1980

Bakke and Weber: The Concept of Societal Discrimination

Nancy E. Dowd

Follow this and additional works at: http://lawcommons.luc.edu/luclj

Part of the Civil Rights and Discrimination Commons

Recommended Citation
Available at: http://lawcommons.luc.edu/luclj/vol11/iss2/6

This Note is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.
**Bakke and Weber: The Concept of Societal Discrimination**

**INTRODUCTION**

In the fifteen years since Title VII of the 1964 Civil Rights Act¹ became effective, the federal courts have gradually developed a legal definition of "discrimination."² A significant addition to that definition was made by the United States Supreme Court's recent decision in *United Steelworkers of America v. Weber.*³ The Court held that an affirmative action plan, voluntarily undertaken as a result of collective bargaining between the Steelworkers and Kaiser Aluminum and Chemical Corporation, was permissable under Title VII and did not constitute reverse discrimination.⁴ The Court found that the plan, which reserved half of the spaces in an on-the-job craft training program to minorities, was justified on the basis of historical discrimination against blacks by the craft unions.⁵ By considering the historical pattern and its present manifestations, the Court implicitly accepted the concept of societal discrimination as a legal justification for affirmative action programs.⁶

Societal discrimination is caused by broad social factors and attitudes, and is manifested by general patterns of inequality. The legal significance of the concept is that it is not ascribed to a particular entity, such as an employer, university, or governmental unit. Rather it is the result of pervasive racism, which has affected the structure and expectations of society, even absent intentional, discrete acts of discrimination.⁷ Where discrimination can be tied to a

---

2. See text accompanying notes 134 through 167 infra.
4. Id. at 2730. For a discussion of reverse discrimination in the civil rights field prior to Weber, see Annot., 26 A.L.R. Fed. 13 (1976).
5. 99 S. Ct. at 2730.
6. The Court in Weber did not specifically use the term "societal discrimination"; rather, it referred to "traditional patterns of racial segregation" and historical patterns of exclusion of blacks from the craft unions. In *University of California Regents v. Bakke,* the issue of societal discrimination was specifically raised and discussed. 438 U.S. 265, 307 (1977).
7. One commentator has found that the Supreme Court's decisions on discrimination generally have focused on the acts of the particular entity being accused of discrimination (the perpetrator) rather than the considerations affecting the person discriminated against.
specific source it is legally actionable under various substantive theories, including several titles of the 1964 Civil Rights Act, constitutional guarantees, and the Reconstruction Statutes. On the other hand, societal discrimination is a justification for voluntary affirmative action, rather than a basis for legal liability and corrective relief.

This article will examine the Court's understanding and use of the concept of societal discrimination. The decision in *University of California Regents v. Bakke*, where the concept was rejected, will be contrasted with the Court's apparent acceptance of the same justification in *Weber*. Finally, this aspect of *Weber* will be analyzed in the context of the development of the legal definition of discrimination under Title VII of the 1964 Civil Rights Act.

**WEBER AND BAKKE**

The Factual Context

The *Weber* case arose out of the 1974 master contract between the Steelworkers and Kaiser covering fifteen Kaiser plants nationwide, and its specific application at the Gramercy, Louisiana plant. The contract contained an affirmative action plan for the company's craft training program. The plan provided that one minority employee was to be selected for each non-minority employee chosen for the program, until the percentage of minority craft workers reached the goal set by the individual plant. The selec-

---

12. Id. at 310.
14. The contract provision at issue stated:

It is further agreed that the Joint Committee will specifically review the minority representation in the existing Trade, Craft and Assigned Maintenance classifications, in the plants set forth below, and, where necessary, establish certain goals and time tables in order to achieve a desired minority ratio: [Gramercy Works listed, among others]. As apprentice and craft jobs are to be filled, the contractual selection criteria shall be applied in reaching such goals; at a minimum, not less than one minority employee will enter for every non-minority employee entering until the goal is reached unless at a particular time there are insufficient available qualified minority candidates.

1974 Labor Agreement, Addendum to Art. 9, quoted in Weber v. Kaiser Aluminium &
tion of trainees was otherwise based on seniority. Separate seniority rosters for each race were set up solely for selection into the program. The expressed justification for the plan was to increase minority representation in craft positions. At the Gramercy plant the goal was set at thirty-nine percent, based on the percentage of minorities in the general population of the two parishes from which the plant drew its workers.

The impact of historic discrimination by the craft unions was clearly evident at Gramercy. Prior to 1974, Kaiser received five years experience in the trade to qualify for employment. Despite active recruitment of minorities, in 1974 blacks accounted for only 1.83% (five of 273) of the craft positions at the plant. Few blacks could meet the experience requirement because prior discrimination by the unions had thwarted the opportunity for training and experience.

The situation at Gramercy did not escape the attention of the Office of Federal Contract Compliance (OFCC). The OFCC apparently pressured Kaiser to develop an affirmative action plan to remedy the scarcity of black craft workers and the general under-representation of blacks in the overall plant workforce. Kaiser and the Steelworkers were also vulnerable under Title VII to both private suits and federal pattern and practice suits. In this sense,

---

15. Id. at 218 n.1.
17. Id.
18. Id. at 2731.
19. Id. at 2725.
20. Id. at 2731.
21. Id. The overall labor force at the Gramercy plant showed a significant under-representation of blacks. The plant opened in 1958 with a "no discrimination" policy, but by 1969 had only 10% black employees. In 1969 the company instituted a policy of hiring at the gate on the basis of one white, one black, but by the time of trial, blacks still constituted only 14.8% of the total labor force. Weber v. Kaiser Aluminium & Chemical Corp., 415 F. Supp. 761, 764 (E.D. La. 1976).
22. Weber v. Kaiser Aluminium & Chemical Corp., 563 F.2d 216, 229 (5th Cir. 1977) (dissenting opinion of Wisdom, J.). At the time the 1974 contract was negotiated between the Steelworkers and Kaiser, the Steelworkers and nine major steel producers were being investigated by the federal government for discrimination in craft positions. The investigation resulted in a pattern and practice suit brought by the EEOC under 42 U.S.C. § 2000e-5(f) (1976). The suit was settled by the simultaneous filing of a consent decree. See United States v. Allegheny-Ludlum Indus. Inc., 517 F.2d 826 (5th Cir. 1975). The provisions of the consent decree were virtually identical to the plan negotiated with Kaiser. The consent decree was entered in April, 1974, and was the product of six months negotiation between the government and the potential defendants. The Kaiser-Steelworkers contract was agreed to in February, 1974. 563 F.2d at 229.
the Kaiser plan was not "voluntary," but instead a "preventive" measure to avoid future legal liability.

By contrast, the affirmative action plan at issue in the *Bakke* case was initiated free from any direct governmental pressure. It followed a national trend of educational programs aimed at increasing minority representation in the medical profession.\(^\text{23}\) The Medical School of the University of California at Davis (Davis) set up a special admissions program in 1971, which reserved sixteen out of 100 places for students who were "economically or educationally disadvantaged."\(^\text{24}\) Under the special program academic factors were assigned less weight than in the general admissions program.\(^\text{25}\)

Davis initiated the program after finding the general admissions program yielded a low percentage of minority admissions. The first class, in 1968, had a class of fifty students, with a minority representation of three Asians.\(^\text{26}\) Throughout the period when the special admissions program was in effect, this pattern continued. From 1971 to 1974, when each entering class numbered 100, the general program admitted one black, six Mexican-Americans, and thirty-seven Asians. During this same period, twenty-one blacks, thirty Mexican-Americans, and twelve Asians were admitted under the special program.\(^\text{27}\)

The justification for the Davis program rested on four grounds: (1) reducing the historic deficit of minorities in medicine; (2) counterbalancing the effects of societal discrimination; (3) increasing the number of physicians to serve minority communities; and (4) diversifying the student body.\(^\text{28}\) These justifications reflected concern over the significant under-representation of minorities at Da-

---

24. *Id.* at 274, 279. Although this broad descriptive term was used for the program, the program was confined to Blacks, Chicanos, Asians and American Indians. No whites were accepted into the special admissions program although whites applied. *Id.* at 274-76.
25. *Id.* at 272.
26. *Id.* at 275, 276 n.6.
27. *Id.* at 306.
vis and in the medical profession in general. As of 1975, for example, blacks constituted only five percent of all physicians.29

Judicial scrutiny of the Weber and Bakke programs resulted from charges that the programs constituted “reverse discrimination.” It was alleged that they preferred minorities over more qualified whites and thus discriminated against whites on the basis of race. Weber’s higher qualification was greater seniority than blacks accepted into the training program;30 Bakke’s higher qualifications were test scores and grades above those of students admitted through the special admissions program.31 Bakke based his claim on Title VI of the 1964 Civil Rights Act32 and the equal protection clauses of the federal33 and California34 constitutions; Weber based

<table>
<thead>
<tr>
<th></th>
<th>Bakke Regular Admittees</th>
<th>Bakke Special Admittees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Science GPA</td>
<td>3.44 3.44</td>
<td>3.51 3.36</td>
</tr>
<tr>
<td>Overall GPA</td>
<td>3.46 3.46</td>
<td>3.49 3.29</td>
</tr>
<tr>
<td>MCAT Verbal</td>
<td>96 96</td>
<td>81 69</td>
</tr>
<tr>
<td>MCAT Quantitative</td>
<td>94 94</td>
<td>76 67</td>
</tr>
<tr>
<td>MCAT Science</td>
<td>97 97</td>
<td>83 82</td>
</tr>
<tr>
<td>MCAT Gen. Information</td>
<td>72 72</td>
<td>69 72</td>
</tr>
</tbody>
</table>

29. Id. at 369-70. The 5% figure reflected a recent increase. The percentage was 2.2% in 1950 and had remained fairly constant until 1970. Id.
30. 99 S. Ct. at 2725. The District Court noted that the contract provision was administered in the following fashion: In April, 1974, Kaiser posted openings for instrument repairman, electrician and general repairman, and selected one black and one white for the first two positions, and three blacks and two whites for the third position. In October, 1974, openings were posted for insulator and carpenter, and one black was selected for the first position, one black and one white for the second position. Kaiser admitted at trial that blacks with less seniority than whites had been chosen. Brian Weber had been an employee for seven years at Kaiser. 415 F. Supp. at 763-64.
31. 438 U.S. at 277 n.7. Part of the trial record was a comparison of Bakke’s grade point average and MCAT scores to average scores of regular and special admittees in the two years that Bakke applied to Davis:

32. 42 U.S.C. § 2000d (1976) provides:
   No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.
33. U.S. Const. amend. XIV, § 1 provides in pertinent part:
   “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.”
34. Cal. Const. art. I, § 21 provides;
his claim solely on Title VII.35

The Supreme Court upheld Bakke’s claim and ordered his admission to medical school, finding that the Davis program contained an impermissible racial quota.36 The Court, however, also held that race could be used as a factor in admissions.37 A year later the Court denied similar relief to Weber, finding the Kaiser plan permissible under Title VII.38 In both cases a vigorous argument was made that societal discrimination was a sufficient legal basis for the affirmative action plans at issue.39

The Bakke Decision

Justice Powell’s opinion40 in Bakke characterized societal dis-
Crimination as "an amorphous concept of injury that may be ageless in its reach into the past." Impliedly interpreting the concept as a "compensation for past wrongs" or "guilt complex" approach, whereby race-conscious programs would be measured against a historical catalogue of racial injustice, Justice Powell maintained that such a justification for affirmative action programs would have to be predicated on legislative or judicial findings, not on the isolated determination of an educational institution. Such findings would convert "societal discrimination" into "identified discrimination" by subjecting the matter to legislative and judicial controls. These controls would serve to minimize the impact of remedial measures on innocent parties who were not themselves responsible for discrimination. In order to constitute "legal," as opposed to mere "societal" discrimination, general patterns of discrimination would have to be examined to find their specific source, so that appropriate relief within defined boundaries could be applied.

Of the three remaining rationales offered for the Davis program, Justice Powell found only the desire for diversity in the student body to be a legitimate state interest. Since the plan involved a racial classification, Justice Powell determined that strict scrutiny should apply in analyzing whether this interest was sufficient to agreed that race could be used as a factor in admissions. Individual opinions were also filed by Justices White, Marshall and Blackmun. Justice White focused exclusively on Title VI. Justices Marshall and Blackmun further explained their support for the joint opinion.


41. 438 U.S. at 307.
42. Id.
43. Id. at 309.
44. Id.
45. Id. at 308. Justice Powell thus analyzes the problem from the perspective of the "perpetrator" rather than the "victim." See note 7 supra.
46. Id. at 308 n.44. Justice Powell emphasized that nothing in the record substantiated the argument that the factors used in the regular admissions program, grades and test scores, were culturally or racially biased. He further noted that such an argument was an attempt to transfer the disparate impact analysis of Title VII cases to this case. He pointed out that Title VII was supported by legislative findings that disparate impact could be traced to particular sources of discrimination and concluded, "Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications." Id.
47. Id. at 311.
permit race-conscious action. Measured by this standard, the Davis plan unnecessarily abridged individual rights by limiting access to the special admissions program by race. Although race could be used as a factor in the admissions process, Justice Powell held that race could not be used to deny consideration for any opening.

Justices Burger, Rehnquist, Stewart and Stevens agreed that the Davis program was impermissible, but based their conclusion on Title VI rather than constitutional grounds. Justice Stevens, writing for this group, stated that under general principles of appellate review, statutory analysis is favored over constitutional scrutiny. Thus, Title VI should be preferred over equal protection as a basis for decision. Justice Stevens interpreted Title VI as an independent force which strengthens constitutional proscriptions of discrimination, thereby imposing a higher standard of review than the equal protection clause. Based on a literal reading of Title VI, Stevens argued that the statute imposed a standard of racial neutrality or "color blindness" that cannot be abridged regardless of whether the discrimination is invidious or benign. Analyzed under this standard, the Davis program clearly violated the statute.

In a joint opinion concurring in part and dissenting in part, Just-
Bakke and Weber

Brennan, White, Marshall and Blackmun maintained that neither the Constitution nor Title VI required the "colorblind" standard, but that both permit the use of race-conscious programs to achieve the goal of racial equality. They noted that the Court has never declared racial classifications to be per se invalid under the equal protection clause. They also pointed to race-conscious remedies approved by the Court in school desegregation and employment discrimination cases.

In discussing Title VI, these justices found that the legislative history and purpose behind the passage of the statute supported the use of race-conscious remedies for discrimination. The statute was designed to give the federal government clear authority to cut off funding where the recipient discriminated on the basis of race, so that the federal government would not be indirectly fostering discrimination. Title VI therefore reinforces the equal protection clause by clarifying the federal government's authority to reach private recipients of federal funding. It does not impose a higher standard of scrutiny of racial classifications than the standards imposed by the equal protection clause.

The joint opinion also cited regulations promulgated by the Department of Health, Education and Welfare to enforce Title VI. These regulations state a preference for voluntary action over punitive measures to achieve the goals of the statute. It would be inconsistent to find that the same statute required affirmative action where discrimination is specifically found, but prohibited af-

56. Id. at 327. The opinion went on to state:

Against this background, claims that law must be 'colorblind' or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens. Id.

57. Id. at 336-40.

58. Id. at 356, 397. These justices, in contrast to Justice Powell's position, argued that under a constitutional analysis the standard of review applied to benign racial classifications should be an intermediate one; that is, less stringent than strict scrutiny. Id. at 359. For further analysis of this intermediate standard, see Tribe, Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice, 92 Harv. L. Rev. 864 (1979).

59. Id. at 362-63, 365.

60. Id. at 329.

61. Id. See also Justice White's separate opinion, which focused solely on the issue of a private cause of action under Title VI. Id. at 379-86.

62. Id. at 328. See also id. at 384 (opinion of White, J.).

63. 45 C.F.R. § 80.3(b)(6)(i), (ii) (1977).
firmative action when voluntarily undertaken to counter societal discrimination.64

These justices viewed the Constitutional and statutory proscriptions against discrimination as inextricably tied to the social context in which they operate.65 While these proscriptions express a principle of equality, that principle cannot be divorced from the reality of pervasive discrimination which necessitated their passage.66 A historical perspective is crucial, not to identify a list of past grievances, but to understand present conditions.67 Further, the principle of racial equality, as reflected in contemporary law, is of relatively recent vintage.68 Although laws, such as the Reconstruction Statutes, embodied this principle over a century ago, its actual realization has begun only in the last twenty-five years.69 Contemporary legislative and judicial attempts to achieve racial equality require both adherence to that principle and the use of remedial and preventive measures.70

The joint opinion concluded that voluntary affirmative action plans should be permitted to rest on a reasonable finding of societal discrimination.71 The question raised in Bakke, then, was whether racial preference could be justified by the pattern of societal discrimination in the medical profession. The statistical underrepresentation of minorities in medicine, as well as the results of Davis' regular admissions program, supported such a finding, when considered against the background of the legal disabilities of blacks in education until the 1954 decision in Brown v. Board of Education72 and the resistance to integration after Brown.73 This combination of factors led to the conclusion that, but for this prior

64. 438 U.S. at 340.
65. Id. at 327.
66. Id. at 326-27.
67. Id. at 327.
68. Id. at 326-27. Justice Marshall stated in his separate opinion:
   For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier. Id. at 387.
69. Id.
70. Id. at 340 n.17, 353-54, 362-68.
71. Id. at 362.
and persisting discrimination, minorities would qualify for regular admission to medical school in approximate proportion to their representation in the general population.\textsuperscript{74}

These justices found that the Davis program was a reasonable approach to compensating for the effects of discrimination. Whether a racial quota is used or whether race is used as a factor, they argued, is not constitutionally significant; rather, the key question is whether any racial preference is justified.\textsuperscript{75} In this case, the Davis program could achieve its goal only if it were limited to the minorities.\textsuperscript{76} Otherwise, the absolute number of “educationally and economically disadvantaged” whites would overwhelm the number of minority applicants.\textsuperscript{77} Furthermore, the program did not stigmatize whites as inferior nor deny them access to admissions.\textsuperscript{78}

The joint opinion in Bakke thus took a practical approach to reaching the goal of a racially “unconscious” society. Under this approach, societal discrimination is a flexible concept. The stress is on current indicators of persisting racism, on how society operates in fact. Such a finding of societal discrimination would justify race-conscious action, for “[in] order to get beyond racism, we must first take account of race.”\textsuperscript{79}

The Weber Decision

In Weber,\textsuperscript{80} societal discrimination was accepted as a legal justification for a voluntary affirmative action program.\textsuperscript{81} Justice Stewart joined Justices Brennan, White, Marshall and Blackmun to form a majority holding the Kaiser plan permissible under Title VII.\textsuperscript{82} Writing for the majority, Justice Brennan took judicial no-
tice of the history of discrimination against blacks by the craft unions. The statistical picture at the Gramercy plant supported the conclusion that the effects of such discrimination persisted. This situation, the Court held, was precisely the kind of discrimination Title VII was meant to correct. In passing Title VII, Congress was concerned with the high rate of black unemployment. Equal access to employment was viewed as a prerequisite to enjoying other rights guaranteed by the 1964 Civil Rights Act. Justice Brennan reasoned that Title VII must be read in the context of this legislative history as well as the general history of discrimination against blacks. The prohibition against racial discrimination contained in sections 703(a) and (d) could not be applied literally, because to do so would be inconsistent with the remedial purpose of the statute.

Section 703(j) of Title VII precludes an interpretation of the statute which would require racially preferential hiring solely to maintain racial balance. Justice Brennan read this section to mean that voluntary race-conscious programs would be permitted, noting that Title VII encourages voluntary action. Since race-con-

83. Id. at 2725 n.1.
84. Id. at 2725.
85. Id. at 2730.
86. The relative rate of unemployment of blacks as compared to whites was 64% higher in 1947, 124% higher in 1962, and 129% higher in 1978. Id. at 2727, 2728 n.4.
87. Id. at 2727.
88. Id. at 2730.
90. Id. at 2727.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area. . . .
92. 99 S. Ct. at 2729.
93. Id. at 2728. The enforcement provisions of Title VII, 42 U.S.C. § 2000e-5(b) and (f) (1976), specifically require that the Equal Employment Opportunity Commission attempt voluntary conciliation prior to filing suit against a party.
scious programs have been upheld where ordered by the courts, it would be contrary to the spirit of Title VII not to permit them to be voluntarily instituted by an employer aware of the effects of racial discrimination on his employment practices. To prohibit such voluntary action would mean that an employer or union would have to be exposed to legal liability before affirmative action would be justified. Title VII does not require such a paradoxical result; rather, voluntary affirmative action may be based on evidence of societal discrimination, including union and employer refusal to train and hire in the past.

Although the Court refused to define precisely the boundaries of reasonable and permissible affirmative action, it noted several factors about the Kaiser plan that weighed in its decision. The plan: (1) opened job opportunities in an area traditionally closed to blacks; (2) did not unnecessarily impinge on whites, in that it assured whites access to the training program and did not displace any incumbent white; and (3) was temporary, in that it sought to achieve a defined goal rather than insure or sustain a particular racial balance.

Justice Blackmun, in his concurring opinion, conceded that reliance on societal discrimination at first glance appeared to be overly broad, and that a more limited, “arguable violations” approach

---

94. 99 S. Ct. at 2729. Court-ordered preferential remedies and quota relief have been challenged under the “no preference” section, 42 U.S.C. § 2000e-2(j), but the courts have uniformly rejected such arguments. The short response has been that the section applies to employers, not to the courts. Section 706(g), 42 U.S.C. § 2000e-5(g), of Title VII confers upon the courts broad authority to grant equitable relief, including preferential and quota remedies. EEOC v. American Tel. and Tel., 556 F.2d 167 (3d Cir. 1977); EEOC v. Local 638, Sheet Metal Workers’ Int’l Ass’n., 532 F.2d 821 (2d Cir. 1976); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971); Carson v. Am. Brands, Inc., 446 F. Supp. 780 (E.D. Va. 1977). Courts which have analyzed the statutory issue in more detail have argued that “[a]ny other interpretation would allow complete nullification of the stated purposes of the Civil Rights Act of 1964.” United States v. IBEW Local No. 638, 428 F.2d 144, 149 (6th Cir. 1970). See also United states v. Wood, Wire and Metal Workers’ Int’l Union, Local 46, 471 F.2d 408 (2d Cir. 1973); S. Ill. Builders Ass’n v. Oglivie, 471 F.2d 680 (7th Cir. 1972); United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973). The role of the courts in providing affirmative relief is not merely to admonish, but also to compensate for discrimination and prevent its future occurrence. Quota relief is an extreme form of relief and has been applied sparingly, but it has been found necessary in some cases to practically achieve the goals of Title VII.

95. 99 S. Ct. at 2729.
96. Id.
97. Id. at 2728, 2730.
98. Id. at 2730.
might appear to provide a more suitable standard. The "arguable violations" standard would permit voluntary affirmative action only when the employer or union had committed an apparent violation of Title VII. Justice Blackmun pointed out, however, that although the approach was appealing, its adoption would encourage litigation and defeat the purpose of Title VII. Employers would have to determine when they had committed acts sufficient to meet the standard of an "arguable violation" without going beyond the standard into the realm of actual violation and hence legal liability.

The broad standard actually adopted by the Court avoids this dilemma for employers; it does not require that the employer approach a violation or actually violate Title VII. Rather, it permits the employer to look to statistical disparity alone to determine if affirmative action is necessary. This standard also allows the employer to remedy discrimination beyond the scope of Title VII, that is, pre-Act discrimination. Justice Blackmun's analysis un-

99. Id. at 2731.

100. Judge Wisdom suggested this approach in his dissenting opinion to the Fifth Circuit's decision in Weber. 563 F.2d at 227-239. Judge Wisdom noted that the posture of the parties in the Weber case had limited the amount of information available to the court concerning past employment practices. Kaiser had no motive to offer evidence which would tend to show its own legal liability for any past acts of discrimination; the same rationale applied to the union. Such evidence would also have undercut Weber's claim and provided a premise for court-ordered affirmative action, so Weber himself was not likely to have produced the information. Minority employees were not parties to the suit. Id. at 231.

Nonetheless, Judge Wisdom argued, the limited evidence in the record could theoretically have supported a prima facie case of discrimination under Title VII. The statistical disparity between black employees and black representation in the general population, the five-year experience requirement for craft positions, unjustified by business necessity, and the requirement of prior training for some craft jobs all pointed to an "arguable violation" of Title VII. Id. at 231-232. A voluntary program to correct the situation would have been justified on the basis that legal liability should not be a prerequisite for affirmative action. If this were not the case, an employer would be made to walk a "tightrope" of acting under the affirmative duty of Title VII to correct discriminatory practices while being required to limit his actions so that they would not impinge on the expectations of white employees. Id. at 230.


102. Id. at 2733. In Teamsters v. United States, 431 U.S. 324 (1977) the Court examined a seniority system which acted to preserve the present effects of past discrimination. In finding the system to be bona fide and therefore exempt from Title VII under section 703(h), 42 U.S.C. § 2000e-2(h), the Court held that discriminatory hiring which had ceased with the passage of the Act could not be reached by the statute. See note 156 infra. Weber would permit voluntary action to remedy such pre-Act discrimination. As Justice Blackmun remarked: "Absent compelling evidence of legislative intent, I would not interpret Title VII itself as a means of 'locking in' the effects of segregation for which Title VII provides no remedy." 99 S. Ct. at 2733.
derscores the usefulness of the concept of societal discrimination as a flexible tool for determining the necessity and scope of voluntary affirmative action.

The dissenters in Weber, Chief Justice Burger and Justice Rehnquist, advanced the same statutory argument for Title VII that they had supported with regard to Title VI in Bakke. Title VII, they argued, is clear on its face and requires no inquiry into legislative history or social context. The statute proscribes all race-conscious employment decisions, and therefore the Kaiser program was illegal. Justice Rehnquist further pointed out that an examination of the legislative history reinforces the position that racial preference is neither required nor permitted under the statute.

A Comparison of the Weber and Bakke Decisions

The decision of the Court in Weber upholding voluntary affirmative action appears to inconsistent with Bakke. It is difficult to distinguish the cases on a factual basis. Both cases involved the use of a racial quota, and in Weber the quota involved a much higher percentage of the total number of available positions. Both quotas were tied to the goal of achieving the racial representation that would have occurred but for discrimination. In Weber, this goal was expressed as a specific figure: when 39% of the craft workers were minorities, the training program would no longer operate on an affirmative action basis. In Bakke, this goal was implicit in the reasons for developing the program: when minorities were adequately represented through the regular admissions process, the special program would become unnecessary. Both programs were premised on evidence of substantial and pervasive societal discrimination. In Weber, this evidence was bolstered by the possibility that hiring policies and qualifications for specific jobs were themselves discriminatory. In Bakke, a similar presumption of discrimination could have been applied to the “objective” factors of grades and MCAT scores, since these reflect the discriminatory effects of

103. 99 S. Ct. at 2734, 2736 (dissenting opinion of Burger, C.J.).
104. Id. at 2752 (dissenting opinion of Rehnquist, J.). A persistent objection to Title VII which had been raised by its opponents during debate over its passage was that the absence of a definition of “discrimination” in the statute would allow the federal government to require employers to maintain a racial balance. The proponents of the bill had consistently stated that Title VII did not allow this result. Section 703(j) was added to the law to clarify that “no preference” could be imposed on employers. Justice Rehnquist concluded from this legislative history that a strict statutory reading of Title VII was required and that the majority position deviated from the express meaning of the statute. Id. at 2752-53.
unequal education. Both programs denied whites access to a certain number of positions, but did not totally deny them the ability to gain the benefit involved. The denial to whites implied no racial stigma, but it constituted a limitation on their prior expectations. Neither of the programs stigmatized blacks: blacks were not chosen solely because of race, but had to meet basic qualifications. Finally, both programs were reasonable and practical approaches to achieving the socially desirable goal of racial equality.

The difference in the legal theories underlying the decisions also does not serve to explain the different results. The Court has held that before strict scrutiny under the equal protection clause will be applied, there must be a showing of discriminatory purpose or intent. Until such intent is shown there will be an assumption that the state has acted reasonably. Disparate impact alone is not sufficient to raise an inference of discriminatory purpose unless it is “stark.” Under Title VII, on the other hand, disparate impact is sufficient to establish a prima facie case of discrimination. Good or bad intent is irrelevant. The presumption is that racially disparate effects are the result of discriminatory practices, absent a strong countervailing explanation.

The different levels of review imposed by equal protection analysis and Title VII analysis suggest that if the difference in legal the-

105. Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). In Davis, the Court reviewed a challenged testing program for the Washington, D.C. police department that had a disproportionate disqualifying effect on black applicants. The Supreme Court found that the Court of Appeals had improperly applied Title VII standards to decide a constitutional issue. Under an equal protection clause analysis, racially discriminatory purpose must be shown; disparate impact alone was insufficient to trigger strict scrutiny unless so strongly demonstrated that only intentional actions could explain it. Id. at 239-42. This interpretation of the equal protection clause was reinforced by Arlington Heights. 429 U.S. at 265-66.


107. See discussion of disparate impact, as that concept has developed under Title VII, in text accompanying note 138.


109. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1972). Once a prima facie case has been established the burden of proof shifts to the defendant to show that the policies arise out of “business necessity,” i.e., that they are essential to the operation of the business and that no alternative means are available to achieve the same end with a less discriminatory effect. The plaintiff may then rebut such a defense as pretextual. Id. at 792.

110. Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Intent under the statute has been interpreted to mean that acts are done purposefully, regardless of motive. Id.

ory were important, the holdings arguably should be reversed. Under the higher standard of Title VII, the private action in Weber should be disallowed, while the presumption in favor of the state under equal protection should favor upholding the program in Bakke, assuming that Bakke was decided on a constitutional basis. The same argument would apply if Title VI were the basis of the decision in Bakke, since a majority of the Court held that Title VI imposed a standard of review equivalent to that imposed by the equal protection clause.

The different results in Bakke and Weber may perhaps be traced to two unarticulated reasons. First, there is the difference in the benefit involved: admission to medical school versus acceptance into a craft training program, or higher education versus employment. Employment is a fundamental need as well as a means to acquire other social benefits. The Court has shown a sensitivity to employment issues which perhaps indicates a judgment that the end of economic discrimination may be the most crucial step toward eliminating all racial discrimination. The educational benefit at issue in Bakke, by contrast, was admittance to an elite profession. There was no question of insuring equal access to basic educational training. On the contrary, a medical degree is a highly limited benefit conferred on a chosen few after an intensely competitive process. Although the Court might seek to guarantee that every person is able to secure employment commensurate with his skills and abilities and absent racial considera-

112. It was only Justice Powell, however, who reached the constitutional issue in Bakke, and decided that under the standard of review imposed by the equal protection clause the Davis program was impermissible. See note 40 supra. Justices Burger, Rehnquist, Stevens and Stewart decided the case under Title VI, which they held to require stricter scrutiny than the fourteenth amendment. See note 53 supra. In so holding, however, they represented a minority of the Court. 438 U.S. at 287, 336-37.


114. Bakke is distinguishable from the line of school cases under Brown, where the focus has been on mandatory education at the elementary and secondary levels. Post-secondary education, by contrast, is voluntary and limited, with admissions standards necessarily imposed to determine access. An analogy in the employment area would be the difference between a non-skilled entry level position and a supervisory position justifiably requiring knowledge or skill of the specific production process.

115. The Court has read Title VII broadly in defining discrimination. See text accompanying note 136 infra. The Court's attitude has been supportive of private litigants. See Belton, Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments, 20 St. Louis L.J. 228 (1976). The author points out that the first phase of litigation under Title VII focused on procedural obstacles thrown up by defendants, which the courts uniformly refused to allow to bar relief to private litigants. Id. at 231-45.
tions, certainly it would recognize that admission to medical school is inherently a limited opportunity.

Another perspective on the difference between employment and education is the question of alternative means to achieve the goals of the programs at issue. In Bakke the Court saw an alternative to the Davis program: the "race as a factor" approach.\textsuperscript{116} This alternative offered a means to achieve minority admissions without utilizing the drastic remedy of an absolute quota and minimized the impact of finding the Davis program impermissible.\textsuperscript{117}

In the Weber case, on the other hand, no less drastic alternative was available. The "race as a factor" approach would not have worked at Kaiser because the training program involved entry level positions for which no qualifications were required. A possible alternative would have been to reduce the quota to a level lower than the fifty percent set up by the plan. Such a solution, however, would have required the Court to set a mathematical standard of permissibility.\textsuperscript{118} Disallowing the program entirely would have meant insuring the continuance of the racial status quo unless a violation of Title VII could have been proven. Thus, the impact of a different decision in Weber would have virtually strangled all voluntary affirmative action efforts.

These differences between the Bakke and Weber cases reflect

\textsuperscript{116} 438 U.S. at 316-18. Justice Powell specifically approved of the Harvard admissions process, which was presented to the Court as an appendix to the \textit{amicus curiae} brief of Columbia, Harvard and Stanford Universities and the University of Pennsylvania. The Harvard approach described the university's undergraduate admissions process, where race could be taken into account, along with many other factors, to choose from the large pool of academically qualified applicants. The complete Harvard presentation is reproduced in an appendix to Justice Powell's opinion. \textit{Id.} at 321-24.

\textsuperscript{117} Blacks as a percentage of all medical school graduates were 2.2\% in 1970, 3.3\% in 1973 and 5.0\% in 1975. \textit{See} 438 U.S. at 369 n.45. This represents an annual rate of increase over the period 1970-1975 of 15.6\%, or an annual rate for the period 1973-75 of 8.0\%. At the former rate of increase, a goal of 13\% representation, which would be roughly proportional to the population, would be achieved in approximately 16 years; at the latter rate, the time needed would be ten years. Assuming, then, that medical schools would use the "race as a factor" approach and accept minorities in comparable numbers to the pattern which produced the 1970-75 increase, the goal of proportional minority representation in medicine could still be achieved.

\textsuperscript{118} In 1974, five of 273 skilled craft workers at the Gramercy plant were black. 99 S. Ct. at 2725. Assuming that the number of annual openings in the training program remained constant at the first year rate of 13, it would have taken 14 years to achieve the goal of 39\%, or 106 black workers, using the 50\% ratio. The progress of the program would be affected, of course, by fluctuations in the number of discharges, retirements, and the like; but a lower percentage of blacks taken into the program would have greatly lengthened the period needed to reach the goal.
the dual patterns of litigation in the education and employment areas. Civil rights litigation in education has focused on equal access to basic education at the elementary and secondary levels. Higher education presumably will eventually reflect the effects of basic equal educational opportunity through a "filtering upward" process. Thus, this approach looks to the future; the effects of unequal educational opportunity on those who have already been through a discriminatory system remain a permanent disability.

Litigation in the employment field, by contrast, has been characterized by across-the-board attacks to eliminate the effects of prior discriminatory practices as well as to prevent future discrimination in employment. Within certain limitations, past discrimination has not been permitted to "freeze an entire generation" of blacks; instead, "make whole" relief has been required to restore blacks to their "rightful place." The decisions in Bakke and Weber preserve this distinction. Bakke permits limited recognition of the effects of unequal educational opportunity, returning the focus again to the elementary and secondary levels where equal access to the education need to qualify for medical school should be insured. Weber allows an immediate remedy before another generation is affected.

Another possible reason for the different results in the cases is the existence in Weber of evidence corroborating the claim of societal discrimination. This evidence included not only information about the specific history of the Gramercy plant and the pattern of racial disparity there, but perhaps more importantly, a long line of Title VII cases involving pre- and post-Act discrimination in the craft unions. The cases demonstrated that craft union discrimination against blacks had been a nationwide practice. They showed the impact of prior discrimination on present employment opportunities and the persistence, in some instances, of the unions' resistance to integration. They also provided a benchmark for assessing the voluntary Kaiser program against the judicial remedies imposed in other cases.

120. See text accompanying notes 141-62 infra.
122. See cases cited in note 155 infra.
123. Racial quotas, preferences and goals are common forms of relief ordered in the union cases, and follow a pattern comparable to the voluntary action undertaken in the
By comparison, in *Bakke* the Court had no significant prior cases on preferential admissions to higher education.\textsuperscript{1}\textsuperscript{2}\textsuperscript{4} The line of school desegregation cases would have supported the inference that Davis’ general admissions standards had a discriminatory impact on minorities who had been educationally disadvantaged. An inference based on the actual operation of objective admission standards, like college grades and MCAT scores, however, would have been far stronger. There was no prior judicial experience in administering relief in this area to judge the reasonableness or necessity of the Davis plan. Furthermore, the admissions process involves academic decision-making, with which the Court has traditionally been reluctant to interfere.\textsuperscript{1}\textsuperscript{2}\textsuperscript{5}

Although these considerations may explain the different results in the two cases, they do not resolve the inconsistency in the application of the concept of societal discrimination. They suggest a compartmentalized approach to the issue of discrimination, where the weight given to societal discrimination will vary according to the area under consideration and the pattern of prior judicial findings. In the employment area, the Court will be willing to apply the concept as a rationale for voluntary affirmative action.

\textbf{WEBER AND TITLE VII}

The \textit{Weber} decision is clearly consistent, however, with the pattern of Title VII litigation. It represents an approach consonant with the purpose of Title VII and a logical progression in the use of the concept of societal discrimination in defining discrimination under the statute.

\textsuperscript{124} The only other case that has arisen on racially preferential admissions policies is \textit{DeFunis v. Odegaard}, 416 U.S. 312 (1974). \textit{DeFunis} involved law school admissions, but the case was held moot because DeFunis had been admitted and completed his degree by the time the case came up for review. Justice Douglas filed a dissenting opinion arguing that the case should have been remanded for further consideration of whether the admissions criteria used were culturally or racially biased. Thus, there was nothing in the record in either \textit{Bakke} or \textit{DeFunis} examining the disparate impact on minorities of the use of grades and test scores as primary admissions criteria. See Comment, \textit{The Case for Minority Representation in Reverse Discrimination Litigation}, 67 CAL. L. R. 191 (1977). See also note 100 supra.

\textsuperscript{125} \textit{438 U.S. at 404}.  

The Legislative History of Title VII

Title VII was enacted in 1964 in response to overwhelming evidence of racial discrimination in employment. The racial disparity was dramatic: in 1962 the unemployment rate was 4.9% among whites, 11.0% among blacks; median income in 1960 was $5,137 for white males, $3,075 for black males. Blacks were concentrated in the lower-paying occupations: in 1962, 16.7% of non-whites were white collar workers, 39.5% were blue collar workers, 32.8% were service workers, and 11.0% were farmworkers.

Title VII was enacted as a remedial and enforcement measure to achieve equal employment opportunity. Voluntary efforts were encouraged but recognized as insufficient. The elimination of discrimination in employment was crucial to the real enjoyment of other rights guaranteed by the 1964 Civil Rights Act: as the House Committee commented, "[t]he right the vote . . . does not have much meaning on an empty stomach." When Title VII was amended in 1972, it remained obvious that "minority groups [were] not obtaining their rightful place in our society." The Equal Employment Opportunity Commission was given enforcement powers in recognition of the limited success of

126. H. Rep. No. 914, 93d Cong., 2d Sess. ___, reprinted in [1964] U.S. Code Cong. and Ad. News 2355, 2391. Although discrimination on the basis of sex, national origin and religion was also prohibited by the statute, the major impetus for its passage was concern over racial patterns in employment:

In various regions of the country there is discrimination against some minority groups. Most glaring, however, is the discrimination against Negroes which exists throughout our Nation. Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens. Id. at 2393.

127. Id. at 2513-16. The occupational groupings for whites in 1962 were: 47.3% white collar, 35.4% blue collar, 10.6% service workers, 6.8% farm workers.

128. Id. at 2393:

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

129. Id. at 2513.

the conciliation approach.\textsuperscript{131} Discriminatory practices were persistent and pervasive, as indicated by the mounting volume of charges filed with the Commission.\textsuperscript{132} The realization had come that employment discrimination was not primarily characterized by overt, discrete acts, but rather was rooted in complex and subtle patterns which perpetuated historical and continuing social discrimination.\textsuperscript{133}

Title VII thus reflects Congressional recognition of the need for practical, realistic approaches to reach the goal of equal employment opportunity. It encourages voluntary action while insuring legal enforcement. The broad prohibitions of the statute are not merely a negative command to cease discrimination, but impose a positive duty to affirmatively act to eliminate the effects of discrimination.

Societal Discrimination in Title VII Litigation

Judicial interpretation of Title VII has stressed the realistic achievement of the goals of the statute. The courts do not wear blinders when determining whether discrimination exists or how it can be remedied. Rather, they consistently apply Title VII in the social context out of which it arose. In defining what constitutes discrimination, the courts have looked not only to intentional, overt acts, but also to the more subtle, indirect impact of societal discrimination upon employment decisions. Against this background the decision in Weber is a logical extension of the role societal discrimination has played in defining discrimination under Title VII.

“Discrimination” is not defined in Title VII; its definition has evolved and continues to be developed through the course of litigation. A broad framework, however, exists, based on several Supreme Court decisions\textsuperscript{134} which focus on the questions of what ef-

\textsuperscript{131} H.R. Rep. No. 92-238, 92d Cong., 2d Sess. \_\_, reprinted in [1972] U.S. Code Cong. and Ad. News, 2140. In the first five years of the Commission’s existence, less than half of the charges where reasonable cause was found were partially or fully settled by conciliation. \textit{Id.}

\textsuperscript{132} \textit{Id.} at 2139. In the first five years after its creation in 1965, the EEOC had received over 52,000 charges, of which 35,445 had been recommended for investigation. Of these, 56% had been based on race, 23% on sex, and the remainder on national origin or religion. In fiscal year 1969, the annual number of charges had risen to 12,148; it had increased to 14,129 in 1970 and to 14,644 in the first seven months of 1971. \textit{Id.}


\textsuperscript{134} Teamsters’ v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co.,
fects are discriminatory and what types of conduct are discriminatory.\textsuperscript{138} Subsumed under discriminatory effects are the well-settled theories of "disparate treatment" and "disparate impact." "Disparate treatment" means the use of race as an invidious modifier of employment decisions, resulting in the denial of employment benefits based on that factor rather than on neutral and uniform criteria.\textsuperscript{136} Disparate treatment is most commonly alleged in individual suits brought under Title VII and is often tied to conduct which is overtly racially discriminatory.\textsuperscript{137} Where the imposition of facially neutral criteria results in a racially disproportionate exclusion or denial of employment benefits, the effect is one of "disparate impact."\textsuperscript{138} Disparate impact is commonly alleged in class action suits and pattern-and-practice actions.\textsuperscript{139} Discrimination against a class often reflects or incorporates societal discrimination.\textsuperscript{140}

What constitutes discriminatory conduct continues to be an area of developing law. The broad outlines were set out by the Supreme Court in the seminal case of \textit{Griggs v. Duke Power Company}.\textsuperscript{141} In \textit{Griggs} the Court established that Title VII was not limited to intentional, overt acts of discrimination.\textsuperscript{142} Overt acts such as a re-

\begin{footnotesize}

135. Conduct and effect are not disjunctive categories of discrimination; conduct and its effects are intertwined and both elements will be present in any Title VII violation. In the development of the legal definition of discrimination, however, the issues have been examined separately by the courts. In some cases, the focus has been on effect and the question has been whether a racial disparity, either in treatment or in impact, existed. Cases which focus on conduct have primarily been concerned with describing or delimiting the employer's actions.


140. \textit{See text accompanying notes 153 to 161 infra}.

141. 401 U.S. 424 (1971). In \textit{Griggs}, high school diploma and aptitude testing requirements were challenged for their discriminatory effects in disqualifying blacks at a disproportionate rate for hiring, promotion and transfer. The employer had segregated departments until 1965. The diploma and testing requirements were instituted in 1955 for all new hires and transfers except for the Labor Department, which was then all black. In 1965 the requirements were extended to all employment positions. Neither requirement was validated or shown to be job related.

\end{footnotesize}
fusal to hire or promote despite equal or superior qualifications, or an assignment of minorities to the lowest paid, least desirable jobs are clearly covered by the statute. This conduct is prohibited not only because of the racial animus in the employment decision, but primarily because of its consequences. The employer's intent is not a determinant of legal liability. Good intent does not repay wages lost, provide the promotion denied, or replace the opportunity to learn new skills.

The Court in *Griggs* also found that discrimination can occur even without overt acts, through the incorporation of societal discrimination in employment practices. The Court focused on those “practices, procedures, or tests neutral on their face and even neutral in terms of intent,” that nonetheless constitute discrimination because they “operate to ‘freeze’ the status quo of prior discriminatory employment practices.” The Court also recognized that some practices are “fair in form, but discriminatory in operation,” not because they perpetuate prior employment discrimination, but because they are based on present societal discrimination. Since *Griggs*, much of Title VII litigation has involved an effort to define these practices.

The courts have found such “neutral” practices to exist in cases involving changes in employment policies, made in response to Title VII, which operate to continue pre-Act segregation. For example, some employers “merged” formerly segregated lines of pro-


146. 401 U.S. at 432. “[G]ood intent or absence of discriminatory intent does not redeem [such] employment procedures. . . . Congress directed the thrust of the Act to the consequences of employment practices.” *Id.* (emphasis in original).

147. *Id.*


150. *Id. at 430*.

151. *Id.*

152. *Id. at 431*. 
gression by putting "black" jobs at the bottom of "white" jobs;\textsuperscript{183} or imposed new educational or testing requirements for promotion into formerly all-white departments, but did not require them of incumbent white employees.\textsuperscript{184} Other cases have dealt with the continuation of pre-Title VII policies which formerly operated in the context of overt racial discrimination. Illustrative are the age and experience requirements for union membership where the union's past exclusion of blacks made it impossible for them to meet the qualifications.\textsuperscript{185} Another common pattern is the opening up of formerly all-white positions to blacks while retaining the use of departmental or unit seniority to restrict or deter transfer, or as a preference factor in promotion. While all positions are now open on an equal basis, blacks must give up employment security in their old positions to be placed at the bottom of the seniority list in the new department, with the prospect that they will never "catch up" to the position they would have had but for the prior discrimination.\textsuperscript{186}


The most common employment practices challenged on the basis that they are “fair in form, but discriminatory in operation” are high school diploma requirements and general intelligence tests, when used as qualifications for hiring or promotion. These clearly reflect the effects of societal discrimination. Unless these qualifications are job-related or validated as predictive of performance or capability, they are impermissible if they have a discriminatory impact. The courts have also disapproved of hiring and promotion policies that rely heavily on subjective evaluation when the administrative and supervisory personnel making those evaluations are predominantly white. Wherever possible, employment decisions are to be based on objective criteria closely tailored to the actual qualifications needed for a particular job.

A sensitivity to societal factors outside the specific acts of a particular employer or union permeates the definition of discrimination that has developed under Title VII. The theories of disparate

---

This has been a troublesome area for the courts because of the exemption for bona fide seniority systems contained in Title VII. Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1976) provides in part:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority... system... provided that such differences are not the result of an intention to discriminate because of race... or national origin... The Supreme Court has interpreted this exemption to mean that prior discrimination which is perpetuated by otherwise neutral seniority systems must have occurred since the effective date of Title VII in order to be actionable. Teamsters v. United States, 431 U.S. 324, 353-54 (1977). See also Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).


158. “[C]hildhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, should not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.” McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).


treatment and disparate impact are founded on the presumption that when a disparity exists in employment of blacks as compared to whites it is usually attributable to race, not to some other factor. Discriminatory conduct, as defined by the courts, may include neutral or fair policies undertaken in good faith. Thus, the concept of societal discrimination has been implicit in the legal definition of discrimination, although legal liability has always been premised on specific conduct and demonstrable discriminatory effects.\textsuperscript{162}

The Impact of Weber: Societal Discrimination and Voluntary Action

The decision in Weber takes the concept of societal discrimination a step further. It permits societal discrimination to be the sole basis for voluntary affirmative action.

Societal discrimination was found in Weber to be a sufficient basis to justify a racially preferential program. The Court upheld a remedial effort as drastic as the most extreme relief granted in Title VII litigation.\textsuperscript{163} Racial preference in this context is not, however, equivalent to invidious racial discrimination.\textsuperscript{164} Rather, it is a necessary means of achieving racial equality and of adjusting employment expectations which are based on a long history of discrimination. It is a practical, realistic means for minorities to achieve their “rightful place.”

A less drastic approach could “freeze” the status quo for another generation. Title VII was enacted to avoid that result and affirma-

---

162. The Title VII practitioner who exercises moderate care in the selection of cases to take to court may confidently anticipate a successful conclusion to the litigation in virtually every instance. The primary reason for this optimistic view is that the racist and sexist character of our culture is so pervasive that it is almost impossible for an employer of any size to have avoided incorporating unlawful practices into the everyday operations of the enterprise. Specter and Spiegelman, \textit{Employment Discrimination Action under Federal Civil Rights Acts}, 21 \textit{Am. Jur. Trials} 1, 125 (1974).

163. \textit{See} note 94 \textit{supra}.

164. It does not expressly or implicitly pin a badge of inferiority on whites. It does not cut off any employment benefit; rather, it limits the expectations of achieving that benefit. Those employment expectations are arguably premised on the existence of discrimination, for it is expected that whites will have a better opportunity to gain the skills, education and experience to qualify for a job, and that if whites are measured against blacks with equal or even superior qualifications, whites will be hired because of race. Thus to uphold these expectations under the rubric of “reverse discrimination” is to permit continued reliance on, and benefit from, societal discrimination. \textit{See} EEOC v. Enterprise Ass’n Steamfitters Local 638, 542 F.2d 579, 586 (2d Cir. 1976); Patterson v. Newspaper and Mail Deliverers’ Union, 514 F.2d 767, 775 (2d Cir. 1975); Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974), rev’d in part on other grounds, 538 F.2d 1094 (6th Cir. 1976).
tively eliminate the effects of discrimination. As Justice Brennan observed in *Weber*:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long,"... constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.\(^{165}\)

The *Weber* decision recognized the context in which Title VII arose and is consistent with the legislative purpose for its enactment. It is also in accord with the pattern of judicial relief granted under Title VII, which has sought to restore blacks to their "rightful place" and remove all vestiges of discrimination wherever possible. *Weber* recognized that such action should be encouraged on a voluntary basis, and thereby avoided the legal paradox of prohibiting affirmative action unless the employer has violated Title VII. Title VII operates as a statement of what cannot be done, not as a limitation on what should be done.

*Weber*, however, does not hold that whites can have no cause of action for invidious discrimination nor that race-conscious affirmative action programs will be uniformly upheld.\(^{166}\) The Court carefully points out the factors relevant to its decision, suggesting that a race-conscious program must be reasonable, fair, and limited to achieving a result justified by evidence of societal discrimination.\(^{167}\)

*Weber* established that voluntary action should not be unduly restrained from using reasonable and effective means to remedy general patterns of employment discrimination. It reassures private employers that reliance on general evidence of persisting employment discrimination as a basis for instituting affirmative action will not result in legal liability.\(^{168}\) On the one hand, the voluntary

\(^{165}\) 99 S. Ct. at 2728.

\(^{166}\) Although violations of Title VII are most frequently claimed by minorities, it is settled that whites may also sue under either that statute or the Reconstruction Statutes. In *McDonald v. Santa Fe Trail Trans. Co.*, 427 U.S. 273 (1976), white employees, who were discharged for stealing, claimed discrimination because a black employee charged with the same offense was not discharged. The Court held that the complaint stated a claim under both Title VII and 42 U.S.C. § 1981.

\(^{167}\) 99 S. Ct. at 2730.

\(^{168}\) A case challenging Congressional authority to mandate affirmative action was granted certiorari May 21, 1979, by the U.S. Supreme Court. *Fullilove v. Kreps*, 584 F.2d 600 (2d Cir. 1978), *cert. granted* 99 S. Ct. 2403 (1979). The statute in question is Section 103(f)(2) of the 1977 Public Works Employment Act, 42 U.S.C. § 6705(f)(2), which requires that 10% of federal funds for public works projects be used on bids submitted by businesses
actions of an employer committed to equal employment opportunity are supported and encouraged. On the other hand, a recalcitrant employer who has committed "arguable violations" of Title VII can be urged to institute voluntary affirmative action as an alternative to private or government suits under the statute. The knowledge that voluntary programs will be upheld may therefore be a valuable negotiating tool and promote conciliation.

The decision also indirectly supports judicially-imposed racial preferences and quotas. The Court relied on prior case history of craft union discrimination where these types of remedies had been imposed. By upholding a voluntary race-conscious program, the Court implicitly approved preferential quotas as a proper exercise of equitable relief. It is unlikely that the courts will significantly expand the use of such remedies or view them as other than extreme. Certainly a court-ordered preference is distinguishable from one voluntarily adopted; but the underlying concept of preference as a valid means to remedy employment discrimination is the same.

CONCLUSION

Weber provides a basis for remedying discrimination which is beyond the scope of Title VII. Pre-Act conduct and general societal discrimination not actionable under the statute can be reached by voluntary affirmative action. Title VII litigation, when viewed in this perspective, is merely one means to correct discrimination, rather than the strict limit on what can or should be done. Weber recognizes that the attainment of equal opportunity is not solely the responsibility of judicial enforcement and administration. The decision provides support and encouragement for private voluntary action to achieve the goal of racial equality based on a realistic assessment of the social matrix of discrimination.

The extension in Weber of the use of the concept of societal discrimination has significant implications. It reaffirms the desirability and legitimacy of voluntary affirmative action. Bakke indicated

which are at least 50% minority-owned. The issues presented are whether the statute violates Title VII and the due process and equal protection clauses of the Constitution. For a discussion of the issues raised, see Leventhal, ACES Back to Bakke, 65 A. B. A. L. J. 214 (1979). Affirmative action based on Congressional findings and authority would arguably stand on even a stronger basis than the private action upheld in Weber. 169. 99 S. Ct. at 2725 n.1.

170. Although quota relief has been ordered by the courts, see note 94 supra, the permissibility of such relief has never been expressly ruled on by the Supreme Court.
that affirmative action programs in educational admissions could not justify racial quotas on this basis. *Weber* insures that the concept can be applied in the employment sector. Recognition of societal discrimination is essential to achieving social equality, and application of the concept should be extended to other areas of civil rights litigation.

Nancy E. Dowd