# Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber

Robert Belton

# DISCRIMINATION AND AFFIRMATIVE ACTION: AN ANALYSIS OF COMPETING THEORIES OF EQUALITY AND *WEBER*

ROBERT BELTON†

*Since Title VII of the Civil Rights Act of 1964 was passed to proscribe discrimination in employment, the courts have had to determine the proper scope and application of the Act. This inquiry has gained more crucial significance in the past decade as courts, amid cries of "reverse discrimination" by disadvantaged white employees, have had to judge the validity under Title VII of race-conscious affirmative action plans, plans that use minority status as a factor in employment decisions. The United States Supreme Court has made their task more difficult by reading into the Act two competing theories of equality. One theory, disparate impact, supports the use of affirmative action programs to increase minority representation in the work force. The other theory, disparate treatment, precludes the use of race in an employer's decisionmaking process and thus supports claims of reverse discrimination. In this Article Professor Belton first traces the development of these two competing and conflicting theories of equality. He then analyzes the Court's decision in* United Steelworkers v. Weber, *a decision in which the Court again faced the problem of the validity of affirmative action programs. Professor Belton believes that the Court in* Weber *has at last adopted a rationale that will allow for an accommodation between the two views of equality and for the use of race-conscious affirmative action plans in appropriate circumstances. Professor Belton lauds this result, believing that affirmative action is necessary to overcome the effects of prior discrimination and assure that individuals whose lives have been marked by discrimination will not be forever barred from equal access to and opportunity in the job market.*

## I. INTRODUCTION

Brian Weber, a white laboratory technician at a Kaiser Aluminum plant in Gramercy, Louisiana, succeeded Allan Bakke as the central character in perhaps the most controversial and vigorously debated issue facing the Supreme Court and the nation in recent years: May affirmative action programs, consistent with either constitutional or statutory provisions, include race-conscious quotas designed to remedy *specific* and *societal* discrimination? The United States Supreme Court, after many years of refusing to consider the issue,[1] faced it squarely in *Regents of University of California v. Bakke*.[2] At

† Associate Professor of Law, Vanderbilt Law School. B.A. 1961, University of Connecticut; J.D. 1965, Boston University School of Law. I express my appreciation to Waverly D. Crenshaw for his research assistance in the preparation of this Article.

1. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312 (1974); Contractors Ass'n v. Secretary of

issue in *Bakke* was the validity of a medical school's voluntary affirmative action plan that reserved sixteen seats out of an entering class of one hundred for minority and disadvantaged students. Four Justices, relying solely on statutory grounds, held that the plan violated Title VI of the Civil Rights Act of 1964[3] because of its explicit use of racial quotas.[4] A majority of the Court, however, held that neither Title VI nor the fourteenth amendment prohibits the specific use of race as one of several factors in academic admissions decisions.[5] Because of the sharply divided votes, *Bakke* did little to settle the question of the legality of race-conscious affirmative action beyond deciding the fate of Allan Bakke and the admissions program at the medical school. It provided even less help with employment discrimination cases brought under Title VII of the Civil Rights Act of 1964,[6] which, like Title VI, is part of the Civil Rights Act passed by Congress in 1964.[7]

Almost one year after *Bakke*, the Supreme Court, in *United Steelworkers v. Weber*,[8] considered the legality under Title VII of a voluntary race-conscious affirmative action program adopted by a union and a private employer

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Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); United States v. International Bhd. of Electrical Workers, Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

2. 438 U.S. 265 (1978).

3. 42 U.S.C. §§ 2000d-2000d-6 (1976 & Supp. III 1979). The Act provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied of the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* § 2000d.

4. 438 U.S. at 271. Justice Stevens, writing for Chief Justice Burger and Justices Stewart and Rehnquist, adopted the plain-meaning canon of statutory construction to interpret Title VI and thus found it unnecessary to reach the issue of the constitutionality of the use of race-conscious quotas. 438 U.S. at 408-21.

5. Justice Brennan, joined by Justices White, Marshall and Blackmun, reached the constitutional question. 438 U.S. at 324-79. Justice Powell's vote was pivotal to the result reached in the case. He also reached the constitutional question, but on different grounds from Justice Brennan. *Id.* at 269-320.

Justice Powell attempted to lay to rest the semantic squabble over whether the legitimacy of race-conscious remedies turn on whether they were designated "goals and timetables" or "quotas." 438 U.S. at 288-89.

6. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. II 1978). Title VI of the Civil Rights Act of 1964 provides a limited opportunity to redress employment discrimination. The broad prohibition against discrimination on the ground of race, color or national origin "under any program or activity receiving Federal financial assistance" is qualified as to employment discrimination under § 2000d-3, which states, "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where the primary objective of the federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3 (1976). Thus, Title VI does not provide a judicial remedy for employment discrimination by employers receiving federal funds unless providing employment is a primary objective of the federal aid or discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid. *See* Trageser v. Libbie Rehab. Center, Inc., 590 F.2d 87, 88-89 (4th Cir. 1978); Baker v. City of Detroit, 483 F. Supp. 930, 980 (E.D. Mich. 1979); 45 C.F.R. § 80.3(c)(3) (1975) (dealing with the relationship between 42 U.S.C. § 2000d and 42 U.S.C. § 2000d-(3)).

7. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

8. 443 U.S. 193 (1979). After the highly publicized decision in *Bakke*, some pronouncement from the Court on the legality of quotas in employment discrimination was expected in County of Los Angeles v. Davis, 440 U.S. 625 (1979). The Court had agreed to review two questions in *Davis*: (1) whether the use of employment policies that were exclusionary in operation, but not purposefully discriminatory, violated the Civil Rights Act of 1966, 42 U.S.C. § 1981 (1976), and (2) whether the imposition of minimum hiring quotas for "fully qualified minority applicants"

without a prior judicial finding of past racial discrimination. The Court, by a five-to-two vote, held that Title VII does not prohibit all privately adopted race-conscious affirmative action designed to eliminate a manifest racial imbalance in traditionally segregated job categories. Although the full implications of *Weber* remain to be developed, it is a basic thesis of this Article that *Weber*, unlike *Bakke*, provides a framework for establishing a balanced solution to a difficult conceptual problem—the meaning of equality—and helps to define the potential contours of race-conscious affirmative action. Explicit also in this thesis is the recognition that *Weber* provides a long-needed doctrinal foundation, albeit a limited one, for validating the concept of affirmative action, which since 1961 has been central to the national policy against discrimination in employment.[9]

The implications of *Weber* for the implementation of race-conscious affirmative action cannot be understood without an examination of the factual and legal background against which it was decided. Critical to an understanding of that background is an examination of the conflict perceived by the courts among the stated primary purpose of Title VII, the statutory language chosen to carry out that purpose, and the competing theories of discrimination or equality that the Supreme Court has read into the substantive provisions of Title VII. Neither Congress nor the Supreme Court has resolved this conflict.

Part II of this Article develops the factual and legal background of *Weber*. Part III analyzes and discusses *Weber*. The basic thesis of Part III is two-fold. First, the analysis used by the majority—balancing the literal language of Title VII with the primary purpose, or "spirit," of the Act—is an attempt to accommodate the conflicting theories of equality read into the Act by the Supreme Court.[10] Second, by implication at least, *Weber* deals with two questions that are of critical importance to the continued vitality of the affirmative action concept: (1) whether race-conscious quotas are permissible absent a legislative, judicial, or adminstrative finding of unlawful discrimination, and (2) whether the beneficiaries of affirmative action plans must themselves be identifiable victims of specific, as opposed to societal, discrimination.[11]

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was an appropriate remedy in the circumstances of this employment case. 440 U.S. at 627. A majority of the Court avoided these questions on the ground of mootness. *Id.*

9. The concept of "affirmative action" as a remedial tool to combat discrimination in employment was first introduced in 1961 with the issuance of Exec. Order 10,925 by President Kennedy. 3 C.F.R. 448 (1959-1963 Compilation). This order required the inclusion of the following clause in all contracts with the federal government: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." *Id.* at 450. Exec. Order 11,375, 3 C.F.R. 684 (1966-1970 Compilation), which became effective in October 1968, amended Exec. Order 11,246, *id.* at 339 (1964-1965 Compilation), the successor to Exec. Order 10,925, *id.* at 448 (1959-1963 Compilation), by forbidding discrimination on the basis of sex by federal contractors.

10. *See* text accompanying notes 30-128 *infra*.

11. *See* text accompanying notes 278-320 *infra*.

## II. FACTUAL AND LEGAL BACKGROUND

### A. *The Affirmative Action Concept*

This nation unquestionably has a long way to go to achieve a society in which the status of being a black person[12] is as irrelevant as the color of one's eyes. The affirmative action concept embodies a policy decision that some forms of race-conscious remedies are necessary to improve the social and economic status of blacks in our society. That policy decision, however, cannot be isolated from the history that gave rise to the affirmative action concept. When viewed in light of that history—decades of blatant public and private discrimination against blacks *as a group*—the underlying premise of affirmative action is manifest: If the chasm between "equality" as an abstract proposition and "equality" as a reality is to be bridged, something more is needed than mere prohibitions of positive acts of discrimination and the substitution of passive neutrality. That something more, the affirmative action concept dictates, must include race-conscious remedies.[13]

The crucial aspect of affirmative action is that it goes beyond the mere

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12. Although racial discrimination is the dominant issue discussed in this Article, much of the discussion is applicable to other kinds of discrimination, such as sex discrimination and ethnic discrimination.

13. This point was stated succinctly by Justice Blackmun in his separate opinion concurring in the judgement in *Bakke*:

> I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. *In order to get beyond racism, we must first take account of race. There is no other way*. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetrate racial supremacy.

438 U.S. at 407 (Blackmun, J., dissenting) (emphasis added).

Other courts and commentators also have acknowledged this need for race-conscious remedies. In Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), the court noted:

> [O]ur society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

*Id.* at 16. A former Solicitor at the Department of Labor has argued that

> [N]ondiscrimination and affirmative action are not mutually exclusive concepts designed to impale an employer upon the horns of a dilemma, but are wholly consistent and equally obtainable both in theory and in practice. The theory is best understood by acknowledgement of the fact that de facto discrimination permeates American society despite our successes in combatting de jure discrimination. Thus, although an employer may not seek to discriminate, neutral employment policies may have the effect of discriminating against minorities. For instance, the recruitment policies of an employer determined not to discriminate may in the actual selection of job applicants have the effect of excluding minority persons unless a conscious effort is made to give the minority community notice of outstanding job vacancies. If this is not done, minority applicants will not appear to seek employment, and the employer will have no opportunity to place his nondiscriminatory selection policy into effect. In this situation, taking affirmative steps to broaden the recruitment base is wholly consistent with the employer's nondiscrimination obligation.

Nash, *Affirmative Action Under Executive Order No. 11,246*, 46 N.Y.U.L. REV. 225, 230 (1971). *See also*, Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975).

adoption of a passive, prospective, nondiscriminatory principle and focuses on active implementation of specific race-conscious remedies that are designed to promote the status or number of discriminatees in a given setting. A race-conscious remedy may be instituted by judicial mandate upon finding a statutory violation,[14] by voluntary action taken by an employer or institution based on self-perceived discriminatory behavior,[15] or by legislative action,[16] executive action,[17] or consent decree.[18] Thus, it could be argued that affirmative action is a recognition of the necessity of adopting theories of liability and remedy that are not based solely on causation[19] and fault[20] of a particular

14. *E.g.*, Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.), *cert. denied*, 419 U.S. 895 (1974) (en banc); Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

15. *E.g.*, Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673 (E.D. Va. 1976), *vacated and remanded*, 586 F.2d 297 (4th Cir. 1978).

16. *E.g.*, 28 U.S.C. § 631 note (Supp. III 1979) (requiring that selection panels "shall give due consideration to all qualified individuals, especially such groups as women, blacks, Hispanics, and other minorities."); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. III 1979) (requiring federal contractors to employ handicapped individuals); Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2012 (1976 & Supp. III 1979) (requiring government contractors to adopt affirmative action procedures in the employment of veterans); Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2) (Supp. I 1977) (the legality of the 10% set-aside for minority enterprises was affirmed in Fullilove v. Klutznick, 100 S. Ct. 2759 (1979)).

17. *E.g.*, Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), *as amended by* Exec. Order No. 11,375, 3 C.F.R. 320 (1967), and Exec. Order No. 11,478 (1966-1970 Compilation) (prohibiting government contractors from discriminating on the basis of race, sex, religion, or national origin). *See* Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U.L. REV. 225 (1971).

18. *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom.* Harris v. Allegheny-Ludlum Indus., Inc., 425 U.S. 944 (1976); United States v. City of Chicago, 395 F. Supp. 329 (N.D. Ill.), *aff'd*, 525 F.2d 695 (7th Cir. 1975); Comment, *Consent Decrees: Can They Withstand the Charge of Reverse Discrimination?*, 19 SANTA CLARA L. REV. 115 (1979).

19. Underlying much of the controversy over the affirmative action principle is the question of the extent to which the twin notions of "causation" and "fault" should be applicable in determining both liability and remedy under laws prohibiting discrimination. The causation principle relies heavily on principles of causation developed in tort law. Although there is some disagreement about the outer fringes of the causation theory, two core principles run through much of the discussion: to establish defendant's liability, plaintiff must establish both cause-in-fact and proximate cause. *See, e.g.*, James & Perry, *Legal Cause*, 60 YALE L.J. 761 (1951). As applied to employment discrimination cases, the causation principle would direct a court to find a defendant liable whenever the plaintiff could show that race, for example, was both a cause-in-fact and a proximate cause of an adverse employment decision. The cause-in-fact requirement is usually tested by the familiar "but for" principle of tort law. *See, e.g.*, Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 995-96 (5th Cir. 1969); W. PROSSER, HANDBOOK OF THE LAW OF TORTS 102, 236-41 (4th ed. 1971); James & Perry, *supra*, at 762. *See also* Note, *Tort Remedies for Employment Discrimination Under Title VII*, 54 VA. L. REV. 491 (1968). The defendant's action need not be the sole cause in fact of the injury; it is sufficient that it be *a* cause in fact. *See* Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349 (7th Cir. 1971).

For an attempt to build an entire theory on a civil rights version of proximate cause, see Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36, 42-99 (1977).

20. Under the "fault" notion, an underlying premise of the laws prohibiting discrimination is the emphasis on the need to separate from the masses of society those blameworthy individuals who are violating the otherwise shared norm that certain forms of discrimination are legally and morally wrong. The "fault" idea is reflected in the assertion that only "intentional" discrimination violates the laws prohibiting discrimination. *See, e.g.*, Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977); Washington v. Davis, 426 U.S. 229, 239-42 (1976) (cases emphasizing that both an act and an intent are necessary to effect intentional

individual. The affirmative action concept is now explicit or implicit in every major piece of federal legislation[21] or executive order[22] dealing with wide-ranging manifestations of discrimination.[23]

Efforts to eliminate discrimination through affirmative action received widespread and broad-based support when blatant forms of discrimination were more prevalent.[24] However, the enthusiasm for the economic redistribution that had evolved during the 1960's civil rights era began to wane in 1971 when the worldwide economic recession started to have an impact on the American economy. The continued expansion of the middle-class sector was no longer assured, and white males who found themselves competing not only with other white males but also with blacks, other minorities, and women, began to seek judicial redress for their own claims of discrimination. Thus, affirmative action became one of the more controversial and vigorously litigated issues because it was claimed to impose discrimination in "reverse" against white male citizens and was, therefore, legally and morally indefensible.[25]

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discrimination). In its pure form, intentional discrimination is conduct accompanied by a purposeful desire to produce discriminatory results. One can thus evade liability for ostensibly discriminatory conduct by showing that the action taken was for good reasons, *e.g.*, Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978), or for no reason at all. The fault concept gives rise to a complacency about one's own moral status. It creates a class of "innocents" who need not feel any personal responsibility for the conditions associated with discrimination and who therefore feel great resentment when called upon to bear any burden in connection with remedying violations. This notion is reflected in the views of several of the Supreme Court Justices in employment discrimination cases. *E.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747, 781 (1976) (Burger, C.J., dissenting in part, concurring in part). This resentment accounts for much of the ferocity surrounding the "reverse discrimination" issue. *See, e.g.*, N. GLASER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975); B. GROSS, DISCRIMINATION IN REVERSE, IS TURNABOUT FAIR PLAY? (1978); R. O'NEIL, DISCRIMINATING AGAINST DISCRIMINATION (1975). *See also* Black, *Civil Rights in Times of Economic Stress*, 1976 ILL. L. F. 559, 565.

21. *See generally* 2 EMPL. PRAC. GUIDE (CCH) ¶¶ 5001-5002 (1979); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW (1976).

22. Exec. Order No. 11,141, 29 Fed. Reg. 2477 (1964) (proscribes age discrimination by federal contractors); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation) (proscribes discrimination based on race, color, religion, sex, and national origin, as amended); Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Compilation) (amends Exec. Order No. 11,246 by substituting "religion" for "creed" and adding "sex" to the types of discrimination prohibited); Exec. Order No. 11,758, 39 Fed. Reg. 2075 (1974) (employment of veterans by federal contractors); Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969) (equal employment opportunity in federal employment); Exec. Order No. 11,830, 40 Fed. Reg. 2411 (1975) (employment of the handicapped); Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (1976) (also dealing with the handicapped); Exec. Order No. 11,935, 41 Fed. Reg. 37,301 (1976) (requiring citizenship for federal employment). The orders are collected and reprinted in 1 EMPL. PRAC. GUIDE (CCH) ¶¶ 3675-3764 (1978).

23. *See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT (1971); UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT 20-23 (1979); UNITED STATES COMMISSION ON CIVIL RIGHTS, TOWARD EQUAL EDUCATIONAL OPPORTUNITY: AFFIRMATIVE ADMISSIONS PROGRAMS AT LAW AND MEDICAL SCHOOLS (1978).

24. *See, e.g.*, Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2 (1976); Bell, Book Review, 25 EMORY L.J. 897 (1976).

25. A basic statement of the argument against the use of quotas based upon the affirmative action principle is found in A. BICKEL, THE MORALITY OF CONSENT 133 (1975):

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of

The concepts of affirmative action and reverse discrimination are so intertwined as to make clear conceptual delineations between them extremely problematic. Both concepts have doctrinal foundations in the same constitutional[26] and statutory[27] provisions. There appears to be a consensus, however, that an issue of reverse discrimination arises only when the form of affirmative action is articulated in terms of a race-conscious preference for blacks. A fundamental problem in the affirmative action/reverse discrimination controversy is the alleged conflict between the desire to render the law "blind" as to particular attributes (for example, race) and the pragmatic need to prefer, in some but not all circumstances, one group historically disadvantaged in its competition with others because of that attribute.[28] This fundamental problem has

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fundamental principle but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution. Yet a racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.

*See also* Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

26. The fourteenth amendment equal protection clause is the constitutional provision on which a majority of the Court relied, for example, in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (quotas questioned by a majority of the Court), and in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (mathematical ratios based on race approved).

27. Title VII has been relied upon to sanction race-conscious quotas for blacks, *see, e.g.*, Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974), and to uphold claims of "reverse discrimination" of whites, *see e.g.*, McAleer v. AT&T Co., 416 F. Supp. 435 (D.D.C. 1976). *See also* EEOC v. Contour Chair Lounge Co., 596 F.2d 809, 814 (8th Cir. 1979).

28. The commentary on this subject is extensive. *See, e.g.*, B. BITTKER, THE CASE OF BLACK REPARATIONS (1973); N. GLAZER, AFFIRMATIVE DISCRIMINATION (1975); B. GROSS, *supra* note 20; R. O'NEIL, DISCRIMINATION AGAINST DISCRIMINATION: PREFERENTIAL ADMISSIONS AND THE DEFUNIS CASE (1975); Baldwin & Nagan, *Board of Regents v. Bakke: The All-American Dilemma Revisited*, 30 U. FLA. L. REV. 843 (1978); Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979); Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21 (1979); Brest, *The Supreme Court, 1975 Term-Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 16-22 (1976); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Edwards & Zaretsky, *supra* note 13 (1975); Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFF. 107 (1976); Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87 (1979); Hastie, *Affirmative Action in Vindicating Civil Rights*, 1975 U. ILL. L.F. 502; Kaplan, *Equal Justice in an Unequal World; Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHILOSOPHY & PUB. AFF. 348 (1973); O'Neil, *Bakke in Balance: Some Preliminary Thoughts*, 67 CAL. L. REV. 143 (1979); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 CAL. L. REV. 171 (1979); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Ravenell, *DeFunis and Bakke . . . The Voice Not Heard*, 21 HOW. L.J. 128 (1978); Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Sedler, *Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California*, 17 SANTA CLARA L. REV. 329 (1977); Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. PITT. L. REV. 285 (1977).

The color-blind theory was first given explicit recognition in 1896: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

An argument has been advanced that a claim of "reverse discrimination" is a legal fiction and

not been resolved and lies at the heart of *Weber*. Moreover, the legal developments prior to *Weber* exacerbated rather than ameliorated this fundamental problem.

A review of the primary purpose of Title VII and the theories of discrimination that developed out of its statutory language demonstrates the existence of conflicting policy and value choices that Congress left to the courts to decide. However, the courts either fail to resolve these policy and value choices, or, if they make a choice, they erode the doctrinal underpinnings of that choice while at the same time professing to adhere to "settled principles."[29] These judicial shortcomings account for much of the controversy over race-conscious affirmative action at the time *Weber* was decided.

### *B. Conflict Between the Purpose of Title VII and Theories of Equality*

The primary purpose of Title VII was to improve the economic status of blacks as a group.[30] Of all the civil rights legislation enacted prior to 1965, Title VII alone was aimed at the economic oppression of blacks, and few do-

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that in reality the advancement of minorities and women up the economic ladder is not the bestowal of a privilege but the removal of unearned benefits from members of the majority:

> The documentation of past discrimination against minorities also serves to document its counterpart: unfair advantages to non-minorities. If minorities are underrepresented . . . it is safe to assume that non-minorities are overrepresented. Stated simply, what society has been taking from minorities, it has been giving to its non-minorities. The reverse discrimination aspect of affirmative action is, in reality, the removal of that benefit which American society has for so long bestowed, without question upon its privileged classes. The question, viewed in this light, becomes: "Is the removal of a benefit, given for centuries to some at the expense of others, truly a discrimination against that long-privileged class?"

Comment, *The Myth of Reverse Discrimination: An Historical Perspective*, 23 CLEV. ST. L. REV. 319, 322 (1974).

29. *Compare, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971), *with* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). *See generally* Edwards, *The Coming Age of the Burger Court: Labor Law Decisions of the Supreme Court During the 1976 Term*, 19 B.C.L. REV. 1, 4-36 (1977).

30. Extensive hearings in Congress leading to the Civil Rights Act of 1964 focused national attention on the adverse social and economic position of blacks in employment and other areas of society. *See, e.g., Hearing on Equal Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 3, 12-15, 47-48, 53-55, 61-63 (1963); *Hearing on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 2300-03 (1963); *Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 116-17, 321-29, 426-30, 449-52, 492-94 (1963).

Also, the Court in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), noted that

> [a]s the Court observed in *Griggs v. Duke Power Co.*, 401 U.S. at 429-430, the primary objective [of Title VII] was a prophylactic one:
>
> "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of *white employees* over other employees."

*Id.* at 417 (emphasis added). The Court previously had found this objective to be "plain from the language of the statute." Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971). Again, in McDonnell-Douglas v. Green, 411 U.S. 792, 800 (1973), the Court emphasized that the primary purpose of Title VII was to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially ratified job environments to the disadvantage of minority citizens." *See also* EEOC, LEGISLATIVE HISTORY OF TITLES VII AND IX OF THE CIVIL RIGHTS ACT OF 1964, 1-11 (1968). *See generally* M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966).

mestic problems have proved more tractable or received more scholarly attention than the depressed economic position of that group.[31] The statutory language that Congress chose to carry out this purpose, however, provides a remedy that is not limited to blacks. Other groups, whether defined in terms of race, sex, ethnicity, or religion, also are given the protection of Title VII.[32] Therefore, although it is clear that the primary purpose of Title VII was to provide a remedy for blacks, the effectuation of that purpose is inextricably linked to how the concept of "equality" (or "discrimination") should be construed in light of the broad statutory language used by Congress.

There are two basic concepts of equality that have been discussed in the

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31. For a reader on the civil rights struggle in the twentieth century reflecting the diversity of skills and people it has engaged, see J. FRANKLIN & I. STARR, THE NEGRO IN THE TWENTIETH CENTURY AMERICA (1967). *See also* U.S. COMMISSION ON CIVIL RIGHTS, EMPLOYMENT (1961). *See generally* U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE, PUB. NO. 30, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1970-1978 (1979).

32. The broad prohibitory language of Title VII provides in 42 U.S.C. §§ 2000e-2(a)-(c) (1976):

> (a) Employers. 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.
>
> (b) Employment Agency. It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.
>
> (c) Labor Organization. It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against any individual in violation of this section.

Title VII is not the first statute primarily concerned with improving the status of blacks but containing language potentially in conflict with that purpose. For example, the Congress that enacted the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1976), was primarily concerned with providing protection for the newly emancipated blacks. Yet, a principle of equality of treatment for all persons (except perhaps women *qua* women) is sounded in the congressional debates. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976); Spiess v. C. Itoh & Co., 408 F. Supp. 916, 919-25 (S.D. Tex. 1976); CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (remarks of Rep. Wilson). *See generally* Buchanan, *The Quest for Freedom: A Legal History of The Thirteenth Amendment*, 12 HOUS. L. REV. 1, 3-23 (1974).

cases and the literature.[33] In most situations each yields a different outcome in the implementation of affirmative action. One conception of equality is *equal treatment*. It embraces the notion of color-blindness and focuses on fairness to the individual instead of fairness to the group of which he is a member. Under this view individual blacks should be treated "equally" by an employer in the sense that race should not be a factor in an employment decision. This conception of equality is often analogized to positions in a foot race: if race is eliminated as a factor in the employment decision, blacks will be on an equal footing with whites.[34] An ambiguity exists, however, in the implementation of this view, because a pure application would prohibit consideration of race in *all* circumstances, even if the result is to perpetuate continuing effects of prior discrimination.[35] Another application of this theory, one more consistent with decisions of the Supreme Court, would permit, and in some cases require, consideration of race in effectuating a remedy based upon a judicial, legislative, or administrative finding of unlawful discrimination against a group or an individual member of a group.[36] The Supreme Court has found support for the equal treatment concept in section 703(a)(1) of Title VII, which makes it an unlawful employment practice for an employer to discriminate against "*any*

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33. These two conceptions of equality are explained in Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237-49 (1971).

The court in Local 189, Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970), (*citing* Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967)), articulated several possible theories of equality under Title VII. The "freedom now" theory would allow blacks who had been the victims of discrimination immediately to replace whites who "but for" the past discrimination would not now enjoy the employment benefit they now enjoy. The "status quo" theory would allow an employer who has been found guilty of unlawful discrimination to satisfy the requirement of Title VII by merely ending explicit racial discrimination. Under the "status quo" theory, whatever unfortunate effects of discrimination there might be in the future as to those blacks who were the victims of past discrimination would be considered merely as an incident of the now extinguished discrimination. The court found that the "rightful place" theory stands between "freedom now" and "status quo." Under the "rightful place" theory, Title VII would be construed as prohibiting the *future awarding* of jobs on the basis of a system found to be unlawful and which has the effect of perpetuating the effects of past discrimination.

34. Fiss, *supra* note 33, at 237.

35. For example, in upholding a claim of reverse discrimination in employment brought by a white male, the court in Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673, 681 (E.D. Va. 1976), *vacated*, 586 F.2d 297 (4th Cir. 1978), stated:

> There will never be sex or racial peace until the idea of sex and racial discrimination is dead and buried. The primary—the only—beneficiaries of affirmative action plans and their siblings are the thousands of persons engaged in the civil rights business, bureaucrats, lawyers, lobbyists and politicians. The persons who are suffering are the ostensible objects of the plans' solicitude, and persons, such as plaintiff herein, who get flattened by the civil rights steamroller.
>
> The only means of ridding the nation of invidious discrimination is to tear it out . . . "root and branch," *Green v. Sch. Bd. of New Kent Co.*, 391 U.S. 430, 438 . . . (1968). Affirmative action only perpetuates it.

36. The color-blind theory has never become the law. The Supreme Court has explicitly upheld the remedial use of racial classifications on a number of occasions. *See, e.g.*, United Jewish Organization v. Carey, 430 U.S. 144 (1977); Wright v. Council of Emporia, 407 U.S. 451 (1972); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971). *See also* Regents of Univ. of Cal. v. Bakke, 438 U.S. at 300-02, 301 n.40 (Powell, J.); Monroe v. Board of Comm'rs, 391 U.S. 450 (1968).

*individual* . . . because of such *individual's* race."[37] Claims of reverse discrimination such as Weber's are based on the equal treatment theory.

A second conception of equality is *equal opportunity* (or equal achievement). This view recognizes that race sometimes must be considered when distributing jobs among racial groups[38] and requires those subject to Title VII to consider race in appropriate cases to ensure that discrimination is not perpetuated against protected classes. Only decisions that do not continue to disadvantage protected classes would be permitted. It is concerned also with both the quantity and quality (measured, for example, by income levels and status) of the jobs for which blacks are employed. Under this view of equality, jobs are to be distributed so that the relative economic position of blacks as a group is improved, making the economic status of blacks approximately equal to that of whites. Both the elimination of disproportionate underrepresentation of blacks in all levels of the actual work force of an employer and their overrepresentation in the unemployed ranks in the relevant labor market are the aims of this view of equality. Proponents of the second view of equality reject the equal treatment view as a spurious sort of equality because it fails to accommodate for the present and continuing effect of past discrimination.[39] The Supreme Court has found statutory support in Title VII for the equal opportunity view of equality in section 703(a)(2), which provides that it is an unlawful employment practice for an employer 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 opportunity or otherwise *adversely affect* his status as an employee, because of such individual's race . . . ."[40] The affirmative action principle is based in substantial part on the equal opportunity theory of equality.

Support for both views of equality is found in *Griggs v. Duke Power Co.*,[41] the first major substantive Title VII employment discrimination decision by the Supreme Court. Much of the controversy surrounding race-conscious affirmative action can be traced directly to *Griggs*, notwithstanding its profound impact on the development of employment discrimination law.[42] An analysis of *Griggs* shows that it provides doctrinal support both for race-conscious affirmative action plans and claims of reverse discrimination. In

37. 42 U.S.C. § 2000e-2(a)(1) (1976) (emphasis added); *see* Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

38. *See* Fiss, *supra* note 33, at 237-38. President Johnson articulated the concept of affirmative action he intended the Executive Order to implement in a commencement address at Howard University in 1965: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line in a race and then say, 'you are free to compete with all other' and still justly believe that you have been completely fair." Address by President Johnson, Howard University Commencement (May 1965) (Presidential Papers of Johnson).

39. *See, e.g.*, Edwards & Zaretsky, *supra* note 13, at 1; Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341.

40. 42 U.S.C. § 2000e-2(a)(2) (1976) (emphasis added); *see* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

41. 401 U.S. 424 (1971).

42. *Griggs* has been called "the most important court decision in employment discrimination law." B. SCHLEI & P. GROSSMAN, *supra* note 21, at 5.

retrospect, a critical analysis of *Griggs* suggests that it is, perhaps, a legal centerpiece of major internal contradictions. Moreover, the seeds of *Weber* were sown there and were nurtured in later cases.

### 1. *Griggs*—Disparate Impact and Group Remedies

*Griggs v. Duke Power* established the critically important concept of discrimination on which affirmative action is based. In *Griggs* the Court held for the first time that a facially neutral employment practice that was not purposefully discriminatory, but that nevertheless had the *effect* of excluding a group on the basis of race, was discrimination[43] and, if not shown by the employer to be job-related, was unlawful. Prior to July 2, 1965, the effective date of Title VII, Duke Power Company openly engaged in racial discrimination against blacks. Although the company did not totally exclude blacks from its work force, it had an overt policy to limit the employment of blacks to "dead-end" jobs in one of its five departments. After Title VII became effective in 1965, the company abandoned its explicit policy of discrimination. However, to transfer out of the "dead-end" jobs, blacks either had to have a high school diploma or score successfully on two professionally developed ability tests. These post-Act requirements operated to limit severely the employment opportunities of blacks because whites as a group had a higher percentage of high school diplomas and scored better on the tests than blacks as a group. Duke Power had taken no steps to determine whether persons having high school diplomas and scoring successfully on the tests made better employees. Thus, the case raised the question of the lawfulness of a facially neutral employment policy that achieved essentially the same results as overt discrimination. The Court in *Griggs* articulated the issue as follows:

> [W]hether an employer is prohibited by the Civil Rights Act of 1964, Title VII, from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to a job when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites.[44]

A unanimous Court, in an opinion written by Chief Justice Burger, answered the question in the affirmative.

The Court could have grounded its decision solely on a rationale directed to subpart (c) of the question posed above and held that post-Act perpetuation

43. Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) (1976), empowers courts both to enjoin defendants from engaging in unlawful employment practices and to order such affirmative relief as may be appropriate. There is only one major statutory limitation on the grant of remedial relief under Title VII—no relief may be granted in the absence of a finding that the defendant has "intentionally engaged in or is intentionally engaging in an unlawful employment practice." *Id.*

44. 401 U.S. at 425-26.

of pre-Act purposeful discrimination violates Title VII. The Court's discussion of the primary purpose of Title VII supports this rationale:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[45]

The "prior discriminatory" practices demonstrated in the record were overt pre-Act discriminatory hiring and assignment practices. Had the Court adopted this rationale as its sole basis for decision, it arguably would have meant that, absent a history of overt discrimination, the high school diploma and testing requirements would have been valid, no matter how disproportionate their impact may be on blacks.[46] The Court chose, however, not to depend solely on a finding of prior discrimination and, in doing so, had to find a different rationale for its decision.

Alternatively, the Court could have adopted the rationale used in a voting rights case it had decided several years earlier. In *Gaston County v. United States*[47] the Court refused to approve a voting literacy test that, because of the inferior education inherent in segregated schools in North Carolina, arguably was designed to limit black voter registration. The automatic "triggering" provisions of the Voting Rights Act of 1965[48] had suspended Gaston County's literacy test because certain indicia chosen by Congress raised a presumption that the test was being used to discriminate against blacks seeking to register. In order to reinstate its test under the Voting Rights Act, Gaston County had to show that it had not used the test in the preceding five years "for the pur-

45. *Id.* at 429-30. A theory of present effects of past discrimination, *i.e.*, the perpetuation into the post-Act period of the effects of pre-Act discrimination, was relied upon by the court of appeals to find that some of the plaintiffs in *Griggs* were entitled to relief. 420 F.2d 1225 (4th Cir. 1970). This theory, however, was most effectively used in the seniority discrimination cases. *See, e.g.*, Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968); Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *See also* Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225, 257-66 (1976). This theory, as applied in the seniority cases, seemed well-developed prior to the Supreme Court decision in *Griggs*. *But see* Teamsters v. United States, 431 U.S. 324 (1977).

46. For example, the Court noted in Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1977), that an "employer who from [the effective date of Title VII] forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding [blacks]."

47. 395 U.S. 285 (1969).

48. The Voting Rights Act of 1965, 42 U.S.C. §§ 1971 & 1973 (1976), requires political units that use a voting test or device and have relatively low turnouts to obtain advance approval of changes in their voting requirements from the Attorney General or the United States District Court for the District of Columbia. *Id.* § 1973c (1970). A political unit can gain an exception from this provision if it shows that it has not used a voting test or device in a discriminatory manner. *Id.* A nonexempt political unit must show that the proposed change in requirements "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.*

pose or with the effect of denying or abridging the right to vote on account of race or color."[49] The district court found that the county's black schools had not provided blacks with educational opportunities equal to those available to whites. That alone, the Court held, would make the imposition of a literacy test an act of continuing discrimination.[50] Under the *Gatson County* rationale, the tests and high school requirements in *Griggs* would have been violations only to the extent that they penalized blacks for the inferior education they had received in the segregated schools. Some language in *Griggs* suggests that the Court relied in part on this rationale: "Basic intelligence must have the means of articulation to manifest itself fairly in a testing process. Because they are [blacks], petitioners have long received inferior education in segregated schools and this Court expressly recognized these differences in *Gaston County*. . . ."[51] Had this been the dominant rationale in *Griggs*, the case essentially would have been just another school desegregation case. The violation of Title VII would have been not the employer's selection procedure but rather the pre-existing system of de jure segregated schools.

A straightforward application of *Gaston County* to *Griggs* would have suspended all test and diploma requirements only until blacks no longer suffered the residual effect of an inferior segregated education. While the Court was willing to allow all citizens, blacks as well as whites, to vote regardless of literacy, it recognized that Congress did not intend for all employees and job applicants to be promoted or hired without regard to basic job qualifications.[52] Thus, it was necessary for the Court in *Griggs* to develop a rationale that would identify those instances in which a test or other facially neutral employment policy would be lawful, even against blacks who had suffered from historical or societal discrimination. To develop this rationale, the Court focused on the relationship of the tests and diploma requirements to the employee's ability to perform the job. Under this analysis, the company's overt pre-Act discriminatory practices were irrelevant because the issue was limited to whether under Title VII the employer's selection procedure that disproportionately affected blacks was necessary to the conduct of its business, regardless of the educational experience of the employees and applicants.[53]

Thus, the central rationale of *Griggs* is that employment practices and policies, even facially neutral ones, that have a disparate impact or adverse effect on the employment opportunities of blacks are unlawful under Title VII unless they can be demonstrated to be job-related and mandated by business necessity. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [blacks]

49. *Id.* § 1973b. *See* 395 U.S. at 293.

50. 395 U.S. at 29. *See also* Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379.

51. 401 U.S. at 430.

52. *Id.* ("Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications.").

53. *See* text accompanying note 44 *supra*.

cannot be shown to be related to job performance, the practice is prohibited."[54] The standard of business necessity was held to be extremely rigorous, demanding a showing of job-relatedness and the removal of "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."[55] Standards that "measure the person for the job and not the person in the abstract"[56] are prohibited. In short, *Griggs* demands that employers and unions transform the theory of meritocracy into reality. The Court, by adopting the disparate impact or adverse effects theory of discrimination, accepted, based on a construction of section 703(a)(2) of Title VII,[57] the equal opportunity concept of equality. It therefore changed, in a very profound way, the concept of discrimination.

*Griggs* also established the doctrinal foundations for the implementation of race-conscious affirmative action. This reading is derived from the Court's refusal to require a plaintiff to prove purposeful pre- or post-Act discrimination by the employer. The Court's rationale makes clear that "good intent, or absence of discriminatory intent does not redeem employment procedures that operate as 'built-in headwinds' for minority groups"[58] and that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[59] Under the *Griggs* disparate impact theory an employer is put on notice that he is discriminating within the meaning of Title VII if he continues to use an employment practice that has a disparate impact on, or is unfair to, a protected class and cannot be justified on grounds of business necessity.

With its emphasis on the *consequences* of an employment practice, the importance of *Griggs* to the affirmative action principle was the recognition that, while section 703(a) speaks in terms of *individuals*, the real problem of employment discrimination is not one of isolated cases of bigotry directed toward particular persons. Rather, the real problems lie in the institutionalized societal practices and policies, such as testing procedures, subjective selection standards, race and sex-role stereotypes, and seniority rules, that systematically exclude certain minority *groups* from the workforce and from certain job classifications. Although Congress appeared not to have fully understood the impact of the systemic aspect of discrimination when it originally enacted Title VII in 1964,[60] the federal courts, particularly in the South (because of their

54. 401 U.S. at 431.

55. *Id.*

56. *Id.* at 436. *See* Belton, *supra* note 45, at 254-57.

57. 42 U.S.C. § 2000e-2(a)(2) (1976). *See* Belton, *supra* note 45, at 240-46; Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Discrimination*, 71 MICH. L. REV. 59 (1972).

58. 401 U.S. at 432.

59. *Id.* (emphasis in original).

60. The Senate Committee on Labor and Public Welfare, in its 1979 report recommending amendments to strengthen the enforcement of Title VII, said it could not "stress too much the importance of the 'pattern and practice' approach" to the problem of employment discrimination. The Committee outlined the reasons for this recommendation as follows:

extensive experience with other forms of discrimination),[61] realized almost immediately that employment discrimination was inherently class, rather than individual, discrimination:

> Race discrimination is by definition a class discrimination . . . . [A]lthough the actual effects of a discriminatory policy may . . . vary throughout the class, the existence of the discriminatory policy threatens the entire class. And whether the Damoclean threat of a racially discriminatory policy hangs over the racial class is a question of fact common to all the members of the class.[62]

*Griggs* also affirmed a body of law that was developing in the lower courts which held that Title VII suits are "perforce" class actions and that an individual Title VII plaintiff is cloaked with the responsibilities of a private attorney general when he seeks to remedy employment discrimination.[63] This development was a recognition that the primary objective of Title VII could be obtained only by eliminating widespread, institutionalized discrimination through emphasis on class remedies. The *Griggs* reading of Title VII was in harmony with its primary purpose.

In addition, the *Griggs* emphasis on consequences validated the use of statistics as a method to establish discrimination. Proof of discrimination against particular individuals requires evidence relating primarily to a particular incident, but proof of discrimination inherent in institutionalized practices requires a much broader approach—an approach that relies almost exclusively on statistics.[64] The *Griggs* prima facie rule, or rule of exclusion, requires a

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> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individuals or organizations. . . . Employment, as viewed today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs. . . . In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that a problem exists in the first place, and the system complained of is unlawful.

S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971), *cited with approval in* Franks v. Bowman Transp. Co., 424 U.S. 747, 764 n.21 (1976).

The General Accounting Office, after a two-year study of the EEOC, strongly recommended that the agency's efforts be directed toward ending institutional discrimination. GENERAL ACCOUNTING OFFICE, EEOC HAS MADE LIMITED PROGRESS IN ELIMINATING EMPLOYMENT DISCRIMINATION 46 (1976).

61. *See generally* C. HAMILTON, THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS (1973); J. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION (1961); F. READ & L. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH (1978).

62. Hall v. Werthan Bag Corp., 251 F. Supp. 184, 186 (M.D. Tenn. 1966). *Accord*, Oatis v. Crown Zellerback Corp., 398 F.2d 496, 499 (5th Cir. 1968).

63. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719-20 (7th Cir. 1969); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968); Oatis v. Crown Zellerbuch Corp., 398 F.2d 496, 499 (5th Cir. 1968). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

64. *Compare, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971), *with*, *e.g.*, McDonnell Douglas v. Green, 411 U.S. 792, 800-02 (1973). In response to an argument advanced in Teamsters v. United States, 431 U.S. 324 (1977), that statistics have no probative value in discrimination cases, the Court held that "our cases make it unmistakably clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue. . . . We have repeatedly approved the use of statistical proof, where it reached proportions comparable to those in this case, to establish a prima facie case of racial

plaintiff to show a significant disparity between the percentage of class members in the work force and the percentage in the relevant labor market.[65] This showing constitutes a prima facie case of unlawful discrimination and shifts the "burden of proof"[66] to the employer.[67] The defendant's burden under the *Griggs* prima facie rule is a heavy one and cannot be overcome by general assertions of nondiscrimination.[68] The Supreme Court approved the heavy reliance on statistics for three basic reasons. First, and most obviously, the one inevitable consequence of systematic discrimination is the consistent underrepresentation of blacks in jobs from which they have been excluded. Underrepresentation is often a telltale sign of purposeful discrimination and is therefore highly probative.[69] Second, statistics are frequently the best available evidence of discrimination because discrimination will seldom, if ever, be admitted by any employer.[70] Third, under a *Griggs* analysis, subjective motivation is not critical to a finding of unlawful discrimination.[71]

The provision of Title VII that, if literally construed, argues against the *Griggs* disparate impact theory is section 703(j). This section prohibits employers and unions from granting "preferential treatment to any individual or to any group" because of race to remedy a statistical imbalance in the employer's work force.[72] The Supreme Court, nevertheless, declined to read this

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discrimination in jury selection cases . . . . [S]tatistics are equally competent in proving employment discrimination." *Id.* at 339 (citations omitted).

65. *See* Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1975).

66. *See* note 106 *infra*.

67. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

68. Teamsters v. United States, 431 U.S. 324, 342 n.24 (1977) (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

69. Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977). "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired."

70. *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977); United States v. Board of School Comm'rs, 573 F.2d 400, 412 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978) ("[I]n an age where it is unfashionable . . . to openly express racial hostility, direct evidence of overt bigotry will be impossible to find"); Marquez v. Omaha Dist. Sales Office, 440 F.2d 1157, 1162 (8th Cir. 1971). *See also* Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377, 1382 (4th Cir.) (en banc), *cert. denied*, 409 U.S. 982 (1972).

71. Griggs v. Duke Power, 401 U.S. at 432; Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

72. 42 U.S.C. § 2000e-2(j) (1976) provides:

> (j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, 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, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national

section as a limitation on the disparate impact theory. In rejecting the argument that section 703(j) imposes a statutory barrier on the use of statistics, the Court, in *Teamsters v. United States*[73] stated:

> The argument fails in this case because the statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant even though § 703(j) makes clear that Title VII imposes no requirement that a work force mirror the general population. . . . Considerations such as small sample size may, of course, detract from the value of such evidence . . ., and evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant.[74]

After *Griggs* the courts began to develop a coherent body of employment discrimination law based primarily on the disparate impact theory. Then, in 1975, the Supreme Court decided *Albemarle Paper Co. v. Moody*,[75] which established the "make whole" theory of relief. *Moody* directed the lower courts, upon a finding of liability, to use the authority under section 706(g) of Title VII[76] to enter broad remedial orders to eradicate discrimination throughout the economy and make persons whole for injuries suffered through past discrimination.[77] *Moody* was read by the majority of the lower courts as an affirmation of the general course these courts had taken already, namely, to construe Title VII in a broad and flexible manner.[78]

The substantive developments on issues of both liability and remedies under the *Griggs/Moody* line of cases had a substantial impact on the congressionally favored enforcement of Title VII through voluntary compliance.[79]

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origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

73. 431 U.S. 324 (1977).

74. *Id.* at 339 n.20 (citations omitted).

75. 422 U.S. 405 (1975).

76. 42 U.S.C. § 2000e-5(g) (1976).

77. 422 U.S. at 421.

78. *See generally* Belton, *supra* note 45, at 289-300.

79. When the House Judiciary issued its report on the bill which became the Civil Rights Act of 1964, it clearly stated that a primary objective of the Act was to encourage voluntary action to eliminate the effects of discrimination against blacks:

> In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

On more than one occasion prior to *Weber*, the Supreme Court had underscored the importance of voluntary compliance by employers to the effectuation of the national policy against discrimination in employment. For example, in *Alexander v. Gardner-Denver Co.*,[80] the Court held that an individual does not forfeit his private right of action under Title VII if he first pursues his employment discrimination claim through arbitration under a nondiscrimination clause of a collective bargaining agreement. The Court, although noting that ultimate enforcement authority rests with federal courts,[81] stated:

> Cooperation and voluntary compliance were selected as the preferred means for achieving [the] goal [of assuring equality of employment opportunity]. To this end, Congress created the [EEOC] and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.[82]

Also, in *Albemarle Paper Co. v. Moody* the Court recognized that the role of the courts in carrying out the congressional preference for voluntary compliance is to establish the legal guidelines that provide the "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[83] *Moody* thus contemplates that there would be substantial voluntary compliance with the laws prohibiting employment discrimination without the intervention of the administrative or the judicial coercive process.

The broadest statement from the Court on the extent to which employers and unions may engage in voluntary compliance is found in *Franks v. Bowman*

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. . . .

> No bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities. There is reason to believe, however, that national leadership provided by the enactment of Federal legislation dealing with the most troublesome problems will create an atmosphere conducive to voluntary or local resolution of other forms of discrimination.
>
> It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination.

H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2393.

Congress by statute also directed the EEOC, the federal agency responsible for implementing much of Title VII, to attempt to conciliate charges as the initial effort to resolve discrimination claims. 42 U.S.C. § 2000e-5(b) (1976) provides, in pertinent part, that: "If the Commission determines . . . that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *See also* 110 Cong. Rec. 2566 (1964) (House debate on amendment to clarify the EEOC's duty to attempt to conciliate prior to court action).

80. 415 U.S. 36 (1974).

81. *Id.* at 44.

82. *Id.*

83. 422 U.S. at 417-18 (quoting United States v. N.L. Indus., Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

*Transportation Co.*,[84] and had particular significance for *Weber*-type defendants. In *Franks* the Court, in rejecting the argument that an award of retroactive seniority to black victims of discrimination deprived white employees of seniority rights conferred by a collective bargaining agreement, stated:

> The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by other employees under the previous seniority agreement. And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority" is certainly no less than in other areas of public policy interests.[85]

The recognition in *Franks* that employers and unions may adopt remedies pursuant to collective bargaining that enhance national public policy interests under Title VII, even though they may adversely affect the employment expectancies of some whites,[86] was a strong endorsement of the affirmative action concept, and provided a strong incentive to employers and unions to implement affirmative action plans to remedy employment discrimination when *Griggs*-type disparate impact is manifest.

*Franks* also rejected the argument that an award of retroactive seniority to identifiable victims of discrimination would be inequitable because it would adversely affect the employment expectancies of "innocent" white employees. The Court took the position that "a sharing of the burden of the past discrimination [between the black victims and the innocent white employees] is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction, particularly when considered in light of our traditional view that '[a]ttainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies.' "[87]

While the encouragement of voluntary compliance is more a procedural than a substantive requirement of Title VII, public policy considerations that

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84. 424 U.S. 747 (1976).

85. *Id.* at 778-79 (citations omitted).

86. *See* Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), in which the Supreme Court ruled that, although national labor policy accords the highest priority to nondiscriminatory employment practices, the National Labor Relations Act does not protect concerted activity by minority employees who seek to bypass their union representative and bargain directly with their employer over issues of employment discrimination. The Court ruled in effect that even if the relief available under Title VII is inadequate, because the legal procedures are too cumbersome or time-consuming, dissident employee action taken against an employer to protest against alleged race discrimination is not justified. The Court thus concluded that employee interest (at least under the NLRA) may be adequately protected when a union is serving as the employees' exclusive bargaining agent and where a collective-bargaining agreement adequately provides for nondiscrimination and makes available a grievance-arbitration procedure to redress employee complaints.

87. Franks v. Bowman Transp. Co., 424 U.S. 747, 777-78 (1976) (quoting Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941)) (footnote omitted).

underlie this congressional policy were as much at issue in *Weber* as were the substantive theories and the purpose of the Act. Congress recognized that the effectuation of the national policy against discrimination would be unduly protracted if all enforcement had to be routed through the courts. Thus, it was deemed necessary to the effective enforcement of the Act, as well as to the efficient operation of the judiciary, that as many employment discrimination cases as possible be resolved through private, voluntary compliance to avoid flooding the already over-burdened dockets of the federal courts.[88]

By 1976 the Supreme Court had attempted to harmonize the primary purpose of the Act with its statutory language. The Court also had clearly established firm doctrinal foundations for the implementation of race-conscious remedies based upon the affirmative action concept. The lessons of *Griggs*, *Moody*, and *Franks* were not lost on private and public employers, unions, and federal enforcement agencies. Even though there was a dramatic increase in the number of employment discrimination cases filed in the federal courts,[89] more and more of the major cases were resolved through consent decrees or voluntary compliance.[90] It was possible, therefore, to conclude that to the extent there were "settled principles" in employment discrimination law, they were firmly in support of the affirmative action concept.

Disparate impact analysis assumed an increased significance in the enforcement of Title VII after *Griggs*. The *Griggs* concept of equality became a demand for results and virtually compelled employers and unions, such as defendants in *Weber*, to adopt affirmative action programs. A potential defendant who wished to avoid liability under Title VII, or who wished to avoid

88. There was a "staggering" increase in the number of Title VII cases filed between 1970 and 1976, from 344 employment discrimination cases filed in federal courts in fiscal year 1970 to 5,321 in fiscal year 1976. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1976 ANN. REP. OF THE DIRECTOR 107-08. This increase is understandable given that the coverage of Title VII was expanded by the Equal Employment Opportunity Act of 1972, 5 U.S.C. §§ 5108, 5314-5316, 42 U.S.C. §§ 2000e to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17 (1976). *See, e.g.*, Chandler v. Roudebush, 425 U.S. 840, 841 (1976). Also the interpretation of Title VII on numerous issues was first clarified during this period. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Belton, *supra* note 45.

89. The enormous rate in Title VII filings slowed after fiscal year 1976. While there was an increase of 1,390 filings or of 35.4% from fiscal year 1975 to fiscal year 1976 (3,931 filings as compared to 5,321 filings), in fiscal year 1977 there was an *increase* of 610 filings or of 11% to 5,931. In fiscal year 1978 there was a *decrease* of 427 filings or of 7% (from 5,931 to 5,504 filings). ADMINSTRATIVE OFFICE OF THE UNITED STATES COURTS, 1978 ANN. REP. OF THE DIRECTOR 88.

While it is difficult to draw hard conclusions from the decrease in the rate of Title VII case filings, it may be inferred that the clarifications in the law and the emphasis on voluntary affirmative action were beginning to have an effect. If voluntary affirmative action were severely restricted—as it would have been if the Fifth Circuit had been affirmed in *Weber*—the remedy for employment discrimination would lie primarily in the courts and not in voluntary compliance, and a return to an increasing rate of Title VII cases could be expected. *Cf.* Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 951-52 (1978) (increase in number of Title VII cases due to more involvement by noninstitutional lawyers).

90. *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976); EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105 (E.D. Pa. 1973), *aff'd*, 506 F.2d 735 (3d Cir. 1974); Belton, *supra* note 89, at 950-52.

the costly and cumbersome validation process[91] to determine the job-relatedness of his employment practices, could adopt a race-conscious affirmative action program designed to increase the number of blacks in his work force and thus reduce the disparity between blacks and whites. *Griggs* in effect required employers to remedy societal discrimination. Absent the historical backdrop against which Title VII was enacted, certainly nothing in the legislative history would have required employers to improve the validity of their employment criteria. *Griggs* thus offered employers a choice: either affirmatively demonstrate that selection procedures are based on merit, or neutralize the disparate impact through race-conscious affirmative action programs.

### 2. *McDonnell Douglas*—Disparate Treatment and Fairness to the Individual

The 1976 Term of the Supreme Court brought a major doctrinal shift in employment discrimination law.[92] The major emphasis during and after this Term was on the equal treatment concept of equality with its emphasis on fairness to the individual. This concept of equality is essentially the same as the disparate treatment theory of discrimination. Although the doctrinal foundations of the equal treatment concept were developed more fully during and after the 1976 Term, the seeds of those foundations can be traced directly to *Griggs*. The Court in *Griggs* had relied on legislative intent to formulate the disparate impact theory of discrimination. It likewise relied on legislative history for this basic proposition:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.[93]

This strand of *Griggs*, which contains the seeds of the disparate treatment theory of discrimination, was more fully developed in later cases such as *McDonnell Douglas v. Green*[94] and *McDonald v. Santa Fe Trail Transportation Co.*[95] It is based on the Court's construction of section 703(a)(1) of Title VII.[96]

In *McDonnell Douglas* a black plaintiff in a nonclass action case sought relief under Title VII, alleging that he had been denied reemployment because

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91. *See* B. SCHLEI & P. GROSSMAN, *supra* note 21, at 181, noting that validating a test in accordance with the federal guidelines on employee selection, 29 C.F.R. § 1607 (1979), is extremely expensive at best, and in many cases economically prohibitive. A test under the Uniform Guidelines on Employee Selection Procedures is defined very broadly. *Id.* § 1607.16(Q). *See The Supreme Court, 1974 Term*, 89 HARV. L. REV. 49, 233-34 (commenting on Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)). *See generally* D. BALDUS & J. COLES, STATISTICAL PROOF OF DISCRIMINATION (1980).

92. *See generally* Edwards, *supra* note 29.

93. 401 U.S. at 430-31.

94. 411 U.S. 792 (1973).

95. 427 U.S. 273 (1976).

96. 42 U.S.C. § 2000e-2(a)(1) (1976).

he had participated in civil rights demonstrations directed at his employer. Plaintiff's qualifications for the job he sought were well established because he had been previously employed by defendant in a similar position. The court of appeals, following the broad construction that lower courts had given Title VII after *Griggs*, held that the employer had the burden to demonstrate a substantial relationship between the reason offered for rejecting plaintiff and the requirements for the job.[97] This standard flowed directly from *Griggs*, which held that the defendant has the burden of showing business necessity after plaintiff has established a prima facie case of discrimination. Thus, the burden of persuasion was on the defendant to demonstrate that the adverse action was based on business necessity, was carefully tailored to the precise demands of the job, and did not involve any residual effects of systemic discrimination. In addition to proving business necessity, the defendant, under the court of appeals' reading of *Griggs*, had to show that the employment policy was applied to all employees equally.[98] This meant, for example, that if the employer could prove that successful performance of the job demanded that emloyees not have been convicted of any criminal offense, that standard would have to be applied to all white applicants as well as to all black applicants.

The Court in *McDonnell Douglas* held that the court of appeals erred in applying the *Griggs* theory of discrimination to the facts of the case:

> The court below appeared to rely upon *Griggs* . . . in which the Court stated: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.". . . But *Griggs* differs from the instant case in important respects. It dealt with standardized testing devices which, however neutral on their face, operated to exclude many blacks who were capable of performing effectively in the desired positions. *Griggs* was rightly concerned that childhood difficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives . . . . [Plaintiff], however, appears in different clothing. He had engaged in a seriously disruptive act against the very one from whom he now seeks employment. And defendant does not seek his exclusion on the basis of a testing device which overstates what is necessary for competent performance, or through some sweeping disqualification of all those with any past record of unlawful behavior, however remote, insubstantial, or unrelated to applicant's personal qualifications as an employee. [Defendant] assertedly rejected [plaintiff] for unlawful conduct against it and, in the absence of proof of pretext or discriminatory application of such a reason, this cannot be thought the kind of "artificial, arbitrary and unnecessary barriers to employment" which the Court found to be the intention of Congress to remove. . . .[99]

97. 463 F.2d 337, 344 (8th Cir. 1972).

98. *See id.* at 346.

99. 411 U.S. at 805-06 (citations omitted).

After distinguishing *Griggs*, the Court reiterated and emphasized its ruling in *Griggs* that Congress did not intend to guarantee a job to every person regardless of qualification and that Title VII cannot be read to command that a person be hired simply because he was formerly the subject of discrimination.[100] In an apparent attempt to reconcile the inconsistency in its rationale in *Griggs*, namely its conclusion that Congress both proscribed discriminatory preferences for any group and also required the removal of artificial barriers to employment that operate invidiously to discriminate on the basis of race against a class, the Court offered the following explanation:

> There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by the employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.[101]

The Court, apparently satisfied that no significant analytical relationship existed between the two cases, read into Title VII the second theory of equality—equal treatment—based on a construction of section 703(a)(1) of Title VII. Under the *McDonnell Douglas* disparate treatment theory of discrimination, a plaintiff can establish a prima facie case under Title VII by showing that (i) he belongs to a protected class, (ii) he applied and was qualified for a job for which the employer was seeking applicants, (iii) despite qualifications, he was rejected, and (iv) after his rejection, the position remained open and the employer continued to seek applicants with plaintiff's qualifications.[102] If this showing is made, the burden of going forward with the evidence shifts to the defendant to establish a "legitimate, nondiscriminatory reason"[103] for plaintiff's rejection. Assuming that the defendant meets this burden, the plaintiff then has the opportunity to show that the defendant's stated reason was merely a pretext for prohibited discrimination.[104]

The disparate treatment strand of *Griggs* came into full fruition in *McDonnell Douglas* and stands in sharp contrast to the *Griggs* disparate impact theory. A showing of intentional discrimination is required under disparate treatment; it is not required under disparate impact.[105] The legitimate non-

100. *Id.* at 800.

101. *Id.* at 801. *See* notes 54-57 *supra*.

102. *Id.* at 802.

103. *Id.*

104. *Id.* at 804.

105. In attempting to explain the difference between the disparate impact and disparate treatment theories of discrimination, the Court in Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977), stated:

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . . Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. See, e.g., 110 Cong. Rec.

discriminatory reason standard that a defendant must meet under disparate

13088 (1964) (remarks of Sen. Humphrey) ("What the bill does . . . is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.").

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory. Compare, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-432, with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-806. . . . Either theory may, of course, be applied to a particular set of facts.

In 1976 the Supreme Court, by a sharply divided vote, ruled in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), that the exclusion of pregnancy from the coverage of a private employer's disability insurance program did not constitute sex discrimination under Title VII. Perhaps the most disturbing element of the decision, for both the concurring and dissenting members of the Court, was the suggestion in Justice Rehnquist's majority opinion that the *Griggs* Title VII theory would be soon replaced by the more stringent substantive standard applicable in fourteenth amendment equal protection cases.

Prior to *Gilbert* the Court, in Washington v. Davis, 426 U.S. 229 (1976), held that purposeful discrimination is necessary to establish discrimination under the equal protection clause. The Court specifically noted in *Davis*, however, that the constitutional standard does not extend to Title VII. *Id.* at 238-39. Accordingly, the Court reiterated that under the Title VII disparate impact theory announced in *Griggs* a prima facie case of discrimination may be established by proof that a facially neutral employment policy has a significantly disparate impact on a protected class. *Id.*

The possibility that the *Griggs* disparate impact theory might soon be replaced by the requirement that a Title VII plaintiff demonstrate not only a disparate impact but also a discriminatory intent was raised in *Gilbert* because of the method of analysis adopted by Justice Rehnquist. In examining plaintiff's claim that exclusion of pregnancy from employer's disability insurance program constituted unlawful sex discrimination, Justice Rehnquist first considered which subsection of 703(a), 42 U.S.C. § 2000e-2(a) (1976), the general antidiscrimination provision of Title VII, encompassed plaintiff's claim. 429 U.S. at 133. Subsection 703(a)(1) declares it to be an unlawful employment practice for an employer "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 . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1) (1976). Subsection 703(a)(2) declares it to be an unlawful employment practice for an employer "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 . . . sex . . . ." *Id.* § 2000e-2(a)(2). As the disability insurance program in *Gilbert* was essentially compensatory in nature, and as § 703(a)(1) expressly prohibits discrimination with respect to compensation, Justice Rehnquist determined that the legality of the program was to be determined according to the standards established under § 703(a)(1). 429 U.S. at 130-40.

Having determined that § 703(a)(1) was the appropriate section under which to analyze the disability insurance program, Justice Rehnquist next examined the standards governing the finding of a Title VII violation. 429 U.S. at 133. In this regard, Justice Rehnquist noted that Congress nowhere defined "discrimination" in Title VII and concluded that it was therefore appropriate to look to fourteenth amendment decisions, which "afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII." *Id.* From this existing body of law, Justice Rehnquist drew upon the Court's decision in Geduldig v. Aiello, 417 U.S. 484 (1974). In *Geduldig*, the Court held that the exclusion of pregnancy from the otherwise inclusive coverage of a disability insurance program does not violate the equal protection clause of the fourteenth amendment because such a program does not discriminate on the basis of sex. *Id.* at 496-97 & 496 n.20. The exclusion of pregnancy does not constitute sex-based discrimination, the *Geduldig* Court reasoned, because "[t]here is no risk from which men are protected and women are not." *Id.* at 496-97. Accordingly, the *Geduldig* Court found the disability insurance program to be merely underinclusive, creating a distinction not between men and women but between "pregnant women and nonpregnant persons." *Id.* at 496 n.20. Applying the constitutional analysis of *Geduldig* to the Title VII claim in

treatment is minimal[106] in comparison to the rigorous business necessity stan-

*Gilbert*, the Supreme Court concluded that the exclusion of pregnancy from General Electric's disability program did not violate Title VII because, as in *Geduldig*, the program discriminated on the basis of pregnancy rather than on the basis of sex.

Although application of *Geduldig's* constitutional analysis mandated a finding that the exclusion of pregnancy from General Electric's disability insurance program did not constitute Title VII sex-based discrimination, Justice Rehnquist recognized that the Court's decision in *Griggs* required consideration of whether the program nevertheless had a discriminatory effect on women in violation of Title VII. Justice Rehnquist noted in this regard that *Griggs* was decided under § 703(a)(2) which, unlike § 703(a)(1), does not contain the word "discriminate." *Id.* at 137. Justice Rehnquist then implied that proof of discriminatory intent is required under § 703(a)(1), although not under § 703(a)(2), and thus the disparate impact theory is unavailable under § 703(a)(1). 429 U.S. at 137. This question, whether the disparate impact theory is available under § 703(a)(1), was not answered in *Gilbert*, however, since the Court ruled that plaintiff failed to prove the disability insurance program was in fact worth more to men than to women and therefore had a disparate impact in violation of the *Griggs* standard. Since the disability insurance program neither classified employees on the basis of sex nor had a disparate impact on female employees, the Court determined that no Title VII violation had been established. *Id.* at 145-46.

Justice Rehnquist's reliance in *Gilbert* on the constitutional analysis of *Geduldig* to define sex discrimination under Title VII raised the question whether in a future case the Court might also require proof of discriminatory intent in Title VII 703(a)(2) cases, thereby vitiating the disparate impact theory announced in *Griggs*. The *Gilbert* Court's willingness to apply the fourteenth amendment definition of discrimination to a Title VII claim was, however, only the first indication in Justice Rehnquist's opinion that the requirement of discriminatory intent would be incorporated into Title VII. The *Gilbert* Court's interpretation of Title VII itself also cast doubt on the continued validity of the disparate impact theory, at least with respect to § 703(a)(1). Prior to *Gilbert*, courts applied the same standard of proof regardless of whether the Title VII claim arose under § 703(a)(1) or § 703(a)(2). Indeed, courts, including the Supreme Court, seldom identified one subsection or the other as providing the basis for its decision. *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 335 & n.14 (1977); Dothard v. Rawlinson, 433 U.S. 321, 328-31 & n.10 (1977); Yuhas v. Libby-Owens-Ford Co., 562 F.2d 496, 498 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978); Jacobs v. Martin Sweets Co., 550 F.2d 364, 370 (6th Cir.), *cert. denied*, 431 U.S. 917 (1977); Rowe v. General Motors Corp., 457 F.2d 348, 350 (5th Cir. 1972); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 248, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971). In *Gilbert*, however, Justice Rehnquist suggested that a different analytical approach applies depending on whether a claim of discrimination is encompassed by § 703(a)(1) or by § 703(a)(2).

Although Justice Rehnquist's opinion in *Gilbert* raised serious questions about the future of the disparate impact theory under Title VII, his reference to the requirement of intent as an essential element of a prima facie case under § 703(a)(2) was not joined by a majority of the Court. Only three members, Chief Justice Burger, Justice White, and Justice Powell, joined Justice Rehnquist's opinion in its entirety. Justice Stewart concurred in the judgment but wrote separately to state that he did not read the opinion as questioning either the validity of *Griggs* or the importance of discriminatory impact in Title VII cases. 429 U.S. at 146 (Stewart, J., concurring). Justice Blackmun wrote separately, dissenting from any inference in the opinion that discriminatory impact may never be a controlling factor in a Title VII case or that *Griggs* is no longer good law. *Id.* at 146 (Blackmun, J., dissenting). In separate dissenting opinions, Justice Brennan, joined by Justice Marshall, *id.* at 146-60 (Brennan, J. and Marshall, J., dissenting), and Justice Stevens, *id.* at 160-62 (Stevens, J., dissenting), both stated their disagreement with the Court's use of constitutional analysis in a Title VII case. Justice Brennan also expressed the view that "[n]otwithstanding unexplained and inexplicable implications to the contrary in the majority opinion" it is established that disparate impact establishes a prima facie case under either § 703(a)(1) or § 703(a)(2). *Id.* at 154-55. Although Justice Stevens objected to the Court's use of constitutional analysis, he did not specifically address the issue of § 703(a)(1), since he was of the opinion that the disability insurance program discriminated on the basis of sex, and therefore should have been found per se violative of Title VII. *Id.* at 161-62. Thus, while Justice Rehnquist's *Gilbert* opinion seemed to threaten seriously the future of the disparate impact theory, it is unclear whether he could ever receive support from a majority of the Court. Congress subsequently amended Title VII to overrule *Gilbert*, Act of Oct. 31, 1978, Pub. L. No. 95-955, § 1, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-(k) (Supp. II 1978), but much of the theoretical and analytical disagreement in *Gilbert* is, arguably, reflected in *Weber*.

106. In *McDonnell Douglas* the Court held that once a plaintiff establishes a prima facie case,

dard applicable under disparate impact.[107] The use of statistical evidence

"[t]he burden then must shift to the employer to *articulate* some legitimate, nondiscriminatory reason for the employee's rejection." 411 U.S. at 802 (emphasis added). The burden of proof problem has proven troublesome to the lower courts. First, the Court's use of the term "articulate" as opposed to "prove" could have implied that the defendant bears only a light burden after a plaintiff establishes a prima facie case. Second, the Court failed to indicate clearly whether a defendant's evidence must show the existence of a single, nondiscriminatory justification or must help negate the presence of *any* discriminatory motive. Some lower courts emphasized the Court's choice of the word "articulate" instead of "prove." This choice, these courts reasoned, indicated that the defendant need only come forward with *some* credible evidence of a legitimate nondiscriminatory justification. *See, e.g.*, Powell v. Syracuse Univ., 580 F.2d 1150, 1155-56 (2d Cir.), *cert. denied*, 439 U.S. 894 (1978); Barnes v. St. Catherine's Hosp., 563 F.2d 324, 329 (7th Cir. 1977). Other courts, however, were of the opinion that casting such a minimal burden of proof upon defendant would make that burden meaningless. These courts adopted the position that in order for defendant to prevail, he must prove by a preponderance of the evidence that a nondiscriminatory explanation supports his action. *See, e.g.*, Williams v. Bell, 587 F.2d 1240, 1245 n.45 (D.C. Cir. 1978); Turner v. Texas Instruments, Inc., 555 F.2d 1251, 1255 (5th Cir. 1977).

The Supreme Court addressed the burden of proof issue in two cases during its October 1977 Term. In Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Court begged the question by using both terms in the operative paragraph:

> When the prima facie case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of *proving* that he based his employment decision on a legitimate consideration . . . . To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only "*articulate* some legitimate, nondiscriminatory reason for the employee's rejection."

*Id.* at 577-78 (emphasis added). Arguably, the Court meant that the two terms were synonymous and interchangeable. But the Court made it clear that this was not its meaning in the second case, Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) (per curiam).

In *Sweeney* the Court tacitly recognized that its own earlier choice of words had created confusion about the appropriate allocation of the burdens of proof. But it held that the citation to *McDonnell Douglas* in *Furnco* emphasized that the employer need only "articulate some legitimate, nondiscriminatory reason for [its action rather than] prove the absence of discriminatory motive." *Id.* at 24. The four dissenting Justices found no operative distinction between the words "prove" and "articulate" because both terms involve the presentation of evidence or proof rather than the mere allegation of nondiscriminatory purpose. *Id.* at 28 (Stevens, J., dissenting).

The Court attempted to clarify some of the confusion on the order and allocation of the burdens of proof in Texas Dep't of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981). This decision is limited to claims based upon the disparate treatment theory of discrimination and does not purport to consider the burden of proof problem in cases involving disparate impact.

107. Almost uniformly the courts have held that the business necessity defense of *Griggs* is not satisfied simply by showing that an employment practice serves some legitimate business purpose. Typical of the lower courts' statement of this defense is Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971):

> [T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose *must be sufficiently compelling* to override any racial impact; the challenged practice *must effectively carry out the business purpose* it is alleged to serve; and there *must be no available acceptable alternative policies or practices* which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

*Id.* at 798 (emphasis added; footnotes omitted). Other courts have used similar formulations. *E.g.*, United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2nd Cir. 1971) (necessity connotes an irresistible demand).

*But see* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979), in which the New York City Transit Authority refused to hire methadone users for any position. Plaintiffs, alleging that defendant's exclusion had a *Griggs* disparate impact on blacks and Hispanics, conceded that the goals of safety and efficiency required the exclusion of all methadone users from "safety sensitive" jobs, and of a majority of users from all jobs, but that there was a category of jobs to which the exclusion did not meet the *Griggs* business necessity standard. The Supreme Court disagreed, noting that "[t]hose goals are significantly served by—even if they do not require—[defendant's]

alone may establish a prima facie case of a violation under disparate impact.[108] It is doubtful, however, that statistics alone could accomplish the same result under disparate treatment.[109] Perhaps the most fundamental difference between the two theories is that disparate treatment is seen as an obligation to focus on fairness to the individual rather than on fairness to the group.[110]

In *McDonald v. Santa Fe Trail Transportation Co.*[111] the Court again faced the problem of reconciling the primary purpose of Title VII with either the equal treatment concept or the equal opportunity concept of equality. Two white employees had been terminated after being charged with theft. A black employee charged with the same offense was retained. The white employees sued under Title VII and 42 U.S.C. § 1981.[112] Notwithstanding that the Court, relying on the legislative history, had earlier noted that the primary purpose of Title VII was to provide a remedy for blacks, it relied upon the same legislative history to hold in *McDonald* that Title VII bars *all* racial discrimination—against whites as well as blacks and other disadvantaged groups.[113] The disparate treatment strand of *Griggs* was again emphasized in *McDonald*:

> Thus, although we were not there confronted with racial discrimination against whites, we described the Act in *Griggs* . . . as prohibiting "[d]iscriminatory preference for *any* [racial] group, *minority* or *majority*."
>
> . . . .
>
> We . . . hold today that Title VII prohibits racial discrimination against the white petitioner in this case upon the same standards as would be applicable were they Negroes and Jackson whites.[114]

The Court noted that it need not consider whether the result would have been different if the action taken by the employer had been done in the context of an affirmative action program.[115]

The importance of *McDonnell Douglas* and *McDonald v. Santa Fe Trails*

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rule as it applies to all methodone users including those who are seeking employment in non-safety sensitive positions. . . . The record thus demonstrates that [defendant's] rule bears a 'manifest relationship to the employment in question'" as required by *Griggs*. *Id.* at 587 n.31. Thus the Court held that even assuming plaintiffs statistics made out a prima facie case of disparate impact, the showing of job relatedness protected defendant from liability. While *Beazer* seemed to apply a more lenient business necessity standard than has been applied by the lower courts, it did not make explicit the parameters of the defense. Hence, it is now unclear how the lower courts will treat *Beazer*.

108. *See* Dothard v. Rawlinson, 433 U.S. 321, 328-31 (1977); Teamsters v. United States, 431 U.S. 324, 339 (1977).

109. *See, e.g.*, King v. Yellow Freight Sys. Inc., 523 F.2d 879, 882 (8th Cir. 1975); Terrell v. Feldstern Co., 468 F.2d 910, 911 (5th Cir. 1972). *But see* General Elec. Co. v. Gilbert, 429 U.S. 125, 153 n.6 (1976) (Brennan, J., dissenting).

110. *See generally* Fiss, *supra* note 28, at 107; Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966).

111. 427 U.S. 273 (1976).

112. 42 U.S.C. § 1981 (1976).

113. 427 U.S. at 80.

114. *Id.* at 279 (emphasis in original; citations omitted).

115. *Id.* at 280 n.8.

is that the Court impliedly rejected the notion that discrimination under Title VII is a unitary concept that must embrace either the equal treatment conception or the equal opportunity conception. Both views now had been read into Title VII, notwithstanding the conflict in the outcome that both have for the implementation of race-conscious affirmative action.[116] The *McDonnell Douglas/McDonald v. Santa Fe Trails* disparate treatment theory and the portion of *Griggs* stating that Congress did not guarantee a job to everyone simply because he was subject to prior discrimination[117] became the doctrinal foundation for the Court's shift in emphasis from the equal opportunity conception of equality to the equal treatment conception. This development was predicated on a construction of Title VII that emphasizes fairness to the individual rather than to a group and on the establishment of rigorous standards to establish a prima facie case under the *Griggs* disparate impact theory and correspondingly more lenient standards to rebut a prima facie case under the disparate treatment theory.[118]

In *Teamsters v. United States*[119] the Court held, in a case in which plaintiff relied only upon the disparate treatment theory, that although treatment of a group is permissible as an evidentiary tool to establish liability,[120] Title VII, as a remedial device, must be interpreted as requiring fairness to individuals and not groups.[121] The district court in *Teamsters*, after finding that defendant's seniority system had unlawfully prevented plaintiff's class from transferring to more desirable jobs within the company, ordered that the identifiable victims of unlawful discrimination receive retroactive seniority and priority in job placement.[122] The court of appeals adjusted the district court's remedy

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116. *See* note 39 *supra*; Fiss, *supra* note 33. *Compare, e.g.*, Edwards & Zaretsky, *supra* note 13, *with* Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 784-85 (1979) (suggesting that the Court has been consistent in the theory of equality read into Title VII).

117. *See* text accompanying note 93 *supra*.

118. *See* notes 106 & 107 *supra*. *Compare, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) *and* Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977), *with* Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978) (per curiam).

119. 431 U.S. 324 (1977).

120. *Id.* at 339-40 & 339 n.20.

121. Rejecting the government's argument that the entire class was entitled to relief, the Court stated:

> Although not directly controlled by the Act, the extent to which the legitimate expectations of nonvictim employees should determine when victims are restored to their rightful place is limited by basic principles of equity. In devising and implementing remedies under Title VII, no less than in formulating any equitable decree, a court must draw on the "qualities of mercy and practicality [that] have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330. Cf. *Phelps Dodge Corp. v. NLRB*, 313 U.S., at 195-196, modifying, 113 F.2d 202 (CA2); 19 N.L.R.B. 547, 600; *Franks*, 424 U.S., at 798-799 (Powell, J., concurring in part and dissenting in part). Especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the courts must "look to the practical realities and necessities inescapably involved in reconciling competing interests," in order to determine the "special blend of what is necessary, what is fair, and what is workable." *Lemon v. Kurtzman*, 411 U.S. 192, 200-201, (opinion of Burger, C.J.).

*Id.* at 374-75.

122. *Id.* at 330-32.

and extended the remedy to a group of blacks who were not shown to have actually suffered specific discrimination at the hands of the employer.[123] The Supreme Court reversed, holding that only identifiable black victims, that is blacks who could show that they had applied for a transfer or who would have applied but for the company's unlawful practices, were entitled to relief. Title VII, the Court held, protects only individuals and not all of the company's minority employees or applicants as a class.[124]

The Court's most direct treatment of the individual versus group discrimination is found in *City of Los Angeles v. Manhart*.[125] *Manhart* was a class action challenging the pension plan of one of the city's departments. The plan required female employees to make larger contributions than male employees. The basis for the differential was the unchallenged actuarial fact that the female employees would live a few years longer than the males. Since the monthly pension payments were the same for each sex, the cost of a pension was greater for female retirees than for male retirees. The Court stated the issue as "whether the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics."[126] Justice Stevens, writing for the Court, stated unambigously that Title VII prohibits discrimination "against any *individual* . . . because of such *individual's* race, color, religion, sex, or national origin."[127] Under the *Manhart* rationale even an accurate generalization about a group cannot be used against an individual whom it does not fit; each person must be treated as an individual, not as a member of a group. As Justice Stevens went on to state, the "basic policy" of Title VII is "fairness to the individuals rather than fairness to classes."[128]

### 3. Group vs. Individual Fairness: The Conflict Crystallizes

Beginning in the mid-1970's, and coinciding with the onset of recessionary times, employers who had adopted race-conscious affirmative action programs were increasingly confronted with claims of reverse discrimination by white males. The increase in the number of reverse discrimination claims was not sudden. During the first decade of Title VII, there had been scattered challenges by white males to the special emphasis placed on recruitment, hiring, and promotion of blacks under affirmative action programs. Few of these earlier challenges elicited either judicial sympathy or substantial relief.[129] The

123. *Id.* at 333-34.

124. *Id.* at 368-69 & 368 n.52.

125. 435 U.S. 702 (1978).

126. *Id.* at 708.

127. *Id.* at 708 (quoting 42 U.S.C. § 2000e-2(a)(1) (1976)) (emphasis in original).

128. *Id.* at 709.

129. *See, e.g.*, Rios v. Steamfitters, Local 638, 501 F.2d 622 (2d Cir. 1974) (action under § 1981 and Title VII by union applicants in which the Court upheld a quota for union membership); Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1971) (class action under 42 U.S.C. § 1981 by fire department employees in which the Court sanctioned a temporary hiring quota of one minority person for every two nonminority persons); O'Burn v. Shapp, 70 F.R.D. 549 (E.D. Pa. 1976)) (private action under Title VII by police department applicants in which the

conflict between the two concepts of equality began to take on a more structured form after the Supreme Court decided *McDonnell Douglas v. Green* in 1973.

Race-conscious remedies were first challenged when courts began to adopt hiring and promotion quotas to remedy past discrimination. Many courts approved quotas despite the arguments asserted on behalf of whites who claimed to be innocent victims of reverse discrimination. Judicial justification for quotas was that they were necessary to remedy clear-cut patterns of past discrimination.[130] Finding themselves unable to fashion more appropriate forms of relief, the courts relied upon quotas as a remedy.[131] The *Griggs* disparate impact theory was critical to this development.

Although the authority of the federal courts to order race-conscious remedies had been widely accepted, no uniform standards had been established to determine when quotas were appropriate. For example, in *Carter v. Gallagher*,[132] the court expressed its hesitation with respect to the imposition of absolute quotas, noting that

> [t]he absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee

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district court refused to allow collateral attack on a consent decree which allegedly caused reverse discrimination); Patterson v. Newspaper & Mail Deliverers' Union, 384 F. Supp. 585 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975) (consolidated actions under Title VII by minority newspaper and publications delivery employees in which the Court approved a settlement which provided for aggressive affirmative action and a 25% minority employment goal). *See* Comment, *The Myth of Reverse Race Discrimination: A Historical Perspective*, 23 CLEV. ST. L. REV. 319 (1974). For collections of the cases which have addressed the appropriateness and scope of preferential relief, see *1974-75 Annual Survey of Labor Relations and Employment Discrimination Law*, 16 B.C. INDUS. & COM. L. REV. 965 (1975).

One case that brought analogous issues to national attention was DeFunis v. Odegaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *vacated per curiam as moot*, 416 U.S. 312 (1974). DeFunis was a white male whose application to the University of Washington School of Law was rejected pursuant to an admissions procedure which, while not employing quotas, did consider the race and ethnic background of applicants who chose to indicate those characteristics on the application form. DeFunis filed suit charging that his fourteenth amendment equal protection rights had been violated when the school accepted 36 minority applicants whose past scholastic performance indicated that they were less qualified than himself. The Washington Supreme Court rejected the trial court's ruling that consideration of race by the school was per se unconstitutional. Instead, the court required defendant to prove that consideration of the race of its applicants was "necessary to the accomplishment of a compelling state interest." *Id.* at 33, 507 P.2d at 1182. Compelling interests were found in the state's desire to (1) promote integration; (2) produce a racially balanced law school student body; and (3) correct the shortage of minority members admitted to the bar. The school's consideration of racial characteristics was found to be necessary because less restrictive alternatives such as improving primary and secondary education in the state would not be able to correct the problem of underrepresentation in the foreseeable future. However, by the time plaintiff's case was argued in the United States Surpeme Court, he had already been admitted to the law school pursuant to the trial court's order and had registered for his final semester. Accordingly, the suit was dismissed as moot by the Supreme Court. 416 U.S. at 317.

130. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1971); Commonwealth v. O'Neill, 4 Fair Empl. Prac. Cas. 1286 (3d Cir. 1972).

131. For an exhaustive history of some of the earlier cases on quotas, see Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOY. CHI. L.J. 315 (1974).

132. 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1971).

by the outright denial of another.[133]

Other courts expressed similar concerns.[134] Despite these reservations, and the continuing debate on the appropriateness of quotas, courts generally refused to declare the use of quotas impermissible,[135] and they were approved in the majority of cases in which such relief was proposed.[136]

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133. *Id.* at 330. The *Carter* court eventually approved a hiring quota of one minority person for every two nonminority persons. *Id.* at 331.

134. Commonwealth v. O'Neill, 473 F.2d 1029 (3d Cir. 1973), is an excellent example of a court's uncertainty about the scope and use of quota relief. In evaluating district court quotas for police hiring and promotion, the Third Circuit first rejected quotas for hiring and promotion. Commonwealth v. O'Neill, 5 Empl. Prac. Dec. 6600, 6601 (3d Cir. 1972). "Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them on the face of others, lest we abandon the basic principle of non-discrimination that sparked efforts to pry open those doors in the first place." *Id.* On rehearing, however, the same court again rejected promotional quotas, but affirmed the hiring procedures including the quota provisions because the court was "equally divided" with respect to those provisions. 473 F.2d 1029, 1030 (3d Cir. 1973).

135. *See, e.g.*, Patterson v. Newspaper & Mail Deliverers' Union, 514 F.2d 767 (2d Cir. 1975); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); United States v. Central Motor Lines, Inc., 325 F. Supp. 478 (W.D.N.C. 1970).

136. In the years following the enactment of Title VII, the courts and federal executive agencies reasoned that Congress had not intended to outlaw one of the most effective means of remedying past discrimination. Accordingly, the courts interpreted Title VII to permit, and in some instances to require, the use of race-conscious numerical remedies. The courts held that § 703(j), 42 U.S.C. § 2000e-2(j) (1976), could not be construed as a ban on quotas: "Any other interpretations would allow complete nullification of the stated purposes of the Civil Rights Act of 1964." United States v. Local 38, IBEW, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). Title VII was held to authorize remedial orders requiring union referrals of one black worker for each white worker, Local 53, Asbestos Workers v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969), and specific percentages of blacks in regular apprenticeship classes and special apprenticeship programs for blacks only, United States v. Ironworkers Local 86, 315 F. Supp. 1202, 1247-48 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); United States v. Sheet Metal Workers Local 36, 416 F.2d 123, 133 (8th Cir. 1969). As the Second Circuit stated in summarizing these decisions, "while quotas merely to attain racial balance are forbidden, quotas to correct past discriminatory practices are not." United States v. Wood Lathers Local 46, 471 F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

The courts of appeals in cases from the following seven circuits upheld the authority of the district courts to order race-conscious numerical relief under Title VII or other federal fair employment laws: Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 361 F. Supp. 1293 (D. Mass), *aff'd*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3d Cir. 1974); N.A.A.C.P. v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977); United States v. Masonry Contractors Ass'n, 497 F.2d 871 (6th Cir. 1974); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); Sims v. Local 65, Sheet Metal Workers, 489 F.2d 1023 (6th Cir. 1973); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1978); Crockett v. Green, 534 F.2d 715 (7th Cir. 1976); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973).

Also, during the period between the enactment of Title VII in 1964 and its amendment in 1972, the Department of Labor determined that numerical goals and timetables were necessary to implement the equal employment opportunity and affirmative action obligations of government contractors under Executive Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), and that a permissible method of meeting the goals and timetables in the construction industry was the hiring of one minority craftsman for each nonminority craftsman. *See* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 739-43 (1972). Both the

The rationale supporting quotas began to receive closer scrutiny from the courts as employers and unions attempted to comply with court orders and federal affirmative action regulations[137] requiring increased employment opportunities for blacks. As the number of challenges to those actions increased, the courts began to show greater reluctance to approve preferential treatment of blacks or to impose quota remedies. This reluctance was clearly evidenced by a spate of decisions in 1975 and 1976. Several of these decisions illustrate the doctrinal retreat from *Griggs* as the rationale of *McDonnell Douglas v. Green* and *McDonald v. Santa Fe Trails Transportation Co.* became more dominant.

One of the most notable decisions, which partially denied quota relief because of the effects upon white male employees, was *Kirkland v. New York*

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Department of Justice, 42 Op. Att'y Gen. 37 (Sept. 22, 1969), and the Department of Labor, U.S. DEP'T OF LABOR, LEGAL MEMORANDUM, in *Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 255, 274 (1969), found no conflict between the race-conscious measures and the provisions of Title VII. But see 49 Comp. Gen. 59 (1969). The courts agreed, holding that § 703(j) did not impose any limitation on actions taken pursuant to the Executive Order program and that

> [t]o read § 703(a) in the manner suggested by the plaintiffs, we would have to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other authority designed to overcome existing evils. We discern no such intention either from the language of the statute or from its legislative history.

Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See also* Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680, 684-86 (7th Cir. 1972). Thus, by the time Congress considered the 1972 amendments to Title VII, it was well established that the 1964 Act permitted race-conscious remedial action.

Although the majority of courts concluded that § 703(j) does not preclude all forms of preferential treatment, dissenting views were expressed. For example, Judge Hays, in dissent in Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 634 (2d Cir. 1974), argued that § 703(j) expressly prohibits racial quotas or "goals" even if they are imposed to eliminate past discriminatory practices. Simply stated, Judge Hays argued that § 703(j) was placed specifically in Title VII to remove all racial employment quotas from the panoply of equitable remedies available to the district courts. He sought to support his analysis by relying upon the legislative history of § 703(j), which included a statement from Senator Humphrey, one of the drafters of § 703(j), clarifying the section's purpose:

> The proponents of this bill have carefully stated on numerous occassions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group.

110 Cong. Rec. 12723 (1964) (remarks of Senator Humphrey).

Judge Hays, contrary to the approach taken by a majority of the courts, further suggested that § 703(j), being a specific delegation of power, should control the general remedial provision, § 706(g). 501 F.2d at 637 (Hays, J., dissenting). Under this reasoning, § 703(j) would limit any preferential treatment program under § 706(g), without limiting a number of other affirmative remedies available to the courts to meet the purpose of Title VII. *Id.* Finally, the *Rios* dissent suggests that remedial quotas do violence to Title VII's purpose of ending racism because the approval of racial classifications exacerbates racial attitudes. *Id.* at 639.

A related analysis is found in United States v. International Ass'n of Operating Eng'rs (IUOE), Local 701, 14 Fair Empl. Prac. Cas. 1400 (D. Ore. 1977). In that case, even though statistical evidence demonstrated that the union had engaged in racial discrimination, the court refused to grant a remedy that would have required the local to refer minority workers to contractors on federally funded construction projects "without regard to the minority workers position on [the Union's] hiring hall lists." *Id.* at 1407. Relying on § 703(j), the court held that "[t]he remedy sought by the United States would be a blatant giving of preferential treatment to minorities in the union over nonminorities." *Id.* at 1408.

137. *See, e.g.*, 41 C.F.R. § 60 (1977).

*State Department of Correctional Services*.[138] In *Kirkland* two black correctional officers brought suit to enjoin promotions based upon an allegedly discriminatory promotional examination. The test was held to be racially discriminatory and unlawful, a finding upheld by the court of appeals. The district court, however, had ordered the establishment of a fixed racial quota for promotions.[139] The court of appeals struck down the quota requirement because it was viewed as a permanent rather than a temporary requirement.[140] Although the court of appeals recognized that quotas are appropriate in some instances, it refused to permit their use (1) absent a showing of a clear-cut pattern and egregious history of racial discrimination and (2) the proposed quota would have an immediate impact upon a small number of easily identifiable white males.[141] Yet, the court sanctioned the use of interim quotas as a justifiable remedy when the impact of the remedy would be dispersed among a group of whites whose members could not be individually identified in advance.[142]

In a decision issued shortly before *McDonald v. Santa Fe Trail Transportation Co.*[143] the district court in *Cramer v. Virginia Commonwealth University*,[144] without ruling on the legality of all preferential relief, considered whether a race- and sex-conscious affirmative action plan could excuse preferential treatment in employment decision-making. The university had actively recruited women for faculty positions to compensate for alleged past sex discrimination in hiring. The male plaintiff had been denied two different positions for which he was at least as well or better qualified than the two female applicants who were hired. The male applicant claimed the practice of preferential hiring, pursuant to the university's affirmative action plan, was unlawful reverse discrimination. The university asserted that its policy of considering qualified female candidates to the exclusion of qualified males was not in violation of the equal protection clause[145] because it was rationally related to the university's obligation to conform to federal and state affirmative action requirements.[146] Further, the university argued that the prohibitions against preferential hiring and quotas contained in Title VII were overridden by the

138. 520 F.2d 420 (2d Cir. 1975).

139. The district court ordered that: (1) a lawful, nondiscriminatory selection procedure be established; (2) one out of every four interim appointments be filled by a minority, subject to court approval; and (3) defendants continue to promote at least one black or Hispanic employee for each three white employees until the percentage of minority sergeants equals the percentage of minority correctional officers. *Id.* at 423.

140. *Id.* at 428.

141. *Id.* at 427-30.

142. *Id.* at 429-30. *See also* Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976) (upholding nonpreferential elements of the district court's affirmative action order but reversing that part of the order that required the employer to combine seniority rosters at his two plants and to "bump" white workers); Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976) (reversing a district court order quota "excessing" plan for teachers because of its nonremedial, racially-based distortion of the seniority system).

143. 427 U.S. 273 (1976).

144. 415 F. Supp. 673 (E.D. Va. 1976), *vacated*, 586 F.2d 297 (4th Cir. 1978).

145. *Id.* at 676-78.

146. *Id.* at 677.

implied obligation under Executive Order 11,246 to afford preferences to minorities and women.[147]

The court in *Cramer* recognized the inherent conflict between implementation of the affirmative action plan and completely neutral hiring practices that have an adverse impact on protected classes. Finding, however, that Title VII prohibits such preferences and that Executive Order 11,246 does not negate the prohibition against preferential treatment, the court ruled against any use of race or sex as a criterion for hiring under any circumstances, although it accepted as a fact the past discrimination against women.[148] In finding affirmative action practices that afford preferential treatment to blacks and females unlawful, the court insisted that the same injustices to which affirmative action programs were addressed would be forever perpetuated if preferential treatment were given on the basis of race and sex.[149]

A case that caused considerable consternation among employers and unions was *McAleer v. American Telephone and Telegraph Co.*,[150] in which the court approved an award of damages to a white male employee who had been passed over for a promotion. The plaintiff concededly was entitled to the promotion under the collective bargaining agreement, but the position had been given instead to a less senior female employee pursuant to an affirmative action consent decree negotiated between AT&T and the EEOC under the auspices of a federal district court in another district.[151] The decree had specified that if two applicants for a position have substantially equal qualifications, the position, under the "affirmative action override" provision in the plan, must be offered to the one with the superior seniority. If stated affirmative action employment goals were not met, however, the decree required that, as between persons possessing the same basic qualifications, the employer must choose the minority or female person.[152]

The court in *McAleer* interpreted Title VII as placing the burden of past discrimination on the guilty employer (or union) and thus believed that, whenever possible, the innocent employee should not bear any of the costs of unlawful discrimination. The court rejected the defense that AT&T's action was required by a previous court order, reasoning that the prior order was necessitated by AT&T's own wrongful conduct and thus the company's actions were not protected. The court held that although the employer was legally obligated to comply with the affirmative action consent decree, it also had to compensate innocent white employees who were adversely affected by the affirmative action plan. The court recognized that competitive status job benefits such as promotions, transfers, and order of layoffs and recalls could be withheld from incumbent employees, but held that the employer had to pay

147. *Id.* at 680.
148. *Id.* at 678-80.
149. *Id.* at 681.
150. 416 F. Supp. 435 (D.D.C. 1976).
151. *Id.* at 436.
152. *Id.* at 436-37.

for the loss of those benefits.[153]

Although there was some authority indicating that employment decisions taken pursuant to a court order were protected from a claim of reverse discrimination,[154] the court in *McAleer* chose instead to rely upon the "innocent employee" rationale of *Franks v. Bowman Transportation Co.*[155] *McAleer* is not inconsistent with *Franks*. In *Franks* black applicants for over-the-road driving jobs brought an action against defendants for alleged violations of Title VII. The district court found that the rejected black applicants had been victims of unlawful racial discrimination but refused to grant seniority retroactive to the date of their application. The Supreme Court reversed that aspect of the case and ruled that an award of retroactive seniority, like back pay, is presumptively necessary to make whole the victims of past discrimination.[156] The Court held that the seniority status serves to place the victims in their "rightful place."[157] The majority, in response to a dissent by Justices Powell and Rehnquist, reasoned that any adverse effect upon innocent white employ-

153. *Id.* at 440.

154. *See, e.g.*, Black & White Children of Pontiac School Sys. v. School Dist., 464 F.2d 1030 (6th Cir. 1972); O'Burn v. Shapp, 70 F.R.D. 1029 (E.D. Pa. 1976).

155. 424 U.S. 747 (1976). The issue in *Franks* was whether § 703(h), 42 U.S.C. § 2000e-2(h) (1976), which excludes bona fide seniority systems from coverage under the Act, precludes an award of retroactive seniority to identifiable victims of discrimination. The Court held that a grant of retroactive seniority under the circumstances was consistent with that provision of Title VII, with its legislative history, and with the "make whole" objectives of the Act. *Id.* at 758, 763-64. The Court also noted that the benefits accruing from advanced seniority are as important to incumbent employees as they would be to nonemployee applicants. In addressing the company's argument that an award of retroactive seniority would impinge on the expectancies of "innocent employees," the Court stated:

> [I]t is apparent that denial of seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees would if applied generally frustrate the central "make whole" objective of Title VII. These conflicting interests of other employees will, of course, always be present in instances where some scarce employment benefit is distributed among employees on the basis of their status in the seniority heirarchy. But, as we have said, there is nothing in the language of Title VII, or in its legislative history, to show that Congress intended generally to bar this form of relief to victims of illegal discrimination, and the experience under the remedial model in the National Labor Relations Act points to the contrary. Accordingly, we find untenable the conclusion that this form of relief may be denied merely because the interests of other employees may thereby be affected.

*Id.* at 774-75.

The dissent emphasized that the grant of retroactive seniority to post-Act discriminatees would impact heavily on other "innocent" employees instead of the employer responsible for the unlawful discrimination. *Id.* at 788-89 (Rehnquist, J., and Powell, J., dissenting). Chief Justice Burger indicated a preference for awarding monetary damages rather than competitive seniority to the discriminatees, reasoning that pursuing this remedy would tend to deter the employer from engaging in further discrimination while holding harmless other employees. *Id.* at 780-81. In response to the dissenters' criticism that the creation of a presumption favoring retroactive seniority would unnecessarily harm "perfectly innocent employees," *id.* at 788, the majority stated that "the result [reached today]—which, standing alone, establishes that a sharing of the burden of the past discrimination is presumptively necessary—is entirely consistent with any fair characterization of equity jurisdiction. . . ." *Id.* at 777. In a footnote to that last sentence, the majority opinion suggests the award of monetary damages to each incumbent employee and discriminatee as a possible remedy available to district courts. This suggestion was followed by a disavowal of any views regarding the use of such a remedy since the issue was not properly before the Court. *Id.* at 777 n.38.

156. *Id.* at 774.

157. *Id.* at 764 n.21.

ees simply must be tolerated to achieve racial equality: "If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there is little hope of correcting the wrongs to which the Act was directed."[158] In support of this, the Court noted that regardless of the relief, the discriminatee continues to bear some of the burdens of past discrimination. The Court was careful to point out other remedial action that might be used to balance the interests of the black victims and innocent white employees: a "hold harmless" injunctive order respecting *all* affected employees in a layoff; front pay in favor of each employee and discriminatee; and union liability when the union has participated in the unlawful conduct. The Court, however, expressly refrained from ruling on these issues.[159] Chief Justice Burger, concurring and dissenting in part, stressed, however, that a more equitable remedy would be to provide front pay to the affected black employees. Justice Burger stated that he could not agree with the Court's approach, which he described as "robbing Peter to pay Paul,"[160] because of its impact on innocent white employees. He also stressed that innocent white employees were not foreclosed from suing the employer because of a remedy that benefited blacks.[161]

The dissenting opinion by Chief Justice Burger in *Franks* can be read as an invitation to white employees to bring reverse discrimination claims under Title VII. In *McAleer* the court recognized that invitation when it held that the plaintiff was entitled to the benefits of the seniority position he held immediately prior to remedial efforts. Consequently, after a race-conscious remedy is invoked and a minority employee is awarded the position, the employer is still required to provide the benefits of that position to the affected innocent white employee. In sum, *McAleer* held that two different employees—one female, and the other male—had valid Title VII claims to the benefits of the *same* position. The effect on the employer was apparent: having once discriminated in the past, he became potentially liable for two salaries for the same position, at least until the incumbent vacated the position.

Thus, at the time the Supreme Court heard *Weber*, it had recognized two conflicting theories of discrimination under Title VII. One, disparate impact, designed to increase minority representation in the work force, supported the affirmative action concept. The other, disparate treatment, designed to eliminate any consideration of race in decision-making, supported the reverse discrimination claims. This conflict reflected the two conceptions of equality that the Court had read into Title VII.

The concern with protecting an individual's right to equal treatment is arguably a concern with *process*. The concern with equality of opportunity, on the other hand, is a concern with the position of groups relative to other

158. *Id.* at 775 (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)).

159. *Id.* at 777 n.38.

160. *Id.* at 781 (Burger, C.J., concurring and dissenting).

161. *Id.*

groups—a concern with *outcomes*.[162] While *process* and *outcome* are relatively easy to separate in theory, they are more difficult to disentangle in practice. Given the current state of knowledge, statistics about outcomes remain the most expedient and feasible indicator of process, at least in the area of employment. In other words, the attention given to outcomes does not reflect a change in the ultimate objective, but rather points to the difficulty of obtaining an operational indicator of process. It thus appears that those who reject affirmative action because of philosophical reasons are unable to suggest a better way to measure change in treatment. For example, Professor Glazer, in his chapter addressed to racial discrimination, resorts to using indicators of outcomes to support his contention that blacks advanced further prior to the enactment of Title VII than subsequent to it.[163] In an attempt to refute the existence of "institutional racism," Glazer contends that the argument that it exists "became institutionalized and strengthened at a time when very substantial progress had been made, and was being made, in the *upgrading* of *black employment* and *income*."[164] His proof of these improvements is found in the distribution of black families by income levels and the distribution of blacks by occupation. These are the same types of statistics used by the courts to determine the existence of discrimination.

The real significance of the legal developments prior to *Weber* was that it created a dilemma in the enforcement of the national policy against employment discrimination. Many employers were faced with disproportionate work force populations, and the OFCC, EEOC, and numerous civil rights groups, to say nothing of individual victims, were pressing for changes in the minority profile in the work force. The affirmative action plan at issue in *Weber* had been negotiated in 1974 when the *Griggs* disparate impact theory was the dominant theme of the national policy. *Weber* was decided by the lower courts, however, at the time when there was clearly a discernable shift to the disparate treatment theory of discrimination with its emphasis on fairness to individuals.

## III. *WEBER V. KAISER ALUMINUM & CHEMICAL CORP.*

### *A. The Factual Background*[165]

Kaiser Aluminum operated a plant in Gramercy, Louisiana. All production and maintenance employees at that facility were represented by the Steelworkers Union. As of 1974 the total population in the Gramercy area was approximately forty-six percent black and the local work force was thirty-nine percent black, yet blacks constituted less than two percent of the craft employees (five of the approximately 273 positions) and made up only 14.8% of Kai-

162. *See* Fiss, *supra* note 33, at 237-38.

163. N. GLAZER, *supra* note 20, at 41-43, 69.

164. *Id.* at 69.

165. The basic facts are taken from the petitions for a writ of certiorari in United Steelworkers v. Weber, 443 U.S. 193 (1979), and the lower court opinions, 563 F.2d 216 (5th Cir. 1977) and 415 F. Supp. 761 (E.D. La. 1976).

ser's work force as a whole. The significant statistical disparity between the percentages of blacks in the Gramercy area work force and the craft positions had not occurred by chance. The primary method of gaining craft experience in the Gramercy area was to enroll in training and apprenticeship programs administered by the local building trades industry. Blacks, however, had not enjoyed the same training opportunities as whites because the building trades unions had historically discriminated against blacks and denied them admission to the training programs.[166]

Kaiser realized that there was a severe underrepresentation of blacks in its craft jobs and feared that this underrepresentation, which was in apparent violation of its affirmative action obligation as a government contractor under Executive Order 11,246,[167] would lead to the imposition of federal sanctions. In addition, both Kaiser and the Steelworkers feared possible Title VII actions brought by either black employees or the EEOC alleging discrimination in craft employment under the *Griggs* disparate impact theory.[168]

In response to these fears of private litigation or federal enforcement proceedings, Kaiser and the Steelworkers, on February 1, 1974, entered into a nationwide collective-bargaining agreement that contained provisions designed to increase the representation of blacks and women in the crafts and maintenance positions. The collective-bargaining agreement provided for affirmative action goals and timetables and established a selection ratio of one minority worker for each white employee chosen for future craft vacancies, unless at a particular time there were insufficient qualified minority candidates available. That selection ratio would be maintained at each Kaiser plant until the minority representation in the craft jobs was equivalent to the percentages of blacks in the work force from which the particular plant recruited.[169]

Kaiser and the Steelworkers, subsequent to the conclusion of the national agreement, entered into a "Memorandum of Understanding," which set forth a goal of thirty-nine percent of minority representation in craft positions at the Gramercy plant. To ensure the success of this affirmative action program in light of the scarcity of minorities with prior craft experience, the agreement also provided for the establishment of new on-the-job training programs for which prior experience would not be a prerequisite. The collective-bargaining agreement also established a dual seniority selection ratio under which minority and female employees would be admitted to craft training programs with less plant seniority than their white counterparts.[170]

Brian Weber, a white employee at the Gramercy plant, was passed over for one of the training programs in favor of a less senior black employee. Weber brought a class action on behalf of all nonminority employees at the

166. For a discussion of discrimination against blacks in the unions, see generally H. HILL, BLACK LABOR AND THE AMERICAN LEGAL SYSTEM (1977); L. KESSELMAN, THE SOCIAL POLITICS OF FEPC (1948); UNITED STATES COMMISSION ON CIVIL RIGHTS, EMPLOYMENT 127-51 (1961).

167. 3 C.F.R. 339 (1964-1965 Compilation).

168. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 228-29 (5th Cir. 1977).

169. *Id.* at 218.

170. *Id.* at 222-23.

Gramercy plant who had applied for, or were eligible to apply for, on-the-job training programs set up pursuant to the 1974 collective-bargaining agreement. His complaint alleged that by granting preferential treatment to blacks who had not been shown to be victims of past discrimination, both Kaiser and the Steelworkers violated his rights under sections 703(a) and (d) of Title VII. Defendants opposed Weber's claim on essentially four grounds. First, defendants argued that they had not violated their duty of fair representation in negotiating the collective-bargaining agreement.[171] Second, they argued that the quota provision did not violate section 703(j), the antipreferential section of Title VII, because the language of this section did not include a specific prohibition against quotas in employment or training programs.[172] Third, defendants contended that the quota provision was analogous to affirmative action programs that had been mandated by federal courts in response to lawsuits brought by blacks under Title VII.[173] Finally, they argued that the provision was adopted pursuant to its obligation as a government contractor under Executive Order 11,246.[174] Defendant's arguments were fully supported by the "state of the law"[175] at the time the the agreement was negotiated.

### *B. The District Court Opinion*

The district court agreed with Weber's allegations and issued a permanent injunction against further use of the quotas at the Gramercy plant.[176] The court ruled that the race-conscious affirmative action provisions unlawfully discriminated against white employees on the basis of race.[177] The court held that sections 703(a)(1) and (d) expressly proscribe any employment practice that discriminates against any individual on the basis of race, color, religion, sex, or national origin. The court did not consider the potential applicability of section 703(a)(2) under which *Griggs* was decided, nor how the theories, based on these two sections, could be reconciled.

The court recognized that district courts may lawfully impose race-conscious remedies on employers pursuant to the broad remedial powers under section 706(g). While acknowledging that a district court under *Moody* may require an employer to grant preferential treatment to a victim of discrimination to make that employee "whole" and restore him to the position that he would have had "but for" the employer's discrimination, the district court held that only the judiciary possessed those powers and that an employer and union could not voluntarily adopt such remedies.[178] The court thus impliedly re-

171. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 765 (E.D. La. 1976).
172. *Id.* at 766.
173. *Id.*
174. *Id.* at 764-65, 769.
175. *See generally* Belton, *supra* note 45.
176. 415 F. Supp. at 770.
177. *Id.* at 766.
178. *Id.* at 767. "The most important and obvious distinction is the fact that Sections 703(a) and (d) of Title VII do not prohibit the *courts* from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to *employers*." *Id.* (emphasis added). The district court gave two additional reasons for

jected persuasive precedents from its own court of appeals.[179]

The distinction between judicially imposed and voluntarily adopted race-conscious affirmative action plans was unnecessary to the court's decision. The district court went on to hold that even a court could not mandate the quota system adopted by defendants in this case because a court's authority to order affirmative action relief is limited to situations in which prior discriminatory employment practices displaced employees from their "rightful place" in the employment scheme. In other words, this equitable remedy is appropriate only when there has been a judicial determination of unlawful discrimination.[180] Kaiser had specifically denied any discriminatory conduct, either in hiring or promotion, since the opening of its Gramercy plant in 1958. The district court accepted Weber's argument that since black workers who were selected were not themselves identifiable victims of unlawful discrimination, blacks already occupied their "rightful place"[181] at the Gramercy plant. The court held that in the absence of evidence of prior discrimination and identifiable victims of that prior discrimination, the hiring ratio must be considered an unlawful racial preference in violation of Title VII.[182] The court also found a conflict between Executive Order 11,246 and Title VII. It resolved the conflict in favor of Title VII because of its emphasis on prohibiting discrimination against *individuals*.[183] Thus, the court held that to the extent the Executive Order required the results argued for by defendants, it was unlawful.[184]

### C. *The Fifth Circuit Opinion*

The Fifth Circuit affirmed the decision of the district court by two-to-one vote.[185] However, the majority rejected the lower court's position that an employer is more restricted than a court in instituting a voluntary race-conscious

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distinguishing between private and judicially imposed quotas. Quotas should be deemed to be an extraordinary remedy to be imposed with extreme caution and discretion and only when the courts are in a position to ensure that due process is afforded to all parties in fashioning such relief. Furthermore, the assurance that such a remedy will be imposed solely by the courts ensures that these remedial programs will be uniformly designed and administered and will be in existence only as long as necessary to effectuate the purposes of the Civil Rights Act. *Id.* at 767-68.

179. *See, e.g.*, United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied sub nom.* Harris v. Allegheny-Ludlum Indus., Inc., 425 U.S. 944 (1976).

180. 415 F. Supp. at 769.

181. *Id.*

182. *Id.* Despite the statistical disparity between the percentage of blacks in the craft jobs and the percentage of blacks in the local work force, the court concluded that Kaiser had not discriminated against minorities when filling vacancies. The court focused on the evidence that Kaiser had undertaken vigorous efforts to recruit trained black craftsmen from the surrounding community, including advertising in minority-oriented newspapers and periodicals. Since minority craftsmen in the Gramercy area were either unresponsive or virtually nonexistent, these affirmative recruiting attempts proved fruitless. *Id.* at 764.

183. "This Court, however, is not sufficiently skilled in the art of sophistry to justify such discrimination by employers in light of the unequivocal prohibitions against racial discrimination against *any individual* contained in Sections 703(a) and (d) of the 1964 Act." *Id.* at 769 (emphasis in original).

184. *Id.* at 769-70. The court further held that any exceptions to the prohibitions of Title VII should be made by Congress and not the judiciary. *Id.*

185. 563 F.2d 216 (5th Cir. 1977).

remedy. The majority found that the district court's approach was inconsistent with the fundamental policy objective of Title VII—the elimination of unlawful employment practices through voluntary compliance and private settlement.[186] Nevertheless, the majority agreed with the second reason given by the district court for invalidating the affirmative action plan, and concluded that the hiring ratio used by Kaiser could not be approved even if it had been judicially mandated. While a majority of the panel recognized that Title VII permits preferential treatment for identifiable victims of past discrimination, it affirmed the lower court's finding that no evidence of past discrimination had been presented. The court concluded, therefore, as had the court below, that in "the absence of prior discrimination, a racial quota loses its character as an equitable *remedy* and must be barred as an unlawful racial *preference*" that violates sections 703(a)(1) and (d) of Title VII.[187]

The majority also rejected defendant's argument that the affirmative action plans should be upheld as compensation for the lack of minority training in crafts that was caused by societal discrimination.[188] The court, echoing the disparate treatment strand of *Griggs*, reasoned that Title VII was not intended to provide relief for the effects of *all* racial discrimination. Rather, the Act authorizes racial preferences only if instituted to provide a remedy for employees who are identifiable victims of proven discrimination within a particular employment scheme. Since there was no such proven discrimination here, either intentional or in effect, the court found no justification for interfering with the operation of the seniority system by superimposing on it a racial hiring ratio.[189]

Another argument rejected by the panel was that the hiring ratio included in the collective-bargaining agreement was mandated by Executive Order 11,246. This Order and the accompanying interpretive regulations issued by OFCCP require all government contractors, regardless of prior discrimination, to implement affirmative action "goals and timetables" if a self-analysis of their work force reveals a statistical "underutilization" or "underrepresentation" of minorities.[190] Kaiser's argument that it was required by the Order to establish an affirmative action plan to remedy the significant underrepresentation of blacks in its crafts positions was rejected on the ground that the obligation, even if imposed by the Executive Order, conflicted with section 703(d) of Title VII, which prohibits the use of racial classifications in determining eligibility for on-the-job training programs.[191] The court concluded that any con-

186. *Id.* at 223.

187. *Id.* at 224 (emphasis in original).

188. *Id.* at 225.

189. *Id.* at 225-26.

190. 41 C.F.R. § 60.1 (1979). *See* Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae at 17, Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977).

191. 563 F.2d at 227. Section 703(d), 42 U.S.C. § 2000e-2(d) (1976) provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual

flict between the Executive Order and Title VII must be resolved in favor of the statute.[192]

In his dissent Judge Wisdom formulated a reasonableness standard by which to test the validity of voluntary affirmative action programs. He argued that the majority was correct in rejecting the first ground of the district court's opinion—that only a court may institute an affirmative action quota to remedy prior discrimination—noting that this position, if accepted, would totally undermine the congressionally-favored policy of voluntary compliance.[193] He maintained, however, that by accepting the district court's alternative holding—that an employer could institute a voluntary affirmative action plan only if that plan could have been imposed by a court and that even a court could not have imposed the plan in this case—the majority adopted a standard that would lead indirectly to precisely the same result—the death-knell for voluntary compliance and conciliation under the Act.[194]

Judge Wisdom argued that the majority's theory placed the employer and the union in an untenable position.[195] If the company and union elected not to institute a voluntary remedy, they faced the risk of liability to blacks in private Title VII actions, federal pattern and practice suits by the EEOC, and sanctions under the Executive Order. On the other hand, if they instituted a voluntary remedy, and that plan was deemed excessive by a reviewing court, they would be liable to white employees in private or federal suits alleging reverse discrimination.[196] In addition, their good faith in attempting to comply with Title VII would not be a defense to liability. Judge Wisdom argued that the majority's approach would frustrate the congressional policy of voluntary compliance and flood the courts with more Title VII litigation, thus further delaying the implementation of the national policy to eliminate racial discrimination.[197]

Judge Wisdom then suggested a less stringent standard for evaluating voluntary affirmative action plans: "If an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld."[198] In support of his "arguable violation" approach, Judge Wisdom argued that it was inappropriate to require a conclusive finding or admission of prior discrimination before upholding a voluntary affirmative action plan. A finding of prior discrimination will rarely, if ever, be established in the case of a voluntarily imposed remedy in a reverse discrimination lawsuit because none of the parties will be interested in

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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.

192. "[E]xecutive Orders may not override contradictory congressional expressions." 563 F.2d at 227.

193. *Id.* at 229 (Wisdom, J., dissenting).

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

195. The company and the union "are made to walk a high tightrope without a net beneath them." *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

proving discrimination.[199] Weber, the dissent noted, realized that the presentation of evidence of discrimination would seriously undermine his chances of proving reverse discrimination. The company and the union, on the other hand, recognized that while they might justify their voluntary remedy by admitting past discrimination against blacks, they could do so only at the cost of inviting private Title VII suits by blacks. This, Judge Wisdom noted, was "a pyrrhic victory at best."[200]

Judge Wisdom maintained that the affirmative action plan should have been upheld under his "arguable violation" standard, contending that the evidence indicated the existence of three possible or probable violations. First, the statistical disparity between the percentage of blacks in the Gramercy plant and the percentage of blacks in the area work force constituted a prima facie case of plant-wide hiring discrimination under the *Griggs* theory. Second, the prior experience requirement for admission to Kaiser's earlier craft training program may have had a disparate impact under a *Griggs* analysis. Third, the requirement of any training at all for some of the company's craft jobs may have been illegal since it had a disparate impact on minorities and arguably could not be justified by business necessity.[201]

Judge Wisdom also suggested two other grounds for upholding Kaiser's plan. First, he argued that the affirmative action plan was valid as a proper remedy for societal discrimination against blacks.[202] Alternatively, he maintained that Kaiser's program was not only permissible but actually required by Executive Order 11,246. While he agreed with the majority's conclusion that any conflict between the Executive Order and Title VII must be resolved in favor of the statute, he concluded that the Executive Order was entirely consistent with the primary purpose of Title VII.[203]

The fundamental difference between the majority and Judge Wisdom was the theory of equality used by each to determine the issues raised by the parties. The majority adopted a rigid adherence to the *McDonnell/McDonald* disparate treatment theory. Judge Wisdom, on the other hand, although he did attempt to make an accommodation between the two theories, relied heavily on the *Griggs* disparate impact theory.

### *D. The Supreme Court Decision*

#### 1. General Considerations

In *Weber* the Supreme Court had to decide the question of the legality of race-specific quotas in a voluntary affirmative action plan. More importantly, however, the Court faced the problem of resolving the conflict between the primary purpose of Title VII, with its emphasis on voluntary compliance, and

199. *Id.* at 231 (Wisdom, J., dissenting).
200. *Id.*
201. *Id.* at 231-32.
202. *Id.* at 234-36.
203. *Id.* at 236-38.

the competing notions of equality that the Court had read into the statute. Although the concept of affirmative action was clearly an important aspect of the national policy against employment discrimination, the statutory language sustained two conflicting interpretations.

The task before the Court in *Weber* was the determination of congressional intent, which entails the formidable task of historical reconstruction. The social and political atmosphere that gives birth to a statute, as well as the needs and agitation that provoke it, must be sympathetically understood. Congressional purpose, however dimly made out, must be translated forward and related to contemporaneous or later relevant enactments and other changes, such as the development of new constitutional or statutory approaches. Translation forward can present very intricate problems when statutes that have acquired a certain "gloss" are in question. As recognized either explicitly or implicitly in the majority, concurring, and dissenting opinions in *Weber*, the legislative debates provided no clear and unequivocal answer to the question the Court faced in *Weber*.[204] In addition, a review of the Supreme Court cases on employment discrimination demonstrated a shift in the doctrinal foundations that caused misinterpretation and confusion. The Court simply had not attempted to build a bridge between its earlier and later cases. In short, the Court had not, in the more recent Title VII cases, attempted to lay a foundation for the reasoned analysis expected of the judiciary in a democratic society.[205]

### 2. *Bakke*

The initial problem for the Court in *Weber* was whether constitutional analysis, statutory analysis, or both, should be employed to decide the case. A starting point, of course, is the rule that constitutional issues ought to be avoided by adopting that construction of a statute which does not raise them.[206] However, the problem of which analytical approach to use had been

204. Remarks of certain Senators "were not addressed to temporary, voluntary affirmative measures undertaken to eliminate manifest racial imbalance in traditionally segregated job categories." *Weber*, 443 U.S. at 207 n.7 (Brennan, J.); In *Bakke*, Justice Brennan criticized Justice Steven's view that the legislative history supported a color-blind theory of Title VII, because the "fragmentary comments" from the legislative history on which Justice Stevens relied "fall far short" in support of that theory. 438 U.S. at 340 n.17 (Brennan, J., concurring in part, dissenting in part). He further noted that the same is true with regard to Title VII. *Id.* (Brennan, J., concurring in part, dissenting in part). "[I] share some of the misgivings . . . concerning the extent to which the legislative history clearly supports the result. . . ." *Weber*, 443 U.S. at 209 (Blackmun, J., concurring). "Section 703(j) apparently calmed the fears of most of its opponents; after its introduction, complaints concerning racial balance and preferential treatment died down considerably." *Id.* at 247 (Rehnquist, J., dissenting).

205. *See* A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 114 (1976) (In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of pragmatic political judgments of a particular time and place."); H. HART, THE CONCEPT OF LAW 121 (1961) ("In any large group, general rules, standards and principles must be the main instruments of social control, and not particular directions given to each individual separately.").

206. Rescue Army v. Municipal Court, 331 U.S. 549, 568-69 (1947); Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

compounded by the decision of the Court a year earlier in *Regents of University of California v. Bakke*.[207] *Bakke* also involved the legality of the affirmative action principle, but was decided in the context of Title VI of the Civil Rights Act of 1964.[208] Title VI provides that no person on the grounds of race or color shall be excluded from participating in any program receiving federal financial assistance.[209] In *Bakke* a majority of the Justices reached the constitutional issue on affirmative action because they found that Congress intended to make the constitutional and statutory rights coextensive.[210]

The decision in *Bakke* suggests that a majority of the Justices struggled to fit the difficult problem raised by the affirmative action concept into the traditional analysis of the fourteenth amendment's "equal protection" clause. That clause simply forbids a state to "deny to any person within its jurisdiction the equal protection of the law."[211] The Court has developed what constitutional scholars call a "two-tiered analysis"[212] to flush out the constitution's slender admonition. Since every state action benefits some people more than others, the vast majority of these actions are entitled to only "ordinary" scrutiny. But those that affect "fundamental rights" or benefit people on the basis of a "suspect classification" receive "strict scrutiny." Discrimination on the basis of race has always been the clearest suspect classification.[213]

The attempt to apply the principles of *Bakke* to *Weber*, however, is frustrated by the difficulty of discerning just what those principles are.[214] The array of opinions include five votes for a series of conflicting propositions, each of which might lead to a different view of the legality of quotas under Title VII. Five Justices suggest that race may be a factor considered in judicial, legislative, or administrative determinations. In general, however, the tone of several of the *Bakke* opinions seems to disfavor the use of any criteria that exclude individuals on the basis of race.

Justice Powell, in his plurality opinion, emphasized the personal or individual nature of constitutional rights. Bakke was excluded from consideration for admission because of his race, and this infringement on his individual

207. 438 U.S. 265 (1978).

208. 42 U.S.C. § 2000d (1976).

209. *Id.*

210. *See* note 5 *supra*.

211. U.S. CONST. amend. XIV, § 1.

212. *See* Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 994-1005 (1978); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969). *See also Bakke*, 438 U.S. at 357 n.30 (Brennan, J.).

213. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).

214. *See, e.g.*, United States v. City of Miami, 614 F.2d 1322, 1337 (5th Cir. 1980) ("We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over one hundred and fifty pages of United States Reports, the Justices have told us mainly that they have agreed to disagree."); Edwards, *Preferential Remedies and Affirmative Action In Employment in the Wake of Bakke*, 1979 WASH. U.L.Q. 113, 115; Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979).

rights raised serious constitutional questions for Powell.[215] Four other Justices concurred with this emphasis on the personal and individual nature of the rights involved.[216] This proposition raised serious questions about the affirmative action plan in *Weber* since individual employees and applicants for craft training would be both included and excluded for consideration solely on the basis of race. If the Court were to apply a constitutional analysis to Title VII, as it did to Title VI, Weber, under this strand of Powell's analysis, would seem to have a valid claim.[217]

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215. If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background.

438 U.S. at 299 (Powell, J.) (footnote and citations omitted).

Justice Powell emphasized that the fourteenth amendment protects all persons equally: "It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.' " *Id.* at 289 (quoting Shelly v. Kraemer, 334 U.S. 1, 22 (1948)). He further stated that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.* at 289-90.

Justice Powell rejected the theory that the fourteenth amendment was primarily a protective device to be used by racial and ethnic minority groups. He rejected any view of the Constitution that requires individuals to suffer impermissible burdens in order to enhance the interests of different social groups. When the university urged the Court to hold that discrimination against whites cannot be suspect if its purpose can be characterized as "benign," Justice Powell responded: "The clock of our liberties cannot be turned back to 1868. It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded to others." *Id.* at 295 (emphasis in original) (citations omitted)).

216. Justice Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist, also attached great importance to the personal nature of the right involved in *Bakke*. Justice Stevens, however, chose to rely solely on Title VI of the 1964 Civil Rights Act in concluding that the minority admissions program at Davis was invalid, *id.* at 421 (Stevens, J., concurring in part and dissenting in part), relying on the settled practice to "avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground." *Id.* at 411. Justice Stevens found that there was no exception within Title VI based on the existence of a benign quota: "Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of 'exclusion' is justified by the statute or its history." *Id.* at 414. The university had excluded Bakke from its medical program because of his race, yet, at the same time, was receiving federal funds. To Justice Stevens, this combination of factors led to the inescapable conclusion that the university had violated Title VI. According to Justice Stevens, the statute had to be interpreted on its face. He stressed that the legislative history of § 601 revealed that its opponents feared that the term "discrimination" would be read as mandating racial quotas and "racially balanced colleges and universities." *Id.* at 414-15. In response, the proponents of the legislation "gave repeated assurances that the Act would be 'colorblind' in its application." *Id.* at 415. As a consequence of the wording and history of the statute, Justice Stevens felt that it had to be applied equally to everyone, regardless of race. *Id.* at 418.

217. A related problem that concerned Justice Powell was how "minorities" would be defined for the purposes of dispensing preferential treatment: "The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments. As observed above, the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history

On the other hand, Justice Powell, joined by Justices Brennan, White, Marshall, and Blackmun, implied that racial preferences and exclusions are permissible if used for remedial purposes after a finding of past discrimination by a governmental body competent to make that finding.[218] Courts and administrative agencies, such as the EEOC and OFCC, have ordered preferential race-conscious remedies for blacks, which of necessity have resulted in the exclusion of whites.[219] In *Bakke*, however, there had been no finding that would have provided the predicate for the remedial admissions policy. Moreover, Justice Powell did not think that the medical school was competent to make that finding.[220]

The Court in *Bakke* broke down this way. Four Justices—Brennan, White, Marshall, and Blackmun—believed that "reverse discrimination" programs of almost any sort violate neither the constitution nor the 1964 Civil Rights Act.[221] Another four—Burger, Stewart, Stevens, and Rehnquist—be-

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of prior discrimination at the hands of the State and private individuals." 438 U.S. at 295 (Powell, J.).

This problem was not of great concern to Justice Brennan, as he believed the term "minority" was capable of principled definition on the basis of racial heritage. He noted that legislation requiring that recipients of public works grants use at least 10% of the grant for minority business enterprises defined minorities as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.* at 348 (citing 42 U.S.C.A. § 6705(f)(2) (West Cum. Supp. 1978)) (Brennan, White, Marshall, & Blackmun, JJ., concurring in part, dissenting in part). Later in his opinion, Justice Brennan distinguished the white "majority" from racial minorities on the ground that whites as a class had not been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 357 (citing San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

218. The implication seems to be based on a presumed state interest in ameliorating or eliminating the effects of past discrimination. Justice Powell found that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Id.* at 307 (Powell, J.) Yet, before such racial preference and exclusion are permissible, a finding of prior discrimination must be made and "[b]efore relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination." *Id.* at 309. Justice Powell found that the university was an educational institution rather than a civil rights agency and therefore lacked the capability. *Id.* at 310. As a result, it could not carry its burden of justification on the issue:

> Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.

*Id.* (citations omitted).

219. Justice Powell found that preferences have been upheld "where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination." *Id.* at 301.

220. *Id.* at 310.

221. The Brennan group candidly embraced racial preferences that are soundly designed to remedy the effects of societal discrimination against minorities. *See id.* at 362-63 (Brennan, J.). A racial classification used for such "benign" purposes need not be subjected to the extremely severe standard of judicial review that has been applied to discrimination that stigmatizes a group or works against a minority. *Id.* at 356-62. Instead, the Brennan group would test "benign" racial

lieved that *any* discrimination on the basis of race by an institution receiving federal aid violates the Civil Rights Act. Therefore, these four found it unnecessary to discuss the constitutional question.[222] The ninth Justice, Powell, believed that it is permissible for institutions to take race into account as a "factor" in their admission decisions but that a plan specifically reserving sixteen places for minorities went too far in institutionalizing racial discrimination.[223]

Justice Powell and the other four Justices who discussed the constitutional question gave two very different explanations for why state action that makes distinctions based on race is not automatically invalid in the context of reverse discrimination. The theory of Brennan, White, Marshall, and Blackmun is that a racial classification that operates to the disadvantage of whites is not the same as one that operates against blacks and other minorities. The purpose of the equal protection clause, by this line of reasoning, is to protect a discrete and insular minority. It is intended to help the kind of group that is least able to protect its own interest through the political process and so must be protected from the tyranny of the majority.[224] Whites simply do not qualify for this special constitutional protection. These Justices proposed that "racial classification established ostensibly for benign purposes"[225] be subject only to the sort of middle-level scrutiny that they described as "strict and searching" but not necessarily "fatal."[226] Under this standard, a race-conscious affirmative action program could survive as long as it did not stigmatize or burden any group less well represented in the political process. That is to say, an

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classification against the intermediate, although "searching" standard of review that the Court has adopted for cases of sex discrimination. *Id.* at 359-62; see Craig v. Boren, 429 U.S. 190 (1976). To survive this intermediate scrutiny, the classification must serve an "important and articulated" purpose, and it must be "substantially related" to achieving that purpose. 438 U.S. at 361-62. (Brennan, J.).

222. Justice Stevens argued on behalf of himself and the three other Justices (Chief Justice Burger, Justices Stewart and Rehnquist) that the Davis program violated the "crystal clear" language of the ban on discrimination in Title VI. 438 U.S. at 417-18 (Stevens, J.). He emphasized that the broad language of Title VI must be considered distinct from the fourteenth amendment question: "[N]either its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage." *Id.* at 418 (footnote omitted). Accordingly, Justice Stevens and the three other Justices who joined Justice Powell's opinion did not address the constitutional question. *Id.* at 411-12.

223. *Id.* at 318 (Powell, J.).

224. *Id.* at 357 (Brennan, J.) (citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

225. *Id.* at 361.

226. *Id.* at 362. Justice Powell devotes much of the first part of his opinion to rejecting the Brennan groups' analysis. Two points of doctrinal difference are discussed. First, for Justice Powell, when the issue is the proper standard of review, there is no such things as a "benign" racial classification. All classifications by race, whether they produce immediate stigmatizing effects and whether they work against minorities, demand the rigors of "strict scrutiny." The state must seek to serve a "compelling" interest and must demonstrate that its racial classification is "necessary" for achieving that purpose. Second, the state has a substantial interest in compensating for society's past discrimination. Justice Powell agrees, but the universities and the courts had no principled basis for selecting those minorities who are deserving of preference, *id.* at 294-99 (Powell, J.), and the interest in remedying the effects of discrimination normally cannot support placing burdens on individuals who are themselves not responsible for the discrimination. *Id.* at 307-10.

affirmative plan could not reserve places for Chicanos by denying them explicitly to blacks.

Justice Powell's theory is that all racial distinctions are equally suspect, but in the case of most affirmative action programs, the suspect classification faces "strict scrutiny" and survives it.[227] Powell believed that a university's need to maintain racial diversity in a student body is a "substantial" enough goal to justify even a suspect racial classification. However, the particular method an institution chooses must be "necessary" to the achievement of that goal,[228] and Powell did not consider rigid quotas "necessary" when other affirmative action methods are available.[229] This seems to explain why he voted to invalidate the Davis program while upholding the general right of institutions to use race as a factor in their admissions decisions.

Because Justice Powell's vote was decisive in *Bakke*, courts and commentators have searched his opinion for indications of how far he would be willing to go in upholding similar affirmative action programs in employment dis-

227. *See* Karst & Horowitz, *supra* note 214, at 15-17, in which the authors note that:

> *Diversity and the relevance of past discrimination.* Justice Powell's first opinion rejects the Brennan group's argument that race-conscious remedies for the effects of past societal discrimination against minorities are valid. His "diversity" approach to university admissions, however, once again blurs the distinctions separating him from his four brethren. Underlying Justice Powell's approach is the unspoken assumption that the history of racial discrmination in this country inevitably makes race a valid consideration in the diversity formula.
>
> Harvard has concluded, with Justice Powell's after-the-fact blessing, that "a black student can usually bring something [to the educational process] that a white person cannot offer." Additionally, in Harvard's view, "the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it." The educational advantage of racial diversity among students is that a minority student's distinctive set of attitudes and experiences can broaden the education of the university's students generally. Race, in other words, is a socially significant fact in American society.
>
> The next logical step is a small one: it requires only that we ask why race is so significant. No one would think it desirable to seek diversity in a professional school by giving a "plus" to applicants who are double-jointed or whose wisdom teeth are impacted. Such persons offer nothing special to the educational process by virtue of those qualities. If race is relevant to the goal of "educational pluralism," the point surely is that a black student in, for example, a law school's criminal procedure class may have a view of police conduct that is quite different from the views of his white classmates. That difference in perspective is related to the perception by large numbers of blacks that the police in this country have often been an instrument for keeping blacks "in their place." It is the history of racial subordination, above all, that makes race socially significant. If a black student can "bring something that a white person cannot offer," the "something" is, primarily, an inheritance from past societal discrimination.
>
> Similarly, it is our history of racial discrimination that requires a university to use admissions criteria other than academic performance if it is to admit a racially diverse entering class. There is no need to seek out white admittees in order to achieve this "diversity," because many white applicants will be admitted on the traditional criteria of academic performance, test scores, and the like. Correspondingly, if these traditional criteria do not produce substantial numbers of minority admittees, common sense suggests the reason: racial discrimination over the generations has taken its educational toll. Thus, in order to assure racial diversity in its student body, a university must give a "plus" to the same group of candidates who would be the beneficiaries of a program explicitly designed to remedy the present effects of past societal discrimination.

(Footnotes omitted).

228. 438 U.S. at 313-15. *See also id.* at 312 n.48 (Powell, J.).

229. *Id.* at 310, 315.

crimination cases.[230] Apparently, Powell objects not only to quotas, but also to any system that does not treat "each applicant as an individual in the admissions process."[231] He was in favor of "an admissions program . . . flexible enough to consider all pertinent elements of diversity, in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according to the same weight."[232] He seemed to object to "a classification that imposes disadvantges upon persons [like Brian Weber] who bear no responsibility for whatever harm the beneficiaries of special admissions programs are thought to have suffered."[233] The lower courts have given special attention to these phrases from Powell's opinion in deciding on the validity of other affirmative action programs.

One oddity of Justice Powell's opinion is the suggestion that *any* form of discrimination, even quotas, is lawful if it is imposed as a remedy following a judicial, legislative, or administrative finding of past discrimination.[234] The purpose of this suggestion apparently was to preserve earlier Court decisions upholding quotas and other explicitly racial remedies for civil rights violations. But it created the anomalous possibility that the same program found unlawful in *Bakke* could have been reinstated if a competent legislative, executive, or judicial body had issued it after an official finding that the university had in the past discriminated against minorities in medical school admissions.

### 3. *Weber*

The Court in *Weber* adopted a different analytical approach than the one it took in *Bakke*. All of the Justices in *Weber* decided the case solely on statutory grounds.[235] Justice Brennan, in his opinion for the Court, initially fo-

230. *See, e.g.*, United States v. City of Miami, 614 F.2d 1322, 1337 (5th Cir. 1980); Detroit Police Officer's Ass'n v. Young, 608 F.2d 671, 691, 694 (6th Cir. 1979); Sledge v. J.P. Stevens & Co., 585 F.2d 625, 646 (4th Cir. 1978); Morrow v. Dillard, 580 F.2d 1284, 1292-94 (5th Cir. 1978).

231. 438 U.S. at 318 (Powell, J.).

232. *Id.* at 317.

233. *Id.* at 310.

234. *See id.* at 307-10. *See also* United Jewish Organization of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); McDaniel v. Barresi, 402 U.S. 39 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Green v. County School Bd., 391 U.S. 430 (1968).

235. 443 U.S. 193 (1979). Justice Brennan, joined by Justices White, Marshall, Blackmun and Stewart, delivered the opinion of the Court. Chief Justice Burger and Justice Rehnquist filed dissenting opinions. Justices Powell and Stevens did not participate. Four of the five of the Justices comprising the *Weber* majority (Brennan, White, Marshall and Blackmun) joined in *Bakke*.

The *Weber* majority (the *Bakke* "Brennan four" and Justice Stewart) avoided a discussion of the potentially inconsistent analytical approach in the two cases. *Weber* and *Bakke* were distinguished in a footnote:

> Title VI of the Civil Rights Act of 1964, considered in [*Bakke*], contains no provision comparable to § 703(j). This is because Title VI was an exercise of federal power over a matter in which the Federal Government was already directly involved: the prohibitions against race-based conduct contained in Title VI governed "program[s] or activity[ies] receiving Federal financial assistance." . . . Congress was legislating to assure federal funds would not be used in an improper manner. Title VII, by contrast, was enacted pursuant to the commerce power to regulate purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments. Title VII and Title VI, therefore, cannot be read *in pari materia*.

cused on the voluntary nature of the affirmative action program and narrowed the issue to whether Title VII forbids private employers and unions from instituting race-conscious quota systems to correct racial imbalances in traditionally segregated job categories.[236] Rejecting Weber's reliance upon a literal interpretation of sections 703(a) and (d) of Title VII, Justice Brennan reasoned that, in order to determine the precise meaning and spirit of the statute, the sections must be read in the context of their legislative history and the historical background against which they were enacted.[237] The Court also rejected Weber's reliance on *McDonald v. Santa Fe Transportation Company*, noting that *McDonald* expressly left open the question of the permissibility of affirmative action plans.[238]

After examining the legislative history and the historical background of Title VII, the Court concluded that the purpose of the statute would be frustrated if all affirmative action programs were forbidden. Quoting remarks from various legislators of the 88th Congress, which enacted Title VII, the Court found that the statute was intended to alleviate the economic plight of blacks by opening employment opportunities through nondiscriminatory policies.[239] The Court found support in the legislative history for the premise that Congress did not intend to prohibit all private, voluntary affirmative action efforts to remedy past racial injustices.[240] The Court also relied upon its decision in *Albemarle Paper Co. v. Moody*,[241] which held that the language and history of Title VII manifested an intention to spur self-evaluation by employers and unions of their employment practices with the expectation that they

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*Id.* at 206 n.6 (citations omitted) (emphasis in original). *But see Bakke*, 438 U.S. at 367-69 (Brennan, J.).

236. Justice Brennan set out two articulations of the issue. Initially he stated the issue as "whether Congress, in Title VII . . . *left* employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories." 443 U.S. at 197 (emphasis added). Later, he stated that the "only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan. *Id.* at 200 (emphasis in original).

237. *Id.* at 201-02.

238. *Id.* at 200-01.

239. *Id.* at 202. Senator Humphrey emphasized the importance of the law prohibiting discrimination in employment:

> What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education? Without a job, one cannot afford public convenience and accomodations.

*Id.* at 203 (quoting 110 Cong. Rec. 6547, 6552 (1964)).

240. H.R. 7152 was later to become the Civil Rights Act of 1964. The excerpt provided:

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

443 U.S. at 203-04 (quoting H.R. REP. No. 914, 88th Cong., 1st Sess. 18 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2355, 2393) (emphasis added by the Court).

241. 422 U.S. 405 (1975).

would eliminate "the last vestiges of an unfortunate and ignominious page in this country's history."[242] The Court found that *Moody* could not be interpreted to prohibit all private, voluntary race-conscious measures designed to correct those vestiges.[243]

Justice Brennan also relied on legislative history when he considered the extent of the limitation found in section 703(j). He recognized that several congressmen had objected that Title VII would require employers to give preferential treatment to minorities to correct racial imbalances.[244] Nevertheless, Justice Brennan found it persuasive that Congress drafted section 703(j) to read that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group . . .," rather than drafting it to read "nothing in Title VII shall be interpreted to *permit* voluntary affirmative efforts to correct racial imbalances."[245] He then concluded that the congressional silence on the

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242. 443 U.S. at 204 (quoting Albemarle Paper Co. v. Moody, 422 U.S. at 418).

243. *Id.* at 204.

244. *Id.* at 205. *See* note 204 *supra*.

245. *Id.* at 205-06 (emphasis in original).

The legislative history of the original enactment of Title VII in 1964 demonstrates neither clear approval nor disapproval by Congress of voluntary race-conscious efforts to correct the effects of the past discriminatory exclusion of blacks from training and job opportunities. The major argument against congressional approval of such efforts is premised upon the addition to the bill on the Senate floor of § 703(j), 42 U.S.C. § 2000e-2(j) (1976), which states that nothing in Title VII shall "require" preferential treatment because of race "on account of an imbalance. . . ."

Prior to the adoption of this amendment, the Senate floor managers of the bill had explained that Title VII would not require an employer to maintain a racially balanced work force because,

> [w]hile the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.

110 Cong. Rec. 7213 (1964) (interpretive memorandum of Senators Clark and Case). Notwithstanding this assurance, opponents of the bill continued to argue "that a quota system will be imposed, with employers hiring and unions accepting members, on the basis of the percentage of population represented by each specific minority group." *Id.* at 9881 (remarks of Senator Allott). To put these doubts to rest, Senator Allott proposed an amendment precluding a finding of unlawful discrimination "solely on the basis of evidence that an imbalance exists . . ., without supporting evidence of another nature that the respondent has engaged in or is engaging in such practice." *Id.* at 9881-82. The sense of this amendment was incorporated, in the language of § 702(j), as part of the Dirksen-Mansfield compromise, which resulted in the Civil Rights Act of 1964. As Senator Humphrey explained, in presenting the compromise amendments to the Senate:

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly.

*Id.* at 12723.

The concern of Congress in enacting § 702(j) was not directed to the question whether race could be taken into account for remedial purposes. Rather, its intent was to ensure that findings of discrimination would not be based solely on evidence of statistical imbalance and to allay the fear that Title VII would have the effect of requiring employers to maintain a specific racial balance of employees.

Senators Clark and Case also stated that "any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race." *Id.* at 7213. Senator Allott believed that "a quota system of hiring would be a terrible mistake," but did not indicate whether such a system would be unlawful. *Id.* at 9881. These statements *may* indicate an

permissibility of voluntary affirmative action indicated congressional approval of plans similar to the quota system adopted by defendants.[246]

The Court refused to define in detail the distinguishing characteristics between permissible and impermissible affirmative action plans.[247] It did, however, examine defendants' plan and found it to be within the permissible limits. First, the Court noted that the plan was "designed to break down old patterns of racial segregation or hierachy" resulting from the historical exclusion of blacks from skilled craft jobs.[248] Second, the Court found that the plan did not unduly "trammel the interests of the white employees" because white employees were not totally excluded from the training program. Third, the Court found that the remedy was a temporary one,[249] was not designed to *maintain* racial balance, and thus was not in violation of section 703(j). Fi-

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intention to prohibit employers from deliberately maintaining a particular racial composition of employees as an end in itself, but they do not suggest any intention to foreclose "the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination." *Bakke*, 438 U.S. at 340 n.17 (Brennan, White, Marshall, Blackmun, JJ.).

The language of § 703(j), like that of § 703(h), does not restrict or qualify otherwise appropriate remedial action but defines what is and what is not an illegal discriminatory practice. *Cf.* Franks v. Bowman Transportation Co., 424 U.S. 747, 758-62 (1976) (action of awarding seniority rights to truck drivers not barred as matter of law by § 703(h)). The legislative history of the 1964 Act shows no detailed consideration of the scope and nature of remedial actions which might be taken by employers and unions or ordered by the courts, and it shows no consideration whatever of the permissibility of race-conscious remedial measures. *See generally* EEOC, LEGISLATIVE HISTORY OF TITLE VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1968). Also, Justice Powell noted in *Bakke* that "[t]here simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment." 438 U.S. at 285 (Powell, J.). There is no indication that "in the absence of any consideration of the question, . . . Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends." *Id.* at 340 n.17 (Brennan, White, Marshall, Blackmun, JJ.).

Although Justice Powell did not participate in *Weber*, he noted in his opinion in *Bakke* that:

> Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that [Title VII] enacted a purely color-blind scheme, without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

*Id.* at 284-85 (Powell, J.)

Similarly, Justice Stevens did not participate in *Weber*. In *Bakke*, however, he too noted that:

> Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, *Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action."* Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation.". . .

438 U.S. at 413 (Stevens, J.) (citing H.R. REP. No. 914, Part I, 88th Cong., 1st Sess. 18 (1963)) (*reprinted in* [1964]. U.S. CODE CONG. & AD. NEWS 2391, 2393) (emphasis added). Justice Rehnquist joined in Justice Stevens' opinion in *Bakke*.

In addition, Justice Stevens said in Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979), that in "all cases of statutory construction [the] task is to interpret the words of the [statute] in light of the purposes Congress sought to serve." *Id.* at 608.

246. *Id.*

247. *Id.* at 208.

248. *Id.*

249. *Id.*

nally, Justice Brennan noted that the creation of a new seniority right as a qualifying factor for the new training program served to protect the employment expectancies of nonminority employees.[250] In conclusion, Justice Brennan found that the plan was in the discretionary area left by Title VII to private employers to seek "to eliminate conspicuous racial imbalances in traditional segregated job categories."[251]

Justice Blackmun, who joined the majority, also wrote a separate concurrence. Although he admitted that he shared some of the dissenters' misgivings concerning the legislative history of Title VII, he thought the Court's result was compelled by practical and equitable considerations.[252] He noted that if an employer who has discriminated against blacks in the past takes no corrective measures, he risks liability to blacks for his past violations. If, however, the employer institutes an affirmative action program, he risks liability to whites for claims of reverse discrimination.[253] Blackmun hinted that a judicial finding of a Title VII violation could have been established in the case under the *Griggs* disparate impact theory based on Kaiser's statistical racial imbalance and its arguably invalid job-related requirements of five years of prior craft experience.[254] Adopting the standard articulated by Judge Wisdom, he then argued that employers who committed "arguable violations" of Title VII should be free to take reasonable responses without fear of liability to whites.[255] Although in Judge Blackmun's view the arguable violations standard would enable employers to engage in preferential hiring "whether or not a court, on these facts, could order the same step as a remedy," he viewed the standard as a sensible response to a "practical problem in the administration of Title VII."[256] Finally, Justice Blackmun observed that the Kaiser plan was moderate and that Congress could overrule the *Weber* decision if the Court had misinterpreted congressional intent.[257]

Justice Blackmun compared his "arguable violations" theory with the "traditionally segregated job categories" theory of Justice Brennan. Although he found that his theory would reach the same result as the theory relied upon by the majority, he nevertheless preferred the "arguable violation" theory, which he believed to be more in line with the judicial precedents requiring a

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250. *Id.*

251. *Id.* at 209.

252. *Id.* at 209 (Blackmun, J. concurring).

253. *Id.* at 210-11 (Blackmun, J., concurring). *See* United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

254. In this case, Kaiser denies prior discrimination but concedes that its past hiring practices may be subject to question . . . . Kaiser had made some effort to recruit black painters, carpenters, insulators and other craftmen, but it continued to insist that those hired have five years prior industrial experience, a requirement that arguably was not sufficiently job related to justify under Title VII any discriminatory impact it may have had.

*Id.* at 210 (Blackmun, J., concurring).

255. *Id.* at 211 (Blackmun, J., concurring).

256. *Id.* (Blackmun, J., concurring).

257. *Id.* at 216 (Blackmun, J., concurring).

finding of discrimination.[258] Blackmun was unwilling to adopt the majority's "traditionally segregated job categories" theory because he failed to find statutory support for race-conscious remedies designed to eliminate societal discrimination.[259] Later, however, Blackmun avoided statutory constrictions when he noted that private employers should not be prevented from ameliorating the effects of past societal discrimination simply because no remedy is provided by Title VII.[260]

In his dissent, Chief Justice Burger chastised the majority for ignoring what he perceived as an over-stepping of the bounds of separation of powers by essentially rewriting the clear statutory language of Title VII to reach its desired decision.[261] He also criticized the majority for interpreting section 703(j) to permit employers to do what he believed sections 703(a) and (d) expressly forbade.[262] Burger conceded that Congress may not have gone far enough in the enactment of Title VII to correct the effects of past racial discrimination, and he agreed with the majority that voluntary compliance with Title VII should be encouraged. He nevertheless asserted that "compliance with the no-discrimination principle that is the heart and soul of Title VII . . . will [not] be achieved by permitting employers to discriminate against some individuals to give preferential treatment to others."[263] He suggested that the majority had arrived at a "good result," but that it had been achieved by unauthorized and intellectually dishonest means.[264]

In a vigorous and exhaustive dissent, Justice Rehnquist called the Court "Orwellian" and compared the majority's interpretation to actions not characteristic of "Hale, Holmes and Hughes, but escape artists such as Houdini."[265] Initially relying upon the Court's prior Title VII decisions, Justice Rehnquist read *Griggs v. Duke Power Co.* to stand solely for the proposition that Congress intended to prohibit *all* racial preferences for any group.[266] He then

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258. *Id.* at 211 (Blackmun, J., concurring).

259. *Id.* at 212-13 (Blackmun, J., concurring).

260. "Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of 'locking in' the effects of segregation for which Title VII provides no remedy." *Id.* at 215.

261. *Id.* at 216 (Burger, C.J., dissenting).

262. *Id.* at 217 (Burger, C.J., dissenting).

263. *Id.* at 218 (Burger, C.J., dissenting).

264. *Id.* at 219 (Burger, C.J., dissenting).

265. *Id.* at 219, 222 (Rehnquist, J., dissenting). The reference to the writings of George Orwell, in the context of employment discrimination and affirmative action, had been noted in a less stringent manner in Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 364 (1966-67), where the author observed:

> The problems involved in special and preferential treatment for the Negro are difficult an subtle ones. True, one can parody the whole idea by paraphrasing the pigs in George Orwell's *Animal Farm* and asserting that all men are equal, but Negroes are more equal than others. And admittedly, there is a certain irony in climaxing a long struggle in the name of equality by demanding inequality. The fact is, however, that even within our usual ideals of equality a series of arguments can be made for the special treatment of Negroes.

266. 443 U.S. at 220. "In *Griggs* . . ., our first occasion to interpret Title VII, a unanimous Court observed that '[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.' " *Id.* at 220 (Rehnquist, J., dissenting) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

pointed to *Furnco Construction Corp. v. Waters*,[267] which held that equal opportunity should extend to each applicant without consideration of the proportionate racial representation in the work force.[268] He concluded that these and other cases represented consistent judicial interpretation of Title VII as a congressional prohibition on all racial employment discrimination.[269] This conclusion fails to withstand analysis as the earlier discussion herein demonstrates.[270]

Rehnquist joined Burger in emphasizing that the Court's duty is to construe, not rewrite, legislation. First, relying solely on a plain meaning construction, he stated that the clear statutory language prohibiting discrimination was to be taken as the final expression of legislative intent.[271] Second, Rehnquist relied heavily on Title VII legislative history to conclude that the legislative intent was to end all employment discrimination.[272] Some significant portions of this history included remarks of Representative Celler and Senators Clark, Case, Humphrey, and Muskie.[273] One excerpt he relied on was Senator Saltonstall's remarks concerning the Dirksen-Manfield amendment to the Act, which added section 703(j): "[The amendment] provides no preferential treatment for any group of citizens. In fact, *it specifically prohibits such treatment*."[274] Finally, Rehnquist attempted to meet the majority's reliance on the "spirit" of the Act simply by noting that the congressional purpose was to establish equal opportunity for all.[275] Rehnquist predicted that the Court's

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267. 438 U.S. 567 (1978).

268. 443 U.S. at 220-21 (Rehnquist, J., dissenting).

269. *Id.* at 220 (Rehnquist, J., dissenting).

270. *See* text accompanying notes 129-161 *supra*.

271. *Id.* at 228 n.9 (Rehnquist, J., dissenting).

272. *Id.* at 230 (Rehnquist, J., dissenting).

273. "The Bill would do no more than prevent . . . employers from discriminating against *or in favor* of workers because of their race, religion, or national origin." *Id.* at 233 (quoting 110 Cong. Rec. 1518 (1964) (remarks of Representative Celler, House sponsor of the 1964 Civil Rights Act)) (emphasis added by Justice Rehnquist).

> There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.

*Id.* at 239 (Rehnquist, J., dissenting) (quoting 110 Cong. Rec. 7213 (1964) (memorandum prepared by Senators Clark and Case)).

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

*Id.* at 243 (Rehnquist, J., dissenting) (quoting 110 Cong. Rec. 11848 (1964) (remarks of Senator Humphrey)) (emphasis added by Justice Rehnquist).

"[Title VII] seeks to afford to all Americans equal opportunity in employment without discrimination. Not equal pay. Not 'racial balance.' Only equal opportunity." *Id.* at 248 (Rehnquist, J., dissenting) (quoting 110 Cong. Rec. 12617 (1964)) (remarks of Senator Muskie).

274. *Id.* at 248 (Rehnquist, J., dissenting) (quoting 110 Cong. Rec. 12691 (1964) (remarks of Senator Saltonstall)) (emphasis added by Justice Rehnquist).

275. *Id.* at 254 (Rehnquist, J., dissenting).

decision would open a floodgate of litigation by its undefined tolerance to reverse discrimination, an "evil," he said, that Congress sought to eliminate through the enactment of Title VII.[276]

### *E. Balancing the Spirit and Letter to Uphold the Affirmative Action Concept*

Weber's argument essentially was based on the equal treatment conception of equality with its emphasis on color-blindness and fairness to the individual. Two underlying premises of this argument are that race-specific remedies are inappropriate in the absence of a finding of unlawful discrimination and only identifiable victims of specific discrimination are entitled to race-conscious relief. The arguments of defendants essentially were based on the equal opportunity theory of equality with its emphasis on considerations of color-consciousness and fairness to groups that have been historically disadvantaged by both specific and societal discrimination. Both sides could find support in the employment discrimination cases decided by the Supreme Court.

The Supreme Court adopted neither position totally. The Court rejected Weber's argument that all race-conscious remedies are prohibited under Title VII, or that those remedies could be imposed only upon a finding of unlawful discrimination. The Court likewise rejected the defendants' argument that societal discrimination is an appropriate basis for adopting a race-conscious affirmative action plan, regardless of its impact on white employees. Having rejected the invitation to adopt either position, the Court attempted to find a middle ground on which to reconcile, if possible, the two theories of discrimination under Title VII.

The result in *Weber* turned fundamentally on a difference as to the theory of legal analysis that should be used to address a difficult, but narrowly drawn, statutory issue: Did Congress, in the enactment of Title VII, intend to forbid private employers and unions from voluntarily agreeing upon bona fide affirmative-action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser plan?[277] Implict in this narrowly drawn question, however, are the two critical but interrelated questions that go to the essence of the affirmative action principle: (1) Are race-conscious remedies permissible under any circumstances absent a finding of past or continuing discrimination?; and (2) Must the beneficiaries of race-conscious remedies themselves be identifiable victims of specific (as opposed to societal) discrimination? The question, however framed, was troublesome and provocative enough to place the Justices in the dilemma of having to address, either directly or indirectly, the issue of the competing theories of equality established in *Griggs* and *McDonnell Douglas*.

All of the Justices seemed to agree that it was within the constitutional authority of Congress to specifically sanction voluntary race-conscious affirm-

276. *Id.* at 255 (Rehnquist, J., dissenting).
277. *Id.* at 197.

ative action plans.[278] But, as Chief Justice Burger noted, whatever the wisdom or morality of upholding the plan that Weber challenged, the courts were compelled to disapprove it if Congress had unambiguously prohibited its adoption.[279] The problem for the Court, therefore, was to ascertain the intent of Congress on the issue. The case thus posed a classic issue of statutory construction in the context of a remedial civil rights statute.

The Justices disagreed on which of two approaches should be employed as the method for determining legislative intent. Justice Rehnquist, writing for himself and Chief Justice Burger, relied almost solely on the plain meaning canon of statutory construction. He thus concluded that Congress, in passing sections 703(a) and (d), meant that "*no* racial discrimination in employment is permissible . . . not even preferential treatment of minorities to correct racial imbalance,"[280] and that "Congress outlawed *all* racial discrimination, recognizing that no discrimination based on race is benign, [and] that no action disadvantaging a person because of his color is affirmative."[281] Thus, Justice Rehnquist, even though recognizing that the "reality of employment discrimination against [blacks] provided the primary impetus for the passage of Title VII,"[282] found no conflict between the theories of equality in *Griggs* and *McDonald*, the primary purpose for which Title VII was enacted, nor the statutory language that Congress had chosen to carry out that purpose. Under Rehnquist's analysis, any need to make an accommodation had been foreclosed by the literal language of the Act, the clear legislative intent, and a consistent line of cases extending back to *Griggs*.

The concept of equality that Justice Rehnquist adopted in *Weber*—equal treatment—would obliterate the theoretical distinction between sections 703(a)(1) and 703(a)(2) that the Court had adopted in earlier cases. This conclusion flows from Justice Rehnquist's broad reading of the unanimous opinion of the Court in *McDonald v. Santa Fe Trail Transportation Co.*, which held that the "uncontradicted legislative history . . . [of T]itle VII prohibits racial discrimination against the white petitioners . . . upon the same standards as

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278. Since the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. . . . The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan.

*Id.* at 200 (Brennan, J.) (emphasis in original). "Quite simply, Kaiser's racially discriminatory admission quota is flatly prohibited by the plain language of Title VII." *Id.* at 228.

279. *Id.* at 217 (Burger, C.J., dissenting). The Chief Justice noted that, were he a member of Congress, he would have voted in favor of an amendment to Title VII permitting the Kaiser plan. *Id.* at 216 (Burger, C.J. dissenting). Justice Rehnquist made it clear, however, that he viewed race-conscious remedies as an evil scarcely less dangerous than the initial racial discrimination they were designed to rectify. *Id.* at 254-55 (Rehnquist, J., dissenting).

280. 443 U.S. at 230 (Rehnquist, J., dissenting) (emphasis in original).

281. *Id.* at 254 (Rehnquist, J., dissenting) (emphasis in original).

282. "But this fact by no means supports the proposition the Congress intended to leave employers free to discriminate against white persons." *Id.* at 229 (Rehnquist, J., dissenting).

would be applicable were they [blacks],"[283] and from that part of *Griggs* in which the Court observed that "discriminatory preference for any group, majority or minority, is precisely and only what Congress has proscribed."[284] Under Rehnquist's analysis, Weber not only had established a prima facie case under *McDonald*, he had established a conclusive case of discrimination, because Justice Rehnquist failed to consider whether the justification offered by defendants was sufficient to rebut Weber's case under the *Griggs* business necessity doctrine or the *McDonald* legitimate nondiscriminatory reason rationale. If, as Justice Rehnquist believed, the "operative sections of Title VII prohibit racial discrimination *simpliciter* [because it] prohibits a covered employer from considering race when making an employment decision, whether he be black or white,"[285] his reasoning would yield the same result had the case been brought by a black employee of Kaiser. Under no set of circumstances would an employer be permitted to place even a "whisper of emphasis"[286] on race. His rationale is broad enough to prohibit under Title VII, for example, special recruitment efforts directed primarily at blacks, even on a voluntary basis or even because of pressure from federal agencies.

In fact, the reading of *McDonald* that Justice Rehnquist adopted in *Weber* would prohibit all preferential treatment of blacks over whites and would thus eviscerate the heart of the affirmative action principle.[287] The issue presented in *McDonald*, however, was only the sufficiency of a complainant's allegation of preferential treatment benefitting a black. Defendants in *McDonald*, unlike defendants in *Weber*, offered no justification for the alleged racial preference and claimed that it was the result of a bona fide affirmative action program.[288] In a footnote, the Court explicitly denied that its opinion expressed any view on the "permissibility of such a program, whether judicially required or otherwise prompted."[289] Justice Rehnquist ignored this disclaimer, which he apparently viewed as inconsistent with the Court's expansive language, and read the opinion broadly. This result is supportable only if one accepts his premise that the statute is clear, unambiguous, and leaves no doubt concerning the legislative intent. His opinion in *General Elec-*

283. *Id.* at 220 (Rehnquist, J., dissenting) (quoting McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278 (1976)).

284. *Id.* (quoting Griggs, 401 U.S. at 431).

285. *Id.* at 220 (Rehnquist, J., dissenting) (emphasis in original).

286. *Id.* at 211 (Blackmun, J., concurring).

287. Justice Rehnquist's analysis in *Weber* would, in effect, substantially undercut the clear implication that the use of race-conscious considerations in appropriate cases is permissible, an implication that follows from Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), a case in which he concurred. The Court approved differential validation of employment tests in *Moody*. *Id.* at 435. That procedure requires that an employer ensure that a test score of, for example, 50 for a black applicant means the same thing as a score of 50 for a nonminority applicant. See 29 C.F.R. § 1607.5(b)(5) (1974) (no longer in force). By implication, were it determined that a test score of 50 for a minority applicant corresponded in "potential employment" to a 60 for whites, the test could not be used consistent with Title VII, unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices. *See Bakke*, 438 U.S. at 364 (Brennan, J.).

288. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281 n.8 (1976).

289. *Id.*

*tric Co. v. Gilbert*,[290] however, virtually destroys this premise.[291]

The "crux of the problem" in *Weber*, however, which the dissenters failed to recognize, was that Congress failed to bridge the gap between equality as a theoretical concept and equality as a reality for blacks. Congress, in the enactment of Title VII, recognized that the principle beneficiaries of the legislation were necessarily blacks and other minorities. Race-conscious consideration was very much a part of the motivation that compelled Congress to enact Title VII in the first instance, yet Congress chose language that could be interpreted as embracing the color-blind theory of equality. The decisions of the Supreme Court over the past decade tended to mirror the tension in the nation between a color-blind and a color-conscious programatic approach to the race problem, a problem that is still with us.[292] The Supreme Court in *Weber*, therefore, faced a choice of either allowing some race-conscious programs or perhaps totally defeating the primary purpose of the Act. The majority opted for the former, and rightfully so. Had the view of the dissenters prevailed, the adverse impact on the enforcement of Title VII would have been so extensive that new legislation would have been necessary. The reason for this is found in the statement of Justice Blackmun "that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress support the conclusion reached by the Court today."[293]

The application of the plain meaning rule to sections 703(a), (d), and (j) supports the dissenters' conclusion that Title VII was intended to prohibit all forms of employment discrimination. The dissenters failed to recognize, however, that the application of the plain meaning rule, or strict construction of statutory language, is not always appropriate[294] and that in many instances some accommodation must be made between legislative intent and legislative purpose, two concepts whose meanings are not always congruent.[295] Because

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290. 429 U.S. 125 (1976).

291. *See* note 105 *supra*.

292. *Compare, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) *with* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Recently Mr. Justice Blackmun, writing for the Court in Rose v. Mitchell, 443 U.S. 545, 558-59 (1979), observed:

> For we also cannot deny that 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form more subtle than before. But it is not less real or pernicious.

*See generally* J. DREYFUSS & C. LAWRENCE, THE *BAKKE* CASE: THE POLITICS OF INEQUALITY (1979).

293. 443 U.S. at 209 (Blackmun, J., concurring).

294. *See* Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975).

295. [L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends. The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so the bottom problem is: What is below the surface of the words and yet fairly a part of them? Words in a statute are not unlike words in a foreign language in that they too have "associations, echoes, and overtones." Judges must retain the associations, hear the echoes, and capture the overtones.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533 (1947). *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 67-102 (1975). *See also*

many statutes are enacted to cure social ills, some courts have been able to effectuate both the intent and purpose of the enactment by emphasizing the statutory language. At other times, however, it has been necessary for the courts to look to the "spirit" of the statutes. At still other times it is necessary for a court to strike a balance between the literal language and the spirit of a statute.[296] The majority in *Weber* took the latter approach.

The decision in *Weber* arguably was an attempt to make an accommodation between the competing theories of equality and the primary purpose of Title VII. Justice Brennan recognized that the literal language of the Act and the Court's decision in *McDonald* supported Weber's claim.[297] He rejected sole reliance on this line of reasoning, preferring instead to dispose of the case under another canon of statutory construction: the "familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."[298] This rule of statutory construction, also known as the doctrine of equitable construction,[299] has been employed by courts to expand or restrict the literal expression of a statute when a literal interpretation would defeat the clear purpose of the act or lead to absurdity, contradiction, or injustice.[300] Many statutes enacted to

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Personnel Adm'r v. Feeney, 442 U.S. 256, 284-86 (1979) (although "purpose" of the law was to aid veterans, the "intent" was to achieve that purpose by subordinating employment opportunities of women) (Marshall, J., dissenting); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21 (1970).

296. *See* R. DICKERSON, *supra* note 295, at 213-16 (1975); 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 351-77 (4th ed. 1973).

297. 443 U.S. at 201 (Brennan, J.).

298. *Id.* (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

299. *See* 2A J. SUTHERLAND, *supra* note 296, at 351.

300. Legislative enactments now constitute a major part of the business of the federal courts. One of the most fundamental, and most elusive, concepts in the interpretaton and application of statutes is that of legislative intent. *See, e.g.*, Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). Conceived discrepancies between the "intention" of the legislative body and the "actual" meaning of statutory language to effectuate that intent led to an early development of the doctrine of equitable statutory construction, or what might be called construing a statute according to the "spirit" of the act. *See* DeSloovère, *The Equity and Reason of a Statute*, 21 CORNELL L. REV. 591 (1935).

One of the ongoing disagreements in the case law and the legal lierature on statutory construction is over the question of when a literal or "plain meaning" construction should be used and when an equitable or "spirit" analysis should be used when the legislature does not address the issue in specific terms. *See* 2A J. SUTHERLAND, *supra* note 296, at 354-73; DeSloovère, *supra*. This disagreement is manifest in Weber, 443 U.S. at 201 (Brennan, J.); *id.* at 254 (Rehnquist, J., dissenting), and may shed some light on how Justices Powell and Stevens may have voted if they had participated in *Weber*.

One of the more recent cases (other than *Bakke*) in which both Justices Powell and Stevens participated, and the *Holy Trinity* doctrine of equitable construction, (Holy Trinity Church v. United States, 143 U.S. 457 (1892)), was at issue, is TVA v. Hill, 437 U.S. 153 (1978). The issue in *Hill* was whether the Endangered Species Act of 1973, 16 U.S.C. § 1531 (1976), required the enjoining of a virtually completed federal dam in order to protect the snail darter. Chief Justice Burger, who wrote the opinion of the Court, rejected the application of the *Holy Trinity* doctrine, *see* text accompanying note 298 *supra*, because he found that the Court had applied it only "in rare and exceptional circumstances" and even then "there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." 437 U.S. at 187 n.33 (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930)). Justice Powell dissented, finding that the *Holy Trinity* doctrine was applicable and that the Chief Justice's reading of the cases applying this doctrine was erroneous:

serve the public welfare have been decided under this doctrine.[301]

Justice Brennan found it necessary to balance a literal reading of sections 703(a) and (d) of Title VII against its "spirit" or primary purpose. Noting that Congress sought "to open employment opportunities for [blacks] in occupations which have been traditionally closed to them,"[302] he concluded that "[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve [their] lot," was construed to "constitute the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierachy."[303] Justice Brennan turned to the legislative history to support his conclusion that Title VII did not forbid all voluntary race-conscious affirmative action. His search was principally directed to this question: Given the available legislative history, has Congress unequivocally forbidden private employers and unions from adopting affirmative action plans? His response was that given congressional silence on the question and the absence of the phrase "require or *permit*" in section 703(j), "the natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action."[304] He further supported this inference by noting that many members of the eighty-eighth Congress had insisted that " 'management prerogatives and union freedoms . . .

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The Court suggests . . . that the precept stated in [*Holy Trinity*] was somehow undermined in [*Crooks*, *supra*]. Only a year after the decision in *Crooks*, however, the Court declared that a "literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." [United States v. Ryan, 284 U.S. 167, 175 (1931)]. In the following year, the Court expressly relied upon *Church of Holy Trinity* on this very point. [Sorrells v. United States, 287 U.S. 453, 446-448 (1932)].

*Id.* at 204 n.14 (Powell, J., dissenting).

Apparently, Chief Justice Burger did not believe that the question presented in *Weber* fell within his reading of the *Holy Trinity* doctrine, notwithstanding a more recent case in which the Court held that the doctrine "has particular application in the construction of labor legislation which is 'to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.' " Woodwork Mfg. v. NLRB, 386 U.S. 612, 619 (1967) (quoting Local 1976, United Bhd. of Carpenters v. Labor Board (Sand Door), 357 U.S. 93, 99-100 (1958)).

Justice Powell's defense of the *Holy Trinity* doctrine in *Hill* suggests, by implication at least, that he could have supported either the opinion of Justice Brennan of Justice Blackmun in *Weber* since he recognized in *Bakke* that Congress, in enacting the Civil Rights Act of 1964, had no reason to consider the "validity of hypothetical preferences that might be accorded minority citizens." 438 U.S. at 285 (Powell, J.). Moreover, the *Holy Trinity* "spirit" analysis would allow Justice Powell to avoid a potentially troubling problem of the necessity of developing a theory comparable to the "diversity" rationale on which he relied in *Bakke* as a basis on which he could uphold voluntary race-conscious remedies in the employment discrimination context.

Justice Stevens joined in the Chief Justice's opinion in *Hill* and, presumably, in the reading of *Holy Trinity* that the Chief Justice adopted. This reading of *Holy Trinity* and the "plain meaning" analysis the Court adopted in *Hill* is, arguably, consistent with the position taken by Justice Stevens in *Bakke*. If consistent, Justice Stevens would have difficulty in agreeing with either Justice Brennan or Justice Powell in *Weber*.

301. *See* 2A J. SUTHERLAND, *supra* note 296, at 361-62.

302. 443 U.S. at 203 (quoting 110 Cong. Rec. 6548 (1964) (remarks of Senator Humphrey)).

303. *Id.* at 204 (quoting 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey)).

304. *Id.* at 205-06 (emphasis in original).

be left undisturbed to the greatest extent possible.' "[305]

The majority, like the dissenters, did not squarely face the question of the conflicting notions of equality that the Court had read into Title VII. But unlike Justice Rehnquist, the majority, in upholding defendants' affirmative action plan, at least realized the necessity of making a choice. The majority, for the first time, adopted a rationale that allows for an accommodation between the two views of equality. This conclusion is reached by framing the question before the Court in a manner that it did not articulate: whether Weber was entitled to relief under Title VII under the *McDonnell Douglas* disparate treatment theory of discrimination when defendants have adopted a bona fide race-conscious affirmative action plan? Clearly, Weber made out a prima facie case under the four-part test of *McDonnell Douglas*.[306] The Court, nevertheless, ruled against Weber, but neither Justice Brennan nor Justice Blackmun expressly relied upon the two basic defenses to a prima facie case—business necessity and legitimate nondiscriminatory reason.[307] It then becomes necessary to ask why. The answer seems to lie, in part, on the Court's willingness to realize that, arguably, a black plaintiff could have brought suit against defendants and have established a prima facie case under either the *McDonnell Douglas* or *Griggs* theories.[308] If both blacks and whites had sued the defendants in separate lawsuits, how then should the court resolve the defendant's dilemma? The answer of *Weber* appears to be that neither a black plaintiff nor a white plaintiff is entitled to relief because Title VII does not support a claim for discrimination when a defendant has adopted a voluntary race-conscious affirmative action plan that is designed to eliminate manifest racial imbalances, does not create an absolute bar to the advancement of other members protected under Title VII, and is temporary in duration. This response establishes a defense that does not fit neatly into either of the two most widely recognized defenses to Title VII claims, but allows a defendant to rely, in part at least, on societal discrimination as reflected in his workforce. The emphasis on "manifest racial imbalances" preserves the *Griggs* theory, and the emphasis on accommodating the advancement opportunities of white employees preserves the *McDonnell Douglas* theory. The emphasis on the temporary duration of the plan preserves the vision that some day race will be as irrelevant in employer's decision-making process as is the color of one's eyes.

The opinion of Justice Brennan is perhaps more notable for the limitations that it did not place on affirmative action rather than those that it did. Although Justice Brennan did not speak directly to the question in *Weber*, his

305. *Id.* at 206 (quoting H.R. REP. 914, 88th Cong., 1st Sess. 29 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2516).

306. *See* note 102 *supra*.

307. *See* text accompanying notes 102-03 *supra*.

308. Kaiser's other two plants in Louisiana had been the target of successful Title VII law suits. Parsons v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979); Burrell v. Kaiser Aluminum & Chem. Corp., Civ. Action 67-86 (M.D. La.) (consent decree, Feb. 24, 1972). *Cf.* Weber, 443 U.S. at 211 (Blackmun, J., concurring) (affirmative action cases should be based on "arguable violation" theory of past employer discrimination rather than an official finding of past discrimination). *But see* 443 U.S. at 209 n.9.

analysis undergirds and supports two important considerations for the continued vitality of the affirmative action principle. First, racial quotas are permissible in appropriate circumstances to remedy specific and societal discrimination without a judicial or administrative finding of discrimination. Second, the beneficiaries of an affirmative action program need not be victims of specific discrimination so long as it is reasonable to assume that they have had a limitation placed on their employment opportunities as a result of societal discrimination.

Additionally, while Justice Brennan did not specifically define the outer limits of affirmative action, the rationale of his decision clearly goes beyond the facts of Kaiser's plan. The facts suggest that the defendants were caught between conflicting theories of discrimination, dictates of federal agencies, and employees claiming to be aggrieved by the presence or absence of some type of affirmative action program. Less than two percent of the craft workers at the Gramercy plant were blacks, and despite a thirty-nine percent black population in the surrounding area Kaiser had had little success in recruiting experienced black workers.[309] The obvious answer to Kaiser's problem was some type of training program. If a strict seniority system had been followed, few blacks would have been selected for the program, but the Steelworkers apparently were unwilling to allow Kaiser to ignore seniority. As a result, the parties compromised. Justice Brennan did not rely on these restricted facts in reaching his result. His ruling, therefore, is broad enough to allow race-conscious affirmative actions not only when they are a reasonable response to conflicting pressures, as in the Kaiser situation, but also in other circumstances in which they constitute a reasonable response to the need to "break down old patterns of racial segregation and hierarchy."

Justice Blackmun, in his concurrence, expressed preference for an "arguable violation" theory rather than a "traditionally segregated" standard,[310] but he interpreted this standard in a manner making it essentially the same as the standard adopted by Justice Brennan. Thus, for example, Justice Blackmun held that a statistical disparity in employment ratios between blacks and whites should be sufficient to satisfy the "arguable violation" standard,[311] and that an employer should be permitted, under this standard, to redress discrimination that took place before the enactment of Title VII.[312]

Justice Blackmun reached a result similar to Justice Brennan for practical rather than philosophical reasons. From a philosophical viewpoint, Justice Blackmun would prefer to limit affirmative action to those situations in which it is necessary for an employer to comply with the mandate suggested by *Griggs*, either to validate a selection procedure or to correct any statistical

309. 443 U.S. at 198-99.

310. *Id.* at 211 (Blackmun, J., concurring).

311. *Id.* (Blackmun, J., concurring).

312. "Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not." *Id.* at 214 (Blackmun, J., concurring).

imbalance in the impact of the selection procedure.[313] He recognized, however, that to require a finding of discrimination before implementing affirmative action would place an intolerable burden on the courts, private parties, and enforcement agencies.[314] He was inclined also to enunciate a more restrictive standard than Justice Brennan, but he recognized that to do so would put the employer in the position of having to expose himself to potential liability. Thus, it seems that Justice Blackmun watered down his standard, making it almost indistinguishable from that of Justice Brennan.

It would be fruitless to argue that Congress was unconcerned with eliminating the use of race as an explicit employment criterion. The Court recognized in *McDonald v. Santa Fe Trail* that congressional concern for discrimination in employment properly extended to whites as well as to blacks and other racial minorities. It would be equally disingenuous, however, to suggest that Congress' concern was *limited* to the neutral "nondiscriminatory" principle of equal treatment—that is, the view that Title VII is concerned with no more and no less than the explicit use of race, and that Title VII was not specially concerned with the employment problems of blacks. Indeed, it is probable that in the absence of the historical mistreatment of blacks, Congress would not have perceived a need for Title VII or similar civil rights statutes at all. These laws are, in effect, a recognition that the ordinary interplay of private forces is simply inadequate to undo the patterns of discrimination created by centuries of unequal treatment. The Court recognized this in *Griggs* when it noted that the plain objective of Title VII was to (a) achieve equality of employment opportunity *and* (b) to remove barriers that have operated in the past to favor an identifiable group of white employees over black employees.[315]

Recognition of these dual concerns—"nondiscrimination" plus a special concern for blacks and other minorities—is supported by the judicial as well as the legislative history of Title VII. Initially, most of the Title VII litigation focused upon instances in which racial animus stood behind the denial of employment benefits to blacks.[316] The early cases seemed to require that a Title VII plaintiff demonstrate that the employer's conduct was racially motivated.[317]

This early Title VII history thus reflected the equal treatment theory—situations involving racial animus were merely the starkest examples of the behavior that the equal treatment theory prohibits. However, as courts, enforcement agencies, and others gained experience under Title VII, it became overwhelmingly clear that confining the application of the statute to a neutral

313. *Id.* at 211 (Blackmun, J., concurring).

314. *Id.* at 209-10 (Blackmun, J., concurring).

315. 401 U.S. at 429-30 (1971).

316. *See, e.g.*, Clark v. American Marine Corp., 304 F. Supp. 603, 609 (E.D. La. 1969), *aff'd on other grounds*, 437 F.2d 959 (5th Cir. 1971); United States v. H.K. Porter, 296 F. Supp. 40, 107 (N.D. Ala. 1968); Gunn v. Layne & Bowler Co., 1 Empl. Proc. Dec. ¶ 9823 (E.D. Tenn. 1967); Belton, *supra* note 90, at 935.

317. *See, e.g.*, M. SOVERN, *supra* note 30, at 70-73.

nondiscriminatory standard would fail to achieve meaningful employment opportunities for blacks. As Chief Justice Burger noted in *Griggs*, a broader reading was required in order that Title VII "not provide equality of opportunity merely in the sense of the fabeled offer of milk to the stork and fox."[318]

As it became painfully obvious that our nation's race problem was traceable to a complex set of conditions and to actions and inactions of numerous individuals and institutions, it likewise became clear that Title VII would become "mellifluous but hollow rhetoric"[319] if those individuals and institutions could each place blame on the other and not take steps to deal with the problem.[320] In short, to require a black Title VII plaintiff to pin his deprivation of employment benefits squarely on the misbehavior of others would have materially frustrated congressional purposes.

These concerns lay behind the line of cases beginning with, and perhaps more clearly exemplified by *Griggs*. These cases imported into Title VII law a number of mechanisms that nudged open the judicial door so that the statute might achieve its primary purpose. These mechanisms included, among others, the disparate impact analysis and related statistical presumptions, rather than proof of intent. Devices such as the disparate impact analysis did not relieve black plaintiffs from having to establish that the defendant had unlawfully discriminated. They did, however, substantially broaden the meaning of "unlawful employment discrimination" in order that Title VII might at least begin to reduce the racial disparaties that so concerned Congress.

## IV. CONCLUSION

The aspiration of the American people is for a color-blind society, one that neither knows nor tolerates classes among citizens. But color-consciousness is unavoidable while the effects of decades of governmentally and privately imposed racial wrongs persist. The concept of affirmative action has arisen from that inescapeable conclusion. A society that forecloses racially-conscious remedies would not be color-blind, but morally blind. The justification for affirmative action to secure equal access to the job market lies in the need to overcome the effects of past discrimination by the employers, unions, colleges, and universities asked to undertake that action. It rests also in the practical need to assure that citizens whose lives have been marked by discrimination, overt as well as subtle, are not forever barred from the opportunity to realize their potential and become useful and productive citizens. The test of affirmative action programs is, as *Weber* suggests, whether they are well calculated to achieve these objectives and whether they can do so in a way that deals fairly with the rights and competing interests of all citizens. While care must be taken to safeguard against abuses, affirmative action, as applied in a

318. 401 U.S. 424, 431 (1971).
319. Griggs v. Duke Power Co., 420 F.2d 1225, 1238 (4th Cir. 1970) (Sobeloff, J., dissenting).
320. *See* Black, *Economic Downturn*, 1976 U. ILL. L.F. 559.

variety of contexts, including those in which numerically based race-conscious remedies have been employed, can meet this fundamental standard.

Affirmative action programs have been in effect, in most instances, for less than a decade, an eye-blink in history compared to the centuries of discrimination that preceeded them. The gains secured thus far have been modest and fragile. Yet it is contended, under the banner of reverse discrimination, that the civil rights laws of the 1960's and the gains that go to some individuals render affirmative action a new kind of special favortism. In this challenge, there are echoes of a Supreme Court decision almost a century old:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken up the inseparable concomitants of that state, there must be some state in the progress of his evolution when he takes the rank of a mere citizen and ceases to be a special favorite of the laws.[321]

The 1883 Supreme Court decision that the "state of progress" had been reached signaled the end of efforts to deal with the *consequences* of slavery and helped usher in an era of enforced segregation and discrimination that has persisted throughout this century.

A ruling in favor of Weber would have carried a message into the 1980's that this nation, for a second time, had reached a "state of progress" sufficient to justify the abandonment of the most significant component of affirmative action programs. This message, like the one in 1883, would have disastrous consequences. Such a decision could only be reached by ignoring the crushing burden of unemployment, poverty, and discrimination facing black people and other minorities. The abandonment of affirmative action programs, of which numerical goals are an integral part, would shut out many thousand minority workers from opportunities that have only recently become available to them.

321. United States v. Stanley, 109 U.S. 3, 61 (1883) (Harlan, J., dissenting).