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Paul E. Mirengoff

ARTICLES

THE VALIDITY OF COURT-ORDERED EMPLOYMENT QUOTAS: A STATUTORY AND CONSTITUTIONAL ANALYSIS

*Paul E. Mirengoff**

Although Title VII of the Civil Rights Act of 1964 has produced more than its share of difficult legal and moral issues, none has sparked more controversy than the question of the validity of hiring and promotion quotas. This issue has fueled continuous debate in the popular press and in scholarly journals.[1] It has long divided former allies in the fight for civil rights legislation, and has even divided the two government agencies charged with primary responsibility for enforcing anti-discrimination laws, the Department of Justice and the Equal Employment Opportunity Commission (EEOC).[2]

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* B.A., 1971, Dartmouth College; J.D., 1974, Stanford University. Mr. Mirengoff is an attorney with the law firm of Hunton & Williams, Washington, D.C., and was formerly an attorney with the Office of General Counsel, Equal Employment Opportunity Commission. He is grateful to Professor David Rabban for his suggestions and comments on an earlier draft.

1. *See, e.g.*, Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. REV. 531 (1981); Blumrosen, *Quotas, Common Sense and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966). The precise issue of judicially imposed remedial employment quotas has received less attention from scholars. *See* Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOY. L.J. 315 (1974); Note, *Preferential Relief under Title VII*, 65 VA. L. REV. 729 (1979).

2. The divisions within the federal government were revealed dramatically in Williams v. City of New Orleans, 543 F. Supp. 662 (E.D. La.) (motion for consent decree denied), *rev'd and remanded*, 694 F.2d 987 (5th Cir. 1982), *aff'd*, 729 F.2d 1554 (5th Cir. 1984) (en banc). In a case involving a consent decree establishing a quota for the promotion of black police officers in New Orleans, the Civil Rights Division of the Department of Justice intervened and filed a brief arguing that both § 706(g) of Title VII and the fourteenth amendment to the United States Constitution prohibit any judicial decree, whether entered by consent or after litigation, which orders the hiring or promotion of any person not proven to be the victim of employment discrimination at the hands of the defendant. *See* Bureau of National Affairs, Williams v. City of New Orleans, Summary and Analysis, Briefs Submitted to En

Surprisingly, the profound political divisions over court-ordered quotas were not reflected in the decisions of courts for years. The federal courts of appeals uniformly held that courts may order the use of quota remedies without regard to whether the beneficiaries were personally victimized by the defendant's discrimination.[3] The early cases generally regarded the quota remedy as an extraordinary one to be used only when necessary to ensure that the defendant would consider minorities fairly in the future.[4] Later cases tended to uphold quotas designed simply to raise the level of minority representation to predetermined levels.[5]

Banc, Fifth Circuit, Text of Decisions By Federal District Court and Court of Appeals 1-17 (1983) [hereinafter cited as BNA Special Report]. The Equal Employment Opportunity Commission prepared a draft brief which challenged the Justice Department's brief almost point-by-point. *Id.* at 70-82. The EEOC contended that Title VII and the Constitution permit district courts to order "prospective race conscious goals" as a remedy for employment discrimination whenever they find such relief necessary in a Title VII case to "eradicate the effects of past discrimination by integrating unlawfully segregated work forces," that is, whenever they find it necessary to expedite the raising of minority representation to the level "that likely would have prevailed absent [the defendant's] discrimination." *Id.* at 77-78.

The Fifth Circuit ultimately refused to use the *Williams* case as a vehicle for limiting the general availability of the quota remedy. The precise queston in *Williams* was whether the district court had abused its discretion by refusing to approve a consent decree to the extent that the decree contained a provision requiring black and white police officers to be promoted on a one-to-one ratio until blacks constituted 50% of all ranks within the department. The en banc court ruled that the district court did not abuse its discretion. *Williams*, 729 F.2d at 1555. The court declined to consider "whether affirmative action provisions are permissible as a general remedy under Title VII." *Id.* at 1558. It held only that the district court in that case acted within its discretion in denying the quota relief set forth in the proposed decree. However, nine of the thirteen judges—three members of the majority and the six dissenters—endorsed the Fifth Circuit's longstanding view that Title VII permits courts to use the quota remedy to eradicate the effects of past discrimination. *Id.* at 1557, 1565, 1571.

3. *See, e.g.*, Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir. 1982); Chisholm v. United States Postal Serv., 665 F.2d 482, 499 (4th Cir. 1981); United States v. City of Chicago, 663 F.2d 1354 (7th Cir. 1981) (en banc); Firefighters Inst. v. City of St. Louis, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); United States v. City of Alexandria, 614 F.2d 1358, 1363-66 (5th Cir. 1980); United States v. Lee Way Motor Freight, 625 F.2d 918, 944 (10th Cir. 1979); EEOC v. AT&T, 556 F.2d 167, 174-77 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. IBEW Local 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

4. *See, e.g.*, NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Carter v. Gallagher, 452 F.2d 315, 327, 330 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972).

5. *See, e.g.*, United States v. City of Chicago, 663 F.2d at 1360; United States v. City of Alexandria, 614 F.2d at 1358; Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

For its part, the Supreme Court for years simply avoided the issue. It granted certiorari in two cases squarely presenting the question, but disposed of both cases on procedural grounds.[6] Last term, however, the Supreme Court reversed this pattern of reticence. Ironically, it chose to address the issue of the validity of court-ordered quotas in a case that did not squarely present the question. In *Firefighters Local Union No. 1784 v. Stotts*,[7] a local union challenged a district court order enjoining the city of Memphis, Tennessee, from following its seniority system in determining layoffs of firefighters. The district court had based its order on an earlier consent decree entered in a Title VII class action brought by black firefighters. The Supreme Court vacated the order, holding that because the consent decree did not mention layoffs or the seniority system, it could not be the basis of an order requiring the city to depart from the system in determining layoffs.[8]

The Court could easily have ended its opinion there. Instead, at the invitation of the Justice Department, it found further support for its decision "in the policy behind section 706(g) of Title VII."[9]

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6. *See* Boston Firefighters Local 718 v. Boston Chapter, NAACP, 461 U.S. 477 (1983) (per curiam) (judgment below vacated and case remanded for consideration of mootness); Minnick v. Department of Corrections, 452 U.S. 105 (1981), (judgment below not final), *dismissing cert. to* 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979).

The Court decided three major cases involving the validity of quota-type affirmative action in other civil rights contexts. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). These decisions reflect the divisive nature of the affirmative action debate. The three cases produced fifteen separate opinions. Only one of them, the Court's opinion in *Weber*, gained as many as five signatures, and only four of the five Justices who signed that opinion remain on the Court. For a discussion of *Weber*, see *infra* note 150. For a discussion of *Bakke* and *Fullilove*, see *infra* text accompanying notes 113-46.

7. 104 S. Ct. 2576 (1984).

8. The majority consisted of Chief Justice Burger and Justices White (author of the opinion), Powell, Rehnquist and O'Connor. Justice O'Connor wrote a concurring opinion. Justice Stevens concurred only in the judgment. Justices Brennan, Marshall and Blackmun dissented.

9. *Stotts*, 104 S. Ct. at 2590. Section 706(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the

According to the Court, that policy "is to provide make-whole relief only to those who have been actual victims of illegal discrimination."[10] It cited several statements from the 1964 legislative history of Title VII to the effect that courts would not be permitted to order employers to select candidates not personally victimized by their discriminatory practices.[11]

The majority's discussion of section 706(g) is, however, dicta. Moreover, it can be argued that, despite the largely unqualified wording of the dicta, the Court did not even intend to discuss the validity of court-ordered quotas except in cases where the quota abridges seniority rights. This was Justice Blackmun's contention in his dissenting opinion. He found it unlikely that the Court would reach the broad issue of the general availability of race-conscious remedies without even mentioning that the courts of appeals unanimously have held that race-conscious remedies are not prohibited by Title VII.[12] Civil rights groups also have stated that the *Stotts* majority opinion should not be construed as a definitive ruling on the validity of quota relief in cases where seniority rights are not at stake.[13]

> court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of any individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

42 U.S.C. § 2000e-5(g) (1982).

10. *Stotts*, 104 S. Ct. at 2589.

11. *Id.*

12. *Id.* at 2610. Justice Blackmun added that the nature of the Court's reliance on the last sentence of § 706 was

> unclear . . . because the Court states merely that the District Court 'ignores' the 'policy behind § 706(g).' . . . [I]t appears that the Court relies on the policy of § 706(g) only in making a particularized conclusion concerning the relief granted in these cases, rather than a conclusion about the general availability of race-conscious remedies.

Id. at 2608.

Several lower courts have agreed with Justice Blackmun's reading of *Stotts*. *See* Pennsylvania v. Operating Engineers, ___ F.2d ___, 38 Fair Empl. Prac. Cas. (BNA) 673 (3d Cir. July 17, 1985); Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985); Turner v. Orr, 759 F.2d 817 (11th Cir. 1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985); EEOC v. Local 28 of Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172 (2d Cir. 1985) , *cert. granted*, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985); Diaz v. AT&T, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (dicta).

13. *See, e.g.*, Statements of O. Peter Sherwood, Assistant Counsel, NAACP Legal Defense and Education Fund, Inc., and William L. Robinson and Stephen L. Spitz of the Lawyers' Committee for Civil Rights Under Law, The Memphis Firefighters' Case, A Symposium on the Impact of the Supreme Court's *Stotts* Decision on Affirmative Action, Equal Employ-

The Justice Department, on the other hand, has taken the position that *Stotts* should be read as a general limitation on the authority of courts to order relief for persons who are not the identified victims of an employer's discrimination. It has stated its intention to re-examine all consent decrees to which it is a party that contain quota-type relief and has sought to overturn many such decrees.[14] Thus, the Supreme Court almost certainly will soon be called upon to hold whether section 706(g) prohibits courts from ordering quota relief in non-seniority contexts, particularly in hiring, and, if so, whether there are any exceptions to the prohibition.[15]

This article takes the position that the question of the validity of court-ordered remedial quotas should not be resolved in favor of either of the two competing views typically presented by litigating parties and that it should not be resolved on the basis of section 706(g), the provision cited by the Supreme Court in *Stotts*. The

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ment Litigation, Settlement and Judicial Remedies (November 14, 1984).

Robinson and Spitz argue that the Court's statement that the policy of § 706(g) "is to provide make-whole relief only to those who have been the actual victims of illegal discrimination" does not preclude relief for nonvictims as a prospective remedy. Pointing to the distinction between victim-specific, make-whole relief and prospective race-conscious remedies, they read *Stotts* as stating that quota relief for nonvictims is not a legitimate make-whole remedy, but leaving open the question of whether it is a legitimate form of prospective relief. *Id.* at 3-4.

The problem with this argument is that it reduces the *Stotts* analysis of § 706(g) to a truism. By definition, make-whole relief is available only to persons who have been made less than whole, in other words, victims. It seems likely that the *Stotts* Court was trying to say something more informative about the availability of quota relief under § 706(g).

14. *See* Department of Justice Press Release (June 12, 1984); DAILY LABOR REPORT (BNA) No. 116, at A-7 (June 15, 1984) (remarks of Assistant Attorney General Reynolds); *Justice Department Declares Win Over Quotas*, Washington Post, June 14, 1984, at A-1, col. 1; *see also* NAACP v. Meese, No. 85-1406, n. 5 (D.D.C. July 2, 1985), *reported in* DAILY LABOR REPORT (BNA) No. 129, at F-1 (June 5, 1985).

15. The Supreme Court has granted certiorari in a case that may raise this question. *See* Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985). The precise issue in *Wygant* is whether, in a layoff case, the Constitution permits the use of racial preferences voluntarily agreed to by a public employer and a union, absent findings of past discrimination, based on the disparity between the percentages of minority faculty and students. In resolving this issue, however, the Court may elect to discuss its ruling in *Stotts*, as did the Sixth Circuit. *Id.* at 1158.

The Supreme Court has also granted certiorari in two cases that appear to call for a determination of whether racial preferences in hiring and promotion are valid judicially imposed remedial measures for past discrimination. *See* EEOC v. Local 28, Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172 (2d Cir. 1985), *cert. granted*, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3191 (U.S. Oct. 7, 1985). The *Sheet Metal Workers* case involves the validity of court-ordered, quota-type relief under Title VII and the U.S. Constitution. The *Vanguards* case concerns a consent decree imposing quotas in promotion of minorities.

Justice Department and other quota opponents are wrong in arguing that Title VII absolutely prohibits judicial imposition or approval of quota relief. The language and legislative history of Title VII establish that courts may order quota relief to remedy past employment discrimination where such relief is necessary to ensure that members of the racial or ethnic groups victimized by the defendant's discrimination receive equal employment opportunity in the future. However, civil rights groups and the EEOC have been wrong in upholding the legality of quotas in the additional case in which quotas are necessary to expedite the attainment of minority representation in the percentage likely to have existed absent the unlawful discrimination. Section 703(j), the anti-quota provision of Title VII, prohibits judicial imposition of quotas in precisely that situation.[16]

The position taken in this article comports with the original judicial understanding of the remedial quota issue. The courts that first faced the question viewed section 703(j), not section 706(g), as the applicable provision of Title VII and found in its language a qualified prohibition of quota relief.[17] The demise of this "intermediate" position can be traced to the successful efforts of quota proponents to argue that section 703(j) does not effectively limit a court's ability to order quota relief at all. The success of that argument led quota opponents, especially the Reagan Justice Department, to argue that section 706(g) contains the Title VII prohibition against quota remedies. Unlike section 703(j), section 706(g) is worded categorically—"No order of the court shall require. . . ." Thus, if section 706(g) prohibits quota relief, it does so absolutely.

In fact, however, section 706(g) does not prohibit quota relief at

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16. Section 703(j) provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1982).

17. *See infra* notes 108-12 and accompanying text.

all. It is simply inapplicable to the issue. Because until recently this provision had seldom been invoked in the quota debate, courts and scholars have had little opportunity to analyze it in that context. [18] Although the Supreme Court did so in dicta in the *Stotts* case, it focused on the policy behind section 706(g) of Title VII. It did not analyze the wording of that provision.

This article demonstrates that, by its terms, section 706(g) does not limit a court's power to order quota relief. Moreover, careful analysis of the Title VII legislative history reveals that Congress understood this fact and, in part for that reason, added section 703(j) as the embodiment of its substantial anti-quota sentiment. However, the language and legislative history of section 703(j) establish that its ban on quota relief is not absolute; it does not extend to cases in which such relief is needed to ensure future equality of opportunity for members of the group victimized by the defendant's past discrimination.

The foregoing argument unfolds in three sections. Part I articulates more fully the three competing theories of remedial employment quotas: the view that such quotas are absolutely prohibited, the view that courts may order quotas to attain the level of minority representation that would have existed absent the defendant's discrimination, and the intermediate view endorsed in this article. Part II adjudicates among the three theories as a matter of statutory interpretation. This involves an analysis of the language of sections 706(g) and 703(j) of Title VII as well as the 1964 and 1972 legislative histories. As indicated, only the intermediate view that quotas are justified to the extent they are needed to ensure future equality of opportunity will withstand this analysis. Part III demonstrates that those quotas permitted by Title VII are also permitted by the equal protection clause of the United States Constitution.

I. Three Views of Quota Relief

A. *The Absolute Prohibition View*

The position that courts may never order quota relief under Title VII holds simply that courts may order defendants to select only those persons who establish that they were personally victim-

18. The one court that had so analyzed § 706(g) concluded that it did not limit the right of courts to order quota relief. EEOC v. AT&T, 556 F.2d at 175-77.

ized by actions prohibited under Title VII. As advocated by the Justice Department, the argument starts with the proposition that, in the context of personal rights, fundamental principles of jurisprudence dictate that the scope of permissible remedies be limited to "those measures reasonably necessary to restore the victims of the unlawful conduct to the positions they would have occupied in the absence of such conduct."[19]

The Justice Department finds in the final sentence of section 706(g) an affirmation of the principle that relief must be limited to make-whole measures for actual discriminatees. Other proponents of the prohibitionist view of quotas have found that affirmation in section 703(j). All proponents of this view point to assurances given in both Houses of Congress prior to passage of Title VII that the Act would not empower courts to direct defendants to adopt racial quotas.[20] They also maintain that judicial imposition of quotas on government employers violates the equal protection guarantee of the United States Constitution.[21]

B. *The Intermediate View—Quotas to Ensure Future Equal Employment Opportunity*

Title VII remedies have two purposes: to provide relief for victims of past discrimination and to assure equal employment opportunity in the future.[22] Achieving the latter purpose requires removing the "barriers that have operated in the past to favor an identifiable group of white employees over other employees."[23] A possible justification for judicial imposition of quota relief is that, in cases of severe and longstanding discrimination, quotas may be necessary in order to remove the barriers to equal employment opportunity erected as a result of the defendant's past illegal conduct.

The most obvious and least controversial situation in which quotas might be justified as a means of assuring equal employment opportunity is the case in which the court believes the defendant will not obey an injunction that merely instructs it not to discrimi-

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19. *See* BNA Special Report, *supra* note 2, at 1.

20. *See infra* text accompanying notes 44-62.

21. For a discussion of the constitutionality of judicially mandated employment quotas imposed for the purpose of ensuring future equality of opportunity, see *infra* text accompanying notes 113-46.

22. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

23. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

nate.[24] Although this rationale was invoked in a number of the early quota cases,[25] it probably does not apply to many situations today. For example, it would be difficult to justify court approval of a quota provision in a consent decree on this basis. The employer's willingness to enter into the decree undercuts the claim that it is bent on resisting an injunction. A court should not impose a quota based on the employer's request to "stop me before I discriminate again."[26] And even employers who defend their employment practices in litigation are unlikely, at this point in history, to ignore a court order if their defense is unsuccessful.

It can be argued, however, that quotas sometimes are needed to promote prospective equality of employment opportunity even where an employer is willing to fairly consider applications from members of victimized groups. Courts have found that an employer's pervasive past discrimination may create barriers to equal opportunity that persist even after the discrimination ceases.[27] Thus, a standard justification for quota relief is that it "promptly operates to change the outward and visible signs of yesterday's racial distinctions and, thus, to provide impetus to the process of dismantling the barriers, psychological or otherwise, erected by past practices."[28]

Longstanding discriminatory practices might create barriers to future equal employment opportunity in several ways. First, a defendant's reputation for egregious discrimination might deter members of the excluded group from applying for employment in general, or at least for certain positions.[29] Secondly, equal employ-

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24. Note, *supra* note 1, at 767.

25. *See, e.g.*, Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622 (2d Cir. 1974); United States v. Wood Lathers Local 46, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Operating Eng'rs Local 520, 476 F.2d 1201 (7th Cir. 1973); Local 53 of Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Western Addition Community Org. v. Alioto, 360 F. Supp. 733 (N.D. Cal. 1973).

26. One can easily imagine cases in which a government defendant might, in effect, make such a request. For example, a city under the leadership of a black mayor might attempt to lock future administrations into a quota for the hiring and promotion of minorities in certain departments. Such a city may have engaged in egregious past discrimination. However, the election of a black mayor, while not ensuring against all future discrimination against blacks, should persuade a court that the city has advanced to the point that a quota cannot be justified by the assumption that future administrations will violate an injunction against racial discrimination.

27. *See, e.g.*, Castro v. Beecher, 459 F.2d 725, 730 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315, 331 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972).

28. NAACP v. Allen, 493 F.2d 614, 621 (5th Cir. 1974).

29. *Carter*, 452 F.2d at 331.

ment opportunity does not exist where "pioneer" minority hirees face an unbearably hostile work environment.[30] Quota relief may be viewed as necessary in some instances to bring enough minority group members into previously segregated job classifications to make desegregation work. A quick influx of a sizeable number of members of previously excluded groups ensures that desegregation is not set back by the failure of isolated pioneers to succeed in a hostile work environment. In addition, such an influx breaks down the stereotypes of inferiority associated with discrimination, and creates countervailing forces for nondiscrimination, such as the duty of unions to represent their members fairly.

Of course, even a quota that promotes statutory goals does so at the expense of innocent third parties. Thus, the proponents of such quotas must establish that Congress resolved this tension by permitting courts to disadvantage such third parties in order to optimize equal employment opportunity for victimized groups. In the case of government employers, these proponents must also show that such a trade-off is permitted by the equal protection clause.

C. *The Expansive View—Quotas To Achieve a Particular Balance*

The theory upholding quotas as a means of overcoming barriers to equal employment opportunities will not justify this form of relief even in all cases of severe and longstanding discrimination. In fact, the justification probably works only where past discrimination has resulted in virtual exclusion of minority group members from employment, or at least from employment in certain positions.

Consider, for example, the case of a large employer whose workforce is only twenty percent black even though blacks comprise fifty percent of the relevant labor pool. Under Title VII case law, this employer almost surely has engaged in class-wide discrimination against blacks.[31] Yet it is doubtful that this discrimination

30. *See* Gray v. Greyhound Lines, 545 F.2d 169 (D.C. Cir. 1976).

31. *See generally* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-09 (1977) (in determining whether a school has engaged in discriminatory hiring practices, it is proper to compare the racial composition of the school's teaching staff with the racial composition of the qualified teachers in the relevant labor market); International Bhd. of Teamsters v. United States, 431 U.S. 324, 337-40 (1977) (affirming the district court's finding of system-wide discrimination where the company's total workforce of 6,472 employees was composed

will have deterred blacks from applying. While blacks considering whether to apply with such an employer might well conclude that the employer's hiring process is unfair, they probably would not conclude, nor would it be the case, that application is futile. Similarly, where blacks are underrepresented to a statistically significant degree, but employed in greater than token numbers, it will be difficult to justify a quota in terms of the need to prevent their isolation and harassment or to overcome racial stereotypes. Accordingly, as cases of virtual exclusion of minorities have become relatively rare, advocates of quota relief have articulated a less limited rationale. Their belief is that quotas are justified in order to expeditiously raise the level of representation of a particular minority group to that level which probably would have existed absent the defendant's discrimination against that group.[32]

II. Adjudicating Among the Theories of Quota Relief under Title VII

A. *The Language of Title VII*

1. Section 706(g)

The first sentence of section 706(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice

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of five percent Negroes and four percent Spanish-surnamed Americans).

32. The EEOC's position in its draft brief in the *Williams* case exemplifies this approach. In *Williams*, the district court was willing to approve provisions in the proposed consent decree that almost certainly would have assured that blacks would be considered fairly for future promotion. The measures the court endorsed included the elimination of all examination questions with a significantly adverse impact on blacks, the use of separate distribution frequencies for blacks to offset any adverse impact from the test as a whole, the development of new selection procedures in consultation with the plaintiff's expert, the development of special training and recruiting procedures to assist black officers, and the immediate promotion of 44 black officers into newly created positions. Williams v. City of New Orleans, 543 F. Supp. 662, 681-84 (1982).

These provisions surely were sufficient to eliminate any problem of deterrence of black applicants or isolation of successful candidates. At the same time, it was clear that because of black underrepresentation in entry-level ranks, the measures approved by the district court would not have raised black representation in upper level positions to the levels that, in theory, would have existed absent past discrimination nearly as quickly as the one-to-one promotion quota that the court refused to approve. In taking the position that the district court erred in not approving the promotion quota, the EEOC draft and the briefs of the parties and amici urging reversal of the district court embraced the view that Title VII and the Constitution permit quota relief for the sole purpose of accelerating the attainment of a specific level of minority participation.

> charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, *and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.*[33]

This language appears to leave open the question of whether courts may order quota relief. It advises courts that they may order such affirmative relief as deemed appropriate, but is silent on whether or under what conditions quota relief is appropriate. Although quotas are not listed as one of the types of relief courts are authorized to order, section 706(g) expressly states that its list is not exhaustive. The most plausible interpretation of the first sentence of section 706(g) is that courts may order quota relief to the extent that such relief is appropriate in order to serve the statutory purposes of Title VII. Whether quota relief meets this test depends on an analysis of the other provisions of the Act and its legislative history.

The Justice Department finds the express Title VII prohibition against quota relief in the final sentence of section 706(g), which imposes the following limitation on a court's broad authority to grant "appropriate" equitable relief:

> No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or violation of [§ 704(a)].[34]

The Justice Department argues that the final sentence of section 706(g) prohibits "affirmative equitable relief in favor of an individual whose substantive personal rights under Title VII were not violated by the respondent."[35] Quotas are said to be invalid under this section because they "inevitably require the hiring or promotion of individuals who were not 'refused employment or advancement' by

33. 42 U.S.C. § 2000e-5(g) (1982) (emphasis added). *See supra* note 9 for full text.
34. 42 U.S.C. § 2000e-5(g) (1982).
35. *See* BNA Special Report, *supra* note 2, at 6.

the employer in violation of Title VII."[36]

It is difficult to understand how the language of section 706(g) can be viewed as a prohibition against quota relief. On its face, the language applies only to orders that require the hiring of an individual who was refused employment for any reason other than discrimination. Quota remedies are not framed to require the hiring of such individuals. Typically, the court directs the employer to select a certain percentage of hires or promotees from among qualified members of the class against whom it has discriminated. Nothing in a quota remedy would expressly require the selection of individuals rejected for nondiscriminatory reasons, and most, if not all, quotas can be filled without the selection of such individuals.

The Justice Department's argument would be valid if the sentence stated that "no order shall require the selection of an individual *unless such individual was refused selection for discriminatory reasons.*" However, Congress chose very different language by prohibiting orders that require the selection of individuals who were refused selection for nondiscriminatory reasons. This language is designed to limit hiring or reinstatement relief in the situation to which courts have applied it, the so-called "mixed motive" case where the plaintiff was rejected in part because of discriminatory animus, but would not have been selected even absent discrimination.[37] Accordingly, there is no reason to believe that the final sentence of section 706(g) has any relevance to the quota issue. Unless there is exceptionally clear legislative history demonstrating that the sentence was intended to prohibit quota relief, no such restriction can be found in section 706(g).

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36. *Id.*

37. *See, e.g.*, Harbison v. Goldschmidt, 693 F.2d 115, 117 (10th Cir. 1982); Richerson v. Jones, 551 F.2d 918, 923-24 (3d Cir. 1977); Day v. Mathews, 530 F.2d 1083, 1085-86 (D.C. Cir. 1976).

The final sentence of § 706(g) was derived from § 10(c) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(c) (1982). That provision was intended to prohibit retroactive relief to individuals whom the employer shows would have suffered adverse action notwithstanding their union activity. *See* Wright Line, 251 N.L.R.B. 1083, 1088 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Indeed, as the EEOC noted in its *Williams* draft, this provision of the NLRA could not have been intended to prohibit prospective relief to nonvictims of unfair labor practices generally, since this issue never arose under the NLRA. *See* BNA Special Report, *supra* note 2, at 73.

2. Section 703(j)

Unlike section 706(g), section 703(j) seems at least arguably applicable to the question of the propriety of court orders requiring preferential treatment based on race, color, religion, sex, or national origin. Section 703(j) is framed as a guide to the interpretation of Title VII as a whole, stipulating the parameters of Title VII. It states that nothing in Title VII will be interpreted to require an employer to grant preferential treatment on account of an imbalance. If a court orders an employer to grant preferential treatment on this account, section 703(j) arguably is violated in that section 703(a), prohibiting discrimination, and section 706(g), establishing remedies, will have been interpreted to require the employer to grant such treatment.

On the other hand, the language of section 703(j) plausibly can be interpreted to mean only that courts shall not enter a finding of discrimination based solely on the existence of racial imbalance in the defendant's workforce. Under this interpretation, section 703(j) speaks only to substantive liability, not to remedies. The Supreme Court appears to have endorsed this view in a footnote to *United States Steelworkers of America v. Weber*.[38] Based solely on the language of section 703(j), it is impossible to rule out either of the interpretations described above.

Even assuming that section 703(j) addresses the question of court-ordered remedial quotas, its language does not set forth the congressional answer with clarity. We are told that Title VII shall not be interpreted to require employers to grant preferential treatment "on account of an imbalance which may exist with respect to the total number or percentage of [protected group representation] . . . in comparison with the total number or percentage of [such representation] . . . in the available workforce."[39] However, depending on how one interprets the phrase "on account of an imbalance," section 703(j) can be read to support at least two of the three views of quotas discussed in Part I.

Section 703(j) does not read like a flat prohibition of all quota relief. As one commentator noted, "Congress could have employed simple language to effect an absolute ban on court-ordered racial

38. 443 U.S. 193, 205 n.5 (1979). For a discussion of *Weber*, see *infra* note 150.
39. 42 U.S.C. § 2000e-2(j) (1982).

preferences."[40] Instead, Congress appears to have qualified the prohibition, limiting it only to preferential treatment "on account of" an imbalance. Nonetheless, it can be argued that the "on account of" language does not truly limit the section 703(j) ban on court-imposed quotas.[41]

In a sense, any quota a court is likely to order as a remedy for class discrimination will be "on account of an imbalance" which exists in the employer's workforce. Absent some sort of an imbalance, a court will be unlikely to find class-wide discrimination, and thereby unlikely to order a class-wide remedy, much less to order such an extreme form of class-wide remedy as a quota. Accordingly, virtually all court-ordered quotas are imposed "on account of an imbalance" in the sense that "but for" the imbalance they would not have been imposed. The imbalance, in other words, is a necessary condition for the imposition of the quota. Section 703(j) thus can plausibly be read as prohibiting court-imposed quotas in the only situation in which a court would order a quota. To be sure, Congress could have achieved this result without the "on account of an imbalance" language. However, the inclusion of that language may simply reflect the desire to identify the one situation which Congress feared might give rise to court-ordered quotas. Thus, it can be argued that the language of section 703(j) supports the view that quotas are absolutely prohibited under Title VII.

The key to this argument is the view that a quota is imposed "on account of an imbalance" if it would not have been imposed "but for" the imbalance. It would seem, however, that the "on account of" language entails more, that it is satisfied only when the imbalance is the decisive reason for ordering preferential treatment. The phrase "on account of an imbalance" seems to imply some notion that the imbalance was the central reason, rather than merely one of the necessary conditions, for the imposition of the quota.

The "decisive reason" test comports with the intermediate view that court-ordered quotas are permitted to the extent necessary to ensure future equal employment opportunity. As noted above, there are many cases of racial imbalance, even serious imbalance, in which considerations of future equal employment opportunity would not lead a court to conclude that quota relief is needed. Accordingly, where a quota is ordered under the intermediate theory,

40. Note, *supra* note 1, at 735.
41. *Id.* at 736.

racial imbalance is not the decisive factor in determining whether the quota should have been imposed.

Assuming that section 703(j) applies to remedies, the view that courts may order quota relief to remedy past discrimination by raising minority representation to the level that probably would have existed absent discrimination is difficult to defend. The argument in favor of that view would be that where a court imposes a quota to remedy an employer's past discrimination by expediting the attainment of "fair" levels of minority representation, the quota is not imposed on account of an imbalance but on account of an employer's past discrimination. However, if section 703(j) means only that courts may not impose a quota unless the imbalance to be thereby remedied was caused by discrimination, then that provision is superfluous: "section 706(g) provides ample support, if any is needed, for the proposition that courts may not provide a remedy where there has been no unlawful discrimination."[42]

Moreover, it is disingenuous to argue that a quota specifically designed to achieve a certain numerical balance is not imposed "on account of an imbalance." As noted above, no Title VII remedy of any kind may be imposed on an employer unless it has engaged in past discrimination. Thus, it cannot truly be said that the existence of discrimination is the decisive factor in the decision to go beyond ordinary Title VII relief and impose a quota designed to expedite the attainment of racial balance.[43] The decisive factor in that case would seem to be whether the imbalance caused by past discrimination is so severe that, absent the quota, it will continue for an unacceptably long period of time. This suggests that where a quota is ordered on this rationale, it is ordered "on account of an imbalance."

The foregoing argument, however, cannot be considered a definitive refutation of the expansive view of quotas, inasmuch as it is not clear that section 703(j) applies to remedies. In fact, analysis of the language of section 703(j) does not conclusively rule out any of the three theories of quota relief. The legislative history must be consulted.

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42. *Id.*

43. Indeed, in many cases racial imbalance is the decisive factor leading the court to find the existence of discrimination. *See supra* note 31. In these cases, to say that a remedial quota has been imposed on account of the employer's discrimination may be to say nothing more than that it has been imposed on account of an imbalance.

B. *The 1964 Legislative History*

Typically, the 1964 legislative history is discussed in great detail by opponents of quotas and barely mentioned by quota proponents. To be sure, if the quota debate could be resolved by determining whether there are more statements in the legislative history by Title VII proponents opposing quotas than supporting them, there is no doubt that the anti-quota position would prevail. However, the issue cannot be decided by this type of polling. The key questions in analyzing the legislative history are: (1) what precisely did the proponents of the legislation state would not occur under Title VII, (2) which provisions of Title VII did they say prevented that result, and (3) returning to the language of Title VII, do these provisions effectuate the prohibition.

1. A Summary of the 1964 Legislative History

Title VII of the Civil Rights Act emerged from the House Committee on the Judiciary,[44] and the quota issue first appears in the legislative history in the Judiciary Committee's Report. The Committee Report itself does not discuss quotas. However, the Committee opponents of the legislation raised the issue in their Minority Report, contending that the bill would permit the federal government to force employers and unions to adopt quotas to achieve racial balance.[45] This charge led the Committee's Republican supporters of the bill to state in their Additional Views that the EEOC "must confine its activities to correcting abuse, not promoting equality with mathematical certainty."[46]

The Judiciary Committee bill, H.R. 7152, was introduced in the House of Representatives by Congressman Celler. He devoted a portion of his speech to the "patently erroneous" criticism that the EEOC "would have the power to prevent a business from employing and promoting the people it wished, and that a 'Federal inspector' could then order the hiring and promotion only of employees of certain races or religious groups."[47] Celler pointed out that only

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44. *See* Vass, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 434-37 (1966).

45. H.R. REP. No. 914, 88th Cong., 1st Sess. pt. 1 at 68-73 (1963).

46. H.R. REP. No. 914, 88th Cong., 1st Sess. pt. 2 at 29 (1963). The signers of these Additional Views were Representatives McCulloch, Lindsay, Cahill, Shriver, MacGregor, Mathias and Bromwell.

47. 110 CONG. REC. 1518 (1964).

courts could issue orders under Title VII and that even a court "could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination."[48] In addition, the Republican sponsors again made this point in a memorandum introduced into the record.[49]

The Senate, following seventeen days of debate, voted to take up the House bill directly without referring it to committee. The legislative history consists of the preliminary floor debate and the formal floor debate that followed.

Senator Humphrey, co-manager with Senator Kuchel of the Civil Rights Act of 1964, endeavored during the preliminary debate to answer charges that Title VII would result in quotas.[50] At the outset of the formal debate, in presenting the bill to the Senate, Senator Humphrey again sought to put this fear to rest. The following passage from his speech is perhaps the most quoted statement in this regard:

> The relief sought [in a Title VII suit] would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and payment of back pay. This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e) [enacted as section 706(g)] which makes clear what is implicit throughout the whole title; namely, that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or

48. *Id.*

49. After listing the remedies that a court may order, such as an injunction against discrimination or reinstatement of an employee, the memorandum stated that "title VII does not permit the ordering of racial quotas in businesses or unions." *Id.* at 6566.

50. On March 17, he stated: "[N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." 110 CONG. REC. 5423 (1964). On March 23, he stated: "There is no enforced quota. . . . The only thing that the court would do would be to ask the defendant to cease and desist, to tell him to stop this practice, if it can be proved that the practice has been unlawful." *Id.* at 6001; *see also id.* at 5092, 5094.

national origin.

. . . .

Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

That bugaboo has been brought up a dozen times; but it is nonexistent. In fact the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion.[51]

Title VII of the Civil Rights Act was presented to the Senate by its bipartisan sponsors, Senators Case and Clark. Both Senators denied that Title VII would establish a quota system.[52] In addition, Senator Clark introduced into the record a series of documents to support this assurance.[53] An interpretative memorandum prepared by Senators Clark and Case stated:

[I]f a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a non discriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies. . . .[54]

Following the presentation of the Civil Rights Act by its sponsors, opponents gained the floor and began their filibuster. Charges

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51. *Id.* at 6549. Senator Kuchel's opening speech in support of the legislation also assured the Senate that "the court cannot order preferential hiring or promotion consideration for any particular race, religion or other group" and that "its power is solely limited to ordering an end to the discrimination which is in fact occurring." *Id.* at 6563. After his speech, Senator Kuchel introduced in the record the memorandum prepared by the House Republican sponsors stating that Title VII does not permit "the ordering of racial quotas in businesses or unions." *Id.* at 6566; *see supra* note 46.

52. 110 CONG. REC. 7207, 7253 (1964).

53. The Senators offered a Justice Department letter that stated that there is no provision in Title VII "that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance" and that any attempt to maintain a given balance would itself violate Title VII's prohibition against discrimination. *Id.* at 7207.

54. *Id.* at 7213.

that Title VII would lead to quotas were a frequent feature of the filibuster.[55] Such allegations were countered by assurances to the contrary and challenges to identify statutory language that would permit quotas.[56] Opponents, in turn, argued that although the bill did not directly authorize quotas, it left open the possibility of their use as an enforcement device.[57] To break this deadlock, Senator Humphrey expressed his willingness to add an amendment expressly prohibiting quotas.[58] Senator Allott proposed an amendment which would have precluded courts from finding a violation "solely on the basis of evidence that an imbalance exists with respect to . . . race, color, religion, sex, or national orgin[sic]."[59] Nothing came of this amendment.

On May 26, 1964, Senator Dirksen presented to the Senate the Dirksen-Mansfield Substitute for the entire House-passed Civil Rights Bill.[60] The substitute bill left unchanged both the basic prohibitory language of Title VII and its remedial provision, section 707(e) (enacted as section 706(g)), but added several provisions limiting or defining the scope of the Title as a whole, including section 703(j). The substitute bill was drafted by an informal group of legislators and Justice Department officials. There is no record of their deliberations.[61]

The Senate debate on the Dirksen-Mansfield Substitute contains only one detailed statement explaining section 703(j). Senator Humphrey stated:

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have main-

55. *See, e.g., id.* at 7418, 7800, 8500, 8618.
56. *See, e.g., id.* at 7418-20, 7800, 8500-01, 8618, 8921, 9113.
57. *See, e.g., id.* at 7420, 8501, 8619.
58. *Id.* at 7800.
59. *Id.* at 9881-82.
60. *Id.* at 11,926.
61. However, Senator Dirksen boasted: "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase." *Id.* at 11,935.

tained all along about the bill's intent and meaning.[62]

2. Implications For Section 706(g)

The Justice Department relies on the portion of the 1964 legislative history preceding the introduction of the Dirksen-Mansfield Substitute to argue that section 706(g), standing alone, prohibits court imposition of remedial employment quotas. In doing so, it is able to cite many statements during that period assuring that Title VII would not establish a quota system. A few of these statements purport to find a prohibition against court-imposed quotas in the final sentence of section 706(g).[63] However, read as a whole, the legislative history shows that the final sentence of section 706(g) was not widely regarded as a prohibition against quota relief.

The charge that Title VII would establish a quota system was perhaps the most persistent criticism leveled against the Civil Rights Act. That charge, along with the related one that Title VII would override seniority rights, was seized upon by George Wallace in his presidential primary campaigns in the North against local Democratic candidates acting as surrogates for President Johnson.[64] Wallace's ability to persuade white Democrats of the truth of these charges was of great concern to the party establishment.[65] Thus, apart from the legislative battle to pass Title VII, there were urgent political reasons why the quota charge had to be answered.

In this setting, it would seem logical that if the pre-Dirksen-Mansfield Substitute version of Title VII contained a provision affirmatively limiting court-imposed quotas, every proponent of the Act, and certainly every Democratic proponent, would have cited that provision as at least a partial answer to the quota charge. In fact, however, very few proponents pointed to the final sentence of section 706(g). As discussed above, the usual approach was simply to deny that courts could order quotas and to challenge opponents to identify the provision of Title VII that would authorize them to do so.[66]

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62. *Id.* at 12,723.

63. *See id.* at 6549 (remarks of Sen. Humphrey); *id.* at 7214 (interpretative memorandum of Sen. Case and Sen. Clark).

64. *See, e.g., id.* at 11,471 (example of Governor Wallace's allegations in this regard).

65. *See* T. WHITE, THE MAKING OF THE PRESIDENT 1964, at 234 (1965).

66. *See supra* text accompanying notes 55-57. Senator Williams argued that quotas would not be imposed under Title VII by noting that courts had not imposed them in cases involving allegations of racial discrimination in jury selection. 110 CONG. REC. 8921 (1964). Senator

There were occasions when proponents did invoke the final sentence of section 706(g) in an attempt to refute the quota charge. In his speech presenting the Civil Rights Act to the Senate, Senator Humphrey answered the charge in part by stating:

> No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e) . . . .[67]

Senators Clark and Case made an almost identical statement in their interpretative memorandum.[68] These statements, however, misrepresented the terms of section 707(e) (now section 706(g)). The final sentence of this provision does not, as Senator Humphrey said, prohibit employers from selecting "anyone who was not [rejected] by an act of discrimination"; it prohibits employers from selecting anyone who was rejected "for any reason other than discrimination."[69] This difference in phrasing is crucial to the quota issue. Quota relief generally requires employers to select persons who have not been rejected by an act of the employer's discrimination, in other words, nonvictims. It does not require the selection of that subset of nonvictims who have been rejected by an act of the employer that did not constitute discrimination.[70] On its face, section 706(g) precludes only the latter form of relief. Only by construing the language to preclude the former relief could Senators Humphrey, Clark, and Case invoke that provision to assure Congress that Title VII would not permit court-imposed quotas.

Ultimately, Senator Humphrey apparently recognized that the last sentence of section 706(g) could not legitimately be used in this way.[71] On the eve of the presentation of the Dirksen-Mansfield

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Keating stated that "[f]or . . . a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution." *Id.* at 9113. Neither Senator alluded to § 706(g).

67. *Id.* at 6549.

68. *Id.* at 7214.

69. *See id.* at 11,933.

70. *See supra* text accompanying notes 34-36. As a practical matter this subset of nonvictims will consist of persons rejected because they were unqualified. Thus, the final sentence of § 706(g) is essentially an assurance that employers are not required by Title VII to select unqualified applicants.

71. In the days following his presentation of the Act, he engaged in several colloquies in

Substitute, he provided a written explanation of the pre-Substitute civil rights legislation. With respect to Title VII, he stated:

> The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title would prohibit preferential treatment for any particular group, and any person, whether or not a member of any minority group, would be permitted to file a complaint of discriminatory employment practices. The title does not provide for the reinstatement or employment of a person . . . if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the title. The title contains no provisions which would jeopardize union seniority systems, nor would anything in the title permit the Government to control the internal affairs of employers or labor unions.[72]

In this passage, Senator Humphrey accurately described the final sentence of section 706(g) and did not characterize it as a prohibition on court-imposed quotas. Indeed, the statement makes no reference to court-ordered quotas and appears to find the Title VII ban on "quota systems" and "preferential treatment" in the general ban on employment discrimination on the basis of race.[73]

In short, although several Senators flirted with the idea that the final sentence of section 706(g) could be interpreted to mean that courts could not impose quotas under Title VII, it cannot be said that this was ever "the sense of the Senate." Although many Senators sought to provide assurances that even courts could not order

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which he countered the quota charge not by citing § 706(g), but by asking rhetorically whether any provision of Title VII provided for quotas and whether quotas had been imposed in states with fair employment statutes. *See, e.g.*, 110 CONG. REC. 7418-20, 7800 (1964). Moreover, in an exchange with Senator Smathers, Senator Humphrey asked:

> Would the Senator from Florida be more pleased if we included in the bill an amendment which provided that there should be no quota system?
>
> . . . .(response omitted)
>
> That might be a good amendment. It is only to satisfy those who are doubters, because if we do not expressly provide for a quota system, obviously it will not be included. But since we do provide in other sections of the bill—for example, in title VI—that the withdrawal of federal funds should not relate to insured activities or guarantees, we might very well want to include that sort of restraint in the bill.

Id. at 7800.

72. *Id.* at 11,848.

73. This is where the Justice Department had located the same ban in its memorandum explaining why Title VII did not provide for quotas. *Id.* at 7207; *see supra* note 53.

quotas, few pointed to section 706(g) as containing that assurance. Those who did had to misstate the terms of that provision and did not press the point. This is not the kind of unambiguous legislative history necessary to support a construction of section 706(g) that is flatly contrary to the statutory language. Accordingly, the view that the final sentence of section 706(g) bars courts from imposing quota remedies can be dismissed.

A more promising anti-quota argument can be based on the first sentence of section 706(g) which, in 1964, provided that courts could "order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay." This language standing alone seems to permit quotas to the extent that they are "appropriate." However, the 1964 legislative history contains numerous statements to the effect that quotas are not an appropriate Title VII remedy. Indeed, it contains statements that quotas would not be imposed because Title VII does not specifically provide for this kind of relief.[74] Thus, a plausible argument exists that even if section 703(j) had not been added to Title VII, the Act would have prohibited court-ordered quotas.

The argument is entirely academic, however. First, the 1964 Congress added section 703(j), an affirmative prohibition of preferential treatment which, according to Senator Dirksen, was the result of extensive deliberation and meticulous wording.[75] That provision should be regarded as the embodiment of the prevailing anti-quota sentiment of 1964. Any quota not prohibited by the specific language of section 703(j) should not be considered prohibited by implication under the first sentence of section 706(g).

In any event, Congress amended that sentence in 1972 to state that court-ordered affirmative action under Title VII "is not limited to reinstatement or hiring of employees with or without back pay" and that courts may order "any other equitable relief [they deem] appropriate."[76] Congress thereby undermined any argument that its failure in section 706(g) to list quotas as a permissible remedy means that courts are barred from imposing this remedy. Thus, the anti-quota position stands or falls on section 703(j).

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74. *See, e.g.*, 110 CONG. REC. 7418-20 (1964) (remarks of Sen. Humphrey); *id.* at 8500-01 (remarks of Sen. Allott); *id.* at 8618 (remarks of Sen. Keating); *id.* at 8921 (remarks of Sen. H. Williams).

75. *See supra* note 61.

76. 42 U.S.C. § 2000e-5(g)(1982).

3. Implications for Section 703(j)

The legislative history undercuts the view that section 703(j) flatly prohibits courts from ordering preferential treatment under any circumstances. To be sure, the 1964 debate contains assurances that appear categorical enough to support the prohibitionist view. Representative Celler stated that a court "could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination."[77] The House Republican sponsors declared in their explanatory memorandum that "title VII does not permit the ordering of racial quotas in businesses or unions."[78] Senator Humphrey insisted: "There is no enforced quota. . . . The only thing that the court would do would be to ask the defendant to cease and desist, to tell him to stop this practice, if it can be proved that the practice has been unlawful."[79]

However, the categorical assurances against court-ordered quotas stopped appearing in the debates just about the time the notion of proposing a specific anti-quota amendment began to appear. Such anti-quota assurances as were offered from the time the idea of an anti-quota amendment was first discussed to the time that amendment emerged did not mention quotas imposed by courts as a remedy for proven discrimination.[80]

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77. *See supra* note 48 and accompanying text.

78. *See supra* note 49.

79. 110 CONG. REC. 6001 (1964); *see also supra* text accompanying notes 52-54 (remarks of Senators Clark and Case).

It can be argued that even these statements are not so sweeping as to clearly prohibit court-ordered preferential treatment in the special case where such relief is necessary to ensure future equality of opportunity. Some of the statements posit a dichotomy between ordering a quota or preferential relief (not permitted) and ordering an end to discrimination (permitted and presumably required). A preference which is necessary to usher in a regime in which members of previously victimized groups receive equal opportunity arguably fits within both categories of the supposed dichotomy and thus might not unequivocally be prohibited under these statements. Similarly, to the extent the statements denounce "quotas," it is not clear that they are denouncing the special case of preferential treatment upheld by the intermediate view. Such preferential treatment resembles what is commonly understood to be a quota in that it involves a race- or sex-based preference and the use of numbers. However, it differs from the traditional quota in that it sets no ultimate number defining the desired level of minority representation. Nonetheless, if the categorical sounding anti-quota assurances had been incorporated in § 703(j), or had been offered by way of explaining that provision, the argument would be strong that Title VII precludes preferential treatment in all circumstances.

80. *See* 110 CONG. REC. 10,520 (1964) (remarks of Sen. Carlson); *id.* at 11,848 (remarks of Sen. Humphrey).

This pattern continued once Senator Dirksen introduced the Dirksen-Mansfield Substitute containing section 703(j). The only detailed explanation of that provision, a statement by Senator Humphrey, described the limitation as a qualified one applying only to quotas aimed at achieving racial balance. According to Humphrey, section 703(j) was added to make it clear that "title VII does not require an employer to achieve any sort of racial balance in his workforce by giving preferential treatment to any individual or group."[81] Similarly, Senator Dirksen, stated that "the Senate substitute bill expressly provides that an employer does not have to maintain any employment ratio, regardless of the racial ratio in the community."[82] Neither statement appears to contemplate a limitation on a court's ability to order the selection of minority candidates on an interim basis in order to ensure future equality of opportunity.

This legislative history should be regarded as a repudiation of the absolute prohibitionist position. Congress knew how to formulate an absolute prohibition. The sponsors had done so many times in their speeches. Instead, they drafted a provision which, on its face, is qualified and which can be reconciled with the prohibitionist view only with difficulty.[83]

In short, it appears that when it came time to actually formulate an anti-quota provision, the sponsors, in consultation with the Justice Department, decided that it would be unwise to enact the categorical ban on the use of remedial quotas described in some of their earlier statements.[84] The qualified wording of section 703(j)

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81. *Id.* at 12,723; *see supra* text accompanying note 62 (full text of Sen. Humphrey's statement).

82. 110 CONG. REC. 14,329 (1964).

83. *See supra* text accompanying note 40.

84. The Justice Department actively participated in the informal sessions during which the Dirksen-Mansfield Substitute was hammered out. Its avowed role was to make sure the Civil Rights Act was not watered down in the course of negotiations between moderate Republicans and Democrats anxious to obtain Republican support for ending the filibuster. *See* 110 CONG. REC. 11,939 (1964). The hand of the Justice Department can be discerned in § 703(j). In April, it had prepared a memorandum for Congress which stated: "There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance." *Id.* at 7207. Section 703(j) codifies almost precisely this assurance ("Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group . . . on account of an imbalance. . . ."), and not the more categorical sounding assurances that were made at about the time the Justice Department memorandum was placed in the record. *See supra* text accompanying notes 51-54.

and of the statements explaining the provision put Congress on notice that the prohibitionist view had been rejected.

The question, then, is how far did Congress retreat from the prohibitionist view. One possibility is that it decided not to impose any specific restriction on the judicial authority to order quotas as a Title VII remedy. The other possibility is that it meant section 703(j) to restrict this authority, but only to the point of banning quotas imposed on account of an imbalance. The legislative history supports the latter view. If the sponsors had intended section 703(j) not to apply at all to remedies, but to provide only that failure to maintain a quota is not a violation of the anti-discrimination requirement of Title VII, they could simply have adopted the anti-quota amendment of Senator Allott which plainly said just that.[85] Instead, they rejected the Allott formulation in favor of language which can be read as prohibiting court-ordered remedial quotas in certain situations.[86] The most likely explanation for the decision is that Congress did not intend section 703(j) to speak only to the question of what constitutes a violation of Title VII.

This explanation is all the more likely given the political context of the debates. The categorical anti-quota assurances of the early debates were a response to the potentially fatal charge that Title VII would result in widespread use of quotas.[87] It appears that the sponsors, on closer analysis, decided to draft an anti-quota amendment that would leave open the possibility that courts might impose quotas in exceptional cases as a remedy for egregious discrimination. However, it is difficult to believe that they went so far as to draft an anti-quota amendment that would not apply at all to courts. Such an amendment, far from reassuring those who feared that Title VII would result in widespread use of quotas, would have confirmed that fear. It would have supported the claims of the congressional opponents and George Wallace.[88]

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85. *See supra* text accompanying note 59.

86. *See supra* text accompanying note 59.

87. *See supra* text accompanying notes 64-65.

88. It is not difficult to believe that the proponents would have drafted an anti-quota amendment that did not address the issue of court-ordered quotas if § 706(g) already prohibited courts from ordering remedial quotas. As discussed earlier, however, § 706(g) cannot be read, and was not understood, as such a prohibition. *See supra* text accompanying notes 35-37, 63-74.

C. *The 1972 Legislative History*

The tone of the 1972 legislative debate concerning quotas differed markedly from that of the 1964 debate. This time proponents of the legislation did not offer assurances that quota remedies would be limited under the Act. Instead, they expressed approval of the quota remedy and succeeded in defeating amendments intended to limit it. Again, however, it is necessary to analyze precisely what types of quotas were endorsed during the debates and what, if any, legislative steps were taken to effectuate the endorsement.

1. What Congress Did

Proponents of quota relief argue that Congress took several actions in 1972 which confirm that such relief is permissible under Title VII. First, Congress amended the first sentence of section 706(g) to authorize courts to order "such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without back pay . . . or *any other equitable relief as the court deems appropriate.*"[89]

Second, Congress rejected attempts to amend Title VII to restrict the use of quotas. Senator Ervin introduced an amendment which would have prohibited any federal "department, agency or officer" from requiring employers to practice "discrimination in reverse by employing persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, [or] quotas."[90] Senator Ervin did not state that this amendment was addressed to quotas ordered by the judiciary. His explanation of the amendment's purpose focused on alleged excesses by the EEOC and the Department of Labor.[91] However, Senator Javits, in opposing the Ervin amendment, warned that it would affect not only the activities of these agencies, but also the activities of "the courts of the United States."[92] He noted that courts had approved the use of preferential numerical relief as a Title VII remedy and urged that the Ervin amendment be rejected in order to preserve the availability of such remedies. The Ervin amendment was defeated by a

89. 42 U.S.C. § 2000e-5 (1982) (language added in 1972 emphasized).
90. 118 CONG. REC. 1662 (1972).
91. *Id.* at 1663.
92. *Id.* at 1664.

vote of 44-22.[93]

Finally, the Conference Committee Report on the 1972 amendments stated: "In any areas where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."[94] By 1972, several courts had ordered the use of quotas as a remedy for past discrimination.[95] Moreover, the Court of Appeals for the Third Circuit had upheld the "Philadelphia Plan," which required contractors on federally assisted projects to adopt quotas for the employment of minorities.[96] During the debate on Senator Ervin's anti-quota amendment, Senator Javits had the full text of two circuit court cases affirming the quota remedy placed in the Congressional Record.[97]

2. Implications for the Anti-Quota Position

Nothing that happened in connection with the 1972 amendment of Title VII serves to resurrect the view that section 706(g) prohibits court-imposed preferences for minorities as a remedy for discrimination. The second sentence of section 706(g) was not changed.[98] The first sentence was changed, but in such a way as to

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93. *Id.* at 1676. In the House, Representative Dent introduced an amendment which would have prohibited the EEOC "from imposing or requiring a quota or preferential treatment with respect to numbers of employees, or percentage of employees of any race, color, religion, sex, or national origin." 117 CONG. REC. 31,784, 31,984 (1971). The Dent amendment never came to a vote. Instead, the House adopted a substitute amendment proposed by Representative Erlenborn. The Erlenborn substitute did not contain the Dent amendment language or any new anti-quota provisions. Quota opponents urged that it be rejected for that reason. *Id.* at 32,089-90. Thus, it might be argued that the adoption of the Erlenborn substitute constituted a rejection of the Dent amendment.

94. 118 CONG. REC. 7166 (1972).

95. *See, e.g.*, Carter v. Gallagher, 452 F.2d 315, 327 (8th Cir.) (en banc), *cert. denied*, 406 U.S. 950 (1972); United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Local 53 of the Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

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

97. 118 CONG. REC. 1665-75 (1972).

98. In its *Williams* brief, the Justice Department noted that the Senate-passed 1972 bill eliminated the final sentence of § 706(g), but that this sentence was restored to the bill that emerged from the House-Senate conference and became law. *See* BNA Special Report, *supra* note 2, at 12. However, this fact shows only that Congress wished to retain the final sentence; it does not support any particular interpretation of it. In reinstating the sentence, the conference committee commented: "The provisions of existing law prohibiting court-ordered remedies based on any adverse action except unlawful employment practices under

undercut the argument that this sentence, when read in conjunction with the 1964 anti-quota assurances, serves as a prohibition against any form of quota relief. This argument reasoned that by not listing quotas as an available remedy, Congress had intended to foreclose their use. If one accepts this logic, it is difficult to reject the corollary that, by later stating that available remedies are not limited to those listed, but may include any relief deemed appropriate, Congress intended to reverse its prior position. This corollary seems particularly compelling in view of the favorable comments by proponents about court-ordered remedial quotas[99] and the defeat of the anti-quota amendments.

The only statement in the 1972 legislative history directly pertaining to the change in the first sentence of section 706(g) is the following excerpt from the section-by-section analysis prepared by Senator Williams:

> The provisions of this subsection are intended to give the court wide discretion, as has been generally exercised by the courts under existing law, in fashioning the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of but also requires that [the persons aggrieved by] the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. This broad reading of the need for effective remedies under this subsection is intended to be preserved in this bill in order to effectively combat the presence of employment discrimination.[100]

The second sentence of Senator Williams' statement suggests that the amendment of section 706(g) was, at least in part, an endorsement of the rightful-place seniority relief remedy, whereby the vic-

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Title VII are retained." Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers, H.R. REP. No. 238, 92d Cong., 2d Sess. 15, 19, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2179, 2183. This explanation supports the view that the sentence simply means that persons subjected to adverse employment action for reasons other than discrimination are not entitled to Title VII relief, and does not address the status of nonvictims generally.

99. *See, e.g.*, 118 CONG. REC. 1675 (1972) (remarks of Sen. Javits); *id.* at 1676 (remarks of Sen. Williams).

100. *Id.* at 4942.

tims of discrimination are awarded the jobs for which they were discriminatorily rejected with seniority dating from the time of the improper rejection. However, if this were the only purpose of the amendment, Congress could simply have changed section 706(g) to state that Title VII permits courts to order appropriate affirmative relief "which may include reinstatement or hiring of employees with or without back pay and with or without back seniority."

The first and last sentences of Senator Williams' statement explain why Congress did not draft section 706(g) in so narrow a fashion. Congress wanted to give courts broad discretion to exercise their equitable powers to grant the most complete relief possible. By 1972, some courts had ruled, in decisions specifically endorsed elsewhere in the legislative history, that in certain cases of severe discrimination complete relief entails preferential treatment of nonvictim members of the victimized racial group in order to remove barriers to equal employment opportunity created by the discrimination.[101] Thus, if one concludes that Congress originally intended section 706(g) to prohibit by implication all quota relief, it is fair to conclude that one of the motives for amending section 706(g) was to overturn this absolute prohibition.

3. Implications for the View that Quotas May Be Imposed to Achieve Specific Levels of Minority Representation

The 1972 amendment of section 706(g) has no bearing on interpretation of section 703(j). As discussed above, that provision was intended by the 1964 Congress, in part, to prohibit court-ordered quotas intended to achieve a particular racial balance, including quotas intended to more rapidly attain the level of minority representation in an employer's workforce that would have existed absent the employer's discrimination. If support for this type of quota is to be found in the 1972 legislative history, it must lie in the defeat of various anti-quota amendments and the endorsement of certain cases approving quota relief.

There are serious difficulties, however, with any such argument. Unlike section 706(g), section 703(j) was not amended in 1972. Thus, the Supreme Court's statement with respect to section 703(h) of Title VII, pertaining to seniority rights under the Title, may be applicable here:

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101. *See infra* text accompanying notes 108-12.

> [T]he Section of Title VII that we construe here, section 703(h), was enacted in 1964, not 1972. The views of members of a later Congress . . . are entitled to little if any weight. It is the intent of the Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls.[102]

Moreover, to the extent that the positive rejection of amendments designed to restrict court-ordered quota relief may be entitled to significant weight,[103] the proponent of quota relief as a means of expediting the attainment of racial balance confronts two additional obstacles. First, no positive rejection of any amendment designed to restrict court-ordered quotas occurred in the House of Representatives.[104] Secondly, it is not even clear that the Senate's rejection of the Ervin amendment constituted positive rejection of an amendment designed to restrict court-ordered quotas. The Ervin amendment would have prohibited any "department, agency or officer of the United States" from requiring employers to adopt quotas. According to Senator Ervin, the amendment was necessary because of the actions of the Department of Labor and the EEOC. It was Senators Javits and Williams, in opposing the amendment, who claimed it would deprive courts of the power to impose quotas.[105] Thus, there is considerable ambiguity as to what the defeat of the Ervin amendment meant. It is not clear how many of the Senators who voted against the amendment understood it to prohibit court-ordered quotas, or even how many of those who did so understand the amendment opposed it for that reason, as opposed to its restriction on enforcement by government agencies.[106]

Finally, even if it could be concluded that Congress, or at least the Senate, rejected an amendment that would have eliminated all court-ordered quotas, there is no support in the 1972 legislative history for the view that either House of Congress indicated approval of quotas designed to accelerate the attainment of the levels of minority representation that would have existed in the em-

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102. International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977).

103. *Compare* Girouard v. United States, 328 U.S. 61, 69-70 (1946) *with* Runyon v. McCrary, 427 U.S. 160, 174 (1976).

104. Even if the adoption of the Erlenborn substitute, containing no new provision pertaining to quotas, implies the rejection of the Dent anti-quota amendment, the Dent amendment did not address the remedial power of the judiciary; it would only have forbidden "the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the federal contract compliance program." *See supra* note 93.

105. *See supra* note 92 and accompanying text.

106. *See* Note, *supra* note 1, at 757.

ployer's workforce absent illegal discrimination. The opponents of the Ervin amendment did not point to any such quota as the type of desirable remedy the amendment would preclude. Senator Javits argued that the amendment would "torpedo orders of courts" imposing affirmative action as a remedial device and cited several court decisions he felt would no longer be valid.[107] None of the cases cited by Senator Javits and, indeed, none of the cases existing at the time of the 1972 debate, supports the view that Title VII courts may impose quotas in cases other than those in which special circumstances make such relief necessary to ensure future equality of opportunity.

In *United States v. Ironworkers Local 86*,[108] the district court ordered quota relief after finding that certain unions and their joint apprenticeship and training committees had violated Title VII by their virtual total exclusion of blacks. The Court of Appeals for the Ninth Circuit found this relief permissible notwithstanding section 703(j). The court stated that Title VII grants district courts "broad remedial power to remove the vestiges of past discrimination and eliminate present and assure the nonexistence of future barriers to . . . equal job opportunities by qualified black workers."[109] The court indicated that the district court remedy merely assured that the injunction against racial discrimination would be effectuated and, accordingly, did not establish a system of racial quotas of the kind prohibited by section 703(j).[110] There is no suggestion in *Ironworkers* that quotas may be imposed for the purpose of accelerating the attainment of a predetermined level of black representation.

In *Contractors Association v. Secretary of Labor*,[111] the court did not even interpret section 703(j). The case involved a challenge

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107. 118 CONG. REC. 1675 (1972). He cited United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971), as an example of the kind of affirmative remedy courts would be unable to order. He also cited Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 859 (1971), in which the court had upheld the Labor Department's imposition of the "Philadelphia Plan" requiring contractors on federally assisted projects to adopt quotas. Senator Javits further cited the district court's decision in Rios v. Enterprise Ass'n Steamfitters Local 638, 337 F. Supp. 217 (S.D.N.Y. 1972). However, in that case the court simply ordered the union to admit to journeyman status persons who were found to be the direct victims of the union's employment discrimination. *Id.* at 220.

108. 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

109. *Id.* at 553.

110. *Id.* at 553-54.

111. 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

to a quota system imposed by the federal government pursuant to Executive Order 11246. One of the contractors' arguments was that the quota program required them to violate section 703(j) of Title VII. However, the court sidestepped that argument. It stated:

> Possibly an employer could not be compelled, under the authority of Title VII, to embrace such a program . . . . We do not meet that issue here, however, for the source of the required contract provision is Executive Order 11246. Section 703(j) is a limitation only upon Title VII not upon any other remedies, state or federal.[112]

In short, although quotas were much discussed in the 1972 debates, Congress took no action to alter the resolution of the quota debate it had reached in 1964. Indeed, such action as it took indicates that Congress agreed with that earlier resolution. The amendment of section 706(g) and the endorsement of certain court cases ordering quotas confirm the view that quotas may be ordered in those special cases in which they are needed to assure future equal opportunity for members of the group discriminated against. However, there is no indication in the legislative history that Congress intended to allow the quota remedy to be used for the sole purpose of expediting the attainment of a particular racial balance.

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112. *Id.* at 172. Like *Ironworkers*, 443 F.2d at 544, the other pre-1972 amendment appellate court cases approving quota relief did so on the theory that such relief was necessary to assure future equality of opportunity. The first such case to affirm quota relief, Local 53, Int'l Ass'n of Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969), did so because such relief was necessary "to ensure compliance with the Act" and "to prevent future discrimination." *Id.* at 1052, 1054. The relief involved the alternate referral of one black and one white until objective selection standards were developed. *Id.* at 1055. There was no ultimate numerical goal for black representation. *Id.* at 1051; *see also* Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971).

Similarly, in Carter v. Gallagher, 452 F.2d 315 (8th Cir.), *cert. denied*, 406 U.S. 950 (1972), the Eighth Circuit approved a remedy whereby the Minneapolis Fire Department was required to hire one minority group member for every three people hired until at least 20 minorities were so hired. Applying Title VII principles, the court justified use of this remedy on the theory that, given the city's past discrimination, "it is not unreasonable to assume that minority persons will still be reluctant to apply for employment, absent some positive assurance that if qualified they will in fact be hired on a more than token basis." *Id.* at 331.

III. The Constitutionality of Quotas Permitted Under Title VII

A. *Introduction*

A separate article would be required to fully address the constitutional issues raised by court-ordered employment quotas in the context of government employment. Having concluded that Title VII permits courts to impose employment quotas only in special circumstances, this article will address only the constitutional issues raised by the use of quotas in those circumstances. Specifically, the issue is whether the Constitution permits a court, pursuant to congressional authorization, to impose employment quotas as a remedy for discrimination by public employers where it finds such relief necessary to ensure that members of classes previously victimized by the employer's discrimination will receive equal employment opportunity from the employer in the future.

As noted above, even a quota imposed in furtherance of the fundamental goal of ensuring equal employment opportunity will result in lost employment opportunities for innocent candidates who do not belong to the beneficiary class. Accordingly, the proponent of such a quota must explain why the government has an interest, in the context of an employment discrimination suit, in helping one group of applicants at the expense of another group merely because the members of the beneficiary group belong to the same racial minority as the victims of the employer's past discrimination. The proponent's response would be that such a quota, applied for a short period of time, will prevent long-term discrimination against minorities resulting from the defendant's recalcitrance or the discriminatory environment created by the defendant's past practices. The argument is that by affecting relatively few employment decisions in the present, the quota can reverse a pattern of unfairness that otherwise would be perpetuated for many years. For the reasons presented below, this justification should suffice to establish the constitutionality of those quotas permitted by Title VII.

B. *Traditional Equal Protection Analysis*

Under traditional equal protection analysis, a classification that intentionally disadvantages a particular class of individuals must be justified by some state interest. How weighty that interest must be depends on the nature of the disadvantage and the nature of

the class that suffers from it. In the case of a classification that intentionally disadvantages blacks, courts have required a showing that the state interest is "compelling" and that there is no alternative less burdensome than the use of the classification by which the interest can be satisfied.[113] This is the "strict scrutiny" standard. The type of quota permitted by Title VII survives even traditional strict scrutiny.[114]

The government has a substantial interest in maximizing the extent to which public employers provide equal employment opportunity to members of all races. It was precisely this interest that led Congress to extend Title VII to public employers. The government's interest in fully effectuating this statutory goal should be considered compelling. In a similar context, courts have found the elimination of segregation in public schools and the creation of unitary school systems to be compelling state interests sufficient to justify remedial orders using racial classifications to benefit persons not themselves victimized by past discrimination.[115]

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113. *See* Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

114. It is not clear that strict scrutiny should apply to a classification that intentionally disadvantages members of the racial majority. It can be argued that the white majority is unlikely to enact legislation that disadvantages whites without a good reason and therefore the presumption of illegitimacy that is a basis for strictly scrutinizing classifications that disadvantage minority groups should not attach where whites are disadvantaged. *See* J. ELY, DEMOCRACY AND DISTRUST 170 (1980); *see also* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357 (Brennan, J., concurring and dissenting); Brest, *The Supreme Court 1975 Term-Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 16-22 (1976). *See generally* United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). On the other hand, the presumption that racial classifications are irrational is not lightly abandoned, especially since concepts of "majority" and "minority" may be fluid. *See Bakke*, 438 U.S. at 298-99; *see also* R. POSNER, THE ECONOMICS OF JUSTICE 398 (1981). Those who believe, nonetheless, that the presumption should attach less strongly to classifications that intentionally disadvantage whites have proposed a slightly less stringent standard whereby such a classification is judged constitutional if the state has an important and articulated purpose in using it. *See Bakke*, 438 U.S. at 361 (Brennan, J., concurring and dissenting). The type of quota permitted by Title VII passes muster under this standard for the same reasons it passes under strict scrutiny.

115. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); *see also* McDaniel v. Baresi, 402 U.S. 39 (1971). Even under strict scrutiny, when the asserted governmental interest in using a suspect classification is the promotion of a well-established and permissible objective courts are receptive to claims that the interest is "compelling." In *Bakke*, for example, Justice Powell stated that strict scrutiny is satisfied if the state interest is "both constitutionally permissible and substantial" provided that use of the suspect classification is necessary to accomplish the purpose. *Bakke*, 438 U.S. at 305. He was prepared to find that the state's interests in "ameliorating . . . the disabling effects of identified discrimination" and in the attainment of "a diverse student body" were weighty enough to meet this strict scrutiny

Strict scrutiny also requires a showing that the use of racial classifications is necessary to the accomplishment of the state purpose it is intended to serve; in other words, that there is no less burdensome alternative. Under Title VII, a court may impose a remedial quota only if it finds that the quota is necessary to assure future equality of employment opportunity to members of the group against which discrimination has been found. Thus, the statute effectively contains its own less burdensome alternative test. In short, any quota properly imposed pursuant to Title VII will be necessary to serve the compelling interest of promoting equal employment opportunity.

C. *Supreme Court Equal Protection Decisions in Affirmative Action Cases*

The Supreme Court has decided two major cases involving fourteenth amendment challenges to affirmative action: *Regents of the University of California v. Bakke*,[116] involving college admissions, and *Fullilove v. Klutznick*,[117] involving preferences for minority contractors. In *Bakke*, four Justices, in an opinion by Justice Brennan, applied a slightly less stringent standard than traditional strict scrutiny to uphold the University's admissions quota. The only other Justice to reach the constitutional issue, Justice Powell, applied strict scrutiny to strike down the quota system.

Justice Powell's review arguably was more searching than traditional strict scrutiny in that it focused on the process by which the quota was imposed, as well as on the substantiality of the interests it was said to serve. In *Fullilove*, several other Justices focused on similar procedural concerns. In both *Bakke* and *Fullilove*, this approach led to doubts about the validity of the quota at issue that might not have arisen had the inquiry been limited to weighing the state interest and considering alternatives. However, the opinions in *Bakke* and *Fullilove* strongly suggest that the type of quota permitted by Title VII is not subject to such doubts.

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standard. *Id.* at 307, 312.

116. 438 U.S. 265 (1978).

117. 448 U.S. 448 (1980).

1. *Regents of the University of California v. Bakke*

Bakke involved a challenge to the decision of the Medical School of the University of California at Davis (University) to establish a quota for the admission of students belonging to certain minority groups. The primary state interest asserted by the University in establishing the quota was the need to remedy past societal discrimination against blacks. As noted, Justice Brennan, writing for Justices White, Marshall and Blackmun, applied slightly less than the traditional strict scrutiny, and voted to uphold the quota. For the reasons discussed above, it is clear that judicial imposition of quotas permitted by Title VII would pass muster under Justice Brennan's analysis.[118]

Justice Powell, the only other Justice to reach the constitutional issue in *Bakke*, found the University admissions program unconstitutional.[119] He rejected the view that classifications which intentionally disadvantage whites should be judged by a different standard than those that disadvantage blacks. He took the position that any racial classification is constitutional only if the state shows "that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose."[120]

Under this test, Justice Powell concluded that the University's admissions program could not be justified as a remedy for the effects of past societal discrimination. The problem was that the goal of remedying the effects of past societal discrimination involves "an amorphous concept of injury that may be ageless in its reach

118. In fact, Justice Brennan's approach seems sweeping enough to support the constitutionality of employment quotas imposed for the purpose of achieving the racial balance that likely would have existed absent the employer's discrimination. That purpose is similar to, and narrower than, the University's purpose in *Bakke* of remedying past societal discrimination as it has affected minority representation in its student body.

119. Justice Powell's vote to that effect, coupled with the votes of Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens that the admissions program violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982), rendered the program invalid. Justice Powell indicated, however, that not all admissions programs that take race into account for the benefit of minority applicants are unconsitutional. *Bakke*, 438 U.S. at 316-18.

120. *Id.* at 305 (quoting *In re* Griffiths, 413 U.S. 717, 721-22 (1973)). Justice Powell also stated, however, that gender-based classifications "are not subjected to this level of scrutiny." *Id.* at 302. Thus, a quota on behalf of women would be subject to a less onerous standard, presumably along the lines of the test applied by Justice Brennan in *Bakke*. For a discussion of employment quotas for women, see Scanlan, *Employment Quotas for Women?*, 73 THE PUBLIC INTEREST 106 (1983).

into the past."[121] In Justice Powell's view, the Constitution does permit racial classifications as a response to past discrimination, but only when they are justified by the more "focused" rationale of remedying "the disabling effects of identified discrimination";[122] specifically, discrimination identified by "judicial, legislative, or administrative findings of constitutional or statutory violations."[123] As Justice Powell explained:

> After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.[124]

The preference created by the University's admissions plan failed under this analysis because it was not based on findings of any statutory or constitutional violations, findings that, in any event, Justice Powell did not consider the University competent to make.[125]

A quota imposed by a court in a Title VII case, pursuant to a finding of employment discrimination, and for the purpose of ensuring equality of future employment opportunity, stands in a much more favorable position under Justice Powell's analysis. Such a quota is an attempt to ameliorate the disabling effects of

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121. *Bakke*, 438 U.S. at 307.
122. *Id.*
123. *Id.*
124. *Id.* at 307-09.
125. *Id.* at 309. According to Justice Powell, the Board of Regents

> is in no position to make such findings [of discrimination]. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. . . . [I]solated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislatively determined criteria. . . . Before relying upon these sorts of findings in establishing a racial classification a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.

Id.

the employer's discrimination, as identified by the court in its finding of discrimination. The quota is not directed at the effects of "societal discrimination," and there would seem to be no doubt about the court's competence to make findings about the effects of the defendant's discrimination. The concept of injury that might lead a court to order a quota in the name of promoting equal employment opportunity is not amorphous. It is simply a recognition that an employer's severe and longstanding discrimination can result in short-term barriers to fair employment that will not disappear with the issuance of an order requiring the employer to cease its discrimination and compensate the known victims. Nor is the concept of injury "ageless in reach." Such problems as the deterrent effect on potential minority applicants of an employer's past discrimination and the hostility of employees in a previously segregated workforce toward pioneers generally will not justify long-term use of quotas.

To be sure, the substantial governmental interest found by Justice Powell in vindicating "the legal rights of victims" may not exist in the case of a quota designed to ensure future fairness toward nonvictim members of the racial group to which the victims belong. However, the Powell opinion does not state that this interest is a prerequisite for justifying race-based preferences. Rather, the government's "legitimate and substantial interest" in eliminating the effects of identified discrimination appears to be the key. Indeed, Justice Powell pointed to the school desegregation cases as establishing "the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment."[126] The relief approved in the school desegregation cases has involved more than simply vindicating the legal rights of past victims of segregation. It has been designed to dismantle formerly segregated systems and to ensure that blacks as a class will not be victimized by segregation in the future.[127] Thus, there is good reason to believe that judicially imposed employment quotas designed to ensure that employers found to have violated Title VII will treat members of the victimized group fairly in the future would be found constitutional under Justice Powell's analysis in *Bakke*.[128]

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126. *Id.* at 307.

127. *See* cases cited *supra* note 115.

128. Justice Powell cited with apparent approval several employment cases in which courts of appeals upheld racial preferences as remedies for constitutional or statutory violations and several others in which quotas were imposed by governmental agencies as remedies for identified past discrimination in certain industries. *Bakke*, 438 U.S. at 301.

2. *Fullilove v. Klutznick*[129]

In *Fullilove*, the Supreme Court, by a vote of six to three, upheld the constitutionality of a provision in the Public Works Employment Act which required that, absent an administrative waiver, at least ten percent of the federal funds granted for local public works projects be used by state or local grantees to procure services from "minority business enterprises." This time, the four Justices who had abstained from discussing the fourteenth amendment in *Bakke* all reached the constitutional question. Chief Justice Burger, in an opinion signed by Justices Powell and White, upheld the validity of the set-aside program. Justice Stevens, writing separately, and Justice Stewart, in an opinion joined by Justice Rehnquist, dissented.[130]

Chief Justice Burger's opinion concluded that the commerce clause authorizes Congress to ensure that minority businesses have an equal opportunity to participate in federal grants to state and local governments and that the fifth and fourteenth amendments permit Congress to achieve that objective through limited use of racial and ethnic criteria.[131] The Chief Justice emphasized that Congress had an abundant historical basis from which it could conclude that, absent the use of such criteria, "traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination."[132] The opinion described the minority set-aside as "a strictly remedial measure . . . that functions prospectively, in the manner of an injunctive decree."[133]

The parallel between the minority set-aside, as described by Chief Justice Burger, and the kind of employment quota permitted under Title VII is close. Title VII permits courts to impose quotas upon finding that, absent such relief, the past employment practices of the defendant will perpetuate the prevailing impaired ac-

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129. 448 U.S. 448 (1980).

130. Justice Marshall, in an opinion signed by Justices Brennan and Blackmun, agreed with the Chief Justice that the set-aside program was valid. The opinion applied the standard of review articulated by Justice Brennan in *Bakke* and concluded that the set-aside program was substantially related to achievement of the important goal of remedying the present effects of past discrimination. *Id.* at 517-21.

Justice Powell wrote a separate concurrence applying the framework of his *Bakke* opinion. He concluded that the program "serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress." *Id.* at 496.

131. *Id.* at 476, 480-92.

132. *Id.* at 478.

133. *Id.* at 481.

cess of members of the victim race to employment opportunities. Like the set-aside program, permissible Title VII quotas can be viewed as prospective remedial measures aimed at overcoming what the Chief Justice described as "barriers to competitive access which [have] their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct."[134]

Because the Chief Justice's opinion stressed the deference due congressional action, the set-aside approved in *Fullilove* is distinguishable from the imposition of quotas by the judiciary. However, although the opinion found judicial power to impose quota relief as a congressionally authorized remedy for a statutory violation to be more circumscribed than the power of Congress directly to mandate a quota, the opinion strongly indicated that such judicial power does exist. For Chief Justice Burger, the difference between court-ordered preferences and those established by Congress is that courts must tailor such preferences to fit the nature and extent of the violation, whereas Congress can impose preferences on behalf of an entire class based upon findings that many members of the class have been discriminated against.[135] Title VII permits imposition of a quota only where the violation is such that the quota is necessary to ensure future fairness. Thus, any such quota would be tailored to fit the nature and extent of the violation. The fact that the quota would extend benefits to nonvictims is not fatal. The Chief Justice's opinion stated that courts have the authority to "incorporate racial criteria into a remedial decree" for constitutional and statutory violations, and it approved the use of racial criteria as a remedy in school desegregation cases as a means of altering the status quo.[136]

Justice Stevens, in his dissent in *Fullilove*, agreed with Chief Justice Burger that:

> The interest in facilitating and encouraging the participation by minority business enterprises in the economy is unquestionably legitimate. Any barrier to such entry and growth—whether grounded in the law or in irrational prejudice—should be vigorously and thoroughly removed. Equality of economic and investment opportunity

134. *Id.* at 478.
135. *Id.* at 483.
136. *Id.*

> is a goal of no less importance than equality of employment opportunity.[137]

However, for Justice Stevens, the problem with the minority set-aside legislation was that it did not sufficiently identify barriers to minority business participation and was not designed to remove such barriers. Because the statute did not outlaw specific practices that might constitute barriers to minority businesses, but simply awarded such businesses a fixed percentage of the available funds, Justice Stevens found that the program might actually frustrate true progress towards equal opportunity. In light of this danger, he considered it imperative that the court closely scrutinize the congressional decisionmaking process to ensure that the racial preference granted by Congress was justified by attributes characteristic of the preferred class and not simply by an unreasoned reaction to past injustices against the group. He concluded that the minority set-aside legislation failed this test.[138]

Justice Stevens' analysis suggests that although a court should not order Title VII employment quotas as a remedy for discrimination on the mere assumption that this relief is necessary to overcome barriers to future fairness, such quotas can be imposed where careful analysis reveals them to be necessary for that purpose. Justice Stevens required that the reasons for any governmentally imposed quota "be clearly identified and unquestionably legitimate."[139] Where a court bases its award of quota relief on justified findings that the defendant's past discrimination will deter minority applicants in the future, absent the prompt hiring of a sizeable number of minorities, it has clearly identified its reason for quota relief—to remove barriers to equal employment opportunity. In *Fullilove*, Justice Stevens regarded this reason as "unquestionably legitimate."[140] Unlike the minority set-aside, such a quota operates directly to remove the identified barriers and does not award minorities a fixed share of slots in the employer's workforce. Therefore, it appears that, under Justice Stevens' analysis, the type of quota permitted by Title VII is constitutional.

Justices Stewart and Rehnquist dissented from the Court's approval of the ten percent set-aside in categorical-sounding terms.

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137. *Id.* at 542-43.
138. *Id.* at 545-48.
139. *Id.* at 535.
140. *Id.* at 543.

They stated that under the fourteenth amendment "the government may never act to the detriment of a person solely because of that person's race."[141] Notwithstanding that language, however, Justice Stewart's opinion acknowledged that "a court of equity may, of course, take race into account in devising a remedial decree to undo a violation of a law prohibiting discrimination on the basis of race."[142]

Applied to an employment discrimination case, this statement suggests that a court's remedial power does not necessarily end with compensating victims and enjoining future violations. Those remedies do not really "take race into account." It is only when the court extends the remedy to nonvictims who are of the same race as the victims that race is taken into account. By citing school desegregation cases,[143] Justice Stewart's dissent seems to confirm that the Constitution permits courts to do more than simply compensate victims in discrimination cases. What the opinion found impermissible was government action based "solely" on race.[144] However, where the reason the court takes race into account is not to promote the status of members of a particular race, but only to ensure that such members are treated fairly in the future, the preference is not truly based solely on the beneficiaries' race. Such a preference can be considered a "remedial measure to counteract the effects of past or present racial discrimination,"[145] a type of relief deemed proper by Justice Stewart when imposed by a court in a manner "carefully tailored to fit the nature and extent of the violation."[146]

In sum, the opinions in *Bakke* and *Fullilove* strongly suggest that a majority of the present court would find that the type of quota permitted by Title VII is also permitted by the Constitution. These opinions unanimously indicate that the purpose of such

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141. *Id.* at 525.

142. *Id.* at 525 n.4. Justice Stewart explained that "such a judicial decree, following litigation in which a violation of law has been determined, is wholly different from generalized legislation that awards benefits and imposes detriments dependent upon the race of the recipients." *Id.*

143. *Id.* at 448 (citing, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 401 U.S. 1 (1971)).

144. *Fullilove*, 448 U.S. at 527.

145. *Id.*

146. *Id.* at 527, 530 n.12. Justice Stewart stated that "a judicial decree that imposes burdens on the basis of race can be upheld only where its sole purpose is to eradicate the actual effects of illegal race discrimination." *Id.* at 528. A quota properly imposed pursuant to Title VII should meet that standard.

quotas—promoting future equality of employment opportunity—is compelling. Some of the opinions reflect the concern that racial quotas may be rashly imposed pursuant to a decisionmaking process that fails to properly weigh countervailing interests. A quota legitimately imposed by a court under Title VII is the product of two decisions: the decision of Congress not to extend its general ban on judicially imposed quotas to those cases in which such relief is necessary to promote future equality of employment opportunity, and the decision of a court that the defendant's past discrimination was so severe that the case before it justifies such a remedy. There is no indication in the *Bakke* or *Fullilove* opinions that this decisionmaking process is constitutionally infirm.

IV. Conclusion

The prevailing judicial view has been that Title VII and the Constitution permit the imposition of quota relief in appropriate cases as a means of "remedying the effects" of a defendant's past discrimination. The Reagan Justice Department has challenged this view, and, in the wake of the *Stotts* decision, it is now open to serious question.

This article has taken the position that quotas are permissible in order to remedy some effects of a defendant's past discrimination, but not to remedy others. The quota remedy is permissible where necessary to correct those effects of a defendant's past discrimination that stand in the way of providing equal employment opportunity in the future. A quota is not permissible solely as a means of remedying the numerical effects of past discrimination, or, in other words, as a means of creating the racial balance that theoretically would have existed absent the discrimination.

A quota imposed as a means of overcoming obstacles to the fair consideration of minority group members caused by the employer's past discrimination serves the primary goal of Title VII—prospective equal employment opportunity. By contrast, a quota imposed solely in order to accelerate the redress of imbalances caused by past discrimination will ensure that race will be a factor in the selection process, usually for a long period of time, without offering the countervailing tendency to promote equal employment opportunity.

The latter quota will promote a secondary goal of Title VII—improvement of the employment outlook for minority group

members.[147] However, the language and legislative history of Title VII indicate that this "goal" was in the nature of a benefit Congress expected to realize as a result of requiring employers to consider applicants without regard to race, and not something to be achieved at the expense of such consideration.[148] Thus, Congress permitted courts to impose quotas only insofar as necessary to ensure prospective equality of opportunity.

It may be that, at this stage in the history of Title VII, few quotas can be justified in these terms. As discussed above, the courts have developed many injunctive tools with which to attack discriminatory practices. It is only in the case of egregious, longstanding, class-wide discrimination, involving virtually total exclusion of minorities, that a quota remedy would appear to be necessary to ensure that minorities will be considered fairly in the future. It is questionable whether many instances of such blatant discrimination still exist. Thus, the congressional compromise on the quota issue may have entailed fairly frequent use of quotas in the early days of Title VII, with a gradual phasing out of such remedies.

As difficult as it is to discern the congressional resolution of the issue of court-imposed remedial employment quotas, it may be even more difficult to decide whether its resolution was the proper one. Although economists apparently disagree as to whether affirmative action is economically beneficial to minority groups,[149] the instinct of civil rights groups that affirmative action is beneficial seems clearly correct. In essence, employment quotas award to minority group members relatively desirable jobs that otherwise would go to whites. It is difficult to understand why, at least in the short-term, minority groups would not benefit thereby. Indeed, one might argue that without this type of quota tool the gap between

147. See United Steelworkers of Am. v. Weber, 443 U.S. 193, 202-03 (1979), and legislative history cited therein.

148. *See supra* text accompanying notes 51-54. Senator Humphrey explained that the economic plight of blacks was the result of outright discrimination in employment, coupled with the lack of skilled blacks in the workforce due to past societal discrimination, particularly in education. He stated that Title VII addressed the problem of employment discrimination, and Titles IV and VI addressed discrimination in education. 110 CONG. REC. 6547-48 (1964). He emphasized that Title VII is "a very moderate and reasonable remedy for problems of racial discrimination in employment" and not an "effort suddenly to impose on the economy vast new legislation, in an effort to arrive at an immediate solution to a long-range problem." *Id.* at 6548.

149. *See generally Evaluating the Impact of Affirmative Action: A Look At the Federal Contract Compliance Program*, 29 INDUS. & LAB. REL. REV. 485 (1976) (evaluating the implications and potential impact of federal affirmative action programs).

black and white incomes may not shrink in the foreseeable future. Thus, it is understandable that some courts have been inclined to impose the quota remedy even when it could only be justified as a means of accelerating or, perhaps more to the point, guaranteeing the attainment of racial balance.

On the other hand, the allocation of jobs on the basis of racial quotas seems contrary to basic American ideals of fairness. Widespread use of quotas could lead to a society that neither whites nor minorities would find desirable. That is why the Congress that passed the 1964 civil rights legislation was so opposed to quota systems. It resolved the competing policy considerations discussed herein in favor of permitting courts to impose quotas only in extraordinary cases where they were needed to "prime the pump." Congress believed, or at least hoped, that the anti-discrimination provisions of Title VII, and other parts of the civil rights bill, coupled with the use of court-imposed quotas in special cases, and, if *Weber* is correct,[150] the occasional use of voluntary preferential treatment, would improve the economic status of minorities without any serious departure from the ideal of merit selection. Those who favor judicial imposition of quotas to achieve racial balance must persuade Congress both that its 1964 belief was unduly optimistic and that the goal of improving minority economic status justifies departing on a broad scale from the ideal of consideration of all candidates for employment based on merit rather than race.

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150. *Weber* holds that Title VII does not prohibit employers and unions from voluntarily implementing employment quotas to eliminate manifest racial imbalances in traditionally segregated job categories. *Weber*, 443 U.S. at 197. In reaching this conclusion, the Court emphasized that § 703(j) states that nothing contained in Title VII shall be interpreted "to require" employers to grant preferential treatment. *Id.* at 205-06. The Court found that had Congress intended to prohibit voluntary affirmative action plans, § 703(j) would have said that nothing in Title VII shall be interpreted "to permit" employers to grant preferential treatment. *Id.* The Court also stressed that such voluntary efforts to redress gross imbalances are consistent with the Act's goal of improving the economic plight of blacks. *Id.* at 202-04.

The *Weber* rationale is unconvincing. Even if § 703(j) does not prohibit voluntarily adopted quotas, § 703(a), which prohibits employment discrimination because of race, would seem to bar employers from awarding jobs to blacks on the basis of their race, absent a court order. Moreover, as discussed *supra* note 148, the "goal" of improving the economic plight of blacks was actually the benefit Congress hoped to realize as a result of fair employment practices, not something to be attained at the expense of such practices. A more persuasive rationale for the *Weber* result is suggested in Justice Blackmun's concurrence: federal courts may, in some circumstances, order quota relief following Title VII litigation and employers should be permitted to do voluntarily that which they reasonably believe courts will require them to do in the event of litigation. *See Weber*, 443 U.S. at 210-11; *see also* R. POSNER, *supra* note 114, at 406.