IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

LARRY WILLIAMS, et al.,

Plaintiffs-Appellants,

v.

THE CITY OF NEW ORLEANS, LOUISIANA,
A MUNICIPAL CORPORATION, et al.,

Defendants-Appellees,

v.

CINDY DUKE, et al.,

Intervenors-Appellees,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

BRIEF OF THE UNITED STATES AS INTERVENOR-APPELLEE ON REHEARING EN BANC

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No. 82-3435

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STATEMENT OF THE COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

On December 16, 1982, a divided panel of this Court rendered its decision in this employment discrimination case, holding that the district court had abused its discretion in refusing to approve a proposed consent decree that, inter alia, required the promotion of one black officer for every white officer until blacks constituted 50 percent of the sworn officers

in all ranks of the New Orleans Police Department (NOPD). 1/ The salient features of the background of this case and the decisions of the district court (reported at 543 F. Supp. 662) and the panel are summarized at pages 1-5 of the Government's Suggestion of Rehearing En Banc.

On January 7, 1983, the United States filed a Motion to Intervene and a Suggestion of Rehearing En Banc. Limited intervenors -- classes of female officers, Hispanic officers, and white officers permitted by the district court to intervene for the limited purpose of challenging the decree -- also filed

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1/ The pertinent provisions of the proposed consent decree are as follows:

> Defendants shall approve and make promotions of black officers on an accelerated basis pursuant to the formula set forth below until black officers constitute fifty percent (50%) of all ranks within the NOPD at which time this Decree shall cease to be operative.
>
> * * * * *
>
> C. Future Promotions. * * * Defendants will approve and promote qualified black and white officers on a 1-1 ratio as vacancies arise. At no time must blacks be promoted on this basis if to do so will result in a proportion of black officers in the rank of sergeant, lieutenant, captain or major, separately considered, that exceeds the proportion of blacks then occupying the rank of police officer. The initial promotion to each rank made pursuant to this subparagraph shall go to a white officer. Consent Decree at 14-16 (E59-E60).

The proposed consent decree also provides: "If a black officer who has been promoted pursuant to paragraphs VI-B and C of this Decree fails to complete the probationary period successfully and is returned to his/her prior rank, the vacancy thus created shall be filled by a black officer and such action shall have no effect on the sequence of promotions contemplated by paragraph VI, supra." Consent Decree at 18-19 (E62-E63). "E" refers to the Record Excerpts filed separately by Plaintiffs-Appellants and Defendants-Appellees.

suggestions of rehearing en banc. The United States' motion to intervene was granted on January 10, 1983, and on February 14, 1983, the full Court ordered that the case be reheard en banc.

STATEMENT OF ISSUE PRESENTED

Whether, in an employment discrimination case against a municipal police department, the district court abused its discretion in refusing to approve a consent decree because it contained a provision requiring the promotion of one black officer for every white officer until blacks constituted one half of the officers in all supervisory ranks?

SUMMARY OF ARGUMENT

A judicial decree, whether entered by consent or after litigation, cannot contain relief that exceeds the limits of the court's remedial powers. One such limitation derives from the ancient requirement that the right and remedy be congruent: judicial remedial powers can be exercised only on the basis of a violation of law and the remedy must be tailored to fit the nature and extent of that violation. In the context of personal rights, this fundamental principle of jurisprudence restricts the scope of permissible remedies 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. Although the Supreme Court's desegregation decisions best illustrate the application of this rule to cases involving racial discrimination, the limitation is "premised on a controlling principle governing the permissible scope of federal judicial power, a principle not

limited to a school desegregation context." Hills v. Gautreaux, 425 U.S. 285, 294 n.11 (1976).

This victim-specific jurisprudential limitation on judicial remedial authority is embodied in Section 706(g) of Title VII, which expressly limits the scope of permissible remedies under Title VII to "make whole" measures for persons whose personal Title VII rights have been violated -- that is, victims of the defendant's discriminatory practices. Indeed, in the legislative debates preceding Title VII's passage in 1964, the drafters, sponsors, and supporters of Title VII repeatedly emphasized that courts would not be permitted to order affirmative equitable relief, such as hiring and promotion preferences, for anyone who was not a victim of discrimination. Moreover, the 1964 Congress was unanimous in its denunciation of the very form of relief at issue here -- court-ordered racial quotas.

The only authoritative evidence contained in the legislative history of the 1972 amendments to Title VII "indicate[s] that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." Franks v. Bowman Transportation Co., 424 U.S. 747, 765 n.21 (1976). In any event, since the pertinent provisions of Section 706(g) were unchanged by the 1972 amendments, the legislative intent of the 1964 Congress continues to govern interpretation of that provision. Indeed, the Supreme Court has consistently invalidated remedial orders containing measures legally indistinguishable from the promotion quota at issue here.

Moreover, because the proposed promotion quota is victim-blind and would thus require innocent non-black police officers to surrender their legitimate promotion expectations to non-discriminatee black officers who have no "rightful place" to promotion priority, the balance of competing equitable interests in these circumstances weighs against ordering such racially based promotion preferences.

Finally, the equal protection guaranties of the Constitution require that racial classifications such as that created by the proposed consent decree be precisely tailored to advance a compelling government interest. Because government has no compelling interest in according preferential treatment to nondiscriminatees at the expense of innocent third parties, judicial imposition of the one-to-one promotion quota contained in the proposed consent decree would have been unconstitutional. Nor can proposed promotion quota be justified as necessary to satisfy the NOPD's "operational needs."

ARGUMENT AND AUTHORITIES

Although founded on the agreement of the parties, a consent decree is nonetheless a judgment, enforceable by the full panoply of judicial sanctions, including citation for contempt, if it is violated. United States v. City of Miami, 664 F.2d 435, 439-440 (5th Cir. 1981). A federal court, therefore, is bound to examine carefully a consent decree proposed by the parties "to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence." Id. at 441; see United States v. City of Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980) (terms of decree cannot be

"unreasonable, illegal, unconstitutional, or against public policy"); United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975) (decree's terms cannot be "unlawful, unreasonable, or inequitable"). If the terms of a consent decree affect the interests of third parties, the court must ensure that the impact on them is neither "unreasonable nor proscribed." United States v. City of Miami, supra, 664 F.2d at 441.

Obviously, the limitations -- both statutory and jurisprudential -- on a court's equitable remedial powers apply to consent decrees no less than to litigated decrees. A court cannot order through a consent decree a type of relief that it would lack power (in contrast to discretion) to order in a fully litigated decree. 2/

2/ Defendant City of New Orleans attributes to the United States the argument that "a court may not approve a consent decree unless it contains all the elements which would be required had the court itself decided to order into effect the remedial portions of the decree after contested litigation." Br. at 30. The City asserts that we have confused "the power of the court to adjudicate within a specific subject matter area and the formal prerequisites which may be necessary, as a matter of substantive law, to support a particular form of relief in a contested suit." Id. The City's assertion, like the cases it cites in support thereof (id. at 31-32), assumes that the "particular form of relief" at issue could be judicially ordered "in a contested suit." In contrast, it is our position that even if plaintiffs' claims had been litigated to a successful conclusion, the district court, in formulating its own remedial decree, would lack judicial remedial authority to order implementation of the one-to-one promotion quota contained in the proposed consent decree. The statutory, jurisprudential, and constitutional limitations on a court's equitable remedial powers in contested cases apply equally to its ability to enter and enforce consent orders, at least in the context of remedies that infringe on the legitimate interests of third parties. For example, the "bumping" of incumbent nonminority employees in favor of discriminatees is clearly not an available remedy under Title VII. E.g., United States v. Hayes Int'l Corp., 456 F.2d 112, 118 (5th Cir. 1972); Shortt v. County of Arlington, 589 F.2d 779, 782 (4th Cir. 1978); Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d 980, 988 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970). Obviously, such a "remedy" could not be judicially imposed pursuant to a consent decree between the alleged discriminators and discriminatees. See United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981).

In this regard, "a District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." System Federation v. Wright, 364 U.S. 642, 651 (1961). Litigants thus cannot, by agreement, "purchase from a court of equity a continuing injunction" requiring judicial enforcement of rights the statute does not give. Id. at 652; see United States v. Motor Vehicle Mfr. Ass'n, 643 F.2d 644, 650 (9th Cir. 1981); Cf. Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) (in assessing fairness and adequacy, consent decree's terms should be compared with relief that would likely have been received following successful trial).

On appellate review of a challenged consent decree, the appropriate level of scrutiny is determined by a variety of factors, such as the familiarity of the trial court with the lawsuit, the stage of the proceeding at which the consent decree is approved, and the types of issues involved. United States v. City of Alexandria, supra, 614 F.2d at 1361. We submit that the panel decision in this case properly assessed these factors and correctly concluded that the district court's rejection of the proposed promotion quota should be reviewed under the traditional abuse of discretion standard.

We disagree, however, with the panel majority's conclusion that the district court abused its discretion in conditioning approval of the proposed consent decree upon deletion of the promotion quota. Indeed, the district court lacked power to do otherwise.

I. A COURT'S REMEDIAL AUTHORITY TO ORDER AFFIRMATIVE EQUITABLE RELIEF IS LIMITED TO THOSE MEASURES NECESSARY TO "MAKE WHOLE" ACTUAL VICTIMS OF UNLAWFUL DISCRIMINATION

A racial quota is by definition indifferent to all concerns save the race of its beneficiaries. The one-to-one promotion quota

contained in the proposed consent decree would have accorded racially preferential promotion priority to any black officer in the pool of eligible candidates, without regard to whether the promoted black officer had ever been excluded from or otherwise denied promotional consideration on the basis of race; the consent decree inevitably would have required the NOPD to "remedy" its past racial discrimination by promoting black officers who are neither members of the plaintiff class 3/ nor victims of the NOPD's discriminatory promotional practices, at the expense of non-black officers who are free of any involvement in the NOPD's past discrimination. Such is the nature of a quota, and as such, its use to remedy a violation of the personal right to be free from racial discrimination in employment would exceed "the traditional equitable limitations upon the authority of a federal court to formulate such [injunctive] decrees." General Building Contractors Ass'n v. Pennsylvania, 50 U.S.L.W. 4975, 4981 (U.S. June 29, 1982).

A. The Nature of Judicial Remedies

Far from being the "radical" proposition decried by plaintiffs (Supp. Br. at 37), this victim-specific limitation on the judicial exercise of affirmative equitable powers to remedy violations of personal rights is a first-reader principle of equity jurisprudence, inherent in the very nature of the remedial power of courts. "[P]ersonal rights," such as the statutory and constitutional rights to be free from racial discrimination in employment (see

3/ The class of incumbent police officers certified by the district court was confined to actual victims of the NOPD's racially discriminatory practices. See Consent Decree at 2 (E-45).

infra, at 52), "are those which avail to their possessor against a specified, particular person, or body of persons only, and the correlative duty not to infringe upon or violate the right rests alone upon such specified person or body of persons." 1 Pomeroy's Equity Jurisprudence § 93, at 122 (5th ed. S. Symons 1941). Professor Pomeroy, in his classic work on equity jurisprudence, explained the fundamental relationship between right and remedy as follows:

> If a person upon whom a primary duty rests towards another fails to perform that duty, and thereby violates the other's primary right, there at once arise the remedial right and duty. The one whose primary right has been violated immediately acquires a secondary right to obtain an appropriate remedy from the wrongdoer, while the wrongdoer himself becomes subjected to the secondary duty of giving or suffering such remedy. It is the function and object of courts, both of law and of equity, directly to enforce these remedial rights and duties by conferring the remedies adapted to the injury, and thus indirectly to maintain and preserve inviolate the primary rights and duties of the litigant parties. It is plain from this analysis that the nature and extent of remedial rights and duties, and of the remedies themselves, must depend upon two distinct factors taken in combination, namely, the nature and extent of the primary rights which are violated, and the nature and extent of the wrongs in and by which the violation is effected. Id. § 91, at 120. 4/

A remedial decree exceeds the nature and extent of a violation of personal rights if it orders affirmative equitable relief in favor of persons whose rights have not been violated, for "[a]ll possible remedies are either substitutes or equivalents given to the injured party in place of his original primary rights

4/ See 2 Austin on Jurisprudence, at 450, 453 (Eng. Ed. 1863); id. vol. 3, at 162; Pomeroy on Specific Performance of Contracts § 1; Pomeroy on Remedies and Remedial Rights §§ 1, 2.

which have been broken, or they are the means by which he can maintain and protect his primary rights in their actual form and condition." Id. § 90, at 119 (emphasis added).

B. Imposition of the Proposed Promotion Quota Would Exceed Fundamental Limitations on Judicial Remedial Power

The Supreme Court has never wavered in its insistence on the congruence of right and remedy, observing frequently that federal courts are "required to tailor 'the scope of the remedy' to fit 'the nature and extent of the * * * violation.'" Hills v. Gautreaux, 425 U.S. 284, 293-294 (1976), quoting Milliken v. Bradley, 418 U.S. 717, 744 (1974). Accord, e.g., Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). Thus, while a federal court has the "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (Louisiana v. United States, 380 U.S. 145, 154 (1965)), judicial remedial powers of a federal court can "be exercised only on the basis of a violation of the law and [can] extend no farther than required by the nature and the extent of that violation." General Building Contractors Ass'n v. Pennsylvania, supra, 50 U.S.L.W. at 4981. The Supreme Court's application of these "fundamental limitations on the remedial powers of the federal courts" (ibid.) in cases involving claims of unlawful racial discrimination makes clear (1) that the extent of a violation of the personal constitutional and statutory rights to be free from racial discrimination is defined, and delimited, by the class of persons whose rights were violated -- i.e., the victims of the discrimination -- and (2) that judicial authority to remedy

the effects of racial discrimination cannot exceed those measures reasonably necessary to restore the discriminatees to a position they would have enjoyed absent the discrimination. The Court's school desegregation decisions are particularly instructive on these points. 5/

In the first case dealing with federal judicial authority to fashion desegregation remedies, the Supreme Court made clear that federal courts, in exercising the "traditional attributes of equity power," must not lose sight of the nature of the constitutional right to be remedied: "At stake is the personal interest

5/ Plaintiffs (Supp. Br. at 39-40), amici (Br. of Center for National Policy Review, et al. at E-10; Br. of MALDEF, et al. at 35-36; Br. of Equal Rights Advocates, Inc., et al. at 6-7), and defendant City of New Orleans (Br. at 43-44) rely heavily on the Supreme Court's school desegregation cases for the proposition that affirmative equitable relief can be ordered for the benefit of non-victims as well as victims of unlawful discrimination. Amici MALDEF, et al. (Br. at 36) take an uncharacteristically restrictive view of victim status, arguing that the Supreme Court has ordered race-conscious student reassignments to remedy dual school systems "even though the identifiable victims of discrimination had graduated." Similarly, amici Equal Rights Advocates, Inc., et al. (Br. at 7), argue that the implementation of race-conscious pupil assignment plans has not been "confined to children formerly subjected to segregated schooling, [but rather that] there have been millions of children born long after 1954 for whom the courts have required desegregated education through affirmative action plans." Contrary to the arguments of amici, every school child, whether born before or after 1954 and regardless of how many classes have been graduated prior to his enrollment in the system, has a "personal interest * * * in admission to public schools * * * on a nondiscriminatory basis." Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (Brown II). Accordingly, every school child subjected to a racially segregated educational environment as a result of the discriminatory acts of school officials is a victim of the unconstitutional conduct of those officials. This point, while too obvious to require citation of authority to sustain it, is made clear in the Supreme Court's desegregation decisions, as discussed in text above. Also made clear in those decisions, as discussed in text above, is the proposition that desegregation remedies cannot extend farther than is necessary to make the victims of unconstitutional conduct whole.

of the plaintiffs in admission to public schools * * * on a nondiscriminatory basis." Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (Brown II) (emphasis added). 6/ Subsequent cases have consistently stressed the necessary congruence between the constitutional right at issue and the remedy for its violation, holding that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation * * * ." Milliken v. Bradley, 433 U.S. 267, 282 (1977) (Milliken II).

In Milliken v. Bradley, 418 U.S. 717 (1974) (Milliken I), the district court found that various acts by the Detroit Board of Education and state officials had created and perpetuated racial segregation in the Detroit school district. Finding that desegregation plans limited to the Detroit school district "'would accentuate the racial identifiability of the district as a Black school system, and would not accomplish desegregation,'" the district court concluded that only a multi-district plan encompassing 53 of the 85 suburban school districts surrounding Detroit would effectively "eliminate 'root and branch' the effects of state-imposed and supported segregation." Id. at 787-788. The court of appeals affirmed, agreeing with the district court that "any less comprehensive a solution than a metropolitan area plan would result in an all black school system immediately surrounded by practically all white suburban school systems * * * ." Bradley v. Milliken, 484 F.2d 215, 245 (6th Cir. 1973).

6/ It is well established that the right to equal protection of the law is "personal" in nature, "guaranteed to the individual." Shelley v. Kraemer, 334 U.S. 1, 22 (1948). Accord, e.g., Missouri, ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 161-162 (1914).

The Supreme Court reversed, holding that the proposed multi-district remedy went beyond the constitutional violation because there had been no demonstration that the unconstitutional acts committed by officials of the Detroit school system had caused any significant racial segregation in the suburban school districts. Implicit in the Court's holding is the proposition that a constitutional violation is defined by its victims; since the Detroit school board's unconstitutional behavior did not invade the constitutional rights of suburban school students to attend unitary school systems, the constitutional violation, as well as the district court's remedial authority, stopped at the borders of the Detroit school district. But the Court did not make this point merely by implication; in the most explicit terms, it stated:

> [A desegregation] remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system. 418 U.S. at 746 (emphasis added).

Of course, had the district court found that the school board's racially discriminatory acts had caused racial segregation in the adjacent suburban districts, "an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation." Id. at 745. But, "without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy." Ibid. 7/

7/ Nor was an interdistrict remedy warranted by the Board's violation of the constitutional rights of students in its own system. As the Court observed:

(cont'd)

These principles concerning judicial remedial authority were applied in the context of an intradistrict violation in Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (Dayton I). In that case, the district court ordered implementation of a comprehensive system-wide desegregation plan on the basis of the school board's "cumulative" constitutional violation, which consisted of (1) the existence of racially imbalanced schools throughout the system, (2) the Board's use of optional attendance zones, and (3) the Board's rescission of a previous Board's resolution acknowledging responsibility for segregative attendance patterns. Concluding that the evidence of constitutional violations failed to establish the necessity of a system-wide desegregation plan, the Supreme Court held that the lower courts should have "tailor[ed] a remedy commensurate to the [Board's] three specific violations * * * ." Id. at 417. Accordingly, the case was remanded for formulation of a remedy precisely tailored to cure the Board's violations, and no more. The lower courts were instructed to

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7/ (cont'd)

> The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district. Unless petitioners drew the district lines in a discriminatory fashion, or arranged for white students residing in the Detroit District to attend schools in [suburban districts], they were under no constitutional duty to make provisions for Negro students to do so. The view of the dissenters that the existence of a dual system in Detroit can be made the basis for a decree requiring cross-district transportation of pupils, * * * can be supported only by a drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent. 418 U.S. at 746-747 (emphasis in original).

"determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a system-wide remedy." Id. at 420, citing Keyes v. School District, 413 U.S. 189, 213 (1973). 8/

The victim-specific nature of equal protection violations was again acknowledged in Milliken II, supra. At issue in that case was a desegregation decree requiring implementation of four "educational components" -- in-service training for teachers and administrators, guidance and counselling programs, revised testing procedures, and remedial reading programs. The Supreme Court rejected the claim that a desegregation decree designed to remedy racial segregation of students must be limited to pupil assignments. "[M]atters other than pupil assignment must on occasion

8/ Similarly, in Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976), the Supreme Court held that the school board was entitled to modification of a desegregation order permanently requiring that no school in the district have a majority of minority students. Although all schools in the district had satisfied the order during the first year of its implementation, several schools "slipped out of compliance [during ensuing years]." Id. at 433. Because initial implementation of the court's desegregation order had established racial neutrality in the attendance of the district's schools, the district court lacked authority to require readjustment of attendance zones to ensure racial balance unless the changes in the racial mix of the imbalanced schools were caused by segregative acts attributable to school officials.

be addressed by federal courts to eliminate the effects of prior segregation." Id. at 283.

The Court noted, however, that, like all judicial decrees, a judicial decree requiring implementation of "educational components" must nonetheless "be remedial in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" Id. at 280 (emphasis in original), quoting Milliken I, supra, 418 U.S. at 746. The record in Milliken II established that the unconstitutionally segregated nature of the school system had resulted in educational deficiencies which could be treated only through "special training at the hands of teachers prepared for that task." 433 U.S. at 288. And, because the specific educational components at issue "were deemed necessary [by the district court] to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive de jure racial segregation" (id. at 282), the decree was "aptly tailored to remedy the consequences of the constitutional violation" (id. at 287).

The Supreme Court's school desegregation cases thus clearly establish that a judicial decree designed to remedy a violation of the personal constitutional right to be free from governmental racial discrimination can extend no farther than the violation itself -- which, in turn, is defined by and limited to the class of persons whose constitutional rights were infringed by the defendants' conduct -- (i.e., victims). This limitation has general application, for it is "'premised on a controlling principle

governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context.'" General Building Contractors Ass'n v. Pennsylvania, supra, 50 U.S.L.W. at 4981 (employment discrimination case brought under Section 1981), quoting Hills v. Gautreaux, supra, 425 U.S. at 294 n.11 (housing discrimination case brought under the Constitution and Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d). 9/

Applying these "fundamental limitations on the remedial powers of the federal courts" to plaintiffs' employment discrimination claims under the Constitution and Section 1981, it is clear that imposition of the one-to-one promotion quota contained in the proposed consent decree would have exceeded the district court's remedial authority. There is simply nothing remedial -- let alone equitable (see discussion at 47, infra) -- about a court order that requires the promotion of a person whose personal right to nondiscriminatory treatment has not been violated.

9/ Contrary to the arguments of plaintiffs and amici, the Supreme Court has never countenanced an exercise of judicial remedial power extending affirmative relief to persons whose constitutional rights were not violated. In Louisiana v. United States, 380 U.S. 145 (1965), the Court upheld a decree enjoining 21 Louisiana parishes from using a voter registration "interpretation" test because it had been discriminatorily applied to prevent blacks from voting. It further enjoined the use of a new "citizenship" test unless "reregistration of all voters in those parishes is ordered, so that there would be no voters in those parishes who had not passed the same test." Id. at 151. Absent reregistration, use of the new "citizenship" test would have discriminated against blacks previously denied voting rights because only they would have to overcome the new "citizenship" test, similarly situated whites having passed the discriminatory "interpretation" test.

Similarly, the remedial action at issue in United Jewish Organizations v. Carey, 430 U.S. 144 (1976) did not benefit nonvictims. It benefitted only those nonwhite voters who were the victims of unlawful dilution of their votes under the original reapportionment plan instituted by New York. The revised reapportionment plan at issue was drawn in a manner designed to avoid voting discrimination against nonwhites. Id. at 147-155. See note 35, supra, for discussion of Fullilove v. Klutznick, 448 U.S. 448 (1980).

See Milliken II, supra; Milliken I, supra. A remedy properly tailored to "address and relate to the constitutional violation itself" (Milliken II, supra, 433 U.S. at 282) would be designed as nearly as possible to restore the victims of the NOPD's discriminatory promotional practices to the position they would have occupied in the absence of such discrimination. Once every discriminatee has been restored to his or her rightful place in the NOPD, the effects -- all of the effects -- of the NOPD's unlawful promotion discrimination will have been remedied.

Amici Center for National Policy Review, et al. (Br. at E-9), noting that some actual victims of promotion discrimination will no longer be available for or interested in employment with the police force, argue that victim-specific affirmative relief will rarely achieve the racial balance that would have occurred in the work force absent discrimination. See also Brief of Amici MALDEF, et al., at 38; Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); EEOC v. AT&T, 556 F.2d 167, 180 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978). Even assuming, arguendo, that nondiscriminatory promotion practices would ineluctably lead to a racial equivalency in all supervisory ranks of the NOPD, and accepting as well for present purposes that the effort to identify and make whole all victims of the employer's discriminatory practices will not always be entirely successful, a quota that permits nondiscriminatees to be accorded an employment preference on account of race cannot by any rationale be said to "directly address and relate to the constitutional violation itself." Milliken II, supra, 433 U.S. at 282.

The Constitution does not require, either as matter of substantive right (e.g., Pasadena City Bd. of Educ. v. Spangler, supra, 427 U.S. at 433-434; Spencer v. Kugler, 404 U.S. 1027 (1972)) or as a matter of remedy (Milliken I, supra, 418 U.S. at 740-741; see Swann v. Charlotte-Mecklenburg Bd. of Educ., supra, 402 U.S. at 24)), any particular racial balance among the uniformed officers of the NOPD. What the Constitution does require in a remedial context is that individuals whose personal rights to nondiscriminatory treatment have been violated be restored as nearly as possible to their rightful places. This remedial objective is in no way advanced, and the injury suffered by an unidentifiable discriminatee is in no way ameliorated (much less remedied), by conferring preferential promotion priority on other, randomly selected members of the discriminatee's race. A person suffering from appendicitis is not relieved of his pain by an appendectomy performed on the patient in the next room, even if the latter is a member of the same race.

Nor would imposition of a one-to-one racial quota for promotions "prevent" continuation of the employers' racially discriminatory practices. See Pltf's Supp. Br. at 32. In fact, its effect would be precisely the opposite. A person whose personal right to nondiscriminatory treatment has not been infringed by his employer has no higher claim to advancement by reason of race than any other employee competing for promotion. See discussion at 52, infra. A racial quota is designed to give certain employees an edge based solely on the color of their skin. Thus, far from preventing future racial discrimination, judicial imposition

of a one-to-one promotion quota will necessarily guarantee future racial discrimination in promotions.

In sum, the one-to-one promotion quota contained in the proposed consent decree went well beyond the nature and extent of NOPD's violation. Judicial imposition of such relief would clearly have exceeded the traditional and fundamental limitations on the court's remedial authority to order affirmative equitable relief. The question, then, becomes whether Congress, in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., intended to broaden judicial remedial authority in employment discrimination cases beyond traditional limits. As the following discussion demonstrates, Congress intended no such broadening of judicial remedial power. To the contrary, the language and legislative history of Title VII's remedial provision -- Section 706(g) -- demonstrate Congress' intention that racial quotas not be included among the affirmative equitable remedies available to courts. 10/

10/ This Court has never analyzed the question whether Section 706(g) prohibits courts from imposing quota remedies. The first decision in this circuit -- indeed, in any circuit -- to approve a racial quota under Title VII did so in a single sentence saying that the quota was administratively necessary to prevent further discrimination. Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969). Subsequent appellate decisions, save one, in this and other circuits have not engaged in any more searching inquiry of the limitations on remedial powers prescribed by Section 706(g). See, e.g., Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Phillips v. Joint Legislative Committee, 637 F.2d 1014 (5th Cir. 1981). See also cases cited by plaintiffs (Supp. Br. at 37-38 & n.36-37) and defendants (Br. at 35 & n.64). The sole case addressing the question is EEOC v. AT&T, 556 F.2d 167, 174-177 (3d Cir. 1977). As will be demonstrated, the court in AT&T misinterpreted the legislative history of the 1972 amendments to Title VII and should not be followed by this Court.

C. A Court's Remedial Authority Under Title VII to Order Specific Affirmative Relief is Limited to Those Measures Necessary to "Make Whole" Actual Victims of Employment Discrimination

1. By its terms, Title VII establishes a personal right in all individuals to be free from racial discrimination in employment. Section 703(a) makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race * * * ." 42 U.S.C. 2000e-2(a)(1) (emphasis added) (Section 703 is reprinted in full at Appendix A). Noting the statute's unambiguous focus on individuals, the Supreme Court has held that Title VII "precludes treatment of individuals as simply components of a racial * * * class" and, thus, "requires that [courts] focus on fairness to individuals rather than fairness to classes." Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 708, 709 (1978). Accord, Connecticut v. Teal, 50 U.S.L.W. 4716, 4720 (U.S. June 21, 1982) ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole").

The section of Title VII governing judicial remedies -- Section 706(g) -- provided, in part, as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice * * * , 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 reinstatement or hiring of employees, with or without back pay * * * . 42 U.S.C. 2000e-5(g) (reprinted in full at Appendix A).

As we have shown, absent an explicit statutory expansion of the traditional limits on the remedial powers of federal courts, the "appropriate" affirmative equitable relief available under this provision would be restricted to measures that "directly address and relate to the * * * violation itself" (Milliken II, supra, 433 U.S. at 282) -- namely, "make whole" measures for actual discriminatees. The concluding sentences of Section 706(g) plainly reflect that Congress intended no such expansion:

> 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 court shall require * * * the hiring, reinstatement, or promotion of an an individual as an employee, or the payment to him of any back pay, if such individual * * * 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 * * * .

Thus, the statute on its face reflects the congruence between the substantive personal right protected by Section 703 and the relief available under Section 706(g) to remedy a violation. A court, upon finding that the respondent has engaged in unlawful employment discrimination, may order the respondent to provide such affirmative relief (e.g., reinstatement, back pay, hiring priority) as is necessary to make the "person or persons discriminated against" whole, but may not, on the basis of that finding of unlawful discrimination, order such affirmative equitable relief in favor of an individual whose substantive personal rights under Title VII were not violated by the respondent.

A hiring or promotions quota, which inevitably requires the hiring or promotion of individuals who were not "refused employment or advancement" by the employer in violation of Title VII, would exceed the traditional victim-specific limitations on affirmative judicial remedies. Such quota relief also appears to be the archetypal form of relief that Congress determined should not be ordered to remedy a violation of Title VII. To the extent that the language and structure of Title VII admit of any doubt on this latter point -- and we submit that they do not -- it is removed by the statute's legislative history.

2.a. The bill that Congress ultimately enacted as the Civil Rights Act of 1964 began as H.R. 7152. As initially introduced, the bill contained no compulsory provisions directed at private discrimination in employment. The bill was referred to the Committee on the Judiciary where, after hearings and 17 days of mark-up, it was amended to include Title VII. 11/

When the bill emerged from Committee, it was accompanied by a separate minority report authored by committee members who opposed

11/ As it emerged from the Judiciary Committee, the last sentence of Section 706(g) -- then Section 707(e) -- prohibited the granting of affirmative equitable relief for anyone discharged or refused employment or advancement for "cause," as opposed to the language ultimately enacted, for "any reason other than discrimination * * * ." Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431, 438 (1966). This wording was identical to that found in Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), which directs the Labor Board to order, on finding an unfair labor practice, "affirmative action including reinstatement of employees with or without back pay." As the Supreme Court has frequently acknowledged, Section 706(g) was modeled after Section 10(c) (see text at 28, infra), and decisions interpreting the latter are a reliable guide to the intent of the Congress that enacted Title VII. See Franks v. Bowman Transportation Co., 424 U.S. 747, 769, 774-775 & n.34 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975); Teamsters v. United States, 431 U.S. 324, 366-367 (1977); Ford Motor Co. v. EEOC, 50 U.S.L.W. 4937, 4939, n.8 (U.S. June 28, 1982).

(cont'd)

H.R. 7152, 88th Cong., 1st Sess. (1963). H.R. Rep. No. 914, 88th Cong., 1st Sess. 62 (1963), reprinted in [1964] U.S. Code Cong. &

11/ (cont'd)

Decisions construing Section 10(c) make clear that "the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act].'" Franks v. Bowman Transportation Co., supra, 424 U.S. at 769, quoting NLRB v. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969). Indeed, by 1964 it was well settled that the Board's authority under Section 10(c) to order affirmative action is remedial only, and thus limited to those measures necessary to make whole "the victims of discrimination." See, e.g., Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194, 197-198 (1941). Thus, in Carpenters Local v. NLRB, 365 U.S. 651 (1961), a Labor Board order requiring unions to refund dues to all members was invalidated because there was no evidence that the union members had been victimized by the unions' unlawful activity -- maintaining "closed shop" agreements. The order "'reimbursing a lot of old-time union men' by refunding their dues is not a remedial measure in the competence of the Board to impose, unless there is support in the evidence that their membership was induced, obtained, or retained in violation of the Act." Id. at 655-656. See also Republic Steel Corp. v. NLRB, 311 U.S. 7, 9-10 (1940).

Moreover, in the NLRA's history an employer had never been directed to give preferential treatment to union members who were not victims of the violation. See Franks, supra, 424 U.S. at 774-775, n.34; see also, e.g., Nevada Consolidated Copper Corp., 26 NLRB 1182, 1231 (1940), enforced, 316 U.S. 105 (1942); Consolidated Dairy Products Co., 194 NLRB 701 (1971); Great Lakes Dredge & Dock Co., 169 NLRB 631, 635 (1968); The Hughes Corp., 135 NLRB 1222, 1223 (1962); Atlantic Maintenance Co., 134 NLRB 1328, 1330 (1961), enforced, 305 F.2d 604 (3d Cir. 1962). As one commentator has observed, the labor law understanding of "affirmative action" borrowed by Title VII's drafters enabled courts to order "make whole" relief for victims of discrimination, but "excluded from the concept of 'affirmative action' preferential treatment for persons not themselves victims of [unlawful] employment practices * * * ." Comment, Preferential Relief Under Title VII, 65 Va. L. Rev. 729, 747 (1979) [hereinafter "Preferential Relief"].

Amici Center for National Policy Review, et al. (Br. at E-5), correctly asserts that Section 10(c) prohibits the granting of affirmative equitable relief to persons who are not "but for" victims of unlawful practices -- i.e., persons who were victims of the unlawful practice, but who would have been discharged for entirely unrelated and legitimate reasons in any event. See Wright Line, 251 NLRB 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981). The provision also prohibits the granting of such relief to persons who are not victims simpliciter. To the extent that amici maintain that Section

(cont'd)

Ad. News 2391, 2431. In that report, the opponents raised a charge against the bill that was reiterated throughout the ensuing congressional debates -- that under Title VII federal courts and agencies would impose quotas to "racially balance" workforces. To demonstrate how Title VII would operate in practice, the minority report posited hypothetical employment situations, concluding in each example that if the employer's workforce is not racially balanced, "he must employ the person of that race which, by ratio, is next up * * *." Id. at 2441. Supporters of the Act repeatedly answered that Title VII would not require, or permit, federal imposition of racial quotas, either by courts to remedy Title VII violations or by pressure from federal agencies bent on correcting racial imbalance.

In introducing H.R. 7152 on the House floor, Representative Celler, Chairman of the Judiciary Committee and floor manager of the bill, expressly addressed these charges, stating unambiguously that neither the EEOC nor federal courts would have authority to order quotas or other racial preferences:

> [T]he Commission could seek redress in the Federal courts, but it would be required to prove in the court that the particular employer involved had in fact, discriminated against one or more of his employees because of race, religion, or national origin * * * .

11/ (cont'd)

706(g) of Title VII similarly restricts the granting of affirmative equitable relief to "but for" victims, we agree. See, e.g., Harbison v. Goldschmidt, 693 F.2d 115 (10th Cir. 1982); Cf. Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 285-287 (1977). This fact further confirms, rather than rebuts, our victim-specific reading of Section 706(g).

> No order could be entered against an employer except by a court, and after a full and fair hearing, and any such order would be subject to appeal as is true in all court cases.
>
> Even then, the 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. The statement that a Federal inspector could order the employment and promotion only of members of a specific racial or religious group is therefore patently erroneous. 110 Cong. Rec. 1518 (1964) (emphasis added). 12/

Representative Celler's understanding of Title VII was repeated by other supporters during the House debate. 13/ Subsequent to passage of the bill in the House, Republican members of the House Judiciary

12/ One week after delivering this speech, Rep. Celler introduced an amendment to Title VII that inserted in the last sentence of Section 706(g) the phrase "for any reason other than discrimination * * * ." in place of the term "for cause." 110 Cong. Rec. 2567; see note 11, supra. In introducing the amendment, Rep. Celler stated that "the purpose of the amendment is to specify cause" and that a court "cannot find any violation of the act which is based on facts other * * * than discrimination on the grounds of race, color, religion, or national origin." Ibid. Amici MALDEF, et al., seize on this statement, arguing that the final sentence of Section 706(g) "is therefore concerned exclusively with defining a 'violation of the act,' * * * not with limiting the otherwise broad equitable powers granted by Title VII." Br. at 10-11. Putting to one side the fact that Section 706(g) on its face relates only to remedies and not to liability (see United Steelworkers v. Weber, 443 U.S. 193, 205 n.5 (1979); Franks, supra, 424 U.S. at 758-759, 762), in light of the congruence between Title VII rights and Title VII remedies, it is neither surprising nor significant that Congressman Celler discussed his amendment in terms of substantive liability. Indeed, Rep. Gill, the only other member to speak to the amendment, discussed the measure in terms of remedies: "[O]ur purpose is to pinch down the orders that can be issued by the court to a more narrow range. * * * We would limit orders under this act to the purposes of this act." Id. at 2570. By contracting further the scope of permissible judicial action, the amendment "suggest[s], if anything, a growing hostility to preferential relief." Preferential Relief, supra, 65 Va. L. Rev. at 739 n.50. In any event, it is clear that Rep. Celler did not understand his amendment to alter or otherwise affect the view he had expressed a week earlier regarding the victim-specific nature of permissible relief under Title VII.

13/ See 110 Cong. Rec. 1540 (Rep. Lindsay) (Title VII "does not impose quotas or any special privileges."); id. at 1600 (Rep. Minish).

Committee published in the Congressional Record an interpretive memorandum dealing comprehensively with the bill. With respect to judicial remedies, the report stated:

> Upon conclusion of the trial, the Federal court may enjoin an employer or labor organization from practicing further discrimination and may order the hiring or reinstatement of an employee or the acceptance or reinstatement of a union member. But, [T]itle VII does not permit the ordering of racial quotas in businesses or unions * * * . [Id. at 6566 (emphasis added)].

H.R. 7152 passed the House and was sent to the Senate to begin what became that body's longest debate.

b. Opponents of Title VII in the Senate quickly echoed the charge made by their counterparts in the House that federal courts and agencies would enforce the provisions of Title VII by imposing quotas and other forms of preferential treatment. 14/ Senator Humphrey, Democratic floor manager of the bill and perhaps the primary moving force behind its passage in the Senate, was the first to speak to the remedial powers of courts, stating that "nothing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group." Id. at 5423 (emphasis added). 15/

14/ See 110 Cong. Rec. 4764 (1964) (Sens. Ervin and Hill); id. at 5092, 7418-7420 (Sen. Robertson); id. at 8500 (Sen. Smathers); id. at 8618-8619 (Sens. Stennis and Sparkman); id. at 9034-9035 (Sens. Stennis and Tower); id. at 9943-9944 (Sens. Long and Talmadge); id. at 10513 (Sen. Robertson).

15/ Earlier in the debate, Senator Humphrey had introduced a newspaper article quoting the answers of a Justice Department "expert" to common objections to Title VII. In reply to the objection that the law would empower "federal 'inspectors'" to require employers to hire by race, the expert stated that "the Commission may take its case to a Federal judge, leaving it to him to decide if a violation did in fact take place and what the remedy should be. The bill would not authorize anyone to order hiring or firing to achieve racial or religious balance." 110 Cong. Rec. 5094 (emphasis added).

After 17 days of debate the Senate voted to take up the bill directly, without referring it to a committee. Id. at 6455. Supporters of H.R. 7152 in the Senate made elaborate preparations for formal floor debate. Senator Humphrey, the majority whip and Senator Kuchel, the minority whip, were selected as floor managers on the entire bill. Senators Clark and Case were designated as the bipartisan "captains" responsible for explaining and defending Title VII. Id. at 6528. In the opening speech of floor debate, Senator Humphrey provided a detailed description of the intended meaning of Section 706(g):

> The relief sought in such a 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 the 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 [S]ection 707(e) [enacted, without relevant change, 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 national origin. Id. at 6549.

Thus, in describing Section 706(g) to his colleagues, Senator Humphrey pointed out the congruence between the personal rights protected by Title VII and the judicial remedies available to enforce them. Because Title VII protects the personal right of every individual to nondiscriminatory treatment in employment, it is "implicit throughout the whole title" that courts cannot, consistent

with "controlling principle[s] governing the permissible scope of federal judicial power" (General Building Contractors Ass'n, supra, at 4981), order affirmative equitable relief in favor of individuals whose substantive personal rights under Title VII were not violated by the employer. This is made clear, as Senator Humphrey noted, in Section 706(g), which authorizes courts to order only the type of victim-specific "make whole" measures available under the National Labor Relations Act. See note 11, supra. To dispel all doubt on this score, Senator Humphrey went on to expressly address the claims of opponents:

> 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. Id. at 6549 (emphasis added).

In the other major opening speech in support of the bill, Senator Kuchel was equally clear in his understanding that Title VII's remedial provisions would not permit judicial imposition of racial preferences:

> If the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without back pay, which may be appropriate.
>
> * * * * *
>
> Only a Federal court could [issue orders], and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. * * * But

> the important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring. Id. at 6563 (emphasis added).

A few days later the Senate's attention focused exclusively on Title VII, as Senators Clark and Case explained in detail the intent of Title VII. Stating that "[t]he suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate," Senator Clark inserted into the Congressional Record a memorandum prepared by the Justice Department expressly denying that a violation of Title VII could be remedied by quota relief: "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. And, in an interpretative memorandum authored by Senators Clark and Case themselves, 16/ the bipartisan "captains" for Title VII submitted a detailed explanation of each of the statute's provisions.

Turning first to the substantive rights "defined" by Sections 703 and 704, the Senators stressed the personal nature of Title VII rights: "It must be emphasized that discrimination is prohibited as to any individual." Id. at 7213. They also noted that

16/ The Supreme Court has characterized the Clark-Case memorandum as one of the "authoritative indicators" of the meaning of Title VII. American Tobacco Co. v. Patterson, 50 U.S.L.W. 4364, 4367 (U.S. Apr. 5, 1982); Teamsters, supra, 431 U.S. at 352; see Franks, supra, 424 U.S. at 759; Albemarle Paper Co., supra, 422 U.S. at 419 n.11.

"racial imbalance" would not, standing alone, violate Title VII. "[T]hose distinctions or differences in treatment or favor which are prohibited by section [703] are those which are based on any * * * of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title." Id. at 7213. With respect to remedies, Clark and Case reiterated the points made earlier by Senator Humphrey regarding the congruence of Title VII rights and remedies. Although "the court could order appropriate affirmative relief,"

> [n]o court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not discriminated against in violation of this title. This is stated expressly in the last sentence of section [706(g)] which makes clear what is implicit throughout the whole title; 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, color, religion, sex, or national origin. Id. at 7214 (emphasis added). 17/

The Clark-Case memorandum, like Senator Humphrey's earlier remarks, thus states the obvious: (1) because Title VII creates a personal right to nondiscrimination in employment, it "is implicit throughout the whole title" that courts cannot order affirmative equitable relief in favor of "anyone who was not discriminated against in violation of this title"; and (2) this limitation on a court's affirmative remedial powers is stated expressly in the last sentence of Title VII's provision on remedies.

17/ During the debates, the principal Senate sponsors prepared and delivered a daily Bipartisan Civil Rights Newsletter. The issue of the Newsletter published two days after the filibuster had begun, declared: "Under title VII, not even a court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." 110 Cong. Rec. 14465 (emphasis added).

c. In light of (1) the language and structure of Title VII, (2) the unambiguous explanations provided by the statute's principal sponsors regarding the obvious relationship between Title VII rights and remedies, and (3) the acknowledgements by the Supreme Court that Section 706(g) is the sole provision governing Title VII remedies, while other provisions, principally Section 703, govern substantive rights (see note 12, supra), the assertion of plaintiffs (Supp. Br. at 6-8 & n.9) and amici MALDEF, et al. (Br. at 10-12), and National Center for Policy Review, et al. (Br. at E-4), that the last sentence of Section 706(g) is concerned only with defining a substantive violation of the Act rather than judicial remedial authority is simply untenable. Plaintiffs and their amici, moreover, cite not a single statement from the legislative debates that so much as hints at support for racial quotas, whether judicially imposed or otherwise. We have found no such statement. To the contrary, as the foregoing discussion reflects, every Representative and every Senator to address the issue decried the use of quota remedies, and the drafters, sponsors, and supporters of Title VII uniformly and unequivocally assured their colleagues, and the country, that racial quotas and other forms of class-based preferential treatment could not be imposed by courts. 18/

3.a. This clear congressional intention to restrict affirmative equitable relief under Title VII to the traditional

18/ "[T]he consensus among the Act's proponents emerges clearly from these debates; there is little doubt that compulsory "balancing," even when imposed upon an employer or union that had discriminated in the past, was not a measure available to the courts under Section 706 (g) * * * ." Preferential Relief, supra, 65 Va. L. Rev. at 738.

victim-specific, make whole "limitations on the remedial powers of the federal courts" (see text at 9-19, supra) was not reversed when Congress amended Title VII in 1972. 19/ The Equal Opportunity Act of 1972 amended Title VII in several respects. Essentially, the 1972 amendments broadened Title VII's coverage and granted the EEOC authority to investigate charges and to bring suits in federal court. Section 703 was left unchanged, and the only arguably relevant change made in Section 706(g) was the addition to its first sentence of the following underscored language: "* * * 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" (emphasis added).

The language added in 1972 had its origin in an amendment introduced by Senator Dominick, who opposed a provision in the Labor Committee bill to confer "cease and desist" authority on the EEOC; the committee bill proposed to make no change in either Section 703 or Section 706(g). Dominick's filibuster of the committee bill ended with adoption of his amendment, which denied the EEOC independent enforcement authority, but granted it power to institute law suits in federal court. The purpose of the language added to the first sentence of Section 706(g) was not explained, or even discussed, by

19/ See Pltf's Supp. Br. at 10-13; Br. of amici Center for National Policy Review, et al., at E-5 to E-6; Br. of amici MALDEF, et al., at 13-15. Some courts have also erroneously interpreted the legislative history of the Equal Employment Opportunity Act of 1972 as congressional approval of judicial imposition of quotas in Title VII cases. See EEOC v. AT&T, 556 F.2d 167, 175-177 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978); United States v. International Union of Elevators Constructors, Local 5, 538 F.2d 1012, 1019-1020 (3d Cir. 1976); Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1028 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); United States v. Local Union No. 212, IBEW, 472 F.2d 634, 636 (6th Cir. 1973).

Senator Dominick or anyone else during the debate. The amended provision was discussed, however, in a section-by-section analysis prepared by Senator Williams, Chairman of the Labor Committee and the manager of the legislation. The pertinent portion of that analysis is as follows:

> The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion 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 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. 118 Cong. Rec. 7166, 7168 (1972), reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, 92nd Cong., 2d Sess. at 1848 (Comm. Print 1972) [hereinafter "1972 Legislative History"]. 20/

In Franks, supra, the Supreme Court interpreted the "extensive legislative history underlying the 1972 amendments," including addition of "the phrase speaking to 'other equitable relief' in § 706(g)," as "indicat[ing] that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." 424 U.S. at 764 n.21.

Nothing in the legislative history of the 1972 amendments suggests that addition of the phrase "other equitable relief" was added to the last sentence of Section 706(g) for the purpose of

20/ In Franks, supra, the Supreme Court interpreted this passage to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circumstances of a case may require to effect restitution, making whole insofar as possible the victims of racial discrimination * * * ." 424 U.S. 764.

authorizing judicial imposition of quota remedies or otherwise expanding judicial authority to order affirmative equitable relief beyond traditional victim-specific, make whole limits.

b. Plaintiffs and their amici are thus reduced to arguing that such a congressional intent may be inferred from what Congress did not do. They rely particularly on Senator Ervin's failed attempt to amend the statute.

We note initially the profound jurisprudential implications of attaching undue significance to legislative inaction. The Constitution outlines procedures for the exercise of Congress' lawmaking powers under Article I, and each step in the process must be strictly observed to enact legislation, as well as subsequently to repeal or amend it. The enactment itself then becomes the best evidence of the congressional intent underlying it. The collective intent, however, that underlies inaction, such as a failure to enact or amend legislation, is usually difficult, if not impossible, to divine. A legislator's opposition to such a proposal may be based on his disagreement with its substance or his judgment that the measure is redundant to existing law and thus unnecessary, or on matters entirely extraneous to the merits of the proposal. A failure to enact proposed legislation thus obviously cannot become the basis for altering the body of substantive law that existed prior to the defeat of the proposed enactment. Likewise, a failure to amend an existing statute cannot form the basis for altering the legislative intent expressed by the statute. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." Girouard v. United States, 328 U.S. 61,

69 (1946), quoted in Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241 (1970). These jurisprudential concerns need not long detain us here, however, for the legislative events that occurred in 1972 do not support an inference that a congressional consensus favoring remedial use of racial quotas had emerged.

The history of the 1972 amendments began in the House, where Representative Hawkins introduced a bill designed, among other things, to give the EEOC "cease and desist" powers and to transfer the administration of Executive Order 11246 from the Labor Department's Office of Federal Contract Compliance (OFCC) to the EEOC. Because the OFCC had imposed quotas in its enforcement of E.O. 11246, many congressmen feared that the bill would confer on the EEOC authority to order employment quotas.

Before debate commenced, Representative Dent, the bill's floor manager, proposed an amendment that "would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program." 1972 Legislative History at 190. The amendment did not address the remedial power of courts under Title VII because, according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII." (Ibid.) During the ensuing debate, Representative Hawkins stated "some say that this bill seeks to establish quotas * * * . Not only does Title VII prohibit this, but it [prohibits] * * * any individual white as well as black being discriminated against in employment." Id. at 204. Hawkins then acknowledged his support for the Dent amendment, reiterating that Title VII already "prohibits the establishment of quotas." Id. at 208-209.

The House ultimately passed a substitute bill that left administration of E.O. 11246 with the OFCC, and the Dent amendment never came to a vote. The House debate clearly reflects, however, unanimous agreement that Title VII does not and should not permit courts to order quota remedies. Not a single contrary view was expressed.

Thus, plaintiffs and their amici are reduced even further, to focusing not on Congress, but on one-half of that bicameral body. Even within that narrow focus, however, the case for quota remedies cannot be made. It rests largely on the unsuccessful Ervin amendment, which would have prohibited any "department, agency, or officer of the United States" from requiring employers to practice "discrimination in reverse by employing persons of a particular race * * * in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges." 1972 Legislative History at 1017.

Ervin's principal target was the OFCC's Philadelphia Plan, "[t]he most notorious example of discrimination in reverse." Id. at 1043. The amendment was necessary, according to Ervin, because officials of the OFCC and the EEOC "could not understand the plain and the unambiguous words of Congress" in Section 703(j). 21/ Id. at

21/ In response to the repeated claims by opponents of Title VII that federal courts and agencies would equate unlawful employment "discrimination" with the existence of "racial imbalance" in the employer's workforce (see discussion at 24-25, supra), Section 703(j) was added to the measure to make clear the limits of the title's substantive reach. The section provides that "[n]othing contained in [Title VII] shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the race * * * of such individual or group on account of" a racial imbalance in the employer's workforce. 42 U.S.C. 2000e-2(j).

1042. As Ervin explained, the amendment would merely have extended to all federal Executive agencies, particularly the OFCC, Section 703(j)'s prohibition against requiring employers to engage in racially preferential hiring to rectify racial imbalance in their work forces. 22/ As the Supreme Court recognized in United Steelworkers v. Weber, 443 U.S. 193, 205 n.5 (1979), Section 703(j) speaks only to substantive liability under Title VII, not to the scope of judicial remedial authority, which is governed solely by Section 706(g). Thus, notwithstanding the contrary statements of Senators Javits and Williams, who spoke against the amendment (see 1972 Legislative History at 1046-1048, 1070-1073), it is clear that Ervin's amendment did not seek to alter Section 706(g), and thus was not concerned with the remedial authority of courts.

Accordingly, the most that can be inferred from the Ervin amendment's failure is that the Senate did not want to extend Section 703(j)'s substantive limitations to Executive Order 11246. But, as previously discussed, drawing even this limited inference from the Senate's failure to adopt the Ervin amendment is fraught with uncertainty. For example, because the amendment was part of a barrage of amendments offered by Senator Ervin to prolong an ongoing filibuster, it is entirely possible that Senators seeking to end the filibuster (and who voted against all proposed amendments) were voting not on the merits of each amendment, but on the judgment that the filibuster could be ended only by voting down each of the filibusterer's amendments.

22/ That this was Senator Ervin's purpose is made clear in a second amendment he proposed. The second amendment, which was also defeated, would have simply amended Section 703(j) to extend its coverage to executive orders and statutes other than Title VII. 1972 Legislative History at 1714.

Nor is it significant that the last sentence of Section 706(g) was deleted in the Senate bill; it was subsequently restored to the section in the House-Senate conference bill. See text at 42-43.

In any event, had the Senate decided in 1972 to take the momentous step of authorizing the judicial imposition of quota remedies -- and thus to reverse the unanimous judgment of the 1964 Congress, not to mention overturning firmly established principles of equity jurisprudence that prohibit affirmative relief beyond that necessary to make whole victims of the unlawful conduct -- surely some reliable evidence of that intent would have surfaced. Instead, the 1972 amendments' legislative history, particularly the authoritative section-by-section analysis, reflects, just as one would expect, "that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." Franks, supra, 424 U.S. at 764 n.21.

As their final argument, plaintiffs and their amici invoke the following general statement made in the introduction to the section-by-section analysis of the 1972 amendments:

> In any area 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. 1972 Legislative History at 1844.

Noting that court decisions ordering quota remedies had been rendered prior to passage of the 1972 amendments, and that Senator Javits cited and discussed three such cases in his opposition to the Ervin amendment, plaintiffs and their amici argue that this general passage from the section-by-section analysis should be read "as an endorsement of such remedies." Br. of amici National Center for Policy Review, et al., at E-6; see Pltfs. Supp. Br. at 17;

Br. of amici MALDEF, et al., at 13-15. 23/ The very section-by-section analysis on which they rely, however, refutes their argument. As previously noted, the portion of the analysis discussing Section 706(g) expressly acknowledges that "[i]n 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 * * * ." 1972 Legislative History at 1848 (emphasis added).

Moreover, the issue in all of the cases cited by Senator Javits concerned the limits placed on use of quota remedies by Section 703(j), and accordingly cannot provide a basis for inferring congressional approval of a judicial construction of Section 706(g) -- the only section governing judicial remedies. 24/ Indeed, in Teamsters, supra, the Supreme Court rejected a far stronger claim of

23/ Three appellate decisions have accepted this analysis, concluding -- we submit erroneously -- that the 1972 Congress approved of the judicial imposition of quota remedies in Title VII cases. See EEOC v. AT&T, supra, 556 F.2d at 177; United States v. International Union of Elevator Constructors, Local 5, supra, 538 F.2d at 1019-1020; United States v. Local Union No. 212, IBEW, supra, 472 F.2d at 636.

24/ The cases mentioned by Senator Javits were United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. Local 638 (Steamfitters), 337 F. Supp. 217 (S.D.N.Y. 1972); and Contractors Ass'n v. Schultz, 442 F.2d 159, 172 (3d Cir.), cert. denied, 404 U.S. 854 (1971). In Ironworkers, the Ninth Circuit sustained an injunction that contained numerical ratios for minority admissions into apprentice programs against arguments that the injunctions violated Section 703(j). Noting erroneously that the "only statutory limitation on the availability of [court-ordered] relief is the anti-preferential treatment provision of section 703(j)" (443 F.2d at 553), the court of appeals held that the injunction "[did not] establish a system of 'racial quotas' or 'preferences' in violation of Section 703(j)." Id. at 554. In Steamfitters, the district court did not impose a quota, but rather ordered the union to admit to journeyman status 169 minority

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congressional approval of pre-1972 judicial interpretations. Holding that Section 703(h) immunizes bona fide seniority systems from Title VII liability, the Court was unpersuaded by the contention that the 1972 Congress had endorsed contrary lower court interpretations of Section 703(h). 25/ In words equally applicable to the instant case, the Court observed:

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

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24/ (cont'd)

workers whom the court expressly found had been denied membership based on race or national origin. See 337 F. Supp. at 219. In Schultz the Third Circuit rejected a claim that the Philadelphia plan established under Executive Order 11246 violated Section 703(j) of Title VII, concluding that "Section 703(j) is a limitation only upon Title VII. . . ." 442 F.2d at 172. Thus, each of the cases cited by Senator Javits involved an interpretation of Section 703(j), which involves only the substantive reach of Title VII, and not Section 706(g), the provision governing judicial remedies.

25/ The cases in which the Supreme Court has attached interpretive significance to a legislative refusal to act have generally arisen in the context of so-called congressional "acquiescence" in an administrative or judicial statutory construction. Each such case involved a statutory construction that was (1) longstanding and consistent; (2) supported by or consistent with the statute's plain language; (3) supported by persuasive legislative history; and (4) not overturned by Congress. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 385 (1981); Merrill Lynch, Pierce, Fenner & Smith v. Curran, Inc., 456 U.S. 353 (1982); Haig v. Agee, 453 U.S. 280, 301 (1981); United States v. Rutherford, 442 U.S. 544 (1979). Of these, only the last requirement is satisfied, arguably, in this case. The Supreme Court has consistently rejected the claim of congressional ratification in cases, like this one, in which the statutory construction not overturned by Congress is inconsistent with the statute's language or legislative history. See, e.g., SEC v. Sloan, 436 U.S. 103 (1978); Aaron v. SEC, 446 U.S. 680 (1980).

Congress that enacted § 703(h) in 1964, unmistakable in this case, that controls. 431 U.S. at 354 n.39. 26/

Similarly, here the pertinent section of Title VII is Section 706(g). That provision emerged from the 1972 congressional deliberations materially unchanged from its original enactment in 1964. Whatever significance plaintiffs and their amici seek to attach to the Senate's consideration of the 1972 amendments regarding the imposition of quota remedies in Title VII cases, it is clear that the House of Representatives legislated in 1972 on the understanding that Title VII did not, and as amended would not, authorize judicial imposition of quota remedies.

Indeed, plaintiffs and their amici ignore the only meaningful instance of congressional inaction relating to the 1972 amendments. The House and the Senate passed two differing versions of Section 706(g) in 1972. The House bill (H.R. 1746, 92d Cong., 2d Sess. (1972)) left the 1964 provision largely unchanged, except for the addition of a provision limiting back pay awards. See 1972 Legislative History at 331-332. The Senate-passed bill (S. 2515, 92d Cong., 2d

26/ It is well-settled that "the views of one Congress as to the construction of a statute adopted many years before by another Congress have 'very little, if any, significance.'" United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968), quoting Rainwater v. United States, 356 U.S. 590, 593 (1958). This point was underscored in Illinois Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1977). There, the Court rejected a statutory construction based on "subsequent legislative history," noting that the "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congres expressed before the Act's passage. * * * Such statements 'represent only the personal views of these legislators, since the statements were [made] after passage of the Act.' Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974), quoting National Woodwork Manufacturers Ass'n v. NLRB, 386 U.S. 612, 639 n.34 (1967)." Id. at 734 n.14. Accord, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 775 (1979), quoting United Air Lines, Inc. v. McMann, 434 U.S. 192, 200 n.7 (1977); see also Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980).

Sess. (1972)), however, eliminated from Section 706(g) the final sentence contained in the 1964 Act, which makes clear that the traditional victim-specific, make whole limits on affirmative equitable relief apply in cases brought under Title VII (see discussion at 21-32, supra). See 1972 Legislative History at 1783. The bill that ultimately became law, however, emerged from the House-Senate conference with the original final sentence of Section 706(g) restored to that provision. S. Conf. Rep. No. 92-681, 92d Cong., 2d Sess. 5-6, 18-19 (1972); H.R. Conf. Rep. No. 92-899, 92d Cong., 2d Sess. 5-6, 18-19 (1972).

No persuasive evidence has been advanced to suggest that the 1972 Congress viewed Section 706(g) any differently than the 1964 Congress. It is, therefore, as the Supreme Court ruled in Teamsters regarding Section 703(h), the intent animating the 1964 Congress when it drafted and enacted Title VII, including the pertinent provisions of Section 706(g), that continues to govern judicial interpretations of that statute. As we have shown, the 1964 Congress unequivocally rejected judicial use of quota remedies, and confined the scope of permissible affirmative equitable relief to its traditional limits -- make whole relief for victims of the unlawful conduct. Any other reading of the provision must fail.

4. In both Franks, supra, and Teamsters, supra, the Supreme Court invalidated remedial orders containing measures legally indistinguishable from the one-to-one promotion quota at issue here, making clear that judicial remedial authority under Section 706(g) to order affirmative equitable relief extends no farther than is necessary to restore actual discriminatees to their rightful places.

In our Suggestion of Rehearing En Banc at pages 12-17, these cases are thoroughly discussed, and we shall not unnecessarily lengthen this submission by reiterating the analysis set forth therein. Plaintiffs and their amici, however, have made two points concerning these cases that call for brief response.

First, amici MALDEF, et al. (Br. at 18), suggest that the Supreme Court limited affirmative equitable relief in these cases to actual victims by virtue of Section 703(h), which expressly insulates from Title VII liability all bona fide seniority systems. In both cases, however, the Supreme Court's discussion regarding remedies makes clear that it is interpreting Section 706(g). See Teamsters, supra, 431 U.S. at 364-367; Franks, supra, 424 U.S. at 758-759, 762-770. Indeed, in Franks the Court expressly held that Section 703(h), like other provisions of Section 703, "delineates which employment practices are illegal and thereby prohibited and which are not," and rejected the proposition that Section 703(h) "qualifi[ed] or proscrib[ed] relief otherwise appropriate under the remedial provisions of Title VII, § 706(g) * * * ." Id. at 758-759 (footnote omitted).

Second, amici Center for National Policy Review, et al., noting that the victim-specific limitations recognized in Franks and Teamsters apply only to "retroactive" relief, argue that because employment quotas do not entitle specific individuals to preferential treatment, they are "prospective" rather than "retroactive" in nature and thus not governed by Franks and Teamsters. Br. at E-6 to E-7.

This contention is without merit. It rests not upon legal analysis, but rather on a formalistic labelling of relief as being either forward-looking or remedial by nature. But racial quotas fit neither category. They plainly do nothing to repair the injury suffered by actual victims of discrimination, and thus cannot be considered "retroactive" relief. At the same time, they are in no sense "preventive," which, as Teamsters reflects, is the distinguishing characteristic of "prospective" relief. 27/ Quotas provide no protection "against continuation of the unlawful discriminatory practice" (Teamsters, supra, 431 U.S. at 361) already condemned -- i.e., racial discrimination against existing and potential employees. To the contrary, they retain race as a selection criterion for hiring and promotions. Accordingly, traditional labels are of little value in resolving the present inquiry. Rather, one must look to the intended reach of the statutory provision itself.

27/ In Teamsters, the Court identified several examples of permissible "prospective" relief:

> Such relief might take the form of an injunctive order against continuation of the discriminatory practice, and order that the employer keep records of its future employment decisions and file periodic reports with the court, or any other order "necessary to ensure the full enjoyment of the rights" protected Title VII. 431 U.S. at 361; footnote omitted.

As examples of the latter category of prospective relief, the Court cited orders designed to "prevent[] the deterrence of future applicants," such as "posting of job vacancies and job qualification requirements," "dissemination of information," and "public recruitment and advertising." Id. at 365-366 n.51. Like all forms of prospective relief, each of the examples cited by the Court is preventive in nature.

And, in undertaking such an inquiry in Franks and Teamsters, the Supreme Court concluded that Section 706(g) permits courts to order affirmative equitable relief only to the extent necessary to restore actual discriminatees to their rightful places.

5. The Supreme Court's decision in United Steelworkers v. Weber, supra, is not, as plaintiffs and their amici would have it, "directly analogous to the present case." Pltf's Supp. Br. at 18; see Br. of amici Center for National Policy Review, et al., at E-3. In Weber, the Court "emphasize[d] at the outset the narrowness of [its] inquiry":

> [S]ince the [collective bargaining agreement] was adopted voluntarily, we are not concerned with * * * what a court might order to remedy a past proved violation of the Act. The only question before us is the narrow statutory issue of whether Title VII forbids private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the [agreement]. 443 U.S. at 200 (emphasis added).

Thus, in holding that Title VII's substantive prohibitions against employment discrimination did not forbid a provision in a collective-bargaining agreement that reserved for black employees 50 percent of the openings in certain craft training programs, the Weber Court made clear that the case presented no issue regarding the scope of judicial remedial authority under Section 706(g). See id. at 205 n.5. Nor did the Weber case raise a question regarding judicial authority to enforce such an agreement among private parties. See Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer,

supra; Hurd v. Hodge, 334 U.S. 24 (1948). 28/ Accordingly, the Weber decision is simply without relevance to the instant case.

II. IMPOSITION OF THE PROPOSED ONE-TO-ONE PROMOTION QUOTA WOULD CONTRAVENE TRADITIONAL EQUITABLE PRINCIPLES REGARDING APPROPRIATE REMEDIAL RELIEF AND THE LEGITIMATE INTERESTS OF THIRD PARTIES

In our Suggestion of Rehearing En Banc at pages 17-20, we have thoroughly demonstrated that traditional equitable principles preclude judicial imposition of the one-to-one quota contained in the proposed consent decree. We incorporate that discussion herein by reference. See Rule 28(i), Fed. R. App. P.

III. JUDICIAL IMPOSITION OF THE PROPOSED PROMOTION QUOTA WOULD HAVE VIOLATED THE CONSTITUTION'S EQUAL PROTECTION GUARANTIES

As we have demonstrated, judicial approval of the promotion quota at issue would have exceeded the district court's remedial authority and would have constituted an inequitable infringement on the rights of innocent non-black officers. Of course, if the Court agrees with either of our previous points, it need not address the constitutional questions that judicial imposition of the proposed promotion quota would raise. Should the Court reach that issue, however, we submit that entry by the district court of the proposed consent order would violate the equal protection rights of those

28/ Shelley v. Kraemer, supra, involved the constitutionality of judicial enforcement of private agreements to exclude, along racial lines, certain persons from owning or occupying real property. Although the racially restrictive covenants, like the voluntary collective bargaining agreement at issue in Weber, were not themselves unlawful, enforcement of the agreements in state courts could not be squared with Equal Protection Clause of the Fourteenth Amendment. The Court's ruling in Shelley was extended to federal courts in Hurd v. Hodge, supra. Thus, it seems clear that a racially restrictive employment agreement, like that involved in Weber, could not constitutionally be enforced in federal or state courts.

otherwise eligible non-black officers who would be excluded from consideration for promotion to the supervisory positions set aside for blacks. 29/

It is well settled that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and that "courts must subject them to the most rigid scrutiny." Korematsu v. United States, 323 U.S. 214, 216 (1944). See, e.g., Shelley v. Kraemer, 334 U.S. 1, 22 (1948); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 351 (1938). That a governmental classification, such as the proposed racial quota for promotions, works to the detriment of all non-black police officers rather than a "discrete and insular minorit[y]" (United States v. Carolene Products

29/ This Court has frequently countenanced employment quotas and other race-conscious remedies in employment discrimination cases without expressly addressing their constitutionality. See, e.g., Morrow v. Crisler, 491 F.2d 1053, 1056 (5th Cir.), cert. denied, 419 U.S. 895 (1974); id. at 1059 (Clark, J., concurring, but expressing "doubts that [a hiring quota's] constitutional validity can be reasonably articulated"). See also NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (holding that Crisler implicitly upheld constitutionality of racial quota relief in employment discrimination); Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978) (same). Panels of this Court, however, have specifically addressed the constitutionality of consent decrees containing race-conscious employment quotas on two previous occasions. In United States v. City of Miami, 614 F.2d 1322 (5th Cir. 1980), a divided panel of this Court upheld the constitutionality of a consent decree containing race-conscious hiring and promotion quotas, but the panel's decision was subsequently vacated by the full Court. 664 F.2d 435 (5th Cir. 1981) (en banc). In United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980), a companion case to the City of Miami, the same panel upheld the constitutionality of a similar consent decree. The Court's constitutional discussion, however, took place in an unusual context: no party had challenged the constitutionality of the racial quotas in either the district court or the court of appeals. See 614 F.2d at 1363, 1372 (Gee, J., concurring specially). Nonetheless, we do not think that the panel's constitutional ruling in City of Alexandria can be reconciled with the position set forth herein and therefore urge that it be rejected by the full Court.

Co., 304 U.S. 144, 153 n.4 (1938)), is without constitutional significance. 30/ "[I]t is the individual who is entitled to judicial protection against classification based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group * * * ." University of California Regents v. Bakke, 438 U.S. 265, 299 (1978) (opinion of Powell, J.); see, e.g., Shelley v. Kraemer, supra, 334 U.S. at 22 ("[R]ights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."); McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 161-162 (1914). And, if the Equal Protection Clause creates "personal rights," "guaranteed to the individual," its safeguards "cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Bakke, supra, 438 U.S. at 289-290 (opinion of Powell, J.). Accordingly, when a person is classified by government 31/ on the basis of race or ethnic origin, "the burden he is asked to bear on that basis [must be] precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background." Id. at 299; see Shelley v. Kraemer, supra; Missouri ex rel.

30/ As Justice Powell observed in Bakke, discreteness and insularity have "never been invoked in [Supreme Court] decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny." Bakke, supra, 438 U.S. at 290 (opinion of Powell, J.).

31/ This is true whether the individual is classified by legislative, administrative, or judicial action. See note 13, supra. But see United States v. City of Alexandria, supra, 614 F.2d at 1363 (racial quota in consent decree need only be "reasonably related" to affirmative action objectives).

Gaines v. Canada, supra, 305 U.S. at 351; Fullilove v. Klutznick, 448 U.S. 448, 480 (1980) (plurality). 32/

Application of this standard to the facts of this case compels the conclusion that imposition of the proposed one-to-one racial quota for promotions would impermissibly infringe the equal protection rights of non-black police officers.

A. The Proposed Promotion Quota Cannot be Justified as a Measure Necessary to Remedy the Effects of the NOPD's Past Discrimination in Employment

The constitutional issue presented in this case -- whether the proposed consent decree, if ordered by the district court, would violate the Constitution's equal protection guaranties -- focuses not on the "broad remedial powers of Congress" or the policy choices of a legislative or administrative body, but rather on the "limited remedial powers of a federal court." Fullilove,

32/ A panel of the Court of Appeals for the Sixth Circuit has ruled that "[a] different [equal protection] analysis must be made when the claimants are not members of a class historically subjected to discrimination." Bratton v. City of Detroit, No. 80-1837 (6th Cir., Mar. 29, 1983), slip op. 11; (United States' motion for leave to intervene to suggest rehearing en banc pending), quoting Detroit Police Officers Ass'n v. Young, 608 F.2d 671, 697 (6th Cir. 1979), cert. denied, 452 U.S. 928 (1981). See also Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1982). There is, however, nothing in the law to support this approach. Nor can it reasonably be maintained that any discrete racial classes have a monopoly on the claim of being "historically subjected to discrimination." As Justice Powell observed in Bakke, "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals." Bakke, supra, 438 U.S. at 295 (opinion of Powell, J.). Thus, "[t]here is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not." Id. at 296 (footnote omitted).

supra, 448 U.S. at 483. 33/ The essence of the judicial function is to decide justiciable disputes among contending parties and, when legally cognizable interests have been invaded unlawfully, to order appropriate remedial measures. The governmental interest in vindicating the legal rights of victims and redressing unlawful conduct is substantial, indeed compelling, and generally justifies judicial imposition of measures necessary to remedy the injury, even though such measures may incidentally impinge on the interests of innocent third parties. This principle does not change when the unlawful behavior is racial discrimination. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, * * * 'a sharing of the burden' by innocent parties is not impermissible." Fullilove, supra, 448 U.S. at 484, citing Franks, supra; Albemarle Paper Co. v. Moody, supra; Accord, 448 U.S. at 497 (Powell, J., concurring). (The existence of illegal discrimination justifies the imposition of a remedy that will "make persons whole for injuries suffered on account of unlawful * * * discrimination"). That the class of victims is defined by race is but a concomitant of the fact that the defendant's unlawful behavior was defined by race.

We submit that the compelling government interest of curing the effects of past racial discrimination -- the only compelling

33/ Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as that under the Fourteenth Amendment. E.g., Buckley v. Valeo, 424 U.S. 1, 93 (1976). It is also well established that judicial action is no less subject to the constraints of the Constitution's equal protection guaranties than is legislative action. See Shelley v. Kraemer, supra; Ex parte Virginia, 100 U.S. 339 (1879).

interest implicated in the context of judicial remedial action (see note 36, infra) -- will justify a class-based infringement of the legitimate interests and expectations of innocent third parties only to the extent necessary to restore proven discriminatees to the position they would have occupied in the absence of the discrimination. The rights protected under both Title VII and the equal protection guaranties of the Constitution belong to individuals, not groups. E.g., Los Angeles Dept. of Water & Power v. Manhart, supra (Title VII); Shelley v. Kraemer, supra (Constitution). In order fully to vindicate these individual rights, courts should fashion remedies designed to ensure that the identifiable victims of unlawful racial discrimination are restored to their "rightful places" in the employer's work force. The legitimate "rightful place" claims of identifiable discriminatees warrant imposition of a remedy calling for a "sharing of the burden" by those innocent incumbent employees whose "places" are the product of, or at least enhanced by, the employer's discrimination.

Persons who have not been victimized by the employer's discriminatory practices, however, have no claim to "rightful places" in the employer's workplace. And any preferential treatment accorded to nondiscriminatees -- or to discriminatees beyond those measures necessary to make them whole -- necessarily deprives innocent incumbent employees of their "rightful places." Accordingly, as between nonvictims of the unlawful discrimination and innocent third parties, "it cannot be said that the government has any greater interest in helping one individual than in refraining

from harming another." Bakke, supra, 438 U.S. at 308-309 (opinion of Powell, J.). 34/

In this case, the one-to-one promotion quota contained in the proposed consent decree is victim-blind: it would embrace without distinction nonvictims as well as victims of the defendants' unlawful discrimination in promotions. It would thus accord racially preferential treatment to persons having no "rightful place" claim to promotion priority vis-a-vis non-black officers. Because government has no compelling interest in according such preferential treatment to nondiscriminatees at the expense of innocent third parties, judicial imposition of the one-to-one promotion quota contained in the proposed consent decree would have been unconstitutional. 35/

34/ We thus urge the Court to reject the view, recently espoused by the Sixth Circuit, that racially preferential treatment need not be limited under the Constitution to individual victims of discrimination. Bratton v. City of Detroit, supra (United States' motion to intervene to suggest rehearing en banc pending); see Detroit Police Officers Ass'n v. Young, supra, 608 F.2d at 694. See also Valentine v. Smith, supra.

35/ The Supreme Court's decision in Fullilove v. Klutznick, supra, does not lead to a contrary result. In that case the Court rejected a constitutional challenge to a federal law (as opposed to a judicial decree) requiring that at least 10% of federal funds for local public works projects be set aside for contracts with "minority business enterprises." Administrative and legislative findings that minority businesses had been excluded from significant participation in government construction contracts were held sufficient to justify this exercise of Congress' remedial authority. 448 U.S. at 456-472 (plurality). The plurality opinion emphasized that the administrative program contained sufficient procedural safeguards to provide reasonable assurance (1) that application of racial or ethnic criteria would be narrowly limited to accomplishing Congress' remedial purposes by restricting preferential treatment to those businesses actually disadvantaged as a result of prior discrimination and (2) that misapplications of such criteria would be promptly and adequately remedied administratively. See id. at 486-489. Moreover, the plurality

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B. The Proposed One-to-One Racial Quota for Promotions is Not Justified By the "Operational Needs" of the NOPD

Plaintiffs and their amici, particularly the City of Detroit, argue that imposition of the one-to-one racial quota for promotions was justified by the "operational needs" of the NOPD. Plaintiffs urge that racially balancing the police force will "improve the effectiveness of the NOPD in providing police services," will foster "community respect for and confidence in the police," and will help avoid "antagonism, hostility and strife between the citizenry and [the] department." Supp. Br. at 45 & n.41, 47. Making much the same arguments, amicus City of Detroit asserts that "the importance of having racially representative police forces in our cities [is] judicially noticeable." Br. at 7.

Arguments such as these have long been in the service of racial discrimination. They have also, of course, consistently been rejected. 36/ For example, in Baker v. City of St. Petersburg, 400

35/ (cont'd)

stressed that the Court was deciding only a facial challenge to the MBE provision and that any equal protection claims arising out of the specific awards that "cannot be justified * * * as a remedy for the present effects of identified prior discrimination * * * must await future cases." Id. at 486. In sum, then, the plurality in Fullilove left no doubt that the MBE provision, which "press[ed] the outer limits of congressional authority," would not have passed constitutional muster had it been based solely on the contractor's race rather than on the contractor's status as a victim of discrimination in government construction contracting. See id. at 473, 490.

36/ Initially, we note that in the context of this case (that is, a case brought to vindicate alleged violations of personal rights protected by specific federal statutes and constitutional provisions) the only proper judicial interest is remedial. The so-called "operational needs" of the NOPD have nothing to do with vindicating the rights of alleged discriminatees. If the City's operational needs compel it to discriminate on the basis of race, it need not wait for entry of the proposed consent decree to begin implementing the necessary measures. Then, victims of the City's racial discrimination could challenge the City's conduct under the

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F.2d 294 (5th Cir. 1968), a municipal police department cited its "operational needs" to justify racial classifications among its officers. The Department assigned only black officers to patrol the City's predominantly black "Zone 13," and the City's only black sergeant "ha[d] the Negro officers only under his command." Id. at 296 (footnote omitted). According to the City, the black officers were "better able to cope with the inhabitants of that zone, who on occasion [became] abusive and aggressive toward police officers during a disturbance; and, further, * * * they [were] able to communicate with the inhabitants of the Negro area better than white officers and [were] better able to identify Negroes and investigate criminal activities in that zone more effectively than white officers.'" Ibid. With an eloquence that we cannot hope to equal, plaintiff's counsel in that case, the NAACP Legal Defense Fund, stated the governing, and enduring, principle (Br. for Appellants at 23):

> As the Government teaches the whole people by its example, so no Government or Government agency should practice discrimination. If discriminatory practices, which deny to men their right to equal opportunity, are to be ended, the Government must lead. A free society is anchored in the concept of equality before the law. To place police efficiency ahead of equality is to destroy that concept and to destroy the fundamental right of human dignity.

36/ (cont'd)

appropriate statutory and constitutional provisions. Only in the context of that lawsuit would the alleged operational needs of the City become relevant. In the instant case, however, the City cannot "purchase from a court of equity a continuing injunction" to advance interests having nothing to do with the rights asserted in the complaint. See System Federation v. Wright, supra, 364 U.S. at 651 (1961).

This court agreed, remarking: "Of course, if police efficiency were an end in itself, the police would be free to put an accused on the rack. Police efficiency must yield to constitutional rights." 400 F.2d at 300. Noting that the racial assignments were based "on the Department's judgment of Negroes as a class" (ibid.), this Court ordered that black officers be assigned to the various patrol zones "in the same manner as white officers insofar as ability, available workforce, and other variables permit." Id. at 301 (footnote omitted). The Court concluded its opinion on a cautionary note particularly relevant to the instant case: "Nothing we say is intended to suggest that the Negro officers on the police force * * * should be given preferential treatment. They deserve only what they seek -- equality." Ibid.

The operational needs rationale for racial discrimination has fared no better in analogous contexts. For example, in Smith v. Bd. of Educ., 365 F.2d 770 (8th Cir. 1966), the defendant school board argued that it could validly prefer white school teachers for white pupils because "rapport between teacher and pupil * * * may be unattainable where they are of different races and this difference affects attitudes, personal philosophies and prejudices." Id. at 781. The court of appeals, through then Circuit Judge Blackmun, rejected the argument in unequivocal terms:

> [I]n this day race per se is an impermissible criterion for judging either an applicant's qualifications or the district's needs. And this applies equally to considerations described as environment or ability to communicate or speech patterns or capacity to establish rapport with pupils when these descriptions amount only to euphemistic references to actual or assumed racial distinctions. * * * It is now too late for a school board to assume that it may objectively regard all supposed racial differences in order to avoid its obligation to employ teachers in accord with constitutional standards. Id. at 782.

Nor does the constitutional command of equal protection permit the denial or restriction of individual equal protection rights for the purpose of calming or avoiding hostility on the part of a particular community or group of citizens within the community. In a variety of contexts, the Supreme Court has squarely rejected contentions that bowing to popular prejudices, even to avoid the possibility of racial unrest, can constitute a sufficient justification for abridging the equal protection rights of individuals. In Buchanan v. Warley, 245 U.S. 60 (1917), the court unanimously invalidated an ordinance barring blacks from acquiring residences in predominantly white neighborhoods and vice versa. The Court stated:

> It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution. Id. at 81.

See, e.g., Watson v. Memphis, 373 U.S. 526, 535-536 (1963) (rejecting claim that gradual "facility-by-facility" desegregation of municipal parks was "necessary to prevent interracial disturbances, violence, riots, and community confusion and turmoil"); Cooper v. Aaron, 358 U.S. 1, 16 (1958) ("[L]aw and order are not * * * to be preserved by depriving * * * Negro children of their constitutional rights.")

Even in the prison context, where racial unrest is often intense and the threat of violence ever present, the Supreme Court has indicated that the Fourteenth Amendment does not permit prison officials to make blanket celling classifications according to race to accommodate the prejudices of inmates or to prevent racial conflict presumed to be inevitable. See Lee v. Washington, 390 U.S. 333 (1968) (per curiam). The governing principle of these cases

was best stated by Justice White: "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held. Surely the promise of the Fourteenth Amendment demands more than nihilistic surrender." Palmer v. Thompson, 403 U.S. 217, 260-261 (1971) (White, J., dissenting).

We recognize that the governmental interest in effective law enforcement may, with respect to certain narrow and limited race-conscious employment practices, satisfy the heavy burden which the Fourteenth Amendment imposes on governmental classifications based on race. Such practices might include, for example, selecting or assigning individual police officers on the basis of race in order to infiltrate racially exclusive subversive groups (e.g., Ku Klux Klan, Black Panthers) or to conduct undercover investigations in racially identifiable areas of the community. See Baker v. City of St. Petersburg, supra, 400 F.2d at 301 n.10.

The proposed racial quota for promotions, however, clearly is not a "necessary" means for effectuation of such important law enforcement interests. See Bakke, supra, 438 U.S. at 299 (opinion of Powell, J.); Missouri v. Canada, supra, 305 U.S. at 351. Nor is it necessary for the maintenance of the public peace or the furtherance of the City's other "operational needs." The legitimate interests asserted by plaintiffs can be achieved through the application of race-neutral measures designed to reassure black citizens that the days of racial discrimination in the NOPD and racially motivated abuses by police officers are past. Defendants could

begin by (1) dismissing or disciplining officers guilty of racially discriminatory conduct within or without the NOPD, (2) restoring victims of employment discrimination to their rightful places in the NOPD, and (3) adopting nondiscriminatory employment practices. The plaintiffs have failed to establish that a race-neutral solution is not feasible. This is the course demanded by the Constitution; racial quotas are impermissible. 37/

37/ Defendant City of New Orleans contends that the unavailability of quota remedies will "virtually rule out future settlements of Title VII cases." Br. at 41. But nowhere does the City explain why class-based relief, which is unavailable in other contexts, is essential in order to resolve Title VII cases by consent and thus to promote voluntary compliance with the Act. As we have noted previously, remedies traditionally have been limited to those measures which are tailored to redress injuries to actual victims of illegal conduct. In all such cases, including class actions, the successful resolution of outstanding claims without litigation depends upon the ability of the alleged violator and the victim to come to terms. Without the availability of quota relief, the parties may avoid litigation by reaching agreement as to the alleged victim's rightful place in the workforce and the amount of backpay relief necessary to make the victim whole. The parties cannot lawfully bargain over the racial composition of the workforce in the future, a matter of irrelevance in remedying the wrong done the alleged victim.

The City's assertion, moreover, is refuted by the experience of the Government in cases involving a "pattern or practice" of discrimination under Title VII. The Government's pursuit of victim-specific relief under Title VII has not precluded resolution by consent. In United States v. Fairfax County, E.D.Va., No. 78-862-A, the Government recovered the largest sum ever awarded in a Title VII case. After trial in which the County's liability was established, the Government and the County scrutinized approximately 1,950 claims and agreed upon an award of $2,750,000 and priority job offers to 685 of the claimants. In United States v. Nassau County, E.D.N.Y., Civil No. 77-C-1881, a settlement was reached between the Government and the County prior to trial. The parties agreed upon backpay and priority job offers for 60 of the 225 claimants, rejected approximately another 70 individual claims, and are

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CONCLUSION

For the foregoing reasons, approval by the district court of the proposed one-to-one racial quota for promotions would have exceeded the jurisprudential, statutory, and constitutional limits of judicial remedial authority. Accordingly, the district court's judgment refusing to enter the consent decree as proposed should be affirmed.

Respectfully submitted,

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37/ (cont'd)

currently reviewing the remaining claims. A similar agreement was reached prior to trial in United States v. North Little Rock, E.D.Ark., No. LR-C-82-300. Such agreements accomplish fully the remedial aims of Title VII, without transgressing the jurisprudential, statutory, and constitutional limits on judicial remedial power. That the task of identifying "which of the minority employees were actual victims of the [employer's] discriminatory practices" is "not...a simple one" and "necessarily involve[s] a degree of approximation and imprecision" (Teamsters, supra, 431 U.S. at 371-372) simply does not warrant resorting to the "loaded weapon" of racial discrimination. See Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).