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## JOHN MINOR WISDOM LECTURE

### Wisdom on *Weber*

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I cannot imagine a higher honor than to be giving the Wisdom Lecture at Tulane, in this law school that the Judge loved so much. It is especially meaningful to me because this Lecture is the first one given since the Judge's death in May of last year. My clerkship with Judge Wisdom in 1978-79 was the most formative experience in my professional life as a lawyer and later as a law professor. It was also a time of great personal joy. The Judge and Mrs. Wisdom treated me like a member of the family, and I shall always be indebted.

Most of what has been written about Judge Wisdom, both before and after his death, concerned his influence on civil rights in general and race relations in particular.<sup>1</sup> There can be no doubt that he was

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\* Irving Younger Professor of Law, University of Minnesota Law School. This is a slightly expanded and lightly footnoted version of the Wisdom Lecture given on February 7, 2000, at the Tulane Law School. I thank the editors of the *Tulane Law Review* for waiving the usual rules and printing this Lecture without requiring the customary footnotes supporting every assertion.

Much of the information found in this Lecture was gleaned from interviews and e-mail exchanges with Michael Fontham, Michael Gottesman, and Brian Weber. I am especially grateful to Mr. Weber for his generous contributions of time and helpfulness. The Lecture came together after a very helpful conversation with Tom Merrill, to whom I am indebted. Miranda McGowan read an earlier draft and provided excellent suggestions. Thanks also to Jim Chen, Bill Eskridge, Dan Farber, and David McGowan for thoughtful comments on a later draft. All errors remain mine, of course.

1. For a recent analysis of Judge Wisdom's life in the law by his eventual biographer, see Joel Wm. Friedman, *John Minor Wisdom: The Noblest Tulanian of Them All*,

one of the most influential American jurists of the twentieth century on these subjects, indeed, perhaps *the* most influential lower court judge, that is, someone other than a Supreme Court Justice. Judge Wisdom did a great deal to promote the end of racial segregation and the emergence of a New South in which African-Americans have much greater educational, economic, and social opportunities. As a legal academic, though, I am at least as interested in the process as in the outcome. I am going to speak about a civil rights case, but my emphasis will be more on the nature of the controversy, some of the people involved, and the competing theories at work, with less emphasis on the legal or social effects of the outcome. In this Lecture, I want to give persons as much primacy as rules of law. As John Noonan wrote some years before his elevation to an appellate judgeship, in abstract legal discussions, "the particular persons who shaped the rule, argued the rule, applied the rule, submitted to the rule, seem to have disappeared."<sup>2</sup> I join Judge Noonan in thinking of law not only as "a set of technical skills," but also as "a human activity affecting both those acting and those enduring their action."<sup>3</sup>

When commentators discuss Judge Wisdom's judicial methodology, they sometimes emphasize his scholarly marshaling of historical and socioeconomic materials and his ingenious methods of breaking new legal ground while giving due deference to legal precedent.<sup>4</sup> He was "the scholar"<sup>5</sup> of the Fifth Circuit, a judge who "elevat[ed] the craft of judicial opinion-writing to an art form," such that there became such a thing as the "Wisdom Opinion: a characteristically long, detailed exposition of historical development and legal precedent, with particular attention to factual detail adding local color, all set in highly articulate prose."<sup>6</sup> These comments are accurate and deserving, but they should not divert our attention from the fact that, scholar though he was, Judge Wisdom was a pragmatist at heart. Well over a decade ago, I assessed the Judge's voting rights opinions and wrote an article subtitled *The Judicial Artist as Scholar*

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74 TUL. L. REV. 1 (1999). For earlier commentary, see JACK BASS, UNLIKELY HEROES 15-18, 41-55 (1981), and FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 214-23, 432-41 (1978).

2. JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW 13 (1976).

3. *Id.* at xi.

4. See, e.g., Barry Sullivan, *The Honest Muse: Judge Wisdom and the Uses of History*, 60 TUL. L. REV. 314 (1985).

5. See BASS, *supra* note 1, at 16, 27.

6. READ & MCGOUGH, *supra* note 1, at 57 (internal quotations omitted).

and Pragmatist,<sup>7</sup> a reference that could serve as the subtitle to this Lecture as well. Those who attended the memorial service for Judge Wisdom may remember that Justice Breyer, in a letter, recalled having asked the Judge whether it was more important to be theoretical or practical, and the Judge replied “practical.” As a legal pragmatist, it is no surprise that I remain attracted to this strain of the Judge’s opinions.

The topic of this Lecture is a case that arose in Louisiana, *United Steelworkers of America v. Weber*,<sup>8</sup> in which the Judge was at once theoretical and practical. From the United States Court of Appeals for the Fifth Circuit, the case made its way to the United States Supreme Court, where it became one of the handful of truly important precedents on the sensitive topic of racial affirmative action. *Weber* has been recognized as raising a prototypically interesting issue of statutory interpretation. All of the major casebooks in the field of legislation treat it as a principal case.<sup>9</sup> Indeed, in the casebook that Bill Eskridge and I created, we wrote that *Weber* is “the most important statutory case of our generation.”<sup>10</sup> Moreover, in a recent treatise-like monograph, my coauthors and I again use *Weber* as one of two core examples of the fundamental issues that arise in statutory interpretation.<sup>11</sup> Although all this attention has been paid to the Supreme Court opinions in *Weber*, I will suggest that Judge Wisdom’s

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7. See Philip P. Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276 (1985).

8. 443 U.S. 193 (1979), *rev'g sub nom.* *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977).

9. See 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 (Michie Co. 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).

10. ESKRIDGE & FRICKEY, *supra* note 9, at 1.

11. See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 211-328 (2000). Eskridge and I also extensively discussed *Weber* in an article. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 328-84 (1990). For other methodological commentary on *Weber*, see, for example, RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 399-405 (1992); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 14-31, 37-44 (1994); Ronald Dworkin, *How to Read the Civil Rights Act*, N.Y. REV. BOOKS, Dec. 20, 1979, at 37; Daniel A. Farber, *Statutory Interpretation and the Idea of Progress*, 94 MICH. L. REV. 1546, 1561-70 (1996) (reviewing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)); Bernard D. Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

dissent from the Fifth Circuit panel opinion<sup>12</sup> provides the most candid and interesting discussion of all.

Before examining *Weber* in detail, I should note two personal asides. I did not work on the *Weber* case in the Fifth Circuit or later at the Supreme Court, where following my clerkship with Judge Wisdom I had the honor of clerking for Justice Marshall. I was a year late in both courts. Second, Michael Fontham of the New Orleans law firm of Stone, Pigman, Walther, Wittmann & Hutchinson represented the plaintiff in this case, Brian Weber, throughout all the proceedings. The Stone, Pigman firm originated nearly three-quarters of a century ago as Wisdom & Stone, founded by John Minor Wisdom and Saul Stone. The firm has generously provided the funds to support this Lecture, for which I am thankful.

In this Lecture, I begin by identifying what is the matter with *Weber*. The Supreme Court opinions in the case lack much persuasive power, and adverse consequences in both law and life have resulted. I then turn to what was really going on in *Weber*: a look at the people, the plaintiff and the judges alike, that give the case such an interesting quality. I suggest that greater wisdom about *Weber* requires evaluating Judge Wisdom on *Weber* as well as a look at what has happened to Brian Weber since the case was decided. Ultimately, I hope to present a biography of a case and the people associated with it.

## I. WHAT IS THE MATTER WITH *WEBER*?

*Weber* involved the Gramercy, Louisiana, plant of Kaiser Aluminum and Chemical Company (Kaiser). Until 1974, Kaiser hired as craft workers for that plant only persons with prior experience in the craft.<sup>13</sup> At Gramercy, this approach had resulted in a segregated workforce because blacks had historically been excluded from craft unions.<sup>14</sup> Before 1974, only five out of 273 craft workers at the plant were African-American.<sup>15</sup> In a 1974 nationwide collective bargaining agreement, Kaiser and the union, the United Steelworkers of America (Steelworkers), changed things by adopting an apprenticeship program under which Kaiser would train its production workers to fill the craft openings.<sup>16</sup> Craft trainees would be selected on the basis of seniority,

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12. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 227-39 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.* *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

13. See *Weber*, 443 U.S. at 198-99.

14. See Meltzer, *supra* note 11, at 438.

15. See *Weber*, 443 U.S. at 198-99.

16. See *id.* at 199.

with one huge exception: at least fifty percent of the trainees had to be African-American until the percentage of black craft workers approximated the percentage of blacks in the local workforce.<sup>17</sup> Although “temporary” in this sense, the training program would have required quite a long implementation period, ending only when the percentage of African-American craft workers at the plant rose from the less than two percent in 1974 to a figure of thirty-nine percent, which was then the percentage of blacks in the local workforce.<sup>18</sup>

During 1974, the first year of the program, Kaiser accepted thirteen of its production workers, of which seven were black and six were white, for the apprenticeship program.<sup>19</sup> Brian Weber, a disappointed white applicant who had more seniority than two of his black coworkers who were chosen, brought suit, alleging that his exclusion from the program amounted to racial discrimination in employment violative of Title VII of the Civil Rights Act of 1964.<sup>20</sup> Aably represented by Michael Fontham, Weber prevailed in the federal district court.<sup>21</sup> That decision was affirmed by a divided panel of the United States Court of Appeals for the Fifth Circuit, with Judge Wisdom dissenting.<sup>22</sup> Ultimately, however, the United States Supreme Court, by a five-to-two margin, reversed the Fifth Circuit, holding that the employer and the union had not violated Weber’s rights under Title VII.<sup>23</sup>

*Weber* came along only one year after the Supreme Court had decided *Regents of the University of California v. Bakke*,<sup>24</sup> the famous affirmative action case, by a divided vote amidst a sea of separate opinions. *Bakke* dealt with affirmative action in student admissions at a public university medical school.<sup>25</sup> The school had set aside sixteen

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17. *See id.* Literally, the provision used the term “minority” rather than black or African-American, but because “all minority beneficiaries have been and are likely to be black,” the parties and the courts in *Weber* generally used “black” rather than “minority.” Brief for Petitioner at 2 n.1, *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (No. 78-432).

18. *See Weber*, 443 U.S. at 198-99.

19. *See id.* at 199.

20. *See id.* at 199-200; *see also* 42 U.S.C. § 2000e-2(a) (1994) (providing that an employer may not “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race”).

21. *See Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 770 (E.D. La. 1976), *aff’d*, 563 F.2d 216 (5th Cir. 1977), *rev’d sub nom.* *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

22. *See Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 227 (5th Cir. 1977), *rev’d sub nom.* *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

23. *See Weber*, 443 U.S. at 195, 209.

24. 438 U.S. 265 (1978).

25. *See id.* at 269-70 (opinion of Powell, J.).

percent of its seats in the class for minority applicants.<sup>26</sup> Justice Powell, who wrote only for himself but nonetheless controlled the outcome in *Bakke*, reached an arguably moderate, perhaps a compromise, position on affirmative action in public education. On the one hand, Justice Powell condemned racial quotas, such as the one used by the medical school, even if the quota was designed to ensure minority representation in the student body rather than to exclude historically disadvantaged persons.<sup>27</sup> On the other hand, Powell endorsed admission plans in use at elite private universities that considered the overall diversity of the student body, racial and otherwise, as a factor in making admission decisions.<sup>28</sup> He did so because he thought “diversity” in the educational setting was a compelling governmental interest and that using race as a “plus” factor was a reasonable means for attempting to effectuate that interest.<sup>29</sup>

In light of *Bakke*, Weber would have seemed to have had an excellent case against Kaiser and the Steelworkers. 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, the distinction between illegal quotas and legal plus factors might have seemed to lead to a win for Weber, because he was challenging a firm quota, not a plan of goals, timetables, and plus factors at the margin.

To be sure, there were important distinctions between *Bakke* and *Weber*. *Bakke* involved a state university and therefore raised the question whether racial considerations involving affirmative action violated the Equal Protection Clause of the Fourteenth Amendment,<sup>30</sup> which provides that “[n]o State shall . . . deny to any person . . . the equal protection of the laws.”<sup>31</sup> The Equal Protection Clause did not apply to Kaiser and the Steelworkers because they were private, not state, entities.<sup>32</sup> But *Bakke* also involved whether the admissions quota violated Title VI of the Civil Rights Act of 1964, which prohibits racial discrimination by recipients of federal financial assistance, such as state universities.<sup>33</sup> Four Justices in *Bakke*, Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens, concluded that Title VI required recipients of federal financial assistance to conduct their

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26. See *id.* at 275 (opinion of Powell, J.).

27. See *id.* at 315-17 (opinion of Powell, J.).

28. See *id.* at 316-18 (opinion of Powell, J.).

29. See *id.* at 311-19 (opinion of Powell, J.).

30. See *id.* at 287 (opinion of Powell, J.).

31. U.S. CONST. amend. XIV, § 1.

32. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 200 (1979).

33. 42 U.S.C. § 2000d (1994).

operations in a color-blind fashion.<sup>34</sup> Justice Powell interpreted Title VI's prohibition to be equivalent to the Equal Protection Clause.<sup>35</sup> In his view, therefore, Title VI outlawed the admissions quota, but would allow the consideration of race as a plus factor in order to promote educational diversity.<sup>36</sup> Because these five Justices had signaled in 1978 that Title VI prohibited quotas, one might have expected the same five to take the same attitude one year later, in *Weber*, regarding racial quotas in employment and Title VII, Title VI's next-door neighbor in the same Civil Rights Act.

To be sure, four Justices in *Bakke* had voted to uphold the university admissions plan as consistent with both the Equal Protection Clause and Title VI.<sup>37</sup> These Justices, Brennan, White, Marshall, and Blackmun, could be expected to be sympathetic to the Kaiser/Steelworkers plan. But the most inexorable rule of Supreme Court jurisprudence, more fundamental than even the power of judicial review recognized in *Marbury v. Madison*,<sup>38</sup> is that five beats four. For the plan to be upheld, Kaiser and the Steelworkers would need to retain the votes of all four Justices who had supported the admissions plan in *Bakke* and get at least one of the five Justices in *Bakke* who had concluded that the admissions program violated Title VI to defect from that coalition.

The voting setting in *Weber* was further complicated by the fact that two Justices—Powell, the swing Justice in *Bakke*, and Stevens, one of the members of the group voting to strike down the admissions plan in *Bakke* because it violated the norm of color blindness—did not participate in the *Weber* case.<sup>39</sup> Justice Powell had been ill during the oral argument and chose not to participate,<sup>40</sup> even though in some other instances Justices have done so by listening to the tape of the oral argument, studying the briefs, and so on. Justice Stevens gave no reason for his recusal at the time, but the press reported that it was because he had represented Kaiser while he was a private attorney in Chicago.<sup>41</sup> The seven Justices left to decide the *Weber* case constituted

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34. See *Bakke*, 438 U.S. at 408-21 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., Stewart & Rehnquist, JJ.).

35. See *id.* at 284-87 (opinion of Powell, J.).

36. See *id.* at 265, 311-20 (opinion of Powell, J.).

37. See *id.* at 324-79 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part).

38. 5 U.S. (1 Cranch) 137 (1803).

39. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 195 (1979).

40. See Aric Press & Diane Camper, *Victory for Quotas*, NEWSWEEK, July 9, 1979, at 77, 78.

41. See *id.*

a quorum of the Supreme Court, but any opinion joined by fewer than five of them would not constitute a majority opinion subject to the full authority of stare decisis, the doctrine of precedent. Of these seven remaining Justices, four were the four pro-affirmative action Justices in *Bakke*, and the other three had all voted to invalidate the admissions plan in *Bakke* as inconsistent with Title VI. The most likely result, one would have predicted, was a largely Pyrrhic, four-to-three victory for Kaiser and the Steelworkers, denying Weber's challenge, but leaving for another day and case the ultimate resolution of the controversy concerning the applicability of Title VII to racial quotas in private employment. Alternatively, the seven participating Justices could have held the case over to the next Term so that Justice Powell could participate, but that might just have left the Court in a four-to-four tie, affirming the decision of the court of appeals favoring Weber but without any stare decisis effect. Again, that outcome would have put off for another day the ultimate resolution of the overall legal controversy.

All this procedural faldral further complicated what the press viewed as the most important case of the 1978 Term of the Supreme Court,<sup>42</sup> and perhaps even more significant than *Bakke*, because *Weber* involved the question whether affirmative action in the vast private employment market was lawful. Swarms of spectators turned out for the oral argument on March 28, 1979,<sup>43</sup> a date on the Court's calendar that further undermined consideration of the case. Because the Court traditionally adjourns at the end of June, this left little time for the seven participating Justices to sort out their differences and draft their opinions. Indeed, in Supreme Court lore, there is what is called "a June opinion," meaning one issued at the end of the Term that reflects the hurried atmosphere of that period by containing less than the usual thoughtfulness and polish.

The Supreme Court issued its decision in *Weber* on June 27, 1979.<sup>44</sup> Surprisingly, a five-member majority coalesced, and it voted to overturn the Fifth Circuit (in effect vindicating Judge Wisdom's dissenting vote below) by holding that the Kaiser/Steelworkers apprenticeship program did not violate Title VII.<sup>45</sup> Justice Brennan's

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42. See Morton Mintz, *Union, Firm Argue for Plan to Overcome Workforce Imbalance*, WASH. POST, Mar. 29, 1979, at A2.

43. See *id.* (reporting that "289 members of the public were admitted to hear at least parts of the argument, while about 100 more were turned away. Three rows of chairs were added to the press area to accommodate 80 reporters.").

44. See *Weber*, 443 U.S. at 193.

45. See *id.* at 195, 209.

majority opinion was joined by the other three Justices who voted with him in *Bakke* to uphold the admissions program at issue, although, as discussed below, Justice Blackmun only grudgingly stayed with this group.<sup>46</sup> The critical fifth vote for Justice Brennan's opinion came from Justice Stewart, who had been a member of the bloc of four Justices in *Bakke* who had voted to invalidate the admissions program in that case. Chief Justice Burger and Justice Rehnquist, who had also been part of that bloc, dissented in *Weber*.<sup>47</sup>

One might hope that Justice Stewart's apparent flip-flop could be traced to the drafting of an overwhelmingly persuasive opinion by Justice Brennan. Regrettably, however, the Brennan opinion in *Weber* is a June opinion in more than date. With all due respect for Justice Brennan, a man I admired both for his sense of justice and his legal acumen, the opinion is a failure: it so lacks persuasive methodological power as to raise questions, to which we will eventually turn, about the Court's candor in identifying the real reasons why five Justices voted as they did.

The opinion got off to an inauspicious start by failing to trace Weber's claim to any specific statutory prohibition. To be sure, it noted that the complaint prepared by Fontham for Weber alleged that the apprenticeship program violated sections 703(a) and (d) of Title VII, and the opinion dutifully quoted these provisions in footnotes.<sup>48</sup> But that was not merely the beginning, it was also the end of Justice Brennan's interest in the actual words of the prohibitions of Title VII. Justice Brennan accused Weber of relying upon a "literal interpretation"<sup>49</sup> of these provisions, but never stopped to parse the statutory words so that the reader could evaluate how "literally" they supported his claim. Justice Brennan's apparent lack of interest in the statutory text was confirmed by how quickly he concluded that Weber's "reliance upon a literal construction of" these provisions was "misplaced" because it was trumped by a "'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.'"<sup>50</sup> Justice Brennan's ultimate argument was that the legislative history and historical context of Title VII demonstrated that an interpretation

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46. See *infra* text accompanying notes 99-100.

47. See *Weber*, 443 U.S. at 216 (Burger, C.J., dissenting); *id.* at 219 (Rehnquist, J., dissenting).

48. See *id.* at 199 & n.2, 200 & n.3.

49. See *id.* at 201.

50. *Id.* (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

of Title VII prohibiting affirmative action would “‘bring about an end completely at variance with the purpose of the statute’ and [therefore] must be rejected.”<sup>51</sup> For Justice Brennan, the purpose of Title VII was to open employment doors to historically disadvantaged minorities, and fostering that purpose required rejecting Weber’s claim.<sup>52</sup>

To be fair to Justice Brennan, his lack of interest in statutory text was not idiosyncratic. During the era of *Weber*, the Court had reached a consensus that the touchstone of statutory meaning was legislative intent.<sup>53</sup> The briefs in the case marshaled arguments from the legislative history<sup>54</sup> and paid little attention to statutory text standing alone, reflecting the views of skilled advocates concerning what actually was of interest to the Justices. Nonetheless, even judged within its nontextual times, the majority opinion in *Weber* was ineffective. Frankly, this is one of the reasons why it is such a good teaching case for my colleagues and I who use it to introduce the problem of statutory interpretation: first-year law students, with a little prodding, can do a better job.

Recall that Justice Brennan avoided the statutory text by invoking the proposition that the unenacted purpose or spirit of a law may trump the plain meaning of its text. For this approach, Justice Brennan cited a nearly century-old precedent, *Church of the Holy Trinity v. United States*.<sup>55</sup> I tell my students that the *Holy Trinity* move is what you do when the statutory text is hopelessly against you. It is sort of like the Hail Mary pass in football. One might guess from all this that the text of Title VII essentially precluded the result that Justice Brennan wanted and so he needed a supervening principle that allowed him to escape its clutches. That was not the case, however.

Although the prohibitions of Title VII do lend obvious support to Weber’s claim, in my judgment the statute lacks crystalline clarity. Parsed carefully, the three provisions cited by Justice Brennan say essentially the following concerning the *Weber* circumstances. First, section 703(a)(1) of Title VII makes it illegal “to discriminate against any individual with respect to his . . . terms, conditions, or privileges of

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51. *Id.* at 202 (quoting *United States v. Public Utils. Comm’n*, 345 U.S. 295, 315 (1953)).

52. *See id.* at 202-04.

53. *See, e.g., Commissioner v. Engle*, 464 U.S. 206, 214 (1984) (stating that the “sole task” of the Court is to determine congressional intent).

54. *See, e.g., Brief for Petitioners at 23-75, United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (No. 78-432); *Brief for Respondents at 76-79, United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (No. 78-432).

55. 143 U.S. 457 (1892), *quoted in Weber*, 443 U.S. at 201.

employment, because of such individual's race."<sup>56</sup> Second, section 703(a)(2) also makes it illegal "to limit, segregate, or classify . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race."<sup>57</sup> Third, in this context, section 703(d) makes it illegal "for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training."<sup>58</sup>

To be sure, all three provisions have language that can be rather easily read as invalidating the Kaiser/Steelworkers apprenticeship program. In a sense, though, that is as much an analytical problem for Weber as a benefit. If the statute is to have textual integrity, it should not have provisions that overlap each other in varying degrees of specificity and varying breadths of coverage. When I teach this case to my first-year law students, I ask them to pick the provision that they believe should apply. They always pick section 703(d), because it squarely deals with apprenticeship programs. These students intuit the policy behind the long-standing canon of statutory interpretation that when two statutory provisions overlap or conflict, the specific trumps the general.<sup>59</sup>

If I were the attorney for Kaiser or the Steelworkers, I would be delighted to concede that the governing provision is section 703(d). The reason is that this provision, along with the more generally worded section 703(a)(1), uses the term "discriminate against any individual . . . because of . . . race."<sup>60</sup> Although it may not seem so at first glance, this phrase may be ambiguous, as suggested below. If I were an attorney arguing for the legality of the plan, I would want to run as far away as possible from the other provision, section 703(a)(2), which does not use the word "discriminate" and contains more general language prohibiting classifying employees on the basis of race.<sup>61</sup>

If, as I suggest, the most apt provision is section 703(d) because it squarely deals with apprenticeship programs, then one can argue that its key term, "discriminate" on the basis of race, does not inexorably

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56. 42 U.S.C. § 2000e-2(a)(1) (1994).

57. *Id.* § 2000e-2(a)(2).

58. *Id.* § 2000e-2(d).

59. *See, e.g.,* HETZEL ET AL., *supra* note 9, at 606.

60. 42 U.S.C. § 2000e-2(a)(1), (d).

61. *See id.* § 2000e-2(a)(2).

include what Kaiser and the Steelworkers agreed to do. Arguably, not every consideration of race, not even every consideration of race that disadvantages someone because of his or her own race, is "discrimination."

In my own desk dictionary, which was copyrighted in 1968 and thus is 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."<sup>62</sup> The second definition is "[t]o draw a clear distinction; distinguish; to *discriminate* between good and evil."<sup>63</sup> The first definition speaks of invidious discrimination, such as that practiced against African-Americans throughout much of American history. The second definition speaks of drawing a clear distinction. My colleague Jim Chen, who creates vivid labels of legal concepts for his students, calls the first definition "the Boss Hogg definition of discrimination" and the second one "the Audrey Hepburn definition of discrimination."

Weber clearly prevails under the second definition, but not the first. He was not excluded from the apprenticeship program because of invidious prejudice against white people. The message he received was not that he was less a human being than others because of his race, that he was not fit to associate with the dominant group because he was inferior or loathsome. To be sure, his potential earning capacity and employment opportunities were frustrated, and no doubt he was extremely upset. In press accounts, he reportedly felt "cheated."<sup>64</sup> We can all understand and sympathize; his complaint is hardly that of a racist. We can even imagine that Congress *might* have thought that such frustration of potential on account of race, even if well-intentioned to redress significant problems in traditionally segregated jobs like craft work, amounted to the drawing of such a clear distinction on the basis of race, our second definition of discrimination, and had such potential for racial friction that it should be illegal, just as invidious discrimination against African-Americans is illegal. But can we be sure that Congress intended both definitions of "discriminate," not just the first one? In my judgment, the text of section 703(d) is ambiguous on this point. If what I say has merit, Justice Brennan could have gotten a lot of mileage out of this analysis, thereby reducing the apparent result orientation of his *Weber* opinion.

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62. FUNK & WAGNALL STANDARD COLLEGE DICTIONARY 380 (1968).

63. *Id.*

64. See Barry Bearak & David Lauter, *U.S. Anti-Bias Regulations Disrupt Lives, Workplaces*, L.A. TIMES, Nov. 4, 1991, at A1.

Of course, there is ambiguity, and then there is ambiguity. Even if you grant some force to what I say, it may still be the case that a fair-minded reading of Title VII makes it cut, say, sixty/fifty in favor of Weber. But that is far removed from Justice Brennan's apparent admission that the statute was one-hundred percent unambiguous in Weber's favor, requiring the judicial Heimlich maneuver of the *Holy Trinity* move<sup>65</sup> to dislodge text supposedly choking the spirit out of the statute.

With today's law students, I often find a failure, at first blush, to appreciate the two potential ways in which "discriminate" can be defined. One reason may be that the word itself has evolved over the past four decades. Professor Chen has a desk dictionary, copyrighted in 1990, that gives the Audrey Hepburn definition of "discriminate" as the *first* one and the Boss Hogg definition as the second.<sup>66</sup> This tiny example suggests an ambiguity about plain meaning, if you will: which dictionary should we prefer? Or should we simply say that literal meaning only gets us so far in judging the meaning of a statute? Notice that, if that seems plausible, we have reached that conclusion by textual analysis, not textual avoidance à la Brennan.

One would expect that the dissenting Justices would have attacked the Brennan majority opinion in *Weber* for failing to acknowledge the importance of statutory text. Oddly, the attack was oblique, not frontal. The major dissenting opinion in the case, by Justice Rehnquist, did assert that the apprenticeship program was "flatly prohibited by the plain language of Title VII,"<sup>67</sup> but like Justice Brennan, Justice Rehnquist never seriously grappled with what the text actually said, possible nuance and all. Even more fundamentally, Justice Rehnquist largely operated within the same interpretive paradigm as Brennan, for Rehnquist stated that the Court's "task in this case, like any other case involving the construction of a statute, is to give effect to the *intent* of Congress."<sup>68</sup> Justice Rehnquist surely believed that supposedly plain statutory textual meaning was the best evidence of legislative intent,<sup>69</sup> but by conflating textual meaning and legislative intent into one package, he was inviting a long, and

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65. See *supra* text accompanying notes 50, 55.

66. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 362 (1990) (defining the term discriminate as (1) "to distinguish by discerning or exposing differences" or (2) "to make a difference in treatment or favor on the basis other than individual merit").

67. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 228 (1979) (Rehnquist, J., dissenting).

68. *Id.* at 253 (Rehnquist, J., dissenting) (emphasis added).

69. See *id.* at 253-54 (Rehnquist, J., dissenting).

somewhat inconclusive, battle over what the legislative history revealed.

Indeed, both the Brennan majority opinion and the Rehnquist dissent devoted extensive attention to the legislative history of Title VII. In a nutshell, Justice Brennan marshaled quotations from the legislative history to support his conclusion that the primary purpose of Title VII was to open doors to historically disadvantaged peoples.<sup>70</sup> One might easily grant him the point and remain unconvinced about his rejection of Weber's argument, however, for it simply begs the question of what *means* Congress chose to effectuate this purpose: the narrow means of outlawing racial distinctions that harm racial minorities or the broader means of outlawing all racial distinctions. Similarly, Justice Rehnquist marshaled many quotations in support of the general proposition that Title VII was to prohibit all discrimination on account of race, even discrimination against nonminorities, but that again begs the question whether "discrimination" means something narrower (invidious discrimination) or broader (any distinction based on race).<sup>71</sup>

The debate about legislative history produced a wonderful irony. Justice Brennan pounced on an amendment to Title VII in the Senate that added section 703(j),<sup>72</sup> which provides that nothing in the statute "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of" its race to correct racial imbalance in the workforce.<sup>73</sup> Had Congress intended to disallow what Kaiser and the Steelworkers had done, according to Brennan, it would have used the word "permit" rather than "require."<sup>74</sup> Here Justice Brennan, who fled any consideration of the text of Title VII's prohibitions, clung for dear life to the literal language of a proviso. Justice Rehnquist, too, had a bit of a dilemma here: he had to flee the

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70. *See id.* at 202-03.

71. In a glaring example, Justice Rehnquist wrote:

In the opening speech of the formal Senate debate on the bill, Senator Humphrey addressed the main concern of Title VII's opponents, advising that not only does Title VII not require use of racial quotas, *it does not permit* their use. "The truth," stated the floor leader of the bill, "is that this title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII."

*Id.* at 237-38 (Rehnquist, J., dissenting) (quoting 110 CONG. REC. 6549 (1964) (statement of Sen. Humphrey)). Notice that Justice Rehnquist's introduction to the quotation means the same thing as the quotation itself only if Senator Humphrey was using the Audrey Hepburn rather than the Boss Hogg definition of "discriminate."

72. *See id.* at 205-06.

73. 42 U.S.C. § 2000e-2(j) (1994) (emphasis added).

74. *See Weber*, 443 U.S. at 205-06.

apparent plain meaning of the clause in favor of its spirit of color blindness,<sup>75</sup> his own mini-*Trinity* move.

In the last analysis, however, because of the methodological weakness of the Brennan opinion, there was force to Justice Rehnquist's heated assertions that the majority opinion was an example of Orwellian doublespeak, "a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini."<sup>76</sup> Chief Justice Burger, in a short dissent, joined in the Rehnquistian chorus, accusing the majority of engaging in "judicially unauthorized, [even] intellectually dishonest means"<sup>77</sup> to achieve a result it believed was desirable. Even by the standards of Supreme Court Justices, to whom Justice Oliver Wendell Holmes supposedly once referred as "nine scorpions in a bottle,"<sup>78</sup> this is harsh language about persons who, after all, remain colleagues in a small-group decisional setting for the foreseeable future.

When methodological weakness is combined with perhaps the hottest social issue of our time, affirmative action, especially when racial quotas are involved, one can expect more than the usual reaction to a Supreme Court opinion. Justice Rehnquist played the "quota card" in his dissent, calling the racial quota "a creator of castes, a two-edged sword that must demean one in order to prefer another."<sup>79</sup> Justice Rehnquist intimated that, whatever Title VII was intended to do, it was not designed to foster, instead of undermine, caste.

In conservative circles the condemnation of the *Weber* outcome was swift and loud.<sup>80</sup> Even Judge Gee, who had written the majority opinion for the Fifth Circuit in favor of *Weber*, got into the act. When the case arrived on remand from the Supreme Court on its way to the district court, Judge Gee wrote a remarkable statement expressing his strong belief that the majority of the Supreme Court was mistaken and had not just wrongly, but dangerously, taken the nation in a direction of race consciousness rather than color blindness.<sup>81</sup> Judge Gee wrote: "Subordinate magistrates such as I must either obey the orders of

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75. See *id.* at 244-48 (Rehnquist, J., dissenting).

76. *Id.* at 222 (Rehnquist, J., dissenting); see *id.* at 219-21 (Rehnquist, J., dissenting).

77. *Id.* at 219 (Burger, C.J., dissenting).

78. E.g., Richard A. Posner, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990).

79. *Weber*, 443 U.S. at 254 (Rehnquist, J., dissenting).

80. See, e.g., TERRY EASTLAND & WILLIAM J. BENNETT, COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO *BAKKE* AND *WEBER* 197-210 (1979).

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

higher authority or yield up their posts to those who will.”<sup>82</sup> “I obey,” he continued, “since in my view the action required of me by the Court’s mandate is only to follow a mistaken course and not an evil one,”<sup>83</sup> although in context you get the sense that he thought the question was a close one.

As I mentioned at the beginning of the Lecture, my interest in *Weber*, as a law professor concerned with statutory interpretation, is not so much in the outcome as in the methodology. Although I cannot prove it, and lectures like these are great places to make unprovable assertions, I believe that *Weber* has had a remarkable impact upon the methodology of statutory interpretation. I recall as a young lawyer hearing a senior partner at my firm, a sort of “lawyer’s lawyer” who was by no means a conservative, opining to the effect that if the only defense of the outcome in *Weber* was Brennan’s, then the Court should have simply given up on affirmative action. In my judgment, *Weber*, or more precisely, the conservative reaction to *Weber*, has provided much fuel for the remarkable evolution in conservative statutory methodology we have seen since the early 1980s.

Indeed, if pressed to put the case most strongly, I would suggest that *Weber* is the case most responsible for the widespread consideration and, in some circles, the embrace, of two key elements of *the new textualism* promoted by Justice Scalia that are inconsistent with both the Brennan and the Rehnquist approaches in *Weber*.<sup>84</sup> The first is that the only “law” we have is statutory text: statutory interpretation is supposed to be undertaken as a matter of discerning the outcome most capable with the ordinary meaning and integrity of statutory text, perhaps filtered through established canons of statutory interpretation.<sup>85</sup> The second is that legislative intent is essentially a myth.<sup>86</sup> As two journalists once put it, how can Congress, an entity

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82. *Id.*

83. *Id.*

84. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621-24 (1990) [hereinafter Eskridge, *New Textualism*]. For Justice Scalia’s own articulation and defense of his approach, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997). See also William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) (reviewing A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997)).

85. See Eskridge, *New Textualism*, *supra* note 84, at 660-66.

86. See *id.* at 650-56. For my take on these developments, see Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 202-22 (1999).

with two bodies and 535 heads, have any collective intent?<sup>87</sup> To be sure, the law engages in legal fictions when it is functional to do so, but the new textualism maintains that “legislative intent” is a dysfunctional fiction that should be jettisoned. A corollary is that the use of legislative history in statutory interpretation is a waste of time at best and, at worst, an activity so manipulable that it is much more like looking over a crowd and picking out your friends than it is an objective historical recreation of what legislators collectively were contemplating.<sup>88</sup>

These methodological transformations were manifest when the Court revisited the *Weber* issue in 1987, in *Johnson v. Transportation Agency, Santa Clara County, California*.<sup>89</sup> A majority of the Court, again in an opinion by Justice Brennan, reaffirmed *Weber* and even extended its holding to authorize affirmative action any time there was a “manifest imbalance” or underrepresentation of a protected class under Title VII, racial minorities or women, for example, in a particular work category.<sup>90</sup> The case fractured the Justices in a variety of interesting ways. Again, Justice Brennan had a bare majority of five Justices. Justices Marshall and Blackmun, who had been with him in *Weber*, remained with him in *Johnson*. But Justice White, who had joined Brennan’s majority opinion in *Weber*, dissented in *Johnson* and urged the overruling of *Weber*.<sup>91</sup> For Justice White, *Weber* concerned an apprenticeship program that was legal because it had been designed “to remedy the intentional and systematic exclusion of blacks by the employer and the unions from certain job categories,”<sup>92</sup> not on the much broader ground that the program simply was intended to overcome a manifest racial imbalance in the workforce. Justice Powell, who had not taken part in *Weber*, silently provided the fourth vote for Brennan in *Johnson*. The crucial fifth vote came from Justice Stevens, who also had not participated in *Weber* and who, you may recall, had concluded in *Bakke* that Title VI of the Civil Rights Act required color blindness. For Justice Stevens, the issue was whether he should adhere to a decision “that is at odds with my understanding of the actual intent of the authors of the legislation.”<sup>93</sup> He agreed to do so, essentially concluding that the law was well settled: he said that

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87. See Bearak & Lauter, *supra* note 64.

88. See Scalia, *supra* note 84, at 36.

89. 480 U.S. 616, 627-40 (1987).

90. See *id.* at 631-33.

91. See *id.* at 657 (White, J., dissenting).

92. *Id.* (White, J., dissenting).

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

*Weber* is “an important part of the fabric of our law” and that there is an important “public interest in ‘stability and orderly development of the law.’”<sup>94</sup> Justice O’Connor concurred in the judgment on narrower grounds similar to those articulated by Judge Wisdom in the court of appeals back in the *Weber* case.<sup>95</sup>

Justice Scalia, joined by Chief Justice Rehnquist and to a great extent by Justice White, dissented in *Johnson*.<sup>96</sup> His dissenting opinion avoided the missed opportunities found in the Rehnquist dissent eight years earlier in *Weber*. He stressed the apparent plain meaning of the statutory text and the slippery nature of the *Holy Trinity* move Justice Brennan used in *Weber* to avoid it.<sup>97</sup> He did not trouble himself with quotations from the legislative history, merely indicating that Justice Rehnquist’s dissent had “convincingly demonstrated” that, even if one should pretend to believe in such things as the spirit of the statute, whatever that spirit was for Title VII, it could not have been the one invoked by Justice Brennan.<sup>98</sup>

My concern about *Weber* is not the outcome, which has allowed employers and unions to take steps to improve the lot of racial minorities and women in the workforce. As a policy matter, I am untroubled by that result. As someone interested in legal methodology, my concern is that the majority opinion seems so flimsy and result-oriented. Indeed, one Justice in the majority in *Weber* expressed concerns at the time. Justice Blackmun began his concurring opinion in *Weber* this way:

While I share some of the misgivings expressed in Mr. Justice Rehnquist’s dissent 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 . . . .<sup>99</sup>

Justice Blackmun took his guidance in these regards from Judge Wisdom’s dissenting opinion in the court of appeals.<sup>100</sup> A consideration of this and related factors illuminates what was really going on in *Weber*.

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94. *Id.* (Stevens, J., concurring) (quoting *Runyon v. McCrary*, 427 U.S. 160, 190 (1976) (Stevens, J., concurring)).

95. *See id.* at 647-56 (O’Connor, J., concurring).

96. *See id.* at 657 (Scalia, J., dissenting).

97. *See id.* at 657-58, 670-71 (Scalia, J., dissenting).

98. *See id.* at 671 (Scalia, J., dissenting).

99. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 209 (1979) (Blackmun, J., concurring) (citation omitted).

100. *See id.* at 209-10 (Blackmun, J., concurring).

II. WHAT WAS REALLY GOING ON IN *WEBER*?

Brian Weber had been active in the union.<sup>101</sup> Ironically, he was one of the members who had originally proposed the apprenticeship program to union leaders as a way for workers in lower-paying jobs to obtain the skills necessary to break into the craft ranks.<sup>102</sup> The proposal was adopted in the 1974 national collective bargaining process, but with a twist, the racial quota.<sup>103</sup> Presumably the union wanted the program to create enhanced opportunities for its members. Presumably management agreed on the condition of the racial quota because the craft ranks were so lily white that management was exposed to lawsuits under Title VII by racial minorities. Additionally, in light of Federal Executive Order 11,246 requiring contractors with the federal government to reduce racial imbalance in their workforces,<sup>104</sup> the racial imbalance jeopardized management's ability to serve as a contractor for the federal government. Indeed, the record in *Weber* indicates that the apprenticeship program would cost Kaiser approximately \$15,000 to \$20,000 per apprentice,<sup>105</sup> compared to simply hiring a skilled craft worker off the street.

Weber filed a grievance over his exclusion from the apprenticeship program on account of race, which was denied by the union.<sup>106</sup> He then contacted the Equal Employment Opportunity Commission (EEOC) in New Orleans, which eventually gave him the "right-to-sue" letter he needed to pursue a Title VII action.<sup>107</sup> He took the letter to the federal district courthouse, talked to a few people, and ultimately was directed to a federal district judge.<sup>108</sup> As fortune would have it, attorney Michael Fonham, 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 for a case before the judge. With the intent of irony, if not maliciousness, the judge told Fonham he was assigning the case to him. Fonham recalls that the conversation was something like, "Here, since you like civil rights cases, I will appoint you to

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101. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 763 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd sub nom.* *United Steel Workers of Am. v. Weber*, 443 U.S. 193 (1979).

102. See Bearak & Lauter, *supra* note 64.

103. See *Weber*, 415 F. Supp. at 763.

104. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. app. § 2000e (1994).

105. See Brief for Respondents at 17, *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (No. 78-432).

106. See Ronette King, *Color of Money: It's More than Just Green*, *TIMES-PICAYUNE* (New Orleans), Nov. 16, 1993, at A1.

107. See Bearak & Lauter, *supra* note 64.

108. See King, *supra* note 106.

represent a white guy in a civil rights case."<sup>109</sup> After investigating the facts and determining to his own satisfaction that Kaiser had not illegally discriminated against African-Americans at the Gramercy plant, Fonham 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.

Although the lawsuit ruffled plenty of feathers, Weber was no racist. Indeed, "Weber was an active unionist and had a good record on civil rights. Because of his liberalism, union leaders tried, but failed, to convince him to drop the suit."<sup>110</sup> He believed that he had been cheated. Rules are rules: in a union, seniority is the way things are done; in America, we are no longer supposed to judge people by their race. As a delegate elected by his fellow employees at the Gramercy plant to the 1978 United Steelworkers national convention, which was held shortly before oral argument in the Supreme Court, Weber unsuccessfully sought the elimination of the racial quota.<sup>111</sup>

The case generated enormous publicity. Major newspapers and news magazines carried feature articles about it.<sup>112</sup> Weber became "the blue-collar Bakke" and was sometimes photographed outside the Gramercy plant wearing a hard hat with an American flag on it.<sup>113</sup> Kaiser finally had to forbid the press from coming into the plant; it was just too distracting to the work that needed to get done. The Ku Klux Klan demonstrated at the plant in support of Weber, to Weber's deep embarrassment and resentment.<sup>114</sup>

Presumably because the issue in the case seemed to be purely one of law rather than fact, the record in the case was incredibly slim. The trial had taken 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.

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109. E-mail from Michael R. Fonham, Partner, Stone, Pigman, Walther, Wittmann & Hutchinson, to Philip P. Frickey (Dec. 9, 1999) (on file with the *Tulane Law Review*).

110. JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 187 (1998).

111. See Michael H. Gottesman, *Twelve Topics to Consider Before Opting for Racial Quotas*, 79 *GEO. L.J.* 1737, 1755 n.53 (1991).

112. See, e.g., *As the Supreme Court Weighs "Reverse Discrimination" in Jobs—*, *U.S. NEWS & WORLD REP.*, Apr. 9, 1979, at 77 [hereinafter *Court Weighs*]; Molly Moore, *Brian Weber, Blue-Collar Bakke*, *WASH. POST*, Jan. 12, 1979, at D1.

113. See *Court Weighs*, *supra* note 112, at 77.

114. See King, *supra* note 106.

The union did not call any witnesses.”<sup>115</sup> 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.<sup>116</sup> The company and, according to its 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.<sup>117</sup> Based on this record, the district judge found that “the black employees being preferred over more senior white employees had never themselves been the subject of any unlawful discrimination.”<sup>118</sup> 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, evidence that may have already existed in government files.<sup>119</sup> In fact, the United States and the EEOC unsuccessfully sought the Supreme Court to vacate the judgment of the court of appeals and remand the case so that this evidence, perhaps supplemented by evidence from a party or intervenor, could be developed.<sup>120</sup>

When the case reached the Supreme Court, another personal dimension became supremely important, the fundamental rule that five beats four. Of the seven Justices participating, recall that four had voted to uphold the admissions quota in *Bakke*. Of the other three Justices available, Chief Justice Burger and Justices Stewart and Rehnquist, surely Justice Stewart was the most “moderate” one and

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115. Brief for the United States and the EEOC at 10 n.7, *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (No. 78-432).

116. *See id.* at 10.

117. *See id.* at 10-12.

118. *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 sub nom.* *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

119. *See Gertrude Ezorsky, The Case of the Missing Evidence*, WASH. POST, May 27, 1979, at C1 (alleging that federal investigators enforcing the executive order concerning government contracting had amassed evidence in the early 1970s of serious racial bias at work at Gramercy: in addition to the absence of minority employees in the craft and supervisory ranks, because of threats by white workers, black workers had been afraid to bid on better jobs; 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).

120. *See* Petition for a Writ of Certiorari of the United States and the EEOC at 17-20, *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (No. 78-436).

therefore the most likely to be willing to consider upholding the Kaiser/Steelworkers plan.

Michael Gottesman, at the time one of the premier labor lawyers in the country and now a professor at Georgetown Law School, represented the Steelworkers. Most appellate practitioners inherit a case after all the facts are frozen and other attorneys have handled both prelitigation matters and the trial. Gottesman, however, had been “an active participant (as the union’s counsel) in advocating that the industry adopt this quota program [and] in negotiating its details.”<sup>121</sup> He has told me that almost his entire focus in the Supreme Court was to get Justice Stewart’s vote. Gottesman’s argument was an attempt to cast the legislative history of the Civil Rights Act in a way that would warm Potter Stewart’s heart. The argument went something like this: Whatever might have been true in the House of Representatives, which first passed a version of the civil rights bill, by the time the bill made its way to the Senate, the only way it could achieve passage was to avoid a filibuster, and the only way to do that was for its Democratic supporters to round up lots of moderate Republican support.<sup>122</sup> These Republican Senators tended to come from the Midwest, and for them one of the highest of American values was insulating private business from governmental interference. Prior to the adoption of Title VII, as a matter of federal law, business could consider race any way it wanted in employment practices. Gottesman painted the Kaiser/Steelworkers plan as one voluntarily entered into by private collective bargaining, with a desire to address the problem of societal discrimination and improve the lot of disadvantaged minorities, to offer important new opportunities to white and black union employees alike, and to maintain good relations with the federal bureaucrats who monitored government contracting. The picture was one of an attractive volunteerism driven by some related pragmatic concerns. The Court had a choice: it could hold that, in passing Title VII, Congress intended a complete and radical intervention into private business decision making, forbidding business from considering race at all in employment matters, even when motivated by benign volunteeristic considerations, or it could hold that Title VII was narrower, invalidating only racial considerations that were rooted in racial prejudice.

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121. Gottesman, *supra* note 111, at 1754 n.45.

122. For one account of the importance of the Senate Republicans to passage of the bill, see ESKRIDGE & FRICKEY, *supra* note 9, at 16-24.

It was, presumably, no coincidence that Justice Stewart was a moderate Republican from Ohio who, apparently, shared the value of protecting private ordering from governmental interference. That is what made *Weber* different from *Bakke*: while government, in Justice Stewart's view, should behave in a color-blind fashion, private entities have much more leeway. But of course this was a difference of relevance only to one Justice!

By embracing this theory in his *Weber* opinion, Justice Brennan was able to obtain a majority in support of validating the Kaiser/Steelworkers program as consistent with Title VII.<sup>123</sup> But just barely: the theory that captured the vote of Justice Stewart almost lost the vote of Justice Blackmun. As mentioned earlier, Justice Blackmun was dubious about how solidly the legislative history supported the majority's theory.<sup>124</sup> He was much more attracted to Judge Wisdom's theory, articulated in his dissent below, that the apprenticeship program was justified not on the basis of arguably dubious, and certainly reconstructed and rather hypothetical, legislative intent, but rather on the basis that Kaiser was engaged in affirmative action to remedy arguable violations of Title VII.<sup>125</sup>

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123. In her study of the steel industry and its workers as a microcosm of postwar economic and social changes, historian Judith Stein included a helpful discussion of the *Weber* case. See STEIN, *supra* note 110, at 186-92. Based on interviews with the principal players and an examination of the papers of Justices Brennan and Marshall, which are available at the Library of Congress, Stein concluded that the key to the case was Gottesman's successful effort to obtain Justice Stewart's vote. Indeed, she quoted one Justice's notes as stating that Stewart "sufficiently agreed with [the] [Steelworkers'] brief to join 4 others to make a Court." *Id.* at 189 (first alteration in original) (internal quotations omitted).

124. See *supra* text accompanying note 99.

125. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 209-15 (1979). It should be apparent that the voting alignment in *Weber* was somewhat fluid, if not unstable. We will never know whether, had he had a free hand in building a majority, Justice Brennan would have embraced the "arguable violation" theory in preference to the one he adopted to secure Justice Stewart's vote.

A simplified example, based on *Weber*, illustrates the potential for majority rule to be unstable. Suppose a three-Justice Supreme Court consisting of Justice Blackmun (who adopted the Wisdom point of view), Justice Stewart (who opposed affirmative action generally but seemed to embrace it in *Weber*, so long as private ordering was given a free hand), and Justice Rehnquist. If the Court were asked to consider whether to validate private affirmative action quotas (*Y*), uphold them only to remedy arguable violations (*AV*), or strike down affirmative action quotas (*N*), their preferences would probably lie as follows:

Blackmun: *AV*, *Y*, *N*

Stewart: *Y*, *N*, *AV*

Rehnquist: *N*, *AV*, *Y*

This is a classic instance of cycling majorities: for every choice there exists a majority that prefers something else (*AV* beats *Y*; *Y* beats *N*; *N* beats *AV*). For a discussion of cycling majorities, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 49-55 (1991). To make the illustration truer to the *Weber* situation,

The Wisdom “arguable violation” theory<sup>126</sup> is attractive to me for many reasons. I think it more honestly recognizes what was really going on in *Weber*. It makes sense to assume that Kaiser would not have embarked upon an expensive, and legally questionable, apprenticeship program unless it viewed the consequences of maintaining the status quo an even greater legal risk. Kaiser had two significant problems. First, it had federal inspectors breathing down its neck, worrying about whether the shockingly low number of African-Americans in craft work at Gramercy made Kaiser in violation of the federal executive order requiring nondiscrimination by federal contractors.<sup>127</sup> Second, it faced potential legal liability to African-Americans themselves.<sup>128</sup> Eight years before *Weber*, in *Griggs v. Duke Power Co.*,<sup>129</sup> the Supreme Court (with Justice Brennan not participating) had unanimously held that Title VII not only prohibits intentional discrimination against racial minorities, it also invalidates barriers to minority employment that, although neutral with respect to race, have a statistically significant exclusionary racial effect and cannot be justified by business necessity. Kaiser’s former requirement that only applicants with experience in craft work would be considered for craft openings was precisely the sort of prerequisite to employment rendered legally dubious by *Griggs*, for it produced the extraordinarily segregated craft workforce at Kaiser and there were

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we would need to include Chief Justice Burger (who would presumably adopt the same preferences as Justice Rehnquist), Justices Brennan and Marshall (who would probably have a preference order of *Y, AV, N*, but possibly *AV, Y, N* on rule-of-law grounds similar to Judge Wisdom’s reasons for his range of preferences), and Justice White (who voted with Brennan, but whose array of preferences would be unpredictable, at least to me—all we know is that he least preferred *N* in *Weber* and later most preferred *N* in *Johnson*). To complicate things further, we could also toss in Justice Powell (all we know is that he later silently joined *Johnson*) and Justice Stevens (in *Weber*, presumably *N* would be his first preference, unless the stare decisis point about *Bakke* that he later raised in *Johnson* would carry more weight even just one year after *Bakke* was decided). If we ignore Justices Powell and Stevens, my guess is that in *Weber* the array was as follows:

Brennan and Marshall: *Y, AV, N*

Stewart: *Y, N, AV*

White: either *Y, AV, N* or *AV, Y, N*

Blackmun: *AV, Y, N*

Rehnquist and Burger: *N, AV, Y*

The only way Brennan could get a majority would be on *Y* grounds, and that would require both White and Blackmun to join the majority rather than merely concurring in the judgment on *AV* grounds. That is precisely how *Weber* turned out.

126. See *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 230-34 (5th Cir. 1977) (Wisdom, J., dissenting), *rev’d sub nom.* *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

127. See *id.* (Wisdom, J., dissenting).

128. See *id.* (Wisdom, J., dissenting).

129. 401 U.S. 424, 429-36 (1971).

presumably other means, such as an apprenticeship program, to ensure Kaiser a supply of able craft workers. This is not to say that the former requirement necessarily violated Title VII, as interpreted in *Griggs*. When this problem is combined with the pressures flowing from the executive order concerning federal contracting, however, one gets a much better sense of Kaiser's motivations. It is difficult to consider its motivations a simple matter of private sector volunteerism, an example of private ordering designed to remedy *societal* discrimination.

Earlier, I suggested that one element missing from the Brennan/Rehnquist exchange in *Weber* was careful consideration of the statutory text.<sup>130</sup> We are now ready to consider another important perspective that was missing. In the Brennan/Rehnquist debate, both sides were ossified in supposedly neutral inquiries reconstructing the probable intent of the 1964 Congress, a body of 535 people that had ceased to exist a decade and a half before. Neither admitted to any evaluation of the current perspective, the facts of this case, as a perspective filtered through developments after 1964.

Judge Wisdom in the court of appeals had filled this vacuum concerning this postenactment perspective.<sup>131</sup> Because Judge Wisdom had been instrumental in developing the theory of disparate impact embraced in *Griggs*, he must have well understood the problem Kaiser faced. In 1969, two years before *Griggs* was decided, Judge Wisdom had written an influential decision for the Fifth Circuit in *Local 189, United Paperworkers v. United States*,<sup>132</sup> in which he reached the *Griggs* conclusion that facially neutral job rules that perpetuate the effects of past discriminatory practices are presumptively invalid under Title VII. A year later, the United States Court of Appeals for the Fourth Circuit in *Griggs* disagreed,<sup>133</sup> creating a split in the courts of appeals on the issue that led to Supreme Court review. Judge Sobeloff of the Fourth Circuit had dissented in *Griggs*, relying upon Judge Wisdom's analysis and identifying him by name in support of the contrary position.<sup>134</sup> The Supreme Court decision in *Griggs* vindicated the Wisdom/Sobeloff vision of the breadth of Title VII's reach in favor of historically disadvantaged minorities.

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130. See *supra* text accompanying notes 48-50, 67-69.

131. See *Weber*, 563 F.2d at 230 (Wisdom, J., dissenting); *infra* text accompanying notes 138-140.

132. 416 F.2d 980, 991 (5th Cir. 1969).

133. See *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1231-35 (4th Cir. 1970), *rev'd*, 401 U.S. 424 (1971).

134. See *id.* at 1237 n.1, 1241 n.9 (Sobeloff, J., dissenting).

*Griggs* was not alone as a postenactment development of utmost importance for understanding Kaiser's legal situation at Gramercy. In *McDonald v. Santa Fe Trail Transportation Co.*,<sup>135</sup> a Fifth Circuit panel including Judge Wisdom, by per curiam opinion, affirmed a district court decision holding that Title VII did not protect whites against being disadvantaged in employment matters because of their race. This time, the Supreme Court disagreed with the Wisdom position, for a year later it overturned this result, holding that whites could bring Title VII race claims.<sup>136</sup> The combination of *Griggs* and *McDonald* put Kaiser, and perhaps the union as well, in quite a dilemma. The apprenticeship program, adopted three years after *Griggs* but two years before *McDonald*, probably fixed *Griggs* problems at the expense of creating *McDonald* problems.

This extraordinarily difficult situation for Kaiser went unremarked in Justice Brennan's opinion in *Weber*, probably because it was so inconsistent with the argument that prevailed—that Kaiser and the Steelworkers had worked out a voluntary program to remedy social discrimination, rather than a practical program to correct the employer's and union's legal problems while opening opportunities for job advancement for the union's members.<sup>137</sup> Judge Wisdom, however, had made much of the real situation. He wrote that, 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.<sup>138</sup>

Like Justice Brennan's result later in the Supreme Court, Judge Wisdom's solution was to allow private ordering by management and unions. But unlike Justice Brennan, Judge Wisdom wanted the plan to be tailored to the facts that suggested affirmative action was sensible in context. He wrote: "If an affirmative action plan, adopted in a

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135. 513 F.2d 90, 90-91 (5th Cir. 1975) (per curiam), *rev'd*, 427 U.S. 273 (1976).

136. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-80 (1976).

137. *See United Steelworkers of Am. v. Weber*, 443 U.S. 193, 195-209 (1979).

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

collective bargaining agreement, is a reasonable remedy for an arguable violation of Title VII, it should be upheld.”<sup>139</sup>

Unlike both Justices Brennan and Rehnquist in *Weber*, Judge Wisdom did not maintain, with a straight face, that the 1964 Congress foresaw and precisely decided the issue in one way or the other. The vantage point of Wisdom, if you will, was not from 1964 looking forward, but from the late 1970s looking backward. The vantage point of Wisdom was not to maintain that the meaning of law was inexorably fixed at some point by static materials (statutory text and legislative intent) such that in, say, 1965 any sensible court would have reached one decision or the other. Frankly, as Justice Blackmun suggested in his concurring opinion embracing the vantage point of Wisdom,<sup>140</sup> Justice Rehnquist had the better of those arguments. Instead, Judge Wisdom in effect maintained that the vantage point of the late 1970s should count as well. For him, 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. His “arguable violation” theory is just such an attempt at mediating a variety of competing sources of legal legitimacy rather than privileging one to the exclusion of all the others.

The vantage point of Wisdom also has candor supporting it. It is no surprise to anyone familiar with the individual philosophies of William Brennan and William Rehnquist that they would disagree in *Weber*. Indeed, in the world of political science, scholars have long maintained that personal judicial ideology accounts for Supreme Court voting patterns far better than any other explanation.<sup>141</sup> We law professors hope that there is more to it than that, that the process also involves such factors as legal doctrine and precedent; the desire to articulate rules of law of a sufficiently abstract quality so that they can be applied fairly neutrally in the future, even when the judge would rather not do so; the moderating pressures inherent in multimember courts and the opinion-writing process; the judge’s desire to have

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139. *Id.* (Wisdom, J., dissenting). Judge Wisdom also embraced alternative arguments that the apprenticeship plan was a lawful response to societal discrimination and to the federal executive order. *See id.* at 234-38 (Wisdom, J., dissenting). The “arguable violation” theory was his preferred solution, however.

140. *See Weber*, 443 U.S. at 209-11 (Blackmun, J., concurring).

141. *See, e.g.*, HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 290-301 (1999). Recent political science scholarship has attempted to situate the strategic and sincere behavior of the Justices within the small-group dynamics of the Court. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 56-111 (1998); FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000).

legitimacy and respect in the legal interpretive community, a community in which there is a fairly widely shared value in the rule of law rather than the rule of judges; and so on. However one comes out on this, though, I think the reasonable judgment is that virtually no person is capable of deciding a question like the one in *Weber* by blanking her mind to all developments over the subsequent fifteen years and mechanically applying statutory text and objectively reconstructed legislative intent, finding self-satisfaction in the role of automaton rather than human being.<sup>142</sup> And I think if we found such a person, most of us would be scared to death to give that person the power of the judge, the authority to exercise the coercive power of the state.

My own sense is that most judges are pretty much like the rest of us: when we are faced with an important decision, we work from the current context backwards, attempting a thoughtful mediation of whatever important, crosscutting values are at stake. The virtue of the vantage point of Wisdom is that it reflects this human quality with candor rather than obfuscation. Here is how Justice Blackmun, who credited Judge Wisdom by name in his concurring opinion, summed up the virtues of the vantage point of Wisdom: "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."<sup>143</sup> In short, it made sense—functional sense, practical sense—of the law, both positive and decisional, of 1979, not 1964. As Judge Wisdom explained, federal courts possessed the authority to impose race-conscious remedies for proved Title VII violations; in circumstances of high tightropes without nets, potential defendants should have a measure of authority to settle arguable violations.<sup>144</sup>

To be sure, the "arguable violation" theory was not a panacea. It 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 the fact that, as compared to the Brennan approach, the arguable violation theory might have narrowed the acceptable scope of affirmative action in private employment cannot, by itself, be a reason to reject it, if what we seek

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142. On this hermeneutical insight, see William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 620-24 (1990).

143. *Weber*, 443 U.S. at 211 (Blackmun, J., concurring).

144. See *Weber*, 563 F.2d at 230-34 (Wisdom, J., dissenting).

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. My own view is that judges would have been able to do this, on a case-by-case basis. :

Judge Wisdom's approach in *Weber* resonates with two major themes throughout his judicial career. First, he forthrightly believed that the supposed norm of color blindness was too abstract to be of much use in attacking racial inequality. In *Weber*, he quoted his own earlier opinion for the Fifth Circuit stating that "[t]he Constitution is both color blind and color conscious,"<sup>145</sup> forbidding invidious considerations of race while allowing color consciousness designed to undo the present effects of past discrimination, which was precisely the problem at the Gramercy plant. Second, he candidly acknowledged that the federal judiciary, acting alone, could not conquer racial inequality. In an earlier school desegregation case, Judge Wisdom called for "[a] national effort, bringing together Congress, the executive, and the judiciary . . . to make meaningful the right of Negro children to equal educational opportunities. *The courts acting alone have failed.*"<sup>146</sup> Accordingly, Judge Wisdom held that the guidelines adopted by the U.S. Department of Health, Education, and Welfare that linked federal financial assistance to minimum desegregation standards were the circuit-wide minimum constitutional standards.<sup>147</sup> He brought the same policy of interbranch cooperation to employment discrimination as well. In *Weber*, he interpreted Title VII as consistent with the executive order requiring federal contractors to take affirmative steps to improve their employment of racial minorities.<sup>148</sup> Again, for Judge Wisdom, law was an ongoing, evolving, dynamic enterprise in which the judiciary interacted with the federal political branches, especially in the context of finding lawful approaches to counter the perpetuation of the effects of past discrimination.

These two themes, prudential color consciousness and interbranch cooperation and deference in the pursuit of racial justice,

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145. *Id.* at 227-28 (Wisdom, J., dissenting) (quoting *United States v. Jefferson County Sch. Bd.*, 372 F.2d 836, 876 (5th Cir. 1966)).

146. *United States v. Jefferson County Sch. Bd.*, 372 F.2d 836, 847 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967).

147. *See id.* at 851-52.

148. *See Weber*, 563 F.2d at 236-38 (Wisdom, J., dissenting).

are on the wane today.<sup>149</sup> Perhaps our society has evolved in the past two decades to the point that such strong medicine is no longer needed. Even if that perspective is not empirically sustainable, as I believe, perhaps in our current political climate color consciousness is simply an unsustainable method of promoting racial progress. Alternatively, perhaps the problem is not so much empirical as normative: color blindness is supposedly a moral imperative to many. The story of what happened to Brian Weber after *Weber* provides an interesting vignette, a context within which to assess the contemporary turmoil.

### III. WHITHER WEBER?

During the pendency of the lawsuit, Brian Weber remained active in the union and was eventually elected steward at the Gramercy plant.<sup>150</sup> In that role, he helped process matters and grievances about the very apprenticeship program he was challenging. After he lost the suit, he stayed on at the plant in his position as a lab technician. During the 1980s, he took college classes on a part-time basis at night at Tulane University. He was interested in business, human resources, and labor relations, but the offerings at night were not plentiful. The closest degree offered for his interests was paralegal studies, and in 1987 he graduated with a degree in that field. He had hoped to turn this degree into a labor relations position either for a union or for management, but met with no success. He continued to work at Kaiser in his old job. As the industrial economy of Louisiana faltered, he was active in union-management negotiations that resulted in union concessions allowing the Gramercy plant to remain operating. Finally, over a decade after the Supreme Court ruled against him, he left the Gramercy plant. He had answered an advertisement in *The Times-Picayune* by a firm called Wackenhut Services, a large company that provides security services. In Louisiana, Wackenhut Services had the contract to provide security for the Strategic Petroleum Reserve, our nation's underground petroleum storage. Wackenhut hired Weber as its director of labor relations in New Orleans in 1991.

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149. *See, e.g.,* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226-27, 235-39 (1995) (holding that all affirmative action measures must survive strict, as opposed to intermediate, scrutiny); *Shaw v. Reno*, 509 U.S. 630, 647-49 (1993) (invalidating a redistricting scheme adopted by a state legislature to increase minority representation in the U.S. House of Representatives).

150. Much of the information contained in this Part is based on my conversations and e-mail correspondence with Mr. Weber.

In less than three years, Wackenhut chose Weber to be director of labor relations at its premier location in the United States, the Savannah River Site, a South Carolina atomic research facility of the Department of Energy where Wackenhut provides security services. Weber has been director of labor relations there since 1994.

Weber and his colleagues in human resources at the Wackenhut Services-Savannah River Site have been spectacularly successful. As a government contractor, the company is required to take steps to diversify its workforce. It has done this so well that it won the Department of Energy's Equal Employment Opportunity and Diversity Award for Progress in 1999. According to the company's public relations release, "Wackenhut submitted a comprehensive application for the Award for Progress, outlining the significant progress the organization has made in creating an inclusive work environment that values the diversity of our employees."<sup>151</sup> The Department of Energy awards panel making the selection reportedly identified certain notable achievements, including:

- [1] Monthly reviews of established goals and areas of underutilization.
- [2] Effective partnering with Historically Black Colleges and Universities and Minority Enrollment Institutions through development of an onsite degree program.
- [3] Comprehensive Employee Education Program.
- [4] Recognition of employees serving on Diversity teams/committees, demonstrating a strong reinforcement of commitment. Positive upward trend regarding employee satisfaction.
- [5] Effective implementation of an Alternate Dispute Resolution Program and partnership between labor and management to provide training.<sup>152</sup>

As Director of Labor Relations, Weber was an integral part of the human resources team that won the award. He and his colleagues have achieved nationwide recognition in other ways as well. For example, Weber spoke at the 1999 Annual Conference of the Society of Professionals in Dispute Resolution, a nationwide organization.<sup>153</sup> He is scheduled to speak before the American Bar Association Section on Conflict Resolution this year.

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151. Public Affairs Section, Wackenhut Servs., Inc.-Savannah River Site, *Wackenhut Recognized for EEO and Diversity Programs* (May 13, 1999) <<http://www.srs.gov/general/people/wackenhut/news99-03.htm>>.

152. *Id.*

153. See Society of Professionals in Dispute Resolution, *SPIDR Annual Conference* (visited Feb. 14, 2000) <<http://www.spidr.org/thurs231.htm>>.

The story of Brian Weber may seem quite ironic. He helped propose the apprenticeship program that, in part because of pressure from federal contracting authorities, ended up with a racial quota attached to it that resulted in the denial of his application and his resulting lawsuit; as union steward, he had to assist in the administration of the program while the suit was pending; he obtained a first-class attorney by sheer fortuity; after losing the case, he obtained a college education in painful dribs and drabs at night and then was unable to find a position fitting his credentials and interests for four years; and then he traded in his blue collar for a white collar, switched from union to management, and became a highly successful manager intimately involved in the human resources of a company that, as a federal contractor, applied for and won an award from the federal government celebrating achievements in equal employment opportunity and diversity. The story is less ironic than it appears. Weber was never anything remotely like a racist. He was, and is, an ambitious person seeking to advance himself: indeed, at the moment, at the age of fifty-three, he is working on a Masters in Business Administration, which he hopes to receive this summer. By all accounts, he is also a fine fellow. He told me that occasionally even today someone will ask him, "Are you *the* Brian Weber?," and he just answers, "Well, yah," in what I take to be a been there, done that sort of way.

In 1993, *The Times-Picayune* ran a series on race relations and the economy. One feature involved an interview with Weber, who by that time was working for Wackenhut in New Orleans. Here is what he is quoted as saying, which, Weber has confirmed to me, remains accurate of his views today:

Initially, I was active within the union, and I knew this was coming about when the union and the company began working out a plan where race would be the criteria for the training program instead of seniority. It was 50-50, one black and one white, even if the black had less seniority. You have to understand that 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 (Equal Employment Opportunity Commission). It took six months for them to investigate it. They gave me a right-to-sue letter, and I got an attorney. I went to federal court in New Orleans and talked to a clerk, who took me to the judge. The judge just happened to have someone in his office who had been active in civil rights and assigned him the case. But I must admit that over the years I was exposed to things that kind of

altered my feelings somewhat. What I learned from it all is there's this class of people—females and minorities—who haven't been given the same opportunity. Theoretically, I would like to see it where no one would be given preferences. But they didn't start from the same level playing field. And understanding that, I've become more supportive of affirmative action programs. A lot of it had to do with being alert and aware of how people were feeling. What do you do with a society that put people on the side, and they haven't been given the opportunity? Even now, there's a lot of discrimination. I guess I've become more liberal because of what I've been exposed to through the lawsuit. I had black friends who supported me but couldn't say anything because of peer pressure. When I heard about the Klan demonstration (in front of Kaiser in support of the suit) I went out there with a friend of mine. I recognized (David) Duke. They were in their robes and everything. I just wished they had gone away. I didn't want their support, didn't solicit it. All it did was put a negative spin on things, and that wasn't it at all. Knowing what I know now, I don't know if I would do it again. But the suit had a calming effect. A lot of people were very angry and talking about doing things. It took a volatile situation and put it in the context of a legal issue. It took some time to resolve, but it was much easier to accept the final result.<sup>154</sup>

Weber's sensitivity to the lot of women and minorities who did not have a "level playing field" is reminiscent of the facts of his own case, where wanton racial exclusion from higher-paying, skilled jobs by craft unions was the root of the problem that Kaiser and the Steelworkers faced. In this light, consider a favorite story of Thurgood Marshall. When he joined the United States Court of Appeals for the Second Circuit in 1961, very few African-Americans had attained the federal bench. Soon after his appointment, he showed up for a group judicial portrait just as a fuse had blown or some other electrical problem had derailed the photographer. A secretary, who had not yet met Marshall, supposedly said, "[T]hank God, the electrician's arrived," to which Marshall reportedly responded, "Ma'am, you'd have to be crazy to think they'd let me in that union."<sup>155</sup> As Weber recognized, there are some reasons for exclusion from skilled jobs, and then there are some other reasons.

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154. *Speaking of Race*, TIMES-PICAYUNE (New Orleans), Nov. 16, 1993, at A7 (quoting Brian Weber).

155. Deborah L. Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1265 (1992) (internal quotations omitted). The story, which is fairly common currency among acquaintances of Justice Marshall, is recounted in a tribute to him.

## IV. CONCLUSION

Although it is perilous to generalize from one instance, it is tempting to see Brian Weber's story as emblematic of something larger than himself, a microcosm of important social changes over the past two decades. He overcame the frustrations of affirmative action to remake his career. Over time, he perceived racial inequality in a more nuanced way. At the same time, changes in the economy devastated sectors of the manufacturing industry, hurting management and labor alike. My speculation is that ultimately few African-Americans benefited from the apprenticeship program at the Gramercy plant; with changes in the economy, craft work openings presumably dried up, and there would have been little need for the program. Like so many others, Weber himself eventually left a union manufacturing job and entered the service economy. Affirmative action is an important social issue, but we may sometimes overestimate both the hardship it causes nonminorities and the benefits it provides minorities, in light of the powerful social and economic forces that can overwhelm it. Moreover, racial issues are also dynamic: while it made contextual sense in *Weber* for the parties and judges to see the issue as literally one of black and white, given the demographics at the time at the Gramercy plant, the multicultural America of today, two decades later, poses a much more complex setting.

Perhaps because of his experience with the lawsuit, perhaps as well because of his education in paralegal studies, Weber's retrospective on the lawsuit itself is also insightful. In an e-mail message to me, he wrote that he continues to believe that he should have won, because his position was consistent with the intent of Congress. But he understands that

[t]he courts, especially the Supreme Court, may not always rule as we think they should. It can be as clear as anything and we scratch our heads in disbelief when the court rules as it did here. But there is a much bigger picture, one that most of [us] don't see, that will prevail in the [United States] if we are to reach our goal of true justice and equality. Affirmative Action was not "right." It gave preferences to some and not others. But the big picture has to include fairness to others who have been given less than a fair shake. I argued that we, as individuals, should not be discriminated against in favor of individuals who, in many cases, have not been discriminated against themselves. That makes it easy to sidestep the problem that we, as a nation, faced then and still do now. Do we make a statement, as a people, to put

aside petty biases and treat people as people, not as a racial or cultural stereotypical entity?<sup>156</sup>

Weber's sophistication about Supreme Court behavior apparently lacking in formal legal justification reminds me of a favorite quotation from one of Judge Wisdom's most worthy successors on the United States Courts of Appeals. In a case in which formal statutory language conflicted with common sense and likely congressional policy and the court fractured along these lines, Judge Richard Posner of the Seventh Circuit noted a

jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation and the general terms of the Constitution (such as "equal protection of the laws") authorize judges to enrich positive law with the moral values and practical concerns of civilized society.<sup>157</sup>

"Neither approach is entirely satisfactory," Judge Posner continued, because "[t]he first buys political neutrality and a type of objectivity at the price of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness. It is no wonder that our legal system oscillates between the approaches."<sup>158</sup> Judge Wisdom, Michael Fontham, Michael Gottesman, and Brian Weber would have no trouble recognizing the nature of this dilemma.

One of the great law professors of the twentieth century, William Prosser, once provided his own humorous analysis of this conundrum. Prosser and I share at least one thing in common: we both started our careers at the University of Minnesota Law School and moved on—technically, for me, will move on, in a few months—to the University of California at Berkeley. At about the time of Prosser's move west, he published a short review of a book on legal philosophy. He wrote:

The principal thing that I remember about philosophy . . . is the definition of a philosopher. I am sure that everyone knows it: a philosopher is a blind man in a dark cellar at midnight looking for a black cat that isn't there. He is distinguished from a theologian, in that the theologian finds the cat. He is also distinguished from a lawyer,

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156. E-mail from Brian Weber to Philip P. Frickey (Jan. 11, 2000) (on file with the *Tulane Law Review*).

157. *United States v. Marshall*, 908 F.2d 1312, 1334-35 (7th Cir. 1990) (en banc) (Posner, J., dissenting), *aff'd sub nom. Chapman v. United States*, 500 U.S. 453 (1991).

158. *Id.* at 1335 (Posner, J., dissenting).

who smuggles in a cat in his overcoat pocket, and emerges to produce it in triumph.<sup>159</sup>

In the book Prosser was reviewing, a number of law professors had written essays about their philosophy of law. To avoid defamation, presumably, Prosser overtly assumed that they were writing as philosophers, not lawyers.<sup>160</sup> Yet all these writers found a cat, which by process of elimination made them theologians, a matter Prosser felt unqualified to assess.<sup>161</sup> What troubled Prosser was they did not all find the same cat, indeed, they each found a different cat, and the cats were not even of the same breed.<sup>162</sup> Yet each author "insists that his is the original and only genuine Cat."<sup>163</sup> Prosser concluded:

So . . . now I am all mixed up. I had always supposed that law was the product of a lot of pulling and hauling in society, a set of rather inadequate compromises brought about by very headstrong mules all going in different directions, and that the reason that it is in a mess is that society is in the same kind of mess. I had thought that our law was merely a facet of our civilization, about as multifarious, scrambled and altogether unsatisfactory as our civilization itself, and about as difficult to do anything effective about. The lawyers and the judges and even the legislators seemed to me to be a group of struggling opportunists trying to get along and doing their best in the face of specific jobs from day to day; and if they had no particular idea or plan or philosophy about it, and no very sensible pattern was discernible, it was not at all surprising, because look at the rest of the world. . . . I never have seen any reason why law should make any more sense than the rest of life; and I think that the attitude of those of us who have anything to do with it should be that of the familiar sign in the western dance hall, "Don't shoot the piano player, he's doing the best he can."<sup>164</sup>

If there ever was a case in which the pulling and hauling of society, and of a number of outstanding individuals named, for example, Wisdom, Weber, Fontham, and Gottesman, was evident, it was *United Steelworkers of America v. Weber*. That was surely true for Justices Brennan and Stewart as well. Was Brennan's majority opinion in *Weber* an act of judicial statesmanship (in capturing Justice

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159. William L. Prosser, *My Philosophy of Law*, 27 CORNELL L.Q. 292, 294 (1942) (reviewing *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* (1941)). I first encountered this essay in Dan White's excellent collection of humorous legal writing. See *TRIALS & TRIBULATIONS: APPEALING LEGAL HUMOR* 1-5 (Daniel R. White ed., 1989).

160. See Prosser, *supra* note 159, at 294.

161. See *id.*

162. See *id.*

163. *Id.*

164. *Id.*

Stewart's critical fifth vote) or a failure of judicial craft (in leaving the outcome so subject to methodological attack)? Or is it wrong to think of this as an either/or question?

Judge Wisdom personified and did his best to mediate this tension between meeting craft standards and promoting justice. Like Justice Brennan, Judge Wisdom did not feel ultimately, entirely, beholden to static sources of legal legitimacy, such as text and history. But more than Brennan or other judges commonly associated with judicial intervention in the pursuit of justice, Wisdom did hold himself out to be judged by the craft standards of the legal elite.<sup>165</sup> He wanted to have it both ways: to be a lawyer's judge who used law as an instrument of social change.<sup>166</sup> He saw this not as a mixture of water and gasoline, but as the judge's role in a system so driven by a common-law, case-by-case, functional perspective that even instruments of positive law like the Constitution and statutes are understood to have dynamic qualities.

In his recent Tanner Lecture at Princeton, Justice Scalia railed against this mentality concerning constitutional and statutory text, calling it antidemocratic.<sup>167</sup> As Judge Posner suggested, this debate between natural law or legal pragmatism of the Wisdom variety and severe positivism of the Scalia variety lies at the heart of American public law. As Prosser suggested, the reality is that the debate is as much pulling and hauling by headstrong mules as philosophical disputation. For me, Judge Wisdom's career indicates that it is possible to straddle the divide, to promote social justice and simultaneously satisfy the shared values of the legal community. He was not merely a piano player who, doing the best he could, spared himself from being shot. The tunes that he composed were as compelling as they were complex, and they rang true for millions of people.

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165. Cf. Posner, *supra* note 78, at 14 (asserting that Justice Brennan did "not ask to be judged by his fidelity to a text and a history, or by the craft standards of the legal mandarin. He has striven, in the American pragmatic tradition, for concrete results and will be judged in history by the results achieved, both intended and unintended.").

166. Jack Bass's biographical examination of the Fifth Circuit judges who led the post-*Brown* expansion of civil rights labeled Chief Judge Elbert Tuttle "the leader" and Judge Wisdom "the scholar." See BASS, *supra* note 1, at 23-55. Bass was surely correct in writing that Wisdom "possessed the intellect, analytical ability, and writing skills to develop as one of those rare appellate judges who achieved a level of special recognition by the Supreme Court as an outstanding craftsman of legal opinion and as an original thinker." *Id.* at 52.

167. See Scalia, *supra* note 84, at 9.

In the end, the *Weber* case vividly illustrates Judge Noonan's perspective of law as a human activity.<sup>168</sup> "Unmasking"<sup>169</sup> several key persons involved in the case reveals some of the complexity, contingency, and messiness of law when it is understood as a human affair. No single conclusion ineluctably follows from these insights; law as life is at most translucent, not transparent. I am satisfied with concluding with two related thoughts. The first is that law as life must mediate the pragmatic and the idealistic. Judge Wisdom understood that a good judicial opinion must deal with human complexity in a reasoned way. An opinion of this sort is a human accomplishment, in which law at least in part transcends the brute imposition of the coercive power of the state or the mechanical application of abstract geometrical axioms to touch, if only briefly, the sublime. Wisdom on *Weber* is an illustration. The second is that, as Judge Noonan emphasized, not only "those acting," but also those "enduring their action,"<sup>170</sup> are worthy of attention. If Brian Weber was to lose his case, he deserved to be treated with candor, to know the real reason for his loss. That he moved beyond the disappointment, came to appreciate the extraordinary complexity that arises when law and race intersect in America, and ended up developing a career in human resources for a company that fosters workplace racial equality and harmony demonstrates that he, like Judge Wisdom, has attempted to mediate pragmatism and idealism. The wisdom of Weber, no less than Wisdom on *Weber*, belongs in the story of *United Steelworkers of America v. Weber*.

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168. See *supra* text accompanying notes 2-3. I am deeply grateful to Miranda McGowan for her insights in these regards, which I have freely appropriated.

169. See Noonan, *supra* note 2, at 19 ("By masks in this context I mean ways of classifying individual human beings so that their humanity is hidden and disavowed.")

170. *Id.* at xi.