THE WEBER CASE

In its opinion in *United Steelworkers of America and Kaiser Aluminum & Chemical Corporation* v. *Weber*, the Supreme Court, dividing five to two, ruled that Title VII of the Civil Rights Act of 1964 permitted employers and unions in the private sector to adopt collectively bargained affirmative action plans for the purpose of eliminating manifest racial imbalances in traditionally segregated job categories. The majority declined to define the limits of such ostensibly voluntary quotas, or to deal with court-ordered quotas as a remedy for proven violations of the act, or to consider the effect of Executive Order 11246 (covering government contractors). Nevertheless, the opinion has been extravagantly hailed as an unqualified endorsement of "affirmative action" in employment. To appraise that assessment, it is necessary to examine the opinion and its background in some detail.

The Facts and the Issues

Kaiser opened its plant in Gramercy, Louisiana, in 1958. By the 1970s, blacks constituted approximately 39 percent of the labor force in the Gramercy area, but less than 15 percent of the plant's work force and less than 2 percent of its craft workers. Kaiser had hired only craftsmen (carpenters, electricians, and machinists, and so on) with five years industrial experience—experience rarely possessed by blacks, who had previously been excluded from craft unions. As a result, Kaiser's efforts to recruit trained black craftsmen—although apparently bona fide—had been largely ineffective.

In 1974, Kaiser addressed that recruitment problem in its collective bargaining agreement with the United Steelworkers of America. That agreement provided for a new in-plant craft training program at Gramercy (as well as at Kaiser's other aluminum and container plants). At least one black was to be admitted to the training program for every white until the percentage of black craft workers equalled the percentage of blacks in the Gramercy work force, or 39 percent (a goal that the company estimated would be reached in thirty years). Black and white applicants were to be chosen on the basis of their relative plant seniority within their racial group. Since the plant employed more whites than blacks and since whites had, on the whole, more seniority, the separate racial seniority lines appeared to discriminate against whites.

Kaiser, a contractor with the federal government, gave three reasons for adopting this program: (1) pressure from federal contract compliance officers, (2) fear of litigation by blacks, and (3) a belief that such programs advanced national policy.

In 1974, Brian Weber, a white man, was turned down for three skilled training programs at Gramercy even though he had more seniority than two successful black candidates. He then brought a class action challenging the 50 percent minority admission quota under Title VII. He won in the federal district court, which enjoined the use of race as a criterion for admission to the program, and in the Court of Appeals for the Fifth Circuit, with Judge

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Double Talk and Double Standards

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Wisdom dissenting. That court emphasized and sustained the district court's finding that Kaiser had not been guilty of any past discrimination at its Gramercy plant. The case then came to the Supreme Court.

On the surface, *Weber* presented the question of how "equality" had been defined by Congress in the 1964 Civil Rights Act. But not far below the surface were larger and more contentious issues. Did intervening conditions, including the Supreme Court's own decisions, warrant a change in the mandate or the policy of Congress? If so, was it proper for the Court, rather than Congress, to make that change?

Justice William Brennan, who wrote the Court's opinion, purported to deal only with the narrow issue of construction. Chief Justice Warren Burger and Justice William H. Rehnquist (who wrote the principal dissent) objected that, under the guise of construction, the Court was rewriting the mandate of Congress. When basic clashes of values lie behind constructional problems, such protests are as familiar as "Kill the umpire." Nevertheless, in *Weber*, the protest has extraordinary power.

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Indeed, the Court's argument is so weak that it is embarrassing to subject it to conventional legal analysis. But such analysis is a necessary first step in an effort to understand the limitations and implications of the Court's decision.

The Opinion of the Court

Title VII outlaws all employment discrimination against an individual on grounds of race. Thus, the statute's central provision 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 . . . [emphasis added].

Another provision dealing specifically with on-the-job training programs also barred employers or unions from discriminating against any "individual because of his race. . . ." In the light of those provisions, the Court's opinion virtually conceded that Weber's position was supported by a literal interpretation of the Civil Rights Act. But it rejected such an interpretation as incompatible with the spirit of the act and the intention of its makers. Brennan supported this position with these reasons: Congress's primary purpose had been to open to blacks jobs from which they had traditionally been barred. *Weber*'s proposed interpretation was unacceptable because it would prohibit effective steps by private firms to accomplish that purpose. Quoting from the late Senator Hubert Humphrey, the justice observed that it would

> be ironic indeed if a law triggered by a nation's concern over centuries of injustice and intended to improve the lot of those

who had been "excluded from the American dream for so long" were also to be the first blanket prohibition of all voluntary private, race-conscious efforts to abolish old patterns of racial segregation and hierarchy.

Brennan found a central justification for his position in section 703(j) of the act, which provides that nothing in Title VII shall be interpreted to *require* any employer to grant any preferential treatment to any individual or to any group because of a racial (sexual, et cetera) imbalance in an employer's work force. He urged that Congress's use of "require" rather than the phrase "require or permit" shows that Congress "did not mean to prohibit all race-conscious affirmative action to redress racial imbalance." Such a blanket prohibition would, he continued, ignore the fact that section 703(j) had been prompted by the concern about excessive federal regulation expressed by some legislators.

Brennan explicitly declined to go beyond the case before the Court and to delineate the scope and limits of the governing principle. Nor did his listing of those aspects of the Kaiser-USWA plan that in combination made for its legality do much to dissipate the murkiness inherent in the Court's avowedly ad hoc approach. We will look at that list below and suggest that the Court has not yet explicitly endorsed all "affirmative action" preferences even for blacks, and has ostensibly reserved for the future decisions on preferences for women, Hispanics, and other groups.

In the Court's opinion, only a brief footnote was devoted to the troublesome case of *The University of California* v. *Bakke* (1978), which had held that Title VI of the Civil Rights Act outlaws the adoption of explicit racial quotas in federally funded medical schools. Brennan dismissed that case principally on the ground that Title VI and Title VII shed no light upon one another since the former had been enacted pursuant to congressional power to condition federal expenditures and the latter pursuant to the commerce power.

This suggestion—that a different constitutional basis for the two titles implies different substantive standards for each of them—is not supported by any functional consideration. Furthermore, it ignores the fact that both titles incorporated a broad antidiscrimination principle. It is odd indeed to learn from the Court's parsimonious footnote that these two titles of the Civil Rights Act should be severed from each other, even though they had been integrally connected by the approach of all the justices in *Bakke* as well as by common language, purpose, and history. This oddity calls to mind the remark of Thomas Reed Powell (a distinguished law teacher at the Harvard Law School when Brennan was a student there) that a legal mind is one that can think about one subject while refusing to think about another subject inextricably tied to the first.

The Dissents

The core of Rehnquist's dissent is reflected in his charge that "[t]he Court eludes clear statutory language, 'uncontradicted legislative history' . . . , and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions." In his lengthy opinion he relentlessly documents each criticism he leveled against the majority. The power of his opinion is, in part, the power of repetition—especially the repetition of excerpt after excerpt from the legislative debates—all to the effect that under the act employers were not to be permitted (or required) to discriminate in favor of blacks or whites, that racial quotas, voluntary or involuntary, were to be forbidden. A summary cannot, accordingly, convey the force of this argument.

The power of Rehnquist's opinion came also from his clean craftsmanship in disposing of the Court's argument that the use of "required" in section 703(j) implied that some "voluntary" racial preferences were to be allowed. Rehnquist's response went like this: Section 703(j) had been designed to satisfy the bill's critics, who had urged that the act would be interpreted by courts and official agencies to require employers with racially unbalanced work forces to grant preferential treatment to minorities. There had been at that time no need to deal with truly voluntary, in addition to officially required, quotas. For the language of Title VII, as proponents and opponents of the bill both understood, plainly banned voluntary quotas. Indeed, never once during the eighty-three days of Senate debate did a speaker suggest that the bill would permit employers to

adopt voluntary preferences in favor of blacks. It was ironic, first to label Kaiser's plan as "voluntary," when it had actually been induced by pressure from federal agencies charged with enforcing Executive Order 11246 against government contractors, and then to uphold that plan by invoking section 703(j), which had been designed as protection against employers' being forced into quota systems by government pressures. Rehnquist added the final blow by pointing to the express provision in Title VII permitting firms on or near an Indian reservation to grant publicly announced preferences to Indians living close by. He urged that had Congress wished to permit such preferences for blacks it would have used similar language.

Rehnquist's persuasive textual and historical analysis is, moreover, wholly compatible with the statute's primary purpose, as defined by Brennan—to help blacks get jobs. That end was, however, to be advanced by a particular means, by incorporating into law the equal opportunity for employment that had for so long been denied to blacks. It was clear in 1964, as it still is today, that ensuring such opportunity would help blacks enter the economic mainstream. But it was also clear that legal protection of equal opportunity for blacks could not have been enacted if whites had not expressly been accorded the same protection as blacks.

Furthermore, the broad sweep of the antidiscrimination principle had deep moral as well as political roots; equal opportunity for individuals and the irrelevance of their membership in particular racial groups—black or white—had been a classic but unrealized goal of American society. To be sure, equal opportunity, without concern for unequal conditions, could be an idle ritual. But the attack on unequal conditions was not to be based on race or to involve selective employment discrimination against "innocent whites." Instead, that attack was to be based on need or disadvantage—a criterion that cut across racial lines and that was both a better measure of inequality of condition and less troublesome, morally and politically, than race.

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Chief Justice Burger joined in Rehnquist's dissent, but disagreed with him on the ultimate policy question. Rehnquist had expressed distaste for racial quotas. Burger, however, endorsed as a citizen the end sought by the majority—legalization of action such as Kaiser's. His endorsement of the Court's end (without discussing the policy issues) underscored his disapproval of the Court's means, which, he suggested, were an intellectually dishonest assumption of legislative powers.

Post-1964 Developments

None of the three opinions we have touched on covered in any detail developments—judicial and executive—following the passage of the 1964 act that had generated pressures on private employers to adopt employment practices of questionable legality. Justice Harry Blackmun, in his concurring opinion in *Weber*, emphasized those pressures. Although acknowledging his "misgivings" as to whether the pertinent legislative history supported the Court's result, Blackmun found that result supported by "additional considerations, practical and equitable only partially perceived, if perceived at all, by the 88th Congress."

Presumably those considerations were related to a series of judicial decisions under Title VII and executive decisions under Executive Order 11246 (covering government contractors) that purported to require color blindness in employment decisions while exerting great pressure on employers to achieve in their work force statistical proportionality for blacks, women, and other "protected" groups. Thus, the Supreme Court in *Griggs* v. *Duke Power Co.* (1971) had barred the use of professionally developed tests—even in good faith—if they had a disproportionately adverse impact on blacks, unless the employer proved "business necessity." The Court also deferred to and legitimated the stringent guidelines of the Equal Employment Opportunity Commission (EEOC) for validating tests in which

blacks as a group do relatively badly. The resulting burdens of validation involved such expense and difficulties that they undercut the statutory proviso designed to preserve professionally developed tests used in good faith. These impediments to employers' relying on "objective" criteria complemented rules whereby proof of statistical imbalances in a work force could alone lead to back-pay liability to large classes of employees as well as to reputational injury to those found guilty of "discrimination."

The "moral" of all this was clear to employers: There was safety in numbers or in some kinds of numbers—that is, numbers tending to show statistical parity for blacks would not only reduce the risk of charges of or liability for statistical imbalances, but would also be helpful should an individual employee charge particularized and intentional discrimination by the employer.

While these pressures for race-conscious hiring were emerging, the Supreme Court continued to proclaim the color-free theme of Title VII. Indeed, in *Griggs* itself, the Court had announced that the statute outlawed all racial criteria and that it proscribed all "discriminatory preference for any group, minority or majority." Thus the Court purported to bar an employer from using race-conscious or quota hiring in order to avoid the statistical imbalances that might well be the road to costly litigation and liability.

A similar ambivalence regarding equal opportunity and equal outcomes for groups developed under Executive Order 11246. That order required government contractors to commit themselves both to "affirmative action" and to a comprehensive nondiscrimination obligation. But the administration of the order emphasized results. Equality of opportunity insofar as it meant race-free decisions was superseded by, or measured by, equality of outcome. An employer's performance and compliance were measured by the representation of minorities in his work force and in the population—or some population—or in some labor market. Compliance agencies pressed contractors for goals and timetables or "commitments" even without any showing of past or present discrimination. Despite the pressure for racially oriented decisions exerted by these ill-defined extra-statutory requirements, the regulations contained the usual contrapuntal disclaimer that the use of goals and timetables "is not intended to discriminate against any applicant or employee because of race, color, religion, sex or national origin."

These developments, despite their ambivalence, generated expectancies of, and constituencies for, continued "reverse discrimination." Furthermore, some disinterested observers supported such programs on the ground that individual blacks had suffered because of their race and that, accordingly, they should be helped by compensatory programs that were racially oriented. Still others dismissed any legal or moral problems involved on the "practical" ground that, in the real world, curtailment or dismantling of the policy of selective discrimination would threaten social peace.

Blackmun's Opinion

In *Weber*, Blackmun scarcely mentioned such broad issues (some of which were discussed in *Bakke*). He emphasized the plight of business subject to contradictory commands from the government, stating:

> The broad prohibition against discrimination places the employer and the union on . . . a high tight rope without a net between them. If Title VII is read literally, on the one hand, they face liability for past discrimination against blacks, and, on the other, they face liability to whites for voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

Stressing that alleged dilemma, the government in *Weber* argued that employers and unions "who had committed arguable violations of Title VII" should be free to make "reasonable responses" without fear of liability to whites. Blackmun favored that approach, which would have focused on the employment practices of a particular firm. Nevertheless, he joined in the Court's opinion because in the end he found that employers would have substantially the same leeway with respect to racial preference under both approaches. Moreover, he perceived "strong considerations of equity" supporting the majority's approach of permitting preferential treatment designed to remedy

the effects of societal discrimination. Indeed, adding insult to injury, he protested that Mr. Weber seemed "unfair" in challenging Kaiser's efforts to rectify historic discrimination—even though the Court had upheld a similar protest in *Bakke*.

In any event, the "arguable violation" approach favored by Blackmun and the government suffers from fundamental and manifest difficulties. It is needed only if Title VII in general bars all employment discrimination—in favor of or against blacks. But if the statute is read in that way, it is not apparent why arguable discrimination against members of one group should justify actual and undeniable discrimination against members of another group. All of Blackmun's subsidiary arguments beg that question and seek to convert a broad antidiscrimination principle into a question of whose ox is gored (to use Alexander Bickel's phrase). This is not to deny that under Title VII —among other regulatory contexts—employers have been faced with the risk of being damned if they do (engage in reverse discrimination) and damned if they do not. Such dilemmas are, of course, undesirable. Nevertheless, in resolving them in the Title VII context, the critical point is that that statute was designed to regulate employers and to protect employees. And if a choice must be made between a quieter life (or government contracts) for employers and the abrogation of statutory protection for some classes of employees, nothing in the statute suggests that the employees' interests should be sacrificed.

Finally, the employer's alleged dilemma is often a false one—because future affirmative action cannot wipe out liability for past violations. To be sure, affirmative action may divert attention from, and thereby avoid remedies for, past discrimination, but only at the expense of adequate relief for identifiable victims of such discrimination. Indeed, Blackmun seems to endorse voluntary quotas in part because they fuzz things up in this way. Assume for example that, after the Civil Rights Act became effective, an employer engaged in discrimination against two black employees. In order to bolster his legal position the employer grants preferences to two other blacks, who were not directly affected by the employer's wrong. The equity of such results is elusive—and when, as in *Weber*, the employer has not even been found guilty of actual discrimination, the equitable support for racial preferences surely does not grow stronger.

Such indifference regarding a link between the victims and beneficiaries of particular wrongs and remedies contrasts sharply with the sensitivity to such relationships reflected in opinions of the Supreme Court or of individual justices in cases such as *Franks v. Bowman Transportation Company* (1975) or *Bakke* (1978). Those cases suggest, moreover, that substantial constitutional questions arise from a statute that permits an employer to grant voluntary preferences to blacks but prohibits such preferences to whites. The majority of the Court was wholly silent about these interrelated equitable and constitutional questions.

"Additional Considerations, Practical and Equitable"

It is now useful to look more closely at Blackmun's general claim that "additional considerations, practical and equitable, only partially perceived, if perceived at all by the 88th Congress" support the Court's conclusion. It is worthy of emphasis that these unperceived considerations are not developments external to the structure of regulation; on the contrary they consist of the judicial decisions and executive practices that have generated great pressures for statistical parities and racial quotas, despite the resultant tensions with the statutory language and history. Blackmun's statement thus involves a reversal of roles, a painful failure to recognize whose perceptions —the judiciary's or the Congress's—should be respected in nonconstitutional cases. For Blackmun is implying that Congress failed to perceive that the judiciary and the executive would undercut the political and ethical bargain reflected in Title VII, and also failed to perceive that the judiciary, along with the executive, would generate pressures on employers to ignore the statute and to discriminate against members of some groups (including white males) in order to get protection against charges of discrimination against members of other groups (including blacks and females). Nevertheless, Blackmun finds that it is not the Court's inadequate perceptions but those of the Congress that now require a drastic and explicit

narrowing of the antidiscrimination principle written into the statute. This change is necessary not to protect the original policy of the statute but rather to protect those whom it regulates from the conflicting pressures of contradictory policies that have been shaped by the courts, the EEOC, and the Office of Federal Contract Compliance (OFCC)—bodies that are supposed to implement the constitutional mandates of Congress.

Weber is another important step in the transformation of the . . . ideal of equal opportunity for individuals into a new program of equal outcomes for groups that is more divisive than the older ideal and fundamentally inconsistent with it.

The Court had another obvious alternative, namely, to seek to respect the language and history of the statute and to make clear that if doing so placed an innocent employer in an intolerable situation the Court would reexamine and, if need be, revise earlier decisions. For the change made by *Weber* is plainly not a response to a minor hitch, unforeseen by Congress, of the kind that often emerges as a statute is administered. On the contrary, that change goes to the roots of the bargain reached in the Eighty-eighth Congress and to the roots of our tradition. *Weber* is another important step in the transformation of the classic and widely supported liberal ideal of equal opportunity for individuals into a new program of equal outcomes for groups that is more divisive than the older ideal and fundamentally inconsistent with it.

Affirmative Action and the Court's Role

It is not possible here to review the arguments over the relationship of these competing concepts of "equality" to equity and order. What merits emphasis here is that the resolution of such questions by the Court under the guise of statutory construction strains its institutional competence. Thus the Court's opinion does not even notice some questions relevant to a disinterested and informed choice between those two concepts. And one need not romanticize the process of legislative investigation or legislative decision to recognize that litigation is as ill-suited for informing the Court regarding the pertinent questions as the Court is for resolving them. It may be useful to mention some of the pertinent questions neglected by the Court.

Is official pressure for affirmative action a substantial factor in the location of plants away from the centers of black population, with a view to avoiding pressure for the quota hiring required to redress statistical imbalance? As a consequence, are the most disadvantaged blacks being hurt by regulation designed to help them? Will the shift from equal opportunity for individuals to equal outcomes for groups undermine the consensus that was, at last, achieved in 1964? Will those all too ready to exploit the grievances of innocent whites in order to promote bigotry now be able to march under a respectable banner—equal opportunity for all? Will the fallout from *Weber* further polarize our work forces and our communities? Will it obstruct important job training across racial lines—the spontaneous on-the-job instruction of one worker by another? Will the backlash create further obstacles to legislative action necessary for programs designed to help all the disadvantaged, black and white? Will quota hiring result in significant inefficiencies, thereby retarding economic growth, to the particular disadvantage of minorities? Could a shift from individual to group "rights" be stabilized anywhere short of a transformation in the basic values of our society and in our political, legal, and economic institutions—short of a completely "quotified" society?

These illustrative questions are legislative and—in the best sense of the word—political. There is no indication that the Court even considered them. On the other hand, in answering the question presented by *Weber* without appropriate regard for Congress's mandate, the Court risks its future capacity to meet a deeply felt need for trustworthy neutrals. Finally, when the justices stray into the political thicket, it is more likely that the Court will fail a classic test for a Supreme Court opinion, that it give reasoned explanations transcending the case being decided.

Weber fails that test. Although it affects almost the entire work force, it fails to provide coherent guidance to government officials and

private lawyers who must give day-by-day advice and to judges who must deal with a flood of litigation. The Court, as we have seen, emphasized that it was deciding only the case before it. This ostensible strategy of postponement adds still another ironic twist to a decision preceded by arguments that something had to be done to alleviate the uncertainties resulting from discordant regulations.

The Reach of the Court's Opinion

The narrowness of the opinion may, however, be more apparent than real. The distinctive elements of *Weber* that the Court stressed are in the main so unrelated to the opinion's basic argument and basic purpose that if the Court persists in its fundamental position those elements are unlikely to have any importance. Moreover, those elements are in general so ill-defined by the Court that they provide no clear basis for a limiting rule.

First, *Weber* validated quotas only with respect to "traditionally segregated job categories"—in the private sector. Since the Court did not spell out those categories, there are many unanswered questions. Do jobs remain traditionally segregated and, if so, for how long after black representation has markedly increased? Does the Court's emphasis mean that quotas may not be established for relatively new job categories, such as computer programmers, if such categories have not involved any identifiable exclusion in the past but presently involve a racial imbalance? Does "traditionally segregated" mean anything more than current racial imbalance? How are the job categories to be defined for these purposes? If, for example, the relevant rubric were "white collar jobs," computer programmers might easily fit into areas of traditional segregation; and, contrariwise, if computer programmers were a separate category that had been free from segregation. Finally, is "traditional segregation" to be determined on a national, regional, or local basis?

Apart from the confusion inherent in the "traditionally segregated job category" test, the more important question is whether that test is compatible with the Court's basic reasoning. If, as *Weber* indicates, Title VII permitted some voluntary quotas in order to avoid overregulation, it is difficult to see why their legality should depend on their being directed at "traditionally segregated categories." From the standpoint of a black job applicant who has not been the direct victim of discrimination, it is not of primary importance whether there was job segregation in the past. Furthermore, whether a racial imbalance exists in a traditionally segregated occupation or in a new occupation free from prior discrimination would appear to be irrelevant to what the Court posits to be the overriding purpose of the statute—putting blacks into the economic mainstream. Indeed, measures directed at that purpose may be especially significant in areas where jobs are being created by new technologies. A similar point arises from the potential limitation of the Court's approach to the private sector, since employment has recently been growing faster in the public sector than in the private. Conceivably that limitation might be explained on the grounds that racial quotas in the public sector would involve the government directly in racial discrimination and thus raise troublesome constitutional questions. But the Court's interpretation of Title VII as permitting "voluntary" preferences for some races attributes to the Congress the same kind of discrimination on grounds of race.

Another apparent potential limitation on the employer's freedom to adopt "voluntary" preferences may be implicit in the Court's repeated statements that the Kaiser quota had resulted from collective bargaining. It is, however, difficult to find any basis for giving legal significance to that fact. Furthermore, to do so would run counter to *Alexander* v. *Gardner Denver* (1974) where the Supreme Court observed that Title VII protected individual rights against collective bargaining and the power of the majority. Finally, collective bargaining covers less than 25 percent of the work force. If the Court's approach is sound, it would be bizarre to confine it to such a small fraction of the economy.

The Court also noticed (1) that the Kaiser plan did not absolutely bar the admission of whites and (2) that the plan was a temporary one, operating only until blacks in craft jobs at Kaiser reflected the ratio of blacks in the local work force. Again, it is difficult to fit those factors into the Court's basic argument.

Although whites were not disqualified from Kaiser's training program, the places allotted to

blacks—50 percent—exceeded their ratio in the local labor force. Even if one accepted the dubious and unhealthy premise that, without discrimination, employment in different plants would reflect ethnic proportionality, the Kaiser plan called for "overrepresentation" of blacks in the training program. Plainly, then, the plan was presented not as a prophylactic against future discrimination by Kaiser, but as a catch-up remedy for past discrimination by society. If such a "voluntary" remedy is favored or tolerated as a way of getting blacks into the economic mainstream, why should the law limit an employer who wishes to help blacks catch up even more quickly by barring whites altogether until a given statistical goal is reached? Similarly, if an employer can lawfully give blacks a quota higher than their ratio in the local labor force—without any consideration of relative skills—why should an employer who has achieved statistical parity in his own plant be barred from continuing his preference as a means of compensating for still unremedied "societal discrimination" elsewhere? Since the Court does not require guilt on the part of the employer as a condition of his granting racial preferences temporarily, the Court is allowing him to remedy societal discrimination. Why should his privilege end when he has achieved statistical parity but the rest of society has not?

The Court's emphasis upon the legislative history's focus on blacks and their economic plight may imply another limitation on voluntary quotas: that is, they may not be lawfully applied to white women, Hispanics, and members of other "protected groups." To be sure, the Court's emphasis on voluntarism and on traditionally segregated job categories, as well as Blackmun's emphasis on safety nets for employers, could be invoked to validate "voluntary" preferences designed to redress "underrepresentation" of such groups. Within the framework of *Weber*, one would expect that result. But such preferences could be "distinguished" on the basis of other themes in the Court's opinion.

Even if preferences to other groups are permitted, there will be a cluster of additional complexities arising from charges that blacks are being excessively preferred at the expense of Hispanics, women, or Vietnamese refugees—or from charges that run the other way. It is understandable that the Court, in its *Weber* opinion, did not attempt to illuminate those difficulties.

Only one more uncertainty can be mentioned here. What kind of an affimative action plan will protect an employer in **a** *Weber* situation? Does the plan have to be in writing? How detailed and systematic must it be in order to distinguish lawful "reverse discrimination" under such a plan from ad hoc preferences for blacks previously forbidden by the Court? Finally, if the OFCC should openly order an employer to adopt specified affirmative preferences for blacks, would such a plan, because it was "involuntary," be beyond the protection of *Weber*?

Certainty through Uncertainties—The EEOC Guidelines

The uncertainties mentioned above might limit the use of "voluntary" preferences. But they will also in many instances protect employers who act in accordance with EEOC guidelines or affirmative action programs under the executive order. For Title VII seeks to insulate against damages liability firms that in good faith have conformed to and relied on any written interpretation by the EEOC. And under the EEOC's guidelines issued shortly before the Supreme Court's decision in *Weber* and embodying the government's position urged in that case, an employer is protected against damages liability if he engages in reasonable affirmative action in order to redress statistical disparities or to carry out an affirmative action plan pursuant to the executive order covering government contractors. Given the looseness of the Court's rationale for "reverse discrimination," reliance on almost any official guideline sanctioning such discrimination would appear to be in good faith. Hence, the Court has not only rewritten Title VII but—as to damage actions—has by its temporizing facilitated further incursions on that act by the combined operations of the OFCC and the EEOC. Thus, the OFCC's pressures may propel employers into adopting "voluntary" quotas (for women as well as blacks) pursuant to affirmative action programs "suggested" by officials who have chosen to read the *Weber* opinion as a blanket endorsement of affirmative action (as that term is understood by agencies better known for

their zeal for "results" than for their commitment to equal opportunity or their disinterested interpretation of Supreme Court opinions). *Weber* is thus likely to encourage "antidiscrimination" agencies to step up their pressures for discriminatory quotas. And *Weber* is likely to lead to the validation of many of those quotas. As to others, the guidelines—at least in damage actions—will tend to protect employers. Thus the Court, the EEOC, and the OFCC (despite doubts as to the constitutionality of the powers asserted by the OFCC) will interact to protect employers who are pressed into quotas on the ground, among others, that quotas are the voluntary result of self-study. The irony—noticed by Rehnquist—of labeling such quotas voluntary will increase if the club of the procurement power is wielded more vigorously. If it is wielded with more candor, or even less circumspection, the Court may, of course, reexamine its concept of voluntariness.

IN *WEBER*, only Blackmun suggested that intervening judicial and executive action made the issue before the Court more complex than what was the original meaning of Title VII of the 1964 act. Nevertheless, his answer, like the Court's, failed in my view to respect the clear mandate of Title VII and contravened what James Madison called the fundamental principle of our Constitution—separation of powers. That view will, of course, be challenged by those who see the Court as free to substitute its values and perceptions for those of Congress, especially when the Court goes their way. But even those more concerned with results than rationale are, I believe, likely to agree that *Weber* lacks the clarity, the candor, the coherence, and the convincing power that are appropriate for the work product of the Supreme Court of the United States. Those qualities are, indeed, usually the first casualties of judicial forays into the legislative thicket. ■

... Weber lacks the clarity, the candor, the coherence, and the convincing power that are appropriate for the work product of the Supreme Court of the United States.

Synthetic Fuels
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nologies directly. For example, the federal government might announce that it is willing to buy a million barrels per day (or the equivalent) of liquid or gaseous fuels produced from coal or shale at some fixed price above the current market price. But it should not itself pick a particular process or demonstration plant or get involved in technological decisions or production activities. Instead, it should provide an incentive for the private sector to pursue the development of the most cost-effective technologies.

It is private industry, not the government, that is in the best position to determine which new technologies are most economical and most promising, and to manage the commercialization of those technologies. In addition, private industry is much better able than government bureaucracies to drop a particular project should it turn out that the technology is not as promising as it appeared. By choosing to subsidize a project in a particular congressional district and creating a government bureaucracy to manage the project, we inevitably create a set of political forces that makes termination of the project very difficult. Nor is there any reason to believe that the personnel in government agencies are in a particularly good position to evaluate the many proposals always put forward when government subsidies become available.

We should never repeat the mistake made in our breeder reactor program by giving the government a primary role in choosing among programs or managing any particular program. By using broad price and purchase guarantees we can avoid committing ourselves to a technology that appears less and less desirable as time goes on.

To the extent that the government does participate in commercialization, its role should be strictly limited to the most efficient subsidization of alternative energy supplies in general, rather than particular technologies and programs. But we must recognize that this "second-best" policy will still be far more costly to the American public than the "first-best" policy, which largely eliminates the need for government participation in the production of energy in the first place. ■