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Karen Ann Sindelar

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NOTE

Employment Discrimination—*Weber v. Kaiser Aluminum & Chemical Corp.*: Does Title VII Limit Executive Order 11246?

In November 1977 a decision that could seriously retard affirmative action taken to remedy employment discrimination was issued by the United States Court of Appeals for the Fifth Circuit, a court long-noted for its progressive decisions in the area of civil rights. In *Weber v. Kaiser Aluminum & Chemical Corp.*,[1] the court struck down a plan implemented by Kaiser that guaranteed a fifty percent minority admission ratio into a craft apprenticeship program. The decision is the most recent attempt by a federal court of appeals to interpret the possibly conflicting provisions of Executive Order 11246,[2] which demands that government contractors take affirmative action to benefit minorities and women, and Title VII of the Civil Rights Act of 1964,[3] which prohibits race and sex discrimination in employment.[4] Before *Weber* all federal courts of appeals confronting the issue had sustained the legality of specific affirmative action plans instituted under the authority of the Executive Order, despite the antidiscrimination provisions of title VII.[5] In *Weber*, however, the court held that Executive Order 11246

1. 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 47 U.S.L.W. 3408 (U.S. Dec. 12, 1978) (No. 78-435).

2. Exec. Order No. 11,246, *as amended by* Exec. Order No. 11,375 & Exec. Order No. 11,478, 3 C.F.R. 173 (1973), *reprinted in* 42 U.S.C. § 2000e app., at 1232-36 (1976), *and as further amended by* Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (1978).

3. Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15 (1976), *quoted in part in* notes 45-48 *infra*.

4. The potential conflict has generated considerable debate. *See generally* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974); Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975); Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341; Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 WIS. L. REV. 301; Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOY. CHI. L.J. 315 (1974); Sape, *The Use of Numerical Quotas to Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481 (1975); Venick & Lane, *Doubling the Price of Past Discrimination: The Employer's Burden After McDonald v. Sante Fe Trail Transportation Co.*, 8 LOY. CHI. L.J. 789 (1977); Comment, *How Far Can Affirmative Action Go Before It Becomes Reverse Discrimination?*, 26 CATH. U.L. REV. 513 (1977); Note, *A Proposal for Reconciling Affirmative Action with Nondiscrimination Under the Contractor Antidiscrimination Program*, 30 STAN. L. REV. 803 (1978).

5. *See* EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 3145 (1978); Mele v. EEOC, 532 F.2d 747 (3d Cir. 1976), *aff'g mem.* Mele v. United States

violates title VII if it mandates the use of a racial quota in the absence of prior discrimination by the employer.[6]

The legal precedent, legislative history, and policy reasons supporting an employer's use of a quota to comply with the Executive Order will be analyzed in this Note. These issues were largely unexplored by the *Weber* majority. In addition, an analysis of the validity of using quotas in the absence of findings of discrimination will be undertaken. This issue was raised both in *Weber* and in the Supreme Court's later decision in *Regents of the University of California v. Bakke*.[7] Both decisions draw attention to the problems inherent in distinguishing between employer discrimination and societal discrimination when judging the legality of affirmative action plans in employment.

BACKGROUND

In 1974, Kaiser Aluminum negotiated a collective bargaining agreement with the United Steelworkers Union that established a new on-the-job training program within designated plants to increase the participation of minorities in the highly paid craft positions. Previously, Kaiser's official policy was to consider only workers with craft experience outside the plant for craft apprentice and craft positions.[8] Minority workers, who had been discriminated against by outside unions, had no prior experience to qualify them for craft positions.[9] Because of this outside discrimination, and possible discrimination by Kaiser itself,[10] at Kaiser's Gramercy plant blacks held less than 2% of the craft positions, although they constituted 39% of the surrounding labor force.[11] Under pressure from the Office of Federal Contract

Dep't of Justice, 395 F. Supp. 592 (D.N.J. 1975); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also* Associated Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (upholding Governor's executive order similar to Exec. Order 11,246).

6. 563 F.2d at 227. *Weber* presents two important issues: whether a quota that is voluntarily implemented to remedy possible title VII violations is legal; and whether, regardless of any title VII violations, a quota that is voluntarily implemented under the authority of Exec. Order 11246 is legal. Although the second issue is the focus of this Note, the issues are not separable, since most quotas implemented to comply with the Executive Order also remedy arguable title VII violations. *See* notes 26 & 27 and accompanying text *infra*.

7. 98 S. Ct. 2733 (1978).

8. 563 F.2d at 218.

9. *Id.* at 234, 237 (dissenting opinion).

10. *See* notes 17 & 26 *infra*.

11. Prior to 1974 only 5 of 273 craft positions were held by blacks. Petition for Writ of Certiorari on behalf of the United States and the Equal Employment Opportunity Commission at 3.

Compliance (OFCC), which enforces the Executive Order[12] to remedy the underrepresentation of minorities, Kaiser and the union negotiated an agreement that established a new in-plant training program.[13] Qualified white and black workers who previously had not met the prior experience requirement were to be admitted in a one-to-one ratio on the basis of seniority, with separate seniority lists maintained for the two groups. Weber, a white male, sued when a black with less seniority than he had was admitted into the program.[14]

The evidence presented to the district court was sparse. Two Kaiser officials testified that Kaiser had not discriminated in the past, but that past discrimination against blacks by outside craft unions justified the imposition of the racial quota.[15] The statistics showing Kaiser's underutilization of minorities were never analyzed by the court,[16] nor were OFCC findings concerning Kaiser's previous discrimination introduced.[17]

The district court held that the Kaiser quota was illegal because title VII only permits quotas when they are imposed by the courts after judicial determinations of discrimination.[18] Alternatively, the district court held that Kaiser had not discriminated and thus the quota would have been illegal even had it been imposed by a court.[19] In light of its finding that Kaiser had not discriminated, the court found that the Executive Order and title VII were in conflict, since the Executive Order seemed to require employers who had not discriminated to give preferential treatment to minorities.[20]

12. Exec. Order 11246 authorizes the Secretary of Labor to adopt such rules and regulations as may be appropriate to administer the Order. Exec. Order No. 11,246, § 201, 3 C.F.R. 173, 174 (1973). Pursuant to authority granted in the Executive Order, the Secretary has delegated this authority to the Director of the Office of Federal Contract Compliance. *Id.* § 401, 3 C.F.R. 173, 181 (1973); 41 C.F.R. § 60-1.2 (1978).

13. Similar agreements were made throughout the aluminum industry. 563 F.2d at 218. The affirmative action provisions in these agreements mirrored provisions in a nationwide steel settlement that had been previously approved by the Fifth Circuit in United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

14. 563 F.2d at 218.

15. *Id.* at 224.

16. *Id.* at 231 (Wisdom, J., dissenting).

17. In 1971, following a compliance review, OFCC found that Kaiser was guilty of discrimination. In 1973, OFCC found that Kaiser had waived its prior experience requirements for whites but not for blacks who had applied for craft positions. These findings were revealed by the Government, and were never brought out by Kaiser. Petition for Certiorari on behalf of the United States and the Equal Employment Opportunity Commission at 18.

18. 415 F. Supp. 761, 767-68 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *cert. granted*, 47 U.S.L.W. 3408 (U.S. Dec. 12, 1978) (No. 78-435).

19. *Id.* at 769.

20. *Id.*

The court of appeals affirmed, one judge dissenting. The majority disagreed with the district court's holding that only judicially imposed quotas are legal.[21] It affirmed, however, on the basis of the alternate holding,[22] stating that in the absence of prior employment discrimination, a racial quota "loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII."[23] Like the district court, the court of appeals found that the Executive Order could not validate the quota. Invoking Justice Jackson's separation-of-powers analysis in *Youngstown Sheet & Tube Co. v. Sawyer*,[24] the court reasoned that if the Executive Order authorizes the use of a racial quota in the absence of prior employment discrimination it contravenes congressional intent as expressed in title VII, and therefore is illegal.[25]

In a strong dissent, Judge Wisdom argued that Kaiser's affirmative action program was legal, both as a reasonable remedy for Kaiser's own arguable violations of title VII[26] and as a permissible voluntary action to remedy the effects of past societal discrimination.[27] With regard to the Executive Order issue, Judge Wisdom noted that in 1972 Congress had implicitly affirmed the Executive Order, thereby exempting it from title VII.[28] He concluded, however, that the case should be

21. 563 F.2d at 223.

22. *Id.* at 224. The district court's finding that Kaiser was not guilty of discrimination apparently was based on the testimony of two Kaiser officials. The finding is questionable. As Judge Wisdom argued, no litigant in the original proceeding wanted to prove any past discrimination by Kaiser, and no one represented the interests of the minorities at Kaiser, the only persons who were interested in showing the existence of past discrimination. *Id.* at 231 (dissenting opinion).

23. *Id.* at 224.

24. 343 U.S. 579 (1952), *cited in* 563 F.2d at 227. In *Youngstown*, Justice Jackson defined three categories of presidential powers. According to Justice Jackson, the President's power is greatest when he acts pursuant to express or implied congressional authorization. When the President acts in absence of a congressional authorization, he acts in a "twilight zone" in which both he and Congress may exercise concurrent authority. When the President takes measures that are incompatible with the express or implied will of Congress, his powers are only what he alone possesses, and the action can be upheld only if the Constitution has delegated the authority to the President, and not to Congress. *Id.* at 636-38.

25. 563 F.2d at 227.

26. *Id.* at 230 (dissenting opinion). Kaiser's arguable title VII liability was based on (1) a prima facie case of discrimination, proven by the gross statistical underrepresentation of minorities in both its general labor force and its skilled positions, (2) the prior experience requirement for the limited craft training program that existed before 1974, and (3) the requirement that persons hired for craft positions have previous training. *Id.* at 231-32 (dissenting opinion).

27. *Id.* at 234-36 (dissenting opinion).

28. *Id.* at 237-38 (dissenting opinion); *see* notes 80-92 and accompanying text *infra*.

remanded to the district court to determine whether the quota employed by Kaiser violated the Order itself,[29] and if it did not, whether federal authorization of such a quota violates the Constitution.[30]

THE EXECUTIVE ORDER AND TITLE VII

The Executive Order program predates the effective date of title VII by twenty-four years. Since 1941, successive Presidents have issued executive orders prohibiting employment discrimination by government contractors and subcontractors.[31] For twenty years contractors and subcontractors were merely required to follow a policy of nondiscrimination. In 1961, however, President Kennedy added the obligation to take "affirmative action."[32] This requirement was extended by

29. *Id.* at 238 (dissenting opinion). OFCC regulations contain a disclaimer of any intent to impose a quota. 41 C.F.R. § 60-2.12(e) (1978).

30. 563 F.2d at 238 n.24 (dissenting opinion). Judge Wisdom seemed to be questioning on equal protection grounds the general constitutionality of any federal authorization for government contractors to utilize quotas.

31. The major executive orders dealing with the obligations of government contractors and subcontractors are Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Compilation); Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 Compilation) (President Roosevelt); Exec. Order No. 10,308, 3 C.F.R. 837 (1949-1953 Compilation) (President Truman); Exec. Order No. 10,479, 3 C.F.R. 961 (1949-1953 Compilation) (President Eisenhower); Exec. Order No. 10,557, 3 C.F.R. 203 (1954-1958 Compilation); Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963 Compilation); Exec. Order No. 11,114, 3 C.F.R. 774 (1959-1963 Compilation) (President Kennedy); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation); Exec. Order No. 11,375, 3 C.F.R. 320 (1966-1970 Compilation) (President Johnson).

President Roosevelt's initial order, Exec. Order 8802, prohibited discrimination in employment on the basis of race, creed, color, and national origin. Exec. Order 11,375, issued in 1967, extended the prohibition to sex discrimination.

Despite the long history of the Executive Order program, there is no clear statutory grant of authority that gives the President the power to impose any requirements on government contractors that are unnecessary to the management and procurement of goods or services. One court that has analyzed the basis of presidential authority has found that the Executive has the power to further the legitimate government interest in expanding the labor supply as a means of guaranteeing the performance of government contracts. *See* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 175 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 VA. L. REV. 837, 866-68 (1957); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 726-32 (1972). Other courts have more candidly asserted that the goal of equal employment itself, aside from any economic benefits, validates Exec. Order 11246. *See* Rossetti Contracting Co. v. Brennan, 508 F.2d 1039, 1045 n.18 (7th Cir. 1975); Northeast Constr. Co. v. Romney, 485 F.2d 752, 760 (D.C. Cir. 1973).

For excellent discussions of the limits of presidential power in the area, see Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 WIS. L. REV. 301, 301-13; Comment, *supra*.

32. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963 Compilation).

President Johnson in Executive Order 11246, issued in 1965.[33] Pursuant to authority granted in Executive Order 11246,[34] the Secretary of Labor subsequently issued regulations defining the content of "affirmative action."[35] These regulations require nonconstruction contractors and subcontractors with fifty or more employees and a contract of $50,000 with the federal government to develop written affirmative action programs.[36] This entails, among other things, conducting a workforce analysis to determine whether minorities or women are "underutilized" in any job category in light of their general availability.[37] An employer who finds that minorities or women are underutilized must establish goals and timetables for hiring, training, and promotion to correct the deficiencies.[38] In addition, the employer must eliminate unnecessary job prerequisites or qualifications, and "validate," or establish the job-relatedness of employment criteria that are considered essential.[39]

Neither the Executive Order itself nor OFCC regulations states that minorities or females are to be preferred over other candidates. In

33. Exec. Order No. 11,246, *as amended by* Exec. Order No. 11,375 & Exec. Order No. 11,478, 3 C.F.R. 169 (1976), *reprinted in* 42 U.S.C. § 2000e app. 1332-36 (1976).

The following language is included in all government contracts: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." *Id.* § 202, 3 C.F.R. 169, 170 (1976); 41 C.F.R. § 60-1.14(a) (1977).

For a brief history of the development of the executive order program, and the development of the concept of affirmative action, see Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590, 590-96 (1969).

34. Exec. Order No. 11,246, § 203(a), 3 C.F.R. 169, 171 (1976).

35. These rules and regulations are found at 41 C.F.R. § 60 (1978). Section 60-1 establishes general rules applicable under the Executive Order. The sections specifically applicable to affirmative action are § 60-2, Revised Order No. 4, which details affirmative action requirements for nonconstruction contractors; § 60-4, which gives requirements for construction contractors; § 60-20, which contains sex discrimination guidelines; and § 60-60, Revised Order No. 14, which contains standard review procedures to determine compliance with affirmative action requirements for nonconstruction contractors.

36. 41 C.F.R. § 60-1.40(a) (1978). The content and design of these programs is set out in Revised Order No. 4, *id.* § 60-2.1 to .32.

37. The employer must apply the following criteria in determining whether minorities are underutilized: (1) the minority population of the labor area surrounding the facility; (2) the size of the minority unemployment force in the labor area surrounding the facility; (3) the percentage of minority work force as compared with the total work force in the immediate labor area; (4) the general availability of minorities having requisite skills in the immediate labor area; (5) the availability of minorities having requisite skills in an area in which the contractor can reasonably recruit; (6) the availability of promotable minority employees within the contractor's organization; (7) the existence of training institutions capable of training minorities in the requisite skills; and (8) the degree of training the contractor is reasonably able to undertake as a means of making all job classifications available to minorities. *Id.* § 60-2.11(b).

38. *Id.* § 60-2.10.

39. *Id.* § 60-2.24.

fact, the Executive Order itself contains a nondiscrimination clause,[40] and OFCC regulations both disclaim any intent to impose a rigid quota[41] and direct that a goal should not be used to discriminate against any applicant.[42] However, these prohibitions must be read in light of the OFCC regulations requiring the use of goals. The obvious objective of the goals approach is to broaden an employer's recruitment base and promote the hiring or advancement of minorities or women who may formerly have been considered unqualified or less qualified than competing majority group workers. An effective affirmative action program probably both expands the pool of applicants who are considered equally qualified and affords minorities or females some preference because of their status. This will necessarily be the case whenever the percentage goal of minorities or females to be hired or promoted in a given year actually exceeds that group's percentage in the hiring or promotion pool.[43] Additionally, any time a goal is consistently met because the number of qualified minority workers exceeds the goal established, the goal will appear to be a quota.

In light of the obvious objective of the Executive Order program—to eliminate discrimination against minorities and women—the antidiscrimination language in the Order and the regulations should probably be interpreted to afford only constitutional guarantees, rather than absolutely prohibiting preferential treatment.[44] And considering the goals requirement, the OFCC regulations prohibiting rigid quotas should probably be construed as only prohibiting goals that require the hiring of unqualified persons.

Unlike the Executive Order program, title VII does not demand that employers take any voluntary affirmative action. In fact, although

40. Exec. Order No. 11,246, § 202, 3 C.F.R. 173, 174 (1973).

41. "Goals 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." 41 C.F.R. § 60-2.12(e) (1978).

42. *Id.* § 60-2.30.

43. The following example illustrates this point: Thirty percent of *X*'s workforce of 100 are minority. Only 10% of the supervisors are minority. *X* wants to increase the percentage of supervisors to correct the underutilization of minorities in the supervisory job category, so *X* may implement a 50% ratio for minority promotion and choose minorities for 5 of 10 new supervisory positions. However, assuming that all of *X*'s workforce is basically qualified to be supervisor, normally only 3 of the new supervisors would be minority. Any individual minority enjoys a better chance for promotion than a nonminority—in the above example, a 17% chance compared to a 7% chance.

44. Such a construction is consistent with the Supreme Court's interpretation of the nondiscrimination clause in title VI of the Civil Rights Act, 42 U.S.C. § 2000d (1976). *See* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978).

title VII was enacted to prohibit discrimination against minorities, various provisions can be interpreted to prohibit remedial affirmative action favoring minorities. In particular, these provisions are section 703(a), which makes discrimination in hiring and in terms and conditions of employment illegal;[45] section 703(d), which makes discrimination in training and apprenticeship programs illegal;[46] section 703(h), which protects "bona fide" seniority systems;[47] and section 703(j), which provides that title VII shall not be interpreted to require any employer to grant preferential treatment on account of a statistical imbalance between the number of minority workers in the employer's work force and their availability in the labor market.[48]

Prior to *Weber*, the possible conflict between the Executive Order and title VII had been examined in two different contexts. Initial attacks on the Order's validity were made by construction contractors who challenged the imposition of minority hiring goals by the Department of Labor to remedy third-party discrimination by trade unions.[49]

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45. 42 U.S.C. § 2000e-2(a) (1976). The provision states:

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

46. *Id.* § 2000e-2(d). The provision states:

> 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.

47. *Id.* § 2000e-2(h). The provision states:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such diffeerences [*sic*] are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

48. *Id.* § 2000e-2(j). The provision states:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . 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 . . . .

49. The first use of the "goals and timetables" approach to affirmative action was in 1967 in the construction industry. In an attempt to remedy the virtually complete exclusion of minorities

More recently, various white male plaintiffs have challenged quotas

from the skilled trades the Department of Labor held hearings in different geographic areas to determine the extent of minority underutilization in various skilled trades and to set minimum acceptable ranges for minority utilization. Following these hearings, area-wide plans were imposed in a number of cities. The plans required contractors and subcontractors to commit themselves to goals within acceptable ranges in their bids for government projects. Construction *contractors* had to commit themselves to minority hiring goals even though outside trade *unions* were guilty of the prior discrimination. The contractors, in order to meet their goals, were forced either to break their collective bargaining contracts with outside unions, which called for hiring through the hiring hall referral system, or to put pressure on the unions to change their hiring, seniority, and apprenticeship provisions to elevate minority tradesmen to skilled worker status within a shortened time period. The first construction industry plan to use the goals and timetables approach was the Cleveland Plan, which used "manning tables" to increase hiring of minorities. However, the approach was not fully adopted until the Philadelphia Plan was imposed in 1967. As of 1975, there were imposed plans in seven cities. *See* Leiken, *supra* note 4, at 84-90. The provisions of the imposed plans, along with the Department of Labor findings, are found at 41 C.F.R. § 60-5 to -11 (1977).

In addition, since 1970, voluntary "hometown" plans have been adopted in a number of cities. Voluntary plans are developed by local unions, contractors, and minority groups, and are subsequently reviewed by OFCC regional offices. Hometown plans, like imposed plans, include goals, or ranges of goals for minority utilization. 5 UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, 1974: TO ELIMINATE EMPLOYMENT DISCRIMINATION 345-62 (1975) [hereinafter cited as 5 U.S.C.C.R., 1974: DISCRIMINATION]; Leiken, *supra* note 4, at 91.

In April 1978, extensive revisions to the affirmative action regulations in the construction industry were made. Construction contractors now operate under the same goals and timetables approach as nonconstruction contractors. Imposed plans have been eliminated and hiring goals for women have been set for the first time. *See* 41 C.F.R. § 60-4.1 to .9 (1978).

For analysis of the various plans, see generally Gould, *The Seattle Building Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry*, 26 STAN. L. REV. 773 (1974); Jones, *supra* note 4; Leiken, *supra* note 4; Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U.L. REV. 225 (1971); Comment, *The Philadelphia Plan and Strict Racial Quotas in Federal Contracts*, 17 U.C.L.A. L. REV. 817 (1970); Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590 (1969).

Challenges on both constitutional and statutory grounds to these plans and to similar state plans were raised by contractors and unions. Courts, however, have consistently upheld the plans. *See* Associated Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (upholding similar state plan under Governor's executive authority against attack on constitutional grounds and on grounds that plan conflicted with antipreference provision of Massachusetts law similar to title VII); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972) (upholding "Ogilvie Plan" against challenge based on Constitution and title VII); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (upholding "Philadelphia Plan" against challenges based on Constitution, title VI, title VII, and National Labor Relations Act); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) (upholding plan against title VII attack); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 396 U.S. 1004 (1970) (upholding state plan).

Courts have also relied on the Executive Order for legal authority to issue injunctions against unions that impeded the operation of various plans. *See, e.g.*, United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973) (union that continued to discriminate in referrals and membership required to become participant in plan); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972) (union forced to issue work permits to minorities trained under federal program rather than under union's apprenticeship program).

contained in the consent decree that ended lengthy government investigation of A.T. & T. following charges of massive employment discrimination.[50] These quotas provided for the promotion of women and minorities over white males with greater seniority.

In interpreting the provisions of title VII and the Executive Order, courts of appeals have consistently concluded that title VII and the Executive Order are complementary, rather than contradictory.[51] Although title VII was generally interpreted to require race-neutral employment practices, the courts created an exemption from this requirement of race neutrality for racial preferences authorized by the Executive Order. To support this exemption, the courts looked in part to the legislative history and purpose of title VII. For example, in *Contractors Association v. Secretary of Labor*,[52] the seminal pre-1972 decision, the United States Court of Appeals for the Third Circuit found that Congress did not intend to foreclose remedial affirmative action taken under other authority by passing title VII in 1964.[53] Accordingly, the court held that sections 703(h) and (j) did not limit the Executive Order, and that, considering that white workers would not be excluded from any jobs, section 703(a) did not prohibit some minority preference.[54] More recent decisions have interpreted congressional rejection

50. In 1973, after years of investigation by the EEOC, the Department of Labor, and other government representatives, charges were filed against A.T. & T. under title VII, Exec. Order 11,246, and the Equal Pay Act. Concurrent with the filing of charges, two consent decrees were entered and approved. The decrees provided for a substantial back pay award and for a "seniority override" to accelerate advancement of minority group workers over majority group workers with greater seniority. A.T. & T. disclaimed any past discrimination. Challenges to the decree were raised by unions. The United States Court of Appeals for the Third Circuit upheld the legality under title VII and the constitutionality of the plan in EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977). The Supreme Court, immediately following *Bakke*, denied certioriari. 98 S. Ct. 3145 (1978). Individual plaintiffs passed over because of the seniority override have also challenged the decree under § 703(a) of title VII, 42 U.S.C. § 2000e-2(a) (1976). *See* Mele v. United States Dep't of Justice, 395 F. Supp. 592 (D.N.J. 1975), *aff'd mem.*, 532 F.2d 747 (3d Cir. 1976) (plan was put into effect under authority of the Executive Order, and thus is immune from title VII attack). *But see* McAleer v. American Tel. & Tel. Co., 416 F. Supp. 435 (D.D.C. 1976) (court would not enjoin valid consent decree but would award plaintiff damages for violation of his statutory rights under § 703(a)). *See generally* 5 U.S.C.C.R., 1974: DISCRIMINATION, *supra* note 49, at 549-56.

The A.T. & T. consent decrees are reprinted at 8 LAB. REL. REP. (BNA) 431:73 (1978). The decrees expired in January 1979 and were not continued since A.T. & T. was found to have substantially complied with the provisions of the decrees. *See Final Report on A.T. & T.'s Compliance with Consent Decree, id.* at 431:124(1).

51. *See* cases cited notes 49 & 50 *supra.*

52. 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The opinion in *Contractors Association* is the most extensive treatment of the statutory issues raised in opposition to the construction industry plans.

53. *Id.* at 171, 173.

54. *Id.* at 172-73.

in 1972 of amendments that would have made goals and quotas expressly illegal[55] as congressional affirmation that goals and timetables are not prohibited by title VII.[56]

Early decisions upholding the Executive Order were less than candid in analyzing whether the Executive Order can mandate goals or quotas that actually exclude whites from employment opportunities. In general, the construction industry cases tended to ignore the thorny issue of the degree of racial preference authorized under the Executive Order. Some decisions noted that goals would not adversely affect whites.[57] Others ignored the effect on white workers but stressed that the goals were not rigid, and did not force the hiring of unqualified or less qualified minority workers.[58] Despite the tendency in early cases to avoid the issue of the effect of goals on white workers, the early cases nevertheless implicitly affirm that some degree of racial preference is authorized by the Executive Order. The clearest support for the use of a goal or quota that has an obvious exclusionary effect is offered by the more recent A.T. & T. litigation, *EEOC v. American Telephone & Telegraph Co.*,[59] in which strict numerical goals instituted via consent decree were upheld.[60]

Previous Executive Order cases attempted to harmonize the OFCC program and title VII by emphasizing the remedial nature of the challenged goals or quotas and analogizing them to quotas imposed by the judiciary to correct proven title VII discrimination. No decision expressly discussed whether evidence of minority underutilization alone is sufficient to support the conclusion that a goal or quota is properly remedial. Since there was previous administrative consideration of

55. *See* notes 79-92 and accompanying text *infra*.

56. *See, e.g.*, EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 177 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 3145 (1978).

57. *See, e.g.*, Contractors Ass'n v. Secretary of Labor, 442 F.2d at 164, 173 ("Philadelphia Plan" contains assurance that goals are not to be used to discriminate against qualified applicants; Department of Labor made findings that there would be no "adverse impact" on white work force).

58. *See, e.g.*, Associated Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9, 18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (some preference to "equally qualified" minorities is legal); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 686 (7th Cir. 1972) ("goals" will be interpreted flexibly); Joyce v. McCrane, 320 F. Supp. 1284, 1291 (D.N.J. 1970) (goals are not quotas and contractors must only put forth "good faith [effort]" to meet goals in order to avoid sanctions); Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 39, 249 N.E.2d 907, 910 (1969), *cert. denied*, 396 U.S. 1004 (1970) (goal is not quota; quota would violate title VII).

59. 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 3145 (1978), *discussed in* note 50 *supra*.

60. *Id.* at 174.

the evidence of discrimination in most cases,[61] the decisions can possibly be construed to support preferential treatment only when there has been a previous finding of discrimination.[62] Before goals were imposed in the construction industry, the Department of Labor held administrative hearings and made findings of exclusionary practices by outside trade unions.[63] And negotiation of the consent decree with A.T. & T. required extensive involvement by both the OFCC and the Equal Employment Opportunity Commission (EEOC).[64] Prior administrative involvement and administrative findings were not essential to prior decisions, however. No decision was expressly conditioned on prior administrative action. Rather, the factor seems to have been only one of many factors the courts cited to support the presumption of actual employment discrimination. In addition, courts noted extreme statistical underrepresentations of minorities in certain trades and cited title VII suits showing discrimination in skilled trades.[65]

In summary, in prior Executive Order decisions, title VII and the Executive Order were considered complementary. Some courts found it necessary to emphasize that whites were not excluded from employment opportunities. The most important factor noted by the courts in harmonizing title VII and the Executive Order, however, was the consonance in the respective purposes of the two programs—the elimination and remedying of discrimination against minorities. Significantly,

61. *See, e.g.*, Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684 (7th Cir. 1972) ("Ogilvie Plan" involved participation by federal officials); Contractors Ass'n v. Secretary of Labor, 442 F.2d at 162-63 (Department of Labor findings of exclusionary practices by unions); Joyce v. McCrane, 320 F. Supp. 1284, 1287, 1290, 1292 (D.N.J. 1970) (OFCC hearings resulted in findings that some unions guilty of exclusionary practices).

62. *See, e.g.*, Associated Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9, 18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (long history of racial discrimination in construction unions); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684 (7th Cir. 1972) (previous title VII suit showing history of discrimination in highway construction); Contractors Ass'n v. Secretary of Labor, 442 F.2d at 162-63, 173 (orders issued by Department of Labor found prior exclusionary practices by unions); Joyce v. McCrane, 320 F. Supp. 1284, 1287, 1289, 1290, 1292 (D.N.J. 1970) (record of near total minority exclusion in certain trades and government findings that "some unions are guilty of exclusionary practices").

63. Summaries of the findings made prior to the development of the imposed plans are found at 41 C.F.R. § 60-5 to -11 (1977). Significantly, Department of Labor hearings were *not* held before the development of the numerous hometown plans discussed in note 49 *supra*.

64. Investigation of charges against A.T. & T. took over two years. The EEOC was involved to a much greater degree than the OFCC. An EEOC investigative task force put 13.5 person-years into compiling a preliminary report issued in December 1971, over one year before the consent decree was signed. 5 U.S.C.C.R., 1974: DISCRIMINATION, *supra* note 49, at 549-52, 550 n.1661.

65. *See, e.g.*, Associated Gen. Contractors, Inc. v. Altshuler, 490 F.2d 9, 18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (low percentage of minorities is evidence of discrimination); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684 (7th Cir. 1972) (virtually nonexistent minority representation in trades compared to demographic statistics shows discrimination).

no court made any findings of title VII discrimination,[66] nor did any court insist that the party instituting the goals be the discriminating party. Finally, no court required that the beneficiaries of the goals be persons who were, in fact, discriminated against. In contrast to the *Weber* court's conclusion that only "actual" title VII discrimination on the part of the employer can legalize the use of a goal,[67] prior cases support the legality of goals whenever they are used to remedy any arguable employment discrimination.

CONGRESSIONAL CONSIDERATION OF TITLE VII AND THE EXECUTIVE ORDER

In determining that remedial action taken under the authority of the Executive Order is limited by title VII, the *Weber* majority ignored the possibility of congressional ratification of the Executive Order.[68] Yet, interpretation of congressional consideration of the Executive Order in 1964 and in 1972 is significant. Even if sections 703 (a) and (d) of title VII are interpreted to require racial neutrality, congressional ratification could make actions taken in compliance with the Executive Order exempt from these sections. Congressional ratification would also indicate congressional approval of the goal of remedying discrimination, whatever the source, through the imposition by the OFCC of race-conscious affirmative action obligations on employers that have not been adjudged guilty of any title VII violations.

Legislative history of the Civil Rights Act of 1964 offers only slight support for the use of remedial racial preferences in any circumstance.

66. "Title VII discrimination" differs from discrimination that violates the Executive Order. Title VII protects "bona fide" seniority systems. Title VII also allows no remedy for discrimination occurring prior to 1965. The Executive Order, on the other hand, contains no exemption for bona fide seniority systems, and is not limited in time.

Although the Department of Labor made findings of "exclusionary practices" in the construction cases, these findings were not made pursuant to adjudication of title VII issues. The Department of Labor findings were based primarily on the virtual total exclusion of minorities from certain trades, as shown by statistics. Jones, *supra* note 4, at 368; Nash, *supra* note 49, at 232; *See, e.g.*, 41 C.F.R. § 60-5.10 (1977). Such a statistical showing is only a prima facie title VII violation, and can be rebutted by evidence of business necessity or the operation of a bona fide seniority system. It is true that, had there been a court adjudication, the unions would probably have been found guilty of title VII discrimination. The important fact, however, is that none of the courts themselves considered it necessary to make a finding of actual title VII discrimination in order to legalize the challenged goals.

67. 563 F.2d at 224, 226, 227.

68. Judge Wisdom, in contrast, relied on congressional ratification in 1972 to support his theory that Congress has exempted the Executive Order from title VII. 563 F.2d at 237-38 (dissenting opinion).

In fact, it appears that the Congress thought that section 703(j),[69] which states that title VII does not *require* employers to use preferences to remedy statistical imbalances, would prohibit even court-ordered quotas.[70] Goals imposed by the Executive Order were not explicitly considered since the general affirmative action requirement had only recently been added by President Kennedy, and since the goals and timetables approach was not yet in use.[71] Two implications can, however, be drawn from the language of 703(j) that offer some support for an employer's voluntary use of a remedial preference. The first is that the very passage of section 703(j) demonstrates that there was no clear consensus about whether sections 703(a) and (d) would in themselves prohibit racial preferences for minorities.[72] The second is that, although title VII might not *require* employment preferences for minorities, employers might use them voluntarily. Although both of these interpretations contradict remarks made while title VII was being debated,[73] they are not unsupportable, considering that the main concern of the 1964 Congress was to eliminate racial discrimination against blacks and not to legislate on the permissibility of using remedial preferences.[74]

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69. 42 U.S.C. § 2000e-2(j) (1976), *quoted in* note 48 *supra*.

70. *See, e.g.*, 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey):

> 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.

See also id. at 8921 (remarks of Sen. Williams).

71. The obligation to take "affirmative action" was added in 1961 by Exec. Order No. 10,925, § 301, 3 C.F.R. 448, 449-50 (1959-1963 Compilation). Goals and timetables were not used in the construction industry until 1967. *See* note 49 *supra*. They were made a general requirement for all contractors and subcontractors in 1968. *See* 41 C.F.R. § 60-1.40 (1978) (originally became effective on July 1, 1968, 33 Fed. Reg. 7804 (1968)). The more detailed affirmative action requirements for nonconstruction contractors contained in Order No. 4, now Revised Order No. 4, became effective in 1970. *See* 41 C.F.R. § 60-2 (1978), *originally issued in* 35 Fed. Reg. 2586 (1970).

72. *Cf.* Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. at 2780-82 & 2781 n.28, 2772-74 (Brennan, White, Marshall & Blackmun, J.J., concurring in part and dissenting) (similar interpretation of title VI).

73. *See* note 70 *supra*. *See also* Interpretative Memorandum of Title VII of H.R. 7152, submitted jointly by Senators Clark and Case:

> 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 balance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race.

110 CONG. REC. 7212, 7213 (1964).

74. For a similar interpretation of title VI, see Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. at 2746-47 (intent of Congress in passing title VI in 1964 was to prohibit discrimination against

Despite the language of sections 703(a), (d), and (j), courts have regularly used quotas to remedy proven title VII discrimination.[75] In doing so, courts have relied on the argument that the scope of remedial power granted to courts in section 706(g)[76] is not limited by the language in section 703.[77] The Supreme Court has not considered this interpretation with regard to quotas, but it has accepted the theory in granting seniority relief.[78] Aside from the absence of express limitation on the court's remedial powers in section 706(g), the primary support for the use of quotas by the judiciary comes from actions taken by Congress in the course of passing the Equal Employment Opportunity Act of 1972,[79] which amended the Civil Rights Act of 1964. At that time the Senate voted down an amendment that would have specifically prohibited the imposition of goals or quotas by government agencies, including perhaps the courts.[80] Rejection of this amendment has been

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blacks). *See generally* Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

75. *See, e.g.*, Boston NAACP v. Beecher, 504 F.2d 1017, 1026-27 (1st Cir. 1974) (upholding ratio hiring until minority percentage in work force equals minority percentage in labor force); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (upholding one to one hiring ratio until blacks reach 25% of work force); United States v. N.L. Indus. Inc., 479 F.2d 354, 377 (8th Cir. 1973) (one to one promotion ratio until 15% of foremen are black); Pennsylvania v. O'Neill, 473 F.2d 1029 (3d Cir. 1973) (en banc) (upholding ratio hiring corresponding to black population and number of black applicants); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973) (upholding 11% black quota in apprenticeship program); United States v. Carpenters Local 169, 457 F.2d 210 (7th Cir.), *cert. denied*, 409 U.S. 851 (1972) (remanding to district court to fashion appropriate affirmative relief); United States v. Ironworkers Local 86, 443 F.2d 544, 553 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971) (requiring union training program to select sufficient black applicants to overcome past discrimination. *But see* Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977) (quota struck down when whites with greater seniority laid off ahead of blacks with less seniority); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972) (court struck down quota that would have resulted in next 20 positions being filled by minorities, but allowed ratio hiring of one black for every two whites).

76. 42 U.S.C. § 2000e-5(g) (1976) provides in relevant part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . 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 . . . or any other equitable relief as the court deems appropriate.

77. *See* Comment, *Title VII and Preferential Treatment: The Compliance Dilemma*, 7 TEX. TECH. L. REV. 671, 689-92 (1976).

78. In Franks v. Bowman Transp. Co., 424 U.S. 747 (1976), the Court used the theory that § 703(h), *quoted in* note 47 *supra*, was only a "definitional" provision that did not limit relief available under § 706(g) in holding that a court generally *must* award retroactive seniority to victims of discrimination. *Id.* at 758-62.

79. Pub. L. No. 92-26, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-17 (1976)).

80. The amendment, proposed by Senator Ervin, read in part: "No department, agency, or office of the United States shall require any employer to practice discrimination in reverse by employing persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 118 CONG. REC. 1661 (1972). The amendment was proposed

interpreted as an implicit affirmation that judicial power to remedy discrimination is not limited by section 703.[81]

The same legislative history indicates that Congress similarly exempted the Executive Order from the constraints of section 703. In 1972, debate over the goals and timetables approach had been raging for four years. The "Philadelphia Plan," the subject of the *Contractors Association* case,[82] had received great attention. The Comptroller General declared the plan illegal in 1969. The Attorney General subsequently issued an opinion upholding the legality of the plan.[83] A rider that would have cut off funding for any project that the Comptroller General declared illegal was defeated by Congress in 1969.[84] Both imposed and voluntary plans incorporating goals and timetables were in use in the construction industry,[85] and regulations requiring nonconstruction contractors to utilize goals and timetables had been in effect since 1968.[86]

In summary, Congress in 1972 clearly understood that the OFCC, in the absence of any findings of title VII violations, was forcing employers to adopt or accept race-conscious goals as a remedy either for their own discrimination or for discrimination by outside parties. This was the context then in which both the House[87] and the Senate[88] defeated amendments that would have explicitly abolished the use of

primarily as a means of banning the use of goals under the Executive Order, *id.* at 1663, although opponents, attempting to defeat the amendment, stressed that it could restrict the use of quotas by courts as well, *id.* at 1665-75. In speaking against the amendment, Senator Javits quoted from the opinion in *Contractors Association* and had the opinion printed in the record. *Id.* at 1665-76. The amendment was soundly defeated, 22 to 44. *Id.* at 1676.

81. For example, this legislative history was cited by the *Weber* majority to support the fact that quotas may be imposed by courts. 563 F.2d at 220. *See* EEOC v. American Tel. & Tel. Co., 556 F.2d at 177; United States v. International Union of Elevator Constructors, 538 F.2d 1012, 1019-20 (3d Cir. 1976).

82. *See* note 49 *supra.*

83. *See* note 97 *infra.*

84. The Fannin rider was specifically intended to stop the imposition of goals and timetables in the construction industry. The rider was passed by the Senate, 115 CONG. REC. 40,039 (1969), defeated by the House, *id.* at 40,921, and, upon reconsideration, defeated by the Senate, *id.* at 40,749. *See* Comment, *supra* note 31 at 748-50 (author sees vote as qualified support for ratification of Executive Order through appropriation).

85. *See* note 49 *supra.*

86. *See* note 71 *supra.*

87. Consideration of the quota issue in the House was not as clear-cut as it was in the Senate. The Dent amendment, which would have combined the EEOC and the OFCC and prohibited the EEOC from using quotas or preferential treatment, was added to the Hawkins-Reed bill, the bill that was reported out of Committee. A substitute bill, the Erlenborn-Mazzoli bill, was offered from the floor. The Hawkins bill gave the EEOC authority to issue cease and desist orders, whereas the Erlenborn substitute only gave the EEOC authority to prosecute suits in the federal courts. The issue of the EEOC's enforcement power was actually the critical point of difference between the bills, but the quota issue was also important in the debate. Congressman Dent, before

goals and timetables under the Executive Order. Debate in the Senate, in particular, indicates that supporters and opponents of the OFCC program understood that the Executive Order was not operating within the constraints of title VII.[89] The Senate also voted down two amendments that could have diluted or destroyed the unique affirmative action components of the OFCC program.[90] Debate over these amendments clearly demonstrates congressional understanding that

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the vote on the Erlenborn substitute, decided not to offer any amendments to the substitute so that the House would have a choice between a bill that would continue the OFCC's imposition of quotas, the Erlenborn substitute, and a bill that would prohibit quotas, the Hawkins bill. SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 275-77 [hereinafter cited as 1972 LEGISLATIVE HISTORY] (remarks of Congresswoman Abzug) (summary of differences in the bills); *id.* at 254-56 (remarks of Congressman Dent) ("the two bills offer a clear-cut choice for and against quotas"). Ironically, many liberals supported the Hawkins bill, despite the inclusion of the Dent amendment, since it gave the EEOC stronger enforcement authority. The Erlenborn substitute, without the Dent amendment, was accepted by the House, 202 to 194. *Id.* at 312.

88. The Senate defeated two amendments offered by Senator Ervin. The first would have prohibited any government agency from using goals or quotas. *See* note 80 *supra*. The second amendment would have specifically applied only to the Executive Order and not to the courts. It would have amended § 703(j) to read: "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 . . . to grant preferential treatment . . . ." 118 CONG. REC. 4917 (1972) (emphasis added). It was defeated, 30 to 60. *Id.* at 4918; *see* Comment, *supra* note 31, at 754-57.

89. *See, e.g.*, 118 CONG. REC. 1386 (1972) (remarks of Sen. Saxbe) (discussing a different amendment, stating that the Executive Order is independent of title VII and not subject to its more restrictive provisions); *id.* at 4918 (remarks of Sen. Javits) (noting that federal government is not limited by title VII if title VII requires color-blindness); *id.* at 4918 (remarks of Sen. Ervin) (stating that the Executive Order is not, but should be, operating within limits of title VII).

90. Two amendments were proposed. The first amendment, which was defeated, would have transferred the OFCC program to the EEOC. Senator Saxbe, speaking against the amendment, stated:

> The "affirmative action" concept is the mainstay of the Executive Order program . . . .
>
> . . . The OFCC has utilized the proven business technique of establishing "goals and timetables" to insure the success of the Executive Order program. It has been the "goals and timetables" approach, which is unique to the OFCC's efforts in equal employment, coupled with extensive reporting and monitoring procedures that has given the promise of equal employment opportunity a new credibility.
>
> . . . The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. *Proof of overt discrimination is not required.*

Id. at 1385 (1972) (emphasis added).

Senator Saxbe also noted that violations of the Executive Order might be found when there were no violations of title VII. Finally, he expressed concern that merging the OFCC and the EEOC would result in renewed challenges to plans such as the Philadelphia Plan. *Id.* at 1386.

Congress also defeated an amendment that would have made title VII the exclusive federal remedy for certain individuals. *Id.* at 3367-73, 3959-65. In opposing the amendment, Senator Williams, one of the floor managers of the 1972 Act, noted that it could "bar enforcement of the Government contract compliance program . . . . I cannot believe that the Senate would do that after all the votes we have taken in the past 2 or 3 years to continue that program in full force and effect." *Id.* at 3372.

government contractors were being forced to take affirmative action that was not required by title VII. These and other actions[91] provide, as one court has found, "unusually clear evidence" that Congress in 1972 recognized the existence of the Executive Order program, including its goals and timetables requirements, and rejected efforts to restrict or eliminate it.[92]

Congressional ratification of the Executive Order does not necessarily mean that an employer's use of a quota to comply with OFCC regulations is legal, however. It is possible that congressional ratification could not effectively exempt the Executive Order from title VII. And regardless of whether remedial action under the Executive Order is subject to title VII, Congress may not have affirmed the use of quotas. The Supreme Court in *International Brotherhood of Teamsters v. United States*[93] indicated that in interpreting a law a court must look primarily to the intent of the Congress that enacted the law. Thus, in holding in *Teamsters* that section 703(h) protects seniority systems that perpetuate pre-1964 discrimination, the Court disregarded the apparent understanding of the 1972 Congress that such systems were not "bona fide" and looked to the contrary intent of the 1964 Congress.[94] Similar reasoning would dictate that the 1972 Congress could not exempt actions implemented to comply with the Executive Order from sections 703(a) and (d) if the 1964 Congress originally intended those sections to apply to *all* employer action regardless of any governmental authorization.

This result seems extreme, however, especially since if Congress

91. Additional evidence of Senate ratification comes from the section-by-section analysis of the amendments undertaken by the Senate Subcommittee on Labor. With the decision in *Contractors Association* and its holding that §§ 703(a), 703(h), and 703(j) of title VII are not applicable to the Executive Order clearly before the Congress, the subcommittee provided: "In any area where the new law does not address itself, or any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 1972 LEGISLATIVE HISTORY, *supra* note 87, at 1844.

Finally, Senate affirmation of the Executive Order in 1972 can be inferred from the adoption of two provisions designed to make the program fairer and more efficient. The Javits amendment, which became § 715, created the Equal Employment Opportunity Coordinating Council, composed, in part, of the Secretary of Labor and the Chairman of the EEOC to "maximize effort, promote efficiency, and eliminate conflict and inconsistency" among the departments and agencies responsible for equal employment policies. 42 U.S.C. § 2000e-14 (1976). Section 718, requiring a hearing and adjudication before a contract with a contractor who has an approved affirmative action program can be terminated, was also approved. *Id.* § 2000e-17.

92. United States v. International Union of Elevator Constructors, 538 F.2d 1012, 1019-20 (3d Cir. 1976).

93. 431 U.S. 324 (1977).

94. *Id.* at 353-54, 354 n.39 (1977).

could not effectively exempt the Executive Order from the operation of section 703 in 1972, neither could it effectively exempt the courts.[95] Thus all court-imposed quotas would be illegal. In fact, the question whether Congress intended to exempt the courts or the executive branch from title VII's constraints is largely irrelevant if one interprets section 703 to apply only constitutional standards to all remedial affirmative action plans.[96] If, instead, section 703 embodies a race-neutral standard, however, an exemption for remedial action authorized by the courts or by Executive Order is reasonable, considering that the 1972 Congress gave greater consideration to the issue of affirmative action than did the 1964 Congress.

It can also be argued that congressional ratification of the Executive Order in 1972 did not encompass the use of quotas. The distinction between goals and quotas may be one of semantics, but it was generally voiced in 1972.[97] Accordingly, it can be argued that Congress

95. *See* notes 70-81 and accompanying text *supra.*

96. This interpretation was adopted by five justices in Regents of the Univ. of Cal. v. Bakke, 98 S. Ct. 2733 (1978). *See* notes 115-19 and accompanying text *infra.*

97. The Philadelphia Plan and similar plans in the construction trades were the focus of intense debate from 1969 to 1972. The Comptroller General in 1969 ruled that the goals contained within the plans were quotas and were illegal. 49 Comp. Gen. 59 (1969). The Attorney General, in response, issued a statement declaring that the goals did not violate title VII. 42 Op. Att'y Gen. 405 (1969). The gist of the Attorney General's opinion was that race-conscious remedial action does not violate title VII, although totally excluding whites from consideration for positions might be illegal:

> The hiring process, viewed realistically, does not begin and end with the employer's choice among competing applicants. The standards he sets for consideration of applicants, the methods he uses to evaluate qualifications, his techniques for communicating information as to vacancies, the audience to which he communicates such information, are all factors likely to have a real and a predictable effect on the racial composition of his work force. Title VII does not prohibit some structuring of the hiring process, such as the broadening of the recruitment base, to encourage the employment of members of minority groups.

Id. at 411.

President Nixon also distinguished between goals and quotas. *See* Statement by the President Urging Senate and House Conferees to Permit Continued Implementation, 5 WEEKLY COMP. OF PRES. DOC. 1762 (1969) (Philadelphia Plan sets goals, not quotas); President's Radio Address, 8 WEEKLY COMP. OF PRES. DOC. 1343 (1972) (fixed quotas are unfair and are a short-cut to equal opportunity).

The President's statements must be viewed critically since some were made in the context of the President's political "courting" of construction unions. *See* Gould, *Labor & Nixon: Moving the Hard Hats In,* NATION, Jan. 8, 1973, at 41, *cited in* W. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 339 n.16 (1977). If President Nixon had wished to assure that goals would not be used as quotas, he could have issued an Executive Order to that effect and definitively settled the controversy. Also, the President objected to quotas because they were a "detour away from measuring a person on the basis of his ability." President's Radio Address, *supra.* However, in any situation where employees are not chosen on the basis of ability or on the basis of a number of factors, but are chosen purely on the basis of seniority, which has little to do with ability, then quotas may be more defensible.

only affirmed the use of goals. The political rhetoric concerning the distinction between goals and quotas should not necessarily be interpreted as an absolute limit on the type of affirmative action permissible under the Executive Order, however. What seems critical is congressional ratification of the concept of affording minorities a remedial preference.[98] Whether a racial classification assumes the form of an unquantified subjective preference, a quantified weight system, a goal, or a quota may depend largely on the employment context. Hiring goals in the construction industry, which were specifically at issue when Congress rejected amendments to restrict the Executive Order in 1972, were not quotas because the number of available qualified minority workers was unknown.[99] In a situation like Kaiser's, however, in which the number of qualified available minorities exceeds the goal, the goal will consistently be met and will appear to be a quota. The difference, then, between the construction industry goals that were approved by Congress and the Kaiser quota is in the predictability of the results, and not necessarily in the degree of preference given. Because in many situations the difference between a goal and a quota appears to be merely a rhetorical one, congressional affirmation of the use of racial preferences under the Executive Order should probably be interpreted to include the use of quotas, at least when quotas do not result in the hiring of unqualified workers.

POLICY REASONS FOR ALLOWING A SHOWING OF UNDERUTILIZATION TO VALIDATE AFFIRMATIVE ACTION PLANS

If, as the *Weber* court found, a court must find "actual" title VII discrimination when an employer's voluntary affirmative action program is challenged, voluntary efforts to remedy past discrimination will cease. Employment discrimination law has become a complex science, and no employer can predict with any confidence whether a particular

98. Congress definitely approved the concept of a remedial preference. It would not have been necessary to defeat the second Ervin amendment to title VII, *see* note 88 *supra*, had the Congress thought that the Executive Order did not require *any* preferential treatment. Statements about how the Executive Order was operating outside the constraints of title VII also show that Congress understood that the Executive Order resulted in granting some preference to minorities. *See* note 89 *supra*.

99. *See* note 49 *supra*.

employment practice will be struck down by a court as discriminatory.[100] An employer that knows it will be liable for reverse discrimination unless, when its affirmative action plan is challenged, a court finds that the employer is guilty of actual discrimination, will not institute an affirmative action program at all. A flood of title VII suits by minorities will ensue. Such suits are costly, time-consuming, and are an enormous drain on judicial resources.

Requiring a judicial finding of title VII discrimination also presents an evidentiary problem. Information necessary to make a finding of title VII discrimination will typically not be before the court in a reverse discrimination suit. For example, although Kaiser had an interest in defending itself from Weber's claims of reverse discrimination, it had no interest in being adjudged guilty of discrimination under title VII, which could invite further claims by minorities, or allow the court to fashion additional remedial relief aside from the training quota. Not surprisingly, rather than submitting as evidence OFCC findings that it was guilty of discrimination,[101] Kaiser presented oral testimony indicating that it had not discriminated. Such "good faith" declarations are given little weight in title VII suits.[102] Therefore, the district court's determination, accepted by the court of appeals, that Kaiser had not actually discriminated[103] was not well founded. The court's related proposition that the Kaiser quota was implemented solely to remedy "societal" discrimination[104] is also debatable.

The possibility of using the utilization analysis mandated by the Executive Order to determine whether Kaiser was warranted in implementing an affirmative action plan was all but ignored by both the district court and the court of appeals. Yet a statistical showing of gross

100. An employer cannot know with any certainty that (s)he is guilty of discrimination. This is especially true when job requirements that may be justified by business necessity are at issue, *e.g.*, Kaiser's requirements for its apprenticeship program and its craft positions. The outcome of cases in which an employer has used largely subjective criteria that have a disparate racial impact is also difficult to predict. Kaiser could not know whether it was guilty of discrimination in its hiring of the "most qualified" workers before 1969. It did know that its workforce in 1969 was only 10% black. *See* 563 F.2d at 230 (Wisdom, J., dissenting).

101. *See* note 17 and accompanying text *supra*.

102. Two company officials testified that Kaiser had not discriminated, and that Kaiser had hired the "most qualified" workers before 1969. 563 F.2d at 228 (Wisdom, J., dissenting). However, it is well-established in employment discrimination law that absence of discriminatory intent is no defense when a practice that has a discriminatory impact is not justified by business necessity. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

103. 563 F.2d at 224.

104. *Id.* at 224-26.

underutilization should certainly carry some weight in a reverse discrimination suit. Admittedly, demographic comparisons cannot isolate the various sources—employer and societal—that have contributed to an underrepresentation of minorities in an employer's work force.[105] Despite these limitations, however, the Supreme Court has recently accepted the idea that a prima facie case of title VII discrimination can be established by proof that minorities are underrepresented in an employer's workforce in comparison with their availability in the labor market.[106] Thus, even though the defenses available under title VII and the Executive Order may differ slightly,[107] at least the initial stages of proving discrimination are the same under both title VII and the

105. *See generally* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 265-81 (1971); Hallock, *The Numbers Game—The Use and Misuse of Statistics in Civil Rights Litigation*, 23 VILL. L. REV. 5 (1977); Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463 (1973).

Factors contributing to an underrepresentation may include: pre-1965 discrimination, for which an employer is not liable under title VII; the operation of a seniority system that may be bona fide; difference in qualifications of individual applicants in a pool of basically "qualified" applicants; social or psychological factors that may discourage minorities or women from applying for some jobs; housing patterns and transportation systems that may affect job selection. Despite these problems, such statistics are regularly used to prove and to remedy title VII discrimination. *See* cases cited note 75 *supra*. In all likelihood, statistics overstate an employer's actual title VII violation. Similarly, their use in formulating quota remedies ensures that quotas will remedy societal discrimination along with discrimination for which an employer is liable under title VII.

The conceptual distinction between employer discrimination and societal discrimination is unclear. If an employer locates a plant in a suburban area because it is safer, and inner-city residents therefore do not apply for jobs in a proportion that might be expected, it is difficult to characterize the resultant underrepresentation as employer or societal discrimination. If women are deterred from applying for particular industrial positions because they have been excluded from such jobs in the past and no women currently hold those positions, the discrimination may, again, be termed both employer discrimination and societal discrimination.

106. Hazelwood School Dist. v. United States, 433 U.S. 299, 308-09, & 309 n.14 (1977); International Bhd. of Teamsters v. United States, 431 U.S. at 339-43, 339-40 n.20 & 342 n.23. The minority underrepresentation approach is only one way of proving discriminatory effect and a prima facie case in a title VII suit. In the second method, the disparate impact approach, the exclusionary effect of a particular job requirement is shown through a comparison of the percentage of minorities who are excluded by the requirement with the percentage of whites who are excluded. Griggs v. Duke Power Co., 401 U.S. 424, 429-31 (1971).

107. Under title VII, bona fide seniority systems are protected. Also, employers can offer statistical proof showing that a statistical disparity is caused by discrimination that occurred before title VII took effect in 1965. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1977). Finally, the employer can offer proof that the statistics are overbroad and do not reflect the qualified population. *Id.* at 310-13.

A contractor cannot raise the first two defenses noted above to a charge of noncompliance with the Executive Order. A contractor can use statistics showing the actual "qualified" population to formulate goals. Yet the contractor must also consider how much training (s)he is able to provide in order to make all job classifications available to minorities. 41 C.F.R. § 60-2.11(b), .23(a), (b) (1978). The obligation to provide a reasonable amount of compensatory training may go beyond what is required by title VII. Yet if the business necessity defense is construed very narrowly, employers under title VII may also have to train underqualified minorities. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 236-40 (5th Cir. 1974) (experience prerequisite for eligibility for apprenticeship program and on-the-job training found to perpetuate effects of

Executive Order; a statistical showing of underutilization under OFCC guidelines establishes a presumptive violation of title VII. If, in the face of such an underutilization, an employer chooses to give minorities a hiring or promotional preference rather than validate existing employment criteria, or contest in court their business necessity,[108] the presumption that the employer has violated both title VII and the Executive Order should be even stronger. The employer, and not the court, has greater knowledge concerning whether previous employment practices were actually necessary.

Applying this to the Kaiser situation, the statistical utilization analysis conducted by Kaiser under OFCC guidelines showed that Kaiser was at least presumptively guilty of discrimination, both under title VII and under the Executive Order. Faced with these statistics, Kaiser and the predominately white Steelworkers Union implemented a program granting some minority preference, rather than contesting with the OFCC the validity of the previous requirements for craft and craft apprentice positions.[109] At trial, the district court had no evidence before it other than testimony of Kaiser officials to counter the presumption that Kaiser was guilty of both discrimination under title VII and under the Executive Order. This presumption should have been recognized by the court as sufficient support for the proposition that Kaiser itself was probably guilty of discrimination, and that some affirmative action was therefore justified.

In summary, strong arguments favor a court's upholding a plan

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past discrimination; district court ordered to consider whether experience prerequisite could be shortened).

108. Between 1971 and 1978 OFCC guidelines and EEOC guidelines for validating scored objective criteria were substantially the same. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 71-73 (1976). New guidelines to be used by both OFCC and EEOC took effect on August 22, 1978. *See Uniform Guidelines on Employee Selection Procedures*, LAB. REL. REP. (BNA) 401:2231 (1977). The basic principles underlying these guidelines is that employer practices that have an adverse impact on minorities are illegal unless they are justified by business necessity.

There are no objective standards under OFCC or EEOC regulations for evaluating the legality of various nonscored objective criteria that an employer might use—for example, a prior experience or educational requirement. At the least, an employer must be able to show that the requirements are job-related, and predictive of job performance. *See* B. SCHLEI & P. GROSSMAN, *supra*, at 143-47. It is arguable that any requirement that excludes virtually all minorities should be justified by a higher standard of business utility than would otherwise be necessary. *Id.* at 146-47.

109. It is not clear from the record exactly what entry requirements Kaiser used for its craft positions, other than the prior experience requirement. At a different Kaiser plant, an entrance test was used until 1968, and an educational prerequisite was used until 1970. *See* Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1381 (5th Cir. 1978). Any test used would have to be validated according to OFCC or EEOC guidelines.

like Kaiser's without making actual findings of title VII discrimination. Mandating such findings would only discourage employers from voluntarily taking action to remedy discrimination. Moreover, Congress in ratifying the Executive Order in 1972 affirmed that goals could be used in the absence of such findings.[110] Previous Executive Order cases were not predicated on findings of discrimination, but on presumptions.[111] Similarly, quotas ordered pursuant to EEOC consent decrees and conciliation agreements are upheld even though such argreements contain employer disclaimers of title VII discrimination, and even though courts do not examine the facts supporting title VII liability.[112] Finally, the affirmative action guidelines issued by the EEOC allow an employer to utilize a remedial preference in the absence of court findings.[113] A utilization analysis under OFCC guidelines, and an employer's reasonable evaluation that employment practices have an adverse affect on minorities or that such practices leave uncorrected the effects of prior discrimination, will immunize an employer from monetary liability for reverse discrimination.[114]

The court of appeals in *Weber* totally ignored congressional recognition of the Executive Order program in 1972 and thereby refused to acknowledge the independent validity of the OFCC requirements. Also, by somewhat naively accepting Kaiser's allegations that it had not discriminated, the court concluded that the Executive Order and title VII conflicted and that the former mandated a racial preference in the absence of discrimination. Proper analysis of statistics showing underutilization, and judicial notice that such statistics are used in title VII suits, would, however, have enabled the court to conclude that Kaiser was presumptively guilty of discrimination under both the Executive Order and title VII. The court could have upheld the Kaiser quota under the strength of this presumption. Such a result would have promoted voluntary compliance with title VII and would have furthered the congressionally approved objective of imposing on government contractors affirmative action requirements that may occasionally exceed what contractors have to do to comply with title VII.

110. Congress understood in 1972 that judicial findings of discrimination were not made before goals were imposed on contractors. Congress also knew that goals were being voluntarily adopted in hometown plans. *See* notes 49, 63, & 90 *supra.*

111. *See* notes 63-66 and accompanying text *supra.*

112. *See* General Electric Conciliation Agreement, 8 LAB. REL. REP. (BNA) 431:53, 54 (1978); Steel Industry Consent Decree I, *id.* at 431:125; Consent Decree II, *id.* at 431:147.

113. EEOC Affirmative Action Guidelines, 44 Fed. Reg. 4422 (1979).

114. *Id.* § 1608.4, 44 Fed. Reg. at 4449.

BAKKE AND THE EXECUTIVE ORDER

Some of the issues raised by the *Weber* opinion were addressed, but not resolved, in the Supreme Court's first ruling on the voluntary use of racial quotas, *Regents of the University of California v. Bakke*.[115] In *Bakke*, a fragmented Court held that an admissions quota employed by the Medical School of the University of California at Davis violated title VI of the Civil Rights Act of 1964.[116] Four Justices (the Stevens group) found that title VI imposes a requirement of strict racial neutrality,[117] while five Justices (the Brennan group and Justice Powell) held that title VI affords only constitutional protection to whites claiming injury from an affirmative action plan.[118] Despite the invalidation of the Davis quota, five Justices (the Brennan group and Justice Powell) held that race may be used as a factor in university admissions programs.[119]

Because of the peculiar split of the Court, *Bakke* is difficult to apply to *Weber*. The Court clarified only one issue—that even if title VII is applicable to action taken under the Executive Order, the language of section 703 probably codifies only equal protection guarantees when applied to affirmative action.[120] The use of a constitutional standard to judge the legality of affirmative action programs opens up possible bases for upholding voluntary affirmative action that were not considered in *Weber*. Nevertheless, it is possible that the result reached in *Weber* was correct. If a strict scrutiny test is applied to the Kaiser situation

115. 98 S. Ct. 2733 (1978).

116. 42 U.S.C. § 2000d (1976); *see* 98 S. Ct. at 2764 (Powell, J.); *id.* at 2813-14 (Stevens, J., concurring in part and dissenting in part) (Burger, C.J., Stewart and Rehnquist, JJ., joined in the opinion). Five Justices held the quota illegal. Justice Stevens, joined by Chief Justice Burger and Justices Rehnquist and Stewart, decided the issue on statutory grounds. Justice Powell, holding that title VI enacted constitutional principles, decided the issue on constitutional grounds.

117. *Id.* at 2814 (Stevens, J., concurring in part and dissenting in part) (Burger, C.J., Stewart and Rehnquist, JJ., joined in the opinion).

118. *Id.* at 2747 (Powell, J.); *id.* at 2774 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting).

119. *Id.* at 2764 (Powell, J.); *id.* at 2766 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting).

120. *Bakke* leaves unclear whether the constitutional standard is applicable to blacks also, or only to whites claiming reverse discrimination under an affirmative action plan. This issue is more critical in the title VII context, since the Supreme Court has enunciated different standards for judging discrimination against blacks under the Constitution and under title VII. Employment practices that have an adverse impact on blacks and are not justified by business necessity violate title VII although they only violate the Constitution if some discriminatory purpose is shown. Washington v. Davis, 426 U.S. 229 (1976).

and the government's interest in remedying discrimination is only considered compelling when there is a finding of discrimination, the Kaiser quota would be illegal even under a constitutional test.

Unfortunately, it is not clear from *Bakke* what standard of review should be applied to affirmative action programs implemented to comply with the Executive Order, much less what interests are strong enough to be recognized under the applicable constitutional test. The Stevens group never reached the constitutional issue.[121] Of the five justices who did address the constitutional issue, only one, Justice Powell, applied a strict scrutiny test, concluding that the use of quotas to benefit minorities must serve a compelling purpose and must be necessary to accomplish that purpose.[122] However, since Justice Powell's opinion was critical in affirming that a university can use a racial preference although not a quota, it arguably should be given the weight of a majority opinion, at least for affirmative action plans challenged under the various provisions of the Civil Rights Act.

In applying the strict scrutiny test, Justice Powell inferred the government's interest in remedying discrimination was not compelling in the absence of judicial or administrative findings of discrimination or a remedial scheme authorized by Congress.[123] Justice Powell specifically rejected the goal of remedying societal discrimination as a compelling purpose.[124] Two objectives are generally suggested as being served by the Executive Order. One is the government's interest in ensuring that all groups in society share equally in the employment opportunities created and supported by government spending. In addition, the government has an interest in remedying the effects of past employment-related discrimination that can be presumed to exist from severe underrepresentations of minorities in an employer's workforce.[125] Given

121. 98 S. Ct. at 2814 (Stevens, J., concurring in part and dissenting in part) (Burger, C.J., Stewart and Rehnquist, JJ., joined in the opinion).

122. *Id.* at 2749.

123. Justice Powell noted that classifications favoring victimized groups have never been approved absent a judicial, legislative, or administrative finding of a constitutional or statutory violation. *Id.* at 2757-58. He recognized the validity of congressionally authorized administrative actions, and legislation passed by Congress pursuant to its powers under the thirteenth and fourteenth amendments. *Id.* at 2755 n.41. However, he emphasized the need for "legislatively-determined criteria" and stressed that the classification should be responsive to "identified discrimination." *Id.* at 2759.

Arguably, congressional approval of the Executive Order makes the Executive Order program congressionally approved administrative action. Congressional authority to approve broad racial classifications to remedy general employment discrimination can be found in U.S. CONST. amend. XIII, § 2, and *id.* amend. XIV, § 5.

124. 98 S. Ct. at 2756-58.

125. *See* 118 CONG. REC. 1664 (1972) (remarks of Sen. Javits) (recognizing both government's

Justice Powell's analysis, whether or not these purposes are considered compelling may depend on whether the Executive Order has been ratified by Congress.

Congressional ratification in 1972, the consonance of the purposes served by both the Executive Order and title VII,[126] and the direct control Congress exercises over the OFCC are all factors that give the Executive Order program a status similar to that of a program enacted directly by Congress and provide a basis for arguing its validity under *Bakke*. At the time of ratification in 1972, Congress discussed and implicitly affirmed the use of goals and timetables and remedial racial preferences. It also debated and implicitly accepted the validity of using government contracts to enforce remedial action that went beyond title VII and that would ensure that all *groups* within American society share in the benefits resulting from government spending. Finally, Congress recognized that requirements imposed under the Executive Order do not rest on determinations of past discrimination.[127] Given that the 1972 Congress apparently fully understood the operation of the Executive Order program, and that present and future Congresses can restrict the operation of the OFCC in any way, it seems the contract compliance program should be considered as remedial legislation. Accordingly, it should not be necessary that specific determinations of discrimination be made before an employer can implement an affirmative action program involving some racial preference. Similarly, that the Executive Order program is largely self-enforcing should not be taken to indicate that the discrimination it remedies is not identifiable or is merely societal discrimination.

A compelling government interest does not alone justify the use of racial classifications. The classification must also be necessary in light of the purpose to be achieved. Assuming, in light of the implicit congressional authorization of the use of remedial preferences by government contractors, that employers are allowed to use some degree of

ability to promote full utilization of minority employees and government's power to correct discrimination); *id.* at 4918 (remarks of Sen. Javits) (noting that government can affirmatively encourage nondiscrimination and full utilization of minority group employees and women through its contracting power). These remarks were made during the debates in 1972 over the two amendments that would have restricted the Executive Order program. *See* notes 80 & 88 *supra*. *See also* EEOC v. American Tel. & Tel. Co., 556 F.2d at 175, 179 (government has interest in having all groups "fairly represented" in employment).

126. The Supreme Court has recognized that a primary objective of title VII is prophylactic: to remove barriers that have operated to favor white male employees over other employees. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

127. *See* notes 80-90 and accompanying text *supra*.

racial preference to comply with the Executive Order, the issue is whether that preference can take the form of a goal or quota as used by Kaiser.

In *Bakke*, the Brennan group upheld the use of quotas to remedy societal discrimination.[128] Justice Powell, though, found that in light of its objective of maintaining a diverse student body, Davis could only make race "a factor" in its admissions program.[129] Race could only be used as one factor among many because the particular goal that Justice Powell recognized as compelling in *Bakke*—attaining a diverse student body—is necessarily achieved through use of numerous factors. In contrast to the goal of achieving diversity, the Executive Order focuses particularly on minority group status and achievement. Its goal is to upgrade the status of minority and women workers by forcing institutional changes in hiring and promotion that will both remedy the effects of past discrimination and prevent future discrimination. In some contexts, most notably the area of professional employment, these purposes may perhaps be served through a decisional process that factors in race among other attributes. But such a system is unrealistic in the typical industrial employment context in which employment decisions are not made with regard to a number of individual factors. For example, in *Weber*, seniority was the only criterion used to select among the applicants, all of whom were basically qualified. As seniority is allowed as a dominant factor in selection for industrial opportunities, race must also be considered a critical factor. The explicit consideration of race is necessary to remedy the employment discrimination evidenced by statistics showing gross minority underutilization. That alternate means, such as recruitment, would be unsuccessful is evidenced by the situation at Kaiser's plant in 1974. Minorities held 5 of 273 craft positions. The failure of less "drastic" ways of ensuring nondiscrimination and promoting job mobility in the skilled trades has been well-documented.[130] Arguably, therefore, there were no means of upgrading the skills of minorities and guaranteeing that the effects of past discrimination would not be carried into the future other than by

128. 98 S. Ct. at 2789-93 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting).

129. *Id.* at 2762-63. As the Brennan group noted, there is no difference between allowing a racial preference and allowing a quota, other than that the public might find the former more palatable since it obscures the actual weight given to race. However, both result in some exclusion of white candidates. *Id.* at 2793-94 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting).

130. *See generally* W. GOULD, BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES 281-362 (1977).

targeting new training opportunities to minorities and women. Such targeting can best be achieved through the use of goals or quotas.

The previous analysis illustrates that *Bakke* does not foreclose the possibility of upholding a quota such as Kaiser's. However, if the interests served by the Executive Order are not considered "compelling" or if quotas are rejected as unnecessary, then under Justice Powell's analysis a quota could only be implemented in response to prior findings of discrimination.[131] This result is actually narrower than that reached in *Weber*. Yet, Justice Powell also intimated that quotas might be permissible in circumstances broader than those suggested in *Weber*. For example, Justice Powell cited with apparent approval the construction industry cases, thus implying that prevailing OFCC standards rather than title VII standards may be used to evaluate discrimination, and that administrative findings of third-party discrimination may warrant quota relief.[132] If these possibilities were further developed, perhaps the OFCC could make industry-wide findings of discrimination in order to legalize quotas in major industries.

CONCLUSION

It is important that the concept of identifiable discrimination articulated by Justice Powell in *Bakke*[133] not be interpreted to mean "actual employer discrimination," as was demanded by the *Weber* court.[134] The differentiation between employer and societal discrimination presents obvious evidentiary problems since no party before the court in an affirmative action case has an interest in proving employer discrimination. Moreover, the use of statistics in both the proof and remedial stages of litigation under title VII and in the Executive Order program makes it extremely difficult to separate the effects of societal and employer discrimination. Given these difficulties, and the implicit recognition of the importance of societal discrimination that is embodied in the use of quotas in *any* circumstance, it is doubtful that the constitutionality of racial classifications should depend on the distinction.

Rather than being limited to findings of employer discrimination,

131. 98 S. Ct. at 2754-59.
132. *Id.* at 2754 n.40.
133. *Id.* at 2754-59.
134. 563 F.2d at 224-25.

the concept of identifiable discrimination should be broadened in affirmative action litigation to include "presumptive" discrimination. Although the Supreme Court has rejected the idea that disparate impact or minority underrepresentation alone makes out a constitutional[135] or statutory violation,[136] it has accepted the fact that a statistical underrepresentation creates a presumption of discrimination that shifts to the employer the burden of proving nondiscrimination.[137] When statistics showing underrepresentation are used in accordance with a legislatively approved remedial scheme such as the Executive Order program, they should be weighed heavily by the courts in determining whether an affirmative action program is justified by employment discrimination. The idea that a court can recognize the existence of probable discrimination without making actual findings to that effect is supported by early Executive Order decisions, by judicial acceptance of consent decrees under title VII, and by congressional approval of the Executive Order program in 1972.

Beyond the broad statutory and constitutional issues *Weber* raises, the case demonstrates the reality of "progress" in "equal employment opportunity" for minorities in this country. After ten years of enjoying the legal rights to equal employment under the Civil Rights Act of 1964, minorities, who comprised thirty-nine percent of the area labor force, held only two percent of the craft positions at Kaiser's plant. Such statistics demonstrate the continuing effects of employment discrimination, and that legal rights alone may result in little measurable economic progress for minorities. As was noted in an early Executive Order decision, "it is fundamental that civil rights, without economic rights, are mere shadows."[138] In order to remedy past and continuing discrimination, and in order to guarantee some measure of economic progress to minorities and women, training opportunities must be targeted. Arguably, targeting cannot be achieved without the use of quotas. At the least, modest entry quotas should be permitted[139] for

135. Washington v. Davis, 426 U.S. 229 (1976).

136. Disparate impact or extreme underrepresentation can constitute a statutory violation but only if the employer cannot successfully rebut the inference of discrimination. Hazelwood School Dist. v. United States, 433 U.S. 299, 311-13 (1977); Dothard v. Rawlinson, 433 U.S. 321, 339-40 (1977).

137. *See* note 106 *supra.*

138. Contractors Ass'n v. Secretary of Labor, 311 F. Supp. 1002, 1010 (E.D.Pa. 1970).

139. The 50% quota for Kaiser's program is misleading. In the first year the training program admitted 7 blacks, and one black craftsman was hired from outside the plant. The same year, 6 whites were admitted into the training program, and 21 whites were hired as craftsmen from

totally new training opportunities, with respect to which majority workers have no existing rights or expectations.

Major industrial employers such as Kaiser are well-situated to remedy both their own discrimination and other employment-related discrimination that affects opportunities within their industries. Judicial insistence on findings of discrimination either prior to or subsequent to the implementation of a quota will probably halt all voluntary affirmative action programs by employers like Kaiser. Conditioning preferential treatment on industry-wide administrative findings of discrimination, and defining discrimination by OFCC standards, is preferable to requiring judicial findings of title VII violations. Nonetheless, even this option would significantly impede progress toward equal employment goals by making all affirmative action dependent on administrative proceedings. Remedial action would thus slow to a snail's pace. This result is legally unnecessary, in light of the possibility of affirming the legality of the Executive Order program and its system of self-enforcement, and recognizing that in the vast majority of cases title VII and the Executive Order are complementary, and not contradictory.

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outside the plant. Kaiser's program would have ensured an increase of approximately 2.5% minority craftsmen yearly. Petition for Writ of Certiorari on behalf of the United States and Equal Employment Opportunity Commission at 3-5.