MEMORANDUM TO THE CONFERENCE


My present view is that Bill Rehnquist's dissent requires no changes in my circulated opinion.

W.J.B. Jr.

Interesting! It would have been interesting to see WJBJr. or anyone refute the leg. history marshalled by WtR. These may be an answer to WtR, but apparently we are still trying to advance it.
June 18, 1979


Dear Bill,

Please join me.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference

cmc
MR. JUSTICE BLACKMUN, concurring.

While I share some of the misgivings expressed in Mr. Justice Rehnquist's dissent, post, concerning the extent to which the legislative history of Title VII clearly supports the result the Court reaches today, I believe that additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the conclusion reached by the Court today, and I therefore join its opinion as well as its judgment.

I

In his dissent from the decision of the United States Court of Appeals for the Fifth Circuit, Judge Wisdom pointed out that this case arises from a practical problem in the administration of Title VII. The broad prohibition against discrimination places the employer and the union on what he accurately described as a “high tightrope without a net beneath
them.” 563 F. 2d 216, 230. If Title VII is read literally, on the one hand they face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.

In this case, Kaiser denies prior discrimination but concedes that its past hiring practices may be subject to question. Although the labor force in the Gramercy area was approximately 30% black, Kaiser’s work force was less than 15% black, and its craft work force was less than 2% black. Kaiser had made some effort to recruit black painters, carpenters, insulators, and other craftsmen, but it continued to insist that those hired have five years prior industrial experience, a requirement that arguably was not sufficiently job-related to justify under Title VII any discriminatory impact it may have had. See Parson v. Kaiser Aluminum & Chemical Corp., 375 F. 2d 1374, 1389 (CA5 1978), cert. denied, ___ U. S. ___ (1979). The parties dispute the extent to which black craftsmen were available in the local labor market. They agree, however, that after critical reviews from the Office of Federal Contract Compliance, Kaiser and the Steelworkers established the training program in question here and modeled it along the lines of a Title VII consent decree later entered for the steel industry. See United States v. Allegheny-Ludlum Industries, Inc., 517 F. 2d 826 (CA5 1976). Yet when they did this, respondent Weber sued, alleging that Title VII prohibited the program because it discriminated against him as a white person and it was not supported by a prior judicial finding of discrimination against blacks.

Respondents’ reading of Title VII, endorsed by the Court of Appeals, places voluntary compliance with Title VII in profound jeopardy. The only way for the employer and the union to keep their footing on the “tightrope” it creates would be to eschew all forms of voluntary affirmative action. Even a whisper of emphasis on minority recruiting would be forbidden. Because Congress intended to encourage private
efforts to come into compliance with Title VII, see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), Judge Wisdom concluded that employers and unions who had committed "arguable violations" of Title VII should be free to take reasonable responses without fear of liability to whites. 563 F.2d, at 230. The United States takes a similar position here. Brief for United States 35. Preferential hiring along the lines of the Kaiser program is a reasonable response for the employer, whether or not a court, on these facts, could order the same step as a remedy. The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow a response limited to such victims. If past victims should be benefited by the program, however, the company mitigates its liability to these persons. Also, to the extent that Title VII liability is predicated on the effect of an employer's past hiring practices, the program makes it less likely that a "disparate effect" could be demonstrated. Cf. *County of Los Angeles v. Davis*, ___ U.S. ____ (1979) (hiring could moot a past Title VII claim). And the Court has recently held that work force statistics resulting from private affirmative action were probative of benign intent in a "disparate treatment" case. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579-580 (1978).

The "arguable violation" theory has a number of advantages. It responds to a practical problem in the administration of Title VII not anticipated by Congress. It draws predictability from the outline of present law, and closely effectuates the purpose of the Act. Both Kaiser and the United States urge its adoption here. Because I agree that it is the soundest way to approach this case, my preference would be to resolve this litigation by applying it and holding that Kaiser's craft training program meets the requirement that voluntary affirmative action be a reasonable response to an "arguable violation" of Title VII.
The Court, however, declines to consider the narrow "arguable violation" approach and adheres instead to an interpretation of Title VII that permits affirmative action by an employer whenever the job category in question is "traditionally segregated." Ante, at 13, and n. 9. The sources cited suggest that the Court considers a job category to be "traditionally segregated" when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of blacks in the labor force and the proportion of blacks among those who hold jobs within the category.*

"Traditionally segregated job categories," where they exist, sweep far more broadly than the class of "arguable violations" of Title VII. The Court's expansive approach is somewhat

*The jobs in question here include those of carpenter, electrician, general repairman, insulator, machinist, and painter. App. 165. The sources cited, ante, at 2 n. 1, establish, for example, that although 11.7% of the United States population in 1970 was black, the percentage of blacks among the membership of carpenters' unions was only 3.7%. For painters, the percentage was 4.9, and for electricians, 2.5. United States Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions 274, 281 (1976). Kaiser's Director of Equal Opportunity Affairs testified that, as a result of discrimination in employment and training opportunity, blacks were underrepresented in skilled crafts "in every industry of the United States, and in every area of the United States." App. 90. While the parties dispute the cause of the relative underrepresentation of blacks in Kaiser's craft work force, the Court of Appeals indicated that it thought "the general lack of skills among available blacks" was responsible. 563 F. 2d, at 224 n. 13. There can be little doubt that any lack of skill has its roots in purposeful discrimination of the past, including segregated and inferior trade schools for blacks in Louisiana, United States Commission on Civil Rights, 50 States Report 209 (1961); traditionally all-white craft unions in that State, including the electrical workers and the plumbers, id., at 208; union nepotism, Local 53, Asbestos Workers v. Vogler, 407 F. 2d 1047 (CA5 1969); and segregated apprenticeship programs, R. Marshall and V. Briggs, The Negro and Apprenticeship 28 (1967).
disturbing for me because, as Mr. Justice Rehnquist points out, the Congress that passed Title VII probably thought it was adopting a principle of nondiscrimination that would apply to blacks and whites alike. While setting aside that principle can be justified where necessary to advance statutory policy of encouraging reasonable responses as a form of voluntary compliance that mitigates "arguable violations," discarding the principle of nondiscrimination where no countervailing statutory policy exists appears to be at odds with the bargain struck when Title VII was enacted.

A closer look at the problem, however, reveals that in each of the principal ways in which the Court's "traditionally segregated job categories" approach expands on the "arguable violations" theory, still other considerations point in favor of the broad standard adopted by the Court, and make it possible for me to conclude that the Court's reading of the statute is an acceptable one.

A. The first point at which the Court departs from the "arguable violations" approach is that it measures an individual employer's capacity for affirmative action solely in terms of a statistical disparity. The individual employer need not have engaged in discriminatory practices in the past. While, under Title VII, a mere disparity may establish a prima facie case against an employer, Dothard v. Rawlinson, 433 U.S. 321, 329-331 (1977), it would not conclusively prove a violation of the Act. Teamsters v. United States, 431 U.S. 324, 339-340, n. 20 (1977); see § 703(j), 42 U.S.C. § 2000e-2(j). As a practical matter, however, this difference may not be that great. While the "arguable violation" standard is conceptually satisfying, in practice the emphasis would be on "arguable" rather than on "violation." The great difficulty in the District Court was that no one had any incentive to prove that Kaiser had violated the Act. Neither Kaiser nor the Steelworkers wanted to establish a past violation, nor did Weber. The blacks harmed had never sued and so had no
established representative. The Equal Employment Opportunity Commission declined to intervene, and cannot be expected to intervene in every case of this nature. To make the "arguable violation" standard work, it would have to be set low enough to permit the employer to prove it without obligating himself to pay a damage award. The inevitable tendency would be to avoid hairsplitting litigation by simply concluding that a mere disparity between the racial composition of the employer's work force and the composition of the qualified local labor force would be an "arguable violation," even though actual liability could not be established on that basis alone. See Note, 57 N. C. L. Rev. 695, 714–719 (1979).

B. The Court also departs from the "arguable violation" approach by permitting an employer to redress discrimination that lies wholly outside the bounds of Title VII. For example, Title VII provides no remedy for pre-Act discrimination, Hazelwood School District v. United States, 433 U. S. 299, 309–310 (1977); yet the purposeful discrimination that creates a "traditionally segregated job category" may have entirely predated the Act. More subtly, in assessing a prima facie case of Title VII liability, the composition of the employer's work force is compared to the composition of the pool of workers who meet valid job qualifications. Hazelwood, 433 U. S., at 308, and n. 13; Teamsters v. United States, 431 U. S., at 339–340, and n. 20 (1977). When a "job category" is traditionally segregated, however, that pool will reflect the effects of segregation, and the Court's approach goes further and permits a comparison with the composition of the labor force as a whole, in which minorities are more heavily represented.

Strong considerations of equity support an interpretation of Title VII that would permit private affirmative action to reach where Title VII itself does not. The bargain struck in 1964 with the passage of Title VII guaranteed equal opportunity for white and black alike, but where Title VII provides
no remedy for blacks, it should not be construed to foreclose private affirmative action from supplying relief. It seems unfair for respondent Weber to argue, as he does, that the asserted scarcity of black craftsmen in Louisiana, the product of historic discrimination, makes Kaiser's training program illegal because it ostensibly absolves Kaiser of all Title VII liability. Brief for Respondents 60. 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. Such a construction, as the Court points out, ante, at 9, would be "ironic," given the broad remedial purposes of Title VII.

The dissent, while it focuses more on what Title VII does not require than on what Title VII forbids, cites several passages that appear to express an intent to "lock in" minorities. In mining the legislative history anew, however, the dissent, in my view, fails to take proper account of our prior cases that have given that history a much more limited reading than that adopted by the dissent. For example, in *Griggs v. Duke Power Co.*, 401 U. S. 424, 434-436, and n. 11 (1971), the Court refused to give controlling weight to the memorandum of Senators Clark and Case which the dissent now finds so persuasive. See post, at 21-24. And in quoting a statement from that memorandum that an employer would not be "permitted . . . to prefer Negroes for future vacancies," post, at 22, the dissent does not point out that the Court's opinion in *Teamsters v. United States*, 431 U. S. 324, 349-351 (1977), implies that that language is limited to the protection of established seniority systems. Here seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights. In short, the passages marshaled by the dissent are not so compelling as to merit the whip hand over the obvious equity of permitting employers to ameliorate the effects of past discrimination for which Title VII provides no direct relief.
I also think it significant that, while the Court’s opinion does not foreclose other forms of affirmative action, the Kaiser program it approves is a moderate one. The opinion notes that the program does not afford an absolute preference for blacks, and that it ends when the racial composition of Kaiser’s craft work force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to “maintain” a previously achieved balance. See University of California Regents v. Bakke, 438 U. S. 265, 342 n. 17 (1978) (BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Because the duration of the program is finite, it perhaps will end even before the “stage of maturity when action along this line is no longer necessary.” Id., at 403 (BLACKMUN, J.). And if the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses.
June 25, 1979

Dear Bill:

Re: (78-432 United Steelworkers of America v. Weber
    (78-435 Kaiser Aluminum & Chemical Corporation v. Weber
    (78-436 United States v. Weber

Show me joining your dissent.

Regards,

Mr. Justice Rehnquist

cc: The Conference
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78-432 United Steelworkers v. Weber
July 5, 1979

The Chief Justice Warren E. Burger
United States Supreme Court
Washington, D. C. 20543

Dear Chief,

The enclosed editorial from The Virginian-Pilot was written by J. Wilkinson, a former clerk who is now editor of the Pilot.

The Virginian-Pilot, published in Norfolk, has the largest circulation of any state paper.

The observations about Weber are quite perceptive.

Sincerely,

Enclosure:
Editorial

cc: J. Harvie Wilkinson, Jr.
109 Kenwoodale Lane
Richmond, Virginia 23226
The Supreme Court approved on Wednesday the use of racial quotas by private employers to bring more blacks into skilled jobs.

Minority groups were jubilant. NAACP Executive Director Benjamin Hooks called the court's ruling "probably the most important civil rights decision in recent history." President Vilma S. Martinez of the Mexican-American Legal Defense and Educational Fund termed it tremendous for Hispanics, "soon to be the nation's largest minority." A long list of would-be quota beneficiaries lined up to applaud.

The facts of this momentous ruling are simple. Kaiser Aluminum and Chemical Corporation agreed with its union, the United Steelworkers of America, to reserve 50 percent of the openings in a training skills program for blacks. In the first year of the plan, Kaiser selected seven blacks and six whites for the program. The most junior black selected had less seniority than several whites who had been rejected, including one Brian Weber.

So Weber brought suit, clairing reverse racial discrimination. The Supreme Court scotched his claim.

The law now is that private employers may "voluntarily" utilize "benign" racial quotas more easily than universities supported by federal funds.

'The tricky word in the court's lexicon is, of course, "voluntary." With the court's imprimatur now on racial quotas in the marketplace, employers are going to start feeling federal and minority pressures not so readily characterized as "voluntary."

The real question, however, is whether numerical quotas are the right way to overcome this nation's shameful legacy of racial discrimination. We believe they are not.

For one thing, they breed hostility. Whites rejected for employment or admission to a university tend to blame that fact on special preferences for blacks. The racial resentment generated will be just as unhealthy in the long run as that inflicted in the past by our indefensible segregation laws.

For another thing, quotas tend to affect minority achievement with a presumption of charity. Some people always assume—wrongly—that the only reason this or that black person is in professional school or a top management post is because of racial preference. That is a racially degrading notion which quotas are only helping to perpetuate.

Just who will benefit from quotas in education or employment? Blacks? Hispanics? Women? Filipinos? Chinese Americans? Appalachian whites? Italian Americans? American Indians? Though this nation's wrongs against blacks are unique in severity, that will not stop others from pressing their claims. As a result of the court's ruling, we may anticipate a scramble for preferred status in which gracious losers will be few.

Where quotas will leave notions of qualification and merit is difficult to say. But it is dangerous for a nation to assert that one's ethnic or racial affiliation should eclipse individual merit. "In a society in which men and women expect to succeed by hard work and to better themselves by making themselves better, it is no trivial moral wrong to proceed systematically to defeat this expectation. . . . To reject an applicant who meets established, realistic, and unchanged qualifications in favor of a less qualified candidate is morally wrong, and in the aggregate, practically disastrous." So wrote Yale law professor Alexander Bickel shortly before his death.

Justice Lewis Powell suggested last summer in the Bakke case a far saner means of achieving an integrated society than the one the court approved this week. Universities could acknowledge an individual's race or disadvantaged background in their decisions, said he, but not set aside a specified number of places on racial or ethnic grounds.

May his advice yet be heeded. We shall not hear the last of this debate for a very long time.