WHAT A LONG STRANGE TRIP IT'S BEEN: THE "UNNECESSARY TRAMMELING" OF INTERESTS OF NONMINORITIES UNDER THE *WEBER* TEST

San Francisco Police Officers Association v. San Francisco, 812 F.2d 1125 (9th Cir. 1987).

In *San Francisco Police Officers Association v. San Francisco*[1] the Ninth Circuit Court of Appeals held[2] that rescoring a promotional examination to annul the examination's adverse impact on women and minorities violated Title VII of the Civil Rights Act of 1964.[3]

In 1979, the United States District Court for the Northern District of California approved a consent decree[4] between the United States, the Officers for Justice (OFJ) and the San Francisco City & Civil Service Commission (Police Department), prohibiting the Police Department from using selection procedures that adversely impacted minorities and women.[5] In 1983, the Consent Decree Unit (CDU)[6] administered a test for

1. 812 F.2d 1125 (9th Cir. 1987).

2. *Id.* at 1132.

3. Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)) (Title VII).

4. The consent decree is an innovative settlement decree which requires the judge's approval. The purpose is to streamline costly litigation by forcing a settlement between the involved parties. For example, litigants have used consent decrees in cases involving the desegregation of school systems, United States v. Board of Educ., 88 F.R.D. 679 (N.D. Ill. 1981), the improvement of prisons, Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983), the regulation of public waste disposal, Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983), and the elimination of allegedly discriminatory civil service exams, Luevand v. Campbell, 93 F.R.D. 68 (D.C. Cir. 1981).

The consent decree has elements of a contract and a court order. It is contractual because it is voluntarily entered, but it is stricter than an ordinary contract because a court may hold a party in contempt of court for any breach of the consent decree. *See, e.g.*, EEOC v. Local Plumbers Union No. 38, 28 F.E.P. 1567 (N.D. Cal. 1981), *remanded*, 676 F.2d 709 (9th Cir. 1982); United States v. Wood, Wire & Metal Lathers Int'l Union, Local Union 46, 328 F. Supp. 429 (S.D.N.Y. 1971). *See generally* Anderson, *The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation*, 1983 U. ILL. L. REV. 493; Note, *The Modification of Consent Decrees in Constitutional Reform Litigation*, 99 HARV. L. REV. 1020 (1986).

5. Officers For Justice v. Civ. Serv. Comm'n, 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). In *San Francisco*, the Officers For Justice (OFJ) and the United States sued the City and County of San Francisco and the Civil Service Commission alleging a violation of 42 U.S.C. §§ 1981 and 1983, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-16 (1982). The District Court for the Northern District of California approved the consent decree on March 30, 1979. It outlined valid procedures for the hiring and promotion of police officers for San Francisco. *Officers for Justice*, 473 F. Supp. 801. The decree required the defendants to make specific, definable and good faith efforts to achieve certain goals within a specific time frame. At the same time, however, the decree precluded the city from

promotion to Assistant Inspector and Sergeant.[7] After grading the exam and notifying the parties of their results,[8] the CDU noticed that the test adversely impacted minorities and women.[9] To vitiate the disparate impact, the CDU changed the weight given to different portions of the exam thereby reducing the number of non-minority promotions.[10]

The Police Officers Association (POA) and three non-minority members sued the Police Department alleging race and gender employment

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unlawfully discriminating in any way based on sex, race, or national origin. The most important aspect of the settlement at issue in this litigation was the prohibition of selection procedures with an adverse impact on minorities and women. Even if a procedure adversely impacted a protected class, however, the Police Department could justify the procedure under the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1978).

6. The city appointed a Consent Decree Unit (CDU) to implement the terms of the Consent Decree. 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

7. 812 F.2d at 1126.

8. *Id.* at 1127. After the Commission administered the multiple choice section of the exam, it set minimum passing rates and weighted the test. The minimum passing rate for Assistant Inspector was 55% and 50% for Sergeant.

Pursuant to Civil Service Commission Rules, the Commission did not reveal the identities of the candidates in giving the results. Instead, it displayed the candidates' scores according to their examination numbers. *Id.* at 1127 n.1.

9. The employees vying for promotion were as follows:

	Total	Ethnic Minorities	Women
Asst. Inspector	576	148 (25.7%)	59 (10.2%)
Sergeant	640	166 (25.9%)	65 (10.2%)

The statistics for the eligibility list were as follows:

	Total	Ethnic Minorities	Women
Asst. Inspector	75	6 (8%)	4 (5.3%)
Sergeant	125	13 (10.4%)	12 (9.6%)

Id. at 1127.

10. The Commission scored the multiple choice and written tests on a pass/fail standard; the multiple choice cutoff for Assistant Inspector was 50 percent and 55 percent for Sergeant. The cutoff for the written test was 60 percent for both positions. Consequently, the reweighing filtered out 25 candidates for sergeant and 23 for assistant inspector while the written exam eliminated 130 candidates for sergeant and 160 for assistant inspector. *Id.*

After the rescoring of the examination most qualified applicants were as follows:

Assistant Inspector	30	Caucasian males (65.9%)
	10	Ethnic minorities (22.29%)
	5	Women (11.11%)
Sergeant	46	Caucasian males (61.4%)
	18	Ethnic minorities (24%)
	11	Women (14.6%)

Id.

discrimination.[11] Having found a disparate impact in the original exams, the District Court for the Northern District of California ruled that the reweighing was a permissible affirmative action plan.[12] The police officers appealed and the Circuit Court reversed and *held*: the reweighing of the examination unnecessarily trammeled the interests of the non-minority police officers and therefore violated Title VII, section 703(d).[13]

Title VII is a comprehensive federal employment statute that prohibits discrimination based on color, race, religion or national origin.[14] Although the catalyst for Title VII was discrimination against minorities,[15] the statute necessarily protects the rights of nonminorities as well.[16]

The Supreme Court employs two models in assessing Title VII discrimination claims: the disparate impact model and the disparate treatment model.[17] The disparate impact model applies to facially neutral

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11. 621 F. Supp. 1221 (N.D. Cal. 1985), *rev'd*, 812 F.2d 1125. The Police Officers Association sought declaratory and injunctive relief in the San Francisco Superior Court and the Officers For Justice intervened. *Id.* at 1226. After the defendants removed the case to federal court, the district court judge preliminarily enjoined the Police Department from using the revised formula until the court rendered a decision. 812 F.2d at 1128.

12. 621 F. Supp. 1221, 1232-33 (N.D. Cal. 1985), *rev'd*, 812 F.2d 1125.

13. 812 F.2d at 1126.

14. Section 703(a), 78 Stat. 255, as amended, 86 Stat. 109, 42 U.S.C. § 2000e-2(a), provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) 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
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> (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.

Section 703(d), 78 Stat. 256, 42 U.S.C. § 2000e-2(d), provides:

> It shall be an unlawful employment practice for any employer . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide . . . training.

15. Senator Humphrey stated:

> I would like to turn now to the problem of racial discrimination in employment. At the present time Negroes and members of other minority groups do not have an equal chance to be hired, to be promoted, and to be given the most desirable assignments. They are treated unequally . . . . No civil rights legislation would be complete unless it dealt with the problem . . . . The Negro is the principal victim of discrimination in employment . . . . Discrimination also affects the kind of jobs Negroes can get . . . . The crux of the problem is to open employment opportunities for Negroes . . . .

110 CONG. REC. 6547, 6548 (1964) (remarks of Senator Humphrey). *See also* United Steelworkers of America v. AFL-CIO-CLC v. Weber, et al, 443 U.S. 193, 202 (1979).

16. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-280 (1976).

17. The Supreme Court differentiated between the two models in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977):

employment practices that disadvantage a protected class.[18] The disparate treatment model applies when an employer treats one class of employees or applicants differently from the majority.[19] Hoping to avoid costly litigation brought under the disparate impact model, some employers began to initiate affirmative action programs.[20] While the

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"Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral . . . but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . . Proof of discriminatory motive . . . is not required under a disparate-impact theory . . . . Either theory may, of course, be applied to a particular set of facts.

International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15.

The distinction between the two theories is crucial in terms of the allocation of burden of proof. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the Court articulated the test for an individual treatment case. The plaintiff must prove that:

a) he belongs to a racial minority;

b) he applied for and was qualified for a job for which the employer sought applicants;

c) despite his qualifications, he was rejected; and

d) after his rejection, the position remained open and the employer continued to seek application from persons with qualifications similar to the plaintiff's. When a class alleges disparate treatment, the plaintiff must show that discrimination is the company's procedure rather than an unusual practice and the plaintiff must prove the disparity is gross. *Teamsters*, 431 U.S. 324, 337-339.

In an impact case, however, the plaintiff must only establish that the employment practice results in a "marked disparity." Even though the distinction between gross and marked seems trivial, it is pivotal in the plaintiff's strategy. *See, e.g.*, Page v. United States Indus., 726 F.2d 1038, 1054 (5th Cir. 1984) (gross disparity standard requires more of a showing of statistical disparity than marked disproportion); EEOC v. Federal Reserve Bank of Richmond, 699 F.2d 633, 640 (4th Cir. 1983), *rev'd on other grounds*, 467 U.S. 867 (1984) (if statistical proof fails to show marked disproportion, *a fortiori* it fails to show gross disparity); Lewis v. Bloomsburg Mills, Inc., 30 F.E.P. 1715 (D.S.C. 1982) (plaintiff's statistical evidence insufficient under the disparate treatment model but sufficient under the adverse impact model).

In Albemarle v. Moody Paper Company, 422 U.S. 405 (1975), the court held that if the plaintiff cannot prove discriminatory intent by the employer, he may bring forth evidence of less discriminatory practices, proving that the test was a pretext to discriminate. *Id.* at 425. *See* Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C.L. REV. 419, 440 (1982); Helfard & Pamberton, *The Continuing Vitality of Title VII Disparate Impact Analysis*, 36 MERCER L. REV. 939 (1985).

18. *See supra* note 17.

19. *See supra* note 17.

20. *See, e.g.*, Simon, *Voluntary Affirmative Action After Weber*, 34 LAB. L. J. 138 (1987).

Employers also must comply with Executive Order 11246 (Order 11246). Order 11246 prohibits every non-exempt government contractor from discriminating based on race, color, religion, sex, or national origin and requires them to take affirmative action to guarantee that such factors are not considered with respect to promotion and employment.

Order 11126 has a wide application; it applies to both government contracts and subcontracts involving sums in excess of $10,000. The order defines a contract as "any agreement . . . between

Supreme Court recognizes the need to compensate discriminated minorities and women, it also recognizes the need to protect innocent nonminorities.[21]

In *United Steelworkers v. Weber*[22] the Court examined a collective bargaining agreement that required the employer to reserve fifty percent of the openings in its training program for blacks.[23] Accordingly, the employer chose black employees for the program while passing over white

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any contracting agency and any person for the furnishing of supplies or services or for the use or real or personal property, including lease arrangements." Order 11246 defines subcontract as any agreement between a government contractor and any person either

> (1) [f]or the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or
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> (2) [u]nder which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

41 C.F.R. § 60 (1980).

Commentators have suggested that Order 11246 affects some 300,000 contractors, or 41 million employees, or one-third of the National Labor Force.

See generally SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Ch-25 (1983) [hereinafter SCHLEI & GROSSMAN]; Pougeau, *Enforcing a Clear National Mandate*, 7 J. INTERGROUP REL. 4 (1979).

21. In Regents of the University of California v. Bakke, 438 U.S. 265 (1977), the Supreme Court invalidated an admissions program that favored minorities. The University of California at Davis Medical School rejected Bakke twice for admission. *Id.* at 276. U.C. Davis adopted an acceptance scheme allotting sixteen out of 100 spots for minorities to increase minority presence at the medical school. Bakke sued claiming that the Medical School violated his rights under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 and the California State Constitution. *Id.* at 279.

Bakke's statistical evidence clearly showed that he was far more academically qualified than the average student who filled the minority slots. *Id.* at 279 n.7. The Court held that the University unfairly denied Bakke admission. *Id.* at 319. Although the University may consider race in the admissions process, race may not be the sole criterion. *Id.* at 318. The Court reasoned that while the University's attempt to alleviate discrimination was noble, it could not alleviate discrimination at the expense of an innocent party. *Id.* at 315, 319. The Court did, however, uphold the use of the "Harvard Plan." *Id.* at 321-324. Harvard used an innovative admission scheme where race was a factor in creating a diverse student body. *See also* Defunis v. Odegaard, 416 U.S. 312 (1974) (issue similar to *Bakke* except case moot since plaintiff about to graduate from law school).

There has been a plethora of studies written about the Bakke decision; *see generally* Haft, *Assuring Equal Educational Opportunity for Language-Minority Students: Bilinqual Education and the Equal Educational Opportunity Act of 1974*, 18 COLUM. J. L. & SOC. PROBS. 209 (1983); Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 59 N.C.L. REV. 531 (1981); Lavinsky, *The Affirmative Action Trilogy and Benign Racial Classifications*, 27 WAYNE L. REV. 1304 (1981).

22. 443 U.S. 193 (1979).

23. The Weber plan only required Kaiser to reserve 50 percent of the openings until the percentage of Blacks in the skilled job sector equaled the percentage of Blacks in the local labor force. 443 U.S. 195 (1979).

males with seniority.[24]

The Supreme Court sustained the program.[25] The Court reasoned that

24. Several white employees who had more seniority than the most senior black selected brought a class action suit. *Id.* at 199.

The Supreme Court later ruled on seniority rights in Firefighters Local Union, 1784 v. Stotts, 467 U.S. 561 (1984). The Court held that race conscious affirmative action is not appropriate where the program overrides elements of a *bona fide* seniority system. *Id.* at 576-578. Frank Stotts, a black firefighter captain sued the Memphis Fire Department alleging racial employment discrimination. *Id.* at 565. The litigants settled the suit by consent decree which required the fire department to hire half of the blacks for all annual job openings. *Id.* The extended goal of the decree was to ensure that 20 percent of all subsequent promotions would be filled by blacks. The issue before the Court was not the affirmative action plan, but rather the layoff provision in the consent decree. *Id.* at 572.

The lower *Stotts* court required a modification of the consent decree. *Id.* at 565-567. Mr. Stotts requested that the last-hired-first-fired method to layoff employees could extirpate any benefit from the consent decree. *Id.* The Firefighters Union intervened opposing the request. *Id.* The district court held for Stotts and prohibited the city from using the seniority system if such use would reduce the percentage of blacks. *Id.* at 566. The Sixth Circuit affirmed the lower court, although it disagreed with the district court's conclusion that the seniority system was not "bona fide". 679 F.2d 541, 568 (6th Cir. 1982).

The United States Supreme Court reversed, holding that Title VII, § 703(h) explicitly protects employees' rights under a *bona fide* seniority system, absent discriminatory intent. 467 U.S. 569, 578-79 (1983). The Court also held that the lower court lacked authority to eviscerate a bona fide seniority provision in order to effectuate a consent decree. *Id.* at 578. The Court, in applying the test to the *Stotts* facts, further held that under *Teamsters*, 431 U.S. 324, each individual must prove that a discriminatory practice actually adversely impacted him or her. 467 U.S. at 579. The Court extended the theme of proof of adverse consequences to hiring, reinstatement, promotion and back pay. *Id.*

The *Stotts* decision left management with unclear guidelines to evaluate the fairness of consent decrees. Essentially there are four unanswered questions:

1) Whether Title VII precludes class relief thereby limiting relief to only those individuals who can prove adverse consequences from discrimination?

2) If a court may grant class relief, what burden does a plaintiff have to prove to vest the court with the authority to use class relief? Further, does the burden vary when the relief is mandated by an affirmative action program? A Consent Decree? A court decision?

3) If a court may grant class relief, and the facts give rise to such relief what relief may be granted?

4) Where does the fourteenth amendment fit in with the above analysis?

See generally Berle, *The Stotts Dilemma: Will Wygant Resolve It*, 11 EMP. REP. J. 635 (1985). *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. —— (1986); Firefighters v. Cleveland, 478 U.S. 501 (1986); Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 427 (1986). For the immediate progeny of *Stotts see* Commonwealth v. Int'l Union of Operating Eng'rs Local 542, 770 F.2d 1068 (3d Cir. 1985), *cert. denied*, 474 U.S. 1060 (1986); Turner v. Orr, 759 F.2d 817 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 3332 (1986); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), *cert. granted, sub. nom.* Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 474 U.S. 816 (1985); Diaz v. Am. Tel. & Tel. Co., 752 F.2d 1356 (9th Cir. 1985); Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985); Grann v. City of Madison, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, 469 U.S. 918 (1984); Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 3337 (1986).

25. 443 U.S. 193 (1979).

because the primary goal of Title VII was to increase employment opportunities for minorities,[26] it would be anomalous to prohibit a private employer from voluntarily upgrading minority representation to the level of nonminorities.[27] Justice Rehnquist, dissenting, argued that the literal construction of section 703(a) and (d) precludes *any* employment program based on race.[28]

Weber provided four guidelines for evaluating the permissibility of an affirmative action plan.[29] The plan must break down old patterns of racial segregation,[30] must not create an absolute bar to nonminorities,[31] must be temporary[32] and must not unnecessarily trammel the interests of nonminorities.[33]

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26. *Id.* at 202. *See supra* note 14.

27. *Id.* at 207.

28. Rehnquist argued that the *Weber* holding could not be rationally reconciled with prior case law. *Id.* at 220-223 (Rehnquist, J., dissenting). Justice Brennan tried to harmonize the two holdings based on factual distinctions: *Bakke* was a constitutional issue while Weber involved private, voluntary action thereby precluding any constitutional issue. *Id.* at 200.

The majority also distinguished the two statutes at issue in the respective lawsuits. Title VII § 703(5) provides merely that Title VII does not compel preferential treatment, while Title VI has no analogous section. The majority reasoned that because there was no overt *prohibition* against affirmative action, Congress did not intend to foreclose it. *See* SCHLEI & GROSSMAN, *supra* note 20, at 839 (arguing that Justice Rehnquist's dissent is more persuasive).

See also Meltzer, *The Weber Case: The Judicial Abrogation of the Anti-Discrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980) [hereinafter Meltzer]; Abraham, *Some Post Bakke-and-Weber Reflections on Reverse Discrimination*, 14 U. RICH. L. REV. 373 (1980); Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of United Steelworkers of America v. Weber and the Misguided Policy of Numerical Employment*, 21 B.C.L. REV. 1 (1979).

29. There is some dissent on whether the *Weber* test involves a two-step or a four-step approach. Although this issue is beyond the scope of this comment, the following cases and articles provide thoughtful arguments for the two-pronged approach. *See* W. Boyd, *Affirmative Action in Employment—The Weber Decision*, 66 IOWA L. REV. 1, 21 (1980) (explaining *Weber* test as two-pronged); *see also* Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220, 228 (2d Cir. 1984), *cert. denied*, 469 U.S. 117 (1985) (implying two prongs to *Weber* test); *Cf.* Krommick v. School Dist. of Philadelphia, 739 F.2d 894, 911 (3d. Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985) (implying temporal limitation factor is third prong); Lehman v. Yellow Freight Sys., Inc., 651 F.2d 520, 526 (7th Cir. 1981) *vacated, reh'g granted, sub. nom.*, Britton v. South Bend Community School Corp, 783 F.2d 105 (1986), *cert. denied*, 108 S. Ct. 288 (1987).

30. The Court held that the goal of Title VII was to eradicate decades of racial discrimination. Because the plan adopted by the employer in *Weber* was designed to break down old patterns of discrimination, it was permissible. 443 U.S. 193, 208.

31. The Court held that because the plan reserved half of the openings for whites, the program did not operate to exclude whites. *Id.*

32. The Court opined that because the plan's aim was to erase blatant racial imbalance as opposed to maintaining racial balance, it was temporary in nature. *Id.*

33. The Court here simply stated that because the plan does not require the displacement of white employees, the plan does not unnecessarily trammel their interests. *Id.*

The circuits have interpreted the *Weber* test and its elements in various ways.[34] Some require an employer to have intentionally discriminated while others hold that a showing of disparate impact on a protected class is sufficient to give rise to a "remedial purpose aimed at breaking down patterns of discrimination."[35] The circuits also diverge in determining how a plan might "unnecessarily trammel the interests of nonminorities."[36]

In *Tangren v. Wakenhut*,[37] for example, an employer initiated an affirmative action program designed to eliminate the adverse impact of seniority-based layoffs.[38] The plaintiff, a white male, claimed that an

34. *See* Meltzer, *supra* note 27 at 459-65; *see infra* notes 35-36 and accompanying text.

35. Britton v. South Bend Community School Corp., 775 F.2d 799 (7th Cir.) *vacated, reh'g granted* en banc 819 F.2d 766, *cert. denied*, 108 S. Ct. 288 (1987) (statistical and non-statistical evidence such as testimony indictating discrimination practice was sufficient to warrant to adoption of affirmative action program); Janowiak v. Corporate City of South Bend, 750 F.2d 557, 561 (7th Cir. 1984), *vacated*, 107 S. Ct. 1620 (1987) (the South Bend Board of Public Safety is . . . competent both to make finding of past discrimination and to implement an affirmative action plan, but statistical disparity not sufficient to justify adoption of affirmative action program); Van Aken v. Young, 750 F.2d 43, 44-45 (6th Cir. 1984) ("in view of history of racially discriminatory hiring record of the Detroit Fire Department, voluntary race conscious affirmative action did not breach . . . rights of white applicant's"); Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1154 (6th Cir. 1984), *rev'd*, 476 U.S. 267 (1986) (judicial finding of past discrimination against minority leaders by board of education was not prerequisite to adoption of affirmative action in collective bargaining agreement between teachers union and board); Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220 (2d Cir. 1984) ("voluntary compliance is a preferred means of achieving Title VII's goal of eliminating employment discrimination).

One resolved issue is whether an affirmative action program must have an ending date or a quota to be temporary. In EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172 (2d Cir. 1984), *aff'd*, 478 U.S. 421 (1986), the court held that the district court's establishment of a non-white membership goal of 29.23 percent was not a permanent quota but a permissible, temporary, race-conscious affirmative action remedy in view of a clear-cut pattern of long-continued and egregious racial discrimination by union and because the effects of the remedy would not be concentrated upon a relatively small ascertainable group of persons. *Id.* at 1186-1187.

36. Paradise v. Prescott, 767 F.2d 1514, 1534 (11th Cir. 1985), *aff'd*, 107 S. Ct. 1053 (1987) (program did not unnecessarily trammel the interests of interveners by requiring their discharge and replacement with black troopers).

Britton v. South Bend Community School Corp., 775 F.2d 799, 806 (7th Cir. 1985), *vacated, reh'g granted*, 783 F.2d 105 (1986), *cert. denied*, 108 S.Ct. 288 (1987) (affirmative action plan did not unnecessarily trammel the interests of white employees because it was temporary (i.e. it had a concrete ending date); nor did the plan require the discharge of white employees and the replacement with black ones).

Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985) (the plan itself cannot require the discharge of non-minority workers and their replacement with minorities; non-minorities do not have a legally protected interest in promotions).

See also Simon, *Voluntary Affirmative Action After Weber*, 34 LAB. L. J. 138 (1983).

37. 658 F.2d 705 (9th Cir.), *cert. denied*, 456 U.S. 916 (1982).

38. *Id.* at 706.

override provision mandating the employer to ignore seniority rights[39] whenever the percentage of women and minorities fell below a certain level violated Title VII.[40] The Ninth Circuit Court of Appeals disagreed with the plaintiff's reasoning that a seniority right is not a vested property right, but an economic right[41] which the employer and the union may bargain away to provide greater employment opportunities for minorities.[42] *Tangren* found that the layoff program had a carefully designed objective—to prevent any disparate impact due to layoffs.[43] Further, the program was a fair response to the inherent problems in a reverse seniority layoff system.[44] Therefore, the program did not unnecessarily trammel the rights of nonminorities because the override provision squarely accomplished the remedial purpose.[45]

In *Kirkland v. N.Y. State Dept. of Correctional Services*[46] the Second Circuit Court of Appeals approved a zoning plan. In *Kirkland*, the Department of Correctional Services (Department) divided promotional candidates into three zones based on test scores and then randomly ranked all of the candidates within each zone.[47] The department first offered the promotion to minorities until the number of minority appointments equaled the percentage of minorities represented on the eligibility list.[48] After minority representation reached this level, the Department promoted four nonminorities for each minority until that specific zone was exhausted.[49] The Department used the same scheme for each successive zone.[50] The *Kirkland* court found that this scheme did not unnecessarily trammel the interests of nonminorities for two reasons. Primarily, the incremental differences between test scores within a certain zone were not great enough to necessarily warrant promotion of

39. *Id. See supra* note 24 (discussing seniority rights).

40. *Id. See also supra* note 13-14 and accompanying text.

41. *Id.* at 705-706. *Tangren* based this premise on Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) and Humphrey v. Moore, 375 U.S. 335 (1963).

42. 658 F.2d at 706. *See* Cooper & Sobel, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L. J. 887 (1984).

43. 658 F.2d at 707.

44. *Id.*

45. *Id.*

46. 711 F.2d 1117 (2d Cir. 1983).

47. *Id.* at 1123-1124.

48. *Id.*

49. *Id.*

50. *Id.*

one candidate over another.[51] Second, like the *Tangren* court, the *Kirkland* court found that the adjustment of the rank ordering system did not deprive the plaintiffs of any vested property right.[52]

The Supreme Court recently affirmed the Ninth Circuit's interpretation of *Weber* in *Johnson v. Transportation Agency of Santa Clara*.[53] Paul Johnson attained a higher score on a promotional examination than a woman, Joyce. The Santa Clara Transportation Agency, however, promoted Joyce and Johnson sued.[54] The Supreme Court articulated three reasons why the Agency did not unnecessarily trammel Johnson's rights. First, Joyce's gender was only one factor in the promotion decision.[55] Second, Johnson had no absolute entitlement to the position at issue.[56] Third, the Agency designed its plan to attain a balanced work force, not to maintain one.[57]

In *San Francisco Police Officers Association v. San Francisco*,[58] the Ninth Circuit Court of Appeals held that the Police Department must discard a test that adversely impacts a protected class instead of regrading or reweighing the test to nullify the impact.[59] Reweighing the examination, the court held, would violate the fourth Weber guideline by unnecessarily trammeling the interest of a non-minority.[60]

The *San Francisco* court distinguished *Weber*, *Tangren*, and its previous decision in *Johnson*.[61] In distinguishing *Tangren* and *Johnson* the

51. *Id.* at 1133.

52. *Id.* at 1134. The Second Circuit applied the holding of Cassidy v. Muncipal Civil Serv. Comm'n, 37 N.Y.2d 526, 529, 337 N.E.2d 752, 753 N.Y.S.2d 300 (1975) (person on eligibility list does not possess any right to appointment or any other legally protected interest).

53. 107 S. Ct. 1442 (1987).

54. A special affirmative action committee recommended Joyce and it was upon this recommendation that the agency promoted her. *Id.* at 1448.

55. *Id.* at 1454-1455.

56. *Id.* at 1455.

57. *Id.* at 1456.

58. 812 F.2d 1125 (9th Cir. 1987).

59. *Id.* at 1133.

60. *See supra* notes 37-57.

61. Before distinguishing the prior case law, *San Francisco* first determined that the Commissioner's decision to reweigh was a race and gender conscious act. Therefore, the act demanded a higher standard of review than the district court's arbitrary and capricious standard. 812 F.2d at 1230. The district and appeals courts differed on whether the Police Department overtly considered race or sex in its decision to reweigh. The district court reasoned that neither race nor sex was considered *over merit.* (emphasis added). The city therefore did not deprive nonminorities of a legitimate expectation of advancement. The city also argued that mere presence on an eligibility list does not bestow a right to appointment and, therefore, the nonminorities had no right which was injured. The district court found this analysis persuasive and further reasoned that because the nonminorities

court determined that reweighing would deviate from the carefully contoured affirmative action plan.[62] The court distinguished *Weber* by focusing on the rights that each program created. In *Weber*, the employer designed the plan to train individuals to assume skilled positions. The plan, therefore, *created* new opportunities for whites and blacks as well.[63] The reweighing of the exam in *San Francisco*, on the other hand, *foreclosed* opportunities to some nonminorities.[64] The court made no attempt to distinguish *Kirkland* or even to address the Second Circuit's analysis.[65]

The court also considered equitable arguments. The reweighing scheme unnecessarily trammeled the nonminorities' interest because the candidates believed the Police Department would base the promotions solely on merit, the exam takers deserved notice of how the Department would grade their performances and the exam process ought to maintain a degree of neutrality.[66] The court further opined that to examine the results of a test and to change the scoring of the test to arrive at a *certain* race and gender result was offensive.[67] Additionally, the court indicated that to regrade the test subsequent to the disclosure of the scores was unfair to exam takers.[68] The court further held that because the consent decree prohibited any racial discrimination, the reweighing discriminated against the nonminorities and violated the consent decree.[69]

Judge Merrill in dissent argued that whether the city met its obligation under the consent decree by reweighing the exam or by giving a new test,

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possessed no tangible right, the only right they did indeed possess was the right not to be treated arbitrarily or capriciously. *Id.* at 1131.

The Ninth Circuit disagreed, inferring that the Commission did indeed make a race and gender conscious decision. Because the Commission used each candidate's performance as a guideline to reweigh and because the Commission reweighed the test to achieve a specific race and gender percentage, the court reasoned that race and gender were the deciding factors. *Id.*

62. The court focused on Tangren v. Wackenhut Services, Inc. 658 F.2d 705 (9th Cir. 1987) (discussed *supra* notes 37-45). In *Tangren*, the defendant contoured its plan to accomplish a specific goal. The Court held that any impact on a nonminority did not violate Title VII so long as the impact was in response to the goals of the plan. *Id.* at 707. *Tangren* implicitly holds that if the employer warns its employees of any potential adverse harm from an affirmative action program, then the plan does not violate Title VII even if the harm ultimately results.

63. 812 F.2d at 1131. *See supra* notes 26-28 and accompanying text.

64. *Id.*

65. *Id.* at 1132 n.9.

66. *Id.* at 1132.

67. *Id.*

68. *Id.*

69. *Id.* at 1132-1133.

the result would be the same—more minorities and less nonminorities.[70] Because the applicants knew the original test scores, the white males ultimately relinquishing the promotion will know they were snubbed.[71] Judge Merrill stated that the expense of requiring the city to administer a new test did not outweigh the marginal utility of the resultant fairness.[72]

San Francisco deviates from established precedent and fails to articulate any analytical framework for lower courts or, more importantly, employers to evaluate affirmative action plans. The reweighing of the exam did not unnecessarily trammel the interests of nonminorities. *Weber* and its progeny suggest that there must be an ascertainable, tangible, economic right before that right can be unnecessarily trammeled.[73] *San Francisco* identified no such right. Had the test been a requirement to keep one's job, then the court's conclusion would bear greater strength. However, the nonminorities did not have a rational expectation of advancement, they merely achieved the first step in a long and involved promotional scheme. Although *Tangren* and *San Francisco* are factually distinguishable, the Police Department satisfied the standard set in *Tangren*: the reweighing adhered to the remedial purpose of the plan—to promote women and minorities. Further, the reweighing did not violate the consent decree. The CDU expressly retained the right to alter the scoring process to meet the mandate of the consent decree.[74] The reasonable inference is that *even if* the nonminorities had a legally cognizable interest in the promotion by virtue of their presence on the eligibility list, that interest was not *unnecessarily* trammeled.

The Ninth Circuit further failed to articulate an analytical framework to evaluate affirmative action plans. The court merely stated conclusions instead of analytically working through the case law. The court states that the reweighing "is offensive"[75] and "undermines the integrity of the

70. *Id.* at 1113.

71. *Id.*

72. *Id.*

73. *See, e.g., supra* notes 48-52 and accompanying text. The Ninth Circuit disagrees with the Second Circuit. *See supra* notes 57-66.

74. 621 F. Supp. 1225, 1230 n.2 (N.D. Calif. 1985). The job announcement for the Assistant Inspector and Sergeant both gave the Consent Decree Commission the right to revise the examination to meet the requirements of the Consent Decree and any applicable law. The Court of Appeals could have found that this reservation of rights and the subsequent regrading was an attempt "to accomplish the limited objective of reducing disparate impact on minority candidates [and therefore] does not unnecessarily trammel the rights of non-minority candidates." 812 F.2d at 1131.

75. 812 F.2d at 1132.

examination process"[76] without giving any rationale. This "rationale" gives no guidance to lower courts or employers to design an affirmative action program.

In *San Francisco Police Department Association v. San Francisco*, there are no winners. The Police Department loses because it does not have a guide (other than *Weber*) of how to test applicants without unnecessarily trammeling a nonminority's rights. The minority police officers lose because employment equality remains elusive. The nonminorities lose because the association must eradicate any adverse impact at their expense. Finally, the citizens of San Francisco also lose because the Department must spend more of the taxpayers' money to develop a test which will yield the exact same result previously achieved under the reweighing scheme. In short, *San Francisco* fails to benefit any of the interested parties, or to advance the clarity of the law.

R.S.H.

76. *Id.*