NOTE

THE PRESENCE OF STATE ACTION IN *UNITED STEELWORKERS V. WEBER*

In *United Steelworkers v. Weber*[1] the Supreme Court decided that an affirmative action plan designed to eliminate conspicuous racial discrimination did not violate Title VII of the Civil Rights Act of 1964.[2] Weber, who had been denied admission to his plant's training program even though less senior black employees had been accepted, asserted that he had been discriminated against because he was white. Weber did not seriously pursue a cause of action under the fifth amendment of the Constitution;[3] as a result, the Court did not consider whether the

1. 443 U.S. 193 (1979).

2. 42 U.S.C. §§ 2000e to 2000e-16 (1976).

3. U.S. CONST. amend. V provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." In Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court held that the fifth amendment's due process clause includes a requirement of equal protection and places the same constitutional limitations on federal action as the fourteenth amendment's equal protection clause places on state action. *See* Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714, 721 (1963). *See also* Schneider v. Rusk, 377 U.S. 163, 168 (1964).

Unlike the plaintiffs in Davis v. Passman, 442 U.S. 228 (1979), and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), who asserted that they were entitled to constitutional protection, Weber relegated this argument to a footnote. Weber asserted:

> A theoretical constitutional issue could arise if the Court determined that Congress in Title VII, or by its subsequent failure to enact amendments to Title VII, authorized the executive branch to require the imposition of racial preferences. However, this case does not involve a government-imposed quota, even though the regulations and requirements of the OFCC were a motivating force in the decision of Kaiser and USWA to institute the 50 per cent quota.

Brief for Respondents at 46 n.186, United Steelworkers v. Weber, 443 U.S. 193 (1979).

In *Davis* a United States Congressman fired a female assistant because he decided "that it was essential that [the assistant] be a man." 442 U.S. at 230. In a five-to-four decision, the Supreme Court held that the assistant could bring an action for damages directly under the due process clause of the fifth amendment. *Id.* at 248-49.

In *Bakke* the Medical School of the University of California at Davis rejected a white applicant. The applicant contended that the admission committee's affirmative action policies unconstitutionally discriminated against him solely because of his race. The Supreme Court held that the admission policy was unconstitutional because it violated the equal protection clause of the fourteenth amendment. Justices Burger, Stewart, Rehnquist, and Stevens declined to reach the constitutional question, holding that 42 U.S.C. § 2000d (1976) prohibited the plan. Justices Brennan, White, Marshall, and Blackmun found the plan compatible with the fourteenth amendment. Justice Powell concluded that the particular plan violated the fouteenth amendment. For an analysis of the decision's implications, see *Symposium*: Regents of the University of California v. Bakke, 67 CALIF. L. REV. I (1979). *See also* Tribe, *Perspectives on* Bakke: *Equal Protection, Pro-*

state action in the case was sufficient to trigger the equal protection component of the fifth amendment's due process clause.

Fullilove v. Klutznick,[4] decided last term, presented the Supreme Court with a "reverse discrimination" claim brought under the fifth amendment. The minority business provision of the Public Works Employment Act of 1977[5] requires that, absent an administrative waiver, at least ten percent of the federal funds granted for public works projects be used to procure services or supplies from businesses of which fifty percent or more is owned by members of minority groups. The Court held that the set-aside provision is constitutional.

Because of important distinctions between the *Fullilove* set-aside program and the *Weber* affirmative action plan, the question whether a *Weber* plan would survive a fifth amendment challenge remains open.[6] The most important difference is that the *Fullilove* program was enacted by Congress. The Court defers to Congress in this area because the Constitution charges the legislative branch with providing for the general welfare of the United States and with enforcing the equal protection clause of the fourteenth amendment.[7] The Court has held that Congress has the power to define violations of the equal protection clause and to remedy such violations.[8] Although the use of racial and ethnic criteria led the *Fullilove* Court to scrutinize the set-aside provi-

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cedural Fairness, or Structural Justice?, 92 HARV. L. REV. 864 (1979); Van Alstyne, *A Preliminary Report on the* Bakke *Case*, 64 A.A.U.P. BULL. 286 (1978); Van Alstyne, *Controversy: More on the* Bakke *Decision*, 65 ACADEME 49 (1979).

4. 100 S. Ct. 2758 (1980).

5. 42 U.S.C. § 6705(f)(2) (Supp. II 1978).

6. The Supreme Court has recently granted certiorari in two cases involving constitutional attacks on affirmative action plans. *See* Johnson v. Chicago Bd. of Educ., 604 F.2d 504 (7th Cir. 1979), *cert. granted*, 100 S. Ct. 3055 (1980) (No. 79-1356); Minnick v. California Dep't of Corrections, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979), *cert. granted*, 100 S. Ct. 3055 (1980) (No. 79-1213).

7. In *Fullilove*, the Court stated:

> In *Columbia Broadcasting System, Inc. v. Democratic National Comm.* 412 U.S. 94, 102 . . . (1973), we accorded "great weight to the decisions of Congress" even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. The rule is not different when a congressional program raises equal protection concerns. See, *e.g., Cleland v. National College of Business*, 435 U.S. 213 . . . (1978); *Mathews v. De Castro*, 429 U.S. 181 . . . (1976).

100 S. Ct. at 2772.

8. Katzenbach v. Morgan, 384 U.S. 641 (1966). In *Katzenbach* the Court held that Congress had the power to remedy past discrimination. In *Fullilove*, Justice Powell, concurring, stated: "Implicit in . . . [*Katzenbach*'s] holding was the Court's belief that Congress had the authority to find, and had found, that members of this minority group had suffered governmental discrimination." 100 S. Ct. at 2786 (Powell, J., concurring). Justice Powell also recalled that in South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966), the Court had noted that Congress has authority to define and provide remedies for violations of the fifteenth amendment. 100 S. Ct. at 2786.

sion strictly,[9] the Court determined that Congress had acted within its constitutional authority.[10] In contrast to the *Fullilove* set-aside program, the *Weber* affirmative action plan was implemented pursuant to a collective bargaining agreement between private parties.[11] Government agencies induced and approved the affirmative action plan,[12] but Congress did not specifically authorize it.[13] The Court would subject a plan coerced by government agencies to a more rigorous review than one enacted by Congress.[14]

This distinction, along with other differences between the *Fullilove* and *Weber* affirmative action plans,[15] indicates that a constitutional attack on a *Weber*-type plan might still be successful. If presented with such a challenge, the Court would need to determine, as a threshold

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9. Strict scrutiny is required even if the racial or ethnic classification has a remedial purpose. 100 S. Ct. at 2771. The Court stated:

> Here we pass, not on a choice made by a single judge or a school board but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny and it "is not to say we 'defer' to the judgment of the Congress . . . on a Constitutional question," or that we would hesitate to invoke the constitution should we determine that Congress has overstepped the bounds of its constitutional power. *Columbia Broadcasting*, . . . 412 U.S. [94] at 103 [1973] . . . .
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> Congress may employ racial or ethnic classifications in exercising its Spending or other legislative Powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.

100 S. Ct. at 2772, 2776. The Court applied a two-step analysis. First, it determined that the objectives of the minority business enterprise provision were within the power of Congress. *Id.* at 2772-75. Second, it decided that the "limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.* at 2772, 2775-80 (emphasis omitted).

10. *Id.* at 2780. The Court noted, however, that "the program may press the outer limits of congressional authority . . . ." *Id.* at 2781.

11. United Steelworkers v. Weber, 443 U.S. at 197.

12. See text accompanying note 27 *infra*.

13. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 218 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

14. In Fullilove v. Klutznick, 100 S. Ct. 2758, 2777 (1980), the Court stated: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."

15. There are two other significant distinctions between *Fullilove* and *Weber*. First, the *Fullilove* program included a number of minority groups, yet permitted flexibility of administration. *See* 42 U.S.C. § 6705(f)(2) (Supp. II 1978). The Court stressed these features in *Fullilove* in upholding the set-aside program. 100 S. Ct. at 2779-80. The *Weber* plan, on the other hand, applied only to blacks and mandated a strict racial quota. 443 U.S. at 199. Second, *Fullilove* involved a facial constitutional challenge to the Act, *see* 100 S. Ct. at 2775, whereas in *Weber* there was an attack on the application of the affirmative action plan, *see* 443 U.S. at 200. The Court probably would have examined the *Fullilove* plan more closely, and perhaps would have reached a different conclusion, had the plaintiff in that case been directly affected by the plan.

matter, whether sufficient state action was present to raise fifth amendment questions. This Note argues that the government contacts with the defendants in *Weber* were sufficient to constitute state action and thus to trigger fifth amendment protections. These contacts included the National Labor Relations Board's involvement with Weber's union, the United Steelworkers of America;[16] the Equal Employment Opportunity Commission's pressure upon Weber's employer, Kaiser Aluminum and Chemical Corporation, to institute affirmative action plans;[17] and the Office of Federal Contract Compliance Programs' insistence that private contractors seeking government contracts implement affirmative action plans.[18] Although predicting the result of a constitutional challenge to a *Weber*-type plan is beyond the scope of this Note, an analysis of the facts in *Weber* and of the case law on state action demonstrates that a court should reach the constitutional issue if it is presented again in a similar case.[19]

I. THE FACTS OF *WEBER*

The United Steelworkers of America and Kaiser Aluminum and Chemical Corporation entered into a collective bargaining agreement covering fifteen Kaiser plants, including the one that employed Weber. The agreement required Kaiser to train production workers to fill craft openings by establishing programs in which the trainees would be selected on the basis of seniority. The parties agreed to eliminate racial imbalance in Kaiser's craft work forces by reserving for blacks half the openings in a plant's program until the percentage of black craft workers in a plant was equal to the percentage of blacks in the local labor force.[20] Pursuant to this plan, the Kaiser plant in Gramercy, Louisiana, selected seven black and six white craft trainees from its production work force. The most senior blacks selected had less seniority than several rejected white production workers. Weber, one of the rejected white workers, instituted a class action to obtain injunctive and monetary relief.[21] He claimed that the affirmative action plan denied him the opportunity to participate in the training program solely because of

16. See text accompanying notes 75-134 *infra*.

17. See text accompanying notes 135-58 *infra*.

18. See text accompanying notes 159-75 *infra*.

19. Weber's attorney did not vigorously assert Weber's constitutional rights apparently because he was confident that Weber would prevail on his Title VII claim. Furthermore, the attorney probably believed that if the Court found state action the federal government would be encouraged to assume a more active role in the implementation of affirmative action plans.

20. 443 U.S. at 199.

21. *Id.* at 199-200.

his race, in violation of Title VII of the Civil Rights Act of 1964.[22]

Neither the district court[23] nor the court of appeals,[24] which both found in Weber's favor, discussed any constitutional issues. The Supreme Court, reversing the lower courts, agreed that the only question presented was the interpretation of Title VII: "[W]hether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan."[25] Justice Brennan, speaking for the Court, concluded from the legislative history that Congress did not intend through Title VII to prohibit all voluntary race-conscious affirmative action.[26]

Both the district court and the court of appeals stated that there had been substantial government involvement in the affirmative action plan. The district court found that if the Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission had not exerted so much pressure on Kaiser and the Steelworkers Union, they would never have instituted the affirmative action plan: "satisfying the requirements of OFCC, and avoiding vexatious litiga-

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22. 42 U.S.C. §§ 2000e to 2000e-16 (1976).

23. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

24. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

25. 443 U.S. at 200 (emphasis added). The Court stated: "We emphasize at the outset the narrowness of our inquiry. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment." *Id.*

Weber asserted that 42 U.S.C. § 2000e-2(a) to -2(d) (1976) makes it unlawful to discriminate because of race when selecting apprentices for training programs. 443 U.S. at 199-200. Subsection (a) provides:

> 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
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> (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.

42 U.S.C. § 2000e-2(a) (1976). Subsection (d) 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.

Id. § 2000e-3(d).

26. 443 U.S. at 204-08. *See* Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 439-43 (1980).

tion by minority employees, were [their] prime motivations."[27] Weber did not assert that the extensive government contacts provided him with a fifth amendment equal protection claim; yet these contacts were sufficient to constitute state action and thus to entitle Weber to invoke the rights guaranteed by the fifth amendment.[28]

II. PRINCIPLES OF STATE ACTION

The rights guaranteed by the fifth and fourteenth amendments protect the individual from state aggression; "[i]ndividual invasion of individual rights is not the subject-matter of the amendment."[29] Courts must therefore distinguish between individual and state action.[30] State action clearly arises from state and local legislation and from actions of government officers that abridge individual rights. The distinction is less clear when state activity is mixed with private activity. The Supreme Court has found that state action can be present in three of these mixed situations:[31] private performance of a governmental function;[32] judicial enforcement of a private agreement;[33] and significant government involvement with the conduct of private parties.[34] Moreover, courts are more inclined to find state action in any of these three situations if racial discrimination has occurred.[35] The Supreme Court has not developed a uniform standard for finding state action. Generally, it sifts through the facts of a particular case to ascertain whether the totality of government activity is sufficient to constitute state action.

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27. 415 F. Supp. at 765. The district court also stated that the quota system "was prompted not only by [Kaiser's] desire to increase the percentage of its black craftsmen, . . . but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance . . . ." *Id.* Similarly, the court of appeals stated:

> [T]he affirmative action complained of was not imposed by the judiciary; rather, this collective bargaining agreement was entered into to avoid future litigation and to comply with the threats of the Office of Federal Contract Compliance Programs (OFCC) conditioning federal contracts on appropriate affirmative action.

563 F.2d at 218.

28. See text accompanying notes 72-74 *infra.*

29. Civil Rights Cases, 109 U.S. 3, 11 (1883).

30. *See* Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

31. Magill v. Avonworth Baseball Conference, 516 F.2d 1328, 1331 (3d Cir. 1975).

32. See text accompanying notes 36-42 *infra.*

33. See text accompanying notes 43-47 *infra.*

34. See text accompanying notes 48-69 *infra.*

35. See text accompanying notes 70-71 *infra.*

A. *Private Performance of a Governmental Function.*

The "white primary" cases[36] illustrate the first mixed situation: private performance of a governmental function. The white primary cases involved various schemes to prohibit minorities from voting in primary elections. In *Nixon v. Condon*[37] the Texas legislature enacted a statute delegating to the local Democratic Party's executive committee the power to determine voter qualifications for the Democratic primary election. The legislature enacted this statute in response to *Nixon v. Herndon*,[38] in which the Supreme Court held that Texas could not forbid blacks to vote in primaries. The Democratic Party's executive committee continued the legislature's practice of excluding blacks from voting in primaries. The Supreme Court held that the state's delegation of authority to the Democratic Party constituted state action. The exclusion of blacks from participating in the primaries thus violated the fourteenth amendment:

> [The members of the committee] are not acting in matters of merely private concern like the directors or agents of business corporations. They are acting in matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly. . . . The test is not whether the members of the Executive Committee are the representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.[39]

Private performance of governmental functions also occurs in other contexts. In *Marsh v. Alabama*[40] a company-owned town imposed criminal punishment on a person who distributed religious literature on its premises. The Court held that regardless of whether the corporation or a municipality owned the town, it was subject to constitutional limitations; the town could therefore not abridge first amendment rights.[41] Although the Court has classified other activities as

36. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

37. 286 U.S. 73 (1932).

38. 273 U.S. 536 (1927).

39. Nixon v. Condon, 286 U.S. at 88-89. The Court may have been more willing to find state action in the primary cases because the infringement of the right to vote directly violated the rights guaranteed by the fifteenth amendment.

40. 326 U.S. 501 (1946).

41. *Id.* at 507. The Court stated:

> We do not think it makes any significant constitutional difference as to the relationship between the rights of the owner and those of the public that here the State, instead of permitting the corporation to operate a highway, permitted it to use its property as a town, operate a "business block" in the town and a street and sidewalk on that business block. Cf. *Barney v. Keokuk*, 94 U.S. 324, 340 [1876]. Whether a corporation or a mu-

governmental, it has been reluctant to place many activities performed by private parties into this category.[42]

B. *Judicial Enforcement of a Private Agreement.*

In *Shelley v. Kraemer*[43] the Supreme Court established a second class of cases in which private activity may constitute state action subject to constitutional scrutiny. The issue in *Shelley* was whether "judicial enforcement by state courts of restrictive covenants based on race or color" is state action.[44] The Court held that a racially restrictive covenant could not be enforced in equity against a black purchaser because such enforcement would constitute state denial of equal protection:

> The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.[45]

> nicipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free. As we have heretofore stated, the town of Chickasaw does not function differently from any other town.

Id. at 507-08.

42. The Court has applied the governmental-function test in other private action cases. *See, e.g.*, Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (some shopping centers perform public functions), *questioned*, Hudgens v. NLRB, 424 U.S. 507, 518 (1976); Evans v. Newton, 382 U.S. 296 (1966) (private parks render municipal services). The Supreme Court seems, however, to be limiting the scope of the governmental-function test. In Hudgens v. NLRB, 424 U.S. 507 (1976), the plurality opinion of the Court would have overruled *Logan Valley* and held that a shopping center does not perform a public function. *Cf.* Pruneyard Shopping Center v. Robins, 100 S. Ct. 2035, 2041-42 (1980) (holding that a state constitutional provision giving individuals the right to solicit signatures and distribute pamphlets at a private shopping center does not violate the owner's property rights under the fifth amendment). Similarly, in Evans v. Abney, 396 U.S. 435 (1970), the Court in effect overruled Evans v. Newton, 382 U.S. 296 (1966). In *Newton* an individual devised to a municipality, in trust, a tract of land that was to be used as a park for whites only. *Id.* at 297. The Court held that the park services were municipal, so that the Constitution prohibited the park's discrimination. As a result of the *Newton* decision, the Supreme Court of Georgia ruled that it had become impossible to fulfill the intention of the testator and that the trust had therefore failed. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968), *aff'd*, 396 U.S. 435 (1970). The Supreme Court's affirmance placed primary emphasis on the testator's desire "that the park remain forever for the exclusive use of white people," and on the state's nonapplication of the *cy pres* doctrine. *Id.* at 447.

43. 334 U.S. 1 (1948).

44. *Id.* at 8.

45. *Id.* at 20 (footnote omitted).

Although the broad principle enunciated in *Shelley* could implicate the state in numerous instances, the Court has not construed *Shelley* liberally.[46] Generally, more than judicial enforcement of a private contract is required before a court will find state action.[47]

C. *Significant Government Involvement with the Conduct of Private Parties.*

The Supreme Court has also found state action in cases in which the state has significant involvement with private defendants. For the requisite involvement there must be either joint participation between the state and the private party in the activity,[48] state authorization and encouragement of the private conduct,[49] or a "close nexus"[50] between the private conduct and the government.[51]

1. *Joint Participation with the Private Party.* In *Burton v. Wilmington Parking Authority*[52] a state agency built and owned a parking garage. The agency leased space in the garage to a public restaurant that refused to serve blacks. The Court determined that the state and the private party were joint participants in the discriminatory venture. The state had furnished gas and heat and had repaired the building's structural flaws. Moreover, the state and the restaurant had mutually benefited from this symbiotic relationship:

> Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to con-

46. *See, e.g.*, Black v. Cutter Laboratories, 351 U.S. 292 (1956), in which the Court did not apply *Shelley* despite Justice Douglas's assertion in dissent that to allow an employer to dismiss an employee for communist activity would violate the first amendment. 351 U.S. at 302 (Douglas, J., dissenting). In Evans v. Abney, 396 U.S. 435, 445 (1970), the Court explicitly refused to apply *Shelley* to force defendants to keep open a park that was to revert to its donor upon the park's desegregation.

The Court has applied *Shelley* in other cases, however. For example, in Barrows v. Jackson, 346 U.S. 249 (1953), the Court reaffirmed *Shelley*'s proscription of judicial enforcement of racially restrictive covenants. *See also* Hurd v. Hodge, 334 U.S. 24 (1948).

47. For example, in *Weber*, 443 U.S. at 209, the Court enforced the contract between the United Steelworkers and Kaiser despite Weber's assertion that such enforcement would violate the *Shelley* doctrine. *See* Brief for Respondents at 46 n.186, United Steelworkers v. Weber, 443 U.S. 193 (1979).

48. See text accompanying notes 52-58 *infra*.

49. See text accompanying notes 59-64 *infra*.

50. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

51. See text accompanying notes 65-69 *infra*.

52. 365 U.S. 715 (1961).

> demn. It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen . . . .[53]

The Court noted that within the lease or contract the state could have "affirmatively required [the private party] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation."[54] This ability, in light of the "degree of state participation and involvement"[55] in the discriminatory action, satisfied the state action requirement of the fourteenth amendment. The Court cautioned, however, that "the peculiar facts or circumstances" of each case would determine whether government participation subjects a venture to constitutional requirements.[56]

In no case since *Burton* has the Supreme Court found state action in a joint venture between private enterprise and government. Lower courts have occasionally used the *Burton* analysis,[57] but the restrictive trend in state action analysis[58] tempers reliance on the *Burton* doctrine.

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53. *Id.* at 724.

54. *Id.* at 725.

55. *Id.* at 724.

56. *Id.* at 725-26.

57. *See, e.g.*, Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 23 (2d Cir. 1979); Briscoe v. Bock, 540 F.2d 392, 395 (8th Cir. 1976); Johnson v. Botica, 537 F.2d 930, 938 (7th Cir. 1976); Ginn v. Mathews, 533 F.2d 477 (9th Cir. 1976); Sarkees v. Wright & Kremers, Inc., 433 F. Supp. 705, 706 (W.D.N.Y. 1977); Melanson v. Rantoul, 421 F. Supp. 492, 498-99 (D.R.I. 1976), *aff'd sub nom.* Lamb v. Rantoul, 561 F.2d 409 (1st Cir. 1977). *See also* De Malherbe v. International Union of Elevator Constructors, 476 F. Supp. 649 (N.D. Cal. 1979). In *De Malherbe* the plaintiff brought suit against a collective bargaining representative and local and international unions, alleging that they had violated his fifth amendment rights by denying him admission to a federally funded and monitored training program because he was not a United States citizen. The court, finding that the defendants and the federal government were joint participants, placed particular significance on the role of the Office of Federal Contract Compliance in approving and fostering the citizenship requirement. *Id.* at 652-53. The court relied on Mathis v. Opportunities Industrialization Centers, Inc., 545 F.2d 97 (9th Cir. 1976), and Ginn v. Mathews, 533 F.2d 477 (9th Cir. 1976):

> *Ginn* and *Mathis* together indicate that the Court of Appeals for the Ninth Circuit is willing to base a finding of government action on government funding accompanied by substantial contractual restrictions without a detailed inquiry into the degree of administrative responsibility or control vested in the entity that provided the funding. In *Ginn* the court held that a Project Headstart program was a government instrumentality under *Burton*, since it received substantial funding from the federal government and, "[a]s might be expected, the generous purse was not made available without the ever-present strings attached."

476 F. Supp. at 661-62.

58. For a discussion of the Supreme Court's restrictive trend in state action analysis, see Note, *State Action After* Jackson v. Metropolitan Edison Co.: *Analytical Framework for a Restrictive Doctrine*, 81 DICK. L. REV. 315 (1977); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974).

2. *State Authorization and Encouragement of Private Conduct.* In addition to finding state action based on the joint participation of the state and a private party in a discriminatory venture, the Supreme Court has also found state action when the state has authorized and encouraged private discrimination. In *Reitman v. Mulkey*[59] the Court considered an amendment to the California state constitution prohibiting the state from abridging "the right of any person . . . to decline to sell, lease or rent [his] property to such person or persons as he, in his absolute discretion, chooses."[60] Although the amendment did not ostensibly involve the state in private discriminatory activity, the Court reviewed the decision of the California Supreme Court, and agreed with that court that the intent behind the amendment was "to overturn state laws that bore on the right of private sellers and lessors to discriminate."[61] Because the amendment in effect had authorized the private right to discriminate, and because the amendment's "ultimate impact" was to encourage private racial discrimination,[62] the amendment had involved the state "in private racial discriminations to an unconstitutional degree."[63] Indeed, private discrimination had become "one of the basic policies of the state."[64]

3. *The Close-nexus Test.* In *Jackson v. Metropolitan Edison Co.*[65] the Supreme Court considered a heavily regulated private utility that had terminated a customer's service without prior notice or a hearing before an impartial body. The customer asserted that the termination constituted state action and, as such, denied her due process of law. According to the customer, the state, in creating and regulating a public utility monopoly, had either delegated a governmental function to a private party or significantly involved itself in a private party's activities. The Court rejected this contention,[66] and held that the monopoly

59. 387 U.S. 369 (1967).

60. *Id.* at 371-72 (quoting CAL. CONST. art. I, § 26 (1964) (invalidated by Reitman v. Mulkey, 387 U.S. 369 (1967))).

61. 387 U.S. at 374, 376.

62. *Id.* at 376.

63. *Id.* at 376-79.

64. *Id.* at 381.

65. 419 U.S. 345 (1974).

66. *Id.* at 353. The Court stated:

> If we were dealing with the exercise by *Metropolitan* of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State. The Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty. *Girard Life Insurance Co. v. City of Philadelphia*, 88 Pa. 393 (1879). . . . Doctors, optometrists, lawyers, Metropolitan, and Nebbia's upstate New York grocery selling a quart of milk are all in regulated busi-

created by the state did not itself constitute state action.[67] Instead, the Court formulated a test that requires the party alleging state action to show a close relationship between the state and the challenged action of the regulated entity:

> It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.[68]

The Court failed to delineate standards that would be helpful in determining when "a sufficiently close nexus" exists between private and public activity to trigger constitutional scrutiny. It did indicate, however, that mere government approval of or permission for a private activity without a showing of government inducement or close participation did not constitute state action.[69]

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nesses, providing arguably essential goods and services, "affected with a public interest." We do not believe that such a status converts their every action, absent more, into that of the State.

Id. at 352-54 (footnotes omitted).

67. The Court stated:

> We also reject the notion that Metropolitan's termination is state action because the State "has specifically authorized and approved" the termination practice. In the instant case, Metropolitan filed with the Public Utility Commission a general tariff—a provision of which states Metropolitan's right to terminate service for nonpayment. . . . The District Court observed that the sole connection of the Commission with this regulation was Metropolitan's simple notice filing with the Commission and the lack of any Commission action to prohibit it.

Id. at 354-55 (footnote omitted). Moreover, the Court did not find that there had been a symbiotic relationship or joint participation as in Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

68. 419 U.S. at 350-51.

69. Lower court decisions since *Metropolitan Edison* have consistently distinguished between active participation or inducement and mere approval. Thus, in cases involving state grants-in-aid to private parties, the courts have not found state action unless the state has done more than merely provide money and engage in general regulation. *See, e.g.*, Musso v. Suriano, 586 F.2d 59 (7th Cir. 1978) (medicare funding of a nursing home and a hospital; funding of a private university), *cert. denied*, 440 U.S. 971 (1979); Bethel v. Jendoco Constr. Corp., 570 F.2d 1168 (3d Cir. 1978) (government contracts); Greenya v. George Washington Univ., 512 F.2d 556 (D.C. Cir. 1975) (funding of a private university); Spark v. Catholic Univ. of America, 510 F.2d 1277 (D.C. Cir. 1975) (funding of a private university); Ascherman v. Presbyterian Hosp. of Pac. Medical Center, 507 F.2d 1103 (9th Cir. 1974) (funding for a hospital).

The courts require that the *Metropolitan Edison* nexus test be satisfied even if the state has some additional control over the parties. Thus, in Hines v. Cenla Community Action Comm., 474 F.2d 1052 (5th Cir. 1973), the court found no state action although the private party, a community action agency, had received federal funding and had been required to carry out its program in accordance with the terms and conditions of the federal grant: "Since CCAC was not a public corporation controlled by the federal government, the plaintiff could not be a federal employee. Therefore, CCAC as a private employer had complete freedom of action and was not bound by the due process clause of the Fifth Amendment." *Id.* at 1058. The plaintiff thus failed to establish the nexus between state involvement and the alleged unconstitutional activity. The court indi-

D. *State Action in Cases Alleging Racial Discrimination.*

Besides evaluating the extent of government contact, courts often look to the nature of a plaintiff's claim to determine whether state action exists in a private activity. Some lower courts have indicated that a lesser degree of state involvement is needed to invoke constitutional protection in cases involving racial discrimination.[70] This use of a more relaxed standard for state action in cases involving racial discrimination is consistent with the standard of judicial scrutiny employed in claims asserted under the equal protection clause. Under the equal protection clause, classifications based upon race, alienage, or national origin are treated as inherently suspect while classifications based on other considerations are subject to less stringent review.[71]

III. THE APPLICATION OF STATE ACTION PRINCIPLES TO THE FACTS OF *WEBER*

The federal government was extensively involved in the formation of the collective bargaining agreement between Kaiser and the United Steelworkers of America that resulted in the *Weber* affirmative action

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cated, however, that state action would have existed if the state had been involved in the daily supervision of the plan. *Id.*

Other cases also emphasize that whether state action exists depends upon the amount of government supervision over the private party. Several courts have held that a state's appointment of a majority of an institution's board of direetors is either determinative of state actiou or an important factor in establishing state actiou. *See* Downs v. Sawtelle, 574 F.2d 1 (1st Cir. 1978), *cert. denied*, 439 U.S. 910 (1979); O'Neill v. Graysou County War Memorial Hosp., 472 F.2d 1140 (6th Cir. 1973); Chiaffitelli v. Dettiner Hosp., Inc., 437 F.2d 429 (6th Cir. 1971); Mercdith v. Allen County War Memorial Hosp. Comm'n, 397 F.2d 33 (6th Cir. 1968); Aasum v. Good Samaritan Hosp., 395 F. Supp. 363 (D. Or. 1975), *aff'd*, 542 F.2d 792 (9th Cir. 1976). Some courts have indicated that the presence of even a minority of state appointees on a board of directors will be an important factor in determining state actiou. *See* Braden v. University of Pittsburgh, 392 F. Supp. 118 (W.D. Pa. 1975); Isaacs v. Board of Trustees, 385 F. Supp. 473 (E.D. Pa. 1974).

70. *See, e.g.*, Granfield v. Catholic Univ. of America, 530 F.2d 1035 (D.C. Cir.), *cert. denied*, 429 U.S. 821 (1976); Girard v. 94th St. and Fifth Ave. Corp., 530 F.2d 66 (2d Cir. 1975), *cert. denied*, 425 U.S. 974 (1976); Rhode Island Chapter, Associated Gen. Contractors of America, Inc. v. Kreps, 450 F. Supp. 338 (D.R.I. 1978).

The court in Jackson v. Statler Foundation, 496 F.2d 623, 628-29 (2d Cir. 1974), commented on the tendency of some courts to regard state action claims in discrimination cases differently:

> Prior case law while not directly controlling is not, of course, unenlightening. It is noteworthy that several courts have considered claims that the activities of tax exempt organizations constitute "state actiou." Significantly, these cases divide into two groups: Where racial discrimination is involved, the courts have found "state action" to exist; where other constitutional claims are at issue (due process, freedom of specch), the courts have generally concluded that no "state action" has occurred. . . . This dichotomy is explained in part by the double "state action" standard which has beeu recognized—one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims. . . . However, these results may also be explainable in terms of facts and circumstances peculiar to eacli case.

71. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Loving v. Virginia, 388 U.S. 1 (1967).

plan. Three fundamental connections between the government and the private parties provided sufficient government contacts to invoke the due process protections of the fifth amendment. First, the National Labor Relations Board certified the United Steelworkers of America as the bargaining representative for the agreement.[72] Second, the Equal Employment Opportunity Commission exerted pressure upon private industry to implement affirmative action plans.[73] And third, the Office of Federal Contractors Compliance Programs threatened to withhold federal contracts from Kaiser if it did not develop suitable affirmative action plans.[74]

A. *Involvement of the National Labor Relations Board.*

The agreement between Kaiser and the Steelworkers containing the affirmative action plan was entered into pursuant to a master collective bargaining agreement.[75] As a result, there were three possible instances of state action. First, as a private bargaining representative, the United Steelworkers implemented national labor policy, thus arguably performing a governmental function.[76] Second, the government arguably enforced a racially discriminatory contract.[77] And finally, the government significantly involved itself with the conduct of the United Steelworkers of America.[78]

1. *Implementing National Labor Policy: Private Performance of a Governmental Function.* Section 7 of the National Labor Relations Act[79] guarantees employees the basic rights of industrial self-determination: "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[80] These rights effectuate the national labor policy of minimizing industrial strife by encouraging the practice and procedure of collective bargaining.[81]

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72. See text accompanying notes 75-134 *infra.*
73. See text accompanying notes 135-58 *infra.*
74. See text accompanying notes 159-75 *infra.*
75. United Steelworkers v. Weber, 443 U.S. at 197-98. The collective bargaining process is authorized by the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976).
76. See text accompanying notes 79-97 *infra.*
77. See text accompanying notes 98-103 *infra.*
78. See text accompanying notes 104-18 *infra.*
79. 29 U.S.C. § 157 (1976).
80. *Id.*
81. *See id.* § 151.

In order to implement effectively the national labor policy embodied in section 7, the Act grants the employees' bargaining representative the exclusive right to represent the employees, once it has obtained majority support.[82] To protect minority interests within the union, Congress has imposed a duty of fair representation on this bargaining representative:

> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . . ." *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202 [1944]. . . .
>
> It was because the national labor policy vested unions with power to order the relations of employees with their employer that this Court found it necessary to fashion the duty of fair representation. That duty "has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. 171, 182 [1967].[83]

The National Labor Relations Act also binds the bargaining representative to a policy of nondiscrimination in employment.[84] The duty of fair representation thus requires the statutory representative to bargain in good faith for the interest of all the members of the unit.[85]

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82. *Id.* § 159(a). The principle of majority rule is central to the policy of fostering collective bargaining. *See* Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327, 1333 (1958).

83. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180-81 (1967). The Supreme Court first recognized the statutory duty of fair representation in Steele v. Louisville & N.R.R. Co., 323 U.S. 192 (1944). In *Steele* the agreement between the union and the employer provided that no more than 50% of the firemen in each class of service within each seniority district would be black and that until that percentage was reached all vacancies would be filled by whites. The Court invalidated this plan, which effectively limited the opportunity for black employees, because the union had failed to represent them fairly. The Court stated that although a statutory representative may enter into a contract that unfavorably affects some of its members, such unfavorable treatment must be based upon "relevant differences." *Id.* at 203. "[T]he discriminations based on race alone," the Court concluded, were "obviously irrelevant and invidious." *Id.*

Although *Steele* interpreted actions imposed under the Railway Labor Act, 45 U.S.C. §§ 151-188 (1976), the doctrine of fair representation has been extended to actions under the National Labor Relations Act. *See* Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944). *See generally* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 158-59 (1966); H. WELLINGTON, LABOR AND THE LEGAL PROCESS 129-84 (1968).

84. 29 U.S.C. § 158(b)(2) (1976); *see* Emporium Capwell Co. v. Western Addition Comm. Organization, 420 U.S. 50, 66 (1975). *See also* United Packinghouse Workers v. NLRB, 416 F.2d 1126, 1134 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969).

85. *See* American Communication Ass'n v. Douds, 339 U.S. 382 (1950), in which the Supreme Court explained that "when authority derives in part from the Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by the Government itself." As a result, "the public interest in the good faith exercise of that power is very great." *Id.* at 401-02.

A bargaining representative enjoys other benefits besides the exclusive right to represent the union. One of these is the rule that ties employees to the union they elect for one year after the election, during which no rival union may file for an election to represent the workers.[86] This contract-bar rule extends the protection against rival union challenges to the life of a collective bargaining agreement, up to a maximum of three years.[87]

The National Labor Relations Board is vested with primary authority to ensure that the bargaining representative does in fact effectuate national labor policy.[88] The Board has authority to conduct elections of representatives,[89] to prevent unfair labor practices,[90] and to enforce the duty of fair representation.[91] The Board can, for example, decertify a bargaining representative and strip it of its exclusive right to represent the workers on finding that it has failed to represent minority employees fairly.[92] The Board has also indicated that it will deny the benefits of the contract-bar rule to a bargaining representative that has practiced racial discrimination or allowed racial discrimination to appear on the face of the contract.[93] Consequently, the Board has significant powers and duties to ensure that a bargaining representative such as the United Steelworkers of America acts in accordance with the mandates of the National Labor Relations Act.

A bargaining representative, as supervised by the National Labor Relations Board, thus has considerable responsibility for implementing national labor policy. Under *Nixon v. Condon*[94] such private performance of a governmental function would appear to constitute state action, requiring constitutional review of a bargaining representative's actions. The Supreme Court has been reluctant, however, to find that private actions constitute performance of a governmental function.[95]

86. "No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § 159(e)(2) (1976).

87. *See* General Cable Corp., 139 N.L.R.B. 1123 (1962); Deluxe Metal Furniture Co., 121 N.L.R.B. 995, 998-1004 (1958).

88. 29 U.S.C. § 160(a) (1976).

89. *Id.* § 159(c)(1).

90. *Id.* § 160(a).

91. *See* Local Union No. 12, United Rubber Cork, Linoleum & Plastic Workers v. NLRB, 368 F.2d 12, 19-20 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967). The Supreme Court neither recognized nor rejected the doctrine.

92. Independent Metal Workers Local 1, 147 N.L.R.B. 1573 (1964); Pioneer Bus Co., 140 N.L.R.B. 54, 55 (1962); Hughes Tool Co., 104 N.L.R.B. 318, 321-24 (1953).

93. *See* Pioneer Bus Co., 140 N.L.R.B. 54, 55 (1962). *See also* St. Louis Cordage Mills, 168 N.L.R.B. 981 (1967).

94. 286 U.S. 73 (1932). See text accompanying notes 37-39 *supra*.

95. See note 42 *supra* and accompanying text.

Generally, such findings have been made only when private parties performed municipal activities, as in *Marsh v. Alabama*,[96] or became involved with voting qualifications, as in *Nixon v. Condon*.[97] Thus a bargaining representative's role in effectuating national labor policy probably does not in itself constitute state action. Nonetheless, the collective bargaining agreement in *Weber*, when considered together with other government contacts, does indicate state action.

2. *Judicial Enforcement of a Racially Discriminatory Contract.* The Supreme Court in *Shelley v. Kraemer*[98] held that judicial enforcement of a racially restrictive covenant constitutes state action denying equal protection of the laws.[99] In *Weber* the collective bargaining agreement between Kaiser and the United Steelworkers of America contained a provision that restricted the opportunities of nonminority workers in favor of minority workers. Under the rationale of *Shelley*, judicial enforcement of the racially restrictive contract in *Weber* should constitute state action. In *Ciba-Geigy Corp. v. Local 2548, United Textile Workers*,[100] a federal district court did apply *Shelley* in the context of enforcement of a collective bargaining agreement. In that case, the employer and the bargaining representative entered into a collective bargaining agreement that contained a provision allowing the employer to schedule Sunday work for its employees. The petitioning employee claimed that such an agreement violated rights guaranteed by the establishment clause of the first amendment; the employer responded that no state action was involved. The court rejected the employer's response, stating that *Shelley* applied:

> . . . I find the requisite government action furnished by this Court's action, under the reasoning of Shelley v. Kraemer . . . . In *Shelley*, the Supreme Court held that a private agreement which would be unconstitutional if entered into by the state was valid, so long as its terms were voluntarily adhered to by private parties. The Court concluded, however, that any attempt to seek judicial enforcement of the agreement would sufficiently involve the state in an unconstitutional activity so as to preclude enforcement. Both the Supreme Court and the First Circuit have acknowledged the applicability of *Shelley* to the enforcement of a collective bargaining agreement. Railway Employers' Department v. Hanson, 351 U.S. 225, 232 n. 4 . . . (1956); Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971), cert. denied,

96. 326 U.S. 501 (1946). See text accompanying notes 40-41 *supra*.
97. 286 U.S. 73 (1932). See text accompanying notes 37-39 *supra*.
98. 334 U.S. 1 (1948).
99. See text accompanying notes 43-45 *supra*.
100. 391 F. Supp. 287 (D.R.I. 1975).

404 U.S. 872 [1971] . . . .[101]

The *Ciba-Geigy* decision is persuasive because enforcement of a collective bargaining agreement involves not only the court's action but also the supervision of the National Labor Relations Board.[102] Thus, even greater government contact with the private activity exists in collective bargaining agreements than in *Shelley*, in which only judicial enforcement was involved. Nonetheless, the Supreme Court's reluctance to extend the *Shelley* doctrine[103] indicates that it would probably not apply *Shelley* in the *Weber* context.

3. *Government Contact with the Bargaining Representative.* A third factor a court might consider in determining whether state action exists in a *Weber* situation is simply the extent of the government's involvement with the activity of the bargaining representative. A court could find state action, for example, based on the joint participation between the National Labor Relations Board and the bargaining representative.[104] Alternatively, a court might rule that the monopoly granted the bargaining representative results in a close nexus between state and private activity, and thus constitutes state action.[105]

In *Burton v. Wilmington Parking Authority*[106] the Court concluded that there can be state action based on joint participation when the state and a private party have substantial contacts and they benefit mutually from a joint activity.[107] Arguably, the National Labor Relations Board is a joint participant with the bargaining representative: the representative plays an essential role in effectuating the national policy[108] and furthers the policy of minimizing industrial strife by encouraging organized negotiations.[109] Indeed, Congress intended to rely upon the independently organized unions, which in turn must rely on the National Labor Relations Board,[110] to implement the national labor policy. Consequently, the relationship between the government and the representative is symbiotic, and thus similar to the relationship between the state and the restaurant in *Burton*.

101. *Id.* at 298 (citations omitted).
102. See text accompanying notes 88-93 *supra*.
103. See notes 46-47 *supra* and accompanying text.
104. See text accompanying notes 106-10 *infra*.
105. See text accompanying notes 111-18 *infra*.
106. 365 U.S. 715 (1961).
107. *Id.* at 721-26. See notes 52-56 *supra* and accompanying text.
108. See text accompanying notes 88-93 *supra*.
109. See text accompanying notes 79-81 *supra*.
110. See text accompanying notes 88-93 *supra*.

Even if the courts do not consider the bargaining representative and the government joint participants under *Burton*, they may still find state action under the nexus test enunciated in *Jackson v. Metropolitan Edison Co.*[111] Under the nexus test a party seeking constitutional protection must show a close relationship between the state involvement and the challenged activity of the private entity, so that the private action may be treated as that of the state.[112] Mere governmental knowledge or approval of the private activity will not constitute state action.[113] Under *Metropolitan Edison* the state-granted monopoly in *Weber* would not itself satisfy the nexus test.[114] There are, however, two significant distinctions between *Metropolitan Edison* and *Weber*, making a finding of state action in the *Weber* context more likely. First, a *Weber* situation involves an alleged denial of equal protection instead of a violation of procedural due process as claimed in *Metropolitan Edison*. Courts are more willing to find state action when a plaintiff alleges racial discrimination.[115] The second distinction involves the nature of the monopoly in *Weber*. In *Metropolitan Edison* the state agency was regulating a natural monopoly that would exist regardless of state protection.[116] The state regulation was intended "not to aid the company but to prevent its charging monopoly prices . . . ."[117] The Court found that this limited government involvement with the utility's termination procedures did not constitute state action. The monopoly position of the statutory representative in *Weber*, however, was not the result of a natural monopoly, but was created solely by Congress's enactment of the National Labor Relations Act.[118] This fact, together with the bargaining representative's role in effectuating national labor policy and the Board's close supervision of the representative, indicates a much closer nexus between the government and the private party than there was in *Metropolitan Edison*. Moreover, if either the Federal Office of Contract Compliance Programs or the Equal Employment Opportunity Commission requires that a racially discriminatory plan be inserted into the collective bargaining agreement, there is clearly a tight nexus and a need for constitutional scrutiny of the agreement.

111. 419 U.S. 345 (1974).

112. *See id.* at 351.

113. See note 69 *supra*.

114. See text accompanying notes 65-69 *supra*.

115. See text accompanying notes 70-71 *supra*.

116. For discussion of natural monopolies, see T. MORGAN, CASES AND MATERIALS ON ECONOMIC REGULATION OF BUSINESS 5-23 (1976).

117. 419 U.S. at 367 (Marshall, J., dissenting).

118. See note 82 *supra* and accompanying text.

4. *State Action in Collective Bargaining Agreements.* Several lower court decisions have found state action based on collective bargaining agreements when the government has authorized or encouraged potentially unconstitutional activity. In *Linscott v. Millers Falls Co.*[119] the Court of Appeals for the First Circuit considered a collective bargaining agreement that provided for the creation and maintenance of a union shop, and that required all employees to pay dues or be discharged by the employer. One employee, a Seventh-Day Adventist, refused to pay dues because her religion forbade contributing money to a union. She was subsequently discharged by her employer. In a suit for injunctive relief and damages, the employee claimed that the dues requirement deprived her of the right to free exercise of religion under the first amendment. The employer argued that the employee had been discharged pursuant to a private agreement, and that therefore no state action was present.[120]

The court rejected the employer's argument. Concluding that section 14(b) of the Labor Management Relations Act[121] constituted "federal approval" of a union shop,[122] the court stated that the federal statute was "the source of the power and authority by which private rights [were] lost or sacrificed."[123] As a result, the employer's discharge sufficiently involved the government for the discharge to be subject to first amendment review.[124] The *Linscott* court's analysis thus resembled that of the Supreme Court in *Reitman v. Mulkey*,[125] in which the Court concluded that a court should assess the potential impact of official action to determine if the state has significantly involved itself with invidious discrimination.[126]

In *Cubas v. Rapid American Corp.*[127] a federal district court indicated that although congressional authorization of a bargaining representative alone would not constitute state action, congressional authorization of specific discriminatory action by the representative would implicate the government in that activity. In declining to find

119. 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971).

120. 440 F.2d at 16-17.

121. 29 U.S.C. § 164(b) (1976). Section 14(b) provides: "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any state or Territory in which such execution or application is prohibited by State or Territorial law."

122. 440 F.2d at 17.

123. *Id.* at 16 (quoting Railway Employees' Dep't v. Hanson, 351 U.S. 225, 232 (1956)).

124. 440 F.2d at 17.

125. 387 U.S. 369 (1967). See text accompanying notes 59-64 *supra.*

126. 387 U.S. at 380.

127. 420 F. Supp. 663, 669 (E.D. Pa. 1976).

state action in the mere certification of a union as a bargaining representative, the court stated:

> Plaintiff relies primarily on *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir. 1971) a case in which the relevant actions by the union consisted of carrying out a procedure that Congress had specifically endorsed[.] 440 F.2d at 16 n. 2. The holding does not stand for the proposition that all actions taken by unions which are under the jurisdiction of the National Labor Relations Act are governmental actions. In the instant case, the Local's allegedly unlawful behavior was not taken in connection with efforts to comply with a federally favored procedure. Consequently, plaintiff's First and Fifth Amendment claims . . . must be dismissed . . . .[128]

Finally, in *NLRB v. Mansion House Center Management Corp.*[129] the court held that state action would exist if the National Labor Relations Board required an employer to negotiate with a bargaining representative that discriminated on the basis of race:

> When a governmental agency recognizes such a union to be the bargaining representative it significantly becomes a willing participant in the union's discriminatory practices. Although the union itself is not a governmental instrumentality the National Labor Relations Board is. N.L.R.B. v. Nash-Finch Co., 404 U.S. 138 . . . (1971). Moreover, here the Board seeks judicial enforcement of its order requiring collective bargaining in a federal court. Obviously, judicial enforcement of private discrimination cannot be sanctioned.[130]

Under *Linscott, Cubas*, and *Mansion House*, state action thus exists when the National Labor Relations Act or the National Labor Relations Board coerces, directly encourages, or actively approves of a specific activity of the bargaining representative.[131] Though it is unclear whether the Supreme Court would follow the rationale of these

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128. *Id.*

129. 473 F.2d 471 (8th Cir. 1973).

130. *Id.* at 473 (citations omitted). For a discussion of the relationship of the National Labor Relations Board and racial discrimination by the statutory representative, see Axelrod & Kaufman, Mansion House—Bekins—Handy Andy: *The National Labor Relations Board's Role in Racial Discrimination Cases*, 45 GEO. WASH. L. REV. 675, 682-88 (1977) (discussing legislative history); Leslie, *Governmental Action and Standing: NLRB Certification of Discriminatory Unions*, 1974 ARIZ. ST. L.J. 35; Meltzer, *The National Labor Relations Act and Racial Discrimination: The More Remedies, the Better?*, 42 U. CHI. L. REV. 1 (1974); Note, *Union Racial Discrimination: A Liberalized Standard of Proof*, 58 MINN. L. REV. 335 (1973); Note, *The Impact of De Facto Discrimination by Unions on the Availability of NLRB Bargaining Orders*, 47 S. CAL. L. REV. 1353 (1974); 7 GA. L. REV. 770 (1973).

131. In Bell & Howell Co. v. NLRB, 598 F.2d 136, 148-50 (D.C. Cir. 1978), *cert. denied*, 442 U.S. 942 (1979), the petitioner argued that the NLRB had violated the fifth amendment by granting exclusive bargaining representative status to a union that had previously discriminated against women. The court rejected this argument and held that the Board's certification of a union did not violate the fifth amendment because the certification had not authorized or encouraged discrimination. 598 F.2d at 149. Board certification imposed on the union an affirmative duty not to discriminate, however, and subjected the union to sanctions for future discrimination. *Id.* Dis-

cases, they nonetheless provide persuasive authority that state action is present in the *Weber* context. In *Weber* the National Labor Relations Board, the Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance Programs approved[132] or encouraged[133] the racially restrictive contract. Thus, there was greater government involvement in *Weber* than in *Cubas*, in which the only government contact alleged was the general grant of the bargaining representative's powers. Even the *Cubas* court, though refusing to find state action, implied that specific government authorization of the private activity would constitute state action.[134]

B. *Involvement of the Equal Employment Opportunity Commission.*

The extensive pressure the Equal Employment Opportunity Commission exerted in *Weber* constitutes a second fundamental connection between the government and the private parties who entered into the collective bargaining agreement. The Commission's primary function is to eliminate unlawful employment practices.[135] In creating the Commission, Congress established a procedure whereby state and local agencies, as well as the national commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party is permitted to file a lawsuit.[136] In the Equal Employment Opportunity Act of 1972,[137] Congress amended Title VII to give the Commission authority to investigate charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against the employer or union named

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crimination by a certified union and tacit acceptance by the Board, the court indicated, would constitute state action:

> Once certified, a union is invested with significant governmental powers, and passive acquiescence by the Board in union discrimination might well pose serious constitutional questions. Both the Court and the Board have avoided these difficulties by interpreting the Act to prohibit such discrimination, and by providing a wide variety of sanctions to enforce the prohibition.

Id. at 149-50.

132. The National Labor Relations Board knew of the racially restrictive contract in *Weber* and in effect approved that contract by not invoking its sanctioning powers. See text accompanying notes 88-93 *supra.*

133. The Equal Employment Opportunity Commission encouraged affirmative action by threatening to bring suit against industries without satisfactory affirmative action plans. See text accompanying notes 135-58 *infra.* The Office of Federal Contract Compliance Programs also promoted affirmative action by awarding lucrative government contracts to industries that implemented satisfactory plans. See text accompanying notes 159-75 *infra.*

134. 420 F. Supp. at 669.

135. Fekete v. United States Steel Corp., 424 F.2d 331, 334 (3d Cir. 1970).

136. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

137. Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at scattered sections of 42 U.S.C. § 2000e (1976)).

in a discrimination charge.[138] The Act uses the term "voluntary compliance" merely as a term of art; the term does not imply that there is private compliance without any government coercion. Rather, it means compliance in the absence of judicial intervention.[139] The Commission's role is to encourage and, if necessary, to pressure private parties to make amends for past discrimination.[140]

Before *Weber*, the Equal Employment Opportunity Commission had exerted significant pressure on Kaiser. Kaiser officials denied at trial that Kaiser had discriminated in hiring or promotion; they stated, however, that the company was aware of its vulnerability to private or government lawsuits under Title VII.[141] The officials explained that they had been defendants in Title VII litigation involving other plants similar to the one at Gramercy.[142] Furthermore, the Kaiser officials intimated that the government's industry-wide lawsuit against the steel industry in *United States v. Allegheny-Ludlum Industries, Inc.*[143] influenced the Kaiser collective bargaining agreement.[144] Recognizing their potential vulnerability to such suits, the bargaining representative and Kaiser entered into the collective bargaining agreement that included the affirmative action plan.[145]

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138. Alexander v. Gardner-Denver Co., 415 U.S. at 44.

139. *Id.* at 44-47.

140. *See* United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 843, 847, 868-69 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). *See generally* Fekete v. United States Steel Corp., 424 F.2d 331, 336 (3d Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 32 n.8 (5th Cir. 1968).

Section 706a of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (1976), provides:

> [T]he Commission . . . shall make an investigation . . . . If the Commission determines after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion.

Furthermore, section 706(3) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f) (1976), provides:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) . . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.

The Equal Employment Opportunity Commission, a governmental agency, thus is involved in bringing about a voluntary settlement.

141. Petitioner's Brief for Certiorari at 6-7, United Steelworkers v. Weber, 443 U.S. 193 (1979).

142. Petitioner's Brief for Certiorari, *supra* note 141, at 6.

143. 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). See text accompanying notes 146-54 *infra*.

144. Petitioner's Brief for Certiorari, *supra* note 141, at 6-7. Doubtless, the United Steelworkers officials were also familiar with *Allegheny-Ludlum*, for the United Steelworkers had been named a defendant in that case.

145. Petitioner's Brief for Certiorari, *supra* note 141, at 6-7.

The specific pressures exerted by the Equal Employment Opportunity Commission were not indicated in the *Weber* record. The facts in *Allegheny-Ludlum*, however, illustrate the pressures that the Commission typically exerts upon private parties to encourage their implementation of effective affirmative action plans. In *Allegheny-Ludlum* the Secretary of Labor and the Commission sued nine major steel companies and the United Steelworkers of America alleging widespread hiring discrimination and job-assignment discrimination on the basis of race, sex, and national origin. The complaint alleged that the companies had violated Title VII and Executive Order No. 11,246[146] by hiring and assigning employees on impermissible grounds and by restricting ethnic minorities and females to low-paying and undesirable jobs. The complaint also charged the companies and the union with formulating, in the collective bargaining contracts, systems for promotion, layoff, recall, and transfer that deprived minority and female employees of opportunities for advancement comparable to those opportunities enjoyed by white males.[147] The Commission filed the complaint after six months of negotiations with the collective bargaining representative, during which time the parties had attempted to establish voluntary compliance with Title VII. The Commission and the private parties settled after the defendants agreed to comply with Title VII.[148]

An examination of the provisions of the *Allegheny-Ludlum* consent decree illustrates the coercive and supervisory powers the Commission exercises when effectuating "voluntary compliance." For example, in order to avoid possible interpretative problems with the decree, the parties provided for enforcement procedures through a nationwide system of implementation committees located within the local plants. Each committee included at least two union representatives and two company representatives; in addition, the government was entitled to designate a representative to meet with any implementation committee.

146. 3 C.F.R. 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976). See text accompanying notes 159-68 *infra*.

147. 517 F.2d at 834.

148. 517 F.2d at 834-35. Consent Decree I provided:

> The substantive relief falls into three basic categories: (1) immediate implementation of broad plantwide seniority, along with transfer and testing reforms, and adoption of ongoing mechanisms for further reforms of seniority, departmental and line of progression (LOP) structures, all of which are designed to correct the continuing effects of past discriminatory assignments; (2) establishment of goals and timetables for fuller utilization of females and minorities in occupations and job categories from which they were discriminatorily excluded in the past; and (3) a back pay fund of $30,940,000, to be paid to minority and female employees injured by the unlawful practices alleged in the complaint.

Id. at 835. Also, Consent Decree II required the companies "to initiate affirmative action programs in hiring, initial assignments, promotions, management training, and recruitment of minorities and females." *Id.*

The implementation committees were responsible for ensuring compliance with the consent decrees at the local plants and for establishing goals and timetables for affirmative action.[149]

A second committee, the audit and review committee, also ensured compliance with the consent decree. This committee, composed of five management members, five union members, and one Commission member, was created to enforce consent decrees that were not being implemented properly.[150] The committee met regularly to oversee compliance and to resolve disputes, including those unresolved by the local implementation committees. One of the most significant clauses of the *Allegheny-Ludlum* consent decree provided that any issue not unanimously resolved by the audit and review committee could be brought by the dissenting member before a federal district court.[151] Thus, if the government member of the committee did not approve of the execution of the consent decree, he could force litigation over the particular issue, in effect exercising a veto power. This is a powerful weapon to force the company and the bargaining representative to accept the Commission's interpretation of the consent decree. The audit and review committee was also responsible for modifying the consent decree if it appeared that the company was not properly remedying the past discrimination.[152] If the Commission representative was at this point dissatisfied with the consent decree he could file suit in federal district court.[153] Moreover, if he determined that the company was not eliminating past discrimination or that the parties were not complying with the consent decree, he could treat the alleged violations as new violations of Title VII (or of Executive Order No. 11,246).[154] Thus, the government had significant coercive powers to ensure that the company executed an effective affirmative action plan.

The intensive network of control the Commission exercises in organizing and implementing affirmative action plans could prompt a court, in a *Weber* context, to conclude that the activity of the bargaining representative constitutes state action. A court might, for example, find elements of coercion in the Commission's activities, having an effect similar to the apparent government encouragement of discrimination in *Reitman v. Mulkey*.[155] Or the Commission's involvement with affirmative action plans might lead to a finding of state action under the

149. *Id.*
150. *Id.*
151. *Id.* at 835-36.
152. *Id.* at 836.
153. *Id.*
154. *Id.* at 838.
155. 387 U.S. 369 (1967). See text accompanying notes 59-64 *supra.*

nexus test of *Metropolitan Edison*.[156] The Commission's use of coercion to induce private parties to establish affirmative action plans certainly indicates a "close nexus between the State and the challenged action."[157] Indeed, the Commission's use of a veto power, illustrated in *Allegheny-Ludlum*,[158] reinforces the nexus between the government's actions and the challenged activity. By use of such a veto, the Commission can force the statutory representative and the company to accede to its demands. The nexus between the state and the challenged activity is certainly close.

C. *Involvement of the Office of Federal Contract Compliance Programs.*

The pressure the Office of Federal Contract Compliance Programs (OFCCP) exerts on employers and unions constitutes a third connection between the government and private parties in the *Weber* context. The primary responsibility of the OFCCP[159] is to effectuate the directives of Executive Order No. 11,246,[160] issued by President Johnson, which requires federally assisted construction contractors and their subcontractors to accord equal employment opportunity in order to do business with the federal government.[161] Executive Order No. 12,086[162] and Executive Order No. 11,246[163] authorize the Secretary of Labor to adopt rules, regulations, and orders to implement Executive

156. 419 U.S. 345 (1974). See text accompanying notes 65-69 *supra*.

157. *Id.* at 351. See text accompanying notes 68-69 *supra*.

158. See text accompanying notes 150-54 *supra*.

159. The OFCCP "is responsible for establishing policies and goals and providing leadership and coordination of the Government's program to achieve nondiscrimination in employment by Government contractors and subcontractors . . . ." OFFICE OF THE FEDERAL REGISTER, NATIONAL ARCHIVES & RECORDS SERVICE, GENERAL SERVICES ADMINISTRATION, UNITED STATES GOVERNMENT MANUAL, 1980/81, at 416 (1980). In June of 1975 the Office of Federal Contract Compliance was merged with two other Department of Labor equal employment programs to form the Office of Federal Contract Compliance Programs. [1978] 8 LAB. REL. REP. (BNA) § 421, at 201.

160. 3 C.F.R. 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976).

161. Exec. Order No. 11,246 requires affirmative action by government contractors and subcontractors with regard to various aspects of employment, including "employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship." 3 C.F.R. at 340, *reprinted in* 42 U.S.C. § 2000e app., at 1233. The Secretary of Labor requires contractors and subcontractors meeting certain minimum standards to file annual employment reports, 41 C.F.R. § 60-1.7 (1979), and to develop and implement written affirmative action programs that establish procedures, goals, and timetables for increased hiring and promotion of minorities and women, *id.* § 60-1.40.

162. 3 C.F.R. 230 (1979), *reprinted in* 42 U.S.C. § 2000e, at 1453 (Supp. II 1978).

163. 3 C.F.R. 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976).

Order No. 11,246 and its provisions. The OFCCP regulations require that government contracts of over $10,000,[164] if not exempt,[165] include equal employment opportunity provisions.[166] Contractors are, for example, prohibited from engaging in employment discrimination and are required to fulfill certain affirmative obligations.[167] Moreover, Executive Order No. 11,246 authorizes the Secretary of Labor to require periodic compliance reports from the contractor and to investigate the contractor to ensure compliance with those duties.[168] To help implement the program, the OFCCP has established a system of area coordinators to develop government-wide compliance programs for labor market areas.

In *Weber* the OFCCP exerted pressure on Kaiser to institute the affirmative action plan. As the court of appeals noted,

> the case . . . is unique in that the affirmative action complained of was not imposed by the judiciary; rather, this collective bargaining agreement was entered into to avoid future litigation and to comply with the threats of the Office of Federal Contract Compliance Programs conditioning federal contracts on appropriate affirmative action.[169]

In fact, the involvement of the OFCCP was very similar to that of the Equal Employment Opportunity Commission in *Allegheny-Ludlum*. Both agencies were moving forces behind their respective affirmative action plans, for both could ensure compliance with affirmative action objectives through coercive tactics. The Equal Employment Opportunity Commission could, for example, threaten the company with Title VII litigation; the OFCCP could threaten to withhold government contracts or to invalidate present contracts.[170]

Because they are determinative forces in private decision-making, these threats to withhold future contracts or to invalidate present ones

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164. 41 C.F.R. § 60-1.5(a)(1) (1979). Also included in the OFCCP regulations are contracts or subcontracts that are bills of lading, that involve depositories of federal funds, or that involve financial institutions paying or issuing United States savings bonds. *Id.*

165. 41 C.F.R. § 60-1.5 (1979). Most contracts under $10,000, contracts and subcontracts for indefinite quantities, contracts for work performed outside the United States, contracts with state or local governments, contracts with certain educational institutions, contracts to be performed near Indian Reservations, and contracts explicitly exempted by the Director of OFCCP are exempt. *Id.* § 60-1.5(a) to -1.5(b). However, the Director of OFCCP may withdraw any exemption to further the goals of Executive Order No. 11,246. *Id.* § 60-1.5(d).

166. *Id.* § 60-1.4.

167. *Id.*

168. 3 C.F.R. 339, § 203(c) (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976).

169. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 218 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Webor, 443 U.S. 193 (1979).

170. Exec. Order No. 11,246, § 209(a)(5), 3 C.F.R. 339, 344 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e app., at 1232 (1976); 41 C.F.R. § 60-1.26(a) (1979).

appear to constitute state action under *Reitman v. Mulkey*.[171] Such threats necessarily would have a coercive effect upon private parties and encourage them to implement affirmative action plans. Adoption of the affirmative action plans could also constitute state action either under the *Metropolitan Edison* nexus test[172] or under the theory that the OFCCP and the private parties are joint venturers as in *Burton v. Wilmington Parking Authority*.[173] An employer's implementation of an affirmative action plan in response to an OFCCP threat to invalidate or withhold federal contracts indicates, at the very least, a close nexus between the OFCCP and the plan. Similarly, a finding of joint participation under *Burton* may be based on the relationship between the government and private contractors created by Executive Order No. 11,246 and the regulations promulgated thereunder.[174] To execute the objectives of this executive order, the government must rely upon acceptance of the government contract by private individuals. At the same time, private contractors must depend upon federal contracts for their work. The result is a symbiotic relationship between the government and private contractors, much like the relationship between the parking authority and the restaurant in *Burton*.[175] The similarity of these two relationships is enhanced by the OFCCP's power to insert into government contracts whatever clause it desires concerning racial discrimination. *Reitman v. Mulkey*, the nexus test of *Metropolitan Edison*, and the joint participants test of *Burton* thus all indicate that the activities of the OFCCP are, in the *Weber* context, sufficiently integrated with private decision-making to cause the private adoption of an affirmative action plan to be state action, subject to scrutiny under the fifth amendment.

IV. CONCLUSION

In *United Steelworkers v. Weber* the Supreme Court held that an affirmative action plan that gave preference to black workers over white workers did not violate Title VII of the Civil Rights Act of 1964. Although the plaintiff in *Weber* did not seriously challenge the constitutionality of his employer's affirmative action plan, the government's involvement with the plan indicates that sufficient state action existed to trigger constitutional review. Rather than applying a rigid formula

171. 387 U.S. 369 (1967). See text accompanying notes 59-64 *supra*.
172. See notes 65-69 *supra* and accompanying text.
173. 365 U.S. 715 (1961). See notes 52-58 *supra* and accompanying text.
174. See notes 159-68 *supra* and accompanying text.
175. See text accompanying notes 52-58 *supra*.

to determine when state action exists, courts generally examine the particular facts or circumstances of a given case.

In *Weber* the government had three significant contacts with the affirmative action plan. First, the National Labor Relations Board's certification of the United Steelworkers of America as the exclusive bargaining agent for Kaiser workers, under several of the Supreme Court's state action tests, is sufficient to implicate the government in that representative's activities. Second, the Equal Employment Opportunity Commission's pressure to implement particular affirmative action plans also supports a finding that the *Weber* plan resulted from state action. Finally, the Office of Federal Contract Compliance Programs' threat to withhold or invalidate government contracts in the absence of affirmative action plans clearly constitutes the type of involvement that has led some courts to treat ostensibly private activity as that of the state.

Courts in the future are likely to address affirmative action plans in the *Weber* factual setting. These courts should subject such affirmative action plans to constitutional scrutiny.

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