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COMMENT

AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION: WHERE DO WE STAND NOW?

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Title VII of the Civil Rights Act of 1964[1] and Executive Order 11246[2] have dramatically increased the opportunities for blacks to successfully challenge discriminatory practices in employment. These two major sources of authority were designed to open up employment opportunities for blacks.[3] Senator Humphrey's remarks during the congressional debate on the Civil Rights Act of 1964 exemplified the problems of blacks:

> 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? We all know of cases where fine Negro men and women with distinguished records in our best universities have been unable to find any kind of job that will make use of their training and skills.[4]

These remarks echoed those of President Kennedy in his original message to Congress upon the introduction of the Civil Rights Act in 1963: "There is little value in a Negro's obtaining the right to be admitted to hotels and restaurants if he has no cash in his pocket and no job."[5]

Until the passage of the Civil Rights Act of 1964 and the issuance of Executive Order 11246, blacks and other minorities had few, if any, possibilities of redress when subjected to discriminatory be-

1. 42 U.S.C. § 2000e (1976).
2. 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. 684 (1966-1970 Compilation), Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Compilation) *reprinted in* 42 U.S.C. § 2000e (1976).
3. 110 CONG. REC. 6548 (1964).
4. *Id.* at 6547.
5. 109 CONG. REC. 11159 (1963).

havior. Blacks and other minorities could, of course, claim protection under the Civil Rights Acts of 1866,[6] 1870,[7] and 1871,[8] but for approximately 100 years it was assumed that these Acts afforded protection only against state action. Since sections 1981[9] and 1982[10] of the Civil Rights Acts of 1870 and 1866 were enacted under the authority of the fourteenth amendment, it was assumed that they, like the fourteenth amendment, required some form of state action and that private actions were not regulated by the Acts. It was not until 1968 that the United States Supreme Court, using the thirteenth amendment, concluded that section 1982 bars private as well as public discrimination.[11] It was not until 1975 that the Court, using similar reasoning, concluded that section 1981 bars any state or private action which might hamper a person's right to contract.[12] Under this interpretation, anyone who has been refused a job because of race, color, religion, sex, or national origin has been denied the right to contract, in violation of section 1981. Thus, it was only after the 1964 Civil Rights Act was passed that the Civil Rights Acts of 1866 and 1870 were interpreted as affording blacks and other minorities an alternative (that is, other than Title VII) basis for relief.[13]

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6. 42 U.S.C. § 1982 (1976).
7. 42 U.S.C. § 1981 (1976).
8. 42 U.S.C. § 1985(c) (1976).
9. Section 1981 provides as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

10. Section 1982 provides as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

11. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).
12. Johnson v. Railway Express Agency, 421 U.S. 454 (1975).
13. In 1971, the United States Supreme Court interpreted section 1985(c) as prohibiting purely private conspiracies. Griffen v. Breckenridge, 403 U.S. 88 (1971). Section 1985(c) provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person

Sections 703(a), 703(d), and 703(j) of Title VII of the Civil Rights Act of 1964 have produced their share of the controversy over the legality of affirmative action plans. Section 703(a), for example, makes it unlawful 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 race, color, religion, sex, or national origin."[14] Section 703(d) makes it an unlawful employment practice for any employer or labor organization to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to or employment in any training program.[15] Finally, section 703(j) provides that nothing in Title VII shall be interpreted to require any employer or labor or-

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as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy, in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

However, state action *is* an essential element of a cause of action under section 1983 of the Civil Rights Act of 1871. Lorentzin v. Boston College, 440 F. Supp. 464 (D. Mass. 1977), *aff'd*, 577 F.2d 720 (1st Cir. 1978), *cert. denied*, 440 U.S. 924 (1979). Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976).

14. Section 703(a) provides as follows:

> 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 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.

15. Section 703(d) provides as follows:

> 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.

ganization 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 because of any imbalance that might exist between the percentage of such persons in the employer's work force (or in the labor organization) and the percentage of such persons in the available work force in a community.[16] The Equal Employment Opportunity Commission was created by Title VII to enforce the provisions of the Civil Rights Act of 1964.

A literal interpretation of these three sections of Title VII would lead one to the conclusion that whites are as fully protected as blacks (and other minorities) under Title VII and that Title VII permits no reverse discrimination against whites. Courts do, of course, have the authority under section 706(g) to order equitable relief, including appropriate affirmative action,[17] where it is shown that the respondent has intentionally engaged in an unlawful employment practice after the passage of Title VII. Courts hold that their power to remedy Title VII discrimination is not hampered by the prohibition against preferences in section 703(j) and that therefore they can order preferential remedies.[18] The rationale for this

16. Section 703(j) provides:

> Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance 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 work force in any community, State, section, or other area.

17. One formal definition of an affirmative action program is:

> a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women, at all levels and in all segments of its work force where deficiencies exist.

41 C.F.R. § 60-2.10 (1980).

18. *See* Rios v. Enterprise Ass'n Steamfitters Local 638 of U.A., 501 F.2d 622, 630-31 (2d Cir. 1974); United States v. Wood, Wire and Metal Lathers Int'l Union, Local 46, 471

position is that the purpose of Title VII of the Civil Rights Act of 1964 would not be achieved if the effects of an employer's past discrimination (occurring after the passage of Title VII) were allowed to continue.[19] Thus, a court-ordered remedy to reduce the present effects of past discrimination is lawful because it is remedial in nature.[20] Questions arose, however, concerning how far employers and labor organizations were required to go in removing the present effects of past discrimination without at the same time discriminating, to some degree at least, against whites.

One could argue that if remedial efforts designed to rectify past violations of Title VII are not considered to be discriminatory it should follow that voluntary, non-judicially ordered plans designed to remove the present effects of such discrimination would not be discriminatory either, since Title VII certainly "cannot distinguish remedies by their sources."[21] One could also, perhaps, logically extend this argument to voluntarily adopted affirmative action plans where there is no proven history of Title VII violations. In any event, employers with a low percentage of blacks or other minorities

F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. IBEW Local No. 38, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

19. Courts have held, however, that § 703(j) precludes preferential treatment or affirmative relief solely to correct any statistical racial imbalance—that is, where there is no proven violation of Title VII. *See* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1969).

20. One question that arose after the passage of Title VII was whether the courts could order remedial measures for discriminatory behavior that occurred before Title VII but the continuing effects of which could be felt subsequent to Title VII. Some courts held that Title VII did not bar affirmative relief to correct past discriminatory practices whose lingering effects would perpetuate previous injustices. *See, e.g.*, Associated General Contractors, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); United States v. IBEW, Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). Other courts held that Title VII precluded any such relief. *See, e.g.*, Pennsylvania v. Glickman, 370 F. Supp. 724 (W.D. Pa. 1974); Culpepper v. Reynolds Metals Co., 296 F. Supp. 1232 (N.D. Ga. 1969). However, the United States Supreme Court seems to have resolved this issue when it held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." International Bhd. of Teamsters v. United States, 431 U.S. 324, 353-54 (1977). The Court has also held that "[a] public employer who from that date [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 Negroes." Hazelwood School Dist. v. United States, 433 U.S. 299, 309 (1977). Assuming that the last statement would apply equally to private employers, it would seem that an employer would not be liable for any discrimination before the effective date of Title VII.

21. Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of Weber*, 13 CREIGHTON L. REV. 713, 752 (1980).

in their work forces, whether due to past discrimination or other economic or social forces, found themselves in difficult positions. On the one hand, if they did nothing, they could be accused of discriminating against blacks or other minorities under section 703(a) and 703(d) of Title VII. On the other hand, adopting a hiring program that favored blacks or other minorities over whites could result in a charge of reverse discrimnation by whites. Thus, in a sense, Title VII and the interpretative judicial decisions[22] that followed required employers to walk a fine line between claims of discrimination by minorities and charges of reverse discrimination by whites.

Executive Order 11246 is the second major weapon at the government's disposal to prevent discrimination in employment. Executive Order 11246, issued in 1965, prohibits government contractors from discriminating against any employee or applicant because of race, color, religion, sex, or national origin. It also requires government contractors to take affirmative action to insure that employees and applicants are treated in a nondiscriminatory manner. Written affirmative action plans and timetables for their implementation are required of many contractors, and penalties include cancellation of contracts and debarment from future contracts for noncompliance.

The Secretary of Labor, Office of Federal Contract Compliance Programs (OFCCP), has the responsibility of enforcing Executive Order 11246 and, pursuant to that responsibility, issues the necessary regulations to see that the Order is implemented.[23] The guidelines for affirmative action have become known as "Revised Order No. 4."[24]

Although proof of discrimination is rquired for a judicial order of affirmative action under Title VII, no such proof is required under Executive Order 11246. That is, a government contractor can be required to institute an affirmative action plan even though there is no showing of previous discrimination.

One question that arose with respect to Executive Order 11246 was whether there was a conflict between the Order and Title VII (section 703(j) in particular). A number of lower courts had ruled that Title VII "cannot be construed as limiting Executive authority in defining appropriate affirmative action on the part of a contractor."[25] Thus the lower federal courts have said in effect that the pro-

22. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

23. 41 C.F.R. § 60 (1980).

24. 41 C.F.R. § 60-2.1 (1980).

25. Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir. 1971). *See also*

hibition against reverse discrimination in section 703(j) of Title VII relates to only Title VII and not to other programs which remedy racial imbalance. Title VII, according to lower court decisions, is not violated by Executive Order 11246.

Backed by Title VII, Executive Order 11246, and the interpretative judicial decisions referred to above, blacks and other minorities, during the early 1970's, were calling for an increased number of affirmative action programs to rectify inequities resulting from past discrimination. Whites, on the other hand, felt that in many cases affirmative action meant reverse discrimination and that it was inequitable to burden them with the sins of their forefathers. This issue set the stage for guidance from the United States Supreme Court.

The first significant attempt by the United States Supreme Court to resolve the affirmative action/reverse discrimination issue came in the case of *Regents of the University of California v. Bakke*.[26] In *Bakke*, the University of California at Davis Medical School had two different admissions programs for its entering class of 100 students—the regular admissions program and the special admissions program. Eighty-four students were admitted under the regular admissions program, while sixteen economically or educationally disadvantaged minority students were admitted under the special admissions program. Bakke, a white male, having been rejected twice for admission to the medical school, brought suit. He alleged that the special admissions program operated to exclude him on the basis of his race in violation of the equal protection clause of the fourteenth amendment, a provision of the California Constitution, and Title VI of the Civil Rights Act of 1964.[27] The trial court found that the special admissions program acted as a racial quota and that it violated constitutional and statutory proscriptions. The California Supreme Court affirmed, holding that the special admissions program violated the equal protection clause of the fourteenth

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Southern Illinois Builders Ass'n v. Ogilvie, 327 F. Supp. 1154, 1160 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972); Joyce v. McCrane, 320 F. Supp. 1284, 1290-91 (D.N.J. 1970); Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

26. 438 U.S. 265 (1978).

27. Title VI of the Civil Rights Act of 1964 provides as follows:

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

42 U.S.C. § 2000d (1976).

amendment.[28]

The United States Supreme Court justices divided into three discernible positions. Mr. Justice Stevens, in an opinion joined by Chief Justice Burger and Justices Stewart and Rehnquist, declined to consider any of the constitutional issues involved. Rather, he relied upon Title VI since the medical school received federal funds and was subject to its proscriptions. Stevens reasoned that Bakke was impermissibly excluded from admission to medical school in violation of the Act.

Mr. Justice Brennan, joined by Justices Marshall, Blackmun, and White, saw the question whether Title VI was applicable as a constitutional issue and reasoned that Title VI proscribed only those racial criteria that would violate the fourteenth amendment. Under this rationale the critical question became whether Bakke's exclusion from medical school was constitutionally permissible. Justice Brennan first intimated that it would be illogical to read Title VI as barring affirmative action programs when the legislative history indicated that Title VI was passed in order to end segregation in federally funded activities.[29] Thus, Title VI did not prohibit the remedial use of race when such action was constitutionally permissible. Justice Brennan also concluded that "racial classifications are not *per se* invalid under the Fourteenth Amendment"[30] but that such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."[31] He observed that the racial classification used in *Bakke* served the important governmental objective of remedying the effects of past discrimination[32] and that the means chosen were appropriate to accomplish this goal.[33] Since no group would be stigmatized by the Davis special admissions program, Justice Brennan concluded that the medical school program was constitutionally acceptable.

Neither Justice Brennan nor Justice Stevens could form a majority for his position; thus, Justice Powell's vote became critical. Justice Powell agreed with Justice Brennan that Title VI would proscribe only those racial classifications that would violate the equal

28. Bakke v. Regents of Univ. of California, 18 Cal. 3d 34, 533 P.2d 1152, 132 Cal. Rptr. 680 (1976).

29. Regents of Univ. of California v. Bakke, 438 U.S. 265, 328-40 (1978).

30. *Id.* at 356.

31. *Id.* at 359 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

32. *Id.* at 362.

33. *Id.* at 373-79.

protection clause.[34] He saw racial and ethnic classifications as being inherently suspect and, therefore, subject to the most exacting judicial examination.[35] In justifying the use of a suspect classification, Justice Powell wrote, "a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."[36]

Justice Powell noted, however, that the compelling government purpose must be based on some findings of previous discrimination,[37] and that the University did not purport to have made such findings. Thus, for Justice Powell, the Davis program, which favored victims of "societal discrimination," imposed an impermissible burden on persons like Bakke who did not bear any responsibility for the discrimination that the beneficiaries of the special admissions program were thought to have suffered.[38] He also noted that while the University's goal of having a diverse student body was constitutionally permissible,[39] a strict racial quota was not the least intrusive way to accomplish this goal.[40] This was because the Davis program:

> tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admission seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.[41]

Thus, while Justice Powell would allow race to be one of the factors considered in attaining a diverse student body, he found that a strict racial quota was unnecessarily intrusive on the rights of nonminorities. Therefore, while supporting Justice Brennan's view that race could be a factor in a school's admission program, Justice Pow-

34. *Id.* at 287.
35. *Id.* at 291.
36. *Id.* at 305 (quoting *In re* Griffiths, 413 U.S. 717, 721-22 (1973)).
37. *Id.* at 308-09.
38. *Id.* at 310.
39. *Id.* at 311-12.
40. *Id.* at 311-18.
41. *Id.* at 319.

ell sided with Justice Stevens in finding that the specific program in question was unconstitutional.

In sum, Brennan was willing to use racial quotas to accomplish the valid state objective of rectifying the present effects of past societal discrimination. Powell, on the other hand, said that all racial discrimination, be it against whites or blacks, was suspect and should be judged by a strict scrutiny standard of review. Powell apparently would be willing to impose racial quotas when it could be shown that the institution had intentionally discriminated against blacks or other minorities. He recognized that removing past societal discrimination was a valid goal, but he rejected the use of a racial quota in the Davis program, since the necessary proof of intentional discrimination at the University was missing. Thus, Powell would not approve the use of quotas unless the strict scrutiny standard could be satisfied, and this could not be satisfied without a showing of intentional discrimination. Justice Powell did, however, see the attainment of a diverse student body as a justifiable state objective and one that was constitutionally permissible. Race could be one factor in the admissions process, but a quota system, without a showing of discrimination, was seen to be too intrusive into the rights of nonminority candidates for admission to the Davis medical program. Thus, in its first attempt to resolve the affirmative action/reverse discrimnation question the Court did not strike down affirmative action programs generally or end the use of all racial quotas.

The effect of the *Bakke* ruling on the private employment sector was minimal, since it dealt with state action in a nonemployment context. Nevertheless, the thought of having one set of guidelines (as nebulous as they might be) defining the permissible scope of affirmative action might have eased some employer's minds even though those guidelines were not strictly applicable to them.

About one year after the *Bakke* ruling, the United States Supreme Court handed down its decision in *United Steelworkers v. Weber*.[42] In *Weber*, white employees brought suit under Title VII charging that an on-the-job training program which required one minority employee to be admitted for every nonminority employee admitted presented a clear case of reverse discrimination. The reverse discrimination, white employees claimed, resulted from the fact that during its first year of operation some of the black employees selected for the program had less seniority than several white

42. 443 U.S. 193 (1979).

employees whose bids for admission to the program were rejected.[43] The affirmative action plan, which had been adopted voluntarily in 1974 in a collective bargaining agreement between Kaiser Aluminum & Chemical Corporation and the United Steelworkers of America, was designed to eliminate the conspicuous racial imbalance in Kaiser's almost exclusively white, craft work force.[44]

Weber, a white employee claiming reverse discrimination, charged that he and other white employees had been discriminated against in violation of sections 703(a) and (d) which prohibit racial discrimination in hiring.[45] The district court[46] and the Court of Appeals for the Fifth Circuit[47] agreed that this program violated Title VII's prohibition against racial discrimination in employment. The United States Supreme Court, in a 5-2 decision, reversed the lower court decisions and held that the affirmative action plan in question was not proscribed by Title VII. Justice Brennan, writing for the Court, noted that the question to be decided was whether 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."[48] Brennan also pointed out the narrowness of the court's inquiry:

> Since the . . . plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment. Further, since the . . . plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proven violation of the Act. 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 . . . plan.[49]

In essence, then, the question resolved in *Weber* was whether a private employer could voluntarily adopt an affirmative action plan. The court held that it could.

In arriving at a decision, Justice Brennan looked at the legislative history of Title VII and noted that part of the Civil Rights Act

43. *Id.* at 199.
44. *Id.* at 197-98.
45. *Id.* at 199-200.
46. Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976).
47. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216 (5th Cir. 1977).
48. United Steelworkers v. Weber, 443 U.S. 193, 197 (1979).
49. *Id.* at 200.

of 1964 was designed to open up employment opportunities for blacks and other minorities.[50] Based on this, Brennan argued that it would be incongruous to read Title VII as prohibiting all private, race-conscious affirmative action plans since this would be in direct opposition to the purpose behind Title VII.[51] Therefore, Brennan concluded, Congress, in passing Title VII, could not have meant to prohibit all voluntarily adopted affirmative action plans.[52]

It is clear that the Court would not sanction *all* affirmative action plans, but it did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans."[53] The Court, however, was willing to conclude that the affirmative action plan in *Weber* "falls on the permissible side of the line."[54]

Although Brennan would have been willing to admit that the plan had favored blacks over whites, he did not think the affirmative action plan imposed an inordinate burden on white employees. First, the plan did not require the discharge of any white employees. Second, the plan did not create an absolute bar to the advancement of white employees. Third, the plan was temporary, designed to correct a manifest racial imbalance.[55] Also, the fact that the plan was voluntarily entered into by the company and the union most likely played some role in Brennan's decision.

In a dissenting opinion Justice Rehnquist, joined by Chief Justice Burger, argued that the pertinent parts of Title VII should be read literally as proscribing *all* discrimination against both blacks and whites alike.[56] From Rehnquist's point of view, the Kaiser affirmative action plan should have been prohibited since it favored blacks over whites. Rehnquist also argued that the majority had rewritten sections 703(a) and (d) by interpreting those sections to mean that a certain amount of discrimination based on race was now justified.[57] According to Rehnquist, only Congress has the authority to so amend Title VII.

The narrow ruling in *Weber* was that Title VII does not prohibit private employers from instituting voluntary, affirmative action plans in a traditionally segregated work force as long as those

50. *Id.* at 201-07.
51. *Id.*
52. *Id.* at 206.
53. *Id.* at 208.
54. *Id.*
55. *Id.*
56. *Id.* at 220.
57. *Id.* at 221.

plans do not represent a major intrusion upon nonminority rights. A permanent plan that represents an absolute bar to the advancement of white employees may fall in the impermissible zone according to the vague guidelines set down by the majority. Also, it is important to note that there was no judicial finding that Kaiser had engaged in any previous discriminatory behavior. Read in light of this fact, *Weber* implies that employers can voluntarily adopt an affirmative action plan in a case in which there is no judicial finding of past discrimination and, perhaps, even in a case in which there is not the slightest proof of any past discrimination.

In January 1979 the Equal Employment Opportunity Commission adopted affirmative action guidelines which, if followed by an employer, will, at least to a certain extent, insulate it from a charge of reverse discrimination—the defense being good faith reliance on the guidelines promulgated by the Equal Employment Opportunity Commission. *Weber*, decided approximately six months later, affirmed the appropriateness of these guidelines which encourage voluntary adoption of affirmative action programs.

Weber discussed the legality of affirmative action plans in the private sector. It offered no guidance, however, about the legality of such plans in the public sector. The decision in *Fullilove v. Klutznick*,[58] handed down approximately one year after *Weber*, offered some direction in this respect.

The problem addressed by the Court in *Fullilove* had its genesis in the federal government's efforts to reduce employment discrimination against minorities and to remove, through the use of affirmative action programs, the continuing effects of past discrimination against minorities. Governmental efforts to promote affirmative action plans in favor of racial minorities were due to the realization that nondiscriminatory employment practices alone would not be enough to promote full equality between the races.

Congress enacted the Local Public Works Capital Development Investment Act of 1976[59] to alleviate the problem of national unemployment and to stimulate the economy by providing state and local governments the needed funds to build public facilities.[60] The Public Works Employment Act of 1977[61] amended this legislation

58. 448 U.S. 448 (1980).

59. 42 U.S.C. §§ 6701-6735 (1976).

60. H.R. REP. No. 94-1077, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 1746, 1747.

61. 42 U.S.C. §§ 6701-6735 (1976 & Supp. III 1979).

and authorized an additional six billion dollar appropriation for local public works projects. One important change[62] in the new law provided that no grant would be made for any local public works project unless the state or local government provided assurance that at least ten per cent of the amount of each grant would be allocated to minority business enterprises. The legislative intent behind the "minority business enterprise" (MBE)[63] provision was to insure that at least a certain proportion of government expenditures under this program would be directed to the minority buisness community—an area requiring economic stimulation.[64] Congress determined that the provision was needed to insure that minority firms would have an opportunity to share in the benefits of the program.[65]

In November 1977 nonminority plaintiffs[66] filed a complaint seeking declaratory and injunctive relief to enjoin enforcement of the MBE provision of the 1977 Act.[67] The complaint alleged that the plaintiffs had sustained economic injury as a result of the ten per cent set-aside provision and that this provision on its face violated the equal protection clause of the fourteenth amendment, the equal protection component of the due process clause of the fifth amendment, and various antidiscrimination statutes.[68] The district court upheld the validity of the MBE provision and denied the injunctive relief sought.[69] The United States Court of Appeals for the Second Circuit affirmed.[70] The United States Supreme Court granted certiorari and held that the MBE provision of the 1977 Act was not, on

62. 42 U.S.C. § 6705(f)(2) (Supp. II 1978).

63. The term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

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

64. 123 CONG. REC. 5098 (1977).

65. *Id.*

66. Plaintiffs were several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air-conditioning work.

67. The complaint was filed in the United States District Court for the Southern District of New York.

68. 42 U.S.C. §§ 1981, 1983, 1985, 2000d (Title VI), 2000e (Title VII) (1976).

69. Fullilove v. Kreps, 443 F. Supp. 253 (S.D.N.Y. 1977).

70. In affirming, the court noted that one of the most significant factors contributing to the legitimacy of the MBE provision was the narrowed focus and limited extent of the statutory and administrative program, in size, impact, and duration. Also the court rejected petitioners' contention that the 10% MBE requirement violated the equal protection guarantees of the Constitution. Fullilove v. Kreps, 584 F.2d 600, 607-09 (2d Cir. 1978).

its face, unconstitutional.[71]

As in *Bakke*, the Court split into three factions. Mr. Chief Justice Burger, joined by Justices White and Powell, speaking for the Court, found the MBE program to pass constitutional review, holding that such a program legitimately came within the range of congressional authority. Justice Powell applied a strict scrutiny test and found the MBE program to be constitutional under this alternative standard. Justices Marshall, Brennan and Blackmun applied a less rigorous standard than Justice Powell, but one more rigorous than the rational basis standard of review, in finding the MBE program constitutional.

In analyzing the question placed before it, the Court first concluded that the 1977 Act was an exercise of congressional spending power and that Congress has frequently used this power to further broad policy objectives by conditioning receipt of federal monies upon compliance with federal policy.[72] The Court also found a basis in the Commerce Clause for regulating the practices of prime contractors on federally funded public works projects.[73] The Chief Justice reasoned that any practice by prime contractors to limit access by minority businesses to public contracting opportunities may ultimately affect interstate commerce. Given this cause-effect relationship, Congress was well within its authority to attempt to alleviate the situation.[74]

In analyzing "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives,"[75] the Court first disposed of the contention that Congress must act in a wholly "color-blind" fashion.[76] The Court pointed out that Congress has been

71. Fullilove v. Klutznick, 448 U.S. 448 (1980).

72. *Id.* at 474.

73. *Id.* at 475.

74. The Court found a third basis of congressional authority to implement the MBE program in section five of the fourteenth amendment. Section five gives Congress the power to secure the equal protection guarantees of the amendment. The Court reasoned that Congress could reasonably have determined that without the MBE provision minorities would be denied their fair share of contracting opportunities, thus perpetuating the effects of prior discrimination. Congress was within its authority to insure that minority businesses were not denied equal opportunity to the proceeds of federal grants to state and local governments. *Id.* at 476-78.

75. *Id.* at 473.

76. In *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), the Court rejected the argument that Congress must act in a wholly "color-blind" fashion in considering a court-formulated school desegregation remedy on the basis that examination of the racial composition of student bodies was a necessary starting point. Also, the Court in *North Caro-*

held to have the authority to use racial criteria in attempting to eliminate the effects of past discrimination.[77] Were this not the case, the status quo—the target of all desegregation process—would be maintained. Congress, in using this broad remedial power, could thus single out minority businesses for special attention.[78]

The Court thus concluded that the *objectives* of the legislation were within congressional authority and that the means to the end were not objectionable. The Court specifically pointed out that it did not adopt, either expressly or impliedly, the analysis developed in *Bakke* but stated that the MBE provision would survive judicial review under either test articulated in that case.[79]

In a concurring opinion, Justice Powell followed his analysis in *Bakke* that a racial classification will be subject to strict scrutiny and will be constitutionally prohibited unless it is a necessary means of advancing a compelling government interest.[80] Justice Powell found that the MBE program was justified as a remedy that served the compelling government interest in eradicating the continuing effects of past discrimination.[81] Thus, in his view, both the existence and the continuing effects of past discrimination justified devoting a certain portion of government contracting business to minority businesses.[82]

In reviewing the constitutionality of the MBE program, Justice Powell found that: 1) Congress was in a position to make findings of unlawful discrimination;[83] 2) there were sufficient findings to es-

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lina Bd. of Educ. v. Swann, 402 U.S. 43 (1971) held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *Id.* at 46.

77. Fullilove v. Klutznick, 448 U.S. 448, 483.

78. The Court also considered the charge that the MBE program deprived nonminority businesses of access to at least some portion of government contracting opportunities generated by the 1977 Act. The Court answered this contention by agreeing that in remedying the effects of past discrimination some innocent parties may be affected but that the burden must be shared by all. The burden on any one nonminority firm is likely to be small, the Court noted, given the overall construction contracting opportunities available. In addition, many of these nonminority firms may have reaped economic benefits in the past from the virtual exclusion of minority firms from these contracting opportunities. *Id.* at 484-85.

79. *Id.* at 492.

80. *Id.* at 496.

81. *Id.* at 507.

82. Justice Powell observed that a race-conscious remedy cannot be compelling unless an appropriate governmental authority has found such a need. *Id.* at 498. Also, even if there were a compelling interest to support a racial classification the remedy must be narrowly drawn to fulfill the governmental objective. *Id.*

83. Justice Powell noted, for example, that Congress under the commerce clause had the power to prohibit racial discrimination in public restaurants. Katzenbach v. McClung,

tablish that unlawful discrimination had adversely affected minority businesses;[84] and 3) the ten per cent set-aside was a permissible means of removing the effects of past discrimination.[85] One further criterion used by Justice Powell in reviewing the constitutionality of the MBE program was its effect upon innocent third parties.[86] He concluded that the effect would be so widely displaced that its use would comport with fundamental fairness.[87]

Justice Powell saw the MBE provision as both a reasonable and a necessary means to further the compelling governmental purpose of coping with racial discrimination against minority businesses. The effect on nonminority contractors is small enough to be outweighed by the compelling governmental interest in this program. Thus, in attempting to ameliorate the effects of past discrimination, Congress may choose a remedy that is reasonably necessary to accomplish its purpose. The MBE program is such a remedy, according to Justice Powell.[88]

In a concurring opinion, Justices Marshall, Brennan, and

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379 U.S. 294 (1964). Using the same powers, Congress had enacted Title VII of the Civil Rights Act of 1964 in order to assure equality of employment opportunity. Thus, Congress had "the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects." *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980).

84. Although the legislative history of the MBE program reflected no such congressional finding, Congress had made such findings for previous legislation. *Id.* at 502-06. Justice Powell concluded that it was not necessary for Congress to make new findings of discrimination for every piece of new legislation that might come along.

85. Justice Powell first concluded that the enforcement clauses of the thirteenth and fourteenth amendments gave Congress the authority to choose appropriate remedies to implement the compelling state interest of ameliorating the effects of past discrimination. *Id.* at 510. He also stated that the remedy chosen should be upheld if the means selected were equitable and reasonably necessary to redress the identified discrimination. *Id.*

In reviewing the selection by Congress of this race-conscious remedy, Justice Powell looked at four factors: "1) the efficacy of alternative remedies . . . , 2) the planned duration of the remedy . . . , 3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force . . . , and 4) the availability of waiver provisions if the hiring plan could not be met." *Id.* at 510-11. In reviewing these four criteria in connection with the MBE program, Justice Powell found that: 1) Congress knew that other remedies to lessen the effects of racial discrimination had failed when it enacted the MBE provision; 2) the set-aside program was not a permanent part of federal contracting requirements; 3) the percentage chosen (10%) was reasonable in light of the pertinent facts; and 4) the waiver provision would eliminate any unfairness that might result from the set-aside provision being rigidly applied in areas where minority group members constitute only a small percentage of the population. *Id.* at 511-14.

86. *Id.* at 514.

87. *Id.* at 515.

88. *Id.*

Blackmun, using their analysis developed in *Bakke*, concluded that the ten per cent set-aside provision passed constitutional review.[89] In their view, racial classifications are not *per se* invalid under the equal protection clause of the fourteenth amendment, but must serve important governmental objectives and must be substantially related to the achievement of those objectives.[90] The standard chosen for reviewing the MBE program then, was less rigorous than the "strict scrutiny standard" but more rigorous than the "rational-basis standard" of review.[91]

Since Congress enacted the MBE program to remedy the continuing effects of past discrimination[92] and minority businesses have received a disproportionately small amount of government conracting business because of the present effects of past discrimination,[93] Justice Marshall held that there was a sufficiently important governmental interest to justify the use of racial classifications in the MBE program. The MBE program was, therefore, able to pass the first prong of the test. The MBE program also passed the second prong of Justice Marshall's test, since Congress could reasonably determine that racial classifications were necessary to remove the barriers confronting participation by minority businesses in federally funded public works projects.[94]

In a dissenting opinion, Justices Rehnquist and Stewart[95] argued that via the ten percent set-aside provision of the 1977 Act, the federal government was participating in racial discrimination in violation of the equal protection standard of our Constitution.[96] In their view, the law was unconstitutional on equal protection grounds since it barred some members of a class from receiving government contracts solely because of their race. They also concluded that coverage by the MBE program was too broad, since no waiver was provided for those state or local governments that could show themselves to be free of racial discrimination. Also, the statute made no attempt to direct the aid to those minority contractors who still suffered from the effects of past or present discrimination. This, according to Justices Rehnquist and Stewart, was not a finely tuned

89. *Id.* at 517.
90. *Id.* at 519.
91. *Id.*
92. *Id.* at 520.
93. *Id.*
94. *Id.* at 521.
95. Justice Stevens filed a separate dissenting opinion.
96. Fullilove v. Klutznick, 448 U.S. 448, 527 (1980).

program designed to eliminate a specific evil.[97]

In sum, according to the Court's opinion, future legislation of the type considered in *Fullilove* would pass constitutional review if its objectives were within the power of Congress and if Congress used a permissible means of achieving those objectives. Justice Powell used a strict scrutiny standard in reviewing the MBE program. He argued that such a program can pass constitutional muster only if it serves a compelling governmental purpose and is narrowly drawn to fulfill that purpose. Justices Marshall, Brennan, and Blackmun used the substantial relation test in passing favorably on the ten per cent set-aside provision of the 1977 Act. It is clear that if any future legislation based on race or any other type of classification (not necessarily one that is suspect) were able to meet Justice Powell's strict scrutiny standard, it would pass the two other proposed tests.

If any future legislation failed to pass the strict scrutiny standard, however, it is unclear how far away from that standard the federal program could be and still gather enough affirmative votes for the Court's approval. Mr. Chief Justice Burger noted in *Fullilove* that although the Court used the congressional authority test, the analysis demonstrated that the MBE program would survive review under the two alternative testing schemes.[98] But this does not mean that legislation which meets the minimum acceptable level for the congressional authority test will necessarily pass the substantial relation or strict scrutiny tests, although the chances would be higher for the former than for the latter. The water remained murky after *Bakke* and *Weber* and it was by no means clarified by *Fullilove*.

Now that the United States Supreme Court has given its approval to this type of program, Congress may be encouraged to increase the number and variety of federal spending programs that have set-aside provisions based on classification schemes relating to race and perhaps sex. Under Executive Order 12138,[99] President Carter noted that: 1) women entrepreneurs can play a significant role in promoting full employment and balanced growth in our economy; 2) there are many obstacles facing women entrepreneurs; and 3) there is a need to aid and stimulate women's business enter-

97. *Id.* at 530 n.12.

98. *Id.* at 492.

99. Exec. Order No. 12138, 44 Fed. Reg. 29637, *reprinted in* 15 U.S.C. § 631 (Supp. III 1979).

prises. Based on *Fullilove* and this executive order, it seems possible that Congress may enact a provision similar to the MBE program directed toward women. A logical question would be whether a similar program directed toward women could pass a *Fullilove*-type constitutional analysis. Since classification by sex has never been held to be constitutionally suspect by a majority of justices voting in a single case, it seems apparent that such a program would not be judged by a strict scrutiny standard. In *Craig v. Boren*[100] the Court adopted a specific standard of review for gender based classifications. Under this standard, a program comparable to the MBE program directed toward women would be upheld if it served an important governmental objective and was substantially related to the achievement of those objectives. This is the substantial relation test used by Justices Marshall, Brennan, and Blackmun in *Fullilove*. Whether a program such as this would be upheld would depend on how the program is structured and on how each justice viewed an MBE type program in light of gender classification.

It is difficult to summarize exactly where we are in the affirmative action/reverse discrimination debate because it is by no means clear that the evolution of this problem has proceeded to a point where all major questions have been resolved. However, it is possible to distill some broad generalizations from the Court's opinions. First, it is clear that the Court will not view all affirmative action programs in an unfavorable light. Second, those programs that have the best chance of passing constitutional muster are those that do not unnecessarily infringe on nonminority rights. Third, voluntary affirmative action programs in the private sector are constitutional even in the absence of a showing of previous discrimination.

In looking at the future course of developments in this area, one must necessarily view things in light of the change in administrations in Washington. A major retreat from our present position seems unlikely in light of previous legislation and court decisions; nevertheless a decision on the part of the Reagan administration to follow the basic philosophical trend set out in the transition team report[101] in this area could have a chilling effect on the vigor with which affirmative action plans are pursued and enforced. The transition team report, prepared under the general direction of J.A. Parker, president of the Lincoln Institute for Research and Educa-

100. 429 U.S. 190 (1976).

101. The report was not published. However, a discussion of the report may be found at 106 LAB. REL. REP. (News and Background Information) 81, 84 (Feb. 2, 1981).

tion, attacks the Equal Employment Opportunity Commission for having created what it called a "new racism in America, in which every individual is judged by race and every employer must keep records on the basis of race, sex, and other such criteria."[102] In his view, the Equal Employment Opportunity Commission has exceeded the scope of its authority under the 1964 Civil Rights Act. The report recommends that the Commission's budget be cut and that it be barred for one year from issuing any new guidelines or instituting any new lawsuits.[103] Another recommendation is that the Commission's future guidelines be subject to review by the Office of Management and Budget.[104] In the area of affirmative action, the report argues that the Commission violated the intent of the 1964 Civil Rights Act and that the entire philosophy behind affirmative action should be reconsidered.[105] It is still too early to determine what impact this report will have on the new administration's thinking and resultant policies.

102. *Id.*
103. Washington Post, Jan. 29, 1981 at 3.
104. *Id.*
105. 106 LAB. REL. REP. (News and Background Information) 81, 85 (Feb. 2, 1981).