AFFIRMATIVE ACTION: ALIVE AND WELL AFTER STOTTS

INTRODUCTION

America has long faced the problem of racial discrimination. Although the Thirteenth Amendment banned all vestiges of slavery and involuntary servitude, it was not until well into the Twentieth Century that the government recognized that without some kind of affirmative efforts, blacks and other minorities would be held back indefinitely by the lingering effects of their pre-Civil War disabilities. The Civil Rights Act of 1964, more than any other piece of legislation in this century, helped rid this country of lawful, public discrimination.

One of the most important sections of the Act is § 703(a) of Title VII. This section prohibits employers from refusing to hire or promote any individual on the basis of race, color, religion, sex, or national origin. Section 706(g) provides the courts with broad power to remedy unlawful employment discrimination.

Before Congress passed the Act, some members were concerned with how the remedies available under § 706(g) would affect established seniority plans. Since the remedies included reinstatement with the possibility of retroactive

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2. In 1941, President Franklin Roosevelt instituted a policy of nondiscriminatory employment and training in the defense industry. Exec. Order No. 8802, 3 C.F.R. 957 (1941).
4. Section 703(a) states:
   It shall be an unlawful employment practice for an employer (1) 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
6. Id.
7. Section 706(g) states:
   If the court finds that the respondent had intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate ... No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a).
seniority, some congressmen felt that Section 706(g) might destroy established seniority plans in companies that violated the Act. To allay these fears, Congress included § 703(h) in Title VII. Under § 703(h), actual discriminatory intent must be shown for a seniority system to violate the Act. Under the general employment discrimination provision, 703(h), only an unjustifiable discriminatory impact needs to be shown to find a violation. Under § 703(h), even if a seniority system has a disproportionally adverse impact on minorities or if it perpetuates the effects of past discrimination, the system is still a lawful, bona fide plan.

The United States Supreme Court has had a very difficult time in determining the extent to which 703(h) protects seniority plans. Although 703(h) makes it harder to prove that a seniority plan unlawfully discriminates, the extent to which seniority plans can be modified to remedy other unlawful employment practices is not clear. To make the situation even more uncertain, most Title VII claims end in either a collective bargaining agreement or a consent decree, with no specific findings of unlawful discrimination. All too often, these settlements have included an offer by the employer to implement an affirmative action program, but have not clearly stipulated what would be the seniority rights of those hired under the plan.

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8"See supra note 6 and accompanying text.
9Section 703(h) states:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quantity of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of the Fair Labor Standards Act of 1938.

13A consent decree is a settlement agreement. It is most often drafted by the parties themselves. It is construed as a contract, but it is actually a court approved settlement and can be enforced by a contempt of court citation. See EEOC v. Local Union No. 38, 28 Fair Empl. Prac. Cas. (BNA) 1567, 1575 (N.D. Cal. 1981).

A collective bargaining agreement is a privately negotiated employment agreement where a bargaining agent represents an uncoerced majority of the employees within the bargaining unit. JENKINS, LABOR LAW § 9.114 (1969).
14For a thorough explanation of the content and use of consent decrees in Title VII litigation, see Public Law By Private Bargain, supra note 12 at 894-901.
In 1984, the Supreme Court addressed the conflict between §§ 703(h) and 706(g) in *Firefighters Local Union No. 1784 v. Stotts.* In *Stotts,* the Court held that a federal court could not modify a consent decree so as to prevent the layoff of minority employees hired under an affirmative action plan where a bona fide seniority system existed. Although many considered *Stotts* to be the beginning of the end for all affirmative action programs, the *Stotts* holding was probably quite limited. *Stotts* has not had a significant impact in most Title VII cases before the lower federal courts. This comment examines the current state of affirmative action in light of the special protection that the Supreme Court grants seniority systems. This comment also discusses the future of affirmative action and how the changes in affirmative action will affect collective bargaining agreements and consent decrees.

**AFFIRMATIVE ACTION UNDER TITLE VII**

The phrase affirmative action means different things to different people. To some, it refers to affirmative action measures as preferences; to others, as reverse discrimination. Affirmative action measures try to correct the effects of past discriminatory injustices. However, in any affirmative action program, innocent nonminority individuals are adversely affected. These individuals did not participate in the past discrimination, but they nonetheless enjoy the benefits of it. The Constitution and The Civil Rights Act afford the same protection from unjustifiable discrimination to these nonminority individuals as to the minorities. Therefore, an affirmative action, or reverse discrimination, program must pass constitutional and statutory requirements.

In a trilogy of cases from 1978-1980, the Supreme Court attempted to define the allowable limits for affirmative action plans. In these cases, *Regents of the University of California v. Bakke,* *United Steelworkers of America v. Weber,* and *Fullilove v. Klutznick,* members of the Court issued fifteen

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16 Id.

15 See A Right Turn on Race?, 103 Newsweek 29 (June 25, 1984); Quotas, Again-And Again, And Again ..., 37 National Review 14 (May 31, 1985); As Reagan Tries To Roll Back The Quotas, 98 U.S. News and World Report 12 (April 15, 1985).

19 See infra notes 118-33 and accompanying text.

20 The labels are partisan in nature. See Remedial Race and Gender Preferences, supra note 12 at 801 n.1. "Even the most neutral sounding principles . . . fail to prevent bias from intruding into the decision making process." Spann, Simple Justice, 73 Geo. L.J. 1041 (1985).


24 448 U.S. 448 (1980).
separate opinions of which only the majority opinion in Weber could muster as many as five signatures. These cases present the basic constitutional and statutory requirements facing affirmative action plans.

Bakke

In Bakke, the University of California at Davis medical school denied admission to a white applicant, allegedly because of his race. The school had established a special admissions policy that reserved sixteen spaces out of the 100 openings for minority students. Bakke alleged that he was denied admission because of the preference. The Supreme Court found that the school's minorities admissions quota was improper. The Court stated that race could not be the sole criteria for establishing an admissions quota without a judicial, legislative, or administrative finding of past discrimination by the institution. The Court did state that race could be taken into account in a school's admissions process, but it could not be the sole basis for an admissions decision.

Even though the Court found the school's admissions policy to be improper, it did not force the school to admit Bakke because he had not shown that he would have been admitted but for the school's minority preferences. Although the case related to Title VI of the Civil Rights Act, the Court made numerous references to Title VII.

Weber

In Weber, the Court considered its first reverse discrimination suit under Title VII. The employer, Kaiser Aluminum and Chemical Corporation (Kaiser), and the employees' union, the United Steelworkers of America, entered into a comprehensive collective bargaining agreement covering terms of employment at fifteen Kaiser plants. In order to eliminate obvious racial imbalances at its plants, Kaiser agreed to institute a voluntary affirmative action program whereby fifty percent of the openings in an in-plant craft training program would be reserved for blacks until the percentage of Kaiser's black craftworkers reflected the percentage of blacks in the local labor force. Other than
the fifty percent minority qualification, admissions to the training program were made strictly on the basis of seniority.33

Brian Weber, a white production worker, filed a class action suit challenging the affirmative action quota on the grounds that it violated Title VII’s ban on employment discrimination. After both the trial court and the Fifth Circuit upheld his claim, the Supreme Court reversed, finding in favor of the racial quota plan.34 The Court stated that Congress enacted Title VII to reverse the effects of years of employment discrimination against minorities.35 Title VII could not be construed to prohibit “race-conscious” quotas intended to break traditional practices of discrimination.36 The majority determined that a “literal construction” of Title VII’s ban on racial classifications would be contrary to the purpose of The Civil Rights Act.37 In a two-pronged analysis, the Court stated that Kaiser’s affirmative action quota was permissible because 1) “the purposes of the plan mirror those of the statute,” and 2) “the plan does not unnecessarily trammel the interests of white employees.”38

Kaiser’s plan mirrored the purposes of Title VII in that it was intended to help correct the “plight of the negro in our economy”39 of being “largely relegated to ‘unskilled and semi-skilled jobs.’”40 Kaiser’s plan also did not “unnecessarily trammel the interests of white employees”41 because it did not require white employees to be fired in favor of black replacements, it did not absolutely bar the advancement of white employees, and it was temporary in nature. Although the Court did not set forth explicit guidelines by which to judge voluntary affirmative action plans, the Court found the Kaiser plan to be on the permissible side of Title VII’s general ban on racial classifications.42

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33 The seniority system was based on the length of time employed. See Kaiser, 415 F. Supp. 761, 764 (1976).
35 Id. at 202-04.
36 *Id. at 209.
37 *Id. at 201. It “would be ironic indeed if a law triggered by a Nation’s concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.” Id. at 204.
38 *Id. at 208.
39 *Id. at 205 (quoting 110 CONG. REC. 6552 (1964) (remarks of Senator Humphrey)).
40 *Id.
41 *Id. at 209.
In *Fullilove*[^4] the Public Works Employment Act required that at least ten percent of all federally funded local public works projects must go to minority business enterprises (MBE).[^4] Several non-MBE contractors challenged the preferences as violating the equal protection clauses of the fifth and fourteenth amendments.^[4] 4

The Court, again looking to its Title VII decisions,[^6] determined that it was well within Congress' power under the commerce clause to require such preferences because there was abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities.^[4] 47 Here, Congress had the factual findings on its side that the University of California did not have in *Bakke*.^[4] 48

The Court not only determined that Congress had sufficient reason for the affirmative action plan, but that Congress' remedial measures were proper, as well. Chief Justice Burger stated that the Court rejected "the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."[^4] 49 Burger noted that both the courts and Congress can incorporate racial criteria into remedial decrees for statutory violations, such as Title VII violations. Burger stated that just as race "must be considered in determining whether a . . . violation has occurred, so also must race be considered in formulating a remedy."[^5] 50

Until 1980, affirmative action seemed to be alive and well. Although the Supreme Court's opinions in *Bakke*, *Weber*, and *Fullilove* were fiercely divided,[^5] the lower courts read them as generally favoring affirmative action.^[5] After each case, commentators urged further liberalizations of affirmative ac-


[^4]: 42 U.S.C. § 6705(f)(2) (1977). A minority business enterprise must be (1) owned by a group of investors of which at least 50% are minority group members, or (2) if a publicly owned corporation, owned by a group of stockholders of which at least 51% are minority group members. *Id.*

[^4]: *Fullilove*, 448 U.S. at 493 n. 77.

[^4]: The Court relied on *Franks*, 424 U.S. 747, 761 (1976) for the principle that Congress could prohibit practices that perpetuated the effects of not unlawful discrimination occurring prior to the Civil Rights Act. *Fullilove*, 448 U.S. at 484. The breach of federal anti-discrimination laws can also trigger race conscious relief. *Id.*

[^4]: *Id.* at 479.

[^4]: In *Bakke*, the school made no findings of previous discrimination. 438 U.S. 265. In *Fullilove*, Congress determined that there had been discrimination. 448 U.S. at 484. Justice Burger stated that the MBE provision of the Public Works Employment Act would "survive either test articulated in the *Bakke* opinions." 448 U.S. at 493.

[^4]: *Bakke*, 448 U.S. at 483.


[^5]: See *supra* notes 21-50 and accompanying text.

tion principles. However, when these principles came into direct conflict with the Court’s strong backing of seniority systems, the Court made it clear that court-ordered affirmative action could only go so far.

**AFFIRMATIVE ACTION AND SENIORITY PLANS**

Congress provided the courts with broad remedial powers to provide “the most complete relief possible” under § 706(g). Congress desired to restore individual victims of discrimination to the same positions they would have held had they not been discriminated against. The courts, with Congress’ approval, used § 706(g) to grant retroactive seniority, thereby interfering with preexisting seniority plans. The courts justified this on the basis that 703(h) only protected seniority plans from findings that they unlawfully discriminated, not from modifications of them to remedy other discriminatory acts of the employer.

The Supreme Court first addressed the conflict between § 706(g)’s broad remedial provisions and § 703(h)’s protection of seniority plans in *Franks v. Bowman Transportation Co.* In *Franks*, a black truck driver filed a class action suit against Bowman Transportation, alleging discriminatory hiring practices in violation of § 703(a). The district court found for the plaintiffs, but it refused to order back pay or retroactive seniority for the members of the class. The Fifth Circuit affirmed the denial of retroactive seniority on the basis of § 703(h).

The Supreme Court reversed the denial of retroactive seniority. The Court held that such an award was an appropriate judicial remedy since it placed the individual victims in positions that they would have held but for the unlawful discrimination. The Court read § 703(h) as being definitive in nature permits employer-initiated seniority override even where not stipulated in negotiated affirmative action plan; *Setser v. Novask Investment Co.*, 657 F.2d 962 (8th Cir.), cert. denied, 454 U.S. 1064 (1981) employer is entitled to judgment as a matter of law once it shows its affirmative action plan was a remedial response to a conspicuous racial imbalance, it was reasonably related to its remedial purpose, it did not unnecessarily trammel the interests of non-minority workers, it is not shown to be motivated by nonremedial reasons, and it is not shown to unreasonably exceed its remedial purpose.


*118 Cong. Rec. 7166, 7168 (1972) (memorandum by Senators Williams and Javits to interpret changes in Title VII enforcement provisions).*

*Section 706(g) of Title VII empowered the courts to “make persons whole for injuries suffered on account of unlawful employment discrimination.” Albemarle Paper Company v. Moody, 422 U.S. 405, 418 (1975).*

*See Franks, 424 U.S. at 763 (discussing Congress’ intent to allow use of retroactive seniority as a remedy for actual victims of unlawful discrimination).*

*E.g., Int’l. Bhd. of Teamsters v. United States, 431 U.S. 324.*

*Franks, 424 U.S. 747 (1976).*

*Id. at 751.*


*Franks, 424 U.S. 747.*

*Id. at 779.*
and not limiting the broad remedial provisions of § 706(g). The Court determined that although the remedy of retroactive seniority should only be awarded within a court's sound discretion, it was in line with Title VII's purpose of providing "make-whole" relief. The Court found that retroactive seniority should not be withheld simply because it would conflict with the expectations of innocent non-minority employees. The Court reasoned that the remedial effects of the award outweighed the burden on innocent nonminority employees.

The Court again addressed the conflict between §§ 706(g) and 703(h) in International Brotherhood of Teamsters v. United States in 1977. However, the Court was presented with an issue in Teamsters that it had not been forced to address in Franks: whether a seniority system violated Title VII by perpetuating pre-Act discrimination? The government challenged a trucking company's hiring practices and its seniority system on the grounds that they discriminated against minorities. The district court found for the government on both counts. The court determined that since the company's seniority system impeded the free transfer of minorities from one department to another, the seniority system violated Title VII. The court of appeals affirmed.

The Supreme Court disagreed with the lower courts, however. Although the Court agreed that the company had unlawfully discriminated, the Court found that the seniority system that perpetuated the discriminatory effects was protected by § 703(h). The Court stated that the seniority system was bona fide since it was neutral on its face. The Court did remand the case to the district court to determine which individual employees were discriminated

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61 Id. at 759.
62 Id. at 763.
63 Id. at 775.
65 Id. at 349.
66 In Teamsters, the employer trucking company placed those minority members of its work force in the "lower paying, less desirable jobs as servicemen or local city drivers" rather than the higher paying, long-distance hauling jobs. Id. at 329.
67 Id. at 333.
69 Teamsters, 431 U.S. at 369.
70 Id. at 372.
71 Id. at 355. The Fifth Circuit, relying on Teamsters, adopted a four-part test in James v. Stockham Valves and Fittings Co., 559 F.2d 310 (5th Cir. 1977), to determine whether a seniority system was bona fide. The four factors are:
1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
3) whether the seniority system had its genesis in racial discrimination; and
4) whether the system was negotiated and has been maintained free from any illegal purpose.
Id. at 352.
against because awards of retroactive seniority would be appropriate remedies for them.\(^{74}\)

In *Teamsters*, the Court maintained its protective stance over seniority systems, but it also allowed retroactive awards of seniority for actual victims of discrimination.\(^{75}\) The Court affirmed this position later in *Pullman-Standard v. Swint*.\(^{76}\) In *Pullman*, the Court stated that "discriminatory intent... means actual motive... not a legal presumption to be drawn from a factual showing less than actual motive."\(^{77}\)

The Court took its *Teamsters* holding one step further in *American Tobacco Company v. Patterson*.\(^{78}\) In *American Tobacco*, the Court held that seniority systems that perpetuate the effects of post-Act discrimination are nonetheless bona fide. The Court firmly established that in order to attack employment discrimination, the primary source of the discrimination had to be attacked, not the seniority system that merely perpetuated its effects. The Court reiterated that only identified victims of discrimination could receive court-ordered "make-whole" relief.\(^{79}\)

These cases illustrate the progression of both affirmative action and the remedial measures available under 706(g) as restricted by 703(h). In *Bakke, Weber*, and *Fullilove*, the Court approved of the use of affirmative action plans where unlawful discrimination was found by a competent fact-finding body.\(^{80}\) The Court approved of these plans even up to the use of racial quotas to counter the effects of past discrimination. In *Franks*, the Court found that retroactive seniority is an appropriate remedy for actual victims of intentional discrimination.\(^{81}\) Although the Court allowed modification of seniority plans to remedy past discrimination, it stood firmly behind seniority systems in *Teamsters* by allowing seniority systems to perpetuate past legal discrimina-

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\(^{74}\) *Teamsters*, 431 U.S. at 372.

\(^{75}\) Section 703(j) of Title VII states that employers may not be forced to grant preferential treatment on account of race, color, religion, sex, or national origin because of racial imbalances which may exist between any given populations. 42 U.S.C. § 2000e-2(j) (1982). In *Rios v. Enterprise Ass'n of Steamfitters Local 638, 501 F.2d 622, 630 (2d Cir. 1974)*, the Supreme Court held that § 703(j) does not bar a court from ordering affirmative relief when actual discrimination is shown, even if it is based primarily on an imbalance between the percentage of minority employees and the percentage of minorities in the local labor pool. Section 703(j) bars coercive relief only when racial imbalances are not caused by discrimination. *Id.* at 631.

\(^{76}\) *Pullman*, 456 U.S. 273 (1980).

\(^{77}\) *Id.* at 289-90.


\(^{79}\) See supra note 6 and accompanying text.


\(^{81}\) See supra notes 58-65 and accompanying text.
tion if the seniority plan did not intentionally discriminate. The Court furthered this principle in American Tobacco by protecting a seniority plan that perpetuated the effects of past illegal discrimination.

These lines of cases show the conflict between the Court's interpretation of §§ 706(g) and 703(h). The Court has generally expanded the remedies available for Title VII violations, but it has also expanded its protection of seniority systems. The conflicting goals of defeating the effects of discrimination and of protecting the interests of innocent non-minority employees came to a head in Firefighters Local Union No. 1784 v. Stotts.

The Stotts Decision

In 1974, the Justice Department filed suit against the city of Memphis alleging that the city had engaged in racial and sexual employment discrimination. In a consent decree between the parties, the city denied any discrimination but agreed to institute an affirmative action program that included a hiring quota for minorities. This 1974 consent decree specified that the city's seniority system would remain in effect and would apply to all new minority employees. The decree did not stipulate any special contingencies in the event layoffs occurred.

In 1977, Carl Stotts, a black firefighter, filed a class action suit alleging that the city still followed racially discriminatory hiring and promotion practices. In a 1980 consent decree between the parties, the city again denied any unlawful practices but agreed to institute a promotion quota in addition to its hiring quota. The city also agreed to make certain individual promotions, with back pay but without any awards of retroactive seniority. The 1980 decree also neglected to clarify what affect these actions would have in the event of layoffs.

In May, 1981, the city was forced, for the first time in its history, to lay off city employees because of budget deficits. Since the layoffs would have "virtually destroyed" the progress made by the hiring goals in the consent

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1See supra notes 66-75 and accompanying text.
2See supra notes 78-79 and accompanying text.
4Id. at 2581.
5Id. Although no findings of fact were stipulated in the decree, the city agreed that 50% of its new hirings would be made from minority applicants. Id.
6Id.
7Stotts' action was joined by another black firefighter, Fred Jones, in 1979. Id.
8The 1980 consent decree was explicitly entered into to avoid the delay and cost of litigation. Id.
9In the promotion quota, the city agreed to attempt to reserve 20% of all promotions for blacks. Id.
10Id.
12Id. at 561.
decrees, the district court issued a temporary restraining order that prevented the city from laying off any minority firefighters. A preliminary injunction was then issued by the district court, enjoining the city from decreasing the percentage of blacks in certain areas within the fire department by the layoffs. The district court found that it possessed the authority to make these orders because 1) the city's seniority system was not bona fide and 2) the 1980 decree specifically allowed the court to modify the decree.

The Sixth Circuit Court of Appeals held that the district court had acted properly in modifying the consent decree although the Sixth Circuit reversed the lower court's finding that the city's seniority system was not bona fide. The court of appeals found that the seniority system itself had no discriminatory purpose and that the layoffs were not adopted with a discriminatory purpose. The court did find, however, that the district court had the authority under the consent decree to make the modification in order to enforce the terms of the decree. The court also found that the unexpected economic crisis constituted a sufficient change in circumstances to warrant a modification of the decree.

The Supreme Court reversed the Sixth Circuit. After asserting jurisdiction, the Court found that the trial court had exceeded its authority in entering its injunction. In rebutting the court of appeals' justifications for the injunction, the Court noted that "the scope of a consent decree must be discerned within its four corners." The Court, again emphasizing the importance of se-

94 Id. at 549.
95 Id. at 551.
96 The court reasoned that since the proposed layoffs would have a discriminatory effect, the seniority system was not bona fide. Id.
97 Id. at 551 n. 6.
98 Id.
99 Id. at 561-62.
100 Id. at 563. Since a consent decree is a court order, it can be modified by the court in order "to effectuate the basic purpose of the decree." United States v. Atlantic Ref. Co., 360 U.S. 19, 23 (1959). A consent decree can be modified over objection of a party, but a hearing is required and a finding that there are changed circumstances. See id.
102 Before reaching the Title VII issue, the Court determined that there was an actual controversy before it as was required by Article III of the Constitution. Id. at 2583-85. The respondents asserted that since all the firefighters that were laid-off had returned to work, there was currently no controversy. Id. at 2584. The Court stated that a controversy lingered on because the district court's injunction was still in effect, the modification of the consent decree was still in force, and some employees possibly still had back pay claims. Id. Justice Blackmun dissented, arguing that the Court's opinion was "wholly advisory" because their ruling would not affect the interests of the parties involved. Id. at 2596 (Blackmun, J., dissenting). Justice Blackmun contended that the preliminary injunction had ended because the laid-off workers had been rehired and the decree's modifications ended with the injunction. Further, the laid-off firefighters may have back pay claims against the city. The city and the laid-off firefighters were both petitioners in the action, not adversaries, so the back pay issue would be moot. Id. at 2598. In a concurring opinion, Justice O'Connor noted that collateral effects of the layoffs remained since blacks had gained extra seniority rights by not having been laid off. Id. at 2591(O'Connor, J., concurring).
niority plans to American labor, stated that unless the decree specifically au-
thorized the contravention of the seniority plan, the district court could not
prevent the city from following its seniority plan to determine who to layoff.104
Although the district court had retained the power to make further orders as
necessary to “effectuate the purposes of the decree,”105 the Court found that
one of the implied purposes of the decree was to maintain the city’s seniority
plan.106

The Court also found that there were no changed circumstances justifying
modification.107 Although four justices disagreed with the majority,108 the
majority looked to Title VII to determine whether the district court could
modify the consent decree in the face of changed circumstances. The Court
stated that the authority to adopt consent decrees comes only from “the statute
which the decree is intended to enforce.”109 Therefore, when a court seeks to
modify a decree from outside any authority granted by the decree and one of
the parties objects, the court must look to the statute to see if the modification
is consistent with the purposes of the statute. The Court determined that since
§ 703(h) protects bona fide seniority plans, the district court could not enjoin
minority layoffs based on § 703(a)’s general purpose of promoting minority
employment.110 The effect would be the same as granting constructive seniority
for someone who was not an actual victim of discrimination.

The Court’s opinion in Stotts has been highly criticized.111 Some have
stated that the Court’s discussion of Title VII was pure dicta while others have
called the Court’s opinion merely advisory.112 In any event, the Court clearly
wanted to reach the result it did. The Court had to bypass three ways by which
it could have affirmed the lower courts’ holdings. First, the Court could have
found there to be no case in controversy since Memphis had recalled all of its
laid off firefighters.113 Second, the Court could have easily found that the 1980

104 Id.
105 Id. at 2605 (Blackmun, J., dissenting).
106 Id. at 2588.
107 Id.
108 Justice Stevens concurred in the judgment but stated that the Court’s discussion of Title VII was simply
advisory. Id. at 2594 (Stevens, J., concurring).
109 Id. at 2587 n.9 (quoting System Federation No. 91 v. Wright, 364 U.S. 642, 651 (1961)).
110 Although the plaintiff in Stotts was unable to obtain relief, plaintiffs generally bear a lighter burden than
defendants in seeking modification of a consent decree. Paradise v. Prescott, 767 F.2d 1514, 1527 n.13
(1985).
111 See, e.g., Note, Has the Supreme Court Put Out the Fire on Court Ordered Affirmative Action?:
Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984), 18 CREIGHTON L. REV. 737, 768 (1985);
215 [hereinafter cited Last Hired, First Fired]; Krauthammer, A Defense of Quotas, 193 NEW REPUBLIC 9
(September 16, 1985).
112 See Last Hired, First Fired, supra note 110.
113 Many commentators agree with Justice Blackmun that there was no case or controversy. See Spann, Sim-
ple Justice. 73 GEO. L.J. 1041, 1049 (1985). For a discussion of the Article III case or controversy require-
decree authorized the district court to make the modification since the layoffs had such an adverse impact to the decree’s goal of balanced minority employment. Third, the Court could have allowed the modification under the theory that it served to effectuate the basic purpose of the initial consent decree. The initial decree’s most obvious purpose was to increase the percentage of minorities employed by the city in order to better reflect the percentage of minorities in the local labor pool. The Court had to strain to find that the decree placed strict compliance with the city’s seniority plan ahead of trying to eliminate the effects of past discriminatory employment practices. The Court went further in Stotts then it had ever gone before in order to protect the sanctity of a bona fide seniority plan.

**AFFIRMATIVE ACTION AFTER STOTTS**

Many authorities felt that Stotts represented a retreat by the Court from affirmative action principles. After Stotts, the chief of the Justice Department’s civil rights division, William Bradford Reynolds, urged all fifty states to dismantle their affirmative action programs. Reynolds insisted that affirmative action had done more harm than good. Even the head of the Equal Employment Opportunity Commission, Fred Alvarez, backed off pursuing class-wide suits and began concentrating on individual suits. Many in President Reagan’s administration feel that Stotts has effectively, even though not explicitly, overruled Weber’s allowance of voluntary, private affirmative action programs based on mere conspicuous racial imbalances rather than judicial findings of discrimination.

The lower courts have not read Stotts so broadly, however. Arguably, Stotts stands for only two propositions: first, that unless a bona fide seniority plan is expressly overridden in a consent decree, principles of contract law do not allow changes to be made in the seniority plan; and second, that a court cannot modify a consent decree to adversely affect a seniority system where there has been no finding of intentional discrimination and one of the parties objects to the modification. Most circuit courts have limited Stotts to these two propositions and have generally continued to follow Weber’s guidelines.
In Deveraux v. Geary, the First Circuit examined the extent to which Stotts affected Weber and affirmative action. In Deveraux, five white, male police officers challenged the promotion of a black officer on the grounds that they had scored higher on a promotion eligibility exam. The black officer had been promoted rather than one of the white officers because of a minority hiring quota established pursuant to a consent decree in Title VII litigation. The white officers alleged that Stotts had so changed the law of Title VII that the consent decree could no longer stand because it violated the purpose of the statute it was designed to enforce. The First Circuit distinguished Stotts by noting that in Deveraux, 1) no modification of a consent decree over objection was involved, 2) no bona fide seniority system was involved, 3) the parties stipulated in the consent decree that patterns and practices existed that would support a Title VII action. The court noted that it was "not easy to determine from the plurality opinion in Stotts just how far a majority of the Court would want to go in the present situation." The court stated, however, that had the Supreme Court intended to overrule Weber, it would have done so. In analogizing Stotts to Deveraux, the First Circuit found that the plaintiffs had sought "too broad a rule from too narrow a set of facts."

In Kromnick v. School District of Philadelphia, the Third Circuit reversed a district court's determination that a teacher assignment policy violated Title VII. The policy required that the racial proportion of teachers in any of the city's schools be within 75% to 125% of the average proportion for all of the schools combined. If the racial mix of teachers at any given school was not within this ratio, teachers were reassigned. The Second Circuit held that Title VII permitted such a racial quota because 1) there had been a sufficient finding of prior discrimination, 2) no white teachers were laid off by the quota policy, 3) the teachers' seniority rights were not affected, and 4) the measure was presumably temporary even though its length of duration had not been specified.

In Vanguards of Cleveland v. City of Cleveland, the Sixth Circuit upheld a proposed consent decree that incorporated racial hiring and promotion quotas. The Vanguards association, a group of minority firefighters, instituted the initial Title VII action against Cleveland. The firefighters' union, Local 93, intervened and objected to the proposed consent decree between the plaintiffs and the city because of the quotas. The district court approved of the

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120 Id.
121 Id. at 274.
122 Id. at 271.
124 Id.
125 753 F.2d 479 (1985).
decree, nonetheless. The Sixth Circuit upheld the use of the quotas because 1) the city admitted to past discrimination, 2) the firefighters' seniority system would expressly not be affected, and 3) the consent decree was essentially voluntary. The court relied rather heavily on Weber and described Stotts has having "no effect on this case."

In Britton v. South Bend Community School Corp., the Seventh Circuit addressed a situation quite similar to Stotts. In Britton, the school district and the teachers union negotiated a collective bargaining agreement. As part of the agreement, which was approved of by a majority of the teachers union, the school district agreed to institute an affirmative action program. The agreement explicitly stated that no minority teacher would be affected in the event of layoffs. When layoffs ensured, white teachers, who were laid off but who had more seniority than retained black teachers, filed suit challenging the layoff procedures. In upholding the agreement, the Seventh Circuit noted that 1) the no-layoff provision was essential and crucial to the achievement of the collective bargaining agreement's affirmative action objectives, 2) the agreement did not require that unqualified teachers be retained, 3) the agreement did not invidiously trammel the interests of white teachers, 4) the measure was temporary, and 5) the measure was not designed to maintain a particular racial balance. Of great importance to the court was that the predominantly white teachers union approved of the plan. The court found it extremely hard to believe that the plan invidiously trammelled interests of the white teachers, since the white teachers had voluntarily agreed to the plan in the collective bargaining process.

In Johnson v. Transportation Agency, Santa Clara County, a reverse sex discrimination case, the Ninth Circuit upheld an affirmative action plan that was based on a simple showing that of over 238 craftworkers employed by the agency, none were women. The court stated that "a plethora of proof is hardly necessary," in light of such statistics, to show discrimination. In Paradise v. Prescott, and in Turner v. Orr, the Eleventh Circuit

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1 Id. at 489. The consent decree in Stotts had essentially been coercive. Id. at n.10.
2 Id. at 486. The Sixth Circuit also upheld affirmative action plans in Wygant v. Bd. of Education, 746 F.2d 1152 (1984), cert. granted, 105 S. Ct. 2015 (1985) (plan to hire teachers so that the racial mix of minority teachers would reflect the student racial mix) and Van Aken v. Young, 750 F.2d 43 (1984) (temporary plan to hire greater percentage of blacks than were present in local labor pool was upheld because blacks had been victims of years of discrimination).
3 775 F.2d 794 (1985).
4 Id. at 812-13.
5 Id.
7 Id. at 1313.
8 767 F.2d 1514 (1985).
9 759 F.2d 817 (1985).
distinguished *Stotts* in that the consent decrees in *Paradise* and in *Turner* were both premised on findings of actual discrimination. The court also stated in *Turner* that "Stotts must be read in light of . . . Weber."¹³³

In each of these cases, the circuit courts have read *Stotts* as narrowly as possible. Had they read it broadly, the courts would have had to turn their backs on a great amount of case law approving of affirmative action programs. As the First Circuit stated in *Deveraux*, "this hardly seems [to be] the moment for us to strike out in a new direction."¹³⁶ This has also been the reaction of most employers when urged by members of the Reagan administration to dump their affirmative action plans.¹³⁷ Affirmative action principles have been too widely accepted and approved of to be abandoned.¹³⁸ Not only have companies and governmental entities found employment discrimination suits costly, but instituting affirmative action plans has been costly, as well. Employers realize that the executive branch of the federal government is out of touch with the American public and that the next administration will probably reinstitute the affirmative action policies of recent administrations.¹³⁹

*Wygant: the Next Step*

The Supreme Court will soon have cause to review affirmative action principles when it decides *Wygant v. Jackson Board of Education.*¹⁴⁰ In *Wygant*, the Court will have the opportunity to not only address *Stotts* and *Weber*, but the circuit court cases as well. In *Wygant*, a teachers union and local school district entered into a collective bargaining agreement that embodied an affirmative action program. The agreement stated that in the event of layoffs, the percentage of minority teachers would not be decreased by the layoffs. When layoffs occurred, non-minority teachers filed a Title VII and equal protection suit. The district court and the Sixth Circuit found that the af-

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¹³³*Id.* at 825.
¹³⁶765 F.2d at 275.
¹³⁷Thomas Hunt, an employment discrimination attorney in Los Angeles, estimated that 60% of the national companies in the United States used affirmative action goals and timetables. *Assault on Affirmative Action*, supra note 114. Hunt knows of no company that has abandoned its affirmative action plan since Reagan came into office. *Id.* In a recent survey, 95 percent of 128 of the nation’s biggest companies stated that they would continue to use hiring and-promotion goals even if the government stopped requiring them. Gest, *Why Drive on Job Bias is Still Going Strong*, 98 U.S. News & World Rep. 67 (June 17, 1985) [hereinafter cited as *Drive on Job Bias*].
¹³⁸Eleanor Holmes Norton, a former head of the EEOC, states that affirmative action is so well entrenched that "there would be a real moral problem if companies jumped on the Reagan bandwagon," *Drive on Job Bias*, supra note 137.
¹³⁹In 1965, President Johnson issued Executive Order 11246. 3 C.F.R. 339 (1964-1965 Compilation). This order, as amended, requires that all nonexempt federal government contracts contain provisions that impose dual duties on contractors and subcontractors: not to discriminate against employees or applicants because of race, color, religion, sex, or national origin, and to take affirmative action to insure that applicants and employees are employed without regard to such factors. 3 C.F.R. 684 (1966-1970 Compilation). All presidents since Johnson have continued to support Executive Order 11246, but President Reagan’s advisors are pushing for a new amendment to the order that would prohibit the use of quotas in affirmative action plans. *Civil Rights: No More Quotas?*, 106 Newsweek 21 (August 26, 1985).
firmative action plan was proper even though it was based on a finding that there was a racial imbalance between the percentage of minority teachers and the percentage of minority students in the system.

The court of appeals stated that it was appropriate to make such a comparison because of the special relationship teachers have with students and that "societal discrimination has often deprived minority schoolchildren of other role-models." Therefore, the court determined, minorities were substantially underrepresented as teachers.

Wygant will force the Court to look at issues it refused to address in Weber: to what extent are findings of discrimination necessary to institute a voluntary affirmative action program under a collective bargaining agreement? As Weber stated, Title VII does not prohibit a private employer from adopting an affirmative action program "to eliminate conspicuous racial imbalances in traditionally segregated job categories." In Weber, the past discrimination was evidenced first by the disparity between the percent of blacks in the employer's work force and the percent of blacks in the local community. The Court also stated that "judicial findings of exclusion from crafts on racial grounds are so numerous [that they are] a proper subject for judicial notice."

The Court has often recognized that population/work force comparisons are useful and sometimes sufficient to establish proof of past discrimination. However, the disparities in those cases strongly evidenced actual discrimination against minorities. The statistics in those cases compared the percentages of the class in one population with the percentages in another population. In Wygant, the Sixth Circuit compared the percentages of one class in one population to the percentages of another class in another population. This type of comparison is theoretically unsound and illogical to show discrimination against one class. The Court will probably not condone the Sixth Circuit's loose application of statistics to show employment discrimination.

In making the comparisons, the Sixth Circuit was explicitly considering the needs of the minority students and the impact of the employment discrimination on the students, not on the teachers. Although the court found that minority teachers were substantially underrepresented, it failed to express

141 Id. at 1156.
142 Weber, 443 U.S. at 209.
143 Id. at 199 n.1.
144 Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) (population/work force statistics are sufficient to establish prima facia case of employment discrimination, but more finely tuned statistical comparisons may be more probative).
145 As Justice Stewart stated for the majority in Hazelwood, "There can be no doubt . . . that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases . . . (A) proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population." Id. at 309.
why. The court refused to address the issue of "whether the District Court properly utilized a minority student ratio." As Judge Wellford stated in his concurring opinion, "students . . . do not have a constitutional right to . . . a teaching staff of any particular composition."

The Court should not overrule the Sixth Circuit's decision, however. Although the needs of the minority students should not be significant in the employment discrimination context, the percentages of minority students at the school could suffice to show the racial mix of the local labor pool. Although long-term population patterns cannot be shown with great accuracy from only a few years of evidence, as of 1971, the percentage of minority faculty members was only eight and one-half percent while the percentage of minority pupils was fifteen and nine-tenths percent. As recently as 1953, the school district employed no black teachers; in 1961, only one and eight-tenths percent were minority. The Court could easily find that the teaching profession has been a traditionally segregated profession and that a disparity existed between the percentage of minorities and the local labor pool and the percentage of minorities employed as teachers. Such a finding would be consistent with the Court's finding of past discrimination in Weber.

THE FUTURE OF AFFIRMATIVE ACTION PLANS IN CONSENT DECREES AND COLLECTIVE BARGAINING AGREEMENTS

Stotts has clearly had little effect on the lower courts' acceptance of either voluntary or court-ordered affirmative action remedies. Stotts did not limit the circumstances under which Title VII suits could be filed. Employers will undoubtedly still face the same Title VII alternatives in the future: lengthy litigation versus settlement in the form of either strictly voluntary affirmative action plans, as part of a collective bargaining agreements, or in consent decrees. Also, Stotts did not limit Weber's approval of voluntary affirmative action plans designed to reverse racial segregation without trammelling the interests of non-minority individuals.

In the future, when actual or potential plaintiffs agree to waive their Title VII rights in a consent decree or collective bargaining agreement, they should make sure that the agreement is very thorough. The basis for the affirmative action plan should be clear. This may require extensive findings concerning
prior discrimination and the current effects of such discrimination. If population comparisons are used, they should be relative to the class seeking the preference. The plans should not rely on statistics alone, however. They may utilize other indicia of discrimination, such as the use of tests, evidence of traditional discrimination in the job classification, or the requirement of a high school diploma. The best support for an affirmative action plan would probably be testimony from others who were actually discriminated against by the employer or an admission of discrimination by the employer. Such evidence is seldom easy to obtain.

The cost of such extensive findings may deter some plaintiffs from even filing Title VII suits. In light of the cost, however, some employers may also be more willing to make concessions in order to avoid further Title VII expense. Section 706(k) allows courts to award legal fees to prevailing parties. Therefore, the requirement of more extensive findings should not deter bona fide Title VII claims.

The extent to which findings of discrimination are required after Stotts and Wygant will still probably not parallel that required in full-blown trials. Parties will also be more open to forming their own affirmative action plans in consent decrees or collective bargaining agreements rather than letting the courts have absolute control over possible remedies. In light of all of these considerations, settlements are still preferable to trials on the merits. Stotts should not totally frustrate Title VII’s policy of encouraging voluntary settlements whenever possible.

CONCLUSION

Affirmative action programs are still viable tools to use to overcome centuries of racial discrimination. The affirmative action preferences and goals of the last few decades have made great strides in the struggle for racial equality under the law. The ultimate goals of affirmative action, the reversal of the continuing effects of discrimination and the opening up of equal opportunities to all people, have not yet been met, however. Without the continued application of affirmative action principles, this country will never have equal justice for all.

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150Courts generally hold that findings of discrimination can be satisfied by stipulations in consent decrees or conciliation agreements. B. SCHLEI AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 858 (1983).

151Basic ability requirements tests can be slanted in favor or against any race or class of people. In order for a standardized test to be valid employment criteria, in the face of a discriminatory impact, the test must “bear a demonstrable relationship to successful performance of the jobs for which it was used.” Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

152But see Detroit Police Officers’ Ass’n v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981) (city admitted past employment discrimination practices and presented abundant evidence of such discrimination).


The Supreme Court sent out mixed signals in *Stotts*; it appeared to strike a blow to affirmative action, yet it failed to overrule *Weber*. The lower courts have not let this stand in the way of justice, though. The circuit courts have continued to apply *Weber* with full force. The Court will have the opportunity to make a clearer statement about the viability of affirmative action in *Wygant*. In order to erase all doubt about the future of affirmative action, the Court should follow *Weber* and uphold the Wygant teachers' collectively bargained for no-layoff contract provision. By doing so, the Court can put *Stotts* in its proper perspective and effectively state that affirmative action is still a proper way to deal with the continuing effects of past injustices caused by invidious discrimination.

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