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A Revolution at War with Itself? Preserving Employment Preferences from *Weber* to *Ricci*

ABSTRACT. Two aspects of the constitutional transformation Bruce Ackerman describes in *The Civil Rights Revolution* were on a collision course, one whose trajectory has implications for Ackerman's account and for his broader theory of constitutional change. Ackerman makes a compelling case that what he terms "reverse state action" (the targeting of private actors) and "government by numbers" (the use of statistics to identify and remedy violations of civil rights laws) defined the civil rights revolution. Together they "requir[ed] private actors, as well as state officials, to . . . realize the principles of constitutional equality" and allowed the federal government to "*actually achieve* egalitarian advances in the real world." Within the frame of Ackerman's study, these features of the civil rights revolution worked in tandem, perhaps even synergistically, helping to generate the period's remarkable changes in voting, employment, and education. But as this essay shows, at least in the case of employment discrimination, reverse state action quickly became a threat to government by numbers. In the 1970s, no sooner did numerical measures take hold in preventing, settling, and remedying employment discrimination than courts faced claims that these measures violated the very laws pursuant to which they had been adopted. Exactly when and where state action adhered ultimately helped decide the viability of the numerical approach in the new employment discrimination regime. The eventual tensions between the "government by numbers" and "reverse state action" strands of Ackerman's account raise questions about the content and viability of the civil rights revolution he documents. They also underscore the importance of refining his theory's account of what he terms consolidation, synthesis, and judicial betrayal.

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INTRODUCTION

In January 1973, the Equal Employment Opportunity Commission (EEOC) reached a pathbreaking settlement with American Telephone & Telegraph (AT&T). The agency, created to implement the employment discrimination title (Title VII) of the 1964 Civil Rights Act,¹ had a rough start, plagued by uneven leadership, insufficient staff, and underfunding that resulted in enormous backlogs.² The AT&T settlement marked a turn in its fortunes. The case was *sui generis*. As the district court asked to approve the agreement noted, “there was no significant pending litigation in the federal courts when this consent decree was signed or . . . when the extensive negotiations that led to the decree took place.”³ The EEOC’s Chairman, William H. Brown III, called it “the most significant legal settlement in the civil rights employment history.”⁴ The agency’s “comparatively low profile . . . was strikingly altered” by the agreement.⁵ Nowhere was this more the case than within the business community: “There is a lot of teeth-chattering going on around here,” a vice-president of a large retail chain observed; equal employment consulting firms multiplied as their market of worried employers grew.⁶

1. 42 U.S.C. § 2000e-4 (2006).

2. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 180-81* (2014) [hereinafter ACKERMAN, *CIVIL RIGHTS*]; HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960-1972*, at 203-04, 234-37 (1990); JOHN DAVID SKRENTNY, *THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA 120-25* (1996).

3. *EEOC v. AT&T*, 419 F. Supp. 1022, 1030 (E.D. Pa. 1976).

4. Jo Anne Levine, *Landmark Bias Case Settlement*, WASH. POST, Sept. 9, 1973, at G1, G7.

5. Douglas W. Cray, *Job Discrimination Charges Grow: Federal Agency’s Efforts Broaden*, N.Y. TIMES, Mar. 4, 1973, at F14.

6. Harvey D. Shapiro, *Women on the Line, Men at the Switchboard: Equal Employment Opportunity Comes to the Bell System*, N.Y. TIMES MAG., May 20, 1973, at 26, 90. The AT&T settlement resolved a massive action the EEOC initiated against AT&T under Federal Communications Commission (FCC) rules requiring the company to ensure equal employment. It also addressed pending charges against the company by the Office of Federal Contract Compliance (OFCC) and other offices within the Labor Department. For general accounts of the settlement, see VENUS GREEN, *RACE ON THE LINE: GENDER, LABOR, AND TECHNOLOGY IN THE BELL SYSTEM, 1880-1980* (2001); LOIS KATHRYN HERR, *WOMEN, POWER, AND AT&T: WINNING RIGHTS IN THE WORKPLACE* (2003); and MARJORIE A. STOCKFORD, *THE BELLWOMEN: THE STORY OF THE LANDMARK AT&T SEX DISCRIMINATION CASE* (2004). For accounts of the FCC’s adoption of equal employment rules and why they put pressure on AT&T to settle, see SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* (forthcoming 2014) (manuscript at ch. 8) (on file with

The AT&T case plays a small but pivotal role in Bruce Ackerman's compelling new book, *The Civil Rights Revolution*.⁷ This is the third volume in his series contending that Americans have developed an alternate system of "higher-lawmaking" in response to the near impossibility of formally amending the Constitution via Article V. According to Ackerman, all three branches periodically interact with each other and a mobilized electorate in a sustained way over time to formulate new extra-textual constitutional commitments.⁸ His latest installment claims that the "Second Reconstruction" was an instance of this extra-Article V amendment process and elaborates the substance of the resulting commitments.⁹ One of Ackerman's key claims is that rather than adopt a universal, abstract notion of equality, Americans employed what he calls a "sphere-by-sphere" approach in which the legitimate means for achieving equality were fitted to different structures of inequality. So, for instance, although there was a general commitment to achieving "real-world egalitarian gains,"¹⁰ Ackerman explains that the constitutionally acceptable means for doing so varied for voting rights as opposed to public accommodations.¹¹

For Ackerman, the AT&T case typified one foundational feature of the constitutional revolution regarding employment discrimination and helped forge another. First, by targeting private employers such as AT&T, Ackerman argues that Title VII fundamentally altered "the state action doctrine of the nineteenth century," which he notes typically "insulate[d] private actors from [the Constitution's] egalitarian principles but impose[d] them rigorously on all state actors."¹² Second, the AT&T case helped refine how the employment discrimination dimension of this constitutional revolution would employ what Ackerman refers to as "government by numbers": the use of statistics to identify and remedy civil rights violations.¹³ In a 20,000-page report replete

author) [hereinafter LEE, *THE WORKPLACE CONSTITUTION*]; and Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010) [hereinafter Lee, *Race, Sex, and Rulemaking*].

7. ACKERMAN, *CIVIL RIGHTS*, *supra* note 2.
8. See generally 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).
9. ACKERMAN, *CIVIL RIGHTS*, *supra* note 2; see C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 9 (1955) (coining the phrase "Second Reconstruction").
10. ACKERMAN, *CIVIL RIGHTS*, *supra* note 2, at 14.
11. *Id.* at 107-53.
12. *Id.* at 12-13.
13. *Id.* at 14.

with statistical analyses, the EEOC used AT&T to model employment discrimination systemically and nationwide.¹⁴ The AT&T settlement also set numerical hiring goals and timetables for their fulfillment.¹⁵ According to Ackerman, the acceptance of the AT&T case in the executive branch and Congress secured the legitimacy of using numerical measures to remedy, not only identify and prove, employment discrimination.¹⁶

Ackerman is right to highlight the significance of the AT&T settlement. As described above, it was the kind of lightning-rod case that could generate the public and governmental response that fuels Ackerman's theory. Going forward, it also became the template for government enforcement of Title VII.¹⁷ During the summer of 1973, the EEOC filed 150 cases against major corporations and assembled a national team of lawyers to "do the same thing as [AT&T] all over again."¹⁸ As Ackerman observes, over the next few years, the EEOC secured court-approved consent decrees implementing similar number-based remedies in a range of industries.¹⁹

The AT&T case, however, also illuminates unexplored tensions within Ackerman's argument. In the two years after the federal district court approved the AT&T agreement, a number of the company's unions petitioned the court to modify its consent decree.²⁰ They contended, among other things, that by imposing numerical goals, the consent decree violated Title VII and the Constitution's equal protection guarantees.²¹ The district court easily dismissed

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14. Phyllis A. Wallace, *Introduction*, in EQUAL EMPLOYMENT OPPORTUNITY AND THE AT&T CASE 1, 2 (Phyllis A. Wallace ed., 1976); Christopher Lydon, *Job Bias at Bell Charged by Panel: 20,000-Page Report Finds Women Are Oppressed – Policy on Blacks Scored*, N.Y. TIMES, Dec. 2, 1971, at A1.
 15. EEOC v. AT&T, 419 F. Supp. 1022, 1032 n.7 (E.D. Pa. 1976).
 16. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 182-83, 189-91. This claim may require more development since the AT&T settlement occurred after, rather than before, Congress amended Title VII in 1972.
 17. *See generally* LEE, THE WORKPLACE CONSTITUTION, *supra* note 6; STOCKFORD, *supra* note 6, at 209-10; Lee, *Race, Sex, and Rulemaking*, *supra* note 6.
 18. Levine, *supra* note 4, at G1. Months before the AT&T settlement, Congress had amended Title VII to give the EEOC the authority to bring lawsuits challenging private employers' discrimination. Pub. L. No. 92-261, § 5, 86 Stat. 103, 107 (1972) (codified as amended at 42 U.S.C. § 2000e-6(c)-(e) (2006)).
 19. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 183; *see, e.g.*, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 330 n.4 (1977).
 20. EEOC v. AT&T, 419 F. Supp. 1022, 1028-29 (E.D. Pa. 1976).
 21. *Id.* at 1030-33. They brought their claims under the Fifth Amendment's Due Process Clause per the Supreme Court's holding that this Clause incorporated equal protection principles.

their claims in 1976, citing abundant precedent.²² The Third Circuit Court of Appeals quickly affirmed, but cautioned that preferential remedies were not categorically constitutional and “must be held invalid under the . . . Fifth Amendment unless” they satisfied “strict scrutiny.”²³ In the appeals court’s judgment, the AT&T agreement met this test.²⁴ The Supreme Court had not yet applied strict scrutiny to racial preferences adopted to remedy or prevent discrimination.²⁵ But over the next decade, the Supreme Court found an increasing number of preferential schemes to be unconstitutional.²⁶ During this same period, the Court gave greater leeway to preferences under Title VII.²⁷

The “reverse-state-action” and “government-by-numbers” aspects of Ackerman’s constitutional revolution were on a collision course. With preferential treatment more liberally allowed under Title VII than under the Constitution, using numbers to address employment discrimination became incompatible with applying the Constitution to the private sector. Instead, ensuring that the state action doctrine “insulate[d] ‘private’ actors from the [Constitution’s] egalitarian principles” ended up protecting the “government-by-numbers” approach to employment discrimination.²⁸

Part I explains in greater depth Ackerman’s claim that the civil rights revolution included a major reworking of the state action doctrine and an embrace of numerical approaches to achieving equality. It also explains why employment is a particularly ripe site to explore the tensions between them. Part II demonstrates how the Court’s preservation of the nineteenth-century state action doctrine helped preserve the use of numbers to achieve equality in the workplace when employers’ voluntary use of preferences first came before the Court in the 1970s. Part III explains how this state action shield further protected these preferences in the 1980s, both before the Supreme Court and within President Ronald Reagan’s administration. Part IV argues that the state

Id. at 1044-45 (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

22. *Id.* at 1044-51, 1053-54.

23. *EEOC v. AT&T*, 556 F.2d 167, 179 (3d Cir. 1977).

24. *Id.* at 179-80. The Supreme Court denied review. *Comm’ns Workers of Am. v. EEOC*, 438 U.S. 915 (1978); *Tel. Coordinating Council, TCC-1, Int’l Bhd. of Elec. Workers v. EEOC*, 438 U.S. 915 (1978); *Alliance of Indep. Tel. Unions v. EEOC*, 438 U.S. 915 (1978).

25. *See infra* Part III.

26. *See id.*

27. *See id.*

28. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 13.

action doctrine could once again rescue voluntary employer preferences. The Conclusion raises some possible implications of this history for the stability of the civil rights revolution Ackerman documents and for his broader theory of constitutional change.

I. REVERSE STATE ACTION AND GOVERNMENT BY NUMBERS IN ACKERMAN'S REVOLUTION

Ackerman's civil rights revolution has three key characteristics: it took a "sphere-by-sphere" approach to codifying the Constitution's equality guarantee, it employed "government by numbers" to achieve this constitutional goal (albeit to varying degrees in each of the spheres), and it extended this constitutional mandate to the private sector. The result was targeted statutes and tailored administrative regimes customized to the particular structures of inequality in voting, public education, housing, public accommodations, and employment. As I explain below, these latter two characteristics coincided to the greatest degree in employment, making it a prime site to explore the tensions between them.

A. Sphere by Sphere

Ackerman argues that the Supreme Court's increasingly consistent insistence that equal protection is achieved through colorblind policies betrays a central tenet of the civil rights revolution.²⁹ Ackerman traces this tenet back to Chief Justice Earl Warren's opinion in *Brown v. Board of Education*.³⁰ "In making its case against 'separate-but-equal,'" Ackerman contends, *Brown's* reasoning "doesn't apply to all social relationships across the board" but instead "requires the law to single out crucial spheres for the vindication of equality."³¹ When Congress enacted a series of civil rights statutes in the 1960s and early 1970s, it adopted this approach, Ackerman argues, "self-consciously

29. *Id.* at 231; see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 861-65 (2007) (Breyer, J., dissenting) (characterizing the plurality's colorblind approach as "risk[ing] serious harm to the law and for the Nation"); cf. *Ricci v. DeStefano*, 557 U.S. 557, 579-80 (2009) ("Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race.").

30. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 129-33 (describing the "sphere-by-sphere approach" articulated in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

31. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 131.

divid[ing] the world into different spheres of life: public accommodations, education, employment, housing, voting.”³² Congress’s goal in each sphere was the same: “the pursuit of real equality of opportunity.”³³ But Congress had a “contextual understanding of the constitutional meaning of equality in different spheres of social and political life.”³⁴ As a result, it “displayed great creativity in crafting different administrative setups for different spheres,” which in turn “led to the development of different rules and principles in different spheres.”³⁵ For Ackerman, it was these “landmark statutes,” with their sphere-by-sphere approach, not the Court’s increasingly formalist, homogenous approach to equality in decisions such as *Loving v. Virginia*, that defined the civil rights revolution and merit “full constitutional status.”³⁶

B. Government by Numbers

Congress, the executive branch, and the courts deployed “government by numbers” to varying degrees in each sphere of discrimination they targeted. One of Ackerman’s great insights is how the civil rights revolution brought the technocratic impulse of the New Deal to bear on the problem of racial inequality.³⁷ Government by numbers was used, Ackerman argues, only where necessary “to bridge the yawning gap between the law on the books and the law of ordinary life.”³⁸ Generally, this involved discrimination by “institutions whose internal logics of decision are opaque”³⁹ or who were structurally disinclined to comply.⁴⁰ Government by numbers was used paradigmatically in the Voting Rights Act, which “imposed hard-edged output tests on voting registrars” and extensive federal supervision on those that failed.⁴¹ In contrast,

32. *Id.* at 12.

33. *Id.* at 154.

34. *Id.* at 12.

35. *Id.* at 155.

36. *Id.* at 34; *see also id.* at 291 (“I do deny that *Loving* deserves a central place in the civil rights canon. It simply represents an effort by We the Judges to fill in a gap left in the wake of an epochal set of decisions by We the People.”).

37. *Id.* at 14.

38. *Id.*

39. *Id.* at 159.

40. *Id.* at 154-73.

41. *Id.* at 194. As Ackerman observes, the Court’s decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which struck down the Voting Rights Act provision that set the formula used to determine the states that must preclear changes to their voting laws with the Department of

it played no role in policing public accommodations, where discrimination was patent and the market rewarded compliance.⁴² Here, Congress “principally relied on traditional lawsuits by traditional plaintiffs before traditional courts using traditional legal language to attack discrimination.”⁴³

But government by numbers was not an all or nothing proposition, Ackerman reveals. True to the sphere-by-sphere approach, in the case of employment discrimination, the civil rights revolution settled on an intermediate position. As initially enacted, Title VII focused on individual intentional discrimination and forbade numerical quotas, “the hard-edged version of government by numbers” used in voting.⁴⁴ But Congress did not banish numbers entirely. They could be—and were—used as evidence of discriminatory intent,⁴⁵ to identify suspicious employer policies, and to target the EEOC’s limited enforcement resources on the “worst offenders.”⁴⁶ The EEOC also used them to demonstrate that discrimination was a systemic, not individual or intentional, problem.⁴⁷ These uses in turn encouraged businesses to tend to their numbers and to adopt policies that lowered any numerical red flags. “Within the setting of the modern enterprise,” Ackerman observes, “discriminatory intentions had become a numbers-driven affair.”⁴⁸ First the Supreme Court in *Griggs v. Duke Power*,⁴⁹ then Congress and President Richard Nixon endorsed these uses of numbers in the 1972 amendments to Title VII.⁵⁰ The result was a cascade of firms seeking consent decrees, adopting affirmative action programs, and being subject to judgments that used numbers to create preferences for hiring, training, and promoting minorities and women.⁵¹

Justice, has thrown into doubt the future viability of government by numbers under the Voting Rights Act. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 328-35.

42. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 159.

43. *Id.* at 195.

44. *Id.* at 177.

45. *Id.* at 174.

46. *Id.* at 186.

47. *Id.* at 189.

48. *Id.* at 187. For similar accounts of corporate practices, see generally JENNIFER DELTON, RACIAL INTEGRATION IN CORPORATE AMERICA, 1940-1990 (2009); and FRANK DOBBINS, INVENTING EQUAL OPPORTUNITY (2011).

49. 401 U.S. 424 (1971); see also ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 184-86 (discussing *Griggs*).

50. See ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 189-91.

51. See *infra* Part III.

C. *Reverse State Action*

Another central claim of Ackerman's is that the civil rights revolution cast aside the state action limit on the Constitution's equality guarantee. Ackerman argues that the Supreme Court "was on the verge of dispatching the state action doctrine in its 1964 decision in *Bell v. Maryland*," a case involving the trespassing convictions of sit-in protesters at a Baltimore, Maryland restaurant.⁵² But he acknowledges that it "refrained at the last minute since Congress was poised to take leadership on this issue with the Civil Rights Act."⁵³ Nor did the Court in his account later take the step it had avoided in *Bell*. Nonetheless, he contends that the "state action restriction simply doesn't make sense of the living Constitution."⁵⁴ For Ackerman, the Constitution includes the commitments "expressed in the landmark [civil rights] statutes."⁵⁵ And these "requir[ed] private actors as well as state officials to accept wide-ranging responsibilities to realize the principles of constitutional equality."⁵⁶ Indeed, from Title VII, to the Civil Rights Act's public accommodations title, to the Fair Housing Act, these statutes engaged in what Ackerman calls "reverse state action," singling out the private sector.⁵⁷ Ackerman notes that "[t]he current legal community uses *Bell's* deference to Congress as an excuse for pretending that the state action doctrine of the nineteenth century remains intact."⁵⁸ He urges, however, that doing so is "[a] big mistake."⁵⁹

52. *Bell v. Maryland*, 378 U.S. 226 (1964); ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 13. A majority of Justices nearly coalesced around finding that the state's arrest and conviction of the protesters at the behest of the restaurant's private owner violated equal protection. *Id.* at 143-47; LEE, THE WORKPLACE CONSTITUTION, *supra* note 6 (manuscript at ch. 7). Instead, the Court remanded the case to the state court to determine whether a public accommodations antidiscrimination law Maryland adopted after the protesters' convictions rendered their sit-in legally protected. *Bell v. Maryland*, 378 U.S. 226 (1964).

53. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 13.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 175. Ackerman uses this term to refer to Title VII of the 1964 Civil Rights Act, which targeted discrimination in private employment. 42 U.S.C. §§ 2000a, 2000e (2006). I use it here more broadly to refer to all regulation of private discrimination even under the Fair Housing Act, 42 U.S.C. §§ 3601-31, Title II's ban on discrimination in public accommodations, 42 U.S.C. § 2000a, and Title VII after it was amended in 1972 to reach public as well as private employment discrimination, 42 U.S.C. § 2000e.

58. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 13.

59. *Id.* at 176.

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Neither reverse state action nor government by numbers characterizes every sphere Ackerman analyzes. As explained above, reverse state action pertained only to employment, housing, and public accommodations; of these, government by numbers was employed most thoroughly in the employment discrimination context.⁶⁰ Within the timeframe of Ackerman's account, these two aspects of the civil rights revolution coexisted harmoniously. But no more than a few years thereafter, harmony gave way to conflict.

II. THE STATE ACTION DOCTRINE PRESERVES GOVERNMENT BY NUMBERS IN *WEBER*

When the Third Circuit applied strict scrutiny to the AT&T consent decree in 1977, it was stepping out ahead of the Supreme Court, which had yet to adopt this standard of review for racial preferences designed to remedy racial discrimination. But the next year, in *Regents of the University of California v. Bakke*, the Court signaled that it was considering the Third Circuit's approach and sounded a warning about remedial use of preferences under the landmark civil rights statutes.⁶¹ As this Part recounts, *Bakke* was but the opening salvo in a complicated, multi-front reconsideration of government by numbers in the employment context. Over the next decade, the government-by-numbers dimension of Title VII clashed repeatedly with the Supreme Court's increasingly colorblind interpretations of the Constitution. When it came to employers' voluntary use of preferences, the Court's formalist, narrow approach to state action helped preserve the government-by-numbers approach.

60. Ackerman does not focus on the use of numbers in the housing context, but he briefly mentions the government's use of a disparate impact standard. *Id.* at 222. As a result, I too focus on the coincidence of reverse state action and government by numbers in the employment context only. The Court may soon confront the issues raised by this coincidence in the housing context. See *Twp. of Mt. Holly v. Mt. Holly Garden Citizens in Action, Inc.*, 134 S. Ct. 636 (2013) (mem.) (dismissing after settlement a challenge in which the constitutionality of disparate impact liability under the Fair Housing Act was questioned).

61. 438 U.S. 265 (1978).

A. *The Growing Constitutional Threat to Racial Preferences*

Racial preferences in hiring, promotion, and training were already controversial in 1973 when the EEOC entered into its pathbreaking agreement with AT&T. In 1972, both presidential candidates denounced the use of quotas and even some prominent liberals criticized the Nixon administration's use of hiring goals.⁶² The Nixon Administration described the former as a number that "managers are obligated to attain" and the latter as one that would "probably be met."⁶³ To liberal opponents of quotas, however, this was a distinction without a difference. They thought that goals often functioned as "de facto quotas." Even more fundamentally, however, they opposed *any* departure from meritocratic hiring. From this baseline, probable goals were no better than mandatory quotas.⁶⁴ Labor leaders also criticized hiring goals, let alone quotas, for harmfully pitting white and black workers against each other. Guaranteeing jobs for all, not quotas, was the labor movement's answer to African Americans' limited job opportunities.⁶⁵ Conservatives formulated a different critique, embracing colorblindness as the *sine qua non* of equal protection. Under this by now familiar formulation, recognizing race to remedy or prevent discrimination was constitutionally equivalent to recognizing race in order to discriminate.⁶⁶

Bakke signaled the rising influence of the colorblind approach. In that case, the Court was asked to determine whether a university program setting a

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62. LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at ch. 8); Lee, *Race, Sex, and Rulemaking*, *supra* note 6, at 862.
63. Memorandum from the National Executive Council of the United States Civil Service Commission to the Heads of Departments and Agencies (May 11, 1971) (on file with author).
64. Am. Jewish Comm., "Statement on Affirmative Action," Dec. 3, 1972, LCCR Papers, Part I, Box 114, "Quota Hiring: Affirmative Action, 1972" Folder. For more thorough treatments of liberal Jewish groups' disagreements over and critiques of quotas, see DENNIS DESLIPPE, *PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION* (2012); LAURA KALMAN, *RIGHT STAR RISING: A NEW POLITICS, 1974-1980*, at 183-84, 191-94 (2010); and NANCY MACLEAN, *FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 185-224* (2008).
65. For a nuanced account of labor's position on affirmative action, see DESLIPPE, *supra* note 64. For additional general treatments of the complicated politics of affirmative action, see JEFFERSON COWIE, *STAYIN' ALIVE: THE 1970S AND THE LAST DAYS OF THE WORKING CLASS*, 240-43 (2010); and Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).
66. On the rise of colorblind conservatives, see DESLIPPE, *supra* note 64; and MACLEAN, *supra* note 64, at ch. 7.

minimum quota for minority admissions violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.⁶⁷ The Justices splintered so thoroughly that it was hard to conclude anything definite from the decision other than that the admissions program was illegal. But in the Court's first decision reviewing voluntary race-conscious measures adopted to remedy or prevent discrimination, colorblind arguments were key. Justice Powell endorsed a colorblind interpretation of equal protection, calling for strict scrutiny any time the government treated people differently based on their race.⁶⁸ He found that the admissions policy failed this standard.⁶⁹ Four other Justices avoided the constitutional question by interpreting Title VI in equally ominous, and fatal, colorblind terms.⁷⁰

When the Court considered a similar quota-based training program adopted by a private sector employer and union the next term, it seemed possible that the Court would strike it down under a colorblind approach to Title VII, equal protection, or both. Title VII had already been interpreted in ways that defied a strictly colorblind approach, giving the program a better chance under Title VII than it would have had under Title VI.⁷¹ But this would only remove the dodge used by the Justices who struck down the admissions program in *Bakke* on statutory grounds. That a constitutional decision would be close was near certain: *Bakke* had been a five-four decision.⁷² That

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67. Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964) (codified as amended at 42 U.S.C. § 20006).
 68. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (plurality opinion) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).
 69. See *id.* at 320. Powell also stated, however, that some uses of race in the admissions context might be constitutional. See *id.* at 314-19.
 70. See *id.* at 418 (Stevens, J., concurring in the judgment in part and dissenting in part) (“[T]he meaning of the Title VI ban . . . is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program.”). Powell reached the constitutional question because he held that Title VI’s bar on discrimination was coextensive with the constitutional bar on discriminatory state action. See *id.* at 287 (plurality opinion).
 71. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) (“[T]he Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.”); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-33 (1971) (recognizing disparate impact theories of discrimination as cognizable under Title VII).
 72. The four dissenting Justices agreed with Justice Powell that Title VI “prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies.” *Bakke*, 438 U.S. at 328 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part). They would have applied

colorblind constitutionalists would command a majority striking the training program down was entirely possible. Or at least, it would have been if the Supreme Court had recognized that the civil rights revolution had swept away the state action doctrine.

B. Employer Preferences' State Action Shield

1. Narrowing State Action

Kaiser Aluminum's quota-based training program was saved from the constitutional gauntlet because the Supreme Court had not rejected the state action doctrine in or since *Bell*.⁷³ The Court began broadening the definition of state action in the 1940s,⁷⁴ and came close to vastly expanding it in *Bell*.⁷⁵ Over the next several years, the Court continued to inch its way towards a more expansive understanding of state action,⁷⁶ leading one court watcher to predict that the "radical changes in society . . . even now are tolling the demise of state action."⁷⁷ But this progression of decisions can overstate the doctrine's vulnerability. Even liberals at the time were deeply divided over its fate.⁷⁸ The Justices who signed on to the Court's most expansive decisions insisted that they were preserving an intelligible line between public, constitutionally accountable actions and those that were private and thus free from constitutional scrutiny.⁷⁹ When President Nixon replaced Earl Warren with a Chief Justice strongly opposed to state action's expansive trend, he tipped the

intermediate, not strict, scrutiny, however, and would have upheld the program on constitutional and statutory grounds. *See id.* at 326, 359, 362.

73. *Bell v. Maryland*, 378 U.S. 226 (1964).

74. *See* LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at ch. 4); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

75. ACKERMAN, *CIVIL RIGHTS*, *supra* note 2, at 143-49; *accord* LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at ch. 7).

76. *See, e.g.,* *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Evans v. Newton*, 382 U.S. 296 (1966).

77. John Silard, *A Constitutional Forecast: Demise of the "State Action" Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855, 855 (1966).

78. For liberals' divisions, *see* LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at chs. 4-5, 7). For arguments that "regime politics" played an underappreciated role in the doctrine's preservation, *see* Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 LAW & SOC. INQUIRY 273 (2010).

79. *See, e.g.,* *Reitman*, 387 U.S. at 378-81. For the Justices' internal deliberations and concerns about state action in this period, *see* LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at chs. 4, 7, 10).

balance firmly in favor of contraction. Over the course of the 1970s, the Court issued a series of decisions narrowing the circumstances under which state action would be found,⁸⁰ the most recent of which was decided the same term as *Bakke*.⁸¹

2. *Dodging the Equal Protection Bullet in Weber*

This narrowed state action doctrine allowed the Court to avoid deciding the constitutionality of Kaiser's training program. Writing for the majority in *United Steelworkers of America v. Weber*, Justice Brennan began by noting that "[s]ince the Kaiser-USWA plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause."⁸² He instead considered whether it furthered Title VII's overarching purpose of opening jobs to African Americans. The state action divide otherwise critically informed Brennan's analysis. In order to distance Title VII from *Bakke*'s colorblind interpretation of Title VI, Brennan insisted that Title VII as originally enacted "regulate[d] purely private decisionmaking and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments."⁸³ When divining Title VII's purpose, Brennan emphasized that Congress had sought to "avoid undue federal regulation of private businesses," most notably by not "limit[ing] traditional business freedom to such a degree as to prohibit all voluntary, race-conscious affirmative action."⁸⁴ Justice Rehnquist accused Brennan of a "Houdini"-like opinion that "eludes clear statutory language [prohibiting racial discrimination], uncontradicted

80. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (articulating the "close nexus" test); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119-20 (1973) (distinguishing between encouragement and permission and finding the latter insufficient to implicate state action); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972) (rejecting the licensing theory of state action); LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at ch. 10).

81. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

82. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 200 (1979). For arguments that, under a more expansive definition of state action, the union would be a state actor, see LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at ch. 13).

83. *Weber*, 443 U.S. at 206 n.6.

84. *Id.* at 207. Brennan's emphasis on managerial freedom was apparently critical to securing Justice Stewart's vote and thus securing a majority decision with precedential value. Deborah C. Malamud, *The Story of United Steelworkers of America v. Brian Weber*, in *EMPLOYMENT DISCRIMINATION STORIES* 173, 212-16, 218-21 (Joel William Friedman ed., 2006).

legislative history, and uniform precedent.”⁸⁵ But a majority of the Court found that Title VII permitted the training program.⁸⁶

3. *A Weber What If?*

By preventing the Court from considering the constitutionality of Kaiser’s program, the state action doctrine likely not only saved the program, but also either prevented a colorblind interpretation of Title VII or forestalled a strict scrutiny approach to affirmative action. The state action doctrine also channeled the Court in *Weber* towards an affirmative-action tolerant interpretation of Title VII that immunized voluntary employer preferences when they came under sustained attack in the 1980s. My argument relies entirely on counterfactual, which as a historian I am trained to distrust. But I am setting aside those compunctions and making a more lawyerly case.

The first (if unlikely) threat was that the Court would avoid the constitutional question by adopting a colorblind interpretation of Title VII, as the concurring Justices had for Title VI in *Bakke*. Justices Powell and Stevens did not participate in *Weber*. Brennan wrote for the majority. Of the remaining six Justices, four (Thurgood Marshall, Potter Stewart, Byron White, and Harry Blackmun) joined Brennan’s interpretation of Title VII. Two of them would thus have had to defect on the statutory interpretation to avoid having to address the constitutional question. Only one, Stewart, had joined the colorblind interpretation of Title VI in *Bakke*.⁸⁷ For reasons discussed further below, White *might* have provided the second vote, securing a colorblind interpretation of Title VII.

If the constitutional question had been reached rather than avoided, it was quite possible (if far from certain) that the Court would have done what it had refrained from doing in *Bakke*: hold that preferences triggered strict scrutiny. This is where my counterfactual gets the most questionable from a historian’s perspective, because it relies not on predicting the future based on the past, but the past based on the future.⁸⁸ But here goes. Although *Weber* did not press the

85. *Weber*, 443 U.S. at 222 (Rehnquist, J., dissenting).

86. *Id.* at 201-02 (majority opinion).

87. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

88. Of course, *Weber* may have affected the Court’s approach in its later equal protection cases, adding a degree of circularity to my argument. I find it unlikely that this occurred as none of the Justices viewed *Weber* as involving state action or the private employers and government certified unions it concerned as being state actors and thus none saw the case as implicating

constitutional question, *Bakke* was just the first in a steady stream of cases in which the Court considered the constitutionality of various affirmative action programs. In fact, one year after *Weber*, the Court considered a minority set-aside for federal contracts in *Fullilove v. Klutznick*.⁸⁹ Of the seven Justices participating in *Weber*, two—Justices Rehnquist and Stewart—subjected the federal affirmative action program to strict scrutiny in *Fullilove*.⁹⁰ Three, Justices Brennan, Marshall, and Blackmun, favored applying intermediate scrutiny.⁹¹ That leaves Chief Justice Burger and Justice White. Both declined to decide the proper level of scrutiny to apply in *Fullilove*, finding the program passed muster under either.⁹²

There are good reasons to predict that a majority in our hypothetical *Weber* would favor strict scrutiny. Over the course of the 1980s, first Burger and then White signed on to the strict scrutiny standard.⁹³ Burger's initial openness to applying intermediate scrutiny to the federal affirmative action program in *Fullilove* did not mean that he would have backed a lower level of scrutiny in *Weber*. Instead, his opinion in *Fullilove* repeatedly emphasized the special deference the Court owed Congress as a co-equal branch and the uniquely

equal protection doctrine. Even if *Weber* did affect the Justices' later approach to affirmative action under the equal protection doctrine, however, it likely limited rather than exaggerated the Court's scrutiny. In other words, it is hard to imagine that if the Kaiser plan had been found instead to violate Title VII, the Court would have subsequently applied *lesser* rather than *greater* scrutiny to public affirmative action programs or found the ambit of permissible programs greater under equal protection than under Title VII. If the actual *Weber* decision had any effect on subsequent equal protection doctrine, therefore, it most likely minimized rather than maximized the Court's scrutiny. If the hypothetical *Weber* would fail under even the minimized scrutiny the actual *Weber* decision might have caused, the counterfactual is at least as strong if not stronger than if the actual *Weber* had no effect on the Court's subsequent equal protection decisions.

89. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).
90. *Id.* at 523 (Stewart, J., dissenting) ("Under our Constitution, *any* official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid." (emphasis added)). Justices Powell and Stevens (though less clearly so) also would apply strict scrutiny. *Id.* at 496 (Powell, J., concurring); *id.* at 537 (Stevens, J., dissenting).
91. *Id.* at 519 (Marshall, J., concurring).
92. *Id.* at 472 (plurality opinion).
93. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (affirming the use of strict scrutiny for racial preferences); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (analyzing whether the layoff provision at issue serves a compelling government interest and is narrowly tailored).

broad scope of Congress's remedial powers.⁹⁴ His openness to applying intermediate scrutiny to the federal affirmative action program in *Fullilove* thus did not mean that he would have backed a lower level of scrutiny in *Weber*. Further supporting this outcome, Burger favored a colorblind interpretation of Title VI in *Bakke* and of Title VII in *Weber*.⁹⁵ Justice White is a trickier case since he had favored intermediate scrutiny in *Bakke*. The fact that he chose to avoid the level of scrutiny question in *Fullilove* suggests that he was not wedded to intermediate scrutiny, however. Also, even before he signed on to strict scrutiny, he began finding that affirmative action policies denied equal protection, in agreement with the Justices that applied it.⁹⁶ It is likely, then, that at least Chief Justice Burger and possibly Justice White would have provided the two remaining votes necessary to constitute a majority in favor of applying strict scrutiny in our counter-factual version of *Weber*. If they did, the fact that the non-participating Justice Powell was already on record supporting strict scrutiny would have made the full Court's alignment on the issue appear secure.⁹⁷ That the other non-participant, Justice Stevens, also seemed to embrace strict scrutiny the next year in *Fullilove* would have made the alignment starker.⁹⁸

94. *Fullilove*, 448 U.S. at 483; *id.* at 472.

95. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 217 (1979) (Burger, C.J., dissenting) (“[U]nder the plain language of § 703(d), [a quota] is ‘an unlawful employment practice.’”).

96. *United States v. Paradise*, 480 U.S. 149, 196 (1987) (White, J., dissenting); *Wygant*, 476 U.S. at 294-95 (White, J., concurring).

97. See *supra* note 68 and accompanying text.

98. *Fullilove*, 448 U.S. at 537 (Stevens, J., dissenting) (“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.”). Notably, if White instead backed intermediate scrutiny in *Weber*, as a matter of precedent, head-counting, and optics, the result would not have seemed as secure. First, Powell would likely have participated and joined on the side of strict scrutiny, making an evenly split court. See Malamud, *supra* note 84, at 215 n.126. Even if he did not, with only four votes in the majority, the decision would have had no precedential effect. Going forward, Stevens would be the decisive vote. Although he eventually switched sides, as of 1979 he was most associated with the colorblind constitutionalists, making an application of intermediate scrutiny in *Weber* seem weak. Because the outcome would be non-precedential, it would have eliminated the actual *Weber*'s later protective effects, which are described below. Even if the Court somehow cobbled together a five-Justice majority for a statutory interpretation of Title VII akin to that adopted in the actual *Weber* decision, that interpretation would have been weaker than *Weber*'s. This is because, as the constitutional test in whose shadow the Court interpreted Title VII became more stringent, that statutory interpretation would appear weakened and more open for revision or repudiation. This

If the Court had applied strict scrutiny in *Weber*, it would almost definitely have found Kaiser's program unconstitutional, demonstrating why preserving government by numbers in the workplace required creating space between the treatment of employer preferences under Title VII and equal protection. This step also involves counterfactual speculation, as the Court would settle on what standard to apply to affirmative action (strict scrutiny) before flushing out *how* to apply that standard.⁹⁹ Applying Justice Powell's test from *Bakke* and *Fullilove*, however, is probably a safe approach.¹⁰⁰ As more Justices signed on to strict scrutiny during the 1980s, they complained that Powell's version was not strict enough.¹⁰¹ If *Weber* would fail Powell's test, therefore, it would likely fail any articulation of strict scrutiny.

Under Powell's approach, it is unlikely that the Court would have found that the Kaiser plan furthered a compelling interest. As an end in itself, "[r]acial preference never can constitute a compelling state interest," Powell insisted.¹⁰² Nor was the diversity rationale Powell found compelling in *Bakke* advanced in *Weber* or clearly applicable, given Powell's heavy reliance on factors particular to education.¹⁰³ Powell did allow that "ameliorating, or

might have eliminated some or all of the protective effects the actual *Weber*'s construction of Title VII had during the 1980s, most notably the weight it was given under the doctrine of stare decisis.

99. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (applying strict scrutiny to Richmond's minority set-aside program but finding it "almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way"); see also Neal Devins, *Adarand Constructors, Inc. v. Pena and the Continuing Irrelevance of Supreme Court Affirmative Action Decisions*, 37 WM. & MARY L. REV. 673, 698 (1996) (describing the Court's affirmative action decisions as "indecisive, saying little that can be generalized beyond the facts of a particular dispute").
100. Powell restated his application of strict scrutiny in *Fullilove*, relying primarily but not exclusively on *Bakke*. As it is more concise and clearly stated, I use his articulation of the test in *Fullilove* here.
101. See, e.g., *Paradise*, 480 U.S. at 197 (White, J., dissenting) ("[T]he Court adopts a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny . . .").
102. *Fullilove*, 448 U.S. at 497 (Powell, J., concurring); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (plurality opinion).
103. *Bakke*, 438 U.S. at 311-15 (plurality opinion). Even if diversity were claimed and accepted, Powell made clear that a quota (also at issue in *Weber*) was not an acceptable means of advancing that interest. *Id.* at 319-20; see also *Grutter v. Bollinger*, 539 U.S. 306, 328, 334 (2003) (accepting diversity as a compelling government interest but noting that "[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system"); cf. Jessica Bulman-Pozen, Note, *Grutter at Work: A Title VII Critique of Constitutional*

eliminating where feasible, the disabling effects of identified discrimination” was a compelling interest.¹⁰⁴ But he limited it to discrimination that was identified through “judicial, legislative, or administrative findings of constitutional or statutory violations.”¹⁰⁵ As Powell found the university admissions office in *Bakke* incapable of making the predicate finding, he would of necessity find Kaiser Aluminum and its unions similarly incapacitated.¹⁰⁶ In *Weber*, the Court took judicial notice, based on “numerous” lower court decisions, of the craft union discrimination said to explain Kaiser’s decision to adopt its plan.¹⁰⁷ Perhaps our hypothetical *Weber* court would, as the actual one did, accept prior judicial findings of discrimination in lieu of findings by the institutionally incompetent policy adopter. This still would not save the Kaiser plan, however. The actual *Weber* court found “break[ing] down old patterns of racial segregation and hierarchy” in “occupations which have been traditionally closed to” a protected class sufficient justification for employer preferences.¹⁰⁸ But Powell insisted that countering this sort of “societal discrimination” could not justify a racial preference for strict scrutiny purposes.¹⁰⁹

Affirmative Action, 115 YALE L.J. 1408, 1417 (2006) (noting that accepting diversity as a compelling interest is inconsistent with requiring individualized analysis and arguing that the Court’s “narrow-tailoring analysis . . . eschews numerical accountability”).

104. *Bakke*, 438 U.S. at 307 (plurality opinion).
105. *Id.*; see also *Fullilove*, 448 U.S. at 497-98 (explaining that to establish a compelling interest, the governmental body imposing the racial preference has to be empowered to make a finding of discrimination and to have done so).
106. *Bakke*, 438 U.S. at 309-10 (plurality opinion) (“Petitioner does not purport to have made, and is in no position to make, such findings. . . . Lacking this capability, petitioner has not carried its burden of justification on this issue.”).
107. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197-98 (1979).
108. *Id.* at 208 (internal quotation marks omitted).
109. *Bakke*, 438 U.S. at 310 (plurality opinion) (“‘[S]ocietal discrimination’ does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”); see *id.* at 296 n.36; cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 (1986) (O’Connor, J., concurring) (“I agree with the plurality that a governmental agency’s interest in remedying ‘societal’ discrimination, that is, discrimination not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.”). The Court’s early affirmative action decisions allowed greater leeway for Congress to counter society-wide discrimination. *Fullilove*, 448 U.S. at 490; *id.* at 516 (Powell, J., concurring). These decisions also suggested that a state or local legislative body might have some ability to “eradicate the effects of private discrimination within its own legislative jurisdiction.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92 (1989) (plurality opinion); see also Ian Ayres & Frederick E. Vars, *When Does Private Discrimination*

Even if Kaiser's plan were somehow deemed to advance a compelling interest, it likely would have failed the narrow tailoring test. Some of the factors *Weber* considered to determine the plan's comportment with Title VII were similar to those Powell employed under equal protection.¹¹⁰ Other factors were different but not in ways likely to lead to different outcomes.¹¹¹ Powell's narrow tailoring test imposed a unique criterion, however, which Kaiser's plan would most certainly fail, even if it would stand under all the remaining

Justify Public Affirmative Action?, 98 COLUM. L. REV. 1577, 1607 n.108 (1998) (arguing that scholars have underestimated the room the Court left for affirmative action that redresses societal discrimination). But even if the Court had been willing to give an employer and union the same leeway as a legislature (itself fairly unthinkable), the Court held that "an amorphous claim that there has been past discrimination in a particular industry," all that was claimed in *Weber*, "cannot justify the use of an unyielding racial quota." *Croson*, 488 U.S. at 499; see also *id.* at 526 (Scalia, J., concurring). See generally Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986) (observing that the Court "approved affirmative action only as precise penance for the specific sins of racism a government, union, or employer has committed in the past").

110. For instance, both considered the duration of the preferences, with temporariness auguring in favor of permissibility. *Fullilove*, 448 U.S. at 510 (Powell, J., concurring); *Weber*, 443 U.S. at 208. Both tests weighed the impact on "innocent third parties," *Fullilove*, 448 U.S. at 514 (Powell, J., concurring); *Weber*, 443 U.S. at 208, looking particularly askance at any plan that would require white workers' layoff or discharge. See *Weber*, 443 U.S. at 208; see also *United States v. Paradise*, 480 U.S. 149, 182 (1987) (finding a 50% promotion quota narrowly tailored because it was not an "absolute bar" to white advancement" and did not require layoffs or discharges); *id.* at 189 (Powell, J., concurring); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 488 (1986) (Powell, J., concurring); *Fullilove*, 448 U.S. at 514-15 (Powell, J., concurring); cf. *Wygant*, 476 U.S. 267 (holding unconstitutional an affirmative action policy that called for white employees to be laid off before African American employees with less seniority). Although there is some question whether this factor is applied identically under Title VII and equal protection, I will assume the Kaiser plan could pass muster since the Court subsequently affirmed the constitutionality of a similar 50% promotion quota. *Paradise*, 480 U.S. at 183. That said, the long history of employer intransigence in *Paradise* suggests that the Court might have been more willing to tolerate the burden in *Paradise* than it would have been in *Weber* where no such history was involved.
111. Compare *Weber*, 443 U.S. at 208 (requiring that the plan was "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance"), with *Fullilove*, 448 U.S. at 510 (Powell, J., concurring) (considering "the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or workforce"). Using this standard, goals set at or below the targeted group's percentage of the relevant population or workforce easily passed muster. See *Sheet Metal Workers' Int'l*, 478 U.S. at 487; *Fullilove*, 448 U.S. at 513-14 (Powell, J., concurring). But for the reasons given *supra* note 110 regarding the 50% quota in *Paradise*, I will assume Kaiser's disproportionately large quota would have survived this prong as well, with a similar caveat regarding the generosity of this assumption. *Paradise*, 480 U.S. at 179-81.

factors¹¹²: Powell's test required that no alternative, less "trammeling" remedies were available.¹¹³ Indeed, in the cases where Powell was willing to find that a preference, let alone a disproportionately large quota like that used in the Kaiser plan, was narrowly tailored, he did so in part because more moderate remedies had been tried and failed.¹¹⁴ No such history existed at Kaiser.¹¹⁵

* * *

The Court might have adopted a colorblind interpretation of Title VII or found that the Kaiser plan violated equal protection had the state action doctrine not foreclosed this inquiry in *Weber*. But this thought experiment is about more than the fate of Kaiser's voluntary quota. The attack on affirmative action began in earnest in the 1980s when the Reagan Justice Department set out to eliminate all racial preferences. That *Weber* had instead read Title VII to allow the Kaiser plan provided a bulwark for employers' voluntary preferences during the 1980s attack.

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112. Powell also uniquely required that the preferences scheme include "waiver provisions if the hiring plan could not be met, *Fullilove*, 448 U.S. at 511 (Powell, J., concurring), a requirement the Kaiser plan easily met because filling the quota was conditioned on there being sufficient qualified minority applicants, *Weber*, 443 U.S. at 223 n.3 (Rehnquist, J., dissenting).
113. *Fullilove*, 448 U.S. at 510 (Powell, J., concurring).
114. *Paradise*, 480 U.S. at 172-76; *id.* at 186, 188 (Powell, J., concurring); *Sheet Metal Workers' Int'l*, 478 U.S. at 486-87. The Court has applied this requirement quite rigorously where legislatures were countering society-wide discrimination within their jurisdiction. *See, e.g.*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *cf.* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 784 (2007) (requiring, as a component of the least restrictive means prong, that the defendant "establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program").
115. Most obviously, Kaiser did not first try an in-house training program without quotas or with proportional rather than super-proportional ones. Deborah Malamud reports that Kaiser had experimented with in-house training prior to the plan challenged in *Weber*, but it is not clear when it was tried, whether this training was available to minority applicants (Malamud describes evidence that it was operated on a discriminatory basis), or whether it was tried at the plant in which the quota plan was challenged. Malamud, *supra* note 84, at 194, 209. Further, the parties had agreed at trial that prior to the quota plan, Kaiser had failed to provide in-house training at the plant at issue, so no prior efforts were in the record. *Id.* at 196-97.

III. STATE ACTION'S LINGERING PROTECTIVE EFFECTS

The actual *Weber* decision allowed an employer to defend against a claim of reverse discrimination by establishing that its complained of actions were part of a Title VII-compliant affirmative action program. During the 1980s, this test helped preserve voluntary affirmative action under Title VII and opened a divide between its analysis under Title VII and equal protection.

A. *The Reagan Administration's Attack on Preferences*

The legal attack on preferences, thus far waged by individuals and unions, got an enormous boost when President Reagan put the resources and considerable Supreme Court capital of the executive branch behind it. Immediately after taking office, Reagan assured that his "administration is going to be dedicated to equality" but opposed to any "affirmative action programs becoming quota systems."¹¹⁶ Again, after reelection, he reminded the nation that he had run against quotas in both campaigns, and claimed a mandate to eliminate them.¹¹⁷ As President, he appointed opponents of racial preferences to key civil rights positions, including as Chairman of the Civil Rights Commission and the EEOC.¹¹⁸

Reagan's appointment of William Bradford Reynolds to head the Justice Department's Civil Rights Division most threatened government by numbers under Title VII. Reynolds promptly critiqued "racial formulas, such as hiring quotas and fixed goals . . . in the work place."¹¹⁹ These formulas "create[d] a caste system in which an individual must be unfairly disadvantaged for each person who is preferred," Reynolds urged, and were "as offensive to standards of human decency today as they were some 84 years ago when countenanced

116. Ronald Reagan, The President's News Conference (Jan. 29, 1981), <http://www.presidency.ucsb.edu/ws/?pid=44101>.

117. Ronald Reagan, Radio Address to the Nation on Civil Rights (June 15, 1985), <http://www.presidency.ucsb.edu/ws/index.php?pid=38782>.

118. Ernest Holsendolph, *Skills, Not Bias, Seen as Key for Jobs*, N.Y. TIMES, July 3, 1982, <http://www.nytimes.com/1982/07/03/us/skills-not-bias-seen-as-key-for-jobs.html>; John T. McQuiston, *Clarence M. Pendleton, 57, Dies*, N.Y. TIMES, June 6, 1988, <http://www.nytimes.com/1988/06/06/obituaries/clarence-m-pendleton-57-dies-head-of-civil-rights-commission.html>.

119. William Bradford Reynolds, Assistant Att'y General, Civil Rights Division, Dep't of Justice, Remarks at the Fourth Annual Conference on Equal Employment Opportunity: Recent Developments in Federal Regulations and Case Law 7 (Oct. 20, 1981), <http://files.eric.ed.gov/fulltext/ED208160.pdf>.

under *Plessy v. Ferguson*.¹²⁰ The White House quickly assembled a special task force on employment discrimination,¹²¹ and Reynolds publicly announced his desire to, as the *Wall Street Journal* put it, “get the Supreme Court to rule that it is illegal and unconstitutional to give minorities and women preference in hiring and promotion.”¹²² The administration’s attack would be wholesale. Reynolds “bridled at government-imposed preferences and ‘race-conscious relief,’ even as a remedy for proven discrimination.”¹²³ Instead, remedies could benefit “only the individuals discriminated against. . . . Relief, as the tag went, must be victim-specific; if so it is color-blind, for it is predicated on victim status, not race.”¹²⁴ Reconsidering *Weber*, limiting relief under Title VII, securing strict scrutiny for preferences, and ensuring that narrow tailoring would, with exceedingly minimal exceptions, be “fatal in fact”¹²⁵—all would be on the administration’s sweeping agenda.

In complicated ways, Reynolds’s plans were limited by the state action doctrine. Most obviously, the state action doctrine had secured *Weber*, a precedent that provided a drag on the administration’s attack over the course of the 1980s.

B. *Weber’s Protective Effects*

Weber delayed and sculpted the Reagan administration’s challenge to voluntary employer preferences and helped protect them once that attack occurred.

120. *Id.* at 8 (citing *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

121. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 105 (1991).

122. Robert E. Taylor, *Civil Rights Division Head Will Seek Supreme Court Ban on Affirmative Action*, WALL ST. J., Dec. 8, 1981, at A4.

123. FRIED, *supra* note 121, at 105.

124. *Id.*

125. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as “fatal in fact”). *But see* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding Michigan Law School’s racially conscious admissions program under strict scrutiny); Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 237 (1995) (rejecting the idea that strict scrutiny is “fatal in fact”); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 361-62 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“[O]ur review under the Fourteenth Amendment should be strict—not ‘strict in theory and fatal in fact,’ because it is stigma that causes fatality—but strict and searching nonetheless.” (quoting Gunther, *supra*)).

1. *Equal Protection Not Title VII; Public Not Private*

With *Weber* so recently decided, the Reagan administration initially avoided the issue of voluntary employer preferences under Title VII. When Reynolds laid out his agenda in 1981, he opined that “*Weber* is wrongly decided” and expressed hope that, were the Court to revisit the issue, “it would arrive at a different conclusion.”¹²⁶ He also spoke out against all uses of “statistical formulae” in the workplace.¹²⁷ But attacking voluntary employer preferences under Title VII would not be the administration’s immediate goal.¹²⁸ For the most part, the administration challenged *courts’* authority to order—not *employers’* leeway to voluntarily adopt—affirmative action programs.¹²⁹ To the extent that Reynolds focused on voluntary preferences, he pledged to fight for *constitutional* constraints on their use and focused on public, not private, employers.¹³⁰ For instance, the government sought unsuccessfully to intervene before the Sixth Circuit Court of Appeals in a challenge to an affirmative action policy adopted by the Detroit Police Department.¹³¹ As the *Los Angeles Times* reported, the Justice Department argued “that public employers are barred by the Constitution from voluntarily setting up promotion plans based on race, even though the Supreme Court [in *Weber*] approved them for private employers.”¹³²

Further, when Reynolds subsequently targeted voluntary employer preferences under Title VII during Reagan’s second term, he sought to

126. See Taylor, *supra* note 122.

127. William Bradford Reynolds, Assistant Att’y General, Civil Rights Division, Dep’t of Justice, Remarks Before the 1983 Mid-Winter Meeting of the American Bar Association Equal Employment Law Committee 7 (Mar. 4, 1983) (on file with author); see also Reynolds, *supra* note 119 (critiquing the “use of racial formulas” in the workplace).

128. Indeed, in 1981, Reynolds reassured a House Subcommittee that “the *Weber* case is now the law. It would be improper and irresponsible of me to act in a way that is contrary to the law.” NORMAN C. AMAKER, CIVIL RIGHTS AND THE REAGAN ADMINISTRATION 136 n.131 (1988).

129. *Administration Challenges Minority Plan*, L.A. TIMES, May 3, 1983, at B18. See, e.g., Brief of the United States as Amicus Curiae in Support of Petitioners, Firefighters Local Union No. 1784 v. Carl W. Stotts, 467 U.S. 561 (No. 82-206) (1984), <http://www.justice.gov/osg/briefs/1983/sg830186.txt>.

130. Taylor, *supra* note 122.

131. Bratton v. City of Detroit, 712 F.2d 222, 223 n.1 (6th Cir. 1983) (noting that the Justice Department had submitted an amicus brief in support of granting rehearing that arrived after a majority of the Court had already voted to deny).

132. *Administration Challenges Minority Plan*, *supra* note 129.

circumvent *Weber* by challenging public employer programs. Reynolds's influence grew after Reagan's reelection, as he joined the Justice Department's litigation steering committee and his protégés from the Civil Rights Division moved into influential positions in the Department.¹³³ He also gained a powerful ally in Edwin Meese, a close adviser of Reagan's who became Attorney General in 1985. Meese quickly declared that "[c]ounting by race is a form of racism."¹³⁴ The Reagan administration, he asserted, "reject[ed] . . . unequivocally" the argument that affirmative action required "race-conscious, preferential treatment."¹³⁵ Instead, using "racially preferential quotas . . . is nothing short of a legal, moral and constitutional tragedy."¹³⁶ Upon reelection, Reagan specifically singled out for attack the use of voluntary quotas under Title VII, declaring them "exactly what the civil rights laws were designed to stop."¹³⁷

Reagan's Justice Department did not challenge *Weber* head on, however. Instead, it built on Justice Rehnquist's unusual dissent when the Court in 1985 declined to review an appellate court decision upholding a state's voluntary preferences under *Weber*.¹³⁸ Rehnquist quoted *Weber*'s caveat that Kaiser's plan "does not involve state action" and urged that the Court should address how the presence of state action affected the *Weber* framework.¹³⁹ The preferences' violation of equal protection was not at issue in the denied petition, Rehnquist acknowledged. But he urged that "when a state employer claims that arguably discriminatory conduct on its part is nonetheless authorized by Title VII, the claim of such statutory authorization must be considered in the light of the

133. See DOUGLAS KMIEC, *THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* 153 (1992).

134. Edwin Meese, Att'y General, Constitution Day Speech at Dickinson College 19 (Sept. 17, 1985), <http://www.justice.gov/ag/aghstory/meese/1985/09-17-1985.pdf>.

135. *Id.* at 17.

136. *Id.* at 18.

137. Reagan, *supra* note 117. On the Reagan administration's anti-affirmative action policies generally, see DOBBINS, *supra* note 48, at 133-38; FRIED, *supra* note 121, at ch. 4; KMIEC, *supra* note 133, at ch. 7; and MACLEAN, *supra* note 64, at 300-05.

138. *Bushey v. N.Y. Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984) (holding that under *Weber* a state agency could separately normalize the scores of minority and nonminority takers of a qualifying exam in order to avoid disproportionate numbers of nonminority candidates for promotion), *cert. denied*, 469 U.S. 1117 (1985).

139. *Bushey*, 469 U.S. at 1117 (Rehnquist, J., dissenting) (quoting *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 200 (1979)).

prohibitions of the Fourteenth Amendment.”¹⁴⁰ Even if Congress intended *private* employers to have the leeway to adopt voluntary preferences that *Weber* provided, Rehnquist contended that it could not have intended to allow state and local employers “to claim that their actions were shielded under Title VII even if the actions would violate the Fourteenth Amendment.”¹⁴¹ It was this narrower point only that Reynolds pursued during Reagan’s second term.¹⁴²

2. Precedential Effects

When the Justice Department eventually challenged public employers’ voluntary preferences under Title VII, *Weber* helped protect them. Most directly, only because of stare decisis did a majority of the Court find that the public employer preference at issue in *Johnson v. Transportation Agency* comported with Title VII.¹⁴³ Without Justice Stevens’s joinder, Justice Brennan’s opinion would not have commanded a majority of the Court. Stevens joined despite believing that *Weber* was wrongly decided.¹⁴⁴ *Weber*, however, was now “an important part of the fabric of our law,” Stevens explained, which he found a “sufficiently compelling” reason to “adhere to [its] basic construction of” Title VII.¹⁴⁵ That *Weber* was already on the books also secured Justice O’Connor’s concurrence in the judgment, decisively ensuring the continued viability of voluntary employer preferences under Title VII.¹⁴⁶ With the remaining three Justices all in favor of reversing *Weber*, its existence is all that saved the Court from adopting a colorblind interpretation of Title VII in *Johnson*.

140. *Id.* at 1121.

141. *Id.*

142. This was despite calls for a check on private employers’ use of preferences. *See, e.g.,* Herman Belz, *What the Supreme Court Means on Racial Quotas*, L.A. TIMES, June 21, 1984, at F7. President Reagan similarly focused only on public employers in his 1985 civil rights address arguing that voluntary quotas were contrary to Title VII. Reagan, *supra* note 117 (criticizing those who “tell us that the Government should enforce discrimination in favor of some groups through hiring quotas”).

143. 480 U.S. 616 (1987).

144. *See id.* at 643-44 (Stevens, J., concurring).

145. *Id.* at 644.

146. *See id.* at 648 (O’Connor, J., concurring). Public employer preferences, as commentators noted, still hung under equal protection’s ominous cloud. *See, e.g.,* Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 368 (1989).

Less tangibly, *Weber* shielded voluntary preferences through what might be called the first-mover advantage. While hardly a formal canon of construction, where other statutes regulated similar conduct but only some involved state action, the Court's initial interpretation has bled across the state action line regardless of the different constitutional stakes.¹⁴⁷ Imagine if the Court in *Johnson* had been considering for the first time voluntary employer preferences under Title VII or that my hypothetical *Weber* had produced a splintered Court akin to that in *Bakke*, with neither a constitutional nor statutory ground prevailing. If so, this first authoritative interpretation of Title VII would have occurred deeply in the Constitution's shadow. Indeed, the government and a dissenting Justice Scalia urged the Court in *Johnson* to follow the approach Rehnquist had suggested previously and read equal protection limits into Title VII.¹⁴⁸ For the reasons discussed in the *Weber* hypothetical, this would have led to a narrower ambit for voluntary employer preferences.¹⁴⁹ This more crabbed interpretation, in turn, might have then been applied in the private employer context due to the first-mover effect.¹⁵⁰ Instead, the inertial path ran in the other direction: the Court swept aside equal protection concerns in *Johnson*,¹⁵¹

147. For instance, under the federal labor laws, the Supreme Court first interpreted the Railway Labor Act, 45 U.S.C. § 152 (2006), to bar unions from using money collected from the workers they represented for political purposes to which those workers objected. See *Int'l Assoc. of Machinists v. Street*, 367 U.S. 740 (1961). In doing so, the Court avoided First Amendment issues that would have been raised had the statute not been so interpreted. *Id.* at 750; see also *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) (reserving judgment with respect to cases where "the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment"). That interpretation was then extended as a matter of First Amendment doctrine to public sector workers organized under similar state law provisions, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 226 (1977), and later to private sector workers organized under an entirely different statute, the National Labor Relations Act, 29 U.S.C. §§ 151-69 (2012), where neither the direct nor avoided constitutional issues pertained, *Comm'n Workers of Am. v. Beck*, 487 U.S. 735 (1988).

148. *Johnson*, 480 U.S. 616, 664-65 (1987) (Scalia, J., dissenting); Brief for the United States as Amicus Curiae Supporting Petitioner, *Johnson*, 480 U.S. 616 (No. 85-1129), 1986 WL 728148, at *11 ("Victim specific, make whole relief is the natural and usual remedial corollary to the substantive 'individual rights' principle of Title VII and the Equal Protection Clause.").

149. Cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down a layoff preference under equal protection in part because it targeted societal as opposed to employer-specific discrimination).

150. See *supra* note 147.

151. *Johnson*, 480 U.S. at 620 n.2.

and applied *Weber's* test, emphatically crafted for the private sector, to the public employer involved.¹⁵²

* * *

Thanks to the Court's narrow, formal approach to state action, during the 1980s, Title VII preserved space for voluntary preferences by private employers that were no longer available to public employers under equal protection. Going forward, even the Reagan Justice Department conceded that the test under Title VII was more permissive than under equal protection.¹⁵³

IV. STATE ACTION TO THE RESCUE AGAIN?

In 2009 the Supreme Court in *Ricci v. DeStefano* did what it had refused to do in *Johnson*: interpret Title VII in light of equal protection standards.¹⁵⁴ *Ricci* involved a reverse discrimination claim against a city for deciding not to certify the results of a promotion exam on which "white candidates had outperformed minority candidates."¹⁵⁵ In defense, city officials argued that, if "they had certified the results, they could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters."¹⁵⁶ The Court avoided applying equal protection directly by finding the city's actions violated Title VII.¹⁵⁷ Equal protection nonetheless crept into the Court's analysis, as Justices Rehnquist and Scalia as well as the Reagan administration

152. *Id.* at 627 ("The assessment of the legality of the Agency Plan must be guided by our decision in *Weber*"). Although beyond the scope of this essay, *Weber* also helped protect *judicial* use of numbers-based remedies under Title VII when they also came under attack in the 1980s. See Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 448, 453, 463, 479 (1986).

153. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION 49 (1988).

154. 557 U.S. 557 (2009).

155. *Id.* at 562.

156. *Id.* at 563. Disparate impact liability can attach if an employer adopts a practice that disproportionately disadvantages protected workers unless the employer demonstrates that the practice is a "business necessity" and the plaintiff cannot identify a less discriminatory alternative. *Id.* at 577-78 (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2(k)(1) (2006))).

157. *Ricci*, 557 U.S. at 563.

had urged it should in the 1980s.¹⁵⁸ How broadly *Ricci* sweeps is as yet unclear.¹⁵⁹ As courts work this question out, the state action doctrine could once again shield some voluntary employer preferences.

Ricci newly imports equal protection standards into Title VII analysis of employers' preferential practices. Finding that Title VII's disparate impact and disparate treatment provisions were "in conflict absent a rule to reconcile them,"¹⁶⁰ the Court turned to "cases similar to this one, albeit in the context of the Equal Protection Clause."¹⁶¹ Specifically, *Ricci* borrowed these equal protection cases' requirement that an employer have a "strong basis in evidence" that [its] remedial actions were necessary" before a court will find the employer's race-conscious efforts to remedy past racial discrimination constitutional.¹⁶² Translated into the Title VII context, in order to escape liability, *Ricci* required an employer to have a strong basis in evidence that its abandoned practices either "were not job related and consistent with business necessity, or" if they were, that "there existed an equally valid, less-discriminatory alternative that" the employer had "refused to adopt."¹⁶³

Thus far, *Ricci* has not spelled the end of voluntary employer preferences but it *has* created the need to distinguish the preferences to which the framework applies. *Ricci* does not mention *Johnson* or *Weber*,¹⁶⁴ and the *Ricci* dissenters explicitly distinguish the employer defense rejected therein from that allowed in *Johnson* and *Weber*.¹⁶⁵ Whether that distinction will hold is as yet

158. See *supra* note 148 and accompanying text.

159. Academic predictions about *Ricci*'s impact diverge widely. See, e.g., Barbara Jean D'Aquila, *A Management Employment Lawyer's Perspective on Ricci v. DeStefano*, 25 ABA J. LAB. & EMP. L. 213, 221 (2010) (interpreting *Ricci* to indicate "that when the employer is undertaking voluntary affirmative action to achieve the objectives of Title VII, *Ricci*'s stricter strong-basis-in-evidence standard should not apply and that prior affirmative action decisions remain valid"); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010) (identifying two interpretations of *Ricci* compatible with disparate impact and one interpretation under which disparate impact conflicts with equal protection).

160. *Ricci*, 557 U.S. at 580.

161. *Id.* at 582.

162. *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). The Court states that it is only borrowing equal protection doctrine, which is seemingly different than finding that Title VII must be construed to comport with equal protection. As Richard Primus has argued, however, equal protection reasoning infects *Ricci*'s entire analysis, rendering the decision a de facto conflation of the two. Primus, *supra* note 159, at 1362.

163. *Ricci*, 557 U.S. at 587.

164. See *id.*

165. *Id.* at 626 (Ginsburg, J., dissenting).

undetermined. The majority opinion contains language that could sweep broadly to include preferences such as those in *Weber* and *Johnson* that are adopted to correct a “manifest imbalance” as well as language promising the decision’s narrow reach.¹⁶⁶ Lower courts thus far have interpreted *Ricci* to apply only to public employer preferences adopted to avoid disparate impact liability.¹⁶⁷ The Second Circuit has given the question its most extensive treatment, finding that the *Weber/Johnson* framework still applies if a public employer prospectively adopts preferences to benefit a protected class generally.¹⁶⁸

As yet unaddressed is the *Ricci* test’s application to *private* employers’ preferences, whether adopted to avoid disparate impact liability or to “break down old patterns of racial segregation and hierarchy.”¹⁶⁹ Whatever position the Supreme Court takes regarding the Second Circuit’s approach to *public* employers, the state action doctrine could (and indeed should) foreclose *Ricci*’s application to *private* employer preferences under either the disparate impact or

166. Compare *id.* at 583 (majority opinion) (“[T]he standard appropriately constrains employers’ discretion in making race-based decisions.”), with *id.* at 585 (“We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.”).

167. See, e.g., *NAACP v. N. Hudson Reg’l Fire & Rescue*, 665 F.3d 464, 484 (3d Cir. 2011) (distinguishing *Ricci*, where defendants had to choose between possible disparate impact liability and a definite disparate treatment action, from the instant case, in which “North Hudson face[d] a classic disparate-impact claim, one that we have resolved based on the three-step inquiry dictated by the statute”); *United States v. Brennan*, 650 F.3d 65, 97–99, 104 (2d Cir. 2011); *Humphries v. Pulaski Cnty. Special Sch. Dist.*, 580 F.3d 688, 693–97 (8th Cir. 2009) (applying the *Weber/Johnson* framework to a school district’s affirmative action policies, including the use of biracial hiring committees as well as minority hiring goals and quotas); *Shea v. Kerry*, 961 F. Supp. 2d 17, 54 (D.D.C. 2013) (citing *Weber* and *Johnson* while describing the standards by which courts analyze affirmative action plans and noting that “[w]hile the tide may be turning against this approach to affirmative action, it has yet to directly reach *Johnson*’s Title VII standard”); cf. *Briscoe v. City of New Haven*, 654 F.3d 200, 208–09 (2d Cir. 2011) (construing *Ricci* not to allow employers to defend against disparate impact claims by asserting a “strong basis in evidence” that it would have been subject to disparate treatment liability).

168. *Brennan*, 650 F.3d at 104 (finding that Title VII’s disparate treatment provision “draws a distinction between *affirmative action* plans, which are intended to provide *ex ante* benefits to all members of a racial or gender class, and *make-whole relief*, which is intended to provide *ex post* benefits to specified individuals who have suffered discrimination,” and stating that the *Weber/Johnson* framework applies only to the former).

169. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979).

Weber/Johnson defense. The strong-basis-in-evidence test that *Ricci* borrowed is derived from strict scrutiny's compelling interest prong.¹⁷⁰ Even the Court's conservative Justices (indeed, especially the Court's conservative Justices) should find imposing this standard on private employers unwarranted. If *Ricci* did no more than *borrow* a standard from equal protection doctrine, then as a matter of statutory construction, this borrowing is less justified in the private sector. In *Ricci*, the only factor the Court weighed in favor of maximizing employer flexibility was "Congress's intent that 'voluntary compliance' be 'the preferred means of achieving the objectives of Title VII.'"¹⁷¹ Regarding private employers, however, an additional factor weighs in favor of flexibility and against *Ricci*'s borrowing: what Justice Brennan in *Weber* described as Congress's desire to limit federal regulation of the private sector and maximize "traditional business freedom."¹⁷² This desire derives from the same public/private divide that animates the traditional state action doctrine.

As a matter of constitutional law, whether *Ricci* merely borrows equal protection doctrine or is conforming Title VII to it, the Justices in the *Ricci* majority should be loath to extend its test to private sector employers. If Congress intended equal protection doctrine to sculpt the scope of Title VII as applied to state and local employers has been debated since at least *Johnson*.¹⁷³ But whatever arguments this position has in its favor, they evaporate as regards the private sector—especially for those wedded to a narrow conception of state action. State and local employers' voluntary preferences are undeniably infected with state action and Congress, in applying Title VII to them, relied on its authority to enforce the Fourteenth Amendment's equal protection provisions.¹⁷⁴ In contrast, Congress grounded the Title VII provisions

170. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

171. *Ricci*, 557 U.S. at 581 (quoting *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 515 (1986)).

172. *Weber*, 443 U.S. at 207; see also *supra* note 84 and accompanying text.

173. See, e.g., Devins, *supra* note 146, at 369-70 (surveying arguments for and against this position); Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524, 542 (1987) ("[I]f Congress thought there would be such a difference between public and private employers, with the constitutional provisions significantly more stringent than those of Title VII, it surely would have so indicated.").

174. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 5, 86 Stat. 103, 107 (codified as amended at 42 U.S.C. § 2000e-6(c)-(e) (2006)). The Title VII amendments were explicitly passed under § 5 of the Fourteenth Amendment. H.R. REP. NO. 92-238 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2154.

governing private actors solely on its Commerce Clause authority.¹⁷⁵ Furthermore, these provisions merely *permit* private actors to use voluntary preferences, a form of state action even the Warren Court at its height never found to trigger constitutional scrutiny.¹⁷⁶ There is thus no basis for importing equal protection standards into Title VII review of private employers' voluntary preferences. Indeed, doing so would violate one of the central tenets of the state action doctrine. As Reagan's former Solicitor General Charles Fried, a strong supporter of the state action divide and the colorblind Constitution, has argued, "the notion that governments are bound by stricter rules than are private actors" renders *Weber* "appropriate."¹⁷⁷

Even if Title VII does more than permit those preferences adopted to avoid disparate impact liability, there is still not sufficient state action to trigger constitutional concerns. Some affirmative action critics argue that Title VII not only permits, but also actually *encourages* employer preferences by providing disparate impact liability.¹⁷⁸ This claim is at its strongest when an employer

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175. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 701, 78 Stat. 241, 253-55 (codified as amended at 42 U.S.C. § 2000e). Although many assumed initially that Title VII as applied to private actors codified, and thus tracked, the Constitution's equal protection guarantees, this view was ultimately rejected by the Supreme Court. See *Washington v. Davis*, 426 U.S. 229 (1976). See generally LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at chs. 8-10). This view of Title VII is also antithetical to the textualist, strict constructionist approach to statutory interpretation legal conservatives have promoted since the 1970s. See, e.g., DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, *GUIDELINES ON CONSTITUTIONAL LITIGATION* (1988).
176. See *supra* Subsection III.B.1; see also *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999) ("Action taken by private entities with the mere approval or acquiescence of the State is not state action." (citing *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982))).
177. FRIED, *supra* note 121, at 130; see also Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1829-30 (2010) (arguing that the fact that "current constitutional anti-discrimination norms may not be suited for simple extension to private people" supports retaining the current narrow state action doctrine). On Fried's strict adherence to narrow state action, see LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at ch. 13). But see Brief for the U.S. as Amicus Curiae Supporting Petitioner at 29 n.5, *Johnson v. Transp. Agency of Santa Clara Cnty.*, 480 U.S. 616 (1987) (No. 85-1129) 1986 WL 728148, at *9 ("As to all employers covered by Title VII, this Court's prior pronouncements on the constitutional permissibility of voluntary affirmative action programs by public employers are instructive with respect to Title VII's parallel bar of discrimination, since similar values and interests are at stake." (emphasis added)).
178. See FRIED, *supra* note 121, at 93-96, 119; see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992 (1988) (plurality opinion) ("[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures."); Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L.

takes preferential action in order to avoid feared disparate impact liability, as the city in *Ricci* did. Yet even this strongest case should not trigger equal protection concerns in private employment, especially given the state action contractions of the Burger Court. In the late 1970s and early 1980s, Chief Justice Burger and Justice Rehnquist led the Court in more narrowly construing when a state “exercised coercive power or . . . provided such significant encouragement . . . that the choice must in law be deemed to be that of the State.”¹⁷⁹

The Court, since articulating the “significant encouragement” test, has never found that the test was met,¹⁸⁰ nor should proponents of a contracted state action doctrine do so in this instance. Indeed, it would vastly expand the ambit of state action were the Court to hold that a private decision made to avoid legal liability sufficed.¹⁸¹ Every action taken to avoid civil or criminal laws could potentially result in constitutional applicability. For instance, a private employer that prevents its employees from making racist or sexist remarks in the workplace in order to avoid hostile work environment claims would trigger free speech rights for the censured employee. If the employer bars handguns in

REV. 535, 537 (2011) (noting the tension between disparate impact and disparate treatment liability because the former encourages employers to “make race-conscious employment decisions to avoid disparate impact liability”); *cf.* *Ricci v. DeStefano*, 557 U.S. 557, 581 (2009) (“Allowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate-impact liability would encourage race-based action at the slightest hint of disparate impact.”).

179. *Compare Blum*, 457 U.S. at 1008 (finding that federal regulations generally encouraging a decision that was “made by private parties according to professional standards that are not established by the State” did not suffice), *with Reitman v. Mulkey*, 387 U.S. 369 (1967) (finding that a state constitutional amendment repealing a fair housing law encouraged private discrimination sufficiently to violate equal protection). *See* LEE, *THE WORKPLACE CONSTITUTION*, *supra* note 6 (manuscript at chs. 10, 13).
180. *See, e.g., American Mfrs. Mut. Ins.*, 526 U.S. at 52-53 (finding that a law permitting private insurers to withhold a certain type of payment did not convert such withholdings into state action and noting that “[w]e have never held that the mere availability of a remedy for wrongful conduct, even when the private use of that remedy serves important public interests, so significantly encourages the private activity as to make the State responsible for it”); *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 546-47 (1987) (holding that where the federal government did no more than “approv[e] of or acquiesce[] in” the United States Olympic Committee’s enforcement of its exclusive right to use the word “Olympic,” there was not sufficient state action to trigger Fifth Amendment protections (internal quotation marks and citation omitted)).
181. Such a holding regarding Title VII would be all the more sweeping because it would include not only actions taken to avoid criminal laws but also those taken to avoid far less coercive civil liability.

the workplace to avoid violent workplace felonies, its employees could raise Second Amendment challenges. Just as the current Court would never find that an employee could directly bring equal protection challenges against a private employer that adopts a preference in order to avoid disparate impact liability, the Court should not import equal protection standards into Title VII analysis of those preferences.

* * *

Even if *Johnson* falls to *Ricci*, *Weber* should not share its fate, nor should preferences that private sector employers adopt to avoid disparate impact liability.

CONCLUSION

If and when the Supreme Court addresses *Ricci*'s application to private employment, proponents of voluntary employer preferences will have to decide how to limit its reach. As this history demonstrates, for over thirty years, the Supreme Court's narrow view of state action has been these preferences' primary protection. Proponents would be wise to insist that it remain so. I have marshaled this history not to map future litigation strategy, however, but to emphasize how quickly and persistently the reverse-state-action and government-by-numbers dimensions of Ackerman's civil rights revolution came into conflict. With government by numbers secured under Title VII but increasingly constrained under equal protection, the relationship between the two became of paramount importance. The narrow state action doctrine fashioned by the Burger Court directly and indirectly insulated and preserved government by numbers under Title VII and in the private sector.

What does this mean for Ackerman's account of the civil rights revolution? I began by arguing that this history reveals an unexplored tension inherent in Ackerman's account. If Title VII truly reworked the state action status of private employers and unions, then most likely either Title VII would have been interpreted to prohibit voluntary preferences or they would have been found unconstitutional. Either way, a key dimension of government by numbers would have been eliminated from the civil rights revolution's response to employment discrimination.¹⁸² If so, the civil rights revolution, as Ackerman describes it, was inherently unstable.

182. The other dimensions of government by numbers in the workplace that were not insulated by the state action doctrine have also been threatened by equal protection. See *Ricci*, 557 U.S.

The tension could be illusory, but explaining it away raises hard and as yet unanswered questions for Ackerman's overall theory of extra-Article V constitutional amendment. One way to explain away the tension is to contend that it resulted not from conflicts endemic to the civil rights revolution but from the Court's failure to appropriately incorporate that revolution's constitutional changes. In this account, the Court betrayed the civil rights revolution when it turned against government by numbers and towards colorblindness in the equal protection context.

This is a plausible, even attractive, position: scholars have lodged trenchant critiques of the Court's colorblind turn since it began.¹⁸³ But this account raises questions about how consolidation is measured under Ackerman's theory. According to Ackerman, the Court never fully embraced government by numbers under equal protection.¹⁸⁴ Instead, it wavered, reaching back to what Ackerman calls the anti-humiliation principle in *Brown* even as it deployed a colorblind constitutionalism dating to World War II.¹⁸⁵ None of the cases Ackerman discusses involved the workplace. The Court's first decision addressing government by numbers under equal protection and in the employment discrimination context, *Washington v. Davis*, rejected it.¹⁸⁶

at 584 (avoiding deciding whether the city's actions taken to avoid disparate impact liability violated equal protection by finding that they violated Title VII); *Local No. 93, Int'l. Ass'n. of Firefighters v. Cleveland*, 478 U.S. 501, 517 n.8 (1986) (observing that although a challenged consent decree did not violate Title VII, its compliance with equal protection was a separate, and likely harder, question); cf. *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (upholding numbers-based judicial remedies for employment discrimination under equal protection and Title VII, but under extremely egregious facts).

183. Reva Siegel, in particular, has explored its limitations, inconsistencies, and contestable roots. See, e.g., Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); Siegel, *supra* note 65. For a recent book-length critique, see RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* (2013).
184. In Ackerman's view, the Court went the furthest toward government by numbers under equal protection in the education context, but even there it pulled back. See, e.g., ACKERMAN, *CIVIL RIGHTS*, *supra* note 2, ch. 12. esp. 267-69, 272-76, 278-82, 287) (arguing that although the Court embraced numbers-based judicial remedies in the education context, it rejected government by numbers for identification purposes, requiring discriminatory intent for an equal protection violation).
185. *Id.* at 257-88. Ackerman argues that the Court's colorblind decisions do not "deserve[] a central place in the civil rights canon" because they were merely a judicial effort "to fill in a gap left in the wake of an epochal set of decisions by We the People." *Id.* at 291. They instead should be treated as "a supplement to, not a substitute for, the principles elaborated in *Brown*, *Emporia*, and the landmark statutes." *Id.*; see also *id.* at 299, 321.
186. 426 U.S. 229 (1976) (declining to apply disparate impact analysis under equal protection).

Coming in 1976, shortly after Ackerman's account ends, *Davis* presses the question of whether government by numbers was ever consolidated as a matter of equal protection doctrine, at least in the workplace. An affirmative answer would resolve the tension I posited, but providing that answer requires knowing more about how consolidation occurs and when, under Ackerman's theory, the window for it closes and that for judicial betrayal opens.

Alternatively, perhaps the tension I identify is illusory because there are simply two constitutional tracks, one embedded in landmark statutes and the other in formal constitutional text. On this account, the civil rights revolution only ever reversed state action under Title VII, leaving intact the traditional doctrine as a matter of enforcing the Constitution's equal protection provisions. This is the sturdiest solution, as it could also allow government by numbers under Title VII but not equal protection, making easy sense of *Davis*. It seems to fall far short of Ackerman's vision for extra-Article V constitutional change, however. He inveighs against the legal profession for ignoring landmark statutes when interpreting Article V-compliant text and urges that they should inform each other.¹⁸⁷ Ackerman promises to address in a future volume how to synthesize the civil rights revolution across time, then to now.¹⁸⁸ But the fate of government by numbers in the employment discrimination context also calls for elaborating how synthesis should occur synchronically, across the statutory and textual domains of Ackerman's Constitution. Only by clarifying this dynamic can we truly determine whether the tension I have posited is illusory or real, and whether it is attributable to the consolidation, synthesis, or betrayal of the civil rights revolution.

187. ACKERMAN, CIVIL RIGHTS, *supra* note 2, at 311-42.

188. *Id.* at 328-37.