Masthead Logo

NYLS Journal of Human Rights

Volume 2
Issue 2 *Volume II, Part Two, Spring 1985*

Article 3

1985

Weber: Remedying the Effects of Past and Present Discrimination

James S. Bowen

WEBER: REMEDYING THE EFFECTS OF PAST AND PRESENT DISCRIMINATION

*JAMES S. BOWEN**

I. INTRODUCTION

This paper explores selected ramifications of the benchmark case, *United Steelworkers of America, Kaiser Aluminum & Chemical Corporation v. Brian Weber, et al.*,[1] ("*Weber*"). The thesis here is that if such evidence as was publicly available had been presented to the court, there would have been sufficient ground for the Supreme Court to hold that a case of prior employment discrimination by Kaiser had been proven. In addition, the sociological and legal context of this historic decision is examined to aid in the determination of the contemporary orientation of this nation toward affirmative action in employment.

To facilitate this examination, the *Weber* facts are reviewed to reveal the purpose of affirmative action in the context of employment discrimination. As a result of this process, the basis for a broader ruling by the Court is shown. Such a ruling would have more effectively addressed the goals of affirmative action. Pressure from the conservative school is considered, taking into account its effects for maintaining the status quo. On the other hand, the response of the liberal school is evaluated. Altogether, this review of *Weber* indicates an uncertain future for affirmative action programs in employment.

The Court chose to decide only one of the issues before it in *Weber:* that of the validity under Title VII of voluntary affirmative action efforts. The Court decided to construe away the involuntary aspects of the case. The record presented to the Court was not congruent to, but was a selectively narrowed subset of,

---

* Associate Professor of Law, New York Law School; B.A., Ph.D. (Sociology), Columbia University; J.D., Yale Law School; former Chairman, Black Studies Department, S.U.C.-New Paltz. Appreciation to Professor Drew S. Days III, for his guidance.

1. 415 F. Supp. 761 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

the full facts of the case. The direct litigating parties in the case at the trial and appellate levels (Weber, the union and the employer) did not represent the black or other minority beneficiaries of affirmative action. The Civil Rights Division of the Department of Justice and the Equal Employment Opportunity Commission intervened after the appellate decision by filing petitions for rehearing and rehearing *en banc* with the Fifth Circuit. When both of those were denied, a petition for *certiorari* to the Supreme Court, and later a brief on the merits were filed. Based on the absence of direct interest in affirmative action by the immediate litigants, the parties selectively presented the facts and doctrinal issues of their case. As a result of this selectivity, the Supreme Court enunciated an unnecessarily and unconscientiously narrow (although otherwise meticulous) standard which covered only "voluntary" efforts, rather than all affirmative action efforts.

II. THE FACTS OF WEBER

A. *Overview of the Case*

A collective bargaining agreement between union and employer established a job upgrading and training program for workers without craft experience. Blacks were to be selected from seniority lists in equal proportion to, but separately from, whites until the black employee ratio showed parity to the black percentage of the labor force. The black employee ratio for the Gramercy, Louisiana plant was only 1.83 percent (5 out of 275 employees) and blacks were more than one-third (39%) of the area work force.[2] Kaiser attributed the low percentage of black craftworkers to the lack of training opportunities for blacks in the building trades and craft industries from which Kaiser hired most of its skilled workers.[3]

---

2. 443 U.S. at 198-99.

3. Appellant Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit at 3, United States and EEOC v. Weber (Supreme Court October Term 1977) [hereinafter cited as petition for Cert.] Out of joint negotiations between the union and the employer, a plan developed to increase the percentage of black workers at the skilled level. The plan was spurred by findings of non-compliance by the Office of Federal Contract Compliance (OFCC) and Kaiser's attempt to avoid suits for backpay by black employees. *Id.* at 3-4, 8, 16 and 18. For a copy of the Petition for Cert. *see* 112 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CON-

The master collective bargaining agreement for the Kaiser industry covered fifteen Kaiser plants, including Gramercy, Louisiana. The agreement between Kaiser and the United Steelworkers of America (USWA) union provided that an in-house committee composed of both employers and employees would review minority employment levels and, if warranted, establish goals and timetables for upgrading the percentage of minorities in the Gramercy plant's skilled craft workforce. Selection to the apprenticeship program was to be according to racial classification, one-for-one, with selection from each racial class according to seniority. Pursuant to the agreement, seven black and six white craft trainees would constitute the first class at the Gramercy plant.[4] Although these thirteen training positions were filled by persons already employed by Kaiser, the company hired 22 craftsmen from outside the plant of whom 21 were white.[5]

A class action suit for injunctive and monetary relief was instituted by Brian Weber, a white who had more seniority than several of the selected black trainees, alleging that Title VII forbade Kaiser's affirmative action plan because it discriminated against him and his white colleagues.[6] The district court and the court of appeals struck down the affirmative action program because, in their view, trainee selection was based on an impermissible racial classification in violation of Title VII of the 1964 Civil Rights Act.[7] The Supreme Court, taking judicial notice of traditional segregation "on racial grounds," held that race-conscious plans may be voluntarily adopted by employers to achieve affirmative action.[8]

STITUTIONAL LAW 6-13 (Kurland and Casper ed. 1978).

4. Two black employees with three months less seniority than Brian Weber were accepted as skilled craft apprentices, thus providing Weber the alleged basis for his discrimination claim. 443 U.S. at 225 (Rehnquist, J., dissenting).

5. Petition for Cert. at 5.

6. 443 U.S. at 199-200.

7. *Weber*, 563 F.2d 216.

8. 443 U.S. at 208-09. The trial court found that Kaiser had never discriminated. 415 F. Supp. at 769. Based on a restitutionary view (i.e., that affirmative action is only available "to restore employees to the positions they would have occupied but for prior discrimination"), the appellate court found that there was no discrimination. 564 F.2d at 224.

B. *The Majority*

Whether the Congressional intent, as revealed by legislative history and the language of Title VII, approved or disfavored the existence of the Kaiser-USWA Plan in *Weber* is the central issue which divides the Court. A majority of the Court (J.J. Brennan, Marshall, Stewart, White and Blackmun) hold that Title VII manifests no intent to prohibit all race-conscious affirmative action plans. Finding distinctions in the letter and spirit of Title VII, Justice Brennan, writing for the majority, declares that a law cannot be read intelligibly outside of the historical context which produced the law as evidenced by its legislative history. Constrained by the "plight of the Negro" in our economy, Congress moved to eliminate the barriers between blacks and their economic competition in the marketplace. Upon a close review of the rationale and supporting evidence offered during the debate on the proposed Civil Rights Act of 1964, Justice Brennan finds sufficient justification to hold that Congress intended to leave open the option of voluntary action aimed at correcting the present consequences of past racial discrimination.[9]

Justice Brennan substantiates his assertion that Congress intended to encourage voluntary affirmative action programs by quoting the House Report which said that "national leadership . . . *will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.*"[10]

On the basis of this legislative history, Justice Brennan concludes that Congress did not and could not have intended to preclude voluntary efforts to ameliorate the consequences of racial injustice:

> The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and 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," . . . cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious

9. 443 U.S. at 194-95, 203-04.

10. *Id.* at 204 (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess. 18 (1963)). (Emphasis supplied by Justice Brennan).

> affirmative action efforts to hasten the elimination of such vestiges . . . .[11]

Justice Brennan's analysis is further reinforced by scrutiny of the specifically relevant section of Title VII: § 703(j).[12] Opponents of the bill which later became Title VII argued that it would either require or induce employers to accord preferential treatment to blacks where racial imbalance existed in their industrial workforce. However, Justice Brennan finds no justification for such arguments. Section 703(j) prohibits requiring employers to engage in such action; however, since the section does not provide that "nothing in Title VII shall be interpreted to *permit*" voluntary affirmative efforts to correct racial imbalances, Justice Brennan emphasizes that the logical inference is that Congress chose not to disallow all voluntary race-conscious affirmative action. On the contrary, Justice Brennan declares that inasmuch as Congress considered the possibility of voluntary affirmative action and consciously chose neither to forbid nor deny permission for voluntary efforts by employers to redress racial imbalance, the Act as constituted allows such efforts.[13] The compromise represented by § 703(j) of Title VII reflects the concern of some members in the Congress that federal intrusion into private business might be increased or that "management prerogatives and union freedoms" might be decreased.[14] Therefore, Justice Brennan argues that in adopting

---

11. *Id.* at 204 (citations omitted).

12. Section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j) (1976), 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 the race, color, religion, sex, 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 an employer, referred or classified for employment by an employment agency or 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.

Section 703(j) speaks to substantive liability under Title VII, but it does not preclude courts from considering racial imbalance as evidence of a Title VII violation. 443 U.S. at 204 n.5.

13. 443 U.S. at 205-06.

14. *Id.* at 206-07.

§ 703(j) Congress could not have provided for ends inconsistent with the stated purposes of Title VII as given in its legislative history. Thus, Congress did not preclude all race-conscious affirmative action.[15]

The Kaiser-USWA Plan falls within the permissible area of affirmative action plans, as it was designed to eliminate traditional segregation and racial hierarchy and to dislodge the barriers which foreclosed blacks' employment possibilities.[16] Further, the plan neither "trammel[s] the interests of white employees," nor requires their discharge,[17] nor proffers an absolute bar to their advancement. It neither erects a permanent structure in the workplace nor maintains racial balance,[18] the latter of which would violate the *Bakke*[19] mandate.[20]

Finding that the program specifies the conditions of its own demise in the provision that it will be terminated when the proportion of blacks in the Kaiser skilled craft workforce approximates the percentage of blacks in the local labor force and recognizing that the plan includes whites for half its openings, the majority reverses the lower court and holds that the plan is clearly within the discretion permitted employers who attempt to eliminate the conspicuous racial disparity in their workforces.

C. *Justice Blackmun's Position*

Justice Blackmun shares "some of the misgivings" expressed by Justice Rehnquist in his dissent in *Weber,* especially as to the majority's reading of the legislative history of Title VII. In his concurrence, Justice Blackmun looks to "additional considerations, practical and equitable" which lead to the result reached by the *Weber* Court.[21] Quoting Judge Wisdom,[22] Justice Blackmun initially characterizes the situation as arising from a

---

15. *Id.*

16. *Id.* at 208-09.

17. *Id.* at 208; *see* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (where a plan requiring the discharge of white workers in order to hire new black workers was struck down).

18. 443 U.S. at 208-09.

19. University of California Regents v. Bakke, 438 U.S. 265 (1978).

20. Broderick, *The Nature of the Constitutional Process: Equal Protection and the Burger Court,* 12 N.C. CENTR. L. J. 320, 327 (1981). [hereinafter cited as Broderick].

21. 443 U.S. at 209 (Blackmun, J., concurring).

22. *Weber,* 563 F.2d at 227 (Wisdom, J., dissenting).

paradox created by the nondiscrimination mandate of Title VII itself and views the position of the union and employer as on a "high tightrope without a net beneath them." Justice Blackmun explains that while blacks are to be redressed for past discrimination, whites may not be put at a disadvantage by the imposition of any measure designed to alleviate the present effects of past discrimination.[23] According to Justice Blackmun, without engendering any liability to whites, Kaiser-type affirmative action: a) avoids identification of, and thereby backpay claims by, past victims; b) reduces liability to past victims to the extent of the program's benefits to them; and, c) reduces the probability that the disparate effect requirement could be satisfied where it is mandated as a predicate to Title VII liability.[24]

Arguing that Congressional policy may be more effectively accomplished by constricting the application of Title VII to "arguable violations" rather than the broader target of "traditionally segregated" job categories, Justice Blackmun charges that the Court adopts an overly broad approach which distorts the intent of Congress. He suggests that the principle of non-discrimination is abandoned by the majority's unfocused approach and that targeting traditionally segregated job categories (even in Louisiana with its history of segregated and inferior trade schools for blacks, its traditionally all-white craft unions, its union nepotism and its segregated apprenticeship programs) would overreach the malady which Congress intended to correct.[25]

However, Justice Blackmun does not rest his analysis on the way in which the majority departs from the Congressional intent expressed in Title VII. In a most incisive analysis, Justice Blackmun declares that the majority's broad standard does not violate the spirit of the Act. First, the majority's measure of discrimination is statistical disparity.[26] While such disparity meets the standard in *Dothard v. Rawlinson*, it does not surmount the threshold of *Teamsters v. United States*.[27] According to Justice

23. 443 U.S. at 209-10.

24. *Id.* at 211 (Blackmun, J., concurring).

25. *Id.* at 212-13.

26. *Id.* at 213.

27. *Id.* The Court stated that "While, under Title VII, a mere disparity may provide the basis for a prima facie case against an employer, Dothard v. Rawlinson, 443 U.S. 321,

Blackmun, the practical considerations surpass the theoretical here: the "arguable violation" approach and the "traditionally segregated job category" approach produce almost identical results where the arguable violation standard is set sufficiently low as an indicator to be effective in identifying discrimination. Such a low threshold for an "arguable violation" approach would subsume most traditionally segregated job categories as measured by disparate impact.[28]

Further, based on *Hazelwood School District v. United States*[29] and *Teamsters*[30] analysis, to the degree that claimants can show that past discrimination creates present disparity, the majority would allow a comparison of the employer's workforce (itself possibly reflective of discriminatory impact) with the larger local work force.[31]

Prodded by the momentum of his analysis, Justice Blackmun declares that "[s]trong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not . . . . Where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief."[32]

Respondent Weber had argued that the alleged scarcity of black craftsmen in Louisiana, itself the legacy of historic discrimination, made Kaiser's training program illegal because it absolved Kaiser from liability under Title VII. Kaiser allegedly had no hand in the creation or perpetuation of the discriminatory cause. Pinpointing the immense unfairness and illogic of this argument, Justice Blackmun rejoins that this alleged status of clean hands does not make Kaiser's program illegal:[33]

> Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of "locking in" the effects of segregation for which Title VII provides no remedy. Such a construction, as the Court

---

329-331 (1977), it would not conclusively prove a violation of the Act. Teamsters v. United States, 431 U.S. 324, 339-40 n.20; *see* § 703(j), 42 U.S.C. § 2000e-2(j)."

28. 443 U.S. at 213.
29. 443 U.S. at 299, 309-10 (1977).
30. Teamsters v. United States, 431 U.S. 324, 339-40 and n.20 (1977).
31. 443 U.S. at 213-14 (Blackmun, J., concurring).
32. *Id.* at 214.
33. *Id.*

points out . . . would be "ironic," given the broad remedial purposes of Title VII.[34]

Justice Blackmun approves the moderate nature of the Kaiser affirmative action plan, noting with the majority that there is no absolute preference for blacks and that the program is scheduled to terminate "when the racial composition of Kaiser's craft workforce matches the racial composition of the local population." This finite duration complies with the *Bakke* mandate that disallows the maintenance of a previously achieved racial balance.[35]

D. The Dissents

Chief Justice Burger, in his dissenting opinion, criticizes the majority's rewriting of Title VII in *Weber* and charges the majority with violating the separation of powers principle. Stating that the majority uses application of the statute in *Weber* as a guise for statutory reconstruction, Chief Justice Burger accuses the majority of usurping powers assigned by the Constitution to Congress.[36] Like Justice Rehnquist, the Chief Justice sees the statutory language of Title VII, §§ 703(a) and (d),[37] as clearly

---

34. *Id.* at 215.

35. *Id.* at 215-16 (citing to University of California Regents v. Bakke, 438 U.S. 265, 342 n. 17 (1978) (Brennan, J., concurring in part and dissenting in part).

36. 443 U.S. at 216-18 (Burger, C.J., dissenting).

37. Sections 703(a) and (d), 42 U.S.C. § 2000e-2(a) and (d) (1976) provide:

(a) Employer practices

It shall be an unlawful employment practice for an employer—(1) to fail or to 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.

. . . .

(d) Training Programs

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.

and unambiguously prohibiting racial discrimination in employment. He says that the Kaiser-USWA Plan is exactly that—racial discrimination.[38]

The second dissenting opinion in *Weber* is fuller and more detailed. Noting that the Court's decision is anachronistic and discreditable, Justice Rehnquist, joined by Chief Justice Burger, sardonically recommends that the Orwellian year of 1984 would give better perspective to the Court's opinion in this case since that opinion, in their view, is such a volte-face of the Court's earlier interpretation of Title VII.[39] According to Justice Rehnquist, Title VII had previously been read to "prohibit racial discrimination in employment *simpliciter*."[40] Justice Rehnquist argues that under *McDonald v. Santa Fe Trail Transp. Co.*,[41] and the Court's earlier readings of Title VII based on its "uncontradicted legislative history," the same standards of racial discrimination are applied to black and white alike.[42]

Justice Rehnquist avers that the dispositive determination and controlling precedent are the Court's several previous utterances that Title VII prohibits discrimination against "each" applicant regardless of race and regardless of the proportion of applicant's race already on the job. Justice Rehnquist accuses the Court of permitting exactly what the Court says is forbidden: tramelling the interests of white employees.[43]

In the opinion of Justice Rehnquist, "the Court eludes clear statutory language, 'uncontradicted' legislative history, and uniform precedent" to reach its conclusion that Title VII permits employers to consider race in making employment decisions.[44]

Even on their respective views of relevant facts, the two sides of the Court are split. For example, Justice Rehnquist emphatically introduces his factual history of the case by noting that since "the Gramercy facility had no apprenticeship or inplant craft training program," only persons with previous craft

---

See 443 U.S. at 199-200.

38. 443 U.S. at 216-17.

39. *Id.* at 219-20 (Rehnquist, J., dissenting).

40. *Id.* at 220.

41. 427 U.S. 273 (1976).

42. 443 U.S. at 220.

43. *Id.* at 221.

44. *Id.* at 222.

experience were hired.[45] For Justice Rehnquist this practice would have been tantamount, in an employment discrimination suit by black plaintiffs, to justification sufficient to satisfy an employer-defendant's burden to explain the business necessity of a practice having racially disparate results.

An additional divergence on the Court is reflected in Justice Rehnquist's comments about the role of the agency charged with enforcement of equal opportunity regulations:

> The OFCC [Office of Federal Contract Compliance] employs the "power of the purse" to coerce acceptance of its affirmative action plans. Indeed, in this case, the district court found 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.[46]

Further, Justice Rehnquist again places the Court's view of the facts in disfavorable context in his questioning of the validity of characterizing the Kaiser-USWA Plan as temporary and not designed to maintain racial balance.[47]

Arguing that the Kaiser-USWA Plan is prohibited by the plain language of Title VII,[48] Justice Rehnquist re-affirms that he sees "no irony in a law that prohibits *all* voluntary racial discrimination, even discrimination directed at whites in favor of blacks."[49]

E. Evaluating the Opinions

Here, the arguments are succinctly juxtaposed: at the vortex, the majority's affinity for antidiscrimination measures collides with the dissent's approbation of nondiscrimination. Within this configuration, several questions arise: Can there be effective redress of societal discrimination with no regard for the racial identity of its victims and no measure taken to restore what has been wrongfully denied them? Is it fair to equate the

45. *Id.*
46. *Id.* at 223 n.2.
47. *Id.* at 223-24 n.3.
48. *Id.* at 228.
49. *Id.* at 228 n.10.

lot of black and white workers, say in 1964 in the Civil Rights Act, by declaring them as equal now and henceforth, without attempting to make some rectification for past discrimination? Justice Rehnquist does not answer these questions. In the context of his opinion in *Weber*, these questions do not exist. Rather, Justice Rehnquist finds that the majority's averred support for defeating the "plain language" of §§ 703(a) and (d) is tenuous and read out of the context of H.R. Rep. No. 914, where the legislative history of Title VII is given.[50] Justice Rehnquist's reading of this legislative history would indicate that Congress intended only to eliminate "the most serious types of discrimination" against minorities.[51] This Congressional thrust would then create the leadership which others would follow--voluntarily and locally.[52]

In essence, while the majority reads the language of the legislative history expansively, allowing broad rein to the articulated aims of Congress in Title VII, Justice Rehnquist would truncate these aims and construe most narrowly the stated intentions of the legislature.

Concluding on the discordant note that the majority's legitimation of racial quotas is the sowing of the wind from which later courts will reap the whirlwind, Justice Rehnquist says that "[w]hether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another."[53]

Justice Rehnquist's reading of the legislative history does not resolve the question of the reach of Title VII in prohibiting employment discrimination. He points to no explicit prohibition of voluntary, race-conscious affirmative action.[54] While he does advance statements that various Senators had made in the course of debate on the proposed bill, nowhere can or does he show definitively that Title VII was designed to prohibit a plan of the Kaiser-USWA variety. Perhaps Rehnquist's main error is his failure to distinguish preferential treatment and compensa-

50. *Id.* at 229-30 n.11. *See also* note 59 *infra.*
51. *Id.* 443 U.S. at 229-30 n.11.
52. *Id.*
53. *Id.* at 254.
54. *Id.* at 237-43.

tory treatment. While he suggests repeatedly that Title VII was designed to correct racial discrimination in employment, nowhere does he show what steps other than nondiscrimination may be taken to accomplish this specifically articulated purpose of Title VII.[55] Such a myopic view of appropriate remedies in reverse discrimination suits is misguided. Rather than view the centuries of discrimination and oppression suffered by minorities as the evil deserving of correction, Justice Rehnquist has chosen to attack the use of numerical quotas, which has been to date the only effective means for ending some of the enduring effects of that discrimination. Justice Rehnquist resurrects the exhausted argument about the meaning of equality: whether its essence is equality of opportunity or equality of results. At no time does he recognize that opportunity may be determinatively influenced in a capitalist economy by intergenerational transmission of socio-economic advantage. In American society, such transmission occurs not only for families, but also for racial groups.

Robert Staples, a black scholar who has analyzed the nature of the influence of race and racism in American society, suggests one impact of the intra-racial intergenerational transmission of advantage.[56] Staples, a primary advocate of the view that blacks are an oppressed group in a racist society, indicates that race strongly determines a person's life chances in jobs, housing, education, health "and even life or death." Staples notes that racism is a justification and "symbol" for oppression which manifests itself in ghettoization and colonial subjugation. He sees much of the societal racism as a result of institutional racism, primarily benefitting the average white citizen by such arrangements (*e.g.*, the exclusion of blacks from fair and equal competition in access to occupations, education, housing, health and life itself). Although Staples defines majority groups as "the collective group of whites who benefit from minority subordination," he specifies

---

55. The critical evaluation of Justice Rehnquist's analysis may be taken a step further. Nondiscrimination, for Justice Rehnquist, may be defined as the equal treatment of majority and minority persons, treatment without regard to race in the employment process. For him, previous discrimination and attempts to correct it have no place in the endeavor to create equality now: only the present status of an applicant need be examined; the past is simply obliterated.

56. R. STAPLES, AN INTRODUCTION TO BLACK SOCIOLOGY 250 (1976) [hereinafter cited as STAPLES].

that this view does not mean that all whites actively discriminate against blacks. Nonetheless, by virtue of black exclusion from opportunities . . . white chances for benefits are automatically increased.[57]

Thus, if parity or at least proportionality is not achieved at some point in the hiring for jobs requiring a low level of skills which admittedly some persons from all groups, majority and minority, could perform, the hiring process should be examined in detail and modified. Such an examination would inquire into the causes and consequences of the particular disparity within a given industry, with an eye toward violations of specific sections of Title VII, the equal protection clause and the due process clauses. Indicated modifications would include any of the remedies, legal and equitable, which courts have employed in redressing racial discrimination.

III. More Arguments

A. The Legislative History

The argument over the "plain language" of Title VII[58] as opposed to the "legislative history" and "historical context" of the Act is instructive—even if it does not settle the question of what kinds of affirmative action programs Congress intended to allow. The argument juxtaposes the plain statutory language that declared discrimination an unlawful employment practice against the purpose and spirit of the Act.

The General Statement introducing the Legislative History of the Civil Rights Act of 1964 proclaims a broad interdiction of discrimination in American life.[59] Through the Equal Employment Opportunity Commission (EEOC) established under Title VII, Congress envisioned the use of "formal and informal remedial procedures" to eliminate racial discrimination in employ-

57. J.S. Bowen, Black Student Militance: Campus Unrest Among Black Students, 1968-72, 112-13 (1981) (Ph.D. Dissertation for Columbia University; available in Columbia University Library) [hereinafter cited as Bowen Dissertation].

58. For an opinion which demonstrates that *Weber* was not the first time the Court looked beyond the "plain language" of a statute to find its meaning, *see* NLRB (National Labor Relations Board) v. Allis-Chalmers Mfg. Co., 338 U.S. 175 (1967), a plurality opinion written by Justice Brennan in which Justice White concurred.

59. H.R. Rep. No. 914, 88th Cong. 2nd Sess. (1964) *reprinted in* 1964 U.S. Code Cong. & Ad. News 2393-94 [hereinafter cited as Legislative History 1964].

ment.[60] Enumerated in the Legislative History are the activities of employers, labor unions and apprenticeship programs which will constitute unlawful employment practices. When done because of an applicant's or employee's race, these unlawful employment practices include: the failure or refusal to hire; discharge; discrimination in compensation; restrictive and depriving limitations; segregation or classification of employees; discrimination against a Title VII grievant or a participant in an apprenticeship program; and advertisement of racial preferences.[61] Sections 704(a)-705(b) especially support the contention that the nature and extent of the prohibition against discrimination in employment is broad and comprehensive in the elaboration of unlawful practices. Section 714(b) provides a good faith defense to employers and other parties who act in reliance on written statements of the EEOC.

The minority report of the proposed Civil Rights Act of 1963[62] details the "parade of horribles" which some representatives foresaw as the consequences of passage of the Act.[63] Even from its incipiency, opponents of the bill abortively attempted to characterize it as a reverse discrimination measure. This cry of reverse discrimination would prove to be a favorite device of the opponents of affirmative action into the ensuing decades.[64]

Perhaps the most significant aspect of the Legislative History for our purposes here is the evidence presented of the lack of equal employment opportunity. Tables demonstrating (a) black and white unemployment rates for 1962, (b) occupational breakdown of black and white workers for 1948 and 1962, (c) median earnings for whites and blacks for a 21-year period beginning in 1939 and (d) employment by major occupational group 1960-75 show, for Congress, the history of discrimination in employment.[65] The picture presented is one of "overwhelming" evidence of discrimination and "straightjacket" impact.[66]

---

60. *Id.* Although the Legislative History names the Fair Employment Practices Commission (FEPC), subsequent legislation gave this function to the EEOC.

61. Legislative History 1964 *supra* note 59, at 2474, § 2401 *et seq.*

62. *Id.* at 2431-32.

63. For one listing of the "parade of horribles" consequent to the proposed Act, *see* Legislative History 1964, *supra* note 59, at 2433-34, 2439-41.

64. *Id.* at 2441.

65. *Id.* at 2513-14.

66. *Id.* at 2513-14.

The economic effect on blacks has been to force a large segment into "marginal existence" economically.[67] The Report also recognizes the secondary and recurrent effects of economic marginality in generating added costs for "unemployment insurance, relief, disease and crime."[68]

B. Judge Wisdom's Dissent

Circuit Judge Gee, affirming the district court for the majority in the Fifth Circuit decision, held that there was insufficient evidence to show employer past discrimination in the *Weber* case. Absent such evidence, the quota system violated the Civil Rights Act of 1964. According to Judge Gee, to the degree that Executive Order No. 11246[69] required discrimination, that Order must necessarily yield to the Congressional mandate against discrimination.[70]

Judge Wisdom dissented, pointing out initially that the majority did not assert that race may never be considered as a factor in employment decisions. The controversy was over whether the plan instituted by Kaiser Aluminum met the statutory and constitutional requirements for affirmative action programs.[71]

Judge Wisdom indicated "three independent legal justifications" for affirmative action programs like Kaiser's.[72] First, the plan was negotiated by the employer and the union. Given the duty of fair representation to both black and white workers and the fact that the membership majority of the union was white, union advocacy served as an effective check on any plan's unfairness.[73] Second, rather than require the replacement of white workers to accommodate blacks, the plan correctly applied a "rightful place" theory which prohibited future discrimination. Because "entirely new rights were created by the plan," no expectations of white incumbents were disappointed. No white workers lost their jobs. Rather, all employees were given new expectations by the new plan which allowed both black and white

67. *Id.* at 2514.
68.. *Id.* at 2515.
69. Section 202(1), 3 C.F.R. 169 (1974).
70. 563 F.2d at 227.
71. *Id.* (Wisdom, J., dissenting).
72. *Id.* at 228.
73. *Id.* at 232-33.

to be considered. Third, since the program was not exclusively for blacks, white participation was facilitated; the possibility of white participation increased the reasonableness of the plan.[74]

A fourth justification for the plan, which Judge Wisdom treated as tangential given the majority's refusal to discuss it at all, is an employer's decision to compensate victims of societal discrimination. Finding that Title VII does not require compensation for societal discrimination, Judge Wisdom argued that neither does it preclude it.[75] Although some other groups[76] could claim that at times they too have been discriminated against in American society, he observed that their inclusion would eviscerate the effectiveness of affirmative action programs for "blacks, Latin-Americans, Asian-Americans and women." As presently victimized groups, persons from these backgrounds would "start behind the other competitors" in any employment situation.[77]

Further, according to Judge Wisdom, Executive Order 11246 serves as justification for upholding the Kaiser program. In support of this proposition, Judge Wisdom indicated that Congress distinguished Executive Order programs from judicial remedies for proven discrimination. Hence, arguably, Executive Order program plans would not need to meet the requirement of such court-ordered plans.[78]

Judge Wisdom recognized that the use of race as a consideration to achieve an end to racial discrimination is "perilously close to self-contradiction."[79] In essence, his dissent is an eloquent and forceful statement supporting the validity of affirmative action programs of the Kaiser model.

IV. The Sociological Context: Unanticipated Consequences Of the Affirmative Action Remedy in Weber

The theory of unanticipated consequences of goal-oriented social behavior suggests that the effects of certain actions are unrecognized and considered improbable. The theory points to

74. *Id.* at 234.
75. *Id.* at 235.
76. *Id.* In this category, Judge Wisdom specifies "Americans of Irish, Italian, Jewish or German extraction."
77. *Id.*
78. *Id.* at 237-38.
79. *Id.* at 239.

the displacement of ends phenomenon where unintended outcomes are substituted for intended goals.[80] This theory signals the importance of the lack of motivation by the parties before the lower courts in *Weber* to present evidence of discrimination.[81] Since it was not to the advantage of any of the parties to the litigation at the trial or appellate levels to document past discrimination, such evidence as existed was not offered.

There were distinct reasons for the union, the company and Weber himself to omit or avoid a showing of prior racial discrimination at Kaiser-Gramercy. A showing of present or past discrimination against blacks would have weakened Weber's case, since his claim was that the extant racial discrimination was against him and other whites *qua* whites. Since a majority of union members were white, it would not have been in their interests to produce evidence supporting the thesis of past discrimination and thereby mitigating the legality (and morality) of their status quo positions. For the employer, it would have been especially disadvantageous to adduce evidence of past discrimination because such proof would leave Kaiser subject to suits by those discriminated against for back pay and other statutory remedies.[82]

Evidence of discrimination not considered by the trial court includes census data: the high unemployment rate of blacks as compared to whites in Louisiana—9.5% black unemployed; 4.7% white unemployed (Year 1960) and discrepancy in median income.[83]

Kaiser's most implausible argument—that it never discriminated—was not challenged. Nonetheless, there were several bases for asserting such a challenge. Among these were Kaiser's five-year prior experience requirement, typically fulfilled by work in the building trades—an industry known for its rampant discrimination. Others include the disparity in racial proportions

---

80. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 895-904 (1936).

81. The Department of Justice, the EEOC and the Department of Labor were not parties in the lower courts. They entered as intervenors or litigating amici subsequent to the appellate court decision.

82. Comment, *The Distorted Adversarial Posture of Title VII Affirmative Action Challenges*, 128 U. PA. L. REV. 1543, 1549 (1980) [hereinafter cited as Comment, *The Distorted Adversarial Posture*].

83. *Id.* at 1550.

between workforce and labor pool; and the reviews of the Atomic Energy Commission detailing the racially "disparate impact" of Kaiser hiring. All of these suggest illegal, post-Act (Title VII) discrimination. They further show that prior to the establishment of the affirmative action plan minority applicants were not considered for hiring.[84]

In sum, evidence of discrimination did exist. If this evidence had been given its due probative value, the lower courts would have found the Kaiser affirmative action program sufficiently justified as a remedy for past racial discrimination. Furthermore, the evidence would support a broader statement by the Supreme Court, holding that discrimination on these facts of *Weber* would have justified both voluntary and involuntary affirmative action programs.[85]

Although the *Weber* holding was limited to private employers by the Supreme Court, decisions in subsequent cases by lower courts have extended the *Weber* principles to the public sector. While pre-Title VII discrimination may be considered in a challenge to an affirmative action plan, if post-Title VII discriminatory actions can be proved the court may not recognize the narrow restrictions imposed by the Supreme Court on the extent of the *Weber* holding.[86] In addition, subsequent to the announcement of *Weber*, several courts have explicitly cited *Weber* in support of their decisions supporting affirmative action programs.[87]

Where evidence of specific employer past discrimination exists, the standard of proof should not require evidence of category-wide discrimination in a suit against a single employer. However, some interpretations of *Weber* would require specific

---

84. *Id.* at 1554.

85. While such a broad holding may have been somewhat redundant for constitutional purposes, given other holdings supporting involuntary affirmative action, the leadership potential of the broad holding will become apparent when it is given preclusive effect in future cases similar to *Weber*.

86. *See* Detroit Police Officers Assn. v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 453 U.S. 938 (1981).

87. *See* Maehren v. City of Seattle, 92 Wash. 2d 480, 599 P.2d 1255 (Wash. 1979) (upholding a Seattle Fire Department program); Tangren v. Wackenhut Services, Inc., 480 F. Supp. 539 (D. Nev. 1979) (upholding a voluntary program); Price v. Civil Service Commission of Sacramento County, 26 Cal. 3d 257, 604 P.2d 1365, (Cal. S. Ct. 1980); Chmill v. City of Pittsburgh, 488 Pa. 470, 412 A.2d 860 (Pa. S. Ct. 1980).

employer past discrimination.[88] Nonetheless, where no evidence of specific discrimination was shown within a category but where evidence of specific employer discrimination was found, *Weber* has been cited as authority for upholding a voluntary affirmative action plan.[89]

The question is sufficiently clear: is it not disproportionate to require categorical (throughout a particular job within an industry) discrimination when there is sufficient proof that a specific employer has discriminated—especially when the proposed remedy is merely and only to correct the direct injury caused by that employer's discriminatory actions? Why should not a requirement of industry-wide or occupation-wide proof of discrimination suggest an analogously industry-wide or occupation-wide remedy? New industries, such as the computer industry, which have expanded their job categories since the Act, may present great difficulty for a petitioner claiming discrimination to show "traditional segregation" in their relatively new job categories.

As the foregoing discussion demonstrates, the Supreme Court did not go as far as it could have in addressing the Kaiser Aluminum affirmative action plan. However, those on the other side of the issue argue that the Court went too far. To be sure, *Weber* arguably addressed more than the applicability of Title VII to the plan. Nonetheless, given the extent of discrimination extant at the plant, there were constitutional principles which were applicable not only in the *Weber* situation, but also to other remedies for discrimination including consent decrees, court-ordered affirmative action and public employment. One such principle is embodied in the argument that the *Weber* plan constituted unlawful state action in its hiring preference for minority persons. The counterargument is that the government had long been a party to the discrimination which the plan was designed to correct. Further scrutiny of these arguments as related to the principle of state action provides one illustration of the applicability of the Constitution to the issue.

---

88. *See* Comment, *The Distorted Adversarial Posture, supra* note 82, at 1546 n. 19 and text.

89. Mann, *Civil Procedure v. Civil Rights: The Plight of the Claimant in Employment Discrimination Cases*, 11 U. WEST L.A. L. REV. 69, 72 (1979).

V. THE "STATE ACTION" ARGUMENT

One analyst observes that "Weber did not seriously pursue a cause of action under the fifth amendment of the Constitution."[90] As part of his thesis that an equal protection requirement operates against what he sees as the "reverse discrimination" of the training plan in *Weber*, he would assert that the fifth amendment would bar race-conscious affirmative action which operates unequally for whites. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . . "[91] As a basis for his interpretation, the analyst cites a companion case to *Brown I*,[92] *Bolling v. Sharpe*,[93] holding that racial segregation in the District of Columbia school system was outlawed because of the unconstitutional deprivation of liberty of black school children.[94] Hence, the analyst, as do many who champion the arguments of reverse discrimination, wishes to use the very same principles as supported civil rights to argue that the only possibly effective strategy for diminution of employment discrimination discovered to date in America might be used to limit (what is in the view of many blacks) the exiguous economic progress of Black Americans. While the Supreme Court did not consider the implications of the fifth amendment in *Weber*, the analyst proposed that an examination of the facts of *Weber* invokes a fifth amendment-equal protection challenge to the decision in *Weber*. According to this view, inasmuch as the OFCC, the EEOC and the NLRB's (National Labor Relations Board) involvement with the USWA induced Kaiser to generate and initiate the Gramercy Plan, state action may be said to be present in *Weber*. The analyst attempts to posit, in his view, a stronger case of state action when he notes that Congress did not "specifically authorize" the *Weber* plan, which would insulate it from the special protection accorded Congressionally-authorized plans.[95] Under each of the various criteria

---

90. Note, *The Presence of State Action in United Steelworkers v. Weber*, 6 DUKE L. J. 1172 (1980) [hereinafter cited as *State Action*].

91. *Id.* (quoting U.S. CONST. amend. V).

92. Brown v. Board of Education, 347 U.S. 483 (1954).

93. 347 U.S. 497 (1954).

94. *State Action, supra* note 90, at 1172 n.3.

95. *Id.* at 1172-75. This analyst has noted three distinguishable types of possible "state action": 1) private performance of a government function, *see, e.g.*, Nixon v.

for state action, the analyst in "State Action" closely scrutinizes the *Weber* facts and decision, finding a labyrinthine but pervasive argument supporting his thesis that *Weber* involves state action inasmuch as the government was involved through the several named agencies. He injudiciously ignores, however, conflicting rights of minority claimants in employment discrimination contests. If such state action is present, the observer avers that, where sufficient, it may constitute the basis for a fifth amendment-equal protection challenge to the affirmative action plan scrutinized in *Weber*.[96]

One could argue, however, that since half the spaces in the Kaiser-USWA Plan are specifically reserved for whites, the program does indeed operate equally for whites. Nonetheless, the main argument opposing a reverse discrimination position is that the program's equality inheres in its compensatory nature: its attempt to redress the centuries of exclusion and segregation which have resulted in the present disadvantage of blacks.

State action arguments against affirmative action for minority advancement are misguided. Such attacks have been based on an ahistorical analysis which obliterates the long, pervasive, entrenched and inextricable involvement/collusion of the state for more than three centuries in the suppression of the rights of black people. Several periods of black history in America have been chronicled which may contribute to a critical evaluation of the role of blacks in American society today.

Only by historical amnesia, a purposeful forgetting of the vital role of the state in sustaining the oppressed and exploited position of blacks in American history and society, can such an attack be rationalized. Such a revision of history must necessarily negate the role of the state in sustaining the African slave trade, in maintaining the laws which upheld slavery and the return of fugitives, and in the *code noir*.[97]

Herndon, 273 U.S. 536 (1927); 2) judicial enforcement of a private agreement, *see, e.g.*, Shelley v. Kramer, 334 U.S. 1 (1948); and 3) involvement sufficiently significant with the conduct of a private defendant as to amount to "state action," *see, e.g.*, Burton v. Wilmington Parking Authority, 536 U.S. 715 (1961), Reitman v. Mulkey, 387 U.S. 369 (1967).

96. *State Action, supra* note 90, at 1175.

97. J. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF AMERICAN NEGROES 30-67, 85-119, 126-137 (4th ed. 1974) (on the institution of slavery and its nurturance of racism); R. Staples, *The Black Family in Evolutionary Perspective*, THE BLACK SCHOLAR,

Such a rewriting of history would require forgetting about the re-establishment of (white) Bourbon hegemony in the post-Civil War South.[98] This re-established dominance by whites in the middle nineteenth century set the pattern and practice for race relations in the South and perhaps the nation for the following hundred years. The post-slavery transformations of blacks from slaves to migrants to urban workers[99] must also be blocked out of America's collective memory if the anti-minority advancement myth of preferential treatment is to survive.

Moreover, the obliteration of the relationship of blacks to American society would require the elimination of any recall of the discrimination and segregations in the military service in both World Wars, and in the racially unequal distribution of federal sustenance during the Depression.[100] Continued discrimination is today evidenced by the successful discrimination suits in employment (for back pay, unequal hiring and unequal promotion). Other evidence of contemporary racism and discrimination abounds.[101]

The answer to the "state action" argument marshalled against the affirmative action plan in *Weber* and similar cases must go first and foremost to the historical context of affirmative action programs. The etiology of these programs was an attempt to remove the vestiges of the stigma of racial discrimination and domestic colonialism in this country.[102] Aiding victims of historical discrimination to achieve societal parity economically, educationally or socially may be a sufficiently "compelling" state interest to pass the special scrutiny to which courts

---

2, 3-9 (June 1974); THE IDEOLOGICAL ORIGINS OF BLACK NATIONALISM (Stuckey ed. 1972).

98. On the re-establishment of Bourbon Hegemony, *see* AFRO AMERICAN HISTORY: PRIMARY SOURCES 77 *et seq.*, 92 *et seq.* (Frazier ed. 1971). *See also* R. LOGAN, THE BETRAYAL OF THE NEGRO (1965).

99. For such evidence, *see* J. BLACKWELL, THE BLACK COMMUNITY (1975); R. HILL, THE STRENGTHS OF BLACK FAMILIES (1972); K. CLARK, DARK GHETTO (1965); R. STAPLES, THE BLACK FAMILY (1978); D. BELL, JR., RACE, RACISM AND AMERICAN LAW (1980).

100. AFRO AMERICAN HISTORY: PRIMARY SOURCES (Frazier ed. 1971).

101. *See* Bowen Dissertation, *supra* note 57, at 22 n.1.

102. For a careful documentation of racial discrimination and domestic colonialism as background to affirmative action programs, *see* Bowen Dissertation, *supra* note 57, at 111-43. *See also*, Turner, *The Black Community as Colony: An Argument For* (1970), Harris, *The Black Community as Colony: An Argument Against* (1972), and Carmichael and Hamilton, *White Power* 2-32 (1972) in INTRODUCTION TO AFRO-AMERICAN STUDIES (1978).

subject racial classifications.[103] Indeed, Justice Marshall and Justice Brennan believe that it is.

It has been argued that "reverse racial discrimination" may be constitutional:

> "[S]pecial scrutiny" is not appropriate when White people have decided to favor Black people at the expense of White people . . . . Whites can do things to Whites they could not do to Blacks . . . . It is not suspect in a constitutional sense for a majority, any majority, to discriminate against itself.[104]

Note that whether majority here is understood as sociological (read: power) or numerical, it makes little difference since in either case the controlling group decides to "prefer," i.e., compensate, others (non-controllers).

The question remains as to why it is not an equivalently appropriate test for the Supreme Court (with a black and several white Justices) to decide that within constitutional limits, compensatory treatment for past societal (or occupational) discrimination is in order. The role of deciding such questions is clearly appropriate to an antimajoritarian institution such as the Court under our constitutional scheme. As an arbiter of individual rights, the Court has increasingly seen itself as the primary safeguard for such rights.

If one accepts the historical argument (that there was slavery of blacks in America; that historically black education was opposed and discouraged *de jure, de facto* and informally with state action-imposed hardships), then one must see "bootstrapping" as having been denied, as forbidden, because blacks never had the "boots." In every decade, one can point to laws and social attitudes which precluded blacks from becoming part of mainstream America.[105] Even those who hold that only equal opportunity and not equal results is what the Constitution mandates must recognize the important role of parental socio-economic status for intergenerational mobility. That one's grandparents or great-grandparents or ancestors (to whatever

---

103. Ely, *The Constitutionality of Reverse Discrimination*, 11 U. CHI. L. REV. 723, 726-27 (1971).

104. *Id.*

105. *See* Bowen Dissertation, *supra* note 57, at 21-23 nn.1-11.

degree) had certain opportunities means that it is more likely than not that one comes into today's economic arena advantaged. To the degree that one's ancestors were denied opportunities, were systematically prevented (by the state) from using or developing them, then one comes into today's market disadvantaged. Hence, when blacks have made arguments about reparations[106] owed to blacks for contributions extorted in building this nation, compensatory treatment in the economic sector, *inter alia,* may be just what they had in mind. And, what is more, such treatment may be all that America is willing to provide in restitution.[107]

To be sure, the question is essentially settled when one considers the evidence of discrimination and the considerations of "state action" which were before Congress in 1963 and 1964 when it was deliberating on the proposed Civil Rights Bill. The evidence of discrimination which the Congressional committee itself characterized as "overwhelming" consisted of Department of Labor reviews of black employment over a twenty year period and median earnings during the same time for whites compared to blacks.[108] When the committee drafting the proposed bill reviewed the involvement of states and state apparatus in upholding discrimination, the support and advancement of the discriminatory treatment of minorities by private parties was found to have been augmented and embellished by such state activity.[109]

---

106. *See* Forman, *Black Manifesto* in THE CASE FOR BLACK REPARATIONS 161-75 (Bittker ed. 1973). For a major effort by a state to make reparations to its citizens albeit in a contemporary context, *see Brown Moves to Aid Japanese-American Interned in Wartime,* N.Y. Times, Aug. 19, 1982, at A21, col. 1.

107. One may contemplate various alternatives: 1) cash payments based on some formula calculating discrimination against ancestors or self; 2) preferential treatment for a period equal to the 300-400 year period of discrimination-slavery. Other formulations have suggested a separate nation with land in the South (five southern states, for instance); the promised "40 acres and a mule" calculated to 1985 dollars to guard against inflation. As with any of these formulations, some observers would see a problem in determining which contemporary individuals were sufficiently victimized (through their ancestors or selves) as to require such restitution. On these and other formulations, *see* BLACK SEPARATISM AND SOCIAL REALITY: RHETORIC AND REASON (Hall ed. 1977).

108. Legislative History 1964 *supra* note 59, at 2444, 2445 & 2459-60.

109. Comment, *The Distorted Adversarial Posture, supra* note 82, at 1543 and n.5.

VI. The Weber Legacy

Weber upheld the legality of private, voluntary, race-conscious imbalance in traditionally segregated job categories. However, *Weber* aided the elimination of only one segment of the most blatant variety of occupational discrimination: the conspicuous imbalance resulting from private discrimination based on race. Hence, although it upheld affirmative action programs designed to rectify this imbalance, *Weber* did not speak directly to several other types of affirmative action programs: 1) court-ordered affirmative action; 2) administratively generated affirmative action pursuant to compliance with Executive Order 11246 or EEOC guidelines; 3) affirmative action in governmental employment; or 4) affirmative action pursuant to consent decrees. In essence, *Weber* did not decide what constituted a "permissible" affirmative action plan.[110] Nonetheless, *Weber* has been cited in support of affirmative action programs in the public sector.[111] Most importantly, *Weber* did not decide what was constitutionally permissible with past proved discrimination. If affirmative action programs are theoretically designed to correct the present effects of present and past discrimination, for a court to act in an equitable and judicious manner the alleged discrimination must be proved sufficient to a clear and convincing standard to the satisfaction of a reasonable man. Therefore, while *Weber* left undecided the most central contemporary question of discrimination (i.e., what standard is to be applied for past proved discrimination and what remedy pursuant to this proof), it did provide some insight and guidelines for decisions on these issues.[112]

Two commentators have emphasized the divergence of the holdings in *Weber* and *Bakke* by pointing to the constitutional considerations of the latter.[113] The thesis may be proffered that since *Weber* did not consider constitutional questions, it may be necessary, given the homologous situation, to distinguish *Bakke* quite narrowly. Contrary to the statements of these commenta-

---

110. *Id.*

111. *See* notes 87-89 *supra* and accompanying text.

112. *See* note 116 *infra* and accompanying text.

113. Robertson and Johnson, *Reverse Discrimination: Did Weber Decide the Issue?* 31 Labor L. J. 693, 696 (1980) [hereinafter cited as Robertson and Johnson].

tors, the distinctions, that there was in *Bakke* a state-established quota system reserving places only for minorities as opposed to a voluntary, private, race-conscious affirmative action program as in *Weber*, may be more illusory than real. Indeed, if one considers that in *Bakke* evidence of actual discrimination might have been recognized (both the institution's history of minority exclusion and the medical profession's deficiency in minority inclusion in the context of the percentage of minority presence in California), then the omissions in *Weber* presented above are all the more crucial proof of the convergence.[114]

The significance of the *Weber* decision has been perhaps best characterized metaphorically by the observer who noted that after *Weber's* assault, affirmative action is like one who has been shot at and missed.[115] In essence, the lower courts came close enough with their decisions to maiming and wounding the victim (affirmative action programs) to count as a very near miss, so that such a program must know that it barely got away with its life and must now stand constantly vigilant, anticipatory of the next attempted onslaught.

Finally, the legacy of *Weber* is the ground rules established by the court for reviewing affirmative action programs. One may delineate the four *Weber* requirements which may serve as guidelines for redressing racial imbalances, as proffered by Justice Brennan: 1) an affirmative action plan may not "unnecessarily trammel the interests" of white employees; 2) a plan may not require that white workers be terminated and replaced with black employees; 3) a plan may not "create an absolute bar" to the advancement of white employees; 4) a plan may be only "temporary" until racial imbalance is corrected and may not be used only to "maintain racial balance."[116]

Observing that the Kaiser-Gramercy plan met all four of these requirements, one analyst further noted that rather than moving "too fast" to correct past inequities, the *Weber* plan would, at present rates, take 30 years to achieve the 39% parity

---

114. *See* Justice Marshall's eloquent but abortive dissent in *Bakke*, 438 U.S. at 387; *see also*, amicus curiae brief by NAACP.

115. Robertson and Johnson, *supra* note 113, at 696.

116. 443 U.S. at 208.

with minority labor force proportions for craft positions at Kaiser-Gramercy.[117]

These words, written in the summary of the legislative history, which now sound almost as empty platitudes, were given serious note at the passage of the Civil Rights Act of 1964:

> The United States is a nation of many peoples. The interests of some are not always the interests of all. In sustaining our way of life and in preserving our historic traditions, however, the fundamental rights of each citizen must be protected, and, in order for our Nation to maintain its role as world leader, the hopes and aspirations of minorities must always be safeguarded. The enactment of H.R. 7152,[118] while by no means a panacea, will be a significant beginning.
>
> Every segment of American life must bear a heavy burden in this epochal struggle. Congress must move rapidly—more rapidly than it has to date—to legislate intelligently and effectively in this critical area. The agencies of Government must strive more actively to enforce the law of the land. The courts—State and Federal—must exercise greater vigilance in guarding the interests of all the people. Each citizen must make a greater effort to respect the dignity of his fellow man.[119]

VII. Conclusion

At its broadest, *Weber* held that voluntary, race-conscious affirmative action programs for private employers are permissible under the law (Title VII of the 1964 Civil Rights Act), whether or not there has been a showing of prior (employer) discrimination where there has been a history of societal discrimination, either regional or occupational. The Court explicitly declined to decide either that this holding was applicable to public sector employment or that similar standards would be applied where there has been a bona fide showing of prior discrimination. Already, *Weber* has been applied by lower court judges who cite it as collateral authority for upholding affirmative action programs in public employment. The question remains as to

117. Robertson and Johnson, *supra* note 113, at 697.
118. H.R. 7152 was the proposed Civil Rights Act of 1964.
119. Legislative History 1964, *supra* note 59, at 2518-19.

what standard the Court will evoke when prior discrimination is proven, either state or private.

Inasmuch as the courts are restoring intent rather than effects (or consequences) as a basis of proof in some kinds of civil rights cases (e.g., voting cases), it should be perceptibly more difficult to establish the necessary grounds to prevail in these suits. Several cases[120] suggest that the Court has begun to retrogress from the position of supporting the civil rights advances of the Warren Years.[121] While arguably these cases do not all lie under the same constitutional clauses or statutory claims as would Title VII cases, the perception of a change and the arguable reality of change unfavorable to affirmative action is undesirable and perhaps ominous.

While the holding in *Weber* is a positive step, it also reflects a conservative expression within the Court which, on a societal issue of such burning importance, chose to abide by the time-worn precedent of deciding issues narrowly rather than giving clear and widely applicable guidelines to a nation highly divided on the proper role and place for affirmative action. The *Weber* legacy in its narrow decision is incongruous because all of black history in America, i.e., much of American history, must be forgotten (obliterated) for *Weber*, as a narrow precedent on the social problem of employment discrimination, to stand. If affirmative action is to be a viable, workable, and effective remedy for employment discrimination in this country, it cannot be so enervated as only to be a liquid paste of a solution when cement is needed . . . else the entire fabric of justice in this country may come further unraveled.

---

120. American Tobacco Co. v. Patterson, 456 U.S. 63 (1982); Guardians Ass'n of the N.Y.C. Police Dept. v. Civil Service Comm'n of N.Y.C., 633 F.2d 232 (2d Cir. 1980), *aff'd on other grounds*, 103 S. Ct. 3221 (1983); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

121. White v. Regester, 412 U.S. 755 (1973) which found a category of "minor" deviations in population equality requiring no justification. *See* Mobile v. Bolden, 446 U.S. 55 (1980) which overturned a holding that at-large elections diluted black voting strength. *See also* Pear, *Courts and Lawmakers Restoring Intent as Ground for Proof of Bias*, N.Y. Times, Apr. 19, 1981, § 1, at 18, col. 1.