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COMMENTS

THE PHILADELPHIA PLAN AND STRICT RACIAL QUOTAS ON FEDERAL CONTRACTS

I. INTRODUCTION

In 1967, after an exhaustive review of the national employment situation in specific cities, the Department of Labor concluded that nonwhite workers were almost wholly excluded from membership in the industrial and craft unions which serve the building industry in the city of Philadelphia.[1] Such exclusion was found to be tantamount to unemployment in that industry, much of which is located in the economically depressed areas where the nonwhite worker must live. The percentage of nonwhites belonging to these construction and craft unions corresponded almost exactly to the number of nonwhite workers employed under the lucrative Federal construction contracts, an incredible one percent![2]

The Labor Department, in an attempt to combat this blatant discrimination by contractors and unions, issued the Philadelphia Plan in 1967, requiring government contractors to take affirmative action to hire minority workers. That plan, having been found illegal by the Comptroller General of the United States, was dropped, and a revised Philadelphia Plan was issued in 1969.[3] Because the Department found virtual exclusion in six of the high paying crafts, the Plan was designed to apply (initially at least) to those six trades. It was later announced, however, that the Plan would be extended to other trades in the Philadelphia area, and to other areas of the country, should it prove to be a success in Philadelphia.[4] This brief, that such a Plan will be extended nationwide and thereby reach and affect innumerable industries and unions, has stimulated an involved controversy which has surrounded the Plan since its inception and has led the Department of Labor, the Attorney General, the Comptroller General, the AFL-CIO, and even the Congress of the United States to do battle on the issue of the Philadelphia Plan.

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1 The Labor Department's study of the construction industry in the Philadelphia area was promulgated in the Department of Labor Order of September 23, 1969, at 4 (unpublished order) [hereinafter cited as September 23 Order].

2 *Id.*

3 Department of Labor Order of June 27, 1969 [hereinafter cited as June 27 Order].

4 *See* Department of Labor News Release, June 27, 1969, at 2. *See also* remarks by Assistant Secretary of Labor Fletcher that the Plan may be extended to twenty specified cities within the very near future. L.A. Times, Feb. 9, 1970, § 1, at 4, col. 4.

This comment will analyze the Plan—what it says, and what it will mean for the minority workers for whom it was created. Questions of legality, constitutionality, and effectiveness of the Plan will be discussed. In addition, questions raised by a tougher and more controversial plan, which, it is proposed, is necessary to end racial discrimination on Federally-assisted contracts, will be considered.

II. Employment Realities for the Nonwhite Worker

The economic facts of life for a minority or nonwhite worker are very simple: he will have much less opportunity to join an all important union than if his skin were white; if he does manage to get a job despite his highly visible handicap, he will have to work for a great deal less money than if his skin were white; if he is hired, his chances of staying on that job for any length of time are considerably less than if his skin were white.[5] Federal, state, and local government units have tried to end this situation through a variety of devices, including Presidential Executive Orders issued by the past three Presidents,[6] the 1964 Civil Rights Act which devoted an entire title to employment practices and job discrimination,[7] and state and local Fair Employment Practices Commissions.[8] Yet with all these devices, very little has changed for the nonwhite worker; "the present minority participation in . . . trades (is) far below that which should have reasonably resulted from participation in the past without regard to race, color, and national origin . . . ."[9]

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[5] Since World War II the nonwhite's unemployment rate has been double that of the white's. Even though the total number of unemployed has dropped, the 2-1 ratio has remained constant. In addition, the median income of the nonwhite has never been more than 60% of the white's income. *See generally* Equal Employment Opportunity Commission, Report No. 1 (1966); Report of the National Advisory Commission on Civil Disorders (1968); Peter, *Housing: From Crisis to Disaster?* Look, Feb. 10, 1970, at 53; M. Harrington, The Other America, ch. 4: *If You're Black Stay Back* (1962).

[6] Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965); *reaffirmed in*, Exec. Order No. 11,375, 32 Fed. Reg. 14303 (1967), and adopted by President Nixon in Exec. Order No. 11,478, 34 Fed. Reg. 12985 (1969).

[7] 42 U.S.C. § 2000(e) (1964).

[8] *See, e.g.*, Cal. Labor Code §§ 1410-1432 (West Supp. 1970).

[9] September 23 Order, *supra* note 1, at 5. It was found that minority group membership in the six major trade unions was:

1. Iron workers—1.4%
2. Steamfitters—.65%
3. Sheetmetal workers—1%
4. Electricians—1.76%
5. Elevator Construction Workers—.54%
6. Plumbers & Pipefitters—.51%

Id. at 4-5.

III. The Origins and Requirements of the Philadelphia Plan

The original Philadelphia Plan, issued in 1967, was formulated with the avowed purpose of ending the low level of minority employment on Federal projects in the city of Philadelphia. It was intended to implement the anti-discrimination program set forth in Executive Order 11246 which is directed at *all* government contractors. Section 202(1) of the Order provides:

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include but not be limited to the following: employment upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.[10]

Unlike the Order, the Plan was designed to deal with the employment problems of a small number of trades in a restricted area. It required contract bidders to commit themselves to specified affirmative action programs for nonwhite workers. The Comptroller General of the United States, viewing his office as auditor and watchdog of government expenditures,[11] declared this Plan to be invalid, as violating competitive bidding principles.[12] He based this finding on the fact that bidders had no specific idea, under the Plan, what numerical goals they were committing themselves to at the bidding stage.[13] The Labor Department set out to remedy this defect

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[10] 30 Fed. Reg. 12,319 (1965).

[11] "Our interest and authority in the matter exists by virtue of the duty imposed upon our Office by the Congress to audit all expenditures of appropriated funds, which necessarily involves the determination of the legality obligating the Government to payment of such funds. Authority has been specifically conferred on this Office to render decisions to the heads of departments and agencies of the Government, prior to the incurring of any obligations with respect to the legality of any action contemplated by them involving expenditures of appropriated funds, and this authority has been exercised continuously by our Office since its creation whenever any question as to the legality of a proposed action has been raised, whether by submission by an agency head, or by complaint of an interested party, or by information coming to our attention in the course of our other operations." Comptroller General's Opinion, August 5, 1969, at 2 (unpublished opinion) [hereinafter cited as Comptroller General's Opinion].

[12] 47 Comp. Gen. 666 (1968).

[13] The only court to hear the merits of such a plan disagreed with the Comptroller General on its legality. In Weiner v. Cuyahoga Community College District, 19 Ohio 2d 35, 249 N.E.2d 907 (1969), *cert. denied*, 90 S. Ct. 554 (1970), the Ohio Supreme Court held that a "Cleveland Plan," established by the State and Federal Governments, was constitutional, and a proper action under the 1964 Civil Rights Act. That Plan required affirmative action programs in government contract bids, but did not

while still attempting to use the "color blind" approach envisioned in E.O. 11246. Two years later, in June of 1969, the revised Philadelphia Plan was announced.

The scope of the revised Plan is virtually the same as the 1967 Plan. It is applicable to the five counties in and around Philadelphia,[14] applies only to contractors with Federal or Federally-assisted construction contracts which exceed $500,000, and covers only six specified crafts: Iron Workers, Steamfitters, Sheetmetal Workers, Electricians, Elevator Construction Workers, and Plumbers and Pipefitters.[15] The Plan requires a potential contractor either to agree in his bid to rely on a multi-employer program supervised by the Office of Federal Contract Compliance,[16] or to submit an affirmative action program for recruiting minority employees[17] which is satisfactory under the Plan. Such a program must "include specific goals of minority manpower utilization within the ranges to be established by the Department of Labor, in cooperation with the Federal contracting and administering agencies in the Philadelphia Area . . . ."[18]

The Labor Department, through its Office of Federal Contract Compliance, held public hearings, where the following factors were considered:

(1) The current extent of minority group participation in the trade.
(2) The availability of minority group persons for employment in such trade.
(3) The need for training programs in the area and/or the need to assure demand for those in or from the existing training programs.
(4) The impact of the program upon the existing labor force.[19]

Based on these four factors, the Labor Department set employment goals for minority workers in the six affected trades. These begin at four to six percent for the employer's 1970 work force, and increase to a high of 20 percent in each trade after four years.[20] The

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include specific goals or ranges set by either the State or Federal Governments prior to the bidding.

[14] Bucks, Chester, Delaware, Montgomery, and Philadelphia counties. June 27 Order, *supra* note 3, at 1.

[15] September 23 Order, *supra* note 1, at 4-5. *See* note 9 *supra*.

[16] September 23 Order, *supra* note 1, app. at 4.

[17] These workers include "Negro, Oriental, American Indian, Spanish Surnamed American. Spanish Surnamed American includes all persons of Mexican, Puerto Rican, Cuban or Spanish origin or ancestry." September 23 Order, *supra* note 1, app. at 5.

[18] *Id.* This requirement of specific goals, developed in response to the Comptroller General's 1968 ruling, note 12 *supra*, has been the focus of the controversy surrounding the revised Plan. *See* notes 25-35 *infra*, and accompanying text.

[19] September 23 Order, *supra* note 1, at 12-13.

[20] *Id.* at 15.

contractor's duty under the Plan is to make a good faith attempt to meet his goal of minority employment by broadening his recruitment base, but the Plan expressly prohibits him from discriminating against any individual applicant or employee while doing so.[21] If the contractor does not agree to make this good faith attempt, the O.F.C.C. cannot accept his bid, even though it be the lowest submitted. It must turn instead to the lowest bidder who agrees to broaden his recruitment base and meet the goals set forth.

In addition, the O.F.C.C. has the duty, once the contract has actually commenced, to conduct periodic checks on the contractor to determine if his program is being adhered to. The affirmative action program is the equivalent of any other material condition of a government contract. If the contractor breaches that condition, the O.F.C.C. may cancel the contract and sue for damages resulting from that cancellation.

Failure of a contractor to reach his goals is not, however, a per se breach, for he may defend by showing that he has made a "good faith effort" to reach them.[22] In order to find that a contractor has made that legitimate good faith effort, the O.F.C.C. will look to his efforts to broaden his recruitment through at least the following activities:

(a) Notifying the community organizations (registered with the O.F.C.C. Area Coordinator) of opportunities for minority workers on the government contract.
(b) Maintaining a file of each minority worker referred to him, specifying what action was taken with respect to each referred worker.
(c) Notifying the O.F.C.C. Area Coordinator whenever he has information that the union referral process has impeded him in his effort to meet his goal.
(d) Demonstrating that he participated in the Labor Department's training programs which are designed to provide trained craftsmen in the specified trade.[23]

Reliance upon the practices of a local labor union to secure the goals clearly is not enough to qualify as a good faith attempt.[24]

IV. The Controversy Surrounding the Philadelphia Plan

The major and most complete attack on the Philadelphia Plan was made by the Comptroller General, who once again found it to

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[21] *Id.* app. at 5.
[22] *Id.* at 17.
[23] *Id.* at 17-18.
[24] June 27 Order, *supra* note 3, at 10.

be invalid. This time, however, the invalidity related to the corrected defect of which he had seemingly stimulated development. Because of the specific goals in the program, he reasons, the contractor will be irresistibly drawn to look to the race or national origin of individual applicants, and such race or national origin will prove to be the decisive factor in deciding whether or not to hire an individual.[25] Such racial considerations, he argues, are directly outlawed by two separate sections of the 1964 Civil Rights Act: Section 703(a) dealing with individual discrimination because of race, and Section 703(j) dealing with preferential treatment of individuals or groups of individuals.[26]

> If, for example, a contractor requires 20 plumbers and is committed to a goal of employment of at least five from minority groups, every nonminority applicant for employment in excess of 15 would, solely by reason of his race or national origin, be prejudiced in his opportunity for employment, because the contractor is committed to make every effort to employ five applicants from minority groups . . . the essential question is whether the Plan would require the contractor to select a black craftsman over an *equally* qualified white one. We see no room for doubt that the contractor in [this] situation . . . would believe he would be expected to employ the black applicant[s], at least until he had reached his goal of five nonminority [sic] group employees . . . .[27]

In an opinion issued after the Comptroller General's,[28] Attorney General Mitchell declared the Plan to be lawful. Though he agrees

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[25] Comptroller General's Opinion, *supra* note 11, at 7. An important countervailing consideration is the weight the craft unions would exert against such minority "favoritism." *See* notes 36-44 *infra*, and accompanying text.

[26] Comptroller General's Opinion, *supra* note 11, at 6. Section 703(a) makes it an unlawful employment practice 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, color, religion, sex, or national origin;

Section 703(j) provides that:

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

42 U.S.C. § 2000(e) (1964). *See* notes 50-57 *infra*, and accompanying text.

[27] Comptroller General's Opinion, *supra* note 11, at 13.

[28] Attorney General's Opinion of September 22, 1969 [hereinafter cited as Attorney General's Opinion].

with the Comptroller General that Section 703(a) of the Civil Rights Act requires each individual to be treated without regard to race, he argues that the Plan itself explicitly forbids just the kind of racial considerations at the hiring stage to which the Comptroller General makes reference.[29] It concerns itself *only* with broadening the recruitment base of government contractors and does not refer in any way to dealing with individual applicants, except to outlaw racial considerations at the non-recruitment or hiring stage.[30] In commenting upon the Comptroller General's example of the twenty plumbers, the Attorney General reaches a very different conclusion.

> If the contractor has filled fifteen of these posts with nonminority plumbers, says the Comptroller General, the next white applicant for one of the five vacancies will inevitably be discriminated against by reason of the fact that he is not a member of a minority group. Doubtless a part of the good faith effort . . . would have been to avail himself of manpower sources which might be expected to produce a representative number of minority applicants, so that the situation posed in the Comptroller General's example would arise but infrequently. Yet, quite clearly, if notwithstanding the good faith efforts of the employer such a situation does arise, the qualified nonminority employee may be hired. The fact that the minority employment goal was to this extent not reached would not in itself be sufficient ground for concluding that the contractor had not exerted good faith efforts to reach it.[31]

The Comptroller General, in anticipation of the argument raised by the Attorney General, has refuted it as one of "semantics."[32] He believes that a contractor covered under the Plan will find it impossible to avoid looking to the race of individual applicants in fulfilling his commitment to hire minority workers. The contractor will be encouraged to do so by the belief that, inevitably, bidders who have met their goals will be looked upon more favorably on

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[29] "[The contractor may] not discriminate against qualified employees or applicants [because] the purpose of the Philadelphia Plan is to place squarely upon the contractor the burden of broadening his recruitment base whether within or without the existing union referral system . . . [and it is not] intended and shall not be used to discriminate against any qualified applicant or employee." *Id.* at 5, 13, 14.

[30] "Nothing in the Philadelphia Plan requires an employer to violate section 703(a). The employer's obligation is to make every good faith effort to meet his goals. A good faith effort does not include any action which would violate section 703(a) or any other provision of Title VII . . . [t]o remove any doubt the Plan specifies that the contractor's commitment shall not be used to discriminate against any qualified applicant or employee." *Id.* at 10.

[31] *Id.* at 13.

[32] "Whether the provision of the Plan requiring a bidder to commit himself to hire—or make every good faith effort to hire—at least the minimum number of minority group employees specified in the ranges established for the designated trades is, in fact, a 'quota' system . . . or is a 'goal' system, is in our view largely a matter of semantics, and tends to divert attention from the end result of the Plan—that contractors commit themselves to making race or national origin a factor for consideration in obtaining their employees." Comptroller General's Opinion, *supra* note 11, at 7.

huge multi-million dollar projects than those who have not. Because the Plan will result in encouraging an employer to make race or national origin a determinative factor in his decision to hire workers, the Comptroller General argues, it crosses over into the restricted bounds of quotas and individual discrimination as prohibited by Sections 703(a) and 703(j).

In recent legislative action, Congress has implicitly adopted the position of the Attorney General, and rejected that of the Comptroller General. In the closing weeks of 1969, an amendment which would have accepted the Comptroller General's interpretation of the Philadelphia Plan and upheld his decision not to pay for contracts issued under it was introduced in the Senate.[33] The debate over the bill was long and vigorous, with the two sides basically adopting the position of either the Attorney General or the Comptroller General.[34] The Attorney General's position prevailed, and the amendment was defeated.[35] In recognition of the Congress' apparent desire to go forward with the Plan, the Comptroller General has since dropped his previously announced plans to refuse to pay out any money to contractors complying with its terms.

V. The Need for Racial Quotas

Regardless of whether one supports the position of the Comptroller General that the Philadelphia Plan establishes quotas, or agrees with the Attorney General that it does not, a more important question must be faced: will the Philadelphia Plan work? Will it end discrimination against nonwhites on government contracts? The

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[33] Amendment 33 to the Senate version of H.R. 15209 reads as follows:

> In view of and in confirmation of the authority invested in the Comptroller General of the United States by the Budget and Accounting Act of 1921, as amended, no part of the funds appropriated or otherwise made available by this or any other Act, shall be made available to finance, either directly or through any Federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any Federal statute . . . .

115 Cong. Rec. § 17624 (daily ed. Dec. 22, 1969). Debate over the amendment indicated that it was put in solely to endorse the position of the Comptroller General vis-à-vis the Philadelphia Plan.

"Senator Byrd (Dem. W. Va.): Of course, the factual situation which brought this issue to a head involved the so-called Philadelphia Plan." *Id.* at § 17634.

"Senator Percy (Rep. Ill.): There is only one smart way to resolve this [employment situation] and that is by establishing procedures which stimulate, prod, and encourage both sides to agree together on sound, equitable hiring practices. This is the Philadelphia Plan. This is not coercive, as some have sought to make it . . . ." *Id.* at § 17630.

[34] *Id.* at § 17625-34.

[35] Though it had once passed, the amendment was rejected by the House, then deleted by the Senate. Final vote on the measure was 39 in favor (of deleting the amendment), 29 opposed. *Id.* at § 17634.

realities of the construction industry lead one to conclude that the Plan will not work. A plan which does not lay out specific, strict racial quotas will not work because racial attitudes have hardened almost to the breaking point. In addition, rising problems of inflation and automation are combining to raise the level of unemployment and promise to result in less and less opportunity for the lower or nonskilled tradesmen, of which nonwhites make up a disproportionate share.[36]

Moreover, the powerful craft unions wholly control the hiring in the construction industry.[37] To predict that the manpower goals will indeed be utilized as quotas, and that employers will look to the race of individuals so as to give preference to nonwhites is to discount the sheer force and power of the construction unions.[38] These powerful unions are likely to bring substantial pressure to bear if the contractor attempts to hire nonwhite, nonunion workers for high paying construction jobs to the exclusion of white, union applicants. This is an industry which has historically ignored all moves toward nondiscrimination.[39] Many varied attempts have been made nationally and locally to end job discrimination. Such attempts included actions under the National Labor Relations Act[40] and the Civil Rights Act of 1964, the creation of State Fair Employment Practices Commissions,[41] and various self-help mechanisms.[42] All these attempts have failed. Still the nonwhite works for much less

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[36] *See generally* L.A. Times, Feb. 7, 1970, § 1, at 1, col. 1, where Labor Editor Harry Bernstein discussed the most recent unemployment survey [as yet unpublished] issued in January by the Bureau of Labor Statistics.

[37] "[Contractors] . . . rely on the construction craft unions as their prime or sole source of their labor . . . [and] referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction." Comptroller General's Opinion, *supra* note 11, at 3. In Philadelphia, the Labor Department also found that nonunion membership was tantamount to nonemployment on the government contracts. Such union activity in referring only union members for jobs is clearly a violation of the National Labor Relations Act, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964), yet it is a violation not easily proven. *See generally* Teamsters Local 357 v. NLRB, 365 U.S. 667, 673-74 (1961).

[38] The power of the unions is especially great in the construction industry. *See* Department of Labor News Release, September 23, 1969 (Secretary Shultz).

[39] See note 9 *supra*, and accompanying text.

[40] *See* United Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969), for a novel (and potentially revolutionary) approach to employee complaint coverage under the NLRA: holding racial discrimination to be a per se violation of § 8(a)(1) (29 U.S.C. § 158(a)(1) (1964)) of the Act. Unfortunately, such an approach is highly unlikely to become widespread.

[41] *See* Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis with Recommendations*, 14 BUFFALO L. REV. 22 (1965).

[42] Such as the ever increasing economic boycotts and applications of political and social pressures. Note, for example, the recent strikes in Pittsburgh and Chicago which closed down numerous construction sites. NEWSWEEK, Oct. 6, 1969, at 105, and Sept. 8, 1969, at 34.

money each year than his white counterpart, is out of work for much longer periods of time and much more often,[43] and is, on the whole, excluded from membership in many vital unions.[44]

The situation is strikingly parallel to that in public education. For fifteen years, the courts relied on the school boards to desegregate with "all deliberate speed."[45] These courts have found, however, after fifteen difficult and frustrating years, that only by ordering immediate desegregation, with the school boards drafting and adhering to strict desegregation plans (and only under close and careful judicial scrutiny) will the legality of desegregation become reality. Allowing school boards to initiate "good faith" freedom of choice plans simply achieves nothing for those who are being discriminated against.[46] It is unrealistic for the Government to request desegregation or forbid segregation—such a well intended, sweeping action simply does not work.

There is no reason to believe that persuasion, conciliation, and requirements of good faith efforts will achieve any more in employment than they have in education,[47] nor to believe that a law which places the burden of going forth on the nonwhite worker,[48] who is being discriminated against, will work. The overlapping anti-discrimination statutes and orders have not accomplished any real change because they proclaim a policy of color-blindness in a color conscious society. The only approach, therefore, which will work in employment is the one ordered in education: strict numerical requirements and a time schedule for hiring nonwhite workers, *i.e.*, racial quotas.[49]

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[43] *See generally* EQUAL EMPLOYMENT OPPORTUNITYS COMMISSION, REPORT NO. 1 (1966).

[44] *See* note 5 *supra*, and accompanying text.

[45] Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

[46] "In my opinion there is no reason why such a wholesale deprivation of constitutional rights [segregated schools] should be tolerated another minute. I fear that this denial of constitutional rights is due in large part to the phrase 'with all deliberate speed.' I would do away with that phrase completely." Alexander v. Holmes City Bd. of Educ., 396 U.S. 1218, 1222 (1969) (Black, J.) (application to vacate suspension of order denied).

"The time for mere 'deliberate speed' has run out. . . . The burden on a school today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." Green v. New Kent School Bd., 391 U.S. 430, 439 (1968).

[47] *See generally* United States v. Jefferson Cty. Bd. of Educ., 372 F.2d 836, 888-91 (5th Cir. 1967).

[48] The present procedure under the 1964 Civil Rights Act for suits brought under it.

[49] There may, however, be some basis for the view that local solutions, singularly unsuccessful in the past, should be exhausted before having the Federal Government step in and impose a tough program on a community. A fresh new local approach is being attempted in Chicago, where a plan quite similar to the Philadelphia Plan

VI. The 1964 Civil Rights Act, the Constitution and Strict Racial Quotas

If such a revolutionary program as a strict racial quota system is to be initiated on Federal contracts, two different standards must be met, restrictions in the 1964 Civil Rights Act, and limitations set forth in the Constitution. The 1964 Civil Rights Act does appear to prohibit such quotas. It is the thesis of this comment, however, that the Constitution does more than permit racial quotas by the Government. It requires them. Therefore, if the Act prohibits what we shall see is a constitutional requirement, that prohibition would itself fall as an unconstitutional restriction.

A. *The Civil Rights Act of 1964*

It is argued that an employment quota system based on race would violate the Civil Rights Act in two separate ways: it is preferential treatment, outlawed by Section 703(j), and it would result in discrimination against whites as forbidden by Section 703(a).

Section 703(j) provides that

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race [or] color . . . of such individual or group . . . .[50]

The Comptroller General asserts that Section 703(j) must be read as forbidding racial quotas, for that, he declares, was the clear legislative intent behind the section.[51] The legislative history he cites,[52] however, does not support this conclusion. Rather the Senators were saying that the title itself gives no power to anyone to require quotas. They were not saying that the title forbids anyone from so requiring, or that the power to require such quotas cannot derive from another source, such as a court or executive order

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was developed by the City of Chicago, the black community, and local employers and unions, and not by the Federal Government. *See* L.A. Times, Jan. 18, 1970, § F, at 1, col. 1. The major difficulty with such a plan, as Senator Percy (himself an advocate of local plans) noted, is that there simply are no tough enforcement measures to make sure that all parties abide by the plan. 115 Cong. Rec. § 17630 (daily ed. Dec. 22, 1970).

50 42 U.S.C. §§ 2000(e)-2(j) (1964); *see* note 26 *supra*.

51 Comptroller General's Opinion, *supra* note 11, at 8.

52 Senator Humphrey: "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." 110 Cong. Rec. 6549 (1964).

Senators Clark and Case:

"There is no requirement in title VII that an employer maintain a racial balance in his work force." *Id.* at 7213.

based on the Constitution.[53] Section 703(j) simply states that Congress did not see fit to require preferential treatment in Title VII; it does not declare such preferential treatment to be forbidden or unlawful.

There are two very distinct issues involved which the Comptroller General seems to merge, what the Act requires, limited by Section 703(j), and what the Act prohibits, in Section 703(a). Section 703(a) makes it an unlawful employment practice 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, color, religion, sex, or national origin . . . .[54]

Requiring an employer to follow a quota seems to encourage him to fail or refuse to hire any individual (the white man not covered by the quota) because of such individual's race. There can be very little doubt that in order to meet his quota an employer may well have to hire a black or brown man rather than a white man even though their job "credentials" are not as impressive. Section 703(a) appears then to make such conduct unlawful.[55]

Another construction of Section 703(a) is available, however. It seems not unreasonable to read "fail or refuse to hire . . . or otherwise to discriminate against . . ." as making it unlawful to fail or refuse to hire an individual *only* if the employer's purpose is to *discriminate against him* by this failure or refusal. In the case of the white worker who is turned away from the job, he is not discriminated against. He is refused a job, not because the employer feels any ill will toward him, or harbors any racial bigotry, but only because the employer (or the Federal Government) wishes to hire more nonwhite workers so as to equalize the available opportunities in employment. This construction is more credible when one looks to the rationale behind the entire 1964 Civil Rights Act, nonwhites

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[53] The Comptroller General himself accepted the independent authority of the President to issue Exec. Order 11,246, 30 Fed. Reg. 12,319 (1965), with or without the Civil Rights Act as additional authority. Comptroller General's Opinion, *supra* note 11, at 2.

[54] 42 U.S.C. §§ 2000(e)-2(a) (1964).

[55] This is how Senators Clark and Case apparently felt. ". . . (A)ny deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual." 110 CONG. REC. 7213 (1964).

The Attorney General agrees with this view of § 703(a). *See* text accompanying note 29 *supra*.

were being treated unequally at all levels of society because of their race, and something was needed to end such inequality.[56]

Two constructions of Section 703(a), therefore, are available. To use the latter and allow quotas seems to contradict much of the sentiment expressed by the lawmakers who enacted Section 703(a). To adopt the former, however, might immediately draw the section into conflict with a constitutional requirement for racial quotas on Federal contracts.[57]

B. *Are Quotas Permissible under the Constitution?*

The major constitutional objection to racial quotas on Federal contracts is the claim that such quotas would violate the Due Process Clause of the Fifth Amendment, which has been interpreted to require the same racial equality of the Federal Government as the Equal Protection Clause of the Fourteenth Amendment does of the states.[58] It is argued that, because the employment quotas cover only nonwhites, whites will be treated unequally. However, even though the white worker may be treated unequally, it does not follow that his constitutional rights have somehow been infringed, as the

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[56] *See* H.R. REP. No. 914, 88th Cong., 1st Sess. 1963; EQUAL EMPLOYMENT OPPORTUNITYS COMMISSION, REPORT No. 1 (1966).

[57] *See* notes 69-79 *infra*, and accompanying text. A very similar problem arises in the interpretation of § 202(1) of Executive Order 11,246, 30 Fed. Reg. 12,319 (1965), for it provides that:

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include but not be limited to the following: employment upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

E.O. 11,246 appears to go even one step beyond § 703(a), for it requires that employees be treated "without regard to their race," and not just that the employer may not discriminate against any individual. Thus, a quota which may force employers to look to the race of individuals would appear to be causing them to treat applicants *with* regard to their race. While E.O. 11,246 must face the same conflict with a constitutional requirement for a quota as § 703(a), a real difference exists between them. Although a court could order quotas implemented on Federal contracts, with or without a modification of E.O. 11,246, it is unlikely that any large scale racial quota would ever be imposed on contractors without the President's authorization, and the President has the power to amend, modify, or even revoke prior executive orders.

[58] Bolling v. Sharpe, 347 U.S. 497, 500 (1954). *See also* Shapiro v. Thompson, 394 U.S. 618, 642 (1968); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Fernandez v. Meier, 408 F.2d 974, 976 (9th Cir. 1969); Whirl v. Kern, 407 F.2d 781, 786 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969).

Comptroller General apparently feels.[59] The purpose of having an equal protection test is to determine if an action by the government unconstiutionally deprives any individual of his rights, or, stated another way, whether the individual has the "right" which he claims. If there is an *overriding purpose* for the Government's action, and there is *no less onerous alternative* for achieving that purpose, no rights are denied, even though the individual is treated unequally.[60]

The purpose of the Federal Government in requiring racial quotas on its contracts would be to end the racial discrimination which nonwhites have been systematically and historically subjected

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[59] ". . . [W]e believe there is a material difference between the situation in those cases, where enforcement of the rights of the minority individuals to vote or to have unsegregated education or housing facilities *does not deprive any member of a majority group of his rights*, and the situation in the employment field, where the hiring of a minority worker, as one of a group whose number is limited by the employer's needs, in preference to one of the majority group *precludes the employment of the latter*." Comptroller General's Opinion, *supra* note 11, at 14 (emphasis added).

[60] Normally an equal protection issue such as this would be resolved by determining whether the purpose of the governmental action is a rational, legitimate one, and whether the means employed to achieve that end are reasonably connected to it. "Although the equal protection clause is, of course, concerned with classifications which result in disparity of treatment, not all classifications resulting in disparity are unconstitutional. If classification is reasonably related to the purpose of the governmental activity involved and is rationally carried out, the fact that persons are thereby treated differently does not necessarily offend." Hobson v. Hansen, 269 F. Supp. 401, 511 (D.D.C. 1967). *See also* Levy v. Louisiana, 391 U.S. 68 (1968); Norvell v. Illinois, 373 U.S. 420 (1963); Ferguson v. Skrupa, 372 U.S. 726 (1963); McGowan v. Maryland, 366 U.S. 420 (1961); Allied Stores v. Bowers, 358 U.S. 522 (1959); Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A. L. REV. 1147 (1966) [hereinafter cited as Horowitz]; Tussman and ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

In some areas, however, because of the important nature of the interests involved, something more than this normal test is required to resolve the equal protection claims. These other areas include actions which: deprive a citizen of his voting franchise, Carrington v. Rash, 380 U.S. 89 (1965), where servicemen were prohibited from voting in state elections; limit the indigent's ability to defend himself at the appellate level of the criminal process, Douglas v. California, 372 U.S. 353 (1963), where the appellate court had the right to determine if sufficient reason existed for providing the indigent defendant with counsel for appeal, and Griffin v. Illinois, 351 U.S. 12 (1956), where trial transcripts were not provided to indigent defendants seeking appeal; or classify citizens as to race, Loving v. Virginia, 388 U.S. 1 (1967), where the state banned interracial marriages, and McLaughlin v. Florida, 379 U.S. 184 (1964), where the state forbad racially mixed couples from living together out of wedlock.

In these areas, a much tougher test is utilized to resolve the questions raised. Here the courts require more than the "rational basis and means" determination, for in all the cases cited above there was, at least arguably, some rational basis for the action taken by the state. The action must be validated by an *overriding statutory purpose* and the government must sustain a very heavy burden of justification to show that there are *no less onerous alternatives* for achieving that purpose. *See generally* Horowitz, *supra*, at 1162-66. *See also* Loving v. Virginia, *supra*; Rinaldi v. Yeager, 384 U.S. 305 (1966); McLaughlin v. Florida, *supra*; McGowan v. Maryland, *supra*.

to.[61] Quotas would provide nonwhites with more than the present one percent of construction contract jobs they now have in many cities, including Philadelphia, and would also begin to solve many of the unemployment (and underemployment) problems which nonwhites must face when turned away from construction employment. In addition, such quotas would begin to eliminate some of the less tangible but equally severe effects of racial discrimination in employment: hate, fear, docility, and "an inhibition to act for change."[62]

The critics of racial quotas in employment contend, however, that the purpose behind the quotas cannot be overriding or essential because of the effects such quotas will have on white workers: they will not be able to get particular jobs which but for the quotas they would get, and they may find themselves without jobs.[63] Yet even given this possibility, the purpose of ending racial discrimination so outweighs any harm done to white workers as to still be overriding and vital. The only alternative to such quotas and potential harm to white workers is to retain the same methods of anti-discrimination enforcement as have been used in the past, *i.e.*, to perpetuate the virtual exclusion of nonwhite workers from the construction industry. Moreover, although potential harm to white workers is present in the form of unemployment, this is no greater harm than if nonwhites had never been discriminated against, for then all workers would presumably have been treated equally—nonwhites would not have been as greatly unemployed or underemployed as they are. White workers, through a system of manpower supply and demand, would have had less employment than they do now.[64] For the Government then to begin to require quotas on its contracts is simply to strip away the results of past racial inequalities; white workers would be affected as if there had been no racial discrimination against nonwhites in the past. Hence, even with potential harm to white workers, the overriding purpose for the quotas remains. Unless employment opportunities can somehow be equalized, one must drop

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[61] *See* notes 1-9 *supra*, and accompanying text.

[62] United Packinghouse Workers v. NLRB, 416 F.2d 1126, 1136-37 (D.C. Cir. 1969). *See* note 72 *infra*.

[63] *See generally* L.A. Times, Feb. 7, 1970, § 1, at 1, col. 1. The Labor Department argues that no whites will be put out of work as a result of its employment goals, because the goals will merely take up the attrition and growth "slacks" in the construction industry. September 23 Order, *supra* note 1, at 9. There is, however, evidence to the contrary, especially in light of the slump the construction industry is presently in. *See* Peter, *Housing: From Crisis to Disaster?* LOOK, Feb. 10, 1970, at 53.

[64] This is, of course, assuming that the infusion of nonwhite workers into the construction industry would not have resulted in increased growth in the industry (due to the broader spending power which would have resulted for nonwhites) and therefore more jobs for *all* construction workers. While no statistical evidence is available on this point, one can safely assume that such infusion of nonwhites would have indeed expanded economic growth at least to some extent.

any hopes of ever equalizing any other social, economic, or political opportunities in our nation.[65]

Given an overriding statutory purpose for racial quotas, there still remains the question of whether any less onerous alternative exists to achieve that purpose. Unfortunately, no less onerous alternative does exist.[66] The Civil Rights Act, Executive Orders, and State F.E.P.C.s have had no material success. The nonwhite worker is still in the same comparative situation he was in twenty years ago, long before any of these anti-discrimination efforts were made.[67] A goals system, such as the Philadelphia Plan, will not work because it does not have the power to shatter the bitter racial attitudes which pervade the construction industry, nor can it end the stranglehold the union appears to have on construction contractors.[68]

Therefore, since the only means for achieving an end to racial discrimination is strict racial quotas initiated by the Federal Government, such action is not prohibited by the Constitution.

C. *Are Quotas Required by the Constitution?*

Racial quotas are a factual necessity to combat the grossly unfair and unequal employment conditions which exist on Federal construction contracts. They are also a constitutional necessity. This is true because the Federal Government is required to eradicate conditions of present and past discrimination in which it has been involved through past action, and because it cannot now take part in racial discrimination.[69] Past policies of contract issuance have contributed to, and present "color blind" policies support, racial discrimination. Thus, an affirmative duty must be imposed on the Government to end and undo the effects of this discrimination through the only effective means available, racial quotas.[70]

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[65] *See* note 72 *infra*.

[66] Some have argued that there is another alternative to racial quotas, quotas for *all* poor people. The appeal of such a program primarily rests with the fact that it would benefit whites as well as nonwhites. The problem, however, is that poor whites do not need quotas to get jobs—they are not discriminated against because of their race, they are merely unskilled. A training program would work for them, even though such programs have proved to be a failure for nonwhites.

[67] *See* notes 1-9 *supra*, and accompanying text.

[68] *See* notes 37-49 *supra*, and accompanying text.

[69] The same questions are involved with actions by the Federal Government as they are with actions by the states. *See* text accompanying note 58 *supra*.

[70] The Comptroller General felt otherwise about the requirement for quotas: "Even if the present composition of an employer's work force or the membership of a union is the result of past discrimination, there is no requirement imposed by the Constitution, by a mandate of the Supreme Court, or by the Civil Rights Act for an employer or a union to affirmatively desegregate its personnel or membership." Comptroller General's Opinion, *supra* note 11, at 13.

The Supreme Court in *Brown v. Board of Education*[71] ordered public schools to desegregate because of the disastrous effects segregation and discrimination were having on the black youths, and also because the states themselves were clearly and actively involved in the segregation and discrimination. With employment racial discrimination on Federal contracts, the situation is the same.[72] The government involvement here is just as decisive as the State Action was in *Brown*. Here, though, the government is involved through its money, which supported those who discriminated against nonwhite workers. Such financial aid is enough to constitute prohibited State Action by the Federal Government.[73]

> These Federal dollars—part of which are Black, Puerto Rican, Mexican-American, and others—enter local economy primarily through Federal contracts. Once these dollars pass the "Gateway" of contracting procedure—the Federal Government has no further control over them. Through the "multiplier" effect experienced by imported money in the regional economy and the existence of institutionalized segregation—the Federal Government can be pictured as contributing to the denial of the right to succeed for substantial groups of people. No amount of money spent by whatever level of Government to correct this situation can be justified after the fact.[74]

Such active financial support is not, however, the only form of the

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[71] 347 U.S. 483 (1954).

[72] "The conclusion that racial discrimination may impede its victims in asserting their rights seems inescapable. This docility stems from a number of factors —fear, ignorance of rights, and a feeling of low self-esteem engendered by repeated second class treatment because of race or national origin. Discrimination in employment is no different in this respect than discrimination in other spheres. In its historic decision in *Brown v. Board of Education* . . . the Supreme Court stated: '. . . To separate [Negroes] from other[s] of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . .' . . . Dr. Kenneth Clark . . . has shown discrimination induced self-hatred in Negro inhabitants of slums, due in good part to discrimination in employment, creates a feeling of inferiority and lack of motivation to assert themselves to change their condition. In all this, discrimination in employment thus establishes, or reinforces the effect of discrimination in other areas—an inhibition to act for change." United Packinghouse Workers v. NLRB, 416 F.2d 1126, 1136 (D.C. Cir. 1969).

These intangible effects of job discrimination such as fear, feelings of inferiority, and docility, strongly resemble those engendered by discrimination in the area of education. Yet the tangible effects of employment discrimination point to even harsher consequences for the nonwhite. He will earn considerably less money than the white, and he must live in a slum or ghetto environment where his children are forced to attend grossly inferior schools and face emotionally damaging conditions of crime and violence daily. In this way the employment discrimination affects not only the worker himself, but another entire generation as well.

[73] For other formulations of the government involvement-State Action standards, see Evans v. Newton, 382 U.S. 296 (1966); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Pennsylvania v. Board of Directors, 353 U.S. 230 (1957).

[74] Remarks by Assistant Labor Secretary Fletcher, June 23, 1969 in Philadelphia, at 2 [on file with the UCLA Law Review].

Federal Government's involvement with past racial discrimination on its projects. Though cognizant of the discrimination which was (and is) taking place against nonwhite workers,[75] the Federal Government took no effective actions to end the discrimination, such as cancellation of contracts. Such inaction has resulted in a continuation of the discrimination, for the contractors knew they would not be punished for their unlawful deeds. Such silent encouragement or stimulation, albeit through omission rather than commission, bears the same mark of prohibited State Action as was found in *Burton v. Wilmington Parkington Authority*.[76] The essential factor in both cases is the official posture of the government, which, by doing nothing affirmative, profits (through financial rewards or satisfaction of contracts) from the private racial discrimination.

Even if one were to argue that the Federal Government's past involvement with discrimination is somehow not the equivalent of the State Action in *Burton* or *Brown*,[77] the Government would still, of course, be precluded from making contracts which would now result in racial discrimination against nonwhite workers. Factually, this means that the Government may not rely on the present "color blind" hiring system. Such a hiring system is theoretically neutral. It requires an employer to hire the most qualified and experienced worker he can find, regardless of that individual's race—he is simply looking for the worker with the most ability. The practice, however, perpetuates the effects of past discrimination. In the employment area, past instances of racial discrimination have stripped the nonwhite of any sort of comparative ability or work skills by denying him decent schooling, the chance to belong to a union and receive on-the-job apprenticeship training, and by keeping him out of work for such long periods as to eliminate any potential skills he might have. To rely on the "color blind" ability test is to acknowledge, accept, and perpetuate acts of past discrimination against the minority worker. Thus, to compare abilities or experience will result in the nonwhite being turned away on the basis of past racial considerations. Factually such a policy "disregarding" past discrimination does not make any sense.

> We can't tomorrow say: "All right, we're not going to have any more discrimination. We're going to treat all Americans as if they are Americans, and therefore everything will be all right." This is non-

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[75] *See* September 23 Order, *supra* note 1, at 5.

[76] 365 U.S. 715 (1961).

[77] Much the same argument is made in the school desegregation cases where the distinction between de facto and de jure segregation is drawn. *See* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), involving the Washington, D.C. schools; Crawford v. Board of Education of Los Angeles, Civil No. 822,854 (L.A. Super. Ct., Feb. 11, 1970) involving Los Angeles City schools.

> sense. During the transition from injustice to justice, it is my personal opinion that we cannot pretend that there are no consequences of past injustices. We've got to face those consequences and do whatever is necessary to rectify them. . . . (These problems) have to be resolved by color-consciousness until we get to that ideal state where we need no longer worry about a person's color.[78]

Legally, it makes just as little sense.

> Such past conduct may illuminate the purpose and effect of present policies and activities and show that policies which appear neutral are in fact designed to presently discriminate.[79]

This "ability hiring system" in employment is no less discriminatory than is the ability-tracking schemes in education for non-white youngsters.

> The court does not, however, rest its decision on a finding of intended racial discrimination. Apart from such intentional aspects, the effects of the track system must be held to be a violation of plaintiffs' constitutional rights. As the evidence in this case makes painfully clear, ability grouping as presently practiced . . . is a denial of equal educational opportunity to the poor and a majority of the Negroes attending school in the nation's capital . . . .[80]

VII. CONCLUSION

The unequal employment problems facing the United States are truly overwhelming both in scope and in intensity. The Labor Department's Philadelphia Plan is a lawful, yet ineffective, attempt to alter that situation on Federal contracts. Only a strict racial quota system will alleviate these problems as well as satisfy the constitutional requirement for affirmative government action in this area. Section 703(a) seemingly may be construed so as to forbid such quotas. If so, it must fall as an unlawful impingement on a constitu-

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[78] Doctor Kenneth Clark, quoted in N. HENTOFF, THE NEW EQUALITY at 98 (1964).

[79] Dobbins v. Local 212, 292 F. Supp. 413, 443 (S.D. Ohio, 1968). *See also* Quarles v. Phillip Morris, Inc., 279 F. Supp. 505, 516 (E.D. Va. 1968), where the court was forced to look to past practices in the industry as well as by the employer to determine if present actions of requiring minority employees to start at the bottom of a departmental seniority list when transferring from a "lower" department are discriminatory against these workers. The court found that they were, because these workers had been forced to remain for long periods of time in the "lower" departments due to past racial discrimination. To allow this kind of seniority system would simply be to ratify and validate past discrimination, much as if the workers were forbidden now to transfer because they possessed no prior skill or experience in the new departmental jobs.

[80] Hobson v. Hansen, 269 F. Supp. 401, 443 (D.D.C. 1967). Judge Wright went on to explain how the background of the black children led to their poor showings on ability tests. *Id.* at 514.

tional duty. However, it can be interpreted as permitting racial quotas.

Having asked ourselves these legal and constitutional questions, one further question remains to be answered: should the Federal Government adopt as a major policy a racial quota scheme which will continue to stress the race problems and differences which exist in our country? In a recent article, Professor John Kaplan asserts that to initiate racial quotas, whatever the valid purpose, would be a mistake, for such quotas can only exacerbate an already frighteningly tense racial situation.[81] While not disputing at all that quotas may exacerbate our racial situation, one must reject such an argument as the same argument which has been used throughout the past half century to forestall attempts, including the integration of schools, to improve the lot of impoverished, oppressed people. It says, "Look, we just cannot do that right now because people will get angry and violent; so let's just sit on it awhile." Such an argument, if ever valid, can certainly not be accepted today, for other people, those who are being discriminated against, are getting angry and violent, and for good reason. One must realize that nothing done by the Government will, in the short run, prevent violence and anger from some segment of society. The real hope is that, even if racial quotas do produce such violence and anger now, in the long run they will produce equality and justice which will result in domestic tranquillity. As the Supreme Court has realized,[82] there are some national goals which cannot be put off any longer—decent educational opportunities is one of these goals, equal employment opportunities must be another.

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[81] Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966).

[82] Holmes v. Alexander Bd. of Educ., 396 U.S. 19 (1969).