

# Semantic Quibbles Miss the Point in EEO Debate

By James P. Scanlan

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In the continuing controversy over affirmative action in employment, an extraordinary proportion of the recent commentary has focused almost exclusively on semantics. One side argues that goals invariably become quotas; and the other insists that the goals and timetables that actually have been implemented are qualitatively different from rigid quotas. The proliferating rhetoric of this nature obscures a difficult issue and hampers conscientious efforts to address that issue. Particularly dismaying is that there is an important distinction that would facilitate the discourse in this area, but it has yet to surface in the semantic quibbling about goals and quotas.

What really matters in this controversy is this: Commencing in the late 1960s there have been measures, implemented pursuant to court decree or otherwise, that require employers to use race/ethnic- or gender-conscious decisions in order to increase the representation of certain groups among their employees. The crucial feature of these measures is that when necessary to satisfy numerical requirements, preferential selections will be made. That is, persons who would not be selected over persons who would be selected were the employer blind to race and sex. The preference may entail the selection of less-qualified over more-qualified candidates, the favoring of less-senior over more-senior employees, or the use of race or sex as the

basis for selection when the employer would otherwise flip a coin.

Over the years sometimes these measures have been called goals, and sometimes they have been called quotas, and sometimes they have been called a host of other things. I prefer to call them quotas because it more clearly connotes that if necessary a preference will be used to meet the required selection percentage, and because that is what the courts usually have called them in what prior to the Memphis Firefighters case had been a consistent line of authority upholding the legality of such measures. At the same time, I can hardly quarrel with those who prefer to call them goals, so long as they do not suggest the difference is of more than cosmetic significance.

## **‘Quota’ Redefined**

The way the distinction between these two words first assumed importance (for some) is as follows. After preferential measures came into common use it was appreciated by some of their supporters that they might too easily be equated with the restrictive measures called quotas that had been widespread in other times, but that the conventional morality had lately renounced. This difficulty was addressed by a redefinition of the word quota to include requirements such as the hiring of the

unqualified, the hiring of unneeded persons, and an unwarranted rigidity in implementation. With quotas so defined, they could usually be distinguished from measures actually being imposed.

But none of these distinctions goes to the critical issue of whether the employer is supposed to use preferences if necessary to meet his numerical obligations. Nor does the now commonly heard claim that goals- as distinguished from quotas- merely require an employer's "good-faith efforts" at all address what those efforts shall entail, and as a rule "good-faith efforts" have been intended to include preferences. Unduly rigid requirements are of course absurd. But preferential measures, that are not unduly rigid still raise a difficult fairness issue as to the persons advantaged and disadvantaged by them.

There is, however, an ignored, but important, distinction between what may be termed enhanced and preventive quotas. Most of the quotas considered by the courts have been enhanced quotas. Such measures seek to make up for an employer's past discrimination by accelerating the process of integrating his work force beyond the pace that would be achieved simply by future non-discrimination. For example, assume that a group comprises 20 percent of the interested and qualified labor market from which an employer hires, but due to past discrimination that group comprises only 10 percent of his work force; a court might require the employer to fill 40 percent of his openings with members of the group for a certain number of years or until the group comprises some figure closer to 20 percent of the employer's work force.

With such a requirement, preferences are typically involved in a considerable proportion of selections, since the subject group is to comprise a larger percentage of hires than it comprises of the relevant labor pool. And the persons who benefit from the

preference as a rule are not victims of the employer's past discrimination. Thus, an enhanced quota pointedly raises the difficult issue of whether it makes sense to favor one person to make up for discrimination against other members of his or her group.

An example of a preventive quota would be a 20 percent hiring requirement in the case just mentioned. Such a measure differs from an enhanced quota in several respects. First, its intent is simply to ensure future non-discrimination in the face of barriers to equal opportunity deemed too institutionalized to yield to less stringent measures, not to favor some persons to make up for discrimination against other members of their groups. Second, in theory at least a properly drawn preventive quota need not require preferences; and if in practice preferences at times prove necessary in order to meet the established percentage, the preferences ought to influence only a limited proportion of selections. Hence, such a remedy should not materially affect the competence of the work force or significantly detract from the opportunities available to members of other groups.

(As to timetables, incidentally, while the rhetoric generally joins the word with goals to suggest the modesty of the remedy, in fact timetables only have meaning in the context of enhanced quotas; our hypothetical employer, for example, might be required to take whatever measures are necessary to ensure that the subject group comprises 12 percents of his work force after one year, 14 percent after two ears, and so on. Hence, the occasional, richly confusing efforts to distinguish between goals and timetables and quotas on the basis that the former, unlike the latter, do not require the selection of the less qualified over the more qualified have never made sense. Moreover, from a mechanical perspective, programs that include timetables have tended to be a least foolish, if not invariably unreasonable, since an employer's

compliance turns on factors- expansion/contraction and turnover- that he cannot predict precisely. Thus, midway through the decree affecting American Telephone and Telegraph Co., timetables were eliminated as criteria for measuring the Bell Companies' compliance.)

### **Necessary Distinction**

I do not argue here that the differences between enhanced and preventive quotas should or should not be of determinative significance in any particular case (although I have elsewhere argued that, while the justification for preventive quotas are essentially the same for minorities and for women, the justifications for enhanced quotas are quite different; see "Employment Quotas for Women?," *The Public Interest*, Fall 1983, at 106). But the distinction is necessary to an evaluation of the arguments advanced by either side in the affirmative action debate. Thus, when one side argues that goals are essential to ensuring that minorities and women have equal access to the job market, such arguments are germane only to preventive quotas; they do not bear on the enhanced quotas that have been the staple of remedial court decrees and, at least throughout the '70s, the executive order program of the Department of Labor.

Similarly, when the other side condemns quotas, arguing that you cannot make up for discrimination against some people by favoring other members of their group and emphasizing concerns about the quality of the work force, such arguments are directly pertinent only to enhanced quotas; they have considerably less relevance to the preventive quotas that many employers desiring to make numerical measures an important part of their selection processes may in fact implement- or that could be made a continuing aspect of the executive order program.

It is therefore of some importance that we keep this distinction in mind when appraising these and other arguments about the wisdom or fairness of various measures aimed at securing employment opportunities for minorities and women. Just as important is that we do not further cloud the issue by debating fabricated differences between goals and quotas. Weighing the numerous competing policy considerations surrounding the quota controversy generally, or applying those considerations to a particular factual setting, is never an uncomplicated undertaking. We can facilitate the process, however, by giving more attention to the things that matter and less attention to the things that do not.