EMPLOYER AND EMPLOYEE—EMPLOYMENT DISCRIMINATION—VOLUNTARY AFFIRMATIVE ACTION PROGRAMS NOT PROHIBITED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964—*United Steelworkers v. Weber*, 99 S. Ct. 2721 (1979).

On February 1, 1974, Kaiser Aluminum and Chemical Corporation (Kaiser)[1] entered into a labor agreement with the United Steelworkers of America, AFL-CIO (USWA).[2] In addition to providing for hourly wages and conditions of employment, the agreement called for the establishment of an on-the-job training program based on race.[3] Through the use of dual seniority lists drawn according to race, the agreement provided for a minimum fifty percent minority representation in this training program.[4]

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[1] United Steelworkers v. Weber, 99 S. Ct. 2721, 2725 (1979). Kaiser is a Delaware corporation with its principal place of business located in California. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 763 (E.D.La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 99 S. Ct. 2721 (1979). It is the third largest producer of aluminum in the United States. N.Y. Times, Mar. 30, 1979, Sec. D.1.

[2] United Steelworkers v. Weber, 99 S. Ct. at 2725. The USWA is a labor organization which represents both skilled and unskilled employees at all Kaiser plants covered by the 1974 agreement. Brief for Petitioner at 3, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979) [hereinafter cited as Brief for Petitioner]. Its function is to exert influence upon management in favor of its members during labor negotiations. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. at 763.

[3] United Steelworkers v. Weber, 99 S. Ct. at 2725. Prior to the 1974 agreement, Kaiser obtained most of its skilled employees from outside the plant. *Id.* In response to pressure from the USWA to open craft positions to union members already working for the company, Kaiser, prior to 1974, instituted a training program under which an unskilled employee with partial craft experience would be provided with the training that they did not already have. Brief for Plaintiffs-Appellees at 9, Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977) [hereinafter cited as Fifth Circuit Brief for Plaintiffs-Appellees]. By 1975 Kaiser employed 292 skilled workers, twenty-eight of whom had obtained this status through the partial experience training program. *Id.* By 1974, however, only five blacks were employed as craftsmen. United Steelworkers v. Weber, 99 S. Ct. at 2725.

[4] United Steelworkers v. Weber, 99 S. Ct. at 2725. The controversial part of the 1974 agreement was as follows:

> "It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft, and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio:"
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> [Gramercy Works listed, among others]
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> "As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates . . . ."

Id. at 2738 n.3 (Rehnquist, J., dissenting) (quoting from 1974 agreement).

According to the terms of the agreement, the joint implementation committee determined that the desired goal for minority craft representation at the Gramercy plant would be 39%. *Id.*

Brian Weber, an unskilled employee at the Kaiser plant located in Gramercy, Louisiana,[5] applied for the training program openings which became available in April of 1974.[6] Consistent with the scheme established under the agreement, Weber's application was denied while minority employees with less plant seniority were accepted.[7] After exhausting alternative remedies outside the courts,[8] Weber brought a class action in the United States District Court for the Eastern District of Louisiana against Kaiser and the USWA on behalf of himself and all other white union-member employees at the Gramercy plant who became eligible on February 1, 1974, for participation in the on-the-job training program.[9] Alleging that the pref-

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This figure was based on the percentage of minority workers in the surrounding area. *Id.* Kaiser estimated that in order to achieve the desired ratio at the Gramercy plant, the racially based training program would have to exist for at least 30 years. Brief for Petitioner, *supra* note 2, at 52–53 n.135.

[5] United Steelworkers v. Weber, 99 S. Ct. at 2725. Weber was hired by Kaiser in approximately 1968 and throughout the case was employed as a laboratory analyst. N.Y. Times, Feb. 25, 1979, § 6 (Magazine), at 38. As a union member he was active in labor negotiations and, by the time of trial, he had become chairman of the plant grievance committee. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. at 763.

[6] United Steelworkers v. Weber, 99 S. Ct. at 2738 (Rehnquist, J., dissenting). The openings available in April, 1974, were for the positions of instrument repairman, electrician, and general repairman. Brief for Respondents at 5, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979). [hereinafter cited as Brief for Respondents]. Five blacks and four whites were selected to be trained for these positions. United Steelworkers v. Weber, 99 S. Ct. at 2738 (Rehnquist, J., dissenting). Later in 1974, Kaiser offered four more training positions for which two white and two black employees were selected. *Id.* at 2738 n.4 (Rehnquist, J., dissenting).

The opportunity afforded unskilled employees by these training programs was significant. Brief for Respondents, *supra*, at 6. Skilled workers earn approximately $20,000 per year and have the opportunity to work overtime if they so desire. N.Y. Times, Feb. 25, 1979, § 6 (Magazine), at 38. Additionally, skilled workers invariably work the day shift. *Id.* Weber, as an average unskilled worker, earned about $18,000 per year, had less overtime opportunity, and had to take a regular turn on the night shift. *Id.*

[7] United Steelworkers v. Weber, 99 S. Ct. at 2725; Brief for Respondents, *supra* note 6, at 5. Aside from the use of the racial criteria imposed by the 1974 agreement, seniority was the only other factor which determined acceptance into the program. *Id.* at 4. Acceptance was on a one to one racial basis with the most senior applicant in each racial group being chosen. *Id.* at 5. Of the seven blacks admitted into the program in 1974, two had less seniority than Weber. N.Y. Times, Feb. 25, 1979, § 6 (Magazine), at 100. Being active in union affairs, Weber was aware that the racial criteria had been included in the 1974 agreement. *Id.* He assumed that the provision was included " 'to keep the Government happy.' " *Id.* When the dual seniority lists were established he decided to test the company by bidding for the April 1974 openings. *Id.*

[8] N.Y. Times, Feb. 25, 1979, § 6 (Magazine) at 100–01. Weber's first step was to file a grievance with the USWA. *Id.* When this was denied he lodged a complaint with the Equal Employment Opportunity Commission in New Orleans. *Id.* When the Commission did not act on the complaint he was informed that he had the right to institute a private action. *Id.*; *see* 42 U.S.C. § 2000e-5(f)(1)(1976).

[9] Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. at 763. The 1974 agreement covered fifteen Kaiser plants throughout the country. United Steelworkers v. Weber, 99 S. Ct. at 2725. Weber's complaint dealt only with the application of the training program to the Gram-

erential treatment for minority unskilled employees with less seniority constituted a quota system which violated Title VII of the Civil Rights Act of 1964,[10] Weber sought injunctive relief against further implementation of the training program by Kaiser.[11]

In granting Weber's request for a permanent injunction,[12] the district court held that the quota system created under the 1974 agreement was a violation of sections 703(a) and 703(d) of Title VII under two different rationales.[13] First, the court determined that Title VII unequivocally prohibits an employer from discriminating against any employee on a racial basis,[14] but that federal courts are not subject to the same restrictions and may establish quota remedies where appropriate.[15] Secondly, quotas should only be imposed when the employer has been found guilty of actual discrimination, which

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ercy plant and the trial court considered the training program only as it was implemented there. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. at 763.

[10] United Steelworkers v. Weber, 99 S. Ct. at 2725–26. The applicable sections of Title VII are sections 703(a) and (d), which provide that:

> (a) 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.
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> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs 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 apprenticeship or other training.

42 U.S.C. §§ 2000e-2(a), (d)(1976).

Weber also claimed a violation of 42 U.S.C. § 1981. Brief for Respondents, *supra* note 6, at 46 n.185. Neither the district court nor the Fifth Circuit considered that claim and Weber conceded that reliance on section 1981 was unnecessary. *Id.*

[11] Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. at 762–63. Weber originally requested a preliminary injunction but the trial was conducted as if he had sought a permanent injunction pursuant to stipulation of the parties. *Id.* at 763.

[12] *Id.* at 770.

[13] *Id.* at 766–67; *see* note 10 *supra*.

[14] Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. at 766. The court stated that Congress was aware of affirmative action programs when the Civil Rights Act of 1964 was being debated and did not exempt those programs from the clear prohibition against granting preferential treatment based on race. *Id.*

[15] *Id.* at 767. The court held that sections 703(a) and 703(d) are directed only at employers. *Id.* Furthermore, the court noted that because quotas are such extreme remedies, federal courts alone are able to ascertain the necessity and duration of such a remedy. *Id.* at 768.

Kaiser had not,[16] and then only in favor of those who have actually been discriminated against.[17]

On appeal, the Fifth Circuit rejected the first rationale,[18] but affirmed the district court's decision under the second.[19] Although voluntary compliance was found to be a major objective of Title VII,[20] actual past employment discrimination must be present to make a racial quota lawful.[21] Since Kaiser had never discriminated against its minority employees, the racial preference violated Title VII.[22] The court also held that the quota could not be made valid under Executive Order 11,246, which requires government contractors to take affirmative action to avoid racial discrimination.[23] Being a government contractor, Kaiser was subject to the regulations promulgated under the Executive Order which compel the contractor to set goals for hiring and promotion to overcome any underutilization of racial minorities.[24] The court concluded, however, that this mandate for affirmative action could not be upheld over the direct congressional prohibition of racial discrimination in Title VII.[25] The Fifth Circuit denied rehearing,[26] and the United States Supreme Court granted certiorari to the petitions of Kaiser, the USWA, and the United States.[27] On June 27, 1979, in a five to two decision, in

[16] *Id.* at 764, 769. The court found that since the Gramercy plant opened in 1958, Kaiser had never discriminated in its hiring practices. *Id.* at 764. At approximately the time that Weber was hired, Kaiser began hiring unskilled employees at the gate on a one to one racial basis in an effort to increase minority representation in the work force at the Gramercy plant. *Id.* With regard to skilled positions, Kaiser had made extensive attempts to recruit black craftsmen through such devices as advertising in black newspapers. *Id.*

[17] *Id.* at 768. The court found that black employees at the Gramercy plant had not been discriminated against by any employment practices of Kaiser. *Id.* at 764, 769.

[18] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 223 (5th Cir. 1977), *rev'd*, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

[19] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 224.

[20] *Id.* at 223. The court stated that "the central theme of Title VII" is the elimination of discrimination through private settlement. *Id.*

[21] *Id.* at 224. Judge Wisdom, in dissent, argued that the majority's holding would force employers who desired to implement affirmative action to predict precisely what a federal court would do under the particular circumstances of their case, or else be liable for reverse discrimination. *Id.* at 230 (Wisdom, J., dissenting).

[22] *Id.* at 224–26. Kaiser had argued that the training program should be validated as a remedy for the past societal discrimination endured by its minority employees. *Id.* at 225. In response to this the court stated that, although societal discrimination may have adversely affected the minority unskilled employees at the Gramercy plant, it had not affected their seniority there. *Id.* at 225–26.

[23] *Id.* at 227; Exec. Order No. 11,246, § 202, reprinted following 42 U.S.C. § 2000e (1976).

[24] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 222; 41 C.F.R. § 60-2.30 (1978).

[25] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 227.

[26] Weber v. Kaiser Aluminum & Chem. Corp., 571 F.2d 337 (5th Cir. 1978) (en banc).

[27] 99 S. Ct. 608 (1979).

United Steelworkers v. Weber, the Supreme Court reversed and held that the voluntary affirmative action plan embodied in the Kaiser—USWA agreement was not prohibited by Title VII.[28]

Title VII of the Civil Rights Act of 1964[29] is "one of the most important pieces of legislation of our time."[30] The primary reason for the need for federal legislation in this area was, of course, the harsh reality of employment discrimination against black Americans.[31] Title VII's effectiveness in providing impetus for minority employment was, however, limited by the principle of color blindness.[32] While the eighty-eighth Congress may perhaps be criticized for imposing a color blind constraint on legislation designed to open employment opportunities to those who had been excluded from "the main stream of American life,"[33] it is doubtful whether a bill drawn in explicit racial terms would have been passed. During the congressional debate over the merits of the Act, one commentator noted that "it is being argued in a nervous Congress that the need for civil rights legislation is not to advance the Negro cause, but to control and contain it."[34]

The bill which eventually became the Civil Rights Act of 1964 was introduced in the House on June 20, 1963, and immediately re-

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[28] 99 S. Ct. 2721, 2725 (1979).

[29] 42 U.S.C. § 2000-e to -e17 (1976).

[30] 110 CONG. REC. 15832 (1964) (remarks of Sen. Humphrey); *id.* (remarks of Sen. Javits). One congressman stated that Title VII would do "more to eventually win the hearts and minds of all Americans for the broad principle of equality of citizenship that is inherent in this civil rights bill" than any other title. *Id.* at 15876 (remarks of Rep. Roosevelt).

[31] *See id.* at 6547–48 (remarks of Sen. Humphrey); *id.* at 7204 (remarks of Sen. Clark); *id.* at 6552 (remarks of Sen. Humphrey); Cooper & Sobol, *Seniority And Testing Under Fair Employment Laws: A General Approach To Objective Criteria Of Hiring And Promotion*, 82 HARV. L. REV. 1598, 1598–99 (1969); Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 431–32 (1966); Note, *Legal Implications of the Use of Standardized Ability Tests in Employment and Education*, 64 COLUM. L. REV. 691, 695–96 (1968); Developments in the Law, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1111, 1113–14 (1971).

[32] *See* Developments in the Law, *supra* note 31, at 1114–15. The Act itself states that an employer not discriminate "because of race." 42 U.S.C. § 2000e-2a (1976); *see* Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) ("the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race . . . ."). *Id.* at 579 (emphasis in original).

[33] 110 CONG. REC. 13080 (1964)(remarks of Sen. Clark); *see* Schmidt, *Title VII: Coverage and Comments*, 7 B.C. INDUS. & COM. L. REV. 459 (1966). Professor Schmidt argues that to attempt to secure equal employment opportunity in color blind terms "is equivalent to treating a cancer with aspirin because you also happen to have a headache, a sore toe, and a hangnail!" *Id.* at 460. *But see* Developments in the Law, *supra* note 31, at 1116.

[34] Ashmore, *The Desegregation Decision: Ten Years After*, Saturday Review, May 16, 1964, at 69.

ferred to the Committee on the Judiciary.[35] It was reported back to the House on November 20, 1963, and was passed after brief debate on February 10, 1964, by a vote of 290-130.[36] The bill was subsequently sent to the Senate and on March 9, 1964, Senator Mansfield moved that it be debated on the merits immediately without the benefit of committee.[37] The motion was passed on March 26, 1964, and the Senate began debate on the merits of the bill.[38]

The Senate debate lasted eighty-three days.[39] Since the bill was not referred to Senate committee, the legislative history of Title VII is mainly composed of the virtually countless arguments that appear in the Congressional Record.[40] While it is certainly questionable whether these arguments and statements are the most accurate form of legislative history, they are the principal source from which the intent of Congress may be discerned.[41]

There can be no doubt that certain legislators believed that the Civil Rights Act of 1964 "would make the members of a particular race special favorites of the law,"[42] and that the United States "may be governed and run for the benefit of minority groups."[43] Especially prevalent was fear that the Equal Employment Opportunity Commission would impose racial quotas on employers.[44] Proponents

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[35] Vass, *supra* note 31, at 434.

[36] 110 CONG. REC. 15865 (1964).

[37] Vass, *supra* note 31, at 444.

[38] 110 CONG. REC. 6417 (1964). After the Mansfield motion was passed, Senator Morse of Oregon immediately moved to refer the bill to the Senate Judiciary Committee. *Id.* In support of his motion Senator Morse stated that "this is an instance in which the committee owes a clear duty to the American people and the courts, in connection with the litigation that will be instituted for the next 10 years if the bill is passed," *id.* at 6417–18, and Senator Lausche admonished that "disregard for orderly procedure will come back to haunt us . . . because of the many ramifications and the novel provisions contained in the bill." *Id.* at 6419. The Morse motion was subsequently defeated. Vass, *supra* note 31, at 444.

[39] Vass, *supra* note 31, at 445. Actual debate on the merits lasted sixty-six days. *Id.* The other 17 days were consumed by the procedural arguments concerning whether the bill should be sent to committee. *Id. See* notes 37–38 *supra* and accompanying text.

[40] Vass, *supra* note 31, at 444. When Senator Morse was arguing his motion he stated that "[t]he thesis of my remarks is that we are not giving the courts the best evidence as to congressional intent. It is that simple." 110 CONG. REC. 6421 (1964)(remarks of Sen. Morse). He also cited a list of United States Supreme Court cases, all of which contained some variation of the general thought that the debates on the floor of Congress indicate the feelings of individual legislators and are not accurate indications of legislative intent. *Id.* at 6423–25.

[41] Cooper & Sobol, *supra* note 31, at 1609; Vass, *supra* note 31, at 444. "Although the Morse motion was defeated, the reasons for its proposal left their mark on the subsequent handling of the bill." *Id.*

[42] 110 CONG. REC. 13079 (1964)(remarks of Sen. Ervin). *See id.* at 13077. Senator Dirksen stated that "[t]he bill would remake the social pattern of this country." *Id.* at 6445.

[43] *Id.* at 15878 (remarks of Rep. Sikes).

[44] *Id.* at 2557 (remarks of Rep. Dowdy); *id.* at 4764 (remarks of Sen. Ervin and Sen. Hill); *id.* at 5092 (remarks of Sen. Robertson); *id.* at 8500 (remarks of Sen. Smathers).

of Title VII continually assured the critics that the bill did not authorize anyone to impose a quota[45] and "that to hire a Negro solely because he is a Negro is racial discrimination, just as much as a 'white only' employment policy."[46] In an interpretative memorandum prepared by the bill's floor managers, Senators Clark and Case, it was additionally stated that an employer would not be required, or even permitted, to prefer Negroes for future opportunities.[47] Yet even when it was recognized that quotas were not directly written into the bill, it was charged that an employer would institute them in any event, "in order to keep the weight of the Federal Government off his neck."[48]

As the debate continued, a bipartisan coalition prepared a number of amendments to the Civil Rights Bill which became known as the Mansfield-Dirksen substitute.[49] This substitute, which eventually became law, contained a new section, 703(j), which codified the congressional purpose "that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group."[50] The

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[45] *Id.* at 1518 (remarks of Rep. Celler); *id.* at 1540 (remarks of Rep. Lindsay); *id.* at 1600 (remarks of Rep. Minish); *id.* at 2558 (remarks of Rep. Goodell); *id.* at 5094, 5423 (remarks of Sen. Humphrey); *id.* at 6563, 6566 (remarks of Sen. Kuchel); *id.* at 12617 (remarks of Sen. Muskie).

[46] *Id.* at 8921 (remarks of Sen. Williams). Responding to charges that blacks would be favored by the Act, Senator Williams queried "how can the language of equality favor one race or one religion over another? Equality can have only one meaning, and that meaning is self-evident to reasonable men." *Id.*

[47] *Id.* at 7213 (remarks of Sen. Clark and Sen. Case).

[48] *Id.* at 8500 (remarks of Sen. Smathers); *accord*, *id.* at 8618–19 (remarks of Sen. Sparkman and Sen. Keating); *id.* at 9034 (remarks of Sen. Tower and Sen. Stennis).

[49] Cooper and Sobol, *supra* note 31, at 1610–11; Vass, *supra* note 31, at 445–46; Developments in the Law, *supra* note 31, at 1159.

[50] 110 CONG. REC. 12723 (1964) (remarks of Sen. Humphrey). It was added that section 703(j) "does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning." *Id.* *See* Vass, *supra* note 31, at 450. The exact wording of the section is as follows:

> (j) Preferential treatment not to be granted on account of existing number or percentage imbalance.
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> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State,

anti-discrimination language of sections 703(a) and (d), upon which Brian Weber would later rely, was nevertheless left unchanged.[51]

Title VII opponents were also concerned with the power that would vest in the federal judiciary.[52] They were assured that a federal court would not be able to "order preferential hiring or promotion consideration for any particular race"[53] but would be "solely limited to ordering an end to the discrimination which is in fact occurring."[54] Senators Clark and Case later stated that a court could order "appropriate affirmative relief"[55] after a finding of discrimination, but not in favor of "anyone who was not discriminated against in violation of this title."[56]

It has been said that a major reason for the protracted debate on the Civil Rights Act of 1964 was "the need for 'legislative history' . . . to guide the courts in interpreting and applying the law."[57] Regardless of whether Congress felt it had succeeded in providing that guidance, several legislators expressed apprehension that the Supreme Court would not follow "a basis of law and precedent"[58] in deciding civil rights issues but would instead rely on "personal predilection[s]."[59] Despite any and all fears, on June 17, 1964, the Senate passed the bill by a vote of 76 to 18.[60] On July 2, 1964, the House of Representatives voted 289 to 126 to accept the Senate amendments

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section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1976).

[51] Cooper and Sobol, *supra* note 31, at 1608; Vass, *supra* note 31, at 448–50; Developments in the Law, *supra* note 31, at 1159–60.

[52] *See* 110 CONG. REC. 13078 (1964) (remarks of Sen. Ervin).

[53] *Id.* at 6563 (remarks of Sen. Kuchel). *See id.* at 9113 (remarks of Sen. Keating).

[54] *Id.* at 6563 (remarks of Sen. Kuchel).

[55] *Id.* at 7214 (remarks of Sen. Clark and Sen. Case).

[56] *Id.* Senator Clark had also asked the Justice Department to prepare a memorandum to rebut the criticisms of the Civil Rights Bill made by Senator Hill. *Id.* at 7206–07. That memo stated:

> There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance.

Id. at 7207.

[57] United Steelworkers v. Weber, 99 S. Ct. 2721, 2752 (1979) (Rehnquist, J., dissenting) (quoting Vass, *supra* note 31, at 444).

[58] 110 CONG. REC. 15873 (remarks of Rep. Wyman). *See id.* at 9029 (remarks of Sen. Tower and Sen. Talmadge); *id.* at 15878 (remarks of Rep. Bennett).

[59] *Id.* at 15873 (remarks of Rep. Wyman).

[60] *Id.* at 15865 (remarks of Sen. Humphrey). The Senate imposed cloture on debate by its members for only the second time in history. Vass, *supra* note 31, at 446.

and President Lyndon B. Johnson signed the bill on the same day.[61] The Act went into effect one year later, on July 2, 1965.[62]

The seminal Supreme Court case involving Title VII was *Griggs v. Duke Power Co.*[63] There Chief Justice Burger, on behalf of a unanimous Court, stated that Title VII evidences a congressional purpose to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[64] In holding that an employer's requirement of a high school education or the passing of a standardized intelligence test as a condition of employment was prohibited by Title VII, when neither was job related, the Court rejected the argument that the employer must have discriminatory intent.[65] Because the tests were found to operate so as to disqualify black applicants at a much greater rate than white applicants, they could only be used if the employer was able to demonstrate that they were job related.[66] Although the Court held

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[61] Cooper and Sobol, *supra* note 31, at 1611; Vass, *supra* note 31, at 457. *See* 110 CONG. REC. 15865 (1964) (remarks of Sen. Humphrey).

[62] 42 U.S.C. § 2000e (1976).

[63] 401 U.S. 424 (1971).

[64] *Id.* at 429–30. In *Griggs*, thirteen black employees of respondent instituted an action under Title VII. *Id.* at 426. The district court found that prior to the effective date of Title VII, the company had openly assigned blacks to the lowest paying job classifications (the Labor Department). *Id.* at 426–27.

After July 2, 1965, the company abandoned this obvious discriminatory practice, but instituted a requirement of a high school diploma for transfer out of the Labor Department into any of the all-white departments. *Id.* at 427. For initial employment in any of these departments an applicant had to achieve satisfactory scores on two professionally developed tests and also have completed high school. *Id.* at 427–28.

[65] *Id.* at 432. Chief Justice Burger stated that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

[66] *Id.* at 434–35. Reliance on the fact that the employer's requirements in *Griggs* disqualified blacks at a higher rate than whites was the beginning of the adverse impact analysis which has subsequently played a large part in Title VII litigation. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). If an employee selection procedure determines successful candidates "for hire or promotion in a racial pattern significantly different from that of the pool of applicants," the employer must justify the procedure on the grounds of business necessity. Albemarle Paper Co. v. Moody, 422 U.S. at 425. The employer must then show that the test is significantly related to job performance. Griggs v. Duke Power Co., 401 U.S. at 426; *see* Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 5–9 (1977). In *Griggs*, there was some question as to whether the legislative history of Title VII authorized the result. Griggs v. Duke Power Co., 401 U.S. at 434 n.11. Chief Justice Burger noted the language in the interpretive memorandum of Senators Clark and Case which stated that "[a]n employer may set his qualifications as high as he likes." *Id.*; 110 CONG. REC. 7213 (1964) (remarks of Sen. Clark and Sen. Case). The use of the word "qualifications" in that memo and also in a later memorandum convinced Chief Justice Burger that what the Senators meant was that employers could require that employees be fit for the actual job rather than being able to set up any qualifications at all. Griggs v. Duke Power Co., 401 U.S. at 434 n.11; 110 CONG.

that "the thrust of the Act [was] the *consequences* of employment practices, not simply the motivation,"[67] Chief Justice Burger also noted that "[d]iscriminatory preference for any group, *minority* or *majority*, is precisely and only what Congress has proscribed."[68] Even though whites were not discriminated against in *Griggs*, this language clearly indicated that all citizens are protected by Title VII.[69]

Five years later the Court directly confronted the issue of reverse discrimination for the first time. In *McDonald v. Santa Fe Trail Transportation Co.*,[70] Justice Marshall, writing for the Court, stated "that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes."[71] The discrimination suffered by the white petitioners in *McDonald*, however, was not part of any affirmative

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REC. 7247 (remarks of Sen. Clark and Sen. Case). *See* Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

[67] Griggs v. Duke Power Co., 401 U.S. at 432 (emphasis in original).

[68] *Id.* at 431 (emphasis added).

[69] The indication was apparently not clear enough. In Mele v. United States Dep't of Justice, 395 F. Supp. 592 (D.N.J. 1975), a white job applicant instituted a Title VII action against his union alleging that the union utilized a dual grading system on employment tests with the aim of fulfilling a court ordered minority quota. *Id.* at 594. Plaintiff alleged that the test constituted discrimination *per se* because it had not been validated; i.e., shown to be job related. *Id. See generally*, Shoben, *supra* note 66, at 19–23. The court, however, held that since the plaintiff was not a member of a minority group he was not entitled to the protection of Title VII. Mele v. United States Dep't of Justice, 395 F. Supp. at 597. In holding that "[t]he persons protected under Title VII are those minority group members who have traditionally been the targets of discrimination by labor unions," *id.*, the court relied on the congressional purpose in enacting Title VII as stated in *Griggs*. *Id.* The court did not draw a distinction between the language of equality in *Griggs*, *see* note 68 *supra* and accompanying text, and its conclusion that whites were not protected by Title VII. Mele v. United States Dep't of Justice, 395 F. Supp. at 597.

One possible basis for harmonizing the two decisions is that the quota in *Mele* had been judicially authorized. *Id.* at 594. Therefore, even if the court had held the white plaintiff to be protected by Title VII, "the Federal policy in favor of overcoming the effects of past discrimination by means of affirmative action" could have been declared paramount. *Id.* at 597.

[70] 427 U.S. 273 (1976).

[71] *Id.* at 280. In *McDonald*, two white employees charged with stealing property from the respondent were discharged from the respondent's employ while a black employee, similarly charged, was not dismissed. *Id.* at 276. They brought suit pursuant to Title VII and also under the Civil Rights Act of 1866. *Id.* at 275; 42 U.S.C. § 1981 (1976). Although Justices White and Rehnquist could not agree that section 1981 was applicable, all of the Justices agreed that the white employees had stated a valid cause of action under Title VII. 427 U.S. at 296.

Justice Marshall noted that recent EEOC decisions had interpreted Title VII as proscribing racial discrimination against whites and stated that "[t]his 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.' " *Id.* at 280.

action program, and Justice Marshall expressly declined to rule on the validity of any form of such preferential treatment.[72]

The problem of reverse discrimination in an affirmative action context was faced two years later in *Regents of the University of California v. Bakke*.[73] There a divided Supreme Court issued two holdings: first, the University could not utilize a quota system whereby a certain number of seats in the medical school were reserved for minority applicants;[74] and second, the University could, however, consider the applicant's race during the admission process.[75] The *Bakke* case was decided under Title VI of the Civil Rights Act of 1964 and the equal protection clause of the fourteenth amendment,[76] and thus has no direct application to a Title VII action. To a limited degree, however, the opinions did analyze prior Title VII decisions.[77] Justice Powell, delivering the opinion of the Court, stated that federal courts have ordered race conscious remedies in employment discrimination cases only after finding actual discrimination by the employer.[78] Justices Brennan, White, Marshall, and Blackmun expressed the opposite view:

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[72] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 280–81 n.8. Justice Marshall stressed the fact "that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." *Id.* The Court's holding in *McDonald* was a major area of contention during the oral argument in the *Weber* case. 47 U.S.L.W. 3645 (April 3, 1979). Counsel for Brian Weber argued that Justice Marshall's opinion in *McDonald* "establishes the proposition that Title VII strikes down racial barriers to any group—whether majority or minority." *Id.* at 3647. Justice Marshall disputed the applicability of *McDonald* and read aloud the passage where the Court declined to decide the validity of affirmative action. *Id.* The Justice then inquired: " 'Why do you think the Court threw that in? Dictum?' " *Id.*

[73] 438 U.S. 265 (1978). The *Bakke* case involved a white male who had been denied admission to the medical school at the University of California at Davis for two consecutive years. *Id.* at 276. He alleged reverse discrimination against the medical school's special admissions program under which sixteen of the one hundred available seats were reserved for members of minority groups each year. *Id.* at 278–79. The medical school had never been adjudged guilty of racial discrimination in their admission practices. *Id.* Rather, a major factor in the decision to implement affirmative action was the desire to remedy societal discrimination. *Id.* at 306. For an excellent discussion of the events leading up to *Bakke* and the Court's action in that case, see H. WILKINSON, FROM BROWN TO BAKKE, 253–306 (1979). See also Bakaly and Krischer, Bakke: *Its Impact on Public Employee Discrimination*, 4 EMPLOYEE REL. L.J. 471, 471–74 (1979).

[74] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978).

[75] *Id.* at 272.

[76] *Id.* at 270.

[77] *Id.* at 300–02, 308 n.44 (opinion of Powell, J.); *id.* at 340–42 n.17, 353–55, 363–69 (opinion of Brennan, White, Marshall, and Blackmun, J.J.).

[78] *Id.* at 308–09 n.44 (opinion of Powell, J.). Justice Powell stated that "Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classification." *Id.* Also, that "we have never approved preferential classifications in the absence of proved constitutional or statutory violations." *Id.* at 302.

> Thus, our cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination.[79]

When the Court of Appeals for the Fifth Circuit was faced with the *Weber* case,[80] the Supreme Court had not yet decided *Bakke*. Two of the circuit judges adopted reasoning similar to that which Justice Powell would later express in *Bakke*. The Fifth Circuit majority stated that "[i]n the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII."[81] Additionally, the Fifth Circuit felt that such affirmative action may be implemented only in favor of those who are actual or potential victims of that discrimination.[82]

The situations which pose little difficulty under Title VII are those in which the discriminator and injured party are readily identifiable.[83] In such cases as *Franks v. Bowman Transportation Co.*,[84] "[t]he beneficiaries receive[d] a preference not because they are minorities, but because the employer [had] discriminated against them."[85] In *Franks*, an employer who had denied individuals cer-

[79] *Id.* at 366 (opinion of Brennan, White, Marshall, and Blackmun, J.J.). The opinion contained language particularly appropriate to the situation that *Weber* would later present: "[a]lthough Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute." *Id.* at 340–42 n.17.

[80] 563 F.2d 216 (5th Cir. 1977), *rev'd*, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

[81] *Id.* at 224 (emphasis in original).

[82] *Id.* at 224–25. On behalf of the court, Judge Gee stated that "[a] minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment 'not because he is Black, but because, and only to the extent that, he has been discriminated against.' " *Id.* (quoting Chance v. Board of Examiners, 534 F.2d 993, 999 (2d Cir. 1966), *cert. denied* 431 U.S. 965 (1977)).

This idea seems to have originated in Griggs v. Duke Power Co., 401 U.S. 424 (1971), where Chief Justice Burger stated: "the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group." *Id.* at 430–31.

[83] Developments in the Law, *supra* note 31, at 1111.

[84] 424 U.S. 747 (1976).

[85] Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 39 (1976); *see* Franks v. Bowman Transp. Co., 424 U.S. 747, 751–52 (1976).

tain positions was required not only to hire the petitioners but also to give them full seniority.[86] While the form of the remedy may be disputed,[87] all agreed that the individuals deserved some preference.[88] This "requirement of mutuality between wrongdoer and beneficiary"[89] is an essential part of the "rightful place" and "make whole" theories of Title VII remedies.[90]

It is not always possible, though, to compensate the precise victim of the discrimination.[91] It may be that a person who was denied employment on racial grounds has moved away or has found other employment.[92] Members of minority groups, knowing that an employer follows discriminatory practices might refrain from application in order to avoid the humiliation of almost certain rejection.[93] In such situations it has been held, after a finding of discrimination on the part of the employer, that the remedy should be given to a racial group, even if some of the members were not actual victims.[94]

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[86] Franks v. Bowman Transp. Co., 424 U.S. at 779–80. *Franks* was a class action in which the petitioners alleged that the respondent had refused to employ them as over-the-road truck drivers because of their race. *Id.* at 750–51. The fact that the employer had discriminated was not contested; the only issue was whether retroactive seniority should be granted to unnamed members of the class. *Id.* at 752.

[87] The opinion of the Court granted full seniority to members of the petitioning class. *Id.* at 766–72. Justice Powell, in partial dissent, argued that the petitioners should not be given competitive seniority which "determines an employee's preferential rights to various economic advantages at the expense of other employees." *Id.* at 787 (Powell, J., dissenting in part and concurring in part).

[88] *Id.* at 786–87 (Powell, J., dissenting in part and concurring in part). Justice Powell was in favor of granting benefit type seniority which he felt would work "complete equity." *Id.* at 787 (Powell, J., dissenting in part and concurring in part). Benefit seniority would determine such things as "pension rights, length of vacations, size of insurance coverage and unemployment benefits," i.e., employee rights vis-à-vis the employer. *Id.* In this way the wrongdoer would be penalized while the victim would be made whole. *Id.*

[89] Brest, *supra* note 85, at 41.

[90] *See* Franks v. Bowman Transp. Co., 424 U.S. at 763–64; Albemarle Paper Co. v. Moody, 422 U.S. at 417–21; Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 220 (5th Cir. 1977), *rev'd*, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979); Morrow v. Crisler, 491 F.2d 1053, 1058 (5th Cir. 1974), *cert. denied*, 419 U.S. 895 (1974); United States v. N.L. Indus., Inc., 479 F.2d 354, 374–75 (8th Cir. 1972); Brest, *supra* note 82, at 38–39.

[91] Carter v. Gallagher, 452 F.2d 315, 329–30 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). *See generally* Brest, *supra* note 85, at 39–42; Givens, *Manhart in the Light of Bakke*, 4 EMPLOYEE REL. L.J. 330, 331–33 (1979).

[92] *See* Brest, *supra* note 85, at 48–52.

[93] *Id.* at 51–52; *see* United States v. International Bhd. of Electrical Workers, Local 38, 428 F.2d 144, 150–51 (6th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970).

[94] *See* EEOC v. Contour Chair Lounge Co., 596 F.2d 809, 813 (8th Cir. 1979); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 175 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 532 F.2d 821, 828 (2d Cir. 1976); Rios v. Enterprise Ass'n Steamfitters, Local 638, 501 F.2d 622, 631 (2d Cir. 1974); NAACP v. Allen, 493 F.2d 614, 620–21 (5th Cir. 1974).

Since Kaiser had never been found guilty of actual discrimination, the black employees at the Gramercy plant were in their rightful place within the Kaiser employment structure.[95] The issue thus became the permissibility of a voluntary affirmative action program to remedy societal discrimination.[96] On behalf of five members of the Court, Justice Brennan declared that such action was permissible.[97]

The majority opinion began by emphasizing the narrowness of its inquiry.[98] Since there was no state action present in the Kaiser-Steelworkers program, the equal protection clause of the fourteenth amendment was not involved.[99] The voluntary nature of the program removed the issue of a court's power to remedy Title VII violations, leaving only the "narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan."[100]

The conclusion that such plans were not forbidden rested on three basic grounds. First, Weber's reliance on a "literal construction" of Title VII, although "not without force," was inconsistent with the essential spirit of Title VII.[101] In what will probably become the

[95] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 224; *see* Watkins v. United Steel Workers of America, Local 2369, 516 F.2d 41, 46 (5th Cir. 1975).

[96] 47 U.S.L.W. 3284 (Oct. 24, 1978). Throughout the entire history of the case, no party mentioned the case of Barnett v. International Harvester, 12 Fair Empl. Prac. Cas. 786 (W.D. Tenn. 1976), the facts of which were almost identical to *Weber*. There the district court held that an apprenticeship program, designed to eliminate historic discrimination in the skilled trades, did not violate section 703(j) of Title VII over the objection of a white who had scored higher on the admittance test than any black who was admitted. *Id.* at 789–90.

[97] United Steelworkers v. Weber, 99 S. Ct. 2721, 2730 (1979).

[98] *Id.* at 2726.

[99] *Id.*

[100] *Id.* (emphasis in original).

[101] *Id.* at 2726–27. Justice Brennan indicated that although a situation may seem to fit within the four corners of a statute, it should not be so viewed if it would not further the intent of the statute. *Id.* In support of this proposition, Justice Brennan cited Holy Trinity Church v. United States, 143 U.S. 457 (1892). In that case, the Supreme Court was faced with a federal statute which made it a crime for anyone to advance transportation costs to an alien pursuant to a contract whereby the new immigrant would then perform services for the person who paid the costs. *Id.* at 458. A church in New York City had hired a pastor who was then residing in England. *Id.* at 457–58. As part of the contract, the church was to pay the new pastor's passage to New York. *Id.* The Court held that the statute could not be applied to this situation. *Id.* at 472. In so doing, the Court noted that the obvious aim of the statute was to prevent employers from importing "great numbers of an ignorant and servile class of foreign laborers," which would "reduce other laborers engaged in like occupations to the level of the assisted immigrant." *Id.* at 463–64.

Although it can of course be contended that Title VII was debated much more carefully than the statute involved in *Holy Trinity Church*, it has been shown that those debates may not be entitled to controlling weight and therefore should not be allowed to overcome the spirit of Title VII. *See* notes 37–41 *supra* and accompanying text. *See also* note 142 *infra* and accompanying text.

most frequently quoted passage in the decision, Justice Brennan identified the apparent conflict between the letter and spirit of the Act, stating that

> [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.[102]

The second basis for the Court's decision depends on a construction of section 703(j) of the Act which provides that an employer shall not be *required* to grant preferential racial treatment.[103] Because of the difference between a mandatory practice and a prohibited one, the Court concluded that "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action."[104]

Finally, the Court's approval of the Kaiser-USWA agreement rested on their observation that critical support in both Houses of Congress for Title VII had been provided by legislators "who traditionally resisted federal regulation of private business."[105] These legislators had sought maximum preservation of " 'management prerogatives and union freedoms.' "[106] From this, the Court inferred legislative intent to provide a sphere in which the private sector could remedy the problems caused by discrimination.[107]

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[102] United Steelworkers v. Weber, 99 S.Ct. at 2728 (citation omitted). It has been held that the preferred means of fulfilling the goals of the Act is voluntary compliance by employers and unions. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Patterson v. American Tobacco Co., 535 F.2d 257, 268 (4th Cir. 1976), *cert. denied*, 429 U.S. 920 (1977).

[103] 42 U.S.C. § 2000e-2(j) (1976). *See* note 50 *supra* and accompanying text. Justice Brennan stated that the section was added to Title VII to prevent unwarranted government intervention into private enterprise, not to prevent employers themselves from undertaking race conscious action. United Steelworkers v. Weber, 99 S.Ct. at 2729.

[104] United Steelworkers v. Weber, 99 S.Ct. at 2729. The majority noted that "[t]he section does *not* state that 'nothing in Title VII shall be interpreted to *permit*' voluntary affirmative efforts to correct racial imbalances." *Id.* (emphasis in original).

[105] *Id. See* notes 42–44 *supra* and accompanying text.

[106] United Steelworkers v. Weber, 99 S.Ct. at 2729 (quoting H.R. REP. NO. 914, 88th Cong., 1st Sess., 29.

[107] United Steelworkers v. Weber, 99 S.Ct., at 2729. The court then faced Weber's contention that proponents of Title VII had anticipated the situation where an employer would utilize racial criteria. *Id.* at 2729–30 n.7. The majority drew a distinction between maintaining a racially balanced workforce and achieving one. *Id.* The former practice would violate Title VII, but the latter would not because, when an employer institutes voluntary affirmative action to achieve a racial balance, the employer is responding to "manifest racial imbalance in traditionally segregated job categories." *Id.*; *see* United States v. Wood, Wire & Metal Lathers Int'l

Justice Brennan did not attempt to define the permissible scope of an affirmative action plan.[108] For several reasons, however, the Kaiser-USWA agreement was acceptable. First, in opening opportunities for blacks it was in harmony with the purposes of Title VII.[109] Second, because it did not require the discharge of white workers and did not flatly prohibit their advancement, their interests were not "unnecessarily trammel[led]."[110] Finally, the agreement was temporary and did not attempt to maintain a permanent racial balance.[111]

Justice Blackmun joined the majority opinion and also filed a brief concurrence.[112] Sharing, to a degree, the dissenters' concern that the majority opinion conflicted with the plain language of the statute, Justice Blackmun stated that he would have preferred a narrower basis for the decision.[113] That basis, the "arguable violation" theory, is closely akin to the position taken by Judge Wisdom in his Fifth Circuit dissent.[114] In essence, the theory is that employers and unions may adopt affirmative action plans when, under the circumstances, they could reasonably be concerned about Title VII liability and where the plan itself is a reasonable response to the circumstances causing that concern.[115] Justice Blackmun's anxiety at the reach of the majority's reasoning, however, was eased by his analysis of the two principal ways in which it deviated from the argu-

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Union Local 461, 471 F.2d 408, 413 (2d Cir. 1973). Unless, however, there is a large influx of black craftsmen to the Gramercy area, the end of the quota will be the beginning of a decline in the black representation in the skilled workforce. *See* note 19 *supra*.

[108] United Steelworkers v. Weber, 99 S. Ct. 2730.

[109] *Id.*

[110] *Id. See* Kirkland v. N.Y. State Dept. of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1977); *see* notes 164–65 *infra* and accompanying text.

[111] United Steelworkers v. Weber, 99 S. Ct. at 2730. Aside from the question whether a program structured to endure for thirty years can legitimately be classified as temporary, there appears to be an inherent inconsistency between the temporary nature of a program and the extent to which it retards the advancement of white employees. The shorter the life of a program the more it would trammel the interests of white employees since a higher percentage of minorities would have to be trained to reach the desired goal. The longer the duration of the program the more it appears that the temporary nature of the program is only formal. It is thus suggested that while the temporary nature of a program must be taken into account in that it must stop once the desired goal is reached, *see* note 107 *supra*, the white participation in the training program was the more decisive factor in determining its permissibility.

[112] United Steelworkers v. Weber, 99 S. Ct. at 2730–31 (Blackmun, J., concurring).

[113] *Id.* at 2732 (Blackmun, J., concurring).

[114] *Id.* at 2731–34 (Blackmun, J., concurring); *see* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 227–39 (Wisdom, J., dissenting). Judge Wisdom had stated that Kaiser and the USWA were walking a "high tightrope without a net beneath them." *Id.* at 230 (Wisdom, J., dissenting).

[115] United Steelworkers v. Weber, 99 S. Ct. at 2731–32 (Blackmun, J., concurring); *see* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 231–34 (Wisdom, J., dissenting).

able violation theory.[116] His discussion of these points somewhat illuminates the majority's holding.

First, Justice Blackmun observed that the majority's approach would permit affirmative action simply because of a statistical disparity.[117] Since Title VII liability cannot always be based on such a disparity alone, Justice Blackmun believed that reliance on statistics in evaluating the permissibility of affirmative action will avoid severe practical problems; employers will not be forced to choose between Title VII liability and possible reverse discrimination,[118] and courts need not determine new statistical guidelines for reverse discrimination actions.[119]

Second, Justice Blackmun noted that the majority opinion permits affirmative action to remedy the effects of discrimination which Title VII could not itself reach.[120] For example, the creation of a "traditionally segregated job category" may have predated the Act.[121] Additionally, Justice Blackmun observed that the majority approach allows the use of affirmative action to increase the number of minorities in jobs where their near absence might not constitute a prima facie case because societal discrimination had limited the number of available skilled minorities in the labor force.[122] These

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[116] United Steelworkers v. Weber, 99 S. Ct. at 2732–34 (Blackmun, J., concurring).

[117] *Id.* at 2732–33 (Blackmun, J., concurring).

[118] *Id.* at 2733. The employer is permitted to rebut the prima facie case by demonstrating that there is a legitimate business reason for the statistical disparity in his workforce. *See* note 66 *supra* and accompanying text; International Bhd. of Teamsters v. United States, 431 U.S. 324, 339–40 n.20 (1977).

[119] United Steelworkers v. Weber, 99 S. Ct. at 2733 (Blackmun, J., concurring). Justice Blackmun thought that an arguable violation of Title VII did not amount to a prima facie violation. *Id.* If the arguable violation standard were adopted, the employer could then identify it and not create liability to minority employees. *Id.* This would "avoid hair-splitting litigation." *Id.*

[120] *Id.*

[121] *Id.*; *see* International Bhd. of Teamsters v. United States, 431 U.S. 324, 348–55 (1977). As long as the employer's seniority system is bona fide, any pre-Act discrimination is not covered by Title VII. *Id.* at 352.

[122] United Steelworkers v. Weber, 99 S. Ct. at 2733 (Blackmun, J., concurring). Justice Blackmun indicated that the minority employees at the Gramercy plant, had they been a party to the case, would probably have been unable to prove a prima facie Title VII violation. *Id.* The relevant statistics would have been the number of black craftsmen in the area compared with the racial makeup of craftsmen in Kaiser's Gramercy plant. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308–09 (1977). Kaiser's unsuccessful attempts to recruit black craftsmen prior to the 1974 agreement indicate that the first statistic would have been too low to establish prima facie liability. *See* note 16 *supra*. The majority opinion had stated that the "exclusion [of minorities] from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." United Steelworkers v. Weber, 99 S. Ct. at 2725 n.1; *see also* Local 35, Int'l Bhd. of Electrical Workers v. City of Hartford, 462 F. Supp. 1271, 1277–78 & n.10 (D.Conn. 1978) ("generalized findings of past discrimination rather than . . .

expansions on the "arguable violation" theory were, in his opinion, justified on equitable grounds.[123] Because he also felt that the dissenters had overvalued Title VII's legislative history,[124] Justice Blackmun overcame his concern with the statutory language and joined the five justice majority.[125]

Chief Justice Burger, although not completely opposed to the result that the Court reached,[126] dissented because he felt the Court violated "the explicit language of the statute and . . . long-established principles of separation of powers."[127] Stating that judicial interpretation should only be resorted to where the statute involved is ambiguous,[128] Chief Justice Burger believed that it was unnecessary to construe the legislative history of Title VII because the plain language of the statute would void the Kaiser-USWA agreement.[129] While his inclination would be to support the majority's result if he were a member of Congress amending Title VII,[130] Chief Justice Burger argued that the majority decision exceeded the bounds of judicial authority.[131]

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specific findings as to each and every union and contractor affected by the program" warrants broad affirmative action relief). *Id.*

[123] United Steelworkers v. Weber, 99 S. Ct. at 2733 (Blackmun, J., concurring).

[124] *Id.* at 2733–34. Justice Blackmun noted that Chief Justice Burger, writing for a unanimous Court in *Griggs*, had declined to literally interpret certain statements made by Title VII proponents. United Steelworkers v. Weber, 99 S. Ct. at 2733–34 (1979) (Blackmun, J., concurring). *See* note 66 *supra*.

[125] United Steelworkers v. Weber, 99 S. Ct. at 2731 (Blackmun, J., concurring).

[126] *Id.* at 2734 (Burger, C.J., dissenting).

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 2735 (Burger, C.J., dissenting). Chief Justice Burger admitted that it can be contended that "Congress may not have gone far enough in correcting the effects of past discrimination when it enacted Title VII," and if there were to be any changes in policy "it is for Congress, not this Court, to so direct." *Id.* Justice Blackmun had taken exactly the opposite view in his concurring opinion when he stated "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." *Id.* at 2734 (Blackmun, J., concurring).

Congress has recently seen fit to amend the Civil Rights Acts to reject the Supreme Court decisions in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) and Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). Those decisions had held that an employer did not have to include pregnancy disabilities in his disability plan, and that sick leave benefits could be denied to pregnant employees. General Elec. Co. v. Gilbert, 429 U.S. at 145–46; Nashville Gas Co. v. Satty, 434 U.S. at 145. *See* 92 Stat. 2076 (1978) (to be codified as 42 U.S.C. §2000e-2(k)). This recent legislation disapproves those cases and clarifies the "original intent to include pregnancy-based discrimination in its prohibition of sex discrimination in employment." Somers v. Aldine Independent School Dist., 464 F. Supp. 900, 902 (S.D. Tex. 1979).

[131] United Steelworkers v. Weber, 99 S. Ct. at 2735 (Burger, C.J., dissenting).

Justice Rehnquist, joined by the Chief Justice, also dissented.[132] After an intemperate introduction in which he accused the majority of sharply altering prior Court interpretation of Title VII,[133] Justice Rehnquist conducted an exhaustive study of the legislative history of Title VII and concluded that the drafters of Title VII had anticipated the instant situation and had intended that reverse discrimination be prohibited.[134] Stating that the Kaiser-USWA plan was not as voluntary as the majority might have thought,[135] Justice Rehnquist believed that Kaiser, in "[b]owing to that [government] pressure"[136] created the situation that Title VII opponents feared most.[137] Because he believed that one reason for the lengthy debate over Title VII was to furnish precise legislative history " 'to guide the courts in interpreting and applying the law,' "[138] Justice Rehnquist was "led inescapably to the conclusion that Congress fully understood what it was saying and meant precisely what it said."[139]

It is not altogether clear, though, that Congress anticipated voluntary affirmative action during the spring of 1964. An overwhelming majority of the passages cited by Justice Rehnquist occurred in the context of debate over forced quotas.[140] Voluntary programs of the Kaiser-USWA variety may well have been "the 'farthest thing' from

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[132] *Id.* at 2736 (Rehnquist, J., dissenting).

[133] *Id.*

[134] *Id.* at 2741–52 (Rehnquist, J., dissenting).

[135] *Id.* at 2737 n.2 & 2749 (Rehnquist, J., dissenting). Justice Rehnquist stated that "Kaiser and the Steelworkers acted under pressure from an agency of the Federal Government, . . . which found that minorities were being 'underutilized' at Kaiser's plants." *Id.* at 2749 (Rehnquist, J., dissenting). Because of the result the majority reached concerning the meaning of Title VII, it was unnecessary for Justice Brennan to discuss the relationship of Executive Order Number 11,246 (reprinted following 42 U.S.C. § 2000e (1976)). United Steelworkers v. Weber, 99 S. Ct. at 2730 n.9. Justice Rehnquist, while he described the action of the court below concerning Executive Order Number 11,246, saw fit not to discuss any conflict it may have had with his view of Title VII in his dissent. 99 S. Ct. at 2739 n.6 (Rehnquist, J., dissenting). The relationship of the Executive Order to affirmative action is discussed in notes 145–55 *infra* and accompanying text. See also notes 23–25 *supra* and accompanying text.

[136] United Steelworkers v. Weber, 99 S. Ct. at 2749 (Rehnquist, J., dissenting).

[137] *Id. See* notes 42–48 *supra* and accompanying text.

[138] United Steelworkers v. Weber, 99 S. Ct. at 2752 (Rehnquist, J., dissenting)(quoting Vass, *supra* note 28, at 444).

[139] United Steelworkers v. Weber, 99 S. Ct. at 2752 (Rehnquist, J., dissenting).

[140] United Steelworkers v. Weber, 99 S. Ct. at 2752 (Rehnquist, J., dissenting). *See, e.g.*, 110 CONG. REC. at 1148 (1964) (remarks of Sen. Humphrey) (context of "permit[ting] the Government to control the internal affairs of employers or labor unions"); at 1518 (remarks of Rep. Celler) (context of the powers of the Equal Employment Opportunity Commission and the federal judiciary); *id.* at 1540 (remarks of Rep. Lindsay) ("force acceptance"); *id.* at 1600 (remarks of Rep. Minish) ("no one will be forced to hire . . ."); *id.* at 4764 (remarks of Sen. Ervin & Sen. Hill)(employer being compelled by Commission).

the legislators' minds at that time."[141] If this is true, the spirit of the Act should assume an important posture in Title VII construction, for at least the spirit of the act can be accurately identified.[142]

United Steelworkers v. Weber,[143] while a firm endorsement of affirmative action, will not, of course, be the final word in this area. The permissible extent of voluntary affirmative action programs and the statistical situations in which they may be implemented, remain to be clarified.[144] The decision also fails to dispel concern as to the difference between a voluntary program and a required one.[145] Even though the Kaiser-USWA agreement was not judicially imposed under the remedial provisions of Title VII, it was involuntary in the sense that Kaiser feared the loss of its government contracts.[146] The decision of the Supreme Court to avoid consideration of Executive Order No. 11,246 leaves open the possible argument that the Executive Order and Title VII are inconsistent.[147] If the threshold violation level of Executive Order No. 11,246 is substantially lower than the level of a Title VII violation, employers could be forced into remedial action to overcome the effects of societal discrimination, even when their actions do not amount to a prima facie violation of Title VII.[148] This would destroy much of the management-union freedom that the Court found to be a primary concern of the eighty-eighth Congress.[149] To accept this result simply because Title VII itself is not imposing the remedy is to beg the question. The language of the regulations promulgated under Executive Order No. 11,246, requir-

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[141] 47 U.S.L.W. 3646 (April 3, 1979). This position was taken by the Government at oral argument. *Id.*

[142] 110 CONG. REC. 6547–48 (1964) (remarks of Sen. Humphrey). "An antidiscrimination law cannot be evaluated simply by an examination of its provisions, 'for the letter killeth, but the spirit giveth life.' " *Id.* at 7214 (remarks of Sen. Clark and Sen. Case).

[143] 99 S. Ct. 2721 (1979).

[144] United Steelworkers v. Weber, 99 S. Ct. at 2730.

[145] *See generally*, Mass & Biles, Weber: *A Practitioner's Dilemma—Walking the EEO "Tightrope Without a Net,"* 5 EMPLOYEE REL. L.J. 39, 44–49 (1979).

[146] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 226. The court of appeals noted the district court's findings "that the 1974 collective bargaining agreement reflected less of a desire on Kaiser's part to train black craft workers than a self-interest in satisfying the OFCC in order to retain lucrative government contracts." *Id.* The Executive Order requires all government contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." Exec. Order No. 11,246, § 202(1) (*reprinted in* 42 U.S.C. § 2000e (1976)). *See* notes 23–25 *supra* and accompanying text.

[147] *See* Developments in the Law, *supra* note 31, at 1299–1304.

[148] *Id; see* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 171–74 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1972).

[149] *See* notes 105–07 *supra* and accompanying text.

ing affirmative action wherever underutilization of a certain racial group exists, should be equated with a prima facie violation of Title VII.[150] A prima facie violation should be present if there is "manifest racial imbalance in traditionally segregated job categories."[151] In this way, "underutilization" will not depend solely upon the racial composition of the surrounding work place and the employer will be able to refute the argument that he may have violated Title VII.[152]

It can, of course, be contended that an employer would institute remedial action at the first mention of an arguable violation rather than assume the heavy burden of rebuttal.[153] Even if this were true, management-union freedom will not suffer extensively as long as it is clearly understood that underutilization means "manifest racial imbalance in traditionally segregated job categories."[154] In this manner, an affirmative action program can be easily justified because the focus will not be on societal discrimination itself but rather on its effects on the community work force and the particular employer's job groups.[155]

Scholars will undoubtedly debate, for some time to come, the relative strengths and weaknesses of the majority and dissenting opinions in *United Steelworkers v. Weber*.[156] The inquiry will assuredly be centered on the legislative history of Title VII, and the respective merits of Justice Brennan's and Justice Rehnquist's interpretations.[157] While the two Justices came to opposite conclusions, it is possible that they were both correct in their judgment, but with regard to different areas. Justice Brennan's interpretation weighs the value of minority group interests—the need of black Americans to finally take significant steps toward the achievement of equal employment oppor-

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[150] 41 C.F.R. § 60-2.11(b) (1978). *Compare* Contractor's Ass'n v. Secretary of Labor, 442 F.2d at 172 ("Section 703(j) is a limitation upon Title VII . . .") *with* United States v. Trucking Management, Inc., 20 Fair Empl. Prac. Cas. 342, 346 (D.D.C. 1979) (a seniority system lawful under Title VII cannot be declared unlawful under Executive Order Number 11,246). The logical extension of the idea expressed in *Trucking Management* is its application to a government contractor who resists the pressure to implement voluntary affirmative action and is threatened with the loss of his government contracts.

[151] United Steelworkers v. Weber, 99 S. Ct. at 2729–30 n.7. *See* note 66 *supra*.

[152] It is difficult to see how Kaiser could validly have been found to be underutilizing minority craftsmen when it had made extensive but unsuccessful attempts to locate them. *See* note 19 *supra*. It has already been demonstrated that Kaiser would probably have been able to prevail had minority unskilled workers at the Gramercy plant instituted a Title VII action. *See* note 122 *supra*.

[153] *See* note 48 *supra* and accompanying text.

[154] United Steelworkers v. Weber, 99 S. Ct. at 2729–30 n.7.

[155] *See id.* at 2733 (Blackmun, J., concurring); Brest, *supra* note 85, at 42 ("racial discrimination is hardly the only injury that our society has inflicted on its members").

[156] 99 S. Ct. 2721 (1979).

[157] Address by Alfred W. Blumrosen, Analyzing Supreme Court Decision in *Weber v. Kaiser Aluminum*, [*reprinted in*] Daily Labor Rep. F-1 (July 2, 1979) [hereinafter cited as Blumrosen].

tunity.[158] Justice Rehnquist focuses on the interests of the individual—Brian Weber's right to have his position considered as sympathetically as every other individual and to demand that employers not distribute benefits on the basis of the accident of race.[159] Past Supreme Court decisions have recognized and provided remedies for both of these interests.[160] The difficulty arises when individual and group rights demand inconsistent results in a single case. Which interest should be paramount?

The origin of both the individual and group interests in this case dictate that the latter was rightly preferred. It must be remembered that prior to the 1974 agreement between Kaiser and the Union, the unskilled employees, white and black, had no opportunity whatsoever to receive craft training.[161] The Kaiser-USWA plan was created solely to ease the plight of minority employees.[162] The white participation in the program existed solely because of these efforts to satisfy minority group interests.[163] But for the plight of the minority employees the training program never would have existed. Brian Weber's claim is thus reduced to a demand that the group interest continues to remain unsatisfied while his interest goes first.

Viewed in this light, the Kaiser-USWA plan is acceptable. The group interest was legitimate and, in distributing the needed benefits, individual interests were adequately considered and compensated.[164] Reverse discrimination, though, is by no means a dead is-

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[158] *Id.* at F-1, F-2.

[159] *Id.* For a general discussion of individual and group interests, see Venick & Lane, *Doubling the Price of Past Discrimination: The Employer's Burden After* McDonald v. Santa Fe Trail Transportation Co., 8 LOY. U.L.J. 789, 790–812 (1977).

[160] Blumrosen, *supra* note 157, at F-2, F-3. The differing interests are best illustrated by these statements: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race . . . ." Furnco Constr. Corp. v. Waters, 438 U.S. at 579 (emphasis in original) and: It is the objective of Title VII to "remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Griggs v. Duke Power Co., 401 U.S. at 429–30.

[161] It will be remembered that Kaiser, prior to the 1974 agreement, provided craft training only to those workers who had some training already, and before that, hired their skilled workers off the street. *See* note 3 *supra*.

[162] Even though it was found that Kaiser feared the loss of its government contracts, *see* note 146 *supra*, there would have been no government pressure if black workers were not in such a depressed state.

[163] Blumrosen, *supra* note 157, at F-4.

[164] *Id. See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY 227–39 (1978). In *Weber* the effect of the "reverse discrimination" was that whites received something they did not have before. *See* note 160 *supra*. Other forms of affirmative action, such as hiring quotas, deflect employment opportunities from nonminority persons. In response to situations of this type, there has been developed a test which states that reverse discrimination can be acceptable if its effects are not "concentrated upon a small ascertainable group of non-minority persons." Local

sue. When individual rights are the sole issue in a case, there seems to be no reason why the principle of color blindness should not apply.[165] Voluntary affirmative action should not be haphazardly implemented by an employer who seeks to insulate himself from liability. Rather, careful and intelligent evaluation of the effects of societal discrimination should determine whether minority group interests do exist and, if they do, the intensity of the resulting preference.

Steven Backfisch

Union 35, Int'l Bhd. of Elec. Workers v. City of Hartford, 462 F. Supp. 1271, 1279 (D.Conn. 1978); Hollander v. Sears, Roebuck & Co., 450 F. Supp. 496, 506 (D.Conn. 1978).

[165] *See* Butta v. Anne Arundel County, 20 Fair Empl. Prac. Cas. 24 (D.Md. 1979)(mere preference for a black person for a position on the county human relations board is not justification for choosing a black applicant over a more qualified white); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. at 579 (employment decisions should be made "without regard to whether members of the applicant's race are already proportionately represented in the work force"). *Id.*