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UNITED STEELWORKERS OF AMERICA, v. WEBER: AN EXERCISE IN UNDERSTANDABLE INDECISION*

George Schatzki**

I. INTRODUCTION

It is well known to those involved in the world of employment-discrimination law that in 1974 the United Steelworkers of America and Kaiser Aluminum & Chemical Corporation entered into a collective-bargaining agreement which provided for a new on-the-job training program designed solely to correct the virtually total absence of blacks in Kaiser's craft workforce. Fifty percent of the trainees were to be black. Brian Weber, a white production worker who failed to obtain a position in the program, instituted a class action suit alleging that the affirmative action plan discriminated against him and his white colleagues in violation of Title VII of the Civil Rights Act of 1964.[1] When the case reached the Supreme Court, a five-to-two majority in *United Steelworkers of America, AFL-CIO-CLC v. Weber*[2] upheld the affirmative action plan. Writing for the Court, Justice Brennan conceded that, under some circumstances, discrimination against whites may be outlawed by Title VII, but it did not follow that affirmative action plans fell under that prohibition. Although the language of the statute might appear to outlaw the Kaiser plan, the Court reminded us 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."[3] The Court then observed that the statute had to be "read against the background of the legislative history of Title VII and the historical context from which the Act arose."[4] The Court's approach was a reminder for me of what one of my own law professors had claimed, sarcastically, had become the mode for statutory interpretation: if the legislative history is not clear, look to the words of the statute. Having decided that the answer to the question was to be found in the legislative history, Justice Brennan quoted many of the congressional supporters of Title VII. The general impact of all the quotes was that

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1. 42 U.S.C. § 2000e (1976).
2. 443 U.S. 193 (1979).
3. *Id.* at 201 (citations omitted).
4. *Id.*

blacks in our society had had very bad employment opportunities due to long traditions of discrimination; this state of affairs had resulted in their having fewer of the necessities of life than were available to members of society in general. The Court recognized Congress had expressly made it clear that the Act did not *require* racial balancing; however, Congress had not similarly addressed the question whether racial balancing was permitted. Somehow, this fortified the Court's conclusion "that Congress did not intend to limit traditional business freedom to such a degree as to prohibit voluntary, race-conscious affirmative action."[5]

Having concluded that the affirmative action plan was lawful because Congress had passed Title VII to help blacks get more jobs, the majority opinion made clear that it was unlikely to approve any and all affirmative action plans. The Kaiser plan passed muster because it had the same purposes as Title VII, to wit, "to break down old patterns of racial segregation and hierarchy" and "to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.' "[6] The Court went on:

> At the same time, the plan does not unnecessarily trammel the interests of the white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. . . . Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.[7]

In a very subtle and thoughtful concurring opinion, Justice Blackmun preferred to approve the Kaiser plan on a ground the majority implicitly rejected—that to fail to approve would place companies like Kaiser in an impossible position. Whenever an employer has a disparate work force, it is exposed to potentially successful litigation by blacks because they are underrepresented. If the law does not permit the employer to extricate itself from that situation, at least where the employer is arguably committing a violation of the Act, it means the employer may be required to continue violating the law and having back pay accrue against it. Moreover, it hardly seems wise to leave all resolution of such problems to the courts, and to preclude private parties from working out these matters without governmental interference.[8] On balance, however, Blackmun was prepared to join the majority's opinion, as well as its result, because

5. *Id.* at 207.
6. *Id.* at 208 (citations omitted).
7. *Id.* (citations omitted).
8. Justice Blackmun preferred approaching the problem in terms of the dilemma which employers and unions everywhere face: what to do when there are "not enough" blacks to satisfy the doctri-

he was not persuaded that his "arguably violative" standard would result in different conclusions than the majority's "societal discrimination" approach. Justice Blackmun made a powerful statement supporting the idea of private parties' remedying past discrimination, much of which might not be remediable under Title VII. Blackmun agreed with Brennan that it would be ironic if Title VII, passed to help black people, were to be interpreted to prevent private citizens from correcting abuses against blacks, abuses the statute did not address.

Justice Rehnquist wrote one of his more colorful and vitriolic dissents. He suggested the majority had accelerated the impendency of George Orwell's *1984*. He told us that "by a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes clear statutory language, 'uncontradicted' legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions."[9] As to the statutory language, Rehnquist opined:

> Were Congress to act today specifically to prohibit the type of racial discrimination suffered by Weber, it would be hard pressed to draft language better tailored to the task than that found in Section 703(d) of Title VII: 'It shall be an unlawful employment practice for any employer . . . to discriminate against any individual because of his race . . . in admission to . . . any program established to provide apprenticeship or other training.'[10]

Justice Rehnquist also argued that the legislative history does not support the views of the majority. Although he would have had the reader believe that the Congress rejected the majority's interpretation of the Act, close reading of his opinion as well as of the legislative history makes clear that Congress had a great deal of debate about the Act's *requiring* proportional work forces; as a result, Section 703(j) was passed. In truth, the Congress never considered the issue of voluntary affirmative action, and in one part of his opinion, Justice Rehnquist conceded as much.

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nal requirement of Griggs v. Duke Power Co., 401 U.S. 424 (1971)? See notes 22–28 and accompanying text *infra* for a discussion of *Griggs*. Blackmun could not believe that the law precluded someone who may be already violating the law from remedying the situation. *Weber*, 443 U.S. at 209–11 (Blackmun, J., concurring). My own sense of justice reaches the same conclusion. Given what may be serious constitutional problems, as well as common fairness, in the absence of an explicit Congressional mandate prohibiting plans like Kaiser's, a court would be seriously remiss in construing Title VII to outlaw Kaiser's conduct. The "arguable violation" thesis embraced by Blackmun was not adopted by the Court's majority, however.

9. *Weber*, 443 U.S. at 222.

10. *Id.* at 226 (citations omitted).

II. VOLUNTARY AFFIRMATIVE ACTION IN EMPLOYMENT TO REMEDY THE EFFECTS OF SOCIETAL DISCRIMINATION

A. *The Language of the Act*

The proper place to begin the analysis of the issue addressed by both the majority and dissent is where Justice Rehnquist wanted—with the language of the Act. The statute says that it is an unlawful employment practice for an employer to "discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race. . . ."[11] It is also an unlawful employment practice for the employer to "classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race. . . ."[12] Finally, the Act also expressly outlaws racial discrimination in admission to apprenticeship or training programs.[13] Justice Rehnquist would have it that the words are clear, that Congress could not have stated the matter any more clearly, even if that august body had anticipated Brian Weber's plight and had intended to help him out of it. It would be foolhardy, at least, to deny that the statutory words can carry the meaning Justice Rehnquist gives them. On balance, however, he is wrong in his claim about the clarity of the Act, and in being wrong, has overstated the logical limitations of alternative constructions of the Act. The statute does not explicitly say it shall be unlawful to discriminate against an employee "in order to achieve a better balance between white and black employees," or "in order to help black employees have better opportunities to overcome their lifetime of being victims of discrimination." I do not read anywhere in the statute the words that say, explicitly, that it is unlawful for an employer to discriminate on the basis of race "in any and all circumstances, even circumstances of which the members of Congress never dreamed—probably—and surely about which the members never talked with one another." In the absence of such explicit language, which would come much closer to being the kind of clear language which Justice Rehnquist claimed existed, it is my judgment that the statutory language upon which he relied does not necessarily resolve—or even address—the problem presented in *Weber*.

Reaching a conclusion 180° from Justice Rehnquist's, one can make a contrary facial argument based on section 703(j), which states: "Nothing

11. 42 U.S.C. § 2000e-2(a)(1) (1976).
12. 42 U.S.C. § 2000e-2(a)(2) (1976).
13. 42 U.S.C. § 2000e-2(d) (1976).

contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . because of race . . . on account of an imbalance . . . in the work force."[14] If affirmative action plans are outlawed by the general prohibitions of the Act upon which Justice Rehnquist relied, section 703(j) is rendered wholly redundant; therefore, in order to give section 703(j) any meaning, it can be argued, voluntary affirmative action is lawful. I have difficulty with this argument also. The legislative history reflects a Congressional alarm that courts, upon discovering racial imbalance in work forces, would find violations based on that fact alone and order quota-like remedies. The Congressional concern was not that voluntary affirmative action might be permissible, rather, that courts would interpret the general prohibitions of the Act to require racial balance. In my view the Congress never dealt with the matter of voluntary affirmative action. If it is true that the provision is redundant, one is a little glib, I believe, to hoist the Congress on its own petard. Congressional redundancy is neither impossible nor unthinkable. When we know Congress never meant, one way or the other, to deal with a difficult question, resolution of the issue solely through nice parsing of statutory words—either way—is or ought to be unthinkable.

B. The Purposes of the Act

If the language does not resolve the issue, what does? The majority came closer than did the dissent in wrestling with the nature of the problem; the majority, at least, tried. Whether the Court came up with the correct answer is debatable. No one doubts that Congress meant to outlaw motivated employment discrimination based on ethnicity. The more difficult question is whether Congress also meant to outlaw some forms of racial imbalances, whether Congress was sufficiently concerned with the social problem caused by racial discrimination to attempt somewhat—or a whole lot—racial balancing. Or, whether Congress meant to leave racial balancing to private ordering. Or, finally, whether Congress found all racial balancing to be repugnant.

The answers obviously turn on—why does society desire to outlaw employment discrimination based on race? I believe there are three reasons. The first is that race is an innate quality, or characteristic, over which an individual has no control.[15] Accordingly, it is not fair or just for society to impose burdens when the person is not responsible. The second reason is that race appears to be wholly—or virtually—irrelevant to the

14. 42 U.S.C. § 2000e-2(j) (1976).

15. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 240–44 (1971).

ability to do the job.[16] That is, although one is not responsible for being black, we might still tolerate racial discrimination in employment if we believed the trait was relevant to performance. Aside from other persons' biases which might affect one's performance, we do not believe ethnicity is relevant to one's ability to do the job.

The stated two reasons, however, are not sufficient to explain the existence or purpose of Title VII. It is not clear we would want to outlaw racial employment discrimination, however irrational we believed it to be, if all persons were sometimes the discriminators and sometimes the discriminatees; if all ethnic groups had equal, statistical access to jobs; if all ethnic groups were equally affluent, prestigious, and influential. At least I am not sure we should want to outlaw a pluralism that allowed random ethnic discrimination. Although, on balance, I might prefer the "melting pot," or I might prefer some integration as well as some identifiable pluralism, it is not clear to me that we, as a society, desire to destroy ethnic pride, consciousness, and behavior. Destruction of that pluralistic attitude and behavior would be difficult; quick destruction might be possible, but only with involvement of the law.

Since my judgment, albeit not empirically provable, is that pluralism is desired by large segments of our society and is not—in any event—a clear, indefensible evil, there must be another reason for the legislation called Title VII. The third reason for the passage of the Act is simply stated: in the United States, the burden of discrimination (in employment and elsewhere) has fallen on the members of certain ethnic groups. Racial discrimination is not random. Most of us do not suffer the burdens and barbs of ethnic discrimination; more importantly, whether or not we do suffer this irrationality sometimes, most of us have been treated most of the time by dominant persons or institutions without our race being a handicap. Saying that about blacks or chicanos, for example, would be an outright lie. These are people in our society—as a whole—who suffer in a vastly disproportionate way because of their ethnicity. The degrees of suffering and disparity are probably immeasurable, but few—if any—would deny their existence.

A rational justification, then, for Title VII is that identifiable ethnic groups in our society have suffered in a vastly disparate way and that society, through Title VII, determined to rectify that imbalance. The historical fact is, I think, that Title VII never would have been passed without notice of the obvious state of affairs that black people, specifically, were systematically prevented from participating usefully and gainfully in our culture. The political history of the Act is consistent with my ethical

16. *Id.* at 244–49.

or moral observation that it is not necessarily racial discrimination alone that ought to generate a response from law; what needs obliteration is racial discrimination which oppresses one or more particular groups.

At this point, to avoid for myself all sorts of trouble, I should make clear that I find virtually nothing usefully "rational" about discrimination based on ethnicity, whether or not the victim is a member of an oppressed group. I have already made it clear that ethnicity (with the possible exception of religion) is not voluntary and, absent other persons' biases, ethnicity is not relevant to job performance. My only point is that a pluralistic society must not outlaw the exercise of all biases believed to be irrational, or more particularly, the biases created by the pluralism itself. On the other hand, I am not so naive as to ignore the nature of employment today. The exercise of ethnic biases by a large corporate employer, for example, hardly ever reflects the sort of personal pluralistic impulse about which I am talking. Moreover, employment is such an important part of mere existence that we may well desire outlawing pluralistic bias, even when exercised by a small individual employer who wants her own ethnic group around her. Nevertheless, the dichotomy I suggest—there is a difference between random, pluralistic ethnic discrimination, and societal ethnic discrimination against one, or a few, identifiable groups—is real, important, and supportive of my position that Title VII would not have been, and perhaps never should have been, passed without the massive oppression of black people.

In *Weber's* majority and concurring opinions, there was recognition of this argument. Justice Brennan, for the majority, stated:

> It 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.[17]

Justice Blackmun wrote:

> Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief. It seems unfair for respondent Weber to argue, as he does, that the asserted scarcity of black craftsmen in Louisiana, the product of historic discrimination, makes Kaiser's training program illegal. . . . Absent compelling evidence of legislative intent, I would not in-

17. *Weber,* 443 U.S. 193, 204 (1979).

terpret Title VII itself as a means of 'locking in' the effects of segregation for which Title VII provides no remedy.[18]

Having argued that a purpose of the Act is consistent with voluntary balancing of the races in the work force, I should add that one cannot candidly argue that the statute is unambiguously committed to that objective. One's own sense of propriety regarding racially conscious employment behavior is important, indeed it is essential, in resolving the question, which I submit is not clearly answered by the face of the Act, and is only supported—not compelled—by the purposes of the Act. The arguments that are for and against private affirmative action are well known.

In favor of such affirmative action the following can be said:[19]

(1) Affirmative action may be the only way to end the cycle of discrimination that so adversely affects certain minorities[20] in our society; so long as those minorities disproportionately cannot get good education, good jobs, or good homes, it may be necessary for society to engage in some forms of affirmative action. Arguably, employment is the most logical—or most likely—place to begin the effort. If not, it may at least be one of the places.

(2) Affirmative action may compensate individuals who have already suffered from past personal and societal discrimination.

(3) Affirmative action may create an incentive for the next generations of minorities to try harder to succeed. Models of success may serve as inspiration.

(4) Affirmative action may well prove to be the most efficient use of some people in our society. That is, because of stereotypes (many of which are subconscious), minorities presently have abilities which are not used to best advantage.

(5) In the long run, it may be true that through affirmative action, we will better train and prepare minorities, thereby utilizing talents which at the present time go undeveloped and unused.

(6) Arguably, although very debatably, affirmative action may be necessary if society is ever going to attain full employment. By qualifying more persons for more jobs, we may well approach more closely the ideal of full employment.

(7) By working side-by-side with minorities, whites may learn that their stereotypical attitudes about minorities are fallacious.

18. *Id.* at 214–15.

19. Since this paper was delivered, Judge Skelly Wright has published a strong defense of *Weber* which discusses the advantages of affirmative action. *See* Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 231 (1980).

20. Throughout this paper, I refer only to discrimination based on ethnicity. Of course, much—although probably not all—of the reasoning and comments may apply similarly to sex discrimination.

(8) By placing more minorities in better jobs, we may improve communications between various segments of society, the effect of those communications being that society as a whole may reflect the values and interests of a broader range of the population.

(9) The alleged innocent victims of affirmative action may have shared in the actual bigotry of society or of the employer; in any event, they are the beneficiaries of an illegitimate heritage, and as between them and the innocent minorities, there is much to be said in favoring the minorities.

(10) To the extent we believe motivated discriminatory employment exists, but we cannot prove it, affirmative action catches the malfeasors in its net.

(11) Affirmative action may involve efficient methods of proof, since motive and pretext are such slippery matters for the trier of fact.

(12) To a considerable extent, affirmative action assuages the majority's guilt. In this sense, affirmative action is a symbol of egalitarian mores.

(13) The absence of affirmative action, which is symbolic of society's efforts to undo a terrible heritage, may cause deep resentment among the oppressed minorities in society and, thereby, exacerbate racial tensions.

There is also much, however, to be said against affirmative action:[21]

(1) Employers will be forced to engage in inefficiencies, at least in the short run, and possibly in the long run, by using less competent persons.

(2) Most, although not all, of the "victims" (the white employees) of affirmative action are fairly innocent.

(3) Employing people because of their race will only reinforce in the long run the very classifications we are attempting to eliminate.

(4) If the beneficiaries of affirmative action are not as competent to do certain jobs as the other employed people, the stereotype of inability will be reinforced.

(5) The beneficiaries of affirmative action are not necessarily the victims of the larger societal discrimination, and they are also unlikely to have been the victims of the particular practices of the involved employers.

(6) To the extent that less competent persons are being used, not only does the employer suffer from the inefficiency—so, too, does society. There may be less money, more danger, and less quality goods and services in general.

(7) If people know there is affirmative action being practiced, they

21. Since this paper was delivered Professor Bernard Meltzer has published a strong attack on *Weber* which discusses the disadvantages of affirmative action. *See* Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

(other than the beneficiaries) will believe to some extent that all minorities are not as competent as their abilities may really be. Probably, these people will be suspicious of all minorities in good jobs.

(8) If it is known that affirmative action is being practiced, the individuals who share the preferred qualities with the beneficiaries of the program will wonder if they obtained their jobs because they were able or because they had the preferred qualities. Self-doubt will be unnerving, at best, debilitating, at worst.

(9) There are minorities who are fully qualified regardless of ethnicity, and they may affirmatively desire that their credentials' bona fides not be compromised.

(10) Affirmative action may cause deep resentment among the whites in society, in general, thereby exacerbating racial tensions.

(11) The elements of proving imbalance are far more complicated and burdensome, perhaps, than chasing the elusive subjective state of mind of the actor. Moreover, as a practical matter, a plaintiff will attempt to prove both bad motive and disparity in the work force. Affirmative action, then, may make litigation longer and more difficult.

(12) To the extent we are moved to affirmative action because we suspect there is a lot of unprovable motivated racial discrimination, we must recognize that affirmative action will also impose upon a number of innocent employers.

(13) There is no easy way to identify which groups ought to be denominated "oppressed" and thereby qualify for the benefits of affirmative action.

(14) There is a danger that affirmative action for one group will slip into destructive discrimination against another minority group.

Undoubtedly, there may be other pros and cons. Nevertheless, the list just recited is sufficiently long and complicated, the items sufficiently non-quantifiable, that one cannot—it seems to me—be certain affirmative action is either a good or a bad idea. One's own intuition as to what will happen, and to what degree it will happen, must be determinative. Moreover, one's own values will play a role. For example, my own intuition tells me *all* of the pros and cons I have listed are real; their existence will vary in strength from situation to situation. Most generally, my own bias, if it is that, is that our society needs to persuade the next generation of minorities that they do have a chance to succeed in this complicated and competitive world. My sense tells me that without that belief and consequential motivation, we shall wait even longer (perhaps, forever) to have a society in which no class of human beings is significantly disadvantaged because of race. The objective of motivating future generations

of minorities convinces me that, on balance, affirmative action is a legitimate technique which ought to be pursued.

C. Case Law

Having reached the conclusion that the language of the Act does not address voluntary affirmative action, having observed that the purposes of the Act are consistent with but do not compel affirmative action, and having listed the pros and cons about affirmative action and found the balance not wholly conclusive, I think it is time to look at precedent. Unfortunately, I believe we shall find that it, too, *compels* neither the majority's nor the dissent's conclusion.

Most importantly, the Court had to deal with *Griggs v. Duke Power*[22] and its progeny. In that case, you will remember, the employer (assumed by the Supreme Court to be acting in good faith) required applicants for all but the most menial jobs to have high school diplomas and to pass certain so-called literacy or intelligence tests. The Court noted that a much higher percentage of whites than blacks graduated from high school in North Carolina, where Duke Power is, and that on a national basis, whites did far better than blacks on the required tests. It followed that blacks were being disproportionately disqualified from the jobs. The burden, said the Court, was on the employer to explain or justify that disparity. Since the employer had not done so (How could the employer have done so? The employer did not know, until the Supreme Court said it, that the employer had that burden.), the employer lost. In my judgment, the decision is affirmative action, pure and simple. The very idea that the Court was not chasing motivated discrimination suggests affirmative action was involved. This conclusion is underscored by two observations. First, disparate impact (a fancy phrase for saying, "There are not enough blacks around here") is nothing but a statistical game reflecting a desire for a balanced work force. Second, there is little doubt in my mind that the standards did have some correlation with the capacity to do well in most jobs in our society and probably some correlation with the jobs at Duke Power. Literacy is almost always helpful for employment. The better an employee can read and communicate the more likely the employee will do a good job. I am not saying that the relevance is necessarily strong or that the standard used was the best indicator of who would be a good employee. What I am saying, however, is that if we assume the employer is acting in good faith, as the *Griggs* Court did, we must recognize the employer's business judgment was not wholly irrational. Despite reams

22. 401 U.S. 424 (1971).

of subsequent litigation and rulings and regulations, and despite considerable pretense that tests and standards can be quantified or made objective and scientific, the truth is that there is a lot of discretion being exercised in all tests and their validation, and that subjectivity is not far from the surface. That being the case, it is not clear to me that by applying the Act we are demonstrably improving the employer's standards for employment. Even if we were, however, the Act was not meant to improve employment standards. It was meant to outlaw racial discrimination.

If the employer in *Griggs* did not mean to discriminate, then it must be that the Court is saying nothing more than Duke Power did not have enough blacks (the fact the employer may defend does not change the nature of that fundamental accusation). This is affirmative action. Additionally, the employer may be forced to compromise the efficiency of the work force—to the extent the attacked standards were relevant to employment—in order to increase the number of minority workers. This, too, is a characteristic of affirmative action. In these two senses, then, affirmative action was an important part of the *Griggs* opinion. Note, however, in holding that the tests and diploma requirements were not sufficiently related to the job, the Court obfuscated what it was doing. To that extent, some of the cons associated with affirmative action are not so clearly a problem. That is, for example, minorities who get jobs at Duke Power will be less likely to wonder if they are qualified. Their colleagues at work will be less inclined to be suspicious of their competence. Nevertheless, many of the reasons for not having affirmative action are still present in *Griggs*. Also, the *Griggs* approach suffers from a lack of candor.[23] On the other hand, all the reasons for having such a program support the *Griggs* decision.

Since *Griggs*, courts have extended its reasoning to qualifications other than tests and diplomas. In the face of disparate statistics, employment standards based on the size of the job applicants have fallen;[24] standards based on garnishment of wages have been set aside;[25] standards based on arrest records have been set aside,[26] and even on occasion, standards

23. One may argue that the lack of candor is justified because some of the costs of affirmative action are obfuscated or even eliminated by the slight of hand. However, to the extent the lie is exposed, the Court's credibility is seriously undermined. Moreover, the Court may be tempted, even unconsciously, to substitute dishonesty for reasoning more often than can be justified by anyone's pragmatic philosophy. "Lying" is a technique, I believe, not often—if ever—legitimate for the Court.

24. Dothard v. Rawlinson, 433 U.S. 321 (1977).

25. *See, e.g.*, Johnson v. Pike Corp. of America, 332 F. Supp. 490 (C.D. Cal. 1971).

26. *See, e.g.*, Gregory v. Litton Syss., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd*, 472 F.2d 631 (9th Cir. 1972).

based on conviction records as well.[27] In all of these cases, the employer could, I believe, argue reasonably that the standards had some relevance to the business. More important, in none of these cases was it assumed that the employer meant to discriminate against minorities. In short, courts are substituting their own judgment for that of employers in weighing employers' justifications against the disparity and determining whether the former justifies the latter. This falls short of instructing all employers always to have proportional work forces. It compromises the desire for affirmative action and proportionality with, at least, the desire to avoid some of the more serious risks of employing less qualified people.[28]

In addition to the *Griggs* progeny which I characterize as affirmative action decisions, there was the very substantial body of cases in which the courts, themselves, had imposed quotas on employers.[29] In most of those cases, the employers had proven to be violators of the Act in egregious and flagrant circumstances, and the courts despaired that the employers could be convinced to behave themselves without a coercive order to integrate through quotas. Nevertheless, it is almost surely true that most of the beneficiaries of those court orders were not the victims of the employers' earlier violations of the law; conversely, the white applicants who did not get jobs because of the court imposed quotas were not the beneficiaries of the earlier discrimination. Moreover, the burden of the remedy was not placed on the law-breaking employers; the onus was placed on the relatively innocent white, usually blue collar, workers. In many ways, these cases were strong support for the result in *Weber*.[30] Although there is a difference between the flagrant-violator cases and Kaiser Steel's situation because the legal system needs to deal with the persistent law

27. *See, e.g.*, Green v. Missouri Pac. R.R., 523 F.2d 1290 (8th Cir. 1975).

28. *See, e.g.*, Spurlock v. United Airlines, Inc., 475 F.2d 216 (10th Cir. 1972) (high degree of risk involved in piloting a commercial jet justified lighter burden on employer to show his employment criteria were job related).

29. *See, e.g.*, Morrow v. Crisley, 491 F.2d 1053 (5th Cir. 1974); United States v. Wood Lathers, Local 46, 471 F.2d 408 (2d Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), *modified en banc*, 452 F.2d at 327.

The first judicial attempts at quota remedies were the school desegregation cases. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Wright v. Council of the City of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). The complexities and inconsistencies of the school cases are such that one can safely find support for affirmative action and for all sorts of limitations on that action. While many of the considerations are different, most of the pros and cons set out in the text have some impact in the school cases.

30. Some might argue that the quota-remedies cases are distinguishable from the *Griggs* type cases because in the quota-remedy cases the employer had proven to be an incorrigible violator of the law, and something had to be done. Moreover, these same persons might say that courts have considerably greater freedom in granting remedies than they do in finding violations. For the reasons set out in the text, I am less persuaded by these arguments.

breaker, the quota-remedies do not accomplish a proper goal very effectively. To the extent we are concerned with having an integrated work force, the court orders make sense. That is straight affirmative action, however, regardless of prior violations of the law. To the extent the courts wish to punish wrongdoers or force employers to behave in the future, the quota-remedy is a crude method for policing the employers' employment practices, a crude method which has the problems to which I have already alluded. To the extent that the quota-remedy is meant either to undo the employers' earlier acts or to deter other employers in the future, it seems to me the remedy is misplaced. A better remedy would be to compel employers to pay both the black and white employees who are already involved; to wit, force the employer to pay twice. This remedy would protect both the white and black employees from suffering and would place the burden where it belongs—on the wrongdoing employers. Unfortunately and inexplicably the law generally has not imposed that burden on the employers.

It is plain, then, that at the time the court dealt with Brian Weber's complaint, there was precedent under Title VII for governmentally imposed affirmative action. In the absence of any other precedent, it might have been an easy matter to conclude that voluntary affirmative action, the work of private ordering,[31] was unobjectionable. There were, however, two obstacles. First, insofar as one were to rely on quota-remedy court decisions, the language of section 703 makes at least a plausible case for Justice Rehnquist.[32] That is, section 703's tabu may apply to private action, but not necessarily to statutory remedies. Moreover, the judicial decisions authorizing affirmative action remedies had not been approved by the Supreme Court.

Second, and much more complicating, there was counter-precedent. Two cases were most significant, although the justices spoke of only one, *McDonald v. Santa Fe Trail Transportation Co.*[33] The other apparently relevant case was *University of California Regents v. Bakke*.[34] In *McDonald,* two white individuals complained that they had been discharged for dishonesty while a fellow black employee had not been, although he had done what the plaintiffs had done. The district court dismissed the complaint; the court of appeals affirmed. On the basis of the complaint's allegations, the Supreme Court held the plaintiffs had stated a claim upon

31. The "private ordering" was a response, at least in part, to threats of loss of government contracts.

32. 42 U.S.C. § 2000e-(2)(j) (1976).

33. 427 U.S. 273 (1976).

34. 438 U.S. 265 (1978).

which relief could be granted. The Court said that whites were protected by Title VII. In *Weber,* Justice Rehnquist was of the view that *McDonald* controlled. However, the procedural status of *McDonald* was such that the only matter upon which the Court ruled was the sufficiency of the plaintiffs' pleading; the Court was merely holding that it was conceivable the plaintiffs might win. In *Weber,* the majority did not approve all affirmative action; there were stated limitations. Reconciling the cases, then, is not difficult. On the one hand, for example, if Kaiser had fired all its white employees and embarked on a "black only" employment policy, the Court's opinion suggests the employer would have violated the law, especially if the employer's motive was not to undo racial imbalance. *McDonald* also suggests that result. On the other hand, if Santa Fe had determined to tolerate some dishonesty among its black employees in order to avoid exacerbating an already unbalanced work force, it is not clear to one reading the *McDonald* opinion that the company violated the law. If *Griggs* can impose on employers a little illiteracy, or *Dothard v. Rawlinson*[35] can impose on employers more costly although, probably, more accurate methods of assuring sufficiently strong employees, perhaps an employer voluntarily can accept the greater costs of a little dishonesty in the work force.[36]

Another analysis which may reconcile *McDonald* and *Weber* is the presence or absence of the employer's motive to undo racial imbalance through affirmative action. The motive of undoing earlier discrimination was an important part of the Supreme Court's reasoning in *Weber.* Absent an employer explanation, the Court could not assume the same about the motive in *McDonald.* One should not be surprised, for example, that, if an employer refuses to employ whites solely because of hatred for whites and regardless of an interest in affirmative action, the courts may treat the employer differently than Kaiser was. Whether there are real differences between the hypothetical hateful mind and the mind of Kaiser is more

35. 433 U.S. 321 (1977).

36. In the recent decision of Harmon v. San Diego County, 477 F. Supp. 1084 (S.D. Cal. 1979), the district court interpreted *Weber* to require an affirmative action *plan* if discrimination in favor of blacks or women is to be permitted. In *Harmon,* a white individual with a superior paper record was passed over twice by an employer who first promoted a black and then a woman. The court suggested that the absence of a preconceived plan made the reverse discrimination intolerable under the law.

It is not clear to me why there must be a "plan." If we hypothesize affirmative action motives on the part of the employer, it is difficult to believe affirmative action is any more or less served by a formal plan. The only gain I see in having a plan is that it will be easier for reviewing institutions to understand and judge the propriety of the affirmative action. Whether the possible absence of a plan in *McDonald* rationally reconciles that case with *Weber* seems doubtful.

subtle and difficult for me to handle. Nonetheless, the *Weber* court believed the motive was important.[37]

The *Bakke* decision was not relied upon by the justices in *Weber*. Since the *Bakke* decision can be distinguished on a number of grounds, it may be understandable why the case was ignored.[38] First, much of *Bakke's* opinions found their bottoms in the Constitution. Second, to the extent the case was based on legislation, it was a different statute.[39] Third, the employer was a governmental institution, and there was question whether an appropriate governmental body had authorized the affirmative action.[40] Fourth, there was no suggestion or colorable claim that the school had ever discriminated against minorities. Fifth, in *Bakke*, the affirmative action replaced, as a standard for admission to medical school, a lifetime of competition which purported to reward effort and skill. And, sixth, *Bakke* involved entrance into the medical profession, an unusually high skill, high risk profession. In my mind, none of these distinctions are wholly persuasive. One may even believe some are cynical. In the end, of course, efforts to reconcile *Weber* with *McDonald* and *Bakke* depend to a very considerable extent on what *Weber* subsequently proves to mean (or, for that matter, what *McDonald* and *Bakke* may prove to mean; but they are other stories).

D. *A Note on Legislative History*

I should say a word about the legislative history. In my judgment, both the majority and the dissent missed the mark. The truth is, I believe, whether or not the members of Congress thought of voluntary affirmative action, they did not discuss the issue. That being so, it is difficult for me

37. Consistent with this analysis, the *Harmon* court found a violation of the law because (the court believed) the employer in that case did not discriminate against the white male employee in order to help classes of victims of earlier societal discrimination (blacks and women).

38. Since this paper was delivered, the Court has held that it is constitutional for Congress to set aside for minority contractors ten percent of federal funds for public works projects. Fullilove v. Klutznick, ____ U.S. ____, 100 S.Ct. 2758 (1980). Consistent with the analysis presented in this text to justify affirmative action, the Court held that it was at least reasonable for Congress to wish to assure support for racial groups victimized by earlier societal discrimination. Not surprisingly, the Court was clear that Congress had the authority to behave reasonably. Moreover, the set-aside was not absolute; a recipient of public works funds could obtain a waiver of the ten percent requirement. The Court relied on the flexibility provided by the waiver. While the *Fullilove* opinion inched the Court a little further towards unequivocal support of affirmative action, it appears that, once again, the Court has refused to embrace affirmative action without some apparent restrictions, limitations, or exceptions.

39. The *Bakke* opinion relied, in part, on Title VI of the Civil Rights Act of 1964.

40. The result in *Fullilove*, different from that reached in *Bakke*, is partially explained by the fact that Congress, rather than the medical faculty at the University of California at Davis, embraced the quotas.

to understand how either the majority or the dissent found much solace in the history. Justice Rehnquist stated, on the one hand, that Congress never thought about the matter; on the other hand, the Justice was convinced the history rejected affirmative action. He relied on congressional comments which were virtually all addressed to whether Title VII compels balanced work forces, not whether employers can voluntarily attempt the same balance.[41] In a real sense, Justice Rehnquist's quarrel was with *Griggs,* which did compel some affirmative action, and not with the *Weber* majority. In any event, I fail to see how the legislative history can lead someone to both of Rehnquist's conclusions—that the Congress did not deal with affirmative action and that the Congress clearly rejected it.

For the majority, Justice Brennan also overstates enormously the meaning of the legislative history. The truth is, Congress did not discuss or debate the issue. On a more general level, Justice Brennan may be closer to the mark. Supporters of Title VII wanted to put blacks in a better position. The Congressional statements reflected a concern for the overwhelmingly disproportionate burden that societal discrimination had placed on black people, and reflected a desire to lighten the burden and to do away with the disparate impact in the game of life. Nevertheless, the legislative history is overwhelmingly inconclusive.

IV. THE *WEBER* LIMITATIONS AND SOME UNANSWERED QUESTIONS

By noting several acceptable aspects of the Kaiser plan, the *Weber* majority appeared to imply there were limitations on its general ruling that voluntary affirmative action was permissible. First, the Kaiser plan's purpose was "designed to break down old patterns of racial segregation and hierarchy" and "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[42]

Second, the plan did not unnecessarily interfere with the interests of the

41. Justice Rehnquist did identify the only legislative history which purported to address the issue of voluntary affirmative action. *Weber,* 443 U.S. 193, 249–50 (1979)(Rehnquist, J., dissenting). Toward the end of the Senate debate on the House bill, two opponents of Title VII (Senators Cotton and Curtis) had an exchange in which they purported to interpret the bill to outlaw voluntary affirmative action. 110 CONG. REC. 13086 (1964). It is not clear they were being anything but sardonic. In any event it is also unclear how many others heard the dialogue. It is clear that no one—proponents or opponents—responded to the very brief exchange. It would be ridiculous, and Justice Rehnquist does not rely heavily on the exchange, to believe that Congress was bound by a very brief (and possibly non-serious) exchange of only two persons, both opponents of the bill, made late in the day, made in the presence of no one knows whom, and never discussed further by anyone. It may be true that the issue was clear, as Rehnquist argued; but it may also be true either that Congress did not address the matter or meant for the issue to be resolved, if at all, by the courts.

42. *Weber,* 443 U.S. 193, 208 (1979).

white employees. The Kaiser plan did not, for example, require the discharge of white workers in order to employ blacks. Moreover, since half the beneficiaries of the program were white, the plan did not bar entirely the advancement of white employees. Third, the plan was to continue only until the number of blacks in the crafts was proportionate to the number of blacks in the local labor force. Thus, the plan was a temporary measure; it was not intended to maintain racial balance, but only to "eliminate a manifest racial imbalance."[43] The Court did not explain why it was noting these qualities in the Kaiser plan.

The remainder of this paper will address the meaning and desirability of the apparent limitations on affirmative action, and what lower courts have done with *Weber's* holding and limits. The problems for the lower courts are complicated by the uncertain substantive meanings of the limitations; by the question as to whether each limitation is conjunctive, disjunctive, or merely exemplary; and by what I call the *Weber* opinion's fundamental schizophrenia. That schizophrenic quality reflects the following conflict. On the one hand, the Court made clear that it was addressing the wrongs society has visited on blacks. On the other hand, the Court suggested that there are limitations which have implicit in them, I believe, some reservations about whether the Court really meant to address frontally societal discrimination. This divided or confused commitment will affect all subsequent issues arising after *Weber*. Some of these unanswered questions follow. Must there be an affirmative action *plan* in order to protect discrimination in favor of minorities? Must the plan be "voluntary"? What is "voluntary"? Must the objective be to undo the ravages of prior discrimination? By this employer? Its industry? By all of society? Must the plan be temporary? What is meant by "temporary"? Can whites ever be excluded from the plan? Will *Weber* prove to be a decision limited to training programs? Must the plan be newly conceived and thereby not infringe on others' rights, like preexisting seniority rights? Despite the Court's rhetoric, will it permit affirmative action plans in cases with less suspicious incriminating facts than existed at Kaiser? Will the Court permit such plans when the jobs more clearly involve safety? Or if the jobs more clearly involve educational credentials? In the past several months, some of these questions have been addressed.

A. *Proportionality*

Will an employer violate the Act if it engages in affirmative action to an extent beyond proportionality? If *Weber's* bottom is societal discrimi-

43. *Id.* at 209.

nation, then an employer should be permitted to employ affirmatively more than its "fair share" of minorities, at least until the entire society is integrated. The societal discrimination thesis supports affirmative action even where the employer and the relevant industry have "enough" blacks. If societal discrimination is the basis of *Weber,* then the number of minorities with the employer or industry ought not to be relevant. (Moreover, the only necessary time limitation on such an affirmative plan's life would be the time it would take to integrate all of society. Perhaps, it is this last observation that dictates some limit to the reach of the Court's opinion.)[44]

In some recent cases, courts have had to ask what sort of background statistics supported a voluntary affirmative action plan. In most cases, the courts concluded that the statistics supported a finding of preexisting arguable violation of the Act by the employer. Indeed, in some, the employer had already admitted that there had been violations in the past.[45] In those cases, it is no surprise that the courts have found, *a fortiori* in light of *Weber,* that the affirmative action plans were lawful. One court stated that although it was true there was no underemployment of minorities in the relevant industry (plant security) there were disparate statistics for a particular employer group, of which the defendant was a member.[46] That disparity was sufficient to justify an affirmative action plan. The same court observed that it was relevant that minorities were victims of discrimination, in general, in that geographical area. Another court ruled that the existing disparity within an industry (teaching) was sufficient to justify affirmative acion, despite the fact that there had been no disparate figures within the work force of the employer who implemented the affirmative action program.[47] One court has suggested that no evidence of prior acts of discrimination is necessary.[48] All of these cases suggest that the courts may be of a single mind, to wit, that any affirmative action program is justified because societal discrimination cannot be gainsaid and, therefore, finding some statistic of discrimination is only a rationalization. Another view, however, of these cases, is that the courts have not

44. In fairness to the Court, it should be observed that the following would reconcile somewhat the apparent inconsistency in *Weber*. Perhaps the Act compels or permits each and every employer to do its proportional share, and no more, towards integrating society. This would pressure *all* employers to do a better job of integrating their work forces until society was truly integrated.

45. *See, e.g.,* Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979)*(appeal pending);* Price v. Civil Serv. Comm'n, Sacramento County, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980)*(appeal pending);* Chmill v. City of Pittsburgh, Pa., 412 A.2d 860 (1980); Maehren v. City of Seattle, 92 Wn.2d 480, 599 P.2d 1255 (1979)*(appeal pending).*

46. Tangren v. Wackenhut Serv., Inc., 480 F. Supp. 539 (D. Nev. 1979).

47. Cohen v. Community College of Philadelphia, 484 F. Supp. 411 (E.D. Pa. 1980).

48. Edmondson v. U.S. Steel, 20 FEP Cases (BNA) 1745 (N.D. Ala. 1979).

yet agreed upon the standard by which to measure the legitimacy of setting up an affirmative action plan. It would not be surprising if the courts are confused, given the fundamental contradiction in the Supreme Court's opinion.

B. *Time Limitations*

The *Weber* court pointed out that the Kaiser plan was temporary. Why? The Court did not say. Was the Court suggesting that there must be temporal cutoffs for such plans? One subsequent decision reflects lack of concern for a time cutoff, even in a situation where the employer's work force is already balanced but the relevant industry's is not.[49] If there must be a cutoff, when should it be? When the employer's work force is balanced? That is the time Kaiser proposed for cutting off its plan. How about at the time the industry, rather than the employer, no longer has an imbalance? As just mentioned, at least one court, *Cohen v. Community College of Philadephia*,[50] has implied that such a plan would be all right. Since the Supreme Court eschewed the "arguable violation" route,[51] I find it difficult to believe that the temporary quality of such plans must necessarily be tied to the individual employer's getting a proper balance. *Cohen* must be correct. On the other hand, so long as there is any imbalance in society, the Court's primary logic would permit any employer to have an affirmative action plan. The Court's limitation suggests something less grand. In-between stances, which the Court may yet adopt, would permit a plan to remain in effect so long as the involved employer, the industry of which it is a part, or the employer's geographical area has an arguably inappropriate disparity in the number of oppressed minorities in the work force.

C. *Harm to White Employees*

In another small group of cases, courts have had to concern themselves with the effects plans have on white employees. This is another *Weber* limitation which I find confusing. After all, whatever program is adopted, presumably the last affirmative act of employment will result in an otherwise more qualified white being denied a job. The rejected applicant's interest in challenging the system does not vary with the presence or absence of whites in the program. There is no question that the rejected white has been denied employment because of race. If an affirmative ac-

49. *See* Cohen v. Community College of Philadelphia, 484 F. Supp. 411 (E.D. Pa. 1980).

50. *Id.*

51. *See* note 8 *supra*.

tion program is justified because there are societal reasons for discriminating against whites, it matters not that only some or no whites get the benefits of the program. Indeed, to the extent there is positive value in the affirmative action plan, the more blacks—and the fewer whites—hired, the more effective the program.

The impact on white employees need not be only in situations involving original employment. In *Weber,* it involved eligibility for an apprenticeship program. In other cases, the matter may involve promotions, or layoffs. What interests do whites have? Whatever they are, as I have already suggested, they are inconsistent with the objectives of affirmative action. Moreover, I do not believe we can rationally delineate between those white interests we will protect in the face of affirmative action and those white interests we will not protect. For example, there were skilled non-employees who could no longer obtain jobs at Kaiser because of the company's affirmative action training program. These whites were not given jobs because of their race. Why should there be a distinction between refusing to employ whites for racial reasons (*Weber* allows the refusal) and discharging whites for the same reasons? (*Weber* may not allow such discharges.) While I fully understand the possible different psychological impacts on incumbent whites and on the applicant whites, the logic of it all is not so clear or obvious that explanation is not needed. Moreover, as I have already suggested, why should it matter whether some or no whites are eligible for new jobs, promotions, or whatever, in the face of the affirmative action plan? Each unsuccessful white will suffer equally. Is the Court addressing only political realities, is it recognizing society will not like very much plans that employ blacks only?

In any event, it is not surprising that a few courts since *Weber* have had to wrestle with the rights of whites. In one case, the decision in *International Brotherhood of Teamsters v. United States*[52] was put under siege by a questionable reading of *Weber.* In *Tangren v. Wackenhut Services, Inc.,*[53] in the face of governmental pressure (threats of lost government contracts) to keep more minorities on the job, the company forced the union to accept an amendment to the collective bargaining contract's seniority provisions, so that recently employed minorities would be retained and more senior whites laid off, when economics necessitated putting some employees out of work. The *Tangren* court upheld the seniority override. Governmental pressures (albeit, not court pressures) forced a company and a union to abandon a bona fide seniority ladder, despite the mandate of Title VII and the *Teamsters* case that such seniority ladders

52. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
53. Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539 (D. Nev. 1979).

were immune from attack under the statute. The *Tangren* court blithely asserted that the plan was "voluntary," presumably because there was no court order. The threat of lost government contracts (not wholly unlike the *Weber* situation) did not dilute the voluntariness of the action, saith the court. It may be, then, that due to *Weber* and governmental action short of court orders, the *Teamsters* doctrine will be substantially undone and seniority ladders will be remade to accomplish the "proper balance" that was not attainable through litigation.

I have another difficulty with the decision in *Tangren*, where senior whites lost their jobs to junior blacks; that is, the limitations in *Weber* may suggest a different result. First, the Supreme Court was impressed that the Kaiser plan did not require "the discharge of white workers and their replacement with new black hirees. Cf. *McDonald v. Santa Fe Trail Trans. Co.*"[54] It is true that in *Tangren* the employer did not hire new blacks to replace the whites. Nevertheless, it appears the Supreme Court in *Weber* was impressed that whites were not losing their already attained jobs to blacks in the name of affirmative action. The "Cf." citation to *McDonald* at least implies the Court had more in mind than being uncomfortable only with the employment of newly hired blacks to replace old incumbent whites. Second, the Supreme Court was also impressed that Kaiser's plan was to eliminate racial imbalance, not to retain racial balance. I am not sure what that distinction means in the face of societal discrimination; nonetheless, the facts and the court's reasoning in *Tangren* in part reflect a desire on the part of the employer and the court to maintain racial balance within that employer, even after the employer had reached the appropriate ratio of blacks and whites.

V. CONCLUSION

All of what I think *Weber* means may not add up to much logic. Quite obviously, the majority opinion is a compromise between the general approval of affirmative action and its objectives, on the one hand, and a concern for some of the consequences of unfettered, indefinite affirmative action, on the other. The opinion also reflects the uncertainty which integrity may require of any conclusions about affirmative action. In my judgment, logic will never resolve the conflicting norms. The reasons which support affirmative action plans cannot be reconciled with the reasons that dictate the weaknesses of such plans. *Griggs* and *Bakke*, also, were compromises, of sorts, not reconciliations.[55] The *Griggs* Court disguised its

54. *Weber*, 443 U.S. 193, 208 (1979).

55. So, too, is Fullilove v. Klutznick, ____ U.S. ____, 100 S.Ct. 2758 (1980), discussed at note 38 *supra*.

affirmative action objectives in rhetoric about unnecessary barriers, thereby authorizing appropriate barriers to integration (so-called "business necessity"). In *Bakke,* the Court could not even reach an apparent compromise. In *Weber,* the Court did give affirmative action open, but qualified, approval. One should take note, again, that—in the end—both the facts and rhetoric of *Weber* are quite narrow. The plan was reasonably voluntary, it involved an apprenticeship (not the skilled jobs themselves), it did not override established seniority rights or other preexisting identifiable rights, it was to end when the skilled workers at Kaiser were proportionately black, it involved blue collar jobs which—so far as the records show—were not high risk jobs, the employer had a disproportionately low number of blacks in the skilled jobs, blacks had been disproportionately (and intentionally) excluded historically from those positions on a national scale, no whites could be identified as certain individual "victims" of the plan, and the plaintiff in the case was not placed in a worse employment posture than he would have been if there had been no plan.[56]

Which of these factors will prove, in the future, to be important in the analysis to legitimize an affirmative action plan is not clear. It is clear, however, that there will be considerable litigation over the years while the Court continues to accommodate, probably more politically than logically, the competing interests, until the true meaning of *Weber* is known.

56. One should note that the facts in *Weber* made the questions in the case significantly easier than they might otherwise have been. Brian Weber had been an employee of Kaiser for a period of time prior to the company's and union's decision to initiate the affirmative action program. He did not, however, have the skills to be a craft employee, the job category for which the special training program was created. It is clear then that if the program, which was created solely for the purpose of increasing the number of black employees qualified for craft work, had never come into being, Weber would never have applied for the program.Moreover, since it is certain he did not have the skills to be a craftsman, there can be no question that the affirmative action program did not work to his disadvantage. To the contrary, the program worked to his advantage. He had at least a new opportunity for craft work training, although it was not fulfilled in the first year of the plan.

In light of these facts, it is arguable that Wèber had no real interest to justify a challenge to the program. Unlike Alan Bakke in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), about whom it would never be clear whether he would have been admitted to medical school if there had been no affirmative action in admissions at the Davis Medical School, we are virtually certain that at the time of litigation, Brian Weber would never have been employed as a skilled craftsman, whether or not there was an affirmative action training program. The only persons who were financially injured by the program were those people who normally would have been hired to do the work if there had been no special craft work training. Although the Court did not mention this fact, one cannot discount its potential importance in reading the *Weber* decision. While Weber almost surely had standing to challenge the allegedly discriminatory plan because the program did make job opportunities available on racial grounds to the exclusion of Weber, it is possible that the outcome may reflect the Court's conviction that Weber and those other white employees in his situation suffered no injury.