Nos. 84-1656 and 84-1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*,
Respondents.

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C.,
Petitioner,

v.

CITY OF CLEVELAND, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second and Sixth Circuits

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BRIEF OF LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS AND LOCAL 36, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Local 542, International Union of Operating Engineers, is the exclusive bargaining representative for all unionized operating engineers in Eastern Pennsylvania and Delaware. Local 36, International Association of Firefighters, AFL-CIO, is the exclusive bargaining representative for all members of the uniformed force of the District of Columbia Fire Department in the ranks of Firefighter through Captain. Each of these amici is presently involved in litigation concerning the legitimacy of court-ordered or governmentally imposed racial quotas in the employment context. See *Local Union 542, International Union of Operating Engineers v. Commonwealth of Pennsylvania, et al., pet. for cert. pending*, No. 85-828; *Hammon v. Barry*, 606 F. Supp. 1082 (D.D.C. 1985). The principles by which this Court decides the instant cases may well determine the validity or invalidity of the racial quotas at issue in amici's cases. Amici file this brief amici curiae with the consent of the parties as provided for in the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses only the question whether courts are authorized to order racial quotas as remedies for employment discrimination found to violate Title VII of the Civil Rights Act of 1964 or 42 U.S.C. §§ 1981 or 1983.[1] More specifically, the question is whether under

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[1] The petitions in these cases do not expressly raise any question regarding the authority of courts to order racial quotas as remedies for violations of §§ 1981 or 1983. However, in No. 84-1999 *(Local Number 93)* the complaint was premised on §§ 1981 and 1983 as well as Title VII, and presumably so was the consent decree containing the racial quotas. Accordingly, in No. 84-1999 the Court

these statutes a court may order that persons of one race be deprived of jobs, solely because of their race, in order to open those jobs to persons of another race who have not been victims of the discrimination practiced by the defendant.

This brief will examine the pertinent legislative history of Title VII and show the following: (1) In 1964, when the law was enacted, Congress expressly determined that courts would not be authorized to order racial quotas; (2) in 1972, when certain provisions of Title VII were amended, Congress exhibited full awareness of its earlier decision to prohibit court-ordered racial quotas, and determined not to alter that decision.

With respect to the remedial authority of courts in actions brought under §§ 1981 or 1983, we will show: that the post-Civil War Congress that enacted those provisions—as well as the companion provision, 42 U.S.C. § 1988—did not intend to authorize quota remedies; and that, if those provisions are to be interpreted in light of "modern law," the judgment of Congress to prohibit court-ordered quotas under Title VII precludes courts from construing the post-Civil War statutes to reach a contrary result.

ARGUMENT

I. TITLE VII DOES NOT AUTHORIZE COURTS TO AWARD RACIAL QUOTA REMEDIES

In *Firefighters Local Union No. 1784 v. Stotts*, —— U.S. ——, 104 S.Ct. 2576, 2588-89 (1984), this Court stated that "the policy behind § 706(g) of Title VII . . . . is to provide make-whole relief *only* to those who have been actual victims of illegal discrimination . . ." (em-

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may address the validity of racial quota remedies for violations of §§ 1981 or 1983. The question of the validity of quota remedies under § 1981 is directly presented in the petition for certiorari filed by amicus Local 542 in *Local Union 542, International Union of Operating Engineers v. Commonwealth of Pennsylvania, et al.*, No. 85-828.

phasis added), and that the quota before the Court in *Stotts* "runs counter" to that policy (*id.* at 2590, n. 17). Section 706(g) is *the* provision that creates and establishes the limits of the remedial power of the courts under Title VII. There has been considerable doubt expressed in the lower courts as to whether the *Stotts* Court meant to preclude racial quotas as remedies for Title VII violations.[2] We do not propose here to debate what this Court intended in *Stotts*. For the question of the power of the courts to order racial quotas as remedies for Title VII violations is purely one of statutory interpretation. And, examination of the relevant legislative materials from 1964 and 1972 establishes that Congress left no doubt as to *its* intention on this question: Congress intended to preclude courts from ordering racial quota remedies in Title VII cases.

1. When Congress considered Title VII in 1964, the issue whether courts would be authorized to order racial quota remedies was expressly addressed. The sponsors of the bill in both the House and the Senate repeatedly and unequivocally confirmed that Title VII would not empower courts to order racial quota remedies.

Before the 1964 debate began, the bill's opponents cited quota remedies as one of the evils that would be produced. See, *e.g.*, H.R. Rep. 914, 88th Cong. 1st Sess. (1963) at 72. These opponents declared this "a not too subtle system of racism-in-reverse" (*id.* at 73).

When the bill reached the House floor, the opening speech in support of its passage was delivered by Repre-

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[2] See, *e.g., Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers*, 770 F.2d 1068 (3d Cir. 1985) (table) (opinion published at 38 FEP Cases 673), *pet. for cert. pending*, No. 85-828; *Paradise v. Prescott*, 767 F.2d 1514, 1528-1530 (11th Cir. 1985); *Deveraux v. Geary*, 765 F.2d 268, 273 (1st Cir. 1985); *Turner v. Orr*, 759 F.2d 817, 823-824 (11th Cir. 1985), *pet. for cert. pending*, No. 85-177; *Britton v. South Bend Community School Corp.*, —— F.2d ——, 39 FEP Cases 170, 180-181 (7th Cir. 1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n.9 (9th Cir. 1985) (dictum).

sentative Celler, the Chairman of the House Judiciary Committee. A portion of that speech was devoted to answering the "unfair and unreasonable criticism" that had been leveled against the bill (110 Cong. Rec. 1518):

> In the event that wholly voluntary settlement proves to be impossible, the 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 . . .
>
> *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.* [*Ibid* (emphasis added)].[3]

Subsequent to the House's passage of the bill, the Republican sponsors in the House published a memorandum describing the bill as passed. In pertinent part, the memorandum 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, *Title VII does not permit the ordering of racial quotas* in businesses or unions and does not permit interferences with seniority rights of employees or union members. [*Id.* at 6566 (emphasis added)].

When the bill was taken up by the Senate, Senators Humphrey and Kuchel, the co-managers of the entire bill, undertook a description of each of the titles. In the course of his description of Title VII, Senator Humphrey detailed the manner in which discrimination claims could be processed through suit and finding of discrimination, and then described the remedial powers available to a court:

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[3] See also *id.* at 1600 (Rep. Minish) ("no quota system will be set up").

> 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 payment of backpay. This relief is similar to that available under the National Labor Relations Act in connection with the unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of Section 707e [enacted, without change, as § 706(g)] . . . .
>
> * * *
>
> *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 6548 (emphasis added).]

Senator Kuchel made the other major opening speech in support of the bill. He, too, took pains to demonstrate that the remedial provisions would not permit court-ordered quotas:

> Title VII might justly be described as a modest step forward. Yet it is pictured by its opponents and detractors as an intrusion of numerous Federal inspectors into our economic life. These inspectors would presumably dictate to labor unions and their members with regard to job seniority, seniority in apprenticeship programs, racial balance in job classifications, racial balance in membership, and preferential advancement for members of so-called minority groups. Nothing could be further from the truth. I have noted that the Equal Employment Opportunity Commission is empowered merely to investigate specific charges of discrimination and attempt to

> mediate or conciliate the dispute. It would have no authority to issue orders to anyone. Only a Federal court could do that, and only after it had been established in that court that discrimination because of race, religion, or national origin had in fact occurred. Any order issued by the Federal district court would, of course, be subject to appeal. *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)].

Senators Clark and Case were the bipartisan "captains" of Title VII in the Senate. They prepared and submitted to the Senate an interpretative memorandum[4] which, *inter alia*, made clear that § 706(g) precluded courts from ordering preferential treatment for non-victims of discrimination:

> No 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)] . . . [*Id.* at 7214].

Senator Clark also set before the Senate written answers he had prepared to certain "objections" which had been voiced to Title VII. To the objection that Title VII would "require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market," the answer was: "Quotas are themselves discriminatory." *Id* at 7218.

Each day during the Senate debates on the Civil Rights bill, the principal Senate sponsors prepared a Bipartisan Civil Rights Newsletter which was hand-delivered to the office of each Senator supporting the bill. Its purpose,

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[4] This Court has recognized the "authoritative nature of [this] interpretative memorandum." *Stotts*, 104 S.Ct. at 2589 n.13; *American Tobacco Co. v. Patterson*, 456 U.S. 63, 73 (1982); *Teamsters v. United States*, 431 U.S. 324, 352 (1977).

as explained by Senator Humphrey, was "to keep Senators who are in favor of civil rights legislation informed of our point of view."[5] The April 11, 1964, issue of the Newsletter 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.* [*Id.* at 14465 (emphasis added)].

Senator Humphrey introduced an explanation of the House bill which he said had been "read and approved by the bipartisan floor managers of the bill in both houses of Congress." *Id.* at 11847. In pertinent part, the explanation provided:

> The relief available is a court order enjoining the offender from engaging further in discriminatory practices and directing the offender to take appropriate affirmative action; for example, reinstating or hiring employees, with or without back pay . . .
>
> *The Title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment.* . . . The Title does not provide for the reinstatement or employment of a person, with or without back pay, if he was fired or refused employment or promotion for any reason other than discrimination prohibited by the Title. [*Ibid* (emphasis added)].

In addition to the materials just cited which directly and unambiguously relate to the power of *courts* to order racial quotas as "remedies," the 1964 legislative history is replete with more general statements by proponents of Title VII that racial quotas could not be imposed under Title VII, including numerous statements that

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[5] *Id.* at 5042. It is apparent from the numerous references to the Newsletter in the floor debates, that the publication was widely read by Senators. See *id.* at 5044, 5046, 5079, 7474, 8369, 8912, 9105, 9870, 10622, 12210, 14464.

imposition of racial quotas would run counter to the anti-discrimination principles of the statute. For the convenience of the Court, we set forth a number of these statements in an appendix to this brief. Significantly, we have not found, nor has any advocate of racial quota relief under Title VII ever cited, a single instance in the 1964 legislative history in which any supporter of Title VII suggested that Title VII would provide for or permit court-ordered racial quotas.

2. What was said and done in 1964 shows conclusively that Congress in enacting Title VII intended to provide affirmative remedies for the victims of discrimination but not quota remedies benefiting nonvictims. Nothing Congress has said or done since 1964 provides a basis for reading Title VII, as amended in 1972, differently in this regard from Title VII as originally passed. Examination of the 1972 legislative materials shows: (i) that the only arguably pertinent legislative *act* in 1972 was designed to confirm that "rightful place" relief for *victims* is the remedial objective of Title VII, and not to reverse the determination in 1964 to preclude quota remedies; and (ii) that the 1972 Congress—particularly the House—recognized that the 1964 Congress had determined to rule out quota remedies, and had no wish to alter that determination.

a. In 1972, Congress amended the first sentence of § 706(g) to add the words "but is not limited to" and "any other equitable relief as the court deems appropriate" to the specification of remedies already listed in that provision. The only explanation for that amendment is contained in the Section-by Section Analysis that was introduced in both houses:

> Section 706(g)—This subsection is similar to the present section 706(g) of the Act. It authorizes the court, upon a finding that the respondent has engaged in or is engaging in an unlawful employment practice, to enjoin the respondent from such unlawful conduct and order such affirmative relief as may be appropriate including, but not limited to, rein-

> statement or hiring, with or without backpay, as will effectuate the policies of the Act. Backpay is limited to that which accrues from a date not more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the aggrieved person(s) would operate to reduce the backpay otherwise allowable.
>
> 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 (emphasis added)].[6]

As this Court explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 764 n.21 (1976), the Congress that "added the phrase speaking to 'other equitable relief' in § 706(g) . . . indicated that 'rightful place' was the intended objective of Title VII and the relief accorded thereunder." And, the Court understood the portion of the Section-by-Section Analysis quoted above to be "emphatic confirmation that federal courts are empowered to fashion such relief as the particular circum-

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[6] The Section-by-Section Analysis quoted in text was first submitted to the Senate by Senator Williams (the bill's floor manager in the Senate) prior to adoption of the Senate bill. Senator Williams submitted it again in conjunction with the Conference Report, as did Rep. Perkins in the House. See Legislative History of the Equal Employment Opportunity Act of 1972, prepared by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972) (hereinafter "72 Leg. Hist."), pp. xv n.3, 1769, 1773-74, 1843-44, 1848, 1856.

stances of a case may require to effect restitution, making whole insofar as possible the *victims* of racial discrimination . . ." *Id.* at 764 (emphasis added).

There is not a word in the legislative history to suggest that "other equitable relief" was added to § 706(g) to authorize quota remedies, and it is hardly conceivable that so profound a departure from the anti-quota decision made in 1964 would have been accomplished without evidence of an intention to do so.

b. Not only did the 1972 Congress take no legislative act which purported to reverse the anti-quota decision of 1964, but that Congress also manifested a recognition and an acceptance of the fact that court-ordered racial quota remedies are barred under Title VII.

That recognition and acceptance are most readily seen in the debate in the House. That debate focused on two competing bills—one (H.R. 1746) introduced by Rep. Augustus Hawkins and reported out by the House Labor Committee, and the other (H.R. 9247) offered by Rep. John Erlenborn "as an amendment in the nature of a substitute." 72 Leg. Hist. 150-151. The principal differences between the bills—and the subject of virtually all the debate—involved matters wholly irrelevant to the issue here (*e.g.*, Should the EEOC be given "cease and desist" power? Should Title VII be extended to public employment?) Insofar as relevant here, the difference between the bills was that the Committee bill proposed to transfer administration of Executive Order 11246 from the Department of Labor's Office of Federal Contract Compliance (OFCC) to the EEOC, while the Erlenborn bill did not. The proposed transfer of OFCC administration to the EEOC in the Committee bill was perceived by some as providing the EEOC with a power to order quotas, for the OFCC in its administration of the Executive Order had made it a condition to receipt of government contracts that the contractor adopt "goals and timetables." The discussion of quotas in the House in 1972 centered on the propriety of giving the EEOC

power to require quotas under the Executive Order, with all sides agreeing that quotas could not be ordered under Title VII.

In support of his position that the OFCC administration should not be transferred to the EEOC, Rep. Erlenborn stated the theory on which quotas, although not authorized under Title VII, had been treated differently under the Executive Order:

> The OFCC is an altogether different type of jurisdiction [from the EEOC]. It is not based upon constitutional rights. It is not based upon statutory rights.
>
> The genesis of the power of the OFCC is the contractual relationship that exists between the Federal Government and those with whom they contract for the acquisition of goods and services. In this jurisdiction the OFCC can and does go beyond those powers granted by the 1964 Civil Rights Act. I think it is important to note that the Chairman of the Equal Employment Opportunity Commission himself has testified that you cannot mix these two enforcement authorities. [72 Leg. Hist. at 231].

Supporters of the Committee bill did not dispute the theoretical basis for such a distinction, and they proposed to resolve the dilemma not by leaving administration of the Executive Order with the OFCC, as Rep. Erlenborn would have done, but by making Title VII's ban on quotas equally applicable to the Executive Order. Their solution—incorporated in the so-called Dent Amendment to the Committee bill—was that coincident with transfer to the EEOC of authority to enforce the Executive Order, the EEOC should be "prohibited from imposing or requiring a quot[a] or preferential treatment." 72 Leg. Hist. at 189. Rep. Dent, the floor manager of the Committee bill, explained the reason for incorporating this express prohibition:

> My . . . amendment would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal

> contract-compliance program. This responsibility, which is now vested in the Office of Federal Contract Compliance of the Department of Labor, would be transferred by H.R. 1746 to the Commission. *Such a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII. My amendment would, for the first time, apply these restrictions to the Federal contract-compliance program.* [72 Leg. Hist. at 190 (emphasis added). See also *id.* at 199 (Rep. Perkins); *id.* at 204, 208 (Rep. Hawkins)].

While there was some debate over the propriety of exacting quotas under the Executive Order as the price for receipt of government contracts (see, e.g., *id.*, at 202, 208-209, 222-223, 231), there was unanimity that quotas were not to be imposed under Title VII. Rep. Hawkins, the author of the Committee bill, declared:

> [S]*ome say that this bill seeks to establish quotas . . . Not only does Title VII prohibit this,* but it establishes beyond any doubt a prohibition against any individual white as well as black being discriminated against in employment. It only seeks to insure that persons will be treated on their individual merits and in accordance with their qualifications. [72 Leg. Hist. at 204 (emphasis added)].[7]

And Rep. Erlenborn, the author of the rival bill, correctly identified the narrow scope of the dialogue by pointing out that *neither the Committee bill nor the Erlenborn substitute "is going to repeal the prohibition against quotas that is in Title VII of the Civil Rights Act"* [*Id.* at 261 (emphasis added)].

In the end—over the opposition of those normally associated with the "liberal" position on civil rights matters, including the members of the Black Caucus[8]—the

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[7] Rep. Hawkins later repeated, during a colloquy, that Title VII already "prohibits the establishment of quotas." *Id.* at 209.

[8] See e.g., *id.* at 223-224 (Rep. John Conyers); *id.* at 232, 269-272 (Rep. Fauntroy); *id.* at 233-234 (Rep. Parrin Mitchell); *id.* at 274-277 (Rep. Abzug); *id.* at 299-301 (Rep. Stokes).

House voted to adopt the Erlenborn substitute. *Id.* at 312-314. As that substitute did not provide for the transfer of OFCC administration to the EEOC, there was no occasion for the House to vote on the Dent amendment, which was never formally offered, nor on any other measure respecting the propriety of quotas under Executive Order 11246. What is important here is that all parties to the debate took as given, and did not propose to change, the fact that Title VII does not authorize court-ordered racial quotas.[9]

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[9] The fact that the House debate manifests the uniform understanding that Title VII does not permit court-ordered quotas—not a surprising fact in view of the definitive resolution of that controversial issue just eight years earlier—precludes any notion that, because a few, isolated lower court cases purportedly authorizing court-ordered quotas had been decided by 1972, Congress should be deemed to have acted on the assumption that Title VII authorized such quotas.

Indeed our research has uncovered only two cases decided prior to the completion of the 1972 consideration of Title VII that even arguably approved quota remedies, and in both the approval was cryptic. In *Asbestos Workers v. Vogler,* 407 F.2d 1047 (5th Cir. 1969), the court upheld an injunction striking down nepotism and prior experience as requirements for union membership and "ordered the development of objective membership criteria," 407 F.2d at 1051, not racial quotas or preferences, to govern future admissions to union membership. Pending development of such objective criteria, the injunction prohibited new admissions of members (save identified discriminatees) and directed that during the interim period work referrals of existing members be made on a chronological basis, with alternating referrals of whites and blacks, *id.* In a cryptic passage near the end of its opinion, the Fifth Circuit explained that the temporary alternating referrals were required for "administrative reasons." *Id.* at 1055. In *United States v. Iron Workers Local 86,* 443 F.2d 544, 553-554 (9th Cir.), *cert. denied,* 404 U.S. 984 (1971), the Court, relying on *Vogler,* sustained an injunction that contained compulsory numerical guidelines for minority admissions into apprentice programs, rejecting arguments that the injunction violated § 703(j). The court declared that the injunction it was affirming "did not establish a system of racial quotas or 'preferences' in violation of section 703(j)." 443 F.2d at 554. Thus while close reading of *Vogler* and *Ironworkers* reveals that orders establishing racial preferences were in fact approved, neither case purported to endorse court-ordered racial quotas in

While the Senate's consideration of proposed amendments was hardly more indicative of a desire to overturn the 1964 decision to prohibit quota remedies, we relegate discussion of the Senate's consideration to the margin. For given the House's clear opposition to quota remedies under Title VII, nothing the Senate might have done *alone* could have effectuated a turnaround of the 1964 decision. As this Court has recently confirmed, a congressional decision made by both houses and signed by the President may not later be overturned even by the positive action of one house, *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983), and *a fortiori* cannot be found inferentially to have been overturned by rejection of proposed amendments within one house.[10]

Title VII cases. And there was as of 1972 case law and commentary supporting the opposite proposition, *viz.*, that quota remedies are not authorized under Title VIII. *Castro v. Beecher,* 334 F. Supp. 930, 945 (D. Mass. 1971); *Developments in the Law—Title VII,* 84 Harv. L. Rev. 1109, 1114-16 (1971).

To say the least, there was not on this issue in 1972 "established judicial precedent" "consistently and routinely" applied as there was in *Herman & MacLean v. Huddeston,* 459 U.S. 375, 385 (1983); see also, *Merrill Lynch, Pierce, Fenner & Smith v. Curran,* 456 U.S. 353, 379 (1982) ("the federal courts routinely and consistently had recognized an implied cause of action").

[10] In the Senate, there was one proposed amendment that related tangentially to the issue of court-ordered quotas. Senator Ervin, in the course of introducing numerous amendments to prolong a filibuster, introduced one prohibiting any "department, agency, or officer of the United States" from requiring employers to "practice discrimination in reverse by employing persons" in percentages or quotas on the basis of race, sex, religion or national origin (72 Leg. Hist. at 1017). This amendment, he explained, was addressed primarily to the OFCC's implementation of Executive Order 11246 to require government contractors to adopt quotas ("the Philadelphia Plan"), and secondarily to "[t]he EEOC", which "on less frequent occasions, has hailed employers before its bar to practice discrimination in reverse." (*Id.* at 1042-45.) The amendment was defeated by a vote of 44-22 (*Id.* at 1074-75).

Given the legislative dynamic in which the Ervin amendment was proposed—an ongoing filibuster that Senator Ervin was seeking to

3. It has been suggested that the last sentence of § 706(g) should be understood to be a limit on the relief available to *individuals* who are victims of unlawful discrimination but not to preclude a grant of preferential relief to a *class* of persons of the same race who are not victims. *See Stotts*, 104 S.Ct. at 2608-2609 (Blackmun J., joined by Brennan and Marshall JJ., dissenting). Such an interpretation would produce precisely the opposite result from that intended by Congress. The legislative history recounted above shows unmistakably that Congress decided that there were to be *no* quota remedies under Title VII. The unqualified assurances of the bill's sponsors would have been hollow, indeed, if they left room for quotas labelled "class-wide, race-conscious relief" (*Id.* at 2608). What quotas, after all, would not meet that description? It is self-evident that the fear to which these assurances were addressed was not that quotas would be awarded as relief to the victimized individuals (those individuals would be made whole by rightful place relief), but rather that quotas might eventuate from precisely the notion advanced by the dissenters in *Stotts:* that Title VII would be seen as an instrument for according preferences to races rather than relief to individuals. It was to refute that concern

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prolong through the introduction of multiple amendments—it is entirely possible that those seeking to end the filibuster (and who voted against all the amendments proposed by Senator Ervin) were basing their vote not on the substance of each amendment, but on the tactical judgment that the way to end the filibuster was to vote down each amendment proffered by those conducting the filibuster. Moreover, those not wishing to forbid goals and timetables under the Executive Order were required to vote against the Ervin Amendment, and the vote therefore cannot be understood as manifesting a desire to overturn Congress' 1964 decision disapproving court-imposed quotas under Title VII. The importance of such tactical considerations in the legislative process makes it always dangerous to impute a new meaning to a previously enacted statute from the choice of a later Congress *not* to amend that legislation. "Ordinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983).

that the bill's sponsors pointed to the last sentence of § 706(g) as proof that the remedies under Title VII were to be victim-specific.

This Court's decisions to date have been faithful to the victim-specific remedial scheme intended by Congress. And those decisions leave no room for the issuance of judicial quotas under the label "class wide, race-conscious relief" advocated in the *Stotts* dissent.

a) As this Court has consistently recognized, Title VII provides protection to individuals, not to races as such. The language both of the provision defining unlawful conduct (§ 703) and of the remedial provision (§ 706(g)) focuses expressly on protecting the "*individual*" from unlawful discrimination in employment. In *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) this Court stated:

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual or national class . . . Even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

In *Connecticut v. Teal*, 457 U.S. 440, 453-454 (1982), the point was repeated:

> The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. See, *e.g.*, §§ 703(a)(1), (b), (c) . . . .

And in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), this point was reiterated in each of the opinions. *Id.* at 1083-1086 (Opinion of Justice Marshall); *id.* at 1103 (Opinion of Justice Powell); id. at 1108 (Opinion of Justice O'Connor).

(b) Precisely because Title VII's focus is on the individual and not the racial class, this Court has recognized that in determining the appropriate remedy for a

Title VII violation—whether in an individual or a class action—relief must be limited to making whole individuals who have suffered discrimination by the defendant. Individuals whose claim to an entitlement to relief is that they are members of the same minority group as the victims, but who have not suffered from such discrimination, are already in the position they would have occupied in the absence of the defendant's discriminatory conduct and accordingly are not entitled to a court order that improves their position.

Thus, in *Franks v. Bowman Transportation Co.*, the Court drew the line as to the scope of permissible remedy between make-whole relief for "actual victims of racial discrimination" (424 U.S. at 772), which is permitted, indeed virtually required, and relief for nonvictims of such discrimination, which is not permitted. In *Franks*, the Court stated that the 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 in hiring." 424 U.S. at 764. And the Court made clear that members of the plaintiff class in *Franks* who were found *not* to be actual victims of the defendant employer's discrimination—*viz.*, who were "not in fact discriminatorily refused employment as an OTR driver" (*id.* at 773 n.32)—would not be entitled to any equitable relief. *Id.* at 772-773, and n.32. Then, in *Teamsters*, the Court analyzed at length the question of how to determine whether a claimant for relief is an actual victim of the litigated violation and thus eligible for relief. 431 U.S. at 356-377.[11] That lengthy discussion in *Teamsters*

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[11] Under *Franks* and *Teamsters*, when a class violation of hiring discrimination is proven, the burden of proof shifts to the defendant to establish that individual members of the class who applied for the position or positions in question were not actually victims of the violation. This shift in the burden of proof, far from authorizing relief to nonvictims, simply determines how the court is to decide whether a given individual was a victim of discrimination and is thus entitled to relief. Members of the class against whom the unlawful practice was committed—*e.g.*, black applicants for jobs

would have been pointless if courts were empowered under Title VII to provide remedies to nonvictims.[12]

(c) This Court has also recognized that Title VII imports general principles of equity which may limit the remedial powers of courts even when the remedy is directed solely to victims of discrimination, and which certainly would preclude extending a preferential remedy to nonvictims at the expense of other innocent employees.

In the context of competitive hiring and promotion decisions, the Court has recognized that even a remedy designed only to make the victims of discrimination whole has a heavy cost: where a court order confers upon the individual who was a victim of the employer's wrong an improved competitive status with respect to a job, some employee who was not in any respect responsible for the employer's wrong is of necessity disadvantaged. A majority of the Court in *Franks* determined

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from an employer who has been proved to have had an across-the-board practice of refusing to hire blacks—are presumed to be victims, unless the defendant proves otherwise. *Franks*, 424 U.S. at 772 n.32; *Teamsters*, 431 U.S. at 357-362.

[12] This Court's school desegregation decisions follow precisely the same remedial principle: " 'to restore the victims of discriminatory conduct to the positions they would have occupied in the absence of such conduct.' " *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (*"Milliken II"*). In school cases, the violation generally consists of practices intentionally maintained by a school board for the purpose of segregating the races. All minority students subjected to such practices are victims of the violation. To make such victims whole may require both the "dismantling" of the discriminatory practices and the affirmative correction of education deficiencies which resulted from those practices. *Milliken II*, 433 U.S. at 282-283; *Swann v. Bd. of Educ.*, 402 U.S. 1, 28, 31-32 (1971). In that context, for example, make-whole relief may require that a "dual system" be dismantled, which may in turn require such actions as race-conscious assignment policies for teachers and pupils alike. But, in that context, too, this Court has been careful to confine remedial decrees to the make-whole purpose, and has not permitted such decrees to be used to achieve goals, such as racial balancing, beyond that purpose. *Swann*, 402 U.S. at 15-16, 31-32; *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 435-437 (1976); *Dayton Board of Education*, 433 U.S. 406, 419-420 (1977).

that it is consistent with equity for the innocent employee to be disadvantaged so that the victim can be made whole. 424 U.S. at 776-779; compare *id.* at 780-781 (Opinion of Chief Justice Burger) and *id.* at 787-793 (Opinion of Justice Powell.) But the majority recognized that there might be circumstances in which considerations of equity would dictate limiting the relief out of concern for the innocent employee. *Id.* at 779-780 & n. 41.

In *Teamsters*, after making it clear that nonvictims have no entitlement to a remedy of competitive seniority, 431 U.S. at 367-372, the Court stated that equitable balancing is required even in determining remedies for *victims*:

> [*A*]*fter the victims have been identified and their rightful place determined*, the District Court will . . . be faced with the delicate task of adjusting the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing. [431 U.S. at 372 (emphasis added).]

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), the Court disapproved as inequitable a remedy that would have encouraged employers to give competitive seniority advantage to persons who *claim* they are victims of discrimination but whose claims have not yet been adjudicated:

> . . . Title VII . . . permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978). See also *Teamsters v. United States*, 432 U.S. 324, 371-376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination . . . .
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their

> claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitelv while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that the " 'large objectives' " of Title VII, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden. [458 U.S. at 239-240.]

Where, as in the instant cases, a court is asked to direct that a nonvictim of discrimination be given a job instead of an innocent employee of a different race, solely because the nonvictim is of the same race as other persons who were actually discriminated against, there is not the competition of legitimate interests that calls into play equitable discretion. To give the nonvictim the job is not to "restore [him to his] rightful place" (*Teamsters*, 431 U.S. at 375)—he was not wrongfully deprived of that place in the first instance. On the other hand, the "innocent worker" deprived of a job would have had a "wrong done him." *Ford Motor Co.*, 458 U.S. at 240.

II. RACIAL QUOTA REMEDIES ARE NOT AUTHORIZED FOR VIOLATIONS OF 42 U.S.C. § 1981

The question whether courts may impose racial quotas benefiting nonvictims at the expense of innocent persons upon finding a violation of 42 U.S.C. § 1981 was not addressed in *Stotts*, see 104 S.Ct. at 2590, n. 16, but arguably is presented here in No. 84-1999 (see p. 1, n. 1 *supra*). As in the case of Title VII, the question is strictly one of statutory interpretation.

Section 1981 provides in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1981 forbids racial discrimination in private as well as public employment, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1985), and protects whites equally with blacks against such discrimination, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285-96 (1976).

1. Analysis of the permissible scope of judicial remedies properly begins with the nature of the substantive right that Congress sought to vindicate. It is difficult to conceive of a statutory command to which quota "remedies" according preference to nonvictims on the basis of race would be more antithetical than the command of § 1981. If one or more persons are denied "the same right . . . to make and enforce contracts," it is plain that the court is empowered to make the victims whole for that deprivation and assure that the wrong is not repeated. But for a court to impose a quota that would run to the benefit of other persons who were *not* victims of a violation of § 1981, and that would extend them a preference based solely on their race over others who have done no wrong, would be to visit the very injustice against which § 1981 was directed. The innocent white would be deprived of "the same right" to make contracts as the nonvictim black; and the judicially-ordered racial preference would violate the statute's command that "all persons" are to "be subject to like punishment, pains, penalties . . . and exactions of every kind, *and to no other*" (emphasis added).

The remedial power of a court sitting in equity is not unlimited. *Swann v. Board of Education*, 402 U.S. 1, 31 (1971); *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976); *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424, 434 (1976). Cf. *Hecht v. Bowles*, 321 U.S. 321, 329-330 (1944). Foremost among the applicable limitations is that "the scope of the remedy is determined by the nature and extent of the . . . violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (*Milliken I*); see also, e.g., *Swann*, 402 U.S. at 16; *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (*Milliken II*): "Rights, constitutional or otherwise, do not exist in a vacuum. Their

purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect," *Carey v. Piphus*, 435 U.S. 247, 254 (1978). The remedies fashioned for deprivation of those rights "should be tailored to the interests protected by the particular rights in question" (*id.* at 259). The task of the equity court "once a . . . violation is found, . . . is . . . to tailor 'the scope of the remedy' to fit 'the nature and extent of the . . . violation.'" *Hills*, 425 U.S. at 294; see also *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420 (1977). And this Court has defined with precision the way in which the remedy must relate to the violation: "the decree must indeed 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.'" *Milliken II*, 433 U.S. at 280 (emphasis added); see also *Milliken I*, 418 U.S. at 76. See p. 18 n. 12, *supra*.

Thus, in assessing whether a remedial decree has exceeded proper limits, it is critical to know what is the violation being remedied, who are the victims, and how has the violation affected the victims. Section 1981 is designed to protect individuals from discrimination on the basis of race; it is not intended to mandate racial balance or the achievement of particular proportions of the races in a given workforce. In the words of one of its sponsors, § 1981 "is not for any race or color . . . but . . . will, if it become[s] a law, protect every citizen . . ." (quoted in *McDonald v. Santa Fe*, *supra*, 427 U.S. at 295). And, this Court has held that § 1981 does not reach "practices that merely result in a disproportionate impact on a particular class . . ." *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 386 (1982).

It follows from what we have shown thus far that under § 1981 the individuals who have suffered discrimination by the defendant—the victims—are the ones entitled to be made whole. Individuals whose claim to an

entitlement to relief is that they are members of the same racial group as the victims, but who have not suffered from such discrimination, are already in "the position they would have occupied in the absence of [the defendant's discriminatory] conduct," *Milliken II*, 433 U.S. at 280, and are not entitled to a court order that improves their position—an order that would yield them "a windfall, rather than compensation," *Carey v. Piphus*, 435 U.S. at 260.

That would be the case even if an award to nonvictims would not harm innocent third parties. But in employment discrimination cases such as these, where relief that benefits nonvictim blacks necessarily deprives innocent whites of employment opportunities, it is all the more clear that "the 'historic power of equity' " (*Albemarle Paper Co., v. Moody*, 422 U.S. 405, 416 (1975)) does not countenance such relief. That is the teaching of this Court's analysis of the competing equities at issue in *Franks*, *Teamsters*, and *Ford* (see pp. 17-20 *supra*); and that teaching is equally applicable under § 1981. Thus, to hold that quota remedies are available under § 1981 would require the conclusion that the post-Civil War Congress intended to authorize the courts to prescribe a form of relief which, under long-established principles of equity, is an inappropriate remedy for a violation of the rights Congress created in that statute. There is no basis for such a conclusion. Not only were such remedies unheard of at the time § 1981 was enacted (indeed, for a century thereafter), but they would be antithetical to the very values enshrined in § 1981.

2. Analysis of the courts' remedial authority in § 1981 actions is not complete without consideration of 42 U.S.C. § 1988. Section 1988 was enacted at the same time as § 1981 and applies to suits brought pursuant to § 1981. Section 1988 does not itself specify remedies for § 1981 actions. But § 1988 does state that in § 1981 suits courts will enforce their jurisdictions "in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect"; only if "the laws of

the United States . . . are not adapted to the object [of § 1981], or are deficient in the provisions necessary to furnish suitable remedies," may the courts apply "the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of such . . . cause is held . . . ." 42 U.S.C. § 1988.

In *Smith v. Wade*, 461 U.S. 30 (1983), a closely-divided Court stated—presumably on the basis of § 1988—that the remedies available in a § 1983 action are not necessarily fixed at those that could have been within the contemplation of the Congress that enacted § 1983, explaining that "if the *prevailing view* on some point of . . . law has changed substantially in the intervening century . . . we might be highly reluctant to assume that Congress intended to perpetuate a *now-obsolete* doctrine," *id.* 34, n.2 (emphasis added); but see, *id.* at 65-66 (Rehnquist, J., dissenting); *id.* at 92-93 (O'Connor, J., dissenting). Assuming that the same approach would prevail in § 1981 actions, that approach would only strengthen the view that quota remedies are impermissible in such actions. For that approach would lead directly to the determination of the modern Congress, in enacting Title VII, to forbid racial quota remedies.

In the intervening century between enactment of § 1981 and enactment of Title VII there was no evolution making quota remedies the "prevailing view" or their refusal an "obsolete doctrine." Indeed, at the time Congress was debating Title VII in 1964, quota remedies were non-existent, a point cited by the sponsors of Title VII as proof that such remedies would not result under Title VII.[13] Racial quotas have emerged subsequent to

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[13] See, *e.g.*, 110 Cong. Rec. 6001 (Sen. Humphrey, explaining that quota remedies have not eventuated under State FEPC laws); *id.* at 7800 (colloquy between Senators Humphrey and Smathers in which they agree that no State has ordered quotas under its FEPC law); *id.* at 8921 (Sen. Williams of New Jersey explaining that quota remedies have not been issued in cases finding racial discrimination in the selection of juries). The opponents of Title VII had

1964 only in lower court orders that have misapplied the congressional will in Title VII cases.

Moreover, it is surely pertinent in applying § 1988 that when Congress first addressed the propriety of quota remedies—during consideration of Title VII—it set its face squarely against them. While the precise product of the 1964 debates was a determination that quota remedies would not be authorized under Title VII (see part I, *supra*), that result does not reflect simply a choice not to add a particular remedy to the arsenal of powers afforded the judiciary for enforcement of that particular statute (as is the case, for example, in the judgment to provide only equitable relief (including backpay), and not compensatory or punitive damages, under Title VII). Rather, the decision not to authorize quota remedies reflects a congressional determination that governmentally-imposed quota remedies are antithetical to the very values upon which Title VII is premised. In the words of the Clark-Case materials, quota remedies were not being authorized in Title VII because "[q]uotas are themselves discriminatory" (110 Cong. Rec. 7218).[14] See also, Senator Humphrey's repeated declarations that he would "vote against" Title VII if it authorized quota remedies, (*id.* at 5092), that such remedies were a "bugaboo" and the "very opposite" of what Title VII was attempting to achieve (*id.* at 6548; *see also*, *id.* at 11847), and that "I do not believe in a quota system" (*id.* at 7800). And see, to the same effect, 110 Cong. Rec. 8500, 9881 (Sen. Allott); *id.* at 9113 (Sen Keating).

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raised the spectre of quota remedies not because there was a backdrop of judicial quota remedies in other contexts—there was not—but because they feared that the then-incumbent administration would champion them, as "evidenced by numerous Executive orders, other administrative actions and statements of officials in the executive branch of the Federal Government." H.R. Rep. No. 914, 88th Cong. 1st Sess. 64, 68 (1963) (Minority Report).

[14] This theme appeared throughout the Clark-Case materials. See, e.g., 110 Cong. Rec. 7207 (Dept. of Justice letter); *id.* at 7213 (Clark-Case interpretative memorandum). See *supra*, p. 6 n. 4.

Given that §§ 1981 and 1988 had not been construed to authorize quota remedies prior to 1964, and that Congress in that year, upon first addressing the propriety of racial quotas, adjudged them antithetical to the principle of equal employment opportunity, it would be inappropriate to import them through subsequent judicial interpretation of §§ 1981 and 1988. Courts should not be free effectively to circumvent the judgment of the Congress that enacted Title VII by imputing to the Congress that enacted §§ 1981 and 1988, without a basis in the legislative materials, an "intent" to allow quota remedies.

3. Even without the express command of § 1988 that resort be had to other federal laws, the principle that general legislation should not be interpreted by the courts to achieve results inconsistent with the clear intent of Congress manifested in later, more specific legislation would point to the same result. In *Labor Board v. Drivers Local Union*, 362 U.S. 274 (1960), for example, the NLRB had construed Section 8(b)(1)(A) of the NLRA, 29 U.S.C. § 158(b)(1)(A)—which in general terms makes it an unfair labor practice for a union "to restrain or coerce" employees in the exercise of their Section 7 rights—to outlaw all recognitional picketing. This Court reversed, relying in part upon the fact that when Congress *later* focused *specifically* on recognitional picketing it outlawed only certain forms of such picketing:

> To be sure, what Congress did in 1959 does not establish what it meant in 1947. However, as another major step in an evolving pattern of regulation of union conduct, the 1959 Act is a relevant consideration. Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit. We avoid the incongruous result implicit in the Board's construction by reading § 8(b)(1)(A), which is only one of many interwoven sections in a complex Act, mindful of the manifest purpose of the Congress to fashion a coherent national labor policy. [362 U.S. at 291-92].

See also, *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193-95 (1967); *Hunter v. Erickson*, 393 U.S. 385, 388 (1969). The language of §§ 1981 and 1988 is not so "vague" as even to be "read literally" to authorize quota remedies. But even if it were, the principle just quoted would dictate against such remedies, particularly where, as here, what is at issue is the proper exercise of the courts' equity powers. For it can hardly be equitable for a court to award under § 1981 the very relief that Congress denounced as unjust when it enacted Title VII.[15]

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[15] We recognize that this Court has "generally conclude[d] . . . that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975). But while it follows that remedies are not foreclosed for § 1981 violations simply because they are not authorized for Title VII violations (e.g. compensatory and punitive damages, *id.* at 460), it does not follow that under § 1981 courts may award remedies that Congress concluded in enacting Title VII were a positive evil. A too-rigid adherence to the independence of § 1981 from Title VII could lead, for example, to the invalidation of seniority systems that Congress acted affirmatively to "protect" in Title VII (see, e.g., *Johnson v. Ryder Truck Lines, Inc.*, 575 F.2d 471, 474-75 (4th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n.37 (5th Cir. 1977), *cert. denied*, 439 U.S. 1115 (1979)), or, as here, to the erosion of other values that a contemporary Congress has adopted as the policy of our nation.

A useful analogy is furnished by this Court's treatment of 42 U.S.C. § 1982, which was enacted as part of the same statute as § 1981. In *Jones v. Mayer Co.*, 392 U.S. 409, 416 (1968), this Court declared that "[t]he Civil Rights Act of 1968 does not mention 42 U.S.C. § 1982, and we cannot assume that Congress intended to effect any change, either substantive or procedural, in the prior statute." One year later, the Court ruled, in *Hunter v. Erickson*, 393 U.S. at 388:

> The 1968 Civil Rights Act specifically preserves and defers to local fair housing laws, and the 1866 Civil Rights Act considered in *Jones* should be read together with the later statute on the same subject, *U.S. v. Stewart*, 311 U.S. 60, 64-65 (1940); *Tablot v. Seeman*, 1 *Cranch.* 1, 34-35 (1801), so as not to pre-empt the local legislation which the far more detailed Act of 1968 so explicitly preserves.

III. RACIAL QUOTA REMEDIES ARE NOT AUTHORIZED IN ACTIONS BROUGHT UNDER 42 U.S.C. § 1983

In the case of public employers, racial discrimination also violates the Fourteenth Amendment and is actionable under 42 U.S.C. § 1983. This Court did not address in *Stotts* whether quota remedies are available in § 1983 actions, see 104 S.Ct. at 2590, n.16.

Just as in the case of § 1981, suits brought under § 1983 are subject to the provisions of § 1988. And, like Title VII and § 1981, the rights enforced in a § 1983 action are the rights of *individuals* to be free of racial discrimination. Section 1983 by its terms protects "any citizen . . . or other person within the jurisdiction"; transgressors incur liability "to the party injured." See, e.g., *Wilson v. Garcia*, —— U.S. ——, 105 S.Ct. 1938, 1948 (1985). And the Fourteenth Amendment itself—the source of the right to be free of racial discrimination enforceable under § 1983—is, like Title VII, designed to protect individuals. As this Court stated in *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948):

> [T]he rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

See also *Castaneda v. Partita*, 430 U.S. 482, 499-500 (1977); *University of California Regents v. Bakke*, 438 U.S. 265, 299 (1978) (Opinion of Justice Powell.)

And, this Court repeatedly has held that the Fourteenth Amendment, whether sued on directly or through § 1983, does not prohibit official conduct simply because that conduct has a greater adverse effect on racial or ethnic minority *groups* than on majority *groups*. In *Washington v. Davis*, 426 U.S. 229, 239 (1976), the

Court held that "a racially neutral qualification for employment is [not] discriminatory . . . simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245. "That other Negroes also failed to score well would, alone, not demonstrate that [plaintiffs] *individually* were being denied equal protection of the laws . . ." *Id.* at 246 (emphasis added). See also, *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-265 (1977); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

With these similarities established, the analysis we have heretofore provided with respect to § 1981 is equally applicable to suits brought under § 1983. The "historic power of equity" no more warrants judicial dispensation of racial preferences to nonvictims over other innocent persons in § 1983 actions than in § 1981 actions.[16]

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[16] Of course, given that § 1983 furnishes a cause of action to enforce *constitutional rights* it is arguable that the courts in § 1983 actions have the power to issue remedies beyond those authorized by Congress. That power of course would remain circumscribed by the basic principle of equity that "the scope of the remedy is determined by the nature and extent of the violation." See cases cited *supra* at pp. 21-22. And even if the courts were somehow released from that limitation, it would not follow that Congress' judgments about what remedies are appropriate, and what inappropriate, are to be disregarded in fashioning relief for constitutional violations. Thus, even assuming *arguendo* that the federal courts have *power* in constitutional cases to enter quota remedies compelling the subordination of the interests of innocent employees of one race to advantage nonvictims of another race, the congressional judgment that such remedies are inappropriate is entitled to weight in the courts' determination whether that power should be exercised. In *Bush v. Lucas*, 462 U.S. 367 (1983), for example, where the petitioner sought "a new nonstatutory damages remedy for federal employees whose First Amendment rights are violated by their superiors" (*id.* at 368), this Court declined to adopt this remedy, explaining:

> Because such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive remedies . . . we conclude that it would be inappropriate for us

CONCLUSION

For the reasons set forth above, the decisions of the courts of appeals in these cases should be reversed.

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to supplement that regular scheme with a new judicial remedy. [*Ibid.*]

This Court did not question its "power [in suits arising directly under the Constitution] to grant relief that is not expressly authorized by statute" (*id.* at 373), but concluded that the circumstances warranted no departure from its predisposition that "such power is to be exercised in the light of relevant policy determinations made by the Congress" (*ibid.*). The Court ultimately answered in the negative the question "whether an elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by a new judicial remedy for the constitutional violation at issue." *Id.* at 388.

APPENDIX

APPENDIX

Additional Statements of Proponents of the Bill That Became the Civil Rights Act of 1964 Respecting the Availability of Quota Remedies under Title VII

The Republican sponsors of Title VII in the House, in their "Additional Views" to the House Judiciary Report, declared:

> It must also be stressed that the [Equal Employment Opportunity] Commission must confine its activities to correcting abuse, not promoting equality with mathematical certainty. In this regard, nothing in the title permits a person to demand employment. Of greater importance, the Commission will only jeopardize its continued existence if it seeks to impose forced racial balance upon employers or labor unions.[1]

Senator Clark, one of the bipartisan "captains" for Title VII, declared in his principal speech describing Title VII: "The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate." [2] At the conclusion of his speech he introduced a Justice Department letter that stated:

> There is no provision, either in title VII or in any other part of the 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 . . .[3]

Senator Humphrey, responding to a political advertisement opposing enactment of Title VII, stated on the floor of the Senate:

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[1] H. Rep. No. 914, *supra*, at 150.

[2] 110 Cong. Rec. 7207.

[3] *Id.* at 7207.

> [N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group.[4]

And, responding to a charge by Senator Smathers that Title VII would lead to employment quotas, Senator Humphrey declared:

> The quota system which has been discussed is nonsense. Everybody knows that it is not in the bill, and that where there are State FEPC laws, it is not the pattern.
>
> . . . The only thing that the court would do would be to ask the defendant to cease and desist, to tell him to stop this practice, if it can be proved that the practice has been unlawful.[5]

Senator Humphrey, in an extended colloquy with Senator Robertson, made the following remarks:

> I feel sure that the Senator from Virginia is not going to suggest or intimate that under this title of the bill there would be such a thing as a quota or a required percentage.
>
> * * *
>
> [C]an the Senator from Virginia point out in title VII any section or subsection or provision that would indicate that in connection with the elimination of the segregation in employment based on color, race, religion or national origin an employer would be required to hire any member of a certain ethnic group?
>
> * * *
>
> I would like to make an offer to [the Senator]. If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating

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[4] *Id.* at 5423.

[5] *Id.* at 6001.

> the pages one after another, because it is not in there.[6]

Senator Allott, one of the Republican sponsors of the bill, in another colloquy with Senator Smathers, expressed his disapproval of governmentally-imposed quotas:

> I completely agree with the Senator that if an employer were required to employ a person on the basis of a quota, there would be no justification for that procedure under the American system . . .
>
> * * *
>
> The only point I wish to make is that if anyone sees in the bill quotas or percentages, he must read that language into it. It is not in the bill.[7]

Senator Williams of New Jersey, declaring that "there is nothing whatever in the bill that provides for racial balance or quotas in employment," cited as proof of this proposition that courts did not enter quotas remedies upon finding racial discrimination in the selection of juries.[8]

Senator Keating, in a colloquy with Senator Sparkman, secured the latter's agreement that "the bill does not provide in any way for quotas of any kind."[9] Senator Keating later declared, in response to a public advertisement that the bill would require quotas:

> The coordinating committee has charged . . . that Title VII would . . . permit the Government to impose quotas and preferences upon employers and labor organizations in favor of minority groups .. .
>
> Title VII does not grant this authority to the Federal Government . . .

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[6] *Id.* at 7418-20.

[7] *Id.* at 8500-01.

[8] *Id.* at 8921.

[9] *Id.* at 8618.

An employer or labor organization must first be found to have practiced discrimination before a court can issue an order to prohibit further acts of discrimination in the first instance. Adequate administrative and judicial procedures have been provided in the title to assure that an order of court is only founded upon clear and conclusive evidence of discrimination. For the Commission to request or a court to order preferential treatment to a particular minority group would clearly be inconsistent with the guarantees of the Constitution.[10]

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[10] *Id.* at 9113.