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Casenotes: Civil Rights — Equal Employment Opportunity — Title VII — Private Employers May Voluntarily Adopt Affirmative Action Measures to Eliminate Conspicuous Racial Imbalance in Traditionally Segregated Job Categories. United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979)

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CASENOTES

CIVIL RIGHTS — EQUAL EMPLOYMENT OPPORTUNITY — TITLE VII — PRIVATE EMPLOYERS MAY VOLUNTARILY ADOPT AFFIRMATIVE ACTION MEASURES TO ELIMINATE CONSPICUOUS RACIAL IMBALANCE IN TRADITIONALLY SEGREGATED JOB CATEGORIES. *UNITED STEELWORKERS OF AMERICA v. WEBER*, 99 S. Ct. 2721 (1979).

I. INTRODUCTION

Since the passage of federal[1] and state[2] legislation designed to afford all persons equal employment opportunities, the courts have been called upon frequently to review the hiring and promotional practices of private employers.[3] Court decisions requiring that minorities be given preference in order to ameliorate the impact of prior discrimination have elicited the contention that such affirmative action programs constitute "reverse" discrimination[4] prohibited by Title VII of the Civil Rights Act of 1964.[5] The Act is a two-edged sword, inasmuch as its prohibition of discrimination is used not only to justify the imposition of preferential programs, but also to challenge them. It is generally recognized that Title VII does not prohibit *courts* from imposing racial quotas[6] preferring persons who have been discriminated against on the basis of race.[7] In *United Steelworkers of America v. Weber*,[8] the Supreme Court was faced with the issue of whether an affirmative action program *voluntarily adopted by an employer* violates Title VII. The litigation arose as a result of an agreement between Kaiser Aluminum & Chemical Corporation (Kaiser) and the United Steelworkers of America (USWA) to impose a racial quota system in order to increase the percentage of black craft employees at Kaiser's Gramercy, Louisiana plant. There had been no judicial determination that blacks seeking

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1. 42 U.S.C. §§ 2000e to 2000e–17 (1976).
2. *See, e.g.*, MD. ANN. CODE art. 49B, §§ 14–16 (1979).
3. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973) (court ordered next thirty promotions to foreman on one-to-one basis); United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D.N.C. 1971) (court ordered one-for-one hiring ratio until percentage of blacks in certain positions equaled 20%).
4. *See generally* Janssen, *The Use of Racial Preferences in Employment: The Affirmative Action/Reverse Discrimination Dilemma*, 32 VAND. L. REV. 783 (1979); Comment, *How Far Can Affirmative Action Go Before It Becomes Reverse Discrimination?*, 26 CATH. L. REV. 513 (1977).
5. 42 U.S.C. §§ 2000e to 2000e–17 (1976).
6. *See* 2 N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 961–65 (4th ed. 1979) [hereinafter cited as CIVIL RIGHTS].
7. Title VII also prohibits discrimination on the basis of color, religion, sex, and national origin, but *Weber* only concerns racial discrimination.
8. 99 S. Ct. 2721 (1979).

employment at that plant had been discriminated against by either Kaiser or the USWA. The *Weber* Court nevertheless held that Title VII did not prohibit the employer and the union from voluntarily adopting an affirmative action plan involving the use of racial quotas to counter the effect of "societal" discrimination.[9]

This casenote discusses the legality under Title VII of racially based quotas voluntarily implemented by employers and reaches the conclusion that the Court misconstrued Title VII when it validated the quota plan in *Weber* and that it ignored evidence of actual discrimination by Kaiser that should have significantly affected its analysis. Finally, it suggests that Executive Order 11246,[10] which supplements legislative efforts in the area of civil rights, specifically authorizes the adoption of the quota plan implemented by Kaiser and the USWA.

II. THE *WEBER* SETTING

In February, 1974, the Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement[11] with the United

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9. Societal discrimination is distinguished from actual discrimination (discrimination) in that the former term does not describe a situation in which individual employment practices have caused the underrepresentation of blacks in the employer's workforce; rather, the underrepresentation was caused by factors outside the control of the employer. Actual discrimination results directly from an employer's hiring practices.

   The Supreme Court in University of Cal. Regents v. Bakke, 438 U.S. 265 (1978), in applying the equal protection clause of the fourteenth amendment to a special minority admissions program at a state medical school stated:

   > [T]he purpose of helping certain groups . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . 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. at 310. *Bakke* is only of academic value to *Weber*, however, because different law was applied in each. *Bakke* involved the fourteenth amendment and Title VI of the 1964 Civil Rights Act, while *Weber* was based solely upon Title VII.

10. 3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. § 2000e note (1976).

11. *Weber* deals solely with the legality of the agreement implemented in Kaiser's Gramercy, Louisiana plant, although the agreement was designed to cover fifteen Kaiser plants throughout the United States. In addition, although this collective bargaining agreement specified hours of work, hourly wages, and conditions of employment, the relevant provisions are those dealing with minority representation in trade, craft, and assigned maintenance classifications. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 763 (E.D. La. 1976). The agreement applied to blacks, other minority groups, and women, but *Weber* deals solely with the agreement's application to preferences for blacks. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 228 n.2 (5th Cir. 1977) (Wisdom, J., dissenting).

Steelworkers of America, the union representing Kaiser employees. The contract was intended to raise the percentage of blacks in craft positions at Kaiser's Gramercy, Louisiana plant to thirty-nine percent,[12] the percentage of blacks in the local workforce. It provided in pertinent part:

> As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates.[13]

Prior to the 1974 agreement, Kaiser had selected employees for its craft positions from persons already so skilled.[14] During this time, the plant had conducted two on-the-job training programs, each of which required prior craft experience as a prerequisite for admission.[15] The primary method of obtaining the craft experience requisite for admission to Kaiser's program was to enroll in training programs administered by the local trade unions.[16] These local unions had traditionally discriminated against minorities with regard to admissions.[17] Therefore, only a small number of blacks had been able to gain the training necessary for craft employment at

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12. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 764 (E.D. La. 1976).
13. Appendix at 137, *Weber,* 99 S. Ct. 2721 (1979) (1974 Labor Agreement between Kaiser Aluminum & Chem. Corp. and United Steelworkers of America, Article 4, No. 4).
14. Appendix at 125, *Weber,* 99 S. Ct. 2721 (1979).
15. The carpenter-painter craft training program, begun in 1964, required one year of prior experience. Brief for the United States and the Equal Employment Opportunity Commission at 6, United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979). In 1968, the second program, for the general-repairman craft, began. *Id.* Initially, this training program required three years of experience, but in 1971, the requirement was reduced to two years. Appendix at 126, *Weber,* 99 S. Ct. 2721 (1979). A total of eleven employees had entered the on-the-job programs for the carpenter-painter craft during its existence (as of the date of testimony at the district court). Brief for the United States and the Equal Employment Opportunity Commission at 6, United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979). Only two of those eleven were black. *Id.* Of the seventeen trainees selected for the general repairman training program, all were white. *Id.*
16. Appendix at 63, *Weber,* 99 S. Ct. 2721 (1979) (testimony of Dennis English, industrial relations superintendent at Kaiser's Gramercy plant).
17. *Id.*

Kaiser.[18] The 1974 agreement provided for new on-the-job craft training programs, admission to which did not require prior craft experience.

Neither party to the 1974 agreement was motivated by altruism. At the time the contract was executed, blacks comprised less than two percent of the total craft population at the Gramercy plant.[19] Kaiser, a government contractor, realized that such a disproportionately small representation of blacks could result in the imposition of sanctions by the Office of Federal Contract Compliance (OFCC),[20] the agency charged with enforcing Executive Order 11246 mandating equal employment opportunity. In addition, both Kaiser and the union feared that private Title VII actions would be brought by blacks alleging discrimination in the procedures for hiring and training craft employees at Gramercy.[21] Seeking to avoid costly litigation, the parties entered into the 1974 agreement attacked in *Weber*.[22]

Weber, a white employee at Kaiser's Gramercy plant, brought a class action on behalf of all non-minority employees prevented from entering on-the-job training programs solely because of race.[23] He claimed that he had been rejected for admission to the craft training programs established by the 1974 agreement, while blacks with less seniority than he had been accepted.[24] Weber alleged that this constituted discrimination violative of Title VII.[25]

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18. In February, 1974, the total Kaiser workforce was 14.8% black. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 764 (E.D. La. 1976). Prior to 1974, blacks made up only 1.83% (5 of 273) of the craft workers at the Gramercy plant. Brief for Petitioner, Kaiser Aluminum & Chem. Corp. at 3, United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979). A dual seniority list was designed in accordance with the 1974 Labor Agreement. One black and one white were selected for each two openings for trainees. Each trainee would be selected according to seniority within his respective racial group. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 223 (5th Cir. 1977).
19. See note 18 *supra*.
20. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 228–29 (5th Cir. 1977) (Wisdom, J., dissenting).
21. *Id.* at 229.
22. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 765 (E.D. La. 1976).
23. *Id.* at 763.
24. Brian Weber would not have been selected for any of the training programs at the time of the trial even if the sole prerequisite to entrance were plant seniority. Appendix at 88, *Weber*, 99 S. Ct. 2721 (1979). Standing to sue, however, would still exist. As long as the program would affect him in the future, Brian Weber need not currently suffer the effects of discrimination. Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186, 1188 (7th Cir. 1971), *cert. denied*, 404 U.S. 939 (1971). Because the action was brought on behalf of a class, another class member could have replaced Weber had his standing been found defective. Cox v. Babcock & Wilcox Co., 471 F.2d 13, 15–16 (4th Cir. 1972).
25. 415 F. Supp. at 763.

III. THE SUIT IN THE FEDERAL COURTS

A. The District Court Opinion

The federal district court[26] agreed with Weber's contentions and permanently enjoined Kaiser from denying non-minority employees admission to on-the-job training programs because of race.[27] The court ruled that Kaiser's quota plan violated both section 703(a) of Title VII,[28] which expressly prohibits an employer from discriminating on the basis of race, and section 703(d),[29] which includes admissions to training programs within the reach of the Act's prohibition of racial discrimination.

While recognizing the broad power of the judiciary to remedy the effect of past discriminatory practices of an employer, even to the extent of establishing quota systems that discriminate against

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26. 415 F. Supp. 761 (E.D. La. 1976).
27. *Id.* at 770.
28. Section 703(a), 42 U.S.C. § 2000e–2(a) (1976) provides:
> 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.

Section 703(c), 42 U.S.C. § 2000e–2(c) (1976) provides:
> 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 an individual in violation of this section.

29. 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 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.

individual employees,[30] the trial court held that similar voluntary action by an employer is impermissible.[31] It stated that in the absence of a showing that the individual blacks preferred over more senior whites had been the victims of unlawful discrimination by Kaiser, affirmative action programs like Kaiser's violate Title VII.[32] Because the evidence at trial did not demonstrate that Kaiser had discriminated against these blacks with regard to hiring, the district court held that even the judiciary did not have the authority to order the quota implemented by Kaiser and the union.[33]

In defending the agreement, Kaiser relied upon section 703(j),[34] contending that while that section did not require imposition of quotas to counter racial imbalance, it also did not prohibit them.[35] In

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30. 415 F. Supp. at 766–67. Proff of the power of courts to provide a remedy when they discover discrimination is found in the statute itself. Section 706(g) of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e–5(g), provides in relevant part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

31. "The proscriptions of the statute are directed solely to employers." 415 F. Supp. at 767.
32. *Id.* at 768–69. The Supreme Court, in Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), recognized the "make whole" purpose of Title VII. This remedy is best described by the fact that "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." Wicker v. Hoppock, 73 U.S. (6 Wall.) 94, 99 (1867) (quoted by the majority in *Moody*, 422 U.S. at 418–19). In *Moody*, the employer was found to have discriminated against those black employees receiving relief under Title VII.
33. 415 F. Supp. at 769.
34. 415 F. Supp. at 766. Section 703(j), 42 U.S.C. § 2000e–2(j) (1976), provides:

> 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 origin in any community, State, section, or other area, or in the available workforce in any community, State, section, or other area.

35. 415 F. Supp. at 766.

response, the trial court stated that section 703(j) could not "override" the clear meaning of Title VII, which prohibited the quota adopted by Kaiser and the USWA.[36] The court maintained that had Congress wanted to allow such voluntary action to correct racial imbalance, it would have so provided in the Act.[37]

In addition, the court implicitly acknowledged Kaiser's argument that the Executive Order program authorized the quota system.[38] Although it found the objectives of that program exemplary, it was unwilling to approve an affirmative action plan that it found clearly violated Title VII.[39] The court believed that if exceptions were to be made to the prohibitions of Title VII, it was solely the job of Congress to make them.[40]

B. The Court of Appeals Opinion

The Court of Appeals for the Fifth Circuit[41] affirmed the judgment of the district court,[42] but disagreed with the lower court's conclusion that employers and unions may never voluntarily implement quota systems,[43] observing that voluntary action to eliminate employment discrimination was the "central theme" of Title VII.[44] The court of appeals failed, however, to specify the extent to which voluntary remedial action may be permitted. It merely affirmed the district court's holding that in the absence of prior discrimination by

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36. *Id.*
37. *Id.* at 769–70.
38. *Id.* at 769.
39. *Id.*
40. *Id.* at 770.
41. 563 F.2d 216 (5th Cir. 1977).
42. *Id.* at 227.
43. *Id.* at 223. The court did state that strong authority existed for the proposition that courts have broader remedial powers than private employers. *Id.* Sections 703(a), (d), (h) & (j) of the 1964 Act were *restrictions on employers and not on the courts. Id.* at 224.
44. *Id.* at 223. *Accord,* Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968) (There is great emphasis in Title VII on private settlement and the elimination of discriminatory employment practices without litigation.). As an indication of the interest in private settlement of Title VII violation claims, 42 U.S.C. § 2000e–5(b) provides in part: "If the Commission [EEOC] determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

No Title VII charges had been filed against Kaiser because of its employment practices at the Gramercy plant as of the time the 1974 Agreement was initiated. At that time, Kaiser was only aware of charges of Title VII violations at its Baton Rouge plant and about ongoing Title VII litigation at its Chalmette facility. Brief for Petitioner (Kaiser) at 4, United Steelworkers of America v. Weber, 99 S. Ct. 2721 (1979). The Kaiser and United Steelworkers Agreement was formed in the absence of an EEOC investigation into possible Title VII violations.

Kaiser against those blacks receiving preferential treatment, the voluntary quota plan violated Title VII.[45]

As had the district court, the Fifth Circuit noted that even the judiciary could not impose a racial quota that does not guarantee preferential treatment to the actual victims of discrimination.[46] Although recognizing that blacks had suffered from societal discrimination, the court emphasized that Kaiser itself had not been shown to have discriminated against blacks. It rejected the argument that victims of societal discrimination should be preferred, stating that a preference was valid only to restore employees to their "rightful places" within a particular employment scheme[47] — those positions each would have obtained in the absence of discrimination by the

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45. 563 F.2d at 224.

46. Title VII outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications, but it does not outlaw preferences favoring victims of discrimination. A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment "not because he is Black, but because, and only to the extent that, he has been discriminated against."

563 F.2d at 224–25 (quoting Chance v. Board of Examiners, 534 F.2d 993, 999 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977)).

Mr. English, Kaiser's industrial relations supervisor at the Gramercy plant, testified as to the non-discriminatory nature of Kaiser's employment practices: "In an attempt to correct an imbalance in the number of minorities in the Gramercy plant compared with the number of minorities in the labor force, Kaiser began, in 1969, to hire, on a 50 percent minority basis, employees for jobs requiring no prior experience." Appendix at 78, *Weber*, 99 S. Ct. 2721 (1979). In addition, according to Mr. English, Kaiser never had a discriminatory plant seniority system, *Id.* at 72, and the statistical imbalance in employment was caused by factors unrelated to Kaiser's past hiring practices. *Id.* at 77.

Although Kaiser and the USWA argued that prior discrimination by Kaiser was shown because prior craft experience was formerly required for admittance to on-the-job training programs, the court of appeals found the program too limited in its effect on hiring to be valuable evidence in proving discrimination. 563 F.2d at 224 n.13. Only 28 employees in all had become craft employees due to the craft training programs which had required prior experience. *Id.*

47. A minority employee is entitled to his rightful place in the employment scheme, not because he is a minority, but because he is a victim of past unlawful discrimination. 563 F.2d at 224–25 (citing in part, Chance v. Board of Examiners, 534 F.2d 993, 999 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977)).

> The fact that some unnamed and unknown White person in the distant-past may, by reason of past racial discrimination in which the present applicant in no way participated, have received preferences over some unidentified minority person with higher qualifications is no justification for discriminating against the present better qualified upon the basis of race.

Carter v. Gallagher, 452 F.2d 315, 325 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972).

employer.[48] It found that the plant-wide seniority system Kaiser used before the 1974 agreement was non-discriminatory.[49] Because the quota instituted by the 1974 agreement went beyond restoring persons to their "rightful places," it violated Title VII.[50]

Kaiser and the USWA also contended that Executive Order 11246 and the regulations implementing it provided authority for imposition of the quota, notwithstanding Title VII's prohibition of discrimination.[51] Weber responded that Kaiser had already fulfilled the affirmative action requirements of the Executive Order and that the quota therefore was excessive.[52] The Fifth Circuit did not consider the effect of the Executive Order on the suit in light of its

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48. Franks v. Bowman Transp. Co., 424 U.S. 747, 764 (1976). In *Franks*, the Court stated that once members of a plaintiff class have been shown by the employer not to have been the particular victims of racial discrimination, then seniority relief, given to the other members of the class of actual victims, will be denied to those non-victims. *Id.* at 772–73.
49. 563 F.2d at 226. The framers of Title VII insisted on preserving existing seniority systems after the enactment of the Act. Senators Joseph Clark and Clifford Case, the Act's floor managers, submitted interpretive memoranda prepared by the Department of Justice and themselves, indicating that (1) no existing seniority rights would be affected; (2) the act operated only prospectively and mandated no alteration of existing seniority rights; and (3) differences in the treatment of employees based on seniority would not be Title VII violations, particularly "last hired, first fired" provisions of many labor contracts. 110 CONG. REC. 7207, 7212–13, 7217 (1964). Judge Wisdom, in his dissent in the court of appeals, criticized the majority's acceptance of the district court's finding of no past discrimination at Gramercy because he believed the majority used the wrong standard in judging Kaiser's actions. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 229 (5th Cir. 1977). He maintained that allowing voluntary compliance only when a court would have permitted such action would bring about less voluntary compliance overall and would place the employer and union in a difficult position. *Id.* at 230. Judge Wisdom noted that the employer and the union were faced with liability from two directions because on the one hand they faced the possibility of litigation from minorities under Title VII and sanctions under Executive Order 11246, and, on the other, the threat of suit by whites if Kaiser's remedies were excessive. *Id.* He claimed that in order for voluntary compliance to exist at all, Kaiser and the union should be able to invoke the quota in question if it was a "reasonable remedy for an arguable violation of Title VII." *Id.* Judge Wisdom found evidence indicating possible violations of Title VII, although at trial the court simply accepted the testimony of two Kaiser personnel officers that no discrimination existed. *Id.* at 231. He observed that in a suit such as this, a peculiar event occurs in the presentation of evidence. No litigant wants to have discrimination discovered. *Id.* Kaiser and the union could only admit past discrimination at the great risk of inviting private Title VII suits by blacks. *Id.* Additionally, Weber risked losing his ability to prove reverse discrimination if actual discrimination was shown, because a quota would have been considered a proper response to actual discrimination by Kaiser. *Id.*
50. 563 F.2d at 226.
51. *Id.* See notes 105–118 and accompanying text *infra*.
52. 563 F.2d at 226. Weber argued that the Office of Federal Contract Compliance improperly coerced Kaiser into implementing the quota, because the requirements of Executive Order 11246 had been met prior to the OFCC's threats to withdraw federal contracts. *Id.*

finding of a Title VII violation, stating that "executive orders may not override contradictory congressional expressions."[53]

C. *The Supreme Court Opinion*

Mr. Justice Brennan's majority opinion reversed the judgments of the district court and the court of appeals.[54] Emphasizing the need to examine the legislative history of Title VII, the majority rejected Weber's reliance on the "literal interpretation of sections 703(a) and (d) of the Act,"[55] finding that such a literal interpretation contradicted the legislative intent underlying Title VII.[56]

Justice Brennan reasoned that Title VII was designed to give blacks employment opportunities not previously available to them and that in enacting the Civil Rights Act of 1964, Congress had intended that employers and unions examine their own employment policies and voluntarily adopt programs to eliminate discrimination.[57] The language of section 703(j), Justice Brennan noted, was further evidence of Congress' intent to allow voluntary "race conscious efforts to abolish traditional patterns of racial segregation and hierarchy."[58] Section 703(j) states that, "[n]othing . . . shall be interpreted to *require* any employer [or] labor organization . . . to grant preferential treatment to any individual or to any group . . . on account of a racial imbalance in the employer's workforce."[59] Had Congress intended to disallow voluntary action by employers and labor unions it could easily have done so, said Justice Brennan, by stating not only that Title VII did not require but also that it did not *permit* preferential treatment merely designed to eliminate racial

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53. *Id.* at 227. When an executive order and a statute conflict, the statute prevails as long as Congress acted pursuant to its constitutional powers. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The majority recognized that Executive Order 11246 had been previously upheld as valid in Contractors Assoc. of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971). The court, however, found that the affirmative action imposed in that case was a result of the finding of "prior exclusionary practices by the six trade unions controlling the work force." 563 F.2d at 227.
54. 99 S. Ct. at 2726. Justice Brennan stated the issue: "[W]hether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan." 99 S. Ct. at 2726 (emphasis in original). Two other possible issues were summarily disposed of by Justice Brennan. First, there was no alleged violation of the Equal Protection Clause of the Constitution, because no state action was involved. Second, what a court may order as a "remedy to a past proven violation of the Act" is not important to the case at bar, because the Kaiser-USWA plan was adopted voluntarily. *Id.*
55. 99 S. Ct. at 2726.
56. *Id.* at 2727.
57. *Id.* at 2727–28.
58. *Id.* at 2728–29.
59. *See* note 34 *supra.*

imbalance.[60] Justice Brennan emphasized that in enacting the Civil Rights Act, both Houses of Congress had desired to keep employers and unions free from undue governmental interference.[61] He found that Congress had intended to enable private businesses to take voluntary steps towards reaching the statutory goal of equal opportunity.[62]

Justice Brennan did not set forth a test for determining under what circumstances voluntary action would be permissible under Title VII, stating only that the Kaiser-USWA plan was "on the permissible side of the line."[63] He did, however, provide some general reasons to support this conclusion. First, the agreement was designed to create opportunities for blacks in jobs historically unavailable to them.[64] Second, no white employees were discharged from jobs and replaced by black employees,[65] and there was no absolute bar to the advancement of whites.[66] Finally, the plan was a temporary action, not intended to maintain racial balance, but to eliminate "manifest racial imbalance."[67]

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60. 99 S. Ct. at 2729.
61. *Id.*
62. *Id.*
63. *Id.* at 2730.
64. *Id.*
65. *Id.*
66. *Id.* One-half of those entering the training program were white.
67. *Id.* "Preferential selection of craft trainees at the Gramercy plant will end as soon as the percentage of black skilled craft workers in the Gramercy plant approximates the percentage of blacks in the local labor force." *Id.* Justice Blackmun, in his concurring opinion, agreed with Judge Wisdom's dissent in the court of appeals, stating that the "arguable violation" theory was advantageous to solving the problem of when voluntary action may be taken by a private employer. For the definition of "arguable violation," see text accompanying note 98 *infra*. Blackmun claimed that the "arguable violation" theory had many advantages in that it effectuated the Act's purpose and helped solve problems not anticipated by Congress when developing Title VII legislation. *Id.* at 2732. Initially, Justice Blackmun maintained that the majority view was too permissive in practice, because it allowed voluntary affirmative action whenever the job category typically was segregated as a result of pervasive segregation. *Id.* After a "closer look," the majority view was acceptable to him. *Id.*

According to Justice Brennan, the employer need not have a history of employment discrimination to implement the Kaiser-USWA plan. If the arguable violation theory were imposed as a standard, Justice Blackmun noted, the threshold level of discrimination, at which point voluntary action would be permitted, would have to be set at a low level to permit an employer to take affirmative action without subjecting himself to costly litigation and possible monetary damages. *Id.* at 2733. The reason for taking voluntary action is to avoid litigation. As a result, Blackmun maintained, a mere disparity between the percentage of minority employees and the percentage of minorities in the local workforce would qualify as an arguable violation. *Id.* In Kaiser's situation, an arguable violation was shown by the statistical disparity between the percentage of blacks in craft positions at the Gramercy plant and their percentage representation in the local workforce.

Nowhere did the Court dispute the lower courts' finding that there had been no actual discrimination by Kaiser and the USWA. Rather, it attributed the disproportionately small representation of blacks in the craft trades at Gramercy to *societal* discrimination. Prior to *Weber,* no affirmative action program employing a quota system, whether court-imposed or voluntary, had passed judicial scrutiny absent a showing that it had been implemented to redress the effect of *actual* discrimination.[68]

In dissent, Chief Justice Burger argued that the position taken by the Court's majority in *Weber* was legislatively desirable but judicially unsound.[69] He stated that Title VII was written with "extraordinary clarity,"[70] and that it was "enacted to make discrimination against any individual illegal."[71] The Chief Justice further noted that the clear language of section 703(d) prohibited the quota contained in the Kaiser-USWA plan[72] and that by according a preference to some individuals, the plan discriminated against others.[73]

In a separate dissenting opinion, Justice Rehnquist examined the wording of the statutes and observed that in permitting race to be the basis of the Kaiser-USWA agreement the majority had rejected the literal meaning of sections 703(a), (d), and (j),[74] as well as the Court's own precedent.[75] Congress could not have drafted language that more strongly prohibited the race-based labor agreement in *Weber,* he stated, indicating that sections 703(d) and 703(a)(2) were directly on point.[76] Both sections describe as unlawful the classification and unequal treatment of employees on the basis of

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68. The issue of whether voluntary affirmative action is subject to a different Title VII standard than court-ordered remedies for a Title VII violation was "expressly left open," 99 S. Ct. at 2726, in McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 281 n.8 (1976).
69. 99 S. Ct. at 2734.
70. *Id.*
71. *Id.* at 2735.
72. *Id.* at 2734.
73. *Id.*
74. *Id.* at 2736, 2737, 2739.
75. *Id.* at 2737. The precedent referred to was from prior Supreme Court decisions: Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) ("[T]he obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." (emphasis in original)); McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 283 (1976) (Title VII "prohibits *all* racial discrimination in employment, without exception for any particular employees. . . ." (emphasis in original)); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.").
76. 99 S. Ct. at 2739.

race. He observed that section 703(j) and the other two sections are theoretically consistent.[77]

Next, Justice Rehnquist noted that despite the clarity of Title VII's language, the majority had deemed it necessary to resort to legislative history in construing the Act, and in doing so had incorrectly interpreted congressional intent.[78] In conclusion, he observed that the majority opinion was poor precedent for future Title VII suits because it legitimized the use of voluntary racial quotas to offset racial imbalances in the workforce, "the very evil

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77. Justice Rehnquist demonstrated that the sections had different purposes. 99 S. Ct. at 2749. Sections 703(a) and (d) were directed at employers and labor unions, while section 703(j) was directed at courts and federal agencies.

The majority maintained that voluntary action to correct an imbalance was proper, because Title VII intended for management decisions in hiring to be disturbed as little as possible. Because the purpose of Title VII was to prevent discrimination on the basis of race, freedom in management decisions can be consistent with the goal of Title VII by allowing management to make its own employment choices as long as those choices are made without regard to race. *Id.* at 2749 n.25. Furthermore, Rehnquist questioned the majority claim that Kaiser should have a right voluntarily to adopt the quota to correct racial imbalance, when basically its reason for adopting the quota was to avoid sanctions from the Office of Federal Contract Compliance. *Id.* at 2749.

78. *Id.* at 2740–41. Opponents of the bill, which eventually became the Civil Rights Act of 1964, in the House of Representatives frequently argued during debates and in written reports that employers would be forced to hire on the basis of race to alleviate a racial imbalance in employment. For example, one minority report charged that discrimination would be defined by the administration as "lack of racial balance." H.R. REP. No. 914, 88th Cong., 2d Sess. 67–68 (1963), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2431, 2436. In response to these assertions, proponents of the bill argued that this was exactly what the bill proscribed. When the bill reached the House floor, Representative Celler, Chairman of the House Judiciary Committee and the Congressman who introduced the legislation, stated that "[t]he Bill would do no more than prevent . . . employers from discriminating against or in favor of workers because of their race [*sic*]." Neither a court nor the EEOC "would have power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualification [*sic*] simply because they are a given race or religion. Only actual discrimination could be stopped." 110 CONG. REC. 1518 (1964).

In the Senate, similar attacks were made on the interpretation of the Civil Rights bill. Senator Humphrey, a strong proponent of the bill in the Senate, described the meaning of discrimination as "a distinction and treatment given to different individuals because of their different race [*sic*]." In concurrence with Senator Humphrey's interpretation of the bill, Senators Clark and Case clarified the bill's meaning as to preferential treatment:

> 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.

that the law was intended to eradicate," and articulated no limits for permissible voluntary affirmative action plans.[79]

IV. ANALYSIS

Weber holds that Title VII does not prohibit employers from voluntarily implementing racially based affirmative action programs in order to redress the effects of societal discrimination,[80] provided the plan lies on the "permissible side of the line." The decision accords private employers a prerogative denied the courts, because the Court has held that Title VII prohibits the judiciary from imposing racial quotas absent a showing of actual discrimination by the employer.[81] Neither the Civil Rights Act of 1964 and its legislative history, nor the Court's prior decisions are in accord with the *Weber* majority's approach to Title VII controversies.

The Court buttressed its holding with strained interpretations of Title VII. The majority construed the section 703(j) prohibition of preferential affirmative action programs to apply solely to courts and not to private employers.[82] This construction was premised on the fact that although section 703(j) does not *require* employers to formulate affirmative action programs, it likewise does not prohibit them from doing so. It can be more readily asserted, however, that had Congress intended to empower employers to institute such preferential programs, it would have expressly stated as much in section 703(j) — particularly so as to overcome the prohibition in

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110 CONG. REC. 7213. Justice Rehnquist felt that the following observations, made by the Senators, were spoken as if they were directed at Brian Weber himself:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged — *or indeed permitted* — to fire whites in order to hire Negroes, *or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights as the white workers hired earlier.*

110 CONG. REC. 7213 (1964) (emphasis added).

79. 99 S. Ct. at 2753. The Court, however, did provide some limits. *See* notes 64–67 and accompanying text *supra.*

80. This indication is derived from the Court's holding that Title VII permits the "private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalances in traditionally segregated job categories." 99 S. Ct. at 2730. Only a few, if any, job categories have not evidenced conspicuous racial discrimination.

81. *See* note 75 *supra.*

82. As Justice Rehnquist pointed out, no opponent or proponent of Title VII in the Senate even implied, much less directly stated, that the statute would allow private employers voluntarily to prefer black employees over white employees. 99 S. Ct. at 2748.

sections 703(a) and (d) of discriminatory hiring practices. The conspicuous absence in section 703(j) of language expressly empowering employers to formulate preferential employment schemes is, therefore, a strong indication that the majority misconstrued the statute. Tenets of statutory construction compel the same conclusion. Express prohibitions in a statute prevail over negative inferences,[83] and the various parts of a legislative enactment should be read consistently with each other.[84]

The Court found additional justification for its interpretation of Title VII in the fact that Congress had emphasized the importance of "traditional management prerogatives" in attaining the Title VII ideal of voluntary compliance. The majority asserted that by permitting voluntary action, management would have the freedom to achieve this employment goal without undue governmental interference.[85] In reality, however, Kaiser exercised no real freedom of choice in adopting the program disputed in *Weber*. Rather, the corporation was acting in response to possible Title VII suits and sanctions from the Office of Federal Contract Compliance, the enforcement arm of Executive Order 11246, arising from its earlier hiring practices. Consequently, Kaiser implemented the plan not to integrate its workforce voluntarily, but rather to avoid both costly litigation and the loss of federal contracts.[86] Indeed, had Kaiser's quota system once implemented been improper with respect to necessity or scope, a court would have had the power to order changes had anyone sued on the ground of reverse discrimination. These considerations indicate anything but freedom of choice. The sole voluntary aspect of Kaiser's implementation of affirmative action was the absence of a court order.

Additionally, the Court misinterpreted section 703(j) when it partially based its validation of the Kaiser-USWA agreement on the

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83. *See* C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.05 (4th ed. 1973).
84. *Id.* Senator Humphrey's interpretation of § 703(j) was in accordance with this view:

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of the bill have carefully stated on numerous occasions that title VII does not *require* an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. *This subsection does not represent any change in the substance of the title.* It does state clearly and accurately what we have maintained all along about the bill's intent and meaning.

110 CONG. REC. 12723 (1964) (emphasis added).
85. As Justice Rehnquist declared, "[t]he whole purpose of Title VII was to deprive employers of their 'traditional business freedom' to discriminate on the basis of race." 99 S. Ct. at 2749 n.25.
86. One sanction against government contractors is the loss of federal contracts. 3 C.F.R. 169 (1974), *reprinted in* 42 U.S.C. § 2000e note (1976).

fact that the plan was a temporary measure,[87] "not intended to maintain [a] racial balance, but simply to eliminate a manifest racial imbalance."[88] As Justice Rehnquist pointed out, however, the distinction between eliminating a "manifest racial imbalance" and maintaining a racial balance has no foundation in Title VII.[89] If, as the majority emphasized, the main purpose of Title VII is to open employment opportunities for blacks, the distinction between whether an employer could take voluntary affirmative action measures to eliminate racial imbalances or to maintain racial balances is one without a difference.[90]

The Court decided *Weber* without relying on its own precedent interpreting Title VII. Prior Supreme Court decisions mandated the elimination of race as a factor in employment only pursuant to a showing of past *actual* discrimination.[91] The Court maintained that *voluntary* action by a private employer should be judged against a different standard than the *court ordered* affirmative action with

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87. An estimate of the time necessary for black representation to reach 30% in the skilled crafts at Gramercy ranged from 15 to 20 years. Appendix at 87, *Weber*, 99 S. Ct. 2721 (1979) (testimony of Dennis English, industrial relations superintendent of Kaiser's Gramercy plant).

88. 99 S. Ct. at 2730.

89. *Id.* at 2746 n.19.

90. *Id.*

91. "An employer will remain wholly free to hire on the basis of his needs and of the job candidate's qualifications. What is prohibited is the refusal to hire someone because of race or religion." 110 CONG. REC. 5094 (remarks by Senator Humphrey).

"Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing." 110 CONG. REC. at 6549 (Senator Humphrey). "[T]he bill now before us . . . is color-blind." *Id.* at 6564 (Senator Kuchel). "The language of [the civil rights bill] simply states that race is not a qualification for employment. Every man must be judged according to his ability." *Id.* at 8921 (Senator Williams). "Basically, I believe that the color of a man's skin, or the faith to which he adheres, should be completely extraneous considerations when an employer hires or a labor union admits to membership . . . ." *Id.* at 9881. "Everything in this proposed legislation has to do with providing a body of law which will surround and protect the *individual* from some power complex. This bill is *designed for the protection of individuals.* When an *individual is wronged he can invoke the protection to himself* . . . ." 110 CONG. REC. 1540 (statement of Representative Lindsay) (emphasis added). "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate." *Id.* at 7207 (Senator Clark's statement). These quotes present strong evidence that the Act was directed at individuals and not minority group members. When rights are given to individuals themselves, those particular individuals are protected as persons and not as members of a larger group. If societal discrimination was the basis of relief, members of the group discriminated against would have a right to relief without having been the actual victims of discrimination.

As one incisive professional commentator writes:

[A quota] achieves those purposes in circumstances where more

which all prior Title VII cases had been involved.[92] Voluntary action, however, although the preferred means of achieving Title VII objectives,[93] is intended to achieve the same goals as is action pursuant to court order, and therefore should be judged by the same standard.

Despite the majority's misplaced reliance on what it considered the voluntary aspect of the affirmative action program in *Weber,* the Court was correct in recognizing that voluntary compliance is the preferred means of achieving the objectives of Title VII.[94] This is evidenced by the language of Title VII and court decisions construing it.[95] The difficulty arises, in *Weber* and in other cases, when one attempts to formulate a workable standard governing when employers may appropriately use their own initiative to implement affirmative action programs voluntarily. On one hand, if an employer that had not been involved in discriminatory behavior were allowed to adopt affirmative action voluntarily, an explicit prohibition of Title VII would be violated, providing grounds for reverse discrimination suits.[96] This result also contravenes the Title VII goal

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> moderate forms of relief will be ineffective. For example, the courts order [quotas] to compensate for past discrimination when the victims of the discrimination cannot be identified; or to assure future equal opportunity when it is clear that simply ordering an employer to eliminate unlawful hiring practices will not encourage minority group members to seek positions with that employer; or when the evidence establishes that an employer will not comply with a prior, more moderate order.

Slate, *Preferential Relief in Employment Discrimination Cases,* LOY. CHI. L.J. 315, 323 (1974) [hereinafter cited as *Preferential Relief*]. As Senator Humphrey noted, "[A]ny 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 refuse to hire on the basis of race. *It must be emphasized that discrimination is prohibited as to any individual.*" 110 CONG. REC. 7213 (emphasis added).

92. Justice Brennan maintained that federal governmental interference with private employment practices, not private voluntary action to eliminate societal discrimination, was sought to be eliminated by section 703(j). 99 S. Ct. at 2729.

93. This was stated in the majority opinion at the court of appeals level, 563 F.2d at 216, and in the majority opinion of Justice Brennan. 99 S. Ct. at 2727–30. In fact, the wording of Title VII itself evidences Congress' desire for voluntary compliance. "If the Commission [EEOC] shall determine, after such investigation, that there is a reasonable cause to believe that the charge [brought by an employee against his employer] is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." Title VII, § 706(a).

In United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), the court emphasized that voluntary compliance in eliminating unfair employment practices is preferable to court action. *See also* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 258 (5th Cir. 1974).

94. *See* note 93 and accompanying text *supra.*

95. *Id.*

96. *See* notes 28 & 29 *supra.*

of avoidance of litigation.[97] On the other hand, if employers were allowed to implement affirmative action programs voluntarily only pursuant to a showing of actual discrimination, they would never implement a voluntary remedy because to do so would be to admit past actual discrimination upon which Title VII suits could be predicated. The solution to this problem, then, must lie somewhere between the two extremes just mentioned.

In light of this dilemma, Justice Blackmun proposed an intermediate standard. This approach avoids the use of Justice Brennan's sweeping "societal discrimination" standard to determine when employers may voluntarily adopt affirmative action plans. According to Justice Blackmun, private employers may voluntarily adopt reasonable affirmative action programs in order to redress the effect of "arguable violations" of Title VII[98] — that is, whenever there is an arguable, yet demonstrable, connection between minority underrepresentation in a particular company and that employer's hiring practices. This is a less stringent standard than the "actual" discrimination standard employed in earlier decisions, yet not so lax as that actually used by the *Weber* court. The standard would not be satisfied by a statistical disparity reflecting mere societal discrimination. The arguable violation rule would enable employers to avoid liability for prior discrimination while conceding that their past hiring practices may have had a discriminatory effect.

The facts in *Weber* demonstrate that Kaiser committed two arguable violations of Title VII. First, Kaiser hired skilled craft employees directly from the local unions, which had traditionally discriminated on the basis of race. Second, Kaiser admitted to its skilled craft training programs only persons with prior craft experience, which, in the Gramercy area, could be acquired only through membership in the local unions.[99]

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97. One reason voluntary compliance with Title VII is welcomed is because litigation can be avoided. Allowing an employer to comply with Title VII when the employer has not discriminated, however, is a misnomer. In the absence of discrimination by the employer, the employer is in compliance with Title VII. Voluntary action taken under these circumstances will only place the employer in noncompliance, affording opportunities for litigation.

In addition, voluntary compliance with Title VII is a substitute for a district court remedy for a violation. Comment, *Weber v. Kaiser Aluminum & Chemical Corp.: The Challenge to Voluntary Compliance Under Title VII,* 14 COLUM. J. L. SOC. PROB. 123, 139 (1978). When an employer acts to vary from a nondiscriminatory employment practice, the plan is not remedial and the employer is not acting as a court would. *Id.*

98. 99 S. Ct. at 2731–32.

99. In order to rebut this prima facie case of discrimination, Kaiser would have been required to show that this method of hiring and training craft persons was permitted by business necessity. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). A business necessity could only be shown by evidence that the hiring and training procedures had "a manifest relationship to the employment in question." *Id.* at 432. Convenience and the saving of expenses are not sufficient

Additionally, Kaiser's near-total exclusion of blacks from craft positions at its Gramercy plant justified the challenged quota. As a general proposition, courts are more likely to order quotas rather than other less extreme relief when an employer's past practices have resulted in almost total exclusion of blacks from a portion of the workforce.[100] At the same time, however, courts attempt to tailor the relief granted so as to minimize harm to white employees.[101] As Justice Brennan's opinion in *Weber* noted, the Kaiser plan did not provide for the firing of white employees to make room for blacks. It created trainee positions for both whites and blacks, and it was only temporary.[102] Consequently, because a court finding a Title VII violation by Kaiser could have ordered the quota system assailed by Brian Weber,[103] an employer that under the "arguable violation" standard would possess more latitude than the courts to initiate remedial activity could certainly engage in the make-whole quota remedy giving rise to the controversy in *Weber*.

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to constitute a business necessity. Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir. 1971).

100. CIVIL RIGHTS, *supra* note 6, at 961.

101. *Preferential Relief, supra* note 91, at 344.

102. 99 S. Ct. at 2730.

103. In a factual situation similar to *Weber*, but based on 42 U.S.C. §§ 1981 and 1983, a federal district court found unlawful discrimination and instituted the same quota system voluntarily adopted by Kaiser. In Crockett v. Green, 388 F. Supp. 912 (E.D. Wis. 1975), *aff'd*, 534 F.2d 715 (7th Cir. 1976), the defendants, officers of the City of Milwaukee, were charged with discriminating against blacks in the hiring of skilled craft workers. In hiring a certain class of skilled craft workers, the defendants required prospective employees to have completed a formal apprenticeship in the specific trade and to have worked a certain number of years as journeymen following completion of the apprenticeship. The fact was that the building trade unions provided the only source of journeymen who had also completed a formal apprenticeship in most of the skilled craft positions. As a result of the low percentage of blacks employed by the building trades industry, only 3.1% of the total number of persons employed in skills craft positions by the City of Milwaukee and the Board of School Directors were black.

The court found a prima facie case of discrimination due to the disparity between the percentage of black population in Milwaukee (17.2%) and the percentage of blacks employed in skilled craft positions (3.1%). Following Griggs v. Duke Power Co., 401 U.S. 424 (1971), the court announced that the burden of proof shifted to the defendants to show that their job requirements were permitted by a "business necessity." The defendants were unable to show such "business necessity," and the court mandated that for every two job openings in skilled craft positions, one qualified black would be appointed for every white until the percentage of blacks in that job classification equaled the percentage of blacks in the City of Milwaukee.

V. WAS *WEBER* A FICTION?

The Court failed to limit its holding to the actual facts of the case when it stated the issue as: "[W]hether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan."[104] Reverse discrimination suits are anomalous because neither party wants to offer evidence of discrimination by the employer. The plaintiff will harm his chances of proving reverse discrimination when actual discrimination is shown. In addition, the defendants do not want to prove actual discrimination because doing so will likely elicit Title VII suits by minorities. As a result, a court will be unaware of evidence of actual discrimination. For this reason, the *Weber* Court was unaware of important facts, namely that Kaiser had acquired craft employees and trainees in a discriminatory manner. Had it had these facts, the Court would probably have limited its inquiry into permitted actions under Title VII and the holding would have been affected significantly. Instead, the Supreme Court in *Weber* issued a holding too broad to focus on the actual narrow issue. The issue should have been whether Title VII forbids private employers from adopting affirmative action plans created when self examination reveals its hiring practices are arguably discriminatory. An appropriate resolution of this issue would have demonstrated that the Kaiser-USWA plan was a proper response. The Court then would never have reached the issue of whether societal discrimination may be a basis for a remedy in compliance with Title VII.

VI. EXECUTIVE ORDER 11246

Shortly after the passage of the Civil Rights Act of 1964, President Johnson issued Executive Order 11246[105] in order to foster equal employment opportunity. Among other things, the order

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104. 99 S. Ct. at 2726 (emphasis in original).

105. Discrimination in employment by government contractors has been prohibited, by the use of Executive Orders, since the administration of President Franklin Roosevelt. Exec. Order 8802, 3 C.F.R. 957 (1938-1943 Compilation). As studies revealed, however, contractors usually made no effort to comply with the Executive Orders. COMMITTEE ON GOVERNMENT CONTRACTS, PATTERNS FOR PROGRESS (Final Report) 14 (1961); UNITED STATES COMMISSION ON CIVIL RIGHTS, EMPLOYMENT 92 (1961). In response to government contractors' non-compliance with these apparently passive measures aimed at removing discriminatory employment practices, President Kennedy, in 1961, issued Executive Order 10925, 3 C.F.R. 448 (1959-1963 Compilation), which not only prohibited discrimination by governmental contractors, but also required contractors to "take affirmative action to ensure" non-discrimination. These two provisions were repeated in Executive Order 11246, 3 C.F.R. 339 (1965), the Executive Order currently in effect.

requires government contractors[106] such as Kaiser, to adopt affirmative action plans to eliminate discrimination. Additionally, regulations implementing the order place on the individual government contractor the onus of determining whether women and minorities were "underutilized"[107] and, if so, of taking specific steps, including the establishment of goals and timetables,[108] designed to produce equal employment. Finally, the order mandated affirmative action even in the absence of a finding of past discrimination by a judicial or administrative tribunal[109] and regardless of the source of the discrimination.[110]

Title VII's legislative history demonstrates that Executive Order 11246 and the statute do not conflict. Interpretive memoranda from several United States Senators who were instrumental in achieving the passage of Title VII indicate that Title VII in no way diminishes the authority of the President to require government contractors to implement necessary affirmative action programs as a condition

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106. "A government contractor under Executive Order 11246 is an employer which has: 50 or more employees and (1) a contract of $50,000 or more; or (2) Government bills of lading which, in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) who serves as a depository of Government funds in any amount; or (4) who is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount." Revised Order No. 4, 41 C.F.R. § 60–2.1(a) (1979).

107. Underutilization is defined as having a lesser percentage of minorities in a particular job category than would be expected by examining their representation in the available workforce. Revised Order No. 4, 41 C.F.R. § 60–2.11(b) (1979).

108. *Id.* §§ 60–2.10, 60–2.12 (1979). Goals and timetables are really, in this instance, no different than quotas proscribed under § 703(j). According to a man who served in the Labor Department and helped develop goals for minority employment hiring for government contractors:

> I now realize that the distinction we saw between goals and timetables on the one hand, and unconstitutional quotas on the other, was not valid. Our use of numerical standards in pursuit of equal opportunity has led ineluctably to the very quotas, guaranteeing equal results, that we wished to avoid.

Silberman, *The Road to Racial Quotas*, Wall St. J., Aug. 11, 1977, at 12, col. 4.

109. Self analysis is the determining factor as to whether affirmative action is justified and required. 41 C.F.R. §§ 60–2.11, 60–2.12 (*l*) (1979).

110. 41 C.F.R. § 60–2.11 (1979). It was held in Contractors Assoc. of E. Pa. v. Secretary of Labor, 442 F.2d 159, 176 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), that even though the unions were found to have discriminated and not the contractors, the non-discriminating contractors in Philadelphia could be forced to comply with Executive Order 11246:

> [The contractors'] argument misconceives the source of the authority for the affirmative action program. [The contractors] are not being discriminated against. They are merely being invited to bid on a contract with terms imposed by the source of the funds . . . . *The Plan does not impose a punishment for past misconduct. It exacts a covenant for present performance.*

(emphasis added).

precedent to doing business with the government.[111] Furthermore, an examination of the debates of the 1972 amendments to Title VII in the Senate discloses that the members of that body flatly rejected several attempts to use Title VII to dilute Executive Order 11246.[112] At the very least, this last occurrence demonstrates a specific congressional intent not to preempt the field of equal employment opportunity.

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111. In an interpretive memorandum explaining Title VII to the Senate, Senators Clark and Case, the bill's floor managers, discussed the facial conflict between Title VII and the Executive Order program stating that Title VII "has no effect on the responsibilities of the [President's Committee of Equal Employment Opportunity] or on the authority possessed by the President or Federal Agencies under existing law to deal with racial discrimination in the areas of Federal Government employment and Federal contracts." 110 CONG. REC. 7215 (1964).

Additionally, an amendment by Senator Tower, which would have made Title VII the exclusive federal remedy for employment discrimination, was rejected. *Id.* 13650–52.

112. Senator Saxbe, concerned with a proposed merger provision of the Senate bill which would have merged the Executive Order enforcement power with the Equal Employment Opportunity Commission, believed that the merger would have diluted the Executive Order program. The Senator stated in a speech proposing an amendment to strike the merger provision from the bill:

> The Executive Order program should not be confused with the judicial remedies for proven discrimination which unfold on a limited and expensive case-by-case basis. Rather, affirmative action means that all Government contractors must develop programs to insure that all share equally in the jobs generated by the Federal Government's spending. *Proof of overt discrimination is not required.*

118 CONG. REC. 1385 (1972) (emphasis added). Senator Saxbe's amendment was adopted, *Id.* at 1387–98, and served to show the desire of the Senate for an independent and strong agency supervising the program governing federal contracts. Congressman Dent proposed a similar merger provision amendment to the main bill in the House. The Dent amendment was defeated. *Id.* at 32111.

In confirming the power of the Executive Order program to prescribe goals, timetables, and other types of preferential treatment for federal contractors, the Senate defeated Senator Ervin's proposal to expand section 703(j) of Title VII. Ervin's amendment provided: "Nothing contained in this title or in *Executive Order No. 11246, or in any other law or Executive Order,* shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group" because of a statistical disparity between the percentage of those persons employed and the percentage in the local available workforce. 118 CONG. REC. 4917 (1972) (emphasis added). Senator Ervin freely acknowledged that the amendment was intended to destroy the entire Executive Order program. 118 CONG. REC. 1663 (1972). Another Ervin amendment, also defeated, would have prohibited any "department or agency or officer of the United States" from requiring any employer to hire "persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 118 CONG. REC. 1663 (1972). The Senate's rejection of the Ervin amendment, 118 CONG. REC. 4918 (1972), exhibited its understanding that Title VII and Executive Order 11246 did not conflict. Section 703(j) only limited remedies under Title VII, not under the Executive Order program. Contractors Assoc. of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Because of the legislative approach to Executive Order 11246, the executive branch has unquestioned authority to implement the order fully. Indeed, in an analogous situation over two decades ago, the Supreme Court stated:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . . If his act is held unconstitutional under the circumstances it usually means that the Federal Government as an undivided whole lacks power.[113]

Furthermore, under such circumstances, the "burden of persuasion [rests] heavily on any who might attack it."[114] The legislative history of Title VII indicates that with respect to Executive Order 11246, this burden could not be met.

Within the factual scenario of *Weber*, the Executive Order would have insured the plaintiff's defeat even had the Supreme Court held that the Kaiser plan violated Title VII. Department of Labor regulations issued pursuant to the order specifically stated that one area of employment in which minorities are most likely to be underutilized is skilled crafts.[115] In addition, the regulations indicate that underutilization is manifested in a lower percentage of minority workers in a particular job than in the general workforce.[116] Kaiser, a government contractor, was therefore required under Executive Order 11246 to adopt an affirmative action plan because of its underutilization of blacks in the Gramercy plant's craft positions.[117] In fact, it instituted just such a program, using its one-to-one quota.[118]

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113. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–37 (1954).
114. *Id.* at 637.
115. Revised Order No. 4, 41 C.F.R. § 60–2.11 (1979). "The provisions of Revised Order No. 4, issued under Executive Order 11246, have the force of law." Legal Aid Soc'y of Alameda County v. Brennan, 608 F.2d 1319, 1329 & n.14 (9th Cir. 1979).
116. Revised Order No. 4, 41 C.F.R. § 60–2.11 (1979).
117. See note 18 *supra*.
118. The Kaiser-USWA quota comported with the regulations determining what type of affirmative action was permitted to be used by an employer after underutilization is found to exist. The Kaiser-USWA plan used on-the-job training programs, Revised Order No. 4, 41 C.F.R. §§ 60–2.11(b)(1)(viii), 60–2.20(a)(1) (1979), it established a goal based on minority representation in the local workforce, *Id.* § 60–2.11(b)(1)(iii) (1979), and it provided for a hiring ratio of blacks designed to attain the goal with white participation. *Id.* § 60–2.12(c), (d) & (g) (1979).

VII. CONCLUSION

Kaiser and the United Steelworkers of America devised a voluntary affirmative action plan which was validated by the Supreme Court under Title VII. The Court upheld that plan because it was voluntarily adopted in order to reach a racial balance between the percentage of blacks in the skilled craft workforce and the percentage of blacks in the geographical area. The Court, however, came to the correct conclusion, but for the wrong reasons. Title VII permits a private employer to act voluntarily to correct an arguable violation of the statute, but specifically prohibits action, voluntarily adopted or court ordered, to create a racial balance in the absence of discriminatory employment practices by an employer or a labor organization creating the racial imbalance. The Court nonetheless came to the correct conclusion because Kaiser had maintained craft employment practices which arguably would have resulted in a violation of Title VII had suit been brought by a black worker claiming discrimination. Furthermore, had these employment practices not constituted even an arguable violation of Title VII, Executive Order 11246 would have validated the Kaiser-USWA plan.

A careful consideration of the *Weber* decision would logically lead one to conclude that the employer would be well advised to institute affirmative action programs in almost all situations of racial imbalance. The employer would have nothing to lose and everything to gain.[119] Without increasing the number of black employees towards a racial balance, the employer likely would be subjected to suits by blacks for Title VII violations. Using the *Weber* standard, an employer could avoid possible suits by instituting a hiring goal or a quota similar to that order in *Weber*. Inasmuch as almost all employment classifications have traditionally exhibited the effects of societal discrimination, the employer's affirmative action plan would likely prevent successful reverse discrimination suits from occurring. As a result, although the effects of the decision are not yet fully known, *Weber* will likely produce employment practices inconsistent with the intent of Congress when it enacted Title VII.

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119. Neuborne, *Observations on Weber*, 54 N.Y.U. L. Rev. 546, 558 (1979).