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Abrogation of the Principle of Nondiscrimination - The Advent of Voluntary, Race-Dependent, Preferential Treatment in Employment

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financial position, unable to attract capital or maintain their financial integrity. The utility pointed to certain indicia as evidence of this contention, including the fact that the company had had to borrow money in order to pay dividends.[69] The court countered this argument with the observation that borrowing money is a routine business transaction undertaken in order to raise capital to meet various costs, including not only the payment of dividends, but wages and other expenses as well.[70] Pointing out that Gulf States still enjoyed an AA bond rating and that the company would earn a 13.84% return on equity without the rate increase, the court dismissed the end result argument.[71] Although the court's assessment of the situation in the instant case may be correct, it is submitted that continued refusal to allow earnings on CWIP will bring about the financial crisis Gulf States portrayed.

The United States has for several years been experiencing an economy of inflationary spirals and a dwindling of energy resources, and there are no indications that either of these trends will reverse in the foreseeable future. Unlike free enterprises, regulated industries are unable to respond naturally to the laws of supply and demand in order to weather the storm. Their economic viability rests with the regulatory agencies; a faithful discharge of the agencies duties requires realistic recognition of these trends. Once adopted, this realistic viewpoint will surely entail a reassessment of the traditional treatment of CWIP.

James Winston Pierce, Jr.

ABROGATION OF THE PRINCIPLE OF NONDISCRIMINATION — THE ADVENT OF VOLUNTARY, RACE-DEPENDENT, PREFERENTIAL TREATMENT IN EMPLOYMENT

Pursuant to a collective bargaining agreement,[1] the Gramercy, Louisiana plant of Kaiser Aluminum & Chemical Corporation insti-

69. 364 So. 2d at 1272.
70. *Id.* at 1273.
71. *Id.*

1. Effective on February 1, 1974, the master collective bargaining agreement entered into by the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation included an affirmative action plan designed to eliminate conspicuous racial imbalances then present in Kaiser's almost exclusively white craft work forces. The plan removed the requirement of prior craft experience for on-the-job training and

tuted an in-plant craft training program. During the first year of the agreement's operation, seven black and six white employees were selected for the program. The most junior black trainee selected had less seniority than several white production workers whose applications for admission were rejected. Brian Weber, one of the rejected white workers, instituted a class action suit in federal district court,[2] alleging that because the affirmative action[3] program of the collective bargaining agreement had resulted in junior black workers receiving craft training in preference to more senior white employees, he and other similarly situated white employees had been discriminated against in violation of Title VII of the Civil Rights Act of 1964.[4] Affirming the district court judgment,[5] the Court of Ap-

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established an entrance ratio of one minority worker to one white worker until the percentage of minority craft workers approximated the percentage of minority population in the local work force. Eligibility for training continued to be determined by plant seniority, but to implement the affirmative action goal it was necessary to establish dual seniority lists: for each two training vacancies, one white and one black worker would be selected on the basis of seniority within their respective racial groups. The pertinent portions of the collective bargaining agreement provide:

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

Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 763 (E.D. La. 1976).

2. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976).

3. The Kaiser-United Steelworkers affirmative action plan was neither a court-imposed plan nor was it developed as part of a consent decree after an administrative investigation. The plan was adopted to avoid future litigation and to comply with the requirements of the Office of Federal Contract Compliance Programs under Executive Order 11246, which requires all applicants for federal contracts to refrain from employment discrimination and to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin . . . ." 3 C.F.R. § 202(1) (1974), *reprinted at* 42 U.S.C. app. § 2000e (1976).

4. 42 U.S.C. §§ 2000e to 2000e-17 (1976). Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) (1976), provides:

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

peals for the Fifth Circuit held that all racially-based employment preferences, absent prior hiring or promotion discrimination, including preferences incidental to affirmative action programs, violate the prohibition of Title VII against racial discrimination in employment.[6] The United States Supreme Court reversed and *held* that Title VII of the Civil Rights Act of 1964, which expressly prohibits discrimination "because . . . of race"[7] in hiring and admission to on-the-job training programs, does not condemn all private, voluntary, race-conscious affirmative action plans. *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).

The concepts of affirmative action and reverse discrimination[8]

Section 703(d) of Title VII, 42 U.S.C. § 2000e-2(d) (1976), provides:

> 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.

5. The district court held that the affirmative action quota system violated sections 703(a) and (d) of Title VII, entered judgment for the plaintiff class, and granted an injunction. Furthermore, the district court concluded that since the black employees being preferred over more senior white employees had never themselves been the subject of any unlawful discrimination during hiring, they occupied their "rightful place" in the plant. Thus, the affirmative action quota system was inappropriate and violated the unequivocal prohibitions against racial discrimination against any individual contained in sections 703(a) and (d) of Title VII of the Civil Rights Act of 1964. 415 F. Supp. at 769. For a full discussion of the "rightful place" and "freedom now" doctrines as they relate to fictional seniority, *see* United States v. Local 189, United Papermakers & Paperworkers, 282 F. Supp. 39 (E.D. La. 1968), *aff'd*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

6. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977). The fifth circuit held that the evidence was insufficient to show that Kaiser had been guilty of any prior hiring or promotion discrimination and, absent such past discrimination, the affirmative action quota system implemented by Kaiser and the Steelworkers union violated sections 703(a) and (d) of Title VII of the Civil Rights Act of 1964. *Id.* at 224. Furthermore, the court of appeals concluded that if Executive Order 11246 mandates a racial quota for admission to the Kaiser training program, then the Executive Order must fall before the direct congressional prohibition embodied in the explicit language of section 703(d), which specifically prohibits racial classification in admission to on-the-job training programs. *Id.* at 226. The decision of the fifth circuit ultimately rested upon what it viewed to be a proper distinction between permissible affirmative action and unlawful reverse discrimination. *Id.* at 219. *See generally* Note, *The Use of Racial Preferences in Employment: The Affirmative Action/Reverse Discrimination Dilemma*, 32 VAND. L. REV. 783 (1979).

7. See note 4, *supra*.

8. *See generally* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Husak, *Preferential Hiring and Reverse Discrimination in Favor of Blacks: A Moral Analysis*, 23 AM. J. JURIS. 143 (1978). As in the instant case, the argument in the past against "reverse discrimination" has been that Title VII prohibits such racial preferences for minorities because those preferences discriminate

can be viewed as outgrowths of the constitutional and statutory principle of nondiscrimination.[9] Since the Reconstruction amendments were enacted after the Civil War, the nation has been committed by constitutional mandate to the principle of nondiscrimination. The fifteenth amendment expressly reflects this principle,[10] and, with the enactment of the Civil Rights Act of 1866, Congress extended the principle of nondiscrimination into the thirteenth amendment.[11] The fourteenth amendment guarantees that no state shall deny any citizen equal protection of the laws.[12] Reaching beyond its initial interpretation that the fourteenth amendment protected only blacks,[13] the Supreme Court has expansively construed[14]

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against whites on the grounds of race. *See, e.g.*, Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977) (court-imposed quotas altering seniority system held to be unlawful reverse discrimination).

9. Nondiscrimination is a principle of generally disapproving practices and classifications that are race-dependent. *See* Note, *supra* note 6, 787. A proper distinction between permissible affirmative action and unlawful reverse discrimination has persistently resisted clear delineation due to the interaction of the concepts. A charge of reverse discrimination emerges only in reaction to some antecedent affirmative action which results in a race-dependent preference in favor of a minority. *Id.* For a discussion of decisions and practices that depend on the race of the parties affected, *see* Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).

10. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

11. Ratified in 1865 to abolish slavery, the thirteenth amendment encountered postbellum Southern resistance in the form of state statutes which deprived the freed slaves of their legal and civil rights. Pursuant to section 2 of the amendment (which gave Congress the power to enforce the guarantees of the amendment by "appropriate" legislation), Congress enacted the Civil Rights Act of 1866. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982 (1976)). Since the constitutionality of the Act was in doubt, and to insulate it from repeal, Congress enacted the fourteenth amendment which was ratified in 1868. *See* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1329 (1952). The enforcement power to section 5 of the fourteenth amendment enabled Congress in 1870 to re-enact *in toto* the 1866 Act. Act of May 31, 1870, ch. 114, § 18, 16 Stat. 144. *See* Casper, *Jones v. Mayer: Clio, Bemused and Confused Muse*, 1968 SUP. CT. REV. 99, 123. *See also* Note, *Federal Power to Regulat Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 452 (1974). The decision of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), is indicative of how the principle of racial nondiscrimination has been extended into the thirteenth amendment by the Civil Rights Act of 1866. The *Jones* Court held that 42 U.S.C. § 1982, a codified version of the 1866 Act, "bars *all* racial discrimination, private as well as public, in the sale or rental of property, and . . . is a valid exercise of the power of Congress to enforce the Thirteenth Amendment." 392 U.S. at 413 (emphasis in original).

12. The equal protection clause provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

13. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

14. *See, e.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Skinner v. Oklahoma, 316

the language of the equal protection clause, holding that race-dependent classifications are constitutionally suspect[15] and require strict scrutiny. The principle of nondiscrimination is also a core concern of most state fair employment laws[16] and federal civil rights legislation, including the Civil Rights Act of 1964.[17] As the fundamental federal law embodying the principle of nondiscrimination as it applies to employment relationships, Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer, employment agency, or labor union to "discriminate against any individual" in hiring, promotion, or other employment relationships for reasons of "race, color, religion, sex, or national origin."[18]

Proponents of affirmative action concepts have argued that the legislative history of the Civil Rights Act of 1964 emphasizes congressional concern with discrimination against minorities[19] and congressional intent to make available opportunities which traditionally had been denied to minorities.[20] It is argued that the language[21] and

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U.S. 535 (1942). *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

15. McLaughlin v. Florida, 379 U.S. 184, 192 (1964); *see* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

16. A majority of the states have enacted fair employment practice legislation. Alabama, Arkansas, Louisiana, Mississippi, and North Dakota do not have fair employment laws. For the text and citations of the laws, *see* 8A BUREAU OF NATIONAL AFFAIRS, FAIR EMPLOYMENT PRACTICES MANUAL 453:1 (1977). For a comprehensive study of the coverages and exemptions provided by state fair employment laws, *see* Bonfield, *The Substance of American Fair Employment Practices Legislation*, (pt. 1) 61 NW. U.L. REV. 907 (1967); (pt. 2) 62 NW. U.L. REV. 19 (1967). *See also* P. NORGREN & S. HILL, TOWARD FAIR EMPLOYMENT (1964); M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 19-60 (1966).

17. 42 U.S.C. §§ 2000e to 2000e-17 (1976). In *Diaz v. Pan American Airways*, 442 F.2d 385, 386 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971), the fifth circuit stated that "the purpose of the [Civil Rights Act of 1964] was to provide a foundation in the law for the principle of nondiscrimination." *See also* Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (1978) ("The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.").

18. 42 U.S.C. § 2000e-2(a)(1) (1976).

19. *See* 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey).

20. *See, e.g.*, Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 952-54 (1978); Brest, *supra* note 9, at 31-43; Deutsch, *The Jurisprudence of Affirmative Action: A Post-Realist Analysis*, 65 GEO. L.J. 879, 880 (1977); Ely, *supra* note 8.

21. Title VII provides that "informal methods of conference, conciliation, and persuasion" are to be employed to eliminate unlawful employment practices. 42 U.S.C. § 2000e-5(b) (1976).

legislative history of Title VII provide evidence that Congress intended to create an atmosphere conducive to voluntary compliance[22] with the national policy of nondiscrimination as a primary requisite to the success of the legislation.[23] However, the Supreme Court in *McDonald v. Santa Fe Trail Transportation Co.*,[24] interpreted Title VII as mandating color-blind[25] decisions and concluded that it makes unlawful any plan that creates a race-dependent preference except as a make-whole remedy[26] for victims of a particular employer's past discrimination. Such a construction of Title VII—that remedial use of quotas is lawful—has led to charges of reverse discrimination.[27] But the Supreme Court has rejected attacks on affirmative action

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22. The House Report accompanying the Civil Rights Act of 1964 indicates that Congress did not intend to forbid all forms of private, voluntary affirmative action. The Report provides:

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

H.R. REP. NO. 914, 88th Cong., 1st Sess. 18 (1963).

23. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). In *Alexander*, the Supreme Court described the legislative history of Title VII as follows:

> Congress enacted Title VII . . . to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. . . . In the Equal Employment Opportunity Act of 1972 . . . Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.

Id. at 44.

24. 427 U.S. 273 (1976).

25. In affirming a general principle of color-blindness, the Supreme Court held that the 1866 and 1964 civil rights acts protect white as well as black employees against racially discriminatory disciplinary discharges. *Id.* at 280 & 287. Noting that it was not determining the permissibility of an affirmative action program, the Court stated: "Santa Fe disclaims that the actions challenged here were any part of affirmative action program, . . . and we emphasize that we do not consider here the permissibility of such a program, whether judicially required or otherwise prompted." *Id.* at 281 n.8.

26. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 767-68 (1976). *See also* Albermarle Paper Co. v. Moody, 422 U.S. 405, 418-21 (1975).

27. *See generally* N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); REVERSE DISCRIMINATION (B. Gross ed. 1977); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 367-88 (1966).

plans when the programs creating race-dependent preferences were judicially imposed[28] or approved in consent decrees.[29]

Interpretation of Title VII has created additional discord because of the seemingly contradictory provisions of section 703(j),[30] which states that employers are not to be required to give race-dependent, preferential treatment on account of a de facto racial imbalance in the employer's work force, and section 706(g),[31] which vests in the courts broad remedial powers to order equitable relief for substantive violations. While court-imposed affirmative action quota relief had been upheld on the grounds that section 703(j) does not apply once prior discrimination is found,[32] until the *Weber* decision it was uncertain whether voluntary, race-conscious affirmative action plans were permissible.[33]

In considering the question of whether Title VII permits employers and unions in the private sector to voluntarily take race-dependent steps to eliminate manifest racial imbalances in traditionally segregated job categories, the Supreme Court in *Weber* held that Title VII does not prohibit such race-dependent affirma-

28. *See* Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). The lower courts have not hesitated to impose remedial affirmative action quotas. *See, e.g.*, Rios v. Enterprise Assoc. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (*en banc*), *cert. denied*, 419 U.S. 895 (1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir.) (*en banc*), *cert. denied*, 406 U.S. 950 (1972).

29. A consent decree involves no proof of prior discrimination as a prerequisite for affirmative action. *See* EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir.), *cert. denied*, 438 U.S. 915 (1978). Consent decrees generally assume the form of an agreement by the defendant to cease the activities asserted to be illegal by the government. Upon court approval of such an agreement, the government's action against the defendant is dropped. A consent decree binds only the consenting parties and is not binding upon the court. BLACK'S LAW DICTIONARY 370 (5th ed. 1979).

30. 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 . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of any race . . . employed by any employer, . . . or in the available work force . . . .

31. Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1976), provides: "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate."

32. *See, e.g.*, Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767 (2d Cir.), *cert. denied*, 427 U.S. 911 (1976); Rios v. Enterprise Assoc. Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

33. 99 S. Ct. at 2729.

tive action programs.[34] Furthermore, while noting that the express language of sections 703(a) and (d) of Title VII makes it unlawful to "discriminate . . . because of . . . race"[35] in hiring and in the selection of apprentices for training programs,[36] the Court held that the prohibition in sections 703(a) and (d) of Title VII against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action programs.[37]

At the outset of the majority opinion written by Justice Brennan,[38] the *Weber* Court emphasized the narrowness of its inquiry.[39] Since no state action was involved in the 1974 collective bargaining agreement, the case did not present an alleged violation of the equal protection clause of the Constitution.[40] Furthermore, the private, voluntary nature of the affirmative action plan enabled the Court to restrict the scope of its inquiry.[41] Thus, the Court expressly stated that it was not concerned with what Title VII requires or with what relief a court might impose to remedy a past violation of Title VII.[42] The only question the Court addressed was the limited statutory issue of whether Title VII *forbids* private employers and unions from voluntarily adopting affirmative action programs that accord race-dependent preferences.[43]

Express statutory language of sections 703(a) and (d) of Title VII

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34. *Id.* at 2725.

35. See note 4, *supra*.

36. 99 S. Ct. at 2726.

37. *Id.* at 2730.

38. Justice Brennan was joined by Justices Stewart, White, Marshall, and Blackmun to form the majority. Justice Blackmun also filed a concurring opinion. Chief Justice Burger filed a dissenting opinion. Justice Rehnquist filed a dissenting opinion in which the Chief Justice joined. Justices Powell and Stevens did not participate in the consideration or decision of the case.

39. 99 S. Ct. at 2726.

40. The lack of an alleged violation of the equal protection clause enabled the *Weber* Court to base its decision on statutory interpretation of Title VII. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justices Brennan, White, Marshall, and Blackmun opined that voluntary, race-dependent preferences as remedial actions are not violative of the equal protection clause. Justice Powell asserted that the preferential treatment in that case was a violation of equal protection. Justice Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist did not reach the equal protection issue because of their finding that Title VI was violated. This four-four-one decision left many reverse discrimination questions unanswered, but did foreshadow the Court's decision in *Weber*. Although *Bakke* was not a Title VII action, in their concurring opinion, Justices Brennan, White, Marshall, and Blackmun expressed the view that voluntary, race-dependent preferences as remedial actions do not violate Title VII. *Id.* at 352-55.

41. 99 S. Ct. at 2726.

42. *Id.*

43. *Id.*

makes it unlawful to "discriminate . . . because of . . . race" in hiring and in the selection of apprentices for training programs.[44] To overcome this literal manifestation of congressional intent embodied in the plain language[45] of Title VII, the Court declared that "[t]he prohibition against racial discrimination in §§ 703(a) and (d) of Title VII must therefore be read against the background of the legislative history of Title VII and the historical context from which the Act arose."[46]

The historical context[47] giving rise to the enactment of Title VII of the Civil Rights Act of 1964 encompassed a complex of motives,[48] chief among which was doubtless a desire to enhance the relative social and economic position of American blacks.[49] Few contemporary domestic problems have received more scholarly attention[50]

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44. See note 4, *supra*.

45. Undoubtedly, when dealing with a statute, the function of a court is to ascertain and effectuate the intention of the legislature. One way in which the courts have dealt with the intention of the legislature has been to apply the "plain meaning rule," which has as its essential aspect a denial of the need to "interpret" unambiguous language. Applying this "rule" in *United States v. Missouri Pacific Railroad Co.*, 278 U.S. 269, 278 (1929), the Court asserted that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." In an earlier decision the Court had stated:

> If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning. . . . [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source.

Caminetti v. United States, 242 U.S. 470, 490 (1917). For a discussion of the application of this rule by modern courts, *see* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975). *But see* Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2 (1939).

46. 99 S. Ct. at 2727. To support its method of statutory interpretation, the Court relied on the statement that "[i]t is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.'" *Id.*, *quoting* Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

47. For an interesting discussion of the historical context from which Title VII arose, *see* Schlei, *Foreword* to B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vii (1976).

48. President Kennedy thought the legislation was needed to stem "a rising tide of discontent that threatens the public safety." 109 CONG. REC. 11,174 (1963).

49. *See* Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113 (1971).

50. *See, e.g.*, O. ASHENFELTER & A. REES, DISCRIMINATION IN LABOR MARKETS (1973); J. FRANKLIN & I. STARR, THE NEGRO IN TWENTIETH CENTURY AMERICA (1967); H. NORTHRUP & R. ROWAN, THE NEGRO AND EMPLOYMENT OPPORTUNITY (1965); A. ROSS & H. HILL, EMPLOYMENT, RACE, AND POVERTY (1967).

than the depressed economic status of black Americans.[51] Accordingly, there is no reason to dispute the *Weber* Court's conclusion that the primary concern of Congress in enacting the prohibition against racial discrimination in Title VII was "the plight of the Negro in our economy."[52] Although the assessment by the *Weber* Court of the historical context surrounding the enactment of Title VII is in accord with events of those days, the Court's interpretation of the statute and its legislative history "seizes every thing from which aid can be derived"[53] to support its conclusion that an interpretation of Title VII upholding Weber's claim would "bring about an end completely at variance with the purpose of the statute."[54]

The Court recognized the force[55] of Weber's argument that race-dependent, affirmative action quotas are prohibited by the plain language of sections 703(a) and (d) of Title VII[56] combined with the *McDonald* holding that Title VII forbids discrimination against whites as well as blacks.[57] Since the challenged affirmative action plan was voluntarily adopted by private parties and had as its purpose the elimination of traditional patterns of racial segregation, the Court concluded that Weber's reliance upon a literal construction of sections 703(a) and (d) combined with the holding in *McDonald* was misplaced.[58] To support such a conclusion in the face of clear and unambiguous statutory language in Title VII, the Court relied upon its interpretation of the statute[59] and an extremely selective reading of the legislative history of Title VII. Emphasizing that the "purpose" of Title VII divined from seemingly newly discovered[60] legislative history should control over the extraordinary clarity of the statutory language, the Court prefaced its "interpretation" of Title VII by stating: "It is a 'familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not

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51. *See* Note, *supra* note 49, at 1113.

52. 99 S. Ct. at 2727. In his dissenting opinion, Justice Rehnquist agreed with the majority that "the reality of employment discrimination against Negroes provided the primary impetus for passage of Title VII." 99 S. Ct. at 2740 (Rehnquist, J., dissenting).

53. United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

54. 99 S. Ct. at 2727.

55. *Id.* at 2726.

56. See note 4, *supra*.

57. See text at notes 24-26, *supra*.

58. 99 S. Ct. at 2726.

59. *Id.* at 2727.

60. In *McDonald*, the Court concluded from the "uncontradicted legislative history" that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes." 427 U.S. at 280.

within its spirit nor within the intention of its makers.'"[61] Under the rubric of statutory interpretation, the Court radically reconstructs Title VII, apparently to achieve what it regards as a proper result.[62]

Investigation of the legislative history of Title VII to divine the "purpose of the statute,"[63] as the five Justices[64] of the *Weber* majority perceived it, prompted one of the five, Justice Blackmun, in his concurring opinion to state that he shares "some of the misgivings expressed in Mr. Justice R[ehnquist]'s dissent . . . concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today."[65] Such misgivings regarding the

61. 99 S. Ct. at 2727. The Supreme Court quoted from an 1892 opinion, *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), as authority for this "rule." Ironically, *Holy Trinity Church* has been discussed as an illustration of the application of the "golden rule" of literalism in statutory construction. *See* Coffman, *Essay on Statutory Interpretation*, 9 MEM. ST. U.L. REV. 57, 65 (1978).

The *Holy Trinity Church* maxim cited by the Court was applied originally in a case in which a disputed contract was found to be within the letter of the statute under consideration. 143 U.S. at 458. However, the *Holy Trinity Church* Court construed the statute as inapplicable in light of the result to which a literal application of the statute would lead. *Id.* at 459.

62. For a discussion of result-oriented statutory interpretation, *see* Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). Professor Radin has suggested that an interpretation of a statute should take into consideration only its results. A desirable result will be "what satisfies the social emotions of the judge, what fits into the ideal scheme of society which he entertains." *Id.* at 884.

63. 99 S. Ct. at 2727.

64. In *Weber*, Justice Stewart joined the four Justices who in their concurring opinion in *Bakke* reasoned that findings of specific discrimination are not necessary as long as the beneficiaries of the affirmative action are within a class of persons who have suffered from discrimination in society at large. *See* 438 U.S. at 372-73. See note 40, *supra*.

65. 99 S. Ct. at 2730-31 (Blackmun, J., concurring). Justice Blackmun stated that "the passages marshaled by the dissent are not so compelling as to merit the whip hand over the obvious equity of permitting employers to ameliorate the effects of past discrimination for which Title VII provides no direct relief." *Id.* at 2734. However, Justice Powell in *Bakke* had addressed the absence of jurisprudential support for the fashioning of such remedies for societal discrimination by stating that the Court had never approved such schemes for "persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." 438 U.S. at 307. Only after such findings have been made does the governmental interest in preferring members of the injured group become substantial, "since the legal rights of the victims must be vindicated." *Id.* Not only must the extent of the injury and the consequent remedy require judicial, legislative, or administrative definition, but the remedial action "usually remains subject to continuing oversight to assure that it will work the least harm to other innocent persons competing for the benefit." *Id.* at 308. Otherwise, the result would be "to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. This is a step we have never approved." *Id.* at 310.

result reached by the Court are founded in a recognition of what appears to be the obvious—the Court need not have resorted to legislative history to discover what is apparent from the face of the statute.[66] Since sections 703(a) and (d) unambiguously and unequivocally forbid employers from discriminating because of race in hiring and in the selection of apprentices for training programs,[67] the racially discriminatory, affirmative action quota at issue is flatly prohibited by the plain language[68] of Title VII. However, this normally dispositive fact did not prevent the Court from deciding that Title VII does not forbid private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord race-dependent preferences.[69] This result was achieved by resorting to a questionable reading of legislative history and by focusing on the use of only the word "require" rather than the words "require or permit" in section 703(j)[70] of Title VII.

While rejecting a literal construction of sections 703(a) and (d), the *Weber* Court favored a version of legislative history which led it to a conclusion diametrically opposed to that compelled by the "uncontradicted legislative history"[71] developed in *McDonald* and other prior decisions. In *Griggs v. Duke Power Co.*,[72] the Court's first opportunity to interpret Title VII, a unanimous Court observed that "[t]he objective of Congress in the enactment of Title VII is plain

66. See note 45, *supra*. In *United States v. Oregon*, 366 U.S. 643 (1961), the Court stated: "Having concluded that the provisions of [the section] are clear and unequivocal on their face, we find *no need* to resort to the legislative history of the Act." *Id.* at 648 (emphasis added). In another case, *Gemsco, Inc. v. Walling*, 324 U.S. 244 (1945), the Court, per Justice Rutledge, concluded: "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Id.* at 260. Justice Vinson, as organ of the Court in *Ex Parte Collett*, 337 U.S. 55 (1949), relied upon the *Gemsco* rule when he stated: "The short answer is that there is no need to refer to the legislative history where the statutory language is clear. . . . This canon of construction has received consistent adherence in our decisions." *Id.* at 61.

67. See note 4, *supra*.

68. See note 45, *supra*.

69. 99 S. Ct. at 2726.

70. See note 30, *supra*.

71. McDonald v. Sante Fe Trail Transp. Co., 427 U.S. at 280. In his concurring opinion in *Weber*, Justice Blackmun charged the dissent with "[failing] to take proper account of our prior cases that have given that history a much more limited reading than that adopted by the dissent." 99 S. Ct. at 2733 (Blackmun, J., concurring). While the passages cited by Justice Blackmun from *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-36 (1971), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 349-51 (1977), arguably support his limited reading of legislative history, these same passages again demonstrate congressional concern for the principle of nondiscrimination embodied in Title VII.

72. 401 U.S. 424 (1971).

from the language of the statute"[73] and furthermore, "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[74] The statutory principle of nondiscrimination was emphasized once more in *Trans World Airlines, Inc. v. Hardison*,[75] in which the Court stated that "[t]he emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin."[76] The Court further added: "The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities."[77] Additionally, until *Weber* was decided, the Court's language in *Furnco Construction Corp. v. Waters*[78] seemed dispositive of the question raised by *Weber*. The *Furnco* Court stated that "[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."[79] Thus, from an examination of pre-*Weber* jurisprudence it is evident that the Supreme Court had been consistent in its interpretation that the statutory language and legislative history of Title VII "prohibits *all* discrimination in employment, without exception for any particular employees."[80] Contrary to these prior statements, the *Weber* Court concluded that the legislative history of Title VII indicating congressional concern with minority employment frees employers to discriminate on the basis of race to alleviate the effects of traditional patterns of racial segregation which have resulted in manifest imbalances in certain job categories.

As further support for its holding, the Court examined the wording of section 703(j)[81] of Title VII and inferred that "Congress chose not to forbid all voluntary race-conscious affirmative action."[82] Section 703(j) provides that nothing contained in Title VII "shall be interpreted to require any employer . . . to grant preferential treat-

73. *Id.* at 429.
74. *Id.* at 431.
75. 432 U.S. 63 (1977).
76. *Id.* at 71.
77. *Id.* at 81.
78. 438 U.S. 567 (1978).
79. *Id.* at 579 (emphasis in original).
80. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 283 (emphasis in original).
81. See note 30, *supra*.
82. 99 S. Ct. at 2729.

ment . . . to any group because of the race . . . of such . . . group on account of"[83] a de facto racial imbalance in the employer's work force. From this language, the Court argued that section 703(j) contains a "negative pregnant"[84] that allows employers to do what sections 703(a) and (d) expressly forbid employers from doing. The Court declared that "[t]he section does *not* state that 'nothing in Title VII shall be interpreted to *permit*' voluntary affirmative efforts to correct racial imbalances."[85] To the contrary, the Court concluded, this word choice compels the inference that "Congress chose not to forbid all voluntary race-conscious affirmative action."[86]

Rather than adhering to the plain-meaning rule of statutory construction,[87] the *Weber* Court consulted the legislative record and concluded that the selection of the word "require" rather the words "require or permit" was a result of a compromise between proponents of Title VII and its opponents who traditionally resisted federal regulation of private business.[88] The argument advanced by the Court focused on portions of legislative history that revealed the fears of the opponents of Title VII that section 703 would be interpreted in such a way as to interfere with management prerogatives and union freedoms and lead to undue government interference with private business decisions.[89] Based upon this view of legislative history, the Court reasoned that "a prohibition against all voluntary, race-conscious affirmative action efforts would . . . augment the powers of the Federal Government and diminish traditional management prerogatives."[90] Therefore, the conclusion drawn by the Court was that the "use of the word 'require' rather than the words 'require or permit' in § 703(j) fortifies the conclusion that Congress did not intend to limit traditional freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."[91]

Instead of strengthening the argument for race-dependent preferences, the shift in emphasis from the explicit prohibitions

83. 42 U.S.C. § 2000e-2(j) (1976).

84. *See* 99 S. Ct. at 2735 (Burger, C.J., dissenting).

85. 99 S. Ct. at 2729 (emphasis in original).

86. *Id.*

87. The plain meaning rule of statutory construction was reiterated by the Court in a decision only nine days removed from the *Weber* decision. United States v. Rutherford, 99 S. Ct. 2470 (1979). In *Rutherford*, the Court stated that "[w]hen construing a statute so explicit in scope, a court must act within certain well-defined constraints. If a legislative purpose is expressed in 'plain and unambiguous language, . . . [the] duty of the courts is to give it effect according to its terms.'" *Id.* at 2475. See note 45, *supra*.

88. 99 S. Ct. at 2729.

89. *Id.*

90. *Id.*

91. *Id.*

against racial discrimination of sections 703(a) and (d) toward a focus upon language not present in section 703(j) actually weakens the majority position.[92] Section 703(j) was added to the bill which ultimately became law to define and clarify the scope of Title VII's substantive prohibitions.[93] Unlike sections 703(a) and (d), section 703(j) is specifically directed at enforcement entities—federal agencies and courts—charged with the responsibility of interpreting Title VII.[94] Opponents of the civil rights bill did not argue that Title VII would permit voluntary, race-dependent preferential treatment by employers to correct racial imbalance.[95] As Justice Rehnquist noted in his dissent, "[t]he plain language of the statute too clearly prohibited such racial discrimination to admit of any doubt."[96] They argued, however, that Title VII would be construed by enforcement authorities to require employers to achieve a racial balance in their work force by granting race-dependent preferential treatment. Supporters of the civil rights bill responded that Title VII would not be so interpreted because it does not permit preferential treatment of any race.[97] To quieten the opposition, section 703(j) was added to the civil rights bill to enjoin the enforcement entities from construing Title VII to require an employer to grant race-dependent preferential treatment to correct racial imbalances in his work force. However, section 703(j) "says nothing about voluntary preferential

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92. After a thorough examination of legislative history, Justice Rehnquist stated that

> [c]ontrary to the Court's analysis, the language of § 703(j) is precisely tailored to the objection voiced time and again by Title VII's opponents. Not once during the 83 days of debate in the Senate did a speaker, proponent or opponent, suggest that the bill would allow employers *voluntarily* to prefer racial minorities over white persons.

99 S. Ct. at 2748 (Rehnquist, J., dissenting) (emphasis in original).

93. *See* H.R. 7152, 88th Cong., 1st Sess. (1963). Supporters of Title VII proposed the carefully worded amendment to the bill to put to rest the opposition's charge that Title VII would be applied by federal agencies in such a way that "some kind of quota system will be used." 110 CONG. REC. 8619 (1964) (remarks of Sen. Sparkman).

94. *Compare* section 703(a) at note 4, *supra* ("It shall be an unlawful employment practice for an employer"), *with* section 703(j) at note 30, *supra* ("Nothing contained in this subchapter shall be interpreted").

95. *See, e.g.*, 110 CONG. REC. 13,077 (1964) (remarks of Sen. Ervin); *id.* at 13,149 (remarks of Sen. Russell).

96. 99 S. Ct. at 2752 (Rehnquist, J., dissenting).

97. Representative Lindsay noted that "this bill does not require quotas, racial balance, or any of the things that the opponents have been saying about it." 110 CONG. REC. 15,876 (1964). Moreover, Representative McCollugh emphasized this understanding when he remarked that "[t]he bill does not permit the Federal Government to require an employer or union to hire or accept for membership a quota for persons from a particular minority group." *Id.* at 15,893.

treatment of minorities because such racial discrimination is plainly proscribed by sections 703(a) and (d)."[98]

Without defining in detail the line of demarcation between permissible and impermissible affirmative action plans, the *Weber* Court held that the challenged affirmative action plan "falls on the permissible side of the line."[99] Several factors enabled the Court to conclude that this plan "falls within the area of discretion left by Title VII to the private sector."[100] The fact that the affirmative action plan was "a temporary measure,"[101] which was "voluntarily adopted by private parties to eliminate traditional patterns of racial segregation,"[102] was relied upon by the Court to uphold the challenged preferential treatment. Thus, three criteria emerge from the approach used by the *Weber* Court to approve race-dependent preferences: the affirmative action plan must be a temporary plan, voluntarily adopted, and designed to end traditional segregation.

The Court's characterization of the plan[103] as a temporary measure[104] is misleading. Far from being a temporary measure, the plan, as implemented, will require years of preferential selection of craft trainees before the percentage of black skilled craft workers approximates the percentage of blacks in the local labor force.[105] Furthermore, the testimony of the industrial relations superintendent at the Gramercy plant[106] disputes the *Weber* Court's assertion that

98. 99 S. Ct. at 2752 (Rehnquist, J., dissenting). Justice Rehnquist noted that had Congress intended to except voluntary, race-dependent preferential treatment from the explicit prohibition on racial discrimination in sections 703(a) and (d) it could have so drafted with express language as it did in section 703(i):

> "Nothing contained in [title VII] shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

Id.

99. 99 S. Ct. at 2730.

100. *Id.*

101. *Id.*

102. *Id.* at 2726.

103. See note 1, *supra*, and accompanying text. The "Joint Committee" established a goal of thirty-nine percent as the percentage of minorities that must be represented in each "craft family" at the plant. 415 F. Supp. at 764.

104. 99 S. Ct. at 2730.

105. As implemented, the Kaiser-United Steelworkers affirmative action plan will require an estimated thirty years to achieve the goal of at least thirty-nine percent minority representation in each craft family. Once the present goal is achieved, new quotas are planned to perpetuate the program. Address by Michael R. Fontham, attorney for Brian Weber, *Phi Alpha Delta* Chapter, Law Center, Louisiana State University (Oct. 3, 1979).

106. At trial, Dennis E. English, industrial relations superintendent at the Gramercy plant, testified:

> Once the goal is reached of 39 percent, or whatever the figure will be down the

preferential selection of craft trainees at the Gramercy plant will end as soon as the required percentages are achieved.[107]

Since the instant affirmative action plan was adopted through collective bargaining by the employer and the union,[108] the Court deemed the plan to be "voluntary." However, the voluntary nature of the plan is questionable[109] when the following facts underlying its adoption are considered: the Office of Federal Contracts Compliance[110] was exerting pressure on Kaiser's Gramercy, Louisiana, plant because of the small percentage[111] of blacks among its skilled workers, and Title VII actions had arisen at two other Kaiser plants in Louisiana.[112] The question raised by the *Weber* Court, but not decided, is that of what is "voluntary" affirmative action.[113]

Scant reasoning was put forward by the Court to support its argument that because the challenged affirmative action plan was designed to "eliminate manifest racial imbalances in traditionally segregated job categories"[114] the plan is not forbidden by Title VII.

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road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage. The idea being to have a minority representation in the plant that is equal to that representation in the community work force population.

99 S. Ct. at 2738 n.3 (Rehnquist, J., dissenting).

107. 99 S. Ct. at 2730.

108. *Id.* at 2724.

109. *See* 99 S. Ct. at 2749 (Rehnquist, J., dissenting).

110. The Office of Federal Contract Compliance (OFCC), subsequently renamed the Office of Federal Contract Compliance Programs (OFCCP), is an administrative agency of the Department of Labor which is responsible for ensuring compliance by government contractors with the requirements of Executive Order 11246, 30 Fed. Reg. 12,319 (1965), *as amended by* Exec. Order 11375, 32 Fed. Reg. 14,303 (1967), *and by* Exec. Order 12086, 43 Fed. Reg. 46,501 (1978). Executive Order 11246 requires all government contractors to "take affirmative action to ensure that applicants are employed, and the employees are treated during employment, without regard to their race, color, religion, sex or national origin." 3 C.F.R. § 202(1) (1974), *reprinted at* 42 U.S.C. app. § 2000e (1976).

Under Executive Order 11246, the Secretary of Labor is empowered to issue rules and regulations necessary to achieve its purpose. The Secretary of Labor has delegated most enforcement duties to the OFCCP. 563 F.2d at 218 n.3.

111. Prior to the 1974 Labor Agreement only 1.83% (5 out of 273) of the skilled craft workers at the Gramercy plant were black. 99 S. Ct. at 2725.

112. See the background facts of *Weber* listed by Stephen M. Booth, attorney for Kaiser Aluminum & Chemical Corp., in [1979] 101 LAB. REL. REP. (BNA) 358-60.

113. It may be that an affirmative action plan adopted as a result of pressures from the OFCCP is not converted into a non-voluntary plan. Furthermore, it remains to be seen whether actions taken as a result of pressure from the EEOC or actions filed under Title VII, such as consent decrees and conciliation agreements, are voluntary within the meaning of *Weber*. Perhaps the only non-voluntary affirmative action plan is a court-ordered one. *See id.* at 359.

114. 99 S. Ct. at 2725.

As read by the Court, the legislative history demonstrated that "it was clear to Congress that 'the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them.'"[115] Notwithstanding the principle of nondiscrimination, the Court concluded that it was to the problem of "manifest racial imbalances in traditionally segregated job categories"[116] that "Title VII's prohibition against racial discrimination was primarily addressed."[117] That the Court's foremost concern was furthering social policy it deemed desirable cannot be doubted in light of the Court's reflection that

> [i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.[118]

The apparent effect of the Court's result-oriented[119] interpretation of Title VII is to permit race-dependent, preferential treatment in affirmative action plans whenever a job category is "traditionally segregated."[120] It appears that the Court included in its category of "traditionally segregated" any job in which there has been a societal history of purposeful exclusion of blacks resulting in a manifest racial imbalance between the proportion of blacks in the labor force and the proportion of blacks with jobs in that category.[121] This expansive approach to affirmative action is absolutely inconsistent with the principle of nondiscrimination applicable to blacks and whites alike.

The sequence of race-dependent, preferential affirmative action that motivated Brian Weber to bring suit for reverse discrimination evidenced a practical problem in the administration of Title VII. If Title VII is read literally, its broad prohibition against all discrimination in employment[122] clearly upholds the principle of nondiscrimination. However, before *Weber*, employers and unions, on the one hand, faced liability for past discrimination against blacks and, on the other hand, faced liability to whites for any voluntary, race-dependent preferences adopted to lessen the effects of historic dis-

115. *Id.* at 2728.
116. *Id.* at 2725.
117. *Id.* at 2728.
118. *Id.*
119. See note 62, *supra.*
120. 99 S. Ct. at 2730.
121. *See* 99 S. Ct. at 2732 (Blackmun, J., concurring).
122. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 283.

crimination against blacks. Thus, they were placed on "a high tightrope without a net beneath them."[123] By abrogating the principle of nondiscrimination, the *Weber* Court has removed the potential liability under Title VII of employers and unions to whites for reverse discrimination.

The *Weber* Court enables the employer to redress discrimination that arose wholly outside the bounds of Title VII, which provides no remedy for pre-Act discrimination.[124] The Court approved a plan designed to remedy historic discrimination that has resulted in a "conspicuous racial imbalance in traditionally segregated job categories."[125] Such discrimination may have entirely predated the Act. Moreover, the Court gauges the employer's potential for affirmative action strictly on the basis of a statistical disparity.[126] Thus, the employer need not have engaged in any acts of past discrimination. Although a statistical disparity may support a prima facie case against an employer,[127] a mere disparity previously would have been insufficient to conclusively prove a violation of Title VII.[128] Furthermore, in pre-*Weber* assessments of a prima facie case under Title VII, the composition of the employer's work force would have been compared to the composition of the pool of workers possessing valid job qualifications.[129] However, the rationale of the *Weber* Court is that when historic discrimination has created "traditionally segregated job categories,"[130] the pool of qualified applicants will reflect the results of segregation. Thus, under an expansive approach to Title VII, the *Weber* Court permits a comparison with the composition of the labor force as a whole, with its higher minority representation.

Although considerations of equity support an interpretation of Title VII that enables private employers to voluntarily adopt affirmative action programs designed to uplift the status of minorities, no form of voluntary affirmative action that violates the principle of nondiscrimination, which is the "heart and soul of Title VII as currently written,"[131] can achieve truly equitable results "by permitting employers to discriminate against some individuals to give preferen-

123. 563 F.2d at 230 (Wisdom, J., dissenting).

124. Hazelwood School Dist. v. United States, 433 U.S. 299, 309-10 (1977).

125. 99 S. Ct. at 2730.

126. *Id.* at 2725 & 2728 n.4.

127. Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977).

128. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339-40 n.20 (1977); *see* Civil Rights Act of 1964, § 703(j), 42 U.S.C. § 2000e-2(j) (1976).

129. Hazelwood School Dist. v. United States, 433 U.S. at 308 & n.13; International Bhd. of Teamsters v. United States, 431 U.S. at 339-40 & n.20.

130. 99 S. Ct. at 2730.

131. 99 S. Ct. at 2735 (Burger, C.J., dissenting).

tial treatment to others."[132] For the sake of responding to the "spirit" of Title VII to reach what the present majority of the Court deemed to be a desirable result, the *Weber* Court has rewritten Title VII to overcome the prohibition against *all* discrimination based on race embodied in the plain language of the statute and has founded its decision on a legislative history in which there are no explicit statements that warrant this radical reconstruction of Title VII. With the *Weber* decision, the Court has introduced into Title VII a tolerance for discrimination based upon race, the very evil that Title VII's drafters sought to eradicate. Moreover, by declining to define precisely "the line of demarcation between permissible and impermissible affirmative action plans,"[133] the *Weber* Court has placed few limits on its tolerance for abrogating the principle of non-discrimination. The *Weber* decision frees future courts to divine the "spirit" of Title VII directly against its plain statutory language and previously "uncontradicted legislative history"[134] apparently all for the sake of achieving what is deemed to be a socially desirable result.

J. Lanier Yeates

132. *Id.*
133. 99 S. Ct. at 2730.
134. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. at 280.