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Constitutional Law: Equal Protection: Affirmative Action Plan Upheld Absent Prior Finding of Discrimination. (United Steelworkers v. Weber)

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NOTES

CONSTITUTIONAL LAW — Equal Protection — Affirmative Action Plan Upheld Absent Prior Finding of Discrimination. *United Steelworkers v. Weber*, 99 S. Ct. 2721 (1979). In *Regents of the University of California v. Bakke*,[1] the United States Supreme Court first set forth its views on an issue of increasing public controversy — affirmative action. Affirmative action is a recently developed concept which revolves around the precept of extending preferential treatment to minorities. An affirmative action plan is a special effort to increase the number of minorities in any particular program or job category. The plan often takes the form of a quota system, relaxed hiring standards, or increased recruiting of minorities. The goal of an affirmative action plan is to ameliorate the effects of past discriminatory practices.[2]

The *Bakke* decision[3] represented a somewhat confused approval of affirmative action. *Bakke* indicated that while racial considerations in formulating affirmative action plans were acceptable, quotas which explicitly excluded nonminorities were inappropriate.

However, the Court in *Bakke* failed to reach a consensus of opinion.[4] Justice Powell, who provided the deciding vote, stated that there is "a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[5] However, the admission program in *Bakke* was invali-

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1. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

2. *See generally* Harkins, *Affirmative Action: The Constitution, Jurisprudence and the Formulation of Policy*, 26 KAN. L. REV. 85 (1977); Renfrew, *Affirmative Action: A Plea for a Rectification Principle*, 9 SW. U.L. REV. 597 (1977).

3. In *Bakke*, a white male was denied admission to a medical school in two consecutive years. Bakke claimed that he was denied admission because of a special admissions program in which only minorities were considered for 16 of the 100 places in the entering class. In the two years Bakke applied, these minorities had had lower admission scores, on the average, than Bakke. On certiorari, the United States Supreme Court split on several issues. Five members of the Court agreed that the medical school's program was invalid and at least five members were of the opinion that race could be considered in future admissions processes.

4. For a comprehensive discussion of the various opinions filed in *Bakke*, *see generally* Tribe, *Perspectives on* Bakke: *Equal Protection, Procedural Fairness, or Structural Justice*, 92 HARV. L. REV. 864 (1979).

5. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

dated because it "involve[d] the use of an explicit racial classification"[6] designed to exclude nonminority applicants from a specified percentage of available seats.

Chief Justice Burger, Justices Stewart, Rehnquist and Stevens concurred in part and dissented in part. Their opinion focused on the statutory language of Title VI.[7] They wrote, "[T]he meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program."[8]

Justices Brennan, White, Marshall and Blackmun concluded that the admissions program was constitutional, stating that the university's "articulated purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic."[9]

The Supreme Court next faced the issue of affirmative action in *United Steelworkers v. Weber*.[10] In *Weber*, the Supreme Court clearly held that under Title VII of the Civil Rights Act of 1964,[11] private employers may voluntarily adopt race-conscious quota systems to abrogate the effects of past discriminatory practices.[12] No pattern of discrimination by the employer need be shown. Although *Weber* approved the use of quota systems to correct manifest racial imbalance in traditionally all-white job categories, the Court's decision should not be interpreted as a blanket approval of all affirmative action plans. The fundamental question was not addressed by the Court; that is, what are the limits of a permissible affirmative action plan.

Although the Court did not directly establish the limits of affirmative action programs,[13] three basic guidelines can be identified. Generally, affirmative action programs will be up-

6. *Id.* at 319.

7. 42 U.S.C. §§ 2000d to 2000d-4 (1976).

8. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 418 (1978) (Stevens, J., concurring in part and dissenting in part).

9. *Id.* at 362 (Brennan, J., concurring in part and dissenting in part).

10. 99 S. Ct. 2721 (1979).

11. 42 U.S.C. § 2000e-17 (1976).

12. United Steelworkers v. Weber, 99 S. Ct. 2721, 2730 (1979).

13. *Id.* at 2730.

held if they do not require the displacement of nonminority workers; do not unnecessarily intrude on rights of nonminority employees (*e.g.*, advancement); and the programs are instituted to correct a racial imbalance in the work force.

This note will examine these guidelines and analyze the probable impact of the *Weber* decision on future affirmative action plans. Since the majority view in *Weber* represents a departure from prior interpretations of Title VII, it must necessarily be examined in light of the history of Title VII. Additionally, the principles set forth by *Weber* will be contrasted with those established by *Bakke*.

I. *United Steelworkers v. Weber*

Respondent, Brian Weber, a white employee of Kaiser Aluminum & Chemical Corp., was denied admission to an on-the-job training program under a racial quota system by which majority and minority workers were admitted to a craft-training program on a one-to-one basis.[14] The quota voluntarily imposed by petitioner, Kaiser Aluminum & Chemical Corp., pursuant to its affirmative action obligations, resulted in the admission to the program of black employees with less seniority than white employees also seeking admission.[15] Weber brought a class action on behalf of himself and all other similarly situated employees arguing that the quota system violated section 703(a)[16] and 703(d)[17] of Title VII of the

14. Kaiser Aluminum and the United Steelworkers Union entered into a collective bargaining agreement which included an affirmative action plan designed to eliminate conspicuous racial imbalances in Kaiser's, then almost exclusively white, craft work forces by reserving for black employees fifty percent of the openings in the in-plant craft training programs until the percentage of minority craft workers roughly equaled the percentage of the minority population in the community surrounding the plant. Kaiser created a program to train production workers to fill craft openings, selecting trainees on the basis of seniority. To achieve its affirmative action goals, it was necessary to create dual seniority lists. During the first year of the plan, seven black and six white workers were selected from the plant production force. Most of the blacks selected had less seniority than several white production workers whose bids for admission were rejected. *Id.* at 2725-26.

15. *Id.* at 2725.

16. 42 U.S.C. § 2000e-2(a)(1976). Section 703(a) provides:

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

Civil Rights Act of 1964. The district court invalidated the program because Kaiser Aluminum failed to establish past hiring or promotion discrimination against minorities.[18]

The Fifth Circuit Court of Appeals affirmed,[19] holding that employment preferences based on race where no past discrimination was shown, including preferences incidental to bona fide affirmative action plans, violated Title VII's prohibition against racial discrimination in employment. The Supreme Court, however, in a five to two decision, reversed,[20] holding that Title VII does not prohibit race-conscious affirmative action plans. In upholding the Kaiser plan, the majority did not define the line of demarcation between permissible and impermissible affirmative action plans. Rather, the Court merely held this particular plan was permissible because no nonminority employees were discharged and nonminority interests were not "trammel[led]."[21]

II. *Bakke* VERSUS *Weber*

The results reached in *Bakke* and *Weber* appear to be contradictory. The former disapproves of the use of quotas, while the latter gives limited approval to quotas. However, factual and legal distinctions between the two cases justify the conflicting results.

The challenge to the affirmative action plan in *Weber* was premised on Title VII of the Civil Rights Act of 1964. The Court approved the plan holding that Title VII did not proscribe the voluntary institution of race-conscious programs.[22]

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17. 42 U.S.C. § 2000e-2(d) (1976). Section 703(d) provides: "It shall be an unlawful employment practice for any employer . . . controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training."

18. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

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

20. United Steelworkers v. Weber, 99 S. Ct. 2721 (1979). Justices Brennan, Stewart, White, Marshall and Blackmun joined the Court's opinion. Chief Justice Burger and Justice Rehnquist filed dissenting opinions. Justices Powell and Stevens took no part in the consideration or decision of the case.

21. *Id.* at 2730.

22. *Id.* at 2726-30.

On the other hand, the challenge to the admissions program in *Bakke* was premised on Title VI of the Civil Rights Act of 1964 and the equal protection clause of the fourteenth amendment.[23] This essential difference limits the rationale of *Weber* to cases in which a violation of Title VII is alleged.

The scope of the two statutes is markedly different. The prohibition of discrimination under Title VII applies to private parties,[24] while the provisions of Title VI apply only to public institutions receiving federal assistance.[25] Further, while the prohibition of race discrimination under Title VI is closely related to the equal protection clause of the fourteenth amendment,[26] the prohibition of race discrimination by private parties under Title VII is not directly related to any constitutional provision. The motivation behind Title VII was correction of a social problem. It was not an attempt to particularize or enforce any provision of the fourteenth amendment.[27] This distinction becomes particularly important in determining the overall applicability of *Weber* to equal opportunity law.

The statutory language of Title VI and Title VII illustrates

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23. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

24. Section 703(a)(1) states: "(a) It shall be an unlawful employment practice for an *employer* — (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color . . . ." 42 U.S.C. § 2000e-2(a) (1976) (emphasis added).

25. The relevant provisions of Title VI of the Civil Rights Act of 1964 are found in § 601: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, 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).

26. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 328 (1978) (Brennan, J., concurring in part and dissenting in part). Justice Brennan stated that

> Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment.

Id. Bell, *The Bakke Opinions and Equal Protection Doctrine,* 14 HARV. C.R.-C.L. L. REV. 327 (1979).

27. Senator Humphrey said in his speech introducing Title VII to the Senate: "The constitutional basis for title VII is, of course, the commerce clause . . . . [I]f Congress can prevent discrimination in employment on the basis of membership or nonmembership in a labor union, as it does in the National Labor Relations Act, it can prevent discrimination on the basis of race . . . ." 110 CONG. REC. 6548 (1964).

the different emphasis of two sections. Title VII specifically provides in section 703(j) that no employer will be required to preferentially treat any individual in order to correct a racial imbalance in the work force of a community.[28] Title VI has no comparable provision.

Furthermore, sections 703(a) and 703(d) of Title VII specifically refer to the regulation of the private sector while the language of Title VI refers to any program receiving federal assistance. In short, the literal prohibitions of Title VI and Title VII reflect their different origins, histories and concerns addressed. Consequently, because the basis of the *Weber* decision is inherently different from that of *Bakke*, *Weber* should be limited to programs arising under Title VII.

The *Weber* Court also distinguished *Bakke* on a factual basis. Since *Bakke* dealt with a state university receiving federal funds, the equal protection clause of the fourteenth amendment was a key area of dispute.[29] *Weber*, on the other hand, involved a private program with no governmental involvement. Therefore the proscriptions of the fourteenth amendment were not applicable.[30] This factual difference played a vital role in the Court's decisionmaking process.

What initially appears to be a liberal decision is rooted in conservative philosophy. The plan in *Weber* represented a voluntary effort by both employer and union to ameliorate past social injustice. They attempted, via collective bargaining, to formulate a private solution to a public problem. This principle of industrial self-determination was codifed in the

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28. The relevant provisions of Section 703(j) state:
Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, [or] color . . . 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, [or] color . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race, [or] color . . . in any community, State, section or other area . . . ." 42 U.S.C. § 2000e-2(j) (1976).

29. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978). Justice Powell observed in his majority opinion that "decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment." *Id.*

30. United Steelworkers v. Weber, 99 S. Ct. 2721, 2726 (1979). The Kaiser plan was a result of a collective bargaining agreement between Kaiser Aluminum and the United Steelworkers in which the federal government took no part. *Id.* at 2725.

National Labor Relations Act[31] and subsequently recognized by the Supreme Court.[32]

The Court in *Weber* viewed restrictions on all voluntary affirmative action programs as interfering with this principle of self-determination. Consequently, the *Weber* majority opted to refrain from interfering with private solutions to the problem of racial imbalance in some job categories. This public-private dichotomy not only aids in the distinction between *Weber* and *Bakke* but also explains the Court's decisionmaking rationale.

III. Prior Interpretation of Title VII

Title VII of the Civil Rights Act of 1964 provides that it is an unlawful employment practice for an employer to discriminate against any individual with respect to the terms, conditions, or privileges of employment, or to limit, segregate or classify his employees so as to deprive any individual of employment opportunities because of such individual's race, color, religion, sex, or national origin.[33] The first case interpreting this language was *Griggs v. Duke Power Co.*[34] In *Griggs,* the Court ruled that Title VII required the elimination of artificial barriers to employment that operate to discriminate on the basis of race.[35] *Griggs* indicated that the scope of relief under Title VII would be broadly interpreted by the courts.[36] This is exemplified in *Griggs* where the Court looked beyond practices facially neutral to find a Title VII violation when such practices acted to perpetuate prior discrimination.[37] However, the Court was careful to point out that there were restrictions on this broad remedial approach. Justice Burger stated, "Discriminatory preference for any groups, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of

31. 29 U.S.C. §§ 151-68 (1976).

32. Franks v. Bowman Transp. Co., 424 U.S. 747, 778-79 (1976); Ford Motor Co. v. Huffman, 345 U.S. 330, 342 (1953).

33. 42 U.S.C. § 2000e-2(a) (1976).

34. 401 U.S. 424 (1971).

35. *Id.* at 429-33.

36. *Id.*

37. Chief Justice Burger wrote: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431.

artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[38] The mandate in *Griggs* was subsequently ignored by the *Weber* majority.

Despite the broad scope of sections 703(a) and (d) of Title VII, judicial authority to impose remedies which include racial quotas is not clear.[39] Section 703(j) contains language which appears to prohibit the use of any preferential quotas. While a literal reading of 703(j) appears to prohibit the use of quotas, it has been interpreted to prohibit preferential treatment only when based solely on numerical racial imbalance where past discriminatory employment practice was not a factor. Where past discriminatory practices were established, the courts uniformly held that preferential treatment could be considered appropriate relief.[40] An illustrative case is *Rios v. Enterprise Association of Steamfitters, Local 638,*[41] in which the United States sought an injunction against the union from further discrimination against nonwhite workers. The Court of Appeals upheld a thirty percent fixed goal for union integration, stating that once a violation of Title VII is established, a district court has broad remedial powers to erase the vestiges of past discrimination.[42]

Although courts acknowledged their broad remedial powers once discrimination was proven, some courts criticized the use of quotas merely to correct racial imbalance where no prima facie case of discrimination was established.[43] In

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38. *Id.*

39. *See generally* Note, 12 GA. L. REV. 669 (1978).

40. Patterson v. American Tobacco Co., 535 F.2d 257, 273-74 (4th Cir. 1976); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 683-86 (7th Cir. 1972); United States v. Ironworkers Local 86, 443 F.2d 544, 552-53 (9th Cir 1971).

41. 501 F.2d 622 (2d Cir. 1974).

42. *Id.* at 629.

43. *See* Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Cox v. Allied Chem. Corp., 382 F. Supp. 309, 319 (M.D. La. 1974).

In Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972), the court stated:

> [T]hus, any classification based on race is suspect. Such classifications have been allowed by the courts, but *only to correct* past discriminatory practices. In the instant case there has been no showing that the classifications and discriminations on the basis of race to be put into effect . . . , are to be undertaken to correct past discrimination.

United States v. Wood, Wire, and Metal Lathers International Union, Local 46,[44] the court found evidence of past discrimination in the issuance of union work permits. While ordering the issuance of one hundred permits to minority workers the court expressed reservations about its ability to do so in all circumstances. The court wrote, "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not."[45]

In sum, although the courts recognized that preferential numerical treatment was permissible to correct effects of past discrimination, it remained an extraordinary remedy not appropriate in all cases.[46]

The Supreme Court again addressed Title VII in *McDonald v. Santa Fe Trail Transportation Co.*[47] In *McDonald*, the Court held that the protection of Title VII was not limited to members of any particular race.[48] Although *McDonald* clearly held that Title VII applies uniformly to all individuals regardless of race, the Court specifically reserved ruling on the appropriateness of affirmative action programs under Title VII.[49] This reservation helped the *Weber* majority to sidestep the express mandate of *McDonald*.

Before *Weber* only two lower courts addressed the issue of voluntarily instituted preferential hiring in an employment context.[50] *Reeves v. Eaves*[51] involved preferential treatment

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> No authority presently exists to uphold a practice which discriminates on racial or ethnic lines which is not being implemented to correct a prior discriminatory situation.

Id. at 250 (emphasis in original).

44. 471 F.2d 408 (2d Cir. 1973).

45. *Id.* at 413.

46. *See* note 37 *supra*. For a general overview of the key cases, *see* Jones, *Equal Employment Law in the Twenty-First Century*, 39 OHIO ST. L.J. 700 (1978).

47. 427 U.S. 273 (1976).

48. The Court stated in *McDonald* that "Title VII was intended to 'cover white men and white women and all Americans,' . . . . We therefore hold today that Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they [minorities]." *Id.* at 280 (citiations omitted).

49. *Id.* at 281 n.8. The *Weber* majority recognized that *McDonald* did not rule on the appropriateness of quotas under Title VII. 99 S. Ct. at 2726.

50. A third case, Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976), involved preferential treatment under which two women were selected for a faculty position before an equally or better qualified male. The district court held that the hiring plan of the university violated Title VII even though the program was

under which nonminority police officers were discriminated against in favor of less qualified minorities in order to create a racial balance on the police force. The district court held that affirmative action did not include unilateral discrimination by the police department in favor of less qualified applicants on the basis of race or the lowering of qualification standards so as to impair the department's overriding function of protecting persons and property. The court was explicit in its holding that if preferential action is necessary to overcome the effects of prior discrimination, it must come by court decree.[52]

In a similar case in California, *Anderson v. San Francisco Unified School District*[53] the district court addressed the permissibility of percentage quotas in promotion of school administrative personnel. Although *Anderson* was decided under Title VI, the fact that it arose within the context of a voluntarily instituted hiring program makes it relevant to the present discussion. Title VI did not play a crucial role in the court's reasoning, rather it simply applies because the school district was receiving federal funds.

The quota system in *Anderson* was designed to achieve ethnic balance in school administrative personnel approximating the racial and ethnic distribution of the total school popu-

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voluntarily instituted in compensation for alleged past societal discrimination in hiring women. The court felt that reliance upon preferential treatment to correct alleged past deficiencies in hiring constituted unconstitutional means to achieve constitutional ends. *Id.* at 678-79.

The Fourth Circuit Court of Appeals later vacated the district court's judgment and remanded the case for further findings of fact and conclusions of law in light of the *Bakke* decision. Cramer v. Virginia Commonwealth Univ., 586 F.2d 297 (4th Cir. 1978).

51. 411 F. Supp. 531 (N.D. Ga. 1976).

52. The same district court denied the employer's motion to stay a preliminary injunction of the preferential program. Reeves v. Eaves, 415 F. Supp. 1141 (N.D. Ga. 1976). In that case the court stated:

> There will be few who would challenge the proposition that, in view of their almost equal proportions in the city's population, the proportion of blacks to the total force should be larger. But reverse discrimination is not the answer. Affirmative action is permissible to eliminate and remedy the effects of past discrimination, otherwise discrimination on the basis of race is prohibited . . . .
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> There has been no finding of past discrimination in this case, . . . [b]ut, even assuming that point, preferential minority hiring is the province of the Court, not the defendant.

Id. at 1147-48 (citations omitted).

53. 357 F. Supp. 248 (N.D. Cal. 1972).

lation. Because of budget restriction, reduced enrollment, and the adoption of a freeze on administrative appointments by the school district, the quota acted as a bar to all nonminority advancement.[54] The court held that the white plaintiffs were being "systematically excluded from promotions, advancement, and compensation in their chosen profession solely on the ground of their race."[55]

In short, the lower court decisions dealing with voluntarily initiated preferential programs held the programs invalid absent a court order. But neither court specifically addressed the issue of whether any quota system voluntarily enacted was proscribed by Title VII.

IV. THE RATIONALE OF *Weber*

The import of *Weber* lies in its approval of voluntarily initiated preferential programs designed to remedy the absence of minorities in traditionally segregated job categories. The decision does not provide a blanket approval of quota systems. Further, the critical question of defining the limits of a permissible program was unanswered.

The *Weber* majority based its decision on the intent of the legislature in formulating Title VII.[56] Title VII was intended by Congress, the majority wrote, "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[57] The majority further relied on the statutory and judicial emphasis on voluntary conciliation under Title VII.[58] These two reasons led the majority in *Weber* to conclude that voluntarily instituted affirmative action programs were not violative of Title VII.[59]

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54. *Id.* at 253-55.

55. *Id.* at 253.

56. *See* United Steelworkers v. Weber, 99 S. Ct. 2721, 2727 (1979).

57. *Id.* at 2728 (quoting remarks of Sen. Humphrey, 110 CONG. REC. 6548 (1964)).

58. In Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974), the Court stated:

> [C]ooperation and voluntary compliance were selected as the preferred means for achieving this goal [equal employment opportunity]. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.

59. The Court in *Weber* wrote "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative

The main problem faced by the Court was reconciling certain sections of Title VII which seem to prohibit preferential treatment. The majority examined sections 703(a) and 703 (d) and concluded that the Court should look beyond their literal meaning to the intent of Congress.[60] In this manner, the majority circumvented any literal prohibition of preferential treatment in these sections.

The majority's largest obstacle was the language of section 703(j) which does *not* require employers to institute preferential treatment to correct racial imbalances. The Court held that although section 703(j) does not require preferential treatment, it did not proscribe voluntary imposition of a quota system.

The Court found the following language to be ambiguous: "Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment."[61] The ambiguity was whether the word "require" proscribed *voluntarily* imposed programs.[62] Having isolated the ambiguous language, the Court was then free to look to congressional intent.

It appears that the *Weber* majority reached their conclusion at the expense of past precedent. The majority failed to address their recent language in *Furnco Construction Corp. v. Waters.*[63] In *Furnco,* the Court stated "[i]t 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 proportionately represented in the work force."[64]

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prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarachy." 99 S. Ct. at 2728.

60. It is a generally accepted maxim of statutory interpretation that a court cannot look at legislative intent unless there exists some ambiguous language in the statute. J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 45.02 (4th ed. C. Sands 1975).

61. 42 U.S.C. § 2000e-2(j)(1976).

62. United Steelworkers v. Weber, 99 S. Ct. 2721, 2728-29 (1979).

63. 438 U.S. 567 (1978). In *Furnco* three black bricklayers had sought employment with petitioners, but two of them, although fully qualified, were not hired. The Supreme Court held that the policy of not training black bricklayers on the job was racially neutral since the policy applied to both blacks and whites.

64. *Id.* at 579 (emphasis in original). A similar idea was expressed by Justice Rehnquist in his dissent in *Weber.* United Steelworkers v. Weber, 99 S. Ct. 2721, 2736 (1979) (Rehnquist, J., dissenting). *See also* Sek v. Bethlehem Steel Corp., 421 F.

The factual similarity between *Furnco* and *Weber* indicates that *Furnco* should have been persuasive precedent in the *Weber* rationale. The failure to distinguish or reconcile *Furnco* leaves a gaping hole in the Court's reasoning. The *Weber* majority also failed to deal with the mandate of *Griggs v. Duke Power Company*[65] that discriminatory preference for any group was proscribed by Title VII.[66]

Both *Griggs* and *Furnco* clearly indicated that Title VII prohibited preferential treatment based solely on race. Since past discriminatory practices by the employer were not established in *Weber*, the accepted basis for approval of preferential treatment was lacking. Under pre-*Weber* standards the Kaiser plan constituted a discriminatory preference for a certain racial group. The majority's approval of the plan departed from prior case law.

The language of sections 703(a) and 703(d) is inconsistent with the Court's holding. Both sections appear to proscribe the very preference approved in *Weber*. Section 703(a) specifically prohibits the classification of employees in any manner which would deprive those employees of employment opportunity because of race.[67] The Kaiser plan concededly deprived some nonminorities of the opportunity to participate in the craft-training program. Justice Rehnquist, in dissent, felt the majority misread congressional intent. He felt that Title VII was not intended solely to protect minorities, but rather it was designed to apply to all individuals regardless of race.[68] Therefore he condluded that section 703(a) limited the type of preference involved in the Kaiser plan.

Section 703(d) states that an employer cannot discriminate

Supp. 983, 994 (E.D. Pa. 1976), *aff'd mem.*, 565 F.2d 153 (3d Cir. 1977); Frockt v. Olin Corp., 344 F. Supp. 369, 370-71 (S.D. Ind. 1972).

65. 401 U.S. 424 (1971).

66. *Id.* at 431.

67. *See* note 13 *supra.*

68. Justice Rehnquist wrote:

> In passing Title VII Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. With today's holding, the Court introduces into Title VII a tolerance for the very evil that the law was intended to eradicate, without offering even a clue as to what the limits of tolerance may be.

United Steelworkers v. Weber, 99 S. Ct. 2721, 2753 (1979)(Rehnquist, J., dissenting)(emphasis in original).

against any individual because of race in admission to any program established to provide appreticeship training.[69] The Kaiser plan did provide for preferential treatment in job-training programs. The literal meaning of section 703(d) provides that all discrimination in job-training programs is prohibited. This view that Title VII was intended to apply to all individuals, both minorities and nonminorities, is further supported by the *Furnco* and *Griggs* decisions.

V. Affirmative Action After *Weber*

Although the *Weber* Court approved the voluntary institution of affirmative action programs under Title VII, the fundamental question was unanswered — what are the permissible limits of such a program. The Court specifically withheld decision on the characteristics of a permissible or impermissible program.[70] This reflects the Court's attitude that Title VII cases should be decided in light of each particular fact situation. The most important legacy of *Weber* is that in determining whether an affirmative action plan is permissible, it will be appropriate to confine scrutiny to the program, and it is of little significance whether the program was voluntary or court-imposed.[71]

While the main difficulty posed by *Weber* is its failure to define the line of demarcation between impermissible and permissible programs, it is possible to develop a general prognosis for the future of affirmative action programs.

A voluntary quota system requiring the displacement of white workers in favor of minorities will likely be held impermissible. The most prominent recent cases where a court refused to uphold a quota system involved layoffs when such a quota would have meant that whites lost their jobs.[72] An affirmative action program is appropriate if it ensures that all persons are afforded the same opportunity or considered for benefits on the same basis, but the program will not be per-

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69. *See* note 14 *supra.*

70. United Steelworkers v. Weber, 99 S. Ct. 2721, 2730 (1979).

71. This same idea was expressed in Hollander v. Sears, Roebuck & Co., 450 F. Supp. 496, 502-03 (D. Conn. 1978).

72. Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977); Kirkland v. New York State Dep't of Correctional Servs., 520 F.2d 420 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976).

missible when it allocates a scarce resource such as jobs in favor of one race to the detriment of others.[73] This does not mean that nonminorities cannot endure some intrusion on their rights, rather it means that a system which directly displaces nonminorities is inherently unconstitutional. The courts have viewed Title VII as not imposing the duty on employers to demote or discharge incumbent job holders in order to make room for minorities who are victims of discrimination.[74]

The Supreme Court in *United Jewish Organizations v. Carey*[75] approved a reapportionment plan which used specific numerical quotas to establish a certain number of black-majority voting districts.[76] The Court reasoned that racial considerations if used in a purposeful manner were permissible because the plan would not impose any racial stigma on nonminorities.[77] An affirmative action program which specifically displaced nonminority workers would be imposing a racial stigma. Future affirmative action programs will likely not be permissible if they have the effect of displacing nonminorities.

The lower courts have developed a test to determine whether a program unconstitutionally displaces nonminorities. In *Kirkland v. New York State Department of Correctional Services*,[78] the court found a promotion examination discriminatory. But the court, in searching for a proper remedy, concluded that no one should be bumped from a preferred position on an eligibility list solely because of race.[79] Furthermore, the court formulated a test under which quotas would be jus-

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73. Flanagan v. Georgetown Univ., 417 F. Supp. 377 (D.D.C. 1976).

74. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 355 (1977); Patterson v. American Tobacco Co., 535 F.2d 257, 267 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

75. 430 U.S. 144 (1977).

76. In *Carey*, the State of New York redrew the voting lines in Kings County in order to enhance the opportunity for election of nonwhite representatives. The Court held that the fourteenth and fifteenth amendments mandate no per se rule against using racial factors in districting and apportionment. Permissible use of racial criterion is not confined to eliminating the effects of past discriminatory districting or apportionment.

77. *Id.* at 165. While *Carey* involved the Voting Rights Act of 1965, its discussion of racial stigmata is appropriate to a discussion of Title VII.

78. 520 F.2d 420 (2d Cir. 1975).

79. *Id.* at 429.

tifiable if their effects are not identifiable, in other words, not concentrated upon a relatively small, ascertainable group of nonminority persons.[80]

If a voluntarily imposed quota were permitted to displace nonminority workers, the impact upon that group would be direct, immediate and obvious. The key attribute of the plan in *Weber* is that there was no direct impact, *i.e.*, the effect of the plan was not concentrated upon an ascertainable group of white workers. Hence, the *Weber* Court has implicitly approved this trend toward avoiding the displacement of white workers. To date, no federal court has approved a quota system which displaces nonminority workers from their jobs.

A second consideration in the permissiblity of a quota program is the extent to which the program excludes nonminorities from participation in training programs and advancement. If the program excludes nonminority workers from participation and they are given little chance for advancement, the program approaches impermissible status. Most courts appear to favor a temporary preference for victims of past discrimination rather than an absolute, inflexible quota system which makes no allowance for employee merit, nonminority participation, and which may force an employer to hire less-qualifed workers.[81] The plan in *Weber* allowed reasonable participation by white workers and insured adequate opportunity for advancement. The impact upon the interests of nonminorities was not severe.

The effect of affirmative action programs on seniority rights established under a collective bargaining agreement has been the issue in a number of cases.[82] Some courts have up-

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80. *Id.* The court concluded that a hiring quota deals with the public at large, none of whose members can be identified individually in advance. But a quota placed on a small number of identifiable candidates only results in intensifying the effects of the quota upon a small identifiable group. *Id. See also* EEOC v. Local 638, 532 F.2d 821 (2d Cir. 1976); Hollander v. Sears, Roebuck & Co., 450 F. Supp. 496 (D. Conn. 1978).

81. *See* Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767, 773 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); EEOC v. Int'l Union of Elevator Constructors, Local No. 5, 398 F. Supp. 1237 (E.D. Pa. 1975), *aff'd*, 538 F.2d 1012 (3d Cir. 1976).

82. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); EEOC v. American Tel. & Tel., 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom.* Communications

held hiring quotas while striking down promotional quotas reasoning that promotional quotas have an impermissible discriminatory effect on nonminority seniority rights.[83] In *Anderson v. San Francisco Unified School District,* the quota system was held invalid because nonminorities had been excluded from any participation.[84] But, nonminority seniority rights have not been given absolute protection. The Supreme Court recognized in *International Brotherhood of Teamsters v. United States*[85] that the legitimate expectations of nonminority employees may be intruded upon to the extent necessary to correct the effects of discrimination. There must be a balancing of legitimate nonminority seniority rights with the goal of correcting the effects of past discriminatory practices.

The plan in *Weber* attempted to reach that balance by providing that no rights or expectations of nonminority workers were compromised unnecessarily. The 50-50 quota did intrude on expectations of some white workers but only to the extent necessary to correct the racial imbalance in the work force. In considering the permissibility of future quota systems, the participation of white workers and their opportunity to advance will be critical in gaining court approval.

In evaluating future affirmative action programs, the Court will likely avoid overly broad remedies which tend to trammel white interests. A relationship between the nature and scope of the remedy and the problem sought to be cured should be established.[86] The Court's analysis involves three basic inquiries: (1) Is the program conceived to cure a narrowly defined problem;[87] (2) Is the cause of the problem identified; (3) What

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Workers v. EEOC, 438 U.S. 915 (1978).

83. Kirkland v. New York State Dep't. of Correctional Servs., 520 F.2d 420, 429 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976); Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979, 1010-12 (E.D. Mich. 1978).

84. 357 F. Supp. 248 (N.D. Cal. 1972).

85. 431 U.S. 324 (1977).

86. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 300-01 (1978) and cases cited therein; Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977). *See also* Brief for Petitioner at 51-53, United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

87. *See* EEOC v. American Tel. & Tel., 556 F.2d 167 (3d Cir. 1977), *cert. denied sub nom.* Communications Workers v. EEOC, 438 U.S. 915 (1978); Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *cert. denied,* 431 U.S. 965 (1977). *See also* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 632 (2d Cir. 1974), where the court held that it would extend the preferential treatment remedy to mi-

are the consequences of failing to correct the problem. The Kaiser training program was conceived to cure the problem of minority absence in the craft program. The problem was limited to racial imbalance between the black population and the number of blacks in crafts. The cause of the problem was identified — namely the minority inability to meet minimum craft standards. Finally, a failure to correct the problem would probably lead to widespread claims of discrimination by black employees. In this sense, the courts should continue to require future affirmative action programs to be in response to a narrowly defined problem. A court will probably not design an overly broad remedy since that would increase the likelihood of injury to nonminority workers.

The final area of inquiry is to what extent a racial imbalance must exist in order to justify the use of an affirmative action program. The *Weber* majority was explicit in their support of temporary measures designed to maintain racial balance.[88] Prior to *Weber*, the Court addressed the issue of racial imbalance in *United Jewish Organizations v. Carey*.[89] The Court was explicit in its use of specific numerical quotas in establishing a certain number of black voting districts.[90] The permissible use of racial criteria was not confined to eliminating the effects of past discrimination but was directed toward eliminating a racial imbalance.[91] The Court did not define the degree of imbalance necessary to warrant the use of racial criteria. At best, a delicate balance must be struck in the use of quotas between the permissible elimination of racial imbalance and the involvement of the court in maintaining racial balance which would constitute reverse discrimination.[92] To approve of a program simply based on maintaining an anticipated future increase in the nonwhite percent of the population and work force would be to cross the line from lawfully remedying the effects of past discrimination to un-

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norities only to the extent that the minority had been discriminated against.

88. United Steelworkers v. Weber, 99 S. Ct. 2721, 2730 (1979).

89. 430 U.S. 144 (1977).

90. *Id.* at 161-62.

91. *Id.*

92. *See* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

lawfully attempting to maintain a racial balance.[93]

The *Bakke* decision also recognized a widespread racial imbalance between the number of minorities in law schools and the minority population in general.[94] The Court recognized that race could be a consideration in correcting this imbalance. Justice Brennan, in his concurring opinion, stated that a race-conscious program was permissible if the purpose of the program was to remove a disparate racial imbalance which can be attributed to society at large.[95] It is clear from Brennan's opinion that race-conscious measures must be a response to either past discriminatory practices or some type of racial imbalance. What is not clear is how much of an imbalance must exist. The most solid conclusion to be drawn from the case law is that a program instituted to maintain a racial balance would probably constitute an arbitrary preference for minorities without any real justification for its imposition.[96] Since a racial imbalance will have to exist, the question remains whether the Court will maintain a program when the imbalance is comparatively slight. It is still open to question how far the Court wanted to go in *Weber*. This is a key issue which awaits further decision in cases now moving toward the Court.

VI. CONCLUSION

It is evident from *Weber* that the Court has given its approval to the use of affirmative action quotas under Title VII. The Court has interpreted Title VII as allowing private, voluntary, race-conscious affirmative action plans. But *Weber* should not be viewed as approval for all types of quota systems. The Court limited its holding to a narrow statutory issue involving Title VII and merely stated that the Kaiser plan was permissible. Hence, *Weber* should be restricted only to its limited approval of voluntarily instituted programs. The

93. *See* Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974).

94. 438 U.S. 265 (1978).

95. *Id.* at 365-66 (Brennan, J., concurring in part and dissenting in part).

96. The *Weber* majority was explicit in its holding that some racial imbalance must exist in order to justify an affirmative action program. To what extent the imbalance must exist is open for debate. United Steelworkers v. Weber, 99 S. Ct. 2721, 2730 (1979).

Court was careful to point out that not every voluntarily instituted quota system is permissible.[97]

Prior to *Weber* the courts had required a showing of past discriminatory practices before a preferential remedy could be used. *Weber* has changed this perspective, and currently only a showing of some racial imbalance in traditionally segregated job categories is needed to justify preferential remedies. The disturbing factor in *Weber* was the Court's failure to deal with such past precedents as *Furnco* and *Griggs*. Because of this omission, *Weber* is difficult to reconcile with previous decisions which uniformly interpret Title VII as proscribing preferential treatment for any race, absent a showing of past discriminatory practices.

Even though the Court failed to define the boundary between permissible and impermissible programs, a few general guidelines have emerged. First of all, it is apparent that courts will not approve programs which require the displacement of nonminorities. Secondly, the courts will not approve overly broad remedies which have the effect of precluding white participation and advancement under the program. Finally, there must be some racial imbalance in the work force which the program is designed to correct. Whether courts will approve a quota system which is designed to correct only a slight imbalance is still awaiting decision. Consequently, the permissibility of any affirmative action program will be judged on an ad hoc basis.

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97. The *Weber* majority, by stating that the Kaiser plan was permissible, also implied that there may be some voluntarily imposed quotas which are impermissible. The majority did not state whether the Kaiser plan was middle-of-the-road or bordering on impermissibility. Because of this lack of guidance, it is difficult to speculate on what factual variations will make a program invalid. *Id.* at 2728-30.