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4

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The Story of *Steelworkers v. Weber*: Statutory Text, Spirit, and Practical Reasoning

John Minor Wisdom (1905–99) and Brian J. Weber (born 1946) are sons of Louisiana, perhaps America's most distinctive state. Although they were on opposite sides of the most famous statutory interpretation case of the twentieth century, they were at heart very similar gentlemen—good-hearted pragmatists who advanced the cause of racial integration in the long-segregated American South.

The case that brought them together, *United Steelworkers of America v. Weber*,[1] posed the question whether federal anti-discrimination law allows employers and unions to engage in voluntary affirmative action to redress racial imbalances in the workplace. This was an issue that legislators deliberately submerged when they adopted the Civil Rights Act in 1964, but federal executive officials believed that affirmative action was needed to achieve the goal of civil rights laws—namely, racial integration. An architect of America's civil rights law, Judge Wisdom agreed with this assessment and urged an interpretation of the 1964 act that allowed employers and unions to adopt racial quota plans to head off potential lawsuits from underrepresented workers of color.

A worker in Gramercy, Louisiana, Weber felt such a plan "discriminated" against him because of his race, in violation of the statute. From

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1. 443 U.S. 193 (1979).

his perspective, race-based "remedial" plans were using the same criterion—race—that had been discredited by the civil rights revolution. Such a "colorblind" interpretation of the 1964 act had a political constituency that was rapidly growing by the time the Supreme Court decided Weber's case in 1979. Agreeing with Judge Wisdom's result but not his reasoning, the Court endorsed affirmative action based upon the "spirit" of the statute; in order to produce workforce integration, the statute should be interpreted to give businesses and unions a great deal of freedom to develop their own affirmative action plans.

Like Judge Wisdom's approach, the Supreme Court's decision was pragmatic—and it came under immediate fire from the conservative social movement that elected Ronald Reagan president the year after *Weber*. Although the dissenters in 1979 relied on the original expectations of the enacting Congress, the new Reaganite criticism of *Weber* was text-based at the same time it was deeply political: Affirmative action was unfair to white men like Brian Weber, who paid the price for workforce segregation to which they did not contribute. *Weber* withstood the Reaganite assault, but with interpretive twists that pressed it closer to Judge Wisdom's interpretation. In a final irony, John Minor Wisdom and Brian Weber came together on this issue at the very same time the Supreme Court was dynamically revising the *Weber* precedent.

The Civil Rights Act of 1964 and Workplace Integration

The Civil Rights Movement and School Integration

The story of the civil rights movement features not only Martin Luther King, Jr., the charismatic minister who led many of the popular boycotts and marches for equality, and Thurgood Marshall, the brilliant litigator who argued and won *Brown v. Board of Education*, but also judges such as John Minor Wisdom. Perhaps the greatest judge to serve on the old Fifth Circuit,[2] Judge Wisdom's background made him an unlikely architect of the New South.[3] Although he was the scion of a prominent New Orleans family (his father, Mortimer Wisdom, was a wealthy cotton broker and his mother, Adelaide Minor, was from one of the First Families of Virginia) and graduated from the most elite southern private schools, John Minor Wisdom revealed an independence

2. Before the new Eleventh Circuit was carved out of it, the old Fifth Circuit included half of the former Confederacy (Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas), as well as the Panama Canal Zone. Judge Wisdom waged a twenty-year campaign to preserve the old Fifth Circuit.

3. *See* Jack Bass, *Unlikely Heroes: The Dramatic Story of the Southern Judges of the Fifth Circuit Who Translated the Supreme Court's* Brown *Decision Into a Revolution for Equality* (1981); Joel William Friedman, *Champion of Civil Rights: John Minor Wisdom* (2009); Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 Tul. L. Rev. 276 (1985).

of mind early on. Breaking with family tradition, he became a Republican out of disgust with the corrupt politics of the Huey Long machine. Because of Wisdom's critical support for President Dwight Eisenhower in the elections of 1952 and 1956, the president elevated him to the Court of Appeals in 1957.

A moderate Republican in a region filled with segregation-loving Democrats, Judge Wisdom appreciated how apartheid violated a central tenet of government, that the state provide everyone a fair chance to enjoy a flourishing life. He also understood that governments of the southern states had contributed to a deeply entrenched regime of private racism as well as public discrimination against African Americans. While most other federal judges were deferring to southern foot-dragging and evasion of *Brown*'s mandate that public schools be desegregated "at all deliberate speed," Judge Wisdom was one of four Fifth Circuit judges who firmly admonished trial judges and state officials to follow the law of the land, and promptly.[4]

By the mid-1960s, Judge Wisdom was insisting upon actual integration and not just formal desegregation. In his most famous opinion, *United States v. Jefferson County Board of Education*,[5] Judge Wisdom upheld a lower court order deploying racial quotas in order to reverse generations of deep-seated school segregation. Typically, Judge Wisdom did not shirk from acknowledging that he was requiring public officials to use race-based remedies to reverse race-based segregation:

> The Constitution is both color blind and color conscious. To avoid conflict with the equal protection clause, a classification that denies a benefit, causes harm, or imposes a burden must not be based on race. In that sense the Constitution is color blind. But the Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination. The criterion is the relevancy of color to a legitimate government purpose.[6]

The United States Department of Justice deployed *Jefferson County* in briefs over the next generation in an effort to move school districts toward integration. Indeed, as a direct result of lawsuits brought by the government and by the NAACP's Legal Defense & Educational Fund, Inc. (the "Inc. Fund"), black children in the South were attending integrated schools in unprecedented numbers by 1979.[7]

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4. *E.g.*, Meredith v. Fair, 298 F.2d 696 (5th Cir. 1962) (Wisdom, J.) (directing the desegregation of the University of Mississippi through admission of James Meredith). The other judges were Elbert Tuttle, John Brown, and Richard Rives.

5. 372 F.2d 836 (5th Cir. 1966).

6. *Id.* at 876.

7. Janet Ward Schofield, *Review of Research on School Desegregation's Impact on Elementary and Secondary School Students*, in *Handbook of Research on Multicultural Education* 597–617 (James Banks & Cherry McGee Banks eds., 1995).

Workplace Integration, Title VII, and Affirmative Action

Even before the civil rights movement achieved national recognition that race discrimination in public schools is wrong, presidential executive orders disapproved discrimination because of race in federal employment.[8] Admittedly, these orders had limited effects, and the civil rights movement demanded stronger measures. President John F. Kennedy issued Executive Order 10925 (1963),[9] which not only prohibited race discrimination in federal employment and among federal contractors, but also required federal contractors to "take affirmative action to ensure" that minorities were not being excluded because of race. President Lyndon Johnson reaffirmed that precise directive in Executive Order 11246, issued in 1967.[10]

Presidents Kennedy and Johnson also supported civil rights legislation that would bar race discrimination in certain public accommodations, federally funded programs, and private workplaces. After the most famous legislative debate of the twentieth century, a coalition of liberal Democrats and pro-civil rights Republicans broke a southern filibuster in the Senate in April 1964. The supermajority vote needed to defeat the filibuster was only possible by securing the support of conservative GOP Minority Leader Everett McKinley Dirksen, of Pekin, Illinois. The bill that President Johnson signed into law as the Civil Rights Act of 1964 was the Mansfield–Dirksen substitute that represented a negotiated compromise between liberal and more conservative supporters of the anti-discrimination law.[11]

Title VII of the act, in particular section 703(a), made it an "unlawful employment practice" for any employer covered by the act

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employ-

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8. *See* Exec. Order No. 8802, 3 C.F.R. 957 (1938–1943 Compilation) (President Roosevelt); Exec. Order 10210, 3 C.F.R. 390 (1949–1953 Compilation) (President Truman); Exec. Order 10479, 3 C.F.R. 961 (1949–1953 Compilation) (President Eisenhower).

9. 3 C.F.R. 448 (1959–1963 Compilation).

10. *See* Note, *Executive Order 11246: Anti-Discrimination Obligations in Government Contracts*, 44 NYU L. Rev. 590 (1969).

11. For legislative histories of the 1964 act, *see* Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972* (1990); Charles & Barbara Whalen, *The Longest Debate: A Legislative History of the 1964 Civil Rights Act* (1985); as well as William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 2–23 (4th ed. 2007). On the Mansfield–Dirksen substitute, *see* Daniel Rodriguez & Barry Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. Pa. L. Rev. 1417, 1487–96 (2003). Mike Mansfield (D–Mont.) was the Senate majority leader.

ment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[12]

Reflecting divisions of opinion within the enacting coalition, Title VII did not define "discriminate," but did include, in section 703(j), a mandate that the new law "shall not be interpreted to require any employer . . . to grant preferential treatment to any individual or group . . . because of the race . . . of such individual or group on account of an imbalance" in the workforce.[13]

Title VII also created the Equal Employment Opportunity Commission ("EEOC") to help implement the new rules. Although the EEOC did not have substantive rulemaking authority, per the compromise with bureaucracy-hating Senator Dirksen, it was supposed to investigate violations and was empowered to bring lawsuits to enforce the act. Echoing President Kennedy's executive order the previous year, the 1964 act vested courts with broad remedial authority. If a court found an unlawful employment practice reflecting an intent to discriminate, section 706(g) authorized the judge to enjoin that practice and order "such affirmative action as may be appropriate," including reinstatement of employees.[14]

Implementing Title VII: Disparate Impact Liability and Affirmative Action

Title VII left many legal issues unanswered. One of those issues was whether employment policies that did not on their face discriminate on the basis of race could violate the statute. If employers could escape liability by choosing an apparently neutral criterion, such as seniority or performance on tests, they might be able to continue to maintain segregated workforces.

Whether by design or inattention, this is what many employers and unions did. For example, Kaiser Aluminum Co. followed a practice whereby craft workers at its plants were required to have previous craft experience, a race-neutral rule. In practice, however, the rule excluded

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12. Civil Rights Act of 1964, § 703(a), 78 Stat. 241, 253–54, codified at 42 U.S.C. § 2000e–2(a). Section 703(b)–(c) set forth similar prohibitions for employment agencies and unions. Section 703(d), id. § 2000e–2(d), sets forth an anti-discrimination rule similar to § 703(a)(1) to apprenticeship and training programs.

13. *Id.* § 2000e–2(j).

14. *Id.* § 2000e–5(g).

workers of color, because local craft unions followed nepotistic practices—namely, an "old-boys" network of referrals that channeled jobs almost exclusively to white men. In 1969, 58% of local craft unions told the EEOC that they had not a single black member; nationwide, 1.9% of the members of electrician unions were African American, 1.7% of ironworker unions, 0.8% among plumbers, and 0.7% of sheet metal workers.[15]

The perseverance of segregated workforces was a matter of concern to both the EEOC and the Office of Federal Contract Compliance (OFCC) within the Department of Labor. The latter was charged with enforcing Executive Order 11246, requiring governmental contractors to be nondiscriminatory. Frustrated by the persistence of segregated workforces, OFCC became committed to more aggressive enforcement in order to achieve actual integration.[16] In 1969, it issued plans for Philadelphia and other areas, requiring government construction contractors to make good faith efforts to meet percentage targets for minority employees in craft positions. The "Philadelphia plan" suggested a remedial strategy so that half of the new hires would be minority workers.[17] Following up on the Philadelphia plan, OFCC subsequently required non-construction contractors, such as Kaiser, to analyze their workforces and identify areas in which minorities and women were underutilized in comparison with their availability in the relevant labor force; if the numbers were unsatisfactory, the contractors were required to modify their hiring practices that contributed to the deficiency.[18] As the Equal Employment Opportunity Coordinating Council (established by Congress in 1972) advised public employers in 1976, "[v]oluntary affirmative action to assure equal employment opportunity" in workforces that remain substantially segregated is "appropriate at any stage of the employment process"; such affirmative action could include race-conscious steps designed to redress the problem.[19]

At the same time that the OFCC was putting real pressure on federal contractors to create truly integrated workforces, the EEOC was pressing courts to interpret Title VII to remedy the same problem. Staff

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15. United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* 29–30 (1976).

16. The discussion that follows is taken from Brief for the United States and the Equal Employment Opportunity Commission, 57–63, *Steelworkers v. Weber* (U.S. Supreme Court, Docket Nos. 78–432 et al.) (hereinafter "EEOC Brief").

17. *The Philadelphia Plan: Hearings on S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 26–38 (1969).

18. Department of Labor, Order No. 4, 36 Fed. Reg. 23152 (1971), codified at 41 C.F.R. Part 60–2; affirmative action obligations were codified at *id.* Part 60–4.

19. Equal Employment Opportunity Coordinating Council, *Affirmative Action Programs for State and Local Government Agencies*, 41 Fed. Reg. 38814–15 (Aug. 26, 1976).

attorney Sonia Pressman, a labor lawyer, warned the agency that employers would seek to evade their duties under the statute and urged the EEOC to interrogate supposedly neutral criteria to ensure that they were adopted for reasons of business necessity and not preservation of segregated workplaces.[20] The commission adopted Pressman's idea and interpreted section 703(a)(2) to bar employer policies that had the effect of discriminating against minority workers and were not justified by an independent business need.[21]

In *Local 189, United Papermakers v. United States*,[22] Judge Wisdom agreed with the EEOC and ruled that seniority arrangements could be invalidated if they had a discriminatory effect that could not be justified by business necessity. In *Griggs v. Duke Power Co.*, which involved tests that had strong racially discriminatory effects, the Fourth Circuit declined to follow Judge Wisdom's lead—but the Supreme Court unanimously reversed.[23] "The objective of Congress," the Court reasoned, "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Thus, "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."[24]

The Kaiser-Steelworkers Agreement and the Weber Lawsuit

The Kaiser–Steelworkers Agreement

When Title VII was adopted, neither Kaiser Aluminum nor the United Steelworkers had any kind of racially exclusionary policy in place, but the craft force in most of the Kaiser plants remained virtually all white. This was cause for concern among both managers and union leaders. The state of the law after *Griggs* provided incentives for both the union and the company to adopt an affirmative action plan that integrated the craft jobs at Kaiser's plants.

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20. Memorandum from Sonia Pressman to Charles T. Duncan, *The Use of Statistics in Title VII Proceedings* (May 31, 1966).

21. EEOC, Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333–36 (July 31, 1970).

22. 416 F.2d 980, 988–89 (5th Cir. 1969).

23. Griggs v. Duke Power Co., 401 U.S. 424 (1971), *reversing* 420 F.2d 1225 (4th Cir. 1970). Judge Simon Sobeloff's dissenting opinion in the Fourth Circuit case followed Judge Wisdom in finding that Title VII prohibited employment practices that were "fair in form but discriminatory in substance."

24. *Id.* at 429–30, *following* Brief for the United States as *Amicus Curiae*, Griggs v. Duke Power Co. (U.S. Supreme Court, 1970 Term, Docket No. 124), itself relying on Judge Wisdom's opinion in *Papermakers*.

The Steelworkers were, admittedly, progressive and pro-civil rights. The union, for example, filed an *amicus* brief supporting the EEOC in *Griggs*—the only private institution to do so—because the union believed that discriminatory testing ought to be illegal. But the Steelworkers had also helped lobby Congress to include in Title VII a safe harbor (in section 703(h)) against liability for workplace disadvantages "pursuant to a bona fide seniority or merit system," so long as the disadvantages are not the result of an "intention to discriminate" because of race.[25] The Steelworkers assumed that section 703(h) immunized seniority rules from Title VII attack, but the Inc. Fund, the EEOC, and most federal judges believed that seniority rules ought to be open to attack when they locked black workers into permanent second-class positions within a company. Indeed, the leading opinion rejecting a seniority-rules defense was Judge Wisdom's opinion in *Papermakers*.[26]

Kaiser, too, might be liable under a *Griggs–Papermakers* theory, because none of its craft forces enjoyed a portion of minority employees anywhere close to the number of minority persons in the community workforce. During the 1970s, the company was sued by plaintiffs relying on this precise theory.[27] Kaiser was also under targeted pressure from the OFCC. Although only 1% of Kaiser's business was directly with the federal government, it was a subcontractor to many businesses contracting with the federal government. That aspect of its business meant that Kaiser was sensitive to the OFCC, which after 1969 aggressively pressed contracting firms to improve their poor numbers. Accordingly, Kaiser adopted racial quotas in entry-level hiring in response to federal contracting pressure—but resisted OFCC pressure to create in-house training programs to improve racial diversity because such programs cost the company $30,000–70,000 per trainee.[28]

Finally, both Kaiser and the Steelworkers were aware of a 1974 master consent decree between the steel industry and the union; the EEOC, OFCC, and the Department of Justice had actively participated in crafting the consent decree. The decree, which was approved by the Fifth Circuit, reformed but largely preserved seniority arrangements; it also established "goals and timetables" for steel companies to improve the representation of female and minority workers in areas where they had traditionally been excluded.[29]

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25. 42 U.S.C. § 2000e–2(h).

26. On the early § 703(h) litigation, *see* Malamud, *Weber*, *supra* note *, at 181–84.

27. Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978) (finding Kaiser liable under a disparate effect theory).

28. Malamud, *Weber*, *supra* note *, at 192–93.

29. United States v. Allegheny–Ludlum Indus., Inc., 517 F.2d 826 (5th Cir. 1975); *see* Malamud, *Weber*, *supra* note *, at 188–92, describing the dynamics of the steel industry consent decree.

Under pressure from the Steelworkers, the OFCC, the EEOC, and private plaintiffs, Kaiser entered into a national agreement with the Steelworkers in 1974 that addressed the issue of workforce diversity. Specifically, the Steelworkers, represented by attorney Michael Gottesman, insisted that diversity be channeled through in-house training programs, with half the spots reserved for blacks and half for whites until the racial balance reached appropriate levels. Union members of both races benefited from this proposal: black workers because they enjoyed a faster track to better craft jobs within a plant and white employees because they gained an entrée into craft jobs that had previously been filled outside the plant. Kaiser did not like the high cost of this solution but was persuaded to go along by the prospect of lawsuits and pressure from the OFCC.[30]

The new 1974 Steelworkers–Kaiser agreement promised a transformation of Kaiser's plants in the South, especially the one in Gramercy, Louisiana, where the craft force was 1.83% (five out of 273 workers) African American, in contrast with a community workforce that was almost 40% black. During the first year of the new program, Kaiser accepted thirteen of its production workers, of which seven were black, for the apprenticeship program. Within each racial grouping, employees with higher seniority were given priority, consistent with labor norms. However, all of the admitted black workers had less seniority than all of the admitted white workers—and less than several of the white workers who had not been admitted. That last fact created trouble for the program.

Brian Weber's Lawsuit and the Fifth Circuit

Brian F. Weber was a lab technician at Kaiser's Gramercy plant. He was also active in the local Steelworkers' union; during his service on the plant's grievance committee, Weber had urged in-house training programs.[31] He was elated with the 1974 accord for creating such a program, especially because he might benefit. Craft training would enable him to increase his salary (from $17,000 to as much as $25,000 a year) and to enjoy better job security and better hours. But Weber was dismayed to learn that spots in the training program would *not* be distributed entirely on the basis of seniority and that half the spots were set aside

30. *See* Brief for Respondent Kaiser Aluminum & Chemical Corporation, *Steelworkers v. Weber* (U.S. Supreme Court, Docket Nos. 78–432 et al.).

31. These and other facts about Brian Weber are taken from the Record on Appeal, *Steelworkers v. Weber* (U.S. Supreme Court, Docket No. 78–432 et al.); Molly Moore, *Brian Weber, Blue-Collar Bakke,* Wash. Post, Jan. 12, 1979, at D1; Steven V. Roberts, *The Bakke Case Moves to the Factory,* N.Y. Times, Feb. 25, 1979; *Speaking of Race,* Times–Picayune (New Orleans), Nov. 16, 1993, at A7 (interview with Weber fourteen years after the Supreme Court's decision).

based upon race. As he later put it, "in the union, everything works by seniority. When they did this, I was opposed to it. I thought it was not only illegal, but unfair. I voiced my opposition to this by filing a grievance with the union. But the union then dropped the grievance after a couple of steps, so I filed a complaint with the EEOC."[32] The EEOC declined to press the matter and gave Weber a "right to sue" letter, which gave him the option of filing a lawsuit.

Weber took the letter to the federal district courthouse in New Orleans and ultimately was directed to Judge Jack M. Gordon. As fortune would have it, attorney Michael Fontham, who was making a name at his young age for being willing to take on civil rights cases, was sitting in the judge's courtroom at that moment. Judge Gordon told Fontham that he was assigning the case to him. Fontham recalls that the conversation was something like, "Here, since you like civil rights cases, I will appoint you to represent a white guy in a civil rights case."[33] After investigating the facts and determining to his own satisfaction that Kaiser had not illegally discriminated against African Americans at the Gramercy plant, Fontham agreed to represent Weber. Neither the young attorney, just three years out of law school, nor his similarly aged client could have dreamt that they would ride the case all the way to the United States Supreme Court. (Fontham, by the way, was an associate at the New Orleans law firm of Stone, Pigman, Walther, Wittmann & Hutchinson. Fontham's firm had a distinguished background in handling civil rights matters; it had its origins three-quarters of a century ago as Wisdom & Stone—founded by John Minor Wisdom and Saul Stone.)

Fontham's complaint in Weber's case alleged that the training program adopted for admission to the craft force by Kaiser and the Steelworkers used unlawful racial quotas. In the argot of Title VII, the quota-based program "discriminate[d] because of race" against Weber in the "terms, conditions" of his employment (violating section 703(a)(1)) *and* in the apprenticeship or training program (thus also violating section 703(d)). Fontham did not assert a claim for relief under section 703(a)(2), the broader prohibition against classifying employees because of race, apparently because that provision was the basis for *Griggs* and was unavailable to so-called "reverse discrimination" claimants.

Kaiser and the Steelworkers denied that their policy constituted legal "discrimination." What they were doing was not excluding people because of racial animus, the classic discrimination scenario, but were instead integrating the workplace using criteria that the federal government itself was insisting upon in school desegregation cases and federal

32. *Speaking of Race*, *supra* note 31, at A7.

33. E-mail from Michael R. Fontham, Partner, Stone, Pigman, Walther, Wittmann & Hutchinson, to Philip P. Frickey (Dec. 9, 1999).

contracting negotiations. The remedial, integrative use of racial quotas is different from the exclusionary, segregating deployment of race. Anyone in the South knew the difference, argued the defendants. Obviously, the plaintiff and these defendants were positioning themselves on either side of a normative debate that was ripping through the United States in the 1970s: Are the Constitution and the 1964 act *colorblind*, as opponents of affirmative action maintained? Or do we need to consider color and race in order to remedy the ongoing effects of centuries of slavery and apartheid, as Judge Wisdom said in *Jefferson County*?

The bench trial before Judge Gordon took only one day and involved four witnesses: "Weber, the two Kaiser officials, and another white employee who had not been selected for any of the training programs. In addition, a short factual stipulation and accompanying exhibits were introduced into evidence. The union did not call any witnesses."[34] The Kaiser officials stated that no discrimination had occurred, but that the company was aware that it might get sued nonetheless and was subject to pressure and potential sanctions under the executive order governing employment by government contractors. The company and, according to its own officials, the union preferred voluntary measures to address these concerns, and the union was particularly interested in the apprenticeship program because it opened opportunities for its members of both races to obtain access to better jobs.

Based on this record, Judge Gordon found that "the black employees being preferred over more senior white employees had never themselves been the subject of any unlawful discrimination."[35] We cannot know what the record would have revealed if any African American employee or potential employee at Kaiser had intervened to present evidence about racial discrimination at Gramercy. Federal investigators enforcing the executive order concerning government contracting had amassed evidence in the early 1970s of serious racial bias at work at Kaiser's Gramercy plant. In addition to the absence of minority employees in the craft and supervisory ranks, investigators reported that black workers had been afraid to bid on better jobs because of threats by white workers; white workers used racial epithets; blacks were outside the pipeline used by white workers to funnel jobs to white friends and relatives; whites had been promoted to foreman ahead of more senior blacks; and the company had sometimes waived qualification requirements to advance whites.[36]

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34. EEOC Brief, 10 n.7; *see id.* at 10–12 (containing a judicious summary of the testimony at the short bench trial).

35. Weber v. Kaiser Aluminum & Chem. Corp., 415 F.Supp. 761, 769 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

36. Gertrude Ezorsky, *The Case of the Missing Evidence*, Wash. Post, May 27, 1979, at C1.

Because the judge found that Kaiser and the Steelworkers had not engaged in any previous race-based discrimination, he rejected their argument that they needed to use racial quotas to remedy past discrimination. Recognizing that the Fifth Circuit, under Judge Wisdom's leadership, had repeatedly approved race-based remedies for prior discrimination, Judge Gordon found those precedents inapposite when there was no finding of prior discrimination. Hence, the defendants were in violation of section 703(d).

On appeal to the Fifth Circuit, Kaiser and the Steelworkers assailed the premise of Judge Gordon's decision. If the court wanted Title VII to work as Congress expected, employers and unions needed a lot of leeway to adopt voluntary plans that gradually integrated workplaces. Otherwise, the laborious process of lawsuits and appeals would yield few tangible results. Also, it was unreasonable to expect employers and unions to admit to prior discrimination—a tacit explanation for Kaiser's testimony at trial—for that would expose them to private lawsuits by minority employees. Hence, the defendants proposed that upon an internal finding of an "arguable violation," employers and unions enjoyed some leeway to remedy the situation under standards courts had developed for judicial remedies.

Representing the United States and the EEOC, the Department of Justice intervened in the case on appeal and filed a brief agreeing with the defendants' position and defending the legality of Executive Order 11246 as applied to Kaiser and other contractors. The United States argued that the executive order was an independent reason to reverse the district court's decision. Not only had federal courts upheld the affirmative action plans (including quota plans) undertaken in response to OFCC pressure, but Congress also had arguably ratified those interpretations when it amended Title VII in 1972. For example, Senator Sam Ervin (D–N.C.) proposed the following amendment: "Nothing contained in this title or in Executive Order No. 11246, or in any other law or Executive Order, shall be interpreted to require any employer ... to grant preferential treatment to any individual."[37] The floor managers of the Title VII amendments recognized this as an attack on the Philadelphia plan and urged its rejection for that reason; the Senate did indeed reject the Ervin amendment,[38] a fate shared by other such proposals in both the House and the Senate.[39]

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37. 118 Cong. Rec. 1676 (1972) (Sen. Ervin, D–NC).

38. 118 Cong. Rec. 1664–65 (1972) (Sen. Javits, R–NY).

39. *E.g.*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, *Legislative History of Equal Employment Opportunity Act of 1972*, at 1844 (1972) (subcommittee consensus that the Title VII amendments accepted the validity of decisions upholding remedial plans in response to OFCC pressure). Debate over the various proposals is

At the Fifth Circuit, Weber's case produced a clash between the Old (Lincolnian) Republican philosophy of John Minor Wisdom and a New (harder-edged) Republicanism. Consistent with his commitment to making civil rights laws work as a practical matter, Judge Wisdom accepted the arguable violation theory. If Title VII precluded all voluntary affirmative action efforts, "[t]he employer and the union are made to walk a high tightrope without a net beneath them. On one side lies the possibility of liability to minorities in private actions, federal pattern and practice suits, and sanctions under Executive Order 11246. On the other side is the threat of private suits by white employees and, potentially, federal action. If the privately imposed remedy is either excessive or inadequate, the defendants are liable."[40] Lest the statutory purpose be wholly undermined through judicial construction, Judge Wisdom maintained that Title VII ought to be construed to allow voluntary plans such as the Kaiser–Steelworkers' accord. "If an affirmative action plan, adopted in a collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld."[41] As an independent ground for reversing the district court, Judge Wisdom reasoned that Executive Order 11246, which had repeatedly been upheld as legal, required the judiciary to go along with private plans adopted to remedy problems identified by the OFCC.[42]

Judge Wisdom, however, no longer spoke for the Fifth Circuit, which was bending to the right after eight years of appointments by Presidents Richard Nixon and Gerald Ford. One of the Nixon appointees, Judge Thomas Gee of Texas, wrote for the Fifth Circuit panel in Weber's case. (Joining the opinion was Judge Peter Fay from Florida, named to the court by President Ford.) Judge Gee's opinion reflected the strict constructionist approach that President Nixon promised for his judicial appointments: hew closely to statutory texts and original congressional intent, and do not expand statutes to reflect liberal values. Accordingly, Judge Gee refused to read an "arguable violation" exception into the blanket prohibition of workplace race discrimination in section 703(d).[43] He also declined to carve out an exception for programs established to comply with Executive Order 11246 and ruled, instead, that the executive order must give way to the clear meaning of Title VII. "If Executive

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assembled in Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723, 751–57 (1972).

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

41. *Id.* Employers and unions should enjoy a "zone of reasonableness" within which to adopt remedial plans in furtherance of the statutory goals. *Id.*

42. *Id.* at 236–38.

43. *Id.* at 220–26 (Gee, J., for the panel majority).

Order 11246 mandates a racial quota for admission to on-the-job training by Kaiser, in the absence of any prior hiring or promotion discrimination, the executive order must fall before this direct congressional prohibition."[44]

The Steelworkers' Volte-Face at the Supreme Court

The Fifth Circuit's opinion was handed down on November 17, 1977. Michael Gottesman, who had been brought into the case by the Steelworkers during the appeal, filed a motion for rehearing before the entire Fifth Circuit in January 1978. The full court denied the request. Kaiser, the Steelworkers, and the United States all filed petitions for *certiorari* with the Supreme Court in September 1978. At the Court's conference of December 8, 1978, the justices voted 6–2 to take review in the case.[45] Only Chief Justice Warren Burger and Justice William Rehnquist voted against taking the case; Justice John Paul Stevens recused himself because he owned stock in Kaiser. On the day that the Court announced that it was granting review, December 11, 1978, the EEOC issued guidelines on affirmative action that broadly permitted remedial programs that were "reasonable" or adopted to comply with Executive Order 11246.[46]

By the time the Court agreed to review the Fifth Circuit's judgment, the legal terrain had changed in ways that both clarified and complicated the case. As Professor Deborah Malamud has demonstrated, one important development was the Supreme Court's decision in *Teamsters v. United States*,[47] which held that section 703(h) barred lawsuits alleging that bona fide seniority systems impeded the integration of black workers into desirable jobs. Gottesman felt that *Teamsters* undermined Judge Wisdom's "arguable violation" approach to Weber's case. The best argument for a violation, upon the public record then available, was that Kaiser's pre-1964 discrimination against hiring black workers in Louisiana meant that they would not have the seniority needed to advance within the plant; under *Griggs*, this facially neutral seniority rule would be legally vulnerable, because it had a strongly disparate effect on workers of color. *Teamsters*, however, seemed to insulate unions and

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44. *Id.* at 227.

45. Papers of Justice William J. Brennan, Library of Congress, Madison Building, File for *Steelworkers v. Weber* (Docket No. 78–432) (Justice Brennan's docket sheet, recording votes on *certiorari* and on the merits).

46. The EEOC's guidelines were codified as 29 C.F.R. Part 1608 (1979).

47. 431 U.S. 324 (1977), discussed in Malamud, Weber, *supra* note *, at 204–07. The Steelworkers worked with the AFL–CIO to create an *amicus* brief demonstrating that the legislative history of § 703(h) reflected a congressional intent to insulate seniority systems against disparate impact lawsuits. The *Teamsters* Court essentially followed the AFL–CIO's approach.

employers from *Griggs* claims resting on seniority systems—and so it was no longer clear to Gottesman that Kaiser's practices were "arguable" violations of Title VII.

An even bigger bombshell fell on June 28, 1978, when the Court announced its decision in *Regents of the University of California v. Bakke*.[48] Alan Bakke had challenged an affirmative action quota program for admission to a state medical school. Five justices (William Brennan, Byron White, Thurgood Marshall, Harry Blackmun, and Lewis Powell) agreed that Title VI of the Civil Rights Act of 1964, barring the use of federal funds in governmental programs discriminating because of race, should be interpreted the same as the Equal Protection Clause.[49] Among the five in that majority, Justice Powell found the quota program for admission to state schools to be a violation of the Fifth Amendment, and therefore also of Title VI. But Justice Powell opined that the Equal Protection Clause permitted race-based affirmative action if it was narrowly tailored to serve educational diversity.[50] Because four other justices (Chief Justice Warren Burger and Justices Potter Stewart, William Rehnquist, and John Paul Stevens) believed that the legislative history of Title VI evidenced a congressional judgment that even voluntary affirmative action or quota programs could not be supported by federal monies, the Court majority overturned the quota program followed by the public medical school.[51]

Brian Weber's case looked more promising in light of the Court's division in Alan Bakke's case; indeed, the press dubbed Weber the "Blue-Collar Bakke." Whatever might be said about "diversity" being important to all students in an educational setting, it seems hard to translate that idea into craft work. In addition, Powell's distinction between illegal quotas and legal plus factors might have seemed favorable to Weber, because he was challenging a quota program like that in *Bakke*. In light of the information about the justices' preferences revealed in *Bakke*, one might wonder why Solicitor General Wade McCree sought Supreme Court review in *Weber*. Why not wait for a case where there was better evidence of actual discrimination in the record? Or where the union and employer adopted a plus-factor approach (as Justice Powell recommended in *Bakke*) rather than a strict numerical quota program (which was the case in *Weber*)? In fact, the solicitor general asked the Supreme Court to take the case, vacate the Fifth Circuit's disposition, and remand

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48. 438 U.S. 265 (1978).

49. *Id.* at 284–87 (Powell, J., delivering the judgment of the Court); *id.* at 328–50 (Brennan, J., joined by White, Marshall & Blackmun, J.J., concurring in part).

50. *Id.* at 311–15 (Powell, J.).

51. *Id.* at 295–321 (Powell, J.); *id.* at 408–21 (Stevens, J., concurring in the judgment in part and dissenting in part).

the case to the lower courts for evidence-taking to explore the government's belief that there was strong evidence of Kaiser's potential liability to workers of color—evidence that would strengthen Judge Wisdom's argument. The Court did not accept this invitation when it took review, however.

After the Court took the case, however, Weber's odds of success plummeted, because Justice Powell, the swing vote in *Bakke*, and Justice Stevens, who voted to strike down the admissions plan in *Bakke,* did not participate in *Weber*.[52] Because all of the four quota-tolerant *Bakke* justices were participating in *Weber,* this shifted the *Weber* Court from 5–4 against state quota programs to 4–3 in favor of them. On the other hand, a 4–3 opinion dealing with a controversial issue such as affirmative action would have been a Pyrrhic victory and would not carry the full weight of *stare decisis*. Under those circumstances, there would be no final resolution of the controversy concerning the applicability of Title VII to racial quotas in private employment.

The Court had several options. The participating justices could have vacated and remanded the case, as the solicitor general had urged. Or they could have held the case over to the next term. Justice Powell suggested as much when he reflected on the fact that he would, again, be the critical justice, but also that his vote might generate a 4–4 tie because Justice Stevens was not participating. Justice Powell's suggestion did not generate sufficient support within the Court, suggesting that Justice Brennan, the liberals' master strategist, felt that he could still corral five justices to overturn the Fifth Circuit, and perhaps vindicate Judge Wisdom's dissenting opinion without a remand.

Accordingly, the parties submitted their briefs in the winter of 1979. Kaiser and the United States (speaking also for the EEOC) adhered to the theories advanced in Judge Wisdom's dissenting opinion: Title VII gives private parties breathing room to create race-conscious remedial programs when they reasonably believe that there are arguable violations of the statute; in the alternative, reasonable remedial programs adopted in response to Executive Order 11246 are not violations of Title VII.

After *Teamsters*, Mike Gottesman and his Steelworkers legal team were dubious about Wisdom's approach to the statute, and their dubiety was deepened when they conducted their own in-depth research into the legislative history of Title VII. This research persuaded Gottesman that

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52. Justice Stevens recused himself because he owned stock in Kaiser (whose position he would have voted against). Justice Powell missed the oral argument because of surgery; he had the option of participating in the vote but, after circulating a memorandum expressing deep ambivalence about the statutory issues, took himself out of the case voluntarily.

section 703(j), added to the civil rights bill as a key part of the Mansfield–Dirksen substitute that broke the southern filibuster, meant what it said: The government (including the judiciary) could not *require* Kaiser to adopt a quota program simply based upon a racial "imbalance" in its craft workforce, absent a finding of actual discrimination in violation of Title VII. Gottesman's conclusion was contrary to that of Judge Wisdom, as well as that of Kaiser and the solicitor general.[53] Thus, the Steelworkers' Supreme Court brief (joined also by the AFL–CIO) explicitly rejected the government's position, on the ground that it was inconsistent with the legislative history of Title VII.[54]

On the other hand, the Steelworkers vigorously maintained that section 703(j) gave unions and employers substantial freedom to adopt plans to redress ongoing workplace segregation. Recall that section 703(j) said that nothing in Title VII should be read to *require* employers and unions to adopt remedial race-based measures. By negative implication, Congress was saying that Title VII *permitted* employers and unions to adopt such programs. Gottesman buttressed this textual argument from negative implication with forty pages of in-depth examination of Title VII's legislative history. That history demonstrated that "enactment of Title VII . . . depended upon developing a bipartisan coalition of legislators whose philosophies about the desirable extent of government intrusion upon free enterprise varied widely. Because the southern Democrats were almost unanimously opposed to any bill, there could not be a majority in the House (nor, of course, the two-thirds necessary to invoke cloture in the Senate) without the support of a substantial number of legislators who traditionally resisted federal regulation of private business"—namely, Midwestern Republicans such as Senator Dirksen.[55]

> Title VII in particular presaged a substantial new federal role in the employment decisions of America's businessmen, and in the joint decisions of employers and unions in collective bargaining. . . . These legislators demanded, and the more liberal sponsors agreed, that a guiding principle in shaping Title VII be that . . . "management prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor

53. Gottesman's research and his interactions with his own client, other unions, the government, and Kaiser are described in Malamud, Weber, *supra* note *, at 207–14.

54. Brief for Petitioner United Steelworkers of America [and] AFL–CIO, 21–22, *Steelworkers v. Weber* (U.S. Supreme Court, Docket Nos. 78–432 et al.) (hereinafter "Steelworkers Brief"). Perhaps for this reason, Mike Fontham's brief for Weber adopted Gottesman's lengthy examination of the legislative history. Brief for Respondent Brian Weber, 38–39, *Steelworkers v. Weber* (U.S. Supreme Court, Docket Nos. 78–432 et al.).

55. Steelworkers Brief, 18.

organizations must not be interfered with except to the limited extent that correction is required in discriminatory practices."[56]

Gottesman's brief made this argument in part because it was the only one supported by the legislative history of the statute, but also in part because it was the respondents' best shot at prying away a vote from one of the four justices (Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens) in the no-quota opinion in *Bakke*. With Justice Stevens out of the case, the most likely switcher was Justice Potter Stewart, a moderate (and generally pro-civil rights) Republican whose father served as mayor of Cincinnati, Ohio. The same small-town, give-businesses-freedom-of-action philosophy that Gottesman was reporting from the legislative history was sure to have some appeal for Justice Stewart, and perhaps also Chief Justice Burger (from Minnesota). No one held out any hope for securing the vote of Justice Rehnquist, who was viewed as a doctrinaire conservative.

Swarms of spectators turned out for the oral argument on March 28, 1979. It was clear from the oral argument that Justice Stewart was intrigued by Gottesman's brief. For example, Justice Stewart asked Lawrence Wallace of the Solicitor General's Office why the Court should not adopt the Steelworkers' approach, for it would allow the Court to rule narrowly and without addressing the thorny issue of whether the courts could order race-based quotas without a finding of actual discrimination. Wallace wasted valuable minutes hemming and hawing, before he confessed that the Court could agree with the Steelworkers without ruling on court-imposed race-conscious remedies. At the end of the respondents' argument, Justice Blackmun asked Mike Fontham how liberal Senator Hubert Humphrey (D–Minn.) (the floor manager of the civil rights bill in the Senate) would have voted in this case?[57] Fontham relied on Humphrey's denials that Title VII would be a "quota bill," but Justice Blackmun was doubtful that his idol would follow Judge Gee over Judge Wisdom. His questions did not, however, reveal how he could justify a vote to reverse the Fifth Circuit.

The petitioners, especially the Steelworkers, were cautiously optimistic after the oral argument—and they knew a decision would come soon. Because the Court traditionally adjourns at the end of June, there was little time for the seven participating justices to sort out their differences and draft their opinions. In Supreme Court lore, there is what is called "a June opinion," meaning one issued at the end of the

56. *Id.* at 19. This point was supported by a massive analysis of Title VII's legislative history, *id.* at 26–66.

57. Minnesota was also Justice Blackmun's state, and Senator Humphrey supported (the Republican) Blackmun's nomination to both the Eighth Circuit in 1959 and the Supreme Court in 1970.

term that reflects the hurried atmosphere of that period by containing less than the usual thoughtfulness and polish.

The Supreme Court's Decision in Weber *and Its Aftermath*

The justices met to decide *Steelworkers v. Weber* at their conference on March 30, 1979. Chief Justice Burger opened the discussion with a rambling speech in which he insisted the statute had a plain meaning that covered Weber's case, that section 703(j) was meant to ratify the non-discrimination idea, that arguments based upon Executive Order 11246 were a "red herring," that the quota program in this case "operates to discriminate and to repeal the statute," that "new minorities will be emerging here (he is a Cajun)," and that he would personally "like to reach [the] other result."[58] After this speech, Burger passed on the merits and suggested that the case should be reargued, so that Justice Powell could participate (an idea that ultimately went nowhere).

The senior associate justice, Brennan, spoke next. Surprisingly, he was persuaded by the Steelworkers' interpretation of section 703(j): The government cannot impose racial quotas on employers and unions, but the statute allows them to craft programs that help integrate segregated workforces. Justice Stewart, the key vote, was next. He agreed with the chief justice that the "statute's literal language" supported Weber's claim and that the government's arguable violation approach was not persuasive, but Justice Stewart "was persuaded by the Union's Brief" to join four other justices to "make a Court." He urged his colleagues in the potential majority *not* to say anything about Executive Order 11246. Justices White and Marshall agreed with Justices Brennan and Stewart, and each specifically said that they were persuaded by Mike Gottesman's brief "as refined in oral argument" (for Justice White).

Justice Blackmun went into the conference prepared to defend Judge Wisdom's arguable violation approach, as articulated by the solicitor general and Kaiser. He felt that this was a "reasonable response" to problems with implementing Title VII. Employers and unions had private knowledge about their own policies and possible violations but also had strong incentives not to admit such evidence, lest they be subject to expensive and embarrassing lawsuits by private plaintiffs. Nonetheless, Justice Blackmun at conference said he was willing to go along with the Steelworkers' arguments, in order to make a Court majority.

With the chief justice ultimately in dissent, Justice Brennan assigned the majority opinion. Justice Brennan reportedly spoke with Justice White about authoring the opinion, but Justice White demurred,

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58. The discussion and quotations in text are from the notes taken at conference by Justice Brennan and, especially, Justice Blackmun, and can be found in their respective papers at the Library of Congress' Manuscript Collection in the Madison Building.

because his own study of the legislative history left him with the impression that this would be a hard opinion to write. Ultimately, Justice Brennan assigned the task to himself and produced a draft that he circulated privately to his probable majority (Justices Stewart, White, Marshall, and Blackmun) in early May 1979. With Justices White and Blackmun less than fully supportive, Justice Brennan circulated the draft to the Court on May 7. On June 14, Justice Rehnquist circulated a dissenting opinion, joined only by the chief justice. Justice Brennan soon had his majority, and the Supreme Court handed down its 5–2 decision reversing the Fifth Circuit on June 27, 1979.

The Justices' Debate in *Steelworkers v. Weber*

Justice Brennan's opinion for the Court acknowledged that a "literal interpretation" of section 703(d) might support Weber, but opined that literalism had to give way to the " 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' "[59] Because Title VII's purpose was to achieve racially integrated workforces, Justice Brennan read section 703(d) to allow employer and union efforts to respond to manifest imbalances in the workforce. Justice Brennan supported the purpose argument with the Steelworkers' inference from section 703(j): Congress barred the government from imposing racial quotas on employers, but that meant the latter were permitted to adopt them on their own.[60]

Justice Rehnquist's dissent accused the majority of anticipating George Orwell's *1984* with its doublethink and its volte-face from the Court's previous pronouncements.[61] Section 703(a) and (d) could not have been clearer, Justice Rehnquist argued. That the Court then relied on section 703(j) to defend its rewriting of Title VII was a "*tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini."[62] In his own *pièce de la résistance*, Justice Rehnquist downloaded the Steelworkers' vast legislative history and stripped it of their bottom line: At every point in the process, according to Justice Rehnquist's rendering, the enacting coalition not only assured congressional moderates that the government could not impose quota programs on unwilling employers (the Steelworkers' em-

59. *Weber*, 443 U.S. at 201, *quoting* Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

60. *Id.* at 205–09.

61. *Id.* at 219 (Rehnquist, J., dissenting). Justice Blackmun wrote on his copy of the draft dissent, "This is a scream."

62. *Id.* at 221–22.

phasis), but also that "[q]uotas are themselves discriminatory" under all circumstances, and hence per se violations of section 703.[63]

Weber has been one of the most celebrated statutory interpretation cases in American history; however, the analytical debate among the justices leaves much to be desired. To begin with, is it as clear as all seven justices seemed to think that section 703(d)'s admonition that employers "discriminate against any individual" because of race supports Weber's claim? In a dictionary roughly contemporaneous with Title VII, the first definition for "discriminate" is "[t]o act toward someone or something with partiality or prejudice: to discriminate against a minority; to discriminate in favor of one's friends."[64] The second definition is "[t]o draw a clear distinction; distinguish; to discriminate between good and evil."[65] The first definition speaks of invidious discrimination, such as that practiced against African Americans throughout much of our country's history. The second definition speaks of drawing a clear distinction.

Dean Jim Chen calls the first the "Boss Hogg definition" of discrimination and the second "the Audrey Hepburn definition." Weber prevails under the Audrey Hepburn definition, but not under the Boss Hogg one. In our judgment, the text of section 703(d), even "literally read," is ambiguous on this point.[66] In case of ambiguity, shouldn't the statute be read pragmatically, to carry out its integrative purpose, as Judge Wisdom had argued? Shouldn't the Court have followed the lead of the EEOC, the agency charged with its implementation? None of these inquiries lends much support to Weber's interpretation.

The most persuasive opinion remains Judge Wisdom's dissent in the Fifth Circuit, which was adopted by Justice Blackmun's concurring opinion on Supreme Court review.[67] One virtue of Wisdom's approach is that it more honestly recognized what was really going on in *Weber*. At least in part, Kaiser and the Steelworkers were responding to pressure from both the OFCC and from workers of color with apparently plausible *Griggs* complaints. If you combine a broad, Audrey Hepburn view of "discrimination" barred by section 703(a)–(d) with Executive Order 11246 and *Griggs*, there is a strong tension with no easy resolution.

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63. *Id.* at 230–52; 110 Cong. Rev. 7218 (1964) (quotation in text) (Sen. Clark, manager for Title VII).

64. *Funk & Wagnall Standard College Dictionary* 380 (1968).

65. *Id.* For similarly contrasting definitions, *see Webster's Ninth New Collegiate Dictionary* 362 (1990).

66. Justice Rehnquist also invoked § 703(a)(2), which does not use the term "discriminate," but Weber's complaint and his brief did not rely on § 703(a)(2), which was the basis for *Griggs*.

67. *Weber*, 443 U.S. at 209–11 (Blackmun, J., concurring).

Second, the Wisdom solution had the virtue of being a practical effort to accommodate *three* not entirely consistent congressional purposes: (1) integration of segregated workforces; (2) elimination of race as a basis for hiring and promotion decisions; and (3) allowing employers and unions freedom to figure out the most effective way to manage their personnel affairs. It also accommodated these purposes under the conditions of the world in 1979, not those imagined in 1964. For Judge Wisdom, the role of the judge was a synthetic one, attempting to mediate the influences of statutory text, original legislative context, and current context, including social and legal evolution since 1964. Wisdom recognized the dynamic features of statutory interpretation, developed within a law-like framework of reasonableness and fidelity to statutory purposes.[68]

Third, Judge Wisdom's approach had the advantage of bringing the judiciary into cooperation with the other branches of government. The executive branch had achieved significant inroads against de facto segregation among federal contractors and their subcontractors under Executive Order 11246. In 1972, Congress considered the relationship between the executive order and Title VII and repeatedly opted to allow the OFCC to continue its pressure. Following up on Congress' lead, the EEOC adopted guidelines for employers like Kaiser that wanted more integrated workplaces, for OFCC or just business reasons.

To be sure, Judge Wisdom's arguable violation theory might have made it difficult to sustain a nationwide collective bargaining agreement incorporating an apprenticeship program with a racial quota, if under this theory only plants that have local "arguable violations" could lawfully participate. But that cannot, by itself, be a reason to reject it, if what we seek is a mediation of competing legal values rather than mere privileging of a political one. A bigger problem might have been that employers would often lack incentives to admit arguable violations. In any event, many details would have needed to have been hammered out to make the theory fit reality. Our view is that judges would have been able to do this, on a case-by-case basis.

Weber Survives the Backlash

In some circles, *Weber* was a sensation of the worst sort, and pundits subjected it to savage critique from the beginning.[69] On remand, usually a routine matter, Judge Gee wrote an opinion complaining that the

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68. Thus, Judge Wisdom's and Justice Blackmun's arguable violation theory is praised in William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994).

69. *E.g.*, Terry Eastland & William J. Bennett, *Counting by Race: Equality from the Founding Fathers to* Bakke *and* Weber (1979); Bernard D. Meltzer, *The* Weber *Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. Chi. L. Rev. 423 (1980).

Supreme Court's disposition was lawless—albeit not so "evil" that he felt compelled to defy the mandate.[70] In the wake of *Weber,* one of us recalls hearing a senior partner at our firm opining that if the only defense of the outcome in *Weber* was Justice Brennan's, then the Court should have simply given up on affirmative action. The conservative reaction to *Weber* has provided much fuel for the remarkable evolution in conservative statutory methodology since the early 1980s. Moreover, the affirmative action issue is one that Ronald Reagan deployed adroitly to win the presidency in 1980, and his administration in turn appointed justices (Rehnquist as chief and Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy as associate justices) who were more critical of affirmative action than the justices they replaced. Shortly after Reagan's election, Senator Orrin Hatch (R–Utah) held hearings to publicize his proposed constitutional amendment to override both *Weber* and *Bakke* in favor of a strict colorblind understanding of the anti-discrimination principle.[71]

Statutory affirmative action returned to the Court in *Johnson v. Transportation Agency, Santa Clara County.*[72] At issue was a public employment policy allowing sex and racial diversity to be considered as a "plus." Although President Reagan had placed two new conservatives on the Court (Justices O'Connor and Scalia), Justice Brennan held together a five-justice majority. Indeed, the new majority not only reaffirmed but expanded *Weber* to include remedies for sex-segregated workplaces and to allow employer discretion to adopt preferential policies any time there was a "manifest imbalance" or underrepresentation of a protected class under Title VII (such as racial minorities or women) in a particular work category.[73] The case fractured the justices in odd ways. Justice Stevens joined the Brennan opinion for reasons of *stare decisis,* even though he confessed he would have dissented in *Weber.*[74] In contrast, Justice Brennan lost Justice White, who urged that *Weber* be overruled, apparently because Justice White felt the earlier case reflected a serious effort "to remedy the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories" (the Wisdom rationale), while subsequent cases simply reflected employer deployment of racial preferences for their own sake.[75]

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70. Weber v. Kaiser Aluminum & Chem. Corp., 611 F.2d 132, 133 (5th Cir. 1980).

71. *Affirmative Action and Equal Protection: Hearings on S.J. Res. 41 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 97th Cong., 1st. Sess. (1981) (proposed amendment to override both *Bakke* and *Weber*).

72. 480 U.S. 616 (1987). Joining the Brennan opinion were Justices Marshall, Blackmun, Powell, and Stevens.

73. *Id.* at 631–33.

74. *Id.* at 644 (Stevens, J., concurring).

75. *Id.* at 647 (White, J., dissenting).

Justice O'Connor concurred in the judgment.[76] Following the equal protection approach Justice Powell had suggested in an earlier case, Justice O'Connor indicated that sex- or race-based preferences were allowable under Title VII so long as the employer had a "firm basis" to believe that it might be liable for *Griggs* violations.[77] This was, essentially, Judge Wisdom's approach, but stated more restrictively. As in *Weber*, however, the Wisdom approach only attracted one vote within the Court; Justice Blackmun silently joined Justice Brennan's opinion this time, without any separate statement.

Justice Scalia, joined by Chief Justice Rehnquist and to a great extent by Justice White, dissented in *Johnson*. Although indicating that Justice Rehnquist's *Weber* dissent had "convincingly demonstrated" that any kind of racial preferences were illegal under Title VII, Justice Scalia denounced the majority's refusal to follow the plain meaning of section 703(a) and, indeed, its "inversion" of the rule in section 703(j).[78] Oddly, Justice Scalia made no effort to defend his view that "discriminate" had only the broad (Audrey Hepburn) meaning that Brian Weber had advanced a decade earlier.[79] Notwithstanding Justice Scalia's blistering attack on *Weber*, and its abandonment by Justice White, six justices reaffirmed it as binding precedent in 1987.

In short, *Weber* survived—but its story had only just begun.

Weber and Statutory Interpretation Theory

After a generation of inexplicable neglect in the legal academy, statutory interpretation made a big comeback in the 1980s. More than any other single case, *Weber* inspired that comeback. All of the new

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76. Early in the drafting process, Justice Brennan sought to accommodate Justice O'Connor's concerns that affirmative action be cabined—but once he had his fifth vote (Justice Powell), Justice Brennan terminated negotiations and left Justice O'Connor to her concurring opinion.

77. *Johnson*, 480 U.S. at 647–56 (O'Connor, J., concurring in the judgment), drawing from Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (Powell, J., for a plurality) ("strong basis").

78. That is, § 703(j)'s rule that the government cannot "require" racial quotas is effectively repealed if the government can pressure employers (through the OFCC, for example) into adopting "voluntary" affirmative action programs.

79. Perhaps even more peculiar is that Justice Scalia made no effort to provide a structure-of-the-statute argument for his broad definition. One such argument is that § 703 contains very broad rules against race-based decision-making in workplaces (subsections (a)–(d)) and then provides safe harbors in subsections (e)–(i), with subsection (j) then extending the broad rule to the EEOC and other government agencies. *See* Eskridge, *Dynamic Interpretation*, *supra* note 68, at 42–44, for this argument, which also helps explain why § 703(j) says nothing about whether racial preferences are "permitted" for covered employers; structurally, subsection (j) says nothing because those rules have already been laid down by § 703(a)–(i).

casebooks in the field of legislation treat it as a principal case[80]—and for good reasons. Perhaps the main reason is that *Weber* has, from the beginning, been a fun case to teach. The facts are dramatic, and the affirmative action issue remains one that goes to the root of debates about race, class, and the workplace. The over-the-top rhetoric of the Rehnquist dissent assures that students will be amused by the reading. The poor quality of the majority's reasoning imposes upon law students (the large majority of whom *want* to agree with Justice Brennan) the obligation to think, to be creative, and to confront hard and serious arguments posed by the dissent.

As a further benefit, *Weber* and *Johnson* present opportunities to focus on any number of the great doctrinal themes of statutory interpretation. Among the great doctrinal themes presented in these cases are the "golden rule," whereby the plain meaning rule sometimes gives way when it directs "unreasonable" as well as "absurd" results; the importance of purpose (or "spirit") in statutory interpretation; how to use legislative history, and how the same history can support diametrically opposed constructions; the key role that agencies play in the evolution of statutory meanings and the deference judges ought to afford their approaches; and the super-strong *stare decisis* weight the Court says it affords statutory, as opposed to constitutional or even common law, precedents.

Finally, *Weber* and *Johnson* are cases that inspired and then illustrated most of the great theoretical debates of the last generation among law professors and judges. Among those debates are those relating to dynamic statutory interpretation, the new textualism, and the role of norms in statutory interpretation.

Dynamic Statutory Interpretation

Weber was the occasion for a whole new generation to appreciate the Hart and Sacks approach to statutory interpretation and its dynamic potential. Henry Hart and Albert Sacks' legal process materials posited that the lodestar of statutory interpretation should be the statutory *purpose*.[81] *Weber* deployed statutory purpose to trump the "literal" meaning of section 703(d), and (following Mike Gottesman's brilliant

80. William N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 71–87 (2d ed. 1995); Otto J. Hetzel et al., *Legislative Law and Process: Cases and Materials* 456–84 (2d ed. 1993); Abner J. Mikva & Eric Lane, *Legislative Process* 835–60 (1995); William D. Popkin, *Materials on Legislation: Political Language and the Political Process* 472–76 (2d ed. 1997).

81. Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958 tent. ed.).

lawyering) used the purpose to read Title VII in a way that went beyond, and perhaps against, the expectations of the enacting Congress.[82]

We have deployed *Weber* to argue more systematically for the point that statutory interpretation involving fundamental issues will, inevitably, be dynamic.[83] The main reason for dynamic statutory interpretation is pragmatic: Changed circumstances will press statutes away from the original expectations of the legislators who enacted them. In *Weber*, the changed circumstances were both factual and legal. The enacting Congress assumed—or pretended to believe—that colorblind hiring would produce actual integration over time. As Kaiser's experience indicated, that often did not happen; unconscious racism and structural impediments prevented workplaces from integrating. Hence, whichever way one votes in *Weber*, one is going beyond the expectations of the enacting Congress.

Additionally, as Judge Wisdom maintained in *Weber*, new legal circumstances changed whatever deal was struck in 1964. No one in the enacting Congress foresaw that administrators would press Executive Order 11246 toward quota programs for federal contractors such as Kaiser or would persuade the Supreme Court to recognize disparate impact claims in *Griggs*. These new legal developments not only emphasized the integration purpose of Title VII but also created hydraulic pressure for employers and unions to create voluntary affirmative action programs.

A separate reason why statutory interpretation will inevitably be dynamic is that statutory policy involves the interaction of different institutions over time. *Weber* and Title VII dramatically illustrate the unpredictable but powerful dynamism of institutional interaction. Between 1965 and 1981, the primary engine for Title VII's evolution was not the Supreme Court, but the EEOC, which originated the notion of disparate impact claims and supported remedial affirmative action. After 1981, the Supreme Court itself was the primary engine of interpretive dynamism. Although the Court reaffirmed *Weber* in *Johnson*, a more conservative majority put in place by President Reagan started to roll back *Weber* in *Wards Cove Packing Co. v. Atonio*.[84] The Court (four Reagan appointees plus Justice White, who had flipped on these issues

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82. Commentators have remarked on this dynamism from the beginning, usually with favor, *e.g.*, Ronald Dworkin, *How to Read the Civil Rights Act*, N.Y. Rev. Books, Dec. 20, 1979, at 37, but sometimes with a more critical edge. *E.g.*, Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281 (1989); Meltzer, *supra* note 69.

83. Eskridge, *Dynamic Interpretation*, *supra* note 68, at 14–31, 37–44; William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan. L. Rev. 321, 328–84 (1990).

84. 490 U.S. 642 (1989).

during the Reagan administration) narrowed *Griggs* and called into question the disparate impact cause of action.

Congress responded almost immediately, and quite vigorously, to *Wards Cove*. Claiming that the Court had "reneged on history" when it made it harder to sue for policies having a racially disparate impact, Congress by large and bipartisan margins overrode the decision and codified a disparate impact claim for relief in the Civil Rights Act of 1991.[85] An even more conservative Court, including new justices appointed by President George W. Bush, reinterpreted *Weber–Johnson* in *Ricci v. DeStefano*.[86] The Court overturned New Haven's decision to void the results of promotion tests because racial and ethnic minorities fared poorly on them and rejected the city's defense that it had good reason to think that a *Griggs* suit was possible. Narrowly construing both *Weber* and *Johnson,* the Court ruled that voluntary race-based remedies are allowed only when "the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[87] Notice that Justice O'Connor's concurring opinion in *Johnson*, joined by no other justice, has now become the controlling opinion in that case, as the Court now sees it. *Ricci* illustrates how precedents like *Weber* and *Johnson* are applied just as dynamically as Title VII was. Conservative justices have proven themselves to be dedicated dynamicists, and so the evolution of *Weber* continues.

The New Textualism

Weber was the high point (or low point, depending on your perspective) of the Supreme Court's generations-long love affair with legislative history. Justice Rehnquist's dissenting opinion was a rich cornucopia of legislative history, almost all of it taken from the Steelworkers' celebrated brief. Justice Brennan's opinion for the Court not only invoked its own materials from the legislative record, but started off (in the "spirit trumps letter" introduction) with a quotation from the grandparent of American legislative history cases, *Holy Trinity Church v. United States*.[88] The Court in *Holy Trinity* had deployed, for the first time in our history, committee reports to justify departing from the statute's plain meaning—and that triggered a rising tide of history references by the Court for a century, culminating in *Weber*.

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85. Pub. L. No. 102–166, § 2(2)–(3), 105 Stat. 1071 (1991). The new disparate impact claim for relief was codified at 42 U.S.C. § 2000e–2(k).

86. 129 S.Ct. 2658 (2009) (Kennedy, J., for the Court). Justices Stevens, Souter, Ginsburg, and Breyer dissented.

87. *Id.* at 2664.

88. 143 U.S. 457 (1892).