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Civil Rights - Employment Discrimination - Employer May Establish Voluntary Affirmative Action Program within Area of Discretion Granted by Title VII

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Recent Developments

CIVIL RIGHTS—EMPLOYMENT DISCRIMINATION—EMPLOYER MAY ESTABLISH VOLUNTARY AFFIRMATIVE ACTION PROGRAM WITHIN AREA OF DISCRETION GRANTED BY TITLE VII.

United Steelworkers of America, AFL-CIO-CLC v. Weber (U.S. 1979)

Brian Weber, a white male, filed suit on behalf of himself and the class of similarly situated nonminority employees of Kaiser Aluminum and Chemical Corporation (Kaiser), alleging that the affirmative action plan in Kaiser's collective bargaining agreement established a racial quota system in violation of Title VII of the Civil Rights Act of 1964 (Title VII). The United States District Court for the Eastern District of Louisiana granted injunctive relief to the plaintiffs, ruling that the voluntary affirmative action plan, which required that preferential treatment be given to minority
employees, violated sections 703(a)\(^7\) and 703(d)\(^8\) of Title VII. The United States Court of Appeals for the Fifth Circuit affirmed, maintaining that a racial quota is illegal under Title VII absent a finding of prior discrimination by the employer.\(^9\) On writ of certiorari,\(^{10}\) the United States Supreme Court reversed, holding that the Kaiser plan fell within the area of discretion left by Title VII to industry to voluntarily adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories. United Steelworkers of America, AFL-CIO-CLC v. Weber, 99 S. Ct. 2721 (1979).

Congress enacted the Civil Rights Act of 1964 (Act) to eliminate pervasive discrimination against Negroes and other minorities.\(^{11}\) The purpose of Title VII of the Act was to eliminate employment discrimination\(^{12}\) on the

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7. 415 F. Supp. at 769. Section 703(a) provides in pertinent part:
   It shall be an unlawful employment practice for an employer—
   \(1\) to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race . . .; or
   \(2\) to . . . classify his employees . . . in any way which would deprive . . . any individual of employment opportunities . . . because of such individual’s race . . .

8. Section 703(d) provides in pertinent part:
   It shall be an unlawful employment practice for any employer, labor organization or joint labor management committee controlling apprenticeship or other training . . . to discriminate against any individual because of his race . . . in admission to . . . any program established to provide apprenticeship or other training.

The district court held that Kaiser’s plan was invalid because only a court may devise an affirmative action quota system under Title VII. 415 F. Supp. at 767-68. Moreover, the court maintained that such a plan would have been inappropriate for Kaiser’s Gramercy plant because the black employees being preferred over more senior white employees had never themselves been personally discriminated against by Kaiser. Id. at 769.

9. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977). The Fifth Circuit held that a bona fide seniority system could not be upset unless the minority employees receiving preference had been previously denied their “rightful places” in the employment scheme due to race discrimination. Id. at 225-26. The court reasoned that Title VII only permits the use of voluntary affirmative action plans to eliminate unfair employment discrimination if the employer had been guilty of discrimination in the past. Id. at 224. The district court had found that Kaiser was not guilty of past discrimination. 415 F. Supp. at 761. However, it must be noted that none of the parties had any reason to prove the existence of past discrimination. See 563 F.2d at 231 (Wisdom, J., dissenting). If Kaiser or the union had proved their past discrimination, they would have subjected themselves to potential damage suits by the victims of such discrimination. Id. Moreover, Weber had no desire to weaken his case by proving that Kaiser had discriminated in the past, since to do so would have legitimized the voluntary quota system. Id. at 224-25.

The court of appeals rejected the district court’s finding that any voluntary affirmative action program created by an employer or a union is a per se violation of Title VII. Id. at 223. The court noted that Title VII prefers voluntary compliance in eliminating discrimination rather than court action. Id. The court did not, however, find it necessary at this time to distinguish between permissible court enforced quotas and voluntary quota programs. Id. at 224.


12. See note 6 supra. Title VII’s proscription of employment discrimination does not, however, forbid an employer from establishing bona fide occupational qualifications which are reasonably necessary for his particular business. 42 U.S.C. § 2000e-2(h) (1976). Bona fide seniority systems are protected so long as they are not designed, intended, or used to discriminate. Id.
Title VII also created and empowered the Equal Employment Opportunity Commission (EEOC) to protect nonfederal employees' rights under Title VII. *Id.* § 2000e-5(a). In order to obtain assistance from the EEOC, an aggrieved nonfederal employee is required to file a complaint with the EEOC. *Id.* § 2000e-5. If the EEOC finds reasonable cause to believe a violation of Title VII has occurred, it may then bring a civil action against the employer if compliance cannot be reached through informal methods of "conference, conciliation and persuasion." *Id.* § 2000e-5(b). The EEOC is also authorized to seek immediate injunctive relief prior to the final disposition of the charge if necessary to carry out the purpose of the Act. *Id.* § 2000e-5(f). Furthermore, Title VII permits an aggrieved person to institute a civil suit if charges are dismissed by the EEOC, or if the EEOC has not filed a civil action within 180 days from the filing of the charge. *Id.* § 2000e-5(b).

The Senate debate on Title VII is of particular importance in interpreting the intent of Congress. Usually, testimony of individual legislators, even committee members, is not a reliable source to determine the intent of Congress as a whole. See G. Folsom, Legislative History, Research for the Interpretation of Laws 33-36 (1972). However, there are no Senate Committee reports on Title VII because the House bill was sent directly to the Senate floor without the usual Senate Committee procedures. 1 Legislative History of 1964, supra, at 3001. Moreover, there are no joint committee reports because the full House passed the Senate bill without amendments. *Id.* Therefore, the statements made during the general debate on Title VII have taken on additional significance. See Vaas, Title VII: Legislative History, 7 B.C. Indus. & Com. L. Rev. 431 (1965).

The minority report from the House Judiciary Committee, however, sets forth a different point of view: "This legislation is the most radical proposal in the field of civil rights ever recommended by any committee of the House or Senate." *Id.* at 2062.

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13. House Committee on Judiciary, H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), reprinted in 1 Legislative History of 1964, supra note 11, at 2018. As the legislative history of Title VII indicates, "the purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion or national origin." 1 Legislative History of 1964, supra, at 2026. Many liberal members of Congress believed that the bill as passed was too weak to accomplish its goals. *Id.* at 2122-23. The Minority Report from the House Judiciary Committee, however, sets forth a different point of view: "This legislation is the most radical proposal in the field of civil rights ever recommended by any committee of the House or Senate." *Id.* at 2062.


15. 42 U.S.C. § 2000e-5(g) (1976). For the text of this section, see note 6 supra.

16. 42 U.S.C. § 2000e-5(g) (1976). Title VII's delegation of authority to the courts to order affirmative relief has raised the issue whether the courts can impose racial quotas. Prior to *Webber*, the Court had never reviewed an employment discrimination case where this type of relief was ordered by the court. But in an earlier school desegregation case, the Court upheld the district court's integration plan which set as a goal the attainment of a specific balance. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). In *Swann*, the Court found that the use of mathematical ratios is a valid starting point in shaping an equitable remedy. *Id.* at 25. The Court also noted that once the affirmative duty to desegregate has been fulfilled and
The substantive issues raised by Title VII's prohibition of employment discrimination first reached the Supreme Court in the 1971 decision of *Griggs v. Duke Power Co.* The *Griggs* Court held that an employer may not require qualifications for jobs which operate to exclude minorities, unless the employer can show that the qualifications are related to job performance. In so holding, the Court stated: "[T]he Act does not command that any person be hired simply because he was a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." The court concluded that the objective of Congress in passing Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Furthermore, the *Griggs* Court held that a violation of section 703(h) of Title VII may be proved without showing that the employer intended to violate the Act.

After *Griggs*, the Supreme Court on several occasions has considered the nature and scope of relief under Title VII. In one case, the Court discrimination by official action eliminated, there will be no further need for the courts to interfere. *Id.* at 32.

Similarly, in cases dealing with reapportionment of voting districts under the Voting Rights Act of 1965, *42 U.S.C. § 1973(c) (1976)*, the Supreme Court has accepted the use of racial quotas even absent a specific finding of past discrimination. *See United Jewish Organizations v. Carey, 430 U.S. 144 (1977).* Moreover, in *Regents of the University of California v. Bakke, 438 U.S. 265 (1978)*, five justices tacitly approved the use of racial quotas provided there was an administrative, legislative, or judicial finding of past discrimination. *Id.* at 307. For a discussion of *Bakke*, *see notes 32-37 and accompanying text infra.* For a discussion of the indirect effects of *Weber* on the quotas issue, *see note 4 supra*; notes 53-57 and accompanying text infra.

17. *401 U.S. 424 (1971).* The employer in *Griggs* required both a high school diploma and a satisfactory score on two professionally prepared tests to obtain the higher paying jobs at the company. *Id.* at 427-28. An employee hired prior to 1965 without a high school diploma could obtain a transfer to one of the desirable positions only by passing the two tests. *Id.* at 428.

18. *Id.* at 436. The district court had dismissed the complaint because it had found that the employer's racial discrimination occurred prior to the effective date of Title VII. *292 F. Supp. 243 (1965), modified, 420 F.2d 1225 (4th Cir. 1970), rev'd, 401 U.S. 424 (1971).* *See note 5 supra.* The district court reasoned that since Title VII is not retroactive, the Act was not violated by the prior discriminatory practices. *292 F. Supp. at 247.* Although the court of appeals agreed with the district court, that the Act does not apply to discrimination that occurred prior to 1965, it found that the employer did not violate Title VII because the employer had no discriminatory purpose or intent in his testing requirements. *420 F.2d at 1230, 1235.* The Supreme Court, on the other hand, found that the two professionally prepared tests were not job related and, therefore, were invalid. *401 U.S. at 431-32.*

19. *401 U.S. at 430-31 (emphasis added).*

20. *Id.* at 429-30.

21. *Id.* at 432. Section 703(h) provides in pertinent part:

[N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race . . . .

*42 U.S.C. § 2000e-2(h).* For the text of § 703(h), *see note 35 infra.*

The *Griggs* Court interpreted the phrase "used to discriminate" to mean that if racial discrimination is a consequence of the test, the employer's good intent is irrelevant. *401 U.S. at 432-33.*

22. *See notes 23-31 and accompanying text infra.* One issue concerning relief under Title VII that the Supreme Court has not yet addressed involves the authority of the EEOC to
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held that a plaintiff is not precluded from Title VII relief merely because he had previously attempted to obtain relief from the alleged discriminatory practice through union grievance procedures. Also, the Court has upheld the granting of back pay and of retroactive seniority status as proper require affirmative relief in a consent decree. See EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978) (circuit court upheld, against union challenge, a consent decree which required quotas in future hiring); EEOC v. Jersey Central Power & Light Co., 508 F.2d 687 (3d Cir. 1975), vacated and remanded, 425 U.S. 987 (1976) (Supreme Court vacated the circuit court decision which had rejected portions of a consent decree that adversely affected the seniority provisions of a collective bargaining agreement, and remanded for reconsideration in light of Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)). For a discussion of Franks, see note 25 and accompanying text infra. A consent decree is the result of the efforts of the EEOC, pursuant to its power under § 706(b), to seek a resolution to the unlawful employment charge through "conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b) (1976). In light of Jersey Central Power & Light and American Tel. & Tel. Co., it would appear that the Supreme Court believes that consent decrees may contain affirmative relief, including grants of constructive seniority, notwithstanding the provisions of § 703(h) which outlaw any employment practices that "discriminate because of race [or] color." 42 U.S.C. 2000e-2(h). For the text of § 703(h), see note 25 infra.

23. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). In Alexander, the district court had held that the petitioner was precluded from bringing suit under Title VII because he had voluntarily chosen to seek a remedy through the grievance provisions of a collective bargaining agreement. 346 F. Supp. 1012, 1019 (D. Colo.), aff'd, 466 F.2d 1290 (10th Cir. 1972), rev'd, 415 U.S. 36 (1974). The Supreme Court reversed, noting that "[c]ooperation and voluntary compliance were selected as the preferred means" to assure equal employment opportunity. 415 U.S. at 44. The Court reasoned that if Title VII was construed to foreclose a party from suing under the Act only because he had previously tried to settle the dispute without the aid of a court, the "possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation ..." Id. at 59.

24. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). The Court explained that the purpose of awarding back pay was to provide employers with incentive to voluntarily eliminate discriminatory practices, rather than allowing them to wait for a court to force their compliance with the Act by the imposition of injunctive relief and large judgment awards. Id. at 418.

25. Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). In Franks, the district court found that Bowman's policies for hiring and discharging over-the-road truckers discriminated on the basis of race. Id. at 751 (the district court opinion was unpublished). The district court enjoined Bowman from perpetuating the discriminatory practices and ordered that members of the injured class be notified of their right to priority consideration for the jobs. Id. However, the lower courts denied the grant of seniority status retroactive to the date of application for the over-the-road jobs. Id. The Supreme Court reversed, holding that the award of retroactive seniority was necessary to put the injured persons into their "rightful place." Id. at 768, 770. The Court explained that, otherwise, a party subject to discrimination would never be entitled to the benefits which his subordinates have obtained despite the seniority that he was wrongfully denied. Id. at 767-68.

Moreover, the Court maintained that § 703, which defines unlawful employment practices, does not modify or restrict the scope of equitable relief which a court can order pursuant to § 706(g) to remedy violations of Title VII. Id. at 758-59. See 42 U.S.C. §§ 2000e-2(a) to -2(h) (1976). In particular, § 703(h) provides in pertinent part that it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences [sic] are not the result of an intention to discriminate because of race, [or] color . . . . Id. § 2000e-2(h). The Court found that § 703(h) was not intended to limit or qualify the relief granted by § 706(g), the remedial section of Title VII. See 424 U.S. at 758-59. For the text of § 706(g), see 42 supra.
remedies for violations of Title VII, and as appropriate incentives for employers to voluntarily eliminate discriminatory practices.26 However, in International Brotherhood of Teamsters v. United States,27 the Court limited the scope of Title VII relief, holding that a bona fide seniority system remains unaffected by Title VII, even though it perpetuates the effects of pre-Title VII discriminatory practices.28 Additionally, the Court clarified the power of lower courts to impose hiring schemes upon employers in Furnco Construction Corp. v. Waters.29 Nonetheless, in McDonald v. Santa Fe Trail Transportation Co.,30 the Court, for the first time, specifically held that Title VII is applicable to discrimination against members of the majority white race as well as against members of minority groups.31

The applicability of the Civil Rights Act of 1964 to discrimination against whites arose again last term in Regents of the University of California v. Bakke.32 The Bakke Court33 determined that Title VI34 incorporated the
constitutional standards of the equal protection clause of the fourteenth amendment, and therefore did not per se require the termination of federal funds to parties who discriminate in favor of minorities in order to remedy the effects of prior discrimination. Nevertheless, the Court held that the program established by the University of California at Davis, which set aside a specified number of places in the incoming medical school class for minority students, violated the equal protection clause.

34. The section of Title VI that was challenged in Bakke, § 601, provides: "No person in the United States shall, on the ground of race, color, or national origin, be denied the benefits of, or be subjected to discrimination under any program, or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1976).

35. 438 U.S. at 281-87. The equal protection clause of the fourteenth amendment provides: "No State shall... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Court held that only racial classifications which violate the equal protection clause or the fifth amendment violate Title VI. 438 U.S. at 287; id. at 328 (Brennan, J., concurring in part and dissenting in part).

36. 438 U.S. at 320. Justice Powell, joined by the Brennan group, found that racial distinctions are "inherently suspect," but may be considered in admissions programs if the state can show a substantial interest to justify the use of such a suspect classification. Id. at 320. Justice Powell then applied the strict scrutiny test in assessing the purported purpose for the special admissions program, concluding that the state has a compelling interest in obtaining a diverse student body to enhance the educational atmosphere of its universities. Id. at 306-15. Nevertheless, Justice Powell maintained that the Davis program of setting aside a specific number of places for racial minorities was not the least drastic means to accomplish this purpose. Id. at 319-20. The Brennan group, however, rejected the use of the strict scrutiny test. Id. at 356-62 (Brennan, J., concurring in part and dissenting in part). Their "intermediate" test required that an "important and articulated purpose" be shown to justify the use of the racial classification. Id. at 361 (Brennan, J., concurring in part and dissenting in part), and that the classification be used reasonably in light of the program's objectives. Id. at 373-74 (Brennan, J., concurring in part and dissenting in part). The Brennan group found that the Davis program was designed to remedy the effects of past societal discrimination against minorities in education and in the medical profession and that this satisfied their intermediate test. Id. at 370-71 (Brennan, J., concurring in part and dissenting in part).

While Justice Powell agreed with the Brennan group that the state has a legitimate and substantial interest in eliminating the effects of identified discrimination, he did not think that a university was competent to determine if an identifiable discrimination had occurred, nor to create a remedy for the victims which would not substantially harm other innocent persons. Id. at 307-10. Justice Powell maintained that such determinations must be made by judicial, legislative, or administrative findings. Id. at 307-08. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, dissented from this interpretation, insisting that the constitutional analysis was inappropriate since the language of the statute clearly "prohibits the exclusion of individuals from federally funded programs because of their race." Id. at 418 (Stevens, J., concurring in part and dissenting in part). The Brennan group added that the Stevens group's contention that when the words of a statute are clear there is no need to consider constitutional claims. Id. at 412. (Stevens, J., concurring in part and dissenting in part).

Against this background, Justice Brennan began the majority opinion in *Weber*\(^{38}\) by noting that the Court was considering 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 . . . ."\(^{39}\) As the majority pointed out, the case did not involve a fourteenth amendment claim,\(^{40}\) nor did it deal with the issue of court-imposed remedies for violations of Title VII.\(^{41}\)

Turning to the issue at bar, the Court rejected Weber's argument that sections 703(a) and 703(d) of Title VII\(^{42}\) should be read literally to forbid discrimination in hiring against whites as well as blacks.\(^{43}\) Stating that a statute must be construed in light of its legislative history,\(^{44}\) Justice Brennan surveyed the history and found that the purpose of Title VII was to enable blacks to obtain opportunities in areas of employment which have traditionally been closed to them.\(^{45}\) The majority then found support in the House Report\(^{46}\) for its position that Congress did not intend to prohibit private, voluntary affirmative action plans.\(^{47}\) The House Report, according to Justice Brennan, expressed the view that Title VII would not cure all racial dis-

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38. 99 S. Ct. at 2724. Justice Brennan was joined in the 5-2 majority opinion by Justices Stewart, White, Marshall and Blackmun. Justice Blackmun filed a separate concurring opinion. Justice Rehnquist filed a dissenting opinion, joined in by Chief Justice Burger who also filed a separate dissent. Justice Stevens did not participate in the decision because he had been counsel to Kaiser in the past. *Newsweek*, July 9, 1979, at 78. Justice Powell did not participate because he had been ill during the oral argument of the case. *Id.*

39. 99 S. Ct. at 2726 (emphasis in original).

40. *Id.* at 2726. Since the Kaiser-USWA plan did not involve state action, the Court was not faced with an alleged violation of the equal protection clause. The Court noted that Title VII "was enacted pursuant to the Commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth amendments." *Id.* at 2729 n.6. Contrasting Title VII with the Title VI provisions considered in *Bakke*, the *Weber* Court stated that "Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved," because Title VI governs the receipt of federal funds. *Id.* Therefore, the *Bakke* decision, which found that Title VI incorporated the standards of the fourteenth amendment, see note 35 and accompanying text *supra*, had no bearing upon the Court's analysis in *Weber*.

41. *Id.* at 2726. The Supreme Court has validated court-imposed affirmative action plans pursuant to § 706(g) of Title VII. See International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). For the text of § 706(g), see note 6 *supra*. For a discussion of *Teamsters*, see notes 27-28 and accompanying text *supra*. For a discussion of *Franks*, see note 25 and accompanying text *supra*.

42. 42 U.S.C. §§ 2000e-2(a), -2(d) (1976). For the text of these sections, see notes 7 & 8 *supra*.


44. 99 S. Ct. at 2727. Justice Brennan noted that "[i]t is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.'" *Id.*, quoting *Holy Trinity Church* v. United States, 143 U.S. 457, 459 (1892).

45. 99 S. Ct. at 2728-30. See notes 12-13 and accompanying text *supra*.

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Crimination, but would create an atmosphere conducive to voluntary resolution of discriminatory practices. Justice Brennan found it inconceivable that a law enacted at the apex of the civil rights movement to benefit victims of centuries of racial discrimination should be interpreted to forbid private and voluntary efforts to “abolish traditional patterns of racial segregation.”

In further support of its conclusion that private, voluntary affirmative action is permissible, the Court relied upon section 703(j) of Title VII of the Civil Rights Act of 1964. While noting that this section does not require any employer to give preferential treatment to minorities in order to achieve racial balance, the Court also pointed out that section 703(j) does not specifically forbid such action by employers. Thus, the Court concluded that the Kaiser plan fell “within the area of discretion left by Title VII to the

49. 99 S. Ct. at 2728. The Weber majority relied upon Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), to support its finding that Congress did not intend to prohibit the use of voluntary measures designed to eliminate “the last vestiges of an unfortunate and ignominious page in this country’s history.” 99 S. Ct. at 2728, quoting 422 U.S. at 418. The majority in Weber interpreted Albemarle to indicate that Congress would not have provided for broad equitable relief in § 706(g) of Title VII, including back pay and other affirmative relief, unless Congress intended that the few suits which were actually brought would spur others to correct their violations voluntarily. 99 S. Ct. at 2728. For the text of § 706(g), see note 6 supra. Limited relief, such as cease and desist orders, would have stopped individual employers from continuing their discriminatory practices but would have had little effect on other employers since they would be given no economic incentive to cease their prior practices.
50. 99 S. Ct. at 27-28. Section 703(j) provides:

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

51. 99 S. Ct. at 2729. The majority concluded that § 703(j) was added to Title VII to assure operators of private businesses that the federal government would not unduly interfere in their management decisions, so that businesses could freely determine whether they desired to racially balance their work force with an affirmative action plan. Id. One commentator has reasoned that § 703(j) should be read literally because the legislative history pertaining to that section was in conflict. Rachlin, Title VII: Limitations and Qualifications, 7 B.C. INDUS. & COM. L. REV. 473, 490-91 (1965). Thus, according to this view, the majority was justified in limiting its analysis to the text of § 703(j).
private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."

Limiting its decision to the facts of the Kaiser plan, the Court declined to articulate a precise, all-encompassing test for determining the permissibility of other types of affirmative action schemes. Rather, the Court simply listed the four positive aspects of the Kaiser plan which led it to conclude that this particular scheme was permissible: 1) the plan was designed to give minorities employment opportunities in traditionally segregated job classes; 2) no majority workers need be fired or demoted to make room for minority employees; 3) the plan does not absolutely bar the advancement of white employees; and 4) the plan is temporary, terminating when the goal of 39% minority craftsmen is achieved.

Both Justice Rehnquist and Chief Justice Burger filed strong dissents, challenging the validity of the majority's interpretation of the legislative history. Justice Rehnquist argued that the language of sections 703(a) and 703(d) clearly prohibits racial discrimination against whites as well as blacks. Moreover, Justice Rehnquist found that the legislative history

52. 99 S. Ct. at 2730 (footnote omitted).
53. Id.
54. Id. The Court took judicial notice of the lack of minorities in craft unions. Id. at 2725 n.1.
55. Id. at 2730.
56. Id. The plan merely requires that for every white worker chosen for the training program, one minority worker must also be selected. 563 F.2d at 218. In other words, 50% of those given the opportunity to learn a new trade would be white. Id. It should be noted that because Kaiser had only hired experienced craft workers prior to the adoption of this program, none of these inexperienced employees would have been eligible for the craft jobs if Kaiser had not instituted the affirmative action plan. Id. at 234 (Wisdom, J., dissenting).
57. 99 S. Ct. at 2730. See note 4 supra.
58. See 99 S. Ct. at 2734-35 (Burger, C.J., dissenting); id. at 2736-37 (Rehnquist, J., dissenting).
59. For the text of § 703(a), see note 7 supra.
60. For the text of § 703(d), see note 8 supra.
61. Id. at 2741 (Rehnquist, J., dissenting). Justice Rehnquist analogized what he considered the "dramatic" and "unremarked" switch in the majority's interpretation of Title VII to the rhetorical meandering of a "1984" Orwellian government official who changes enemies in midsentence without breaking syntax. Id., citing G. ORWELL, NINETEEN EIGHTY-FOUR 182-83 (Harcourt Brace Jovanovich, Inc. 1949). Consequently, Justice Rehnquist suggested that the majority opinion was five years ahead of its time. 99 S. Ct. at 2736 (Rehnquist, J., dissenting).
62. 99 S. Ct. at 2737, 2741-53 (Rehnquist, J., dissenting). Justice Rehnquist embarked upon a thorough search of the legislative history of Title VII and concluded that the 1964 Congress did not intend to allow preferential treatment in employment based on race. Id. at 2752 (Rehnquist, J., dissenting). Justice Rehnquist stressed the importance of the Minority Report's claim that Title VII would allow federal agencies to interpret "the word 'discrimination' to mean the existence of racial imbalance," [and] would require employers to grant preferential treatment to minorities," until a racial balance existed in the work force. Id. at 2742, 2745 (Rehnquist, J., dissenting). See H.R. REP. NO. 914, 88th Cong., 1st Sess. 67-68 (1963), reprinted in 1 LEGISLATIVE HISTORY OF 1964, supra note 11, at 1967-68. The response to this suggestion by the Act's supporters was that Title VII does not "require" every employer to give preferential treatment to minority groups in order to establish a racial balance, nor does it allow federal agencies to demand that an employer meet a racial quota. 99 S. Ct. at 2745 (Rehnquist, J., dissenting).
and the precedent clearly showed that the purpose of Title VII was to forbid all racial discrimination in employment, including any acts of an employer to correct racial imbalances. Justice Rehnquist also criticized the Court for ignoring the language, legislative history, and purpose of section 703(j). He maintained that section 703(j) was included in Title VII to alleviate the fears of Congress that the Act would result in preferential treatment to create racial balances in the work force. Under Justice Rehnquist's analysis, voluntary preferential treatment is not mentioned in section 703(j) because such action is the type of racial discrimination which section 703(a) specifically prohibits.

Justice Rehnquist maintained that the history behind § 703(j) enforces his contention that Title VII tolerates no voluntary racial preferences. Id. at 2749 (Rehnquist, J., dissenting). For the text of § 703(j), see note 50 supra. Justice Rehnquist contended that the reason no one suggested in the 83 days of debate over Title VII that employers would be permitted to voluntarily prefer racial minorities over white persons is that such a proposition would have been preposterous in light of § 703(a). Id. at 2748-49 (Rehnquist, J., dissenting).

Justice Rehnquist's reading of the legislative history does not materially differ from the majority's reading, except for Justice Rehnquist's finding that § 703(j) is addressed solely to federal agencies and courts, and cannot be read to support activity by an employer which is prohibited by § 703(a). Id. at 2752 (Rehnquist, J., dissenting).

99 S. Ct. 2736-37 (Rehnquist, J., dissenting). Justice Rehnquist criticized the Court for ignoring the Court's prior interpretation of Title VII merely to achieve a result more acceptable to the majority. 99 S. Ct. at 2736 (Rehnquist, J., dissenting). Justice Rehnquist cited McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976), to support his view that the Court has repeatedly interpreted Title VII to prohibit "all racial discrimination in employment, without exception for any particular employee." 99 S. Ct. at 2736 (Rehnquist, J., dissenting), quoting 427 U.S. at 283 (emphasis in original). Justice Rehnquist also pointed to the Court's decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), which interpreted Title VII to forbid "[d]iscriminatory preference for any group, minority or majority." 99 S. Ct. at 2736 (Rehnquist, J., dissenting), quoting 401 U.S. at 431. Moreover, Justice Rehnquist intimated that the Court's most recent discussion of the issue in Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), should have been dispositive of Weber for, in Furnco, the Court had stated: "It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionally represented in the work force." 99 S. Ct. at 2736 (Rehnquist, J., dissenting), quoting 438 U.S. at 579. Thus, Justice Rehnquist chided the majority for not providing an adequate explanation for this abrupt change in its construction of Title VII. 99 S. Ct. at 2736-37 (Rehnquist, J., dissenting). Indeed, as Justice Rehnquist indicated, the majority opinion did not even mention, much less distinguish, Griggs and Furnco. Id. at 2736 n.1 (Rehnquist, J., dissenting).

For a discussion of Griggs, see notes 17-21 and accompanying text supra. For a discussion of Furnco, see note 29 and accompanying text supra. For a discussion of Furnco, see note 29 and accompanying text supra.

99 S. Ct. at 2741 (Rehnquist, J., dissenting).

Id. at 2737, 2739-40, 2748-51 (Rehnquist, J., dissenting).

Id. at 2748-49 (Rehnquist, J., dissenting).

Id. Justice Rehnquist also contested the majority's assumption that Kaiser had voluntarily adopted the challenged plan. Id. at 2737-38, 2749 (Rehnquist, J., dissenting). Justice Rehnquist argued that Kaiser's adoption of the plan was induced by pressure from the Office of Federal Contract Compliance (OFCC). Id. The OFCC is a federal agency authorized to condition the granting of federal contracts upon compliance with an executive order requiring contract applicants to take affirmative action to prevent employment discrimination. See Executive Order 11246, 3 C.F.R. 339 (1964-65 Compilation), reprinted in 42 U.S.C. § 2000e app., at 1232 (1976), 1232 amended by Executive Order 11375, 3 C.F.R. 684 (1966-70 Compilation), and Executive Order 12086, 3 C.F.R. 230 (1978). The OFCC had found that minorities were being "underutilized" in Kaiser's plants, and thus, exerted pressure on Kaiser to institute an admissions quota system preferring blacks over whites. 99 S. Ct. at 2749 (Rehnquist, J., dissenting).
Agreeing with Justice Rehnquist's conclusion that the majority opinion is contrary to the explicit language of Title VII, Chief Justice Burger maintained that the Court's decision was "arrived at by means wholly incompatible with long-established principles of separation of powers." 68 Justice Burger asserted that since the intent of Congress is clear from the face of Title VII, there is no need to look at the legislative history. 69 Thus, Chief Justice Burger maintained that the majority had usurped the legislature's role by amending the clear language of the statute to suit its personal preference. 70

Justice Blackmun filed a concurring opinion based on a "practical and equitable" reading of Title VII. 71 While Justice Blackmun was disturbed by the majority's expansive reading of the relief permissible under Title VII, 72 he also maintained that the dissent had erred in failing to consider the Court's prior limited reading of the Act's legislative history. 73

Setting forth his own approach to the issue at bar, Justice Blackmun found difficulty in reading Title VII literally, noting that if an employer who has discriminated against minorities fails to take voluntary affirmative action, he subjects himself to suit for a Title VII violation and possibly a court-imposed affirmative action plan. 74 On the other hand, if the employer voluntarily takes action, he is subject to suit by majority employees claiming reverse discrimination under section 703(a). 75 Justice Blackmun's proposed

68. Id. at 2734 (Burger, C.J., dissenting).
69. Id. (Burger, C.J., dissenting).
70. Id. at 2734-35 (Burger, C.J., dissenting).
71. Id. at 2730 (Blackmun, J., concurring).
72. Id. at 2732 (Blackmun, J., concurring). Justice Blackmun was concerned with the majority's finding that a minority preference is valid whenever "there has been a societal history of purposeful exclusion of blacks from the job category," which results in a racial imbalance in that trade. Id. Justice Blackmun felt that Congress intended Title VII to prohibit hiring preferences for blacks as well as whites, unless that principle is being set aside to encourage "voluntary compliance that mitigates 'arguable violations.'" Id. See note 75 infra.
73. 99 S. Ct. at 2733-34 (Blackmun, J., concurring). Justice Blackmun maintained that in Griggs v. Duke Power Co., 401 U.S. 424, 434-36 & n.11 (1971), the Court refused to give controlling weight to the memorandum of Senators Clark and Case which the dissent quoted in support of its position that Title VII should not result in preferential treatment to minorities. 99 S. Ct. at 2733-34 (Blackmun, J., concurring). See id. at 2745-47 (Rehnquist, J., dissenting). Justice Blackmun concluded that the passages of legislative history quoted by the dissent were not so compelling as to override the equity of permitting employers to ameliorate the effects of past discrimination. Id. at 2734 (Blackmun, J., concurring).
74. 99 S. Ct. at 2731 (Blackmun, J., concurring). For the remedial provisions of Title VII, see note 6 supra. Justice Blackmun found that no party in this case had any desire to prove that Kaiser discriminated in hiring or promoting minority workers. 99 S. Ct. at 2733 (Blackmun, J., concurring). See note 9 supra.
75. 99 S. Ct. at 2730 (Blackmun, J., concurring). Justice Blackmun maintained that this dilemma forces the employer and the union to walk "a high tightrope without a net beneath them." Id. at 2731 (Blackmun, J., concurring), quoting Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d at 230 (Wisdom, J., dissenting). While recognizing that Congress intended for employers to voluntarily comply with the provisions of Title VII, Justice Blackmun indicated that Congress cannot expect employers to do so if, in the process, they open themselves up to reverse discrimination suits. Id. See also Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Chen, The Case for Minority Participation in Reverse Discrimination Litigation, 67 CALIF. L. REV. 191 (1979). Thus, Justice Blackmun espoused the "arguable violation" theory developed by Judge Wisdom in his dissent from the Fifth Circuit's decision in Weber. 99 S. Ct.
solution to this dilemma was that an employer should be permitted to take voluntary affirmative action if he has committed an "arguable violation" of Title VII. 76

Although the majority was not totally convincing in its argument that the legislative history behind Title VII supports the use of voluntary affirmative action plans, 77 it is submitted that the Weber Court reached the result most consistent with Title VII's underlying purposes of providing equal

at 2731-32 (Blackmun, J., concurring). See 563 F.2d at 230-34 (Wisdom, J., dissenting). Justice Blackmun concluded that an employer who finds that he has committed an "arguable violation" of Title VII should be able to mend his ways without fear of suit by white employees and without having to identify the actual victims of past discrimination, thereby avoiding claims for backpay. 99 S. Ct. at 2731 (Blackmun, J., concurring).

76. 99 S. Ct. at 2732 (Blackmun, J., concurring). See note 75 supra. Justice Blackmun observed that the easiest method of establishing an "arguable violation" would be by showing a statistical disparity between the racial composition of the employer's workforce and the composition of the qualified local labor force. Id. at 2733 (Blackmun, J., concurring). The Court has accepted this statistical disparity analysis as a means for a Title VII plaintiff to set out a prima facie case of discrimination, thereby transferring the burden to the employer to show bona fide reasons for the disproportionate number of minority employees in his workforce. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Justice Blackmun believed that the majority's broader holding, allowing affirmative action plans whenever the job category in question is "traditionally segregated," fit into his narrower "arguable violation" theory under the facts of this case. 99 S. Ct. at 2732-34 (Blackmun, J., concurring). He reasoned that determining whether a job class is "traditionally segregated" does not differ in practice from determining if there is an "arguable violation," since both approaches inevitably look at the statistical breakdown of the work force. Id. at 2732-33 (Blackmun, J., concurring). However, Justice Blackmun argued that the majority opinion departed from the "arguable violation" approach by allowing an affirmative action plan to redress discriminatory practices which predate the Act. Id. at 2733 (Blackmun, J., concurring). Nevertheless, Justice Blackmun maintained that even though Title VII does not give minorities a remedy for pre-Act discrimination, "[s]trong considerations of equity support an interpretation of Title VII that would permit affirmative action to reach where Title VII itself does not." Id.

77. The Court purportedly based its conclusion on the legislative history of Title VII and the literal language of § 703(j). 99 S. Ct. at 2727-29. See notes 43-52 and accompanying text supra. Nevertheless, the Court's thorough search of the voluminous Title VII legislative history revealed only one statement that arguably supports its conclusion:

No Bill can or should lay claim to eliminating the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.

99 S. Ct. at 2728 (emphasis supplied by the Court), quoting H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963), reprinted in 1 LEGISLATIVE HISTORY OF 1964, supra note 11, at 2001. This language, however, can reasonably be interpreted to indicate that the House Judiciary Committee hoped that employers would voluntarily stop their discriminatory hiring practices, rather than voluntarily provide redress for their past discriminatory acts by affording preferences to present minority employees. If employers did actually cease their unlawful hiring practices upon the passage of Title VII, as Congress had hoped, they would be immune from suit under Title VII because no remedy is available for discriminatory practices which predate the Act. Hazelwood School Dist. v. United States, 433 U.S. 299, 309-10 (1977). It seems likely that Congress believed that employers who were discriminating against minorities by granting them job opportunities and, therefore, only those employers who failed to voluntarily heed the message of Title VII would be subject to the enforcement provisions of § 706, including court-imposed affirmative action plans.
employment opportunity to all races and of remediying the effects of discrimination for those already adversely affected. The Supreme Court has previously stated that the purpose of the grant of broad remedial powers in section 706 was to enable courts to fashion remedies which will "provide the spur or catalyst which causes employers and unions to self-evaluate their employment practices and to endeavor to eliminate so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." As Justice Blackmun observed, if an employer must fear "reverse discrimination" suits in the event that he chooses to voluntarily remedy the effects of his prior discriminatory acts, he will choose not to act at all. Placing the employer in such a predicament would, it is submitted, be contrary to the congressional intent of creating an atmosphere conducive to voluntary compliance with Title VII.

It is suggested that the majority's most convincing rationale is that the language of section 703(j), which provides that "nothing in this statute shall be interpreted to require any employer . . . to grant preferential treatment," indicates that an employer may choose to give preferential treatment to achieve racial balance, but that governmental agencies may not re-

It is submitted that in 1964, as Justice Blackmun concluded in his concurring opinion, Congress probably did not even consider the possibility that racial preferences would ever be offered to minority members. 99 S. Ct. at 2731 (Blackmun, J., concurring). Similarly, Justice Powell stated in Bakke that, when Congress enacted Title VI, "[t]here simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment." 438 U.S. at 285.

78. See notes 12-16 and accompanying text supra. After an initial reading of Weber, the question arises as to why Justice Stewart changed his position from that which he had taken in Bakke. Justice Stewart was the fifth member of the 5-2 majority in Weber. See note 36 supra. In Bakke, however, he had joined in the opinion of Justice Stevens which concluded that the language of Title VI was "crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." 418 U.S. at 417-18 (Stevens, J., concurring in part and dissenting in part). Justice Stevens did not believe that the legislative history of Title VI required a reading other than "its natural meaning." Id. at 418 (Stevens, J., concurring in part and dissenting in part). It cannot be disputed that the literal meaning of the words of §§ 703(a) and 703(d) of Title VII are not significantly different than those of § 601 of Title VI. For the text of § 703(a), see note 7 supra. For the text of § 703(d), see note 8 supra. For the text of § 601, see note 34 supra. Therefore, Justice Stewart must have relied on other provisions in Title VII, or on its legislative history, in order to find that the intent of Congress differed from Title VI to Title VII. It is submitted that the extensive remedial provisions in § 706(g) of Title VII provide an adequate basis for finding that Congress intended to promote voluntary compliance with the Act. For portions of the text of § 706(g), see note 6 supra. Congress considered it necessary to set up enforcement provisions in Title VII which protect the victims of discrimination through awards such as back pay and constructive seniority if their Title VII rights are violated. See notes 6 & 16 and accompanying text supra. As the Court observed in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), "[c]ooperation and voluntary compliance were selected as the preferred means for achieving this goal." Id. at 44.


80. 99 S. Ct. at 2731 (Blackmun, J., concurring).

81. See notes 24 & 79 and accompanying text supra.

quire him to do so. However, it is unclear from the majority’s analysis why it was willing to look behind the text of sections 703(a) and (d), but was unwilling to go beyond the literal language of section 703(j). It is submitted that the majority was justified in considering just the literal language of section 703(j) because the only relevant legislative history was ambiguous. Senator Humphrey, for instance, thought that section 703(j) was not necessary since it did not add any further prohibitions to Title VII. Senators Clark and Case, however, maintained that Title VII prohibited any deliberate attempt by employers to attain a racial balance. If one considers the interpretation of Senators Clark and Case to be correct, section 703(j) would prohibit voluntary plans; but if Senator Humphrey’s interpretation is the proper reading, then section 703(j) should be read literally. Thus, it is suggested that the majority relied on a basic rule of statutory interpretation, which requires that the plain meaning of the statute should be followed when the legislative history is ambiguous. Accordingly, the Court could properly consider the legislative history behind sections 703(a) and (d) because that legislative history was clear and aided the Court in discovering the true intent of Congress.

While the dissent’s discussion of the legislative history of Title VII appears persuasive, it is submitted that the discussion addresses what is not required by Title VII, rather than what Title VII forbids. Moreover, it is submitted that the dissent, in failing to examine the legislative history behind the 1972 amendments to Title VII, did not consider the total picture.

83. See 99 S. Ct. at 2728-29; notes 50-52 and accompanying text supra.
84. See 99 S. Ct. at 2727, citing Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892); notes 42-49 and accompanying text supra.
85. See notes 50-52 and accompanying text supra. Justice Brennan explained that § 703(j) was incorporated into Title VII to assure private employers that the federal government would not force them to adopt affirmative action plans simply “because of some Federal employee’s ideas about racial balance or imbalance.” 99 S. Ct. at 2729, quoting 110 Cong. Rec. 14,314 (1964) (remarks of Sen. Miller). In his dissent, Justice Rehnquist argued that the majority had invoked § 703(j) to uphold the type of plan that the section was designed to forbid, concluding that the Office of Federal Contract Compliance had forced Kaiser to adopt an affirmative action plan. Id. at 2749 (Rehnquist, J., dissenting). See also text accompanying notes 65-67 supra. It is possible that although Justice Rehnquist’s analysis of the facts in Weber may have been correct, the majority’s theoretical analysis of § 703(j) was entirely consistent with the legislative history of that section. See notes 86-91 and accompanying text infra.
88. It should be noted that if the interpretation of Senators Clark and Case was correct, then § 703(j) should be read “nothing shall require or permit.”
89. See Rachlin, supra note 51, at 490.
90. See W. Statsky, Legislative Analysis: How to Use Statutes and Regulations 106 (1975).
91. See text accompanying note 84 supra; notes 42-49 and accompanying text supra.
92. See 99 S. Ct. at 2735 (Burger, C.J., dissenting); id. at 2741-52 (Rehnquist, J., dissenting); notes 55, 65 & 64-67 and accompanying text supra.
93. 99 S. Ct. at 2733 (Blackmun, J., concurring).
94. The first amendments to Title VII were enacted in 1972 after much debate over whether affirmative action was a proper remedy for violations of the Act. See generally Legislative History of 1972; supra note 13, vols. 2-3.
In 1972, attempts to amend Title VII to prohibit the use of affirmative action as a remedy failed. It is clear that the majority of Congress chose not to overturn prior judicial decisions which allowed race-conscious affirmative action plans to remedy discriminatory acts. Therefore, it is apparent that the 1972 Congress thought that the courts were properly interpreting Title VII as passed in 1964.

It is further submitted that the dissent failed to take into account the limited scope of the majority's decision. The majority did not permit an affirmative action plan whose sole purpose was to maintain a racial balance; rather, it allowed a plan which sought to remedy the effects of a "traditionally segregated" job class. Under Weber, an employer may enact an affirmative action plan if his work force in a particular area has a significantly smaller percentage of minority workers than the general labor force in the area. It is suggested that the employer must also have acted in the past in a manner which contributed to the disproportionate amount of minority workers in the particular job class. A plan instituted solely to maintain a racial balance, unlike a plan designed for remedial purposes, would, it is submitted, certainly violate section 703(a) even after Weber.

Thus, under Weber it is clear that a private employer may adopt a voluntary affirmative action scheme which is designed to alleviate racial imbalances in traditionally segregated job classes—at least where the employer has contributed to these conditions within his workforce. However, other than listing the positive aspects of the Kaiser plan, the Court provided little guidance to assist employers in determining what other types of affirmative action plans are permissible. Consequently, whether or not some very

97. 99 S. Ct. at 2724-25, 2730.
98. Id. at 2725, 2730. In the area around the Kaiser plant at Gramercy, Louisiana, approximately 39% of the labor force was black. Id. at 2725. At Kaiser, only 15% of the employees in general and only 2% of the craft workers were black. Id.
99. Kaiser had in the past required a minimum of five years experience for the craft jobs. 99 S. Ct. at 2731 (Blackmun, J., concurring). This requirement was arguably a violation of Title VII because 1) it operated to exclude minorities; 2) it probably could not have been justified by Kaiser as being related to job performance; and 3) it most likely contributed to the disproportionate amount of minority craft workers in the Gramercy area. See id. Similar requirements which operated to exclude minorities were found to violate Title VII in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). For a discussion of Griggs, see notes 17-21 and accompanying text supra.
100. It is suggested that a plan whose sole purpose is to maintain a racial balance would violate § 703(a) because such a plan would discriminate against a person on the basis of race, and, unlike the Kaiser plan, would not be created for the purpose of redressing the effects of prior discriminatory acts. See 99 S. Ct. at 2726. The Kaiser plan will cease once the effects of past discrimination are eradicated. See id. at 2730. For the text of § 703(a), see note 7 supra.
101. See 99 S. Ct. at 2730; notes 99-100 and accompanying text supra.
102. See 99 S. Ct. at 2730; notes 53-57 and accompanying text supra. It should be noted that employers in the future will also have the guidance of the EEOC Affirmative Action guidelines. 44 Fed. Reg. 4422 (1979) (to be codified in 29 C.F.R. § 1608). If an employer follows these guidelines in good faith he will be protected against a suit by the EEOC. See 44 Fed. Reg. at
common schemes will be upheld is not yet certain. Consider, for instance, a plan which allows a minority employee to be promoted to a management position, even though a white employee was better qualified on the basis of work performance and nondiscriminatory tests.\textsuperscript{103} Although this type of plan may satisfy the four aspects noted by the \textit{Weber} Court,\textsuperscript{104} the facts are so different that the Court might not uphold such a scheme.\textsuperscript{105} Assuming that the promotion criteria have been nondiscriminatory in the past, this plan would permit an employer to discriminate in favor of a less qualified employee solely on the basis of race. It is submitted that such a plan is not protected under \textit{Weber}, since it contains no remedial aspect to justify its discriminatory effects.\textsuperscript{106}

Another problem raised by the holding in \textit{Weber} is that the Court provided no criteria to aid an employer in deciding whether a job class is "traditionally segregated." It is thus submitted that employers and the lower courts will probably rely upon Justice Blackmun's "arguable violation" approach, rather than the majority's "traditionally segregated" job category standard, in determining the validity of affirmative action plans.\textsuperscript{107} The
majority's standard is very difficult to apply because an employer must first determine the relevant geographic market in order to decide who should be counted in the job category. It is also unclear what criteria the majority would consider in determining whether the job class is traditionally segregated. Justice Blackmun's analysis, on the other hand, narrows the scope of inquiry to the prior hiring practices of this employer, thus avoiding many of the problems inherent in the majority's standard. Nevertheless, while Justice Blackmun's approach is appealing, it is suggested that caution must be exercised when requiring an employer to prove an "arguable violation" to justify an affirmative action plan. If the required proof is too specific, an employer may become subject to suit for his prior "arguable violations," thereby decreasing the likelihood that such an employer would be willing to voluntarily engage in affirmative action plans. Therefore, it is submitted that Justice Blackmun's caveat to keep the standard of proof "low enough to permit the employer to prove it without obligating himself to pay a damage award," should be heeded by those courts applying the "arguable violation" standard.

It is important to note that Weber only applies to private affirmative action plans; a significant question left open by the Court is the constitutionality of affirmative action plans in state employment situations. In 1972, Congress amended Title VII to include within the definition of "employer," state governments, governmental agencies, and political subdivisions. Since the 1972 amendments incorporate the fourteenth amendment into Title VII with regard to state employment, it is submitted that the Court will not be bound by Weber—which was based on the 1964 commerce clause legislation—when determining the constitutionality of voluntary state affirmative action plans.

108. For example, an employer located twenty miles from a major metropolitan area would be required to make the difficult determination of whether the job class consists of workers residing in the city, or just those living in the suburbs. See 99 S. Ct. at 2730.
109. Since Title VII is only applicable to remedy discriminatory practices which occurred after July 2, 1965, see note 5 supra, it can be argued that only activities occurring after that date should be considered in determining whether a job class is segregated. See 99 S. Ct. at 2733 (Blackmun, J., concurring).
110. See note 40 supra.
111. See 99 S. Ct. at 2729 n.6; note 40 supra.
114. See 99 S. Ct. at 2729 n.6; note 40 supra.
115. It is submitted that the proper standard to apply in considering the constitutionality of state affirmative action plans can probably be deciphered from the Bakke opinions. It is not clear, however, whether Justice Powell's test of strict scrutiny or Justice Brennan's intermediate test of important governmental objectives will prevail as the means for scrutinizing such schemes. Compare 438 U.S. at 291 (Powell, J., writing for the Court) with 438 U.S. at 359 (Brennan, J., concurring in part and dissenting in part). See note 36 supra. In applying the strict scrutiny test in Bakke, Justice Powell maintained that a university was not competent to determine if an
The *Weber* decision, it is suggested, adopts a strong policy against judicial interference in the area of private employment decisions. The outcome of *Weber*, it is submitted, was required both politically and practically, since our court system is too overburdened to require a judicial finding of discrimination every time an employer wishes to remedy his past violations of Title VII. It is suggested that society will benefit by the majority’s decision to allow employers and employee representatives to make an attempt at remedying the effects of discrimination in employment.

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Identifiable discrimination had occurred. See 438 U.S. at 307-08; note 36 *supra*. With respect to a state affirmative action plan, on the other hand, Justice Powell might be more willing to accept Justice Brennan’s intermediate test, since a state is competent to determine whether it has violated the constitutional and statutory rights of its employees. See note 36 *supra*.