

11-1-1979

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Recommended Citation

Richard K. Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of United Steelworkers of America v. Weber and the Misguided Policy of Numerical Employment*, 21 B.C.L. Rev. 1 (1979), <http://lawdigitalcommons.bc.edu/bclr/vol21/iss1/1>

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BOSTON COLLEGE LAW REVIEW

VOLUME XXI

NOVEMBER 1979

NUMBER 1

THE EXORBITANT COST OF REDISTRIBUTING INJUSTICE: A CRITICAL VIEW OF *UNITED STEELWORKERS OF AMERICA V. WEBER* AND THE MISGUIDED POLICY OF NUMERICAL EMPLOYMENT†

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Noble enthusiasm is no less prone to distort the vision than vulgar prejudice. In evaluating the historical facts we do well to bear in mind Flaubert's view that "personal sympathy, genuine emotion, twitching nerves and tear-filled eyes only impair the sharpness of the artist's vision."¹

I. INTRODUCTION

June 27, 1979, the date the Supreme Court announced its decision in *United Steelworkers of America v. Weber*,² was an historic occasion. Almost a year to the day after its much heralded decision in *Regents of the University of California v. Bakke*,³ in which the Court struck down a racially preferential medical school admissions program, the Court bestowed its imprimatur on the use of a racial quota in the employment context. Hailed immediately as a "sweeping endorsement of voluntary affirmative action,"⁴ the decision unleashed a torrent of accolades from those who favor numerical preferences as the means for responding to this country's unhappy history of discrimination.

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† This article was originally conceived and prepared as one side of a forum on the *United Steelworkers of America v. Weber* decision and it was understood that the other side was to be presented by Professor Alfred Blumrosen. Shortly prior to scheduled publication, however, Professor Blumrosen withdrew his article.

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¹ R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 10* (1977) [hereinafter cited as R. BERGER], quoting 4 A. HAUSER, *THE SOCIAL HISTORY OF ART 76* (Vintage Books, undated).

² 433 U.S. 193, 99 S. Ct. 2721 (1979).

³ 438 U.S. 265 (1978).

⁴ BNA DAILY LABOR REPORT NO. 125, AA-1 (June 27, 1979); see also Address by Professor Alfred Blumrosen (June 29, 1979), reprinted in BNA DAILY LABOR REPORT NO. 128, F-1 (July 2, 1979).

In one such endorsement, Daniel Leach, recently appointed Vice Chairman of the Equal Employment Opportunity Commission (EEOC), enthusiastically assessed the decision as "[a] triumph of reasonableness."⁵ A comparably jubilant writer in the *Village Voice*, however, offered the following more candid and revealing description of the import of the occasion:

Brian Weber's somewhat myopic view of bruised feelings should not lure us into a callous disregard for the tragedy of disappointment which will be the result of any selection process. But programs like the one in Gramercy, Louisiana, do more than provide job opportunities. They reduce the monopoly on shattered dreams that blacks have long held in this country.⁶

As this writer suggests, the *Weber* decision and the policy of numerical employment that it enshrines accomplish nothing so well as they accomplish the redistribution of injustice. In place of the groups that have been the traditional victims of race and sex discrimination are substituted individuals, singled out for the fortuity of their not having been born into one of the previously disadvantaged groups. These individuals may themselves come from backgrounds with inherent social, ethnic or economic disadvantages but their interests are sacrificed to the newly institutionalized concept of "Intergenerational Bookkeeping."⁷ If there be cause for celebration in this, I must confess an inability to see it. Like many others who found the arbitrary denial of opportunity on the basis of race and sex deplorable and who have worked for its eradication, I must agree that if we could identify an affordable means by which we could eliminate overnight every vestige of historical discrimination and obliterate its very memory from the mind of humankind, that would surely be the course of choice. That such a miracle cure likely does not exist was accepted by most of us long ago. But failing such a solution, one must wonder whether "race-conscious affirmative action"⁸ is really the best we can do.

⁵ Address of Daniel E. Leach (July 19, 1979), *reprinted in* The Legal Times of Washington, July 23, 1979, at 23.

⁶ Dreyfuss, *Breaking the Monopoly on Shattered Dreams*, The Village Voice, July 23, 1979, at 24.

⁷ This term is taken from Daniel Boorstin's parody of "affirmative action", *THE SOCIOLOGY OF THE ABSURD* (1970). As this article will suggest, much of what was taken at the time of the book's publication as satire has since come to be taken quite seriously by federal officials.

⁸ The phrase, "race-conscious affirmative action" is borrowed from Justice Brennan's majority opinion in *Weber*. See, 99 S. Ct. at 2725. As will be seen, the meaning of "affirmative action" has been greatly corrupted since its inception during the Kennedy administration. See Section II herein. Because both the origins and the sound of "affirmative action" impart to it a rather misleadingly innocuous air, some have understandably preferred to employ arguably more descriptive terms such as "preferential treatment," "the New Racism," "positive discrimination," "reverse discrimination," or "affirmative discrimination." See L. LOROS, *THE NEW RACISM: REVERSE DISCRIMINATION IN AMERICA* 12 (1971) [hereinafter cited as L. LOROS]; see generally N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975) [hereinafter cited as N. GLAZER]. The Amicus Brief filed in *Weber* on behalf of the Committee on Academic Nondiscrimination and Integrity made the following significant point:

There is much to this matter that warrants deliberate reflection. Many people assume that the national policy of numerical employment is a product of "liberal" ideals that have as their first and only aim the lifting up of the down-trodden. As the historical section of this article suggests, however, there is evidence that this policy may well have sprung from quite different, and less acceptable, ideals and motivations—a point that, itself, mandates careful review of the policy's underlying premises.

In the process by which "affirmative action" as we know it developed and in the judicial methods employed in the *Weber* decision, there are some disturbing indications about the current status of certain constitutional values and fundamental notions of consensual government. The Supreme Court's expansive approach to judicial power in the *Weber* decision is, to be sure, hardly an isolated instance. For another disturbing example, one need turn no further than to the decisions of the Court in its fourteenth amendment cases, which have been ably analyzed and indicted in Professor Raoul Berger's thoughtful work.⁹ But the fact that transgression is commonplace only militates the more urgently in favor of its revelation and condemnation, lest we come to mistake our own callousness for the usurper's legitimacy. Moreover, careful examination of *Weber* in the context of the numerical employment policy reveals a microcosmic view of an ominous symbiotic parasitism among the branches of government, by which they have come to feed upon the illegitimate acts of one another, appropriating them for their own unconstitutional purposes. It was Hamilton who warned us that "liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . ." ¹⁰ It therefore must be asked whether, even assuming the ultimate desirability of the numerical policy, the means employed in its development and implementation did not exact too high a price in terms of democratic values. Finally, there is substantial evidence that "affirmative action" is counterproductive of even its own pre-

. . . [A]lthough this Brief, of necessity, frequently uses the phrase "reverse discrimination," that term is a misnomer, for what it really refers to is one species of discrimination itself, not the reverse of it. Nonetheless, along with "preferential treatment," the phrase must perforce be used for want of a generally accepted better appellation.

Brief for Committee on Academic Nondiscrimination and Integrity as Amicus Curiae at 9.

Rhetoric always exerts a subtle influence, but this is especially so where, as in the discrimination area, the issues and policies under consideration are themselves fraught with complexity and nuance. One should choose one's words with care and be ever mindful of the fact that the antiseptic understatement has often been employed to cloak that which fears the light of day. It seems to me that "race-conscious affirmative action" is a phrase of that variety. Throughout this Article, I shall manifest a predilection for "numerical employment," which I feel suggests something of the dehumanizing effect of the phenomenon it describes. Nevertheless, not being convinced that this phrase fully captures the spirit of the thing, I shall also occasionally revert to and use interchangeably "race-conscious affirmative action," "reverse discrimination," "preferential treatment," etc.

⁹ R. BERGER, *supra* note 1.

¹⁰ THE FEDERALIST NO. 78 (A. HAMILTON), *reprinted in*, THE ENDURING FEDERALIST 331, 333 (C. Beard ed. 1948) [hereinafter cited as FEDERALIST].

sumed objectives. In this regard, the social and economic costs of the policy become extremely relevant, but have not, I submit, been heretofore given the consideration they deserve.

It is the principal purpose of this article to examine each of these issues in turn and to show that the costs of *Weber* and "race-conscious affirmative action" are very high indeed. Along the way, I shall also attempt to throw light upon the underlying philosophy of government that provides the foundation for governmental actions in this area.

II. THE TRANSMUTATION FROM EQUAL OPPORTUNITY TO EQUAL EMPLOYMENT: A REVEALING RETROSPECTIVE ON THE DESULTORY DEVOLUTION OF "AFFIRMATIVE ACTION."

The *Weber* case is most meaningfully studied in its historical context. Interestingly enough, however, although the literature fairly abounds in accounts of the development of "affirmative action,"¹¹ it does not appear that an effort has been made as yet to link the assortment of major events in all three branches of the Government with the political context that gave shape to the creature we confront today. This omission, in itself, may have some significance, for it is only after this process has been traced along its twisting path that an accurate picture of some of its more ominous implications emerge.

The term "affirmative action" first appeared in Executive Order No. 10925,¹² promulgated by President Kennedy in 1961. Essentially, Executive Order 10925, like a number of executive orders issued before it, required that federal contractors refrain from discrimination in their employment practices. President Kennedy's Order differed from its predecessors, however, in its addition of a new requirement providing that:

The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demoting or transfer; recruitment or recruitment

¹¹ The best of these is probably EQUAL EMPLOYMENT ADVISORY COUNCIL, *PREFERENTIAL TREATMENT IN EMPLOYMENT—AFFIRMATIVE ACTION OR REVERSE DISCRIMINATION?* 11-50 (K. McGuinness ed. 1977) [hereinafter cited as EEAC]. See also Manning & Domesick, *Title VII: Relationship and Effect on Executive Order 11246*, 7 B.C. IND. & COM. L. REV. 561, 561-63 (1965); Comment, *Executive Order 11246: Presidential Power to Regulate Employment Discrimination*, 43 Mo. L. REV. 451, 453-56 (1978).

¹² 3 C.F.R. 448 (1961). Executive Order No. 10925 was actually only one of a rather long line of executive orders that had sought to prevent racial discrimination among federal contractors. The first of this line was Executive Order No. 8802, issued by President Roosevelt in 1941. 3 C.F.R. 957 (1941). Other executive orders that dealt with anti-discrimination obligations between 1941 and 1961 included: Exec. Order No. 9346, 3 C.F.R. 1280 (1943); Exec. Order No. 10308, 3 C.F.R. 837 (1951); Exec. Order No. 10479, 3 C.F.R. 976 (1953); Exec. Order No. 10557, 3 C.F.R. 203 (1954). For a good discussion of the historical origins, theoretical underpinnings, and constitutional implications of the executive order concept, see Neighbors, *Presidential Legislation By Executive Order*, in 1 C. SANDS, *STATUTORY CONSTRUCTION* 219-34 (4th ed. 1972) (a revision of the Third Edition of SUTHERLAND *STATUTORY CONSTRUCTION*).

advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.¹³

Nowhere in Executive Order 10925 was the term "affirmative action" further defined or explained. The rules promulgated by the President's Committee on Equal Employment Opportunity (PCEEO), created to administer Executive Order 10925, also failed to provide any elaboration.¹⁴ In an opinion considering the legality of the requirement that the non-discrimination clause (including the above-quoted reference to "affirmative action") be included in federal contracts and the sanctions for noncompliance, then Attorney General Robert Kennedy did not even mention the affirmative action clause, though he referred repeatedly to the "fundamental policy that the powers of Government not be used to promote or perpetuate discrimination."¹⁵

It has been said that the original intended meaning of "affirmative action" is "strictly a matter of conjecture,"¹⁶ but there is ample evidence in the means employed by the PCEEO to carry out the mandate of Executive Order 10925 by which a clear impression can be formed. In its program "Plans for Progress," PCEEO exerted itself most aggressively to fulfill its mission. Pursuant to this program, employers were asked to commit themselves voluntarily to "taking affirmative steps above and beyond the Executive order."¹⁷ Companies accepting this invitation¹⁸ consulted with a representative of the PCEEO to draw up a "Plan for Progress," which then was signed by a high-

¹³ Exec. Order No. 10925, § 301 (1), 3 C.F.R. at 450 (emphasis added). This Executive Order abolished the Committee on Government Employment Policy, which had administered the anti-discrimination program for federal contractors since President Truman's administration, and established in its place the President's Committee on Equal Employment Opportunity (PCEEO). *Id.* § 204, 3 C.F.R. at 449. Another important aspect of Exec. Order No. 10925 was its introduction of the power to impose very tough sanctions against "non-complying" contractors. These included suspension or cancellation of existing contracts, blacklisting, and debarment from eligibility for future contracts. *Id.* § 312, 3 C.F.R. at 452. The utilization of such sanctions had been advocated by the last Chairman of the Committee on Government Contract Compliance, Richard M. Nixon, but the Eisenhower administration apparently rejected the idea, continuing to rely exclusively upon persuasion and mediation. EEAC, *supra* note 11, at 16.

¹⁴ See 26 Fed. Reg. 6585 (1961); 28 Fed. Reg. 9812 (1963); 28 Fed. Reg. 11305 (1963).

¹⁵ 40 OP. ATT'Y GEN. 97, 103-06 (1961).

¹⁶ Note, *Executive Order 11246: Anti-Discrimination Obligations In Government Contracts*, 44 N.Y.U. L. REV. 590, 593 (1969).

¹⁷ *Miscellaneous Proposals Regarding The Civil Rights Of Persons Within the Jurisdiction Of the United States: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. Part II at 1118 (1963) (statement of Hobart Taylor, Executive Vice Chairman, President's Committee on Equal Employment Opportunity) [hereinafter cited as *Hearings On Miscellaneous Proposals*].

¹⁸ There were well over 200 major corporations, with an aggregate work force of 8 million workers, that had been enlisted in this program by August, 1964. M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 117 (1966) [hereinafter cited as M. SOVERN].

level company executive and the Vice President of the United States.¹⁹ The content of the plans, however, was what has been described as "little more than letters of intent not to discriminate."²⁰ Thus, although "Plans for Progress" actually may have involved some "steps above and beyond" those required by the Executive Order, it is at least clear from the very limited scope of the plans what "affirmative action," as originally conceived, did *not* mean. It did not mean preferential treatment of minorities and it did not require employers to strive for a preconceived numerical breakdown in their work forces.²¹

The next major development in this area was the passage by Congress of Title VII of the Civil Rights Act of 1964, broadly proscribing discrimination in employment on the basis of race, color, religion, sex or national origin.²² Although the Act and its legislative history will receive considerable attention in the ensuing discussion of the *Weber* case, a few major points warrant emphasis here. First, the structure of the statute as enacted manifests no congressional approval of a preferential treatment or numerical approach to resolving the problem of discrimination. Indeed, if anything, precisely the contrary conclusion is suggested. In section 703,²³ Congress forbade in unequivocal terms discrimination against "any individual" in the terms and conditions of employment,²⁴ the classification of employees in such a way as to

¹⁹ *Id.* When President Kennedy was assassinated and Lyndon Johnson succeeded to the presidency leaving the vice presidency vacant, Johnson continued to sign "Plans for Progress" on behalf of the United States. *Id.*

²⁰ Professor Michael Sovern described the Plans as follows:

The plans vary considerably in detail, with a few constituting little more than letters of intent not to discriminate, but most follow the basic pattern established by Lockheed. In brief, that pattern entails forswearing discrimination in all phases of the company's personnel policies, with special emphasis on training and education programs; affirming the company's intention to take positive action to recruit minority group applicants for employment, training, and promotion; promising thorough dissemination of the company's equal opportunity policies to company personnel, recruitment sources, and minority groups; spelling out in some detail how these pledges are to be implemented; and undertaking to file progress reports at regular intervals.

Id. (footnote omitted).

²¹ This conclusion is buttressed by an examination of the information requested of construction contractors in the PCEEO's "Compliance Report" form 41-101. In that form, the contractor was asked only such things as whether there was a "company wide policy to assure . . . equal opportunity;" whether such policy had been communicated in writing to all departments, offices and facilities; whether someone had been assigned to see that the policy was understood and implemented; whether educational and training opportunities were made available on a non-discriminatory basis; and whether the policy against discrimination had been communicated to recruiting sources and through recruiting advertising. Form 41-101 is reproduced in THE CIVIL RIGHTS ACT OF 1964, 401-04 (BNA 1964) [hereinafter cited as CIVIL RIGHTS ACT].

²² Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* (1976).

²³ Pub. L. No. 88-352, Title VII, § 703, 78 Stat. 255.

²⁴ Pub. L. No. 88-352, Title VII, § 703(a)(1), 78 Stat. 255.

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

deprive "any individual" of employment opportunities,²⁵ and discrimination against "any individual" with respect to training opportunities.²⁶ In the same section, the Congress provided certain narrowly circumscribed exceptions to its broad anti-discrimination rule. These were, principally, employment situations wherein religion, sex or national origin (but not race) would constitute a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business,"²⁷ religious institutions concerned with the propagation of their religion and desiring to hire employees of like faith to further this objective,²⁸ employment situations involving national security,²⁹ "bona fide seniority or merit system[s],"³⁰ and businesses on or near Indian reservations that wished to give a preference in employment to Indians.³¹

Significantly, the statute contained two references to "preferential treatment." The first was in section 703 (i)³² which created the above-mentioned express exception to the general rule against discrimination for preferential treatment accorded Indians under specifically limited circumstances. The second was in section 703 (j),³³ which made it clear that Title VII was not intended to require employers to give preferences to any groups because of a statistical "imbalance" that might appear when the employer's work force was compared to "the available work force."³⁴

(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.

²⁵ Pub. L. No. 88-352, Title VII, § 703(a)(2), 78 Stat. 255.

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

* * *

(2) to limit, segregate, or classify his employees 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.

²⁶ Pub. L. No. 88-352, Title VII, § 703(d), 78 Stat. 256.

(d) 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.

²⁷ Pub. L. No. 88-352, Title VII, § 703(e), 78 Stat. 256.

²⁸ *Id.*

²⁹ Pub. L. No. 88-352, Title VII, § 703(g), 78 Stat. 256.

³⁰ Pub. L. No. 88-352, Title VII, § 703(h), 78 Stat. 257.

³¹ Pub. L. No. 88-352, Title VII, § 703(i), 78 Stat. 257.

³² *Id.*

³³ Pub. L. No. 88-352, Title VII, § 703(j), 78 Stat. 257.

³⁴ *Id.* This provision reads in full as follows:

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance

Similarly, the term "affirmative action" received only a single mention in the Act, and that not in the context of an exception to the broad proscription of discrimination against "any individual," but rather in a remedial provision. Section 706(g) of the Act, as enacted in 1964, provided in relevant part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such *affirmative action* as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice).³⁵

Although this language does suggest some identity of "affirmative action" with preferential treatment, Congress limited its use to those situations in which a court found that an employer had "intentionally engaged in or is intentionally engaging" in unlawful discrimination. Even then, any such affirmative relief

which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred to or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Id.

³⁵ Pub. L. No. 88-352, Title VII, § 706(g), 78 Stat. 261 (emphasis added). This section was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 107, and now reads as follows:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

(Emphasis added to highlight new language incorporated into the provision via the 1972 amendment.)

was to be limited to the *actual victims* of proven discrimination.³⁶ Justice Brennan later compared the purpose of section 706(g) to that of section 10(c) of the National Labor Relations Act³⁷ and asserted that, for both provisions, "the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act].'"³⁸

Those who seek retrospective justification for the policy of numerical employment, however, point to section 709(d), which provided in pertinent part:

Where an employer is required by Executive Order 10925, issued March 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.³⁹

In this language the proponents of numerical employment would find tacit congressional approval of "affirmative action" and hence preferential treatment under the executive order programs. There are, however, two flaws in this argument. First, it must be remembered that "affirmative action" had not been construed by the executive branch as requiring or condoning preferential treatment or numerical representation at the time Title VII was passed.⁴⁰ Moreover, the legislative history reveals that H.R. 7152 (the bill

³⁶ The last sentence of § 706(g), which has not been altered since its enactment in 1964, makes clear this limitation on the affirmative action contemplated. See note 35 *supra*.

³⁷ 29 U.S.C. § 160(c) (1976).

³⁸ *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 769 (1976).

³⁹ Pub. L. No. 88-352, Title VII, § 709(d), 78 Stat. 263. Section 709 was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 6, 86 Stat. 107 (1972), and the language quoted in the text was stricken.

⁴⁰ See notes 16-21 *supra* and accompanying text.

Attorney General Robert Kennedy, testifying in behalf of the original version of Title VII which would have done little more than legitimize the PCEEO and Executive Order 10925, see note 41 *infra*, emphasized that he and the President had no intention of resorting to a numerical or preferential remedy:

Mr. KING. Mr. Chairman—Mr. Attorney General, there certainly is no intent upon your part to grant any preferential treatment to Negroes, is there?

Attorney General KENNEDY. No.

Mr. KING. And you certainly do not want to grant them any rights that would infringe upon the rights of others.

Attorney General KENNEDY. That's correct.

Mr. KING. So if I made a statement to that effect in my district, I should not be criticized for it by the NAACP.

Attorney General KENNEDY. As far as I'm concerned, I think that is absolutely right. A group of Negroes came down about the employment practices at the Department of Justice and I stated at that time that we hire

that, as amended, ultimately became the Civil Rights Act of 1964), as introduced on the floor of the House, contained a section 711(b) that would have authorized the President "to take such action as may be appropriate to prevent the committing or continuing of an unlawful employment practice by a person in connection with the performance of a contract with an agency or instrumentality of the United States."⁴¹ The fact that section 711(b) was stricken from the statute as enacted clearly negates any inference of an intention to sanction an expansion of executive authority beyond then existing bounds.⁴²

people based on their ability and on their integrity, and that nobody was going to be hired in the Department of Justice just because they were Negroes. And I think also that the President said publicly that he was against a quota system—so many Negroes in a particular area, so therefore, they should have a certain percentage of the jobs. I think it is quite a clear public statement.

Civil Rights Act: Hearings on H.R. 7152, As Amended by Subcommittee No. 5, Before House Comm. on the Judiciary, 88th Cong., 1st Sess. 2769 (1963).

In a later opinion on the legality of the Philadelphia Plan, the Comptroller General confirmed the absence of a numerical policy in either the Kennedy or early Johnson Administration:

In this connection, it should be noted that, while the phrase "affirmative action" was included in the Executive Order (10925) which was in effect at the time Congress was debating the bills which were subsequently enacted as the Civil Rights Act of 1964, no specific affirmative action requirements of the kind here involved had been imposed upon contractors under authority of that Executive order at that time, and we therefore do not think it can be successfully contended that Congress, in recognizing the existence of the Executive order and in failing to specifically legislate against it, was approving or ratifying the type or method of affirmative action which [the Labor] Department now proposes to impose on contractors.

49 Comp. Gen. 59, 70-71 (1969). For further discussion of the Comptroller General's opinion and the response it evoked, see notes 66-96 *supra* and the accompanying text. Indeed, in regulations regarding federally registered apprenticeship programs, promulgated a little less than seven months before the passage of Title VII, the Secretary of Labor had expressly disavowed any intention "to require any program sponsor or employer to select or employ apprentices in the proportion which their race, color, religion, or national origin bears to the total population." Fed. Reg. , reprinted in CIVIL RIGHTS ACT, *supra* note 21, at 415.

⁴¹ H.R. REP. NO. 914, 88th Cong., 1st Sess. pt. 2 (Judiciary Comm. 1963), reprinted in *U.S. Equal Employment Opportunity Comm'n Leg. Hist. of Titles VII and XI of the Civil Rights Act of 1964*, at 2014. An amendment offered by Senator Tower while the bill was in the Senate would have made Title VII the "exclusive means" for redressing employment discrimination. 110 CONG. REC. 13,650 (1964). The amendment was rejected. *Id.* at 13,652. Taken together, the House action in striking § 711(b) and the Senate action in rejecting the Tower amendment support the conclusion that Congress intended neither to remove executive power then being exercised nor to permit any significant expansion of such power.

⁴² This conclusion is borne out by an examination of those portions of the debates in the House focusing on the amendment that was to become § 711(b) and that had been offered by Representative Celler, Chairman of the House Judiciary Committee and floor manager of the bill in the House. At one point Representative Gross inquired of Representative Celler what impact the latter foresaw the bill would have on the PCEEO:

On September 24, 1965, less than three months after the effective date of Title VII, President Johnson promulgated Executive Order No. 11246.⁴³ Superficially, Johnson's Order did not appear to change much of substance in the earlier Kennedy Orders. Executive Order 11246 required federal contractors to undertake essentially the same obligations with respect to non-discrimination and "affirmative action" as had been required under Executive Order 10925.⁴⁴ "Affirmative action" was again left undefined. Much of the significance of Executive Order 11246, however, lay in the fact that it abolished the PCEEO and transferred to the Secretary of Labor, who had always served as Vice Chairman of the PCEEO, the responsibility for administering the Order.⁴⁵ Perhaps most significantly, the President conferred on

Mr. GROSS. * * *

Perhaps the gentleman from New York can give me an answer to this question. You have a Civil Rights Commission, and you have embedded in this bill a section creating a brand new Equal Opportunity Commission. There is also in existence, and has been, headed for years by one Lyndon B. Johnson, when he was the Vice President, the President's Committee on Equal Employment Opportunity. Is that to be abolished in favor of the new Commission or will it, like Topsy, just keep on growing forever?

Mr. CELLER. This bill has nothing whatsoever to do with the Presidential Commission on Equal Opportunity. That is in existence, and it will continue in existence. We do not add or subtract anything with respect to that Commission.

110 CONG. REC. 2569 (1964). Later, just before the vote was taken on the amendment striking § 711(b), the same point was raised in a colloquy between Representatives Celler and Poff:

Mr. CELLER. And will the gentlemen not also say that the deletion of the language by the amendment does not have any effect upon existing Presidential power?

Mr. POFF. Of course, the striking of language from a bill could not in any way impair existing law.

Mr. CELLER. And it does not limit it and it does not broaden it. It remains intact as it is now.

Mr. POFF. That is true.

Mr. Chairman, I join in support of this amendment.

Id. at 2575. It should also be remembered that, as one contemporary observer of the process by which Title VII took shape has written:

Title VII of H.R. 7152, as first introduced in Congress, merely authorized the President to establish another commission, to be known as the "Commission on Equal Employment Opportunity." The purpose of the proposal was to give a statutory basis for the Commission on Equal Employment Opportunity, which had first been established in 1961 pursuant to Executive Order No. 10925. The primary function of the new statutory commission would have been to prevent discrimination by government contractors and subcontractors and in federally financed or assisted programs.

Vaas, *Title VII: Legislative History*, 7 B.C. INDUS & COM. L. REV. 431, 434 (1966) (footnote omitted).

⁴³ 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. § 2000e at 1232 (1976).

⁴⁴ *Id.* The contract provision in Exec. Order No. 11246 differed materially from that in Exec. Order No. 10925, 3 C.F.R. 448 (1961), *reprinted in* 42 U.S.C. § 2000e at 1233 (1976) only in its substitution of references to the Secretary of Labor in the place of references to the PCEEO.

⁴⁵ Exec. Order No. 11246, §§ 201, 403, 3 C.F.R. 340, 347, *reprinted in* 42 U.S.C. § 2000e at 1233, 1236 (1965). The responsibility for redressing discrimination in the federal government itself was given to the Civil Service Commission.

the Secretary of Labor the power to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes [of the Executive Order]." ⁴⁶ The Secretary also was specifically authorized to require of construction contractors, in addition to compliance with the general non-discrimination and "affirmative action" provision, compliance with "such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations." ⁴⁷ Coming, as they did, on the heels of a congressional refusal to authorize the President "to take such action as may be appropriate," ⁴⁸ these provisions in Executive Order 11246 might well have been seen as ominous signs of things to come.

Still, there was a great deal of evidence that nothing much had changed. Not only did Executive Order 11246 not give any further content to "affirmative action," but the term remained undefined in 1966 when the Office of Federal Contract Compliance (OFCC) was established by the Secretary of Labor to administer the federal contractors program. ⁴⁹ It also was not defined when Executive Order 11375 ⁵⁰ rectified the omission of sex from Executive Order 11246's list of proscribed discrimination categories. Indeed, as late as January of 1967, the then Director of the OFCC, Edward C. Sylvester, Jr., stated: "I would say that in a general way, affirmative action is anything that you have to do to get results. But this does not necessarily include preferential treatment. The key word here is 'results.' " ⁵¹ Thus, definitive speculation continued to be fostered by the vague record reflecting the creation and development of "affirmative action."

In the waning days of the Johnson administration, however, the federal contractors program began to take on a somewhat different air. On May 21, 1968, two months after President Johnson announced that he would not seek re-election, the Department of Labor issued a new set of regulations under Executive Order 11246. ⁵² Under these regulations, contractors with 50 or more employees and a federal contract of \$50,000 or more were required to file a written affirmative action plan including an "identification and analysis of problem areas" and provision "in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity." ⁵³ Although the introduction of terms such as

⁴⁶ *Id.* at § 201, 3 C.F.R. at 340, reprinted in 42 U.S.C. § 2000e at 1233.

⁴⁷ *Id.* at § 301, 3 C.F.R. at 346, reprinted in 42 U.S.C. § 2000e at 1235.

⁴⁸ See text and note at note 41 *supra*.

⁴⁹ 31 Fed. Reg. 6921 (1966). The OFCC is now known as the Office of Federal Contract Compliance Programs (OFCCP).

⁵⁰ Exec. Order No. 11375, 3 C.F.R. 684 (1967).

⁵¹ R. NATHAN, JOBS AND CIVIL RIGHTS: THE ROLE OF THE FEDERAL GOVERNMENT IN PROMOTING EQUAL OPPORTUNITY IN EMPLOYMENT AND TRAINING, U.S. COMMISSION ON CIVIL RIGHTS 93 (1969), quoted in EEAC, *supra* note 11, at 19.

⁵² 33 Fed. Reg. 7804 (1969).

⁵³ *Id.* at 7811. The full text of that portion of the regulations relating to affirmative action read as follows:

“deficiencies” and “goals and timetables” arguably set the stage for the numerical employment policy, it remained for the Nixon administration to give the

§ 60-1.40. Affirmative action compliance programs.

(a) *Requirements of programs.* Each agency or applicant shall require each prime contractor who has 50 or more employees and a contract of \$50,000 or more and each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and a subcontract of \$50,000 or more to develop a written affirmative action compliance program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity. Each contractor shall include in his affirmative action compliance programs a table of job classifications. This table should include but need not be limited to job titles, principal duties (and auxiliary duties, if any), rates of pay, and where more than one rate of pay applies (because of length of time in the job or other factors) the applicable rates. The affirmative action compliance program shall be signed by an executive official of the contractor.

(b) *Utilization evaluation.* The evaluation of utilization of minority group personnel shall include the following:

- (1) An analysis of minority group representation in all job categories.
- (2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories.
- (3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

(c) *Maintenance of programs.* Within 120 days from the commencement of the contract, each contractor shall maintain a copy of separate affirmative action compliance programs for each establishment, including evaluations of utilization of minority group personnel and the job classification tables, at each local office responsible for the personnel matters of such establishment. An affirmative action compliance program shall be part of the manpower and training plans for each new establishment and shall be developed and made available prior to the staffing of such establishment. A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to representatives of the agency or Director upon request and the contractor's affirmative action program and the result it produces shall be evaluated as part of compliance review activities.

Id.

Although the regulations provided for slightly different antidiscrimination clauses for federally assisted construction contracts, the above-quoted affirmative action provisions applied equally to both construction and non-construction contractors. The regulations were not published until May 28, but they had been signed by Secretary Wirtz on May 21, 1969. *Id.* at 7812. On the day after the regulations were signed, May 22, the Comptroller General issued an opinion in which the application of such a requirement to contractors working on highway projects receiving federal aid was considered. 47 Comp. Gen. 666 (1968). The Comptroller General held the affirmative action requirement to be incompatible with competitive bidding requirements because it failed to set forth “a statement of definite minimum requirements to be met by the

terms specific content, to vastly expand the concept, and to shift the emphasis away from equal employment *opportunity*. As with so many other well-meant policies of the Johnson years, the infusion of Nixonian logic was to prove disastrous.⁵⁴

About this time, the courts began to play a significant role in the formulation of the numerical employment policy. There were a number of cases⁵⁵ in which the courts proscribed the use of union membership as a criterion for job referral or ordered that minorities be permitted to bid for more desirable jobs on the basis of plant-wide seniority. In some of these cases, the relief provided was expressly limited to those who were actual victims of the unlawful practice that had occasioned judicial intervention.⁵⁶ Other decisions contained decrees that foreseeably might have benefited persons who had never suffered discrimination, but they expressly limited the opportunities they provided to those who were qualified and had greater bona fide seniority than otherwise qualified white employees.⁵⁷ Perhaps the most extreme of these cases was *Local 53, International Ass'n of Heat & Frost Insulators v. Vogler*,⁵⁸ which endorsed the imposition of quota referrals upon a defendant union until objective criteria for admission to union membership could be developed.⁵⁹ Although each of these cases had been carefully reasoned and represented a cautious approach to the problem of providing an adequate remedy for Title VII violations, their resort to quota-type relief paved the way for the next quantum leap by the executive branch.⁶⁰

Seizing upon this concept, the Department of Labor conceived and gave birth to the Philadelphia Plan, the first "affirmative action" mutant with an unmistakably numerical quality. The version of the Plan that was sent to all

bidder's [affirmative action] program, and any other standards or criteria by which the acceptability of such a program will be judged." *Id.* at 670.

⁵⁴ For another example, the Nixon administration's pursuit of executive hegemony at the expense of congressional purpose made a victim of the Office of Economic Opportunity, also a child of the Johnson era. See, J. SCHELL, *THE TIME OF ILLUSION* 298-301 (1976) [hereinafter cited as J. SCHELL].

⁵⁵ See, e.g., *Dobbins v. Local 212, IBEW*, 292 F. Supp. 413 (S.D. Ohio 1968).

⁵⁶ See, e.g., *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 995 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

⁵⁷ See, e.g., *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 519-20 (E.D. Va. 1968).

⁵⁸ 407 F.2d 1047 (5th Cir. 1969).

⁵⁹ *Id.* at 1053.

⁶⁰ A Labor Department official who participated in that jump described the influence of these decisions as follows:

Federal courts already had begun to fashion orders in employment discrimination cases which went beyond relief for those specifically discriminated against. The orders required employers found guilty of discrimination to hire in accordance with a set ratio of whites to blacks, whether or not new black applicants had suffered discrimination. Thus was introduced a group rights concept antithetical to traditional notions of individual merit and responsibility.

Silberman, *The Road To Racial Quotas*, Wall St. J., Aug. 11, 1977, at 12, col. 4 [hereinafter cited as Silberman].

agency heads on June 27, 1969,⁶¹ required construction contractors wishing to bid on federally-assisted projects in the Philadelphia area to submit an "acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitation for bids."⁶² The Plan incorporated findings of discrimination by Philadelphia area building trade unions in admission and referral of minorities which had resulted in low minority representation in seven crafts.⁶³ To remedy this discrimination by *unions*, the Department of Labor planned to develop "definite standards" that would "specify the range of minority manpower utilization expected for each of the designated trades," which the "specific goals" of the *contractors'* affirmative action plans would have to meet if the contractors wished to be eligible for the award of a contract.⁶⁴ The Plan further provided that it was "no excuse" if the union with

⁶¹ The complete text of the Memorandum setting forth the revised Philadelphia Plan is reprinted at 115 CONG. REC. 39951 (1969).

⁶² *Id.*

⁶³ The seven crafts were iron workers, plumbers/pipefitters, steamfitters, sheet metal workers, electrical workers, roofers/water proofers, and elevator construction workers. The unions in these trades were found to have had "about 1.6 percent minority group membership." *Id.*

⁶⁴ *Id.* The full text of section 6 of the Plan, which dealt with "specific goals" and "definite standards" provided as follows:

6. *Specific Goals and Definite Standards:*

a. *General.* The OFCC Area Coordinator, in cooperation with the Federal contracting or administering agencies in the Philadelphia area, will determine the definite standards to be included in the invitation for bids or other solicitation used for every Federally-involved construction contract in the Philadelphia area, when the estimated total cost of the construction project exceeds \$500,000. Such definite standards shall specify the range of minority manpower utilization expected for each of the designated trades to be used during the performance of the construction contract. To be eligible for the award of the contract, the bidder must, in the affirmative action program submitted with his bid, set specific goals of minority manpower utilization which meet the definite standard included in the invitation or other solicitation for bids unless the bidder participates in an affirmative action program approved by OFCC.

b. *Specific Goals.*

(1) The setting of goals by contractors to provide equal employment opportunity is required by Section 60-1.40 of the Regulations of this Office (41 CFR § 60-1.40). Further, such voluntary organization of businessmen as Plans for Progress have adopted this sound approach to equal opportunity just as they have used goals and targets for guiding their other business decisions. (See the Plans for Progress booklet Affirmative Action Guidelines on page 6.)

(2) The purpose of the contractor's commitment to specific goals is to meet the contractor's affirmative action obligations and is not intended and shall not be used to discriminate against any qualified applicant or employee.

c. *Factors Used in Determining Definite Standards.* A determination of the definite standard of the range of minority manpower utilization shall be made for each better-paid trade to be used in the performance of the contract. In determining the range of minority manpower utilization that should result from an effective affirmative action program, the factors to be considered will include, among others, the following:

which the contractor had a collective bargaining agreement failed or refused to refer minorities and that non-complying contractors would be subject to the full range of sanctions under Executive Order 11246.⁶⁵

On August 5, 1969, the Comptroller General issued an opinion to the Secretary of Labor in which he found that the Philadelphia Plan contravened Title VII by requiring contractors to select employees solely on the basis of race or national origin.⁶⁶ In so finding, the Comptroller General expressly considered and rejected arguments that Congress had implicitly approved this sort of "affirmative action" in Title VII⁶⁷ and that the Philadelphia Plan was consistent with the remedial measures that had been approved in recent court decisions.⁶⁸ In short, the opinion concluded that the Plan required of federal contractors precisely the sort of discrimination that Title VII had been intended to prohibit.⁶⁹

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- (1) The current extent of minority group participation in the trade.
 - (2) The availability of minority group persons for employment in such trade.
 - (3) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.
 - (4) The impact of the program upon the existing labor force.

Id.

⁶⁵ *Id.* at 39952. These included suspension or cancellation of existing contracts, blacklisting, and debarment. Exec. Order No. 11246, 3 C.F.R. § 343 (1965), reprinted in 42 U.S.C. § 2000e, at 1234 (1976).

⁶⁶ 49 Comp. Gen. 59 (1969).

⁶⁷ *Id.* at 70-71.

⁶⁸ *Id.* at 70.

⁶⁹ The Comptroller General, it is also worth noting, made short work of the specious distinction sought to be drawn between "goals" and "quotas":

The recital in section 6b.2 of the order (and in the prescribed form of notice to be included in the invitation) that the contractor's commitment "is not intended and shall not be used to discriminate against any qualified applicant or employee" is in our opinion the statement of a practical impossibility. If, for example, a contractor requires 20 plumbers and is committed to a goal of employment of at least five from minority groups, every nonminority applicant for employment in excess of 15 would, solely by reason of his race or national origin, be prejudiced in his opportunity for employment, because the contractor is committed to make every effort to employ five applicants from minority groups.

In your Solicitor's memorandum it is argued that the "straw man" sometimes used in opposition to the Plan is that it "would require a contractor to discriminate against a better qualified white craftsman in favor of a less qualified black." We believe this obscures the point involved, since it introduces the element of skill or competence, whereas the essential question is whether the Plan would require the contractor to select a black craftsman over an *equally* qualified white one. We see no room for doubt that the contractor in the situation posed above would believe he would be expected to employ the black applicant, at least until he had reached his goal of five nonminority group employees, and that if he failed to achieve that goal his employment of a white craftsman when an equally qualified black one was available could be considered a failure to use "every good faith effort." In our view such preferential status or treatment would constitute discrimination against the white worker solely on the basis of color, and therefore would be contrary to the express prohibition both of the Civil Rights Act and of the Executive order.

On September 22, 1969, then Attorney General John Mitchell rushed to the defense of the Philadelphia Plan.⁷⁰ His analysis began with the proposition that although the Executive's power to determine the terms to be included in federal contracts was limited by the Constitution and acts of Congress, "the existence of such power does not depend upon an affirmative legislative enactment."⁷¹ In other words, Mitchell reached his conclusion that the Plan was legal through reasoning grounded in a conception of government that was to become a hallmark of the Nixon administration and to play no small role in its ultimate undoing. Essentially, that conception held that those powers not expressly denied the Executive by the Constitution or the Congress were reserved to the Executive and could be exercised freely by it.

Attorney General Mitchell emphasized that contractors were required under the Plan only to make "every good faith effort" to attain the set numerical goals and were expressly forbidden to "discriminate against any qualified applicant or employee" in doing so. He thus found no inconsistency between the Plan and Title VII.⁷² "Unless it can be demonstrated that the hiring goals *cannot* be achieved without unlawful discrimination," he opined, "I fail to see why the Government is not permitted to require a pledge of good faith efforts to meet them as a condition for the award of contracts."⁷³

The day after Attorney General Mitchell's opinion was released, the Assistant Secretary of Labor for Wage and Labor Standards and the Director of the OFCC issued an order, announcing that a hearing had been held in late August for the purpose of obtaining data relevant to the establishment of "ranges" for appropriate levels of minority manpower utilization under the Philadelphia Plan, and of setting forth the ranges for each of six crafts.⁷⁴ Based on projected vacancies, the predetermined ranges were said to have been set so that "the lower range figure may be met by filling vacancies and new jobs approximately on the basis of one minority craftsman for each non-minority craftsman."⁷⁵ This, however, rather significantly misrep-

Id. at 68. See also Silberman, *supra* note 60 and *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 222 (5th Cir. 1977), *rev'd sub nom. United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).

⁷⁰ 42 OP. ATT'Y GEN. 405 (1969).

⁷¹ *Id.* at 409. But see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). For an excellent discussion of the proposition that the Nixon administration's policies were grounded not merely in such a relatively subtle shift in the balance of power among the branches, but in outright rejection of the rule of law itself, see P. KURLAND, *WATERGATE AND THE CONSTITUTION* 202-04 (1978) [hereinafter cited as P. KURLAND].

⁷² 42 OP. ATT'Y GEN. at 412.

⁷³ *Id.* at 412-13 (emphasis in original) (footnote omitted). Although Attorney General Mitchell was quite firm in his position that there was nothing wrong with the Philadelphia Plan in theory, he did seem willing to concede that problems might arise from abuses in practice. *Id.* at 414.

⁷⁴ The text of the order is reprinted at 115 CONG. REC. 39953 (1969). The seventh craft, roofers and water proofers, was "temporarily excepted" from the Philadelphia Plan because the Department of Labor had "determined that minority craftsmen may be adequately represented in the classification." *Id.*

⁷⁵ *Id.* at 39955. This level was justified on the grounds that "[t]he one for one ratio in hiring has been judicially recognized as a reasonable, if not mandatory, re-

resented the situation, at least in terms of the express provision of the Plan, for all but the first of the four years over which the standards were to apply. Even those contractors whose first year "good faith efforts"⁷⁶ produced results within, but at or near the bottom of, the appropriate range had to hire between 50 percent and 100 percent minorities during the following year to stay within the appropriate range.⁷⁷ Those who failed, however legitimately, to reach the minimum goal for one year faced the cumulative pressure of the

quirement to remedy past exclusionary practices." *Id.* at 39955 n.5, citing *Vogler v. McCarty, Inc.*, 294 F. Supp. 368 (E.D. La. 1967), *aff'd sub nom.*, *Local 53, Int'l Ass'n of Heat & Frost Insulators and Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969). Neither the district court nor the court of appeals decision in the cited case mention anything about quota-type relief being "a reasonable, if not mandatory, requirement." The district court did issue a temporary one-for-one quota to be applied to union membership admissions until objective standards for membership could be developed and the court of appeals found that this did not "constitute an abuse of discretion." 407 F.2d at 1055.

⁷⁶ Perhaps in response to the potential difficulties John Mitchell had perceived in leaving "good faith efforts" undefined (see text and note at 73 *supra*), the order expressly provided criteria by which the bona fides of contractors' efforts were to be measured. 115 CONG. REC. 39955 (1969).

⁷⁷ Taking into account a 2.5% national average annual attrition due to retirement, a 1% national average disability rate resulting from disability or death, and a 4% "conservative estimate" of the average annual rate of attrition for reasons not related to death, injury or retirement, the order calculated an aggregate 7.5% non-growth related annual vacancy rate. *Id.* at 39954. This figure was added to the projected "annual growth rate" for each of the six crafts to come up with the following annual vacancy rates stated as percentages of total jobs:

Ironworkers.....	11.2
Plumbers and Pipefitters.....	10.4
Steamfitters.....	10
Sheetmetal workers.....	9.5
Electrical workers.....	9.7
Elevator construction workers.....	9.6

Id. The ranges of minority manpower utilization set by the order for each of the four years of the Plan were as follows:

1970

Ironworkers.....	5-9
Plumbers and pipe- fitters.....	5-8
Steamfitters	5-8
Sheetmetal workers	4-8
Electrical workers	4-8
Elevator construction workers	4-8

deficit for that year and the minimal goal of five percent for the following year.⁷⁸

1971

Ironworkers.....	11-15
Plumbers and pipe- fitters.....	10-14
Steamfitters.....	11-15
Sheetmetal workers.....	9-13
Electrical workers.....	9-13
Elevator construction workers.....	9-13

1972

Ironworkers.....	16-20
Plumbers and pipefitters.....	15-19
Steamfitters.....	15-19
Sheetmetal workers.....	14-18
Electrical workers.....	14-18
Elevator construction workers.....	14-18

1973

Ironworkers.....	22-26
Plumbers and pipefitters.....	20-24
Steamfitters.....	20-24
Sheetmetal workers.....	19-23
Electrical workers.....	19-23
Elevator construction workers.....	19-23

Id. at 39955. The range of minority hiring that was required, in 1971, for instance, of contractors whose minority hiring had reached, without exceeding the minimal level in 1970 was as follows:

Ironworkers.....	53- 89%
Plumbers and pipefitters.....	48- 87%
Steamfitters.....	60-100%
Sheetmetal workers.....	53- 95%
Electrical workers.....	52- 93%
Elevator construction workers.....	52- 94%

⁷⁸ For example, a contractor who was able to raise its percentage of minority ironworkers to, say, 3% (more than double the percentage of 1969 minority union members) in 1970, had a deficit of 2% to make up and an additional minimal goal of 6% that had to be reached in 1971. In other words, to stay within the appropriate range, the contractor had to hire sufficient minorities in 1971 to comprise 8% of its ironworker workforce. Assuming a vacancy rate of 11.2%, this meant that approximately 71% of anticipated vacancies had to be filled with minorities if they were available.

These remarkable developments did not escape the notice of certain members of Congress, most notably Senator Sam Ervin. Senator Ervin was profoundly disturbed by the Philadelphia Plan, and on October 27, 1969, he convened hearings on the matter before the Senate Judiciary Subcommittee on Separation of Powers, of which he was Chairman.⁷⁹ In his opening statement Senator Ervin expressed the Subcommittee's intention to "examine the Plan as it relates to the doctrine of separation of powers and try to determine whether the Labor Department has usurped Congressional authority and violated legislative intent."⁸⁰ In the same statement, Senator Ervin expressed his opinion that the Plan violated both the letter and the spirit of Title VII and that even if the end were desirable, the means could not be justified. Citing an earlier statement by former OFCC director Edward G. Sylvester to the effect that "affirmative action is anything you have to do to get results,"⁸¹ the Senator left no doubt that he clearly saw the danger posed by this "emphasis on results at the expense of procedure."⁸² "For if we are lax today in adhering to the law," he asked pointedly, "what may happen tomorrow when that practice is adopted by those who would subvert procedure to their own evil purposes."⁸³

Senator Ervin and a substantial number of his colleagues regarded the Administration's actions on the Philadelphia Plan to have been usurpations of power in at least two respects. First, as already mentioned, the Plan was thought to require of federal contractors what Congress, through Title VII, had expressly forbidden them to do.⁸⁴ Second, they saw an even more direct challenge to congressional power in Attorney General Mitchell's denial of the Comptroller General's authority to declare the Philadelphia Plan unlawful.⁸⁵ The Attorney General's posture in this regard was in open defiance of congressional enactments conferring on the Comptroller General the authority to determine whether "financial transactions have been consummated in accordance with laws, regulations or other legal requirements,"⁸⁶ and further providing that "[b]alances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government."⁸⁷ In response to both threats, the Senate added a rider to the supplemental appropriations bill⁸⁸ that expressly proscribed

⁷⁹ BNA Daily Labor Report No. 209, A-11 (Oct. 27, 1969).

⁸⁰ Opening Statement of Senator Ervin, 115 CONG. REC. 32671 (1969).

⁸¹ See text at note 51 *supra*.

⁸² 115 CONG. REC. at 32671.

⁸³ *Id.*

⁸⁴ *Id.* See also 115 CONG. REC. 39964-66 (1969) (remarks of Senator McClellan). Senator Ervin also asserted that the Philadelphia Plan was unlawful because it required contractors to unilaterally alter their collective bargaining agreements in violation of the Taft-Hartley Act. 115 CONG. REC. 39122-23 (1969) (remarks of Senator Ervin).

⁸⁵ 115 CONG. REC. 32672, 39949-50 (remarks of Senator Ervin), 40013-39 (documentary materials submitted by Senator Byrd) (1969).

⁸⁶ 31 U.S.C. § 65(d) (1976).

⁸⁷ 31 U.S.C. § 74 (1976). For the major arguments on this issue, see 115 CONG. REC. 40013-39 (1969) (documentary materials submitted by Senator Byrd).

⁸⁸ H.R. 15209, 91st Cong., 1st Sess. (1969).

dispensing funds to finance any contract or agreement deemed unlawful by the Comptroller General.⁸⁹ The magnitude of the issues raised by Attorney General Mitchell's expansive notion of executive power was clearly perceived by the proponents of the rider. In its Report on the rider, Senate Appropriations Committee declared: "The Committee wishes to emphasize that the basic issue here is the Constitutional authority of the Congress itself."⁹⁰

The supplemental appropriations bill, with the rider, passed the Senate without a single vote cast in opposition.⁹¹ Since there were a number of differences between the Senate and House versions (including the rider, which was omitted from the House version), the bills then went to conference. In the face of a presidential veto threat,⁹² the Senate reversed itself and voted

⁸⁹ The rider was known as the "Fannin rider" because it had originally been introduced by Senator Paul Fannin, S. 931, 91st Cong., 1st Sess. (1969). It became section 904 of the Senate version of the Supplemental Appropriations Bill and provided as follows:

Sec. 904. In view of and in confirmation of the authority invested in the Comptroller General of the United States by the Budget and Accounting Act of 1921, as amended, no part of the funds appropriated or otherwise made available by this or any other Act shall be available to finance, either directly or through any Federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any Federal statute.

115 CONG. REC. 40013 (remarks of Senator Byrd) (1969). This language was amended to insert at the end:

Provided, That this section shall not be construed as affecting or limiting in any way the jurisdiction or the scope of judicial review of any Federal court in connection with the Budget and Accounting Act of 1921, as amended, or any other Federal law.

Id. at 39969, vote on amendment recorded at 39975.

⁹⁰ S. REP. NO. 91-616, 91st Cong., 1st Sess. (1969), reprinted in *pertinent part at*, 115 CONG. REC. 40013 (1969). A member of the Senate Appropriations Committee Staff also bluntly stated his position.

While it is true that the basic issue arises from the desire of the Executive Department to encourage, and possibly compel, the hiring of more members of minority groups by Government contractors, and at the same time encourage, and possibly compel, the craft unions to admit to membership more members of minority groups, these objectives are secondary to the basic question presented: Whether the Congress—acting through its agent, the Comptroller General—has or does not have the final authority to determine the legality of obligating or expending appropriated funds.

The question presented must necessarily be answered in the affirmative. To say otherwise is to deny the constitutional authority of Congress over appropriated funds and thus limit the congressional function to simply approving or disapproving budget estimates submitted by the Executive Branch.

115 CONG. REC. 40013.

⁹¹ The vote was 74 yeas and no nays, with 26 senators not voting. 115 CONG. REC. 40039.

⁹² President Nixon issued a statement on December 22, 1969, articulating his position on the rider. 115 CONG. REC. 40738 (1969).

to recede⁹³ from its insistence on the rider, in part because it was argued that the question was better left to the courts, in part because a veto would have resulted in a number of federal employees not getting paid, in part because there were fourteen federal contracts then in existence in the Philadelphia area that would have been cancelled, and in part because the senators were eager to get home for Christmas.⁹⁴ During debate on the motion to recede, it was Senator McClellan who provided the appropriate headline to herald the event: "Congress Abdicates — The Senate Surrenders."⁹⁵ Senator Hruska had predicted that allowing the rider to fail would provide a "go ahead signal" to the Nixon administration, which would "be just piling up and adding to our troubles and our difficulties."⁹⁶ He hardly could have known how prophetic those words were.

The executive had, in short, tested the mettle of the Congress. The question directly posed was whether the legislative branch had the capacity to act as a check on executive usurpations of legislative prerogatives. At stake, ultimately, was the fundamental notion of separation of powers itself, the concept employed by the Founding Fathers to prevent the accumulation of power, to which Madison referred as "the very definition of tyranny."⁹⁷ The Congress had failed the test, clearing the way for the "imperial presidency" to march on.⁹⁸ If there were to be limits, they would have to be provided by the courts.

At about the time that the Senate expressed its concern regarding the Philadelphia Plan and the implications it raised, the Secretary of Labor was promulgating "Order No. 4," which was to be the first step toward implementing the numerical approach of the Philadelphia Plan on a truly national scale. This Order, which was issued on November 20, 1969, was never pub-

⁹³ The vote in favor of rescission was 39 to 29, with 27 senators not voting. *Id.* at 40749.

⁹⁴ See generally, *id.* at 40740-48.

⁹⁵ *Id.* at 40743.

⁹⁶ *Id.* at 40741.

⁹⁷ FEDERALIST NO. 47, see FEDERALIST, note 10 *supra*. Senator Ervin saw this very clearly. He declared to his colleagues that:

It is clear to me that the Departments of Labor and Justice intend to implement the Philadelphia Plan despite its illegality by whatever expedient is nearest at hand. In doing so, they would effectively repeal sections of the Taft Hartley Act, Title VII of the 1964 Civil Rights Act, and the Budget and Accounting Act of 1921. Their actions are no more than legislation on the part of the executive branch of the Government.

I submit that we cannot allow the executive to be so cavalier with the law. If we do so, we shirk the constitutional responsibility of Congress to maintain control over appropriations. I urge that the Senate take action to remedy this grave violation of the doctrine of separation of powers.

115 CONG. REC. 39126 (remarks of Senator Ervin) (1969).

⁹⁸ The administration's challenge to the constitutional strength of the Congress on the Philadelphia Plan also served as a prelude to further executive usurpations outside the employment area. Through Exec. Order No. 11605, President Nixon later used the same "game plan" to expand substantially the functions and powers of the Subversive Activities Control Board, eliciting predictable objections from Senator Ervin. 118 CONG. REC. 672-74 (remarks of Senator Ervin) (1972).

lished, probably due to the furor then brewing in the Congress over the Philadelphia Plan.⁹⁹ It was also at this time that the Labor Department assured Senator Ervin and other critics that “[i]n assuring equal employment opportunity, no one fixed formula has yet been found suitable for every situation.”¹⁰⁰ The suggestion given by the Labor Department, of course, was that although the numerical employment policy was necessary under the extreme circumstances prevailing in the Philadelphia construction industry, there was no reason to believe that it would be generally necessary or even appropriate.¹⁰¹

Once Congress demonstrated its unwillingness to act as a check on expansive interpretations of executive power in this area, however, it was possible to “go public” with the next step, which Order No. 4 embodied. Thus, on January 30, 1970, a new Order No. 4 was issued, and this time it was published in the Federal Register.¹⁰² This Order extended the obligation for development of an “affirmative action program” to all non-construction contractors in the country with 50 or more employees and contracts of \$50,000 or more. As part of this requirement, contractors were made responsible for “[i]dentification of problem areas (deficiencies)” and “[e]stablishment of goals and objectives by organizational units and job category, including timetables for completion.”¹⁰³ A “utilization analysis” was required, by which contractors were to determine whether they had “fewer minorities in a particular job category than would reasonably be expected by their availability.”¹⁰⁴ If “un-

⁹⁹ The only mention of this Order I have been able to find is in the version of “Revised Order No. 4” that superseded it on January 30, 1970. There, it simply stated: “This is an amplification of and supersedes a previous ‘Order No. 4’ from this Office dated November 20, 1969.” 35 Fed. Reg. 2590 (1970). So far as I have been able to determine, the original Order No. 4 was never released.

¹⁰⁰ Labor Department Statement, BNA Daily Labor Report No. 96, A-4 (Oct. 9, 1969). With respect to the Philadelphia Plan, the statement reads as follows:

* * *

3. *The Government's basic overriding obligation is enforcement of equal employment opportunity.*

The Department plans to pursue an insistent course toward this objective. There are, however, “many roads to Rome.” In assuring equal employment opportunity no one fixed formula has yet been found suitable for every situation. So while undeviating in its objective the Department must be flexible in its methods.

A method like the Philadelphia Plan has one major virtue. It is definitive—it provides a specific way to measure compliance with the obligations of Federal construction contractors in a city.

Id.

¹⁰¹ In his statement to the Subcommittee on Separation of Powers, Secretary of Labor Shultz emphasized that conditions prevailing in the construction industry justified “special measures.” Statement of Secretary Schultz, *reprinted in* BNA Daily Labor Report No. 209, F-1 (Oct. 28, 1969). In this regard, the Secretary was echoing the “findings” that had been set forth in the Philadelphia Plan itself. *See* 115 CONG. REC. 39951 (Revised Philadelphia Plan) (1969).

¹⁰² 35 Fed. Reg. 2586 (1970).

¹⁰³ *Id.* at 2588.

¹⁰⁴ *Id.* at 2587.

derutilization" were found,¹⁰⁵ then the contractor had to set "measurable and obtainable" goals and timetables to eliminate the "deficiencies."¹⁰⁶ The purpose of affirmative action, it was stated, was "to increase materially the utilization of minorities at all levels and in all segments of [the contractor's] work force where deficiencies exist."¹⁰⁷ Nevertheless, the Order directed that "[g]oals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."¹⁰⁸

Clearly, Order No. 4 represented several major steps beyond the Philadelphia Plan. Instead of a limited use of the numerical employment policy as a "special measure" to meet the unique problems of a limited, local situation, the Department of Labor had announced that it would employ the policy on a grand scale as standard operating procedure throughout the nation with a potentially enormous impact on the economy and the labor market.¹⁰⁹ In addition to the vastly expanded scope, where the Philadelphia Plan ostensibly had been aimed at correcting the effects of actual unlawful discrimination, Order No. 4 abandoned any pretense that discrimination needed to have occurred, and substituted disproportional representation as a sufficient criterion to trigger the obligation to adopt "goals and timetables." Although lip-service was still paid to "equal employment opportunity,"¹¹⁰ the emphasis unquestionably had shifted to equality of outcome.¹¹¹

¹⁰⁵ Actually, "underutilization" was only one of several factors that made "special corrective action" appropriate. Others included disparate selection of minorities for hiring, promotion or transfer (apparently regardless of any legitimate business reason for the disparity): "[m]an specifications" or test forms that had not been validated in a manner regarded as acceptable to OFCC (apparently regardless of whether disparate selection rates were thereby produced); and "[s]eniority provisions [that contributed] to overt or inadvertent discrimination, *i.e.*, a racial disparity exists between length of service and types of jobs held." *Id.* at 2589.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2587.

¹⁰⁸ *Id.* at 2589.

¹⁰⁹ It has been estimated that in 1974 as many as 40% (approximately 40 million) of all workers were employed by institutions subject to the Executive Order program. U. S. COMM'N ON CIVIL RIGHTS, 5 THE FEDERAL CIVIL RIGHTS EFFORT—1974 at 230 (1975). Other commentators have estimated that fully 50% of all firms employing 100 or more workers came under the Executive Orders. Goldstein & Smith, *The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contracts*, 29 INDUS. LAB. REL. REV. 523, 524 (1976).

¹¹⁰ 35 Fed. Reg. 2588 (1970) (emphasis added).

¹¹¹ Indeed, Order No. 4 in certain respects abandoned equality of opportunity altogether in favor of preferential treatment. In executing its "affirmative action program," a contractor was urged to take some steps that would benefit exclusively members of minority groups:

(8) Special employment programs should be undertaken whenever possible.

Some possible programs are:

(i) Technical and nontechnical co-op programs with the predominately Negro colleges.

(ii) "After school" and/or work-study jobs for minority youths.

(iii) Summer jobs for underprivileged youth.

(iv) Summer work-study programs for faculty members of the predominately minority schools and colleges.

The next major contribution to the development of the numerical employment policy, albeit an indirect one, came in the form of the Supreme Court's opinion in *Griggs v. Duke Power Co.*¹¹² Handed down on March 8, 1971, the decision contributed to the growing momentum of the numerical policy in at least two ways. First, it endorsed an approach to the allocation of the burden of proof in Title VII cases that itself had a numerical focus. In essence, the unanimous Court¹¹³ held that when a facially neutral employment test produces a racially disparate impact, that is, affects adversely greater proportionate *numbers* of one racial group than another, then the employer has the often impossibly heavy burden of demonstrating a statistical correlation to job performance.¹¹⁴ To some, this was tantamount to a declaration that "numerical standards are an appropriate tool."¹¹⁵ The second way in which *Griggs* advanced the cause of numerical employment was in its holding that the EEOC Guidelines on Employee Selection Procedures were entitled to "great deference."¹¹⁶ Just as the congressional failure to stop the Philadelphia Plan opened the door to further expansions of executive power, the Court appeared to be stepping aside to permit the agencies to take a creative (*i.e.*, expansive) approach to the vindication of interests embodied in employment discrimination legislation. Not surprisingly, this contributed significantly to the already substantial head of steam the EEOC and OFCC had acquired.

Despite its expansive nature, however, the *Griggs* decision also contained language calculated to establish limits on the principles it advanced. Significantly, the Court made it quite clear that the decision should not be taken as an endorsement of the numerical employment policy. The Court stated that Title VII prohibits discriminatory preference for any group, and does not require that any person be hired "simply because he was formerly the subject of discrimination, or because he is a member of a minority group."¹¹⁷

(v) Motivation, training and employment programs for the hardcore unemployed.

35 Fed. Reg. 2590.

¹¹² 401 U.S. 424 (1971).

¹¹³ Chief Justice Burger wrote the opinion for an eight man Court. Justice Brennan did not participate. *Id.* at 436.

¹¹⁴ The Court described the employer's burden as follows:

The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

Id. at 431. The Court in *Griggs* did not actually specify precisely the proof that employers would have to produce in order to carry this burden because Duke Power Co. had not produced any evidence on this score at all. Four years later, the Court would provide a good deal more specific information regarding the rigorous statistical proof to which defendants in "disparate impact" cases were to be put. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

¹¹⁵ Blumrosen, *Strangers In Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 106 (1972) [hereinafter cited as Blumrosen, *Strangers*].

¹¹⁶ 401 U.S. at 433-34. *But see* *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976).

¹¹⁷ 401 U.S. at 430-31. See text at note 259 *infra*.

Nevertheless, in another less than obvious way, *Griggs* provided a significant element that would help to form the foundation upon which the *Weber* decision ultimately could be built. *Griggs* represented a radical and unnecessary departure from traditional jurisprudential concepts. It abandoned intent as a necessary element in the proof of discrimination cases and substituted a mere showing of numerical disparity. This in itself is unremarkable, since numerical disparity, especially of the magnitude involved in *Griggs* where the exclusion of minorities had been absolute, ordinarily would imply foreseeability. The legal concept of "intent" long has been thought to embrace not just a specific desire to cause a certain result, but also the necessary consequences of one's actions, regardless of the subjective frame of mind.¹¹⁸ What was revolutionary about the *Griggs* decision, however, was the imposition on defendants of a burden of producing evidence on the narrow issue of the relationship between the employment practice and job performance. Had more traditional notions obtained, an employer defendant would have sustained its burden of production by coming forward with any evidence that might tend to rebut the inference of an intention to discriminate raised by a numerical disparity.¹¹⁹

To justify its embarkation upon this new and theretofore unanticipated approach to the allocation of the burden of production, the Court first had to get around section 703(h) of Title VII,¹²⁰ which, on its face, immunized employer actions based upon a "professionally developed ability test" that was not "designed, intended or used to discriminate." To that end, the Court employed an unabashedly revisionist analysis of the legislative history of Title VII.¹²¹ By thus creating a wholly new legal standard via a thinly veiled, ma-

¹¹⁸ See generally W. PROSSER, *TORTS* 31-32 (4th ed. 1971). See also J. SALMOND, *JURISPRUDENCE* 369-71 (12th ed. P. Fitzgerald 1966). Indeed, the Supreme Court appears to have adopted the use of a "constructive intent" concept under certain limited circumstances in cases charging discrimination in violation of the fifth or fourteenth amendment of the Constitution. See *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

¹¹⁹ For example, one might offer evidence that one had acted out of a legitimate (*i.e.*, nondiscriminatory) motive, much as one now can do in "disparate treatment" cases. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

¹²⁰ 42 U.S.C. § 2000e-2(h) (1976).

¹²¹ During the debates on Title VII there was considerable discussion of an Illinois Fair Employment Practices Commission decision which ordered a company to stop administering a general intelligence test to prospective employees on the grounds that it was culturally biased and obsolete. 110 CONG. REC. 5664 (1964). Several Senators uniformly expressed their disapproval of this case. *Id.* at 5614-16 (Senator Bruin), 5999-6000 (Senator Smathers), 9025-26 (Senator Talmadge), 9034-35 (Senator Stennis), 9599 (Senator Fulbright), 13503 (Senator Case), 13504 (Senator Miller). Senator Case, one of the bill's co-managers, attempted to deflect the criticism by stating that, "no court could read Title VII as requiring an employer to lower or change the occupational qualification he sets for his employees simply because fewer Negroes than Whites are able to meet them." *Id.* at 6416. See also *id.* at 7213. Because some Senators remained nevertheless unsatisfied an amendment containing what is now the language of § 703(h) was passed to meet this perceived problem.

Against this legislative background, the *Griggs* Court reasoned: "From the sum of the legislative history relevant in this case, the conclusion is inescapable that the EEOC's construction of § 703(h) to require that employment tests be job related comports with congressional intent." 401 U.S. at 436. At no time in the debates on Title

nipulative reading of legislative history, the *Griggs* decision sowed some of the seed from which the *Weber* decision ultimately would grow.¹²²

Just six weeks after *Griggs* was decided, the Third Circuit passed on the legality of the Philadelphia Plan in *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*.¹²³ It found that the Plan did not violate Title VII, the National Labor Relations Act, Executive Order 11246, or the due process and equal protection clauses of the Constitution. Central to the court's conclusions were its findings that "[s]ome minority tradesmen could be recruited . . . with-

VII, it should be pointed out, did anyone state or even suggest that the key to the legitimacy of the test involved in the *Motorola* case was its job relatedness. Seeking an explanation for the Supreme Court's extraordinary reading of the controlling legislative history, one commentator has offered the following assessment:

All that can be said with certainty about the legislative history of Title VII is that most legislators accepted the notion that general intelligence or aptitude tests were nearly always pertinent considerations for determining job performance. Current psychometric learning refutes this premise, and the Supreme Court was therefore presented a difficult problem in *Griggs*. Confronted with a situation in which Congress debated and resolved the issue on an invalid assumption, the Court had two basic alternatives. It could carry out the legislative intent, no matter how ill-conceived it has been shown to be; or it could seek to harmonize the statute with current scientific opinion, either by distorting the legislative history as it did in *Griggs* or by attempting to choose a course that the legislature would have followed had they possessed the correct information. The latter courses of action must be premised on the assumption that general statutory provisions or legislative intent may override specific provisions designed to cover the case presented, an argument that flies in the face of established principles of statutory interpretation. Such an approach is difficult to justify.

Wilson, *A Second Look at Griggs v. Duke Power Company: Ruminations on Job Testing, Discrimination, and the Role of the Federal Courts*, 58 VA. L. REV. 844, 857-58 (1972) [hereinafter cited as Wilson].

¹²² It may well be that license taken in the decisional technique of *Griggs*, the way the decision has been cited as an endorsement of the numerical employment policy, or both, account for the recent appearance of signs of dissatisfaction with the decision on the Court. In *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978), for example, Justice Rehnquist, writing for the majority, seemed to go out of his way to declare:

It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force. See *Griggs v. Duke Power Co.*, 401 U.S. at 430; *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 279 (1976).

438 U.S. at 579. Perhaps even more significantly the Court recently affirmed summarily the decision of a three-judge district court that had declined to strictly adhere to the *Griggs* standard, proceeding instead along the lines of a more classical "intent" analysis. *United States v. South Carolina*, 445 F. Supp. 1094, 1113 (D.S.C. 1977), *aff'd sub nom.*, *National Education Ass'n v. South Carolina*, 434 U.S. 1026 (1978). It may also be that some dissatisfaction with *Griggs* and its progeny stems from recognition of the fact that from an economic perspective, the theory of these cases is unsound. See generally Gwartney, Asher, Haworth & Haworth, *Statistics, The Law and Title VII: An Economist's View*, 54 Notre Dame L. 633 (1979). All this may well presage a move to circumscribe *Griggs* or even overrule it outright.

¹²³ 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854.

out eliminating job opportunities for white tradesmen,"¹²⁴ and that exclusion from the available labor pool of minority tradesmen is likely to have an adverse effect upon the cost and completion of construction projects in which the federal government is interested."¹²⁵ Significantly, although the Comptroller General's opinion finding the Plan to contravene Title VII was mentioned by the Third Circuit,¹²⁶ the separation of powers issue was not discussed.¹²⁷ It is ironic that the Senate defeated the rider which would have sustained the Comptroller General's opinion, in part at least, on the grounds that the binding effect of these opinions on the executive branch should be left to the courts.¹²⁸ The Supreme Court's decision in *Griggs*, although concerned with a quite different issue, clearly influenced the Third Circuit's reasoning in *Contractor's Ass'n*.¹²⁹

Also, at about this time, a number of events were forming the political backdrop for the next major steps in the development of the numerical

¹²⁴ *Id.* at 173.

¹²⁵ *Id.* at 175. This point provided an important basis for the court's conclusion that the Plan fell within the ambit of the President's power to pursue "[t]he federal interest . . . in maximum availability of construction tradesmen for the projects in which the federal government has a cost and completion interest." *Id.* at 177. The court did not address and there is no evidence that it considered whether presidential power to protect the Government's "cost and completion interest" would shield from attack executive actions that would foreseeably increase the bottom line cost component of federal contracts.

¹²⁶ *Id.* at 165.

¹²⁷ It might be said that, by implication, the matter was resolved in favor of the executive branch, because the court did reach the following conclusion:

The Attorney General has issued an opinion that the Philadelphia Plan is valid, and the President has continued to acquiesce in the interpretation of the Executive Order made by his designee. The Labor Department interpretation of the affirmative action clause must, therefore, be deferred to by the courts.

Id. at 175 (footnote omitted). The court also concluded, contrary to the Comptroller General's opinion, that the Philadelphia Plan did not conflict with Title VII. Nevertheless, the question of whether the Comptroller General as the agent of the Congress had the power to make determinations that were binding on the executive—the broad question that the defeated rider of just over a year earlier had posed—was never mentioned. See notes 71-86 *supra*, and accompanying text.

¹²⁸ See notes 81-84 *supra*, and accompanying text.

¹²⁹ The Third Circuit cited the *Griggs* opinion in support of the former's conclusion that §§ 703(h) and (j) were "limitation[s] only upon Title VII, not upon any other remedies." 442 F.2d at 172. It was mentioned that the Supreme Court in *Griggs* had recently construed the portion of § 703(h) having to do with employment tests and had focused upon the "consequence of employment practices, not simply the motivation." *Id.* at 172 n.46, quoting, *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (emphasis in original). From this the Third Circuit concluded, apparently through symmetry of reasoning, that "[n]or can seniority make permanent the effects of past discrimination." 442 F.2d at 172 n.46. Subsequent events have shown that, at least in this last respect, the Third Circuit was in error. See *Int. Brotherhood of Teamsters v. United States*, 431 U.S. 324, 353-54 (1977) where the court stated, "[W]e hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." See also *United Air Lines v. Evans*, 431 U.S. 553 (1977) (seniority system that perpetuates effects of discrimination not made the subject of a timely charge is not a violation).

employment policy. By mid-1971, much of the energy and attention of the Nixon administration, quite naturally had begun to be devoted to the 1972 election. One of the principal concepts to emerge from the planning sessions of this period was the strategy of dividing the Democratic party. One observer has described this phenomenon in terms that demonstrate its relevance here: "With respect to some issues, the formula was simple: the more division the better. Race was one of these, and the President seemed quite willing to precipitate a constitutional crisis in order to divide the nation sufficiently."¹³⁰ Out of this atmosphere emerged "Revised Order No. 4,"¹³¹ issued on December 1, 1971. The Revised Order retained the "utilization analysis" and "goals and timetables" concepts in an essentially unchanged form.¹³² The most significant change, however, was the introduction of an "affected class" concept.¹³³ This innovation was presented as follows:

Relief for members of an "affected class" who, by virtue of past discrimination, continue to suffer the present effects of that discrimination must either be included in the contractor's affirmative action program or be embodied in a separate written "corrective action" program. An "affected class" problem must be remedied in order for a contractor to be considered in compliance.¹³⁴

Revised Order No. 4 provided no further definition of "affected class" nor a description of what it would take to remedy an "affected class" problem." It did make it quite clear, however, that failure to do whatever one was supposed to do about an "affected class" could result in the familiar sanctions of termination, suspension or debarment.¹³⁵

In late 1971 and early 1972, the Congress again became concerned with these matters through its consideration of bills that were to become the 1972

¹³⁰ J. Shell, *supra* note 54, at 216. The same observer also described another ominous aspect of the Nixon administration's manipulative approach to government: The law was already well on its way to being restyled as an instrument for punishing political enemies. Now federal funding was being diverted to the same purpose. By late 1971, in other words, the federal government was being transformed into a machine for punishing and rewarding the whole American people.

Id. at 191.

¹³¹ 36 Fed. Reg. 23152 (1971). The present version of Revised Order No. 4 is codified at 41 C.F.R. § 60-2 (1979). One thing that Revised Order No. 4 did was to extend coverage to women, who had been left unmentioned in Order No. 4, notwithstanding the fact that the omission of women from Executive Order No. 11246 itself had been remedied four years earlier in Executive Order No. 11375. January 17, 1969. 34 Fed. Reg. 744 (1969). See also text of note 50 *supra*.

¹³² 36 Fed. Reg. 23153.

¹³³ Other new provisions included a requirement that the work force analysis be conducted separately for minorities and women, using some slightly different factors in the analysis for each. *Id.* at 23153-54. Contractors were also put on notice that "separate goals and timetables" for a particular minority group or one sex might be required if there were found to be "a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group." *Id.* at 23154.

¹³⁴ *Id.* at 23153.

¹³⁵ These sanctions had been introduced in Executive Order No. 11246. See note 65 *supra*.

amendments to Title VII.¹³⁶ Since some have found support for the numerical employment policy in what was done or, more to the point, what was not done with respect to this legislation,¹³⁷ some consideration of the amendments is necessary. Two of the significant questions raised by the movement to amend Title VII were whether the EEOC should be given enforcement powers¹³⁸ and whether all enforcement efforts, including the OFCC's federal contractors program, should be consolidated in the EEOC.¹³⁹ In the House, essentially two bills were considered. The first was H.R. 1746,¹⁴⁰ which had been reported out of the Committee on Education and Labor. It would have empowered the EEOC to hold hearings and to issue cease-and-desist orders, and it would have transferred to the EEOC all the authority and responsibility of the Secretary of Labor under Executive Order 11246.¹⁴¹ The original Committee bill had been changed somewhat before it reached the floor by amendments proposed by Congressman Dent, the chairman of the Labor Subcommittee. These amendments, among other things, would have prohibited the EEOC from "imposing or requiring a quota or preferential treatment with respect to numbers of employees, or percentage of employees of any race, color, religion, sex, or national origin."¹⁴²

The second bill considered by the House was an amendment in the nature of a substitute offered by Congressman Erlenborn.¹⁴³ The Erlenborn substitute conferred enforcement power on the EEOC, but limited it to the power to bring suit in federal court. There was, however, no provision in the substitute for the consolidation of powers, and the restrictions of the Dent amendment to the Committee bill also were omitted. It was the Erlenborn substitute that prevailed,¹⁴⁴ and it was passed by the House.¹⁴⁵ This action can hardly be said to evidence implicit approval of the Executive Order program. To be sure, there was an occasional observation in the debate on the Erlenborn substitute to the effect that the Dent amendment was intended to eviscerate the Philadelphia Plan.¹⁴⁶ The principal issue before the House, however, was whether administrative or judicial enforcement should be preferred and this point was emphasized repeatedly in the debate.¹⁴⁷ Thus, the

¹³⁶ Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, amending 42 U.S.C. § 2000e *et seq.* (1970).

¹³⁷ See, e.g., *United States v. New Orleans Public Service, Inc.*, 553 F.2d 459, 467-68 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978).

¹³⁸ In the original Act, the EEOC had been given investigatory and conciliatory powers only. Enforcement actions, if any, were to be brought by the Attorney General or private parties.

¹³⁹ See generally 117 CONG. REC. 31718 (statements of Senators Williams and Kennedy); *id.* at 31960-61 (remarks of Rep. Perkins) (1971).

¹⁴⁰ H.R. 1746, 92d Cong., 1st Sess. (1971).

¹⁴¹ 117 CONG. REC. at 31960-61.

¹⁴² *Id.* at 31784.

¹⁴³ The text of the Erlenborn substitute appears at 117 CONG. REC. 31989-90.

¹⁴⁴ The substitute was adopted by a Committee of the Whole by a vote of 200 to 195 and the amendment of the bill was approved in the House by a vote of 202 to 197. *Id.* at 32111-12.

¹⁴⁵ The amended bill passed by a vote of 285 to 106. *Id.* at 32113.

¹⁴⁶ See, e.g., *id.* at 32100 (remarks of Rep. Hawkins).

¹⁴⁷ See, e.g., *id.* at 32098. Representative Steiger remarked that, "This issue is not the smokescreen of setting quotas and it is not the smokescreen of preferential

rejection of the Committee bill with the Dent amendments, particularly in light of the fact that the margin in favor of the Erlenborn substitute was a mere five votes,¹⁴⁸ simply cannot be said to indicate approval of the Executive Order program by a majority of the voting members.

Those who argue that the 1972 amendments somehow constituted implied congressional approval of the numerical employment policy, although generally conceding that events in the House were at best "ambiguous", nevertheless seek support for their conclusion in the events that transpired in the Senate.¹⁴⁹ Principally, the argument derives from the disposition of certain amendments to the Senate bill (S. 2515) offered by Senator Ervin, who doggedly continued to fight the usurpations of the executive branch. One such amendment, designed to combat the evil that arose for the application of inconsistent "affirmative action" standards by the contracting agencies and the OFCC, became what is now section 718¹⁵⁰ of the Act. That a majority of Senators agreed with Senator Ervin that this problem should be eliminated provides weak, if any, support for the notion that the Executive Order programs were approved. But those who seek to find this approval offer the rejection of Senator Ervin's Amendment No. 907, which would have revised section 703(j)¹⁵¹ of the Act to expressly proscribe the requirement of preferential treatment under both the Executive Order and Title VII,¹⁵² as the *coup*

treatment, but, rather, what kind of enforcement powers should be granted to the EEOC." *Id.*

¹⁴⁸ See note 144 *supra*.

¹⁴⁹ See, e.g., Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 754-57 (1972) [hereinafter cited as Comment, *Philadelphia Plan*].

¹⁵⁰ 42 U.S.C. § 2000e-17 (1976). This section provides as follows:

No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of section 554 of title 5, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan.

For the record of the debate and vote on this provision, see 118 CONG. REC. 1400-02, 1507-08 (1972).

¹⁵¹ 42 U.S.C. § 2000e-2(j) (1976).

¹⁵² Pursuant to the proposed amendment, § 703(j) would have read as follows:

Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title or to any other law or Executive Order to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with re-

de grace of their argument. The failure to adopt this amendment, it is asserted, amounted to a rejection of the "effort to alter the thrust of the OFCC's program, and at long last [the Senate] unequivocally approved the affirmative action program of the executive."¹⁵³ There is, however, much that this argument chooses to ignore.

It must be noted at the outset that the failure of a later legislature to act to correct an administrative interpretation of law is, in any event, a "weak reed upon which to lean."¹⁵⁴ Furthermore, the debate on this provision was extraordinarily abbreviated, leaving us with even less to go on in ascertaining the meaning of the vote than would normally be the case. Senator Ervin uttered very few words in the proposed amendment's behalf.¹⁵⁵ Senator Javits spoke with only slightly less brevity in opposition, arguing that the amendment would "make unlawful any affirmative action plan like the so-called Philadelphia Plan," that the Senate and the courts previously had permitted such plans, and that Senator Ervin's proposed amendment "would simply nullify that action."¹⁵⁶ Senator Javits' mention of previous Senate action was apparently a reference to the ultimate failure of the 1969 efforts by Senator Ervin, among others, to stop the Philadelphia Plan.¹⁵⁷ But, as has already been discussed,¹⁵⁸ the failure of that effort hardly provides unambiguous support for the conclusion that numerical "affirmative action," or even the Executive Order itself, had been approved. Moreover, Senator Javits himself had argued in 1969 that the Philadelphia Plan did not require preferential treatment.¹⁵⁹ Other than Senator Javits, only Senator Williams, who was one of the co-sponsors of S. 2515, rose in opposition to the proposed amendment.¹⁶⁰ He expressed the opinion that the Ervin amendment merely sought the "transfer of the OFCC to the EEOC," which proposal already had been rejected by the Senate.¹⁶¹ Senator Ervin replied that the two proposals were not the same and that his amendment was an effort to make Title VII "apply

spect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

118 CONG. REC. 4917 (1972).

¹⁵³ Comment, *Philadelphia Plan*, *supra* note 149, at 757 (footnotes omitted).

¹⁵⁴ 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION 261 (4th ed. 1973) (a Revision of the Third Edition of Sutherland Statutory Construction).

¹⁵⁵ 118 CONG. REC. 4918 (1972). This, of course, does not include Senator Ervin's remarks directed to Senator Williams' comments.

¹⁵⁶ *Id.*

¹⁵⁷ See notes 79-96 *supra*, and accompanying text.

¹⁵⁸ See notes 89-94 *supra*, and accompanying text.

¹⁵⁹ See 115 CONG. REC. 39967-68 (remarks of Senator Javits) (1969).

¹⁶⁰ 118 CONG. REC. 4918 (remarks of Senator Williams) (1972).

¹⁶¹ *Id.*

to the Department of Labor as well as everybody else."¹⁶² Without more, the yeas and nays were ordered and the amendment defeated.

This, quite simply, is hardly the stuff from which a legitimate inference of Senate approval of *anything* should be drawn. The first difficulty with such an inference is that it is unclear that there was any uniform understanding as to the import of Amendment No. 907. To the contrary, what little evidence there is in the debates suggests that the Senate may well have been at best confused, at worst misled. By its terms, the Amendment would not have entirely eliminated a numerical approach, just "preferential treatment." To the extent that Senator Javits' remarks may have been influential, they were inaccurate and make the resulting vote unreliable. Whatever else may be said about the defeat of the Fannin rider to the 1969 appropriations bill, it was disingenuous for Senator Javits to suggest that the vote on the rider was tantamount to approval of preferential treatment in light of the repeated assertions by administration officials and Senate opponents of the rider that the Philadelphia Plan neither required nor permitted contractors to grant racial preferences. Either the Congress had been deluded in 1969, or Senator Javits was misrepresenting the facts in 1972.

Senator Williams' comments further impeach the reliability of any inference of approval by evidencing a fundamental, though apparently good faith, misconception about the thrust of the Ervin amendment. Moreover, Senator Ervin's response to Senator Williams' comments, far from dispelling the confusion, suggested that without Amendment No. 907 the Department of Labor was beyond the pale of Title VII. Although the OFCC frequently has conducted itself in a manner inconsistent with the plain meaning of Title VII's language, no one, either before or since the debate on Amendment No. 907, has seriously maintained that the Executive Order programs are not subject to the Act's proscriptions. In short, if legislative inaction is "a weak reed on which to lean" in statutory construction as a general matter, the paucity of evidence on the meaning of the Senate's rejection of the Ervin amendment, coupled with the fact that the little evidence available is permeated with inaccuracy and indications of confusion, only further weakens that weak reed to the point of inevitable collapse.¹⁶³

In February of 1974, a bare six months before the fall of the Nixon administration, the "affected class" concept¹⁶⁴ was given more elaborate form. Revised Order No. 4 was amended by the Secretary of Labor to state that "[r]elief for members of an affected class who, by virtue of past discrimination, continue to suffer the effects of that discrimination shall be provided in the conciliation agreement entered into pursuant to § 60-60.6 of [Revised

¹⁶² *Id.*

¹⁶³ Indeed, in light of all the surrounding circumstances, it seems likely that at least some of the votes that defeated Amendment No. 907 reflected the belief, consistent with representations that had been made by the administration, that the Secretary of Labor was already subject to Title VII and Senator Ervin's amendment was thus superfluous. Whatever meaning one finds in the Senate's rejection of this amendment, moreover, no such proposal was ever placed before the House and it can scarcely be said to have given its imprimatur, implicitly or otherwise, to any program of preferential treatment initiated by the Secretary of Labor.

¹⁶⁴ See notes 124-26 *supra*, and accompanying text.

Order No.14]."¹⁶⁵ Revised Order No. 14 had been promulgated the same day¹⁶⁶ for the stated purpose of establishing "standardized contractor evaluation procedures."¹⁶⁷ Section 60-60.6 referenced in the newly amended language of Revised Order No. 4, provided for a multi-step review of the contractor's practices, culminating in an "exit conference":

This exit conference should itemize the *apparent violations* that lend themselves to immediate correction and solicit the contractor's agreement to take adequate corrective action by specified dates. The contractor's commitments should be contained in a written conciliation agreement signed at the exit conference.¹⁶⁸

As with many phrases that had preceded it, "apparent violations" was not given a specific meaning. The connection with the "affected class" concept of Revised Order No. 4, however, provided a signal that another major expansion in the numerical employment policy had occurred. The "affected class," it should be recalled, was defined as any group of people who were suffering continuing effects of past discrimination. Significantly, it did not appear that such past discrimination had to have been committed by the contractor or had to have occurred within any applicable period of limitations.¹⁶⁹ Moreover, the provisions for immediate corrective action, specific dates, and written conciliation agreement all suggested that any contractor might be required to provide an "affected class" with specific affirmative relief, such as retroactive

¹⁶⁵ 39 Fed. Reg. 5630 (1974).

¹⁶⁶ *Id.* The present version of Revised Order No. 14 is codified at 41 C.F.R. § 60-60 (1979).

¹⁶⁷ *Id.*

¹⁶⁸ 39 Fed. Reg. 5632 (1974) (emphasis added).

¹⁶⁹ Although Revised Order No. 4 is unchanged in this respect, OFCCP's Contract Compliance Manual, recently revised effective October 1, 1979, contains the following provision:

Affected class. One or more employees, former employees, or applicants who have been denied employment opportunities or benefits because of discriminatory practices and/or policies *by the contractor, its employees, or agents.* Evidence of the existence of an affected class requires: (1) identification of the discriminatory practices; (2) identification of the effects of discrimination; and (3) identification of those suffering from the effects of discrimination.

U.S. DEPARTMENT OF LABOR EMPLOYMENT STANDARDS DIVISION OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, FEDERAL CONTRACT COMPLIANCE MANUAL 1-4 (1979) (emphasis added). This would appear to reflect an enforcement policy decision to limit the remedial responsibilities of contractors to those effects flowing from discriminatory acts that they themselves committed, or that can at least be imputed to them. Chapter 7 of the Manual, entitled "IDENTIFICATION AND RESOLUTION OF AFFECTED CLASS PROBLEMS," provides little insight into what, if any, temporal limits there may be to the contractor's responsibility for remedying the effects of past discrimination. The Manual indicates that back pay liability will be limited to a period of two years (three years in the case of "willful violations") prior to the contractor being "notified in writing of this agency's finding of violation" or, where a complaint has been filed, prior to the date the complaint was filed. *Id.* at 7-27, § 7-130.2d. It also asserts, however, that "[r]emedies other than backpay (e.g., seniority relief) are not subject to the 2/3 year limitation." *Id.* at 7-27, § 7-130.2d.

seniority, preferential consideration for training and promotions, and even back pay.¹⁷⁰

With these developments, the numerical employment policy as we now know it had reached maturity. To be sure, there have been some significant contributions since 1974. The Administrative Conference of the United States in 1975 criticized the application of uniform standards to all non-construction contractors and the failure to take account of idiosyncracies of discreet labor markets,¹⁷¹ but the criticism apparently went unheeded. Instead of relief from the numerical policy, it was again expanded when the EEOC, Civil Service Commission, Department of Labor, and Department of Justice jointly issued the Uniform Guidelines on Employee Selection Procedures.¹⁷² In essence, the Guidelines require all employers¹⁷³ who have "selection procedures"¹⁷⁴ that produce "adverse impact"¹⁷⁵ either to carry a generally impossible burden of demonstrating a statistical relationship to job performance or, in the alternative, to eliminate the "adverse impact."¹⁷⁶ "Affirmative action" is expressly encouraged,¹⁷⁷ and the Guidelines clearly indicate that the bottom line, the numerical representation in the employer's workforce, will control the enforcement agencies' exercise of "their administrative and prosecutorial discretion."¹⁷⁸

Furthermore, in response to the lower court decisions in the *Weber* case and on the same day that the Supreme Court granted certiorari in that case,

¹⁷⁰ Revised Order No. 4 has since been again revised to expressly provide for the inclusion of backpay among other forms of relief for an "affected class." 42 Fed. Reg. 3462 (1977).

¹⁷¹ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1974-75 REPORT at 40-42 (1976).

¹⁷² 43 Fed. Reg. 38290 (1978), *codified at*, 29 C.F.R. § 1607 (1979), 41 C.F.R. § 60-3 (1979), 28 C.F.R. § 50.14 (1979), 5 C.F.R. § 300.103(c) (1978).

¹⁷³ The Guidelines are not only applicable to federal contractors, but to all employers subject to Title VII as well. 43 Fed. Reg. 38296.

¹⁷⁴ The phrase "selection procedures" is defined in the Guidelines very broadly, as follows:

Selection procedure. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

Id. at 38308.

¹⁷⁵ "Adverse impact" is defined in the Guidelines as follows:

Adverse impact. A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

Id. at 38307.

Section 4D explains that a selection rate for any race, sex or ethnic group that is less than 80% of the rate for the group with the highest rate will generally be regarded as presumptive evidence of adverse impact. *Id.* at 38297-98.

¹⁷⁶ *Id.* at 38296, 38297, 38299 *passim*.

¹⁷⁷ *Id.* at 38308-09.

¹⁷⁸ *Id.* at 38297.

the EEOC issued its Affirmative Action Guidelines.¹⁷⁹ These Guidelines represent an overt attempt to shield employers, who succumb to the pressure to comply with the numerical policy, from liability to whites and males who have been discriminated against in the process.¹⁸⁰

Although the significance of such changes should not be minimized, the fact remains that they are simply variations on the theme that was fully developed during the Nixon administration. Recognition of this fact is important for at least two reasons. First, the origins of the policy strongly suggest that it is not the necessary or inevitable extension of liberal programs of the Kennedy and Johnson eras. Since the numerical employment policy comes to us with, at best, highly questionable liberal credentials, it is hardly the heresy that some would suggest for those of us who have always been and remain committed to true equality of opportunity to question the legitimacy of this innovation. Moreover, the prevailing mentality at critical junctures in the Nixon era has been well documented. The fact that many actions by the administration were guided by a purposeful exploitation of divisive issues certainly raises the possibility that the numerical employment policy itself was conceived out of a desire to promote something other than the long-range national interest. This alone compels a reexamination, or possibly an initial examination, of the premises on which the policy is based. Second, the process by which the policy was given shape—expansive and loose statutory interpretations by the courts, an aggressively expansive approach to executive power, an inability or unwillingness of Congress to check usurpations, and a judicial predilection for indulging the executive—is in itself sufficient to warrant lengthy reflection. It is in this context that the *Weber* case arose.

III. UNITED STEELWORKERS OF AMERICA V. WEBER

A. *The Facts and Lower Court Decisions*

The circumstances that gave rise to the *Weber* case were quite simple in comparison to the issues they raised. Kaiser Aluminum & Chemical Corp.

¹⁷⁹ 44 Fed. Reg. 4422 (1979), *codified at* 29 C.F.R. § 1608.

¹⁸⁰ The stated purpose of the Guidelines is to encourage voluntary compliance with Title VII. 29 C.F.R. § 1608.1. The three essential components are a "reasonable self analysis," "a reasonable basis for concluding action is appropriate," and "reasonable action." *Id.* at § 1608.4. The Guidelines hold that there is a "reasonable basis" if one or more employment practices are found to have adverse impact, if the effects of past discrimination are left uncorrected, or if there is disparate treatment. The reasonableness of the conclusion is unaffected by a failure to find that Title VII has been violated or a finding that defenses to a potential Title VII action exist. *Id.* at § 1608.4(b). "Reasonable action" is defined as follows:

The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect of (sic) past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were

opened its plant in Gramercy, Louisiana, in 1958.¹⁸¹ Brian Weber, whose cultural and educational background had provided little inducement to continue his schooling past high school, joined Kaiser's workforce as a laboratory analyst approximately ten years later.¹⁸² In 1969, Kaiser, in response to federal pressure to increase the representation of minority employees at the Gramercy plant, began to hire new employees on a "one white, one black basis."¹⁸³

Generally, Kaiser filled all craft positions by hiring craftsmen from outside the plant who had fully completed their training. Through the efforts of the United Steelworkers of America (USWA), the exclusive representative of Kaiser's employees for collective bargaining purposes, Kaiser agreed to set up partial training programs within the plant, thus making craft jobs more accessible to union members already employed by the company.¹⁸⁴ By early 1974, Kaiser faced the threat of sanctions by the OFCCP, including the loss of its federal contracts, if drastic measures were not employed to increase the representation of minorities among the skilled craft positions.¹⁸⁵

To avert this prospect, Kaiser bargained for and obtained the incorporation of a craft training clause in its nationwide "1974 Labor Agreement" with USWA.¹⁸⁶ Pursuant to this provision, the prior experience requirement for

themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

Id. at § 1608.4(c) (emphasis added).

The EEOC sought to shield employer action with these Guidelines through the operation of § 713(b)(1) of Title VII, 42 U.S.C. § 2000e-12(b)(1) (1976), which permits any employer who has relied in good faith on any "written interpretation . . . of the Commission" to raise such reliance as a defense to liability. Interestingly, the *Weber* decision contained no mention of the Guidelines.

¹⁸¹ *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761, 764 (E.D. La. 1977).

¹⁸² See Chase, *In Bakke's Wake: Kaiser Aluminum Case May Help in Clarifying Reverse-Job-Bias Issue*, Wall St. J., Sept. 21, 1978, at 1, col. 1; Roberts, *The Bakke Case Moves To The Factory*, N. Y. Times, Feb. 25, 1978 (Magazine), at 37.

¹⁸³ *Weber v. Kaiser Aluminum & Chemical Corp.*, 415 F. Supp. 761, 764 (E.D. La. 1977); see also *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 228 (5th Cir. 1977) (Wisdom, J., dissenting).

¹⁸⁴ Carpenter-Painters with one year of experience were accepted from 1964 to 1971 under this program. General Repairmen were accepted with three years experience from 1968 to 1971, and with two years from 1971 to 1974. Of the 28 persons who entered craft positions through these training programs, two (7%) were black. Brief for Respondents in Opposition to Petition for Certiorari, at 11-13, *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).

¹⁸⁵ *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 218, 226 (5th Cir. 1977).

¹⁸⁶ *Id.* at 218. Portions of the 1974 Labor Agreement are set forth in the district court's opinion in *Weber*, 415 F. Supp. at 763. Not only did the clause apply to Kaiser's operations throughout the country, but similar provisions were negotiated by USWA throughout the aluminum industry. 563 F.2d at 218. It appears that the Kaiser agreement, although concluded somewhat earlier, had been influenced by and therefore bore strong resemblance to a provision that was incorporated into national steel producers' collective bargaining agreements with USWA pursuant to two consent decrees. 563 F.2d at 229 (Wisdom, J., dissenting). See also *United States v. Allegheny-*

the training program was eliminated and a new in-plant training program for the skilled crafts was created. Goals for the desired minority ratio were to be established by a "Joint Committee," and 50 percent of the apprenticeships in the programs were to be reserved for minority employees.¹⁸⁷ Under the programs one black employee and one white employee were to be awarded positions for every two openings. The employees were to be selected on the basis of seniority within their respective racial groups until the goals for the desired ratio were attained. In short, dual plant seniority systems, one for minorities and one for whites, were to be set up.¹⁸⁸ Through a "Memorandum of Understanding" the Joint Committee set the goal for minority representation in the Gramercy plant at 39 percent for each "craft family."¹⁸⁹

When the first vacancies under the new craft training program were announced, Kaiser awarded half of them to the most senior whites and the other half to the most senior blacks, as the agreement required. Inevitably, although none of the blacks selected were less qualified for the training positions than their white counterparts,¹⁹⁰ all of the blacks awarded positions were less senior than at least some of the white employees who were denied positions.¹⁹¹ Among those white employees passed over was Brian Weber, who promptly filed a charge of discrimination with the EEOC. In due course, Weber commenced a class action in the Eastern District of Louisiana, alleging that he and members of his class had been discriminated against in violation of their rights under Title VII of the Civil Rights Act of 1964¹⁹² and the Civil Rights Act of 1866.¹⁹³

Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975). The consent decrees themselves are reproduced at FEP MANUAL 431:125 (BNA). From this, one obtains some idea not only of the direct successes, but also of the "ripple effects" of the Government's efforts to implement its national numerical employment policy.

¹⁸⁷ 415 F. Supp. at 764.

¹⁸⁸ The dual seniority systems were for purposes of selecting on-the-job trainees only. All other benefits and working conditions continued to be allocated on a unified seniority system. *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 225 (5th Cir. 1977).

¹⁸⁹ The source of the 39% figure is unclear. The district court appears to have concluded that 39% represented the percentage of minority population in the parishes of St. James and St. John the Baptist, whence Kaiser drew most of its employees. 415 F. Supp. at 764. The majority in the Court of Appeals appears to have agreed. 563 F.2d at 218, 222 n.11. Judge Wisdom, however, who dissented from the Court of Appeals decision stated that "[t]he workforce in those parishes was estimated at 39 percent black." *Id.*, at 228 (emphasis added) (footnote omitted). The majority of the Supreme Court also found the figure to be reflective of the relevant workforce. 99 S. Ct. at 2725. The point may be of some significance. If the figure is strictly a reflection of population in the area, a significant disparity between the percentage of unqualified blacks (too young, too old, infirm, etc.) could skew the available workforce, making 39% inordinately high or low. See *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

¹⁹⁰ 563 F.2d at 225.

¹⁹¹ Petition For Writ of Certiorari on behalf of United Steelworkers of America, at 7, *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).

¹⁹² 42 U.S.C. § 2000e-2, *et seq.* (1970).

¹⁹³ 42 U.S.C. § 1981 (1970). This statute provides as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws

District Judge Jack M. Gordon agreed with Weber's allegations and issued a permanent injunction against any further use of the quota-based program.¹⁹⁴ He premised this result on two grounds. First, he reasoned, although the authority of the courts to impose quota type relief in Title VII cases was "well established," the delicacy of the balance of interests that must underlie such a remedy makes it necessarily the exclusive domain of the courts.¹⁹⁵ Moreover, Judge Gordon found the language of sections 703(a) and (d), prohibiting discrimination against "any individual," to be unequivocal and controlling. Noting that "the black employees being preferred over more senior white employees had never themselves been the subject of any unlawful discrimination [by Kaiser] during hiring,"¹⁹⁶ he concluded that the remedial provisions of Title VII¹⁹⁷ requiring affirmative action in specific instances of

and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

The provision has been interpreted to protect both whites and minorities against employment discrimination. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285-96 (1976). The record of the *Weber* case is unclear as to why the § 1981 claim was never resolved and the only mentions of the fact that it was filed at all that I have been able to find are in one of the briefs of amicus curiae and Weber's Brief in Opposition to Certiorari. Brief of Amicus Curiae For the Committee On Academic Nondiscrimination And Integrity at 26, Brief for Respondents in Opposition to Petition For Certiorari at 7, *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979). The only apparent explanation for the neglect of the § 1981 claim arises from the district court's mention that "by stipulation of all the parties the trial was conducted on the merits of plaintiffs' request for a permanent injunction." 415 F. Supp. at 763. It may be that in order to obtain an expedited determination of Weber's claim for injunctive relief under Title VII, the § 1981 claim, which could have been tried to a jury, was waived or the parties stipulated to its being held in abeyance. In any event, as will appear, the fact that this claim was lost may well have significantly influenced the outcome of the case. See text at notes 290-300 *infra*.

¹⁹⁴ 415 F. Supp. at 770.

¹⁹⁵ 415 F. Supp. at 767-68. Judge Gordon also asserted that sections 703(a) and (d), 42 U.S.C. § 2000e-2(a) and (d), "do not prohibit the courts from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to employers." 415 F. Supp. at 767. As for the effect of § 703(j), 42 U.S.C. § 2000e-2(j), on the courts' authority in this regard, Judge Gordon simply offered the following quotation:

When the stated purposes of the Act and the broad affirmative relief authorization above are read in context with § 2000e-2(j), we believe that section cannot be construed as a ban on affirmative relief against continuation of effects of past discrimination resulting from present practices (neutral on their face) which have the practical effect of continuing past injustices.

415 F. Supp. at 767, *quoting*, *United States v. IBEW Local 38*, 428 F.2d 144, 149 (6th Cir. 1970).

¹⁹⁶ 415 F. Supp. at 769. Indeed, since at least some of the black employees awarded positions had less seniority than Brian Weber, it seems likely that some or all of them began work for Kaiser in 1969 or later. See text at notes 182-83 *supra*. Some or all of those preferred over Weber, therefore, would have been double beneficiaries—first of Kaiser's 50% hiring quota, and later of the training program quota.

¹⁹⁷ For the text of the remedial provisions in section 706(g) see note 35 *supra*.

discrimination were inapposite. He therefore determined that even the courts could not have effectuated Kaiser's quota system under the circumstances.¹⁹⁸ Judge Gordon conceded that he was not "sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in sections 703(a) and (d) of the 1964 Act."¹⁹⁹ Judge Gordon refused to usurp the legislative function by expanding the exceptions to Title VII, and therefore upheld Weber's claim.²⁰⁰

A majority of the United States Court of Appeals for the Fifth Circuit disagreed with Judge Gordon's conclusion that only judges, and not private parties, may use quotas.²⁰¹ The Fifth Circuit majority, however, firmly agreed with the conclusion that no quota was appropriate in the absence of identifiable victims of unlawful discrimination. The important distinction between judicially imposed quotas and that adopted by Kaiser, reasoned the court, is that the purpose of a judicial quota is to remedy a specific wrong—to restore an applicant or employee to the position he or she would have enjoyed but for the employer's unlawful discrimination.²⁰² Non-minority

¹⁹⁸ 415 F. Supp. at 769-70.

¹⁹⁹ *Id.* at 769 (emphasis in original).

²⁰⁰ He ended his opinion on a note that, in the light of subsequent events, seems prophetic:

Moreover, if such racial discrimination by employers against individuals is to be sanctioned as a benign exception to the prohibitions of Title VII of the 1964 Civil Rights Act, then it is the opinion of this Court that such exception should be enacted by the Congress, that branch of our government responsible for creation of the national policy reflected in the prohibitions of Title VII, and not by a life tenured member of the Federal Judiciary. Numerous policy decisions of monumental importance to the nation necessarily would have to be made in creating exceptions to Sections 703(a) and (d) of the 1964 Act, and the type of Congressional scrutiny and public debate such as that reflected in the legislative history of the 1964 Act would ensure that competing interests could be balanced in a fashion consistent with the democratic processes pursuant to which the 1964 Act itself was adopted.

Id. at 769-70.

²⁰¹ 563 F.2d at 223-24. In this connection, the court noted that there was "strong authority" to the effect that courts are not subject to the same restrictions as employers based on the argument that § 703 only defines unlawful practices, but does not limit the judicial remedies authorized by § 706(g). In support of this proposition, the court cited *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), in which the Supreme Court held that "as with the other provisions of § 703," § 703(h) was definitional only and not intended to limit the scope of judicial relief. *Id.* at 758. An argument can certainly be made, however, that notwithstanding the *Franks* opinion, both the language and the legislative history of § 703(j) present a different case. See, for example, the remarks of Senator Humphrey quoted in note 228 *infra*.

²⁰² 563 F.2d at 224-26. Under the "rightful place" doctrine, one who has been the subject of unlawful discrimination at the hands of a defendant employer may obtain an order compelling the *defendant* to do whatever is necessary—including granting fictional seniority—to remove the effects of the *defendant's* unlawful act. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 767-68 (1976); see also *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 988 (5th Cir. 1969).

employees who are disadvantaged by the courts' actions have no legal complaint because the advantages they had acquired were in a sense, taken from the very minority employee to whom they are now returned.²⁰³ For Kaiser to prefer a minority employee over a non-minority employee, however, in the absence of unlawful discrimination by Kaiser, even if that preference is born of a desire to eliminate the effects of past "societal discrimination, . . . has no foundation in restorative justice, and its preference for training minority workers thus violates Title VII."²⁰⁴ The Fifth Circuit majority further found that Kaiser could not shield its quota system behind Executive Order 11246.²⁰⁵ The court of appeals, therefore, affirmed the decision of the district court.

Judge Wisdom dissented from the Fifth Circuit decision, offering his view that the court had left employers facing potential liability to minorities and Government sanctions on the one hand, and the threat of suits by or on behalf of non-minorities on the other. Thus, to use Judge Wisdom's colorful phrase, "[t]he employer and the union are made to walk a high tightrope without a net beneath them."²⁰⁶ He argued that this, in turn, would inevitably diminish "voluntary compliance" and that "the blight of racial discrimination would be still further delayed."²⁰⁷ The better course, Judge Wisdom opined, would be to establish a "zone of reasonableness" within which employers would be "sheltered from liability" to eradicate the effects of discrimination, provided such action was a "reasonable remedy" for an "arguable violation of Title VII."²⁰⁸ Using this standard, he felt that Kaiser's quota system should enjoy immunity because "[t]he statistics here constituted a prima facie case of discrimination,"²⁰⁹ "the defendants did not present any evidence in rebuttal,"²¹⁰ and Kaiser's plan was "reasonable."²¹¹

²⁰³ 563 F.2d at 224-25.

²⁰⁴ *Id.* at 226.

²⁰⁵ 563 F.2d at 227. Relying on Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) the court concluded:

Whether Kaiser has already met its affirmative action burden or not, we are unable to harmonize the more explicit language of section 703(d), which specifically prohibits racial classification in admission to on-the-job training programs, with the affirmative action imposed here. If Executive Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, *in the absence of any prior hiring or promotion discrimination, the executive order must fall before this direct congressional prohibition.*

Id. (emphasis in original).

²⁰⁶ *Id.* at 230 (Wisdom, J., dissenting).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 231 (footnote omitted).

²¹⁰ *Id.*

²¹¹ *Id.* at 232. As to the "reasonableness" of Kaiser's quota, Wisdom noted four factors. First, it was similar to the sort of relief some courts had provided. *Id.* Second, the plan had been negotiated by employer and union and should therefore be "less suspect." *Id.* at 232-33. Third, it "reduced the impact on white workers," apparently meaning that the quota did not require the discharge or demotion of whites. *Id.* at 233. Finally, Kaiser's plan allowed "significant white participation" although "black employees receive[d] more than their white colleagues." *Id.* at 234. Wisdom also concluded that the plan constituted a "proper response to societal discrimination against

B. *The Supreme Court Opinions*

Justice Brennan's opinion for the Supreme Court demonstrates that although Judge Gordon may not have been "sufficiently skilled in the art of sophistry"²¹² to evade the clear import of the language and legislative history of Title VII, Justice Brennan and three of his brethren (Justices Marshall, Stewart and White)²¹³ were equal to the task. Justice Brennan's opinion begins by viewing Kaiser's quota system as entirely voluntary and involving no state action, thus ignoring the influential role of the OFCCP noted by both the District and Circuit Courts.²¹⁴ This maneuver conveniently eliminated the necessity of considering the serious statutory and constitutional implications of the Government's role.

Failing to find state action, Justice Brennan embarked upon an exercise in "creative" statutory construction that, were it not a phenomenon all too commonly encountered in the judicial opinions of this unprincipled age, would leave one breathless. Justice Brennan's starting point is not the literal language of the Act²¹⁵ on which he declares Brian Weber's reliance to have been "misplaced."²¹⁶ Rather, he prefers to commune with the spirit of Title VII, from which he learns that, when Congress *said* that it was to be unlawful to "discriminate against any individual,"²¹⁷ Congress really *meant* to say that it was to be unlawful to discriminate against any individual *unless* such discrimination were in conjunction with "voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy."²¹⁸

We are told that "Congress' primary concern in enacting the prohibition against racial discrimination in Title VII"²¹⁹ was *not* to eliminate once and for all arbitrary employment decisions based on the color of an individual's skin, but to " 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.' "²²⁰ Without manifesting so much as a glimmer of recognition of the fact that he may have identified the legislative *goal* but has revealed nothing about the intention of Congress regarding the appropriate *means*, Justice Brennan finds "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice"²²¹ were con-

blacks," essentially because to hold otherwise would leave a "wrong without a remedy." *Id.* at 234-36.

²¹² See text at note 199 *supra*.

²¹³ Justice Blackmun delivered a separate concurring opinion that, as will be seen, is every bit as ill-reasoned as Justice Brennan's, but Justice Blackmun's opinion can at least claim some candor as a virtue. Chief Justice Burger and Justice Rehnquist each wrote dissents. Justice Stevens excused himself from the case. Justice Powell missed oral arguments because of illness and did not participate in the decision.

²¹⁴ 415 F. Supp. at 765; 563 F.2d at 218, 226.

²¹⁵ For the text of the relevant statutory provisions, sections 703(a) and (d), see notes 24-26 *supra*.

²¹⁶ 99 S. Ct. 2721, 2726 (1979).

²¹⁷ 42 U.S.C. § 2000e-2(d) (1976).

²¹⁸ 99 S. Ct. at 2728.

²¹⁹ *Id.* at 2727.

²²⁰ *Id.* at 2728, quoting, 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey).

²²¹ *Id.*

strued to deprive employers the right to discriminate against persons of all races. Hence, he asserts that it "plainly appears . . . that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem."²²²

Having thus neatly transformed the language of sections 703(a) and (d), conjuring a meaning of which the drafters' words gave no hint, Justice Brennan turns his attention to section 703(j) of Title VII, the language and legislative history of which he finds "further reinforced" his interpretation.²²³ He asserts that opponents of the bill that contained section 703(j) raised two objections: (1) that it would be construed to *require* preferential treatment by employers with racially imbalanced workforces, and (2) that it would be construed to *permit* such preferential treatment even where it was not required.²²⁴ To establish this proposition, however, Justice Brennan cites only a brief portion of Senator Sparkman's remarks on April 21, 1964.²²⁵ Without any further reference to the record of the debates, he concludes that the use of "require" instead of "require or permit" in section 703(j) evidences a congressional choice to meet only the first objection and compels the "natural inference" that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."²²⁶

In a footnote,²²⁷ Justice Brennan dismisses as inapposite statements by Senators Clark, Case, Humphrey and Williams, such as the following excerpt from an interpretive memorandum on H.R. 7152 which was submitted jointly by Senators Clark and Chase, floor managers of the bill, early in the debates:

There is no requirement in title VII that an employer maintain a racial balance in his work force. *On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race.* It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining

²²² *Id.*

²²³ *Id.* For the text of section 703(j), see note 34 *supra*.

²²⁴ *Id.* at 2728-29.

²²⁵ *Id.* The citation is to Senator Sparkman's remarks at 110 CONG. REC. 8618-19 (1964). Examination of the cited passage reveals that the central thrust of the Senator's remarks was directed toward the prospect that the enforcement posture might emphasize numerical breakdowns in the workforce to such an extent that employers would be forced, as a practical matter, to move "toward a kind of quota system." *Id.* at 8618 (remarks of Senator Sparkman). Senator Keating, one of the proponents of the bill, replied: "Of course, *improper administration* of the law is a question that may be encountered at any time." *Id.* (remarks of Senator Keating) (emphasis added). The context of the brief colloquy between Senators Sparkman and Keating makes it clear that Keating's objective was to establish the fact that although a numerical approach to employment might be induced through "improper administration," no such result was either provided for or intended by the anti-discrimination bill. *Id.*

²²⁶ 99 S. Ct. at 2729 (footnote omitted).

²²⁷ *Id.* at 2729-30 n.7.

whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.²²⁸

Justice Brennan asserts that these comments, rejecting quota-based hiring, pertained only to efforts to "maintain racial balance in employment"²²⁹ and therefore had no bearing on the propriety of efforts to *achieve* racial balance. As tenuous as this argument appears on its face, its weaknesses are compounded when Justice Brennan tells us that "[t]here was no suggestion after the adoption of section 703(j) that wholly voluntary, race-conscious, affirmative action efforts would in themselves constitute a violation of Title VII."²³⁰

²²⁸ 110 CONG. REC. 7213 (1964) (emphasis added). In a memorandum responding to certain questions raised by Senator Dirksen about the effect of the bill, Senator Clark had also written:

Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

Answer: *Quotas are themselves discriminatory.*

Id. at 7218 (emphasis added). Similarly, Senator Humphrey remarked:

Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.

In title VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be hired on the basis of merit, and to release the tremendous talents of the American people, rather than to keep their talents buried under prejudice or discrimination.

Id. at 6549. See also *id.* at 8921 (remarks of Senator Williams).

²²⁹ 99 S. Ct. at 2729 n.7, quoting from, 110 CONG. REC. 11848 (1964) (remarks of Senator Humphrey) (emphasis in Supreme Court's quoted version).

²³⁰ 99 S. Ct. at 2730 n.7 (emphasis added). Justice Brennan cites three excerpts from the debates on Title VII to show that "[a]fter § 703(j) was adopted congressional comments were all to the effect that employers would not be *required* to institute preferential quotas . . ." *Id.*, citing, 110 CONG. REC. 12819 (remarks of Senator Dirksen); *id.* at 13079-80 (remarks of Senator Clark); *id.* at 15876 (remarks of Rep. Lindsay). While the remarks of all three legislators cited do indeed limit themselves to disavowals of required preferential treatment, Brennan's assertion that "*all*" statements were so limited is untenable. Two pages before the cited portion of Senator Clark's remarks, for example, Senator Ervin accused the proponents of the bill of manifesting "a purpose . . . that members of the Negro race should not take their rank as mere citizens as white people do but, on the contrary, should be made special favorites of the laws." *Id.* at 13077. Senator Cooper rose to respond to this and other charges, saying (in remarks appearing on the page immediately preceding those of Senator Clark cited by Justice Brennan):

As I understand title VII, an employer could employ the usual standards which any employer uses in employing—in dismissing, in promoting, or in assigning those who work for him. There would be only one limitation; he could not discriminate, he could not deny a person a job, or dis-

Such an assertion fairly invites the revelation of Brennan's disingenuous use of legislative history, and it is an invitation that one should not lightly decline. First, the statement is literally untrue. There was at least one such "suggestion after the adoption of section 703(j)" in a document entered into the CONGRESSIONAL RECORD by Senator Humphrey, the then majority whip and one of the bipartisan captains who shepherded the bill through the Senate. The document was entitled "A Concise Explanation of the Civil Rights Act of 1964; Chronology of Congressional Action";²³¹ it was ordered printed in the Record on July 2, 1964, thirteen days after the Senate passed H.R. 7152 with section 703(j).²³² Senator Humphrey explained that it was "a revised and updated"²³³ version of an explanatory document inserted in the Record by him on May 25, 1964.²³⁴ The Senator also recalled that "[t]he purpose of [the earlier document] was to provide Americans with a short and understandable explanation of the civil rights bill as it was passed by the House of Representatives."²³⁵ Senator Humphrey suggested "that the American people may find useful a similarly brief explanation of the act."²³⁶ With respect to the issue of preferential treatment, the later document was identical to its predecessor:

The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. *It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices.*²³⁷

This passage makes it clear that the understanding in the Senate both before and after the adoption of section 703(j), was that preferences were neither required nor permitted. The earlier explanatory document demonstrates this to have been the understanding of the Senate proponents, concurred in by their counterparts in the House. That the wording of the document did not change in this regard demonstrates that the addition of section 703(j), to use Senator Humphrey's words, "does not represent any change in the substance of the title."²³⁸ This conclusion is only further buttressed by

miss a person from a job, or promote on the sole ground of his color, or his religion, other factors being equal.

I think this should be made clear, because the Senator's remarks may frighten people all over the country who do not have the time to study this bill with the thoroughness it deserves.

Id. at 13078.

²³¹ *Id.* at 15865-67.

²³² The amended Mansfield-Dirksen substitute bill, which added § 703(j) to the House version, was agreed to on June 17, 1964. *Id.* at 14239. H.R. 7152, as amended by the substitute, was passed by the Senate two days later on June 19. *Id.* at 14511.

²³³ *Id.* at 15865.

²³⁴ *Id.* at 11846-48 (remarks of Senator Humphrey).

²³⁵ *Id.* at 15865.

²³⁶ *Id.* at 15865.

²³⁷ *Id.* at 11848 (emphasis added). *See also id.* at 15866.

²³⁸ *Id.* at 12723.

the comments of Senator Saltonstall who spoke in favor of the Mansfield-Dirksen substitute bill, which, among other things, added section 703(j); Senator Saltonstall stated,

[t]he legislation before us today provides no preferential treatment for any group of citizens. In fact it specifically prohibits such treatment. It seeks to assure that all citizens can exercise their rights under our laws and can share the equal opportunities guaranteed by those laws.²³⁹

Furthermore, not only had Senator Humphrey's original explanatory memorandum been "read and approved by the bipartisan floor managers of the bill in both Houses of Congress,"²⁴⁰ but the later document was introduced into the Record both after the adoption of section 703(j) and on the same day that the House debated and voted to accept the bill as amended by the Senate.²⁴¹ Although, with respect to the House debates, Justice Brennan is technically correct in suggesting that none of the discussions after the Senate's adoption of section 703(j) contained a representation that preferential treatment was forbidden, neither did any of the House proponents contradict the unambiguous statements in both of Senator Humphrey's memoranda. Justice Brennan's assertion that "nothing" after the adoption of section 703(j) suggests an intention to proscribe preferential treatment for *all* groups is, therefore, another instance of that aspect of his judicial method that elsewhere has been generously referred to as a "preference for speculation over fact."²⁴²

In the final portion of the opinion for the Court, Justice Brennan informs us that although the Kaiser-USWA affirmative action plan "falls on the permissible side of the line," he is not prepared to tell us precisely where the "line of demarcation between permissible and impermissible affirmative action plans" is.²⁴³ He does, however, enumerate three factors that presumably figured in the conclusion of the Court. These are as follows: 1) The Kaiser-USWA plan and Title VII share a common purpose, to wit: "To break down old patterns of racial segregation and hierarchy."²⁴⁴ 2) It does not "unnecessarily trammel" the interests of non-minorities in that it neither "require[s] [their] discharge" nor "create[s] an absolute bar to [their] advancement."²⁴⁵ 3) It is a "temporary measure," which "will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force."²⁴⁶

²³⁹ *Id.* at 12691 (remarks of Senator Saltonstall).

²⁴⁰ *Id.* at 11847 (emphasis added).

²⁴¹ The House adopted House Resolution 789, which provided for concurrence in the Senate's amendments to the House bill, on July 2, 1964. 110 CONG. REC. 15869-97.

²⁴² Berger, *supra* note 1, at 92.

²⁴³ 99 S. Ct. at 2730.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* Just how "temporary" this arrangement will be depends a great deal on one's perspective. It appears that there are presently around 300 craft positions at the Gramercy plant. See *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 228 (Wisdom, J., dissenting). As has already been mentioned, the Supreme Court appa-

The refusal to more clearly delineate the parameters of permissible behavior and the resort, instead, to a listing of factors without any indication of how they are to be weighed indicates that the Court has not outgrown its predilection for an "incrementalist approach," which has obscured the meaning of its decisions since the early days of employment discrimination litigation.²⁴⁷ But the failure to discuss the limits on private initiative may reflect an inability among the four justices who joined in the Court's opinion to agree upon the necessary and sufficient conditions for permissible "race-conscious affirmative action." It may even suggest, moreover, a lack of agreement on whether preferential treatment always would be proper when all the factors listed at the end of Brennan's opinion were present. That the sweep of the decision may be therefore substantially more narrow than is apparent on first reading is also consistent with Justice Brennan's assertion earlier in the opinion that "[i]t plainly appears . . . that Congress did not intend *wholly* to prohibit private and voluntary affirmative action efforts."²⁴⁸ This statement appears to indicate that under some circumstances voluntary "affirmative action" would be improper.

Another bit of evidence suggesting that the constellation of Justices might well be realigned in a different case is that Justice Stewart joined the Court's opinion. This perhaps would not be remarkable but for the fact that Stewart was one of four Justices who joined the opinion of Justice Stevens in the *Bakke* case.²⁴⁹ That opinion, it bears mentioning, concluded that the race-conscious admissions program at the University of California medical school could not be squared with the plain language of Title VI of the Civil Rights Act of 1964,²⁵⁰ and that nothing in the legislative history of the Act

rently reached the conclusion that the relevant workforce was 39% black. See note 189 *supra*. Prior to 1974, five, or slightly less than 2% of the craftsmen were black. Therefore, in order to achieve proportional representation, an additional 37%, or 111, black craftsmen would have to be hired. The Supreme Court's opinion states that in the first year there were 13 craft trainee openings, seven of which went to blacks. 99 S. Ct. at 2725. If we assume a black trainee induction rate of 6.5 per year, further assume that all trainees actually become craftsmen, and further yet assume that none of the new craftsmen quit, die, become disabled or get discharged, then it will be 17 years before the goal of proportional representation is reached. Moreover, Justice Brennan's assertion that the plan was a "temporary measure" is at odds with the record in the case. Mr. Dennis E. English, industrial relations superintendent at the Gramercy plant gave the following testimony at trial:

Once the goal is reached of 39 percent, or whatever the figure will be down the road, I think it's subject to change, once the goal is reached in each of the craft families, at that time, we will then revert to a ratio of what that percentage is, if it remains at 39 percent and we attain 39 percent someday, we will then continue placing trainees in the program at that percentage.

Brief for Respondents, at 4 n.8, *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).

²⁴⁷ See Wilson, note 110 *supra*, at 846.

²⁴⁸ 99 S. Ct. at 2728 (emphasis added).

²⁴⁹ *Regents of the University of California v. Bakke*, 438 U.S. 265, 408-21 (Burger, C.J. and Stevens, Stewart and Rehnquist, JJ., concurring in part and dissenting in part) (1978).

²⁵⁰ 42 U.S.C. § 2000d, *et seq.* (1976). The Court was principally concerned with § 601 of Title VI, which provides as follows:

could support the conclusion that the "language misstates the actual intent of the Congress that enacted the statute. . . ." ²⁵¹ In construing Title VI to prohibit racial preferences, ²⁵² the Stevens bloc in *Bakke* relied in part on the close relationship between Title VI and Title VII:

Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation," and, with respect to Title VI, the federal funding of segregated facilities. The genesis of the legislation, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimination by enacting a provision that protects all races, so, too, its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of *any* individual from a federally funded program "on the ground of race." ²⁵³

If there is consistency in Justice Stewart's joining Justice Steven's opinion in *Bakke* and Justice Brennan's opinion in *Weber*, it is not readily apparent. At the very least, the importance of the issues and the general confusion that continues to permeate this area of the law make it very difficult to characterize as anything but irresponsible Justice Stewart's failure to file an opinion in either case that would give us some basis for reconciling these apparently irreconcilable positions. ²⁵⁴ More to the present point, however, Justice

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Id. at § 2000d. This language, of course, bears a striking similarity to that of § 703(a) of Title VII. See notes 24-25 *supra*.

²⁵¹ 438 U.S. at 413.

²⁵² To be sure, Justice Stevens stated that "the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and . . . discussion of that issue is inappropriate." *Id.* at 411. As another commentator has pointed out, however, the breadth of the opinion's holding effectively rebuts any inference that the quoted language significantly narrowed its scope: "Nonetheless, if one accepts [Stevens'] basic premise, the conclusion that all preferential admissions programs are illegal (unless ordered by a court as a remedial measure) seems inescapable." Maltz, *A Bakke Primer*, 32 OKLA. L. REV. 119, 123 (1979).

²⁵³ 438 U.S. at 413 (footnotes and citation omitted).

²⁵⁴ Justice Brennan makes the following unconvincing attempt to suggest that the interpretation of Title VI is a matter entirely different from the interpretation of Title VII:

Title VI of the Civil Rights Act of 1964, considered in *University of California Regents v. Bakke*, 438 U.S. 265, 98 S. Ct. 2722, 57 L.Ed.2d 750 (1978), contains no provision comparable to § 703(j). This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved: the prohibitions against race-based conduct contained [sic] in Title VI governed "program[s] or activities receiving Federal financial assistance." 42 U.S.C. § 2000d. Congress was legislating to assure federal funds would not be used in an improper man-

Stewart can hardly be presumed to be solidly in the pro-preferential treatment camp. Indeed, there is at least one arguable basis for distinguishing *Weber* from *Bakke* that may suggest a significant limitation on Justice Stewart's solidarity with the *Weber* majority. It could be said that *Weber* involved the substitution of one arbitrary (in the sense of being unrelated to qualifications for performing the work) selection criterion (race) for another (seniority). *Bakke*, on the other hand, involved the substitution of an arbitrary selection basis (race) for one apparently bearing a rational relationship to performance (qualifications). Although Justice Stewart has given us nothing from which to do anything but speculate, he may well draw the line at a selection system that permits the exaltation of the less qualified over the more qualified on the basis of race.

Justice Blackmun's separate concurring opinion²⁵⁵ is somewhat inconsistent and suggests that he, too, joins the majority fairly tentatively. He apparently perceives "traditionally segregated job categories" as the key to Justice Brennan's formulation.²⁵⁶ This, he finds, is "somewhat disturbing" because "the Congress that passed Title VII probably thought it was adopting a principle of non-discrimination that would apply to blacks and whites alike."²⁵⁷ Nevertheless, Justice Blackmun expresses a preference for the "arguable violation" approach advocated by Judge Wisdom in the latter's dissent to the Fifth Circuit decision.²⁵⁸ Notwithstanding this predilection, and his misgivings about the Court's expansive approach, however, Justice Blackmun ultimately "conclude[s] that the Court's reading of the statute is an acceptable one."²⁵⁹

ner. Title VII, by contrast, was enacted pursuant to the Commerce power to regulate purely private decision making and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*. See 110 CONG. REC. 8315 (1964) (remarks of Sen. Cooper). See also *id.*, at 11615 (remarks of Sen. Cooper).

99 S. Ct. at 2729 n.6. Justice Brennan's citation to legislative history is more than a little disingenuous. The cited comments of Senator Cooper deal, first, with the fact that the different Titles of the Act derive from different constitutional bases and, second, with his concern that Title VI might be construed to reach discrimination in employment, which he felt to be more properly the province of Title VII. In neither case is there the faintest suggestion that discrimination against a particular group may be unlawful under the one Title, but perfectly acceptable under the other. Even if such a misinterpretation of Senator Cooper's remarks could otherwise be supported, any review of the great mass of the debates will clearly show that all Titles were frequently considered in the same breath, or with sentences beginning with a reference to one Title and ending with allusion to another without any hint that the two were to be applied differently in respect to the kinds of discrimination they addressed. Finally, there are very clear indications that the Congress viewed the various Titles alike in this regard. Senator Humphrey's original explanatory memorandum, discussed in text at notes 234-37 *supra*, for example, stated flatly, "It [referring to the whole of H.R. 7152] does not provide for preferential treatment of any individual or particular group of Americans." 110 CONG. REC. at 11848 (1964).

²⁵⁵ 99 S. Ct. at 2730-34.

²⁵⁶ *Id.* at 2732.

²⁵⁷ *Id.*

²⁵⁸ See notes 206-11 *supra*, and accompanying text.

²⁵⁹ 99 S. Ct. at 2732.

This remarkably candid confession of willingness to depart from both statutory language and legislative intent suggests a great deal about the point to which judicial craftsmanship and, more significantly, constitutional limitations on the judicial function have come. In effect, Justice Blackmun concedes that "Title VII guaranteed equal opportunity for white and black alike,"²⁶⁰ but failed to provide whites a remedy for most discrimination, at least where "traditionally segregated job categories" are concerned. He reaches this result neither through construction of statutory language, which gives no hint of differential provision of remedies, nor through the divination of an overriding purpose in the legislative history. Rather, Justice Blackmun tells us that "[s]trong considerations of equity" counsel the creation of such policy "[a]bsent compelling evidence of legislative intent" to the contrary.²⁶¹ In other words, when Congress says that discrimination shall be forbidden as to all groups on the same basis, the courts are free to lift this protection from certain groups if that seems equitable, unless Congress has been prescient enough to anticipate such uneven enforcement of the law and to expressly forbid it. If that seems rather an unreasonable burden to place upon a legislative body, Justice Blackmun has a ready answer for it: "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses."²⁶²

In a short dissent, Chief Justice Burger clearly identifies at least one of the problems in the *Weber* majority opinion. Regardless of the desirability of the result reached by the majority, "it is contrary to the explicit language of the statute and is arrived at by means wholly incompatible with long-established principles of separation of powers."²⁶³ He also raises an admonition that the beguiling result can be obtained through methods that, in the final analysis, cost too much:

What Cardozo tells us is beware the "good result," achieved by judicially unauthorized or intellectually dishonest means on the appealing notion that the desirable ends justify the improper judicial means. For there is always the danger that the seeds of precedent sown by good men will yield a rich harvest of unprincipled acts of others also aiming at "good ends."²⁶⁴

Thus, the Chief Justice's objections to the position of the *Weber* majority and the process by which the numerical policy developed recall concerns Senator Ervin had earlier voiced.²⁶⁵

Justice Rehnquist's dissent provides a necessarily lengthy catalogue of excerpts from the legislative debates demonstrating that Justice Brennan's "legislative purpose" cannot stand against the overwhelming weight of the evidence. Like the Chief Justice, he also ends on an ominous note, predicting that the

²⁶⁰ *Id.* at 2733.

²⁶¹ *Id.*

²⁶² *Id.* at 2734.

²⁶³ *Id.*

²⁶⁴ *Id.* at 2735.

²⁶⁵ See text at note 83.

Court's decision will leave an unwelcome legacy.²⁶⁶ There simply can be no doubt that the *Weber* majority succeeded in rewriting Title VII. The Burger and Rehnquist dissents suggest that the methods employed by the majority were too costly and the result, in any event, undesirable. If they are right, it remains to be asked how costly, how undesirable and what is to be done now?

IV. ASSESSING THE COSTS: WHAT PRICE PROPORTIONALITY?

A. *The Institutional and Constitutional Costs of Weber*

The judge addresses himself to standards of consistency, equivalence, predictability, the legislator to fair shares, social utility and equitable distribution.²⁶⁷

I. Departures From Precedent

One of the persistent problems since the early days of Title VII has been the extent to which confusion has reigned in this area of the law. Some of this has been the natural consequence of the comprehensive regulation, for the first time, of an area of human affairs that previously had been more or less wholly beyond the pale of regulation. But a substantial portion of the confusion has been attributable to the fact that one day's conventional wisdom has too frequently become the next day's misapprehension of the law. This phenomenon has, in turn, derived from frequent legislative activity, truly massive amounts of regulations and guidelines promulgated by the enforcing agencies, and most of all, erratic decisions by the judiciary. On past occasions, both Justice Brennan and Justice Marshall have lamented what they perceived to be departures by the Supreme Court from consistent judicial pronouncements.²⁶⁸ Yet, not only did the position adopted by these two Justices and

²⁶⁶ Justice Rehnquist eloquently described the dangers in the majority's approach to affirmative action and statutory interpretation.

[T]here is perhaps no device more destructive to the notion of equality than the *numerus clausus*—the quota. Whether described as "benign discrimination" or "affirmative action," the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another. In passing Title VII Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative. With today's holding, the Court introduces into Title VII a tolerance for the very evil that the law was intended to eradicate, without offering even a clue as to what the limits on that tolerance may be. We are told simply that Kaiser's racially discriminatory admission quota "falls on the permissible side of the line." By going not merely *beyond*, but directly *against* Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind.

Id. at 2753 (citation omitted).

²⁶⁷ Freund, *Social Justice and the Law*, in *Social Justice* (R. Brandt ed.) (1962).

²⁶⁸ See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 378-80 (1977) (Marshall and Brennan, JJ., dissenting); *General Electric Co. v. Gilbert*, 429 U.S. 125, 146-47 (1976) (Brennan and Marshall, JJ., dissenting).

three of their colleagues in *Weber* take great liberties with the legislative intent embodied in Title VII, it also departed dramatically from the spirit, if not indeed the letter, of virtually every significant Supreme Court opinion in employment discrimination cases.

In the fountainhead decision of *Griggs v. Duke Power Co.*,²⁶⁹ a unanimous Court remarked that:

Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.* What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.²⁷⁰

Five years later, in *McDonald v. Santa Fe Trail Transp. Co.*,²⁷¹ the Court, through Justice Marshall, said that "uncontradicted legislative history" compelled the conclusion that "Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they Negroes"²⁷² Similarly, in *International Brotherhood of Teamsters v. United States*,²⁷³ the Court rejected the Government's argument that no seniority system that perpetuates the effects of past discrimination can qualify for the exemption in section 703(h)²⁷⁴ of the Act for "bona fide" seniority plans. In so doing, the Court emphasized that "[t]o the extent that [the seniority system] 'locks' employees into [less desirable] jobs, it does so for all."²⁷⁵ As partial support for its conclusion, the *Teamsters* Court expressed approval of the following lower court language, stating, "[n]o doubt, Congress, to prevent 'reverse discrimination' meant to protect certain seniority rights that could not have existed but for previous racial discrimination."²⁷⁶

Thus, in its earlier decisions the Court clearly indicated that the anti-discrimination provisions of Title VII apply alike to all employees. It perhaps could be argued that the generally "color-blind" and "sex-blind" theme of these interpretations of Title VII, however, have no application where, as in *Weber*, race-conscious or sex-conscious measures are employed to eradicate the effects of past discrimination, to break down "traditionally segregated job categories." Indeed, this seems a fair restatement of Justice Brennan's opinion in *Weber*. There are, however, significant difficulties in reconciling such an emphasis on past discrimination with certain prior decisions of the Court.

²⁶⁹ 401 U.S. 424 (1971).

²⁷⁰ *Id.* at 430-31 (emphasis added).

²⁷¹ 427 U.S. 273 (1976).

²⁷² *Id.* at 280.

²⁷³ 431 U.S. 324 (1977).

²⁷⁴ 42 U.S.C. § 2000e-2(h) (1976).

²⁷⁵ 431 U.S. at 355-56.

²⁷⁶ *Id.* at 355 n.40, quoting *Paperworkers v. United States*, 416 F.2d 980, 999 (5th Cir. 1969).

First, in *United Air Lines, Inc. v. Evans*,²⁷⁷ the Supreme Court in an opinion joined by seven Justices²⁷⁸ stated quite unambiguously:

A discriminatory act which is not made the basis for a timely charge [with the EEOC] is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has *no present legal consequences*.²⁷⁹

If this language means anything at all, it must mean that prior discriminatory acts, no matter how morally reprehensible, cannot provide a legal justification for present unlawful discrimination. An argument that the *Evans* holding was nothing more than a limitation on the availability of judicial relief only leads to an anomaly. Its necessary implication is that there are some forms of "benign" discrimination that could not be employed in the exercise of judicial remedial powers, but that could be indulged by private parties with impunity. There simply is no evidence in the legislative history of Title VII, however, to support the view that voluntary remedial efforts could permissibly employ means forbidden the judiciary.²⁸⁰ Thus, the relevance of past discrimination,

²⁷⁷ 431 U.S. 553 (1977).

²⁷⁸ Justices Marshall and Brennan dissented. *Id.* at 560-62.

²⁷⁹ *Id.* at 558 (emphasis added).

²⁸⁰ It could perhaps be argued that the contrary is suggested by that portion of the Report of the Committee on the Judiciary quoted in Justice Brennan's *Weber* opinion:

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

H.R. REP. NO. 914, 88th Cong., 1st Sess. (1963), at 18, *quoted at*, 99 S. Ct. 2728 (emphasis added by Justice Brennan). Taken from its context this language is rather suggestive, but the paragraph that followed the excerpt quoted by Justice Brennan is revealing:

It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination. This H.R. 7152, as amended, would achieve in a number of related areas. It would reduce discriminatory obstacles to the exercise of the right to vote and provide means of expediting the vindication of that right. It would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public. It would guarantee that there will be no discrimination among recipients of Federal financial assistance. It would prohibit discrimination in employment and provide means to expedite termination of discrimination in public education. It would open additional avenues to deal with redress of denials of equal protection of the laws on account of race, color, religion, or national origin by State or local authorities.

Id. Clearly, the "other forms of discrimination" mentioned in the first quoted paragraph, as the second paragraph demonstrates, referred to generic categories of discriminatory activity—categories of discrimination in areas *other than* voting, employ-

if any, is confined to its role as circumstantial evidence of present unlawful discriminatory practices.²⁸¹

Another fundamental problem with any numerical program comparable to the Kaiser-USWA plan is that it treats all members of different groups on an undifferentiated basis. Thus, both disadvantaged and undisadvantaged minority group members are benefited at the expense of non-minorities, at least some of whom may have been disadvantaged themselves. In short, the Court's decision in *Weber* amounts to an exaltation of the generalized interests of groups over the specific interests of individuals. Yet, the Court previously has said Title VII does not allow the employer to paint with this broad brush.

The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or

ment, public accommodations, and so forth. Justice Brennan also makes similarly disingenuous use of another portion of the Judiciary Committee Report. He asserts that "legislators in both Houses who traditionally resisted federal regulation of private business . . . demanded as a price for their support [of Title VII] that 'management prerogatives . . . be left undisturbed to the greatest extent possible.'" 99 S. Ct. at 2729, quoting H.R. REP. NO. 914, 88th Cong., 1st Sess., Pt. 2 (1963), at 29. From this, he concludes that Congress intended to preserve a "management prerogative" to employ "racially preferential integration efforts." *Id.* Again, however, as Justice Rehnquist points out in his dissent, when the quoted language is viewed in context it "belie[s] the Court's conclusion." 99 S. Ct. at 2749 n.25. The language excised by Justice Brennan reads as follows:

It must also be stressed that the Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions. Similarly, management prerogatives, and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices. Its primary task is to make certain that the channels of employment are open to persons regardless of their race and that jobs in companies or membership in unions are strictly filled on the basis of qualification.

H.R. Rep. No. 914, 88th Cong., 1st Sess., Pt. 2 (1963), at 29.

²⁸¹ In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the Court described the significance of pre-Act discrimination in the following terms:

This is not to say that evidence of pre-Act discrimination can never have any probative force. Proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued, particularly where relevant aspects of the decisionmaking process had undergone little change. Cf. Fed. Rule Evid. 406; *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267; 1 J. Wigmore, Evidence § 92 (3d ed. 1940); 2 *id.*, §§ 302-305, 371, 375. And, of course, a public employer even before the extension of Title VII in 1972 was subject to the command of the Fourteenth Amendment not to engage in purposeful racial discrimination.

Id. at 309-10 n.15. Due to the Court's equation, in *United Air Lines v. Evans*, of acts not made the subject of a timely charge with pre-Title VII discrimination, there is no apparent reason why the quoted language from *Hazelwood* should not also apply with equal force to the former situation.

privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 USC § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.²⁸²

Even more directly to the point, in *Furnco Construction Co. v. Waters*,²⁸³ the Court declared that "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."²⁸⁴ But *Weber's* inconsistency with prior decisions does not end with the Court's Title VII cases. As will be shown, the subordination of individual interests to group interests also is difficult to reconcile with previous positions taken by most of the Justices in constitutional contexts.

In *Regents of the University of California v. Bakke*,²⁸⁵ Justice Powell, writing for the Court, considered the nature of the rights guaranteed by the fourteenth amendment, which provided in part the constitutional basis for Title VIII:

It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.²⁸⁶

Justices Brennan and Marshall also have asserted that "classifications too often have been inexcusably utilized to stereotype" and that any classification on the basis of sex or race is offensive to the Constitution, even though it serves a "compelling governmental interest," if there exists another "feasible, less drastic means."²⁸⁷ In *Cleveland Board of Education v. LaFleur*,²⁸⁸ Justice Stewart, writing for the Court, found that the fourteenth amendment due process clause requires "individualized determination[s]" in the employment context and that "irrebuttable presumptions" are "disfavored."²⁸⁹ These and a good many other expressions by the various Justices might well have led one logi-

²⁸² *City of Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

²⁸³ 438 U.S. 567 (1978).

²⁸⁴ 438 U.S. at 579 (emphasis in original) (citations omitted).

²⁸⁵ 438 U.S. 265 (1978).

²⁸⁶ *Id.* at 289-90, quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

²⁸⁷ *Kahn v. Shevin*, 416 U.S. 351, 357-60 (Brennan and Marshall, JJ., dissenting) (1974).

²⁸⁸ 414 U.S. 632 (1974).

²⁸⁹ *Id.* at 644-48. See also *Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

cally to the conclusion that any statute that fostered undifferentiated treatment of groups at the expense of individuals, that extended one quantum of protection to the individuals of one racial group and lesser quantum to the individuals of another, would have been unable to pass constitutional muster.

In addition to these problems of reconciling *Weber* with the reasoning of prior Title VII and constitutional cases, another difficulty presented by the decision is its inconsistency with past pronouncements on other legislative enactments. Of particular significance in this regard is 42 U.S.C. section 1981, which derives from section 1 of the Civil Rights Act of 1866.²⁹⁰ Enacted to effectuate the purposes of the thirteenth amendment and to give former slaves the rights of free citizens, the statute provides, in pertinent part, that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ." ²⁹¹ In the 1975 decision of *Johnson v. Railway Express Agency, Inc.*,²⁹² the Supreme Court held, for the first time, that section 1981 reaches racial discrimination in private sector employment relationships, and rejected the argument that Title VII and section 1981 are in any sense mutually exclusive.

One year later the Court, in an opinion written by Justice Marshall in *McDonald v. Santa Fe Trail Transportation Co.*,²⁹³ held that the 1866 Act was part of a "congressional design to protect individuals of all races" and therefore protects whites as well as non-whites.²⁹⁴ In coming to this conclusion, Justice Marshall discussed the legislative history of the 1866 Act at length.²⁹⁵ Among the evidence cited as supporting the Court's conclusion were the following comments made by Senator Trumbull, draftsman of the bill, in response to an argument that the bill extended to blacks protection that had not been accorded whites:

Sir, *this bill applies to white men as well as black men.* It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, *a bill that protects a white man just as much as a black man?* With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when *the very object of the bill is to break down all discrimination between black men and white men?*²⁹⁶

²⁹⁰ 42 U.S.C. § 1981 (1976) (originally enacted as Act of Apr. 9, 1866, c.31, § 1, 14 Stat. 27).

²⁹¹ *Id.*

²⁹² 421 U.S. 454, 459-60 (1975).

²⁹³ 427 U.S. 273 (1976).

²⁹⁴ *Id.* at 289 n.19.

²⁹⁵ *Id.* at 285-96.

²⁹⁶ *Id.* at 290, quoting CONG. GLOBE, 39th Cong., 1st Sess., 599 (1866) (remarks of Senator Trumbull) (emphasis supplied by Justice Marshall).

Justice Marshall observed that although the bill as it passed the Senate covered discrimination against whites, the "as is enjoyed by white citizens" language was added by amendment of the Senate version in the House. That this was not intended to limit coverage to non-whites, Justice Marshall asserted, was amply demonstrated by indications that it was intended as a mere "technical adjustment"²⁹⁷ and by a quite pointed statement made by Congressman Wilson, floor manager of the bill, immediately after he had obtained passage of the amendment. Wilson stated that the purpose of the bill was to secure "to citizens of the United States equality in the exemptions of the law. . . . Whatever exemptions there may be shall apply to all citizens alike. One race shall not be more favored in this respect than another."²⁹⁸ After reviewing this and other material evidence in the legislative history, Justice Marshall concluded that section 1981 can only be construed to proscribe discrimination against whites and non-whites on the same basis.²⁹⁹

How can this construction of section 1981 be reconciled with the *Weber* majority's construction of Title VII? Implied repeal of the 1866 Act by Title VII would appear to be foreclosed by the Court's opinion in *Johnson v. Railway Express Agency, Inc.*³⁰⁰ Whatever the merit of the argument in the Title VII context, it certainly cannot be said that the legislative history of section 1981 reflects any overriding purpose to provide jobs for any one group. Nor does the 1866 Act contain a provision similar to section 703(j), which could, even arguably, admit of Justice Brennan's tenuous inference that the explicit expression of things not required implies that they are permitted. Thus, the

²⁹⁷ *Id.* at 291. Marshall points out that later in the debates Wilson explained that "the reason for offering (the amendment) was this: it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors." *Id.* at 293, quoting CONG. GLOBE, 39th Cong., 1st Sess., App. 157 (1866) (remarks of Representative Wilson).

²⁹⁸ *Id.* at 292-93, quoting CONG. GLOBE, 39th Cong., 1st Sess., 1117 (1866) (remarks of Representative Wilson).

²⁹⁹ *Id.* at 295-96 (citation omitted). Justice Marshall stated:

This cumulative evidence of congressional intent makes clear, we think, that the 1866 statute, designed to protect the "same right . . . to make and enforce contracts" of "citizens of every race and color" was not understood or intended to be reduced by Representative Wilson's amendment, or any other provision, to the protection solely of nonwhites. Rather, the Act was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race. Unlikely as it might have appeared in 1866 that white citizens would encounter substantial racial discrimination of the sort proscribed under the Act, the statutory structure and legislative history persuade us that the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. And while the statutory language has been somewhat streamlined in reenactment and codification, there is no indication that § 1981 is intended to provide any less than the Congress enacted in 1866 regarding racial discrimination against white persons.

Id. at 295-96 (citation omitted).

³⁰⁰ 421 U.S. 454 (1975). See text at note 292 *supra*.

Court distorted statutory meaning in *Weber* to reach an interpretation of Title VII that is wholly at odds with another statute equally applicable by the Court's own interpretation. Paradoxically, it would appear that employers now are authorized by *Weber* to discriminate against whites in a way that section 1981 would not countenance. That the Court reached such an absurd result is made the more inexcusable by the fact that Brian Weber, along with his Title VII claim, filed a claim for relief under section 1981,³⁰¹ a fact completely ignored by both Justices Brennan and Blackmun in their opinions.

A final inconsistency between *Weber* and prior precedent also is reflected by *McDonald v. Santa Fe Trail Transportation Co.*³⁰² In that case, the Court noted that the EEOC "consistently interpreted Title VII to proscribe racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites . . ."³⁰³ The present interpretation of Title VII by the *Weber* Court ignores the Court's observation in *McDonald* regarding EEOC policy and, in that regard is at odds with the principle, first established in *Griggs*, that the consistent interpretations of Title VII by the EEOC are generally entitled to "great deference."³⁰⁴ The failure of the Court to even mention the EEOC interpretations leaves us to guess whether the deference notion is being generally abandoned or whether, like the non-discrimination principle itself, it has no application where agency interpretations regarding "traditionally segregated job categories" are concerned.

Viewed from virtually any angle, the *Weber* decision departs in at least some significant way from past precedent. The most pointedly articulated reason for regarding this departure as lamentable was provided long ago by Blackstone:

For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of

³⁰¹ See text at note 193 *supra*.

³⁰² 427 U.S. 273 (1976).

³⁰³ 427 U.S. at 279, *citing*, EEOC Decision No. 75-268, 10 FEP Cas. 1502 (1975); EEOC Decision No. 74-106, 10 FEP Cas. 269, EEOC Decision No. 74-95, 8 FEP Cas. 701 (1974); EEOC Decision No. 74-31, 7 FEP Cas. 1326 (1973).

The Commission in one case, for example, gave the following observations: . . . [A]dherence to [the principle that all discriminatory preferences are proscribed] cannot be accomplished by automatically disqualifying or failing to consider potentially qualified males and members of the majority population. In this respect we know of no authority which condones the automatic exclusion of all candidates except members of designated groups who have suffered the full brunt of discrimination even in the name of affirmative action.

EEOC Case No. 75-268, 10 FEP Cas. 1502, 1503-04 (1975). In another case, the EEOC said that "a basic premise of Title VII is that employment opportunities are accorded primarily to individuals as distinguished from groups." EEOC Case No. 74-106, 10 FEP Cas. 269, 273-74 (1974).

³⁰⁴ 401 U.S. 424, 433-34 (1971). See also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring). *But see* *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-46 (1976), in which the Court declined to follow an EEOC interpretation that conflicted with earlier Commission pronouncements, contradicted a Labor Department interpretation, and "sharply conflict[ed] with other indicia of the proper interpretation . . ." *Id.* at 143.

justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.³⁰⁵

The *Weber* Court, then, has done a disservice, if in no other respect than in its wholesale abandonment of precedent in favor of the uniquely legislative end of repealing and replacing "known laws." By thus contributing chaos to an already chaotic area of the law, the Court has further complicated the task of lawyers and judges who wish to anticipate, as one commentator put it, "which way the winds will be blowing in the future in the Supreme Court."³⁰⁶ In its eagerness to legislate, the *Weber* majority turned its back on its fundamental judicial responsibility to provide for the orderly development of the law. The cost of this extravagance in terms of confusion, increased litigation and the Court's own institutional credibility is difficult to calculate.

2. The Sacrifice of Fundamental Notions Regarding the Separation of Powers

As disruptive and frustrating as the Court's departure from precedent and the inevitably resulting confusion are, we should be willing to tolerate this confusion if it were necessary to correct earlier misconceptions of Title VII's meaning. It must be asked therefore whether previous majorities had strayed somehow from the "true way" of Title VII, especially in their application of the statute in a "color-blind" fashion. Perhaps, in other words, the method of construction employed by the *Weber* majority was the proper method for ascertaining the statute's meaning, while other methods were deficient in some respect. This argument, however, would make a virtue of that which can be tolerated only at the expense of both democracy and the rule of law. To appreciate the improper aspects of the *Weber* majority's method, it is necessary first to identify with precision the manner in which that method departed from the proper approach to statutory construction. If we also are able to recognize how departure from proper method carries certain necessary implications for the performance of the judicial function within a constitutional framework, we can begin to appreciate what it is about the method of the *Weber* Court that is objectionable.

At the outset, it should be noted that Justice Blackmun, who provided the fifth vote of the *Weber* majority, abandons all pretense of reliance upon legislative intent when he concedes that "affirmative action" involves "a practical problem in the administration of Title VII *not anticipated* by Congress."³⁰⁷

³⁰⁵ 1 BLACKSTONE'S COMMENTARIES 69 (W. Lewis ed. 1902).

³⁰⁶ Finley, *The Courts and Affirmative Action*, in *THE JUDICIARY IN A DEMOCRATIC SOCIETY* 123 (L. Theberge ed. 1979).

³⁰⁷ 99 S. Ct. at 2732 (emphasis added). For further discussion of Justice Blackmun's opinion, see text and notes at notes 255-62 *supra*.

He chooses, rather, to draw upon "additional considerations, practical and equitable, *only partially perceived if perceived at all*, by the 88th Congress, [to] support the conclusion reached by the Court . . ." ³⁰⁸ In short, Justice Blackmun tells us that the judiciary is free to infuse a statute with any meaning it deems consistent with "considerations, practical and equitable," irrespective of whether that meaning comprised any part of the legislative intent. For those who may harbor concern about the breadth of discretion this approach would abrogate to life-tenured judges, effectively beyond the reach of the political accountability, Justice Blackmun offers the consolation that "if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses."³⁰⁹

The technique utilized by Justice Brennan in his opinion for the Court, on the other hand, lacks Justice Blackmun's rather startling candor; it is more circumspect, more subtle. Justice Brennan begins by hurdling the literal language of the statute, which he apparently recognizes would compel the measuring of discrimination against all races and sexes by the same standard. He cites *Church of the Holy Trinity v. United States*³¹⁰ as support for his conclusion that "§§ 703(a) and (d) . . . must be read against the background of the legislative history of Title VII and the historical context from which the Act arose."³¹¹ The language from *Holy Trinity* which Justice Brennan quotes and on which he relies to rationalize ignoring the words of the statute states, "a thing may be within the letter of the statute and yet not within the statute, . . . nor within the intention of its makers."³¹²

One of the most fundamental rules of statutory construction, however, is that if the language of the statute bears a plain and unambiguous meaning, the interpreter must abide by that meaning. An interpreter of a statute should not, presented with unambiguous language, search for other indices of legislative intent. An early authority on statutory interpretation, John Austen, eloquently stated this rule and its *raison d'être*:

[I]f [the interpreter of the statute] be able to discover in the literal meaning of the words any definite and possible purpose, he commonly ought to abide by the literal meaning of the words, though it vary from the other indices to the actual intention of the legislature. For, the statute being framed for the very purpose of laying down a rule to guide the tribunals, it must be assumed that the terms in which the law is expressed were carefully measured. If the interpreter might *ad libitum* desert the literal meaning, it would be impossible for the legislator to express his meaning in terms which would certainly attain their end.³¹³

³⁰⁸ *Id.* at 2731 (emphasis added).

³⁰⁹ *Id.* at 2734.

³¹⁰ 143 U.S. 457 (1892).

³¹¹ 99 S. Ct. at 2727.

³¹² *Id.*, quoting 143 U.S. at 459.

³¹³ 2 AUSTEN'S JURISPRUDENCE 94-95 (R. Cambell ed. 1875). This same notion, which has long enjoyed the respect of scrupulous judges and commentators, also found expression in the writings of Mr. Justice Story:

The only sound principle is to declare *ita lex scripta est*, to follow and to obey; nor, if a principle so just could be overlooked, could there be well

If sections 703(a) and (d) are unambiguous, and Justice Brennan nowhere suggests otherwise, then the Supreme Court's inquiry should have ended with the statutory language.

But it might be argued that in the *Holy Trinity* case the Court indicated that the intention behind a statute controls over the statutory language itself, and that Justice Brennan simply was following the *Holy Trinity* mandate. There are, however, two problems with this argument. First, it is one thing for a court to reach a result beyond the specific contemplation of the enacting legislature; it is quite another to reach a result consciously rejected by the legislature. Second, in the 1978 case of *Tennessee Valley Authority v. Hill*,³¹⁴ the Chief Justice, in an opinion joined by all four of the Justices who joined Justice Brennan's *Weber* opinion, noted that the Court had "explained *Holy Trinity* as applying only in 'rare and exceptional circumstances. . . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail.'"³¹⁵ That Justice Brennan failed to point to any evidence that Congress so intended should surprise no one. There is no such evidence. In fact, a great deal of the debate on Title VII concerned itself directly with the need to employ precise language in the statute that would not engender an unintended construction by the courts.³¹⁶

The plain meaning approach to statutory interpretation, and the related limited application of the *Holy Trinity* exception are firmly grounded in the constitutional principle of separation of powers. Disregard for the narrow parameters within which the *Holy Trinity* principle properly may be applied leads inevitably to judicial incursions into the realm of legislative power.³¹⁷ It was for precisely this reason that Chief Justice Marshall cautioned:

found a more unsafe guide or practice than mere policy and convenience. Men on such subjects complexionally differ from each other. The same men differ from themselves at different times. . . . The policy of one age may ill suit the wishes or the policy of another.

J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 303 (3d ed. 1858) [hereinafter cited as Story]. See also R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 214 (1975).

³¹⁴ 437 U.S. 153 (1978).

³¹⁵ 437 U.S. at 187 n.33, quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

See note 318 *infra*.

³¹⁶ 110 CONG. REC. 6421-22 (remarks of Senator Morse); *id.* at 6445-51 (remarks of Senator Dirksen) (1964).

³¹⁷ The dangerous path from interpreting statutes in terms of a judicially discovered purpose to the exercise of legislative authority by the Court was clearly described in *Crooks v. Harrelson*, 282 U.S. 55, 60:

Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn

It would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.³¹⁸

Putting Chief Justice Marshall's formulation with that reaffirmed by the Court in *Tennessee Valley Authority v. Hill*, it can be seen that there are only two "rare and exceptional circumstances" in which the *Holy Trinity* exception to the basic maxim—that the literal language of statutory enactments is controlling—properly may be applied. The first is where Congress has made plain its intention "that the letter of the statute is not to prevail." As already mentioned, all of the evidence indicates that the 88th Congress was without any such intention.³¹⁹ The second circumstance that would make the application of the *Holy Trinity* exception proper is where adherence to the literal terms of the statute would produce a result that would be, to use Chief Justice Marshall's term, "monstrous." Even those who applaud the *Weber* decision, however, generally characterize the ultimate issue of the case as "whether employers may move 'rapidly' or must go 'slowly' in improving employment opportunities for minorities and women . . ." ³²⁰ If it be assumed that application of sections 703 (a) and (d) according to their terms would require resort to the slower of two methods of redressing traditional forms of discrimination,³²¹ it hardly seems that this is a result "so monstrous, that all mankind would, without hesitation, unite in rejecting the application."

out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.

Id. See text and notes at notes 332-43 *infra*.

³¹⁸ *Sturgis v. Crowninshield*, 17 U.S. [4 Wheat.] 122, 202-03 (1819).

³¹⁹ Indeed, Senator Dirksen in urging (unsuccessfully) that H.R. 7152 be referred to the Senate Judiciary Committee to permit "the most careful deliberations and the most careful scrutiny," said: "The courts will take a look at the language in the bill and out of it they will finally come to a conclusion as to what was the intent." 110 CONG. REC. 6445 (1964). See also *id.* at 6417-27 (remarks of Senator Morse).

³²⁰ Address by Professor Alfred Blumrosen (June 29, 1979), *reprinted in* BNA Daily Labor Report No. 128, F-1 (July 2, 1979).

³²¹ As the ensuing discussion will show, I am not at all convinced that the application of a uniform anti-discrimination standard to minorities and nonminorities alike would necessarily result in "slower" progress toward the goal of the elimination of discrimination on the basis of arbitrary criteria such as race. See text accompanying notes 362-78 *infra*.

Moreover, the Supreme Court has recognized that where there is ambiguity in the legislative history of a statute, courts have no choice but to rely solely upon the language of the statute.³²² As the previous discussion of the liberties taken in Justice Brennan's opinion³²³ demonstrates, the most that the proponents of the policy of numerical employment can say about the legislative history of Title VII is that it is ambiguous.³²⁴ Indeed, Justice Brennan's resort to the legislative record is largely for the ostensible objective of ascertaining "Congress' *primary concern* in enacting the prohibition against racial discrimination in Title VII . . ." ³²⁵ He finds that "it was clear to Congress that 'the crux of the problem [was] to open employment opportunities for Negroes in occupations which have been traditionally closed to them,' and it was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed."³²⁶

It cannot be disputed that Justice Brennan correctly identifies *an* objective of Title VII. There is evidence that there quite likely were others—the reduction of interracial strife, maximization of the productive potential of the national work force, and the like. But the fact that one of the ends of Title VII was that of opening job opportunities that had been arbitrarily denied to minorities, however, tells one little about other, equally critical aspects of statutory meaning such as the *method* approved for the accomplishment of the adopted purpose. Justice Brennan's analysis fails to consider that the legislative prerogative embraces the determination of *means*, as well as ends. Rather,

³²² *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971). It should be noted that Justice Marshall wrote the Court's opinion. The opinion and, presumably, the principle of statutory construction for which it is here cited (and which was important to the Court's decision in *Overton Park*), were joined by Chief Justice Burger and by Justices Stewart, White and Powell. Justice Blackmun concurred separately, but "fully join[ed] the Court in its opinion and in its judgment." *Id.* at 422. With the exceptions of Justice Powell and the Chief Justice all of the Justices who, at least implicitly, approved the rule of statutory construction in *Overton Park* were among the *Weber* majority.

³²³ See text and notes at notes 212-42 *supra*.

³²⁴ The Civil Rights Act of 1964 was the subject of a legislative process that one commentator has referred to, with particular reference to the more than 70 days of maneuvering and debates in the Senate, as "titanic and protracted." Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 443 (1966). Senator Holland at one point briefly discussed the 65 changes made by the Senate in the House version and "regarded by the professional staff of the Judiciary Committee as being most substantial amendments." 110 CONG. REC. 14219. At another point he included in the record a list of 106 amendments that had been rejected. *Id.* at 14460-62. This massive work was also undertaken in the Senate without the benefit of committee consideration or reports. *Id.* at 6455. Notwithstanding the extensive changes, the House, which had debated the original bill for only six days (adopting in the process 16 of 40 proposed amendments), voted to accept the bill as amended by the Senate after only a half day's debate, much of which was cursory and singularly unelucidating. *Id.* at 15869-97. Under the circumstances, at least some ambiguity in the legislative history was virtually assured. Nevertheless, on the issue of equal application of the Act to all races, the proponents of the bill both in the House and in the Senate consistently disputed the point, raised by some opponents that minorities would be entitled to special treatment.

³²⁵ 99 S. Ct. at 2727.

³²⁶ *Id.* at 2728.

implicit in his opinion is the notion that adoption of the goal of increasing opportunity for the members of certain groups necessarily implies that *any* means conducive to that end is legitimate, even in the face of statutory language and other evidence strongly indicating that the legislature chose to approve quite specific and limited means. In this regard, it is rather ironic that in support of his conclusion that Title VII was intended to increase minority job opportunity, Justice Brennan quotes briefly from President Kennedy's message to the Congress introducing the legislation.³²⁷ In the same message, the President indicated that the principal means for progress toward that goal were: the creation of more jobs through the stimulation of economic growth "until the total demand for labor is effectively . . . headed toward a level of full employment,"³²⁸ the enhancement of education and training because "even the complete elimination of racial discrimination in employment . . . will not put a single unemployed Negro to work unless he has the skills required and unless more jobs have been created,"³²⁹ and the elimination of employment discrimination because "[i]t is doubly unfair to throw [the burden of the denial of employment] on an individual because of his race or color."³³⁰ The President's message clearly shows that he envisioned limitations on the means to be employed in attaining the desired goal.

By failing or refusing to recognize that Congress, consistent with the late President's words, chose the proscription of discrimination against all racial groups on the same basis as the sole means for accomplishing its goal, the *Weber* majority has left behind the constitutional limitations on the judicial function and has entered the realm of uniquely legislative prerogative. As clear as this usurpation is, some may assert that where the Congress has failed adequately to confront the problem, we should rejoice, rather than criticize, when the Supreme Court steps in to advance the national interest. Perhaps, after all, where the objective is a "good" one, such an invasion of the legislative domain is a matter of no moment. Before reaching such a conclusion, however, one does well to consider precisely what is lost in the process. This examination necessarily entails further consideration of the sometimes subtle relationship between the established rules of statutory construction and the Constitution, the provisions of which were adopted in large part to check what Madison referred to as the "encroaching nature" of power.³³¹

The performance of all governmental functions, including those performed by the Supreme Court, must be evaluated against the Founders' unyielding commitment to *limited* government, a product in part of their bitter experiences with usurpations by officers of the Crown.³³² Many of the limi-

³²⁷ *Id.* at 2727-28.

³²⁸ 109 CONG. REC. 11159 (1963). President Kennedy also emphasized that "[o]ur concern with civil rights must not cause any diversion or dilution of our efforts for economic progress—for without such progress the Negro's hopes will remain unfulfilled." *Id.*

³²⁹ *Id.* at 11160.

³³⁰ *Id.*

³³¹ THE FEDERALIST No. 48, reprinted in *Federalist*, *supra* note 10, at 217.

³³² See Berger, *supra* note 1, at 252-54. See also Story, *supra* note 313, at 144.

tations they imposed on the Government were express, such as the proscription against bills of attainder, but some of the limitations were inherent in the structure of the Government itself.³³³ Governmental power was separated into three distinct branches, intended to perform distinct functions.³³⁴ The legislative branch, to which was conferred the sole power to create law, was structured to retard the exercise of that power in all but the most compelling circumstances. In part, the law-making power was limited through the obstacle of factiousness inherent in large assemblies whose members derive from diverse regions and circumstances. The provision for sharing such power between the two houses—"different bodies, actuated by different motives and organized upon different principles"³³⁵—provided another occasion for the occurrence of disagreement and, thus, erected an additional obstacle to the exercise of legislative power. Yet another obstacle to the creation of law was set up by subjecting the exercise of such power to high political accountability. Under the system conceived by the Founders, the entire House of Representatives and one-third of the members of the Senate are, at any given moment, no more than two years away from having to account to their electorates for their actions. This, as Madison explained it, was specifically calculated to inhibit any impulse toward promiscuous lawmaking.³³⁶ In addition, in those cases where the formidable obstacles to the accomplishment of a concurrence of majorities in both houses could be overcome, the framers reposed in the

³³³ See generally THE FEDERALIST Nos. 47 and 48, reprinted in *Federalist*, *supra* note 10, at 211-20.

³³⁴ Justice Brandeis once explained the basic conception as follows:

The doctrine of the separation of powers was adopted by Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). See also W. Gwyn, *The Meaning of the Separation of Powers*, in IX *TULANE STUDIES IN POLITICAL SCIENCE* (1965).

³³⁵ Story, *supra* note 313, at 203. J. Story commented that one of the effects of dividing legislative power was that:

[i]t interposes delay between the introduction, and final adoption of a measure; and thus furnishes time for reflection; and for the successive deliberations of different bodies, actuated by different motives, and organized upon different principles.

Id. at 202.

³³⁶ THE FEDERALIST No. 57, reprinted in *Federalist*, *supra* note 10, at 246.

All these securities, however, would be found very insufficient without the restraint of frequent elections. Hence, . . . the House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised: there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

Id.

presidency the power to require an even greater consensus through the exercise of the veto power.

In short, the system was calculated to engender in most legislators a hesitancy to act except where the will of the people was clearly articulated or was otherwise capable of clear perception. The genius of this approach lay in its utilization of inertia to inhibit the creation of law and, hence, the evils that flow from the too ready use of legislative power—government expansion, shrinking personal liberty, ill-considered legislation, demagoguery and so forth.

When the Supreme Court usurps the legislative function as it did in *Weber*, it turns this intricate, carefully conceived and balanced system on its head. It is considerably easier for five Supreme Court Justices to agree than it is for 200 Representatives and over 50 Senators to concur on any given subject. Moreover, in contrast to the ready political accountability of legislators, the only effective means enforcing political accountability with life-tenured judges are impeachment³³⁷ and revolution. A cursory consideration of the issues involved demonstrates that Justice Blackmun's invitation to the Congress to overrule the Court in this matter is an inadequate answer. A 1977 Gallup poll showed 81 percent of those polled to be opposed to preferential treatment in both jobs and education.³³⁸ Such widespread popular opposition likely would make passage of an amendment to Title VII expressly providing what the Court has "inferred" impossible. Yet, for the Congress to mount a successful initiative to legislatively overrule *Weber*, it would have to overcome the very same impediments to legislative action that almost certainly would have precluded legislative enactment of the numerical employment policy in the first place.

Undoubtedly, there are those who would argue that the complexity of society and the task of government are much greater than they were in 1789. Professor Blumrosen, for example, has conceded that "the legislature rather than the courts should be the prime policy maker in [the employment discrimination] field."³³⁹ He has nevertheless castigated those who advocate the application of Title VII according to its literal terms as operating on "too

³³⁷ While this may seem a bit extreme, it appears that Hamilton thought the impeachment of judges for usurping the powers of the legislature an entirely appropriate remedy:

There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations.

THE FEDERALIST No. 81, reprinted in *Federalist*, *supra* note 10, at 348.

³³⁸ American Institute of Public Opinion, 2 *The Gallup Poll: PUBLIC OPINION 1972-1977* at 1057-60 (G. Gallup ed. 1978) [hereinafter cited as Gallup]. The pollsters recorded the following observations about the extraordinarily uniform opposition to "affirmative action": "Rarely is public opinion, particularly on such a controversial issue, as united as it is over this question. Not a single population group supports affirmative action. Attitudes are fairly uniform from region to region and among all age groups." *Id.* at 1059.

³³⁹ Blumrosen, *Strangers*, *supra* note 115, at 63.

simple a notion."³⁴⁰ More recently, he has suggested that courts are at liberty to supply the legislative details where they encounter congressional "use of generalities to avoid sharp issues."³⁴¹ This sort of reasoning reflects either a failure to appreciate the genius of the Founders' plan for the separation of functions and the dispersion of power, or a willingness to pervert it.

Justice Powell, in a recent case, flatly rejected this "fill-in-the-blanks" concept of the interpretation of statutes. According to Justice Powell, this concept encourages Congress to avoid controversial questions, by use of generalities, leaving the hard policy decisions to the courts.³⁴² On the most fundamental level, of course, when the Court undertakes to exercise powers committed by the Constitution to the Congress as it did in *Weber*, it not only has rewritten Title VII, but also the Constitution. We have been doubly deprived—first with respect to our right to have only politically accountable agents make law, and then with respect to our right to amend the Constitution only through the political process prescribed in Article V of the Constitution. Irrespective of one's views on the merits of "affirmative action," it is important that one recognize just how much has been sacrificed to five Justices' view of expediency. There is much lost in such usurpations including, ironically, the respect that is essential to the Court's institutional effectiveness. As Professor Raoul Berger has forcefully argued: "Respect for the limits on power are the essence of a democratic society: without it the entire democratic structure is undermined and the way is paved from Weimar to Hitler."³⁴³

B. *The Social and Economic Costs of the Numerical Employment Policy*

The institutional costs are not the only results of the Court's decision in *Weber*. Our economy and social framework also suffer greatly from this aberration in announced policies. There is substantial evidence that the numerical employment policy, in the name of which the *Weber* majority was willing to subvert the Constitution, departs from the precepts that underlay the Kennedy Administration's support of the proposal that became the Civil Rights Act of 1964, and is inimical to the long range interests of all groups, including minorities and women. Early in the message to Congress in which he recommended passage of the Administration's bill, President Kennedy set forth the objective as "making it clear to all that race has no place in American life or law."³⁴⁴ Toward the end of the message, he emphasized a desire to "end the

³⁴⁰ *Id.* at 100-01.

³⁴¹ Address by Professor Alfred Blumrosen (June 29, 1979), *reprinted in* BNA Daily Labor Report No. 128, F-1 (July 2, 1979).

³⁴² *Cannon v. University of Chicago*, 99 S. Ct. 1946, 1981-82 (1979) (Powell, J., dissenting). Justice Powell observed,

It . . . invites Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide.

Id. (footnote and citations omitted).

³⁴³ Berger, *supra* note 1, at 410.

³⁴⁴ 109 Cong. Rec. 11157 (1963).

kind of racial strife which this Nation can hardly afford," and then paraphrased Lincoln, saying: "In giving freedom to the Negro, we assure freedom to the free—honorable alike in what we give and what we preserve."³⁴⁵ His was a vision of an America in which jobs would be awarded on the basis of training and ability, and the color of a man's skin would be irrelevant. He expressed strong interest in improving the economic lot of minorities, but he was equally unequivocal in the expression of his conviction that the key to such improvement lay in the maintenance of a healthy economy. President Kennedy stated, "[o]ur concern with civil rights must not cause any diversion or dilution of our efforts for economic progress—for without such progress the Negro's hopes will remain unfulfilled."³⁴⁶ It is against this vision of an America where color is irrelevant in employment opportunity, and the economy expands to provide jobs for all that the merits of the numerical employment policy should be measured. When this is done, it becomes apparent that the numerical employment policy does not produce a net benefit for the society as a whole or, indeed, for the long range collective interests of the groups that supposedly comprise its intended beneficiaries. Moreover, he saw very clearly and specifically how progress in minority employment is linked to national economic progress and the steps that would have to be taken to advance both interests.³⁴⁷

I. Social Costs

One of the most obvious social costs of any system in which the members of one group are favored over those of another, solely on the basis of group membership, is, to borrow the apt phrase of the Fifth Circuit in its *Weber* opinion, "the seeds of racial animus such affirmative relief inevitably sows."³⁴⁸ In another recent case, it was observed: "The polarization of races that quotas exhibit creates a divided police department—instead of unifying and strengthening it, the quota underscores differences and sows seeds of internal hatred."³⁴⁹ With the advent of numerical employment programs,

³⁴⁵ *Id.* at 11161.

³⁴⁶ *Id.* at 11159.

³⁴⁷ In this regard President Kennedy said:

More jobs must be created through greater economic growth. The Negro—too often unskilled, too often the first to be fired and the last to be hired—is a primary victim of recessions, depressed areas, and unused industrial capacity. Negro unemployment will not be noticeably diminished in this country until the total demand for labor is effectively increased and the whole economy is headed toward a level of full employment. When our economy operates below capacity, Negroes are more severely affected than other groups. Conversely, return to full employment yields particular benefits to the Negro. Recent studies have shown that for every 1 percentage point decline in the general unemployment rate there tends to be a 2-percentage-point reduction in Negro unemployment.

Prompt and substantial tax reduction is a key to achieving the full employment we need.

Id.

³⁴⁸ 563 F.2d at 227.

³⁴⁹ *Detroit Police Officers Ass'n v. Young*, 446 F. Supp. 979, 1015 (E.D. Mich. 1978), *rev'd*, 608 F.2d 671 (6th Cir. 1979). *See also* *Bakke v. Regents of University of*

one must expect whites excluded by a racial preference to respond with a resentment very much akin to that experienced and expressed by the traditional victims of such preferences. Supervisors, shop stewards, personnel officers, labor lawyers and all who have any significant contact with rank and file workers can attest that this expectation currently is being fulfilled. At trial, Brian Weber described the effect produced by the Kaiser-USWA plan by noting, "the racial relations of the white workers toward their black counterparts, black employees at Kaiser, have progressively gotten worse because of the fact that they realize that the company and the Union have a program in effect which uses race to promote employees ahead of themselves."³⁵⁰

If this reaction were to be encountered only among the remaining unenlightened souls who still harbor the last vestiges of bigotry in their breasts, it might be dismissed as a regrettable effect of an otherwise defensible and necessary policy. Unfortunately for those who would so readily dismiss the matter, however, much the same reaction is to be found among those who were firmly committed to the cause of equal opportunity (as opposed to equality of result).³⁵¹ Even among the staunch adherents to the policy of numerical employment, there has appeared a dawning recognition that the "affirmative action" question has been producing disaffection and division among the ranks of the "liberal-labor-minority-female-Jewish coalition," which has figured so prominently in political developments throughout the broad range of civil rights issues.³⁵² Intended or not,³⁵³ the weakening of this coalition very

California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), *aff'd in part and rev'd in part*, 438 U.S. 265, 272 (1978), where the California Supreme Court said: "The divisive effect of such preferences needs no explanation and raises serious doubts whether the advantages obtained by the few preferred are worth the inevitable cost to racial harmony." *Id.* at 61-62, 553 P.2d at 1171, 132 Cal. Rptr. at 699 (footnote omitted).

³⁵⁰ Brief for Respondent at 11, *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).

³⁵¹ A commentator repenting his former liberal beliefs noted that,

Many of my friends, comrades in political philosophy and causes expressed surprise and dismay over my new found "conservatism." The entire affair provoked the following reflections.

Too much of so-called liberal or progressive thinking today is in fact illiberal, unprogressive, and unintelligent. The essence of liberalism has always been concern with the welfare, rights and responsibilities of *individuals qua individuals*, not the masses or classes or other such linguistic abstractions. Furthermore, although there has been disagreement among liberals as to what social arrangements might best liberate individual capacities, no disagreement exists with the thesis that illiberal means, means that impose *avoidable* injustices on individuals, cannot achieve just ends.

Nisbet, *Affirmative Action—A Liberal Program?* REVERSE DISCRIMINATION 50, 52 (B.R. Gross ed.) (1977) (emphasis in original). Judge Wisdom in his *Weber* opinion also recognized that the "reverse discrimination" issue has "caused heated debates, some between former allies." 563 F.2d at 238 (Wisdom, J., dissenting) (footnote omitted).

³⁵² See Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675, 678 (1974) [hereinafter cited as Blumrosen, *Quotas*].

³⁵³ The possibility that this was a calculated political result has been raised by, among others, Thomas Sowell:

well could prove costly to future efforts to obtain legitimate, truly desirable political objectives. Only time will tell the full extent of these costs, but recent events certainly suggest that the bill is not yet fully paid.

Another expense that should not be overlooked is the countereducative impact of governmental endorsement of a policy of preferential treatment. In effect, the Government is telling employers that they may not use certain "arbitrary" standards that are disadvantageous to certain groups (such as the high school diploma requirement disapproved in *Griggs v. Duke Power Co.*³⁵⁴), but they can, indeed *must*,³⁵⁵ use another arbitrary standard (external labor market proportions) that is generally disadvantageous to certain other groups. The lesson that many can and are taking from this policy is that it is not arbitrariness itself that is objectionable, but those kinds of arbitrariness that do not give the advantage to governmentally favored groups.³⁵⁶

In addition to this suggestion of Government sponsored arbitrariness, there is a clear implication in the proportionality principle that something is inherently illegitimate in heterogeneity itself. Buried just beneath the surface of the numerical employment policy is the notion that human groups, and the individuals who comprise them, are fungible entities. Before we permit this attitude to become as ingrained among the populace as it apparently is in the federal government, we would do well to consider the many cultural and social benefits that heterogeneity has produced. We also should recall that the abhorrence many of us felt for discrimination in the first place sprang from a conviction that it was fundamentally irrational and morally wrong to measure any individual by a standard that presumed him to possess a characteristic

Who were the gainers from "affirmative action" quotas? Politically, the Nixon Administration, which introduced the program, gained by splitting the ethnic coalition which had elected liberal Democrats for decades. Blacks and Jews, for example, were immediately at each other's throats, after having worked together for years on civil-rights legislation and other socio-political goals. Whether the architects of Watergate had any such Machiavellian design in mind is a question on which each can speculate for himself.

Sowell, "Affirmative Action" Reconsidered, *THE PUBLIC INTEREST* 47, 64 (1976) [hereinafter cited as Sowell]. See also notes 130-31 *supra*.

³⁵⁴ 401 U.S. 424 (1971).

³⁵⁵ Shortly after the Supreme Court handed down its decision in *Weber*, Weldon Rouge, Director of OFCCP, was quoted as saying that "there's just no question they [contractors] have to do it [affirmative action]" or risk being barred from federal contracts. In *Weber's Wake: Government job-bias enforcers ready a crackdown*, *Wall St. J.*, July 10, 1979, at 1, col. 5.

³⁵⁶ Professor John Hart Ely has put the matter this way:

[T]he government's intentional and explicit use of race as a criterion of choice is bound—no matter how careful the explanation that this is a "good" use of race—to weaken the educative force of its concurrent instruction that a man is to be judged as a man, that his race has nothing to do with his merit. Citizens, thus besieged by what will understandably be taken to represent two conflicting government endorsed principles, are likely to listen to the voice they wish to hear. (footnote omitted).

Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1259 (1970). See also Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 *SUP. CT. REV.* 1, 22-23.

(stereotype) that was further presumed to be shared by all members of the group with which he was associated. The presumption of capability, after all, is but the reverse side of the coin on which the presumption of incapability is stamped. To borrow the eminently fitting aphorism of Professor Philip Kurland, "[i]t is, I submit, one thing for Gertrude Stein to tell us: 'A rose is a rose is a rose.' It is another for the courts and bureaucracies to tell us that a black is a black is a black."³⁵⁷

Another undesirable social consequence of race-conscious affirmative action is what has been referred to as the "balkanization" of the country "by fostering 'the dangerous notion that ethnic, racial or religious groups are entitled to proportional representation in all occupations.'"³⁵⁸ This phenomenon manifests itself in a number of unfortunate ways, one of which is the perceived (or in many cases real) thrusting of those minority group members who have attained desirable positions into the role of representative for their respective groups. Consequently, it often happens that these individuals suffer under the dual handicaps of polarized relations with their non-minority co-workers and ever-mounting pressures from their fellow group members who urge them to "push" for greater allocations of positions and other benefits for their group.

Finally, the devaluation of accomplishment is perhaps the unkindest product of this policy that "cannot be generalized or gentle."³⁵⁹ As a result, minorities are robbed of the satisfaction accompanying the certainty that one got where one is because one was judged truly worthy on the merits. There is also a collateral detriment to non-minorities who are passed over and either told or encouraged to believe that their failure was due, not to some deficiency that they should work to overcome, but to the immutable, governmentally created fact of life: "affirmative action." It thus becomes too difficult for minorities justifiably to take the credit for accomplishment and too easy for non-minorities to reject their responsibility for failure. The devaluation of minority accomplishment, moreover, works both prospectively and retrospectively, introducing doubt as to the true merit of past achievements.³⁶⁰

³⁵⁷ Kurland, *Ruminations On The Quality of Equality*, 1979 BRIGHAM YOUNG U. L. REV. 1, 19 (footnote omitted) [hereinafter cited as Kurland].

³⁵⁸ *Weber v. Kaiser Aluminum & Chemical Corp.*, 563 F.2d 216, 227 n.17 (5th Cir. 1977), quoting Silberman, *supra* note 60, at 12, col. 5.

³⁵⁹ Silberman, *supra* note 60, at 12, col. 5.

³⁶⁰ The impact of affirmative action on subjective notions of merit has been well established:

During the 1960's—before "affirmative action"—black incomes in the United States rose at a higher rate than white incomes. So too did the proportion of blacks in college and in skilled and professional occupations—and along with this came a faster decline in the proportion of black families below the poverty line or living in substandard housing. When people ask why blacks cannot pull themselves up the way other oppressed minorities did in the past, many white liberals and black "spokesmen" fall right into the trap and rush in to offer sociological "explanations." But there is nothing to explain. The fact is that blacks *have* pulled themselves up—from further down, against stronger opposition—and show every indication of continuing to advance.

It may well be for some or all of these reasons that among blacks, the group that proponents of the numerical employment policy claim most "need" its benefits, there is substantial disagreement as to its desirability. In one recent survey, for example, fully 53 percent of the blacks polled expressed disapproval of the proposition that there should be a federal law giving blacks special advantages over whites in college entrance and employment.³⁶¹ Even more dramatically, in a March, 1977, nationwide Gallup poll, 64 percent of the non-whites and 82 percent of the females in the sample indicated that blacks and women should not be given preferential treatment in employment and college admissions.³⁶² These statistics suggest that the "beneficiaries" of the numerical employment policy recognize a good deal more about the social costs of "affirmative action" than those who are so eager to foist it on them.

2. Economic Costs

The social costs of the policy of numerical employment are certainly great, but as with most well-intentioned Government programs, this one also comes with a tangible, if not precisely ascertainable, economic price tag. The proponents of the policy argue that it is necessary, in part, because in a declining economy minorities and women are the hardest hit. Assuming the accuracy of the premise, there is an obvious question that must be asked, but that is omitted from the discussions: Are efforts toward proportional rep-

While this advance is the product of generations of struggle, it accelerated at an unprecedented pace in the 1960's, once the worst forms of discrimination had been outlawed and stigmatized. Black income as a percentage of white income reached its peak in 1970—the year *before* numerical "goals and timetables." That percentage has gone down since. What "affirmative action" has done is to destroy the legitimacy of what had already been achieved, by making all black achievements look like questionable accomplishments, or even outright gifts. Here and there, this program has undoubtedly caused some individuals to be hired who would otherwise not have been hired—but even that is a doubtful gain in the larger context of attaining self-respect and the respect of others.

Sowell, *supra* note 353, at 63-64. At least one other commentator goes so far as to suggest that the failure of blacks to make *greater* progress may itself be attributable to the interference of the Government in unprecedented ways:

The most tragic thing about the failure to recognize that is that the failure of a large percentage of Negroes and other minorities to "melt" into America's melting pot is viewed by many members of society as group incompetence. Hardly anyone lays the responsibility for this problem where it belongs: to the excesses of government controls. I would guess that if we abolished the minimum wage law, reduced licensing restrictions, changed labor legislation and reorganized the delivery of education, in twenty to thirty years hence there would be no "Negro problem" as there is no Japanese, Chinese, Jewish or other earlier-immigrant problem. These people were able to start off poor and progress because they did not face the market restrictions that today's minorities face.

Williams, *Government Sanctioned Restraints that Reduce Economic Opportunities for Minorities*, 2 POLICY REVIEW 7, 30 (1977) [hereinafter cited as Williams].

³⁶¹ Bolce & Gray, *Blacks, Whites and "Race Politics,"* The Public Interest 61, 64 (1979).

³⁶² See Gallup, *supra* note 338, at 1057.

resentation of minorities and females the "cure," or will they inevitably exacerbate the disease? Even cursory examination of the facts suggests that their effect far more likely will be the latter.

At the outset, it should be recalled that President Kennedy set forth the premise in 1963 that "Negro unemployment will not be noticeably diminished in this country until the total demand for labor is effectively increased and the whole economy is headed toward a level of full employment."³⁶³ He based this notion on "[r]ecent studies [that] have shown that for every one percentage point decline in the general unemployment rate there tends to be a 2-percentage point reduction in Negro unemployment."³⁶⁴

A recent report of the Joint Economic Committee states that "the solution [to our economic ills] lies in the adoption of longer run policies aimed at expanding the supply side of the economy; that is, at expanding our Nation's productive potential in a manner that raises dramatically the growth of American productivity."³⁶⁵ How, it may well be asked, does "race-conscious affirmative action" relate to productivity? Again, for insight at the most fundamental, and hence most significant, level Brian Weber's testimony is quite instructive:

[I]t [the Kaiser/USWA Plan] takes away from the initiative of the individual employee to do more, to do one step further, to do all of his job in the best way he knows how, because he knows that even no matter how well he does it, he won't be able to be promoted, because of this 50 percent minority requirement of the company.³⁶⁶

At the same time that the rancor bred by numerical employment policy works to reduce the productivity of those who, rightly or wrongly, perceive themselves as having been its victims, it may also be producing a similar effect among its beneficiaries. To the extent that employment decisions are made on a basis other than the ability to *produce*, there may be engendered something of a "social insurance mentality" that encourages one to view one's job as an entitlement, rather than as a reward for performance. In addition, to the extent that the employer is either required or permitted to hire, promote, transfer or increase wages for anyone other than those who are the *most* qualified and productive of the available labor pool, productivity will be diminished in direct relation to the failure to maximize productive potential at each position.

The numerical employment policy deprives the employer of both objective and subjective means of predicting productivity potential where racial groups are affected adversely and the employer is able to demonstrate "validity" through a very complex and often prohibitively expensive procedure.³⁶⁷

³⁶³ 109 CONG. REC. 11159 (1963).

³⁶⁴ *Id.* See note 347 *supra*.

³⁶⁵ JOINT ECONOMIC COMM., 96th Cong., 1st Sess., *Report on Midyear Review Of The Economy: The Outlook For 1979* at 28 (Comm. Print 1979).

³⁶⁶ Respondent's Brief at 12, *United Steelworkers of America v. Weber*, 99 S. Ct. 2721 (1979).

³⁶⁷ See generally text and notes at notes 172-80, *supra*. Professor Blumrosen apparently endorses this notion: "Thus, during the period of adverse effect, *all criteria*,

This practical compulsion to choose employees on the basis of race is quite likely to have its most profound impact on productivity in entry level jobs, which generally will attract younger applicants. The labor pool from which the applicants come will generally contain a predominance of minority workers as a result of the extraordinarily high rate of minority teenage unemployment, a phenomenon that has been quite convincingly tied to recent rapid increases in the minimum wage.³⁶⁸ Add to this the evidence of high functional illiteracy rates, especially in the South, and it is easy to see that an employer may have a difficult time acquiring a functional, let alone productive, workforce.³⁶⁹ This "crunch" could be expected to be especially acute in labor intensive industries, where the additional cost to the employer of less productive workers, coupled with the administrative cost of compliance with federal regulation, often will provide the incentive to resort to labor saving capital investment.³⁷⁰ This effect is, of course, doubly unfortunate in that it raises short run unemployment and eliminates a "feeder-industry,"³⁷¹ wherein many minority workers would be able to acquire the training and experience necessary for advancing to more highly skilled and more desirable jobs.

In addition to these problems, another form of economic impact, making itself felt principally among the more highly skilled jobs, results from "affirmative action's" distortion of the labor market for the already limited supply of qualified minorities. It was the unavailability of skilled black craftsmen, it bears noting, that provided a major stimulus for the Kaiser/USWA plan. Indeed, a recent article in the New York Times indicates that N.A.A.C.P., itself, has had difficulty obtaining and retaining qualified minority employees.³⁷²

objective and subjective, are suspect if they do not contribute to the expeditious elimination of the adverse effect." Blumrosen, *Strangers*, *supra* note 115, at 104 (emphasis added). If "all criteria" carry the potential for legal liability, the employer is clearly put to the choice of racial (or sexual) preferences or random selection. Elsewhere, Professor Blumrosen expresses his concern "that both subjective judgment and objective standards may fail to improve the opportunities of minorities and women," and reveals that the idea is to "help channel the discretion of the employer so that he does not, in the exercise of his discretion, perpetuate the exclusionary pattern." Blumrosen, *Quotas*, *supra* note 352, at 687 (footnote omitted). He also declares his disdain for a productivity criterion by indicating that this is precisely the employer "discretion" he would "help channel": "For example, the uncritical assumption that hiring and promotion decisions are normally made on the basis of maximum productivity has been shown again and again to be a vast oversimplification which conceals within it a wide range of employer discretion." *Id.* at 683 (footnote omitted).

³⁶⁸ Brozen, *The Effect of Statutory Minimum Wage Increases on Teenage Unemployment*, J. LAW & ECON. 109, 117-21 (1969); Williams, *supra* note 360, at 10-19.

³⁶⁹ See McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORD. L. REV. 651, 653-54 (1979).

³⁷⁰ G. TULLOCK & R. OAGNER, POLICY ANALYSIS AND DEDUCTIVE REASONING 117-18 (1978).

³⁷¹ For a brief discussion of the "feeder-industry" concept and how it relates to employment discrimination laws, see Munnell, *The Economic Experience of Blacks*, 1978 NEW ENG. ECON. REV. 5, 17.

³⁷² Delaney, *The Struggle to Rally Black America*, N.Y. Times, July 15, 1979, § 6 (Magazine), at 20, 29, col. 2. One commentator has graphically illustrated the problems created by this "Balkanization" of the job market in the higher education field:

Because of the pressure to meet "goals and timetables," the unnatural demand for qualified minority employees practically compels the employer to pay a premium in order to compete with other employers who face the same pressure.³⁷³ Obviously the more capital that is consumed in the payment of premium wages, the less there is available for job creation at the entry level. It also must be recognized that this capital is consumed in a way that does nothing to enhance productivity.

Finally, governmental regulation itself diverts capital to the non-productive purpose of "compliance"—drafting "affirmative action plans," filing required reports, and paying lawyers to work through the bewildering mass of federal regulations. In its most recent report, the Joint Economic Committee refers to this cost as "a significant deterrent of productivity growth."³⁷⁴ The Committee also estimates that compliance with governmental regulations cost \$100 billion for 1979 alone.³⁷⁵ The total price tag on the numerical employment policy probably will never be known. That it costs a great deal appears quite certain.³⁷⁶ Most importantly, it diverts resources that otherwise would be available to stimulate the economy, help in job formation, and thus create the expanding labor market that John Kennedy over 16 years ago told us would be essential.

If the counterproductive effect of the numerical employment policy were not already evident, it surely would become so upon review of the tables set forth in the appendix to this article. As the figures in the tables demonstrate, the ten year period beginning the year before the Philadelphia Plan was implemented hardly was one of the sort of numerical "progress" for minorities that the proponents of "affirmative action" purport to have as their goal. In every age group, both male and female minority group members suffered an erosion in the percentages of their group in the workforce able to find work. Except for minority females between the ages of 25 and 44, every age group

[T]hese charades take the place of meeting quotas which no one seriously expects to be met. For example, if American colleges and universities were to hire every black Ph.D. in the United States, active or retired (or indeed, living or dead)—a 100 percent drain from industry, government, and other institutions—the result would still be less than three black faculty members per institution. Given the hard facts of the situation, it is not surprising that colleges and universities do not fulfill their employment "goals," but instead go through a costly and demoralizing process called "good faith efforts"—a process equally embittering to supporters and opponents of "affirmative action." This produces few jobs and much anguish.

Sowell, *supra* note 353 at 58.

³⁷³ See *id.* at 63.

³⁷⁴ JOINT ECONOMIC COMM., 96th Cong., 1st Sess., *Report on Midyear Review of the Economy: The Outlook for 1979* at 34 (Comm. Print 1979).

³⁷⁵ JOINT ECONOMIC COMM., 96th Cong., 1st Sess., *Summary of Midyear Report and Staff Study* 27 (Comm. Print 1979).

³⁷⁶ For example, the University of Michigan spent \$350,000 in connection with its "affirmative action" program just to compile the necessary statistics. Sowell, *supra* note 353, at 57. For some further indications of the regrettable effects of this kind of governmental regulation upon the institutions of higher education in this country, see *Plastering College With Federal Paper Work*, 87 U.S. News and World Report 49-50 (Dec. 24, 1979).

in both sexes suffered similar reductions in the percentage of the total population employed.³⁷⁷ Perhaps most significantly, losses were concentrated among those who were new to or just entering the work force. Minorities also have significantly fallen off their previous pace for acquiring new jobs created by expansion of the labor market. Between 1963 and 1968, before "affirmative action," 12.6 percent of over eight million new jobs went to minorities. Between 1968 and 1977, however, when they were "benefitting" from the policy of numerical employment, minorities were able to acquire only 11.2 percent of the just over fourteen and a half million new jobs created during that period.³⁷⁸

It would stretch credulity to suggest that employers began discriminating more during this period. Nor would it be sensible to ascribe the phenomenon to suddenly intensified present effects of past discriminatory acts. If this had been the case, the effects should not have been concentrated, as they were, among the most youthful age groups. In the declining rate of new job acquisition, we can see the vindication of President Kennedy's theory. In an expanding, healthy economy there is greater opportunity generally, and minority opportunity in particular improves at a more accelerated rate. We need to return to President Kennedy's original insight: "Our concern with civil rights

³⁷⁷ The total population for a given group (e.g., minority males aged 20-24) includes those who are "[p]ersons not in the labor force" as the Bureau of Labor Statistics uses that phrase. This means "all civilians 16 years of age and over who are not classified as employed or unemployed." U.S. BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS, 1978, at 2 (1979). "Employed persons" and "unemployed persons" are defined as follows:

Employed persons comprise: (a) all those who, during the survey week, worked at all as paid employees, in their own business or profession or on their own farm, or who worked 15 hours or more as unpaid workers in an enterprise operated by a family member; and (b) all those who were not working but who had jobs or businesses from which they were temporarily absent because of illness, bad weather, vacation, labor-management dispute, or personal reasons, whether or not they were paid by their employers for the time off, and whether or not they were seeking other jobs.

Each employed person is counted only once. Those who held more than one job are counted in the job at which they worked the greatest number of hours during the survey week.

Included in the total are employed citizens of foreign countries, temporarily in the United States, who are not living on the premises of an Embassy. Excluded are persons whose only activity consisted of work around the house (such as own home housework and painting or repairing own home) or volunteer work for religious, charitable, and similar organizations.

Unemployed persons comprise all persons who did not work during the survey week, who made specific efforts to find a job within the past 4 weeks, and who were available for work during the survey week except for temporary illness. Also included as unemployed are those who did not work at all, were available for work, and (a) were waiting to be called back to a job from which they had been laid off; or (b) were waiting to report to a new wage or salary job within 30 days.

Id. at 1 (emphasis added).

³⁷⁸ These figures are derived from, *id.*, Table 3 at 28-32, and Table 58 at 177-180.

must not cause any diversion or dilution of our efforts for economic progress—for without such progress the Negro's hopes will remain unfulfilled."³⁷⁹ Anything, including the numerical employment policy, that tends to retard economic progress is also destructive of the end of increased minority employment.

V. CONCLUSION

The simple fact of the matter is that the policy of numerical employment emerged from an era of highly questionable motivations, was developed through highly questionable means, and produces highly questionable results. It is a legacy of the administration that gave us Watergate, but also a good deal more. It may go too far to assert as fact that "affirmative action" was a product of the same mentality that yielded the more notorious characteristics of the "Imperial Presidency," but experience with these other characteristics counsels the awakening of doubt.³⁸⁰ Of course, even the most pernicious of regimes may be capable of the right deed for the wrong reason. The fact that the Nixon Administration, with its demonstrated proclivity for resort to calculated divisive action as a strategy for its political perpetuation, fathered "race-conscious affirmative action" does not necessarily mean that the policy itself is evil. It does, however, demand that we call into question its basic premises and scrutinize closely its effects. On doing so, we find that the policy of numerical employment is substantially counterproductive of even its purported ends. Even if it were clear that it increased the relative percentage of minorities and females among those who are employed, any quota system that artificially adjusts these percentages must do so at the expense of sound economic policy. Thus, although the relative percentages of minorities and females in the workforce may rise, the absolute number of employees from all groups, and hence the total number of minority and female employees will expand less rapidly than would be the case without the economically retardative effects of "affirmative action."

There is also a sense in which even the advantage gained by the "beneficiaries" of numerical employment is, economically speaking, more apparent than real. True, the minority employees who were promoted over Brian Weber now occupy a job, at presumably higher pay, that they would not have

³⁷⁹ 109 CONG. REC. 11159 (1963) (message of President Kennedy).

³⁸⁰ Professor Kurland, among others, has admonished that it is probably premature for us to pronounce ourselves cured of the disease that produced Watergate:

The crisis of Watergate was a crisis of cumulated power. The *Oxford English Dictionary* defines crisis as "the point in the progress of a disease when an important development or change takes place which is decisive of recovery or death." In this instance, death was avoided. . . .

The notion that because we have come through one critical period we have been restored to health is more wish than reality. Perhaps we have removed a cancerous growth that could have killed us. We have not rid the system of the disease.

P. Kurland, *supra* note 71, at 4.

gotten when they did but for the color of their skin. But the economic component of the cost of numerical employment generally must be passed along one way or another if the employer is to stay in business. One way to do this would be to increase the amount of bids submitted for federal contracts. Since some companies (especially relatively small businesses) will be less able than others to absorb the administrative expense of "affirmative action" their bids will become non-competitive, effectively diminishing competition for reasons unrelated to quality of performance. This anti-competitive impact, coupled with the "affirmative action" cost component incorporated in the remaining competitive bids, results in an increased overall cost of goods and services obtained by the Government.

The Government, in turn, can deal with the increased cost factor in either of two ways. The first is to increase taxes and the second is to increase deficit spending, thereby fueling inflation. In the former case all of us, including the "beneficiaries" of numerical employment, end up with fewer spendable dollars; in the latter, the dollars we receive are worth less. But it is not likely to end there. Under Labor Department Regulations, federal contractors are obliged to implement the numerical employment policy not just as to those employees who work on the Government contract, but as to *all* their employees.³⁸¹ Since it would generally be difficult to pass all of this expense on to the Government and maintain a competitive bidding posture, at least some of it will be passed along to consumers. This, in turn, will tend to make it more difficult for the government contractor to compete in the private sector market with those who either have eschewed or have been forced to forego participation in the federal contract market. Moreover, this sort of governmental regulation can only make more difficult the task of competing against foreign business interests, and to the extent it does so the balance of payments will be adversely affected.

There are two particularly remarkable things about such considerations. First, there is no indication that they occurred to the *Weber* Court. Second, even if they had, they raise issues, the proper assessment of which is well beyond the peculiar competence of courts. These are, in a word, *legislative* issues. The pragmatic problem with the Court's incursion into this realm is that it placed itself in the position of having to do what it could only do poorly, if at all. Nevertheless a majority of the Court proved itself quite willing to make the policy judgment, however superficially, that "affirmative action" was in the national interest. The only strand of judicial restraint to be found in the opinions for the majority is in Justice Brennan's refusal to "define in detail the line of demarcation between permissible and impermissible affirmative action plans."³⁸² As Professor Bernard Meltzer has pointed out, however, this just "adds another ironic twist to a decision preceded by arguments that something had to be done to alleviate the uncertainties resulting

³⁸¹ 29 C.F.R. § 60-1.40 (1979) requires a federal contractor to "develop a written affirmative action compliance program for each of its establishments." (Emphasis added).

³⁸² 99 S. Ct. at 2730.

from discordant regulations."³⁸³ The Court, it seems, is all too eager to govern, but reluctant to guide. The upshot of this is that those of us who work in this area of the law are left with more questions than we had before the *Weber* case was decided.³⁸⁴

The fact that questions remain, however, leaves some hope that the damage may yet be mitigated. Indeed, the pervasive impropriety in the Court's judicial method, the fact that two key Justices (Stevens and Powell) did not participate in the decision, and the lingering question of "[w]hich wisdom will befall Mr. Justice Stewart,"³⁸⁵ all contribute to the possibility of a subsequent opinion that would substantially narrow *Weber's* scope.³⁸⁶ Indeed, the fact that the excessive zeal of the *Weber* majority is so clear may itself provide much of the impetus for its moderation or early reversal. It was this sentiment that Judge Gee, who wrote the Fifth Circuit majority opinion in *Weber*, expressed when he took the extraordinary step of dissenting to the order remanding the case to the district court pursuant to the Supreme Court's decision.³⁸⁷

Regardless of the ultimate fate of the numerical employment policy, however, there are larger issues that must concern us more. As unwise as "affirmative action" surely is, the significance of that un wisdom pales beside the philosophy of government that gave the policy birth and sustains it. It is a philosophy that springs from an impatience with democratic processes and a lack of faith in the ability of people to regulate their own conduct. It is a

³⁸³ Meltzer, *The Weber Case: Double Talk and Double Standards*, 3 REGULATION 34, 41 (1979).

³⁸⁴ For a listing of at least some of the questions that remain, see Connolly, *Legislative, Case History Support "Dishonesty" Cries In Court's "Weber" Ruling*, *The Legal Times of Washington* 42, 46 (August 13, 1979).

³⁸⁵ *Id.* For a discussion of Stewart's enigmatic and unexplained shift from the Stevens bloc in *Bakke* to the Brennan bloc in *Weber*, see text at notes 249-54, *supra*.

³⁸⁶ As this article was in its final stages of preparation for publication, the Supreme Court handed down its decision in *Fullilove v. Klutznik*, 48 U.S.L.W. 4979 (July 2, 1980), rejecting a constitutional challenge to the 10% minority set-aside provision in § 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. 1 1977). Although the decision in that case makes it clear, for the first time, that a majority of the Court regards the interest in ameliorating the effects of past discrimination as a "compelling governmental interest," the opinions shed little light upon most of the issues with which this article is concerned. Chief Justice Burger, who delivered the opinion of the Court (concurring in by Justices White and Powell), heavily emphasized the fact that the "broad remedial powers" of the Congress, as opposed to the less expansive powers of the other branches, compelled the Court to give the statute a reading that accorded due regard to the constitutional scope of congressional authority. 48 U.S.L.W. at 4986, 4988. The opinion of the Chief Justice and the separate concurring opinion of Justice Powell both underscored the fact that § 103(f)(2) and the regulations promulgated thereunder had been carefully crafted to assure that only those minority businesses that had been actually disadvantaged by past discrimination were made the beneficiaries of the set-aside provision. *Id.* at 4989-90, 4997. Interestingly, Justice Stewart, who along with Justice Rehnquist dissented, declared flatly: "Under our Constitution, the government may never act to the detriment of a person solely because of that person's race." *Id.* at 5000 (Stewart, J., dissenting).

³⁸⁷ 611 F.2d 132 (5th Cir. 1980). Judge Gee referred to the Court's decision as "profoundly wrong" and its statutory interpretation message as "a grievous thing." Judge Gee wrote:

philosophy that regards the electoral and legislative system prescribed by the Constitution as rather bothersome obstacles to efficacious government, the way to which appears only to those on whom wisdom magically descends upon their appointment to the Supreme Court or Government agencies. It is to them alone that falls the weighty responsibility for perceiving and implementing the "true meaning" of our national values, even if in doing so they must sacrifice logical and linguistic consistency with statutory and constitutional articulations of the public will.

A case could perhaps be made that processes conceived in the eighteenth century are simply no longer viable in the twentieth, and we therefore have no choice but to resort to other means for the regulation of a complex modern society. Even if there were a consensus on this point, however, and there is considerable evidence that there is not, there remain the questions of who shall make the necessary changes and what form should they take. What the Nixon Administration and the *Weber* Court share, if nothing else, is a presumption that those who occupy the seats of government may themselves assume the power to accomplish its revision. But George Washington, who had perhaps more occasion than any of his successors to face both the temptation and the opportunity to indulge the same presumption, left us in his farewell address with an admonition against precisely that course:

If, in the opinion of the people the distribution or the modification of the constitutional powers be, in any particular wrong, let it be corrected by an amendment, in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good it is the customary weapon by which free governments are destroyed.³⁸⁸

Like so many other government policies today, the numerical employment policy demonstrates once again the incapacity of government for doing much of anything in the way of social regulation well. There is much evidence

But sadder still—tragic, in my own view—is the Court's departure from the long road that we have traveled from *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L.Ed. 256 (1896), toward making good Mr. Justice Harlan's anguished cry in dissent that [o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559, 16 S. Ct. at 1146. I voiced my profound belief that this present action, like *Plessy*, is a wrong and dangerous turning, and my confident hope that we will soon return to the high, right road on which we disdain to classify a citizen, any citizen, to any degree or for any purpose by the color of his skin.

Id. at 113.

³⁸⁸ THE WRITINGS OF GEORGE WASHINGTON 229 (J. Fitzpatrick ed. 1940) (footnotes indicating changes in Washington's final text omitted).

Thomas Paine was even more pointed. He expressed the conviction that the assumption of the power of revision is utterly incompatible with the constitutional form:

A government on the principles on which constitutional governments, arising out of society are established, cannot have the right of altering itself. If it had, it would be arbitrary. It might make itself what it pleased; and wherever such a right is set up, it shows that there is no constitution.

E. BURKE & T. PAINE, REFLECTIONS ON THE REVOLUTION IN FRANCE & THE RIGHTS OF MAN 310 (Dolphin Books Ed. 1961).

of a dawning recognition of this incapacity among the people of this country, and even among some of our politicians.³⁸⁹ In this there is hope, but we must not lose sight of the fact that the more fundamental question is not whether the Government is performing its assumed tasks well, but whether the tasks should have been assumed in the first place. We must begin to resist the impulse to look to government for the solutions to our problems, for it is from that quarter that many of our problems come. The ultimate issue is, as Judge Learned Hand once put it; "whether the ultimate value shall be this wistful, cloudy, errant You or I, or that Great Beast, Leviathan."³⁹⁰

³⁸⁹ See, e.g., Flint, ". . . A System That Has Run Wild," *Forbes* 38 (Nov. 12, 1979).

³⁹⁰ L. HAND, *THE SPIRIT OF LIBERTY* 173 (Phoenix ed. 1977).

APPENDIX

Percentage of Minority Male Workforce
Employed By Age

	Total (16 & over)	16-17	18-19	20-24	25-34	35-44	45-54	55-64	65 & Over
1968	94.4	73.4	81.0	91.7	96.2	97.1	97.5	96.4	96.0
1969	94.7	75.3	81.0	91.6	96.6	97.6	97.6	96.8	96.8
1970	92.7	72.2	76.9	87.4	93.9	96.1	96.7	96.6	96.2
1971	90.9	66.6	74.0	83.8	92.6	95.1	95.5	95.3	96.6
1972	91.1	64.9	73.8	85.3	93.2	95.2	96.2	95.4	93.1
1973	92.4	65.6	77.9	87.4	94.2	96.0	96.8	96.9	96.4
1974	90.9	61.0	73.4	84.6	92.8	95.9	96.0	96.4	94.4
1975	86.3	60.6	67.1	77.1	88.1	91.7	91.0	93.9	90.5
1976	87.3	62.3	66.0	79.3	89.0	92.7	92.8	93.8	90.7
1977	87.6	61.3	65.9	78.3	89.4	93.9	94.8	93.6	91.7
Net per- centage gain or loss 1968- 1977	(-9.8)	(-12.1)	(-15.1)	(-13.4)	(-6.8)	(-3.2)	(-2.7)	(-2.8)	(-4.3)

Source: U.S. Bureau of Labor Statistics, Handbook of Labor Statistics, 1978, Table 58 at 177-180.

Ratio of Employed Minority Males to
Total Minority Male Population By Age

	Total (16 & over)	16-17	18-19	20-24	25-34	35-44	45-54	55-64	65 & Over
1968	73.3	27.8	51.3	77.9	91.4	90.7	87.8	76.7	25.5
1969	72.8	28.4	51.3	77.3	91.2	90.5	87.3	75.4	25.3
1970	70.9	25.1	47.5	73.0	88.0	89.6	85.3	76.5	26.3
1971	68.1	21.6	43.6	68.3	86.0	87.5	83.0	74.1	23.7
1972	67.1	22.1	44.3	69.5	86.4	87.0	82.8	70.2	22.0
1973	68.2	21.9	47.8	71.5	86.4	87.6	85.2	68.5	21.8
1974	66.6	21.1	45.8	69.4	85.6	87.1	81.3	67.7	20.5
1975	61.7	18.7	38.6	60.4	80.5	82.5	77.0	64.5	18.9
1976	61.7	18.8	36.7	62.2	80.6	84.0	77.4	61.6	17.9
1977	62.2	18.9	38.1	61.2	80.8	85.8	78.4	62.7	17.7
Net per- centage gain or loss 1968- 1977	(-11.1)	(-8.9)	(-13.2)	(-16.7)	(-10.6)	(-4.9)	(-9.4)	(-14.0)	(-7.8)

Source: U.S. Bureau of Labor Statistics, Handbook of Labor Statistics, 1978, Table 3 at 28-32, Table 4 at 33, and Table 58 at 177-180.

APPENDIX

Percentage of Minority Female Workforce
Employed By Age

	Total (16 & over)	16-17	18-19	20-24	25-34	35-44	45-54	55-64	65 & Over
1968	91.7	66.3	73.8	87.7	91.6	95.0	96.8	97.2	97.6
1969	92.2	68.8	74.3	88.0	93.4	95.5	96.3	97.1	98.9
1970	90.7	63.1	67.1	85.0	92.1	95.2	96.0	96.8	98.1
1971	89.2	61.5	66.3	82.7	89.3	93.1	95.8	96.5	96.1
1972	88.7	61.7	61.3	82.6	89.8	92.8	95.3	96.0	98.0
1973	89.5	63.5	66.7	82.4	90.3	94.7	96.3	96.8	96.1
1974	89.3	63.8	66.3	82.0	91.4	93.3	95.7	96.7	98.5
1975	86.0	61.1	61.7	77.5	87.1	91.4	93.3	94.7	96.9
1976	86.4	54.0	65.0	78.3	87.0	91.9	93.9	94.5	97.4
1977	86.0	55.3	62.6	76.4	87.1	91.5	94.4	95.1	96.4
Net per- centage gain or loss 1968- 1977	(-5.7)	(-11.0)	(-11.2)	(-11.3)	(-4.5)	(-4.0)	(-2.4)	(-2.1)	(-1.2)

Source: U.S. Bureau of Labor Statistics, Handbook of Labor Statistics, 1978, Table 58 at 177-180.

Ratio of Employed Minority Females
To Total Minority Female Population By Age

	Total (16 & over)	16-17	18-19	20-24	25-34	35-44	45-54	55-64	65 & Over
1968	45.2	15.4	34.6	51.2	51.8	56.3	57.9	45.7	11.6
1969	44.9	15.3	30.0	49.0	53.0	57.0	57.8	45.6	12.0
1971	43.9	13.5	27.4	46.3	52.9	56.8	56.9	45.4	11.0
1972	43.2	13.2	26.9	46.8	54.0	56.3	54.6	42.1	12.5
1973	43.9	15.4	30.1	47.4	55.1	57.5	54.3	43.3	10.7
1974	43.8	16.0	29.6	47.7	55.5	57.4	54.4	42.1	9.8
1975	42.3	16.2	27.8	43.5	53.5	56.4	53.0	41.5	10.2
1976	43.4	12.9	28.1	45.3	56.8	57.2	53.8	41.0	10.9
1977	43.8	12.5	28.0	45.4	57.9	58.3	55.4	40.6	9.5
Net per- centage gain or loss 1968- 1977	(-1.4)	(-2.9)	(-6.6)	(-5.8)	(+6.1)	(+2.0)	(-3.1)	(-5.1)	(-2.1)

Source: U.S. Bureau of Labor Statistics, Handbook of Labor Statistics, 1978, Table 3 at 28-32, Table 4 at 33, and Table 58 at 177-180.

BOSTON COLLEGE LAW REVIEW

VOLUME XXI

NOVEMBER 1979

NUMBER 1

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