

JUSTIFYING AFFIRMATIVE ACTION IN K–12 PRIVATE SCHOOLS

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This Comment examines the consequences of using identical rules to govern affirmative action in both private employers and private schools. It explores accepted legal justifications for private affirmative action, focusing on whether they are internal or external to the defendant. In light of developments in Equal Protection Clause jurisprudence, the Supreme Court's dicta in *Johnson v. Transportation Agency*

private K–12 schools—to justify their affirmative action policies with external racial imbalances. This rule most effectively allocates the incentives and means of private schools to remedy racial disparities. In addition, the affirmative action permitted under this rule benefits society more than currently legal affirmative action in private employers and private colleges.

INTRODUCTION

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

Although the decision was overturned *en banc* by the Ninth Circuit,¹ a three-judge panel in *Doe v. Kamehameha Schools (Kamehameha II)* set forth an approach to answering the above questions.² The panel essentially held that the Kamehameha Schools, a private school system, can never use a racial preference, a Native Hawaiian³ preference, to *exclusively*

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1. *Doe v. Kamehameha Schs. (Kamehameha III)*, 470 F.3d 827, 829 (9th Cir. 2006) (holding that the Kamehameha Schools' admissions policy was valid under 42 U.S.C. § 1981).
2. 416 F.3d 1025 (9th Cir. 2005).
3. Although there is general controversy as to whether Native Hawaiians should be treated as a race by law, the Kamehameha Schools conceded that their Native Hawaiian preference was a racial preference. _____, 416 F.3d at 1047.

The Kamehameha Schools have operated since 1887 “as the charitable legacy of Princess Bernice Pauahi Bishop, the last direct descendant of King Kamehameha I.”⁵ Private and nonsectarian,⁶ the Kamehameha Schools’ mission is “to fulfill Pauahi’s desire to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry.”⁷ To further its mission, the Kamehameha Schools have preferentially admitted students of Hawaiian ancestry for over 118 years.⁸ For its K–12 schools, the Kamehameha Schools’ admissions policy is implemented in a two-part process: the applicant first demonstrates his academic qualifications and then completes the Ethnic Ancestry Survey.⁹

John Doe had sought to be admitted but was denied admission to the Kamehameha Schools twice.¹⁰ Each time he had met the academic standards and acknowledged that he possessed no aboriginal blood.¹¹ Doe consequently filed suit against the Kamehameha Schools.¹² He alleged that the Schools’ admissions policy violated 42 U.S.C. § 1981,¹³ the relevant part of which protects a person’s right to “make and enforce contracts” free from racial discrimination.¹⁴ The district court granted summary judgment in favor of the Schools and other defendants because “the admissions policy constituted a valid race-conscious remedial affirmative action program.”¹⁵ Doe appealed.¹⁶

Because the Kamehameha Schools “employ[ed] an express racial classification,” the Ninth Circuit panel determined that the Schools’ admissions

4. Congress has found that Native Hawaiians academically underperform. *See, e.g.* Native Hawaiian Education Act of 2002, 20 U.S.C. §§ 7511–7517 (2005).

5. *Kamehameha II*, 416 F.3d at 1027.

6. This Comment addresses the legality of affirmative action under 42 U.S.C. § 1981 in private nonsectarian schools but not private sectarian schools, to which different rules apply. *See, e.g.*, *EEOC v. Kamehameha Schs.*, 848 F.Supp. 899 (D. Haw. 1993). KAMEHAMEHA SCHOOLS STRATEGIC PLAN 2000–2015 available at <http://www.ksbe.edu/osp/StratPlan/EntireDocument.pdf>.

8. Thomas Yoshida, *Appeals Court to Rehear Admissions Policy Challenge*, <http://www.ksbe.edu/osp/StratPlan/EntireDocument.pdf>.php?story=20060222115646371.

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

10. .

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13.

14. 42 U.S.C. § 1981 (2006) provides:

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

In *Runyon v. McCrary*, 427 U.S. 160 (1976), the Supreme Court determined that the right of admission to a private school fell under § 1981’s right to “make and enforce contracts.”

15. *Kamehameha II*, 416 F.3d at 1029.

16. *Id.* at 1027.

policy constituted a prima facie case of intentional race discrimination.¹⁷ In response, the Kamehameha Schools argued “that its policy constitute[d] a valid affirmative action plan rationally related to redressing present imbalances in the socioeconomic and educational achievement of native Hawaiians, producing native Hawaiian leadership for community involvement, and revitalizing native Hawaiian culture.”¹⁸ However, the panel reasoned that an affirmative action policy justifies a racial preference only when it satisfies three requirements¹⁹ advanced by the Supreme Court in *United Steelworkers of America v. Weber*
Weber

and (3) do no more than is necessary to achieve a balance.”²¹

Seeing “no basis for a different rule regarding a plan’s alleged violation of § 1981 in the context of private education,” the panel determined that the Kamehameha Schools’ racial preference was designed to deny admission to all students possessing no aboriginal blood so long as a sufficient number of qualified Native Hawaiians sought admission.²² It reasoned that the Schools’ policy effectively created an absolute bar to the attendance of those not descended from the Hawaiian race²³ and consequently failed the second prong of the Ninth Circuit’s *Weber* rule.²⁴

Although the panel did not make this clear, it effectively held that a private school’s affirmative action policy must: (1) respond to a manifest imbalance in its student population, (2) not create an absolute bar to the admission of the non-preferred race or unnecessarily trammel the rights of the non-preferred race, and (3) do no more than is necessary to achieve a balance in its student population.²⁵ Case law in the private employment context provides that a manifest imbalance exists if there is a much smaller percentage of the preferred racial group in the private employer’s population than the surrounding population.²⁶ Extending the panel’s logic of identically treating affirmative action policies in private employment and private education, a manifest imbalance would exist only if there was a

17. *Id.* at 1039. The prima facie case of intentional race discrimination created a presumption that the Kamehameha Schools had engaged in intentional discrimination.

18. *Doe v. Kamehameha Schs. (Kamehameha II)*, 416 F.3d 1025, 1039–40 (9th Cir. 2005).

19. *Id.* at 1040–41.

20. 443 U.S. 193 (1979).

21. *Kamehameha II*, 416 F.3d at 1040–41.

22. *Id.*; *cf. id.* (“We are persuaded that these general principles [for testing the validity of an affirmative action plan] may be rationally applied in the context of private education, with certain modifications to account for the differences of context.”).

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

24. at 1041.

25.

26. *Johnson v. Transp. Agency*, 480 U.S. 646, 631–32 (1987) (reasoning that a manifest imbalance can be determined through “a comparison of the percentage of minorities or women in the employer’s work force with the percentage in the area labor market or general population . . . in analyzing jobs that require no special expertise”).

■ ■

much smaller percentage of the preferred racial group in the private school's population than in the surrounding population.

The Ninth Circuit panel did not address whether the Kamehameha Schools' admission policy would have been valid if it had created a significant rather than an absolute bar to the attendance of people who are not some part Native Hawaiian.²⁷ However, the consequence of importing the rule from private employment to private education, without change, is that the Kamehameha Schools almost certainly would not be able to use Native Hawaiian admissions preference because there is no manifest internal imbalance to justify it. The percentage of Native Hawaiians in the Kamehameha Schools' population is virtually 100%,²⁸ whereas the percentage of Native Hawaiians in Hawaii is 9.4%.²⁹ Thus, applying identical rules to determine the legality of affirmative action in private employment and private education would likely handicap the Kamehameha Schools' ability "to fulfill Pauahi's desire to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry."³⁰

Avoiding this outcome, the Ninth Circuit's decision in _____ reasoned "that we should use a standard for evaluating remedial racial preferences by wholly private primary and secondary schools that is akin to that used in Title VII employment cases, but that takes into account the inherently broad and societal focus of the educational endeavor."³¹ Applying this reasoning to the imbalance prong of the test, the Ninth Circuit held that the "external focus of the educational mission renders unnecessary the requirement of proof of a 'manifest imbalance' within a particular school."³² Instead, "a private school must demonstrate that specific, significant imbalances in educational achieve-

27. _____, 416 F.3d 1025, 1041–42 (9th Cir. 2005) ("Even if we assumed that some, limited racial preferences might be appropriate in order for the Schools to advance its mission, an absolute bar on the basis of race alone exceeds any reasonable application of *Weber*, *Rudebusch*, and the cases that followed in their wake.").

28. A student not of Native Hawaiian ancestry was admitted in 2003. *Id.* at 1040 n.8.

29. U.S. Census Bureau: Hawaii—QT-P3, http://factfinder.census.gov/servlet/QTTable?_bm=y&-context=qt&-qr_name=DEC_2000_SF1_U_QTP3&-ds_name=DEC_2000_SF1_U&-CONTEXT=qt&-tree_id=4001&-all_geo_types=N&-redoLog=false&-geo_id=04000US15&-search_results=01000US&-format=&-_lang=en.

30. _____, note 7.

31. *Doe v. Kamehameha Schs.* (_____, _____), 470 F.3d 827, 842 (9th Cir. 2006). The most relevant section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. for the issue at hand is § 2000e-2(a), which provides:

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.

32.

ment presently affect the target population” in “the community as a whole” to justify a remedial racial preference.³³

Of significance, however, is that other circuits may find the implicit logic of the Ninth Circuit panel more sound than that of the Ninth Circuit

. In fact, that was the position of five dissenting judges in

.³⁴ These judges concluded that neither the text of § 1981 nor Title VII jurisprudence “explain why we must create a special standard for primary and secondary educational contract cases.”³⁵ Thus far, no other circuit has had the opportunity to decide what rule governs the legality of affirmative action in private education. However, almost every circuit’s rule for affirmative action in private employment is like the Ninth Circuit’s in that they require an affirmative action policy to be justified by an imbalance within the employer’s workforce, or in other words, an “internal imbalance.”³⁶ Some circuits, however, have indicated a willingness to justify affirmative action policies with imbalances external to the employer.³⁷

This Comment sets aside the question of whether a private school should be able to use a racial preference to admit students of an academically underachieving racial group.³⁸ Instead, it contends that K–12 private schools, including the Kamehameha Schools, should be able to admit students of an academically underachieving racial group. Such affirmative action most effectively allocates private schools’ incentives and means to remedy racial disparities. It also confers greater benefits and fewer burdens on society than forms of affirmative action

33.

34. at 860–62.

35. . at 862. The dissent interprets the majority’s decision as applying to all “primary and secondary education contract cases,” citing *Taxman v. Bd. of Educ. of Twp. of Piscataway*

Weber

Cunico v. Pueblo Sch. Dist. No. 60

Weber

Id

Taxman

Cunico

Kamehameha III

Taxman Cunico

employees

students

See infra

See infra

Private School’s Remedial Admissions Policy Violates 1981-416 F.3d 1025 (9th Cir. 2005)

HARV. L. REV.

Ninth Circuit Holds That

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

A. *Supreme Court Cases*

Johnson v. Transportation Agency *United Steelworkers of America v. Weber*

Weber *Johnson*

See LEX K. LARSON, EMPLOYMENT DISCRIMINATION
EMPLOYMENT DISCRIMINATION

, the Kaiser Aluminum & Chemical Corporation plant in Gramercy, Louisiana, had a skilled craftworker population that was 1.83% black, while the local labor force was 39% black.⁴³ The Gramercy plant agreed to select new craft trainees on a seniority basis, with the proviso that at least 50% of new craft trainees were to be black until the percentage of its black skilled craftworkers was commensurate with the percentage of blacks in the local labor force.⁴⁴ The most senior black trainee had less seniority than several white production workers whose bids for admission were rejected, including the plaintiff who instituted the action.⁴⁵

The Supreme Court did not “define in detail the line of demarcation between permissible and impermissible affirmative action plans,” but concluded “that the adoption of the Kaiser-USWA plan . . . falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.”⁴⁶ In reaching this conclusion, the Court first reasoned that “the purposes of the [affirmative action] plan mirror those of [Title VII].”⁴⁷ These purposes were “to break down old patterns of racial segregation and hierarchy” and “to open employment opportunities for Negroes in occupations which have been traditionally closed to them.”⁴⁸ The Court’s second reason for upholding the Kaiser-USWA plan was that “the plan does not unnecessarily trammel the interests of the white employees” because the plan: (1) “does not require the discharge of white workers and their replacement with new black hires,” (2) does not “create an absolute bar to the advancement of white employees,” and (3) “is a temporary measure.”⁴⁹

In , the Santa Clara County Transportation Agency voluntarily adopted an affirmative action plan with the long-term goal of attaining a work force whose composition reflected the proportion of minorities and women in the area labor force.⁵⁰ Towards this end, the plan permitted the consideration of gender as a factor when promoting qualified applicants within a traditionally segregated job classification in which women had been significantly underrepresented.⁵¹ The plan did not set aside a specific number of positions for minorities or women but required that short-range goals be established and annually adjusted to serve as the most realistic guide for actual employment decisions.⁵² A female employee, Diane

quirements for establishing a violation of § 1981 are different in any manner from the requirements for establishing a violation of Title VII”), , 648 F.2d 61 (1st Cir. 1981). The Fourth Circuit would likely evaluate the validity of an affirmative action plan identically under both § 1981 and Title VII. Lewis v. Cent. Piedmont Cmty. Coll., 689 F.2d 1207, 1209 n.3 (4th Cir. 1982) (holding “that the criteria apply equally to cases arising under Title VII or § 1981”), , 460 U.S. 1040 (1983).

43. *United Steelworkers v. Weber*, 443 U.S. 193, 198–99 (1979).

44.

at 199.

46. at 208–09.

47. at 208.

48. , 443 U.S. at 208 (internal citation omitted).

49.

50. *Johnson v. Transp. Agency*, 480 U.S. 616, 621–22 (1987).

51. at 620–21.

52. at 622.

Joyce, was promoted to a Skilled Craft Worker job classification over a male employee, Paul Johnson. Both employees had been rated as well qualified for the job, but Johnson had received a seventy-five on his interview and Joyce had received a seventy-three.⁵³

In reviewing the employment decision at issue in this case, the Supreme Court first examined whether the decision was made pursuant to a plan prompted by concerns similar to those of the employer in _____ and then determined whether the effect of the plan on males and whites was comparable to the effect of the plan in _____.⁵⁴ The Supreme Court upheld the validity of the Agency's plan under Title VII because, first, the "consideration of the sex of applicants for Skilled Craft jobs was justified by the existence of a 'manifest imbalance' that reflected underrepresentation of women in 'traditionally segregated job categories'" and, second, the Agency Plan did not "unnecessarily trammel[] the rights of male employees or create[] an absolute bar to their advancement."⁵⁵

*B. Proper Justifications for Private Affirmative Action*⁵⁶

Weber *Johnson*

Id.
Id.
Id.

See infra

see infra

See, e.g.

See, e.g.

see in-

Hotel, Inc.

Schurr, the defendant was Resorts, a casino licensee in Atlantic City, New Jersey.⁶² As a casino licensee, the defendant was regulated by the state's Casino Control Commission pursuant to the Casino Control Act.⁶³ The Casino Control Act required casino licensees to improve the representation of "women and minorities in . . . EEOC job categories in which the casino licensee is below the applicable employment goals" set by the Commission.⁶⁴ In addition, casino licensees were required to develop an Equal Employment and Business Opportunity Plan to meet applicable employment goals set by the Commission and as a prerequisite to obtaining a casino license.⁶⁵ The Commission stated that the purpose underlying the Casino Control Act and similar regulations was "to ensure that the job creation which would accompany casino developments would benefit all segments of the population" in Atlantic City, which had a large minority population.⁶⁶

Karl Schurr, a white male, sought employment as a light and sound technician at Resorts.⁶⁷ Resorts' director of show operations and stage man-

fra Appendix, but case law in these circuits have set forth this requirement. *See, e.g., Dallas Fire Fighters Ass'n v. City of Dallas*, 150 F.3d 438, 442 (5th Cir. 1998) (reasoning that manifest imbalance in the employer's rank of deputy chief satisfied the first prong of *Weber*); *Bennett v. Arrington*, 20 F.3d 1525, 1537 (11th Cir. 1994) ("determining whether a manifest imbalance exists that would justify race-conscious decision-making by the employer involves a comparison of the percentage of minority employees in that job" with either "the percentage of minorities in the general area labor market" or "the labor market who possess that special skill or training"); *Aiken v. City of Memphis*, 9 F.3d 461, 473 (6th Cir. 1993) (reasoning that statistics comparing defendant's labor force with county population and defendant's job categories with defendant's other job categories established a manifest imbalance for Title VII); *Hammon v. Barry*, 826 F.2d 73, 77-78 (D.C. Cir. 1987) (finding no manifest imbalance by comparing the percentage of blacks in the employer's relevant department with the percentage of blacks in the area labor force); *Janowiak v. Corp. City of South Bend*, 836 F.2d 1034, 1039 (7th Cir. 1987) (finding no manifest imbalance established where employer did not proffer any evidence of past discrimination nor a statistical comparison "between the relevant qualified area labor pool and the employer's workforce"); *Stock v. Universal Foods Corp.*, 817 F.Supp. 1300, 1306-07 (D. Md. 1993) (showing racial imbalance in the workforce tends to establish that the affirmative action plan is substantially related to a remedial purpose); *Bertoncini v. City of Providence*, 767 F.Supp. 1194, 1201-02 (D. R.I. 1991) ("In deciding whether the kind of imbalance that exists justifies taking race or gender into account, . . . a comparison of the percentage of minorities or women in the employer's work force with the percentage in the area labor market or general population is appropriate.") (internal citation omitted).

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

61. *Schurr v. Resorts Int'l Hotel, Inc.*, 196 F.3d 486 (3d Cir. 1999).

62. *Id.* at 490.

63. *Id.* at 488.

64. *Id.* at 489 (internal citation omitted).

65. *Id.*

66. *Schurr*, 196 F.3d at 498.

67. *Id.* at 490.

tion in the casino industry or in the technician job category; the plan was not put in place as a result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation.⁷⁵

The Third Circuit concluded that the “absence of any reference to or showing of past or present discrimination in the casino industry [was] fatal” to the validity of the affirmative action plan.⁷⁶ The court’s reasoning suggests that even if there had been no discrimination within the Resorts’ technician jobs, a manifest imbalance may have existed if there had been discrimination in the casino industry or in the technician job category generally.

In *Frost v. Chrysler Motor Corporation* Chrysler had “adopted a Marketing Investment [P]rogram [“(MIP”)] to enable it to place dealerships in those areas in which it ha[d] found no private investors with sufficient capital to open a dealership.”⁷⁸ Mary Frost, a white female, applied for the Edmond Dodge dealership, which was part of MIP, but was rejected at a time when she was the only qualified applicant.⁷⁹ An interim manager ran the dealership until a black male was selected as the dealer six months

68. *Id.*

69. *Id.*

70. *Id.* at 488.

71. *Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 490 (3d Cir. 1999).

72. *Id.* at 496.

73. *Id.*

74. *Id.* at 497.

75. *Id.* at 497–98.

76. *See id.* at 498.

77. 826 F.Supp. 1290 (W.D. Okla. 1993).

78. *Id.* at 1291.

79. *Id.* at 1292, 1294.

later.⁸⁰ Frost filed suit against Chrysler, claiming racial discrimination under § 1981.⁸¹ Chrysler contended that it rejected Frost’s application for the Edmond Dodge dealership pursuant to its affirmative action policy but failed to produce evidence showing that a racial imbalance existed with respect to people qualified for MIP.⁸² Consequently, the Tenth Circuit district court held that Chrysler’s affirmative action plan was invalid:

While it is true that [an employer] may justify the adoption of an affirmative action plan without showing a conspicuous imbalance among its own employees, [the employer] must show a conspicuous imbalance in the particular job category. In this case, Chrysler is attempting to remedy a conspicuous imbalance in one job category (privately capitalized dealership owners) by implementing an affirmative action plan in another (MIP dealers).⁸³

The court proceeded to state that an employer “may justify the adoption of an affirmative action plan without showing a conspicuous imbalance among its own employees.”⁸⁴

In sum, Schurr and Frost indicate the receptivity of the Third and Tenth Circuits to justifying private affirmative action with external imbalances.

USING EXTERNAL IMBALANCES TO JUSTIFY AFFIRMATIVE ACTION IN PRIVATE SCHOOLS

1. No Definitive Resolution by the Supreme Court

Johnson *Weber*

Id.
Id.
Frost
Id.
Id.
See

Runyon v. McCrary

Runyon



Weber

Johnson

Weber

Johnson



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Teamsters v. United States

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Teamsters v. United States

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Id.

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Weber

Weber *Weber*

Weber

Weber *Johnson*



Weber

See

Weber

Id.
Weber

Id.
Johnson

See Weber
See

Johnson
Kamehameha III



2. *Supreme Court Dicta in Case Law*

Weighed Against Equal Protection

son

John-

*Johnson
Weber*

Johnson

tion

Wygant v. Jackson Board of Educa-

Wygant Weber

Id.

Id

Id.

Johnson

Id.



Johnson

Johnson

Grutter v. Bollinger

Gratz v. Bollinger

Reynolds v. City of Chicago

Hunter v. Regents of the University of California

Johnson

Johnson

son

John-

Schurr v. Resorts Int'l Hotel, Inc.
Chrysler Motor Corp
supra

Frost v.

Taxman
Taxman v. Board of Education
Grutter v. Bollinger

Taxman

See, e.g.

■ ■

Johnson

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

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

cf.



School	Mission	Admissions Policy	Percentage of Students That Are of the Target Racial Group	Percentage of Students <i>Not</i> a- cial Group
A				
B				96%
C				
D				
E				
F				





Entities Under § 1981 *12 Schools Differently than Other Private*

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

See
L. REV.

Integration, Affirmative Action, and Strict Scrutiny N.Y.U.

The Key to College Access: Rigorous Academic Preparation in PREPARING FOR COLLEGE:
NINE ELEMENTS OF EFFECTIVE OUTREACH

How.

KARL L. ALEXANDER & DORIS R. ENTWISLE, *ACHIEVEMENT IN THE FIRST 2 YEARS OF
SCHOOL: PATTERNS AND PROCESSES*

BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS STA-
TISTICAL BRIEF: MORE EDUCATION MEANS HIGHER CAREER EARNINGS 1 (1994),

*Trends in Healthy Life Expectancy in the
United States, 1970–1990: Gender, Racial, and Educational Differences*



See
See

Reaching for the Silver Lining: Constructing a Nonremedial yet "Exceedingly Persuasive" Rationale for Single-Sex Educational Programs in Public Schools

See, e.g. *Kamehameha II*

Id. *supra*



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

CONCLUSION



APPENDIX: SURVEY OF RULES GOVERNING AFFIRMATIVE ACTION PLANS

		Plan's Justifications	Plan's Limitations
First Circuit		<ul style="list-style-type: none"> • Eliminating a manifest racial imbalance 	<ul style="list-style-type: none"> • Being a temporary measure • Not maintaining racial balance • Being designed to achieve its goal • Not unnecessarily trammeling the interests of the white employees • Not creating an absolute bar to the advancement of white employees
	The court looks to "whether there is a history of discrimination resulting in a workforce imbalance, whether the plan is temporary in nature, whether it is narrowly tailored to correct the imbalance, and the extent to which it affects the rights of third parties." ¹³⁰	<ul style="list-style-type: none"> • "[R]emedy[ing] a history of discrimination resulting in a workforce imbalance"¹³¹ 	<ul style="list-style-type: none"> • Being temporary in nature • Being narrowly tailored to achieve its goal • Not unnecessarily trammeling the rights of third parties¹³²

128. *Bertoncini v. City of Providence*, 767 F.Supp. 1194, 1201 (D.R.I. 1991) (quoting *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 630 (1987)).

129. ; *Petitti v. New England Tel. & Tel. Co.*, No.CIV.A.85-3951-Z, 1988 WL 82231, at *5 (D. Mass. 1988) ("[T]he validity of such a plan turns on three issues: (1) whether the plan was 'justified by a manifest imbalance that reflected under-representation of women in traditionally segregated job categories'; (2) 'whether the . . . [p]lan unnecessarily trammeling the rights of male employees or created an absolute bar to their advancement'; and (3) whether the plan was intended to attain, rather than maintain, a balanced work force.") (internal citations omitted).

130. *Patrolmen's Benevolent Ass'n v. City of New York*, 74 F.Supp. 2d 321, 338 (S.D.N.Y. 1999) (citation omitted), 310 F.3d 43 (2d Cir. 2002); *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220, 227-28 (2d Cir. 1984), 469 U.S. 1117 (1985) (permitting affirmative action plan under Title VII "when [] the job category in question is 'traditionally segregated'" and when the plan does not "unnecessarily

	<p>“Title VII’s prohibition against racial discrimination is not violated by affirmative action plans which, first, have purposes that mirror those of the statute and second, do not unnecessarily trammel the interests of the [non-minority] employees.”¹³³</p> <p>For an affirmative action plan to have purposes that mirror those of the statute, the purposes must be remedial, like remedying the segregation and underrepresentation of minorities that discrimination has caused in the nation’s workforce.¹³⁴ However, for an affirmative action to be remedial, it must be designed to correct a manifest imbalance in traditionally segre-</p>	<ul style="list-style-type: none"> • Correcting a manifest imbalance in traditionally segregated job categories, which in turn, is a remedial purpose that mirrors those of the statute 	<ul style="list-style-type: none"> • Being designed to achieve its goal • Not unnecessarily trammeling the interest of the non-minority employees
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trammel[] the interests of the nonminority employees”) (citations omitted); *Honadle v. Univ. of Vt. & State Agric. Coll.*, 56 F.Supp. 2d 419, 425 (D. Va. 1999) (“[A]n employer could lawfully make race-conscious employment decisions to eliminate manifest racial imbalances in traditionally segregated job categories, as long as the plan does not unnecessarily trammel the interests of the white employees.”).

131. _____, 74 F.Supp. 2d at 338.

132. _____, 773 F.2d at 228.

133. *Schurr v. Resorts Int’l Hotel, Inc.*, 196 F.3d 486, 497 (3d Cir. 1999) (quoting *Taxman v. Board of Educ.*, 91 F.3d 1547, 1550, 1554–55 (3d Cir. 1996)).

134. _____, 196 F.3d at 497; _____, 91 F.3d at 1557.

	gated job categories. ¹³⁵		
	<p>“An employer’s voluntary affirmative action plan is not a violation of Title VII if (1) its purpose is similar to that of Title VII, namely to ‘break down old patterns’ of discrimination; (2) the plan does not ‘unnecessarily trammel’ the rights of those outside the group that it is designed to protect; and (3) it is designed to eliminate a manifest racial or sexual imbalance.”¹³⁶</p>	<ul style="list-style-type: none"> • Breaking down old patterns of discrimination¹³⁷ • Eliminating a manifest racial or sexual imbalance 	<ul style="list-style-type: none"> • Not unnecessarily trammeling the rights of those outside the group that it is designed to protect • Being designed to eliminate a manifest racial or sexual imbalance
Sixth Circuit	<p>“ stands for the general proposition that voluntary affirmative action is proper if it is reasonable under all of the circumstances.”¹³⁸ A plan is reasonable if, like the plan in , it: (1) is temporary; (2) is not intended to maintain racial</p>	<ul style="list-style-type: none"> • Reasonable goal under all the circumstances • Eliminating a manifest racial imbalance 	<ul style="list-style-type: none"> • Reasonable limitations under all the circumstances • Being temporary • Not maintaining a racial balance • Not unnecessarily trammeling the interests of white employees by causing whites to be dismissed or absolutely barring

135. , 196 F.3d at 497; , 91 F.3d at 1556.

136. Smith v. Va. Commonwealth Univ., 84 F.3d 672, 676 (4th Cir. 1996); Messer v. Meno, 936 F.Supp. 1280, 1293 (W.D. Texas 1996), , 130 F.3d 130 (5th Cir. 1997); Lilly v. City of Beckley, W.Va., 797 F.2d 191, 194 (4th Cir. 1986) (“[T]est drawn from [] inquires whether the plan contains safeguards necessary to avoid trammeling the rights of non-minorities, whether the plan is designed to remedy past discrimination, and whether the plan is temporary.”).

137. This is considered to be a purpose similar to that of Title VII in the Fifth Circuit. , 936 F.Supp. at 1293.

138. Baker v. City of Detroit, 483 F. Supp. 930, 983 (E.D. Mich. 1979), ., Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1982).

	<p>balance but simply to eliminate a conspicuous racial imbalance in traditionally segregated job categories; and (3) "d[oes] not 'unnecessarily trammel' the interests of white employees because it d[oes] not cause any whites to be dismissed and d[oes] not absolutely bar whites from advancement."¹³⁹</p>		<p>whites from advancement</p>
<p>Seventh Circuit</p>		<ul style="list-style-type: none"> • 	<ul style="list-style-type: none"> • •



Eighth Circuit		<ul style="list-style-type: none">•••	<ul style="list-style-type: none">••
Ninth Circuit		<ul style="list-style-type: none">•	<ul style="list-style-type: none">•



			<ul style="list-style-type: none">••
Tenth and Eleventh Circuits		<ul style="list-style-type: none">•	<ul style="list-style-type: none">••
D.C. Circuit			<ul style="list-style-type: none">•



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