Vanderbilt Law Review

Volume 33
Issue 4 *Issue 4 - May 1980*

Article 3

5-1980

Doing Good the Wrong Way: The Case for Delimiting Presidential Power Under Executive Order No. 11,246

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NOTES

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I. INTRODUCTION

The purge of discrimination is a national goal of the highest order and calls for commensurate best efforts. The eradication of employment discrimination and its effects justifiably[1] has been of paramount concern not only to Congress,[2] which is charged with formulating and implementing national goals, but also to the Executive Branch, which since 1941 has issued a series of executive orders dealing with the subject.[3] These executive orders were the federal government's only action on the employment discrimination

1. Senator Humphrey explained the overriding need for equal employment opportunity in the fight against discrimination: "Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities." 110 CONG. REC. 6552 (1964).

2. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206 (1976); Age Discrimination Act of 1975, 42 U.S.C. §§ 621-639 (1976); Civil Rights Act of 1870, 42 U.S.C. § 1981 (1976); Civil Rights Act of 1866, 42 U.S.C. § 1982 (1976); Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976); Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1976); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified in scattered sections of 18, 25, 28, 42 U.S.C.); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-216, 86 Stat. 103 (codified in scattered sections of 5, 42 U.S.C.); State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, tit. I, 86 Stat. 919 (codified in scattered sections of 26, 31 U.S.C.) (amended 1974); Vietnam Era Veterans' Readjustment Act of 1972, Pub. L. No. 92-540, 86 Stat. 1097 (codified in scattered sections of 38 U.S.C.); Vocational Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified in scattered sections of 29 U.S.C.).

3. The key executive orders that have addressed the problem of employment discrimination are as follows: Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Compilation); Exec. Order No. 9001, 3 C.F.R. 1054 (1938-1943 Compilation); Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 Compilation); Exec. Order No. 10,210, 3 C.F.R. 390 (1949-1953 Compilation); Exec. Order No. 10,227, 3 C.F.R. 739 (1949-1953 Compilation); Exec. Order No. 10,231, 3 C.F.R. 741 (1949-1953 Compilation); Exec. Order No. 10,243, 3 C.F.R. 752 (1949-1953 Compilation); Exec. Order No. 10,281, 3 C.F.R. 781 (1949-1953 Compilation); Exec. Order No. 10,298, 3 C.F.R. 828 (1949-1953 Compilation); Exec. Order No. 10,308, 3 C.F.R. 837 (1949-1953 Compilation); Exec. Order No. 10,479, 3 C.F.R. 961 (1949-1953 Compilation); Exec. Order No. 10,577, 3 C.F.R. 218 (1954-1958 Compilation); Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963 Compilation); Exec. Order No. 11,114, 3 C.F.R. 774 (1959-1963 Compilation); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), *reprinted as amended in* 42 U.S.C. § 2000e app., at 1232 (1976); Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Compilation); Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Compilation); Exec. Order No. 11,758, 3 C.F.R. 841 (1971-1975 Compilation); Exec. Order No. 11,830, 3 C.F.R. 936 (1971-1975 Compilation); Exec. Order No. 11,914, 3 C.F.R. 117 (1976 Compilation). The current orders are also collected and reprinted in 2 EMPL. PRAC. GUIDE (CCH) ¶¶ 3675-3765.

front until the passage of the Civil Rights Act of 1964.[4] They also have gained increased importance as antidiscrimination weapons, in part because they sometimes impose greater duties on employers than does existing legislation.[5]

Executive Order No. 11,246 is the currently operative order relating to employment discrimination.[6] The Order and the regulations promulgated pursuant to it[7] (hereinafter referred to jointly as the "Executive Order Program") apply to most contractors and subcontractors of the federal government.[8] The Order mandates

4. Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1976)).

5. For example, in Title VII, §§ 703(a) and (d) of the Civil Rights Act of 1964 prohibit employers from discriminating in hiring on the basis of race, color, sex, religion, or national origin, 42 U.S.C. §§ 2000e-2(a),-2(d) (1976), and under § 703(j) an employer cannot be required to grant preferential treatment to minority members, 42 U.S.C. § 2000e-2(j) (1976). In comparison, Exec. Order No. 11,246, § 202, 3 C.F.R. 339, 340 (1964-1965 Compilation), *reprinted as amended in* 42 U.S.C. § 2000e app., at 1232-33 (1976), provides that each government contract contain *inter alia* the following clause:

> During the performance of this contract, the contractor agrees as follows:
>
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. (emphasis supplied).

The requirement of affirmative action contained in the Order goes beyond the scope of Title VII because under the implementation program, see note 7 *infra*, the Order expressly imposes on employers an obligation to adhere to quotas and timetables for attaining statistical minority representation in the work force—a kind of preferential hiring system not countenanced under Title VII.

6. 3 C.F.R. 339 (1964-1965 Compilation), *reprinted as amended in* 42 U.S.C. § 2000e app., at 1232 (1976).

7. Exec. Order No. 11,246, § 201, delegates to the Secretary of Labor the responsibility for administering the Executive Order Program. The Secretary has delegated this responsibility, in turn, to the Director of the Office of Federal Contract Compliance Programs (OFCCP), 41 C.F.R. § 60-1.2 (1979). With Revised Order No. 4, 41 C.F.R. §§ 60-2.1 to .32 (1979) the OFCCP has established affirmative action requirements for nonconstruction contractors. (Construction contractors are regulated by the separate provisions of 41 C.F.R. §§ 60.4.1 to .9 (1979)). Revised Order No. 4 requires each contractor and subcontractor to submit a written affirmative action plan within 120 days after the commencement of a contract. In the event of "underutilization," the plan must specify numerical goals and timetables for increasing the minority representation in the employer's work force. The regulations define "underutilization" as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." 41 C.F.R. § 60-2.11(b)(1979). The cure for underutilization is affirmative action "appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." Equal Employment Opportunity Commission, 29 C.F.R. § 1608.1(c) (1979). The appropriate action specified by Revised Order No. 4 is the preferential hiring of minority members to meet the numerical goals determined on the basis of the underutilization analysis. *See* Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination,* 1977 U. ILL. L.F. 69, 121-25 (1977).

8. Exec. Order No. 11,246 applies to employers who are federal contractors doing $10,000 or more of federal business per year. 41 C.F.R. § 60-1.5 (1979).

that the "contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin" and that he "will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin.[9] The Executive Order Program further requires statistical representation of minorities in an employer's work force.[10] The breadth of the Program with its concept of affirmative action and concomitant requirement of preferential hiring contrasts so markedly with the straightforward antidiscrimination provisions of Title VII of the 1964 Civil Rights Act[11] that commentators and courts have vigorously questioned the Program's validity.[12]

At the heart of the debate lies the question of the source of authority for Executive Order No. 11,246. That question is ultimately one of separation of powers. This Note focuses on the authority of the Executive to issue Order No. 11,246; it explores several previously unexamined perspectives and discusses policy considerations for defining limits to the Executive's exercise of power. The Note concludes that the order, in its current breadth, may not survive as a valid exercise of Presidential power if it is challenged as a violation of the fifth amendment,[13] or Titles VI or VII of the Civil Rights Act of 1964.[14]

II. Antidiscrimination Executive Orders and the Question of Executive Power

A. *1941-1960: The Early Executive Orders*

The series of executive orders aimed at eliminating employment discrimination predates federal legislation in the area.[15] Between 1941, when President Roosevelt issued the first such order, and 1960, these executive orders were modest in scope; the authority under which they were issued was clear and undisputed. The early orders proscribed discrimination by government defense contractors. President Roosevelt's Executive Order No. 8802 required

9. Exec. Order No. 11,246, § 202, 3 C.F.R. 339 (1964-1965 Compilation), *reprinted as amended in* 42 U.S.C. § 2000e app., at 1233 (1976). *See* note 5 *supra.*

10. *See* note 7 *supra.*

11. *See* note 5 *supra.*

12. Chrysler Corp. v. Brown, 99 S. Ct. 1705, 1719 (1979).

13. U.S. Const. amend. V. At stake are the equal protection and due process rights of minority members as defined in Bolling v. Sharpe, 347 U.S. 497 (1954).

14. Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (current version at 42 U.S.C. §§ 2000e to 2000e-17 (1976)).

15. *See* notes 3-4 *supra* and accompanying text.

that all government defense contracts physically embody a clause stating that the employer-contractors would not discriminate against their employees on the basis of race, creed, color, or national origin.[16] Subsequent orders allowed for incorporation by reference of the antidiscrimination clause[17] and extended the applicability of the clause to all government contractors.[18] Later orders did not further expand the scope of substantive coverage, but reallocated the responsibility for contracting and enforcement among various federal agencies.[19]

Presidents issued the early orders pursuant to the war mobilization powers of the Executive. On their face the orders derived their authority from the various War Powers Acts and Defense Production Acts passed between 1941 and 1950.[20] This authority was never seriously challenged.[21] Some courts[22] also viewed the early orders as authorized by the Federal Property and Administrative Services Act of 1949,[23] which gave the Executive power to issue policies and directives necessary for the procurement of goods and services by the federal government.[24] These courts premised this view on the existence of a connection between the executive order nondiscrimination provisions and the government interest in insuring that "its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen."[25]

Thus, since the employment discrimination executive orders of the 1940s and 1950s were narrowly conceived and bore a direct relation to an explicit grant of statutory authority, there was a direct connection between their provisions and the authority upon which they were issued. Consequently, there was never any serious question as to their validity. Such has not been the case with the post-

16. Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943 Compilation).

17. Exec. Order No. 9001, 3 C.F.R. 1054 (1938-1943 Compilation).

18. Exec. Order No. 9346, 3 C.F.R. 1280 (1938-1943 Compilation).

19. *E.g.*, Exec. Order No. 10,210, 3 C.F.R. 390 (1949-1953 Compilation); Exec. Order No. 10,479, 3 C.F.R. 961 (1949-1953 Compilation).

20. *E.g.*, Exec. Order No. 10,308, 3 C.F.R. 837 (1949-1953 Compilation). This Order was issued expressly under authority granted by the Defense Production Act of 1950 and the appropriation authority granted by 31 U.S.C. § 691 (1976).

21. *See* Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 168-71 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Note, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 725 (1972).

22. *E.g.*, Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 170 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

23. Ch. 288, 63 Stat. 377 (codified in scattered sections of 40, 41, 44 U.S.C.).

24. 40 U.S.C. §§ 471, 486(a) (1976).

25. Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 170 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

1960 orders, particularly those postdating the Civil Rights Act of 1964.

B. 1961-1980: The Later Executive Orders

In 1961 President Kennedy issued Executive Order No. 10,925,[26] which greatly expanded the substantive scope of the Executive Order Program. The expanded scope of this and later orders raised questions about the basis for the authority upon which they rest. President Kennedy's Order initiated the "affirmative action" provision found in the later orders, requiring the contracting employer not to discriminate *and* to "take *affirmative action* to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, creed, color, or national origin."[27] The order also augmented enforcement authority, increasing the impact of the program on federal contractors. Executive Order No. 11,246, originally issued by President Johnson and subsequently amended without significant change,[28] is currently in force. The Order retains the affirmative action mandate and adds a proscription against sex discrimination in hiring.[29] President Johnson's Order also expanded the scope of coverage by requiring that the nondiscrimination and affirmative action clauses apply not simply to employment "*[i]n connection with* the performance of work under this contract,"[30] but to the employer's activities "*[d]uring* the performance of this contract."[31] Thus, while President Kennedy's Order required compliance only in those areas of the contractor's operations directly connected with the work necessary to fulfill the federal contract, Executive Order 11,246 now requires compliance in *all* the contractor's operations as long as he is under contract to the federal government.

Beginning with President Eisenhower's Executive Order No. 10,479 issued in 1953,[32] none of the subsequent employment discrimination orders derived authority expressly or impliedly from the Executive's defense powers. Because they refer to no specific

26. 3 C.F.R. 448 (1959-1963 Compilation).

27. *Id.* § 301, at 450 (emphasis supplied).

28. Part I of the Order has been superseded by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970 Compilation) and Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970 Compilation).

29. Exec. Order No. 11,246, § 202, 3 C.F.R. 339 (1964-1965 Compilation), *reprinted as amended in* 42 U.S.C. § 2000e app., at 1233 (1976).

30. Exec. Order No. 10,925, § 301, 3 C.F.R. 449 (1959-1963 Compilation) (emphasis added).

31. Exec. Order No. 11,246, § 202, 3 C.F.R. 340 (1964-1965 Compilation), *reprinted as amended in* 42 U.S.C. § 2000e app., at 1233 (1976) (emphasis added).

32. 3 C.F.R. 961 (1949-1953 Compilation).

statutory[33] or constitutional[34] grant of authority, these orders by their own terms raise the question of Presidential authority for their issuance. Some courts have agreed with the Third Circuit that "[w]hile the orders do not contain any specific statutory reference . . . they would seem to be authorized by the broad grant of procurement authority with respect to Titles 40 and 41."[35] Other courts and commentators, however, have criticized the Third Circuit for not treating the issue properly as one of separation of powers.[36]

The separation of powers and executive authority disputes have intensified in the wake of passage of the Civil Rights Act of 1964. Courts and commentators traditionally have focused on the potential conflict between Title VII, which appears to proscribe preferential treatment of job applicants and employees by government contractors,[37] and the affirmative action requirements of the Executive Order Program, which call for preferential employment practices in some instances.[38] Courts generally analyze the question within the framework set forth by Justice Jackson in the Steel Seizure Case,[39] focusing only on Title VII of the Civil Rights Act. As detailed in Part V of this Note, a new analysis of the conflict between the Executive Order Program and Titles VI and VII could lead to the conclusion that the expanded Executive Order Program falls outside the scope of the proper exercise of Presidential power.[40]

33. *E.g.*, the preamble to Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), states that President Johnson issued the Order "[u]nder and by virtue of the authority vested in [him] as President of the United States by the Constitution and statutes of the United States."

34. For a discussion of this issue see Note, *supra* note 21, at 726-32, and Part III. B. *infra.*

35. Contractors Ass'n v. Secretary of Labor, 442 F.2d 159, 170 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

36. Note, *supra* note 21, at 732.

37. *See* note 5 *supra.*

38. *See* note 5 *supra.* At least one commentator has observed that

> [t]he use of the goals and timetables is not intended to be "rigid and inflexible" and thus "reverse discrimination" should not occur against any qualified applicant or employee. However, as a practical matter reverse discrimination may still result because of the administrative burden entailed by the failure to meet goals and timetables. . . . Hence, it may be the path of least resistance for an employer to treat his "goals" as though they were quotas.

Comment, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination,* 43 Mo. L. Rev. 451, 466 (1978) (citations omitted).

39. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Justice Jackson's "three categories" are outlined in Part V. A. *infra.*

40. *See* Part V. *infra.*

III. The Sources and Nature of the President's Authority for Issuing Executive Order No. 11,246

A. *Constitutional Sources of Authority*

The power of the President to issue an executive order must derive from either the United States Constitution or from an act of Congress that grants the President authority that is within the power of the Congress to delegate.[41] Article II of the Constitution gives the President no express authority to issue Order 11,246. Two sections of the article, however, appear to offer a source of implied authority. First, the President swears to "preserve, protect, and defend the Constitution of the United States."[42] If, for example, government contracts with employers who practice discriminatory hiring violated the fifth amendment due process clause of the Constitution[43] and Congress had provided no solution to the problem, then the President's oath of office could serve as a basis for the exercise of Presidential power in this area. Congress, however, provided a solution by enacting the Civil Rights Act of 1964. Furthermore, a distinction must be drawn between a ban on Presidential complicity in private discrimination and an affirmative obligation of the Executive to seek out and redress all race- and gender-based imbalances in the work force of federal contractors.[44] Concededly, courts have stretched the concept of state action to attribute to the government much conduct that was formerly considered purely private.[45] Recently, however, the Supreme Court has retreated from its expansive state action decisions by increasingly characterizing activity as private and therefore not subject to constitutional scrutiny.[46] Thus, the imposition of affirmative action-

41. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

42. U.S. Const. art. II, § 1, cl. 8.

43. U.S. Const. amend. V.

44. A 1971 Seventh Circuit decision illustrates this distinction. In Gautreaux v. Romney, 448 F.2d 731 (7th Cir. 1971), the court held that the transfer of federal funds to a local agency that openly practiced racial discrimination was a breach of the fifth amendment. Thus, it is not legal for the Government to fund discriminatory programs. Funding discrimination, however, is quite different from the unilateral enforcement by the executive branch of hiring goals and timetables in order to erase the effects of societal discrimination. The Executive Order Program does not rely on specific discriminatory acts as evidence of discrimination. Instead, it looks only to "underutilization." 41 C.F.R. § 60-2.11 (1979).

45. *See* Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

46. In short, "[t]be state action concept no longer appears to reflect an expansive philosophy of pervasive government responsibility for perceived social inequities; recent decisions seem inclined to permit and even protect an area of private sector conduct for wbich governmental accountability . . . will be attenuated." Havighurst, Blumstein & Bovbjerg, *Strategies in Underwriting the Costs of Catastrophic Disease,* 40 Law & Contemp. Prob.,

preferential hiring requirements on private parties who contract with the government can no longer be justified on the positivistic notion that government has an affirmative constitutional duty to correct "underutilization" in the work force of its contractors.

The second possible basis for implied constitutional authority is the article II mandate that the Executive "shall take Care that the Laws be faithfully executed."[47] An executive order issued to enforce existing legislation would derive authority from this mandate. Commentators and courts have had difficulty discovering exactly which legislative goals or provisions are being furthered by Executive Order No. 11,246.[48] It is therefore doubtful that section 3 of article II provides the necessary constitutional authority. Moreover, the section 3 language quoted above should not be read as conferring any powers of autonomous action on the Executive. The broad language comes at the end of a list of specific, enumerated Presidential powers and should be taken as an interstitial delegation of dependent power, serving the same housekeeping function as the necessary and proper clause in article I.[49]

If the Constitution grants no express or implied authority for Executive Order No. 11,246, the next question is whether any inherent authority may be inferred from the general powers of the President.[50] *Youngstown Sheet & Tube Co. v. Sawyer*[51] is the most instructive case dealing with the inherent powers issue. Because a United Steelworkers Union strike threatened to curtail steel production crucial to the Korean war effort, President Truman issued an Executive Order directing the Secretary of Commerce to seize and operate the steel mills. When the steel companies challenged the seizure order in court, the Government relied on the President's "inherent powers" under his constitutional authority as Commander-in-Chief to support the Executive Order. The Supreme Court rejected this position, finding that the President had attempted to exercise legislative power when none had been dele-

No. 4, at 122, 164 (1976). *See* Flagg Bros. v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

47. U.S. CONST. art. II, § 3.

48. For a full discussion of possible statutory authority, see Part III. B. *infra.*

49. U.S. CONST. art. I, § 8, cl. 18. "[I]f it be true, [that broad language in article II constitutes a grant of all the executive powers of which the Government is capable,] it is difficult to see why the forefathers bothered to add several specific items, including some trifling ones." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640-41 (1952) (Jackson, J., concurring).

50. Justice Jackson recognized the importance of this inquiry in *Youngstown*: "Presidential claim to . . . power . . . must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." 343 U.S. at 638.

51. 343 U.S. 579 (1952).

gated. Writing for the majority, Justice Black explained that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his function in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[52] The flaw in the President's Order was that it did "not direct that a congressional policy be executed in a manner prescribed by Congress—it direct[ed] that a Presidential policy be executed in a manner prescribed by the President."[53] By unilaterally framing a policy and implementing it, the President had overstepped the bounds of his constitutional authority. Justice Black's opinion makes it clear that the scope of inherent executive power is extremely narrow.[54] If President Truman had no inherent power to act in the national interest to avert a catastrophe during an emergency war situation, then it seems highly unlikely that a President will be deemed to have inherent power to remedy a chronic problem such as discrimination.[55]

It is important to distinguish between nondiscrimination and affirmative action. The provisions in Executive Order 11,246 that proscribe discrimination without requiring reverse discrimination may be easier to justify than the affirmative action provisions. Because overt governmental complicity in private discriminatory conduct would be unconstitutional, executive safeguards insuring nondiscrimination in connection with governmental contracts are constitutionally permissible. There is, of course, temptation to confuse the issue of the validity of Presidential power with the merits of the cause championed by the attempted exercise of that power.[56]

52. *Id.* at 587.

53. *Id.* at 588.

54. For more recent decisions recognizing significant limitations on the President's power to act unilaterally see New York Times Co. v. United States, 403 U.S. 713 (1971); Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

55. The detailed scheme of conditions, procedures, and reporting requirements imposed on government contractors by Exec. Order No. 11,246 clearly envisions an extended period of time to remedy the discrimination problem, strongly suggesting that the Executive Order Program is designed to cure a chronic, not an emergency ailment. The scheme also suggests that the Program's affirmative action provisions represent a Presidential, not a congressional, policy, to be executed in a manner prescribed by the Executive, not authorized by Congress. Under *Youngstown* no inherent constitutional authority supports such executive action.

56. Chief Justice Burger wisely avoided the temptation in his *Weber* dissent:

> The Court reaches a result I would be inclined to vote for [i.e. upholding voluntary affirmative action plans designed to eliminate past employment discrimination] were I a Member of Congress considering a proposed amendment to Title VII. I cannot join the Court's judgment, however, because it is contrary to the explicit language of the statute and arrived at by a means wholly incompatible with long-established principles

When, as in the case of Order 11,246, the cause is worthy, the temptation becomes particularly hard to resist. Confusion of these issues, however, may upset the constitutional balance of power and such disruption may in the long run prove harmful to the cause.

B. Statutory Sources of Authority

If the Executive Order is not based on an expressed or implied or inherent constitutional grant of authority, it must, to be valid, be issued pursuant to a statutory grant of such authority. Unlike the early executive orders, Order 11,246 claimed no specific grant of authority, but was issued simply "[u]nder and by virtue of the authority vested in . . . [the] President of the United States by the Constitution and statutes of the United States." As a result, in dealing with challenges to the validity of the Order, courts have attempted to unearth an appropriate statute or statutes that will give color to the claim of power.

Two major circuit court decisions have located the requisite authority in the President's procurement powers, arguing that the increase in cost and time resulting from the exclusion of minority members from government jobs is detrimental to the Government's interests. In *Contractors Association v. Secretary of Labor*[57] the Third Circuit considered a challenge to the Philadelphia Plan, one of the "hometown plans" promulgated by the Secretary of Labor in 1969 pursuant to Executive Order No. 11,246 as a refinement of the affirmative action program.[58] Plaintiff construction contractors contended that the Plan amounted to a piece of social legislation enacted by the President "without the benefit of statutory or constitutional authority."[59] While it recoguized that Presidential power is not unlimited, the court held that the President could, under the procurement authority granted by statute, impose requirements reasonably related to business interests of the Government. According to the court, the primary motivating force behind the affirmative action program was not a concern for equal rights, but a desire to increase the labor pool available for work on government contracts. Thus, the court found a logical connection between the purpose of Order 11,246 and the procurement authority.

Commentators have persuasively criticized *Contractors Association.* First, Professor Morgan has pointed out that it is likely that

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of separation of powers.
United Steelworkers v. Weber, 99 S. Ct. 2721, 2734 (1979).

57. 442 F.2d 159 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

58. For a description of the Plan, see *id.* at 162-66.

59. *Id.* at 166.

the President issued the order solely to achieve employment equality, rather than to increase the available labor force or to cut government procurement costs.[60] Second, Congress' only intention in granting procurement powers to the President was to minimize internal bureaucratic procurement red tape.[61] Even if Congress did envision some sort of affirmative action under the procurement power, it is difficult to justify the Executive Order Program as a measure that insures economical and efficient procurement. Due to the added expense to the contractors of undertaking the requisite underutilization study, setting the necessary goals and timetables, and seeing that they are carried out,[62] the Order almost insures an increase rather than a decrease in procurement costs for the federal government. Even if the increased labor pool produced government savings, the rationale would apply only to government purchase contracts and not to sales contracts. Thus, the necessary nexus between the purported grant of statutory authority and the Order is absent, setting the Order beyond the scope of presidential authority. Third, commentators have attacked the *Contractors Association* opinion as "too facile" on the ground that it does not deal squarely with the central separation of powers issues.[63] The critics contend that if Congress has already acted in the area to codify federal policy and to prescribe the means for implementing it, without specifically granting authority to the Executive also to act in the area, then the President has no authority to act under *Youngstown*. Thus, the court failed to deal with the fact that Congress had indeed preempted the fair employment area by enacting the Civil Rights Act of 1964.[64]

A second case, *United States v. New Orleans Public Service, Inc.*,[65] also found a statutory source of authority for the Executive Order Program. The government brought an action to compel New Orleans Public Service, Inc. (NOPSI), which sold energy to the Government pursuant to contract, to comply with Executive Order No. 11,246 regarding affirmative action. NOPSI argued that the Order was executive action without authority from Congress and

60. Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process,* 1974 WIS. L. REV. 301, 312.

61. *Id.* at 311.

62. *See, e.g.,* 1 REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT 112 (1972): "In a larger sense, it may be cost-effective for the Government and society at large to use the leverage of the procurement process for achieving selected national objectives. It is doubtful that such achievement is cost-effective for the procurement process itself."

63. Note, *supra* note 21, at 732.

64. *See* Part V. *infra.*

65. 553 F.2d 459 (5th Cir. 1977), *vacated and remanded on other grounds,* 436 U.S. 942 (1978).

therefore invalid. The Fifth Circuit followed the reasoning in *Contractors Association* and declared that the Order had the "force and effect of law."[66] Other courts, however, have been reluctant to follow the *Contractors Association* lead. The court in *Cramer v. Virginia Commonwealth University* argued, for example, that the Third Circuit "seemed to accept the mandate of the Order by fiat more than by reason or constitutional imperative."[67]

Litigation involving other "hometown plans" has resulted in decisions that appear to relax *Contractors Association*'s requirement of at least a nexus between the purpose of the Order and the procurement authority of the President. *Northeast Construction Co. v. Romney,*[68] a challenge to the Washington Plan, and *Rossetti Contracting Co. v. Brennan,*[69] a challenge to the Chicago Plan, have been interpreted as standing "for the proposition that *equal employment goals themselves,* reflecting important national policies, validate the use of the procurement power in the context of the Order."[70] The cases posit that in certain instances "social or economic objectives [not on their face connected to procurement objectives] may be sufficiently related to procurement considerations *in a broad sense and over the long run* to validate use of the procurement power by . . . the President."[71] Strictly speaking, however, this proposition was offered as dicta, and the *Northeast* court did not apply it directly to support the validity of the Order; rather, to reach the Washington Plan issue, the court simply assumed that the Executive Order Program was valid. Nevertheless, the implication of the proposition dangerously attenuates the constitutional nexus requirement between the Order and the purported statutory authority for it. The danger is that such relaxed requirements have the effect of delegating to the President virtually unchecked unilateral powers to formulate as well as implement social policy.

IV. Defining the Limits of Executive Power

A. *The Rationale for Narrowing Executive Power*

Assuming *arguendo* that *Contractors Association* and *North-*

66. *Id.* at 465.

67. Cramer v. Virginia Commonwealth Univ., 415 F. Supp. 673, 680 (E.D. Va. 1976).

68. 485 F.2d 752 (D.C. Cir. 1973).

69. 508 F.2d 1039 (7th Cir. 1975).

70. United States v. New Orleans Pub. Servs. Inc., 553 F.2d 459, 467 (5th Cir. 1977), *vacated and remanded on other grounds,* 436 U.S. 942 (1978) (emphasis supplied).

71. Northeast Const. Co. v. Romney, 485 F.2d 752, 760-61 (D.C. Cir. 1973) (emphasis supplied).

east are correct in finding authority for the Order based on the theory that the procurement powers include the prerogative to fashion social and economic policy, the task is twofold: to determine the breadth of those social or economic policies, and to define the limits of Presidential power in the fair employment area. Section 202 of Executive Order No. 11,246 inserts a "national goals clause" into government contracts. The main purpose of the clause is the attainment of nonprocurement objectives.[72] Although such a clause may be a useful means of encouraging worthwhile ends, there are several forceful arguments for restricting their imposition by unilateral executive action.[73] There is often a lack of agreement on national objectives and how they should be implemented. While a nondiscrimination clause may be beyond debate today, recent cases illustrate[74] that affirmative action programs, preferential treatment, and reverse discrimination are still controversial issues rather than unanimous national goals. The determination that such issues have *become* national goals is most appropriately reached through the legislative process with its political safeguards. The affirmative action program of Order 11,246, however, was unilaterally proclaimed by the President in the face of intense national debate. The limits of such nonprocurement use of the procurement power should be clearly defined to avoid abuse and to increase political accountability. It is particularly important to insure accountability at the outset, for once the President has exercised power in a given area, thereby mobilizing a constituency, it may become increasingly difficult for Congress to enact contrary legislation.

Related to the problem of identifying national goals is the problem of implementing conflicting national goals. To the extent that nondiscrimination is an overriding policy concern, its potential conflict with affirmative action requirements is great. The Executive Order Program encourages contractors to depart from strictly neutral hiring practices (nondiscrimination) in order to meet the necessary goals for hiring minority members. Contractors thus run the risk of violating the antidiscrimination provisions of the Civil Rights Act of 1964 or even of the Executive Order itself.

The very nature of the problem outlined above both calls for limits to Presidential power and at the same time suggests guide-

72. Morgan, *supra* note 60, at 302.

73. For a more detailed discussion, see *id.* at 304-06.

74. *E.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Defunis v. Odegaard, 416 U.S. 312 (1974). *See* Falk, *A Lid on Reverse Bias Suits?*, Wall St. J., Oct. 1, 1979, at 28, col. 2.

lines for setting those limits. When public policy is a matter of national debate, various interest groups should air their conflicting views in the national legislative forum, which provides public hearings, open debates, and formal mechanisms that promote the legitimacy of the process. Unilateral executive action short-circuits the typical political dynamic of the legislative arena.[75] The legislative process does not, of course, insure unanimity regarding any particular issue, but it does provide an opportunity for reaching a consensus. The exercise of executive power, however, has the virtue of flexibility and relative freedom from the constraints of "process" that may delay implementation of the policies. Specific delegation of authority from Congress would retain this virtue while assuring that the Executive acts without promulgating conflicting policies and requirements.[76]

B. The Nexus Approach

Three recent lines of authority reveal a trend toward limiting the Executive's power to set social policy goals. These decisions also provide a "nexus" framework for defining those limits that is responsive to the problems discussed above. Although the trend is discernible mainly in areas not directly related to Executive Order No. 11,246, the analogy is nevertheless instructive.

In *AFL-CIO v. Kahn*[77] plaintiff labor unions challenged the validity of Executive Order No. 12,092, in which President Carter required virtually all federal contractors to certify their compliance with the voluntary wage and price guidelines established by the Council on Wage and Price Stability.[78] Treating the major issue as one of separation of powers, the District Court found that the Order was beyond the scope of presidential authority.[79] The District of

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75. An unreported New York Court of Appeals decision struck down executive orders by Governor Carey and Mayor Beame requiring construction companies to establish hiring programs that would increase the number of minority and women employees.

> In ruling that the two officials had exceeded their authority, the court said "that the desirability of adopting a policy of affirmative action in hiring practices, and mandating the same, is not the prerogative of the executive, but rather of the legislative branch, and it is to those bodies that persons seeking to impose affirmative action should direct their attention. . . . The difficulty . . . is not the means employed by the executive to impose affirmative action, but that the executive attempted it at all."

Daniels, *Minority Hiring Ordered by State is Ruled Invalid*, N.Y. Times, Nov. 21, 1979, § B at 4, cols. 2-3.

76. *See generally* Note, *A Proposal for Reconciling Affirmative Action with Nondiscrimination Under the Contractor Antidiscrimination Program*, 30 STAN. L. REV. 803 (1978).

77. No. 79-1564 (D.C. Cir. June 22, 1979).

78. 43 Fed. Reg. 51,375 (1978).

79. AFL-CIO v. Kahn, No. 79-802 (D.D.C. May 31, 1979).

Columbia Court of Appeals, sitting *en banc,* reversed, relying upon statutory interpretation: "the central issue in this case is whether the FPASA [Federal Property and Administrative Services Act of 1949, *i.e.,* the Procurement Act] indeed grants to the President the powers he has asserted."[80] The court found that any executive order based on the procurement powers must accord with the values of "economy" and "efficiency" regarding government contracts. Order No. 12,092 satisfied that requirement because its predominant objective and overall effect were to contain procurement costs. Consequently, the court upheld the Order on the grounds that it was a proper exercise of executive power pursuant to the FPASA grant of authority "[b]ecause there is a sufficiently *close nexus* between those critieria [of efficiency and economy] and the procurement compliance program established by Executive Order 12092."[81] Chief Judge Wright, writing for the court, repeatedly stressed the importance of finding a nexus between the wage and price standards and the probable savings to the Government; he emphasized that the majority's decision did "not write a blank check for the President to fill in at his will."[82]

The nexus requirement offers one standard for defining reasonable, workable limits within which Presidential power may be exercised pursuant to a grant of statutory authority. If a government contractor challenged the validity of Order 11,246 in the D.C. Circuit, the court would apply intense scrutiny to ascertain whether the affirmative action provisions were in fact consistent with the structure and purposes of the Procurement Act. It is unlikely that

80. AFL-CIO v. Kahn, No. 79-1564, slip op. at 6 (D.C. Cir. June 22, 1979).

81. *Id.* at 16 (emphasis added).

82. *Id.* at 18. Judge Bazelon and Judge Tamm wrote separate concurring opinions to highlight the narrowness of the holding:

> I write only to emphasize the close nexus hetween the Order and the objectives of the Procurement Act, and to underscore my understanding that nothing in the court's opinion intimates any views on the validity of other Executive Orders issued explicitly or implicitly pursuant to the authority granted by the Procurement Act . . . .

Id. (Bazelon, J., concurring).

> Lest we later he construed as having hroadly interpreted the Procurement Act, I write separately only to emphasize my helief that the opinion we issue today is a narrow one. It does not allow the President to exercise powers that reach heyond the Act's express provisions. [It] . . . is predicated upon the close nexus between the purposes of the voluntary guidelines and the goal of the Act to secure economy and efficiency in federal procurement.

Id. (Tamm, J., concurring).

Judge MacKinnon wrote a lengthy dissent in the *Kahn* case because he could "find no license in the President's important but modest powers under the 1949 Act to support his imposition of wage and price controls on federal government contractors." *Id.* (MacKinnon, J., dissenting at 1). Judge MacKinnon advocates an even stricter nexus test than the one applied by the *Kahn* majority.

the affirmative action requirements could survive under the "close nexus" test.[83]

A line of Title IX cases[84] culminating in the 1979 *Isleboro School Committee v. Califano*[85] decision provides a second source of precedent for narrowing the scope of executive power. Title IX of the Education Amendments of 1972[86] proscribes sex discrimination in any educational program activity receiving federal financial assistance. Section 901 of Title IX makes it clear that the discrimination prohibitions are aimed at the beneficiaries of the federal monies—the students and teachers on federal grants. Although Title IX does not expressly exclude employees *qua* employees it does not expressly include them either. Title IX also authorizes HEW to issue regulations to effectuate the mandate of section 901.[87] Pursuant to that statutory grant of authority, HEW promulgated regulations requiring that in educational programs receiving federal funds employee pregnancy be treated as a compensable temporary disability. When school districts denied paid sick leave to pregnant employees, the employees claimed a violation of Title IX. Courts confronting challenges to the pregnancy regulations have unanimously held that the regulations overstep permissible bounds of executive power because the legislative history of Title IX indicates that the section 901 provisions do not cover *employees* of federally assisted programs.[88] Thus, the executive branch may not exceed the scope of the congressionally granted authority by expanding antidiscrimination provisions to cover a class of persons not contemplated by Congress.[89] Instead of requiring a nexus between the exercise of executive power and the statutory authority underlying it, these cases appear to require an explicit statement of authoriza-

83. *See* text accompanying notes 60-71 *supra*.

84. Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir. 1979); Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979), *aff'g* Brunswick School Bd. v. Califano, 449 F. Supp. 866 (S.D. Me. 1978); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio W.D. 1979); McCarthy v. Burkholder, 448 F. Supp. 41 (D. Kan. 1978); Seattle Univ. v. HEW, 16 Empl. Prac. Dec. 5243 (W.D. Wash. 1978); Romeo Community Schools v. HEW, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979).

85. 593 F.2d 424 (1st Cir. 1979).

86. 20 U.S.C. § 1681(a) (1976).

87. 20 U.S.C. § 1682 (1976).

88. *See* note 84 *supra*.

89. In a 1978 amendment to Title VII, *Congress* mandated that pregnancy not be treated differently than other disabilities. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (to be codified at 42 U.S.C. § 2000e(k)). It is interesting to note that HEW's Title IX regulations on pregnancy went well beyond the requirements of equal opportunity under Title VII. In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), the Supreme Court held that exclusions of pregnancies from private disability plans were not illegal. The 1978 law, in effect, overruled *General Electric*.

tion for any given exercise of Presidential power—even stricter limits than in *Kahn.*[90] If the reasoning in these cases were applied analogously to a case challenging the validity of the affirmative action provisions of Executive Order No. 11,246, the result probably would be the invalidation of those provisions for want of proper statutory authority under the Procurement Act.

The third precedential line of authority emerges by analogy to the state action cases, in which a nexus requirement has narrowed the concept of state action. Because the prohibitions of the fourteenth amendment[91] apply only to states, and not to purely private activity, courts must distinguish between governmental involvement in private action and unconnected private conduct. Attempting to make this distinction, Justice Rehnquist articulated the state action nexus requirement in *Jackson v. Metropolitan Edison Co.*[92] Under *Jackson,* if a nexus can be established between the challenged activity and the state, then the fourteenth amendment will apply. Deeming a given act "state action" only when such a nexus exists permits *unrelated* activity by a private party to remain private, untouched by the procedural and substantive requirements of the fourteenth amendment. The nexus test also avoids the pitfall of assuming that application of the fourteenth amendment to the private activity of one group in a particular situation requires that the amendment be applied to all groups in all situations. The analogous trap in the Executive Order No. 11,246 context is the assumption that, because courts have upheld previous executive orders as valid exercises of the President's procurement power, this Order must also be valid. Unfortunately, the court in *Contractors Association* failed to see the fallacy in this assumption.[93] Moreover, the *Jackson* nexus analysis suggests that

90. In dicta the *Islesboro* court implied that it might countenance a nexus theory extension of Title IX requirements in the proper case. The implication arose because HEW argued an "infection theory" to support its exercise of power. It claimed that Title IX proscribes employment-related discrimination when that discrimination infects the beneficiaries (i.e. students) of the program. The court responded by reasoning that such a theory would only work when there is a nexus between the discrimination against the employees and its effect on the students.

It is interesting to note that the Executive appears to be unaware of, or has chosen to iguore, the clear limits set by these cases on executive power under Title IX. In Reorganization Plan No. 1 of 1978, 7 U.S. Code Cong. & Ad. News 9795, 9798 (1978), President Carter stated that one benefit of the Plan would be to "see that a university's employment practices are not subject to duplicative investigations under both Title IX of the Education Amendments of 1972 and the contract compliance program." The case law clearly has rejected the notion that Title IX has any application to employment practices.

91. U.S. CONST. amend. XIV.

92. 419 U.S. 345 (1974).

93. 442 F.2d 159, 170-71 (1971).

President Johnson's expansion of the scope of the executive order to cover all of a government contractor's operations is an unwarranted expansion of the procurement power into unrelated private activities.

A recent Supreme Court decision deals specifically with Executive Order No. 11,246 in the context of the Freedom of Information Act and suggests the applicability of the nexus approach to the Executive Order Program.[94] Chrysler Corporation objected when certain third parties requested publication of its affirmative action program records. The Office of Federal Contract Compliance Programs (OFCCP) regulations promulgated pursuant to Order 11,246 allow disclosure sought by third parties, notwithstanding the exemptions under the Freedom of Information Act. Chrysler maintained, however, that the Freedom of Information and Trade Secrets Acts, which impose criminal sanctions for disclosures "not authorized by law," barred disclosure of the records. Thus, the question was whether the affirmative action plan developed pursuant to the Executive Order Program was or was not "authorized by law." The Court agreed with Chrysler, finding that disclosure of the affirmative action plan was not authorized by law. In so holding, the Court reasoned that, in order for regulations adopted under section 201 of the Order to have the "force and effect of law," there must be some "nexus between the regulations and some delegation of the requisite legislative authority by Congress."[95] The Court found no nexus because when Congress enacted Titles VI and VII of the Civil Rights Act of 1964, or the Procurement Act, which arguably authorized the Executive Order, it was not concerned with the disclosure authority claimed by the Government. Thus, the Court's application of the nexus analysis to Executive Order No. 11,246 in *Chrysler,* albeit only in the disclosure context, suggests that the analysis may also be appropriate for testing the very validity of the Order in its present scope.

In sum, these recent lines of authority suggest that there is precedent for narrowing the scope of Presidential power. More significantly, they suggest that the nexus approach is workable and manageable. It prevents the President from implementing his own policy without the safeguards of the legislative process and yet preserves the flexibility and ease of the executive order as a device for implementing congressionally established policies. It insures that the Executive will neither iguore congressional intent, nor bend it

94. Chrysler Corp. v. Brown, 99 S. Ct. 1705 (1979).
95. *Id.* at 1719.

to some unrelated purpose. It is not an arbitrary definition of the limits of power, but rather an approach logically conceived to lead to the desired end. Finally, the test has proved useful and workable in a variety of situations analogous to the Executive Order Program context.[96]

V. The Conflict Between Executive Order No. 11,246 and the Civil Rights Act of 1964: Refocusing the Inquiry

A. *Overview of the Controversy: Justice Jackson's Three Categories Revisited*

The potential for conflict between the provisions of the Executive Order Program and those of Title VII is troublesome.[97] The relevant provisions of Title VII prohibit racial and gender-based discrimination in employment. In *Griggs v. Duke Power Co.*[98] the Supreme Court interpreted those provisions to proscribe discriminatory preference as well. More recently the Court found it "clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force."[99] At this point the Executive Order Program collides with Title VII. By mandating affirmative action goals and timetables, the Executive Order Program encourages preferential treatment of minorities by government contractors. Those who do comply with the program, however, are subject to suit under the antidiscrimination provisions of Title VII.[100] This conflict is a significant factor in determining the validity of Executive Order No. 11,246. This Note argues that there is no statutory authority for the issuance of the affirmative action orders. If, however, one assumes *arguendo* that the Order was issued pursuant to a valid grant of authority under the Procurement Act, that should not end the inquiry. It is one thing to say that the

96. Specifically, the analogous situations are found in the Title IX cases and state action cases.

97. *See* Morgan, *supra* note 60; Note, *Employment Discrimination*—Weber v. Kaiser Aluminum & Chemical Corp.: *Does Title VII Limit Executive Order 11246?*, 57 N.C. L. Rev. 695 (1979); Note, *Executive Order 11,246 and Reverse Discrimination Challenges: Presidential Authority to Require Affirmative Action*, 54 N.Y.U. L. Rev. 377, 385-95 (1979); Note, *supra* note 21; Comment, *supra* note 38, at 482-87.

98. 401 U.S. 424, 436 (1971).

99. Furnco Const. Corp. v. Waters, 98 S. Ct. 2943, 2951 (1978).

100. Since *Weber* was decided on the assumption that the preferential program at issue was voluntary, it is still possible that involuntary compliance with the Executive Order Program would bring about a different result. *See* United Steelworkers v. Weber, 99 S. Ct. 2721, 2730 & n.9 (1979).

general power to act has been validly granted; it is another thing to say that the power has been validly exercised.

Whenever the federal government acts, three major questions arise in analyzing the validity of the action. First, is there a source of authority for the act? Second, is the act in fact an exercise of power not exceeding the scope of the delegated authority? Third, is there any independent limitation that would thwart the exercise of that power? For example, Congress acted in 1974 to extend the federal minimum wage and maximum hour provisions of the Fair Labor Standards Act to most state and municipal employees.[101] When the validity of that act was challenged in *National League of Cities v. Usery*,[102] the first question was whether Congress had any authority to legislate in that general area. The source of authority clearly was the commerce clause. The second question was whether the specific legislation exceeded the *scope* of the source of authority. The Court found that the legislation was "undoubtedly within the scope of the Commerce Clause"[103] and could validly be applied to private industry. Nevertheless, the Court invalidated the extension of the provisions to state and local government employees, holding that the tenth amendment[104] was an affirmative limitation on federal power, and prohibited congressional impairment of sovereign state functions.

The same three-step analysis should be applied to determine the validity of the affirmative action provisions of the Executive Order Program. This analysis is a different articulation of the framework provided by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*.[105] Justice Jackson's concurring opinion in *Youngstown* sets forth three contexts in which presidential actions may be tested for validity:[106]

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . .
>
> 2. When the President acts in the absence of either a congressional grant or denial of authority, he can only rely on his own independent powers, but there is a zone of twilight in which he and Congress

101. Pub. L. No. 93-259, § 6(a)(1), (5), (6), 88 Stat. 58 (1974) (codified at 29 U.S.C. § 203(d), (s), (x) (1976)).

102. 426 U.S. 833 (1976).

103. *Id.* at 841.

104. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

105. 343 U.S. 579, 635-38 (1952). It should be noted that the three steps of the analysis do not correspond one for one with Justice Jackson's three categories. Rather, the three steps in the aggregate address the same questions addressed by Justice Jackson's categories.

106. *Id.*

> may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

Commentators traditionally have interpreted Justice Jackson's three categories as alternative and mutually exclusive. Thus, viewed traditionally, if a Presidential act falls into category one no further inquiry is necessary; the act is valid. The only justifiable conclusion, however, is that the act is or is not authorized—that the President has or lacks authority to act pursuant to a particular congressional mandate. Similarly, if an act fits into category two, the issue is whether, absent relevant legislation, the President derives authority implicitly or explicitly from the Constitution itself. Categories one and two taken together address the question of whether there is a source of either legislative or constitutional authority to warrant Presidential action. Category three addresses a fundamentally different question: whether the specific exercise of power, though authorized, violates a specific constitutional or statutory limitation on executive power. Thus, in judging a particular act, category three becomes relevant only after authority is found under either category one or two. For example, the Procurement Act may authorize the President to purchase from low-cost suppliers. It is obvious, however, that under such authority a President could not eliminate all contractors of a single race, even if he found that they typically were more expensive. Other statutory and constitutional limitations would bar that exercise of executive power. Therefore, the three categories are not conceptual alternatives; rather, they constitute a cumulative analytical framework, like the three-step analysis in *Usery*. If analysis under categories one or two shows that the President had authority to act, then it still must be determined whether the exercise of that power clashes with another statutory or constitutional policy. If the President did indeed act within the scope of the authorization, then the question is whether such exercise conflicts with and is thus limited by any existing legislation.[107]

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107. This reading of the Jackson concurrence in *Youngstown* helps explain what many commentators have found enigmatic about that decision. Justice Black wrote the majority opinion, which focused exclusively on the source of autbority issue. He narrowly delimited the scope of Presidential power, concluding that no legislative or constitutional mandate

Application of this analysis to Executive Order No. 11,246 illustrates that even if the Order were authorized by the Procurement Act,[108] its validity is nevertheless questionable. This conclusion derives from application of the third criterion under the proffered analysis—whether the Order conflicts with any existing legislation.[109] Courts and commentators have consistently focused on Title VII in answering this question. Ultimately, such focus proves too restrictive to provide any definitive answer. Nevertheless, because the inquiry had produced misguided results, it is worthwhile to re-examine the conflict between the Order and Title VII. It must be underscored at the outset that the following discussion acknowledges that there is no conflict between the *nondiscrimination* provisions of the Order and Title VII. Title VII simply prohibits discrimination in employment and specifies that courts should not interpret it "to require any employer . . . to grant preferential treatment to any individual or to any group because of race . . . on account of an imbalance which may exist" between percentages of minority members in the available work force and minority members actually employed.[110] If President Johnson had not expanded the Order by requiring affirmative action programs, courts would probably find that the Executive acted pursuant to an implicit legislative grant of authority under Title VII itself. By requiring a nondiscrimination clause in federal contracts, the Executive Order would be nothing more than an implementation of the Title VII provisions. The affirmative action program, however, not only expands the scope of the Order tremendously, but also exceeds the limits of any authority granted by Title VII.

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existed for Presidential seizure of the steel mills and ended his inquiry there. Justice Jackson joined the opinion of the Court, but also wrote a concurring opinion in which he articulated his three categories. Justice Jackson interpreted the legislative history to mean that Congress had explicitly opposed Presidential seizure of private property during national emergency labor disputes. He pointed out that, in order to sustain President Truman's action, the Court would not only have to find a source of Presidential power, but also reach a conclusion that the President's inherent power prevailed over a conflicting legislative judgment. Therefore, a ruling to support the seizure of the steel mills would mean that Congress was unable to countermand the President's action.

This Note's reading of Justice Jackson's opinion eliminates any methodological conflict between the approaches of Justices Black and Jackson in *Youngstown.* Justice Black limited himself to the source of power issue; he never considered the limitation problem. Justice Jackson's concern over the limitation problem led him to join the majority because it pretermitted the sticky limitation problem by narrowing the scope of Presidential authority. Courts and commentators most often use Justice Jackson's analytical framework because, of the *Youngstown* opinions, it alone openly addresses the limitation issue.

108. As discussed above, however, this Note maintains that the Order was not authorized under the Procurement Act. *See* Section IV. B. *supra.*

109. *See* Section V. C. *infra.*

110. 42 U.S.C. § 2000e-2(j) (1976).

B. *The Traditional Analysis: The Executive Order Program vs. Title VII*

Courts and commentators traditionally have used three major arguments to support a finding that the Executive Order Program does not conflict with the provisions of Title VII. First, section 703(j) has been intepreted to mean that the Act does not "require" an employer to engage in preferential treatment of applicants or employees.[111] Second, the legislative history, as discussed in *United Steelworkers v. Weber*,[112] supports the view that the Order is compatible with Title VII. Third, one theory of ratification suggests that congressional inaction since 1965 has retroactively authorized the Executive Order Program. The *Weber* decision, which extensively examined the first two points, will serve as the focus for analysis. A separate examination of the ratification concept follows the *Weber* discussion.

(1) The *Weber* Decision

In *Weber* the United Steelworkers Union and Kaiser Aluminum entered into a master collective bargaining agreement that included a provision for an explicitly race-conscious affirmative action plan "to eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craft work forces."[113] The agreement established Black hiring goals for each plant and reserved fifty percent of the places in job training programs for Black employees. A white employee of Kaiser alleged that Blacks with less seniority were filling the training slots and that the plan discriminated against him in violation of Title VII, which barred race discrimination in the selection of apprentices for training programs. Prior case law had determined that the civil rights law prohibits discrimination against whites.[114] Thus, the employee argued that an affirmative action program that discriminated against whites solely on the basis of race violated Title VII.

Although conceding that the "argument is not without force," the majority found that the white employee's position "overlook[ed] the significance of the fact that the Kaiser . . . plan is an affirmative action plan voluntarily adopted by private parties to

111. United Steelworkers v. Weber, 99 S. Ct. 2721, 2724 (1979) (interpreting 42 U.S.C. § 2000e-2(j) (1976)).

112. United Steelworkers v. Weber, 99 S. Ct. 2721 (1979).

113. *Id.* at 2725.

114. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

eliminate traditional patterns of racial segregation."[115] For the majority, the only question was the "narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purposes provided in the Kaiser . . . plan."[116] After superficial examination of the language and legislative history of Title VII, the majority concluded that the antidiscrimination provisions did not bar such voluntary, race-conscious affirmative action plans. Moreover, although section 703(j) provided that nothing contained in Title VII "shall be interpreted to *require*" affirmative efforts to correct racial imbalances, the Court found that the language would *permit* voluntary efforts. Justice Brennan concluded that "[t]he natural inference is that Congress chose not to forbid all voluntary race-conscious affirmative action."[117]

It is not surprising that the Court relegated the executive order issue to a terminal footnote, indicating that it would not consider Kaiser's "contention that their affirmative action plan represented an attempt to comply with Executive Order 11,246."[118] It seems

115. United Steelworkers v. Weber, 99 S. Ct. 2721, 2726 (1979).

116. *Id.*

117. *Id.* at 2729. The Court's approach in *Weber* was an exercise in dissimulation, for the Court treated Kaiser's quota program as voluntarily adopted. *Id.* at 2726. Justice Brennan, writing for the majority, took the position that the legislative history of Title VII makes it clear that Congress did not intend to prohibit all race-conscious affirmative action. The majority found that the primary concern of Congress was to ameliorate the "plight of the Negro in our economy." *Id.* at 2727 (quoting 110 CONG. REC. 6548 (Remarks of Sen Humphrey)). Accordingly, the object of the legislation was to open employment opportunities to Blacks in the occupations traditionally closed to them. Thus, the majority concluded that a law triggered by the desire to eliminate discrimination and to improve the lot of those previously discriminated against cannot be a legislative prohibition on affirmative action. 99 S. Ct. at 2727.

In a dissent joined by Chief Justice Burger, Justice Rehnquist traced the legislative history in great detail, concluding that Title VII prohibits all racial discrimination in employment without exception. Justice Rehnquist agreed with previous cases holding that Title VII protects whites as well as Blacks from certain forms of racial discrimination. *Id.* at 2736 (Rehnquist, J., dissenting). Justice Rehnquist pointed out that some sponsors of Title VII favored a provision allowing preferential treatment for minorities, and that their remarks are, of course, part of the legislative history. One can quote those views out of context to bolster Justice Brennan's line of reasoning. In reality, the Act is the result of compromise, and the legislative history demonstrates that the prime motivating concern of Congress was not preference for the economic welfare of any one group, but a concern for the principle of equality. Congress added Section 703(j) in an attempt to end the dispute about preferential treatment—a compromise necessary to pass the Act. Justice Rehnquist's presentation of the legislative history is clear, complete, detailed, and balanced. His analysis is persuasive; the legislative history of the Civil Rights Act clearly supports the proposition that Title VII proscribes preferential treatment in the employment arena.

118. *Id.* at 2730 n.9. Presumably, the effect of the mandatory nature of the Executive

clear, however, that Kaiser's participation in the affirmative action agreement was not motivated solely by altruistic concerns for the betterment of its Black workers. Rather, it reflected a realistic prophylactic adopted to comply with the dictates of the Executive Order Program and to avoid endangering its retention of lucrative governmental contracts.[119] Nevertheless, the Court sustained the race-conscious quota in *Weber* on the narrow ground that it was the product of a private choice to effectuate a social policy that Congress neither mandated nor condemned.

In light of *Weber,* the affirmative action provisions of the Executive Order Program are highly problematic. Justice Brennan emphasized that support for Title VII came from those "who traditionally resisted federal regulation of private business" and who "demanded as a price for their support that 'management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible.' "[120] As the majority in *Weber* acknowledged, section 703(j) "was designed to prevent § 703 of Title VII from being interpreted in such a way as to lead to undue 'Federal Government interference with private business because of some Federal employee's ideas about racial balance or imbalance.' "[121] In the context of *Weber,* in which the Court characterized the affirmative action program as voluntary, these arguments may suggest that Title VII does not prohibit all such private sector managerial decisionmaking. With respect to the affirmative action requirements of the Executive Order, however, it seems clear after *Weber* that the type of race-consciousness imposed by the federal government on private contractors is in conflict with the language and the policies of Title VII. The affirmative commands of the Executive Order reflect precisely the kind of governmental meddling with private sector managerial decisionmaking that the Court feared in *Weber.* The Court's reasoning in *Weber* is powerful evidence that the terms of the Executive Order, which *require* the establishment of race-conscious goals and timetables, are in conflict with the plain meaning of Title VII. They do not come within the *Weber* exception for voluntary affirmative action. In short, proponents of race-conscious employment programs have won only a pyrrhic victory because *Weber,* if read and followed with integrity, is conclusive that the

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Order Program on Title VII—left open by *Weber*—must be raised either by a defiant contractor or one that complies involuntarily with the Program and asserts his involuntary compliance as the sole justification for a race-conscious employment program.

119. *Id.* at 2737-38 n.2 (Rehnquist, J., dissenting).

120. *Id.* at 2729 (quoting H.R. REP. No. 914, 88th Cong., 1st Sess. Pt. 2, at 29 (1963)).

121. 99 S. Ct. at 2729 (quoting 110 CONG. REC. 14,314 (1964) (remarks of Sen. Miller)).

Executive Order Program, as a governmentally imposed program, conflicts with Title VII.

(2) The Ratification Concept

Proponents of the ratification concept concede that the affirmative action program conflicts with Title VII, but argue that Congress subsequently has ratified the Executive Order Program. For example, in the process of passing the Equal Employment Opportunity Act of 1972,[122] which amended the Civil Rights Act of 1964, the Senate considered and rejected an amendment that would have specifically prohibited the use of goals or quotas by government agencies. Several courts and commentators have interpreted this rejection as an implicit ratification of the affirmative action program.[123]

Although ratification would be proper if Congress, in express recognition of the conflict between the Executive Order Program and Title VII, affirmatively exempted the Program from the constraints of Title VII,[124] there are strong policy reasons for rejecting ratification by inaction in the legislative context. The legislative process is designed to protect the notions of open and accountable procedures and majority rule as the foundation of democracy. For this reason the legislative process places the burden of passing bills by majority vote on the proponents of the particular piece of legislation.[125] Under the theory of ratification by inaction, however, any unsuccessful attempt to defeat or modify the Executive Order Program would be tantamount to an imprimatur of that Program. Such a reading improperly shifts the burden of amassing a majority from the proponents to the opponents of the legislation. It may also cause serious opponents to refrain from open opposition if the result of unsuccessful opposition is ratification of a Presidential program.[126]

122. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

123. Weher v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 220 (5th Cir. 1977), *rev'd on other grounds*, 99 S. Ct. 2721 (1979). *See also* Note, *supra* note 21, at 756.

124. Chief Justice Vinson in his *Youngstown* dissent reviews several instances in which Congress has by express enactments ratified prior unauthorized acts of the Executive. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 683-86 (1952).

125. For example, if the President sent a treaty to the Senate for ratification, and Senate opponents introduced a bill opposing the terms of the treaty, failure to pass the bill would not be equivalent to Senate ratification of the treaty.

126. The ratification by inaction doctrine encourages supporters of Presidential action to introduce legislation with the express hope of its defeat in order to secure this form of approval. Such a result is a perversion of the legislative process and would chill the political process.

In sum, the Executive Order Program requires race-based and gender-based goals and timetables that induce preferential treatment in employment practices by government contractors. This Program directly conflicts with the "no discrimination" language of Title VII. The Supreme Court's reasoning in *Weber* has foreclosed attempts to harmonize the two sets of provisions. The ratification doctrine should not be applied to create legislative authority for the Program because such application would distort separation of powers. Thus, the Executive Order conflicts with congressional action in the same field and falls into Justice Jackson's third category. Even if the Procurement Act is a statutory source of authority for the issuance of Executive Order No. 11,246, the affirmative action program is invalid because it impinges upon an independent statutory policy.[127]

C. *A New Analytical Approach: The Executive Order Program vs. Title VI*

Courts and commentators traditionally have discussed only the inconsistency between Executive Order 11,246 and Title VII, considering Title VI of the Civil Rights Act[128] only in the determination of whether Title VI specifically grants *authority* to the President to issue the Order. It is now well settled that neither Title VII nor Title VI contains an express substantive delegation of authority to the President.[129] If one assumes that the authority to issue the Order comes from some other statutory source, then Title VI must also be considered in an analysis of conflicts between the Order and existing legislation. Indeed, in structure Title VI is more closely analogous to the Executive Order Program than is Title VII. Any conflict between Title VI and the Order places the Order in Justice Jackson's third category and severely jeopardizes the Order's validity.

Title VI prohibits discrimination on the basis of race, color, religion, or national origin in any program or activity receiving

127. Justice Jackson's category three in *Youngstown* recognizes that in some rare cases the Executive will be able to rely on his own *constitutional* powers for authority even if his actions are incompatible with existing legislation. 343 U.S. 579, 637 (1952). Myers v. United States, 272 U.S. 52 (1926), is an example of such a case. Exec. Order No. 11,246, however, does not present such a case because, as this Note demonstrates, the Order does not rest on any independent constitutional authorization.

128. 42 U.S.C. §§ 2000d to 2000d-4 (1976).

129. Cbrysler Corp. v. Brown, 99 S. Ct. 1705, 1719-20 (1979); Contractors Ass'n v. Secretary of Lahor, 442 F.2d 159, 173 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

federal financial assistance.[130] Under Title VI federal agencies have the power to promulgate rules consistent with the achievement of the statutory objective of nondiscrimination, and failure to comply may result in a cutoff of federal funds.[131] Federal financial assistance under Title VI may be in the form of a grant, a loan, or a contract,[132] but section 604 specifically exempts "any employment practice of any employer" from the foregoing provisions.[133] Title VI implements a policy of fairness to every individual, not one of employment preference for members of minority groups.

Viewed against the structure of the Civil Rights Act of 1964, the Executive Order Program is more closely analogous to Title VI than to Title VII. A government contract is a form of federal financial assistance under Title VI; both Title VI and the Executive Order Program use the funds-cutoff mechanism for enforcing a social policy.[134] By virtue of the sanctions listed in section 209(a) of the Order, the Secretary of Labor may cancel, terminate, or suspend the contracts of noncomplying contractors and/or stipulate that all federal agencies refrain from further contracting with that employer. The net effect of the imposition of these sanctions is not necessarily to redress the acts of discrimination that have occurred, but rather to cut off the flow of federal funds to private employers because of certain employment practices—a result that section 604 of Title VI expressly prohibits. If Title VI did not expressly exclude the employment area from its coverage, the Order would simply implement the policies set by Congress. Congress has, however, expressly exempted employment from the coverage of Title VI. Since the Executive Order Program has in effect extended the provisions of Title VI to employment, the Program is in conflict with Title VI. The Civil Rights Act of 1964 confined employment discrimination claims largely to the realm of private enforcement and explicitly withdrew from the federal arsenal the use of the funds-cutoff technique in employment discrimination cases. Focusing on the structure of the Civil Rights Act—distinguishing the scope of coverage and the method of enforcement of Titles VI and VII—clearly demonstrates the basic incompatibility of the Executive Order Program with the Civil Rights Act. Consequently, the Executive Order con-

130. 42 U.S.C. § 2000d (1976).

131. *Id.* § 2000d-1.

132. *Id.*

133. *Id.* § 2000d-3.

134. The Program specifies that certain sanctions may be imposed if employers receiving federal funds pursuant to a government contract breach any of the contractural requirements of the equal employment opportunity clause. 41 C.F.R. § 60-1.26(a) (1979).

flicts with existing legislation and is therefore an improper exercise of executive power.

VI. Conclusion

The controversy over the desirability of race-conscious employment programs is a continuing one. The federal affirmative action program is unique, however, because the executive branch has imposed the program pursuant to an executive order, the validity of which is open to serious question. This Note has attempted to demonstrate that the constitutional and statutory underpinnings for the Executive Order Program are questionable on several grounds.

First, the Note has demonstrated that the concept of affirmative action as embodied in the Executive Order Program induces race-conscious employment programs by federal contractors in contrast to the norm of race-neutral decisionmaking imposed by the Civil Rights Act of 1964. The Note has also argued that a nexus analysis must define the parameters of executive authority to promulgate the Executive Order Program. In other words, there must be a close relationship between the alleged source of executive authority and the President's actual exercise of that authority. State action decisions narrowing the concept of governmental responsibility for private conduct support such a reading. Several recent circuit court decisions also support application of a nexus approach by limiting the executive branch's ability to regulate employment practices in federally funded programs that benefit students, not faculty members. Similarly, in upholding the federal contractor compliance provisions of President Carter's wage and price guidelines, the D.C. Circuit carefully narrowed its approval of executive authority on the ground that the federal procurement legislation bore a close relationship to the provisions of the wage and price order. These cases suggest the desirability of delimiting Presidential power by applying a strict nexus test.

Second, this Note attempts to refine the Presidential power analysis of *Youngstown Steel* and to reconcile the opinions of Justices Black and Jackson. The Note argues that finding a source for Presidential power (whether statutory or constitutional) and determining whether there are independent limits on Presidential power, are two distinct issues. Going beyond Justice Black's discussions of Presidential authority, Justice Jackson suggested that authorized Presidential power may still conflict with separately existing legislative or constitutional prohibitions on the exercise of Presidential power. Justice Jackson's third category provides a

framework of analysis for situations in which a source of executive power exists, but arguably conflicts with some other legislative or constitutional mandate. The Note contends that even if *arguendo* the federal procurement power authorizes the Executive Order Program, the Program conflicts with the Civil Rights Act of 1964.

Third, the Note utilizes the recent decision in *United Steelworkers v. Weber* as a vehicle for discussing the incompatibility of Title VII with the provisions of the Executive Order Program. In sustaining a race-conscious job training quota program, the Court carved out an exception from Title VII's race-neutral language to permit voluntary affirmative action programs. The *Weber* court construed Title VII to permit private managerial decisions with respect to fair employment matters, with the sole proviso that private employers could not discriminate on the basis of race or sex. By narrowing its justification for race-conscious programs to those entered voluntarily, the Court in *Weber* implicitly found that the race-conscious provisions of the Executive Order Program, which are imposed mandatorily on private contractors by the federal government, are inconsistent with the general nondiscrimination provisions of Title VII. Since the only basis for permitting racial hiring quotas in *Weber* was that they were voluntary, it seems to follow a fortiori that an employer who resists adopting race-conscious employment practices, but who is required to do so as a federal contractor by the OFCCP, would have a good argument that the Executive Order violated the terms of Title VII. Thus, *Weber*, albeit inadvertently, is perhaps the strongest case for the proposition that the Executive Order Program is in conflict with Title VII.

Finally, this Note argues that the best structural analogue to the Executive Order Program is Title VI of the Civil Rights Act of 1964 because both use the threat of a federal funds-cutoff as their primary enforcement mechanism. The federal funds-cutoff is a major weapon in the fight against discrimination under Title VI, but section 604 explicitly withdraws that extremely potent weapon from the federal government's arsenal in the area of employment discrimination, leaving the terms and procedures of Title VII as the exclusive remedy for claims of employment discrimination.

In Executive Order No. 11,246, however, the President has seemingly defied the express terms of section 604 by applying the funds-cutoff tool to employment discrimination matters. While limited use of this tool may be acceptable under the President's responsibility to execute the nondiscrimination laws, the far-reaching affirmative action provisions of the Executive Order conflict both with the plain language of section 604 and with the entire

structural scheme of the Civil Rights Act of 1964.

Because of the tenuousness of the President's authority to issue the affirmative action provisions of the Executive Order Program, and because of the conflict of the Program with the provisions of Titles VI and VII of the Civil Rights Act of 1964, the constitutional validity of the Presidential Program is subject to serious doubt on separation of powers grounds.

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