass a written test that excluded blacks in disproportionate numbers and that was not job related.

More than a year after this action was instituted, and approximately one month before trial, petitioners made promotions from the eligibility list generated by the written examination. In choosing persons from that list, petitioners considered past work performance, recommendations of the candidates' supervisors and, to a lesser extent, seniority. Petitioners then applied what the Court of Appeals characterized as an affirmative-action program in order to ensure a significant number of minority supervisors.⁵ Forty-six persons were promoted to permanent supervisory positions, 11 of whom were black and 35 of whom were white. The overall result of the selection process was that, of the 48 identified black candidates who participated in the selection process, 22.9 percent were promoted and of the 259 identified white candidates, 13.5 percent were promoted.⁶ It is this "bottom-line" result, more favorable to blacks than to whites, that petitioners urge should be adjudged to be a complete defense to respondents' suit.

After trial, the District Court entered judgment for petitioners. App. to Pet. for Cert. 18a. The court treated respondents' claim as one of disparate impact under *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), *Albemarle Paper Co.*

⁵ Petitioners contest this characterization of their selection procedure. We have no need, however, to resolve this dispute in the context of the present controversy.

⁶ The actual promotion rate of blacks was thus close to 170 percent that of the actual promotion rate of whites.

v. *Moody*, 422 U. S. 405 (1975), and *Dothard v. Rawlinson*, 433 U. S. 321 (1977). However, the court found that, although the comparative passing rates for the examination indicated a prima facie case of adverse impact upon minorities, the result of the entire hiring process reflected no such adverse impact. Holding that these "bottom-line" percentages precluded the finding of a Title VII violation, the court held that the employer was not required to demonstrate that the promotional examination was job related. App. to Pet. for Cert. 22a-24a, 26a. The United States Court of Appeals for the Second Circuit reversed, holding that the District Court erred in ruling that the results of the written examination alone were insufficient to support a prima facie case of disparate impact in violation of Title VII. 645 F. 2d 133 (1981). The Court of Appeals stated that where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process," that barrier must be shown to be job related. *Id.*, at 138. We granted certiorari, 454 U. S. 813 (1981), and now affirm.

II

A

We must first decide whether an examination that bars a disparate number of black employees from consideration for promotion, and that has not been shown to be job related, presents a claim cognizable under Title VII. Section 703 (a)(2) of Title VII provides in pertinent part:

"It shall be an unlawful employment practice for an employer—

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as

an employee, because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, as amended, 42 U. S. C. § 2000e-2(a)(2).

Respondents base their claim on our construction of this provision in *Griggs v. Duke Power Co.*, *supra*. Prior to the enactment of Title VII, the Duke Power Co. restricted its black employees to the labor department. Beginning in 1965, the company required all employees who desired a transfer out of the labor department to have either a high school diploma or to achieve a passing grade on two professionally prepared aptitude tests. New employees seeking positions in any department other than labor had to possess both a high school diploma and a passing grade on these two examinations. Although these requirements applied equally to white and black employees and applicants, they barred employment opportunities to a disproportionate number of blacks. While there was no showing that the employer had a racial purpose or invidious intent in adopting these requirements, this Court held that they were invalid because they had a disparate impact and were not shown to be related to job performance:

"[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U. S., at 431.

Griggs and its progeny have established a three-part analysis of disparate-impact claims. To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to

avoid a finding of discrimination. *Griggs, supra*, at 432. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination. See *Albemarle Paper Co.*, *supra*, at 425; *Dothard, supra*, at 329.⁷

Griggs recognized that in enacting Title VII, Congress required "the removal of artificial, arbitrary, and unnecessary barriers to employment" and professional development that had historically been encountered by women and blacks as well as other minorities. 401 U. S., at 431. See also *Dothard v. Rawlinson, supra*.⁸ *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), explained that

"*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." *Id.*, at 806.

⁷ Petitioners apparently argue both that the nondiscriminatory "bottom line" precluded respondents from establishing a prima facie case and, in the alternative, that it provided a defense.

⁸ The legislative history of the 1972 amendments to Title VII, 86 Stat. 103-113, is relevant to this case because those amendments extended the protection of the Act to respondents here by deleting exemptions for state and municipal employers. See 86 Stat. 103. That history demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*. Both the House and Senate Reports cited *Griggs* with approval, the Senate Report noting:

"Employment discrimination as viewed today is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs." S. Rep. No. 92-415, p. 5 (1971).

See also H. R. Rep. No. 92-238, p. 8 (1971). In addition, the section-by-section analyses of the 1972 amendments submitted to both Houses explicitly stated that in any area not addressed by the amendments, present case law—which as Congress had already recognized included our then recent decision in *Griggs*—was intended to continue to govern. 118 Cong. Rec. 7166, 7564 (1972).

Petitioners' examination, which barred promotion and had a discriminatory impact on black employees, clearly falls within the literal language of § 703(a)(2), as interpreted by *Griggs*. The statute speaks, not in terms of jobs and promotions, but in terms of *limitations* and *classifications* that would deprive any individual of employment *opportunities*.⁹ A disparate-impact claim reflects the language of § 703(a)(2) and Congress' basic objectives in enacting that statute: "to achieve equality of employment *opportunities* and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U. S., at 429-430 (emphasis added). When an employer uses a non-job-related barrier in order to deny a minority or woman applicant employment or promotion, and that barrier has a significant adverse effect on minorities or women, then the applicant has been deprived of an employment *opportunity* "because of . . . race, color, religion, sex, or national origin." In other words, § 703(a)(2) prohibits discriminatory "artificial, arbitrary, and unnecessary barriers to employment," 401 U. S., at 431, that "limit . . . or classify . . . applicants for employment . . . in any way which would deprive or tend to deprive any individual of employment *opportunities*." (Emphasis added.)

Relying on § 703(a)(2), *Griggs* explicitly focused on employment "practices, procedures, or tests," 401 U. S., at 430, that deny equal employment "opportunity," *id.*, at 431. We concluded that Title VII prohibits "procedures or testing mechanisms that operate as 'built-in headwinds' for minority

⁹ In contrast, the language of § 703(a)(1), 42 U. S. C. § 2000e-2(a)(1), if it were the only protection given to employees and applicants under Title VII, might support petitioners' exclusive focus on the overall result. That subsection makes it an unlawful employment practice

"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."

groups." *Id.*, at 432. We found that Congress' primary purpose was the prophylactic one of achieving equality of employment "opportunities" and removing "barriers" to such equality. *Id.*, at 429-430. See *Albemarle Paper Co. v. Moody*, 422 U. S., at 417. The examination given to respondents in this case surely constituted such a practice and created such a barrier.

Our conclusion that § 703(a)(2) encompasses respondents' claim is reinforced by the terms of Congress' 1972 extension of the protections of Title VII to state and municipal employees. See n. 8, *supra*. Although Congress did not explicitly consider the viability of the defense offered by the state employer in this case, the 1972 amendments to Title VII do reflect Congress' intent to provide state and municipal employees with the protection that Title VII, as interpreted by *Griggs*, had provided to employees in the private sector: equality of *opportunity* and the elimination of discriminatory *barriers* to professional development. The Committee Reports and the floor debates stressed the need for equality of opportunity for minority applicants seeking to obtain governmental positions. *E. g.*, S. Rep. No. 92-415, p. 10 (1971); 118 Cong. Rec. 1815 (1972) (remarks of Sen. Williams). Congress voiced its concern about the widespread use by state and local governmental agencies of "invalid selection techniques" that had a discriminatory impact. S. Rep. No. 92-415, *supra*, at 10; H. R. Rep. No. 92-238, p. 17 (1971); 117 Cong. Rec. 31961 (1971) (remarks of Rep. Perkins).¹⁰

¹⁰ The Committee Reports in both Houses, and Senator Williams, principal sponsor of the Senate bill that was ultimately enacted in large part, relied upon a report of the United States Commission on Civil Rights, which Senator Williams placed in the Congressional Record. See H. R. Rep. No. 92-238, p. 17 (1971); S. Rep. No. 92-415, p. 10 (1971); 118 Cong. Rec. 1815-1819 (1972). The Commission concluded that serious "[b]arriers to equal opportunity" existed for state and local government employees. Two of the three barriers cited were "recruitment and selection devices which are arbitrary, unrelated to job performance, and result in unequal

The decisions of this Court following *Griggs* also support respondents' claim. In considering claims of disparate impact under § 703(a)(2) this Court has consistently focused on employment and promotion requirements that create a discriminatory bar to *opportunities*. This Court has never read § 703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted. Thus *Dothard v. Rawlinson*, 433 U. S. 321 (1977), found that minimum statutory height and weight requirements for correctional counselors were the sort of arbitrary barrier to equal employment opportunity for women forbidden by Title VII. Although we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this "bottom line." We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment. *Id.*, at 329-330, and n. 12. Similarly, in *Albemarle Paper Co. v. Moody*, *supra*, the action was remanded to allow the employer to attempt to show that the tests that he had given to his employees for promotion were job related. We did not suggest that by promoting a sufficient number of the black employees who passed the examination, the employer could avoid this burden. See 422 U. S., at 436. See also *New York Transit Authority v. Beazer*, 440 U. S. 568, 584 (1979) ("A prima facie violation of the Act may be established by statistical evidence showing that an employment *practice* has the effect of denying members of one race equal access to employment *opportunities*") (emphasis added).

treatment of minorities," and promotions made on the basis of "criteria unrelated to job performance and on discriminatory supervisory ratings." U. S. Commission on Civil Rights, *For All the People . . . By All the People—A Report on Equal Opportunity in State and Local Government Employment* 119 (1969), reprinted in 118 Cong. Rec. 1817 (1972).

In short, the District Court's dismissal of respondents' claim cannot be supported on the basis that respondents failed to establish a prima facie case of employment discrimination under the terms of § 703(a)(2). The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria. Title VII strives to achieve equality of opportunity by rooting out "artificial, arbitrary, and unnecessary" employer-created barriers to professional development that have a discriminatory impact upon individuals. Therefore, respondents' rights under § 703(a)(2) have been violated, unless petitioners can demonstrate that the examination given was not an artificial, arbitrary, or unnecessary barrier, because it measured skills related to effective performance in the role of Welfare Eligibility Supervisor.

B

The United States, in its brief as *amicus curiae*, apparently recognizes that respondents' claim in this case falls within the affirmative commands of Title VII. But it seeks to support the District Court's judgment in this case by relying on the defenses provided to the employer in § 703(h).¹¹ Section 703(h) provides in pertinent part:

"Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate be-

¹¹The Government's brief is submitted by the Department of Justice, which shares responsibility for federal enforcement of Title VII with the Equal Employment Opportunity Commission (EEOC). The EEOC declined to join this brief. See Brief for United States as *Amicus Curiae* 1, and n.

cause of race, color, religion, sex or national origin." 78 Stat. 257, as amended, 42 U. S. C. § 2000e-2(h).

The Government argues that the test administered by the petitioners was not "used to discriminate" because it did not actually deprive disproportionate numbers of blacks of promotions. But the Government's reliance on § 703(h) as offering the employer some special haven for discriminatory tests is misplaced. We considered the relevance of this provision in *Griggs*. After examining the legislative history of § 703(h), we concluded that Congress, in adding § 703(h), intended only to make clear that tests that were *job related* would be permissible despite their disparate impact. 401 U. S., at 433-436. As the Court recently confirmed, § 703(h), which was introduced as an amendment to Title VII on the Senate floor, "did not alter the meaning of Title VII, but merely clarifie[d] its present intent and effect." *American Tobacco Co. v. Patterson*, 456 U. S. 63, 73, n. 11 (1982), quoting 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey). A non-job-related test that has a disparate racial impact, and is used to "limit" or "classify" employees, is "used to discriminate" within the meaning of Title VII, whether or not it was "designed or intended" to have this effect and despite an employer's efforts to compensate for its discriminatory effect. See *Griggs*, 401 U. S., at 433.

In sum, respondents' claim of disparate impact from the examination, a pass-fail barrier to employment opportunity, states a prima facie case of employment discrimination under § 703(a)(2), despite their employer's nondiscriminatory "bottom line," and that "bottom line" is no defense to this prima facie case under § 703(h).

III

Having determined that respondents' claim comes within the terms of Title VII, we must address the suggestion of petitioners and some *amici curiae* that we recognize an exception, either in the nature of an additional burden on plaintiffs

seeking to establish a prima facie case or in the nature of an affirmative defense, for cases in which an employer has compensated for a discriminatory pass-fail barrier by hiring or promoting a sufficient number of black employees to reach a nondiscriminatory "bottom line." We reject this suggestion, which is in essence nothing more than a request that we redefine the protections guaranteed by Title VII.¹²

Section 703(a)(2) prohibits practices that would deprive or tend to deprive "*any individual* of employment opportunities." The principal focus of the statute is the protection of the individual employee, rather than the protection of the mi-

¹² Petitioners suggest that we should defer to the EEOC Guidelines in this regard. But there is nothing in the Guidelines to which we might defer that would aid petitioners in this case. The most support petitioners could conceivably muster from the Uniform Guidelines on Employee Selection Procedures, 29 CFR pt. 1607 (1981) (now issued jointly by the EEOC, the Office of Personnel Management, the Department of Labor, and the Department of Justice, see 29 CFR § 1607.1A (1981)), is *neutrality* on the question whether a discriminatory barrier that does not result in a discriminatory overall result constitutes a violation of Title VII. Section 1607.4C of the Guidelines, relied upon by petitioners, states that as a matter of "*administrative and prosecutorial discretion, in usual circumstances,*" the agencies will not take enforcement action based upon the disparate impact of any component of a selection process if the total selection process results in no adverse impact. (Emphasis added.) The agencies made clear that the "guidelines do not address the underlying question of law," and that an individual "who is denied the job because of a particular component in a procedure which otherwise meets the 'bottom line' standard . . . retains the right to proceed through the appropriate agencies, and into Federal court." 43 Fed. Reg. 38291 (1978). See 29 CFR § 1607.16I (1981). In addition, in a publication entitled *Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures*, the agencies stated:

"Since the [bottom-line] concept is not a rule of law, it does not affect the discharge by the EEOC of its statutory responsibilities to investigate charges of discrimination, render an administrative finding on its investigation, and engage in voluntary conciliation efforts. Similarly, with respect to the other issuing agencies, the bottom line concept applies not to the processing of individual charges, but to the initiation of enforcement action." 44 Fed. Reg. 12000 (1979).

nority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, e. g., §§ 703(a)(1), (b), (c), 704(a), 78 Stat. 255-257, as amended, 42 U. S. C. §§ 2000e-2(a)(1), (b), (c), 2000e-3(a); 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Sens. Clark and Case) ("discrimination is prohibited as to any individual"); *id.*, at 8921 (remarks of Sen. Williams) ("Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job").

In suggesting that the "bottom line" may be a defense to a claim of discrimination against an individual employee, petitioners and *amici* appear to confuse unlawful discrimination with discriminatory intent. The Court has stated that a non-discriminatory "bottom line" and an employer's good-faith efforts to achieve a nondiscriminatory work force, might in some cases assist an employer in rebutting the inference that particular action had been intentionally discriminatory: "Proof that [a] work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent when that issue is yet to be decided." *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 580 (1978). See also *Teamsters v. United States*, 431 U. S. 324, 340, n. 20 (1977). But resolution of the factual question of intent is not what is at issue in this case. Rather, petitioners seek simply to justify discrimination against respondents on the basis of their favorable treatment of other members of respondents' racial group. Under Title VII, "[a] racially balanced work force cannot immunize an employer from liability for specific acts of discrimination." *Furnco Construction Corp. v. Waters*, 438 U. S., at 579.

"It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether

members of the applicant's race are already proportionately represented in the work force. See *Griggs v. Duke Power Co.*, 401 U. S., at 430; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U. S. 273, 279 (1976)." *Ibid.* (emphasis in original).

It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group. We recognized in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U. S. 702 (1978), that fairness to the class of women employees as a whole could not justify unfairness to the individual female employee because the "statute's focus on the individual is unambiguous." *Id.*, at 708. Similarly, in *Phillips v. Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), we recognized that a rule barring employment of all married women with preschool children, if not a bona fide occupational qualification under § 703(e), violated Title VII, even though female applicants without preschool children were hired in sufficient numbers that they constituted 75 to 80 percent of the persons employed in the position plaintiff sought.

Petitioners point out that *Furnco*, *Manhart*, and *Phillips* involved facially discriminatory policies, while the claim in the instant case is one of discrimination from a facially neutral policy. The fact remains, however, that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be "of little comfort to the victims of . . . discrimination." *Teamsters v. United States*, *supra*, at 342. Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory. Every *individual* employee is protected against both discriminatory treatment

and "practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U. S., at 431. Requirements and tests that have a discriminatory impact are merely some of the more subtle, but also the more pervasive, of the "practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp. v. Green*, 411 U. S., at 800.

IV

In sum, petitioners' nondiscriminatory "bottom line" is no answer, under the terms of Title VII, to respondents' prima facie claim of employment discrimination. Accordingly, the judgment of the Court of Appeals for the Second Circuit is affirmed, and this case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

In past decisions, this Court has been sensitive to the critical difference between cases proving discrimination under Title VII, 42 U. S. C. § 2000e *et seq.* (1976 ed. and Supp. IV), by a showing of disparate treatment or discriminatory intent and those proving such discrimination by a showing of disparate impact. Because today's decision blurs that distinction and results in a holding inconsistent with the very nature of disparate-impact claims, I dissent.

I

Section 703(a)(2) of Title VII, 42 U. S. C. § 2000e-2(a)(2), provides that it is an unlawful employment practice for an employer to

"limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Although this language suggests that discrimination occurs only on an individual basis, in *Griggs v. Duke Power Co.*, 401 U. S. 424, 432 (1971), the Court held that discriminatory intent on the part of the employer against an individual need not be shown when "employment procedures or testing mechanisms . . . operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Thus, the Court held that the "disparate impact" of an employer's practices on a racial group can violate § 703(a)(2) of Title VII. In *Griggs* and each subsequent disparate-impact case, however, the Court has considered, not whether the claimant as an individual had been classified in a manner impermissible under § 703(a)(2), but whether an employer's procedures have had an adverse impact on the protected group to which the individual belongs.

Thus, while disparate-treatment cases focus on the way in which an individual has been treated, disparate-impact cases are concerned with the protected group. This key distinction was explained in *Furnco Construction Corp. v. Waters*, 438 U. S. 567, 581-582 (1978) (MARSHALL, J., concurring in part):

"It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways. *Teamsters v. United States*, 431 U. S. 324, 335-336, n. 15 (1977). An individual may allege that he has been subjected to 'disparate treatment' because of his race, or that he has been the victim of a facially neutral practice having a 'disparate impact' on his racial group."¹

¹See also *Teamsters v. United States*, 431 U. S. 324, 335-336, n. 15 (1977) (similar explanation).

In keeping with this distinction, our disparate-impact cases consistently have considered whether the result of an employer's *total selection process* had an adverse impact upon the protected group.² If this case were decided by reference to the total process—as our cases suggest that it should be—the result would be clear. Here 22.9% of the blacks who entered the selection process were ultimately promoted, compared with only 13.5% of the whites. To say that this selection process had an unfavorable “disparate impact” on blacks is to ignore reality.

The Court, disregarding the distinction drawn by our cases, repeatedly asserts that Title VII was designed to protect individual, not group, rights. It emphasizes that some individual blacks were eliminated by the disparate impact of the preliminary test. But this argument confuses the *aim* of Title VII with the legal theories through which its aims were intended to be vindicated. It is true that the aim of Title VII is to protect individuals, not groups. But in advancing this commendable objective, Title VII jurisprudence has recognized two distinct methods of proof. In one set of cases—those involving direct proof of discriminatory intent—the plaintiff seeks to establish direct, intentional discrimination against him. In that type of case, the individual is at the forefront throughout the entire presentation of evidence. In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group

²See *Dothard v. Rawlinson*, 433 U. S. 321, 329 (1977) (statutory height and weight requirements operated as a bar to *employment* of disproportionate number of women); *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 409–411 (1975) (seniority system allegedly locked blacks into lower paying jobs; applicants to skilled lines of progression were required to pass two tests); *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971) (tests were an absolute bar to transfers or hiring; the Court observed that all Congress requires is “the removal of artificial, arbitrary, and unnecessary barriers to *employment* . . .”) (emphasis added).

to which he belongs. From such a showing a fair inference then may be drawn that the rejected applicant, as a member of that disproportionately excluded group, was himself a victim of that process’ “built-in headwinds.” *Griggs, supra*, at 432. But this method of proof—which actually *defines* disparate-impact theory under Title VII—invites the plaintiff to prove discrimination by reference to the group rather than to the allegedly affected individual.³ There can be no violation of Title VII on the basis of disparate impact in the absence of disparate impact on a *group*.⁴

In this case respondent black employees seek to benefit from a conflation of “discriminatory treatment” and “disparate impact” theories. But they cannot have it both ways. Having undertaken to prove discrimination by reference to one set of group figures (used at a preliminary point in the selection process), these respondents then claim that *nondiscrimination* cannot be proved by viewing the impact of the entire process on the group as a whole. The fallacy of this reasoning—accepted by the Court—is transparent. It is to

³Initially, the plaintiff bears the burden of establishing a *prima facie* case that Title VII has been infringed. See *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 252–253 (1981). In a disparate-impact case, this burden is met by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group. See *Teamsters v. United States, supra*, at 336–338. Regardless of whether the plaintiff's *prima facie* case must itself focus on the defendant's overall selection process or whether it is sufficient that the plaintiff establish that at least one pass-fail barrier has resulted in disparate impact, the employer's presentation of evidence showing that its overall selection procedure does not operate in a discriminatory fashion certainly dispels any inference of discrimination. In such instances, at the close of the evidence, the plaintiff has failed to show disparate impact by a preponderance of the evidence.

⁴The Equal Employment Opportunity Commission and other federal enforcement agencies have adopted the “bottom-line” principle—*i. e.*, the process viewed as a whole—in deciding when to bring an action against an employer. See Uniform Guidelines on Employee Selection Procedures, 5 CFR § 300.103(c) (1981).

confuse the individualistic *aim* of Title VII with the methods of proof by which Title VII rights may be vindicated. The respondents, as individuals, are entitled to the full personal protection of Title VII. But, having undertaken to prove a violation of their rights by reference to group figures, respondents cannot deny petitioners the opportunity to rebut their evidence by introducing figures of the same kind. Having pleaded a disparate-impact case, the plaintiff cannot deny the defendant the opportunity to show that there was no disparate impact. As the Court of Appeals for the Third Circuit noted in *EEOC v. Greyhound Lines, Inc.*, 635 F. 2d 188, 192 (1980):

“[N]o violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer’s workforce. This conclusion should be as obvious as it is tautological: there can be no disparate impact unless there is [an ultimate] disparate impact.”

Where, under a facially neutral employment process, there has been no adverse effect on the group—and certainly there has been none here—Title VII has not been infringed.

II

The Court’s position is no stronger in case authority than it is in logic. None of the cases relied upon by the Court controls the outcome of this case.⁵ Indeed, the disparate-

⁵The Court concentrates on cases of questionable relevance. Most of the lower courts that have squarely considered the question have concluded that there can be no violation of Title VII on a disparate-impact basis when there is no disparate impact at the *bottom line*. See, e. g., *EEOC v. Greyhound Lines, Inc.*, 635 F. 2d 188 (CA3 1980); *EEOC v. Navajo Refining Co.*, 593 F. 2d 988 (CA10 1979); *Friend v. Leidinger*, 588 F. 2d 61, 66 (CA4 1978); *Rule v. International Assn. of Ironworkers*, 568 F. 2d 558 (CA8 1977); *Smith v. Troyan*, 520 F. 2d 492, 497–498 (CA6 1975), cert. denied, 426 U. S. 934 (1976); *Williams v. City & County of San Francisco*, 483 F. Supp. 335 (ND Cal. 1979); *Brown v. New Haven Civil Service*

impact cases do not even support the propositions for which they are cited. For example, the Court cites *Dothard v. Rawlinson*, 433 U. S. 321 (1977) (holding impermissible minimum statutory height and weight requirements for correctional counselors), and observes that “[a]lthough we noted in passing that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this ‘bottom line.’ We focused instead on the disparate effect that the minimum height and weight standards had on applicants: classifying far more women than men as ineligible for employment.” *Ante*, at 450. In *Dothard*, however, the Court was not considering a case in which there was any difference between the discriminatory effect of the employment standard and the number of minority members actually hired. The *Dothard* Court itself stated:

“[T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question *select applicants for hire* in a discriminatory pattern. Once it is shown that *the employment standards* are discriminatory in effect, the employer must meet the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question.” 433 U. S., at 329 (emphasis added).

The *Dothard* Court did not decide today’s case. It addressed only a case in which the challenged standards had a discriminatory impact at the bottom line—the hiring decision. And the *Dothard* Court’s “focus,” referred to by the Court, is of no help in deciding the instant case.⁶

Board, 474 F. Supp. 1256 (Conn. 1979); *Lee v. City of Richmond*, 456 F. Supp. 756 (ED Va. 1978).

⁶The Court cites language from two other disparate-impact cases. The Court notes that in *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975), the Court “remanded to allow the employer to attempt to show that the tests . . . given . . . for promotion were job-related.” *Ante*, at 450. But the fact that the Court did so without suggesting “that by promoting a suf-

The Court concedes that the other major cases on which it relies, *Furnco, Los Angeles Dept. of Water & Power v. Manhart*, 435 U. S. 702 (1978), and *Phillips v. Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*) "involved facially discriminatory policies, while the claim in the instant case is one of discrimination from a facially neutral policy." *Ante*, at 455. The Court nevertheless applies the principles derived from those cases to the case at bar. It does so by reiterating the view that Title VII protects *individuals*, not *groups*, and therefore that the manner in which an employer has treated other members of a group cannot defeat the claim of an individual who has suffered as a result of even a facially neutral policy. As appealing as this sounds, it confuses the distinction—uniformly recognized until today—between disparate *impact* and disparate *treatment*. See *supra*, at 457–458. Our cases, cited above, have made clear that discriminatory-impact claims cannot be based on how an individual is treated in isolation from the treatment of other members of the group. Such claims necessarily are based on whether the group fares less well than other groups under a policy, practice, or test. Indeed, if only one minority member has

insufficient number of black employees who passed the examination, the employer could avoid this burden," *ibid.*, can hardly be precedent for the negative of that proposition when the issue was neither presented in the facts of the case nor addressed by the Court.

Similarly, *New York Transit Authority v. Beazer*, 440 U. S. 568 (1979), provides little support despite the language quoted by the Court. See *ante*, at 450, quoting 440 U. S., at 584 ("A prima facie violation of the Act may be established by statistical evidence showing that an employment practice has the effect of denying members of one race equal access to employment opportunities") (emphasis added by the Court). In *Beazer*, the Court ruled that the statistical evidence actually presented was insufficient to establish a prima facie case of discrimination, and in doing so it indicated that it would have found statistical evidence of the number of applicants and employees in a methadone program quite probative. See *id.*, at 585. *Beazer* therefore does not justify the Court's speculation that the number of blacks and Hispanics actually employed were irrelevant to whether a case of disparate impact had been established under Title VII.

taken a test, a disparate-impact claim cannot be made, regardless of whether the test is an initial step in the selection process or one of several factors considered by the employer in making an employment decision.⁷

III

Today's decision takes a long and unhappy step in the direction of confusion. Title VII does not require that employers adopt merit hiring or the procedures most likely to permit the greatest number of minority members to be considered for or to qualify for jobs and promotions. See *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 258–259 (1981); *Furnco*, 438 U. S., at 578. Employers need not develop tests that accurately reflect the skills of every individual candidate; there are few if any tests that do so. Yet the Court seems unaware of this practical reality, and perhaps oblivious to the likely consequences of its decision. By its holding today, the Court may force employers either to eliminate tests or rely on expensive, job-related, testing procedures, the validity of which may or may not be sustained if challenged. For state and local governmental employers with limited funds, the practical effect of today's decision may well be the adoption of simple quota hiring.⁸ This arbi-

⁷ Courts have recognized that the probative value of statistical evidence varies with sample size in disparate-impact cases. See, e. g., *Teamsters v. United States*, 431 U. S., at 340, n. 20 ("Considerations such as small sample size may, of course, detract from the value of such evidence . . ."); *Mayor of Philadelphia v. Educational Equality League*, 415 U. S. 605, 621 (1974) ("[T]he District Court's concern for the smallness of the sample presented by the 13-member Panel was . . . well founded"); *Rogillio v. Diamond Shamrock Chemical Co.*, 446 F. Supp. 423, 427–428 (SD Tex. 1978) (sample of 10 too small); *Dendy v. Washington Hospital Center*, 431 F. Supp. 873, 876 (DC 1977) (sample must be "large enough to mirror the reality of the employment situation"). A sample of only one would have far too little probative value to establish a prima facie case of disparate impact.

⁸ Another possibility is that employers may integrate consideration of test results into one overall hiring decision based on that "factor" and addi-

trary method of employment is itself unfair to individual applicants, whether or not they are members of minority groups. And it is not likely to produce a competent work force. Moreover, the Court's decision actually may result in employers employing fewer minority members. As Judge Newman noted in *Brown v. New Haven Civil Service Board*, 474 F. Supp. 1256, 1263 (Conn. 1979):

"[A]s private parties are permitted under Title VII itself to adopt voluntary affirmative action plans, . . . Title VII should not be construed to prohibit a municipality's using a hiring process that results in a percentage of minority policemen approximating their percentage of the local population, instead of relying on the expectation that a validated job-related testing procedure will produce an equivalent result, yet with the risk that it might lead to substantially less minority hiring."

Finding today's decision unfortunate in both its analytical approach and its likely consequences, I dissent.

tional factors. Such a process would not, even under the Court's reasoning, result in a finding of discrimination on the basis of disparate impact unless the actual hiring decisions had a disparate impact on the minority group. But if employers integrate test results into a single-step decision, they will be free to select *only* the number of minority candidates proportional to their representation in the work force. If petitioners had used this approach, they would have been able to hire substantially fewer blacks without liability on the basis of disparate impact. The Court hardly could have intended to encourage this.

BLUE SHIELD OF VIRGINIA ET AL. v. MCCREADY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-225. Argued March 24, 1982—Decided June 21, 1982

Respondent employee was provided coverage under a prepaid group health plan purchased by her employer from petitioner Blue Shield of Virginia (Blue Shield). The plan provided reimbursement for part of the cost incurred by subscribers for outpatient treatment for mental and nervous disorders, including psychotherapy. However, Blue Shield's practice was to reimburse subscribers for services provided by *psychiatrists* but not by *psychologists* unless the treatment was supervised by and billed through a physician. Respondent was treated by a clinical psychologist and submitted claims to Blue Shield for the costs of the treatment. After the claims were routinely denied because they had not been billed through a physician, respondent brought a class action in Federal District Court, alleging that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of § 1 of the Sherman Act to exclude psychologists from receiving compensation under Blue Shield's plans. She further alleged that Blue Shield's failure to reimburse was in furtherance of the conspiracy and had caused injury to her business or property for which she was entitled to treble damages under § 4 of the Clayton Act, which provides for recovery of such damages by "[a]ny person" injured "by reason of anything" prohibited in the antitrust laws. The District Court granted petitioners' motion to dismiss, holding that respondent had no standing under § 4 to maintain her suit. The Court of Appeals reversed.

Held: Respondent has standing to maintain the action under § 4 of the Clayton Act. Pp. 472-485.

(a) The lack of restrictive language in § 4 reflects Congress' expansive remedial purpose of creating a private enforcement mechanism to deter violators and deprive them of the fruits of their illegal actions, and to provide ample compensation to victims of antitrust violations. In the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, § 4 is to be applied in accordance with its plain language and its broad remedial and deterrent objectives. Pp. 472-473.

(b) Permitting respondent to proceed does not offer the slightest possibility of a duplicative exaction from petitioners, *Hawaii v. Standard Oil Co.*, 405 U. S. 251, and *Illinois Brick Co. v. Illinois*, 431 U. S. 720,

applicable state statute of limitations, the federal court would be required to decide what effect denial of class certification would have. The logical source of law, of course, would be the general federal rule, expressed in *American Pipe* and applied to toll the running of the period in the first place. The Court, however, would apparently have the trial judge look to state law. Such a course would obviously be more than a little ironic—the inquiry would appear to be, if state law *did* have a class-action tolling rule, which it *does not*, what would state law say with respect to one aspect of that rule's effect? Such an inquiry would be more appropriate in *Alice in Wonderland* than as a serious judicial undertaking.

Because the Court partially rejects a rule of law that *American Pipe* plainly set forth; because it reaches a result that can only encourage needless litigation and uncertainty, and because its analysis leads to anomalous results, I respectfully dissent.

NEWPORT NEWS SHIPBUILDING & DRY DOCK CO. v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 82-411. Argued April 27, 1983—Decided June 20, 1983

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, because of the employee's race, color, religion, sex, or national origin. Title VII was amended in 1978 by the Pregnancy Discrimination Act to prohibit discrimination on the basis of pregnancy. Petitioner employer then amended its health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions, but the plan provided less extensive pregnancy benefits for spouses of male employees. Petitioner filed an action in Federal District Court challenging the EEOC's guidelines which indicated that the amended plan was unlawful, and the EEOC in turn filed an action against petitioner alleging discrimination on the basis of sex against male employees in petitioner's provision of hospitalization benefits. The District Court upheld the lawfulness of petitioner's amended plan and dismissed the EEOC's complaint. On a consolidated appeal, the Court of Appeals reversed.

Held: The pregnancy limitation in petitioner's amended health plan discriminates against male employees in violation of § 703(a)(1). Pp. 676-685.

(a) Congress, by enacting the Pregnancy Discrimination Act, not only overturned the holding of *General Electric Co. v. Gilbert*, 429 U. S. 125, that the exclusion of disabilities caused by pregnancy from an employer's disability plan providing general coverage did not constitute discrimination based on sex, but also rejected the reasoning employed in that case that differential treatment of pregnancy is not gender-based discrimination because only women can become pregnant. Pp. 676-682.

(b) The Pregnancy Discrimination Act makes it clear that it is discriminatory to exclude pregnancy coverage from an otherwise inclusive benefits plan. Thus, petitioner's health plan unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees. Pp. 682-684.

(c) There is no merit to petitioner's argument that the prohibitions of Title VII do not extend to pregnant spouses because the statute applies only to discrimination in employment. Since the Pregnancy Discrimina-

tion Act makes it clear that discrimination based on pregnancy is, on its face, discrimination based on sex, and since the spouse's sex is always the opposite of the employee's sex, discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees. Pp. 684-685.

682 F. 2d 113, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 685.

Andrew M. Kramer argued the cause for petitioner. With him on the briefs were *Gerald D. Skoning* and *Deborah Crandall*.

Harriet S. Shapiro argued the cause for respondent. With her on the brief were *Solicitor General Lee*, *Deputy Solicitor General Wallace*, *Philip B. Sklover*, and *Vella M. Fink*.*

JUSTICE STEVENS delivered the opinion of the Court.

In 1978 Congress decided to overrule our decision in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976), by amending Title VII of the Civil Rights Act of 1964 "to prohibit sex discrimination on the basis of pregnancy."¹ On the effective

*Briefs of *amici curiae* urging reversal were filed by *Stephen A. Bokat* and *Cynthia Wicker* for the Chamber of Commerce of the United States; by *Frederick T. Shea*, *Robert H. McRoberts, Sr.*, *John F. Gibbons*, and *Thomas C. Walsh* for Emerson Electric Co.; by *Benjamin W. Boley* and *Michael S. Giannotto* for the National Railway Labor Conference; and by *Robert E. Williams*, *Douglas S. McDowell*, and *Lorence L. Kessler* for the Equal Employment Advisory Council.

Briefs of *amici curiae* urging affirmance were filed by *Lawrence B. Trygstad* and *Richard J. Schwab* for the United Teachers-Los Angeles; by *Judith L. Lichtman* and *Judith E. Schaeffer* for the American Association of University Women et al.; and by *J. Albert Woll*, *Marsha S. Berzon*, *Laurence Gold*, *Bernard Kleiman*, *Carl Frankel*, *Carole W. Wilson*, and *Winn Newman* for the American Federation of Labor and Congress of Industrial Organizations et al.

¹Pub. L. 95-555, 92 Stat. 2076 (quoting title of 1978 Act). The new statute (the Pregnancy Discrimination Act) amended the "Definitions" sec-

date of the Act, petitioner amended its health insurance plan to provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions.² The plan continued, however, to provide less favorable pregnancy benefits for spouses of male employees. The question presented is whether the amended plan complies with the amended statute.

Petitioner's plan provides hospitalization and medical-surgical coverage for a defined category of employees³ and a defined category of dependents. Dependents covered by the plan include employees' spouses, unmarried children between 14 days and 19 years of age, and some older dependent children.⁴ Prior to April 29, 1979, the scope of the plan's coverage for eligible dependents was identical to its coverage for employees.⁵ All covered males, whether employees or

tion of Title VII, 42 U. S. C. § 2000e, to add a new subsection (k) reading in pertinent part as follows:

"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . ." § 2000e(k) (1976 ed., Supp. V).

²The amendment to Title VII became effective on the date of its enactment, October 31, 1978, but its requirements did not apply to any then-existing fringe benefit program until 180 days after enactment—April 29, 1979. 92 Stat. 2076. The amendment to petitioner's plan became effective on April 29, 1979.

³On the first day following three months of continuous service, every active, full-time, production, maintenance, technical, and clerical area bargaining unit employee becomes a plan participant. App. to Pet. for Cert. 29a.

⁴For example, unmarried children up to age 23 who are full-time college students solely dependent on an employee and certain mentally or physically handicapped children are also covered. *Id.*, at 30a.

⁵An amount payable under the plan for medical expenses incurred by a dependent does, however, take into account any amounts payable for those expenses by other group insurance plans. An employee's personal cover-

dependents, were treated alike for purposes of hospitalization coverage. All covered females, whether employees or dependents, also were treated alike. Moreover, with one relevant exception, the coverage for males and females was identical. The exception was a limitation on hospital coverage for pregnancy that did not apply to any other hospital confinement.⁶

After the plan was amended in 1979, it provided the same hospitalization coverage for male and female employees themselves for all medical conditions, but it differentiated between female employees and spouses of male employees in its provision of pregnancy-related benefits.⁷ In a booklet describing the plan, petitioner explained the amendment that gave rise to this litigation in this way:

"B. Effective April 29, 1979, maternity benefits for female employees will be paid the same as any other hospital confinement as described in question 16. This applies only to deliveries beginning on April 29, 1979 and thereafter.

"C. Maternity benefits for the wife of a male employee will continue to be paid as described in part 'A' of this question." App. to Pet. for Cert. 37a.

age is not affected by his or her spouse's participation in a group health plan. *Id.*, at 34a-36a.

⁶ For hospitalization caused by uncomplicated pregnancy, petitioner's plan paid 100% of the reasonable and customary physicians' charges for delivery and anesthesiology, and up to \$500 of other hospital charges. For all other hospital confinement, the plan paid in full for a semiprivate room for up to 120 days and for surgical procedures; covered the first \$750 of reasonable and customary charges for hospital services (including general nursing care, X-ray examinations, and drugs) and other necessary services during hospitalization; and paid 80% of the charges exceeding \$750 for such services up to a maximum of 120 days. *Id.*, at 31a-32a (question 16); see *id.*, at 44a-45a (same differentiation for coverage after the employee's termination).

Thus, as the Equal Employment Opportunity Commission found after its investigation, "the record reveals that the present disparate impact on male employees had its genesis in the gender-based distinction accorded to female employees in the past." App. 37.

In turn, Part A stated: "The Basic Plan pays up to \$500 of the hospital charges and 100% of reasonable and customary for delivery and anesthesiologist charges." *Ibid.* As the Court of Appeals observed: "To the extent that the hospital charges in connection with an uncomplicated delivery may exceed \$500, therefore, a male employee receives less complete coverage of spousal disabilities than does a female employee." 667 F. 2d 448, 449 (CA4 1982).

After the passage of the Pregnancy Discrimination Act, and before the amendment to petitioner's plan became effective, the Equal Employment Opportunity Commission issued "interpretive guidelines" in the form of questions and answers.⁸ Two of those questions, numbers 21 and 22, made it clear that the EEOC would consider petitioner's amended plan unlawful. Number 21 read as follows:

"21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

"A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

"But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of

⁸ Interim interpretive guidelines were published for comment in the Federal Register on March 9, 1979. 44 Fed. Reg. 13278-13281. Final guidelines were published in the Federal Register on April 20, 1979. *Id.*, at 23804-23808. The EEOC explained: "It is the Commission's desire . . . that all interested parties be made aware of EEOC's view of their rights and obligations in advance of April 29, 1979, so that they may be in compliance by that date." *Id.*, at 23804. The questions and answers are reprinted as an appendix to 29 CFR § 1604 (1982).

such non-spouse dependents of male and female employees equally." 44 Fed. Reg. 23807 (Apr. 20, 1979).⁹

On September 20, 1979, one of petitioner's male employees filed a charge with the EEOC alleging that petitioner had unlawfully refused to provide full insurance coverage for his wife's hospitalization caused by pregnancy; a month later the United Steelworkers filed a similar charge on behalf of other individuals. App. 15-18. Petitioner then commenced an action in the United States District Court for the Eastern District of Virginia, challenging the Commission's guidelines and seeking both declaratory and injunctive relief. The complaint named the EEOC, the male employee, and the United Steelworkers of America as defendants. *Id.*, at 5-14. Later the EEOC filed a civil action against petitioner alleging discrimination on the basis of sex against male employees in the company's provision of hospitalization benefits. *Id.*, at 28-31. Concluding that the benefits of the new Act extended only to female employees, and not to spouses of male employees, the District Court held that petitioner's plan was lawful and enjoined enforcement of the EEOC guidelines relating to pregnancy benefits for employees' spouses. 510

⁹Question 22 is equally clear. It reads:

"22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?"

"A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level." 44 Fed. Reg., at 23807-23808.

F. Supp. 66 (1981). It also dismissed the EEOC's complaint. App. to Pet. for Cert. 21a. The two cases were consolidated on appeal.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, reasoning that since "the company's health insurance plan contains a distinction based on pregnancy that results in less complete medical coverage for male employees with spouses than for female employees with spouses, it is impermissible under the statute." 667 F. 2d, at 451. After rehearing the case en banc, the court reaffirmed the conclusion of the panel over the dissent of three judges who believed the statute was intended to protect female employees "in their ability or inability to work," and not to protect spouses of male employees. 682 F. 2d 113 (1982). Because the important question presented by the case had been decided differently by the United States Court of Appeals for the Ninth Circuit, *EEOC v. Lockheed Missiles & Space Co.*, 680 F. 2d 1243 (1982), we granted certiorari. 459 U. S. 1069 (1982).¹⁰

Ultimately the question we must decide is whether petitioner has discriminated against its male employees with respect to their compensation, terms, conditions, or privileges of employment because of their sex within the meaning of § 703(a)(1) of Title VII.¹¹ Although the Pregnancy Dis-

¹⁰Subsequently the Court of Appeals for the Seventh Circuit agreed with the Ninth Circuit. *EEOC v. Joslyn Mfg. & Supply Co.*, 706 F. 2d 1469 (1983).

¹¹Section 703(a), 42 U. S. C. § 2000e-2(a), provides in pertinent part: "It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or 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 . . ."

Although the 1978 Act makes clear that this language should be construed to prohibit discrimination against a female employee on the basis of her own pregnancy, it did not remove or limit Title VII's prohibition of discrimination on the basis of the sex of the employee—male or female—which

crimination Act has clarified the meaning of certain terms in this section, neither that Act nor the underlying statute contains a definition of the word "discriminate." In order to decide whether petitioner's plan discriminates against male employees because of *their* sex, we must therefore go beyond the bare statutory language. Accordingly, we shall consider whether Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976), but also rejected the test of discrimination employed by the Court in that case. We believe it did. Under the proper test petitioner's plan is unlawful, because the protection it affords to married male employees is less comprehensive than the protection it affords to married female employees.

I

At issue in *General Electric Co. v. Gilbert* was the legality of a disability plan that provided the company's employees with weekly compensation during periods of disability resulting from nonoccupational causes. Because the plan excluded disabilities arising from pregnancy, the District Court and the Court of Appeals concluded that it discriminated against female employees because of their sex. This Court reversed.

After noting that Title VII does not define the term "discrimination," the Court applied an analysis derived from cases construing the Equal Protection Clause of the Fourteenth Amendment to the Constitution. *Id.*, at 133. The *Gilbert* opinion quoted at length from a footnote in *Geduldig v. Aiello*, 417 U. S. 484 (1974), a case which had upheld the constitutionality of excluding pregnancy coverage under California's disability insurance plan.¹² "Since it is a finding of

was already present in the Act. As we explain *infra*, at 682-685, petitioner's plan discriminates against male employees on the basis of their sex.

¹² "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed v. Reed*, 404 U. S. 71

sex-based discrimination that must trigger, in a case such as this, the finding of an unlawful employment practice under § 703(a)(1)," the Court added, "*Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." 429 U. S., at 136.

The dissenters in *Gilbert* took issue with the majority's assumption "that the Fourteenth Amendment standard of discrimination is coterminous with that applicable to Title VII." *Id.*, at 154, n. 6 (BRENNAN, J., dissenting); *id.*, at 160-161 (STEVENS, J., dissenting).¹³ As a matter of statutory interpretation, the dissenters rejected the Court's holding that the plan's exclusion of disabilities caused by pregnancy did not constitute discrimination based on sex. As JUSTICE BRENNAN explained, it was facially discriminatory for the company to devise "a policy that, but for pregnancy, offers protection for all risks, even those that are 'unique to' men or

(1971)], and *Frontiero v. Richardson*, 411 U. S. 677 (1973)]. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

"The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." [417 U. S.], at 496-497, n. 20." 429 U. S., at 134-135.

The principal emphasis in the text of the *Geduldig* opinion, unlike the quoted footnote, was on the reasonableness of the State's cost justifications for the classification in its insurance program. See n. 13, *infra*.

¹³ As the text of the *Geduldig* opinion makes clear, in evaluating the constitutionality of California's insurance program, the Court focused on the "non-invidious" character of the State's legitimate fiscal interest in excluding pregnancy coverage. 417 U. S., at 496. This justification was not relevant to the statutory issue presented in *Gilbert*. See n. 25, *infra*.

heavily male dominated." *Id.*, at 160. It was inaccurate to describe the program as dividing potential recipients into two groups, pregnant women and nonpregnant persons, because insurance programs "deal with future risks rather than historic facts." Rather, the appropriate classification was "between persons who face a risk of pregnancy and those who do not." *Id.*, at 161-162, n. 5 (STEVENS, J., dissenting). The company's plan, which was intended to provide employees with protection against the risk of uncompensated unemployment caused by physical disability, discriminated on the basis of sex by giving men protection for all categories of risk but giving women only partial protection. Thus, the dissenters asserted that the statute had been violated because conditions of employment for females were less favorable than for similarly situated males.

When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision. It incorporated a new subsection in the "definitions" applicable "[f]or the purposes of this subchapter." 42 U. S. C. § 2000e (1976 ed., Supp. V). The first clause of the Act states, quite simply: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." § 2000e-(k).¹⁴ The House Report stated: "It is the Committee's view that the dissenting Justices correctly interpreted the Act."¹⁵ Similarly, the Senate Report quoted passages from the two dissenting opinions, stating that they "correctly express both the principle and the meaning of title VII."¹⁶

¹⁴The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees.

¹⁵H. R. Rep. No. 95-948, p. 2 (1978), Legislative History of the Pregnancy Discrimination Act of 1978 (Committee Print prepared for the Senate Committee on Labor and Human Resources), p. 148 (1979) (hereinafter Leg. Hist.).

¹⁶S. Rep. No. 95-331, pp. 2-3 (1977), Leg. Hist., at 39-40.

Proponents of the bill repeatedly emphasized that the Supreme Court had erroneously interpreted congressional intent and that amending legislation was necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision. Many of them expressly agreed with the views of the dissenting Justices.¹⁷

As petitioner argues, congressional discussion focused on the needs of female members of the work force rather than spouses of male employees. This does not create a "negative inference" limiting the scope of the Act to the specific problem that motivated its enactment. See *United States v.*

¹⁷*Id.*, at 7-8 ("the bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts"); H. R. Rep. No. 95-948, *supra*, at 8 (same); 123 Cong. Rec. 10581 (1977) (remarks of Rep. Hawkins) ("H. R. 5055 does not really add anything to title VII as I and, I believe, most of my colleagues in Congress when title VII was enacted in 1964 and amended in 1972, understood the prohibition against sex discrimination in employment. For, it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy"); *id.*, at 29387 (remarks of Sen. Javits) ("this bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court's decision in *Gilbert* . . ."); *id.*, at 29647; *id.*, at 29655 (remarks of Sen. Javits) ("What we are doing is leaving the situation the way it was before the Supreme Court decided the *Gilbert* case last year"); 124 Cong. Rec. 21436 (1978) (remarks of Rep. Sarasin) ("This bill would restore the interpretation of title VII prior to that decision").

For statements expressly approving the views of the dissenting Justices that pregnancy discrimination is discrimination on the basis of sex, see Leg. Hist., at 18 (remarks of Sen. Bayh, Mar. 18, 1977, 123 Cong. Rec. 8144); 24 (remarks of Rep. Hawkins, Apr. 5, 1977, 123 Cong. Rec. 10582); 67 (remarks of Sen. Javits, Sept. 15, 1977, 123 Cong. Rec. 29387); 73 (remarks of Sen. Bayh, Sept. 16, 1977, 123 Cong. Rec. 29641); 134 (remarks of Sen. Mathias, Sept. 16, 1977, 123 Cong. Rec. 29663-29664); 168 (remarks of Rep. Sarasin, July 18, 1978, 124 Cong. Rec. 21436). See also *Discrimination on the Basis of Pregnancy, 1977, Hearings on S. 995 before the Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 1st Sess., 13 (1977) (statement of Sen. Bayh); id.*, at 37, 51 (statement of Assistant Attorney General for Civil Rights Drew S. Days).

Turkette, 452 U. S. 576, 591 (1981). Cf. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U. S. 273, 285-296 (1976).¹⁸ Congress apparently assumed that existing plans that included benefits for dependents typically provided no less pregnancy-related coverage for the wives of male employees than they did for female employees.¹⁹ When the question of differential coverage for dependents was addressed in the Senate Report, the Committee indicated that it should be resolved "on the basis of existing title VII principles."²⁰ The legislative

¹⁸ In *McDonald*, the Court held that 42 U. S. C. § 1981, which gives "[a]ll persons within the jurisdiction of the United States . . . the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," protects whites against discrimination on the basis of race even though the "immediate impetus for the bill was the necessity for further relief of the constitutionally emancipated former Negro slaves." 427 U. S., at 289.

¹⁹ This, of course, was true of petitioner's plan prior to the enactment of the statute. See *supra*, at 672. See S. Rep. No. 95-331, *supra* n. 16, at 6, Leg. Hist., at 43 ("Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any Title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans"); 123 Cong. Rec. 29663 (1977) (remarks of Sen. Cranston); Brief for Respondent 31-33, n. 31.

²⁰ "Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for title VII purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing title VII principles." S. Rep. No. 95-331, *supra* n. 16, at 5-6, Leg. Hist., at 42-43.

This statement does not imply that the new statutory definition has no applicability; it merely acknowledges that the new definition does not itself resolve the question.

The dissent quotes extensive excerpts from an exchange on the Senate floor between Senators Hatch and Williams. *Post*, at 692-693. Taken in context, this colloquy clearly deals only with the second clause of the bill, see n. 14, *supra*, and Senator Williams, the principal sponsor of the legislation, addressed only the bill's effect on income maintenance plans. Leg. Hist.,

context makes it clear that Congress was not thereby referring to the view of Title VII reflected in this Court's *Gilbert* opinion. Proponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers.²¹ Against

at 80. Senator Williams first stated, in response to Senator Hatch: "With regard to more maintenance plans for pregnancy-related disabilities, I do not see how this language could be misunderstood." Upon further inquiry from Senator Hatch, he replied: "If there is any ambiguity, with regard to income maintenance plans, I cannot see it." At the end of the same response, he stated: "It is narrowly drawn and would not give any employee the right to obtain income maintenance as a result of the pregnancy of someone who is not an employee." *Ibid.* These comments, which clearly limited the scope of Senator Williams' responses, are omitted from the dissent's lengthy quotation, *post*, at 692-693.

Other omitted portions of the colloquy make clear that it was logical to discuss the pregnancies of employees' spouses in connection with income maintenance plans. Senator Hatch asked, "what about the status of a woman coworker who is not pregnant but rides with a pregnant woman and cannot get to work once the pregnant female commences her maternity leave or the employed mother who stays home to nurse her pregnant daughter?" Leg. Hist., at 80. The reference to spouses of male employees must be understood in light of these hypothetical questions; it seems to address the situation in which a male employee wishes to take time off from work because his wife is pregnant.

²¹ See, e. g., 123 Cong. Rec. 7539 (1977) (remarks of Sen. Williams) ("the Court has ignored the congressional intent in enacting title VII of the Civil Rights Act—that intent was to protect all individuals from unjust employment discrimination, including pregnant workers"); *id.*, at 29385, 29652. In light of statements such as these, it would be anomalous to hold that Congress provided that an employee's pregnancy is sex-based, while a spouse's pregnancy is gender-neutral.

During the course of the Senate debate on the Pregnancy Discrimination Act, Senator Bayh and Senator Cranston both expressed the belief that the new Act would prohibit the exclusion of pregnancy coverage for spouses if spouses were otherwise fully covered by an insurance plan. See *id.*, at 29642, 29663. Because our holding relies on the 1978 legislation only to the extent that it unequivocally rejected the *Gilbert* decision, and ultimately we rely on our understanding of general Title VII principles, we attach no more significance to these two statements than to the many other

this background we review the terms of the amended statute to decide whether petitioner has unlawfully discriminated against its male employees.

II

Section 703(a) makes it an unlawful employment practice for an employer 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 . . ." 42 U. S. C. §2000e-2(a)(1). Health insurance and other fringe benefits are "compensation, terms, conditions, or privileges of employment." Male as well as female employees are protected against discrimination. Thus, if a private employer were to provide complete health insurance coverage for the dependents of its female employees, and no coverage at all for the dependents of its male employees, it would violate Title VII.²² Such a

comments by both Senators and Congressmen disapproving the Court's reasoning and conclusion in *Gilbert*. See n. 17, *supra*.

²² Consistently since 1970 the EEOC has considered it unlawful under Title VII for an employer to provide different insurance coverage for spouses of male and female employees. See Guidelines On Discrimination Because of Sex, 29 CFR §1604.9(d) (1982); Commission Decision No. 70-510, CCH EEOC Decisions (1973) ¶16132 (1970) (accident and sickness insurance); Commission Decision No. 70-513, CCH EEOC Decisions (1973) ¶16114 (1970) (death benefits to surviving spouse); Commission Decision No. 70-660, CCH EEOC Decisions (1973) ¶16133 (1970) (health insurance); Commission Decision No. 71-1100, CCH EEOC Decisions (1973) ¶16197 (1970) (group insurance).

Similarly, in our Equal Protection Clause cases we have repeatedly held that, if the spouses of female employees receive less favorable treatment in the provision of benefits, the practice discriminates not only against the spouses but also against the female employees on the basis of sex. *Frontiero v. Richardson*, 411 U. S. 677, 688 (1973) (opinion of BRENNAN, J.) (increased quarters allowances and medical and dental benefits); *id.*, at 691 (POWELL, J., concurring in judgment); *Weinberger v. Wiesenfeld*, 420 U. S. 636, 645 (1975) (Social Security benefits for surviving spouses); see also *id.*, at 654-655 (POWELL, J., concurring); *Califano v. Goldfarb*, 430

practice would not pass the simple test of Title VII discrimination that we enunciated in *Los Angeles Dept. of Water & Power v. Manhart*, 435 U. S. 702, 711 (1978), for it would treat a male employee with dependents "in a manner which but for that person's sex would be different."²³ The same result would be reached even if the magnitude of the discrimination were smaller. For example, a plan that provided complete hospitalization coverage for the spouses of female employees but did not cover spouses of male employees when they had broken bones would violate Title VII by discriminating against male employees.

Petitioner's practice is just as unlawful. Its plan provides limited pregnancy-related benefits for employees' wives, and affords more extensive coverage for employees' spouses for all other medical conditions requiring hospitalization. Thus

U. S. 199, 207-208 (1977) (opinion of BRENNAN, J.) (Social Security benefits for surviving spouses); *Wengler v. Druggists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980) (workers' compensation death benefits for surviving spouses).

²³ The *Manhart* case was decided several months before the Pregnancy Discrimination Act was passed. Although it was not expressly discussed in the legislative history, it set forth some of the "existing title VII principles" on which Congress relied. Cf. *Cannon v. University of Chicago*, 441 U. S. 677, 696-698 (1979). In *Manhart* the Court struck down the employer's policy of requiring female employees to make larger contributions to its pension fund than male employees, because women as a class tend to live longer than men.

"An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.' It constitutes discrimination and is unlawful unless exempted by the Equal Pay Act of 1963 or some other affirmative justification." 435 U. S., at 711.

The internal quotation was from *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971).

the husbands of female employees receive a specified level of hospitalization coverage for all conditions; the wives of male employees receive such coverage except for pregnancy-related conditions.²⁴ Although *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, because only women can become pregnant, Congress has unequivocally rejected that reasoning. The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions. Thus petitioner's plan unlawfully gives married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees.

There is no merit to petitioner's argument that the prohibitions of Title VII do not extend to discrimination against pregnant spouses because the statute applies only to discrimination in employment. A two-step analysis demonstrates the fallacy in this contention. The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex. And since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees. Cf. *Wengler v. Druggists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980).²⁵ By

²⁴ This policy is analogous to the exclusion of broken bones for the wives of male employees, except that both employees' wives and employees' husbands may suffer broken bones, but only employees' wives can become pregnant.

²⁵ See n. 22, *supra*. This reasoning does not require that a medical insurance plan treat the pregnancies of employees' wives the same as the pregnancies of female employees. For example, as the EEOC recognizes, see n. 9, *supra* (Question 22), an employer might provide full coverage for employees and no coverage at all for dependents. Similarly, a disability plan covering employees' children may exclude or limit maternity benefits. Although the distinction between pregnancy and other conditions is, ac-

making clear that an employer could not discriminate on the basis of an employee's pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee's sex.

In short, Congress' rejection of the premises of *General Electric Co. v. Gilbert* forecloses any claim that an insurance program excluding pregnancy coverage for female beneficiaries and providing complete coverage to similarly situated male beneficiaries does not discriminate on the basis of sex. Petitioner's plan is the mirror image of the plan at issue in *Gilbert*. The pregnancy limitation in this case violates Title VII by discriminating against male employees.²⁶

The judgment of the Court of Appeals is

Affirmed.

JUSTICE REHNQUIST, with whom JUSTICE POWELL joins, dissenting.

In *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976), we held that an exclusion of pregnancy from a disability-benefits

ording to the 1978 Act, discrimination "on the basis of sex," the exclusion affects male and female employees equally since both may have pregnant dependent daughters. The EEOC's guidelines permit differential treatment of the pregnancies of dependents who are not spouses. See 44 Fed. Reg. 23804, 23805, 23807 (1979).

²⁶ Because the 1978 Act expressly states that exclusion of pregnancy coverage is gender-based discrimination on its face, it eliminates any need to consider the average monetary value of the plan's coverage to male and female employees. Cf. *Gilbert*, 429 U. S., at 137-140.

The cost of providing complete health insurance coverage for the dependents of male employees, including pregnant wives, might exceed the cost of providing such coverage for the dependents of female employees. But although that type of cost differential may properly be analyzed in passing on the constitutionality of a State's health insurance plan, see *Geduldig v. Aiello*, 417 U. S. 484 (1974), no such justification is recognized under Title VII once discrimination has been shown. *Manhart*, 435 U. S., at 716-717; 29 CFR § 1604.9(e) (1982) ("It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other").

plan is not discrimination "because of [an] individual's . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, § 703(a)(1), 78 Stat. 255, 42 U. S. C. § 2000e-2(a)(1).¹ In our view, therefore, Title VII was not violated by an employer's disability plan that provided all employees with nonoccupational sickness and accident benefits, but excluded from the plan's coverage disabilities arising from pregnancy. Under our decision in *Gilbert*, petitioner's otherwise inclusive benefits plan that excludes pregnancy benefits for a male employee's spouse clearly would not violate Title VII. For a different result to obtain, *Gilbert* would have to be judicially overruled by this Court or Congress would have to legislatively overrule our decision in its entirety by amending Title VII.

Today, the Court purports to find the latter by relying on the Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 42 U. S. C. § 2000e(k) (1976 ed., Supp. V), a statute that plainly speaks only of female employees affected by pregnancy and says nothing about spouses of male employees.² Congress, of course, was free to legislatively overrule *Gilbert* in whole or in part, and there is no question but what the Pregnancy Discrimination Act manifests congressional dissatisfaction with the result we reached in *Gilbert*. But I think the Court reads far more into the Pregnancy Discrimination Act than Congress put there, and that therefore it is the Court, and not Congress, which is now overruling *Gilbert*.

¹In *Gilbert* the Court did leave open the possibility of a violation where there is a showing that "distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other." 429 U. S., at 135 (quoting *Geduldig v. Aiello*, 417 U. S. 484, 496-497, n. 20 (1974)).

²By referring to "female employees," I do not intend to imply that the Pregnancy Discrimination Act does not also apply to "female applicants for employment." I simply use the former reference as a matter of convenience.

In a case presenting a relatively simple question of statutory construction, the Court pays virtually no attention to the language of the Pregnancy Discrimination Act or the legislative history pertaining to that language. The Act provides in relevant part:

"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . ." 42 U. S. C. § 2000e(k) (1976 ed., Supp. V).

The Court recognizes that this provision is merely definitional and that "[u]ltimately the question we must decide is whether petitioner has discriminated against its male employees . . . because of their sex within the meaning of § 703(a)(1)" of Title VII. *Ante*, at 675. Section 703(a)(1) provides in part:

"It shall be an unlawful employment practice for an employer . . . 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" 42 U. S. C. § 2000e-2(a)(1).

It is undisputed that in § 703(a)(1) the word "individual" refers to an employee or applicant for employment. As modified by the first clause of the definitional provision of the Pregnancy Discrimination Act, the proscription in § 703(a)(1) is for discrimination "against any individual . . . because of such individual's . . . pregnancy, childbirth, or related medi-

cal conditions." This can only be read as referring to the pregnancy of an *employee*.

That this result was not inadvertent on the part of Congress is made very evident by the second clause of the Act, language that the Court essentially ignores in its opinion. When Congress in this clause further explained the proscription it was creating by saying that "women affected by pregnancy . . . shall be treated the same . . . as other persons not so affected but *similar in their ability or inability to work*" it could only have been referring to *female employees*. The Court of Appeals below stands alone in thinking otherwise.³

The Court concedes that this is a correct reading of the second clause. *Ante*, at 678, n. 14. Then in an apparent effort to escape the impact of this provision, the Court asserts that "[t]he meaning of the first clause is not limited by the specific language in the second clause." *Ibid.* I do not disagree. But this conclusion does not help the Court, for as explained above, when the definitional provision of the first clause is inserted in § 703(a)(1), it says the very same thing: the proscription added to Title VII applies only to female employees.

The plain language of the Pregnancy Discrimination Act leaves little room for the Court's conclusion that the Act was

³ See *EEOC v. Joslyn Mfg. & Supply Co.*, 706 F. 2d 1469, 1476-1477 (CA7 1983); *EEOC v. Lockheed Missiles & Space Co.*, 680 F. 2d 1243, 1245 (CA9 1982).

The Court of Appeals' majority, responding to the dissent's reliance on this language, excused the import of the language by saying: "The statutory reference to 'ability or inability to work' denotes disability and does not suggest that the spouse must be an employee of the employer providing the coverage. In fact, the statute says 'as other persons not so affected'; it does not say 'as other *employees* not so affected.'" 667 F. 2d 448, 450-451 (CA4 1982). This conclusion obviously does not comport with a common-sense understanding of the language. The logical explanation for Congress' reference to "persons" rather than "employees" is that Congress intended that the amendment should also apply to applicants for employment.

intended to extend beyond female employees. The Court concedes that "congressional discussion focused on the needs of female members of the work force rather than spouses of male employees." *Ante*, at 679. In fact, the singular focus of discussion on the problems of the *pregnant worker* is striking.

When introducing the Senate Report on the bill that later became the Pregnancy Discrimination Act, its principal sponsor, Senator Williams, explained:

"Because of the Supreme Court's decision in the *Gilbert* case, this legislation is necessary to provide fundamental protection against sex discrimination for our Nation's 42 million *working women*. This protection will go a long way toward insuring that American women are permitted to assume their rightful place in our Nation's economy.

"In addition to providing protection to *working women* with regard to fringe benefit programs, such as health and disability insurance programs, this legislation will prohibit other employment policies which adversely affect *pregnant workers*." 124 Cong. Rec. 36817 (1978) (emphasis added).⁴

⁴ Reprinted in a Committee Print prepared for the Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., *Legislative History of the Pregnancy Discrimination Act of 1978*, pp. 200-201 (1979) (hereinafter referred to as *Leg. Hist.*). In the foreword to the official printing of the Act's legislative history, Senator Williams further described the purpose of the Act, saying:

"The Act provides an essential protection for *working women*. The number of women in the labor force has increased dramatically in recent years. Most of these women are working or seeking work because of the economic need to support themselves or their families. It is expected that this trend of increasing participation by women in the workforce will continue in the future and that an increasing proportion of working women will be those who are mothers. It is essential that these women and their children be fully protected against the harmful effects of unjust employment discrimination on the basis of pregnancy." *Id.*, at III.

As indicated by the examples in the margin,⁵ the Congressional Record is overflowing with similar statements by individual Members of Congress expressing their intention to ensure with the Pregnancy Discrimination Act that working women are not treated differently because of pregnancy. Consistent with these views, all three Committee Reports on the bills that led to the Pregnancy Discrimination Act ex-

⁵See 123 Cong. Rec. 8145 (1977), Leg. Hist., at 21 (remarks of Sen. Bayh) (bill will "help provide true equality for working women of this Nation"); 123 Cong. Rec. 29385 (1977), Leg. Hist., at 62-63 (remarks of Sen. Williams) ("central purpose of the bill is to require that women workers be treated equally with other employees on the basis of their ability or inability to work"); 124 Cong. Rec. 36818 (1978), Leg. Hist., at 203 (remarks of Sen. Javits) ("bill represents only basic fairness for women employees"); 124 Cong. Rec. 36819 (1978), Leg. Hist., at 204 (remarks of Sen. Stafford) (bill will end "major source of discrimination unjustly afflicting working women in America"); 124 Cong. Rec. 21437 (1978), Leg. Hist., at 172 (remarks of Rep. Green) (bill "will provide rights workingwomen should have had years ago"); 124 Cong. Rec. 21439 (1978), Leg. Hist., at 177 (remarks of Rep. Quie) (bill is "necessary in order for women employees to enjoy equal treatment in fringe benefit programs"); 124 Cong. Rec. 21439 (1978), Leg. Hist., at 178 (remarks of Rep. Akaka) ("bill simply requires that pregnant workers be fairly and equally treated").

See also 123 Cong. Rec. 7541 (1977), Leg. Hist., at 7 (remarks of Sen. Brooke); 123 Cong. Rec. 7541, 29663 (1977), Leg. Hist., at 8, 134 (remarks of Sen. Mathias); 123 Cong. Rec. 29388 (1977), Leg. Hist., at 71 (remarks of Sen. Kennedy); 123 Cong. Rec. 29661 (1977), Leg. Hist., at 126 (remarks of Sen. Biden); 123 Cong. Rec. 29663 (1977), Leg. Hist., at 132 (remarks of Sen. Cranston); 123 Cong. Rec. 29663 (1977), Leg. Hist., at 132 (remarks of Sen. Culver); 124 Cong. Rec. 21439 (1978), Leg. Hist., at 178 (remarks of Rep. Corrada); 124 Cong. Rec. 21435, 38573 (1978), Leg. Hist., at 168, 207 (remarks of Rep. Hawkins); 124 Cong. Rec. 38574 (1978), Leg. Hist., at 208-209 (remarks of Rep. Sarasin); 124 Cong. Rec. 21440 (1978), Leg. Hist., at 180 (remarks of Rep. Chisholm); 124 Cong. Rec. 21440 (1978), Leg. Hist., at 181 (remarks of Rep. LaFalce); 124 Cong. Rec. 21441 (1978), Leg. Hist., at 182 (remarks of Rep. Collins); 124 Cong. Rec. 21441 (1978), Leg. Hist., at 184 (remarks of Rep. Whalen); 124 Cong. Rec. 21442 (1978), Leg. Hist., at 185 (remarks of Rep. Burke); 124 Cong. Rec. 21442 (1978), Leg. Hist., at 185 (remarks of Rep. Tsongas).

pressly state that the Act would require employers to treat pregnant employees the same as "other employees."⁶

The Court tries to avoid the impact of this legislative history by saying that it "does not create a 'negative inference' limiting the scope of the Act to the specific problem that motivated its enactment." *Ante*, at 679. This reasoning might have some force if the legislative history was silent on an arguably related issue. But the legislative history is not silent. The Senate Report provides:

"Questions were raised in the committee's deliberations regarding how this bill would affect medical coverage for dependents of employees, as opposed to employees themselves. In this context it must be remembered that the basic purpose of this bill is to protect women employees, it does not alter the basic principles of title VII law as regards sex discrimination. . . . [T]he question in regard to dependents' benefits would be determined on the basis of existing title VII principles. . . . [T]he question of whether an employer who does cover dependents, either with or without additional cost to the employee, may exclude conditions related to pregnancy from that coverage is a different matter. Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether, under title VII, the affected employees were discriminated against on the

⁶See Report of the Senate Committee on Human Resources, S. Rep. No. 95-331 (1977), Leg. Hist., at 38-53; Report of the House Committee on Education and Labor, H. R. Rep. No. 95-948 (1978), Leg. Hist., at 147-164; Report of the Committee of Conference, H. R. Conf. Rep. No. 95-1786 (1978), Leg. Hist., at 194-198.

basis of their sex as regards the extent of coverage for their dependents." S. Rep. No. 95-331, pp. 5-6 (1977), Leg. Hist., at 42-43 (emphasis added).

This plainly disclaims any intention to deal with the issue presented in this case. Where Congress says that it would not want "to encourage" plans such as petitioner's, it cannot plausibly be argued that Congress has intended "to prohibit" such plans. Senator Williams was questioned on this point by Senator Hatch during discussions on the floor and his answers are to the same effect.

"MR. HATCH: . . . The phrase 'women affected by pregnancy, childbirth or related medical conditions,' . . . appears to be overly broad, and is not limited in terms of employment. It does not even require that the person so affected be pregnant.

"Indeed under the present language of the bill, it is arguable that spouses of male employees are covered by this civil rights amendment. . . ."

"Could the sponsors clarify exactly whom that phrase intends to cover?"

"MR. WILLIAMS: . . . I do not see how one can read into this any pregnancy other than that pregnancy that relates to the employee, and if there is any ambiguity, *let it be clear here now that this is very precise. It deals with a woman, a woman who is an employee, an employee in a work situation where all disabilities are covered under a company plan that provides income maintenance in the event of medical disability; that her particular period of disability, when she cannot work because of childbirth or anything related to childbirth is excluded. . . .*

"MR. HATCH: So the Senator is satisfied that, though the committee language I brought up, 'woman

affected by pregnancy' seems to be ambiguous, what it means is that *this act only applies to the particular woman who is actually pregnant, who is an employee and has become pregnant after her employment?*

"MR. WILLIAMS: *Exactly.*" 123 Cong. Rec. 29643-29644 (1977), Leg. Hist., at 80 (emphasis added).⁷

It seems to me that analysis of this case should end here. Under our decision in *General Electric Co. v. Gilbert* petitioner's exclusion of pregnancy benefits for male employee's spouses would not offend Title VII. Nothing in the Pregnancy Discrimination Act was intended to reach beyond female employees. Thus, *Gilbert* controls and requires that we reverse the Court of Appeals. But it is here, at what

The Court suggests that in this exchange Senator Williams is explaining only that spouses of male employees will not be put on "income maintenance plans" while pregnant. *Ante*, at 680, n. 20. This is utterly illogical. Spouses of employees have no income from the relevant employer to be maintained. Senator Williams clearly says that the Act is limited to female employees and as to such employees it will ensure income maintenance where male employees would receive similar disability benefits. Senator Hatch's final question and Senator Williams' response could not be clearer. The Act was intended to affect *only* pregnant workers. This is exactly what the Senate Report said and Senator Williams confirmed that this is exactly what Congress intended.

The only indications arguably contrary to the views reflected in the Senate Report and the exchange between Senators Hatch and Williams are found in two isolated remarks by Senators Bayh and Cranston. 123 Cong. Rec. 29642, 29663 (1977), Leg. Hist., at 75, 131. These statements, however, concern these two Senators' views concerning Title VII sex discrimination as it existed prior to the Pregnancy Discrimination Act. Their conclusions are completely at odds with our decision in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976), and are not entitled to deference here. We have consistently said: "The views of members of a later Congress, concerning different [unamended] sections of Title VII . . . are entitled to little if any weight. It is the intent of the Congress that enacted [Title VII] in 1964 . . . that controls." *Teamsters v. United States*, 431 U. S. 324, 354, n. 39 (1977). See also *Southeastern Community College v. Davis*, 442 U. S. 397, 411, n. 11 (1979).

should be the stopping place, that the Court begins. The Court says:

“Although the Pregnancy Discrimination Act has clarified the meaning of certain terms in this section, neither that Act nor the underlying statute contains a definition of the word ‘discriminate.’ In order to decide whether petitioner’s plan discriminates against male employees because of *their* sex, we must therefore go beyond the bare statutory language. Accordingly, we shall consider whether Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding in *General Electric v. Gilbert*, *supra*, but also rejected the test of discrimination employed by the Court in that case. We believe it did.” *Ante*, at 675–676.

It would seem that the Court has refuted its own argument by recognizing that the Pregnancy Discrimination Act only clarifies the meaning of the phrases “because of sex” and “on the basis of sex,” and says nothing concerning the definition of the word “discriminate.”⁸ Instead the Court proceeds to try to explain that while Congress said one thing, it did another.

The crux of the Court’s reasoning is that even though the Pregnancy Discrimination Act redefines the phrases “because of sex” and “on the basis of sex” only to include discrimination against female employees affected by pregnancy, Congress also expressed its view that in *Gilbert* “the Supreme Court . . . erroneously interpreted congressional intent.” *Ante*, at 679. See also *ante*, at 684. Somehow the Court then concludes that this renders all of *Gilbert* obsolete.

In support of its argument, the Court points to a few passages in congressional Reports and several statements by

⁸The Court also concedes at one point that the Senate Report on the Pregnancy Discrimination Act “acknowledges that the new definition [in the Act] does not itself resolve the question” presented in this case. *Ante*, at 680, n. 20.

various Members of the 95th Congress to the effect that the Court in *Gilbert* had, when it construed Title VII, misperceived the intent of the 88th Congress. *Ante*, at 679, n. 17. The Court also points out that “[m]any of [the Members of the 95th Congress] expressly agreed with the views of the dissenting Justices.” *Ante*, at 679. Certainly *various Members of Congress* said as much. But the fact remains that *Congress as a body* has not expressed these sweeping views in the Pregnancy Discrimination Act.

Under our decision in *General Electric Co. v. Gilbert*, petitioner’s exclusion of pregnancy benefits for male employees’ spouses would not violate Title VII. Since nothing in the Pregnancy Discrimination Act even arguably reaches beyond female employees affected by pregnancy, *Gilbert* requires that we reverse the Court of Appeals. Because the Court concludes otherwise, I dissent.

the termination clause, amended § 418 did not effect a taking within the meaning of the Fifth Amendment.

III

The judgment of the District Court is reversed, and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

MERITOR SAVINGS BANK, FSB v. VINSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1979. Argued March 25, 1986—Decided June 19, 1986

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties presented conflicting testimony about the existence of a sexual relationship between respondent and the supervisor. The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment. The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment. The Court of Appeals reversed and remanded. Noting that a violation of Title VII may be predicated on either of two types of sexual harassment—(1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment—the Court of Appeals held that since the grievance here was of the second type and the District Court had not considered whether a violation of this type had occurred, a remand was necessary. The court further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

Held:

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. Pp. 63-69.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to non-

economic injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment. Pp. 63-67.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim. The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an *economic* effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary. Pp. 67-68.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome. Pp. 68-69.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability. Pp. 69-73.

243 U. S. App. D. C. 323, 753 F. 2d 141, affirmed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 73. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 74.

F. Robert Troll, Jr., argued the cause for petitioner. With him on the briefs were Charles H. Fleischer and Randall C. Smith.

Patricia J. Barry argued the cause for respondent Vinson. With her on the brief was Catherine A. MacKinnon.*

*Briefs of *amici curiae* urging reversal were filed for the United States et al. by Solicitor General Fried, Assistant Attorneys General Reynolds

JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §2000e *et seq.*

I

In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant

and Willard, Deputy Solicitor General Kuhl, Albert G. Lauber, Jr., John F. Cordes, John F. Daly, and Johnny J. Butler; for the Equal Employment Advisory Council by Robert E. Williams, Douglas S. McDowell, and Garen E. Dodge; for the Chamber of Commerce of the United States by Dannie B. Fogleman and Stephen A. Bokut; and for the Trustees of Boston University by William Burnett Harvey and Michael B. Rosen.

Briefs of *amici curiae* urging affirmance were filed for the State of New Jersey et al. by W. Cary Edwards, Attorney General of New Jersey; James J. Ciancia, Assistant Attorney General, Susan L. Reisner and Lynn B. Norcia, Deputy Attorneys General, John Van de Kamp, Attorney General of California, Joseph I. Lieberman, Attorney General of Connecticut, Neil F. Hartigan, Attorney General of Illinois, Hubert H. Humphrey III, Attorney General of Minnesota, Paul Bardacke, Attorney General of New Mexico, Robert Abrams, Attorney General of New York, Jeffrey L. Amestoy, Attorney General of Vermont, and Elisabeth S. Shuster; for the American Federation of Labor and the Congress of Industrial Organizations et al. by Marsha S. Berzon, Jo L. Koletsky, Laurence Gold, Winn Newman, and Sarah E. Burns; for the Women's Bar Association of Massachusetts et al. by S. Beville May; for the Women's Bar Association of the State of New York by Stephen N. Shulman and Lynda S. Mounts; for the Women's Legal Defense Fund et al. by Linda R. Singer, Anne E. Simon, Nadine Taub, Judith Levin, and Barry H. Gottfried; for the Working Women's Institute et al. by Laurie E. Foster; and for Senator Paul Simon et al. by Michael H. Salsbury.

branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment" by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment.[†] Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated, when she started going with a steady boyfriend.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to

[†]Like the Court of Appeals, this Court was not provided a complete transcript of the trial. We therefore rely largely on the District Court's opinion for the summary of the relevant testimony.

call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson v. Taylor*, 22 EPD ¶130,708, p. 14,693, n. 1, 23 FEP Cases 37, 38-39, n. 1 (DC 1980). Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

"[i]f [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.*, at 14,692; 23 FEP Cases, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Ibid.*, 23 FEP Cases, at 43.

Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.*, at 14,691, 23 FEP Cases, at 42.

The Court of Appeals for the District of Columbia Circuit reversed. 243 U. S. App. D. C. 323, 753 F. 2d 141 (1985). Relying on its earlier holding in *Bundy v. Jackson*, 205 U. S. App. D. C. 444, 641 F. 2d 934 (1981), decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," 243 U. S. App. D. C., at 327, 753 F. 2d, at 145, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[U]ncertain as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no materiality whatsoever."

Id., at 328, 753 F. 2d, at 146. The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id.*, at 328, n. 36, 753 F. 2d, at 146, n. 36.

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," 42 U. S. C. § 2000e(b), as well as on the EEOC Guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence—or even the appearance—of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." 243 U. S. App. D. C., at 332, 753 F. 2d, at 150.

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting. 245 U. S. App. D. C. 306, 760 F. 2d 1330 (1985). We granted certiorari, 474 U. S. 1047 (1985), and now affirm but for different reasons.

II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . 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." 42 U. S. C. § 2000e-2(a)(1). The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577-2584 (1964). The principal argument in op-

position to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30-31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment. *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971). Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

Second, in 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex-discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," *Griggs v. Duke Power Co.*, 401 U. S. 424, 433-434 (1971), these Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," *General Electric Co. v. Gilbert*, 429 U. S. 125, 141-142 (1976), quoting *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." 29 CFR § 1604.11(a) (1985). Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." § 1604.11(a)(3).

In concluding that so-called "hostile environment" (*i. e.*, non *quid pro quo*) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally 45 Fed. Reg. 74676 (1980). *Rogers v. EEOC*, 454 F. 2d 234 (CA5 1971), cert. denied, 406 U. S. 957 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers*, the Court of Appeals for the Fifth

Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

"[T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers" 454 F. 2d, at 238.

Courts applied this principle to harassment based on race, *e. g.*, *Firefighters Institute for Racial Equality v. St. Louis*, 549 F. 2d 506, 514-515 (CA8), cert. denied *sub nom. Banta v. United States*, 434 U. S. 819 (1977); *Gray v. Greyhound Lines, East*, 178 U. S. App. D. C. 91, 98, 545 F. 2d 169, 176 (1976), religion, *e. g.*, *Compston v. Borden, Inc.*, 424 F. Supp. 157 (SD Ohio 1976), and national origin, *e. g.*, *Cariddi v. Kansas City Chiefs Football Club*, 568 F. 2d 87, 88 (CA8 1977). Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.

Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee*, 682 F. 2d 897, 902 (1982):

"Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Accord, *Katz v. Dole*, 709 F. 2d 251, 254-255 (CA4 1983); *Bundy v. Jackson*, 205 U. S. App. D. C., at 444-454, 641 F. 2d, at 934-944; *Zabkowitz v. West Bend Co.*, 589 F. Supp. 780 (ED Wis. 1984).

Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers v. EEOC, supra*, at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson*, 682 F. 2d, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.

The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD ¶30,708, at 14,692-14,693, 23 FEP Cases, at 43, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie

absent an *economic* effect on the complainant's employment. See *ibid.* ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[i]f [respondent] and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one." *Id.*, at 14,692, 23 FEP Cases, at 42. But the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." 29 CFR §1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal fantasies," 243 U. S. App. D. C., at 328, n. 36, 753 F. 2d, at 146, n. 36, which the District Court apparently ad-

mitted into evidence, "had no place in this litigation." *Ibid.* The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 29 CFR §1604.11(b) (1985). Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation." 243 U. S. App. D. C., at 328, n. 36, 753 F. 2d, at 146, n. 36. While the District Court must carefully weigh the applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged actions. The Court of Appeals took the opposite view, holding that an employer is

strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that "so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curiae*, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and EEOC as *Amici Curiae* 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory person-

nel, whether or not the employer knew, should have known, or approved of the supervisor's actions. *E. g.*, *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723, 725 (CA6 1972).

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes, agency principles lead to

"a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e. g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." Brief for United States and EEOC as *Amici Curiae* 26.

As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). The Guidelines do require, however, an "examin[ation of] the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid.*

This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing . . . that the employer must have become conscious of [them]." *Taylor v. Jones*, 653 F. 2d 1193, 1197-1199 (CA8 1981) (holding employer liable for racially hostile working environment based on constructive knowledge).

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U. S. C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their em-

ployer's interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

IV

In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

— JUSTICE STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that JUSTICE MARSHALL has answered is fairly presented by the record, I join both the Court's opinion and JUSTICE MARSHALL's opinion.

MARSHALL, J., concurring in judgment 477 U. S.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court's opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The issue the Court declines to resolve is addressed in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See *Griggs v. Duke Power Co.*, 401 U. S. 424, 433-434 (1971) (EEOC Guidelines on Employment Testing Procedures of 1966); see also *ante*, at 65. The Guidelines explain:

"Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

"With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 CFR §§ 1604.11(c),(d) (1985).

The Commission, in issuing the Guidelines, explained that its rule was "in keeping with the general standard of em-

57. MARSHALL, J., concurring in judgment

ployer liability with respect to agents and supervisory employees. . . . [T]he Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor." 45 Fed. Reg. 74676 (1980). I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt companywide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.¹ The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer.² Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did. *E. g.*, *Flowers v. Crouch-Walker Corp.*,

¹ The remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA). See *Albemarle Paper Co. v. Moody*, 422 U. S. 405, 419, and n. 11 (1975); see also *Franks v. Bowman Transportation Co.*, 424 U. S. 747, 768-770 (1976).

² For NLRA cases, see, *e. g.*, *Graves Trucking, Inc. v. NLRB*, 692 F. 2d 470 (CA7 1982); *NLRB v. Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp.*, 473 F. 2d 374, 384 (CA5 1973); *Amalgamated Clothing Workers of America v. NLRB*, 124 U. S. App. D. C. 365, 377, 365 F. 2d 898, 909 (1966).

552 F. 2d 1277, 1282 (CA7 1977); *Young v. Southwestern Savings and Loan Assn.*, 509 F. 2d 140 (CA5 1975); *Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F. 2d 723 (CA6 1972). Following that approach, every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee. See *Horn v. Duke Homes, Inc., Div. of Windsor Mobile Homes*, 755 F. 2d 599, 604-606 (CA7 1985); *Craig v. Y & Y Snacks, Inc.*, 721 F. 2d 77, 80-81 (CA3 1983); *Katz v. Dole*, 709 F. 2d 251, 255, n. 6 (CA4 1983); *Henson v. Dundee*, 682 F. 2d 897, 910 (CA11 1982); *Miller v. Bank of America*, 600 F. 2d 211, 213 (CA9 1979).

The brief filed by the Solicitor General on behalf of the United States and the EEOC in this case suggests that a different rule should apply when a supervisor's harassment "merely" results in a discriminatory work environment. The Solicitor General concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC Guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor "is not exercising, or threatening to exercise, actual or apparent authority to make personnel decisions affecting the victim." Brief for United States and EEOC as *Amici Curiae* 24. In the latter situation, he concludes, some further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the au-

thority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Agency principles and the goals of Title VII law make appropriate some limitation on the liability of employers for the acts of supervisors. Where, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict employer liability. See 29 CFR § 1604.11(c) (1985). Those considerations, however, do not justify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the "pure" hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief. See *Bundy v. Jackson*, 205 U. S. App. D. C. 444, 456, n. 12, 641 F. 2d 934, 946, n. 12 (1981). Under Title VII, the EEOC must notify an employer of charges made against it within 10 days after receipt of the complaint. 42 U. S. C. § 2000e-5(b). If the charges appear to be based on "reasonable cause," the EEOC must attempt to eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* An employer whose internal procedures assertedly would have redressed the discrimination can avoid injunctive relief by employing these procedures after receiving notice of the complaint or during the conciliation period. Cf. Brief for United

States and EEOC as *Amici Curiae* 26. Where a complainant, on the other hand, seeks backpay on the theory that a hostile work environment effected a constructive termination, the existence of an internal complaint procedure may be a factor in determining not the employer's liability but the remedies available against it. Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

I therefore reject the Solicitor General's position. I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

MCMILLAN ET AL. v. PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 85-215. Argued March 4, 1986—Decided June 19, 1986

Pennsylvania's Mandatory Minimum Sentencing Act (Act) provides that anyone convicted of certain enumerated felonies is subject to a mandatory minimum sentence of five years' imprisonment if the sentencing judge—upon considering the evidence introduced at the trial and any additional evidence offered by either the defendant or the Commonwealth at the sentencing hearing—finds, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. The Act, which also provides that visible possession shall not be an element of the crime, operates to divest the judge of discretion to impose any sentence of less than five years for the underlying felony, but does not authorize a sentence in excess of that otherwise allowed for the offense. Each of the petitioners was convicted of one of the Act's enumerated felonies, and in each case the Commonwealth gave notice that at sentencing it would seek to proceed under the Act. However, each of the sentencing judges found the Act unconstitutional and imposed a lesser sentence than that required by the Act. The Pennsylvania Supreme Court consolidated the Commonwealth's appeals, vacated petitioners' sentences, and remanded for sentencing pursuant to the Act. The court held that the Act was consistent with due process, rejecting petitioners' principal argument that visible possession of a firearm was an element of the crimes for which they were sentenced and thus must be proved beyond a reasonable doubt under *In re Winship*, 397 U. S. 358, and *Mullaney v. Wilbur*, 421 U. S. 684.

Held:

1. A State may properly treat visible possession of a firearm as a sentencing consideration rather than an element of a particular offense that must be proved beyond a reasonable doubt. This case is controlled by *Patterson v. New York*, 432 U. S. 197, which rejected a claim that whenever a State links the "severity of punishment" to the "presence or absence of an identified fact" the State must prove that fact beyond a reasonable doubt. While there are constitutional limits beyond which the States may not go in this regard, the applicability of the reasonable-doubt standard is usually dependent on how a State defines the offense that is charged in any given case. Here, the Pennsylvania Legislature has made visible possession of a firearm a sentencing factor that comes into play only after the defendant has been found guilty of one of the

JOHNSON *v.* TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, ET AL.

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

No. 85-1129. Argued November 12, 1986—Decided March 25, 1987

In 1978, an Affirmative Action Plan (Plan) for hiring and promoting minorities and women was voluntarily adopted by respondent Santa Clara County Transportation Agency (Agency). The Plan provides, *inter alia*, 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. The Plan is intended to achieve a statistically measurable yearly improvement in hiring and promoting minorities and women in job classifications where they are underrepresented, and the long-term goal is to attain a work force whose composition reflects the proportion of minorities and women in the area labor force. The Plan sets aside no specific number of positions for minorities or women, but requires that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions. When the Agency announced a vacancy for the promotional position of road dispatcher, none of the 238 positions in the pertinent Skilled Craft Worker job classification, which included the dispatcher position, was held by a woman. The qualified applicants for the position were interviewed and the Agency, pursuant to the Plan, ultimately passed over petitioner, a male employee, and promoted a female, Diane Joyce, both of whom were rated as well qualified for the job. After receiving a right-to-sue letter from the Equal Employment Opportunity Commission, petitioner filed suit in Federal District Court, which held that the Agency had violated Title VII of the Civil Rights Act of 1964. The court found that Joyce's sex was the determining factor in her selection and that the Agency's Plan was invalid under the criterion announced in *Steelworkers v. Weber*, 443 U. S. 193, that the Plan be temporary. The Court of Appeals reversed.

Held: The Agency appropriately took into account Joyce's sex as one factor in determining that she should be promoted. The Agency's Plan 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, and is fully consistent with Title VII. Pp. 626-640.

(a) Petitioner bears the burden of proving that the Agency's Plan violates Title VII. Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision, such as the existence of an affirmative action plan. The burden then shifts to the plaintiff to prove that the plan is invalid and that the employer's justification is pretextual. Pp. 626-627.

(b) Assessment of the legality of the Agency's Plan must be guided by the decision in *Weber*. An employer seeking to justify the adoption of an affirmative action plan need not point to its own prior discriminatory practices, but need point only to a conspicuous imbalance in traditionally segregated job categories. Voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts. Pp. 627-630.

(c) The employment decision here was made pursuant to a plan prompted by concerns similar to those of the employer in *Weber, supra*. 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. Where a job requires special training, the comparison for determining whether an imbalance exists should be between the employer's work force and those in the area labor force who possess the relevant qualifications. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would improperly dictate mere blind hiring by the numbers. However, the Agency's Plan did not authorize such blind hiring, but expressly directed that numerous factors be taken into account in making employment decisions, including specifically the number of female applicants qualified for particular jobs. Thus, despite the fact that no precise short-term goal was yet in place for the Skilled Craft Worker job category when Joyce was promoted, the Agency's management 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 the job category posed no danger that personnel decisions would be made by reflexive adherence to a numerical standard. Pp. 631-637.

(d) The Agency Plan did not unnecessarily trammel male employees' rights or create an absolute bar to their advancement. The Plan sets aside no positions for women, and expressly states that its goals should

not be construed as "quotas" that must be met. Denial of the promotion to petitioner unsettled no legitimate, firmly rooted expectation on his part, since the Agency Director was authorized to select any of the seven applicants deemed qualified for the job. Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers. 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. Pp. 637-640.

770 F. 2d 752, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 642. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 647. WHITE, J., filed a dissenting opinion, *post*, p. 657. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, and in Parts I and II of which WHITE, J., joined, *post*, p. 657.

Constance E. Brooks argued the cause for petitioner. With her on the briefs was *James L. Dawson*.

Steven Woodside argued the cause for respondents. With him on the brief for respondent Transportation Agency, Santa Clara County, California, were *Ann Miller Ravel*, *James Rumble*, and *Morris J. Baller*. *David A. Rosenfeld* filed a brief for respondent Service Employees International Union Local 715.*

*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Fried*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Ayer*, *Deputy Assistant Attorney General Carvin*, *Roger Clegg*, and *David K. Flynn*; for the Mid-Atlantic Legal Foundation by *Richard B. McGlynn* and *Douglas Foster*; and for the Pacific Legal Foundation et al. by *Ronald A. Zumbun*, *John H. Findley*, and *Anthony T. Caso*.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Marian M. Johnston*,

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

Supervising Deputy Attorney General, *Beverly Tucker*, Deputy Attorney General, *Jim Jones*, Attorney General of Idaho, *William J. Guste, Jr.*, Attorney General of Louisiana, *Stephen H. Sachs*, Attorney General of Maryland, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Robert M. Spire*, Attorney General of Nebraska, *Robert Abrams*, Attorney General of New York, *David Frohnmayer*, Attorney General of Oregon, *Bronson C. La Follette*, Attorney General of Wisconsin, and *Elisabeth S. Snuster*; for the American Federation of Labor and Congress of Industrial Organizations by *David Silberman* and *Laurence Gold*; for the American Society for Personnel Administration by *Lawrence Z. Lorber* and *J. Robert Kirk*; for the National League of Cities et al. by *Cynthia M. Pols*, *John J. Gunther*, *Carolyn F. Corwin*, *Bruce N. Kuhlík*, and *Frederic Lee Ruck*; and for the NOW Legal Defense and Education Fund et al. by *Marsha Levick*, *Emily J. Spitzer*, and *Judith L. Lichtman*.

Briefs of *amici curiae* were filed for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby*; for the city of Detroit et al. by *Daniel B. Edelman*, *James R. Murphy*, *Charles L. Reischel*, *Frederick N. Merkin*, and *Robert Cramer*; and for the Lawyers' Committee for Civil Rights Under Law et al. by *Harold R. Tyler, Jr.*, *James Robertson*, *Norman Redlich*, *William L. Robinson*, *Richard T. Seymour*, *James D. Crawford*, *Antonia Hernandez*, *Grover G. Hankins*, and *Kenneth Kimerling*.

¹Section 703(a) of the Act, 78 Stat. 255, as amended, 86 Stat. 109, 42 U. S. C. § 2000e-2(a), provides that it "shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

Northern District of California, in an action filed by petitioner 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. 770 F. 2d 752 (1985). We granted certiorari, 478 U. S. 1019 (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

terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

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

² No constitutional issue was either raised or addressed in the litigation below. See 770 F. 2d 752, 754, n. 1 (1985). 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*, 476 U. S. 267 (1986).

³ 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.

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. 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 pro-

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.

portion 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.

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 counseled 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, equipment, 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 a 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.⁵ 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 con-

⁵Joyce 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 pairs 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 10 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," *id.*, at 153.

cluded 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, affirmative 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 EEOC 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 in evaluating the validity of the Plan. 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 re-

versed, 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. 770 F. 2d, at 756. 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. 770 F. 2d, at 757. 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 trammelled the rights of other employees, nor created an absolute bar to their advancement. *Id.*, at 757-759.

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. 267, 277-278 (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 employer's justification is pretextual and the plan is invalid. As a practical matter, of course, an employer will generally seek to avoid a charge of

pretext by presenting evidence in support of its plan. That does not mean, however, as petitioner suggests, that reliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff.

The assessment of the legality of the Agency Plan must be guided by our decision in *Weber, supra*.⁶ In that case, the

⁶ JUSTICE SCALIA's 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.* This point is underscored by Congress' concern that the receipt of any form of financial assistance might render an employer subject to the commands of Title VI rather than Title VII. As a result, Congress added § 604 to Title VI, 78 Stat. 253, as set forth in 42 U. S. C. § 2000d-3, which provides:

"Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."

The sponsor of this section, Senator Cooper, stated that it was designed to clarify that "it was not intended that [T]itle VI would impinge on [T]itle VII." 110 Cong. Rec. 11615 (1964).

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

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. As we stated:

"It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had been excluded from the American dream for so long' consti-

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.

tuted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Id.*, at 204 (quoting remarks of Sen. Humphrey, 110 Cong. Rec. 6552 (1964)).⁷

⁷JUSTICE SCALIA's 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 670. *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*, "[I]f 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.

JUSTICE SCALIA's dissent faults the fact that we take note of the absence of congressional efforts to amend the statute to nullify *Weber*. It suggests that congressional inaction cannot be regarded as acquiescence under all circumstances, but then draws from that unexceptional point the conclusion that any reliance on congressional failure to act is necessarily a "canard." *Post*, at 672. The fact that inaction may not always provide crystalline revelation, however, should not obscure the fact that it may be probative to varying degrees. *Weber*, for instance, was a widely publicized decision that addressed a prominent issue of public debate. Legislative inattention thus is not a plausible explanation for congressional inaction. Furthermore, Congress not only passed no contrary legislation in the wake of *Weber*, but not one legislator even proposed a bill to do so. The barriers of the legislative process therefore also seem a poor explanation for failure to act. By contrast, when Congress has been displeased with our interpretation of Title VII, it has not hesitated to amend the statute to tell us so. For instance, when Congress passed the Pregnancy Discrimination Act of 1978, 42 U. S. C. § 2000e(k), "it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in [*General Electric Co. v. Gilbert*, 429 U. S. 125 (1976)]." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U. S. 669, 678 (1983). Surely, it is appropriate to find some probative value in such radically

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.” 443 U. S., at 208. 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 in 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

different congressional reactions to this Court’s interpretations of the same statute.

As one scholar has put it, “When a court says to a legislature: ‘You (or your predecessor) meant X,’ it almost invites the legislature to answer: ‘We did not.’” G. Calabresi, *A Common Law for the Age of Statutes* 31–32 (1982). Any belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted.

⁸ See also *Firefighters v. Cleveland*, 478 U. S. 501, 515 (1986) (“We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII”); *Alexander v. Gardner-Denver Co.*, 415 U. S. 36, 44 (1974) (“Cooperation and voluntary compliance were selected as the preferred means for achieving [Title VII’s] goal”). JUSTICE SCALIA’s suggestion that an affirmative action program may be adopted only to redress an employer’s past discrimination, see *post*, at 664–665, 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 ac-

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 nonminorities 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

tion. As JUSTICE BLACKMUN’s concurrence in that case pointed out, such a standard would “plac[e] 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.” *Id.*, at 210. Similarly, JUSTICE O’CONNOR has observed in the constitutional context that “[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*, 476 U. S., at 290 (O’CONNOR, J., concurring in part and concurring in judgment).

Contrary to JUSTICE SCALIA’s contention, *post*, at 664–668, our decisions last term in *Firefighters*, *supra*, and *Sheet Metal Workers v. EEOC*, 478 U. S. 501 (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 635. In *Sheet 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. JUSTICE SCALIA’s suggestion that employers should be able to do no more voluntarily than courts can order as remedies, *post*, at 664–668, 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 524, reflects a desire to preserve a relatively large domain for voluntary employer action.

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 *Steelworkers v. Weber*, 443 U. S. 193 (1979) (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 both that sex or race will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed.

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*, at 649, since we do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans.⁹ Application of the "prima facie" standard in Title VII cases would be inconsistent with *Weber's* focus on

⁹ See n. 6, *supra*.

statistical imbalance,¹⁰ and could inappropriately create a significant disincentive 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.¹¹

¹⁰ The difference between the "manifest imbalance" and "prima facie" standards is illuminated by *Weber*. Had the Court in that case been concerned with past discrimination by the employer, it would have focused on discrimination in hiring skilled, not unskilled, workers, since only the scarcity of the former in Kaiser's work force would have made it vulnerable to a Title VII suit. In order to make out a prima facie case on such a claim, a plaintiff would be required to compare the percentage of black skilled workers in the Kaiser work force with the percentage of black skilled craft workers in the area labor market.

Weber obviously did not make such a comparison. Instead, it focused on the disparity between the percentage of black skilled craft workers in Kaiser's ranks and the percentage of blacks in the area labor force. 443 U. S., at 198-199. Such an approach reflected a recognition that the proportion of black craft workers in the local labor force was likely as miniscule as the proportion in Kaiser's work force. The Court realized that the lack of imbalance between these figures would mean that employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities. Thus, in cases such as *Weber*, where the employment decision at issue involves the selection of unskilled persons for a training program, the "manifest imbalance" standard permits comparison with the general labor force. By contrast, the "prima facie" standard would require comparison with the percentage of minorities or women qualified for the job for which the trainees are being trained, a standard that would have invalidated the plan in *Weber* itself.

¹¹ In 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 nonstatistical 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

It is clear that the decision to hire Joyce was made pursuant to an Agency plan that directed that sex or race be 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 51.¹² 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 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.

regarding employment practices). Of course, when there is sufficient evidence to meet the more stringent "prima facie" standard, be it statistical, nonstatistical, or a combination of the two, the employer is free to adopt an affirmative action plan.

¹² 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.

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.¹³ 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 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 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 constituting 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.

¹³ 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.

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 3 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 available qualified minority applicants . . ." *Sheet Metal Workers v. EEOC*, 478

U. S. 421, 495 (1986) (O'CONNOR, J., 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.¹⁴ The promotion 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 trammelled the rights of male employees or created an abso-

¹⁴ 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.

lute 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. 501 (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 *Regents of University of California 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 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 petitioner. Furthermore, while 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.¹⁵

¹⁵ Furthermore, from 1978 to 1982 Skilled Craft jobs in the Agency increased from 238 to 349. The Agency’s personnel figures indicate that the

Finally, the Agency’s Plan was intended to *attain* a balanced work force, not to maintain one. The Plan contains 10 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 it anticipated only gradual increases in the representation of minorities and women.¹⁶ 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

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 3 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.

¹⁶ 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.

only temporary may be necessary if the program actually sets aside positions according to specific numbers. See, e. g., *Firefighters, supra*, at 510 (4-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*, 478 U. S., at 477-478. 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.

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 290 (O'CONNOR, J., 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 nonminorities. The Agency has identified a conspicuous imbalance in job categories traditionally segregated by race and sex. It has made clear from the outset, how-

ever, 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.¹⁷ 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

¹⁷ JUSTICE SCALIA's dissent predicts that today's decision will loose a flood of "less qualified" minorities and women upon the work force, as employers seek to forestall possible Title VII liability. *Post*, at 673-677. 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 concern 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 n. 8, *supra*.

A second, and more fundamental, problem with JUSTICE SCALIA's speculation is that he 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 the American Society for Personnel Administration as *Amicus Curiae* 9.

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 623-625. The selection of Joyce thus belies JUSTICE SCALIA's contention that the beneficiaries of affirmative action programs will be those employees who are merely not "utterly unqualified." *Post*, at 675.

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.

JUSTICE STEVENS, concurring.

While I join the Court's opinion, I write separately to explain my view of this case's position in our evolving anti-discrimination law and to emphasize that the opinion does not establish the permissible outer limits of voluntary programs undertaken by employers to benefit disadvantaged groups.

I

Antidiscrimination measures may benefit protected groups in two distinct ways. As a sword, such measures may confer benefits by specifying that a person's membership in a disadvantaged group must be a neutral, irrelevant factor in governmental or private decisionmaking or, alternatively, by compelling decisionmakers to give favorable consideration to disadvantaged group status. As a shield, an antidiscrimination statute can also help a member of a protected class by assuring decisionmakers in some instances that, when they elect for good reasons of their own to grant a preference of some sort to a minority citizen, they will not violate the law. The Court properly holds that the statutory shield allowed respondent to take Diane Joyce's sex into account in promoting her to the road dispatcher position.

Prior to 1978 the Court construed the Civil Rights Act of 1964 as an absolute blanket prohibition against discrimination which neither required nor permitted discriminatory prefer-

ences for any group, minority or majority. The Court unambiguously endorsed the neutral approach, first in the context of gender discrimination¹ and then in the context of racial discrimination against a white person.² As I explained in my separate opinion in *Regents of University of California v. Bakke*, 438 U. S. 265, 412-418 (1978), and as the Court forcefully stated in *McDonald v. Santa Fe Trail Transportation Co.*, 427 U. S. 273, 280 (1976), Congress intended "to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians" (citations omitted). If the Court had adhered to that construction of the Act, petitioner would unquestionably prevail in this case. But it has not done so.

¹"Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971).

²"Similarly the EEOC, whose interpretations are entitled to great deference, [401 U. S.,] at 433-434, has consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites, holding that to proceed otherwise would

"constitute a derogation of the Commission's Congressional mandate to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians." EEOC Decision No. 74-31, 7 FEP Cases 1326, 1328, CCH EEOC Decisions ¶6404, p. 4084 (1973).

"This conclusion is in accord with uncontradicted legislative history to the effect that Title VII was intended to 'cover white men and white women and all Americans,' 110 Cong. Rec. 2578 (1964) (remarks of Rep. Celler), and create an 'obligation not to discriminate against whites,' *id.*, at 7218 (memorandum of Sen. Clark). See also *id.*, at 7213 (memorandum of Sens. Clark and Case); *id.*, at 8912 (remarks of Sen. Williams). We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes and Jackson white." *McDonald v. Santa Fe Trail Transportation Co.*, 427 U. S. 273, 279-280 (1976) (footnotes omitted).

In the *Bakke* case in 1978 and again in *Steelworkers v. Weber*, 443 U. S. 193 (1979), a majority of the Court interpreted the antidiscriminatory strategy of the statute in a fundamentally different way. The Court held in the *Weber* case that an employer's program designed to increase the number of black craftworkers in an aluminum plant did not violate Title VII.³ It remains clear that the Act does not require any employer to grant preferential treatment on the basis of race or gender, but since 1978 the Court has unambiguously interpreted the statute to permit the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted. Neither the "same standards" language used in *McDonald*, nor the "color blind" rhetoric used by the Senators and Congressmen who enacted the bill, is now controlling. Thus, as was true in *Runyon v. McCrary*, 427 U. S. 160, 189 (1976) (STEVENS, J., concurring), the only problem for me is whether to adhere to an authoritative construction of the Act that is at odds with my understanding of the actual intent of the authors of the legislation. I conclude without hesitation that I must answer that question in the affirmative, just as I did in *Runyon*. *Id.*, at 191-192.

Bakke and *Weber* have been decided and are now an important part of the fabric of our law. This consideration is sufficiently compelling for me to adhere to the basic construction of this legislation that the Court adopted in *Bakke* and in *Weber*. There is an undoubted public interest in "stability and orderly development of the law." 427 U. S., at 190.⁴

³Toward the end of its opinion, the Court mentioned certain reasons why the plan did not impose a special hardship on white employees or white applicants for employment. *Steelworkers v. Weber*, 443 U. S., at 208. I have never understood those comments to constitute a set of conditions that every race-conscious plan must satisfy in order to comply with Title VII.

⁴As Mr. Justice Cardozo remarked, with respect to the routine work of the judiciary: "The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the

The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave "breathing room" for employer initiatives to benefit members of minority groups. If Title VII had never been enacted, a private employer would be free to hire members of minority groups for any reason that might seem sensible from a business or a social point of view. The Court's opinion in *Weber* reflects the same approach; the opinion relied heavily on legislative history indicating that Congress intended that traditional management prerogatives be left undisturbed to the greatest extent possible. See 443 U. S., at 206-207. As we observed last Term, "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Firefighters v. Cleveland*, 478 U. S. 501, 516 (1986) (quoting *Weber*, 443 U. S., at 204). In *Firefighters*, we again acknowledged Congress' concern in Title VII to avoid "undue federal interference with managerial discretion." 478 U. S., at 519.⁵

courses laid by others who had gone before him.' Turning to the exceptional case, Mr. Justice Cardozo noted: "[W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. . . . If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.' In this case, those admonitions favor adherence to, rather than departure from, precedent." 427 U. S., at 190-191. Even while writing in dissent in the *Weber* case, Chief Justice Burger observed that the result reached by the majority was one that he "would be inclined to vote for were I a Member of Congress considering a proposed amendment of Title VII." 443 U. S., at 216.

⁵As JUSTICE BLACKMUN observed in *Weber*, 443 U. S., at 209, 214-215 (concurring opinion):

"Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself

As construed in *Weber* and in *Firefighters*, the statute does not absolutely prohibit preferential hiring in favor of minorities; it was merely intended to protect historically disadvantaged groups *against* discrimination and not to hamper managerial efforts to benefit members of disadvantaged groups that are consistent with that paramount purpose. The preference granted by respondent in this case does not violate the statute as so construed; the record amply supports the conclusion that the challenged employment decision served the legitimate purpose of creating diversity in a category of employment that had been almost an exclusive province of males in the past. Respondent's voluntary decision is surely not prohibited by Title VII as construed in *Weber*.

II

Whether a voluntary decision of the kind made by respondent would ever be prohibited by Title VII is a question we need not answer until it is squarely presented. Given the interpretation of the statute the Court adopted in *Weber*, I see no reason why the employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII. Indeed, in some instances the employer may find it more helpful to focus on the future. 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—or indeed, any particular affirmative-action decision—in many cases the employer will find it more appropriate to consider other legitimate reasons to give preferences to members of underrepresented groups.

does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief. . . . Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of 'locking in' the effects of discrimination for which Title VII provides no remedy."

Statutes enacted for the benefit of minority groups should not block these forward-looking considerations.

"Public and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination. The Jackson school board, for example, said it had done so in part to improve the quality of education in Jackson—whether by improving black students' performance or by dispelling for black and white students alike any idea that white supremacy governs our social institutions. Other employers might advance different forward-looking reasons for affirmative action: improving their services to black constituencies, averting racial tension over the allocation of jobs in a community, or increasing the diversity of a work force, to name but a few examples. Or they might adopt affirmative action simply to eliminate from their operations all de facto embodiment of a system of racial caste. All of these reasons aspire to a racially integrated future, but none reduces to 'racial balancing for its own sake.'" Sullivan, *The Supreme Court—Comment, Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78, 96 (1986).

The Court today does not foreclose other voluntary decisions based in part on a qualified employee's membership in a disadvantaged group. Accordingly, I concur.

JUSTICE O'CONNOR, concurring in the judgment.

In *Steelworkers v. Weber*, 443 U. S. 193 (1979), this Court held that § 703(d) of Title VII does not prohibit voluntary affirmative action efforts if the employer sought to remedy a "manifest . . . imbalanc[e] in traditionally segregated job categories." *Id.*, at 197. As JUSTICE SCALIA illuminates with excruciating clarity, § 703 has been interpreted by *Weber* and succeeding cases to permit what its language read literally would prohibit. *Post*, at 669–671; see also *ante*, at 642–643

(STEVENS, J., concurring). Section 703(d) prohibits employment discrimination "against *any individual* because of his race, color, religion, sex, or national origin." 42 U. S. C. § 2000e-2(d) (emphasis added). The *Weber* Court, however, concluded that voluntary affirmative action was permissible in some circumstances because a prohibition of every type of affirmative action would "bring about an end completely at variance with the purpose of the statute." 443 U. S., at 202 (quoting *United States v. Public Utilities Comm'n*, 345 U. S. 295, 315 (1953)). This purpose, according to the Court, was to open employment opportunities for blacks in occupations that had been traditionally closed to them.

None of the parties in this case have suggested that we overrule *Weber* and that question was not raised, briefed, or argued in this Court or in the courts below. If the Court is faithful to its normal prudential restraints and to the principle of *stare decisis* we must address once again the propriety of an affirmative action plan under Title VII in light of our precedents, precedents that have upheld affirmative action in a variety of circumstances. This time the question posed is whether a public employer violates Title VII by promoting a qualified woman rather than a marginally better qualified man when there is a statistical imbalance sufficient to support a claim of a pattern or practice of discrimination against women under Title VII.

I concur in the judgment of the Court in light of our precedents. I write separately, however, because the Court has chosen to follow an expansive and ill-defined approach to voluntary affirmative action by public employers despite the limitations imposed by the Constitution and by the provisions of Title VII, and because JUSTICE SCALIA's dissent rejects the Court's precedents and addresses the question of how Title VII should be interpreted as if the Court were writing on a clean slate. The former course of action gives insufficient guidance to courts and litigants; the latter course of action serves as a useful point of academic discussion, but fails

to reckon with the reality of the course that the majority of the Court has determined to follow.

In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause. In either case, consistent with the congressional intent to provide some measure of protection to the interests of the employer's nonminority employees, the employer must have had a firm basis for believing that remedial action was required. An employer would have such a firm basis if it can point to a statistical disparity sufficient to support a prima facie claim under Title VII by the employee beneficiaries of the affirmative action plan of a pattern or practice claim of discrimination.

In *Weber*, this Court balanced two conflicting concerns in construing § 703(d): Congress' intent to root out invidious discrimination against *any person* on the basis of race or gender, *McDonald v. Santa Fe Transportation Co.*, 427 U. S. 273 (1976), and its goal of eliminating the lasting effects of discrimination against minorities. Given these conflicting concerns, the Court concluded that it would be inconsistent with the background and purpose of Title VII to prohibit affirmative action in all cases. As I read *Weber*, however, the Court also determined that Congress had balanced these two competing concerns by permitting affirmative action only as a remedial device to eliminate actual or apparent discrimination or the lingering effects of this discrimination.

Contrary to the intimations in JUSTICE STEVENS' concurrence, this Court did not approve preferences for minorities "for any reason that might seem sensible from a business or a social point of view." *Ante*, at 645. Indeed, such an approach would have been wholly at odds with this Court's holding in *McDonald* that Congress intended to prohibit practices that operate to discriminate against the employment opportunities of nonminorities as well as minorities. Moreover, in *Weber* the Court was careful to consider the effects of the af-

O'CONNOR, J., concurring in judgment 480 U. S.

firmative action plan for black employees on the employment opportunities of white employees. 443 U. S., at 208. Instead of a wholly standardless approach to affirmative action, the Court determined in *Weber* that Congress intended to permit affirmative action only if the employer could point to a "manifest . . . imbalance in traditionally segregated job categories." *Id.*, at 197. This requirement both "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," *ante*, at 632, and is consistent with this Court's and Congress' consistent emphasis on the value of voluntary efforts to further the antidiscrimination purposes of Title VII. *Wygant v. Jackson Board of Education*, 476 U. S. 267, 290 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

The *Weber* view of Congress' resolution of the conflicting concerns of minority and nonminority workers in Title VII appears substantially similar to this Court's resolution of these same concerns in *Wygant v. Jackson Board of Education*, *supra*, which involved the claim that an affirmative action plan by a public employer violated the Equal Protection Clause. In *Wygant*, the Court was in agreement that remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action plan. The Court also concluded, however, that "[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.*, at 276. Instead, we determined that affirmative action was valid if it was crafted to remedy past or present discrimination by the employer. Although the employer need not point to any contemporaneous findings of actual discrimination, I concluded in *Wygant* that the employer must point to evidence sufficient to establish a firm basis for believing that remedial action is required, and that a statistical imbalance sufficient for a Title VII prima facie

616 O'CONNOR, J., concurring in judgment

case against the employer would satisfy this firm basis requirement:

"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." *Id.*, at 292.

The *Wygant* analysis is entirely consistent with *Weber*. In *Weber*, the affirmative action plan involved a training program for unskilled production workers. There was little doubt that the absence of black craftworkers was the result of the exclusion of blacks from craft unions. *Steelworkers v. Weber*, 443 U. S., at 198, n. 1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). The employer in *Weber* had previously hired as craftworkers only persons with prior craft experience, and craft unions provided the sole avenue for obtaining this experience. Because the discrimination occurred at entry into the craft union, the "manifest racial imbalance" was powerful evidence of prior race discrimination. Under our case law, the relevant comparison for a Title VII prima facie case in those circumstances—discrimination in admission to entry-level positions such as membership in craft unions—is to the total percentage of blacks in the labor force. See *Teamsters v. United States*, 431 U. S. 324 (1977); cf. *Sheet Metal Workers v. EEOC*, 478 U. S. 421, 437-439 (1986) (observing that lower courts had relied on comparison to general labor force in finding Title VII violation by union). Here, however, the evidence of past discrimination is more complex. The num-

ber of women with the qualifications for entry into the relevant job classification was quite small. A statistical imbalance between the percentage of women in the work force generally and the percentage of women in the particular specialized job classification, therefore, does not suggest past discrimination for purposes of proving a Title VII prima facie case. See *Hazelwood School District v. United States*, 433 U. S. 299, 308, and n. 13 (1977).

Unfortunately, the Court today gives little guidance for what statistical imbalance is sufficient to support an affirmative action plan. Although the Court denies that the statistical imbalance need be sufficient to make out a prima facie case of discrimination against women, *ante*, at 632, the Court fails to suggest an alternative standard. Because both *Wygant* and *Weber* attempt to reconcile the same competing concerns, I see little justification for the adoption of different standards for affirmative action under Title VII and the Equal Protection Clause.

While employers must have a firm basis for concluding that remedial action is necessary, neither *Wygant* nor *Weber* places a burden on employers to prove that they actually discriminated against women or minorities. Employers are "trapped between the competing hazards of liability to minorities if affirmative action is *not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action is taken." *Wygant v. Jackson Board of Education*, 476 U. S., at 291 (O'CONNOR, J., concurring in part and concurring in judgment). Moreover, this Court has long emphasized the importance of voluntary efforts to eliminate discrimination. *Id.*, at 290. Thus, I concluded in *Wygant* that a contemporaneous finding of discrimination should not be required because it would discourage voluntary efforts to remedy apparent discrimination. A requirement that an employer actually prove that it had discriminated in the past would also unduly discourage voluntary efforts to remedy apparent discrimination. As I emphasized in *Wygant*, a chal-

lenge to an affirmative action plan "does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld." *Id.*, at 292. Evidence sufficient for a prima facie Title VII pattern or practice claim against the employer itself suggests that the absence of women or minorities in a work force cannot be explained by general societal discrimination alone and that remedial action is appropriate.

In applying these principles to this case, it is important to pay close attention to both the affirmative action plan, and the manner in which that plan was applied to the specific promotion decision at issue in this case. In December 1978, the Santa Clara Transit District Board of Supervisors adopted an affirmative action plan for the Santa Clara County Transportation Agency (Agency). At the time the plan was adopted, not one woman was employed in respondents' 238 skilled craft positions, and the plan recognized that women "are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." App. 57. Additionally, the plan stated that respondents "recognize[d] that 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," *id.*, at 31, and that "the selection and appointment processes are areas where hidden discrimination frequently occurs." *Id.*, at 71. Thus, respondents had the expectation that the plan "should result in improved personnel practices that will benefit all Agency employees who may have been subjected to discriminatory personnel practices in the past." *Id.*, at 35.

The long-term goal of the plan was "to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women . . . in the Santa Clara County work force." *Id.*, at 54. If this long-term goal had been applied to the hiring decisions made by the Agency, in my view, the affirmative action plan would violate Title VII. "[I]t is completely unrealistic to assume that individuals of each [sex] will gravitate with mathematical exactitude to each employer . . . absent unlawful discrimination." *Sheet Metal Workers*, 478 U. S., at 494 (O'CONNOR, J., concurring in part and dissenting in part). Thus, a goal that makes such an assumption, and simplistically focuses on the proportion of women and minorities in the work force without more, is not remedial. Only a goal that takes into account the number of women and minorities qualified for the relevant position could satisfy the requirement that an affirmative action plan be remedial. This long-range goal, however, was never used as a guide for actual hiring decisions. Instead, the goal was merely a statement of aspiration wholly without operational significance. The affirmative action plan itself recognized the host of reasons why this goal was extremely unrealistic, App. 56-57, and as I read the record, the long-term goal was not applied in the promotion decision challenged in this case. Instead, the plan provided for the development of short-term goals, which alone were to guide respondents, *id.*, at 61, and the plan cautioned that even these goals "should not be construed as 'quotas' that must be met." *Id.*, at 64. Instead, these short-term goals were to be focused on remedying past apparent discrimination, and would "[p]rovide an objective standard for use in determining if the representation of minorities, women and handicapped persons in particular job classifications is at a reasonable level in comparison with estimates of the numbers of persons from these groups in the area work force who can meet the educational and experience requirements for employment." *Id.*, at 61.

At the time of the promotion at issue in this case, the short-term goals had not been fully developed. Nevertheless, the Agency had already recognized that the long-range goal was unrealistic, and had determined that the progress of the Agency should be judged by a comparison to the *qualified* women in the area work force. As I view the record, the promotion decision in this case was entirely consistent with the philosophy underlying the development of the short-term goals.

The Agency announced a vacancy for the position of road dispatcher in the Agency's Roads Division on December 12, 1979. Twelve employees applied for this position, including Diane Joyce and petitioner. Nine of these employees were interviewed for the position by a two-person board. Seven applicants—including Joyce and petitioner—scored above 70 on this interview, and were certified as eligible for selection for the promotion. Petitioner scored 75 on the interview, while Joyce scored 73. After a second interview, a committee of three agency employees recommended that petitioner be selected for the promotion to road dispatcher. The County's Affirmative Action Officer, on the other hand, urged that Joyce be selected for the position.

The ultimate decision to promote Joyce rather than petitioner was made by James Graebner, the Director of the Agency. As JUSTICE SCALIA views the record in this case, the Agency Director made the decision to promote Joyce rather than petitioner solely on the basis of sex and with indifference to the relative merits of the two applicants. See *post*, at 662-663. In my view, however, the record simply fails to substantiate the picture painted by JUSTICE SCALIA. The Agency Director testified that he "tried to look at the whole picture, the combination of [Joyce's] qualifications and Mr. Johnson's qualifications, their test scores, their experience, their background, affirmative action matters, things like that." Tr. 68. Contrary to JUSTICE SCALIA's suggestion, *post*, at 663, the Agency Director knew far more than

merely the sex of the candidates and that they appeared on a list of candidates eligible for the job. The Director had spoken to individuals familiar with the qualifications of both applicants for the promotion, and was aware that their scores were rather close. Moreover, he testified that over a period of weeks he had spent several hours making the promotion decision, suggesting that Joyce was not selected solely on the basis of her sex. Tr. 63. Additionally, the Director stated that had Joyce's experience been less than that of petitioner by a larger margin, petitioner might have received the promotion. *Id.*, at 69-70. As the Director summarized his decision to promote Joyce, the underrepresentation of women in skilled craft positions was only one element of a number of considerations that led to the promotion of Ms. Joyce. *Ibid.* While I agree with JUSTICE SCALIA's dissent that an affirmative action program that automatically and blindly promotes those marginally qualified candidates falling within a preferred race or gender category, or that can be equated with a permanent plan of "proportionate representation by race and sex," would violate Title VII, I cannot agree that this is such a case. Rather, as the Court demonstrates, Joyce's sex was simply used as a "plus" factor. *Ante*, at 636-637.

In this case, I am also satisfied that respondents had a firm basis for adopting an affirmative action program. Although the District Court found no discrimination against women in fact, at the time the affirmative action plan was adopted, there were *no* women in its skilled craft positions. Petitioner concedes that women constituted approximately 5% of the local labor pool of skilled craft workers in 1970. Reply Brief for Petitioner 9. Thus, when compared to the percentage of women in the qualified work force, the statistical disparity would have been sufficient for a *prima facie* Title VII case brought by unsuccessful women job applicants. See *Teamsters*, 431 U. S., at 342, n. 23 ("[F]ine tuning of the statistics could not have obscured the glaring absence of minority line drivers. . . . [T]he company's inability to rebut the in-

ference of discrimination came not from a misuse of statistics but from 'the inexorable zero'").

In sum, I agree that respondents' affirmative action plan as implemented in this instance with respect to skilled craft positions satisfies the requirements of *Weber* and of *Wygant*. Accordingly, I concur in the judgment of the Court.

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 the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories. That is how I understood the phrase "traditionally segregated jobs" that we used in that case. The Court now interprets it to mean nothing more than a manifest imbalance between one identifiable group and another in an employer's labor force. 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.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE joins, and with whom JUSTICE WHITE joins in Parts I and II, dissenting.

With a clarity which, had it not proven so unavailing, one might well recommend as a model of statutory draftsmanship, Title VII of the Civil Rights Act of 1964 declares:

"It shall be an unlawful employment practice for an employer—

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

“(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U. S. C. § 2000e-2(a).

The Court today completes the process of converting this from a guarantee that race or sex will *not* be the basis for employment determinations, to a guarantee that it often *will*. Ever so subtly, without even alluding to the last obstacles preserved by earlier opinions that we now push out of our path, we effectively replace the goal of a discrimination-free society with the quite incompatible goal of proportionate representation by race and by sex in the workplace. Part I of this dissent will describe the nature of the plan that the Court approves, and its effect upon this petitioner. Part II will discuss prior holdings that are tacitly overruled, and prior distinctions that are disregarded. Part III will describe the engine of discrimination we have finally completed.

I

On October 16, 1979, the County of Santa Clara adopted an Affirmative Action Program (County plan) which sought the “attainment of a County work force whose composition . . . includes women, disabled persons and ethnic minorities in a ratio in all job categories that reflects their distribution in the Santa Clara County area work force.” App. 113. In order to comply with the County plan and various requirements imposed by federal and state agencies, the Transportation Agency adopted, effective December 18, 1978, the Equal Employment Opportunity Affirmative Action Plan (Agency plan or plan) at issue here. Its stated long-range goal was the same as the County plan’s: “to attain a work force whose composition in all job levels and major job classifications approximates the distribution of women, minority and handicapped persons in the Santa Clara County work force.” *Id.*,

at 54. The plan called for the establishment of a procedure by which Division Directors would review the ethnic and sexual composition of their work forces whenever they sought to fill a vacancy, which procedure was expected to include “a requirement that Division Directors indicate why they did *not* select minorities, women and handicapped persons if such persons were on the list of eligibles considered and if the Division had an underrepresentation of such persons in the job classification being filled.” *Id.*, at 75 (emphasis in original).

Several salient features of the plan should be noted. Most importantly, the plan’s purpose was assuredly not to remedy prior sex discrimination by the Agency. It could not have been, because there was no prior sex discrimination to remedy. The majority, in cataloging the Agency’s alleged misdeeds, *ante*, at 624, n. 5, neglects to mention the District Court’s finding that the Agency “has not discriminated in the past, and does not discriminate in the present against women in regard to employment opportunities in general and promotions in particular.” App. to Pet. for Cert. 13a. This finding was not disturbed by the Ninth Circuit.

Not only was the plan not directed at the results of past sex discrimination by the Agency, but its objective was not to achieve the state of affairs that this Court has dubiously assumed would result from an absence of discrimination—an overall work force “more or less representative of the racial and ethnic composition of the population in the community.” *Teamsters v. United States*, 431 U. S. 324, 340, n. 20 (1977). Rather, the oft-stated goal was to mirror the racial and sexual composition of the entire county labor force, not merely in the Agency work force as a whole, but in each and every individual job category at the Agency. In a discrimination-free world, it would obviously be a statistical oddity for every job category to match the racial and sexual composition of even that portion of the county work force *qualified* for that job; it would be utterly miraculous for each of them to match, as the plan expected, the composition of the *entire* work force.

Quite obviously, the plan did not seek to replicate what a lack of discrimination would produce, but rather imposed racial and sexual tailoring that would, in defiance of normal expectations and laws of probability, give each protected racial and sexual group a governmentally determined "proper" proportion of each job category.

That the plan was not directed at remedying or eliminating the effects of past discrimination is most clearly illustrated by its description of what it regarded as the "*Factors Hindering Goal Attainment*"—i. e., the existing impediments to the racially and sexually representative work force that it pursued. The plan noted that it would be "difficult," App. 55, to attain its objective of across-the-board statistical parity in at least some job categories, because:

"a. Most of the positions require specialized training and experience. Until recently, relatively few minorities, women and handicapped persons sought entry into these positions. Consequently, the number of persons from these groups in the area labor force who possess the qualifications required for entry into such job classifications is limited.

"c. Many of the Agency positions where women are underrepresented involve heavy labor; e. g., Road Maintenance Worker. Consequently, few women seek entry into these positions.

"f. Many women are not strongly motivated to seek employment in job classifications where they have not been traditionally employed because of the limited opportunities that have existed in the past for them to work in such classifications." *Id.*, at 56–57.

That is, the qualifications and desires of women may fail to match the Agency's Platonic ideal of a work force. The plan concluded from this, of course, not that the ideal should be reconsidered, but that its attainment could not be immediate.

Id., at 58–60. It would, in any event, be rigorously pursued, by giving "special consideration to Affirmative Action requirements in every individual hiring action pertaining to positions where minorities, women and handicapped persons continue to be underrepresented." *Id.*, at 60.¹

Finally, the one message that the plan unmistakably communicated was that concrete results were expected, and supervisory personnel would be evaluated on the basis of the affirmative-action numbers they produced. The plan's implementation was expected to "result in a statistically measurable yearly improvement in the hiring, training and promotion of minorities, women and handicapped persons in the major job classifications utilized by the Agency where these groups are underrepresented." *Id.*, at 35. Its Preface declared that "[t]he degree to which each Agency Division attains the Plan's objectives will provide a direct measure of that Division Director's personal commitment to the EEO Policy," *ibid.* (emphasis added), and the plan itself repeated that "[t]he degree to which each Division attains the Agency Affirmative Action employment goals will provide a measure of that Director's commitment and effectiveness in carrying out the Division's EEO Affirmative Action requirements." *Id.*, at 44 (emphasis added). As noted earlier, supervisors were reminded of the need to give attention to affirmative action in every employment decision, and to explain their reasons for *failing* to hire women and minorities whenever there was an opportunity to do so.

The petitioner in the present case, Paul E. Johnson, had been an employee of the Agency since 1967, coming there from a private company where he had been a road dispatcher for 17 years. He had first applied for the position of Road Dispatcher at the Agency in 1974, coming in second. Sev-

¹This renders utterly incomprehensible the majority's assertion that "the Agency acknowledged that [its long-term goal] could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories." *Ante*, at 635.

eral years later, after a reorganization resulted in a downgrading of his Road Yard Clerk II position, in which Johnson "could see no future," Tr. 127, he requested and received a voluntary demotion from Road Yard Clerk II to Road Maintenance Worker, to increase his experience and thus improve his chances for future promotion. When the Road Dispatcher job next became vacant, in 1979, he was the leading candidate—and indeed was assigned to work out of class full time in the vacancy, from September 1979 until June 1980. There is no question why he did not get the job.

The fact of discrimination against Johnson is much clearer, and its degree more shocking, than the majority and JUSTICE O'CONNOR's concurrence would suggest—largely because neither of them recites a single one of the District Court findings that govern this appeal, relying instead upon portions of the transcript which those findings implicitly rejected, and even upon a document (favorably comparing Joyce to Johnson), *ante*, at 625, that was prepared *after* Joyce was selected. See App. 27–28; Tr. 223–227. Worth mentioning, for example, is the trier of fact's determination that, if the Affirmative Action Coordinator had not intervened, "the decision as to whom to promote . . . would have been made by [the Road Operations Division Director]," App. to Pet. for Cert. 12a, who had recommended that Johnson be appointed to the position. *Ibid.*² Likewise, the even more extraordi-

²The character of this intervention, and the reasoning behind it, was described by the Agency Director in his testimony at trial:

"Q. How did you happen to become involved in this particular promotional opportunity?

"A. I . . . became aware that there was a difference of opinion between specifically the Road Operations people [Mr. Shields] and the Affirmative Action Director [Mr. Morton] as to the desirability of certain of the individuals to be promoted.

" . . . Mr. Shields felt that Mr. Johnson should be appointed to that position.

"Q. Mr. Morton felt that Diane Joyce should be appointed?"

nary findings that James Graebner, the Agency Director who made the appointment, "did not inspect the applications and related examination records of either [Paul Johnson] or Diane Joyce before making his decision," *ibid.*, and indeed "did little or nothing to inquire into the results of the interview process and conclusions which [were] described as of critical importance to the selection process." *Id.*, at 3a. In light of these determinations, it is impossible to believe (or to think that the District Court believed) Graebner's self-serving statements relied upon by the majority and JUSTICE O'CONNOR's concurrence, such as the assertion that he "tried to look at the whole picture, the combination of [Joyce's] qualifications and Mr. Johnson's qualifications, their test scores, their expertise, their background, affirmative action matters, things like that," Tr. 68 (quoted *ante*, at 625; *ante*, at 655 (O'CONNOR, J., concurring in judgment)). It was evidently enough for Graebner to know that both candidates (in the words of Johnson's counsel, to which Graebner assented) "met the M. Q.'s, the minimum. Both were minimally qualified." Tr. 25. When asked whether he had "any basis," *ibid.*, for determining whether one of the candidates was more qualified than the other, Graebner candidly answered, "No. . . . As I've said, they both appeared, and my conversations with people tended to corroborate, that they were both capable of performing the work." *Ibid.*

After a 2-day trial, the District Court concluded that Diane Joyce's gender was "*the determining factor*," App. to Pet. for Cert. 4a, in her selection for the position. Specifically, it found that "[b]ased upon the examination results and the departmental interview, [Mr. Johnson] was more qualified for

"A. Mr. Morton was less interested in the particular individual; he felt that this was an opportunity for us to take a step toward meeting our affirmative action goals, and because there was only one person on the [eligibility] list who was one of the protected groups, he felt that this afforded us an opportunity to meet those goals through the appointment of that member of a protected group." Tr. 16–18.

the position of Road Dispatcher than Diane Joyce," *id.*, at 12a; that "[b]ut for [Mr. Johnson's] sex, male, he would have been promoted to the position of Road Dispatcher," *id.*, at 13a; and that "[b]ut for Diane Joyce's sex, female, she would not have been appointed to the position . . ." *Ibid.* The Ninth Circuit did not reject these factual findings as clearly erroneous, nor could it have done so on the record before us. We are bound by those findings under Federal Rule of Civil Procedure 52(a).

II

The most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes that have limited the entry of certain races, or of a particular sex, into certain jobs. Even if the societal attitudes in question consisted exclusively of conscious discrimination by other employers, this holding would contradict a decision of this Court rendered only last Term. *Wygant v. Jackson Board of Education*, 476 U. S. 267 (1986), held that the objective of remedying societal discrimination cannot prevent remedial affirmative action from violating the Equal Protection Clause. See *id.*, at 276; *id.*, at 288 (O'CONNOR, J., concurring in part and concurring in judgment); *id.*, at 295 (WHITE, J., concurring in judgment). While Mr. Johnson does not advance a constitutional claim here, it is most unlikely that Title VII was intended to place a lesser restraint on discrimination by public actors than is established by the Constitution. The Court has already held that the prohibitions on discrimination in Title VI, 42 U. S. C. § 2000d, are at least as stringent as those in the Constitution. See *Regents of University of California v. Bakke*, 438 U. S. 265, 286-287 (1978) (opinion of POWELL, J.) (Title VI embodies constitutional restraints on discrimination); *id.*, at 329-340 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.) (same); *id.*, at 416 (opinion of

STEVENS, J., joined by Burger, C. J., and Stewart and REHNQUIST, JJ.) (Title VI "has independent force, with language and emphasis *in addition to* that found in the Constitution") (emphasis added). There is no good reason to think that Title VII, in this regard, is any different from Title VI.³ Because, therefore, those justifications (*e. g.*, the remedying of past societal wrongs) that are inadequate to insulate discriminatory action from the racial discrimination prohibitions of the Constitution are also inadequate to insulate it from the racial discrimination prohibitions of Title VII; and because the portions of Title VII at issue here treat race and sex equivalently; *Wygant*, which dealt with race discrimination, is fully applicable precedent, and is squarely inconsistent with today's decision.⁴

³To support the proposition that Title VII is more narrow than Title VI, the majority repeats the reasons for the dictum to that effect set forth in *Steelworkers v. Weber*, 443 U. S. 193, 206, n. 6 (1979)—a case which, as JUSTICE O'CONNOR points out, *ante*, at 651-652, could reasonably be read as consistent with the constitutional standards of *Wygant*. Those reasons are unpersuasive, consisting only of the existence in Title VII of 42 U. S. C. § 2000e-2(j) (the implausibility of which, as a *restriction* upon the scope of Title VII, was demonstrated by CHIEF JUSTICE REHNQUIST's literally unanswered *Weber* dissent) and the fact that Title VI pertains to recipients of federal funds while Title VII pertains to employers generally. The latter fact, while true and perhaps interesting, is not conceivably a reason for giving to virtually identical categorical language the interpretation, in one case, that intentional discrimination is forbidden, and, in the other case, that it is not. Compare 42 U. S. C. § 2000d ("No person . . . shall, on the ground of race, color, or national origin, be . . . subjected to discrimination"), with § 2000e-2(a)(1) (no employer shall "discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin").

⁴JUSTICE O'CONNOR's concurrence at least makes an attempt to bring this Term into accord with last. Under her reading of Title VII, an employer may discriminate affirmatively, so to speak, if he has a "firm basis" for believing that he might be guilty of (nonaffirmative) discrimination under the Act, and if his action is designed to remedy that suspected prior discrimination. *Ante*, at 649. This is something of a halfway house between leaving employers scot-free to discriminate against disfavored

Likewise on the assumption that the societal attitudes relied upon by the majority consist of conscious discrimination by employers, today's decision also disregards the limitations carefully expressed in last Term's opinions in *Sheet Metal Workers v. EEOC*, 478 U. S. 421 (1986). While those limitations were dicta, it is remarkable to see them so readily (and so silently) swept away. The question in *Sheet Metal Workers* was whether the remedial provision of Title VII, 42 U. S. C. §2000e-5(g), empowers courts to order race-conscious relief for persons who were not identifiable victims of discrimination. Six Members of this Court concluded that it does, *under narrowly confined circumstances*. The plurality opinion for four Justices found that race-conscious relief could be ordered at least when "an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." 478 U. S., at 445 (opinion of BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ.). See also *id.*, at 476. JUSTICE POWELL concluded that race-conscious relief can be ordered "in cases involv-

groups, as the majority opinion does, and prohibiting discrimination, as do the words of Title VII. In the present case, although the District Court found that in fact no sex discrimination existed, JUSTICE O'CONNOR would find a "firm basis" for the agency's belief that sex discrimination existed in the "inexorable zero": the complete absence, prior to Diane Joyce, of any women in the Agency's skilled positions. There are two problems with this: First, even positing a "firm basis" for the Agency's belief in prior discrimination, as I have discussed above the plan was patently not *designed to remedy* that prior discrimination, but rather to establish a sexually representative work force. Second, even an absolute zero is not "inexorable." While it may inexorably provide "firm basis" for belief in the mind of an outside observer, it cannot conclusively establish such a belief *on the employer's part*, since he may be aware of the particular reasons that account for the zero. That is quite likely to be the case here, given the nature of the jobs we are talking about, and the list of "*Factors Hindering Goal Attainment*" recited by the Agency plan. See *supra*, at 622. The question is in any event one of fact, which, if it were indeed relevant to the outcome, would require a remand to the District Court rather than an affirmance.

ing particularly egregious conduct," *id.*, at 483 (concurring in part and concurring in judgment), and JUSTICE WHITE similarly limited his approval of race-conscious remedies to "unusual cases." *Id.*, at 499 (dissenting). See also *Firefighters v. Cleveland*, 478 U. S. 507, 533 (1986) (WHITE, J., dissenting) ("I also agree with JUSTICE BRENNAN's opinion in *Sheet Metal Workers* . . . that in Title VII cases enjoining discriminatory practices and granting relief only to victims of past discrimination is the general rule, with relief for nonvictims being reserved for particularly egregious conduct"). There is no sensible basis for construing Title VII to permit employers to engage in race- or sex-conscious employment practices that courts would be forbidden from ordering them to engage in following a judicial finding of discrimination. As JUSTICE WHITE noted last Term:

"There is no statutory authority for concluding that if an employer desires to discriminate against a white applicant or employee on racial grounds he may do so without violating Title VII but may not be ordered to do so if he objects. In either case, the harm to the discriminatee is the same, and there is no justification for such conduct other than as a permissible remedy for prior racial discrimination practiced by the employer involved." *Id.*, at 533.

The Agency here was not seeking to remedy discrimination—much less "unusual" or "egregious" discrimination. *Firefighters*, like *Wygant*, is given only the most cursory consideration by the majority opinion.

In fact, however, today's decision goes well beyond merely allowing racial or sexual discrimination in order to eliminate the effects of prior societal *discrimination*. The majority opinion often uses the phrase "traditionally segregated job category" to describe the evil against which the plan is legitimately (according to the majority) directed. As originally used in *Steelworkers v. Weber*, 443 U. S. 193 (1979), that phrase described skilled jobs from which employers and un-

ions had systematically and intentionally excluded black workers—traditionally segregated jobs, that is, in the sense of conscious, exclusionary discrimination. See *id.*, at 197–198. But that is assuredly not the sense in which the phrase is used here. It is absurd to think that the nationwide failure of road maintenance crews, for example, to achieve the Agency's ambition of 36.4% female representation is attributable primarily, if even substantially, to systematic exclusion of women eager to shoulder pick and shovel. It is a "traditionally segregated job category" *not* in the *Weber* sense, but in the sense that, because of longstanding social attitudes, it has not been regarded *by women themselves* as desirable work. Or as the majority opinion puts the point, quoting approvingly the Court of Appeals: "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." *Ante*, at 634, n. 12 (quoting 748 F. 2d 1308, 1313 (CA9 1984)). Given this meaning of the phrase, it is patently false to say that "[t]he 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." *Ante*, at 632. There are, of course, those who believe that the social attitudes which cause women themselves to avoid certain jobs and to favor others are as nefarious as conscious, exclusionary discrimination. Whether or not that is so (and there is assuredly no consensus on the point equivalent to our national consensus against intentional discrimination), the two phenomena are certainly distinct. And it is the alteration of social attitudes, rather than the elimination of discrimination, which today's decision approves as justification for state-enforced discrimination. This is an enormous expansion, undertaken without the slightest justification or analysis.

III

I have omitted from the foregoing discussion the most obvious respect in which today's decision overleaps, without analysis, a barrier that was thought still to be overcome. In *Weber*, this Court held that a private-sector, affirmative-action training program that overtly discriminated against white applicants did not violate Title VII. However, although the majority does not advert to the fact, until today the applicability of *Weber* to public employers remained an open question. In *Weber* itself, see 443 U. S., at 200, 204, and in later decisions, see *Firefighters v. Cleveland*, *supra*, at 517; *Wygant*, 476 U. S., at 282, n. 9 (opinion of POWELL, J.), this Court has repeatedly emphasized that *Weber* involved only a private employer. See *Williams v. New Orleans*, 729 F. 2d 1554, 1565 (CA5 1984) (en banc) (Gee, J., concurring) ("Writing for the Court in *Weber*, Justice Brennan went out of his way, on at least eleven different occasions, to point out that what was there before the Court was *private* affirmative action") (footnote omitted). This distinction between public and private employers has several possible justifications. *Weber* rested in part on the assertion that the 88th Congress did not wish to intrude too deeply into private employment decisions. See 443 U. S., at 206–207. See also *Firefighters v. Cleveland*, *supra*, at 519–521. Whatever validity that assertion may have with respect to private employers (and I think it negligible), it has none with respect to public employers or to the 92d Congress that brought them within Title VII. See Equal Employment Opportunity Act of 1972, Pub. L. 92–261, § 2, 86 Stat. 103, 42 U. S. C. § 2000e(a). Another reason for limiting *Weber* to private employers is that state agencies, unlike private actors, are subject to the Fourteenth Amendment. As noted earlier, it would be strange to construe Title VII to permit discrimination by public actors that the Constitution forbids.

In truth, however, the language of 42 U. S. C. § 2000e–2 draws no distinction between private and public employers,

and the only good reason for creating such a distinction would be to limit the damage of *Weber*. It would be better, in my view, to acknowledge that case as fully applicable precedent, and to use the Fourteenth Amendment ramifications—which *Weber* did not address and which are implicated for the first time here—as the occasion for reconsidering and overruling it. It is well to keep in mind just how thoroughly *Weber* rewrote the statute it purported to construe. The language of that statute, as quoted at the outset of this dissent, is unambiguous: it is an unlawful employment practice “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.” 42 U. S. C. § 2000e-2(a). *Weber* disregarded the text of the statute, invoking instead its “spirit,” 443 U. S., at 201 (quoting *Holy Trinity Church v. United States*, 143 U. S. 457, 459 (1892)), and “practical and equitable [considerations] only partially perceived, if perceived at all, by the 88th Congress,” 443 U. S., at 209 (BLACKMUN, J., concurring). It concluded, on the basis of these intangible guides, that Title VII’s prohibition of intentional discrimination on the basis of race and sex does not prohibit intentional discrimination on the basis of race and sex, so long as it is “designed to break down old patterns of racial [or sexual] segregation and hierarchy,” “does not unnecessarily trammel the interests of the white [or male] employees,” “does not require the discharge of white [or male] workers and their replacement with new black [or female] hirees,” “does [not] create an absolute bar to the advancement of white [or male] employees,” and “is a temporary measure . . . not intended to maintain racial [or sexual] balance, but simply to eliminate a manifest racial [or sexual] imbalance.” *Id.*, at 208. In effect, *Weber* held that the legality of intentional discrimination by private employers against certain disfavored groups or individuals is to be judged not by Title VII but by a judicially

crafted code of conduct, the contours of which are determined by no discernible standard, aside from (as the dissent convincingly demonstrated) the divination of congressional “purposes” belied by the face of the statute and by its legislative history. We have been recasting that self-promulgated code of conduct ever since—and what it has led us to today adds to the reasons for abandoning it.

The majority’s response to this criticism of *Weber*, *ante*, at 629, n. 7, asserts that, since “Congress has not amended the statute to reject our construction, . . . we . . . may assume that our interpretation was correct.” This assumption, which frequently haunts our opinions, should be put to rest. It is based, to begin with, on the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant. To make matters worse, it assays the current Congress’ desires *with respect to the particular provision in isolation*, rather than (the way the provision was originally enacted) as part of a total legislative package containing many *quids pro quo*. Whereas the statute as originally proposed may have presented to the enacting Congress a question such as “Should hospitals be required to provide medical care for indigent patients, with federal subsidies to offset the cost?,” the question theoretically asked of the later Congress, in order to establish the “correctness” of a judicial interpretation that the statute provides no subsidies, is simply “Should the medical care that hospitals are required to provide for indigent patients be federally subsidized?” Hardly the same question—and many of those legislators who accepted the subsidy provisions in order to gain the votes necessary for enactment of the care requirement would not vote for the subsidy in isolation, now that an unsubsidized care requirement is, thanks to the judicial opinion, safely on the books. But even accepting the flawed premise that the intent of the current Congress, with respect to the provision in isolation, is determinative, one must ignore rudimentary

principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice. It is interesting to speculate on how the principle that congressional inaction proves judicial correctness would apply to another issue in the civil rights field, the liability of municipal corporations under § 1983. In 1961, we held that that statute did not reach municipalities. See *Monroe v. Pape*, 365 U. S. 167, 187 (1961). Congress took no action to overturn our decision, but we ourselves did, in *Monell v. New York City Dept. of Social Services*, 436 U. S. 658, 663 (1978). On the majority's logic, *Monell* was wrongly decided, since Congress' 17 years of silence established that *Monroe* had not "misperceived the political will," and one could therefore "assume that [*Monroe's*] interpretation was correct." On the other hand, nine years have now gone by since *Monell*, and Congress *again* has not amended § 1983. Should we now "assume that [*Monell's*] interpretation was correct"? Rather, I think we should admit that vindication by congressional inaction is a canard.

JUSTICE STEVENS' concurring opinion emphasizes the "undoubted public interest in 'stability and orderly development of the law,'" *ante*, at 644 (citation omitted), that often requires adherence to an erroneous decision. As I have described above, however, today's decision is a demonstration not of stability and order but of the instability and unpredictable expansion which the substitution of judicial improvisation for statutory text has produced. For a number of reasons, *stare decisis* ought not to save *Weber*. First, this Court has applied the doctrine of *stare decisis* to civil rights

statutes less rigorously than to other laws. See *Maine v. Thiboutot*, 448 U. S. 1, 33 (1980) (POWELL, J., dissenting); *Monroe v. Pape*, *supra*, at 221-222 (Frankfurter, J., dissenting in part). Second, as JUSTICE STEVENS acknowledges in his concurrence, *ante*, at 644, *Weber* was itself a dramatic departure from the Court's prior Title VII precedents, and can scarcely be said to be "so consistent with the warp and woof of civil rights law as to be beyond question." *Monell v. New York City Dept. of Social Services*, *supra*, at 696. Third, *Weber* was decided a mere seven years ago, and has provided little guidance to persons seeking to conform their conduct to the law, beyond the proposition that Title VII does not mean what it says. Finally, "even under the most stringent test for the propriety of overruling a statutory decision . . . — 'that it appear beyond doubt . . . that [the decision] misapprehended the meaning of the controlling provision,'" 436 U. S., at 700 (quoting *Monroe v. Pape*, *supra*, at 192 (Harlan, J., concurring)), *Weber* should be overruled.

In addition to complying with the commands of the statute, abandoning *Weber* would have the desirable side effect of eliminating the requirement of willing suspension of disbelief that is currently a credential for reading our opinions in the affirmative-action field—from *Weber* itself, which demanded belief that the corporate employer adopted the affirmative-action program "voluntarily," rather than under practical compulsion from government contracting agencies, see 443 U. S., at 204; to *Bakke*, a Title VI case cited as authority by the majority here, *ante*, at 638, which demanded belief that the University of California took race into account as merely one of the many diversities to which it felt it was educationally important to expose its medical students, see 438 U. S., at 311-315; to today's opinion, which—in the face of a plan obviously designed to force promoting officials to prefer candidates from the favored racial and sexual classes, warning them that their "personal commitment" will be determined by how successfully they "attain" certain numerical goals,

and in the face of a particular promotion awarded to the less qualified applicant by an official who "did little or nothing" to inquire into sources "critical" to determining the final candidates' relative qualifications other than their sex—in the face of all this, demands belief that we are dealing here with no more than a program that "merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants." *Ante*, at 638. Any line of decisions rooted so firmly in naiveté must be wrong.

The majority emphasizes, as though it is meaningful, that "No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants." *Ibid.* One is reminded of the exchange from Shakespeare's *King Henry the Fourth, Part I*:

"GLENOWER: I can call Spirits from the vasty Deep.

"HOTSPUR: Why, so can I, or so can any man. But will they come when you do call for them?" Act III, Scene I, lines 53–55.

Johnson was indeed entitled to have his qualifications weighed against those of other applicants—but more to the point, he was virtually assured that, after the weighing, if there was any minimally qualified applicant from one of the favored groups, he would be rejected.

Similarly hollow is the Court's assurance that we would strike this plan down if it "failed to take distinctions in qualifications into account," because that "would dictate mere blind hiring by the numbers." *Ante*, at 636. For what the Court means by "taking distinctions in qualifications into account" consists of no more than eliminating from the applicant pool those who are not even *minimally qualified* for the job. Once that has been done, once the promoting officer assures himself that all the candidates before him are "M. Q.'s" (minimally qualifieds), he can then ignore, as the Agency Director did here, how much better than minimally qualified some of the candidates may be, and can proceed to appoint

from the pool solely on the basis of race or sex, until the affirmative-action "goals" have been reached. The requirement that the employer "take distinctions in qualifications into account" thus turns out to be an assurance, not that candidates' comparative merits will always be considered, but only that none of the successful candidates selected over the others solely on the basis of their race or sex will be utterly unqualified. That may be of great comfort to those concerned with American productivity; and it is undoubtedly effective in reducing the effect of affirmative-action discrimination upon those in the upper strata of society, who (unlike road maintenance workers, for example) compete for employment in professional and semiprofessional fields where, for many reasons, including most notably the effects of past discrimination, the numbers of "M. Q." applicants from the favored groups are substantially less. But I fail to see how it has any relevance to whether selecting among final candidates solely on the basis of race or sex is permissible under Title VII, which prohibits discrimination on the basis of race or sex.⁵

Today's decision does more, however, than merely reaffirm *Weber*, and more than merely extend it to public actors. It is impossible not to be aware that the practical effect of our holding is to accomplish *de facto* what the law—in language

⁵ In a footnote purporting to respond to this dissent's (nonexistent) "predict[ion] that today's decision will loose a flood of 'less qualified' minorities and women upon the work force," *ante*, at 641, n. 17, the majority accepts the contention of the American Society for Personnel Administration that there is no way to determine who is the best qualified candidate for a job such as Road Dispatcher. This effectively constitutes appellate-reversal of a finding of fact by the District Court in the present case ("[P]laintiff was more qualified for the position of Road Dispatcher than Diane Joyce," App. to Pet. for Cert. 12a). More importantly, it has staggering implications for future Title VII litigation, since the most common reason advanced for failing to hire a member of a protected group is the superior qualification of the hired individual. I am confident, however, that the Court considers this argument no more enduring than I do.

even plainer than that ignored in *Weber*, see 42 U. S. C. § 2000e-2(j)—forbids anyone from accomplishing *de jure*: in many contexts it effectively *requires* employers, public as well as private, to engage in intentional discrimination on the basis of race or sex. This Court's prior interpretations of Title VII, especially the decision in *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971), subject employers to a potential Title VII suit whenever there is a noticeable imbalance in the representation of minorities or women in the employer's work force. Even the employer who is confident of ultimately prevailing in such a suit must contemplate the expense and adverse publicity of a trial, because the extent of the imbalance, and the "job relatedness" of his selection criteria, are questions of fact to be explored through rebuttal and counterrebuttal of a "prima facie case" consisting of no more than the showing that the employer's selection process "selects those from the protected class at a 'significantly' lesser rate than their counterparts." B. Schlei & P. Grossman, *Employment Discrimination Law* 91 (2d ed. 1983). If, however, employers are free to discriminate through affirmative action, without fear of "reverse discrimination" suits by their nonminority or male victims, they are offered a threshold defense against Title VII liability premised on numerical disparities. Thus, after today's decision the *failure* to engage in reverse discrimination is economic folly, and arguably a breach of duty to shareholders or taxpayers, wherever the cost of anticipated Title VII litigation exceeds the cost of hiring less capable (though still minimally capable) workers. (This situation is more likely to obtain, of course, with respect to the least skilled jobs—perversely creating an incentive to discriminate against precisely those members of the nonfavored groups *least* likely to have profited from societal discrimination in the past.) It is predictable, moreover, that this incentive will be greatly magnified by economic pressures brought to bear by government contracting agencies upon employers who refuse to discriminate in the fashion

we have now approved. A statute designed to establish a color-blind and gender-blind workplace has thus been converted into a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically compelled.

It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies. Nor will it displease the world of corporate and governmental employers (many of whom have filed briefs as *amici* in the present case, all on the side of Santa Clara) for whom the cost of hiring less qualified workers is often substantially less—and infinitely more predictable—than the cost of litigating Title VII cases and of seeking to convince federal agencies by nonnumerical means that no discrimination exists. In fact, the only losers in the process are the Johnsons of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals—predominantly unknown, unaffluent, unorganized—suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent. I dissent.