THE QUESTION OF "VOLUNTARY" RACIAL EMPLOYMENT QUOTAS AND SOME THOUGHTS ON JUDICIAL ROLE

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I. INTRODUCTION

In 1979, the United States Supreme Court held in *United Steelworkers of America v. Weber*[1] that title VII of the Civil Rights Act of 1964[2] does not prohibit an employer and union from "voluntarily" adopting a negotiated "affirmative action plan" designed to eliminate racial imbalance in the employer's skilled workforce by selecting employees for admission to the employer's training program in part on the basis of a racial quota.[3] The *Weber* Court did not explicitly consider the constitutional or statutory validity of affirmative action plans "involuntarily" adopted to correct racial imbalance in a workforce. Nor did the Court consider the question of what character or degree of federal agency involvement in an affirmative action plan might be sufficient to raise the issues of the constitutional and statutory validity of "involuntary" quotas.

More recently, in *Fullilove v. Klutznick*,[4] the Court was faced with the question of the constitutional validity of the ten percent minority business set-aside provision of the Public Works Employment Act of 1977,[5] an express and congressionally mandated quota. The Court upheld that quota both as a proper exercise of the spending power—the

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1. 443 U.S. 193 (1979).
2. 42 U.S.C. § 2000e (1976 & Supp. III 1979).
3. 443 U.S. at 209. For the purposes of this Article, the operating definition of racial quota is set forth in note 8 *infra*.
4. 100 S. Ct. 2758 (1980), *aff'g* Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978).
5. 42 U.S.C. § 6705(f)(2) (Supp. III 1979).

scope of which the Court measured by reference both to the commerce power and to congressional enforcement power under the fourteenth amendment[6]—and as not in violation of the equal protection component of the fifth amendment.[7] *Fullilove*, however, did not present a question of the constitutional or statutory validity of federal executive agency inducement of privately adopted and racially based quotas in the absence of express congressional authorization or in arguable conflict with congressionally mandated policy. The problem in *Fullilove*, rather, was one of congressional authority and the test to be applied in reconciling that authority with equal protection doctrine.

We are thus left with substantial constitutional and statutory issues. This Article will discuss two such issues in the context of employment suggested by the above outline of what the Court did not decide in these cases. Before discussing those issues, however, it is initially necessary to suggest a frame of reference for *Weber* and *Fullilove* by briefly summarizing the state of both the case law and academic argument on the general question of so-called "reverse discrimination."[8]

A. Regents of the University of California v. Bakke *and the "Reverse Discrimination" Debate*

The "reverse discrimination debate" may be briefly summarized as the clash of the "fundamental value"[9] of racial neutrality and the belief that racial minorities disadvantaged by historical racially based decisionmaking may be assured of equal economic, political, and social participation in American society only by taking race into account in allocating scarce resources.[10] That clash has generated two opposing

6. 100 S. Ct. at 2773-75.

7. *Id.* at 2775-76.

8. Reverse discrimination, for purposes of defining the subject matter of pre- and post-*Bakke* discourse, may be said to include any measure, whether adopted by public or private authority, that takes into account race in allocating burdens or benefits for ostensibly benign purposes. A measure is benign if its purpose is to aid racial minority groups or individuals who are members of racial minorities perceived to have suffered discrimination in the past. The phrase "reverse discrimination" may, however, include two types of measures: (1) Those measures taken to aid individuals found to have been the victims of discrimination and limited to an attempt at placing such individuals in the position they would have been in absent the discrimination; and (2) those measures taken to aid individuals on the basis of a more general conclusion that the racial group to which they may be said to belong has suffered discrimination without predicating entitlement to such aid on a finding of individual victimization traceable to the conduct of another. The phrase "racial quota," on the other hand, is here used to describe "reverse discrimination" only in the latter sense—as the use of racial classification for a "benign" purpose without regard to individualized findings of injury and without regard to an individualized finding that an injury is traceable to the conduct of a particular defendant. This ascribed meaning ignores inquiry into degrees of rigidity or flexibility in assigning the label in the belief that such matters are concerned more with the question of substantive validity, not terminology.

9. *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting); Loving v. Virginia, 388 U.S. 1 (1967). *See generally*, Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 1 (1978).

10. *See* text & notes 43-57 *infra*.

positions. The first insists upon adherence to the neutrality principle as an absolute.[11] The second seeks to accommodate the neutrality value and the policy arguments favoring benign nonneutrality by identifying reasons for the value not inconsistent with those arguments.[12]

The debate occurs in a number of forms and at a number of levels, both constitutional and nonconstitutional in character. Both *Weber* and *Fullilove* illustrate the point. The question in *Weber* was framed as whether Congress, as a matter of statute, had compelled absolute racial neutrality in private decisionmaking.[13] In *Fullilove*, the question was whether Congress could constitutionally allocate resources on the basis of race where it had clearly made such an allocation.[14] Lurking in the legal background of both cases are two more fundamental issues essential to an understanding of both cases: (1) to what extent is the "strict scrutiny" equal protection test[15] of racial classification, grounded upon the neutrality value, applicable to classifications designed to effect a benign policy of equal participation? and (2) is the character of the institution that classifies, authorizes, or compels classification on the basis of race a material consideration in determining the legitimacy of the classification? The Court grappled with both issues in *Regents of the University of California v. Bakke*.[16]

Bakke involved a challenge to an admissions program adopted by a state medical school whereby a predetermined number of spaces in the school's entering class were open only to members of disadvantaged groups which apparently were limited in practice to racial minorities.[17] The Supreme Court concluded that the university could take race into account in its admission decisions, but could not utilize the strict quota system it had adopted.[18] The Justices were, however, severely divided in reaching this result.

The group subscribing to Justice Stevens' opinion[19] concluded that title VI of the 1964 Civil Rights Act[20] imposes a strict colorblind standard which precludes any consideration of race in admissions.[21] The Justices subscribing to Justice Brennan's opinion[22] concluded that the

11. *See* text & notes 45-48 *infra*.
12. *See* text & notes 54-57 *infra*.
13. 443 U.S. at 200.
14. 100 S. Ct. at 2762.
15. *See In Re* Griffiths, 413 U.S. 717, 721-22 (1973); Loving v. Virginia, 388 U.S. 1, 9 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).
16. 438 U.S. 265 (1978).
17. *Id.* at 269-70.
18. *Id.* at 319-20.
19. *Id.* at 448.
20. 42 U.S.C. § 2000d (1976 & Supp. III 1979).
21. 438 U.S. at 418-21 (Stevens, J., concurring & dissenting). Chief Justice Burger and Justices Stewart and Rehnquist joined in Justice Stevens' opinion.
22. *Id.* at 328. Justices Marshall, White, and Blackmun joined in Justice Brennan's opinion.

title VI standard is synonymous with that required by the fourteenth amendment.[23] This group of Justices argued that the medical school's program violated neither equal protection nor title VI.[24] According to Justice Brennan, racial classifications established for purportedly benign purposes must serve an "important and articulated purpose" and may not stigmatize any group or single out those "least well represented in the political process to bear the brunt of the benign program."[25] Under the Brennan opinion, the school's program was justified for three reasons: (1) it served the important and articulated purpose of eliminating the "disparate impact" of the school's normal admissions policies;[26] (2) the school had reason to believe that this disparate impact (in the form of underrepresentation of minorities in the student body) was the result of past social discrimination;[27] and (3) the racial classification employed by the school was "reasonably used" in light of its objectives.[28]

Justice Powell, who cast the determinative vote, agreed with Justice Brennan that title VI and equal protection doctrine should be treated as synonymous but rejected Justice Brennan's relaxed standard of review.[29] Justice Powell concluded that any racial classification should be subject to strict scrutiny requiring a compelling government justification.[30] In Justice Powell's view, the validity of a racial classification is dependent upon the character of the government entity adopting the classification.[31] Since the remedying of past social discrimination by means of benign quotas could properly be adopted only by legislative or "responsible" administrative bodies authorized to make "findings" of discrimination,[32] such a justification could not save a program adopted by a state agency concerned with professional education.[33] The school had, however, a legitimate interest in obtaining and maintaining diversity, a concept apparently rooted for Justice Powell in first amendment values;[34] some consideration of race short of strict quotas was therefore constitutionally permissible.[35]

The constitutional legitimacy of benign racial preference as government policy was, at best, unsettled by *Bakke*. The Stevens group

23. *Id.* at 340 (Brennan J., concurring & dissenting).
24. *Id.* at 379.
25. *Id.* at 361.
26. *Id.* at 369.
27. *Id.*
28. *Id.* at 362-78.
29. *Id.* at 296 n.36.
30. *Id.* at 305.
31. *Id.* at 311-12.
32. *Id.* at 305.
33. *Id.* at 311-12.
34. *Id.* at 313.
35. *Id.* at 315.

reached only a question of congressional intent;[36] the Brennan group would clearly substitute a relaxed standard of review when benign policy conflicts with the neutrality principle.[37] Justice Powell for the Court, although purporting to adhere to the strict standard suggested by the neutrality value, was concerned primarily with the question of legitimate institutional decisionmaking.[38]

The *Bakke* opinions nevertheless reflect judicial and scholarly thought on the question of reverse discrimination both with respect to the constitution's equal protection guarantees[39] and with respect to civil rights legislation.[40] That thought focuses on three distinct but interrelated problems: (1) The question of the abstract meaning of equal protection, or, perhaps more accurately, of an antidiscrimination principle;[41] (2) the relationship between a finding of discrimination and the remedial measures imposed to correct discrimination;[42] and (3) the questions of both the absolute authority and relative authority of the distinct branches of the federal government and of federal and state governmental entities to interpret and enforce differing conceptions of the antidiscrimination ideal.

1. *The Meaning of Equality*

The normative debate over the meaning of constitutional and statutory prohibitions of discrimination involves two positions (admittedly oversimplified here): The "colorblindness" position[43] and the "liberation"[44] position.

Proponents of the colorblindness position maintain that any consideration of race is prohibited, or at least sufficiently suspect for constitutional purposes to be prohibited in all but the most compelling circumstances.[45] The arguments in support of absolute racial neutrality are that colorblindness is required because it is not possible to accu-

36. *Id.* at 412 (Stevens, J., concurring & dissenting).
37. *See* text & notes 23-28, *supra*.
38. 438 U.S. at 311-12.
39. U.S. CONST. amends. V, XIV. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
40. In particular, titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000e (1976 & Supp. III 1979), and the post-Civil War civil rights acts, *id.* §§ 1981-1983 (1976 & Supp. III 1979).
41. Although Professor Brest's use of this phrase is sometimes narrower than is intended here, his initial definition—"the general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected"—is sufficiently broad to capture the notion intended in the text. Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976).
42. In short, the use of a quota eliminates the "traditional requirement of mutuality between wrongdoer and beneficiary" imposed as a condition to the imposition of a remedy. Brest, *supra* note 41, at 41.
43. Plessy v. Fergusson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
44. The label is mine. Its meaning is described in text & notes 50-60 *infra*.
45. Examples of such compelling circumstances are limited. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). *Cf.* Dothard v.

rately distinguish between benign and invidious racial classifications,[46] that any racial classification produces stigmatic harm or other psychological costs,[47] and that the difficulties inherent in determining what racial groups warrant benign aid are insurmountable, particularly where granting such aid generates harm to other identifiable racial or ethnic minorities.[48]

The liberation position views the purpose of post-Civil War amendments[49] and civil rights legislation[50] as that of generally eliminating both present acts of discrimination and the "present effects" of past social discrimination. Extreme versions of this interpretation suggest a principle of permanent group rights and racial proportionality,[51]

Rawlinson, 433 U.S. 321 (1977) (bona fide occupational qualification exception to title VII prohibition of sex discrimination).

The colorblindness argument may be alternatively predicated upon: (1) The intent of the framers, *but see* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 664-66 (1975); (2) the intent of legislators, United Steelworkers v. Weber, 443 U.S. 193, 235-55 (1979) (Rehnquist, J., dissenting); (3) moral and political principle, Loving v. Virginia, 388 U.S. 1, 10 (1967); A. BICKEL, THE MORALITY OF CONSENT 133 (1975); N. GLAZER, AFFIRMATIVE DISCRIMINATION 66-76 (1975); Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U.L. REV. 1, 14-23; Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 803-08; and (4) upon arguably current popular understandings of the equality ideal, *see* Dixon, *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69, 85 (1979); Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 26-27 (1979); Posner, *The Bakke Case and the Future of "Affirmative Action"*, 67 CAL. L. REV. 171, 172 (1979).

46. *See* Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12-14.

47. DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting); A. BICKEL, *supra* note 45 at 133; Kurland, *supra* note 45, at 18-20; Scalia, *The Disease as Cure*, 1979 WASH. U.L.Q. 147, 154-55. *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (potential adverse effect of quotas on whites); *id.* at 360 (Brennan, J., concurring & dissenting) (same); United Jewish Organizations v. Carey, 430 U.S. 144, 174 (1977) (Brennan, J., concurring) (same); Dixon, *supra* note 45 at 85 (same); Meltzer, *The Weber Case, Double Talk and Double Standards*, REG. Sept.-Oct. 1979, at 34, 40 (same).

48. For discussion of the difficulties and perversities inherent in classifying persons as members of one or another race or ethnic group, see Fullilove v. Klutznick, 100 S. Ct. 2758, 2804 n.5 (1980) (Stevens, J., dissenting); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295-97 (1978); DeFunis v. Odegaard, 416 U.S. 312, 337-40 (1974) (Douglas, J., dissenting). The extent to which the judiciary is prepared to go in ignoring the problem is indicated by the assertion that Indian preferences are not founded on racial classifications. Mortan v. Mancari, 417 U.S. 535, 553-54 (1974). For criticism, see Rutherglen, *Sexual Equality in Fringe-Benefit Plans*, 65 VA. L. REV. 199, 217 n.87 (1979).

49. *See generally* Brest, *supra* note 41; Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L. L. REV. 133 (1979).

50. *See generally* Edwards, *Preferential Remedies and Affirmative Action in Employment in the Wake of Bakke*, 1979 WASH. U.L.Q. 113; Edwards, *Race Discrimination in Employment: What Price Equality*, 1976 U. ILL. L.F. 572; Edwards & Zaretzky, *Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975); Larsen, *Race Consciousness in Employment After Bakke*, 14 HARV. C.R.-C.L. L. REV. 215 (1979).

51. *See* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 147-77 (1976). *See also* Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 28-44 (1979); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659. The Court's position on the question is at best unclear. *See* Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 434-35 (1976). *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 416-17 n.19 (1978) (Ste-

while lesser versions merely suggest the permissibility of social and economic measures designed to overcome what is seen as a pervasive social racism.[52] Extreme liberationists suggest that disproportion in the allocation of social or economic burden and benefit triggers the equal protection guarantee and therefore at least implies that proportionality is constitutionally required.[53] More moderate versions of the liberation position suggest only that "disproportionate impact" is an appropriate definition of discrimination and that the equal protection guarantee (or antidiscrimination principle) permits use of racial quotas to remedy such impact.[54] The moderate version therefore suggests, at a constitutional level, not that equal protection mandates reverse discrimination, but that it does not prohibit it where consciously imposed proportion is genuinely benign and remedial.

Arguments in support of the moderate version include necessity[55] and the claimed absence of indicia of suspectness where the apparent victims of reverse discrimination (normally nonminorities) have adequate access to the political process and may therefore be characterized as having power to protect themselves.[56] Other arguments contend that prevention of stigmatic harm is a fundamental objective of the constitutional guarantee and that stigma is absent when the white majority is adversely affected by governmental action.[57]

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vens, J., concurring & dissenting) (title VII right to be free of sex discrimination). *But cf.* United Jewish Organizations v. Carey, 430 U.S. 144, 161-62 (1977) (group nature of voting rights).

52. *See generally*, Karst & Horowitz, *supra* note 49; Karst & Horowitz, *supra* note 45.

53. The position relies at least in part upon recent notions of political morality. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY, (1977); J. RAWLS, A THEORY OF JUSTICE (1971).

54. Brest, *supra* note 41, at 59-64.

55. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 396-98 (1978) (Marshall, J., separate opinion); *id.* at 403-04 (Blackmun, J., separate opinion).

56. *See* Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974). *But see* Sandalow, *supra* note 45, at 694.

57. *E.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (1978) (Brennan J., concurring & dissenting); Brest, *supra* note 22, at 35-36; Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6 (1977); Karst & Horowitz, *supra* note 45, at 26.

A necessary premise to the argument is that whites are not stigmatized, at least in the sense that they are not branded or thought to be inferior, when a benign quota is imposed. This proposition intuitively seems to make sense, but the counterargument—that a quota imposed in behalf of a racial minority stigmatizes that minority by suggesting that members of the minority otherwise lack sufficient merit to obtain the benefit conferred by the quota, DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas J., dissenting)—also seems intuitively correct. A response to the effect that "merit" is not a constitutionally compelled criterion misses the point: selection by merit is at least a social-cultural value, and its abandonment for the purpose of achieving proportion may result in stigmatization.

There is, moreover, another problem: if the point of the stigma argument is that stigma involves psychological harm that we as a society are not willing to tolerate, what is the normative basis for our intolerance? The most obvious possibility is colorblindness, Loving v. Virginia, 388 U.S. 1, 11-12 (1967). If stigma means a brand of inferiority, one may concede that a white does not suffer stigma as a consequence of the loss of a benefit granted to a black because the latter is black without thereby conceding that the white suffers no psychological harm. *See* authorities cited in note 47, *supra*.

The question is whether there is or should be a meaningful distinction between the psychological harm suffered by a white as a consequence of a benign racial classification and the inferi-

2. *Preferential Remedies*

The moderate liberation position's argument that benign quotas may be employed as remedies requires suspension of the usual requirement that a wrongdoer compensate a victim of the wrongdoing only to the extent that the harm inflicted is reasonably traceable to that wrongdoing.[58] The argument is particularly evident in the title VII context but is suggested as well by constitutional arguments favoring government adoption of racial preferences as remedies for the effects of historical discrimination.[59]

Under title VII, preferential remedies are clearly available when a court finds racial discrimination in employment and seeks to make whole identified victims of that discrimination.[60] Such remedies are preferential in the sense that the granted relief burdens, in some degree, white employees whose expectations are altered by such relief. A court ordered grant of competitive seniority to a black victim of discrimination which changes the expectations of white employees is an example of such a burden.[61] The remedial classification imposed in such cases may arguably be based, however, upon victimization rather than race.[62]

Less clear is whether a court may grant a quota remedy to a racial group that includes nonvictims of an employer's discrimination. The difficulty in the latter instance is in determining whether section 703j of title VII permits a court imposed remedial quota. Section 703j provides that nothing in title VII shall be interpreted to require an employer to extend preferential treatment to any individual or group because of racial imbalance in a workforce as measured by its proportion to a relevant population.[63]

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ority stigma suffered by a black as the consequence of a nonbenign racial classification. A second question is whether the judiciary has the competence to assess psychological injury or comparative psychological injury. *See* Posner, *supra* note 46 at 184-85. The mere fact of a racial classification, whether or not benign, may itself generate psychic harm and a devaluation of the group adversely affected. *See* Dixon, *supra* note 45, at 85. Moreover, it cannot be said with assurance that a racial classification not grounded upon notions of inferiority is therefore not evil or dangerous; it can be plausibly argued that the perceived superiority of a group used as justification for classification is equally evil and equally dangerous. *See* J. SARTRE, ANTI-SEMITE AND JEW 24-40 (Becker trans. 1970).

58. Brest, *supra* note 41, at 41.

59. *See generally* Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

60. Franks v. Bowman Transp. Co., 424 U.S. 747, 764-66 (1976).

61. Such a grant of seniority will, however, not displace present nonminority workers. *Id.* at 779-80 & n.41; International Bhd. of Teamsters v. United States, 431 U.S. 324, 375 (1977).

62. *See* Brest, *supra* note 41, at 39.

63. 42 U.S.C. § 2000e-2(j) (1976). *See* United States v. Local 5, International Union of Elevator Constructors, 538 F.2d 1012, 1019 (3d Cir. 1976); Carter v. Gallagher, 452 F.2d 315, 329 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 630-31 (2d Cir. 1974); *See generally* Note, *Preferential Relief Under Title VII*, 65 VA. L. REV. 729 (1979).

There are some indications that relief for nonvictims may be impermissible, at least in the

Whatever the limits of a court's statutory authority to impose a quota remedy under title VII, and, to the extent title VII limitations are applied to post-Civil War civil rights legislation[64] to impose quota remedies in actions brought under that legislation, the characterization of a judicially imposed quota as a "remedy" suggests a rather broad definition of the term. The argument that a judicially ordered quota is justified as a means of enforcing a court ordered prohibition of future discrimination[65] suggests that the term remedy is used in a prophylactic rather than compensatory sense.[66]

The racial balancing quotas encouraged or compelled under Executive Order 11246 suggest an even broader meaning for the term remedy.[67] The usual notion that a wrongdoer's obligation to compensate is limited by the scope of the harm reasonably attributable to the wrongful conduct is suspended in the cases both of judicially ordered (title VII) and administratively compelled (Executive Order) quotas. Neither quota remedy is premised upon a finding of individual injury traceable to a defendant's conduct because individual injury is not a condition to eligibility for the quota.[68] In the case of administratively imposed quotas, however, prophylaxis as a rationale for the remedial label is equally absent. Although executive order racial preferences on occasion in the past have been premised upon relatively focused findings of past discrimination by unions and government contractors,[69] the Executive Order program's current definition of the conditions giving rise to contractual "affirmative action" obligations requires racial preferences on the basis of workforce imbalance.[70] Past employer misconduct, and therefore an inference of possible future employer misconduct, is not a condition under the current federal procurement program to the use of quota remedies.[71]

A similar broad definition of the term "remedy" is evident in the minority set-aside upheld in *Fullilove v. Klutznick*. Despite references in some of the opinions in that case to congressional findings of dis-

absence of a finding that a nonvictim was in fact a victim because deterred from applying for employment by the defendant employer's or union's discrimination. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 364-72 (1977). The Supreme Court recently avoided the question of the validity of remedial, court ordered quotas. County of Los Angeles v. Davis, 440 U.S. 625 (1979).

64. *See* Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471, 475 (4th Cir. 1978); United Staes v. East Tex. Motor Freight, Inc., 564 F.2d 179, 185 (5th Cir. 1977).

65. *See* Note, *supra* note 42, at 767.

66. *See* McCormack, *Race and Politics in the Supreme Court*, 1979 UTAH L. REV. 491; Brest, *supra* note 41, at 39-41.

67. 3 C.F.R. 339 (1965). *See* 41 C.F.R. §§ 60-2.1 to -2.6 (1979).

68. *See* text & notes 141-215 *infra*.

69. *See* text & notes 237-241 *infra*.

70. *See* text & notes 138-163 *infra*.

71. *See* text & notes 158-159 *infra*.

crimination in historical procurement practices,[72] the discrimination said to have been congressionally discovered was itself broadly defined as the "present effects" of past, historical, discrimination[73]—a definition clearly inclusive of historical societal misconduct. Moreover, the set-aside remedy at issue in *Fullilove* was neither restricted only to potential contractors formerly victimized by illicit procurement practices[74] nor designed to eliminate or deter future illicit procurement practices.[75] Rather, the remedy was quite clearly a device for increasing proportional minority participation in federal procurement—justifiable not as compensatory or prophylactic but, if at all, on grounds of broad notions of appropriate distribution of resources.[76]

The meaning of discrimination is itself significantly altered by quota remedies of the type contemplated by the Executive Order program and the *Fullilove* set-aside. The focus of such remedies is on a legislative model of broad social relief or strict liability rather than on a fault model of individualized findings of wrongdoing and consequent harm. Discrimination under the former model, and certainly under the understanding of the Congress that enacted title VII,[77] referred to the actions of individual employers. Discrimination under the latter model, exemplified by the approach taken by the Executive Order, refers to systematic social patterns.[78]

3. *Institutional Competence*

The absolute and relative authority of different governmental institutions to compel a benign racial quota are, although traceable to earlier cases and commentary,[79] reflected dramatically in Justice Powell's opinion in *Bakke*. That opinion argues that the medical school's "broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality."[80] The school was therefore not competent to make "findings of discrimination" or to create a remedy for discrimination "found."[81] That argument was

72. 100 S. Ct. 2758, 2775 (1980); *id.* at 2789 (Powell, J., concurring).
73. *Id.* at 2768.
74. *Id.* at 2800-01 (Stewart, J., dissenting); *id.* at 2806-07 (Stevens, J., dissenting).
75. *Id.* at 2800 (Stewart, J., dissenting). *But see id.* at 2789 (Powell, J., concurring).
76. *Id.* at 2806-08 (Stevens, J., dissenting).
77. *See* United Steelworkers v. Weber, 443 U.S. 193, 226-55 (1979) (Rehnquist, J., dissenting); note 96 *infra*. *See generally* Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Ideal*, 47 U. CHI. L. REV. 423 (1980).
78. For a discussion of the movement from the former to the latter understanding of discrimination, see H.R. REP. NO. 92-238, 92nd Cong., 2d Sess. 8 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2144. *See generally* Fiss, *The Fate of An Idea Whose Time has Come, Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974); *see also* Fiss, *supra* note 52 at 46-49.
79. *See generally* Sandalow, *supra* note 45.
80. 438 U.S. at 311.
81. *Id.*

largely made again in Justice Powell's concurring opinion in *Fullilove*,[82] where unique congressional authority under the enforcement clause of the fourteenth amendment was emphasized.[83] The Justices subscribing to Justice Brennan's opinion in *Bakke* and Justice Marshall's concurring opinion in *Fullilove* apparently reject the institutional competence notion. Those opinions do not suggest a material distinction between the substantive analysis employed in the case of a state medical school's decision to adopt racial preferences as government policy and a congressional decision to do so.[84] The position of the remaining Justices on the question is at present unclear.

The fundamental notion underlying the institutional competence argument is that the tension between the racial neutrality ideal and desired racial equality in distribution of resources may be best accommodated as a matter of judicial analysis by restructuring the problem as one of appropriate decisional process.[85] Such a restructuring is obvious in Justice Powell's *Bakke* and *Fullilove* opinions. It is apparent, albeit in lesser degree, in the Chief Justice's opinion in *Fullilove*, where he rather explicitly distinguishes the meaning of remedy in the judicial and legislative contexts: the absence of a connection between discrimination and racial preference is not troublesome where the preference is congressionally imposed because Congress possesses "broad remedial powers" not available to a court.[86] Restructuring may also be viewed as the analytical context of the *Weber* decision. The issues debated by the majority and dissent in that case were, at least ostensibly, the meaning Congress ascribed to the antidiscrimination principle.

Powell's position suggests restructuring the problem as one of process, with the meanings of equality and remedy being defined by the Court, for purposes distinct from ultimate and final resolution of the tension between the values of racial neutrality and distributive equality. The objective under the restructured problem is to fit the appropriate institutional decisionmaker to the appropriate definition. The meaning of appropriate in both instances is not precise, but seems clearly to have constitutional origins.[87]

The three problems suggested by the reverse discrimination debate just described—the meaning of equality, the meaning of remedy, and

82. 100 S. Ct. at 2785 (Powell, J., concurring).

83. *Id.* at 2790-91.

84. *Compare* Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 367-68 (Brennan, J., concurring & dissenting) *with* Fullilove v. Klutznick, 100 S. Ct. at 2795 (Marshall, J., concurring).

85. *See generally* McCormack, *supra* note 66; Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977); Sandalow, *supra* note 41.

86. 100 S. Ct. at 2777.

87. *Id.* at 2785 (Powell, J., concurring); Regents of the Univ. of Cal. v. Bakke, 438 U.S. at 300-05.

institutional competence—provide the background for the present inquiry. That inquiry first focuses on the *Weber* decision because that decision, although facially statutory in character, reflects rather clearly the summarized problems of meaning. Moreover, it raises, rather starkly, the problem of institutional competence in the sense of both the Court's and the bureaucracy's role vis a vis the Congress. Because the Court's opinion in *Weber* rests ultimately upon its premise that it was reviewing only a private and voluntary employment decision, and because an attempt to expose the sophistry of that premise suggests the institutional competence question, the first issues to be addressed are: (1) To what extent and in what sense may the employment quota adopted by the private defendants in *Weber* be accurately considered voluntary; and (2) might a similar, privately adopted quota be attacked on constitutional grounds as the product of federal action and on statutory grounds as violative of title VII's antiquota provision? Upon the assumptions of the suggested answers to these issues, the following discussion seeks to frame a constitutional argument against racial preferences of the type at issue in *Weber* in terms of the relative capacity and legitimacy of the executive, congressional, and judicial decisionmaking processes to impose and encourage racial employment preferences as government policy.

II. *WEBER* AND THE VOLUNTARINESS THEORY

A. *The Case*[88]

In 1974, the United Steelworkers Union and Kaiser Aluminum entered into a collective bargaining agreement covering 15 of the company's plants.[89] The agreement contained an affirmative action plan designed to eliminate racial imbalance in the company's craft workforces by creating craft hiring quotas for blacks equal to the percentage of blacks in the relevant labor markets.[90] Because craft union discrimination in the past had excluded blacks from the unions and, therefore, from the training provided by a union connection, the collective bargaining agreement created programs to train unskilled Kaiser workers as craft workers.[91] To meet the hiring goals created by the affirmative action plan, admission to the training program was based

88. United Steelworkers v. Weber, 443 U.S. 193 (1979).

89. *Id.* at 197-98.

90. Although the plan referred to minorities, Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 763 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.*, United Steelworkers v. Weber, 443 U.S. 193 (1979), the Supreme Court's opinion emphasizes blacks as the relevant minority benefited both by the plan and by title VII. *Id.* at 202-03. *See* Kitch, *The Return of Color Consciousness to the Constitution: Weber, Dayton and Columbus*, 1979 SUP. CT. REV. 1, 4.

91. 443 U.S. at 198 & n.1.

on an explicit quota: 50% of the openings in the program were reserved to blacks.[92] Selection of candidates for the remaining 50% of openings was based upon seniority among production workers.[93]

Brian Weber, a white production worker, was refused admission to Kaiser's training program even though he had greater seniority than black workers admitted to the program.[94] Weber subsequently instituted a class action against Kaiser and the Steelworkers Union alleging that the 50% minority quota violated title VII.

The district court concluded that the defendants had violated sections 703a and 703d of title VII because the quota discriminated between workers on the basis of race.[95] That court found that Kaiser's decision to bargain for the quota provision "was prompted not only by its desire to increase the percentage of its black craftsmen and offer more job opportunities to blacks, but also by its concern about compliance with rules and regulations issued by the Office of Federal Contract Compliance"[96] and by a desire to avoid "vexatious litigation by minority employees."[97] The district court rejected the defendants' argument that their plan was justified by analogy to judicially required affirmative action as a remedy for discrimination in title VII cases.[98] The delicate balancing of competing interests required by the possibility of quota relief is, under the district court's view, peculiarly within the competence of the judiciary.[99]

The Fifth Circuit affirmed,[100] but rejected the district court's reliance on an exclusive judicial competence rationale as inconsistent with title VII's policy of encouraging voluntary compliance and settlement of disputes.[101] Instead, the majority opinion for the Fifth Circuit panel concluded that a private employer may adopt a benign quota only for the purpose of remedying its own past discrimination.[102] Because the district court had found no past discrimination by Kaiser, the quota plan was unlawful.[103] Although the court was not entirely clear on the point, the language of the opinion, particularly the court's rejection of an argument that the plan was justified as correcting past "social discrimination,"[104] suggests that the court intended a distinction between

92. *Id.* at 199.
93. *Id.*
94. *Id.*
95. 415 F. Supp. at 769.
96. *Id.* at 765.
97. *Id.*
98. *Id.* at 767-69.
99. *Id.* at 767-68.
100. 563 F.2d 216 (5th Cir. 1977).
101. *Id.* at 223-24. *See* Alexander v. Garder-Denver Co., 415 U.S. 36, 59 (1974).
102. 563 F.2d at 224-25.
103. *Id.* at 224.
104. "Our response is that unless a preference is enacted to restore employees to their rightful

a valid preferential remedy for individual victims of past employer discrimination and an invalid quota imposed without reference to whether the beneficiaries of the quota suffered discrimination caused by the employer adopting the quota.

In response to a defense argument that the collective bargaining agreement quota program was sanctioned by Executive Order 11246, the Fifth Circuit recognized that the Executive Order program requires a utilization study of a government contractor's workforce and correction of underutilization of minorities by the use of numerical hiring goals indistinguishable from quotas.[105] The court found that the defendants' decision to adopt the challenged program was primarily motivated by a "self-interest in satisfying the OFCC in order to retain lucrative government contracts."[106] The court concluded, however, that if the Executive Order requires a racial quota in admitting employees to training programs, it is inconsistent with section 703d of title VII and therefore invalid.[107]

Judge Wisdom in dissent argued that because title VII litigation is "fact sensitive" and because results in title VII cases display inconsistent interpretations of what title VII requires, an affirmative action plan that includes a reasonable remedy for an "arguable violation" of title VII should be upheld.[108] Since a statistical showing of a significant racial imbalance in a workforce is sufficient to establish a prima facie case of discrimination under title VII, and since such a showing was made in *Weber*, there was an "arguable violation" which Kaiser could remedy by a "reasonable remedial plan."[109] The quota training plan adopted by Kaiser and the Steelworkers Union was, in Judge Wisdom's view, reasonable for three reasons. First, it was adopted after negotiation with the representative of Kaiser's employees; second, the plan did not have a significant impact on whites because the "new rights" (to training) created by the plan did not affect white employees' existing expectations at the time of adoption; and finally, the plan did not totally exclude whites from participation.[110]

Although Judge Wisdom argued that Kaiser's plan was justified as a remedy for past societal discrimination and was required by the Ex-

places within a particular employment scheme it is strictly forbidden by Title VII." *Id.* at 225. The court also distinguished, however, cases in which quota remedies were adopted for nonvictims on the ground that past discrimination had been found in those cases. *Id.* at 221.

105. *Id.* at 222 & n.10.

106. *Id.* at 226.

107. *Id.* at 226-27, citing Justice Jackson's concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952).

108. *Id.* at 228-29 (Wisdom, J., dissenting).

109. *Id.* at 230-31 & n.10 (Wisdom, J., dissenting).

110. *Id.* at 232-34 (Wisdom, J., dissenting).

ecutive Order,[111] he suggested as well that it was unclear whether Kaiser's quota was consistent with the Executive Order and that the case should be remanded for district court consideration of the issue, saying that, "If, on remand, the district court were to conclude that the Executive Order was not violated by this plan, then a constitutional question might arise about the validity of this federal action."[112]

The Supreme Court reversed,[113] saying the issue was the narrow one "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 purposes provided in the Kaiser-USWA plan."[114] The Court's characterization of the issue before it specifically excluded the possibility of a constitutional question was, "[S]ince the Kaiser-USWA plan *does not involve state action*, this case does not present an alleged violation of the Equal Protection Clause of the Constitution."[115]

Writing for a majority of the Court,[116] Justice Brennan characterized the purpose of the Kaiser plan as that of eliminating "traditionally segregated job categories" in craft employment.[117] In his view, the means used to achieve this objective were reasonable because the plan did not create an absolute bar to white employees, the plan was temporary in the sense that it was designed to eliminate racial imbalance rather than to maintain a racial balance, and the plan did not have a substantial impact on white workers.[118] To this list might be added one other consideration derived from the opinion but not expressly relied on as evidencing the reasonableness of Kaiser's voluntary quota—the Court's emphasis upon traditional discrimination in the relevant industry, perhaps as distinguished from society as a whole.[119]

Upon these assumptions, the Court concluded that Kaiser's plan did not violate title VII for two reasons. First, although a literal reading of title VII prohibitions would invalidate Kaiser's plan,[120] Congress was generally concerned with opening up employment opportunities to minorities and therefore did not intend to prohibit voluntary affirmative action designed to accomplish this same objective.[121] Second, sec-

111. *Id.* at 234-38.
112. *Id.* at 238 n.24.
113. 443 U.S. 193.
114. *Id.* at 200 (emphasis in original).
115. *Id.* (emphasis added).
116. Neither Mr. Justice Powell nor Mr. Justice Stevens participated. The Chief Justice and Mr. Justice Rehnquist dissented. *Id.* at 209, 216, 219.
117. *Id.* at 197-98.
118. *Id.* at 208-09.
119. *See id.* at 198-99 & n.1. *Cf.* Local Union No. 35 v. City of Hartford, 625 F.2d 416, 422 (2d Cir. 1980) (constitutional decision emphasizing this factor).
120. 443 U.S. at 201.
121. *Id.* at 205-06.

tion 703j of title VII, the statute's antiquota provision, merely states that title VII does not require employers with racially imbalanced work forces to adopt racial quotas; it does not state that title VII does not permit an employer to do so.[122] Since the motivation underlying the provision was to avoid interference with "traditional business freedom," Congress did not, in the Court's view, intend to limit adoption of voluntary benign racial preferences in the exercise of business discretion.[123]

It is apparent that the Court went considerably beyond Judge Wisdom's version of permissible business decisions in this area.[124] Justice Blackmun, in a concurring opinion, indicated that although he was initially inclined to adopt Judge Wisdom's arguable violation theory, additional "practical and equitable considerations" supported the Court's "traditionally segregated job category" approach.[125] In Justice Blackmun's view, the Court's approach is distinguishable from the arguable violation theory in two ways: (1) the employer need not have discriminated and, therefore, need not establish such discrimination as a prerequisite to adopting a benign quota; and (2) the employer may lawfully adopt such a quota to remedy lawful discrimination, such as pre-title VII discrimination, for which the employer would not be liable.[126] According to Justice Blackmun, these differences are justified despite evidence that the Congress that enacted title VII did not intend to permit voluntary benign quotas.[127] As neither a white employee harmed by a benign quota nor the employer has an incentive to prove that the employer was guilty of discrimination, the arguable violation approach would be unworkable.[128] Moreover, "considerations of equity" require, in Justice Blackmun's view, that title VII not be interpreted to lock in the present effects of past lawful discrimination.[129]

In an exhaustive and persuasive dissent, Justice Rehnquist argued that both the plain language of section 103 and the legislative history of title VII[130] prohibited Kaiser's plan.[131] Both establish that section 703j

122. *Id.*
123. *Id.* at 207.
124. *Id.* at 208 n.8.
125. *Id.* at 214 (Blackmun, J., concurring).
126. Hazelwood School Dist. v. United States, 433 U.S. 299, 309-310 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 n.30 (1977); United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977).
127. 443 U.S. at 214 (Blackmun, J., concurring).
128. *Id.* at 213.
129. *Id.* at 215.
130. 42 U.S.C. § 2000e-2(d) (1976):

> 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.

131. 443 U.S. at 226-52.

was adopted solely for the purpose of assuring opponents of the civil rights bill that the prohibitions of section 703, which both proponents and opponents of the bill understood to prohibit preferential treatment for any race, would not permit federal enforcement agencies or the courts to require preferences as a remedy solely for racial imbalance in a workforce.[132] Under Justice Rehnquist's interpretation, section 703j is directed at preventing federal agencies and the courts from imposing racial balance in private workforces; title VII's prohibition of voluntary quotas was assumed by both proponents and opponents and therefore not directly addressed in section 703j.[133] Although Justice Rehnquist suggested that Kaiser had responded to pressure from the OFCCP in adopting its quota plan,[134] and that the Court had therefore invoked section 703j "to uphold imposition of a racial quota under the very circumstances that the section was intended to prevent,"[135] he nevertheless focused upon the narrow issue settled by the majority: Does title VII prohibit voluntary and privately adopted benign quotas?

Despite the troublesome problem of the degree of candor demonstrated in the majority opinion,[136] the "voluntary benign quota question" for title VII purposes has been at least abstractly resolved. Two questions remain: (1) Under what circumstances could one establish that an affirmative action quota was involuntarily adopted? and (2) what issues would be raised by such a showing?

The initial difficulty in determining the circumstances under which the involuntary quota issue could be raised is the Court's glib assumption that the Kaiser plan was voluntary. That assumption was made in the face of the district court conclusion that Kaiser's prime motivation was complying with the Executive Order and avoiding title VII litigation.[137] The Court did not reach the question whether the Kaiser plan was legitimized by the Executive Order, and neither Weber, Kaiser, nor the United Steelworkers sought to challenge federal agency action as inconsistent with section 703j or to raise an equal protection issue by

132. *Id.* at 245 (Rehnquist, J., dissenting).
133. *Id.* at 253.
134. *Id.* at 223 n.2, 246.
135. *Id.* at 246.
136. *See generally* Lerner, *Employment Discrimination, Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17; Meltzer, *supra* note 77; Meltzer, *supra* note 47. It is beyond the scope of the present paper to review the legislative history in an effort to disprove the interpretation of the statute adopted in *Weber*; Mr. Justice Rehnquist's argument in dissent sufficiently accomplishes that. 443 U.S. at 219-55. The question is, to the extent of *Weber*, moot. The present paper nevertheless assumes the position taken by Mr. Justice Rehnquist in dissent: the legislative history clearly establishes, in the judgment of this writer, that the *Weber* interpretation of title VII is not supportable by reference to original congressional intent. *Id.* at 228-52. The assumption leaves open the question whether original intent is, or should be, controlling; but the assumption is inherent in much of the discussion that follows.
137. 415 F. Supp. at 765.

suggesting that Kaiser's plan constituted government action. The possibility nevertheless remains that the Court's assumption implicitly decides a question not discussed in the opinion: Whether an executive threat to bar an employer from government contracting and the structure and manner of proof in title VII litigation and in Equal Employment Opportunity Commission interpretations of that structure and manner of proof are sufficient to make out a claim of involuntariness. In short, the term voluntary may have a peculiarly expansive meaning in the wake of *Weber*.

B. *The Executive Order*

Executive Order 11246 provides that government "contractor[s] will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin."[138] The order further mandates that "contractor[s] will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."[139]

The Executive Order delegates to the Secretary of Labor authority to enforce its provisions.[140] The Secretary, in turn, has established a detailed program of enforcement administered by the Office of Contract Compliance Programs (OFCCP).[141] The order and program apply to employers who supply goods and services to the federal government and require nondiscrimination and affirmative action provisions in government contracts.[142] Specifically, the OFCCP, through Revised Order No. 4,[143] requires nonconstruction contractors and subcontractors to conduct utilization studies of their workforces.[144] If underutilization is discovered, the contractor or subcontractor must develop numerical goals and timetables designed to eliminate the underutilization.[145] Underutilization is defined in terms of having fewer minority or women workers in a job force than could reasonably be

138. 3 C.F.R. 169 (1976), *reprinted in* 42 U.S.C. § 2000e (1976).
139. *Id.*
140. *Id.*
141. 41 C.F.R. § 60-1 *et seq.* (1979). Although 41 C.F.R. §§ 60-1 and 60-2 were extensively amended late in the Carter administration, 45 Fed. Reg. 86216 (1980), the Reagan administration has, as of the date of this writing, deferred the effective date of the amendments pending further review. 46 Fed. Reg. 9084, 23742, 33033, 36214 (1981). The now-deferred amendments would not affect the descriptions of OFCCP affirmative action obligations in the text. However, the OFCCP's proposed rulemaking, *id.* at 36214, would significantly affect the rigidity of underutilization analysis.
142. 41 C.F.R. § 60-1.4 (equal opportunity clause); *id.* § 60-1.40 (affirmative action). There are limitations in the application of the program based upon monetary limits of contracts. *Id.* § 60-1.5.
143. *Id.* § 60-2.
144. *Id.* § 60-2.11.
145. *Id.* § 60-2.12.

expected, as determined by an analysis that emphasizes racial imbalance in a workforce when compared with a relevant population.[146] Failure to meet goals or to otherwise comply may result in termination of a contract, in judicial enforcement of the contractual obligation, or in barring the contractor from further participation in government contracts.[147]

OFCCP regulations promulgated pursuant to the Executive Order state that rigid and inflexible quotas are not required,[148] that goals may not be used to discriminate against any applicant for employment,[149] that underutilization is determined on the basis of factors (including qualifications of prospective employees) in addition to racial imbalance,[150] and that contractors' compliance with affirmative action requirements will be judged by the contractor's good faith effort rather than actual success or failure in meeting timetables and goals.[151] It is nevertheless apparent that the distinction between goals and quotas attempted by the OFCCP's regulations is questionable. This is so for five reasons.

First, the observed reality is that a relatively rigid racial balancing results from administrative pressure to meet goals.[152] Second, although the major potential contractor defense to failure to meet its goals or to a conclusion that the contractor has underutilized an available minority population is lack of qualification.[153] This defense is subject to the validation requirements of the Uniform Guidelines on Employee Selection Procedures[154] whenever a qualification requirement has an adverse impact[155] on minority employment with the contractor. Despite the assurance that validated qualification requirements are con-

146. *Id.*; *see* Legal Aid Soc'y v. Brennan, 608 F.2d 1319, 1341 (9th Cir. 1979), *cert. denied* 447 U.S. 921 (1980). *But see* Firestone Tire & Rubber Co. v. Marshall, 507 F. Supp. 1330 (E.D. Tex. 1981).

147. 41 C.F.R. § 1.0-1.32. It is also possible that a contractor will be found "non-responsible" and therefore ineligible for federal contracts. *Id.* § 60-2.2. *See* 45 Fed. Reg. 86239 (1980) (to be codified in 41 C.F.R. § 60-2.2), *deferred*, 46 FED. REG. 9950 (1981).

148. 41 C.F.R. § 60-2.12(e).

149. *Id.* § 60-2.30.

150. *Id.* § 60-2.11.

151. *Id.* § 60-2.14.

152. *See* Weber v. Kaiser Aluminum & Chem. Co., 563 F.2d 216, 222 n.10 (5th Cir. 1977), *rev'd on other grounds*, 443 U.S. 193 (1979). In its brief to the Supreme Court, the United States argued that Kaiser's plan was consistent with the Executive Order program. Brief of the United States at 70-72. *See also* Legal Aid Soc'y v. Brennan, 381 F. Supp. 125, 130 (N.D. Cal. 1974), *aff'd in part*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); F. MCGUINESS, PREFERENTIAL TREATMENT IN EMPLOYMENT 27 (1977); Sape, *The Use of Numerical Goals to Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481, 487-89 (1975). *But see* 46 Fed. Reg. 36214 (1981) (notice of proposed rulemaking).

153. *See* 41 C.F.R. §§ 20-2.14, 60-2.23(b)(6), 60-2.24(d)(2) (1979).

154. *Id.* §§ 60-3.1 *et seq.* (the Guidelines were adopted jointly by the EEOC and OFCCP).

155. For purposes of the Guidelines, adverse impact is defined in terms of selection rates: "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty per cent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact." 41 C.F.R. § 60-3.4D. *See also id.* § 60-

sidered in evaluating contractor compliance, an employer may be pressured to adopt training programs as a part of the employer's affirmative action program and as a means of achieving the desired racial balance in skilled worker categories.[156] Validation of an employer's selection criteria does not relieve contractors of their obligation to eliminate underutilization of minorities in their workforces.[157]

Third, no administrative finding of discrimination on the part of the contractor is required as a predicate to application of affirmative action requirements. Mere underutilization is sufficient, and underutilization is mere absence of racial proportion.[158] Fourth, the beneficiaries of the goals and timetables need not establish that they are victims of discrimination; the sole qualification is satisfying a racial (or ethnic or sexual) classification.[159]

Finally, the OFCCP's distinction rests upon a narrow definition of the term quota. Under the OFCCP definition, a quota is a "rigid and inflexible"[160] goal compliance that is mandated without reference to whether a good faith effort to reach the goal was made.[161] Even if it is assumed, however, that actual enforcement of OFCCP goals is not rigid and inflexible, the fact of flexibility does not alter the fact that the goals and timetables device inevitably requires that employment decisions be made on the basis of race without reference to the past conduct of the employer or the connection, if any, between that conduct and the beneficiaries of those decisions. The facts of nonrigidity and of flexibility may well have an impact upon the question of constitutionality if one concludes that the constitutional standard is not colorblindness,[162] and if one assumes that the character and degree of harm in-

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3.3(A). Compare this definition with Hazelwood School Dist. v. United States, 433 U.S. 299, 308-312 & nn. 13, 14, 17 (1977).

156. *See* Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 765 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub. nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

157. 41 C.F.R. §§ 2.23(b)(1), 60-3.13(A) (1979). Moreover, § 60-2.23(b) suggests that, among other factors, either underutilization or use of nonvalidated procedures constitutes a problem area making special corrective action appropriate. *See also id.* § 60-2.24(d) and (e).

158. *Id.* § 60-3.13(A).

159. *See generally id.* § 60-2 (1979).

160. *Id.* § 60-2.12(e): "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."

161. *Id.* § 60-2.14.

162. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315-18 (1978); Fullilove v. Kreps, 584 F.2d 600 (2d Cir. 1978), *aff'd sub nom.* Fullilove v. Klutznick, 100 S. Ct. 2758 (1980). *But see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 378 (1978) (Brennan, J., concurring & dissenting):

> Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. *For purposes of constitutional adjudication, there is no difference between the two approaches.*

(Emphasis added).

flicted by a quota upon nonminorities is material to the question of constitutionality.[163] Flexibility does not, however, alter the character of the device itself.

C. *The Structure and Manner of Proof of Discrimination Under Title VII*

The Supreme Court, in *Griggs v. Duke Power Co.*,[164] first announced the adverse impact theory of liability under title VII. Intentional discrimination, even in the sense of taking race into account in making an employment decision, is not required under this theory.[165] Adverse impact refers to a significant disparity between the number of minority employees in a relevant category of a defendant-employer's workforce and the number of minority persons in a relevant population.[166] A successful showing of adverse impact establishes a prima facie case of discrimination.[167] The burden of proof is then shifted to the employer to establish that its employee selection procedures are justified by business necessity.[168]

The Export Employment Opportunity Commission's (EEOC) enforcement strategy for title VII relies upon the *Griggs* adverse impact theory and upon a narrow interpretation of business necessity to encourage employer adoption of affirmative action plans. Encouragement is accomplished in two steps. First, the Uniform Guidelines on Employee Selection Procedures[169] define discrimination as the use of a nonvalidated selection procedure that has an adverse impact on the hiring, promotion, employment or (union) membership of any race, sex, or ethnic group.[170] A selection procedure is any measure or procedure, including any job qualification requirement.[171] For purposes of EEOC enforcement action, however, only the end result of an employer's practices is emphasized under the guidelines. If an employer establishes racial balance in its bottom line selection rates, the federal agencies will not generally undertake enforcement action even if a particular selection procedure has an adverse impact overcome by the employer's use of other procedures designed to achieve bottom line bal-

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See generally Comment, *Beyond Strict Scrutiny: The Limits of Congressional Power to Use Racial Classifications*, 74 NW. U.L. REV. 617 (1979).

163. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305 (1978).

164. 401 U.S. 424 (1971).

165. "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430.

166. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 65-184 (1976).

167. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 430-32 (1975).

168. 401 U.S. at 431.

169. 29 C.F.R. § 1607 (1979).

170. *Id.* § 1607.2.

171. *Id.* § 1607.16(g).

ance.[172]

If racial imbalance in the workforce is present, compliance with the technical validation standards adopted by the guidelines is, according to the EEOC, required.[173] Validation is accomplished by establishing that a selection procedure is related to actual job functions or characteristics under scientific standards of measurement of that relationship.[174] It is a difficult and costly process.[175] The thrust of the guidelines, then, is to make validation of an employer's selection process unattractive and to create a standard for the exercise of prosecutorial discretion[176] that is founded upon racially balanced employee selection. The employer's clear incentive is to retain its selection procedures and to adopt quotas as a means of achieving bottom line balance or to eliminate racially neutral but, by the terms of the science of validation, irrational or potentially irrational selection procedures.[177]

The second step in encouraging affirmative action is the EEOC's Affirmative Action Guidelines, adopted in early 1979.[178] Those guidelines essentially adopt the approach suggested by Judge Wisdom's dissent in *Weber*[179] and of the argument of the United States before the Supreme Court in *Weber*.[180] Employers adopting affirmative action plans pursuant to the guidelines are protected from reverse discrimination suits. Protection is accomplished by terming the guidelines "a written interpretation and opinion" of the EEOC within the meaning

172. *Id.* §§ 1607.4, 1607.6A. *But see id.* § 1607.11 (disparate treatment remains unlawful); 43 Fed. Reg. 38291 n.16 (1978) (individuals discriminated against by selection procedure may have cause of action despite bottom line balance). *See also* Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978) (statistical evidence of balance is evidence but not conclusive evidence rebutting prima facie case of disparate treatment).

173. 29 C.F.R. § 1607.5 (1979). *But see id.* § 1607.6 (raising possibility of largely undefined alternatives except in the case of affirmative action). Required is a misnomer in the sense that EEOC regulations do not have the force of law but are given only deference by courts applying title VII. Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

174. 29 C.F.R. § 1607.5 (1979). *See generally* Lerner, *supra* note 96. An insistence upon precision in the relationship between an employment test and job performance is arguably supportable on the basis of the legislative history of § 703(h), 42 U.S.C. § 2000e-2(h) (1976). *See* Griggs v. Duke Power Co., 401 U.S. 424, 434-36 (1971). *But see* Albermarle Paper Co. v. Moody, 422 U.S. 405, 451-52 (1975) (Burger, C.J., concurring and dissenting). That history would also support the argument that precision is required solely for the purpose of identifying pretextual (that is, race-based in fact) use of such tests. 110 CONG. REC. 13504 (1964) (Remarks of Sen. Case). *Compare* United Steelworkers v. Weber, 443 U.S. 193, 215 (1979) (Blackmun, J., concurring) *with id.* at 236-52 (Rehnquist, J., dissenting).

175. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 103 n.60 (1976); Lerner, *supra* note 136, at 18 n.6. Validation of selection procedures must be accomplished through compliance with the technical standards of the guidelines, standards suggesting a narrow interpretation of business necessity. 29 C.F.R. §§ 1607.5, 1607.14 (1979).

176. *See* 29 C.F.R. 1607.4, 1607.6A (1979). *See also* 43 Fed. Reg. 38290-91 (1978) (Supp. Information, II-III).

177. *See* Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures With Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1, 31-32 (1977).

178. 29 C.F.R. § 1608 (1979).

179. 563 F.2d at 228 (Wisdom, J., dissenting).

180. Brief of the United States at 40-50.

of § 713(b)(1) of title VII.[181] Under that section, an employer who proves good faith reliance upon a written Commission interpretation or opinion establishes a defense that bars recovery under title VII, even if the Commission interpretation is found to be erroneous.[182]

To take advantage of that defense, an employer must undertake a reasonable self-analysis which discloses a reasonable basis for taking reasonable action.[183] A reasonable basis for adopting an affirmative action plan includes an employment practice that "leave[s] uncorrected the effects of prior discrimination."[184] The self-analysis need not, however, establish that the employer undertaking it has discriminated within the meaning of title VII.[185] Reasonable action, including goals and timetables, may therefore be undertaken to correct the effects of past social discrimination "regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced . . . adverse impact or disparate treatment or which perpetuated past discrimination."[186] In addition to protecting employers who voluntarily adopt affirmative action plans pursuant to a self-analysis, the EEOC's guidelines also extend the § 713 reliance defense to plans adopted under Executive Order 11246[187] and those adoped pursuant to EEOC conciliation and settlement agreements.[188]

The *Griggs* adverse impact theory for three reasons suggests imposition of quotas independently of the EEOC enforcement threat. First, a prima facie case of discrimination is established under the theory by proof of racial imbalance.[189] Although the prima facie case may be rebutted by establishing a business justification for the business practices causing the imbalance,[190] the suggestion that liability is not imposed for mere racial imbalance[191] becomes increasingly difficult to maintain as the standard for establishing business justification is raised.[192] As Judge Wisdom noted in dissenting from the Fifth Circuit

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181. *See* 29 C.F.R. § 1608.2 (1979).
182. 42 U.S.C. § 2000e-12(b) (1976).
183. 29 C.F.R. § 1608.4 (1979).
184. *Id.* § 1608.4(b).
185. *Id.* For criticism, see Note, *Title VII and Preferential Treatment: A Response to EEOC Affirmative Action Guidelines*, 67 GEO. L.J. 855, 863 (1979) (arguing that the guidelines are inconsistent with International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977)).
186. 29 C.F.R. § 1608.4(c) (1979).
187. *Id.* § 1608.5.
188. *Id.* § 1608.6.
189. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
190. *See* Dothard v. Rawlinson, 433 U.S. 321, 329 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
191. *Cf.* International Bhd. of Teamsters v. United States, 431 U.S. 338, 339 n.20 (1977) (rejecting the argument in context of disparate treatment case).
192. *See, e.g.*, Fallon, *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Anti-Discrimination*, 60 B.U.L.R. 815, 846-56 (1980); Lerner, *supra* note 136, at 39-44; Rutherglen *supra* at note 48, at 233-34 n.146; Sape, *supra* note 152 at 492;

opinion in *Weber*, the business necessity defense is narrow.[193]

The second reason the *Griggs* theory suggests resort to quotas is one of practical effect. As the business necessity defense becomes more difficult and expensive to establish, the employer is faced with greater incentives to avoid the costs of justification by eliminating the adverse impact that generated the requirement for justification. That elimination may, of course, be accomplished by withdrawing the practice or practices that generate the adverse impact; but it may also be accomplished by the use of racial quotas.[194] The EEOC enforcement strategy suggested by the employee selection and affirmative action guidelines is very nearly an explicit insistence upon quotas: A business justification for a selection practice is nothing short of a business necessity for the practice, as defined by technical validation requirements.[195] The need for justification is avoided by eliminating adverse impact; the use of affirmative action plans containing goals and timetables is both encouraged as a means of avoiding adverse impact and preserved from reverse discrimination attacks by an EEOC generated section 713 defense.

The final reason that the *Griggs* theory suggests resort to quotas is in the Court's conclusion that intentional discrimination is not necessary for liability.[196] One possible use of adverse impact theory would be that of permitting a statistical disparity to serve as evidence of intentional discrimination.[197] The *Griggs* theory, however, defines discrimination in terms of racial imbalance generated by an employer practice

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Wilson, *A Second Look at Griggs v. Duke Power Co.: Ruminations on Job Testing, Discrimination and the Role of the Federal Courts*, 58 VA. L. REV. 844, 873-74 (1972); Comment, *supra* note 162 at 626-27. *But cf.* Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465, 474-75 (1968) (knowledge of adverse impact is equivalent to intent); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 561 (1977) (arguing that disproportionate impact is distinguishable from affirmative action at a constitutional level of analysis because the latter requires an undoing of present effects of past discrimination and the former requires only that government not exacerbate present effects).

The difficulty with the Blumrosen thesis is that it oversimplifies the matter to the point that his conclusion is misleading; one may have a nonracial reason for a practice, discover its adverse racial impact, and nevertheless continue the practice for the nonracial reasons it was initially adopted. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979). It is possible to legitimately conclude that the continuation should be viewed with suspicion or that the continuation should be prophylactically prohibited, but it is not a legitimate conclusion that the discovery, merely by its occurrence, alters the intent.

193. 563 F.2d at 232. *See* Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971). *See generally* K. MCGUINESS, *supra* note 152 at 107-22; Note, *The Employer's Dilemma: Quotas, Reverse Discrimination, and Voluntary Compliance*, 8 LOY CHI. L.J. 369 (1977); Note, *Title VII and Preferential Treatment: The Compliance Dilemma*, 7 TEX. TECH. L. REV. 671 (1976).

194. *See, e.g.*, Wilson, *supra* note 192, at 873-74; Meltzer, *supra* note 77, at 425-34; Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1302 (1971).

195. 29 C.F.R. 1607.3A (1979).

196. 401 U.S.C. § 2000e-5(f) (1976).

197. *See* Rutherglen, *supra* note 48, at 233 n.144.

not intentionally used to exclude racial or other minorities.[198] Since the business necessity defense requires something more than a reasonableness test of the relationship between the employer's practice and the job,[199] the adverse impact theory effectively shifts to the employer the burdens generated by past social discrimination, such as discrimination in education that resulted in fewer minorities completing high school or passing employment screening tests.[200]

It is, of course, true that the EEOC's interpretation of *Griggs* does not automatically generate liability, title VII is enforced by resort to judicial rather than administrative forums. Even if it is assumed, for purposes of argument, that the litigation costs associated with defense against both private and public title VII actions do not deter employer challenges to the EEOC's interpretation of *Griggs*, it is not clear that the employer will find a responsive judicial ear. The Supreme Court initially slavishly followed EEOC guidelines requiring validation of employer selection procedures.[201] Although later Supreme Court cases have given substantially less deference to Commission positions[202] and have undertaken a more sophisticated analysis of the meaning of racial imbalance than suggested by the Court's initial resort to gross population statistics,[203] the lower federal courts have consistently deferred to the EEOC guidelines and emphasized the requirement for establishing the necessity of the business practice in issue.[204]

The *Griggs* definition of discrimination as adverse impact not jus-

198. 401 U.S. at 430.

199. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 232 (5th Cir. 1977) (Wisdom, J., dissenting); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971). *But cf.* Washington v. Davis, 426 U.S. 229, 249-52 (1976) (court employs a reasonableness test in statutory aspect of decision).

200. *See* 401 U.S. at 430-31.

201. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).

202. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979); General Elec. Co. v. Gilbert, 429 U.S. 125, 145-46 (1976); Washington v. Davis, 426 U.S. 229, 250-52 (1976).

203. Hazelwood School Dist. v. United States, 433 U.S. 299, 309-13 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977). *See also* Rutherglen, *supra* note 48, at 233 n.144 (suggesting the Court may be restricting the *Griggs* rationale); McCarthy, *Is a New Standard of Discrimination Emerging? The Changing Judicial Interpretation of State Intent*, 8 J. LAW & EDUC. 315, 323-25 (1979) (same). Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978), casts some further, albeit ambiguous doubt upon continued adherence to *Griggs* because the court there declined to consider an adverse impact theory. *Id.* at 575 n.7. The case may be viewed, however, as implicitly accepting a bottom line balance view of adverse impact. *See id.* at 584-85 (Marshall, J., concurring and dissenting). *See generally* Blumrosen, *The Bottom Line Concept in Equal Employment Opportunity Law*, 12 N.C.L.J. 1 (1980).

204. *See, e.g.*, Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1388-89 (5th Cir. 1978); Watkins v. Scott Paper Co., 530 F.2d 1159, 1181-82 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976); Kaplan v. Theatrical & Stage Employees, 525 F.2d 1354, 1358 (9th Cir. 1975); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 225 n.34 (5th Cir. 1974); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). *But see* Chrisner v. Complete Auto Transit, 25 Fair Employment Prac. Cases 484, 491 (6th Cir. 1981); Burwell v. Eastern Airlines, 633 F.2d 361 (4th Cir. 1980).

tified by business necessity itself imposes what is in effect a duty to remedy the employer's pre-liability period discrimination and the discrimination of others. This is accomplished by eliminating neutral employment practices that have the effect of precluding employment opportunities for persons who lack skills that but for past discrimination and/or the discrimination of others, they would have had. Title VII remedies for victims of *Griggs*-style discrimination are in this sense inherently quotas.[205] It is quite true that neutral qualifications requirements imposed by employers may in fact mask illicit intent and may therefore warrant suspicion.[206] It is equally true that such qualifications may be irrational in the sense that they have no substantial relationship to a job.[207] But the *Griggs* definition of discrimination is overbroad on both counts. Adverse impact in combination with a requirement of strict business necessity encompasses nonsuspicious qualification requirements[208] and imposes a legal duty of scientific rationality broader than title VII's narrow prohibition of the irrational consideration of race.[209] The *Griggs* definition is, in short, sufficiently broad to encompass persons who are the victims of the intentional discrimination of third persons. In a sense the risk of historical racial injustice and the cost of restructuring society in a way which overcomes the effects of that injustice are spread by the employer.

There is nothing new in the suggestion that adverse impact theory requires racial balancing and suggests the use of quotas.[210] The recognition is inherent in both Judge Wisdom's dissenting opinion in *Weber*[211] and Justice Blackmun's concurring opinion in *Weber*[212]: The reason an employer finds itself in an impossible dilemma, where reverse discrimination suits are permitted, is that it can best avoid liability for adverse impact by consciously seeking racial balance in its workforce, an objective achieved by quota hiring or promotion. Those quotas will, in turn, form the basis for reverse discrimination suits brought by white employees or potential employees.[213] The emphasis

205. *See* text & notes 174-206 *infra*.

206. *See* Blumrosen, note 192 *supra*, at 474-75 (1968); note 192 *supra*.

207. Lerner, *supra* note 136, at 22-23. The difficulty, as Lerner points out, *id.* at 18-27, is whether substantial relationship is to be measured by traditional reasonableness standards or by technical validation tests.

208. *See* Washington v. Davis, 426 U.S. 229, 249-51 (1976); Lerner, *supra* note 136, at 18-27.

209. Title VII prohibits discrimination, not irrationality. It is clear that irrationality is evidence of discrimination and it is possible that it is desirable that irrationality be prohibited, Lerner, *supra* note 136, at 23, but the relevant question is what Congress has in fact prohibited. *Weber* clearly indicates (as does *Griggs* and its progeny) that the Supreme Court views the prohibition as directed at imbalance, and that is the fundamental difficulty. *See* notes 136, 192 *supra*.

210. *See* Wilson, *supra* note 192, at 873-74; Meltzer, *supra* note 78, at 425-34.

211. 563 F.2d at 230 (Wisdom, J., dissenting).

212. 443 U.S. at 211 (Blackmun, J., concurring).

213. *See generally*, Note, *Employer's Dilemma, supra* note 193; Note, *Compliance Dilemma, supra* note 193.

in Judge Wisdom's dissent upon the title VII policy in favor of "voluntary compliance" is not accidental: compliance consists of ensuring racial balance.

III. On the Meaning of Voluntariness

In *Weber*, the Supreme Court limited itself to a narrowly defined issue: The lawfulness under title VII of Kaiser's voluntary affirmative action plan. Under the terms of the majority's opinion, neither government action warranting constitutional inquiry nor government action warranting application of section 703j was involved in *Weber*.[214] Absent from the Court's opinion is any reference to either the district court's findings that Kaiser's plan was motivated by a desire to comply with Executive Order 11246 and by fear of title VII liability for imbalance in its craft workforce. Neither does the Court refer to the argument made in the court of appeals that Kaiser's plan was authorized by Executive Order 11246.[215]

The question, given this background, is what meaning may be ascribed to the Court's use of the term voluntary. There appear to be four possibilities. First, the Court's insistence that the Kaiser plan was voluntary may have constituted a mere judicial assumption for purposes of deciding a narrow title VII question because the issue of voluntariness was not raised before the Court.[216] Second, the plan may have been characterized as voluntary because the Court implicitly accepted the OFCCP's definition of voluntariness under the Executive Order: Action by an employer to adopt an affirmative action plan that will comply with general standards of employer conduct articulated by OFCCP is voluntary action; imposition by OFCCP of an OFCCP designed plan is involuntary.[217] Third, the plan may have been viewed as voluntary because an employer's decision to become a government contractor renders its compliance with government imposed contractual terms voluntary. Finally, the Kaiser plan may be viewed as voluntary for a reason the Court found unnecessary to the validity of the plan: An employer's decision to avoid potential title VII liability and litigation and to avoid OFCCP sanctions for discrimination by eliminating the adverse impact of its craft-employee experience requirements is a voluntary decision.

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214. 443 U.S. at 200.

215. 563 F.2d at 226-27.

216. *See* Boyd, *Affirmative Action in Employment—The Weber Decision*, 66 Iowa L. Rev. 1, 41-46 (1980).

217. Brief for United States at 56-63, United Steelworkers v. Weber, 443 U.S. 193 (1979). *See* Edwards, *supra* note 50, at 126-33.

A. *Voluntariness as Judicial Assumption*

All of the parties before the *Weber* Court took the position that the Kaiser-Steelworkers' affirmative action plan had been voluntarily adopted. But there were significant, if somewhat implicit, distinctions in the meanings each party ascribed to voluntariness. Kaiser maintained that the Executive Order required that it undertake affirmative action and that there was no practical means of complying with this obligation other than by voluntarily adopting the plan in issue.[218] Kaiser characterized its plan as a permissible remedial action for identified societal discrimination in crafts,[219] undertaken in an effort to voluntarily comply with the Executive Order and title VII.[220] Kaiser argued that the Executive Order was consistent with title VII.[221]

The United States[222] made two arguments. It initially adopted Judge Wisdom's dissenting opinion that Kaiser was guilty of an arguable violation of title VII and could seek to remedy that arguable violation through voluntary compliance with title VII.[223] It alternatively argued that the OFCCP had pressured Kaiser to adopt the quota plan,[224] that the plan conformed to the Executive Order requirements,[225] and that the Executive Order affirmative action requirements were consistent with title VII.[226] The government's second argument clearly emphasized the role of the OFCCP in formulating the Kaiser plan. Indeed, at one point it suggested that the Court remand the case for further findings on the basis of its representation that the record "does not reveal the full extent of the role played by the OFCC in the development of Kaiser's on-the-job training programs. The OFCC made specific findings and recommendations concerning craft jobs at [the Kaiser plant], but these findings were not put in the record."[227]

Ironically, Weber's position before the Court was that the Kaiser plan, although adopted to avoid government intervention,[228] was vol-

218. Kaiser Pet. for Cert. at 9-10; Kaiser Brief at 4: "In 1973, Kaiser was told by its federal contract compliance agency to eliminate the underutilization of minorities . . . and to assure minority representation in craft jobs at that plant by various means, including the creation of a training program."

219. Kaiser Brief at 11-12, 46-47.

220. *Id.* at 11-12.

221. *Id.* at 34-35, 40-41.

222. The United States and EEOC intervened in the case at the time of the petition for rehearing in the Fifth Circuit. U.S. Petition for Cert. at 8 n.2.

223. *Id.* at 11-13; U.S. Brief at 42-53.

224. U.S. Petition for Cert. at 6-7.

225. U.S. Brief at 70-72.

226. *Id.* at 63-70.

227. U.S. Petition for Cert. at 18. The government argued that if governmental findings of discrimination are necessary to uphold a quota remedy under Justice Powell's *Bakke* opinion, the Kaiser Plan could be upheld, if further findings by the district court were permitted, on the theory that an administrative agency (the OFCC) had made such findings. *Id.*

228. Brief in Opposition to Petition for Cert. at 27.

untary.[229] Weber apparently wished to avoid a conclusion that the government had compelled adoption of the plan because he would then be forced to confront asserted government interests in remedying past discrimination as justification for the plan.[230]

The Steelworkers' position is particularly important because it appears to reflect to a greater degree than the positions of the other parties the resolution adopted by the Court. Although the Steelworkers recognized that the OFCCP had some influence on Kaiser, the union argued that the plan was part of a voluntary private agreement.[231] Moreover, the Steelworkers argued that the government's suggestion for remand constituted an attempt to inject issues not raised by the record and not present in the case—namely, the government's authority to impose quotas and the possibility of a prima facie case of discrimination by Kaiser as a justification for the Kaiser-Steelworkers plan.[232] Indeed, the Steelworkers argued that not only was there no evidentiary justification in the record for Judge Wisdom's arguable violation theory,[233] but that the legislative history of section 703j demonstrates that it prohibits imposed quotas.[234] The Steelworkers' argument for upholding the plan was premised on the interpretation of section 703j adopted by the Court: Section 703j was designed to preserve business freedom and therefore permits voluntary adoption of affirmative action quotas even while prohibiting government imposed quotas.[235] In short, the Steelworkers' argument invited the Court to ignore the asserted but not, as a matter of the record, factually developed role of the OFCCP and to treat the Kaiser-Steelworkers quota plan as a provision of a collective bargaining agreement freely adopted by private parties without reference to the threat of government sanctions. In view of the Court's narrow definition of the issue before it and adoption of the Steelworkers' interpretation of section 703j, *Weber* may be taken at face value as deciding only what the Court purported to decide: Voluntary affirmative action, untainted by government compulsion, is not prohibited by title VII.

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229. *Id.* at 28-29, 30-31: "The evidence shows that Kaiser and USWA were cognizant of OFCC requirements in establishing the racial quota, but devised it voluntarily and without the Government's participation." *Id.*

230. Weber argued that Kaiser had *not* engaged in past discrimination and that the Kaiser-USWA quota was not a remedy because not applied in favor of identified victims of Kaiser discrimination. Brief at 54-78.

231. Petition for Cert. at 3, 11-12.

232. Memorandum in Opposition to Request for Summary Remand at 3, 4-5.

233. Brief at 22; Reply Brief at 12: "Proof that Kaiser has or has not discriminated against blacks belongs in a case where it is contended that one or more black persons are the victims of such discrimination and should therefore be granted remedy. That proof has nothing to do with a quota program not designed in the first place to remedy any such discrimination." *Id.*

234. Brief at 22.

235. *Id.*

B. *Voluntariness as Compliance With Contract Terms*

Although the Court's opinion in *Weber* may be interpreted as leaving undecided the issue of what constitutes a voluntary affirmative action plan for section 703j purposes, the government's reliance upon broad definitions of voluntariness requires examination.[236] The narrow interpretation of *Weber* suggested earlier fails to explain the district court's findings regarding Kaiser's motivations for its plan—findings assumed in the government's argument. Any attempt at circumventing *Weber* through an attack upon the voluntariness of a privately adopted plan must squarely confront the government's position in *Weber*. That position emphasized Kaiser's status as a party to a government contract. The theory of voluntariness takes two distinct but obviously related forms: An identity of the originator of the specific plan argument and a voluntary status argument.

1. *Voluntary Adoption in Compliance With Government Standards Versus Government Imposed Affirmative Action Plans*

The primary voluntariness argument suggested by the government in *Weber* and by post-*Bakke* defenders of the Executive Order program[237] was that the present program administered by OFCCP and applied to Kaiser should be distinguished from earlier programs—particularly as represented by the Philadelphia plan and other area plans applied to construction contractors in the late 1960's. The Philadelphia plan, upheld in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*,[238] imposed specific racial hiring quotas on government contractors engaged in construction in the Philadelphia area.[239] Later affirmative action requirements generated by the Department of Labor and applied to Kaiser[240] did not impose OFCCP developed quotas, but, according to the government's brief in *Weber*, relied "more heavily

236. It has been suggested, Boyd, *supra* note 216, at 44-45, that *Weber* may be viewed as legitimately involving only private conduct under a limited view of the meaning of state action. That suggestion is grounded, however, upon the substantive argument that there is less need to apply constitutional limitations to reverse discrimination than to nonbenign discrimination. *Id.* at 45. That proposition suggests that substantive constitutional values (or, at least, the substantive values of Supreme Court Justices) may legitimately influence the threshhold question of constitutional application. *But see* text & notes 255-311, *infra*.

237. *See* Edwards, *supra* note 51 at 126-33.

238. 442 F.2d 159 (3d Cir. 1971).

239. *Id.* at 163-64. The plan was upheld by the Third Circuit in part on the basis of administrative findings of discrimination in craft unions, a factor not present in *Weber* (except by judicial notice) or in General Order No. 4, 36 Fed. Reg. 23152 (1972), programs. *Compare* Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), *with* 41 C.F.R. § 60.2 *et seq.* (1979). Defenders of General Order No. 4 were concerned, following *Bakke*, that Justice Powell's insistence upon findings in that case would jeopardize the Order. *See* Edwards, *supra* note 50, at 130-33; Larsen, *supra* note 50, at 229-35. *See also* note 229 *supra*.

240. General Order No. 4, 41 C.F.R. § 60-2 (1979).

on self-analysis and *voluntary* compliance."[241]

In short, the government argued that Kaiser's plan was "voluntary" because Kaiser was required only to undertake a self-analysis, to develop its own plan to remedy underutilization discovered in the course of that analysis, and to obtain OFCCP review and approval of that plan.[242] Affirmative action plans, under the government's characterization, are apparently involuntary only if the government undertakes to make its own findings and to impose its own plan upon a contractor.

2. *Voluntariness As A Voluntary Decision To Become A Government Contractor*

Only implicit in the government's brief in *Weber*,[243] but explicitly argued in analogous contexts,[244] is the notion that since no one has a right to a government contract,[245] the government is free to impose terms and conditions in its contracts that it could not mandate independently. In other words, since no one is compelled to do business with the federal government, a contractor's compliance with the affirmative action terms and conditions of its government contract is voluntary.

The voluntary contractor argument is related to the not entirely discredited constitutional argument that government privileges or benefits may be conditioned on the waiver of rights.[246] It is apparent in the present context, however, that the argument must confront the additional question of the authority of the executive branch to impose particular contractual conditions. Assuming such authority, the government must reconcile the Executive Order's affirmative action requirements with the no-quota commands of title VII.

The government's position in *Weber* resolved these issues by means of two arguments related to the voluntary contractor version of voluntariness. First, the government argued that Congress had thought the Executive Order unaffected by title VII at the time of the enactment of title VII in 1964[247] and that Congress had ratified the Executive Order in 1972 by rejecting amendments to title VII that would have precluded the imposition of quotas under the Executive Order.[248] Second, after concluding that Kaiser could adopt its affirmative action plan to

241. Brief of United States at 61 (emphasis added).
242. *Id.* at 61-62.
243. *Id.* at 54-56.
244. AFL-CIO v. Kahn, 618 F.2d 784, 794 (D.C. Cir.) *cert. denied*, 443 U.S. 915 (1979).
245. *Id. See* Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940); United States Brewers Ass'n v. E.P.A., 600 F.2d 974, 984 (D.C. Cir. 1979).
246. *See* text & notes 300-311, *infra*.
247. Brief of United States at 63-64; *see* notes 322-323 *infra*.
248. Brief of United States at 67-69; *see* note 322, *infra*.

remedy an arguable violation of title VII, the government argued that the Executive Order merely conditions "the government's willingness to deal with Kaiser on the adoption of affirmative action measures that Kaiser and the Steelworkers were free to adopt voluntarily whether they wished to do business with the government or not."[249]

It should be noticed initially that the argument advanced by the government does not logically follow. The imposition of affirmative action obligations on contractors by the Executive Order is not premised upon a finding of an arguable violation by the contractor. The condition to voluntary adoption of a quota proposed by the government would therefore not be met by an Executive Order program designed to remedy social (not employer) discrimination. This difficulty is cured, however, if the Court's holding in *Weber* is substituted for the government's arguable violation premise. If an employer is free to voluntarily adopt or not adopt an affirmative action quota, the government, as a contracting party, is free to require such an adoption as a contractual condition because the employer retains its freedom to contract or to not contract with the government.[250]

C. *Voluntariness As Voluntary Elimination of Litigation Risk*

The final potential meaning of voluntariness is one rejected by the Court as necessary to the legitimacy of the Kaiser-Steelworkers plan. That meaning is manifest in the arguable violation theory suggested by Judge Wisdom's dissenting opinion and adopted by the government in its *Weber* brief and by the EEOC in its affirmative action regulations.[251] The view of voluntariness implicit in the arguable violation theory is that an employer's decision to avoid potential title VII *Griggs* theory liability or litigation (and potential OFCCP sanctions for discrimination) by eliminating adverse impact through quota hiring or promotion is a voluntary decision analogous to settlement of a lawsuit.[252]

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249. Brief of United States at 55-56, *citing* 42 OP. ATT'Y. GEN. 405, 409 (1969) (although the government "may not require an employer to engage in practices which Congress has prohibited . . .", it may require contractors to engage in practices Congress has not (in title VII) required of employers generally). The Attorney General's opinion was in response to a contrary opinion of the Comptroller General. *See* 49 COMP. GEN. 59 (1969). For a general history of the development of and dispute over the Executive Order program, *see generally*, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972).

250. The substitution of premises does not, however, obviate the problem of constitutional limitations or the problem of section 703j's application, if any, to executive agency conduct.

251. *See* notes 179-188 *supra*.

252. Brief of United States, United Steelworkers v. Weber, 443 U.S. 193 (1979) at 38-41 (relying on consent decrees as relevant analogy). For examples of such decrees, *see generally, e.g.*, EEOC v. American Tel. & Tel. Co., 419 F. Supp. 1022 (E.D. Pa. 1976), *aff'd*, 556 F.2d 167 (3d Cir. 1977); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1978). The argument is illustrated in an analogous context by United States v. City

Under this version of voluntariness, voluntary adoption of an affirmative action plan pursuant to the Executive Order program could only mean that compliance with the program under threat of sanction is voluntary because the sanctions have not yet been applied in fact.[253] This definition of voluntariness is analogous to a statement that there may be a dispute about the meaning of a contractual provision. Contractual provisions are mandatory in the sense that sanctions follow from authoritative interpretation of the provision. Voluntariness, by that definition, is a function of the clarity of the legal obligation. If there is no disagreement about the meaning of a contractual obligation, it is at least difficult to see how compliance with that obligation is voluntary in any meaningful sense of the term. Even if there is disagreement, the voluntariness label has a very limited function: The contractor accepts an interpretation it does not wish to accept because the alternative is to face a government attempt to obtain authoritative sanctions.

Voluntariness in this context means, then, settlement. Settlement is voluntary only in the sense that an employer has, under threat of sanction, acceded to an administrative conclusion regarding alleged noncompliance with antidiscrimination obligations rather than litigating the question.

IV. VOLUNTARINESS AND POTENTIAL CONSTITUTIONAL AND STATUTORY CHALLENGES TO PRIVATELY ADOPTED AFFIRMATIVE ACTION QUOTAS

Having suggested potential alternative meanings of voluntariness in the *Weber* case, the question remains what relevance these meanings may have to potential theories for attacking privately adopted benign quotas as involuntary. One such theory is that *Weber*-style quotas violate equal protection. That theory rests upon an assumption that a *Weber* quota constitutes government action. The relevance of voluntariness to the assumption is this: Are the alternative meanings of voluntariness discussed above translatable into a conclusion that a contractor such as Kaiser is not engaged in government action?

A second potential theory is that a *Weber* quota violates title VII's antiquota provision, section 703j. Such a statutory theory would suggest that a plan of the type in issue in *Weber* adopted by a government

of Miami, 615 F.2d 1322, 1341 (5th Cir.) (§ 703h), *rehearing granted*, 625 F.2d 1310 (5th Cir. 1980).

253. *See* Caulfield v. Board of Educ. 583 F.2d 605, 614-15 (2d Cir. 1978); Mayor and City Council of Baltimore v. Matheus, 562 F.2d 914, 921 (4th Cir. 1977). *Cf.* 42 U.S.C. § 2000d-1 (1976) (title VI provides for funds termination as an alternative enforcement measure to voluntary compliance). On the question of what such a voluntariness theory means, *see* note 310, *infra*.

contractor is a plan required within the meaning of the statutory prohibition of required quotas; the relevance of voluntariness to that suggestion is that the Supreme Court's conclusion that section 703j permits voluntary racial preference was grounded upon its unexplained characterization of Kaiser's plan as voluntary.[254]

A. *Voluntariness, Government Action, and Unconstitutional Conditions: Raising an Equal Protection Challenge*

The Supreme Court's resolution of the problem of state action has been subjected to considerable scholarly criticism on the basic ground that any attempt at formulating a principled distinction between government and private actors is doomed to failure in a society in which the role of government is pervasive.[255] The distinction first formulated in the *Civil Rights Cases*[256] nevertheless remains firmly embedded in judicial discourse on the question of the application of equal protection or due process limitations: Those limitations apply to government action, not private conduct.[257] The Court's willingness to find state action in particular cases was greatly expanded in the 1940's, 1950's, and 1960's under the influence of the antidiscrimination principle.[258] But expansion of state action has been curtailed by the Burger Court in opinions which, in their attempt at distinguishing earlier cases, make discovering a consistent doctrine difficult at best.[259]

State action doctrine has been subjected to a number of attempts at rational classification.[260] It is useful to briefly borrow from some of these classification schemes for purposes of the present discussion. The schemes postulate five categories of government or potential government action engaged in by private parties sufficient to invoke constitutional guarantees: (1) the public function category, in which a private

254. 443 U.S. at 207.

255. *See generally* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952); Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961); Comment, *The State Action Conundrum Reexamined: A New Approach and Its Application to the Constitutionality of Creditor Self-Help Remedies*, 62 MARQ. L. REV. 414 (1979).

256. 109 U.S. 3, 17 (1883).

257. *E.g.*, Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 399 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972). For an example of the difficult substantive problems involved in (and inextricably linked to) the distinction, see Columbia Broadcasting Sys. Inc. v. Democratic Nat'l Comm. 412 U.S. 94 (1973).

258. *See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Robinson v. Florida, 378 U.S. 153 (1964); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932).

259. *Compare* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) *with* Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952).

260. Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003 (1973); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974).

actor may be said to have undertaken or to have been delegated governmental authority or tasks; (2) the joint or concerted action category, in which it is not possible to separate the conduct of government and private actors; (3) the private action compelled by goverment action category;[261] (4) the private action regulated by government category;[262] and (5) the private action authorized or encouraged by government action category.[263] To these categories may be added a final category encompassing obvious government action: Direct action initiated or carried out by the government. The last four of these categories are of relevance here.[264]

Although commentators have separated the direct government action, compelled private action, regulated private action, and authorized or encouraged private action cases for purposes of analysis, it is apparent that the lines between these categories are artificial. The distinctions between compelled and authorized or between compelled and regulated are more matters of characterization founded upon a judgment concerning degree of government involvement than means of determining results in particular cases. The distinction between direct government action and the remaining categories is more apparent but rests, in fact, upon an identification and classification of defendants. In the direct action cases, there is no dispute over the classification of the defendant as the government; in the remaining categories, the status of the defendant is disputed. Indeed, it has been argued with persuasive force that the difficulty with cases involving private action subject to state regulation is that the focus of judicial inquiry has been upon private action and its link to state regulation rather than upon the constitutionality of the particular state rule, requirement, or regulation itself.[265]

The Supreme Court has nevertheless adhered to an analysis that

261. Burke & Reber, *supra*, note 260 at 1082. *See, e.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970); Robinson v. Florida, 378 U.S. 153, 155-56 (1964); Lombard v. Louisiana, 373 U.S. 267, 273 (1963); Peterson v. City of Greenville, 373 U.S. 244, 248 (1963).

262. Burke & Reber, *supra* note 260, at 1091. *Compare* Public Utils. Comm'n v. Pollak, 343 U.S. 451 (1952) *with* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

263. Burke & Reber, *supra* note 260 at 1096 (arguing that the Court has never accepted a mere authorization and encouragement theory). *But see* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 218 n.12, 226-229 & n.23 (1977); Railway Employees Dep't v. Hanson, 351 U.S. 225, 231-33 (1953). *See also* International Assoc. of Machinists v. Street, 367 U.S. 740, 789 (1960) (Black, J., dissenting).

264. Although an argument might be made on the basis of either of the first two theories, both such theories are sufficiently narrow to make them of doubtful applicability. Moreover, the *Weber* decision's emphasis upon voluntariness suggests that the state action issue is one of government rule and compliance with government rule rather than one of government action in the sense of function or of the conduct of individual government officials.

265. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 176-77 (1978) (Stevens, J., dissenting); McCoy, *Current State Action Theories, The Jackson Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions*, 31 VAND. L. REV. 785, 809 (1978). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1157-61 (1978).

seeks to first identify cases as falling into one or more of the above categories and which then seeks to characterize degree or character of state involvement. The state authorization and encouragement of a private creditor's self-help remedy in *Flagg Brothers, Inc. v. Brooks*[266] was therefore rejected on the basis that mere state acquiescence in private action is insufficient.[267] The state must compel private action to warrant the application of constitutional limitations to that action.[268] In *Moose Lodge No. 107 v. Irvis*,[269] a state's licensing and regulation of liquor dispensing was not significant involvement in the affairs of a private club charged with racial discrimination.[270] The Court concluded that the state's regulation was not intended to overtly or covertly encourage the discrimination.[271] The application of a state regulation requiring the club to adhere to the latter's internal rules, although neutral on its face, was, however, ordered enjoined by the *Moose Lodge* Court.[272] The Court held that the state regulation operated "to invoke the sanctions of the State to enforce a concededly discriminatory private rule."[273]

A potentially viable test of state action in the regulatory context was developed by the Court in *Jackson v. Metropolitan Edison Co.*[274] *Jackson* involved an attempt to impose procedural due process requirements upon a privately owned electrical utility's policy of terminating service for default in payments on the theory that the utility was a heavily regulated and state-granted monopoly.[275] The Court's test for determining the state action question was "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[276] In rejecting the argument that the state utilities commission had authorized and approved the utility's tariff allowing summary termination of service, the Court concluded that a private party's exercise of a state permitted choice "where the initiative comes from [the private entity] and not from the State" and where the State neither overtly nor covertly encourages a challenged practice does not amount to state action.[277]

266. 436 U.S. 149 (1978).
267. *Id.* at 164.
268. *Id.* at 165-66.
269. 407 U.S. 163 (1972).
270. *Id.* at 173.
271. *Id.* at 176-77.
272. *Id.* at 179.
273. *Id.*
274. 419 U.S. 345 (1974).
275. *Id.* at 351.
276. *Id.*
277. *Id.* at 357 & n.17.

Both the Court's result in *Jackson* and its conclusion regarding state regulation requiring private adherence to a discriminatory rule in *Moose Lodge* may be restated in terms of a nexus requirement: If the nexus required by *Jackson* is a substantial connection between the aspect of the private conduct attacked and the state regulation,[278] the mere fact of general regulation by the state is inadequate; the private action must be identified with a specific aspect of the state regulation so that the private action is a reflection of government policy.[279]

In *Jackson*, the state's failure to disapprove was not sufficiently identified with the utility's termination policy.[280] A state action rule permitting application of constitutional limitations to a state's failures to prohibit private conduct cuts too broadly.[281] Moreover, the circumstances suggesting such an application to a government omission—intentional encouragement by the state of particular private conduct[282] or sufficient consideration by the state of proposed private action to warrant a conclusion that intentional encouragement occurred[283]—were absent.[284]

In *Moose Lodge*, state regulation and licensing of liquor dispensing was insufficiently identified with the private entity's discrimination because the general regulatory scheme was not concerned with the private entity's internal practices unrelated to the dispensing of liquor. The state's specific regulation, requiring enforcement of the private entity's internal rules, although neutral on its face, was sufficiently identified with the private discrimination because it applied to internal rules not related to the dispensing of liquor.[285]

Given this background, the problem for present purposes is determining whether the various possible meanings of voluntariness in the

278. *See* McCoy, *supra* note 265, at 817-19.

279. 419 U.S. at 351.

280. *Id.* at 357.

281. *But see* Reitman v. Mulkey, 387 U.S. 369 (1967); Black, *supra* note 255, at 73; Michelman, *supra* note 51, at 674-79.

282. *See, e.g.*, Norwood v. Harrison, 413 U.S. 455, 463-68 (1973); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970); Robinson v. Florida, 378 U.S. 153, 155-56 (1964). *Cf.* Village of Arlington Heights v. Metropolitan Hous. Redev. Corp., 429 U.S. 252, 265-66 (1977) (intent required for equal protection violation); Washington v. Davis, 426 U.S. 229, 239 (1976) (same).

283. *See* Public Utils. Comm'n v. Pollak, 343 U.S. 451, 462 (1952).

284. It is not here suggested that the distinction between action and omission is always clear. It is apparent, for example, that the regulatory authority's failure to prohibit in *Jackson* may be described as an affirmative authorization. There is, nevertheless, a real distinction between a general regulatory scheme not itself concerned with the private actions complained of, and a regulatory scheme that more or less specifically addresses those actions. *Cf.* NAACP v. FPC, 520 F.2d 432 (D.C. Cir. 1975), *aff'd* 425 U.S. 662 (1976) (regulatory agency lacks authority to directly regulate discrimination).

285. *But see* Note, *supra* note 260, at 420 (arguing that *Jackson* cut back on this aspect of *Moose Lodge* because the regulatory authority involved in *Jackson* approved a tariff containing a summary termination of service provision). The Court went to considerable lengths, however, in suggesting that the tariff approval in *Jackson* was not specific approval of the termination provision. 419 U.S. at 354-55.

arguments made to and by the Court in *Weber* are relevant to a government action analysis of privately adopted affirmative action. If it is assumed that the *Weber* Court adopted the Steelworkers' version of the facts—that there was no government participation in formulating the Kaiser plan—the Court's statement that "[s]ince the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Constitution"[286] would seem accurate. If alternative versions of voluntariness are assumed, however, it becomes, at best, difficult to conclude that government action was absent. Under the government's version of the facts in *Weber*, a private employer adopted a race-conscious employment quota to comply with standards of conduct formulated by a government agency for the clear purpose of encouraging such quotas upon pain of the denial of a government benefit.

It may be that such an employer has, by virtue of its freedom to decline government contracts, a government-permitted choice within the meaning of *Jackson*, but the initiative comes from the government and the government overtly encourages the practice. If the conduct of the employer is viewed for purposes of the *Jackson* analogy as regulated by the terms of the government contract in issue, there is a clear and specific nexus between that aspect of the employer's conduct challenged (the adoption of the quota) and the government regulation (the affirmative action clause).

As previously noted,[287] one may view a government contractor's attempt to comply with OFCCP affirmative action requirements as voluntary because the contractor's status as a contracting party is voluntary[288] and is merely approved rather than imposed by OFCCP. The mere fact that a contractor voluntarily complies with government imposed contractual terms does not, however, render that compliance nongovernmental for purposes of government action doctrine. To so conclude would render the government "compulsion, regulation, encouragement" category of government action impotent. A private entity's voluntary submission to government regulation is not the distinguishing factor between those cases in which mere government authorization is held insufficient for government action and those cases in which government compulsion or intentional encouragement is held to constitute government action. Although the distinction between compelled and merely authorized private conduct appears facially similar to the distinction between voluntary and involuntary private con-

286. 443 U.S. at 200.
287. See text & notes 244-250 *supra*.
288. *But see* United States v. New Orleans Pub. Serv. Co., 553 F.2d 459, 469-70 (5th Cir. 1977) *vacated on other grounds*, 436 U.S. 942 (1978).

duct, compulsion and authorization refer to the degree to which the particular conduct of the private entity is identified with government policy, not to the entity's decision to subject itself to general government regulation.[289]

In *Jackson*, the private utility in question was engaged in private action because the state had merely permitted summary termination of services, not because the utility had voluntarily subjected itself to state regulation.[290] In *Moose Lodge*, the state regulation requiring adherence by private clubs to their internal rules could not be enforced with respect to the club's racially discriminatory rule because the state's rule operated to require discrimination by the private club, not because the club was required by the state to dispense liquor.[291]

The remedy in *Moose Lodge*—enjoining application of the state's regulation—highlights the problem common to *Jackson*, *Flagg Brothers*, and *Weber*: The inquiry should be focused upon the validity of the state rule rather than the character of the private conduct undertaken in at least partial response to that rule. In *Flagg Brothers*, the conclusion that the state had merely authorized creditor self-help was, in effect, a determination that the state could do so.[292] In the present context, the real attack is upon the OFCCP's affirmative action program, not upon the government contractor's response to it. Such an attack would be clear if the contractor sought to challenge that program as impermissibly harming its interests.[293] It is no less true, however, in the case of a nonminority employee's or prospective employee's challenge to the program upon an equal protection theory: For the nonminority employee, the contractor is merely the agent of the government's policy. Moreover, the agency characterization is not grounded merely on the conclusion that the contractor is regulated by the terms of the contract, but rather upon the conclusions that the origin of the contrac-

289. The fact that compulsion is indirect (in the sense that burdens are imposed or benefits withdrawn if particular conduct is not undertaken) rather than direct (in the sense of a government command not tied to the grant of a government authorization or benefit) does not alter the characterization that compulsion is present. The government "by its action has significantly interfered with or encumbered the private ordering of relationships by compelling private parties to act in a specified manner." Burke & Reber, *supra* note 260 at 1082, *citing* Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Robinson v. Florida, 378 U.S. 153 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963); Peterson v. Greenville, 373 U.S. 244 (1963).

290. *See* 419 U.S. at 357.

291. *See* 407 U.S. at 178-79.

292. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 176-77 (1978) (Stevens, J., dissenting). *See generally* L. TRIBE, *supra* note 265, at 1157-74; Glennon & Nowak, *A Functional Analysis for the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221.

293. *See* Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 166 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). It might be argued that the contractor has a right not to discriminate. *Cf.* Buchanan v. Warley, 245 U.S. 60, 73 (1917) (white seller of real property may attack ordinance precluding black purchaser from occupancy on ground white asserts own property interest); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (freedom of association).

tor's conduct is governmental and that the form and content of contractor conduct is mandated by a specific governmental command applicable to the contractor once it has achieved contractor status.[294]

To the extent that a private employer's affirmative action plan is privately formulated, it may be argued that there is a risk that it does not accurately reflect compelled government standards. Judge Wisdom's dissenting opinion in *Weber* makes the point: since the OFCCP regulations state that no discrimination is authorized, a private employer's affirmative action plan, although created to comply with those regulations, may not comply with them if it operates to discriminate.[295] Indeed, this argument appears to be the basis for the government's attempt to distinguish between voluntary and involuntary affirmative action on the basis of whether the plan is formulated by the government contractor to comply with OFCCP requirements or is imposed by the OFCCP. One answer to this argument, if it is made to avoid a government action conclusion, is that it elevates form over substance.[296] A second answer is that even if it is assumed by virtue of freedom of contract that the OFCCP affirmative action program is only indirectly compelled by means of economic burdens, indirect compulsion is merely a lesser species of government command.[297] To conclude that indirect government command is insufficient to make attempted private compliance governmental would be to eliminate all branches of governmental action theory except direct attacks on government rules. If it is determined that private conduct in fact violates government command or that private conduct is in fact not required or intentionally encouraged by government command, there is of course no government action; but these scenarios deny the premise. The risk of incongruity between private conduct and government command is a part of the determination that the private conduct was or was not commanded; it is not a reason for concluding that action commanded by government is non-governmental. The notion that an affirmative action plan privately formulated in compliance with government command is voluntary, unlike a plan publicly formulated and imposed, is not therefore a viable basis for concluding that the contractor is not engaged in government action.

The problem presented by the voluntariness theory of contractually imposed affirmative action is not, therefore, one of government ac-

294. 41 C.F.R. § 60-2 (1979).

295. 563 F.2d at 238 & n.24 (Wisden, J., dissenting).

296. *See* text & notes 154-165 *supra*, and note 310 *infra*.

297. *See* note 289 *supra*. *Cf.* Fullilove v. Klutznick, 100 S. Ct. 2768, 2793 n.13 (1980) (Powell, J., concurring) (government may not base conferral of benefit on impermissible grounds).

tion.[298] Rather, it is at most the substantive problem[299] of whether government use of a form of its spending power immunizes, by virtue of the voluntariness of contract, government imposed conditions from constitutional attack. It is not, however, merely this problem, for there is clearly a third party harmed by the conditions under discussion. Even assuming that affirmative action conditions may be imposed upon a contractor and are not, as to the contractor, unconstitutional because voluntarily undertaken, the question remains whether those conditions are unconstitutional as to the contractor's nonminority employees or potential employees. Are the contractor's employees derivatively precluded from arguing that the government's agent, the contractor, has inflicted unconstitutional harm?

The notion that the government may obtain by agreement what it cannot obtain directly—that is, by an exchange of a government privilege or benefit for a waiver of a legally recognized (*e.g.*, constitutional) right[300]—has been substantially limited by the so-called unconstitutional conditions doctrine, at least where specific constitutional guarantees are implicated.[301] But occasional judicial employment of minimal scrutiny[302] in reviewing claims that a governmental agency has encouraged behavior it could not constitutionally compel by granting benefits suggests that the rights-privileges distinction still retains some vitality.[303]

298. It has been argued, apparently on the assumption that equal protection *requires* affirmative action, that a government failure to impose affirmative action obligations on contractors is unconstitutional and that government contractors are, merely because of their status as such, engaged in state action. *See* Galloway, *Administrative and Judicial Nullification of Federal Affirmative Action Law*, 17 SANTA CLARA L. REV. 559, 580-81 (1977); Nash, *Affirmative Action Under Executive Order 11246*, 46 N.Y.U.L. REV. 225, 229 & n.27 (1971); Comment, *Executive Order No. 11246: Presidential Power to Regulate Employment Discrimination*, 43 MO. L. REV. 451, 479 (1978). Although *Jackson* would seem to preclude this conclusion, there is some judicial support for it. *See* Percy v. Brennan, 384 F. Supp. 800, 812 (S.D.N.Y. 1974); James v. Olgilvie, 310 F. Supp. 661 (N.D. Ill. 1970); Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); Todd v. Joint Apprenticeship Comm., 223 F. Supp. 12, 23 (N.D. Ill. 1963). The argument made in the text is distinguishable because it relies on the *Jackson* nexus between contractor affirmative action and a specific government regulation (the affirmative action clause and OFCC regulations), not on the fact of contractor status alone. *See also* Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 WIS. L. REV. 301, 326-29.

299. *See* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 226 (1977).

300. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").

301. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 82-83 (1973); Tinker v. Des Moines School Dist., 393 U.S. 503, 506 & n.2 (1969); Sherbert v. Verner, 374 U.S. 398, 405 (1963); Speiser v. Randall, 357 U.S. 513, 518-19 (1958). *See generally* Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 CAL. L. REV. 443 (1966); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

302. Maher v. Roe, 432 U.S. 464 (1977).

303. *See* United States Civil Serv. Comm'n v. Letter Carriers, 413 U.S. 548, 554-56 (1973); Wyman v. James, 400 U.S. 309, 317-18 (1971).

The rights-privileges dichotomy has nevertheless been substantially eliminated in the context of equal protection;[304] even if distinctions in the granting of government benefits are not subject to strict judicial scrutiny, they must nevertheless not be arbitrary.[305]

From the point of view of a potential government contractor, the government's insistence upon affirmative action quotas does not create the type of classification challenged in *Fullilove*: The contractor is not classified on the basis of race but rather on the basis of its willingness to classify employees or potential employees on the basis of race. A contractor's equal protection challenge to OFCCP requirements must therefore be founded either on the theory that the OFCCP classification impinges upon the employer's claimed independent right not to discriminate[306] or on the theory that the employer may assert the equal protection interests of employees or future employees.[307] The equal protection argument advanced by the contractor's employees or potential employees does not, however, challenge a classification of contractors or potential contractors. The challenge, rather, is to the affirmative action quota adopted by the contractor as a condition to receipt of a government benefit—the contract.

The question at this point is not the validity of the racial classification created by such a quota under an equal protection analysis; rather, it is whether the fact that the government creates a racial classification by means of a contract condition voluntarily undertaken by a contractor, as opposed to a direct command not attached to a granted benefit, precludes an equal protection challenge to the classification. The answer is necessarily that it does not. As an initial matter, the racial classification is, from the point of view of the employees and potential employees, correctly viewed as government action: The contractor is merely the government's conduit or agent.

Secondly, the notion that "no one has a right to a government contract"[308] is not relevant to the constitutional challenge; the constitu-

304. It may, nevertheless, be recast as a negative rights/positive rights distinction. *See* Appleton, *Professor Michelman's Quest for a Constitutional Welfare Right*, 1979 WASH. U.L.Q. 715, 724-29; Appleton, *The Abortion-Funding Cases and Population Control: An Imaginary Lawsuit (and Some Reflections on the Uncertain Limits of Reproductive Privacy)*, 77 MICH. L. REV. 1688, 1713-20 (1979).

305. *See* Maher v. Roe, 432 U.S. 464 (1977). Where the basis for classification is suspect, stricter scrutiny is appropriate. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2793-94 n.13 (1980) (Powell, J., concurring).

306. *See* note 293 *supra*.

307. *See* Morgan, *supra* note 298, at 323 (arguing that a government contractor should have standing to attack a condition that violates the rights of its constituents).

308. AFL-CIO v. Kahn, 618 F.2d 784, 794 (D.C. Cir. 1979), *cert. denied*, 443 U.S. 915 (1979); *see* Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

The *Perkins* holding that a contractor lacks standing to challenge a contractual provision as inconsistent with statute has been substantially eroded. Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 866 (D.C. Cir. 1970); *see* Association of Data Processing Serv. Organizations v. Camp,

tional provision in question does not depend for its operation upon a right-privilege distinction[309] and is therefore not dependent upon a mandatory-nonmandatory distinction. The equal protection question is not whether the government may be compelled to accept a contract. At the contractor's level, the issue is the basis upon which the government exercises its freedom of contract. At the level of the contractor's employees, the issue is the legitimacy of the basis for employment decisions when that basis is the product of a government policy directly linked to it.

The argument that, following *Weber*, because an employer is free to voluntarily adopt affirmative action quotas the government is free to require such an adoption by contract,[310] ignores the fundamental problem that the government is not merely a contracting party; it is the government. As such, it is subject to constitutional (and, perhaps, statutory) constraints not applicable to private contracting parties. But even assuming that contractual waiver is a viable theory, the argument ignores who is said to have voluntarily waived the right. Certainly the government contractor's employees and prospective employees have not waived, in any meaningful sense, their arguable right to employment decisions untainted by consideration of race where those decisions are linked to specific government participation in formulating employment standards. It is arguably true that the employees participate at a secondary level in the government benefit conferred by a contract, but only the employer contracted with the government. It is also arguably true that the contractor's employees voluntarily undertook the status of employee. But to suggest that such a voluntary status involves a waiver of an arguable right to race-free employment decisions (again assuming a specific government nexus) is to deny the existence of the right as a substantive matter even in cases of direct federal employment.[311]

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397 U.S. 150, 153-54 (1970). With respect to the question of nonminority employee standing, *cf.* Lodge 1858, American Fed'n of Gov't Employees v. Paine, 436 F.2d 882, 892-93 (D.C. Cir. 1970) (federal employees have standing to contest NASA contracting out decision where specific statute governing NASA placed employees within zone of interest protected).

309. *See* notes 304-305 *supra*.

310. *See* Brief of the United States at 55-56; text & note 249 *supra*. A somewhat related argument is that compliance with the executive order is voluntary if no sanction has yet been applied. *See* text & note 253 *supra*. Voluntariness under this argument apparently means compliance with a command. If there is any meaning to the argument, it would seem to be one of ripeness. *But see* Abbot Laboratories v. Gardner, 387 U.S. 136, 152-56 (1967) (rejecting such a view of ripeness).

311. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2792-93 n.13 (1980) (Powell, J., concurring). *But see* NAACP v. Allen, 493 F.2d 614, 618 (5th Cir. 1974); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1337 (2d Cir. 1973).

1. *Voluntariness, The Statutory Challenge, and Title VII's Application to the Executive Order*

Section 703j, title VII's antiquota provision provides:

> Nothing contained in [Title VII] shall be interpreted to *require* any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.[312]

There are four aspects of the cases interpreting this provision of preliminary importance here. First, although section 703j theoretically does not permit a finding of discrimination solely on the basis of racial imbalance in a workforce, neither does it preclude consideration of racial imbalance as evidence of discrimination.[313] Second, section 703j has been repeatedly interpreted by the lower federal courts not to preclude court ordered quota relief as a remedy for discrimination found by a court.[314] Third, section 703j purports by its terms to limit title VII; it does not refer specifically to other statutes prohibiting discrimination or to the Executive Order. Fourth, the Supreme Court in *Weber* interpreted section 703j as directed only to a congressional fear that title VII "would be interpreted to *require* employers with racially imbalanced workforces to grant preferential treatment to racial minorities in order to integrate."[315] The section therefore bars compulsory racial balancing of a workforce but permits racial balancing voluntarily undertaken.[316]

The premise underlying the Court's conclusion in *Weber* that "Congress did not intend to limit traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action,"[317] is that Congress did intend to prohibit "undue Federal government interference with private businesses" solely on the basis of racial

312. 42 U.S.C. § 2000e-2j (1976) (emphasis added).

313. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299, 307 (1977); Griggs v. Duke Power Co., 401 U.S. 424, 432-36 (1971).

314. *See generally Note, supra* note 63. The courts have adopted either of two theories to support this result. One theory is that the antiquota provision merely helps to define the discrimination prohibited by title VII and therefore has no effect on remedies. United States v. Elevator Constructors Local 5, 538 F.2d 1012, 1019 (3d Cir. 1976). The other theory is that if the provision limits remedial authority, a judicially ordered quota remedies discrimination, not workforce imbalance. Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 631 (2d Cir. 1974).

315. 443 U.S. at 205 (emphasis in original).

316. *Id.* at 207.

317. *Id.*

imbalance.[318] If that was the congressional intent, the section 703j prohibition speaks to the federal government as Justice Rehnquist suggested in dissent in *Weber*.[319] The difficulties are to whom in the federal government, on behalf of what class of persons, and against what practices section 703j speaks.

Regarding the first difficulty, the obvious argument, derived from the text of the antiquota provision itself, is that section 703j is a limitation only upon the EEOC and the courts.[320] In general, courts have treated the Executive Order as independent of and not limited by title VII, primarily on the theory that affirmative action quotas employed under the Executive Order are remedies for past (social) discrimination.[321] As previously noted, the remedy theory is (given the traditional understanding that a remedy requires compensation for harm caused by the party required to provide compensation) a fiction distinguishable from court ordered quotas, at least in the sense that the latter may be characterized as prophylactic remedies for "found" discrimination.[322] The remedy argument has nevertheless been bolstered by the argument that the Congress, in rejecting amendments to title VII which would have prevented Executive Order affirmative action quotas,[323] ratified the Executive Order program.[324] More recently, however, some courts have concluded that the Executive Order cannot make unlawful what title VII immunizes from liability[325] and cannot permit what title VII prohibits.[326]

The primary argument underlying an application of title VII limi-

318. *Id.* at 206.

319. *Id.* at 246 (Rehnquist, J., dissenting).

320. Contractors' Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

321. *Id. See also, e.g.*, EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 175 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 467 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978). For a general outline of theories supporting the executive order see Chrysler Corp. v. Brown, 441 U.S. 281, 304-06 nn.33-37 (1979).

322. *See, e.g.*, EEOC v. Local 638, 532 F.2d 821, 830 (2d Cir. 1976); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 630-32 (2d Cir. 1974).

323. *See* 118 CONG. REC. 1662, 1676, 4917-18 (1972) (Senator Ervin sought the amendments). It has also been argued that Congress implicitly recognized executive order affirmative action in 1964 by limiting § 703j to title VII. Contractor's Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The executive order program did not, however, contemplate affirmative action quotas in 1964. 49 COMP. GEN. 59, 70-71 (1969). *See* Comment, *supra* note 249, at 734.

324. *See, e.g.*, Legal Aid Soc'y v. Brennan, 608 F.2d 1319, 1329-30 n.13 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 177 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. New Orleans Pub. Serv. Co., 553 F.2d 459, 467 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978). *See generally* Note, *Executive Order 11246 and Reverse Discrimination Challenges: Presidential Authority to Require Affirmative Action*, 54 N.Y.U.L. REV. 376 (1979); Comment, *supra* note 249.

325. United States v. East Tex. Motor Freight Sys. 564 F.2d 179, 185 (5th Cir. 1977).

326. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 227 (5th Cir. 1977), *rev'd on other grounds sub nom.*, United Steelworkers v. Weber, 443 U.S. 193 (1979). *Cf.* Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471, 473 (4th Cir. 1978) (42 U.S.C. § 1981 interpreted to conform to title VII).

tations to the Executive Order is that the President may not act "contrary to the express or implied will of Congress"[327] in an area in which Congress constitutionally has primary jurisdiction. The counterargument is that the Executive Order is not an action contrary to the will of Congress both because Congress has ratified the Order by declining to invalidate it when the opportunity arose and because it applies only in the context of federal procurement and, therefore, operates in an area independent of and not inconsistent with title VII.[328] It is submitted, however, that there is in fact inconsistency between the Order and the statute. Initially, it is at least a questionable, although certainly not unknown, practice to rely upon a congressional failure to act in interpreting legislation.[329] It is more difficult to enact legislation than to defeat its enactment. Subsequent defeat of an amendment to an existing statute indicates nothing at all about the intent of the Congress that initially enacted that statute.[330] It tells us only that a subsequent

327. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring):

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers *minus any constitutional powers of Congress over the matter*. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38 (emphasis added).

328. *See* Note, *supra* note 324, at 391.

329. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977) (rejecting contention that 1972 Congress approved judicial interpretation of § 703h of title VII overturned in *Teamsters*); Zuber v. Allen, 396 U.S. 168, 185 (1969); Girouard v. United States, 328 U.S. 61, 69 (1946). *Cf.* TVA v. Hill, 437 U.S. 153, 190 (1978) (acquiescence of congressional committee in administrative view insufficient to alter plain meaning of earlier statute). *But see* Runyon v. McCrary, 427 U.S. 160, 174-75 (1976); United States v. International Union of Elevator Constructors, Local 5, 538 F.2d 1012, 1019-20 (3d Cir. 1976). Although subsequent legislation may be considered in interpreting an Act of Congress, Albemarle Paper Co. v. Moody, 422 U.S. 404, 414 n.8 (1975), the 1972 legislation did not expressly reach section 703j.

330. Meltzer, *supra* note 77, at 436-37. *Cf.* Lesnick, *Job Security and Secondary Boycotts*, 113 U. PA. L. REV. 1000, 1014-15 (1965) (status quo of earlier legislation is controlling unless legislators' beliefs have "translated themselves into action", *quoting* O.W. HOLMES, JR., SPEECHES 101 (1913)). A fundamental difficulty with the ratification argument is suggested by the constitutional arguments associated with the so-called legislative veto. *See* L. TRIBE, *supra* note 265, at 161-63 (1978) (legislative veto scheme as altering constitutional allocation of government power). The further difficulty in the present context is that the Congress has not, by its own action, granted authority subject to its veto. The ratification theory, rather, is that the executive's unilateral conduct is permissible because the Congress declined to prohibit it. EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); United States v. New Orleans Pub. Serv. Co. 553 F.2d 459 (5th Cir. 1977, *vacated another grounds*, 436 U.S. 94 (1978).

In addition to the defeat of the Ervin amendments, note 245, *supra*, proposals to consolidate Executive Order and title VII enforcement in the EEOC—thus arguably subjecting executive order enforcement to section 703—were defeated. *See*, Brody, *Congress, The President and Federal Equal Employment Policymaking: A Problem of Separation of Powers*, 60 B.U.L. REV. 239, 297-304 (1980); Comment, *supra* note 249, at 753-57. Brody suggests that the legislative history indicates that the reasons for the defeat had little to do with the question of racial balancing. Brody, *supra* at 299-300.

It has been argued that, since the defeat of Senator Ervin's last attempt at precluding racial balancing occurred only in the Senate, the two-house prerequisite for implied delegation is missing. *See* Brody, *supra* at 301; Meltzer, *supra* note 77, at 436. The fact of the matter is, however,

Congress, because the necessary coalition could not be constructed, was unwilling to enact into positive law the amendment, not that the subsequent Congress wished to enact into positive law the policy or interpretation attacked by the defeated amendment. There is a doctrine of implied delegation,[331] but that doctrine is laden with the danger that a process falling short of legislative decision will nevertheless establish important national policy. The doctrine is, therefore, invoked sparingly and is limited both by the impact adherence to it would have upon prior congressional enactments[332] and by the importance of the subject matter and its constitutional implications.[333] As will be argued later,[334] the constitutional uneasiness with which racial quotas are viewed justifies a demand that they be expressly and deliberately adopted by an institution capable of making a policy decision of this magnitude. An instance of inability to form a political coalition sufficient to amend title VII is not the sort of express and deliberate enactment required.

The argument that the Executive Order is lawful because it operates in an area independent of title VII is weak because it is not apparent that title VII and the Executive Order affect distinct subject matter. Title VII clearly applies to employers who become government contractors.[335] Labeling the Executive Order's focus a distinct subject matter because it relates only to federal procurement elevates form over substance.[336] Moreover, a determination that an executive action is

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that a similar proposal was considered in the House of Representatives. 117 CONG. REC. 31,984 (1971). The ambiguity of the House proposal, Brody, *supra* at 300 n.265, and a potential distinction between congressional approval of an "alternative scheme of remedies" and congressional approval of an "alternative scheme of employment rights", *id.* at 301, are not, however, persuasive reasons for concluding that the fundamental notion represented by the defeated legislation—limiting OFCCP authority regarding racial balancing—was not considered by the full Congress. The ambiguity and the distinction do persuasively indicate that congressional intent in defeating the proposals was unclear; it is precisely in the absence of clarity that the fundamental difficulty with the ratification theory again appears: Congressional inaction is inherently ambiguous because the relative ease with which inaction is accomplished leaves us with a poor guide to identifying legislative policy. Moreover, the values underlying some degree of insistence upon explicit and affirmative congressional policymaking—most notably, the liberty preserved by such an insistence and the limitation upon judicial discretion inherent in it—are threatened by a doctrine of implied delegation or ratification in ways analagous to those which have invoked such doctrines as unconstitutional vagueness. *See* L. TRIBE, *supra* note 265 at 1145-46 (1978).

331. *See* Zemel v. Rusk, 381 U.S. 1, 12 (1965); United States v. Midwest Piping Oil Co., 236 U.S. 459, 474 (1915). The doctrine, essentially, is that congressional acquiescence in administrative policy over time, particularly where Congress had an opportunity to overturn the practice but failed to do so, implies congressional approval of the policy.

332. *See* SEC v. Sloan, 436 U.S. 103, 121-22 (1978); International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977); Brody, *supra* note 330, at 297-99.

333. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2811-12 (1980) (Stevens, J., dissenting); Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976); Greene v. McElroy, 360 U.S. 474, 506-08 (1959).

334. *See* text & notes 561-583 *infra*.

335. *See* United States v. East Tex. Motor Freight Sys. Inc., 564 F.2d 179, 182-86 (1977).

336. *See* Comment, *supra* note 249, at 732-39 (arguing that the 1964 Congress intended to create a comprehensive scheme which precludes executive action inconsistent with that scheme).

consistent or inconsistent with legislation touching upon the same subject matter requires an examination of the underlying policies of the legislation.[337] In the case of title VII, there are two factors indicating a congressional rejection of affirmative action quotas. First, section 703j expressly purports to preclude government compelled racial balancing, at least in the absence of findings of discrimination on the part of a defendant.[338] Second, there is the congressional judgment that title VII would not remedy discrimination that occurred either before enactment or prior to the 180-day period preceding the filing of an administrative complaint.[339] In the Supreme Court's view, preact and prefiling period discrimination is lawful.[340] It is, however, in the very nature of the justification for affirmative action preferences to seek to remedy past discrimination.[341]

Nevertheless, there is reason to suppose that *Weber* modifies this analysis. The potential inconsistency generally relied on or rejected prior to *Weber* was that between the prohibitions of both minority and nonminority[342] discrimination in title VII[343] and benign employment quotas.[344] *Weber* held that those prohibitions were not inconsistent with the quota adopted by Kaiser because Congress did not intend to preclude efforts to generate increased employment opportunities for blacks by prohibiting discrimination.[345] After *Weber*, the argument for inconsistency must rely solely upon the title VII policy, express in sec-

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See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring):

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.

337. United States v. East Tex. Motor Freight, 564 F.2d 179, 185 (5th Cir. 1977).

338. *See* United States v. International Union of Elevator Constructors Local 5, 538 F.2d 1012, 1018-19 (3d Cir. 1976). *Cf.* EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-78 (3d Cir. 1977) (§ 706g), *cert. denied*, 438 U.S. 915 (1978).

339. 42 U.S.C. § 2000e-5(e) (1976).

340. United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 348 n.30 (1977). The Court's refinements regarding the quality of statistical proof of discrimination also reflect this emphasis. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308-13 (1977).

341. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2772 (1980); United Steelworkers v. Weber, 443 U.S. 193, 215 (1979).

342. McDonald v. Santa Fe Trail Transport. Co., 427 U.S. 273 (1976).

343. Sections 703a-d, 42 U.S.C. § 200e-2(a)-(d) (1976).

344. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 224-25 (5th Cir. 1977), *rev'd sub. nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979). *But see* Contractors Ass'n of E. Pa. V. Secretary of Labor, 442 F.2d 159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971) (also rejecting a section 703j argument).

345. 443 U.S. at 203-04.

tion 703j and implicit in the limitations periods, against compelled remedies for past social discrimination.

Section 703j may be viewed either as a definitional clarification of the conduct prohibited by title VII (mere racial imbalance is not discrimination) or as a limitation upon government conduct (racial balance as such may not be compelled). The distinction is more than one of form if it is accepted that, by enacting title VII, Congress occupied the field to a degree requiring executive action to conform to congressional policy.[346] If the section merely defines the conduct prohibited, it is directed to the courts; they may not predicate a finding of liability solely upon imbalance. On the other hand, if the section was intended as a limitation upon government, its impact is broader, for it then potentially reaches government efforts to compel racial balance independently of a finding of discrimination. Thus, it is potentially a congressional conclusion that racial balance in a workforce is not an appropriate subject of government concern. The *Weber* rationale supports the latter interpretation because it predicates the validity of voluntary private affirmative action upon the congressional judgment expressed in section 703j that business freedom is to be preserved.[347]

The Court's interpretation of section 703j, however, raises additional difficulties. First, the Court's business freedom rationale suggests that the class of persons protected by section 703j is employers, not nonminority employees. That suggestion is reinforced by the Court's rejection of the contention that title VII's prohibitions against discrimination do not protect white employees from the effects of a benign quota adopted, in the exercise of business discretion, by their em-

346. Which of Justice Jackson's *Youngstown* categories is applicable here is dependent upon the appropriate characterization of the congressional scheme. If one views section 703j as merely a provision defining the meaning of the § 703 prohibitions (§ 703a-d), it is arguably limited to title VII. It should be noted, however, that title VII may itself be viewed as occupying the discrimination field. *See* Comment, *supra* note 249, at 735-39. *But cf.* Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 (1974) (title VII does not preclude other remedies). If, however, one views section 703j as expressing a general congressional policy against racial balancing, the executive order constitutes an intrusion into a field Congress has occupied by means of a comprehensive scheme. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring); *id.* at 609 (Frankfurter, J., concurring); Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471 (4th Cir. 1978). Consumers Union v. Kissinger, 506 F.2d 136, 143 (D.C. Cir. 1974) (dicta), *cert. denied*, 421 U.S. 1004 (1975); Brody, *Policymaking, supra* note 330, at 286-90.

347. Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible." H.R. REP. No. 914, 88th Cong. 1st Sess. 29 (1963) *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391. Section 703j was proposed by Senator Dirksen to allay any fears that the Act might be interpreted in such a way as to upset this compromise. The section was designed to prevent § 703 of title VII from being interpreted in such a way as to lead to undue "Federal Government interference with private businesses because of some Federal employee's ideas about racial balance or imbalance." 110 CONG. REC., at 14314 (remarks of Sen. Miller). United Steelworkers v. Weber, 443 U.S. 193, 206 (1979). *See* Note, *Preferential Relief, supra* note 63 at 729 n.224.

ployer.[348] Second, if it is assumed that OFCCP affirmative action obligations constitute, as to the employer, a requirement inconsistent both with section 703j and with title VII's general policy that racial balance is not a proper concern of government, nonminority employees are not in a position to challenge their employer as a government agent: The relevant (statutory) prohibition is not a limitation upon government conduct *with respect to the employees*. There arises, then, a significant problem of standing.[349]

Assuming an incentive to do so,[350] employers remain free to challenge their affirmative action obligations. However, such a challenge would again raise the problem of voluntary status. The closest analogous case is *AFL-CIO v. Kahn*.[351] There, the District of Columbia Circuit concluded that wage and price guidelines imposed on government contractors by executive order did not contravene section 3(b) of the Council on Wage and Price Stability Act barring mandatory wage and price controls.[352] The court reached this conclusion despite a government policy letter issued pursuant to the executive order requiring federal contractor compliance with that order on penalty of termination of government contracts.[353]

The district court had concluded, on the basis of an assumption that the Stability Act precluded mandatory controls, that the use of the procurement process to effect wage and price controls violated the Act.[354] The circuit court's reversal was predicated on a two-pronged attack upon the district court's mandatory characterization. First, by analogy to cases upholding federal conditional grants of aid to states against tenth amendment attacks,[355] the use of conditions in a federal contract is a "denial of a benefit" which, although it "may be viewed in some senses as a sanction," does not reflect "those elements of coercion and enforceable legal duty that are commonly understood to be part of

348. 443 U.S. at 205-07.

349. *See* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153-54 (1970) (standing question is whether interest sought to be protected is within zone of interests protected by statute in question). Weber's standing was presumably predicated on § 703a-d, the title VII prohibitions, not section 703j. *See* McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273, 278-79 (1976).

350. *Cf.* United States v. City of Miami, 614 F.2d 1322, 1341 (5th Cir.) (employer, by settlement agreement, may waive § 703h), *rehearing granted*, 625 F.2d 1310 (5th Cir. 1980). *But see* text & notes 387-389 *infra*.

351. 618 F.2d 784 (D.C. Cir. 1979).

352. 12 U.S.C. § 1904 (1976) ("Nothing in this Act . . . authorizes the continuation, imposition, or reimposition of any mandatory economic controls with respect to prices, rents, wages, salaries, corporate dividends, or any similar transfers").

353. 44 Fed. Reg. 1229 (1979).

354. AFL-CIO v. Kahn, 472 F. Supp. 88, 101-02 (D.D.C. 1979), *rev'd*, 618 F.2d 784 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

355. *See, e.g.*, Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Oklahoma v. United States Civil Serv. Comm'n, 330 U.S. 127 (1947); City of New York v. Richardson, 473 F.2d 923 (2d Cir. 1973), *cert. denied*, 412 U.S. 950 (1973).

any legally mandatory requirement."[356] Moreover, "any alleged mandatory character of the procurement program is belied by the principle that no one has a right to a Government contract."[357] Second, recognizing that the issue before it was "not whether in some abstract sense President Carter's program is mandatory or voluntary," but

356. 618 F.2d at 794.

357. *Id., citing* Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940). *See also* United States Brewers Ass'n, Inc. v. EPA, 600 F.2d 974, 984 (D.C. Cir. 1979). The court's reliance on *Perkins* would not preclude a constitutional challenge to Executive Order 11246. To whatever extent *Perkins* remains viable, *see* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 866 (D.C. Cir. 1970), it does not preclude an argument that the government's agent has acted unconstitutionally, and it is at least doubtful that it precludes, solely on a voluntariness theory, a contractor's challenge to the constitutionality of contractual conditions. *See* text & notes 275-311 *supra*.

With respect to the philosophical question of the meaning of voluntariness, *see* NOZICK, "COERCION," PHILOSOPHY, SCIENCE AND METHOD 440-47 (1969). Nozick argues that the distinction between voluntary acceptance of an offer (even when the offer is conditional) and coerced acceptance of an offer, is a matter of the consequences to the party in a position to accept the offer: if a declination of the offer would leave that party's pre-offer condition unchanged, the offer is noncoercive; if declination would result in a detrimental change in that party's pre-offer condition, the offer is coercive. *Id.* at 447-49. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS, § 317 (Tent. Draft No. 12, 1977) (duress is a function of whether reasonable alternative courses of action exist).

It may be argued that government contracts conditioned upon affirmative action are noncoercive within the meaning of Nozick's theory, but such an argument fails in the present context for three reasons. First, it is not, under the earlier analysis presented here, true that coercion is a necessary condition to a constitutional challenge to the Executive Order program. *See* text accompanying notes 299-312, *supra*. Coercion is unnecessary because the government and a private entity may not voluntarily agree to jointly invade the (at least arguably) constitutionally protected interest of another, and because under the interpretation of *Jackson* suggested here, it is sufficient for state action that governmental encouragement of private conduct is relatively specific in identifying what that conduct should be. Moreover, the values preserved by equal protection limitations upon government conduct are less matters of the coercive character of the conduct than of its rationality. *See* text accompanying notes 309-311, *supra*.

Second, it is very difficult to identify an appropriate "status quo ante" for purposes of Nozick's approach. *But see* NOZICK at 450-51. The point is illustrated by defense contractors: it is at least arguable that the very existence of that industry is a product of government procurement policy. If that argument is assumed, how does one define the pre-offer condition of the contractor other than in terms of a detrimental change in that condition as an alternative to continued acceptance of government offers? The private sector's reliance upon the federal government as a customer might be so pervasive that waiver of claims to participation in the federal procurement process is itself an unreasonable alternative. *See* Morgan, *supra* note 298, at 305.

Finally, Nozick's analysis is useful in the context of non-government contracting and tenth amendment analysis because the concern with duress in both contexts is one of preserving the autonomy of competing entities. The problem in the tenth amendment context is that of preserving the separate sovereignty of the states vis á vis the federal government, *see National League of Cities v. Usery*, 426 U.S. 833 (1976). The problem in the private contracting context is one of preserving individual freedom of contract.

The concern in the present context is that of limiting the character and purposes of a federal *exercise* of power. Constitutionally, the concern is insuring that governmental conduct is a legitimate means of achieving legitimate ends. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2775 (1980). For purposes of those concerns, the voluntary or involuntary character of the government-contractor relationship is, at least with respect to third parties directly affected by it, irrelevant. Statutorily, the concern is one of the preservation of relative power, expressed more in the sense of separation of powers than federalism. The means (financial inducement or direct executive command) the executive utilizes are not relevant if the executive's policy conflicts with congressional policy on a matter over which Congress clearly has, if not the only or the initial, at least the last word; a concern with separation of powers preserves the constitutional value of allocation of function, not individual liberty or right vis á vis the government as a whole. *See* Contractor's Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 166-67 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

whether it was barred by the particular statute,[358] the court argued that the Executive Order price guidelines were not the sort of mandatory controls banned by section 3(b) of the Act. Since section 3(b) states that nothing in that Act authorizes mandatory controls, the provision does not preclude an exercise of presidential power under independent legislation.[359]

Although the *Kahn* court's discussion of the meanings of "mandatory" and "voluntary" is only dictum, it obviously parallels arguments in favor of upholding the Executive Order 11246 program in the face of section 703j.[360] There are two difficulties with the *Kahn* analysis. First, as the court itself recognized, the issue in a case challenging presidential action as inconsistent with congressional action is the meaning of the particular congressional action in question.[361] The arguments in favor of a conclusion that section 703j precludes imposition of affirmative action quotas by the executive have been suggested earlier.[362] Second, the voluntariness of a private decision to contract with the government is irrelevant to a challenge to a contractual term or condition as inconsistent with enacted congressional policy. Although it may be true that "no one has a right to a government contract," the meaning of that statement is not immediately apparent. It once meant that no contractor had standing to challenge a term or condition,[363] but that conclusion has been steadily eroded.[364] It may mean, as it meant in *Kahn*, that the merits of a particular challenge to a contractual provision are resolved against a contractor.[365] It cannot mean, however, that congressionally mandated policy, at least if a contractor is within the class benefited by that action,[366] may be waived by the

358. 618 F.2d at 794.

359. The court relied upon the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 486a (1976), as a delegation of authority. The provision is also relied on as authority for the insertion of antidiscrimination and affirmative action provisions in federal contracts. Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 170 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

On the question of whether Congress has unconstitutionally delegated legislative authority to the executive under broad readings of that delegation, *see* AFL-CIO v. Kahn, 618 F.2d 794, 797-815 (D.C. Cir.), (MacKinnon, J., dissenting), *cert. denied*, 433 U.S. 915 (1979). *See generally* Morgan *supra* note 298; Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

360. *See* text & notes 320-326 *supra*.

361. 618 F.2d at 794.

362. *See* text & notes 320-340 *supra*.

363. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

364. *See* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 866 (D.C. Cir. 1970). *See also* Association of Data Processing Serv. Organizations v. Camp, 397 U.S. 150, 153-57 (1970); Lodge 1858, American Fed'n of Gov't Employees v. Paine, 436 F.2d 882, 887-93 (D.C. Cir. 1970).

365. *See* United States Brewers Ass'n Inc. v. EPA, 600 F.2d 974, 984 (D.C. Cir. 1979). *But see* Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 166-67 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). In the Brewer case, the "no one has a right to a government contract" rationale is makeweight. The real conclusion is that congressional policy is not offended by executive action in the particular case. 600 F.2d at 984.

366. *See* AFGE Local 1668 v. Dunn, 561 F.2d 1312 (9th Cir. 1977).

agreement of the executive and a private party. To permit such a waiver is to effectively preclude any challenge to executive action as inconsistent with congressional action.[367]

V. VOLUNTARINESS AS "SETTLEMENT": A SUGGESTED INTERPRETATION OF WEBER

Judge Wisdom's dissent from the Fifth Circuit's resolution of *Weber* postulates what is basically a settlement theory of voluntariness: Given an employer's "arguable violation" of title VII, the employer

367. For criticism of the notion that the sanction of a loss of government contracts, given the pervasive impact of government procurement on the economy, does not render contractual provisions involuntary, *see* AFL-CIO v. Kahn, 618 F.2d 784, 816-17 (D.C. Cir.) (Robb, J., dissenting), *cert. denied*, 433 U.S. 915 (1979); *id.* at 809 (MacKinnon, J., dissenting); Morgan, *supra* note 298, at 305.

It is possible to argue that affirmative action quotas also run afoul of the title VI prohibition of discrimination in programs receiving federal financial assistance. 42 U.S.C. § 2000d (1976). The argument is made in Comment, *supra* note 249, at 743-47, but the Comment concludes that Congress "ratified" the executive order in rejecting the Ervin amendments to title VII in 1972. *Id.* at 753-58.

A title VI challenge to the Philadelphia Plan version of federal procurement affirmative action quotas was rejected in Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 173 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), in part on the basis that 42 U.S.C. § 2000d-3 (1976) (stating that title VI does not authorize agency action with respect to employment) does not preclude affirmative action quotas as a matter of procurement policy independent of title VI. 442 F.2d at 173 n.48.

The impact of Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), on this issue is unclear. One must, of course, first conclude that an affirmative action quota that harms the nonminority employees or potential employees of a government contractor constitutes discrimination within the meaning of the prohibition against discrimination in title VI. In *Bakke*, four Justices concluded that title VI prohibited the admissions quota attacked in that case on the theory that title VI adopts a colorblind version of the antidiscrimination principle. 438 U.S. at 416 (Stevens, J., concurring & dissenting). Five justices concluded that title VI and the equal protection clause of the fourteenth amendment contain identical standards. *Id.* at 287; *id.* at 328 (Brennan, J., concurring & dissenting). *But see* Lau v. Nichols, 414 U.S. 563, 566-67 (1974); Guadalupe Organization, Inc. v. Tempe Elementary School, 587 F.2d 1022, 1026-30 (9th Cir. 1978). Four of these five justices would have permitted the admissions quota in issue in *Bakke*. 438 U.S. at 324-79. Justice Powell, the fifth of the justices finding title VI and equal protection clause equivalency, would interpret title VI to permit some consideration of race in the school admissions context. *Id.* at 312-19. Assuming that Justice Powell would not characterize the OFCCP as an administrative agency properly delegated decisionmaking authority in this context, *see* text & notes 503-517 *infra*, five Justices would arguably find that title VI precludes affirmative action quotas in government contracting. 438 U.S. at 408-421 (Stevens, J., concurring & dissenting). (It is also possible, however, that the Stevens group in *Bakke* would consider itself bound by the "majority's" interpretation of title VI in *Bakke*.)

In *Weber*, the Court distinguishes *Bakke*'s interpretation of title VI on the ground that title VI is an exercise of congressional power over federal spending and title VII is an exercise of the commerce power; title VII does not, therefore, "particularize the commands of the Fifth and Fourteenth Amendments." 443 U.S. at 206 n.6. This argument was presumably made to avoid application of constitutional standards (which, *Bakke* would indicate, may be stricter than the Court's interpretation of title VII in *Weber*) to Kaiser's voluntary quota. The application of these "stricter standards" would, however, appear applicable to the use of government funds in federal contracting (at least if *Contractors Ass'n of E. Pa. v. Secretary of Labor*, 442 F.2d 159, 173 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), is in error in its interpretation of the application of title VI to the executive order) and may, in view of the opinions of at least five Justices, be inconsistent with quotas. *Cf.* Board of Educ. v. Harris, 100 S. Ct. 363, 379 (1980) (Stewart, J., dissenting) (title VI requires more than disparate impact for federal funds cutoff). For another argument that the Order is inconsistent with title VI, *see generally* Note, *Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order 11246*, 33 VAND. L. REV. 921 (1980).

may make a reasonable response to the violation by adopting a remedial quota.[368] Indeed, the theory rests in large measure on the proposition that an employer may settle title VII litigation by means of a consent decree on facts suggesting a prima facie case of discrimination and should therefore be permitted to settle potential claims of discrimination before litigation is commenced.[369] The attraction of the theory is twofold. First, it is consistent with the voluntary compliance policy preference underlying title VII.[370] Second, it is consistent with fundamental judicial policy favoring compromise and settlement of disputes. To label a settlement involuntary because undertaken under threat of litigation would jeopardize basic legal distinctions. Absent extreme circumstances warranting tort liability for the threat itself, the threat of litigation is legitimate.[371]

Brian Weber's attack on the Kaiser plan may be viewed as an attack upon the legitimacy of the threat of litigation that motivated that plan. The fundamental premise of the settlement theory is that the disparate impact theory, which makes racial imbalance in a workforce a prima facie case of discrimination, generated such a substantial threat of liability for racial imbalance that it is unfair to the employer to preclude attempts to eliminate the imbalance.[372]

The unfairness, however, is a matter of the logic of the theory of liability. As previously noted,[373] that theory clearly generates an incentive to remedy racial imbalance in a workforce so as to preclude a finding of adverse impact. To the extent that the business necessity defense is narrowly applied, its costs become prohibitive.[374] The solution to the threat of liability is, therefore, to create a balanced workforce. Moreover, the logic of the theory itself suggests the need for balance. Imbalance suggests discrimination; imbalance coupled with a standard of

368. *See* 563 F.2d at 228-29 (Wisdom, J., dissenting).

369. *Weber* may be viewed as, in effect, simplifying government enforcement actions by eliminating the formerly necessary step of legitimizing a racial balance policy by means of judicial decree. *See* EEOC v. Contour Lounge Co., Inc., 596 F.2d 809, 813-14 (8th Cir. 1979) (EEOC conciliation agreement containing quotas upheld on theory EEOC found "reasonable cause" to believe discrimination occurred); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174 (3d Cir.), *cert. denied*, 438 U.S. 915 (1978) (§§ 703j and 703h do not limit negotiated settlement containing quotas). *See also* Carson v. American Brands, Inc., 606 F.2d 420, 430-31 (4th Cir. 1979) (*Winter, J.*, dissenting) (consent decree may contain quota because voluntarily agreed upon, relying on *Weber*), *cert. granted*, 100 S. Ct. 3009 (1980). It has been suggested that, in view of Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) (eliminating mutuality as an element of collateral estoppel), employers will have an incentive to adopt *Weber* plans as a means of avoiding EEOC enforcement actions and the consequent risk of back-pay liability. *See* Neuborne, *Observations on Weber*, 54 N.Y.U.L. REV. 546, 558 (1979).

370. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).

371. W. PROSSER, TORTS § 120 (4th ed. 1971).

372. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd. sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

373. *See* text & notes 174-215 *supra*.

374. *See* text & notes 166-206 *supra*.

rebuttal which emphasizes the necessity (as distinguished from the neutrality) of an employment practice very nearly compels balance.[375]

The Supreme Court recently appears to have backed away from the implications of *Griggs*. In the first place, it has limited the time frame of relevant analysis by insisting upon adherence to statutory filing periods.[376] It has second tempered the meaning of the business necessity justification for adverse impact in closely analogous contexts by adopting a common sense or reasonableness test of necessity.[377] Finally, it has distinguished between levels of sophistication in employment categories in defining minimum qualifications and insisted upon a more precise statistical comparison to identify causation in disparate treatment cases.[378] It is possible that the Court's emphasis upon statistical proof of cause will influence a disparate impact analysis.[379] These developments may be read as limiting the racial balance implications of *Griggs* in favor of an analysis that views a more precisely defined statistical disparity as raising an inference of intentional discrimination, rebuttable by something less than the scientific precision demanded by the EEOC guidelines.[380]

Even if statistical sophistication is not applied in adverse impact cases, however, the Court's conclusion that neither pre-title VII nor prefiling period discrimination is remediable under title VII[381] places a substantial limitation upon the viability of Judge Wisdom's settlement theory.[382] If the justification for a voluntary affirmative action quota is potential liability, the extent of the potential liability would presumably limit the scope of the voluntary remedy adopted to avoid that liability.[383] If such a limitation is assumed, the Kaiser plan may have

375. *See id.* This conclusion is suggested in the analysis of at least one defender of *Griggs*. *See* Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Discrimination*, 71 MICH. L. REV. 59, 81, 93, 95-101 (1972). *See also Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1166 (1971) (arguing that the 1964 Congress intended a colorblind interpretation of title VII).

376. United Airlines, Inc. v. Evans, 431 U.S. 553, 558 (1977). *But see* Patterson v. American Tobacco Co., 634 F.2d 744, 747-50 (4th Cir. 1980); Jackson & Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811, 822 (1979) (suggesting possible continued vitality of a modified "present effects" theory).

377. Washington v. Davis, 426 U.S. 229, 247-48 (1976).

378. Hazelwood School Dist. v. United States, 433 U.S. 299, 308-13 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 339 n.20 (1977).

379. *See* Rutherglen, *supra* note 48, at 233 n.144 (1979).

380. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979). *See* Furnco Constr. Co. v. Waters, 438 U.S. 567, 575-76 (1978) (declining to reach adverse impact theory); Washington v. Davis, 426 U.S. 229, 250-52 (1976). *Cf.* Board of Trustees v. Sweeny, 439 U.S. 24 (1978) (in disparate treatment case, defendant need only articulate a nondiscriminatory basis for action; defendant need not prove absence of discrimination).

381. United Airlines v. Evans, 431 U.S. 553, 558 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324, 348 & n.30 (1977).

382. *See* Davis v. County, 566 F.2d 1334, 1351-52 (9th Cir. 1977) (*Wallace, J.*, dissenting), *vacated as moot*, 440 U.S. 625 (1979).

383. *But see* Carson v. American Brands, Inc., 606 F.2d 420, 430-31 (4th Cir. 1979) (*Winter, J.*, dissenting). *Compare* International Bhd. of Teamsters v. United States, 431 U.S. 324, 365-67

been truly voluntary to the extent that it went further than Kaiser's potential liability under title VII. One explanation of *Weber* is, therefore, that the Court's restrictive decisions regarding the relevant time frame would narrowly limit the availability of arguable violation theory as a justification for voluntary quotas.[384]

The settlement theory of voluntariness, like any statement that settlement of a legal dispute is voluntary, assumes both that the remedy adopted by the settlement and that the threatened theory of liability are legitimate. Settlement is voluntary because the parties to the settlement have the option of litigation, but the motivation for settlement is the arguable existence of a legal duty. Absent an arguable duty, the settlement is gratuitous. The settlement is, therefore, clearly not voluntary in the very real sense that the party who confers a remedy by settlement does so because of the judgment that there is some probability that there will be a judicial command to do so.

The question remaining is determining what relevance the settlement theory of voluntariness might have to the legitimacy of the Kaiser affirmative action quota. If one wished to attack a similar quota and to therefore distinguish *Weber* by arguing that the similar quota was compelled by the threat of liability imposed for reasons of racial imbalance in a workforce, what success could one expect? The answer, of course, is that one would expect no success. The reason is that such an argument is an attack not upon the quota adopted but upon the structure of the legal rules that motivate the quota. In effect, it is an argument that the involuntary quota adopted is illegitimate because the legal structure motivating it is illegitimate.

It is not seriously suggested here that such an attack would be made in these terms.[385] The point, rather, is that an attack upon a pri-

(1977) (persons deterred by defendant's discriminatory practices from applying for positions are victims entitled to relief) *with* Crockett v. Green, 534 F.2d 715, 719 (7th Cir. 1976) (quota hiring relief is valid since defendant need not hire unqualified persons). The latter limitation on the use of a quota may be distinguished from the former on the theoretical basis that the former classification is one based upon victimization.

384. United Steelworkers v. Weber, 443 U.S. 193, 214 (1979) (Blackmun, J., concurring).

385. The argument in *Weber* was that the Kaiser plan violated §§ 703a-d, the title VII provisions prohibiting discrimination. 443 U.S. at 199. *Weber* eliminates that argument on the theory that those provisions were not intended to reach affirmative action. *Id.* at 204. A statutory challenge to a privately adopted quota must, therefore, be founded on § 703j, the title VII provision under which voluntariness makes a difference. *See id.* at 206-07.

As earlier noted, one difficulty with such an attack is standing. See text & note 348 *supra*. A second difficulty is whether § 703j itself may be said to create an independent basis for cause of action. An employer could, of course, assert that section as a defense, but the problem faced by a nonminority employee is that of affirmative use of the section as a sword. The employee could argue that a cause of action is created by § 705 and that the prohibition sought to be enforced is, *e.g.*, § 703(a), as further defined by § 703j. That argument, however, runs again into what has here been termed the standing problem: If § 703j is a prohibition, it is a prohibition against government conduct with respect to the employer, not a prohibition against the employer's conduct with respect to the employee. See 443 U.S. at 246 (Rehnquist, J., dissenting). If these difficulties

vately adopted quota on the ground that it was compelled by the *Griggs* interpretation of title VII implies an attack upon the *Griggs* formulation itself. One means of countering an attack upon the legitimacy of the motivating legal structure is implicit in Judge Wisdom's argument for an arguable violation theory: Although liability for racial imbalance is impermissible, liability for discrimination is required, and an inference of discrimination arises from racial imbalance.[386] The argument concedes both the possibility of liability for racial imbalance and the incentive for and logic of quotas implicit in such potential liability, but postulates a legitimizing distinction. The difficulty with this argument is that it imposes a theoretical risk of error upon the employer who adopts the quota: The tenuous distinction between racial imbalance and discrimination under a broad reading of *Griggs* suggests that the former may be mistaken for the latter even under an arguable violation standard. Moreover, if the Court's recent cases[387] limiting title VII by requiring more precision in statistical proof and a more precise focus on relevant time periods are emphasized, the employer's risk of remedial error becomes substantial because the employer must take into account and apply the analysis it would argue in defense of a lawsuit before adopting its self-imposed remedy.

A second means of countering such an attack is to ignore it. It is not necessary to reevaluate the legitimacy of the legal structure if private affirmative action quotas are immune from title VII attack and if, therefore, the motivating link between legal rules and private conduct becomes irrelevant. *Weber* holds that a voluntary affirmative action quota, whether or not motivated by fear of liability,[388] is legitimate under title VII. At least one explanation of this result is that it avoids inquiry into the legitimacy of the Court's prior interpretations of title VII and of the lower federal courts' applications of those interpretations. Voluntariness as settlement, in the sense of self-initiated employer settlement of an arguable violation, may have been rejected as a basis for legitimizing racial preference in favor of a theory interpreting title VII as not reaching reverse discrimination.[389] Such an interpreta-

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are assumed away, one could presumably argue that a private quota adopted from fear of title VII liability under a *Griggs* theory is compelled—a theory which suggests either a self-contradiction or an erroneous prior judicial interpretation of the statute.

386. 563 F.2d at 231.

387. *See* authorities cited in notes 375-377 *supra*.

388. 443 U.S. at 208, n.8.

389. Whether *Weber* will turn out to stand for the broad proposition that title VII does not regulate reverse discrimination will depend upon the degree to which the courts emphasize the *Weber* opinion's recognition that craft employment is a "traditionally segregated" job category. *See* 443 U.S. at 198 n.1. Even if it is assumed, however, that past discrimination in the job classification to which a quota remedy is applied is a necessary condition precedent, there would appear to be no reason why mere imbalance in that classification could not meet the condition.

tion has the advantage of avoiding the otherwise nearly insoluble difficulties posed by the logic of adverse impact theory.

Remaining is the statutory issue posed by the argument: If private reverse discrimination is not prohibited by title VII, the executive may require reverse discrimination as a contractual condition. As previously noted,[390] the counter-argument is that the title VII antiquota provision is arguably a congressional policy judgment directed against all executive action in this context. The problem is that the congressional judgment was designed to protect employers, not minority employees. The impact of *Weber* is to remove much of the employer's incentive to assert the congressionally conferred protection; if there is little chance of liability for reverse discrimination and if the adverse impact of an employment practice may subject an employer to liability, the employer's course is clear regardless of the validity of the Executive Order.

VI. SOME THOUGHTS OF THE ROLE OF THE COURT: REPRESENTATION VALUES AND REVERSE DISCRIMINATION

The *Weber* decision suggests that truly voluntary reverse discrimination by private employers is subject only to minimal judicial scrutiny as a matter of statute. Although an attack on reverse discrimination might be mounted on the basis of post-Civil War civil rights legislation,[391] that legislation has been rather consistently read to reflect the substantive policies of title VII[392] despite its remedial independence from title VII.[393] It is difficult to believe that a court insisting that the 1964 Congress intended to leave the question of affirmative action to

390. See text & notes 317-319, 330-331, *supra*. If that argument is accepted, and if the *Weber* holding and rationale are assumed, title VII prohibits executive entanglement in private employment decisions where the object of the entanglement is racial balance for its own sake. Whether one accepts the notion that the federal government's economic power renders the terms of its contracts compulsory, the *Weber* rationale suggests that compulsion is not entirely the point. Section 703j addresses itself to government interference with a racial balancing objective, 443 U.S. at 246 (Rehnquist, J., dissenting), and both the interference and the objective are present in the executive order program.

391. 42 U.S.C. §§ 1981, 1982. *See generally*, McDonald v. Sante Fe Trail Transp. Co., 427 U.S. 273 (1976); *see also* Note, *May Desegregation Remedies Infringe the Rights of Innocent Whites? The Implications of Runyon v. McCrary for Reverse Discrimination*, 1978 WASH. U.L.Q. 211, 246. These "thirteenth amendment" statutes reach private conduct even in the absence of state action. Runyon v. McCrary, 427 U.S. 160, 177-79 (1976); Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968).

392. *See* New York Transit Auth. v. Beazer, 440 U.S. 568, 584 n.24 (1979); Washington v. Davis, 426 U.S. 229, 248-52 (1976); Johnson v. Ryder Truck Lines, Inc., 575 F.2d 471, 475 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); Chance v. Board of Examiners, 534 F.2d 993, 998 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977). *But see*, Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431, 438-39 (1973) (declining to decide whether 1964 Civil Rights Act private club exception applies to § 1982); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 234 (1969) (same); Note, *Federal Power to Regulate Private Discrimination: The Revival of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 481 (1974).

393. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

the discretion of businessmen would be willing to conclude that a 19th century congressional decision nevertheless precludes such discretion.

The extraordinary deference *Weber* purports to give private employers is disturbing. It is, of course, quite plausible to read *Weber* as in fact permitting very little discretion—as an almost perverse bit of judicial legerdemain in which voluntary employer action is in fact compelled employer action. This possibility forms one basis for the constitutional argument that follows. But if it is assumed for the moment that the Court's reliance on business freedom is real, at least in a perceptible degree, it reflects an insensitivity both to the risks of the racial quota[394] and to the fundamental and recurring problem of judicial role. Although *Weber* is, in large measure, the logical culmination of much of the Court's case law interpreting title VII,[395] it formally lets loose the racial genie bottled with great difficulty in 1964.[396] Indeed, the case may be viewed as the culminating act in the transformation of a statute from one congressionally designed to require and protect individual rights to equality of employment opportunity into a statute that both recognizes and enforces a group right—the right of racial groups to proportionate employment. *Weber* was the culminating act because, as is indicated by the preceding discussion,[397] it legitimized employer conduct responsive to a structure of rules that inexorably creates an incentive to recognition of such a group right by penalizing nonrecognition. The legitimization occurs by means of eliminating the legal obstacle to such recognition—the legal protection the statute grants the individual right.

It is not necessarily suggested here that the genie should not, as a matter of national policy, be let loose for benign purposes. There is a legitimate perception that equality of opportunity is a cruel joke in a context in which social and economic realities limit opportunity and render the racial neutrality principle an obstacle to opportunity. Rather, it is submitted that there has been a fundamental failure to deal with the issue of what institution of government has a legitimate claim to making the decision to let the genie loose.

To be sure, the Court hinted that there may be limits. Although it declined to "define in detail the line of demarcation between permissible and impermissible affirmative action plans,"[398] the Court emphasized that Kaiser's plan did not create an absolute bar to whites, did not

394. *See* United Jewish Organizations v. Carey, 430 U.S. 144, 172-75 (1977) (Brennan, J., concurring).

395. See text & notes 368-389 *supra*.

396. *See generally* Van Alstyne, *supra* note 45.

397. See text & notes 368-389 *supra*.

398. 443 U.S. at 208.

require replacement of white workers with black workers, and was a temporary measure not intended to maintain racial balance.[399] Even if it is assumed, however, that these criteria are necessary conditions to satisfying the Court's affirmative action exception to title VII, the license granted remains broad.[400]

In the first place, there need not be a judicial finding of past or even arguably past discrimination by the employer; the remedy the employer adopts may be a remedy for the past discrimination of others.[401] The Court dispenses with the remedial fiction, a fiction which at least has the virtue of giving semantic legitimacy to the quota and therefore some arguable tendency to counter the quota's inherent potential for racial tension.[402]

In the second place, the Court's required criteria, if they are required, do not meaningfully confine employer discretion. It is true that a prohibition on replacement of workers is a limitation, but the Court's suggestion that the plan created no absolute bar to whites and was a temporary measure not designed to maintain racial balance is disingenuous. The plan clearly operated to bar an identifiable group of white workers (those white employees, like Weber, with greater seniority than black employees) from training, and it is not apparent that the plan was not intended to maintain rather than merely achieve racial balance.[403] Ignoring for a moment the question of the precision of the Court's representations, the difficulty presented by reliance upon such criteria is that the decision to adopt a plan that meets the criteria is left in the private hands from which such decisions were taken in 1964. The evaluation and balancing of the risks of racial tension,[404] of the fostering of

399. *Id.*

400. *See* Boyd, *supra* note 216, at 9-26. *But see* Parker v. B & O R.R. Co., 25 Fair Employment Prac. Cases 889 (D.C. Cir. 1981); Seltur v. Novack Inv. Co., 638 F.2d 1137 (8th Cir. 1981).

401. *See* United Steelworkers of America v. Weber, 443 U.S. 193, 208 n.8 (1979).

402. The decisions upholding judicially imposed remedial quotas have emphasized the question of the visibility of the quota, an at least implicit recognition of the risks. *See* EEOC v. Local 638, 532 F.2d 821, 830 (2d Cir. 1976). To the extent that a judicially ordered remedial quota is properly termed remedial because prophylactic, *i.e.* rooting out a pervasive practice somewhat in the way desegregation orders in the education context do so, that explanation of quotas would seem inapplicable to an employer not guilty of past discrimination. It is, however, possible to view the Kaiser plan as rooting out the past pervasive practices of craft unions, although it more clearly seems to have circumvented those practices than directly affected them.

The use of the remedial fiction, or of other arguable fictions, such as Justice Powell's diversity rationale in *Bakke*, may be justified as a means of creating an appearance of justice and, therefore, as eliminating, or at least easing, the psychological harm inflicted on nonminorities not preferred by the quota. *See* note 57 *supra*; Karst and Horowitz, *supra* note 45, at 27-29. It should be noted that such a rationale assumes that a harm to nonminorities occasioned by a denial of an intrusion upon the fundamental value of racially neutral decisionmaking occurs and should be, if possible, avoided.

403. 443 U.S. at 223-24, n.3 (Rehnquist, J., dissenting).

404. Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 379-80 (1966).

a general race consciousness,[405] of the potential stigma visited upon those preferred by the plan,[406] and the risk of error (both in the sense of an ostensibly benign quota not operating as such and in the sense of a quota operating against nonminority subgroups not represented by government agencies and government incentives[407]) is ostensibly the prerogative of employers. One need not imagine private employer malevolence to find this result disturbing.[408]

The concerns thus far stated are concerns of policy not framed as or linked to constitutional policy. They are, moreover, concerns not properly before the Court if its view of *Weber* as involving only a problem of statutory construction, interstitial or otherwise, is taken seriously. Finally, they can arguably not be made constitutional concerns if it is assumed that only private conduct was involved in *Weber*.

There nevertheless remains a difficulty: What if it is government rather than private conduct with which we are concerned; and if we are concerned with government conduct; what are the constitutional implications of that conduct? It is the last question to which the remainder of this discussion will be devoted. The discussion will assume an attack by a Brian Weber on an OFCCP compelled quota. The discussion will nevertheless implicate the Court's view of its role in interpreting title VII, and that implication will be briefly explored in the conclusion.

VII. COLORBLINDNESS AS CONSTITUTIONAL STANDARD

If it is assumed that a private employer's affirmative action plan is subject to constitutional attack if compelled by government action—at least in the case of the employer who contracts to sell goods and services to the government[409]—the question then becomes one of the form of the attack. One common form of argument made in both *Bakke* and in *Fullilove* is a substantive equal protection attack framed in terms of strict scrutiny and premised upon a colorblind interpretation of the fifth and fourteenth amendments. Race, by the terms of such an attack, is suspect and, at least if the usual burden that conclusion generates is applied, an impermissible basis for classification.[410]

The difficulty with the substantive equal protection attack is the

405. *Id. See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 292-95 (1978); United Jewish Organizations v. Carey, 430 U.S. 144, 173 (1977) (Brennan, J., concurring).

406. De Funis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

407. United Jewish Organizations v. Carey, 430 U.S. 144, 172 (1977) (Brennan, J., concurring). *See also* Ely, *supra* note 9, at 12-14 n.47.

408. *See* Weber v. Kaiser Aluminum & Chem. Corp., 415 F. Supp. 761, 767-69 (E.D. La. 1976), *aff'd on other grounds*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

409. *See* text & notes 256-312 *supra*.

410. *See* note 45 *supra*.

argument that equal protection invariably requires colorblindness is not persuasive. If the colorblindness notion ever enjoyed constitutional currency, it was for a brief period following the *Brown* decision.[411] Prior to that decision, moreover, the Court's behavior has not since the *Brown* era suggested that racial neutrality is a constitutional absolute.[412] Furthermore, the argument that colorblindness is not adequate to the task of dismantling the social evil with which we are concerned is a compelling one. The suspicions that benign racial preferences will not resolve that social evil and that such a remedy is unwise because its risks are too great do not justify a conclusion that the remedy is one taken from the options available to a decisionmaker authoritatively assigned the task of formulating and reconciling social and economic policy. Nor do the reasons thus far identified for strict scrutiny of racial classifications—stigma[413] or protection of the politically powerless[414]—compel a conclusion that racial preferences are impermissible.

An argument suggesting that these reasons do require an absolute ban on consideration of race is that the risks of social dysfunction are too substantial. That argument is a satisfactory basis for requiring vigilant review within the context of a structure of analysis calculated to identify which dangers are of constitutional dimension and when the harm threatened is present in fact. It is not a persuasive argument that effective review must adopt a prophylactic standard to be applied even in cases when a legislative body has given consideration to those risks.[415] The argument is unpersuasive because the "felt necessities of

411. 347 U.S. 483 (1954). Although *Brown* need not be read in this manner, it is best viewed as a moral treatise against racial distinction. *See* Loving v. Virginia, 388 U.S. 1 (1967). *But see* Reid, *Assault on Affirmative Action: The Delusion of a Color-Blind America*, 23 How. L.J. 381, 388-91 (1980). *See generally* Van Alstyne, *supra* note 45, at 783.

412. *See* United Jewish Organizations v. Carey, 430 U.S. 144 (1977). *But see* Van Alstyne, *supra* note 45, at 783 (suggesting the *Brown* era extended from 1955 to 1976).

413. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357-62 (1978) (Brennan, J., concurring & dissenting); Karst & Horowitz, *supra* note 45, at 26; Karst, *supra* note 57, at 1, 6-7 (1979). *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978); Dixon, *supra* note 45, at 85.

414. Ely, *supra* note 56, at 734-36 (1974); *see* Regents of the Univ. of Cal. v. Bakke, 438 U.S., 265, 361 (1978) (Brennan, J., concurring & dissenting). An additional identified theory focuses on the intent of the entity creating the classification and invalidates the classification only if motivated by prejudice, apparently on the ground that motivation influences degree of harm. Simon, *Racially Prejudiced Government Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1097 (1978).

415. *See generally* Van Alstyne, *supra* note 45; Posner, *supra* note 46; Posner, *supra* note 45. The argument appears at bottom to be a judgment that the risks of error and of a judicial failure to recognize error outweigh the potential social benefits to be gained by permitting consideration of race, and that an absolute prohibition is therefore necessary. *Id.* at 176.

The Court's record in probing purportedly benign discrimination is disturbing. *See* United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Ely, *supra* note 9, at 14 n.47. Moreover, it must at least give one considerable pause to contemplate the Court (although I think less so the Congress) deciding complex questions of what racial groups or subgroups are entitled to what shares of the social and economic pie. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2804 n.4 (1980)

the time"[416] seem clearly, at least in the minds of a majority of the members of the Supreme Court, to have outweighed the dangers.[417] It is nevertheless apparent that the Court remains hesitant to fully embrace group rights as constitutionally legitimate—a hesitancy evidenced by its adherence to the notion that racial preference must be remedial in purpose and by the diverse avenues by which it has generated its opinions. Given that hesitancy, it remains open to suggest a new, albeit limited role for the principle of racial neutrality.

That the argument for invalidating any consideration of race is unpersuasive does not mean that the colorblindness ideal is without constitutional basis. There are at least three reasons for suggesting such a basis. First, the ideal, despite the absence of a history of universal acceptance, clearly has roots in the traditional, widely held, and arguably fundamental value[418] of racial neutrality. At least in constitutional rhetoric, that value has been given a constitutional status, however uncertain the content of that status.[419] Second, even judicial proponents of benign racial preference recognize that the dangers inherent in the racial quota are matters of constitutional concern.[420] Those dangers are, however, not so well understood as to give us confidence in the judiciary's capacity to precisely evaluate them. The problem lies in the judiciary's capacity to precisely evaluate the constitutional dangers in the context of a court making an initial policy decision encouraging or mandating racial preference or of approving such a policy decision made by an agency of government whose authority is in question.[421]

For example, the vague notion that nonbenign racial classifications are stigmatizing is apparently an attempt at characterizing the

(Stevens, J., dissenting); Van Alstyne, *supra* note 45, at 803-08. Finally, the concept of stigma and of limited political representation are at best slippery. *See* text & notes 423-427, 434, *infra*.

It is submitted, however, that the burden of establishing some reason, other than stigma or limited political representation, for strict scrutiny analysis is upon the critics and that the difficulties inherent in applying these concepts in the litigation process is not an adequate alternative reason for such scrutiny where congressional decision is in issue. Although stigma, as an example, is vague, it remains useful in predicting the general outlines.

416. O.W. HOLMES, JR., THE COMMON LAW 5 (Harv. ed. 1963).

417. Fullilove v. Klutznick, 100 S. Ct. 2758 (1980). *See, e.g.*, United Jewish Organizations v. Carey, 430 U.S. 144 (1977); Beer v. United States, 425 U.S. 130 (1976); Swann v. Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

418. *See generally* N. GLAZER, AFFIRMATIVE DISCRIMINATION 5 (1975). *But see generally* Ely, *supra* note 9 (regarding the propriety of basing constitutional adjudication in contexts such as equal protection on the Justices' perception of such values).

419. One difficulty with rejecting fundamental values is that it implies a rejection of the level of constitutional articulation most easily understood. It therefore threatens the role, or potential role, of the Court as moral teacher. *See* note 430 *infra*.

420. *See* United Jewish Organizations v. Carey, 430 U.S. 144, 171-73 (1977) (Brennan, J., concurring).

421. That capacity might be meaningfully enhanced in the context of review of a congressional decision, at least where a legislative record was sufficiently full to disclose actual consideration of the issues.

psychic harm that, as a matter of constitutional values, we wish to prevent.[422] Yet, it is not clear that benign quotas do not also stigmatize those preferred by the quota[423] or that the psychic harm inflicted on persons victimized by the quota is meaningfully distinguishable from stigma.[424] If the stigma explanation of strict scrutiny is concerned instead with the psychology of decision makers, there is simply not much of a basis for confidence in the ability of a court to distinguish decisions reflecting undervaluation of the human worth of those adversely affected and decisions not reflecting such an undervaluation.[425] It may be that a court may permissively concern itself with psychology as a matter of generalization in formulating policy.[426] But psychological characterizations at that level of inquiry are intuitive speculations justifiable only as generalizations.[427] The justification will not support fine distinctions unless the stigma argument is, in fact, not an argument focusing on injury or attitude but an argument masking a policy judg-

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422. *See* Brown v. Board of Educ., 347 U.S. 483, 494 (1954). The stigma notion may, however, be used in one or more of three senses:

(1) Psychological injury, in the sense of feelings of inferiority, *id.*;
(2) The psychology of the majority, in the sense of the attitude of the non-stigmatized, Karst, *supra* note 57, at 6 n.25 (1977); and
(3) the status harm generated by the majority's attitude. Fiss, *Groups, supra* note 351, at 157; Karst & Horowitz, *supra* note 45 at 23.

The third of these possibilities appears to include aspects of the first two; certainly it includes as an essential element the psychological injury notion discussed in the text. Karst, *supra* note 57, at 6-7. To the extent that what is meant by stigma is the attitude of the majority to the group stigmatized, the core concept it seeks to describe is undervaluation of the human worth of those upon whom a badge of inferiority is imposed. *Id.* In my judgment, the difficulty with the stigma-as-attitude argument is the difficulty suggested in the text with the stigma-as-injury notion: The undervaluation of the worth of a Brian Weber is not meaningfully distinguishable from the undervaluation of the worth of the victims of more traditional discrimination. *See* Posner, *supra* note 45, at 184-85. *But see, e.g.,* Karst, *supra* note 57, at 52-53; Karst & Horowitz, *supra* note 45, at 23. The inferiority label implicit in a denial of benefit or opportunity on the basis of race in the former case may not be (although I think it at best risky to assume it is not) biological, political, or social. But certainly it is at least moral in the sense that there is implicit in such a denial a denial of equal moral worth. Moreover, the suggestion that the benign use of race does not constitute a denial of the humanity of those it adversely affects ignored our history of the use of race. That history, at least until recently, clearly reflects such a denial. If speculation concerning psychology is to be permitted, one may speculate that decision on the basis of race is identified in our collective consciousness as inherently a denial of humanity and is therefore inherently productive of stigmas. Under that view, both malevolent and benign uses of race are demeaning. *See* Dixon, *supra* note 45, at 23. *But see* J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 160 n. (1980).

423. DeFunis v. Odegaard, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting).

424. *See* notes 47-57 *supra*.

425. *See* note 423 *supra*.

426. *See* Brown v. Board of Educ., 347 U.S. 483, 494 (1954).

427. *Id.* The technical fiction that *Brown* did not overrule *Plessy* is in part traceable to an emphasis upon the Court's reliance in *Brown* upon social science data regarding psychological impact. *Id.* at 494-95, n.11. For criticism, *see* Cahn, *Jurisprudence*, 30 N.Y.U.L. REV. 150, 157-68 (1955); Wechsler, *supra* note 293, at 32-33.

The point made here is that stigma is capable of being given content in the litigation process, *see* note 416 *supra*, only if conceived of as generalization and speculation, and only if it is recognized that the generalization is only a part of the analysis. Moreover, the term may be better understood as moral characterization than empirical observation. *See* 412 *supra. See also* A. BICKEL, *supra* note 46, at 133.

ment that the benefits of the quota outweigh a judicially indistinguishable injury. Reference, in some degree, to the a priori value of racial neutrality presents a far less slippery basis for judicial decision than psychological injury, and a policy judgment regarding benefits and risks of this nature is not one a court is well-equipped to make.[428]

Finally, it is at best difficult to explain the nearly universally perceived ultimate objective of benign discrimination, which is to eliminate all discrimination, without reference to colorblindness as in some sense an ultimate value. Although that value may be labeled social or political or moral and not necessarily constitutional, the fact of the matter is that it has been labeled constitutional and the label has been a positive good.[429] Retreat from the label carries with it the real danger of the loss of that good.

VIII. SOME RESERVATIONS ABOUT REPRESENTATION REINFORCEMENT

Both the courts and the commentators have, in the main, characterized the question of the constitutionality of government adopted or compelled racial preference as one of substantive equal protection[430] rather than as a question of a court's legitimate role. Professor Ely, however, in a work which foreshadowed his later representation reinforcement theory of judicial role,[431] made an argument supporting the

428. *See* Meltzer, *supra* note 78, at 457-58.

429. It is not pretended here that the rhetoric of a civics class should control adjudication, but neither should it be ignored. If psychological generalization is a permissible datum, I suggest the following: Whether Justices are the appropriate arbiters of fundamental values, they are widely perceived as such, and people do constitutionalize their often inconsistent value preferences. That phenomenon has, for better or worse, made the Court a moral teacher, sometimes, to be sure, a teacher of false (or at least historically discarded) moralities, but a teacher nonetheless. There has been no better example of the exercise of that role than *Brown* and the cases following it. *See* Van Alstyne, *supra* note 46 at 797.

It may be argued that this role is inappropriate in a democracy, at least to the extent that the moralities taught are not moralities of or traceable to process, J. ELY, *supra* note 422 *supra*. The argument is attractive, but something is lost by discarding at least the language of substantive values. What is lost may, of course, be characterized as a form of tyranny; however, because the Court remains, after all, a sharer of power, the softer characterization—educative role—is not inappropriate.

430. The phrase substantive equal protection is used here to suggest that the main debate has been over the substantive values against which equality is to be measured. *See* Sandalow, *supra* note 45, at 655-63.

431. *See generally*, J. ELY, *supra* note 45; *see also* Ely, *Toward A Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Ely, *supra* note 9; Wright, *Color Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980).

One difficulty with the proposition that the equal protection guarantee is to be measured solely by a representation value is that it is not clear how the Court is to go about measuring representation, or even that the Court has the capacity to measure representation. Although it is true that the Court has done so directly in the context of apportionment, apportionment is a context in which the inquiry may be resolved by resort to numbers. The resort to numbers itself ignores, as the Court itself has discovered, substantial difficulties in defining the meaning of repre-

constitutionality of reverse discrimination in terms of a conception of that role. Ely argued that, because a white majority may be trusted not to "disadvantage itself for reasons of racial prejudice," the justification for judicial overruling of the political process is absent.[432] In Ely's judgment, the white majority is not "likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks."[433] The reasons for suspicion of a racial classification are therefore not present in reverse discrimination cases.[434] Ely's argument limits the scope of the judicial role to unclogging government process when that process is likely to undervalue or underrepresent minority interests.[435]

The argument has been justly criticized as founded upon a naive view of the pluralistic political process; whites are not a monolithic political force and minorities are no longer politically unrepresented.[436] Nevertheless, the argument's emphasis upon process values[437] as an alternative to the search for fundamental values[438] has substantial appeal where constitutional text provides little guidance for judicial decision, as in the case of the equal protection clause. The difficulty is that the theory assumes judicial review of a government institution's decision to adopt racial preferences. The question is whether the character of the institution and the form in which its decision is expressed are matters relevant to that review.

An emphasis on process in defining the judicial role must, it is submitted, take into account the question of which process is appropri-

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sentation (particularly with respect to groups, racial or otherwise) and the distortions produced by a reference only to numbers. *See* Gaffney v. Cummings, 412 U.S. 735 (1973); J. ELY, *supra* note 423, at 124-25. Moreover, the fact of representation, in the sense of numbers and possession of voting power, is not the sum of what Ely is getting at. Ely would, relying upon motivation analysis generally and upon a highly sophisticated (and perhaps too subtle) analysis of the suspiciousness of classifications, impose a judicial review of the legislative process itself. J. ELY, *supra* note 423 at 135-79. *Cf.* Fullilove v. Klutznick, 100 S. Ct. 2758, 2811-14 (1980) (Stevens, J., dissenting) (Court should review procedural as well as substantive history of legislation). The inquiry is to be one which "focuses more on the psychology of decision." J. ELY, *supra* note 425, at 153. Such a focus clearly raises, as Ely himself concedes, a substantial problem of judicial competence. *Id.* at 157. Once adopted, it raises, as well, a substantial danger of wide-ranging substantive judicial review in the guise of legislative psychoanalysis. *See id.* at 156-170. *Compare id.* at 162 *with* Michelman, *supra* note 51, at 676-79.

432. Ely, *supra* note 56, at 735 (1974). *See also* J. ELY, *supra* note 423 at 170-72.

433. Ely, *supra* note 56, at 735.

434. J. ELY, *supra* note 423, at 171.

435. *Id.* at 135-79.

436. *Posner, supra* note 45, at 30; Sandalow, *supra* note 45, at 694; Van Alstyne, *supra* note 45, at 801-02. For Professor Ely's reply, *see* J. ELY, *supra* note 423, at 135-36, 135 n.4.

437. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1937). *See generally* McCormack, *supra* note 66. *But see* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1059 (1980).

438. *See generally* Ely, *supra* note 9.

ate for decision. That question is implicit in Professor Ely's later argument that it is the judiciary's function to enhance representation and participation[439] because those values are most clearly evident in legislative process. Professor Ely's apparent resolution of the question in the present context is not, however, viable.

It is clear that Ely's argument seeks to define representation as encompassing notions much broader than political representation.[440] It seems to suggest that white bureaucrats are likely to identify with white culture and white persons and, therefore, that their decision to impose a preference at the expense of whites is not suspicious; such a decision is not likely to have resulted from the discounting of human value or denial of "equal concern and respect"[441] which makes the white majority's disadvantaging of, *e.g.*, blacks, suspicious.[442]

The problems with this racial representation theory[443] are, however, substantial. First, the theory suffers from the sort of overdone psychological speculation thought here to be fatal to stigma theory. It is one thing to speculate that white decisionmakers, immersed in white culture, are likely to be influenced by their identification with whites, and thus, that their decisions, to the extent they affect blacks are therefore suspicious; it is quite another to suggest that such speculation is a sufficient basis for suspending suspicion when a decision adversely affects whites.[444] If our history has taught us anything, it should be that race is too volatile an issue. When used as a criterion for decision, it is too productive of unpredictable, divided, and too often evil psychologies to be neatly imprisoned by reference to the racial composition of

439. *See generally* Ely, *Judicial Review, supra* note 431. It has been recently made more explicit, at least in the sense of the complementary principle, that representative institutions should be required to decide issues of policy and should not be permitted to delegate that basic responsibility. J. ELY, *supra* note 423, at 131-34. I, of course, make no claim either that Professor Ely would join the argument that follows or that the argument necessarily follows from Ely's premises. Nevertheless, I think it fair to say that much of what follows is not inconsistent with Ely's premises, even though quite inconsistent with some of his conclusions.

440. Professor Ely suggests that courts should take the nonrepresentative character of university faculties into account in judging affirmative action programs, but contends that, because the victims of such a program are white, grounds for suspicion are absent. J. ELY, *supra* note 423, at 258 n.107.

441. *Id.* at 170-72.

442. *Id.* at 258-60 n.109.

443. The label is, as far as I am aware, my own. *But see* Posner, *supra* note 46, at 28 n.51; Van Alstyne, *supra* note 45 at 801-03.

444. It is, for example, not at all clear why it is likely that white OFCCP bureaucrats (or white aluminum company executives or union leaders) will identify with white workers in a way distinct from black workers. Even if it is accepted as true that there is a sort of racial memory, we can permissibly assume that intellectual fashion, guilt, conviction, and any number of other factors may neutralize such a memory and create in the decisionmaker a conscious or unconscious tendency to discount the humanity of the white worker.

Moreover, the corollary, perhaps the necessary corollary, of the analysis is that inquiry into the race of the decisionmaker is appropriate. Why should our suspicion of motivation be thought to be a one way street? If strict scrutiny is an expression of a realistic assessment of probabilities of motivation or of ignorance, it is realistically directed to race as such.

the social and political majority or to the race of the decisionmaker.[445] There is simply no basis for confidence in the ability of the judiciary to accurately speculate about the "probable feelings of relative [racial] identification"[446] of any decisionmaker.

Aside from the problem that the possibility of prejudice is too complex an issue to be so easily resolved, one must question the impact of such a standard of review, honestly and expressly applied, upon the presumably desired values of our society. To answer that question by suggesting that the judiciary's legitimate role does not include the definition of desired values ignores the present difficulty; neither is it the legitimate role of a bureaucracy. The proposition that the definition of appropriate values is a legislative judgment in a democracy and that judicial review of legislative choice is therefore circumscribed may be accepted for purposes of discussion without thereby being forced to any particular conclusion about judicial value choice in the absence of legislative decision.

The second difficulty is that racial representation inadequately emphasizes the underlying problem of reconciling the role of the courts in a society in which the Constitution separates governmental functions and expressly allocates power accordingly.[447] The theory that "denial of equal concern and respect" is the evil at which equal protection doctrine is directed seeks to define the court's function in conformity with the identifiable constitutional values of representation and of fairness of process.[448] To the extent it exists racial representation may provide some basis for believing that a decisionmaking process is not tainted by racial ignorance and therefore fair; such a finding, however, does not exhaust the risk of prejudice.[449] Colorblindness, whatever may have been its value-preference origins, functions as a prophylactic standard capable of avoiding that risk. Moreover, it is a judicially manageable standard. If there is a forum capable of assessing and accepting the risk of prejudice after identifying and assessing claimed social and economic need, it is a legislative forum.

More fundamentally, the racial representative notion when applied to bureaucratic decision has no relation to the notion of representation in the textually and structurally supportable constitutional sense

445. *See* note 444 *supra*. The line of argument in the text is similar to the line of argument adopted by one segment of the Court to justify intermediate review of benign racial preferences. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 360-62 (1978) (Brennan, J., concurring & dissenting); Fullilove v. Klutznick, 100 S. Ct. 2758, 2795-96 (1980). The problem with intermediate review, if that review has a content, is that it gives inadequate weight to these considerations where a noncongressional decision is the subject of review.

446. J. ELY, *supra* note 422, at 259 n.109.

447. U.S. CONST. arts. I, II, III.

448. J. ELY, *supra* note 422, at 145-70; text & notes 445-451 *supra*.

449. *See id.*; text & notes 445-451 *supra*.

in which the latter is commonly understood. One may argue that there can in fact be bureaucratic accountability in the sense that a bureaucracy is subject to political pressure or to judicial review.[450] But that is an argument beside the point: the constitutional allocation of legislative authority is to the Congress.

Finally, Professor Ely's position to the contrary notwithstanding, our society has emerged from an era in which the fundamental value of racial neutrality had been authoritatively proclaimed.[451] There is a need to reconcile the proclamation and its desirable educative effect with the reality of the social and economic need which is largely inconsistent with it. Whatever one's view of the desirability of inquiry into the fundamental value, assessment of those necessities is more clearly a function of a legislative forum than a judicial or bureaucratic one.[452]

IX. AN ARGUMENT FOR REFERRING THE QUESTION TO CONGRESS

A. *Introduction*

The preceding propositions leave us with the problems of determining what is legislative and what is a permissible means of exercising legislative authority. The argument to be made here[453] is this: The appropriate decisionmaker in the present context is not the judiciary, the executive, or the bureaucracy; the constitutionally appropriate decisionmaker is Congress.[454] The appropriate form of decision is deliberate and express. The remainder of this paper will attempt a defense of these assertions.

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450. Judicial and congressional oversight may, as an empirical matter, have largely displaced formal congressional decisionmaking, but the observation doesn't justify itself. On the question of judicial review, *compare* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547-48 (1978) *with* Ethyl Corp. v. EPA, 541 F.2d 1, 68 (D.C. Cir.), *cert. denied*, 426 U.S. 941 (1976); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 746 (D.D.C. 1971).

451. Loving v. Virginia, 388 U.S. 1, 11 (1967); Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

452. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1183-95 (1977).

453. This argument is not new, but is carried here somewhat further than what has gone before. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, (1978); Sandalow, *supra* note 452; Sandalow, *supra* note 45; Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979). *Cf.* Cox, *The Role of Congress In Constitutional Determination*, 40 U. CIN. L. REV. 199, 258-59 (1971) (legislative role in formulating desegregation remedies). *See also* Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 112-13.

454. The state legislatures present a difficulty because separation of powers, as a source of the arguments made here, is not a doctrine applicable to them as a matter of federal constitutional policy. *But see* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 309 (1978). But the argument made here is not inapplicable to the states. There remains the operation of the post-Civil War amendments and the problem of determining to what extent those amendments took from the states the power of decision in matters governed by the amendments. Clearly, the precedent of a colorblindness standard suggests that such power was taken to the extent of any attempt to act inconsistently with the standard, and the argument made here that colorblindness is the necessary standard until modified by the Congress suggests the same conclusion.

A traditional argument[455] against the constitutionality of an executive order's affirmative action requirement on separation of powers grounds would be made along the following lines.[456] First, the President must act pursuant either to an inherent Constitutional authority or pursuant to congressionally conferred authority.[457] Second, the President lacks inherent constitutional authority; further, existing legislative delegations of authority (*e.g.*, procurement acts) either do not confer the authority with sufficient explicitness or there is an insufficient logical relationship between the congressional delegation or the purposes underlying it and the executive order requirement.[458] Third, even assuming that the executive order requirement is sufficiently related to a congressional delegation to pass muster as an exercise of legitimate authority, it is nevertheless inconsistent with some other congressional decision or expression of policy, *e.g.*, section 703 or title VI, and must therefore fall.[459]

That argument is a good one and one largely assumed in the preceding discussion,[460] but the argument made here is distinct; it is that the traditional argument's implied subtlety of inquiry into the question whether a general procurement act authorizes presidentially imposed affirmative action, and the subtlety inherent in determining whether Congress has prohibited affirmative action is inappropriate. The appropriate inquiries, rather, are whether a decision of this magnitude should be imposed exclusively on the Congress, and whether an explicit congressional judgment should be required as a matter of constitutional law.

There are two potential sources of a doctrine of constitutionally appropriate decisionmaker in the present context. First, there is the special role granted the Congress in the post-Civil War Amendments.[461] The second potential basis for the doctrine is one of function derived from notions of separation of powers and from admittedly atrophied notions of the delegation of legislative power. The arguments supporting these sources are suggested in Mr. Justice Powell's opinions in *Bakke*[462] and in *Fullilove*.[463]

455. The framework is provided by Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *See also, e.g.*, Junior College Dist. v. Califano, 597 F.2d 119, 120-21 (8th Cir. 1979); Isle Baro Sch. Comm. v. Califano, 593 F.2d 424, 426-30 (1st Cir. 1979). *But see* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 777-86 (2d Cir. 1980), *cert. granted*, 101 S. Ct. 1345 (1981).

456. *See* Brody, *supra* note 330.

457. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

458. Note, *supra* note 367, at 934-39.

459. *Id.* at 939-49.

460. *See* text & notes 313-367 *supra*.

461. U.S. CONST. amends. XIII § 2, XIV § 5 & XV § 2.

462. 438 U.S. 265, 309.

463. 100 S. Ct. 2758, 2784-85 (Powell, J., concurring).

B. *Mr. Justice Powell and Findings*

Justice Powell's *Bakke* opinion suggests that racial preferences are permissible if designed as a remedy by a court, legislature, or "responsible administrative agency"[464] following a finding of discrimination:

> [I]solated segments of our vast government structures are not competent to make these decisions, at least in the absence of legislative mandates and legislatively determined criteria. Cf. Hampton v. Mow Sun Wong. . . . Before relying upon these sorts of findings in establishing a racial classification, a government body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.[465]

Although Justice Powell reserved in *Bakke* the question of "Congressionally authorized administrative actions" and congressional power under the enforcement clauses of the thirteenth and fourteenth amendments,[466] he appears to have adhered to his *Bakke* position in his concurring opinion in *Fullilove*.[467]

There are two aspects of Justice Powell's argument of initial importance here. First, in *Bakke* he was unwilling to accept the proposition that societal discrimination warrants a quota[468] and insisted upon a reading of prior cases as examples of remedies granted for discrimination on the part of the entities or class of entities required to adopt the quota.[469] The characterization is misleading, for the cases cited cannot be read as examples of compensatory remedies.[470] Rather, they are cases of remedy as rectification of a broadly defined social problem, the causes of which cannot be limited to the actions of the party bearing the costs of the remedy.[471] In short, many of the cases, including the executive order cases[472] cited by Powell in *Bakke* as involving findings of discrimination, are examples of cases in which remedies for societal, or at least industry-wide, discrimination were granted.[473]

The findings insisted upon by Justice Powell may, however, be read as a reference to institutional function and competence. Although

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464. 438 U.S. at 301.

465. *Id.* at 309.

466. *Id.* at 302 n.41.

467. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2784-85 (1980) (Powell, J., concurring).

468. 438 U.S. at 296 n.36.

469. *Id.* at 300-02.

470. *See* Edwards, *supra* note 50, at 128-33; Larson, *supra* note 50, at 230-31. *See also* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 237 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

471. *See* McCormack, *supra* note 66, at 534-38 (distinguishing remedy as compensation and remedy as rectification).

472. *See* Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

473. 438 U.S. at 301.

congressional findings are often neither detailed nor individualized,[474] judicial deference to congressional decisions is often grounded on the notion that Congress has superior fact finding capacity. Indeed, one repeated explanation of the Court's deference to congressional exercises of power under the enforcement clauses of the post-Civil War Amendments[475] has been to cite that superior capacity.[476] The Court has often deferred to presumed legislative facts and to possible but unarticulated legislative rationales.[477] Although the notion of superior congressional competence has also been framed as superior ability to examine social conditions, determine matters of degree, or to evaluate facts,[478] it is submitted that the notion is best characterized as Congress's superior capacity to represent diverse interests and to make policy choices through the process of that representation. More accurately, perhaps, it is not superior capacity but a superior claim to democratic legitimacy that warrants judicial deference.[479] Judicial deference proceeds not so much from the fact that Congress has made extensive findings in any given case of legislation but from the fact that Congress more accurately reflects current values and the popular will, and may therefore make reasonable assumptions in accommodating conflicting values and interests.[480] If there is to be an insistence upon legislative findings as a justification for legislative action, it should more properly be an insistence upon some assurance that Congress actually considered the reasons asserted as justification for the law.[481]

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474. *See* Fullilove v. Kreps, 584 F.2d 600, 605-06 (2d Cir. 1978) (postulating possible bases for congressional policy judgment as sufficient factfinding), *aff'd sub nom.* Fullilove v. Klutznick, 443 U.S. 193 (1980); Larson, *supra* note 50, at 241 (recognizing limited factual findings supporting minority set-aside). *Cf.* FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 813-14 (1978) (describing facts as policy judgments in the administration process); Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 640 (1966) (defining legislative facts broadly).

475. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 248-49 & n.31 (1970); Katzenbach v. Morgan, 384 U.S. 641, 656 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 328-31 (1966).

476. *See* Cox, *supra* note 453, at 229-30.

477. *See* note 455 *supra*. Professor Cox makes this more explicit in Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 104 (1966). *But see* Gordon, *The Nature and Uses of Congressional Power Under Section Five of The Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656, 669 (1977).

478. Cox, *supra* note 453, at 229-30.

479. *Cf.* Burt, *supra* note 453, at 112-13 (arguing that the legislative mechanism is superior in "devising appropriate adjustment of directly conflicting principles" because the legislature is less burdened than the courts by the need to adhere to consistent principles); Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 935-38 (1980) (describing facts as judgments).

480. McCormack, *supra* note 66, at 541-42; *see* Katzenbach v. Morgan, 384 U.S. 641, 656 (1966) ("it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literary requirement to deny the right to vote . . . constituted an invidious discrimination"); Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935) ("a statutory discrimination will not be set aside as the denial of equal protection . . . if any state of facts reasonably may be conceived to justify it.")

481. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2811-14 (1980) (Stevens, J., dissenting). Delegation doctrine, to the extent it remains viable, suggests such an insistence. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); National Cable Television Ass'n v. United States, 415 U.S. 336

Whatever Justice Powell's intended meaning in *Bakke*, his concurrence in *Fullilove* arguably[482] suggests that his concern with findings is a concern with verifying the legitimacy of congressional purpose. As noted here earlier,[483] *Fullilove* involved a constitutional challenge to the minority business enterprise provision of the 1977 Public Works Employment Act.[484] Under that provision, at least ten percent of federal funds granted state and local government grantees to build public facilities were required to be used by the grantees to procure services and supplies from minority business enterprises.[485] Such an enterprise was defined by the provision as one "at least 50 percent of which is owned by minority group members or, in the case of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members."[486] The Court, albeit without a clear majority opinion,[487] upheld the minority set-aside as an exercise of the spending power as measured by the commerce power[488] and by the fourteenth amendment enforcement power.[489]

The Chief Justice, Justice White, and Justice Powell further concluded that the set-aside was a remedy Congress tailored to overcome the "present effects of past discrimination"[490] in government contracting, that Congress need not act in a colorblind fashion in such a remedial context,[491] and that Congress, therefore, did not violate the

(1974); Stoner v. California, 376 U.S. 483 (1964); Greene v. McElroy, 360 U.S. 474, 507 (1959); Kent v. Dulles, 357 U.S. 116 (1958); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). *See generally* S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER (1975); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1978); Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976); Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972); *see also* note 562, *infra*. *But see* Wright, *supra* note 431 at 229-31. It has been suggested that the Court will insist, following *Oregon v. Mitchell*, 400 U.S. 112 (1970), upon express congressional findings when Congress exercises its fourteenth amendment enforcement authority. Gordon, *supra* note 477, at 669. *Cf.* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (suggesting that the Court should insist upon an articulation of the real legislative rationale).

482. *Compare* Fullilove v. Klutznick, 100 S. Ct. 2758, 2787 (1980) (Powell, J., concurring) ("Congress is not expected to act as though it were duty bound to find facts and make conclusions of law") *with id.* at 2789 (Powell, J., concurring) ("In light of these legislative materials . . . I believe that a court must accept as established the conclusion that purposeful discrimination contributed substantially to the small percentage of federal contracting funds that minority business enterprises have received.")

483. *See* text & notes 4-5 *supra*.

484. 42 U.S.C. § 6705(f)(2) (Supp. III 1979).

485. *Id.*

486. *Id.*

487. The Chief Justice announced the judgment of the Court in an opinion in which only Justices White and Powell joined. Justice Powell concurred in a separate opinion. 100 S. Ct. at 2783. Justices Marshall, Brennan, and Blackmun concurred in a separate opinion written by Justice Marshall. *Id.* at 2795.

488. *Id.* at 2772-74; *id.* at 2785 (Powell, J., concurring); *id.* at 2796 (Marshall, J., concurring).

489. *Id.* at 2774-75; *id.* at 2786 (Powell J., concurring); *id.* at 2796 (Marshall J., concurring).

490. *Id.* at 2775.

491. *Id.* at 2776-77.

equal protection component of the fifth amendment.[492] Justice Stewart and Justice Rehnquist dissented on the ground that the equal protection component of fifth amendment due process precludes racial preferences except in a truly remedial context, where such a preference is carefully limited to redress a violation of law.[493] Justice Stevens dissented separately on the ground that Congress had not adequately considered the legislation.[494]

An essential part of Justice Powell's analysis in his separate concurrence in *Fullilove* was the notion that Congress does not act legitimately in adopting an express quota unless it has found a constitutional violation.[495] Such a finding may, in Justice Powell's view, take the form of a policy judgment not evidencing the adjudicatory exactitude expected of a court.[496] How much inexactitude Justice Powell is willing to permit is not clear. In concluding that Congress found purposeful discrimination present in government procurement processes,[497] Powell implies that there is some ultimate definition of discrimination to which the Court should require congressional findings to make reference. Yet, Powell also employs language in his opinion implying that Congress may define discrimination in the course of legislating against it since Congress is a policy making body.[498]

These alternatives need not, of course, be viewed as mutually exclusive and are probably more accurately viewed as matters of degree along a definitional continuum of congressional function. If the Court is to have any role to play in reviewing congressional legislation purporting to remedy (in a legislative sense) discrimination, there must presumably be an outer constitutional limit given the meaning of discrimination.[499] The important point is that Justice Powell's *Fullilove* opinion suggests a meaning to be assigned the term findings significantly colored by a recognition of the value of the congressional process and of policy making as distinguished from policy application.

There is another reason, however, for questioning the seriousness

492. *Id.* at 2776-82. Justices Marshall, Brennan, and Blackmun concurred on the basis of Justice Brennan's analysis in *Bakke*. *Id.* at 2796.

493. *Id.* at 2801 (Stewart, J., dissenting).

494. *Id.* at 2813-14 (Stevens, J., dissenting).

495. *Id.* at 2785 (Powell, J., concurring).

496. *Id.* at 2789 (Powell, J., concurring).

497. *Id.*

498. "Congress is not an adjudicatory body called upon to resolve specific disputes between competing adversaries. Its constitutional role is to be representative rather than impartial, to make policy rather than to apply settled principles of law." *Id.* at 2787 (Powell, J., concurring); *but see id.* at 2788 n.4 (rejecting "perceive a basis" standard of fifth amendment review of congressional action).

499. Whether that limit should include an insistence upon purposefulness, 100 S. Ct. at 2789 (Powell, J., concurring); Washington v. Davis, 426 U.S. 229 (1976), is, it seems to me, doubtful. *Cf.* City of Rome v. United States, 100 S. Ct. 1548 (1980) (fifteenth amendment).

with which the Powell opinions in *Bakke* and *Fullilove* emphasize the question of findings: There is an element of unreality in it. At best, it is difficult to believe that anyone seriously questions the historical fact of racial discrimination and the impact of that discrimination on the social and economic welfare of blacks.[500] To insist upon findings in any but the broadest policy sense of the term is, in the face of such knowledge, really to insist upon a finding of individualized fault. This is an appropriate inquiry, although a forgotten one in this context, for the judiciary, but an irrelevant one for the legislature. Justice Powell's *Fullilove* opinion seems to recognize as much in permitting congressional reliance upon past congressional experience.[501]

The second aspect of Justice Powell's *Bakke* opinion worth noting is that it leaves open the possibility that administrative agencies and state legislatures have the competence to make the necessary findings and to impose remedies.[502] The difficulty with this proposition, if Justice Powell meant to suggest that an administrative agency may make policy decisions in this context without express legislative sanction, is that it ignores the thrust of the cited authority for his institutional competence argument: *Hampton v. Mow Sun Wong*.[503]

Hampton involved a challenge to a civil service regulation barring aliens from federal employment.[504] The Court, "assuming without deciding" that the rule could be upheld as justified by important national interests if either Congress or the President adopted the rule after explicitly determining that those national interests would be served by it,[505] concluded that the civil service commission lacked the competence necessary to the determination:

> It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotas or conditions of entry, or for naturalization policies. Indeed, it is not even within the responsibility of the Commission to be concerned with the economic consequences of permitting or prohibiting the participation by aliens in employment opportunities in different parts of the national market. On the contrary, the Commission performs a limited and specific function.[506]

Hampton's initial points are that an administrative agency's legiti-

500. *See generally* Days, *Concealing Our Meaning from Ourselves: the Forgotten History of Discrimination*, 1979 WASH. U.L.Q. 81.
501. 100 S. Ct. at 2787 (Powell, J., concurring).
502. 438 U.S. at 301-05.
503. 426 U.S. 88 (1976).
504. *Id.* at 90 n.1.
505. *Id.* at 103.
506. *Id.* at 114.

mate institutional competence is a function of the role Congress (and possibly the President if the President possesses inherent or delegated authority)[507] assigns to it and that it is a function of the judiciary to enforce the scope of that role.[508] Those points are not surprising as a matter of abstract dogma; they are surprising in view of what has generally been deemed the death of nondelegation doctrine.[509] There is, however, an underlying point to *Hampton* which, although it too is a part of the thrust of nondelegation doctrine, may now be independently reasserting itself both in the context of congressional delegation and in other contexts in which separation of powers is a relevant value.[510] It is the responsibility of Congress to make legislative decisions of important policy, particularly when those decisions have an impact upon what the Court perceives as constitutionally protected interests. Congress may not shirk the responsibility for making those decisions merely by satisfying itself that noncongressional organs of government are dealing with problems with which Congress would presumably otherwise be interested.

The initial reason for the present criticism of Justice Powell's suggestion that administrative agencies and state legislatures may have the institutional competence to make quota decisions is that the question of their competence is unexplored in that opinion. More disturbing are the cases distinguished by Justice Powell. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*[511] upheld administratively imposed employment quotas; and *United Jewish Organizations v. Carey*,[512] upheld an apportionment plan in effect compelled by the Justice Department under the Court's strained version of congressional intent in the Voting Rights Act.[513] These cases suggest that institutional competence may be created by the inaction of Congress and without its explicit sanction.

Despite Justice Powell's citations, the premise that administrative competence is a function of explicit legislative policy decision provides meaning to his demand for findings and fully answers Justice Brennan's criticism in *Bakke*[514] of Justice Powell's insistence upon institu-

507. *See* Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978).

508. Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976); *see* K. DAVIS, *supra* note 481, at 149-223.

509. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 575-76 (1979); Cannon v. University of Chicago, 441 U.S. 677, 730-49 (1979) (Powell, J., dissenting).

510. *See* Sandalow, *supra* note 452, at 1188-89; Sandalow, *supra* note 452, at 694-99.

511. 442 F.2d 159 (3d Cir. 1971).

512. 430 U.S. 144 (1977).

513. Beer v. United States, 425 U.S. 130, 141 (1976); Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969); *see* United Jewish Organization v. Carey, 430 U.S. 144, 182-85 (Burger, C.J., dissenting); Allen v. State Bd. of Elections, 393 U.S. 544, 583-91 (1969) (Harlan, J., dissenting). *But see* Fullilove v. Klutznick, 100 S. Ct. 2758, 2810 (1980) (Stevens, J., dissenting).

514. 438 U.S. at 366 n.42.

tional competence. The question is not one of Supreme Court interference with state allocations of power. Rather, the question, at least if one assumes that political representation is an enforceable constitutional norm, is whether such an allocation of power took place in fact.[515]

C. *Congressional Powers of Interpretation and* Fullilove v. Klutznick

As previously noted,[516] the first argument in favor of an exclusive congressional competence (including the competence to make an explicit delegation), is that the enforcement clauses of the thirteenth and fourteenth amendments clearly allocate responsibility to the Congress. The objections are that the meaning of enforcement is unclear and that an exclusive congressional competence would repeal the necessary basis for the Court's adjudication of conflicts between state and individual interests, the self-executing nature of the post-Civil War Amendments. The latter criticism attacks a position not taken here. The amendments are self-executing because the Court has, quite properly, so interpreted them[517] and is not likely to change that position. The Court has, therefore, a substantial interpretive role. Exclusivity in this context means that the Congress, not the executive, is expressly granted enforcement authority. To the extent that the President may cite an independent constitutional source of authority to act upon a particular subject matter touching thirteenth and fourteenth amendment interests, the exercise of Presidential power must be limited by recognizing that the amendments are self-executing and that Congress has the express authority to enforce those amendments.[518] The Court's authority may be attributed to its traditional constitutional function.[519] The additional problem of the meaning of enforcement presents, however, two difficulties: Does it imply an interpretive authority, and, if so,

515. Sandalow, *supra* note 46, at 698-99. If colorblindness is the constitutional presumption, one need not assume a federal constitutional doctrine governing allocation of state legislative authority to reach the conclusion that the Executive Order's affirmative action requirements are not constitutional exercises of executive authority. It is possible to go beyond Justice Powell's position and to suggest that the question of racial policy is taken completely from the hands of the states, either on the grounds that it is a national concern and that the post-Civil War amendments and their enforcement clauses preempt state authority, or on the grounds that Congress is the only forum with sufficient representative capacity and legitimacy to consider the issue. *Cf.* Sandalow, *supra* note 452, at 1187-88 (suggesting that broad functional responsibilities of Congress give it a better claim to decisions regarding societal norms than lesser bodies).

516. *See* text & notes 313-366, *supra*.

517. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Palko v. Connecticut, 302 U.S. 319 (1937).

518. *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1951) (Jackson, J., concurring).

519. Marbury v. Madison, 1 U.S. (1 Cranch) 137 (1803); *see* Fullilove v. Klutznick, 100 S. Ct. 2758, 2772 (1980).

what is the extent of congressional interpretive authority vis à vis the Court?

It is submitted that enforcement must inevitably imply interpretation; one cannot enforce what one does not understand as having some assigned meaning. It is, of course, possible to respond by suggesting that the Congress may enforce only what the Court tells it is the constitutional meaning, but the proposition ignores the inference created by the explicit references to congressional power in the enforcement clauses: That enforcement is a legislative act and therefore by its nature a policy making act. Although it is true that the Court exercises a sort of veto power over congressional interpretation at the margin,[520] it is equally clear that congressional judgment is to be given great deference.[521] The primary limitation upon that deference is that Congress may expand, but may not contract, thirteenth and fourteenth amendment rights.[522] The objections to the limitation are that it does not tell us why Congress has such limited power and does not tell us, because rights conflict, when Congress has and has not expanded or contracted those rights.[523]

The objections may be answered in two ways. First, it is difficult to see how the first problem is distinguishable from any other case of congressional regulation. Each such case requires that the Court apply a test of legitimacy, giving deference to congressional action which is assumed to be taken by a Congress having an independent obligation to interpret constitutional sources and limits upon its power.[524] Second, no congressional decision or Court decision reviewing a congressional decision is free from the necessity of choice between conflicting interests, which often are constitutionally recognized conflicting interests. The second objection suggests that the Congress lacks the expertise and, perhaps, the objectivity necessary to balance. Yet, deference need not be, although it has sometimes been in the past,[525] a shorthand for judicial abdication.

Analysis of the Court's pronouncement in *Katzenbach v. Morgan*[526] that Congress does have an interpretive role to play under at

520. Oregon v. Mitchell, 400 U.S. 112 (1970).

521. *See, e.g.*, Fullilove v. Klutznick, 100 S. Ct. 2758, 2775-76 (1980); City of Rome v. United States, 100 S. Ct. 1548, 1560-62 (1980); Hutto v. Finney, 437 U.S. 678, 694-700 (1978); Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976); Katzenbach v. Morgan, 384 U.S. 641, 649-50 (1966); United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring); 383 U.S. at 784 (Brennan, J., concurring & dissenting).

522. Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966).

523. Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 607 (1975).

524. *But see* Choper, *The Scope of National Power Vis à Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1602 (1977).

525. *See* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

526. 384 U.S. 641 (1966).

least the fourteenth amendment has centered upon the problem of limiting that role. One means of approaching the problem is to place only those familiar limitations of the necessary and proper clause on that role. Section five of the fourteenth amendment centers plenary authority on Congress limited only by the general subject matter of the amendment.[527] That approach has been seen rightly and repeatedly as too expansive because it is potentially too threatening to rights we wish to preserve.[528] A second approach has been to suggest that congressional authority is limited to devising legislation consistent with at least the general principles developed by the Court[529] or with the Court's general value preferences or direction.[530] A third approach suggests that the congressional role is limited to functions consistent with its factfinding superiority[531] and does not, except in narrow and almost interstitial senses, extend to normative judgments.[532] A fourth is the suggestion that Congress may enhance but may not restrict the Court's position on the amendment's requirements; Congress has a special institutional competence to adjust the relationship between the states and the federal government.[533]

A final approach suggests that the fourteenth amendment has meaning beyond that given it by the Court. Because Congress is not limited by the institutional constraints restraining the Court's interpretations, it may fully interpret the amendment if the Court can perceive an analytically defensible conception of the relevant constitutional concept.[534] Under the last approach, Congress is limited by the Court's

527. *Id.* at 668 (Harlan, J., dissenting).

528. *See* Buchanan, *Katzenbach v. Morgan and Congressional Enforcement Power Under the Fourteenth Amendment: A Study in Conceptual Confusion*, 17 HOUSTON L. REV. 69, 103-116 (1980).

529. Cox, *supra* note 453, at 254; *see* Buchanan, *supra* note 528, at 116-128.

530. Burt, *supra* note 453, at 114-18. *See* Fullilove v. Klutznick, 100 S. Ct. 2758, 2789 (1980) (Powell, J., concurring) (Congress could have found purposeful discrimination).

531. Oregon v. Mitchell, 400 U.S. 112, 248-49 (1970) (Brennan, J., concurring & dissenting); Cox, *supra* note 453 at 229-30; Cox, *supra* note 477, at 100-107.

532. Fullilove v. Klutznick, 100 S. Ct. 2758, (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

533. The use of the remedial rationale in *Fullilove* suggests as much. 100 S. Ct. at 2776-77. *See also* Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 691 (6th Cir. 1979) ("constitutional duty" to correct past discrimination).

534. In *Fullilove* the Court did not reach the question of congressional authority to regulate private conduct under the fourteenth amendment. The Chief Justice's opinion measures the spending power by the commerce power in the case of private contractors and, in the case of the states, by the fourteenth amendment enforcement power. 100 S. Ct. at 2773-75. In both instances, the power appears to have been judged by a "perceive a basis" and reasonableness test. *Id. See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

Justice Powell's concurring opinion in *Fullilove* appears to find congressional power to enact the set-aside, that is, to find and remedy discrimination, in both the commerce and enforcement powers. 100 S. Ct. at 2785-87. He nevertheless concludes that the means selected (a racial quota) were not unconstitutional (apparently as a matter of the fifth amendment) because the purpose was remedial and because "the enforcement clauses of the Thirteenth and Fourteenth amendments give Congress . . . discretion to choose a suitable remedy." *Id.* at 2790. In short, Justice Powell appears to have adopted, albeit framed in remedial language, the general notion that the

view of the minimum content of constitutional norms.[535]

Each of these approaches seeks to permit a congressional role, even a role which would eliminate a state action predicate for congressional action,[536] and to simultaneously provide a justification for preventing congressional intrusion upon the normative judgments of the Court. Lacking in the case of the problem of benign consideration of race is, however, a Supreme Court normative judgment at a level at which it has legitimate competence. The Court has not been willing to apply the colorblindness norm to reverse discrimination in a manner that even approaches its *Brown*-era view of that norm.[537] It has been equally unwilling to adopt the group rights notion which would seem necessary to a constitutional obligation of benign use of race.[538] Instead, the Court has engaged in the sort of strained statutory interpretation evident in *Weber*. Such an interpretation allows the Court to permit administrative agency conduct it believes necessary while purporting to adhere to an ultimate colorblindness ideal realizable in the indefinite future.

There is a means of avoiding this judicial compromise of conflicting principle and need short of explicitly redefining the principle. It is to adhere to the principle while recognizing the constitutional authority of the Congress to undertake, at a minimum, purportedly shortrun modifications to the principle in reasonable, necessary, and proper ultimate service to the principle. What is necessary, in the absence of an acceptable theory of constitutional mandate, is a determination for the politically responsible institutions of government, not for the courts.

Of course the case which in fact reaches the issue of congressional interpretative authority, albeit substantially commingled with authority under the commerce clause,[539] is *Fullilove v. Klutznick*.[540]

The repeated references to the term remedy in those of the *Fullilove* opinions that seek to uphold the set-aside suggest that the Court, albeit by means of diverse shadings of the meaning,[541] has found a tal-

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enforcement clauses provide a broad base of authority for a unique congressional role. *Id.* at 2794.

535. *See* 100 S. Ct. 2758 (1980).

536. 100 S. Ct. at 2794 (Powell, J., concurring). Although Justice Powell distinguished the standard of judicial inquiry on the question of congressional power from that applicable to the question of 5th amendment limitations on that power, *id.* at 2788 n.4, it is apparent that congressional authority under the 14th Amendment significantly colored his view of the extent of such limitation. *Id.* at 2791, 2794.

537. *Id.* at 2774, 2777-80.

538. *Id.* at 2796-97 (Marshall, J. concurring).

539. Gordon, *supra* note 477, at 671-80.

540. 100 S. Ct. 2758 (1980).

541. My count is four: (1) Remedy means any measure adopted to benefit a class historically the object of discrimination, *Id.* at 2796-97 (Brennan, Marshall, Blackmun J.J.); (2) remedy means remedy for specific victims after a finding of a specific violation causing harm to the victim and tailored to redress the harm, *Id.* at 2801 (Stewart and Rehnquist J.J.); (3) remedy means some-

isman for resolving the problem of the relationship between the Court's enforcement of the equal protection guarantee and congressional authority to enforce that guarantee. Although no Justice reached the question of congressional enforcement authority as such and none reached the question of enforcement and private conduct, it is nevertheless apparent that the Chief Justice and Justices White, Powell, and Stevens were primarily influenced by a recognition of unique congressional role.[542]

Perhaps the Court has found a talisman. The point of the Burger and Powell opinions is that there will be judicial deference to congressional policy making, and that policy making authority seems clearly to include the right to define the evil sought to be remedied so long as the purpose is proper.[543] The Court is looking primarily to the question of legislative motivation[544] even as it insists upon framing its inquiry in part in terms of the propriety of means. To the extent criteria by which means are to be judged are discussed in the opinions,[545] such criteria seem more clearly tailored to identifying when Congress might be attempting to confer a benefit or to inflict harm solely by reason of race than expressive of judicial concern with some unexpressed constitutional defect with the means itself.

If it is true that the Court is concerned only with congressional purpose, it would be folly to believe that such an inquiry is sufficient to

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thing between these extremes, possibly any policy conferring benefits upon a class historically discriminated against if not motivated by a desire to at least permanently create a "group right," *Id.* at 2790 (Powell, J.); and (4) remedy is a label that may be accompanied by language descriptive of (2), but which is in fact judged by the standards of (1) or (3), *Id.* at 2775-82 (Burger, C.J., and White J.) (not intending this characterization to minimize the task of reconciling the value system underlying (2) with the policy underlying (1)). Actually, there appears to be little difference between the verbal formulation of (1) and (3), unless Justice Powell's distaste for the group rights notion is emphasized. *Id.* at 2784. If it is emphasized, Justice Powell would presumably be more likely to invalidate legislation solely designed to confer a benefit on a racial group because of race. It is clear that he would not restrict invalidation only to those instances of legislative action designed to harm because of race alone). *Id.* at 2784 (Powell, J., concurring).

One suspects that Marshall, Brennan, and Blackmun would deem any legislative action not designed to harm by reason of race remedial if of benefit to a minority. The Marshall opinion, if taken at its extreme fringes, would permit what has been suggested here as within the permissible scope of congressional power—a forced restructuring of society, in derogation of traditional merit and individualistic values, with the object of achieving some approximation of equality in fact (rather than merely of opportunity) between the races. *Id.* at 2797-98 (Marshall, J., concurring). Clearly, congressional authority to adopt an impact or effects standard regarding the meaning of equality supports such a power. *See* City of Rome v. United States, 100 S. Ct. 1548 (1980) (fifteenth amendment).

542. *See* text & notes 489-494 *supra*.

543. 100 S. Ct. at 2780-81; *id.* (Powell, J., concurring).

544. *See generally* Brest, *supra* note 42; Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36 (1977); Eisenberg, *Reflections on a Unified Theory of Motive*, 15 SAN DIEGO L. REV. 1147 (1978); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); J. ELY, *supra* note 422 at 136-45; Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155 (1978); Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, (1978).

545. 100 S. Ct. at 2779-80; *Id.* at 2791-94 (Powell, J., concurring).

discover and invalidate all or even most instances of improperly motivated legislative action. At best, the motivation approach may be successful in rooting out the most obvious or egregious of improper purposes. The line between the improper purpose of preference for the sake of preference and the proper one of preference for the sake of redress (or for the sake of generating an increased participation in goods, services, and intangible benefits), is a very difficult one to draw. Indeed, although there is language in the *Fullilove* opinions suggesting that Congress may not confer a benefit on the basis of race alone,[546] the broad definitions of remedy evident in those opinions,[547] and reliance upon congressional experience as a substitute for findings,[548] render that language largely meaningless. The improper motivation targeted by the analysis is more clearly that of harm for its own sake or in disproportion to some level of participatory equality among and between racial groups.

That the approach is limited to the invalidation only of a narrowly defined improper purpose is not fatal to its validity if one accepts what must be its major premise given the limitations of the approach: That judicial role is to be narrowly circumscribed and legislative role given largely free rein. It is submitted, in short, that *Fullilove*, albeit in the form of diverse opinions none of which express the view to this degree, is consistent with the argument made here that Congress is free to define discrimination and to legislate regarding it in virtually any manner it wishes so long as it does not (or too obviously does not) purposefully seek to inflict harm for reasons of race alone. A policy of reparations or a policy of forcing rough economic parity among the racial groups making up American society is not a policy of inflicting harm by reason of race alone; it is a policy the motivation for which is rough economic equality of racial groups. To the extent harm is inflicted in the course of pursuing such a policy, as it inevitably will be, it is not harm purposefully inflicted for its own sake. Nor is it harm intended to render one identifiable group less well off than another. When identifiable subgroups are harmed by what purports to be action in pursuit of the congressional policy in proportion distinct from the harm inflicted upon other groups, suspicion of purpose is in order.[549]

The foregoing interpretation of *Fullilove* does not compel the second argument made here: That there is a substantial catch. The catch

546. *Id.* at 2784 (Powell, J., concurring).
547. *See* note 541, *supra*.
548. 100 S. Ct. at 2787 (Powell, J., concurring).
549. *See* J. ELY, *supra* note 422, at 259 n.109. Although the suggested standard is similar to the stigma as attitude of the majority notion, note 422 *supra*, it is a standard applied only to congressional decision.

is that trusting the democratic process requires that the process both be democratic and be a process traceable to a constitutional source that can compete with and prevail over our recent commitment, in moral and constitutional terms, to racial neutrality. The interpretation does, however, support the second argument; an analysis granting substantial deference to Congress and consuming this degree of judicial energy in support of the deference should suggest to the Court the importance of the fact that the set-aside at issue in *Fullilove* was *congressionally* enacted.

The fundamental objection to an analysis that seeks to prohibit only purposeful infliction of harm for its own sake is not that it permits prejudiced government action. Although such an analysis risks prejudice, it prohibits it. The objection, rather, is that the analysis does not preserve individualist values. A secondary objection is that the analysis runs risks it cannot adequately control. The reason for the Court's inability to adequately respond to these objections, at least prior to *Fullilove*, is that there is no adequate answer short of an institutional answer either in the senses of a judicial redefinition of ultimate principle or a judicial deference to representative government. The fundamental objection is answered by congressional decision because such a decision, at least so long as we adhere to democratic theory, implies that the objection is in fact no longer fundamental. It implies that individualist values are no longer of sufficient weight to command the fundamental label. The secondary objection is answered by congressional decision because that decision is the product of a process which, in its difficulty and complexity alone, provides some insurance against risk and substantial evidence of purpose. Also, the institutional preeminence of Congress suggests sufficient visibility to assure accountability as a counterweight to risk.

Only Justice Stevens' opinion expressly suggests, albeit in radical form, the second argument.[550] That opinion is radical in the sense that it goes beyond what is contended here—that an explicit congressional decision is necessary and sufficient to a constitutionally valid government policy of racial preference. Justice Stevens' opinion differs in that it purportedly requires examination of the process by which such a preference was enacted to ensure that it was not perfunctory.[551] Whatever may be the merit of this radical view,[552] its premise is sound.

550. 100 S. Ct. at 2811-14.

551. *See Id.* at 2812 (Stevens J., dissenting).

552. In addition to the authority cited by Mr. Justice Stevens (Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976)), *see* L. TRIBE, *supra* note 265, at 1144-46. Although I am inclined to view Justice Stevens' position as sound, the first and fundamental problem is requiring congressional decision, not requiring a particular mode of decision.

Given our history of the use of racial preferences, the risks attendant upon such use and our recent moral and constitutional rhetoric condemning such risks, one cannot accept the proposition that there should be a judicial willingness to uphold the decision of a government institution to adopt a racial preference unless one is assured that the institution's process of decision is properly characterized as expressive of a firmly implanted constitutional value transcending these considerations. Despite Justice Stevens' apparent suggestion that the value has something to do with the manner of decision in the particular case,[553] it is submitted that the relevant value is that decision is made by the politically accountable institution expressly allocated policy making authority by the Constitution.

X. DELEGATION BY ABDICATION—A POLEMIC AND SUMMARY

The sources of the Court's legitimacy are presumably its removed objectivity and its self-restraint.[554] The source of congressional legitimacy is its representative character.[555]

If representation or representation reinforcement should be the touchstone of the Court's definition of its role,[556] the implication is necessarily that the accommodation of conflicting fundamental values in a context in which constitutional text provides no guidance as to the choice to be made is for the Congress. It is at least more clearly for the Congress than for the executive, the bureaucracy, and the state legislatures. This is initially so because constitutional text suggests a reference to Congress. In addition, the representation value implies not merely that all groups have access to representation and that the majority must tie its interests sufficiently to the minority to avoid nullification of that representation,[557] but that the representational forum has sufficient capacity to permit representation of diverse interests and sufficient status to give legitimacy to the accommodations reached.[558] Congress has these qualities in at least some observable measure. The

553. 100 S. Ct. at 2812.

554. Weschler, *supra* note 293, at 14-15.

555. Sandalow, *Judicial Protection of Minorities, supra* note 452, at 1187.

556. *See generally* Ely, *supra* note 431.

557. *Id.* at 464-69; *see also* J. ELY, *supra* note 431, at 82-87.

558. This is so if it is assumed that representation-reinforcement does not compel substantive legislative conclusions. In the absence of an indication that minority interests were underrepresented and therefore unconsidered, it is difficult to see on what representational basis a substantive conclusion not satisfying minority claims (but also not so disfavoring those claims to a degree raising underrepresentation and nonconsideration issues) could be invalidated. *But see generally* Michelman, *supra* note 51. (*See* the criticism of Michelman on this point in Appleton, *supra* note 304, at 730-33). *See also* note 422, *supra*. The difficulty, of course, is in determining what distinguishes underrepresentation and nonconsideration from mere legislative failure to agree. *See* J. ELY, *supra* note 422 at 166.

executive does not.[559] Certainly the bureaucracy does not.

There is, however, another prerequisite to institutional competence: There must be identifiable institutional responsibility. It is this prerequisite that suggests issues of separation of powers and of nondelegation,[560] and it is here that the Court's failure to distinguish institutional roles is evident. One premise of a representation value as a constitutional reference must be that significant issues of policy are decided in a process reflecting that value.[561] That is the premise making pernicious the suggestion that Congress ratified the Executive Order program when it declined to adopt an amendment prohibiting it. The declination does not constitute an explicit adoption of policy by a politically responsible forum.[562] Rather, it reflects a congressional failure to undertake the responsibility of making an important policy choice by deferring to an administrative forum not politically responsi-

559. It may be objected that the President is elected and therefore politically accountable and representative. The argument has force to the extent that it seeks to meet the representation value argument, but it does not adequately account for the policy making function of Congress. For that reason, it does not respond to the argument from constitutional allocation of function and fails to distinguish between distinct forms of representation implied by the allocation. *See* text & notes 450-452 *supra*. Moreover, it cannot be said, in the face of the functions of the office and the reality that a single human being cannot represent diverse constituencies, that the executive fits the model advocated. *See* L. TRIBE, *supra* note 265, at 157-63.

It may also be objected that there is an inherent presidential authority to enforce the Constitution consistent with the allocation argument. That objection ignores the thrust of the position asserted here: Whatever might be the scope of presidential interpretive authority, it must be interstitial and properly characterizable as administrative if congressional policy making authority is to be preserved.

An additional counterargument against the objection that inherent presidential authority to enforce constitutional guarantees cannot include affirmative action obligations because there is no affirmative obligation to correct underutilization in private employment, (*see* Note, *supra* note 367, at 927-28), is apparently grounded on the notion that government action is not present where the government spends money. *Id.* The counterargument will not wash in that form. The question is one of substantive doctrine, not government action, and it is not inconceivable to postulate a substantive doctrine of affirmative duty where the government spends money. The problem with the second objection along this line of attack lies, then, in the absence of such a substantive (constitutional) doctrine and in the emphatic reluctance of the main argument made here to permit an executive interpretive role which would intrude upon congressional policy making authority.

560. Nondelegation doctrine has been alternatively traced to separation of powers doctrine, due process, the nature of a democratic society and the "principle of constitutional supremacy." For an overview, see Freedman, *supra* note 481. (reviewing S. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER (1975)). The notion suggested here is similar to that of Professor Barber and others—that Congress may not abdicate responsibility for deciding controverted policy issues either by delegating that responsibility directly or by doing so indirectly by means of insufficiently explicit direction. *See, e.g.*, E. FRUEND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY 218 (1928); Freedman, *supra* note 481, at 326. *But see* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 34 (1965). The "second look" decisions, requiring Congress to make explicit decisions where some fundamental value is intruded upon by administrative action, provide at least some support for the notion. Hampton v. Mow Sun Wong, 426 U.S. 88, (1976); National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); Kent v. Dulles, 357 U.S. 116 (1958). *See* Freedman, *supra*, at 318-29.

561. *See* text & note 439, *supra*.

562. *Cf.* Lesnick, *Job Security and Secondary Boycotts*, 113 U. PA. L. REV. 1000, 1014-15 (1965) (status quo of earlier legislation controlling unless legislator's beliefs have "translated themselves into action," *quoting* O.W. HOLMES JR., SPEECHES 101 (1913)).

ble. It is true that the Court cannot compel congressional decision, but the truism does not warrant a conclusion that inherently ambiguous congressional inaction permits executive action. If the Court perceives a need not addressed by congressional action, it does not, unless prepared to formulate a constitutional mandate for its preference, legitimately address the need itself by forming a partnership with the executive.

The criticism has been leveled as well at the congressional predilection for avoiding decision by delegation of authority without statutory standards[563] and at the judicial tendency to imply private causes of action from regulatory legislation in which Congress has declined to make a decision regarding private enforcement.[564] In both instances, however, it is the Court's failure to enforce the constitutional conception of congressional role—in the first instance by silently annulling nondelegation doctrine and in the second by usurpation—that warrants our concern. If representation is a neutral principle[565] and process a relevant value legitimizing judicial review, it is a value that must be enforced not only by unclogging government processes so as to protect "discrete and insular minorities"[566] but by insisting as well that government institutions that formalize the representational values decide fundamental questions of social and economic policy. Given our history, it is inconceivable that government policy encouraging or compelling the use of race as a criterion for decision could be characterized as not within the category of fundamental questions.

The thesis suggested here—that it would be permissible for Congress to explicitly require employment quotas but that it is impermissible for lesser entities to do so—assumes an additional step. If colorblindness is not a constitutional absolute, why should Congress be required to affirmatively sanction or require employment quotas as a condition to the legitimacy of government action encouraging or compelling such quotas, and why should it not merely be permitted by the Court to prohibit them?[567] The answer has been suggested earlier, but

563. *See, e.g.*, S. BARBER, *supra* note 481, at 38-50; Freedman, *supra* note 481, at 323; Wright, *supra* note 481, at 585. Judge Wright has nevertheless registered his disagreement with Justice Powell's theory in *Bakke*. *See* Wright, *supra* note 481, at 229-30.

564. *See* note 509 *supra*.

565. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

566. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

567. This problem is suggested in Sandalow, *supra* note 45, at 701-02. Professor Sandalow, however, came to a different conclusion on an experimentation rationale. *See also* Pollack, *Mr. Chief Justice; May It Please The Court*, 9 SW. U.L. REV. 571, 580 (1977).

The counterargument is presumably that if the Court is free to adopt the prophylactic standard, it is equally free to adopt an antidiscrimination principle that approves, encourages, or even mandates equality in fact, as distinguished from equality of opportunity. The choice of such a principle could deny the reasons here asserted for maintaining the colorblind standard, but these reasons do not deny the Court's freedom of original choice. Nor does a principle of deference to

the question is of sufficient importance to require a summary.

If one assumes an equal protection clause that references only a representational value, the question of what provisions are inserted in a government contract in the absence of some indication that persons disfavored by particular clauses lack political power or are discounted in the political process does not seem sufficiently weighty to require congressional choice. The answer, then, must lie deeper. It is submitted that it lies initially in the proposition that equal protection analysis cannot be value-free; the analysis is inadequately characterized as limited to representation enhancement or reinforcement as a value where the Court must act in a context in which a governmental decision by a noncongressional source is reviewed and where the decision is of a magnitude to require congressional choice.[568] It particularly cannot be value-free in a context in which the Court has previously declared a relevant and authoritative substantive value. It must then operate within a moral climate it risks denying by compromise.[569]

The answer also lies in the proposition that the Court lacks the capacity to evaluate the risks inherent in the use of race as a basis for

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congressional decision bar freedom of original choice; the proposition that the Court must refer to some value in the absence of an explicit congressional decision clearly leaves open the possibility of choice. Those propositions are, however, largely beside the point for two reasons: First, the arguments made here are not intended to deny the choice, only to point out the proper alternative; second, in fact, there does exist a congressional choice since, despite *Weber*, title VII clearly was enacted in the context of a moral climate in which colorblindness was dominant. *See* note 411, *supra*. That proposition itself suggests a judicial role consistent with the arguments made here. *See* text & notes 586-593 *infra*.

568. It is not a satisfactory answer that the OFCCP, as a part of the executive, is ultimately responsible to the President and that the latter is politically responsible. In the first place, the possibility that OFCCP action will be identified with presidential action is remote at best. In the second, the answer ignores the widely held recognition that the bureaucracy is a fourth branch of government largely immune from either presidential or congressional control. *See generally* R. NEUSTADT, PRESIDENTIAL POWER (2d ed. 1980). Finally, the answer assumes a presidential role not conceded in the text. Of course, it is possible to argue that since the executive action challenged here is not tainted by a disfavoring of groups not represented or adequately considered in the political process, the action is not subject to strict scrutiny. In that argument, the sole relevant value is not implicated and the action is at least theoretically subject to change by politically powerful nonminorities. That argument itself raises two fundamental difficulties with the thesis that representational values should be a sole reference: First, the thesis assumes a description of the political power of racial majorities, minorities and of the political process itself, that is incongruent with observed reality. *See* note 436 *supra*.

Second, the thesis does not provide us with a systematic theory of the workings of the political process sufficiently rooted in observed reality to be at least partially verifiable, and therefore does not provide a standard of judicial measurement of that process. It is at least difficult to imagine how one is to go about proving in a judicial forum insufficient consideration of minority interests in the political process without risking judicial intrusion into legitimate substantive legislative results. *See* notes 431 & 558 *supra*.

These arguments do not necessarily impeach the attractiveness of the representation or process value theories, but they do suggest the reason for reliance on the much more limited proposition that the representational competence of government institutions should be the main focus of judicial concern.

569. *See generally* Dixon, *supra* note 45; Graglia, *Racially Discriminatory Admission To Public Institutions of Higher Education*, 9 SW. U. L. REV. 583 (1977); W. Van Alstyne, *supra* note 45. *Cf.* Karst & Horowitz, *supra* note 45, at 27-29 (suggesting that Justice Powell's *Bakke* opinion may be supportable as preserving an appearance of justice).

decision.[570] Stigma is not an answer to that proposition because we must assume a judicial capacity for distinguishing psychological injury substantially greater than that reasonably attributable to the sciences devoted to that problem.[571] Speculation concerning the probable prejudices of decisionmakers, itself requiring an identification of race, suffers from a similar defect: Race is simply too much a wild card to assume that the judiciary is capable of predicting the consequences of its use.[572] Colorblindness as prophylaxis is a manageable and effective means of avoiding the risks. It is true that the prophylactic cure for racial prejudice itself risks an unacceptable status quo generated by a history of the use of race as a basis for decision, but that is precisely the point. In the absence of a judicial willingness to mandate remediation of that history at a level at which it has a claim to legitimate decision, a commitment to a change in the status quo and the judgments concerning the measures necessary to the change is properly a subject for the Congress. The limitations of motive analysis do not disappear when applied to Congressional decision, but they are of substantially less concern where there is an assurance of legislative decision. If, then, colorblindness does not warrant status as a constitutional absolute, it does warrant, by virtue of the risks and the values underlying the perception that they are risks, the status of a presumption to be informed or modified by congressional action.

Two objections to this proposition should be confronted. The first is that congressional modification of a presumptive constitutional value is unlikely, and requiring congressional action is merely a lengthy means by which to reject government imposed employment quotas.[573] The second is that the theory suffers from the same defect as Professor Ely's argument that the majority may discriminate against itself: There is no monolithic white majority and the theory therefore permits shifting coalitions to gang up on subgroups of the majority least likely to possess political power or to absorb the harm inflicted by racial preferences.[574]

Although both objections may be characterized as merely partisan

570. It lacks, as well, the capacity to evaluate and supervise the practical consequences of its actions. *See* Meltzer, *supra* note 77, at 457-58.

571. *See* text & notes 421-427 *supra*.

572. *See* text & notes 443-446 *supra*.

573. *See* Dixon, *supra* note 45, at 73.

574. *See* Van Alstyne, *A Preliminary View of the Bakke Case*, 64 AM. A.U. PROFESSORS BULL. 286, 296 (1978).

A third objection is that the argument in the text does not recognize the countervailing equality value. The difficulty, however, is one of defining the meaning of equality. If it means social leveling, I would submit that such a form of equality is not, in fact, a value in American society. *See generally* N. GLAZER, *supra* note 45. Equality as equality of opportunity is closer to the mark. The justification for affirmative action would then be that systematic, historical racism has made equality of opportunity unattainable in the absence of affirmative relief. But that determi-

estimates of success, it is apparent that both have merit. The difficulty with both, however, is that they betray dissatisfaction with the constitutional scheme. If it is assumed that the Court will not in the foreseeable future conclude that racial proportionality is constitutionally compelled,[575] the first objection constitutes a suggestion that the quota remedy is properly secured by the judicial sleight-of-hand evident in *Weber*, and that Congress should be permitted to continue its slumber.[576] The second objection suggests that a reliance upon Congress excludes the possibility of a continuing judicial role. It is submitted that that is not the case, despite the Court's record in taking seriously the task of detecting illicitly motivated harm in this context.[577] There need not be judicial abdication if the analytical tools suggested by some of the Court's members[578] for evaluating purportedly benign racial preferences were sensitively applied to congressionally sanctioned or mandated policy. The objection made by the thesis of this paper is not that those tools are inadequate. Although the tools are less than precise and are inadequate if there is no initial assurance of congressional consideration of the issue, they may well be adequate if that additional assurance is present. The objection, rather, is that the tools have been applied to the actions of government agencies which have neither the constitutional competence nor the legitimacy to make the initial decision in a democracy.

XI. THE COURT'S ROLE AND THE WEBER DECISION: A CONCLUDING CRITIQUE

The constitutional attack made here on both Executive Order 11246 and the assumption of voluntariness which permitted the Court to ignore the Order in *Weber* does not resolve the additional difficulty

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nation and the determination of what may be an acceptable means of affirmative relief, remain, it is submitted, legislative determinations.

575. *See* Pasadena Bd. of Educ. v. Spangler, 427 U.S. 424, 434-35 (1976).

576. *Compare* Griswold, *The Bakke Problem—Allocation of Scarce Resources in Education and Other Areas*, 1979 WASH. U. L. Q. 55, 64 (arguing that the problem is social and moral, not a legal problem), *with* Days, *supra* note 500, at 90-91 (expressing fear of "political dog fight" over scarce resources). The question raised by the fear of a political dogfight is whether that fear does not itself suggest that there is something illicit, *i.e.*, contrary to established values and potentially dangerous, in racial balancing. If there is, why should the decision to take those risks be placed in the hands of "platonic guardians," L. HAND, THE BILL OF RIGHTS 73 (1962), rather than the political process? If the risks are too great, should not the possibility of balancing be wholly abandoned?

577. United Jewish Organizations v. Carey, 430 U.S. 144 (1977). The point of this criticism of *Carey* is the Court's insistence in treating the group harmed in that case as the white majority. *Id.* at 163. It clearly was not, and although there may be reasons for concluding that a population consisting of Hasidic Jews should, for the purpose of deciding a given case under relevant policies, be treated as a part of the white majority, J. ELY, *supra* note 422, at 105, 109, the Court provides no analysis sensitive to the question.

578. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (Brennan, J., concurring & dissenting).

that the effect of the Court's prior interpretations of title VII[579] are consistent with the result reached in *Weber* and with the policy of racial balance underlying the affirmative action provisions of the Order.[580] The attack nevertheless suggests the resolution, for the attack implies the additional claim that the Court is not, as a matter of its constitutional role, free to adopt the free-wheeling style of interstitial lawmaking evident in *Weber*.

The question of the appropriate perspective with which a court should approach interpretation of statutes is implicated by the argument that only Congress may legitimately depart from colorblindness as an ideal; any argument favoring a reference to Congress assumes a limited judicial role in statutory interpretation. It specifically assumes that if the Court must make policy interstitially, the policy it makes must be as consistent with the political compromise reflected in the statute as possible. The process, it is true, requires the postulating of an abstraction—congressional purpose—but the abstraction the Court postulates can be measured analytically against the standard of the compromise. The more abstract and general the judicial statement of purpose becomes, the less likely is it that interstitial purpose will reflect original understanding.

The difficulty with the *Weber* decision is precisely in the level of abstraction at which the Court's opinion defines congressional purpose. As has been pointed out by others,[581] the Court's analysis can only be understood in terms of a particular conception of judicial function in the interpretation of statutes. That conception is that a court is free to create a statutory policy interstitially in the absence of a direct congressional prohibition of that policy. The conception in the present context is, more specifically, that the Supreme Court is free to treat civil rights legislation as analogous to the Constitution itself because Congress, in enacting such legislation, creates a "broad philosophical statute"[582] and avoids deciding close questions of proper application of the philosophy. The Court may therefore properly adopt a philosophical interpretive viewpoint analogous to that adopted in a case of constitutional interpretation and may look to the "core purpose" or "equity"[583] of the statute in applying it.

The Court adopted such a philosophical viewpoint in *Weber*. For Mr. Justice Brennan, the core purpose or equity of title VII is that of

579. *See* text & notes 166-206, *supra*.
580. *See* text & notes 394-396 *supra*.
581. Boyd, *supra* note 216, at 7-8; Neuborne, *supra* note 369.
582. Neuborne, *supra* note 369, at 553.
583. *Id.* at 555 n. 32.

providing employment opportunities to minorities.[584] It has been suggested in support of *Weber* that core purpose may be framed in even more abstract (and largely meaningless) language: the congressional purpose was "protection of minority rights."[585]

The importance of the conception of judicial role disclosed by these statements for purposes of the present analysis lies in two observations. First, the statements on their face constitute admissions of judicial policy making far beyond the conceivable boundaries of the congressional scheme; they deny that there is a scheme. Definitions of congressional purpose at these levels of abstraction cannot give effect to legislation because that enacted legislation inherently constitutes political compromise. Title VII is clearly not a broad philosophical statute whatever may have been the broad philosophy that spawned it.[586] It is a detailed statutory scheme riddled with compromise. Section 703j is but one example of such compromise.[587] Second, the statements justify an unlimited judicial discretion in the making of racial policy. At these levels of abstraction, any action and any bureaucratic decision that benefit a minority are consistent with core congressional purpose. Legislative purpose, a concept that clearly functions as a limitation upon judicial discretion, loses any meaning at such levels.

The argument that a congressional judgment mandating racial balance would be constitutionally unobjectionable and that a decision by a lesser entity to mandate a similar policy is constitutionally objectionable implies a judicial role in interpreting legislation inconsistent with a view of that role that assumes carte blanche in the absence of a direct congressional prohibition. The question in this context is not whether the Court might not be free to lay down a similar mandate in the exercise of its role in interpreting equal protection. The question, rather, is the extent of the Court's authority where it has not exercised that role. To make the point concrete, the philosophical view of statutory interpretation evidenced in *Weber* and attacked here is inconsistent with the argument that the Court should, as a matter of

584. 443 U.S. at 203-05.

585. Neuborne, *supra* note 369, at 533-56. The abstraction observation may explain the Court's history in interpreting title VII. To paraphrase Chief Justice Marshall, the Court has forgotten that it is a statute it is expounding. McCulloch v. Maryland, 4 U.S. (4 Wheat.) 415, 422 (1819). Other proponents of racial balance adopt a similar view of permissible judicial license. *See* Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675, 677, 691-94 (1974).

586. If it is possible to identify such a broad philosophy, it is obviously not simply that of protecting minorities. The political price for such protection was, as § 703j makes facially clear, protection of the majority as well. The broad philosophy was the philosophy of individual merit—of employment decision untainted by reference to race as a consideration. *See* note 139, *supra*. That such a philosophy may be naive is not a basis for pretending that it was in fact not the philosophy.

587. 443 U.S. at 226-52 (Rehnquist, J., dissenting).

constitutional law, defer to the Congress with respect to issues of racial policy. It is inconsistent not merely because colorblindness is the appropriate standard in the absence of congressional decision but because the philosophical view is insensitive to any claim that legislative process is an appropriate process for a decision regarding issues of racial policy. Both the claim that congressional decision is essential and the claim that congressional decision is in any degree appropriate assume a judiciary operating on the assumption that congressional decision is discoverable and enforceable. The claims assume, at a minimum, a judicial role definition requiring discovery and enforcement.

It is beyond the scope of this discussion to reach the problems whether judicial discovery and application of congressional purpose are possible. It should suffice to make it clear that it is the obvious premise here that discovery and application are possible and to make clear that a different premise places in jeopardy any claim to limited judicial role. The premise adopted here further assumes, however, that purpose cannot be defined at maximum levels of abstraction without self-denial. Discovery and application of purpose requires a disciplined inquiry that seeks to give effect to political compromise. The fundamentally disturbing aspect of *Weber*, and of the Court's insistence upon its own view of antidiscrimination policy throughout the history of its interpretation of title VII, is not merely that it suggests a denial of the proposal made here to retain the normative status quo and defer to Congress. It is, rather, that the mode of analysis employed suggests a circumvention, largely in partnership with bureaucracy,[588] of Congress.

588. *See* Albermarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975). *Cf.* Braniff Airways, Inc. v. CAB, 379 F.2d 453, 468 (D.C. Cir. 1967) (agency-court "partnership" in regulatory context).