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# **STOTTS' DENIAL OF HIRING AND PROMOTION PREFERENCES FOR NON-VICTIMS: DRAINING THE "SPIRIT" FROM TITLE VII**

Mary C. Daly\*

## **Introduction**

With the exception of the Supreme Court's decision in *Brown v. Board of Education*,<sup>1</sup> no legal topic in recent years has prompted as much heated discussion in every stratum of American society as affirmative action.<sup>2</sup> It has been a particularly nettlesome problem in the context of labor relations. White and blue collar workers,

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1. 347 U.S. 483 (1954).

2. In general, "affirmative action" means "those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity." EEOC Guidelines, Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, 29 C.F.R. § 1608.1(c) (1985). Such actions include training plans and programs, recruiting activity, elimination of any adverse impact caused by selection criteria not validated pursuant to EEOC Guidelines, and modification of promotion and layoff procedures. *Id.* § 1608.3(c); see also OFCCP, Affirmative Action Programs, 41 C.F.R. §§ 60-2.1 to -2.32 (1985).

This Article addresses one aspect of affirmative action, *i.e.*, preference in hiring or promotions given to identified victims of employment discrimination on account of race, color, religion, sex or national origin or to non-victims who share the "offending" characteristic that triggered the employer's conduct. The beneficiaries of this preference obtain it as a result of a judgment following trial, a judgment entered upon the parties' consent or a voluntary agreement. For a description of typical affirmative action provisions, see *infra* notes 29, 90 and accompanying text.

The term itself was "expressly modeled" on section 10(c) of the National Labor Relations Act (NLRA). 49 Stat. 454 (codified as amended at 29 U.S.C. § 160(c) (1982)); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11 (1975). Under this statute, however, relief is limited to actual victims and generally consists of back pay and a monitoring of the employer's compliance with an order prohibiting future violations. The Supreme Court has repeatedly emphasized that "[t]he principles developed under the NLRA generally guide, but do not bind, courts in tailoring remedies under Title VII." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982) (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 366-67 (1977)); see *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768-70 (1976); *Albemarle Paper Co.*, 422 U.S. at 419 & n.11.

managers, personnel officers and professionals in both the private and public sector have sharply debated its merits.<sup>3</sup> Scholars and jurists have taken no less dispassionate views on this topic than the general population.<sup>4</sup> One of the few areas of agreement between affirmative action proponents and opponents concerns the appropriateness of compensation for actual victims of discrimination. This agreement rests on shared concepts of fair play and evenhandedness—two fundamental principles of American jurisprudence. In their common view, employment or promotion preferences, back pay, constructive seniority and other similar forms of relief are permissible when designed to “make-whole” an aggrieved applicant or employee.<sup>5</sup>

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3. *Compare Affirmative Retreat*, N.Y. Times, May 5, 1985, at E24, col. 1; *Why Torpedo Justice in Jobs?*, N.Y. Times, Apr. 20, 1985, at 22, col. 1; Bok, *Admitting Success*, 192 NEW REPUBLIC 14-16 (Feb. 4, 1985); *Negative Action*, 238 NATION 788-89 (June 30, 1984); Wilkins, *Cops and Quotas*, 237 NATION 652-53 (Dec. 24, 1983); with Brown III, *Problems In "Reverse Discrimination": A Management View*, 32 N.Y.U. CONF. LAB. 239 (1980); Cohen, *Why Racial Preference Is Illegal and Immoral*, 67-68 COMMENTARY 40-44 (June 1979); Mosak, *Affirmative Action Si—Quotas No*, 9 EML. REL. L.J. 126 (1983); Sowell, *Myths About Minorities*, 68 COMMENTARY 33 (Aug. 1979); *Quotas, Again—And Again, And Again . . .*, 37 NAT'L REV. 14 (May 31, 1985); *Reverse Discrimination—and Politics*, 35 NAT'L REV. 1589 (Dec. 23, 1983).

4. *Compare Edwards & Zaretsky, Preferential Remedies for Employment Discrimination*, 74 MICH. L. REV. 1 (1975) [hereinafter cited as Edwards & Zaretsky]; Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87 (1979); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); with N. GLASSER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975); B. GROSS, *DISCRIMINATION IN REVERSE: IS TURNABOUT FAIR PLAY?* (1978); R. O'NEIL, *DISCRIMINATION AGAINST DISCRIMINATION* (1975); Posner, *The Bakke Case and the Future of "Affirmative Action"*, 67 CALIF. L. REV. 171 (1979); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. PITT. L. REV. 285 (1977); Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

5. The Supreme Court has squarely held that actual victims should be restored to their “rightful place,” that is, the “position where they would have been were it not for the unlawful discrimination.” *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976) (citation omitted); *accord Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). But it has also tempered the admonition by emphasizing that the courts must respect the legitimate interests of “innocent third parties.” *Ford Motor Co. v. EEOC*, 458 U.S. 219, 239 (1982) (quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 723 (1978)); see also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 371-76 (1977).

Why then is affirmative action so controversial and hotly debated? In large measure, it is because employers and courts frequently have not limited positive employment benefits to identified victims of discrimination. They have extended the benefits to non-victims solely because the latter share the offending characteristics which triggered the original discrimination—such as race, religion, color, sex or national origin.<sup>6</sup> It is at the point of preference for non-victims that affirmative action proponents and opponents part company.

The debate surrounding this aspect of affirmative action recently intensified as a result of the Supreme Court's decision in *Firefighters Local Union No. 1784 v. Stotts*.<sup>7</sup> That case involved the propriety of a district court's interpretation of a consent decree entered under the authority of title VII (Title VII) of the Civil Rights Act of 1964 (the 1964 Act),<sup>8</sup> to enjoin the application of a seniority system in order to preserve the recent employment gains of minority firefighters at the expense of non-minority firefighters with greater seniority. In deciding that issue, however, the Court made very pointed references in dicta to the narrow scope of affirmative relief available to non-victims under Title VII.<sup>9</sup> It strongly suggested that Title VII strictly limited "make-whole" relief to identified victims of discrimination.<sup>10</sup> Non-victims could only benefit indirectly, as a result of court orders which mandated greater minority employee recruitment efforts and granted general injunctive relief against future statutory violations.<sup>11</sup>

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6. See, e.g., *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 499 (4th Cir. 1981); *United States v. City of Chicago*, 663 F.2d 1354, 1359-62 (7th Cir. 1981) (en banc); *Firefighters Inst. For Racial Equality v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981); *United States v. City of Alexandria*, 614 F.2d 1358, 1362-67 (5th Cir. 1980); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1027-28 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); *Rios v. Enterprise Ass'n Steamfitters Local 638 of U.A.*, 501 F.2d 622, 629 (2d Cir. 1974); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), cert. denied, 404 U.S. 984 (1971); *United States v. I.B.E.W.*, Local No. 38, 428 F.2d 144, 150-52 (6th Cir.), cert. denied, 400 U.S. 943 (1970).

For a stimulating examination of employment discrimination from the "victim perspective" analyzed by a proponent of the school of Critical Legal Studies, see Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

7. 104 S. Ct. 2576 (1984).

8. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982)).

9. 104 S. Ct. 2581, (White, J.); *id.* at 2590-94 (O'Connor, J., concurring).

10. *Id.* at 2588-90 (White, J.); *id.* at 2592-94 (O'Connor, J., concurring).

11. *Id.*

*Stotts* intimates that "goals," "timetables," and "quotas," the stock devices routinely used by courts in ordering relief after trial and by defendants and plaintiffs in drafting consent decrees, are no longer available.<sup>12</sup>

The radical impact such a holding would have on Title VII litigation

12. These devices have been the key structural elements in most Title VII judgments and consent decrees. Furthermore, as Justice Blackmun pointed out in *Stotts*, the courts of appeals have unanimously held that extending quota relief to non-victims is appropriate to remedy Title VII violations. 104 S. Ct. at 2606 n.10 (Blackmun, J., dissenting); see, e.g., *Thompson v. Sawyer*, 678 F.2d 257, 294 (D.C. Cir. 1982); *Chisholm v. United States Postal Serv.*, 665 F.2d 482, 499 (4th Cir. 1981); *United States v. City of Chicago*, 663 F.2d 1354, 1359-62 (7th Cir. 1981) (en banc); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), cert. denied, 452 U.S. 938 (1981); *United States v. City of Alexandria*, 614 F.2d 1358, 1363-66 (5th Cir. 1980); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 944 (10th Cir. 1979); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978); *Boston Chapter, NAACP, Inc. v. Beecher*, 504 F.2d 1017, 1027-28 (1st Cir. 1974), cert. denied, 421 U.S. 910 (1975); *Rios v. Enterprise Ass'n Steamfitters Local 638*, 501 F.2d 622, 629 (2d Cir. 1974); *United States v. Ironworkers Local 86*, 443 F.2d 544, 553-54 (9th Cir.), cert. denied, 404 U.S. 984 (1971); *United States v. I.B.E.W., Local No. 38*, 428 F.2d 144, 151-52 (6th Cir.), cert. denied, 400 U.S. 943 (1970).

Other cases in which courts have approved the use of quota relief for non-victims include: *McKenzie v. Sawyer*, 684 F.2d 62, 79-80 (D.C. Cir. 1982); *EEOC v. Contour Chair Lounge Co.*, 596 F.2d 809, 813-14 (8th Cir. 1979); *Davis v. County of Los Angeles*, 566 F.2d 1334, 1342-44 (9th Cir. 1977), vacated as moot, 440 U.S. 625 (1979); *EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n*, 565 F.2d 31, 35-36 (2d Cir. 1977); *United States v. International Union of Elevator Constructors, Local 5*, 538 F.2d 1012, 1017-20 (3d Cir. 1976); *Morgan v. Kerrigan*, 530 F.2d 431, 434 (1st Cir.), cert. denied, 426 U.S. 935 (1976); *Arnold v. Ballard*, 12 Fair Empl. Prac. Cas. (BNA) 1613, 1614 (6th Cir. 1976); *Vulcan Soc'y of New York City Fire Dep't, Inc. v. Civil Serv. Comm'n*, 490 F.2d 387, 398 (2d Cir. 1973); *United States v. New Jersey*, 23 Fair Empl. Prac. Cas. (BNA) 1716, 1719 (D.N.J. 1980); *Dennison v. City of Los Angeles Dep't of Water and Power*, 21 Fair Empl. Prac. Cas. (BNA) 1120, 1122 (C.D. Cal. 1979), aff'd, 658 F.2d 694 (9th Cir. 1981); *Drayton v. City of St. Petersburg*, 477 F. Supp. 846, 860-61 (M.D. Fla. 1979); *Hill v. Western Elec. Co.*, 13 Fair Empl. Prac. Cas. (BNA) 1157, 1164 (E.D. Va. 1976), aff'd in part, rev'd in part, 596 F.2d 99 (4th Cir.), cert. denied, 444 U.S. 929 (1979); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87, 122-23 (E.D. Mich. 1973), aff'd in relevant part sub nom. *EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975), vacated and remanded, 431 U.S. 951 (1977); *Buckner v. Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108, 1124-25 (N.D. Ala. 1972), aff'd per curiam, 476 F.2d 1287 (5th Cir. 1973). See *Detroit Police Officers' Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 278-86 (2d Cir. 1981), cert. denied, 455 U.S. 988 (1982); see also *Edwards & Zaretsky*, supra note 4, at 25-31; *Slate, Preferential Relief in Employment Discrimination Cases*, 5 LOY. U. CHI. L.J. 315, 317-21 (1974) [hereinafter cited as *Slate*]; *Note, Preferential Relief Under Title VII*, 65 VA. L. REV. 729, 731-33 (1979); *1974-75 Annual Survey of Labor Relations and Employment Discrimination Law*, 16 B.C. INDUS. & COM. L. REV. 965 (1975). See generally UNITED STATES COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980'S: DISMANTLING THE PROCESS OF DISCRIMINATION 21-23 (1981).

has caused this author to analyze three issues: (1) whether the *Stotts* dicta are consistent with the Court's analysis in *Bakke*,<sup>13</sup> *Fullilove*<sup>14</sup> and *Weber*;<sup>15</sup> (2) whether the majority's interpretation of the legislative history of Title VII correctly divines Congress' intent; and (3) whether the Court's endorsement of class certifications pursuant to Rule 23(b)(2)<sup>16</sup> and of the use of statistical evidence to establish a prima facie violation of Title VII is consistent with limiting race-conscious relief to identified victims of discrimination.

As set forth below, the analysis of these issues has prompted serious reservations about *Stotts*' restrictions on relief for non-victims. These reservations spring from a constellation of concerns which the Court either ignores outright or treats shabbily.<sup>17</sup> As a

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The majority of cases approving the use of quotas involve government employers—perhaps because of “public policy considerations . . . not present in private employment.” SCHLEI & GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1402 (2d ed. 1983) [hereinafter cited as SCHLEI & GROSSMAN].

Although their use has been uniformly approved, the courts have been less than enthusiastic about their imposition partly because they fly in the face of our “color-blind” concept of equality and partly because they can exacerbate racial tensions. The latter concern has manifested itself particularly in cases involving quotas as a remedy for discrimination in promotion (as opposed to hiring). *E.g.*, *Guardians Ass'n v. Civil Serv. Comm'n*, 630 F.2d 79 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); *Kirkland v. New York State Dep't of Correctional Services*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); *see Patterson v. American Tobacco Co.*, 535 F.2d 257, 268-70 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Chance v. Board of Examiners*, 534 F.2d 993, 998-99 (2d Cir.), *cert. denied*, 431 U.S. 965 (1977). *But see Firefighters Inst. for Racial Equality v. City of St. Louis*, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *United States v. City of Chicago*, 573 F.2d 416, 429 (7th Cir. 1978), *vacated*, 663 F.2d 1354 (7th Cir. 1981) (en banc); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Reed v. Lucas*, 11 Fair Empl. Prac. Cas. (BNA) 153, 156 (E.D. Mich. 1975).

13. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

14. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

15. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

16. FED. R. CIV. P. 23(b) (“[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole”).

17. The Court will have an opportunity to respond to these concerns during the 1985-86 Term. Three cases on its docket raise *Stotts*-related issues regarding relief for non-victims. In *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985), the question before the Court is whether the fourteenth amendment prohibits a school board and a union from voluntarily modifying a seniority system to provide that, in the event of a layoff, the percentage of minority teachers may not exceed the current percentage of minority personnel at the time of the layoff. In *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), *cert. granted*, 54 U.S.L.W. 3223 (U.S. Oct. 8, 1985),

threshold matter, there is the fundamental issue of the Court's selection of *Stotts* as the vehicle to express its views on the nature of appropriate relief under Title VII. To decide the issue of the propriety of the lower court's injunction it was not necessary to reach the general issue of "individual" versus "group" relief. *Stotts* represents a highly disturbing disregard by the Court for the principle of self-restraint.

On the merits, the *Stotts* dicta are fundamentally flawed by their neglect of the Court's prior affirmative action jurisprudence. In *Weber*, the Court held that a private agreement awarding positive employment benefits to non-victims, based solely on their race, did not violate Title VII.<sup>18</sup> It rested that decision on a broad reading of the Act's legislative history, emphasizing Congress' intent to bring blacks into the mainstream of American economic life.<sup>19</sup> Given that intent it seems highly unlikely that Congress would have allowed private employers to use such remedies while denying their use to courts. The dicta in *Stotts* severely disadvantage minority workers whose employers have been found by a court to have engaged in prohibited conduct. They similarly disadvantage minority workers whose employers have sought the protection of a consent judgment. Moreover, dicta in *Bakke* and *Fullilove* suggest that a court's remedial power under Title VII does not limit race-conscious relief to identified victims.<sup>20</sup>

The legislative history of the 1964 Act and the 1972 Amendments casts further doubt on the correctness of *Stotts* dicta. The Court's approach to the legislative history is conceptually faulty because it isolates Title VII from the remainder of the statute. In interpreting Congress' intent, the Court should take an organic approach rather than dissect the Act, title by title. The majority opinion, moreover, places excessive reliance on references to the "individual victim of

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the question is whether a municipality acts consistently with Title VII when entering into a consent decree providing quota-type relief in promotions to non-victims. In *EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172 (2d Cir.), cert. granted, 54 U.S.L.W. 3223 (U.S. Oct. 8, 1985), the question is whether a court can order quota-type relief for union admission as a remedy for contempt if a union has engaged in longstanding and egregious racial discrimination.

If the Court decides in *Wygant* that the fourteenth amendment prohibits race-conscious preferential relief for non-victims, that decision may moot *Vanguards* depending upon the breadth of the Court's opinion. The issue of quota-type relief for non-victims would remain a live one, however, since the fourteenth amendment does not apply to private employers.

18. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208-09 (1979).

19. *Id.* at 202-07.

20. *Fullilove v. Klutznick*, 448 U.S. 448, 482-89 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315-20 (1978); see *infra* notes 154-87 and accompanying text.

discrimination” which appear throughout the legislative history of the 1964 Act and in parts of the legislative history of the 1972 Amendments.<sup>21</sup> “Individual” relief is not inconsistent with “group” relief. The legislators were hampered by the absence of legal terminology to convey their approval of this form of relief.<sup>22</sup> When they were specifically given the opportunity, in 1972, to prohibit race-conscious relief for non-victims, they overwhelmingly rejected the opportunity.<sup>23</sup>

Adding to these weaknesses is the Court’s endorsement of certain procedural and evidentiary mechanisms in Title VII litigation.<sup>24</sup> In reviewing the propriety of Rule 23(b)(2) certifications, the Court has endorsed the principle that racial discrimination is, by definition, a group wrong. Similarly, its approval of the use of statistical evidence to establish a prima facie case points to the non-individualized nature of the injury.

In light of the foregoing, the author concludes that the *Stotts* dicta are seriously flawed and should be reconsidered. As further support for this conclusion, there is offered a brief description of the jurisprudential considerations justifying affirmative relief for non-victims.<sup>25</sup>

### I. The *Stotts* Decision

The *Stotts* case began in 1977 as a class action alleging that Memphis officials engaged in a pattern or practice of discrimination against black applicants and employees in violation of Title VII of the Civil Rights Act of 1964.<sup>26</sup> Following three years of discovery, the parties entered into a consent judgment.<sup>27</sup> The relief afforded reflected the common dualism inherent in most Title VII actions: specific remedies were ordered for named individuals and “class-based” relief was ordered for non-victims.<sup>28</sup> The consent decree was silent with respect to seniority rights. Not surprisingly, it contained no admission of discrimination by the city.<sup>29</sup>

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21. See *infra* notes 211-24, 229-54, 268-82 and accompanying text.

22. See *infra* notes 367-79 and accompanying text.

23. See *infra* notes 229-54 and accompanying text.

24. See *infra* notes 285-367 and accompanying text.

25. See *infra* notes 368-95 and accompanying text.

26. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2581 (1984).

27. *Id.*

28. Thirteen black firefighters received promotions and 81 received back pay and the city agreed to a 50% hiring goal and a 20% promotion goal. *Id.*

29. The consent decree is reproduced as an appendix to the court of appeals decision in *Stotts v. Memphis Fire Dep’t*, 679 F.2d 541, 573-79 (6th Cir. 1982). It contained standard language explicitly stating the “[d]efendants, by entering into



The city's income did not keep pace with its expenses and, in 1981, it announced its intention to lay off non-essential municipal employees. The city's collective bargaining agreement with the firefighters' union contained a standard "last hired, first fired" provision and, therefore, the layoffs would have had a substantially disproportionate effect on recently hired black firefighters. In response to a motion for a preliminary injunction, the district court enjoined the layoffs, insofar as they would result in diminishing the percentage of black firefighters.<sup>30</sup> Compliance with the injunction resulted in at least three white employees being laid off while three blacks with less seniority were retained. The minority firefighters who benefitted from the injunction were not themselves specific victims of any discriminatory practices.<sup>31</sup>

The district court's rationale was far from crystal clear.<sup>32</sup> Although it specifically found that the city and union adopted the seniority system without any intent to discriminate, it concluded that, because of the system's discriminatory impact, it was not a bona fide system within the meaning of section 703(h).<sup>33</sup> While the Court of Appeals for the Sixth Circuit disagreed with this conclusion, it affirmed the district court's issuance of the preliminary injunction on two alternative grounds.<sup>34</sup> Initially, it analyzed the settlement agreement as a contract, characterizing the proposed layoffs as "breach" of the city's obligation to increase substantially the number of blacks in supervisory positions.<sup>35</sup> Under this theory, the district court properly enjoined the city's potential breach of its contractual obligation. Alternatively, it held that, since new and unforeseen circumstances created a hardship for the class members, the district court possessed inherent authority to modify the consent judgment.<sup>36</sup> It flatly rejected

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this Consent Decree, do not thereby admit any violations of law, rule, or regulation with respect to the allegations made by plaintiffs in their complaints." *Id.* at 574. See generally, *Preparation and Management of Affirmative Action Program*, 1 EMPL. PRAC. GUIDE (CCH) ¶¶ 1390-1439; *Sample Agreements and Information Sources*, *id.* at ¶ 1485 (sample consent decree). Another typical decree is reprinted as an appendix in *United States v. City of Miami*, 614 F.2d 1322, 1342-51 (5th Cir. 1980), *modified*, 664 F.2d 435 (5th Cir. 1981) (en banc) (per curiam).

30. 104 S. Ct. at 2582.

31. See *Stotts v. Memphis Fire Dep't*, 679 F.2d 541, 549-51 (6th Cir. 1982), *rev'd*, 104 S. Ct. 2576 (1984).

32. No. 79-2441, slip op. at 1-5 (W.D. Tenn. May 8, 1981).

33. *Id.* at 2. Section 703(h) states: "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 . . . ."

34. 679 F.2d at 556-57.

35. *Id.* at 561-62.

36. *Id.* at 562-64.

the city and union's argument that modification infringed upon the protection extended by section 703(h).<sup>37</sup>

The first issue addressed by the Supreme Court was mootness. Stotts rested this claim on the fact that all the white employees laid off as a result of the district court's preliminary injunction had returned to work one month later and that the demoted employees were reoffered their old positions.<sup>38</sup> Since the majority rejected that contention, an extended analysis of that argument is unwarranted. It may be noted in passing, however, that the mootness issue was a close one. Both the majority and dissenting opinions marshalled an impressive array of facts and legal authorities in support of their respective positions.<sup>39</sup> Since the arguments in favor of mootness were weighty, one can fairly infer that the majority was particularly eager to reach the seniority/layoff issue.<sup>40</sup>

Justice White, writing the majority opinion in which Justices Burger, Powell, Rehnquist and O'Connor joined,<sup>41</sup> rejected both the contract theory and the inherent jurisdiction theory articulated by the Sixth Circuit. With respect to the contract theory, he found the consent decree's silence on the question of modifications in the seniority system to be persuasive. Since layoffs and seniority modifications were not issues dealt with in the "settlement contract," there was no basis upon which to issue an order enjoining the alleged breach.<sup>42</sup>

As for the district court's inherent authority to modify the consent decree, the majority held that such modification conflicted with the broad protection extended by Congress in section 703(h) for bona fide seniority systems.<sup>43</sup> Following this conclusion the decision veers off into a discussion of the limited scope of relief available under

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37. *Id.* at 564-66.

38. 104 S. Ct. at 2583.

39. Compare 104 S. Ct. at 2583-85 (White, J.) and *id.* at 2590-92 (O'Connor, J., concurring) with *id.* at 2596-602 (Blackmun, J., dissenting).

40. Indeed, the year before, the Court had granted certiorari in a case with the identical issue, but dismissed the case as moot without reaching the merits. Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *vacated and remanded for consideration of mootness sub nom.* Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 461 U.S. 477 (mootness issue arose because of "changed circumstances" brought about by subsequent state legislation), *vacated as moot sub nom.* Boston Chapter, NAACP v. Beecher, 716 F.2d 931 (1st Cir. 1983). On review for a second time, the Court in a 5-3 vote ordered the First Circuit to reconsider its holding in light of *Stotts*. 104 S. Ct. 2576 (1984). On remand, the court of appeals reaffirmed its judgment vacating the district court's order on the ground of mootness. 749 F.2d 102, 103-04 (1st Cir. 1984).

41. 104 S. Ct. 2576.

42. *Id.* at 2586.

43. *Id.* at 2586-87.

Title VII.<sup>44</sup> Why Justice White felt compelled to include this analysis is not at all clear. The rejection of the Sixth Circuit's rationale was certainly sufficient to vacate the injunction.

In the view of the majority opinion, Congress limited a court's remedial authority to providing "make-whole relief only to those who have been actual victims of illegal discrimination."<sup>45</sup> Similarly, Justice O'Connor, in a separate concurring opinion, wrote, "a court may use its remedial powers . . . only to prevent future violations and to compensate identified victims of unlawful discrimination."<sup>46</sup> Both opinions cite the Act's legislative history and earlier Title VII cases decided by the Court to support these propositions.<sup>47</sup>

The *Stotts* dicta provoked sharp debate, among both the Justices themselves and other members of the legal community. Justice Stevens, although concurring in the judgment, labelled the Court's discussion of Title VII "wholly advisory."<sup>48</sup> His opinion forcefully objected to the majority's statements, and observed "[t]his case involves no issue under Title VII; it only involves the administration of a consent decree."<sup>49</sup> In a speech delivered at the dedication of a new building at Northwestern University Law School in August,

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44. *Id.* at 2588-90.

45. *Id.* at 2589. A foreshadowing of the Court's new emphasis may be found in *Connecticut v. Teal*, 457 U.S. 440 (1982), in which the Court held that an employer's use of a written test having a discriminatory impact on minority employees in the promotion process constituted a *prima facie* violation of Title VII even though the employer's "bottom line" statistics reflected the racial composition of the labor pool. The majority opinion emphasized Title VII's overriding statutory goal of protecting the "individual employee." *Id.* at 453-56. For criticism of the *Teal* holding, see generally Blumrosen, *The Group Interest Concept, Employment Discrimination, and Legislative Intent: The Fallacy of Connecticut v. Teal*, 20 HARV. J. ON LEGIS. 99 (1983) [hereinafter cited as Blumrosen]; Irvin, *Erasing the "Bottom Line"*: *Connecticut v. Teal*, 6 HARV. WOMEN'S L.J. 175 (1983). *But see* Rigler, *Connecticut v. Teal: The Supreme Court's Latest Exposition of Disparate Impact Analysis*, 59 NOTRE DAME L. REV. 313 (1984) [hereinafter cited as Rigler]. For reasons which are not readily apparent, neither Justice White nor Justice O'Connor cited *Teal* in *Stotts*. The Justices relied principally on *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), and *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). *Stotts*, 104 S. Ct. at 2584-94; *see infra* note 382.

*Stotts* may also represent simply more "backpedaling" along the lines of *Beazer v. New York Transit Auth.*, 440 U.S. 568 (1979); *Furnco Constr. Co. v. Waters*, 438 U.S. 567 (1978); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); and *Washington v. Davis*, 426 U.S. 229 (1976). *See* Kreiling & Mercurio, *Beyond Weber: The Broadening Scope of Judicial Approval of Affirmative Action*, 88 DICK. L. REV. 46, 54 n.42 (1983); *see also infra* note 87; Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 88, 141 (1981).

46. 104 S. Ct. at 2593.

47. *Id.* at 2588-89 (White, J., majority), 2591-93 (O'Connor, J., concurring).

48. *Id.* at 2594 (Stevens, J., concurring).

49. *Id.*

1984, Justice Stevens criticized the Court for reaching out to address the issue.<sup>50</sup>

Justice Blackmun, joined by Justices Brennan and Marshall, filed a vigorous dissent in *Stotts* in which he addressed the propriety of non-individualized "race conscious" affirmative relief.<sup>51</sup> The dissent focused on the case's procedural posture, emphasizing that the dispute arose in the context of administering a consent decree and resolving a motion for a preliminary injunction. Relying on the legislative history of Title VII as enacted in 1964 and amended in 1972, Justice Blackmun endorsed relief for non-victims as a means of eradicating the class-wide effects of prior discrimination.<sup>52</sup> He reasoned that injury to a group required group-structured relief.<sup>53</sup>

The controversy, sparked by the discussion of Title VII remedies in the *Stotts* opinion, immediately spilled over into other Title VII litigation. The Civil Rights Unit of the Department of Justice, which had filed an amicus curiae brief in *Stotts*,<sup>54</sup> seized upon the language in the majority and concurring opinions and filed briefs in several public employment cases arguing that relief to non-victims violates the statute.<sup>55</sup> To date, this position has been consistently rejected by the circuit courts and the district courts, which have interpreted *Stotts* very narrowly.<sup>56</sup>

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50. Address by Justice John Paul Stevens, Dedication of the Arthur Rubloff Building, Northwestern University School of Law (Aug. 4, 1984). Justice Stevens' comments received front page attention. N.Y. Times, Aug. 5, 1984, at A1, col. 1.

51. 104 S. Ct. at 2605-10 (Blackmun, J., dissenting).

52. *Id.* at 2608-10.

53. *Id.*

54. As amicus, the Department of Justice urged the Court to reverse the court of appeals' decision on the ground that section 703(h) protected the seniority system between the Memphis Fire Department and the union. In its brief, the Department forcefully emphasized its view that under Title VII a court cannot order relief to anyone other than a specific victim of discrimination. Brief for the United States Amicus Curiae in Support of Petitioners at 10, 11, 23-29, *Firefighters Local No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984).

55. The Department has aggressively pursued this position, referring to what are obviously dicta in Justices White's and O'Connor's opinions as the case's *holding*. The Department has filed briefs in several cases, urging the courts of appeals to reverse the granting of quota-type relief for non-victims. *E.g.*, Reply Brief for the United States at 2-10, *Paradise v. Prescott*, 767 F.2d 1514 (11th Cir. 1985), *aff'g* 580 F. Supp. 171 (M.D. Ala. 1983); see N.Y. Times, July 18, 1984, at B8, col. 1 (in arguing before Court of Appeals for the Fifth Circuit attorneys for Department of Justice contended "the judge's order 'is precisely the sort of racial quota that the [*Stotts*] Court found impermissible.'")

In *Wygant v. Jackson Bd. of Educ.*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985), the Department has also argued analogously that race-conscious affirmative relief for non-victims violates the fourteenth amendment. See *supra* note 17.

56. *E.g.*, *Turner v. Orr*, 759 F.2d 817, 823-26 (11th Cir. 1985); *Vanguards of*

## II. The Statute Itself

### A. A Brief Description

Essentially, Title VII prohibits an employer from considering an individual's race, color, religion, sex or national origin in making any decision related to the compensation, terms or conditions or privileges of employment.<sup>57</sup> Title VII not only prohibits an employer from treating his employees differently based on these characteristics, but it also prohibits employment practices which have a disparate impact.<sup>58</sup> Similar prohibitions are applicable to employment agencies and labor unions.<sup>59</sup>

Two specific provisions of Title VII are pertinent to determining the scope of a court's remedial power. The first is section 706(g), which provides in pertinent part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice

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Cleveland v. City of Cleveland, 753 F.2d 479, 485-89 (6th Cir.), *cert. granted*, 54 U.S.L.W. 3223 (U.S. Oct. 8, 1985); EEOC v. Local 638, Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172, 1185-86 (2d Cir.), *cert. granted*, 54 U.S.L.W. 3223 (U.S. Oct. 8, 1985); Van Aken v. Young, 750 F.2d 43, 44-45 (6th Cir. 1984); Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1157-59 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 909-11 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); Deveraux v. Geary, 596 F. Supp. 1481, 1485-87 (D. Mass. 1984), *aff'd*, 765 F.2d 268 (1st Cir. 1985); Britton v. South Bend Community School Corp., 593 F. Supp. 1223, 1228-31 (N.D. Ind. 1984), *aff'd*, 775 F.2d 794 (7th Cir. 1985); NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194, 1202-03 (E.D. Mich. 1984).

57. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e-2 (1982)). Subsection (e) of section 703 carves out an exception if "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise." *Id.* § 703(e) (codified as amended at 42 U.S.C. § 2000e-2(e) (1982)).

In addition, the statute specifically excludes from its coverage the employment of aliens outside the United States and permits a religious corporation, association, educational institution or society to discriminate solely on the basis of religion. *Id.* § 702 (codified as amended at 42 U.S.C. § 2000e-1).

58. *See supra* notes 74-89, 338-46 and accompanying text. "Disparate treatment" cases generally turn on proof of an employer's conscious motive; whereas "disparate impact" cases deal with practices which appear neutral but affect one group more severely than another. The employer's good faith motivation is irrelevant in the latter type of case. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-37 n.15 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23 (1975); *see also Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577-78 (1978). *Compare McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973) with *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971). *See generally* Blumrosen, *supra* note 45; Rigler, *supra* note 45.

59. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(b), (c), 78 Stat. 255 (codified as amended at 42 U.S.C. § 2000e-2(b), (c) (1982)).

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) of this title.<sup>60</sup>

The second provision is section 703(j) which states:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual or to any group because of the race . . . 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 . . . 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 . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.<sup>61</sup>

The problem posed by these two provisions is their precise relationship to one another. section 703(j) does not contain a blanket prohibition against preferential treatment to correct a racial imbalance between an employer's work force and the appropriate labor market.<sup>62</sup> It simply states that nothing in Title VII requires preferential treat-

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60. 42 U.S.C. § 2000e-5(g). "Intentionally" does not refer to motive and has generally been interpreted to mean "not accidentally." *See, e.g.,* *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972); *Rowe v. General Motors Corp.*, 457 F.2d 348, 359-60 (5th Cir. 1972); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971).

61. 42 U.S.C. § 2000e-2(j) (1982).

62. For ease of reference, this Article will address discrimination on the basis of race. Unless otherwise indicated, however, its analysis is equally applicable to discrimination based on any of the other outlawed characteristics (i.e., color, religion, sex, national origin).

ment. On the other hand, section 706(g) on its face appears to deny a court the power to order relief to an individual under Title VII in the absence of a discriminatory act specifically affecting that individual.

Three theories have been suggested to reconcile the two provisions.<sup>63</sup> According to the "violation" theory, section 703(j) precludes a court from finding a violation of Title VII based only on an employer's failure to correct voluntarily any racial imbalance existing in its work force.<sup>64</sup> However, once a court finds a Title VII violation based on disparate treatment or adverse impact, section 706(g) vests the court with a full panoply of equitable powers, including the ordering of preferential relief for non-victims.<sup>65</sup> It is difficult to square this theory with the actual wording of that provision prohibiting a court from ordering relief "for any reason other than discrimination on account of race . . . ."<sup>66</sup> The legislative history of section 706(g) suggests, however, that Congress did not intend for this language to be taken at face value.<sup>67</sup>

The "remedy" theory argues precisely the opposite interpretation. It views section 703(j) as a direct limitation on a court's powers.<sup>68</sup> This interpretation has never gained broad judicial acceptance, although it has been articulated on occasion in dissenting and concurring opinions.<sup>69</sup>

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63. Note, *Preferential Relief Under Title VII*, 65 VA. L. REV. 729, 733-37 (1979) [hereinafter cited as *Preferential Relief*]; see Comment, *Affirmative Relief Under Title VII of the Civil Rights Act of 1964*, 29 BAYLOR L. REV. 373, 374-87 (1977) [hereinafter cited as *Affirmative Relief*]; see also Edwards & Zaretsky, *supra* note 4, at 25-28; Sape, *The Use of Numerical Quotas to Achieve Integration in Employment*, 16 WM. & MARY L. REV. 481, 496-500 (1975).

64. *Preferential Relief*, *supra* note 63, at 733-34; Slate, *supra* note 12, at 331.

65. *United States v. International Union of Elevator Constructors, Local Union No. 5*, 538 F.2d 1012, 1018-20 (3d Cir. 1976); *Carter v. Gallagher*, 452 F.2d 315, 328-29 (8th Cir. 1972) (en banc), *cert. denied*, 406 U.S. 950 (1972); *United States v. International Bhd. of Elec. Workers, Local No. 38*, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

66. Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(g), 78 Stat. 261 (codified as amended at 42 U.S.C. § 2000e-5(g)); see *supra* note 60 and accompanying text.

67. See *infra* notes 212-54 and accompanying text; *Preferential Relief*, *supra* note 63 at 737-59; *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *United States v. International Union of Elevator Constructors, Local Union No. 5*, 538 F.2d 1012, 1019-20 (3d Cir. 1976); *Day v. Mathews*, 530 F.2d 1083, 1084-85 (D.C. Cir. 1976); *King v. Laborers Int'l Union, Union Local No. 818*, 443 F.2d 273, 278-79 (6th Cir. 1971); see also Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292 (1982).

68. *Preferential Relief*, *supra* note 63, at 734-35.

69. See, e.g., *Rios v. Enterprise Ass'n Steamfitters Local 638 of U.A.*, 501 F.2d 622, 634-39 (2d Cir. 1974) (Hays, J., dissenting) ("under no circumstance

The most popular theory is the "hybrid," in which section 703(j) is viewed as having both remedial and substantive implications. In other words, mere racial imbalance is not *per se* conclusive proof of discrimination<sup>70</sup> and, accordingly, cannot be the sole basis upon which relief is granted. If there is evidence of discrimination, however, the court is ordering preferential treatment for reasons *not* "on account of an imbalance."<sup>71</sup> Members of the group discriminated against are entitled to relief regardless of specific discriminatory acts directed at them. Some commentators have criticized this theory, arguing that section 703(j) is superfluous if Congress merely intended to withdraw Title VII as a statutory source for requiring employers to remedy racial imbalance in the absence of prohibited discriminatory practices. To these commentators, section 706(g) makes it crystal clear that a court may not order individual relief in the absence of proof of unlawful discrimination directed at that individual.<sup>72</sup>

The problem with this criticism is that it overlooks the tumultuous legislative history of the statute. It would be nice—but naive, given the political upheaval surrounding Title VII's passage—to assume that Congress drafted the various sections of the statute to fit neatly together and, like pieces of a jigsaw puzzle, to make a harmonious composition—each section being logically related to the other.<sup>73</sup>

does Title VII require or authorize the imposition of racial employment quotas as a remedial device"); *United States v. International Ass'n of Operating Engineers, Local Union No. 701*, 14 Fair Empl. Prac. Cas. (BNA) 1400 (D. Or. 1977); see also *Local Union No. 35, IBEW v. City of Hartford*, 625 F.2d 416, 425-29 (2d Cir. 1980) (Van Graafeiland, J., dissenting), *cert. denied*, 453 U.S. 913 (1981); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 276-77 (4th Cir.) (Widener, J., concurring and dissenting), *cert. denied*, 429 U.S. 920 (1976); *Carson v. American Brands, Inc.*, 446 F. Supp. 780, 784-87 (E.D. Va. 1977), *appeal dismissed*, 606 F.2d 420 (4th Cir. 1979), *rev'd*, 450 U.S. 79 (1981); *Price v. Civil Service Comm'n*, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (Mosk, J., dissenting), *cert. dismissed*, 449 U.S. 811 (1980).

70. *Preferential Relief*, *supra* note 63, at 735-37; Edwards & Zaretsky, *supra* note 4, at 27-28; see *United States v. IBEW, Local No. 38*, 428 F.2d 144, 149-52 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); *accord Rios v. Enterprise Ass'n Steamfitters Local 638 of U.A.*, 501 F.2d 622, 630-31 (2d Cir. 1974); *United States v. Ironworkers Local 86*, 443 F.2d 544, 552-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); *Local 53, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. Vogler*, 407 F.2d 1047, 1051-53 (5th Cir. 1969).

71. *United States v. IBEW, Local 38*, 428 F.2d 144, 149 (6th Cir.) (quoting 42 U.S.C. § 2000e-2(j) (1964)), *cert. denied*, 400 U.S. 943 (1970); *Preferential Relief*, *supra* note 63, at 735-36.

72. *Preferential Relief*, *supra* note 63, at 747; *Affirmative Relief*, *supra* note 63, at 383-84.

73. Senator Dirksen has been quoted as saying: "I doubt very much whether in my whole legislative lifetime any measure has received so much meticulous



## B. Title VII Litigation: An Overview

In order to put the problem posed by sections 706(g) and 703(j) in sharper focus, familiarity with the two general kinds of Title VII litigation is required.<sup>74</sup> In a "disparate treatment" case, a private plaintiff sues either on his own behalf or on behalf of a class, claiming the employer treated some people less favorably than others because of their race, color, religion, sex, or national origin.<sup>75</sup> The proof offered directly concerns the plaintiff and the employer's motives and often consists of anecdotal evidence such as conversations with the employer, a supervisor or co-workers. Frequently, this proof is supplemented with statistical or other generalized information showing that the employer has treated others similarly situated to the plaintiff in a like discriminatory manner.<sup>76</sup>

The Supreme Court addressed the issue of burden of proof in *McDonnell Douglas Corp. v. Green*,<sup>77</sup> holding that a prima facie case of racial discrimination exists when a plaintiff shows:

- (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications.<sup>78</sup>

If the plaintiff presents such proof, the burden of going forward with the evidence shifts to the employer; the employer must show a legitimate non-discriminatory reason for the rejection. If the em-

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attention. We have tried to be mindful of every word, of every comma, and of the shading of every phrase." 110 CONG. REC. 11,935 (1964). This comment reeks of the hyperbole for which the Senator was renowned. Moreover, it ignores the political climate and the fact that last minute changes were made in the political hurly-burly in order to guarantee the statute's passage. See *infra* notes 198-201 and accompanying text.

74. For a comprehensive analysis of the disparate treatment and adverse impact theories of employment discrimination, see Schlei & Grossman, *supra* note 12, at 1286-1394. See generally Friedman, *The Burger Court and the Prima Facie Case in Employment Discrimination Litigation: A Critique*, 65 CORNELL L. REV. 1 (1979).

75. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977). See generally Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205 (1981).

76. See, e.g., *Heyman v. Tetra Plastics Corp.*, 640 F.2d 115, 120-21 (8th Cir. 1981); *Underwood v. Jefferson Memorial Hosp.*, 639 F.2d 455, 457 (8th Cir. 1981); *Fong v. American Airlines, Inc.*, 626 F.2d 759, 762 (9th Cir. 1980); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 930 (10th Cir. 1979); *Holder v. Old Ben Co.*, 618 F.2d 1198, 1199-1202 (7th Cir. 1980).

77. 411 U.S. 792 (1973).

78. *Id.* at 802.

ployer successfully does so, the plaintiff must then demonstrate that the employer's explanation is a pretext.<sup>79</sup> At all times, however, the ultimate burden of proving discrimination remains with the plaintiff.<sup>80</sup>

In an "adverse impact" case, the nature of the plaintiff's case is significantly different. The emphasis shifts from the employer's motives or intent to the consequences of its employment policies or practices. As the Court observed in *Griggs v. Duke Power Co.*,<sup>81</sup> "intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."<sup>82</sup>

The Court has approved the use of this approach to challenge employment tests,<sup>83</sup> height and weight requirements<sup>84</sup> and educational requirements such as a high school diploma.<sup>85</sup> In contrast to the disparate treatment theory, if the plaintiff establishes a prima facie case, the burden of proof shifts to the employer who must show a business necessity for the practice.<sup>86</sup> If the employer satisfies its burden, the burden then shifts to the plaintiff who must demonstrate the existence of other selection mechanisms capable of accomplishing the same goal without so severely impacting the protected group.<sup>87</sup>

In an individual action, regardless of which theory the successful plaintiff has relied upon, he is generally entitled to back pay<sup>88</sup> and

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79. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

80. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); see *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 n.2 (1978); *id.* at 29 (Stevens, J., dissenting). See generally 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940) (burden of persuasion "never shifts"). Of course, if the plaintiff's case is tried on the merits, the court must decide the ultimate issue of liability and the presumption "'drops from the case.'" *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

81. 401 U.S. 424 (1971).

82. *Id.* at 432. See generally Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

83. *E.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 425-29 (1971).

84. *E.g.*, *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

85. *E.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 425-27 (1971).

86. *E.g.*, *Coe v. Yellow Freight Sys. Inc.*, 646 F.2d 444, 450-51 (10th Cir. 1981).

87. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975); accord *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982).

88. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418-25 (1975); accord *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976). By deciding that an employer

a compensatory award of retroactive seniority.<sup>89</sup> In a class action, the paradigmatic judgment or consent decree contains three categories of relief.<sup>90</sup> First, employee/victims receive back pay, retroactive seniority and promotions designed to put them in their "rightful place," i.e., the job they would have held absent the employer's discriminatory practices.<sup>91</sup> Similar relief is available for applicant/victims and even for those who can demonstrate that, although they never specifically applied for a job, they would have applied except for the employer's known discriminatory hiring policies.<sup>92</sup> The relief granted thus parallels the relief awarded in an individual action.

Second, non-victims receive employment preferences.<sup>93</sup> The purpose of this relief is not to compensate the non-victim. Rather, it is to remedy existing class-wide effects of the employer's discriminatory conduct. This is why the most common form of relief consists of "percentage" accommodations in the employer's hiring and promotion practices.

In order to attract minority applicants, an employer may be directed to recruit at schools with a high percentage of minority students, to place help-wanted ads in the minority media, to keep extensive records detailing the hiring process or to develop non-biased, job-related tests.<sup>94</sup>

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can toll the accrual of a back pay award by unconditionally offering the plaintiff employment *without* retroactive seniority, the Court has cut back somewhat on the expansiveness of these earlier holdings. See *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982); see also *supra* note 45.

89. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 773-79 (1976). Awards of retroactive seniority cannot, however, be made to any date earlier than July 2, 1965, the effective date of Title VII. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 351-54 (1977).

90. Model judgments or consent decrees are reprinted at *EMPL. PRAC. GUIDE (CCH)* ¶¶ 1484-97; see also *supra* note 29.

91. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 343-47 (1977).

92. *Id.* at 363-71.

93. See *supra* note 12 and accompanying text.

94. *E.g.*, *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 355 (5th Cir. 1977) (employer ordered to recruit management trainees at predominantly black colleges and universities), *cert. denied*, 434 U.S. 1034 (1978); *Jones v. Milwaukee County*, 22 Fair Empl. Prac. Cas. (BNA) 519, 525 (E.D. Wisc. 1984) (employer ordered to advertise vacancies "by means which will reasonably reach members of the black, Latin and Indian communities"); *Kirby v. Colony Furniture Co.*, 21 Fair Empl. Prac. Cas. (BNA) 1169 (E.D. Ark. 1978) (employer ordered to keep detailed reports of recruitment efforts and to notify Arkansas Employment Security Division and Urban League of vacancies), *aff'd in part and rev'd in part on other grounds*, 21 Fair Empl. Prac. Cas. (BNA) 1179 (8th Cir. 1980); *Abron v. Black & Decker Mfg. Co.*, 18 Fair Empl. Prac. Cas. (BNA) 984, 993, 1002 (D. Md. 1977) (employer ordered to recruit at schools within Baltimore City where percentage

The problem alluded to in *Stotts* arises with respect to the second category of relief, employment preferences benefiting individuals who are unable to prove that they suffered from specific acts of discrimination. Justice White's opinion suggests that section 706(g) prohibits relief for these "non-victims."<sup>95</sup> The impact of this interpretation on Title VII litigation is staggering. It would undo carefully crafted relief which has been approved by each of the twelve geographic circuit courts of appeals.<sup>96</sup>

### III. The Affirmative Action Triad—*Bakke*, *Weber* and *Fullilove*

The insistence of the majority in *Stotts* that section 706(g) restricts a court's authority to award preferential treatment to non-victims of discrimination<sup>97</sup> must be examined in light of *Regents of the University of California v. Bakke*,<sup>98</sup> *United Steelworkers of America v. Weber*<sup>99</sup> and *Fullilove v. Klutznick*.<sup>100</sup> Although they are analytically distinct, the three cases weave the fabric of the Supreme Court's jurisprudence respecting the most controversial aspect of affirmative action: reverse discrimination. In each of these cases, the plaintiff asked the Court to consider the validity—either constitutional or statutory—of a program resulting in the displacement of the economic and/or educational expectations of the white majority.<sup>101</sup> In each case, the program's beneficiary was a member of a minority group who benefited from the displacement solely by virtue of his participation in the minority group.<sup>102</sup> In each case, actual victimization was not a predicate to entitlement.

Unfortunately, these cases yield few principles by which to test

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of black students is greater than suburban school districts), *aff'd in part, vacated in part*, 654 F.2d 951 (7th Cir. 1981); *United States v. City of Socorro*, 25 Fair Empl. Prac. Cas. (BNA) 815, 826 (D. N.M. 1976) (employer ordered to keep detailed records of recruitment efforts and to advertise the fact of the court's order directing it "to make every reasonable effort to recruit women"); *Morgan v. Kerrigan*, 388 F. Supp. 581, 582 (D. Mass. 1975) (employer ordered to recruit at colleges with significant numbers of black students), *aff'd*, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

95. See *supra* note 10 and accompanying text.

96. See *supra* note 12.

97. 104 S. Ct. at 2588-90.

98. 438 U.S. 265 (1978); see *infra* notes 106-53 and accompanying text.

99. 443 U.S. 193 (1979); see *infra* notes 154-90 and accompanying text.

100. 448 U.S. 448 (1980); see *infra* notes 154-90 and accompanying text.

101. *Fullilove v. Klutznick*, 448 U.S. 448, 455 (1980); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 199-200 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277-78 (1978).

102. *Fullilove*, 448 U.S. at 453-54, 458-59; *Weber*, 443 U.S. at 193, 198-99; *Bakke*, 438 U.S. at 272-76.

*Stotts*. Despite the cases' parallel issues, the Court's multitudinous decisions form a crazy quilt pattern, in which order, consistency and symmetry of values are nowhere to be seen.<sup>103</sup> Numerous scholars have attempted, with little success, to reconcile the sixteen separate opinions in these cases into a doctrinal whole or, at a minimum, to isolate their transcendent themes.<sup>104</sup> This author makes no pretense of succeeding where far more renowned commentators have failed. The question which this article proposes to answer in this section is a limited one: to what extent do these cases support or undercut the legitimacy of group relief for non-victims under Title VII?

Obviously, *Weber* is most directly pertinent to the question since it involves the legality under Title VII of a voluntary affirmative action program privately initiated by an employer, using racial quotas. Members of the group benefiting from this largesse were not themselves victims of any discriminatory conduct on the part of the employer.<sup>105</sup> Since *Fullilove* and *Bakke* involved equal protection

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103. As the Court of Appeals for the Fifth Circuit so aptly remarked, "We frankly admit that we are not entirely sure what to make of the various *Bakke* opinions. In over one hundred and fifty pages of United States Reports, the Justices have told us mainly that they have agreed to disagree." *United States v. City of Miami*, 614 F.2d 1322, 1337 (5th Cir. 1980), *modified*, 664 F.2d 435 (5th Cir. 1981) (en banc) (per curiam).

Professor Schatzki has explained why it is not possible to reconcile the three cases in any coherent fashion. "In my judgment, logic will never resolve the conflicting norms. The reasons which support affirmative action plans cannot be reconciled with the reasons that dictate the weaknesses of such plans. *Griggs* and *Bakke*, also, were compromises, of sorts, not reconciliations." Schatzki, *United Steelworkers of America v. Weber: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 72 (1980) [hereinafter cited as Schatzki].

104. The constitutionality of affirmative action programs in general and "benign" or "reverse" discrimination in particular has been a fertile field for scholars. They have waged a lively debate on the legal issues involved as well as the desirability of goals and quotas from a social perspective. In addition to the literature cited in *supra* note 3, see A. BICKEL, *THE MORALITY OF CONSENT* 132-33 (1975); Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974); Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U. L. REV. 1 (1979); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1044-45 (1979); Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213 (1980). See generally ROBERT K. FULLINWIDER, *THE REVERSE DISCRIMINATION CONTROVERSY: A MORAL AND LEGAL ANALYSIS* (1980); *Bakke Symposium: Civil Rights Perspective*, 14 HARV. C.R.-C.L. L. REV. 1 (1979).

105. See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 198-99 (1979).

challenges under the Fifth and Fourteenth Amendments, respectively, and not Title VII, they have less direct relevance than *Weber* does. They cannot be overlooked, however, because they also touch upon the propriety of group relief, albeit in a more indirect fashion.

### A. The *Weber* Decision

The Court's opinion in *Weber* is central to this article's examination of the concept of group relief for non-victims of discrimination. In that case, Kaiser Aluminum & Chemical Corporation (Kaiser) and the United Steelworkers Union of America (USWA) entered into a collective bargaining agreement establishing a training program to enable unskilled production workers at various plants to qualify for craft positions.<sup>106</sup> The Kaiser-USWA agreement was not prompted by either party's particular solicitude for minority workers. They were under heavy pressure to accelerate and improve job opportunities not only from the Office of Federal Contract Compliance but also from disgruntled black employees who were threatening to file their own Title VII suit.<sup>107</sup>

In large measure, admission to the program hinged on the applicant's race.<sup>108</sup> Under the agreement, Kaiser and the USWA reserved fifty percent of the places for black employees. Thus, there were two lists of applicants: one composed of white employees, the other of black employees. Within each racial group, selection was made on the basis of seniority.<sup>109</sup>

*Weber*, a white production worker at Kaiser's Gramercy, Louisiana plant, applied for admission into a training program but was rejected by operation of the fifty percent quota. *Weber*, like several other rejected white employees, had greater seniority than some of the black employees selected. If straight seniority had been the basis for selection, as normally would be the case, Kaiser would have admitted *Weber*

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106. *Id.* at 197-98.

107. 443 U.S. 193, 197-98, 209-11 (Blackmun, J., concurring) (1979); see *infra* note 262. In fact, Kaiser's employment practices at another Louisiana plant were successfully challenged by black employees while *Weber* was winding its way to the Supreme Court. See *Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979), *on remand*, 497 F. Supp. 339 (E.D. La. 1980).

108. 443 U.S. at 198-99. Technically speaking the affirmative action quota benefited not only blacks, but also other minority groups and women. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 228 n.2 (5th Cir. 1977) (Wisdom, J., dissenting opinion), *rev'd*, 443 U.S. 193 (1979). However, at the Kaiser plant where *Weber* worked the minority selectees consisted of blacks only. *Id.*

109. 443 U.S. at 199.

and other white employees into the program and excluded most of the black employees. Weber challenged the collective bargaining agreement, arguing it violated subsections (a) and (d) of Section 703 of Title VII which make it unlawful to "discriminate . . . because of . . . race" in hiring and apprenticeship programs.<sup>110</sup> The district court invalidated the plan holding that a quota could be used only by the courts, and not by private parties, to remedy discrimination.<sup>111</sup> The Court of Appeals for the Fifth Circuit, while affirming the decision, did so on a very different ground, foreshadowing *Stotts*. It held that quotas could be used only to benefit identifiable victims of discrimination.<sup>112</sup> Judge Wisdom dissented, however, arguing that the evidence introduced at trial showed "arguable violations of Title VII" (apart from the plan) by both Kaiser and the USWA. In his view, the serious possibility of Title VII liability justified the creation of a race-conscious program to remedy the present effect of past discrimination.<sup>113</sup>

The Supreme Court reversed, in a 5-2 decision.<sup>114</sup> Justice Brennan wrote the majority opinion in which Justices Stewart, White, Marshall and Blackmun joined. Justice Blackmun also wrote a separate concurring opinion. Chief Justice Burger and Justice Rehnquist dissented. Justices Powell and Stevens, for undisclosed reasons, did not participate. Justice Brennan's opinion began by defining the issue as narrowly as possible: "The question for decision is whether Congress, in Title VII of the Civil Rights Act of 1964 . . . left employers and unions in the private sector free to take . . . race-conscious steps

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110. *Id.* at 199-204. Earlier, in *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), the Court had ruled that Title VII protects whites as well as blacks from employment discrimination.

111. *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761 (E.D. La. 1976). In approving judicially imposed quotas the court noted that: "The most important and obvious distinction is the fact that sections 703(a) and (d) of Title VII do not prohibit the *courts* from discriminating against individual employees by establishing quota systems where appropriate. The proscriptions of the statute are directed solely to *employers*." *Id.* at 767 (emphasis added). The opinion also emphasized the court's pivotal responsibilities in assuring that the dictates of due process were observed, in fashioning relief and in guaranteeing that the plan did not last any longer than necessary to achieve the goals of Title VII. *Id.* at 767-68. Justice Brennan's opinion addresses these concerns, *sub silentio*, in *Weber* by emphasizing four sets of facts necessary to support a voluntary affirmative action plan. See *infra* notes 124-28 and accompanying text.

112. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977).

113. *Id.* at 227-34 (Wisdom, J., dissenting). He also maintained that Title VII permitted employers to use race-conscious programs to remedy societal discrimination. *Id.* at 235-39.

114. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1979).

to eliminate manifest racial imbalances in traditionally segregated job categories."<sup>115</sup>

Accepting the proposition that subsections (a) and (d) seemed to forbid the selection mechanism of the Kaiser-USWA agreement, the majority nonetheless upheld Kaiser's refusal to admit Weber. Faulting the plaintiff's "reliance upon a literal construction" of the statute and recalling the "'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers,'"<sup>116</sup> Justice Brennan insisted that section 703's prohibition of racial discrimination had to be "read against the background of the legislative history of Title VII and the historical context from which the Act arose."<sup>117</sup> Since the purpose of Title VII was to bring blacks into the mainstream of American society, he had little difficulty in concluding that striking down the affirmative action program "would 'bring about an end completely at variance with the purpose of the statute' and must be rejected."<sup>118</sup>

Although the majority opinion does not explicitly so state, little doubt exists that the *Weber* result was compelled by the Court's decision in *Griggs v. Duke Power Co.*<sup>119</sup> and *Albemarle Paper Co. v. Moody*.<sup>120</sup> In *Griggs*, the Supreme Court ruled that employment practices neutral on their face nonetheless violated Title VII if they

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115. 443 U.S. at 197. At still another point in the opinion, the Court reemphasized the limited nature of the question, stating: "The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan." *Id.* at 200.

116. *Id.* at 201, 202 (citations omitted). Justice Brennan's opinion has met harsh scholarly criticism. See, e.g., Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17, 45; Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980); Walker, *The Exorbitant Cost of Redistributing Justice*, 21 B.C.L. REV. 1 (1979). While admitting its weaknesses other scholars have nonetheless applauded its holding. See, e.g., Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 59 N.C.L. REV. 531 (1981) [hereinafter cited as Belton]; Blumrosen, *Affirmative Action in Employment After Weber*, 34 RUTGERS L. REV. 1 (1981) [hereinafter cited as *Employment After Weber*]; Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of Weber*, 13 CREIGHTON L. REV. 713 (1980) [hereinafter cited as *The Head and Tail of Weber*]; Schatzki, *supra* note 103; see also Boyd, *Affirmative Action in Employment—The Weber Decision*, 66 IOWA L. REV. 1 (1980) [hereinafter cited as Boyd].

117. 443 U.S. at 201.

118. *Id.* at 202.

119. 401 U.S. 424 (1971).

120. 422 U.S. 405 (1975).



had an adverse impact on minorities and could not be justified as a business necessity.<sup>121</sup> In *Albemarle Paper Co.*, the Supreme Court extended *Griggs* significantly by placing an affirmative responsibility on the employer to eliminate the effects of the offending employment practice.<sup>122</sup> Indeed, Justice Brennan quoted *Moody's* admonition that Congress intended that Title VII act as a "spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" <sup>123</sup> In other words, what Weber was really complaining about was the efforts of Kaiser and the union to follow the Supreme Court's dictate in *Moody*!

Justice Brennan's opinion in *Weber*, however, did not give an unqualified imprimatur to any and all race-conscious plans adopted by an employer.<sup>124</sup> Four sets of facts drew heavy emphasis: first, that the program was voluntarily adopted;<sup>125</sup> second, that it did not "unnecessarily trammel the interests of white employees;"<sup>126</sup> third, that

121. 401 U.S. at 429-33.

122. 422 U.S. at 417-18; see Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 954-55 (1982).

123. 443 U.S. at 204 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975)) (emphasis added).

124. *Id.* at 208.

125. *Id.* at 200-01. The question of the plan's voluntary character is open to dispute. Executive Orders 11246 and 11375 obligated Kaiser to adopt an affirmative action program as a condition of doing business with the government.

The courts have been unsympathetic to claims that compliance with E.O. 11246 was not "voluntary." See, e.g., *McLaughlin v. Great Lakes Dredge & Dock Co.*, 23 Fair Empl. Prac. Cas. (BNA) 1295 (N.D. Ohio 1980); *Tangren v. Wackenhut Services, Inc.*, 480 F. Supp. 539 (D. Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

For a stimulating analysis of the "voluntary" component of the *Weber* rationale, see Cox, *The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87 (1981).

126. 443 U.S. at 208. It is important to recall that as a result of the "50/50" split lists, no white employee suffered the loss of a vested—or even anticipated—benefit. No whites were laid off; none were "bumped"; none suffered any diminution of seniority rights. Ironically, if Kaiser and the USWA (admittedly acting out of self-interest) had not agreed to the in-plant training program, the white workers could not have qualified for the craft position and would have remained in their unskilled production jobs. See *id.* at 198-99.

The selection of an appropriate percentage for awarding benefits based on race is a difficult one. Under the collective bargaining agreement, 50% of the places were reserved for blacks. The percentage of black workers in the labor force, however, was 39%. 443 U.S. at 198-99. This discrepancy has generated much discussion concerning the computation of *Weber*-type quotas. See Allegretti, *Voluntary Racial Goals After Weber: How High Is Too High?*, 17 CREIGHTON L. REV. 773 (1984) [hereinafter cited as Allegretti]. Professor Allegretti suggests interim

it was temporary in nature;<sup>127</sup> and fourth, that it was designed "to eliminate conspicuous racial imbalance in traditionally segregated job categories."<sup>128</sup>

Post-*Weber* litigation in the lower courts has generally revolved around the significance of these four facts.<sup>129</sup> Based on *Dothard v.*

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goals should rarely exceed 50%. *Id.* at 796. Similarly, Professor Blumrosen, has said "[t]o reserve all jobs for minorities or women is probably illegal; reservation of more than fifty percent may be suspect. *Employment After Weber*, *supra* note 116, at 33; see *Valentine v. Smith*, 654 F.2d 503, 510-11 (8th Cir.) (interim goal 25%, final goal 5%), *cert. denied*, 454 U.S. 1124 (1981); *NAACP v. Allen*, 493 F.2d 614, 619-22 (5th Cir. 1974) (interim goal 50%, final goal 25%); *Price v. Civil Serv. Comm'n, Sacramento County*, 26 Cal. 3d 257, 275-76, 604 P.2d 1365, 1376, 161 Cal. Rptr. 475, 486-87 (1980) (interim goal 33%, final goal 8%).

127. 443 U.S. at 208-09. The "temporary" nature of the program is a matter of some dispute. Justice Rehnquist cited the testimony of Kaiser's industrial relations superintendent, who indicated that once the percentage of black employees in craft positions reached 39% Kaiser would continue "placing trainees in the program at that percentage." 443 U.S. at 224 n.3 (Rehnquist, J., dissenting) (citation omitted). Kaiser will not be facing the problem of maintaining the racial balance of its work force for some time, however. Most commentators agree that the percentage of black craftspersons at the plant will not equal the percentage of blacks in the local labor force until the plan has been in effect for 30 years. Powers, *Implications of Weber—"A Net Beneath"*, 5 EMPLOYEE REL. L.J. 325, 329 (1979).

128. 443 U.S. at 209 (footnote omitted). Lower courts in interpreting *Weber's* requirement of a "traditionally segregated job category" have generally looked to "a history of racial discrimination in the relevant occupation or profession at large," *Cohen v. Community College of Philadelphia*, 484 F. Supp. 411, 434 (E.D. Pa. 1980), or "some type of statistical disparity between the local labor force and the minority composition of the employer's work force . . ." *Lehman v. Yellow Freight Sys. Inc.*, 651 F.2d 520, 527 (7th Cir. 1981); *accord Setser v. Novack Inv. Co.*, 657 F.2d 962, 968 (8th Cir.) (en banc), *cert. denied*, 454 U.S. 1064 (1981); *Tangren v. Wackenhut Services, Inc.*, 480 F. Supp. 539, 546-47 (D. Nev. 1979), *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

At least two scholars agree that these approaches are entirely consistent with *Weber*. Allegretti, *supra* note 126, at 785-96; Boyd, *supra* note 116, at 10-21.

129. The Court was acutely self-conscious about the vagueness of the facts which it found significant:

We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)

443 U.S. at 208 (footnote omitted). Perhaps, only by failing to lay down any hard and fast lines of demarcation was Justice Brennan able to muster a majority vote. Kreiling & Mercurio, *Beyond Weber: The Broadening Scope of Judicial Approval of Affirmative Action*, 88 DICK. L. REV. 46, 58 n.75 (1983) [hereinafter cited as Kreiling & Mercurio].

*Rawlinson*,<sup>130</sup> the courts have refused to distinguish between affirmative action plans adopted by private employers and those adopted by public employers.<sup>131</sup> No additional quarter has been given to, or taken from, the public sector employer under Title VII.<sup>132</sup> *Weber*, moreover, has not been limited to preferences based on race. Its protection has been extended to female employees as well.<sup>133</sup>

Although he "shared" some of the dissents' misgivings concerning the majority's interpretation of Title VII's legislative history, Justice Blackmun joined in the majority opinion. In his concurring opinion, however, he approached the validity of Kaiser's training program from a different perspective. Adopting the analysis of Judge Wisdom's dissenting opinion, he stated he would have shielded Kaiser from Title VII liability based on an "arguable violation" theory.<sup>134</sup> Fearing that the majority opinion's reliance on a "traditionally segregated job category" approach cut too broad a swath in per-

130. 433 U.S. 321 (1977).

131. See generally C. SULLIVAN, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 205 (1980). For the argument that courts in resolving reverse discrimination claims challenging *Weber*-type affirmative action programs imposed in the public sector should be more tolerant than in reviewing similar private sector plans, see Kreiling & Mercurio, *supra* note 129, at 108.

132. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *United States v. City of Miami, Fla.*, 614 F.2d 1322, 1336-37 n.27 (5th Cir. 1980), *modified*, 664 F.2d 435 (5th Cir. 1981) (en banc) (per curiam); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *Scott v. City of Anniston, Ala.*, 597 F.2d 897 (5th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980); *United States v. City of Chicago*, 573 F.2d 416, 423-24 (7th Cir. 1978); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir.), *cert. denied*, 434 U.S. 819 (1977); *Price v. Civil Serv. Comm'n of Sacramento County*, 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980); *Chmill v. City of Pittsburgh*, 22 Empl. Prac. Dec. (CCH) ¶ 30,783 (Pa. 1980).

Of course, it is theoretically possible that action taken by the public sector employer, while consistent with Title VII, would nonetheless violate the fourteenth amendment. As noted earlier, *supra* note 17, the Court has granted certiorari to review the fourteenth amendment implications of an affirmative action program employing quotas for the benefit of non-victims. Several courts have concluded that a voluntary affirmative action plan which passes muster under *Weber* will also pass muster under the Constitution. See, e.g., *Boston Chapter, NAACP v. Beecher*, 679 F.2d 965, 976 (1st Cir. 1982). Other courts have imposed a more rigorous standard. See, e.g., *Bratton v. City of Detroit*, 704 F.2d 878, 884-87 (6th Cir.), *vacated and remanded on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *Valentine v. Smith*, 654 F.2d 503, 509-10 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981).

133. *La Riviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982); *Edmondson v. United States Steel Corp.*, 21 Empl. Prac. Dec. (CCH) ¶ 30,380 (N.D. Ala. 1979); see *Minnick v. California Dept. of Correction*, 95 Cal. App. 3d 506, 157 Cal. Rptr. 260 (1979); *Maehren v. City of Seattle*, 92 Wash. 2d 480, 599 P.2d 1255 (1979).

134. 443 U.S. at 209-16. The "arguable violation" theory fits Kaiser's situation quite nicely since it had earlier been sued successfully by black employees. See *supra*, note 107.

mitting an employer to parcel out benefits based on race, Justice Blackmun argued for a more restrained standard.<sup>135</sup>

Chief Justice Burger's dissent characterized the majority as being result-oriented. "[T]he Court effectively rewrites Title VII to achieve what it regards as a desirable result. It 'amends' the statute to do precisely what both its sponsors and its opponents agreed the statute was *not* intended to do."<sup>136</sup>

The tone of Justice Rehnquist's dissent was far more strident. "[B]y a *tour de force* reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini, the Court eludes

135. 443 U.S. at 212-15. As Justice Blackmun's concurring opinion hinted, the question of the type and quantum of evidence necessary to justify adoption of a *Weber*-like affirmative action program has not been a simple one. See, e.g., *La Riviere v. EEOC*, 682 F.2d 1275 (9th Cir. 1982) (police department had previously excluded women from certain job categories); *Tangren v. Wackenhut Services, Inc.*, 658 F.2d 705 (9th Cir. 1981) (statistical imbalance between work force and labor force), *cert. denied*, 456 U.S. 916 (1982); *Setser v. Novack Inv. Co.*, 657 F.2d 962 (8th Cir.) (en banc) (same), *cert. denied*, 454 U.S. 1064 (1981); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671 (6th Cir. 1979) (same), *cert. denied*, 452 U.S. 938 (1981); *Cohen v. Community College of Philadelphia*, 484 F. Supp. 411 (E.D. Pa. 1980) (historical and societal discrimination in the teaching profession nationally); *Baker v. City of Detroit*, 483 F. Supp. 930 (E.D. Mich. 1979) (same), *aff'd sub nom. Bratton v. City of Detroit*, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

Several courts, however, have rejected ad hoc affirmative action decisions allegedly made pursuant to *Weber*. See, e.g., *Lehman v. Yellow Freight Sys., Inc.*, 651 F.2d 520 (7th Cir. 1981); *Savage v. McAvoy*, 23 Empl. Prac. Dec. (CCH) ¶ 31,085 (S.D. Ohio 1980); *Thomas v. Basic Magnesia, Inc.*, 22 Fair Empl. Prac. Cas. (BNA) 1284 (N.D. Fla. 1980).

Prior to *Weber*, the EEOC promulgated guidelines outlining the circumstances under which it would refuse to take action on a reverse discrimination charge against an employer who had voluntarily implemented an affirmative action program benefiting minority and/or female employees. 29 C.F.R. § 1608.3 (1979). Admittedly, the guidelines did not exist in 1974 when Kaiser and the USWA implemented the collective bargaining agreement. However, the Court's failure to mention them even in passing is curious since they are mutually reinforcing. Cf. *Employment After Weber*, *supra* note 116, at 10-11 nn.25-28 (discussing the guidelines as a post-*Weber* defense in reverse discrimination cases). Because these guidelines constituted a "written interpretation or opinion" of the EEOC within the meaning of section 713(b)(i), reliance upon them would be a defense to reverse discrimination claims. See 42 U.S.C. § 713(b)(i) (1978), *omitted*, Pub. L. No. 97-35, Title XXI § 2192(a) 95 Stat. 818 (1981).

136. 443 U.S. at 216 (Burger, C.J., dissenting). The Chief Justice's complaint with the majority decision was not one directed to the merits of the quota system; he simply believed that it was not Congress' intent in enacting Title VII to authorize private voluntary affirmative action programs employing a race-conscious quota. *Id.* at 216-19. The Chief Justice noted that if he were a legislator he would vote in favor of such a program. *Id.* at 216. Barely a year later in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), he delivered an opinion in which Justices Powell and White joined, sustaining a 10% "quota" on federal funding in the Public Works Employment Act of 1977. *Id.* at 486-89; see *infra* notes 179-82 and accompanying text.

clear statutory language, 'uncontradicted' legislative history, and uniform precedent in concluding that employers are, after all, permitted to consider race in making employment decisions."<sup>137</sup> His opinion contains an exhaustive review of the Congressional debate surrounding Title VII's enactment and offers a strong argument against race-conscious relief for non-victims. Rehnquist's thirty-six page opinion rings with a litany of exchanges among the bill's supporters and opponents, and its multiple citations to contemporaneous interpretive memoranda cannot be dismissed lightly.

Two aspects of Justice Brennan's majority opinion are particularly important: first, its analysis of Congress' purpose in enacting Title VII, and second, its factual predicate, i.e., a voluntary program adopted without judicial approval and without a finding of prior discrimination by any state or federal administrative body or court.

In fleshing out the "spirit" of Title VII, the Court abandoned its usual focused review of Title VII's legislative history in favor of a broader perspective.<sup>138</sup> As indicated earlier, this author believes that the *Stotts* Court took a far too restrictive view of Congress' goal in enacting Title VII. The eradication of racial discrimination

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137. 443 U.S. at 222 (Rehnquist, J., dissenting). Justice Rehnquist's dissenting opinion has not escaped criticism. Particularly troublesome is its lack of internal consistency regarding Congress' intent. On the one hand, he vigorously contends that the race-conscious program is flatly contrary to Congress' intention. *Id.* at 220, 227-51. On the other hand, he admits that the possibility of race-conscious programs such as Kaiser's was never even contemplated by the legislative branch. *Id.* at 251-53.

Justice Rehnquist's position is also arguably inconsistent with his position in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), in which he joined the majority opinion authored by Justice Stewart and filed a separate concurring opinion. There, the Court approved the EEOC Guidelines, 29 C.F.R. § 1607.5 (1974) (no longer in effect), which, *inter alia*, required an employer to undertake a "differential validation" of employment tests having an adverse impact on minorities. 422 U.S. at 430-36. The employer had to adjust the test scores to eradicate the discriminating impact. Clearly, the Guidelines approved by Justice Rehnquist required the use of race-conscious adjustments.

It is interesting to note that in *United Jewish Org. v. Carey*, 430 U.S. 144 (1977), Justice Rehnquist joined in two segments of Justice White's opinion approving the use of race-conscious criteria by the state in constructing legislative districts. He did not reject Justice White's view that this mechanism was a valid means to assure "a fair allocation of political power between white and nonwhite voters." *Id.* at 167. Justice Stevens, who did not participate in *Weber*, agreed with this view. *Id.* at 147.

138. 443 U.S. at 201-07. Justice Brennan's exclusive reliance on Title VII's 1964 legislative history is perplexing. It offers almost no support for his conclusion. Schatzki, *supra* note 103, at 67. What is even more perplexing, however, is his failure to discuss the legislative history of the 1972 Amendments which do offer support. See *supra* notes 262-82 and accompanying text; *The Head and Tail of Weber*, *supra* note 116, at 743-50.

in the workplace was only one element of that body's attempt to compel the complete integration of blacks into American life. Thus viewed, the references to individual relief and "make-whole" relief selectively culled by the *Stotts* majority from Title VII's legislative history diminish in significance. In *Weber*, the Court's treatment of the legislative history approaches this broader perspective, although in the author's opinion it is not as panoramic as Congress' in 1964. Rather than examining Title VII as an isolated piece of legislation, the majority viewed it in terms of "the goals of the Civil Rights Act—the integration of blacks into the mainstream of American society."<sup>139</sup> Title VII is thus seen as a means to this greater end. It quoted with approval Senator Humphrey's statement:

What good does it do a Negro to be able to eat in a fine restaurant if he cannot afford to pay the bill? What good does it do him to be accepted in a hotel that is too expensive for his modest income? How can a Negro child be motivated to take full advantage of integrated educational facilities if he has no hope of getting a job where he can use that education?

Without a job, one cannot afford public convenience and accommodations. Income from employment may be necessary to further a man's education, or that of his children. If his children have no hope of getting a good job, what will motivate them to take advantage of educational opportunities?<sup>140</sup>

Justice Brennan's opinion is replete with extensive citations to the Congressional Record to demonstrate Congress' concern for the economic plight of black Americans, the more fortunate of whom were able to find jobs without a future, while the less fortunate were unemployed.<sup>141</sup>

Given this perspective, the argument in favor of relief for non-identified victims of racial discrimination in employment is even stronger. What the *Weber* Court approved in the context of a private voluntary agreement is precisely what the *Stotts* Court disapproved in the context of a consent judgment. The district court in *Weber* specifically found that the black employees benefiting from the quota "had never themselves been the subject of any unlawful discrimination . . . ."<sup>142</sup> A similar finding was made in *Stotts*.<sup>143</sup> *Weber* clearly

139. 443 U.S. at 202.

140. *Id.* at 203 (citations omitted).

141. *Id.* at 202-03.

142. *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 769 (E.D. La. 1976), *aff'd*, 563 F.2d 216 (5th Cir. 1977), *rev'd*, 443 U.S. 193 (1979).

143. *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576, 2588-89 (1984). Along these same lines, it is interesting to note that in *Griggs* the evidence presented

stands for the proposition that a racial quota benefiting non-victims is permissible if adopted voluntarily by "the private sector . . . to eliminate conspicuous racial imbalance in traditionally segregated job categories."<sup>144</sup> Why should Title VII compel a different result if the quota is imposed by a court? Given *Weber's* interpretation of Title VII's legislative history, there is no persuasive justification for a different result. Reinforcing this conclusion is the fact that the affirmative action program adopted by Kaiser and the USWA was modeled after a Title VII consent decree entered for the steel industry.<sup>145</sup> That consent judgment contained no admission of wrongdoing by the defendants; it established a racial quota for admission into training programs; and it awarded relief to non-victims.<sup>146</sup> Under *Stotts*, these provisions of the consent judgment are invalid and would be invalid if contained in a judgment entered after a trial. Under *Weber*, these same provisions, if contained in a private agreement would represent legitimate affirmative efforts to correct racial imbalance. Neither the legislative history nor common sense supports such a conclusion. As Professor Edwards has so succinctly stated, "Title VII cannot distinguish remedies by their sources."<sup>147</sup> A remedial program should be no more or less prohibited because it is voluntarily undertaken by an employer or ordered by a court.

Justice Powell once observed in another context that "[r]espect and support for the law, especially in an area as sensitive as [affirmative action], depend in large measure upon the public's perception of fairness."<sup>148</sup> With that admonition in mind, examination of the *Weber/Stotts* dichotomy from the perspective of the black

to support the plaintiffs' claim of adverse impact consisted of the scores of blacks who were not parties to the litigation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971).

144. 443 U.S. at 209 (footnote omitted).

145. *Id.* at 210 (citing *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975)). In *Allegheny-Ludlum*, the settlement resolved charges of racial and sexual discrimination against nine of the nation's largest steel companies and resulted in a sweeping overhaul of the industry's employment practices and in back pay awards of over \$30 million dollars to approximately 50,000 minority workers. *Employment After Weber*, *supra* note 116, at 6-7 n.13. Provisions similar to the Kaiser/USWA agreement were also included in the union's contracts with Reynolds Metals and ALCOA, the other two major American aluminum producers. *Weber v. Kaiser Aluminum & Chem. Corp.*, 563 F.2d 216, 229 (5th Cir. 1977) (Wisdom, J., dissenting).

146. *United States v. Allegheny-Ludlum Indus., Inc.*, Consent Decree I, FAIR EMPL. PRAC. MANUAL (BNA), ¶ 431:125, 138-39 (1974). To compare the Kaiser collective bargaining agreement and the steel industry consent judgment, see *Weber v. Kaiser Aluminum and Chem. Corp.*, 563 F.2d 216 (5th Cir. 1977).

147. *The Head and Tail of Weber*, *supra* note 116, at 752.

148. *Fullilove v. Klutznick*, 448 U.S. 448, 507 n.8 (1980) (citing, *inter alia*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 n.53 (1978)).

production worker seeking entry to a training program like the one at Kaiser/USWA merits consideration.<sup>149</sup> Under *Weber*, he can be the beneficiary of a racial quota "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories" if his employer and union agree to such an affirmative action program.<sup>150</sup> There is absolutely no requirement of an admission of liability on the employer's or union's part or of any similar finding by a court or administrative agency.

What happens, however, if the employer and union do not agree and a Title VII suit ensues? *Stotts* stands for the proposition that if a person was an actual victim of the discriminatory conduct, he is entitled to be made whole and restored to his rightful place. On the other hand, if he can prove only discriminatory conduct, without demonstrating that he was actually victimized, advancement by means of a racial quota guaranteeing the participation of minority employees in a training program is foreclosed if it is embodied in a consent judgment. From the perspective of the black production worker, the fact that a voluntary agreement entered in a non-judicial context gives him a significantly greater possibility for economic advancement than the same agreement entered in the context of resolving a judicial proceeding seems absurd. The absurdity intensifies if the same rule holds true for a judicially imposed remedy entered after a finding of liability on the merits.

Closely tied to this incongruity is the inhibitory effect of *Stotts* on Title VII settlements. As noted earlier, both the majority opinion and Justice Blackmun's concurring opinion in *Weber* emphasize the voluntary aspect of the Kaiser/USWA collective bargaining agreement.<sup>151</sup> Time and time again the Court has noted Congress' intent in Title VII to promote voluntary settlements of employment discrimination suits.<sup>152</sup> The *Stotts* dicta significantly undermine the

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149. For an excellent account of the "human" side of the *Weber* dispute, see Roberts, *The Bakke Case Moves to the Factory*, N.Y. Times, Feb. 25, 1979, § 3 (Magazine), at 37, col. 3.

150. 443 U.S. at 209 (footnote omitted).

151. See *supra* note 125 and accompanying text; 443 U.S. at 210-12 (Blackmun, J., concurring).

152. See, e.g., *Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). As the Court observed in *Alexander v. Gardner-Denver Co.*:

Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).



Congressional purpose. Suppose the facts giving rise to *Weber* had not occurred in 1974 but a decade later? Three scenarios are possible. In the first, the union agrees with the employer that affirmative relief for present black employees is warranted, and they establish a quota-based training program. This is a pure *Weber* situation, and *Stotts* has no impact. In the second, the union, in light of an economic downturn and the conservative views of its overwhelmingly white membership, declines to agree to such a program.<sup>153</sup> What real option does the employer have other than to wait until he is sued? If he is sued, little incentive exists to settle other than the avoidance of the expense and inconvenience of litigation. The employer knows, as undoubtedly his white work force knows, that under *Stotts*, regardless of whether the court enters judgment after a trial or approves a consent decree submitted by the parties, the employer is powerless to confer the benefit of craft training on black employees who are not actual victims of discrimination. Thus, the employer can “guts it out,” hoping he can persuade the court that he did not discriminate, and knowing that if he loses on the merits, *Stotts* curtails the court’s remedial powers. Correspondingly, the black employee has little incentive to sue unless he possesses overwhelming evidence to prove that he was an actual victim of the employer’s discriminatory conduct.

### B. The *Bakke* and *Fullilove* Decisions

In *Bakke*, the medical school of the University of California at Davis had reserved sixteen out of one hundred seats exclusively for minority students.<sup>154</sup> In *Fullilove*, Congress set aside 10 percent of the funds appropriated under the Public Works Act of 1977 for minority business enterprises (MBE’s).<sup>155</sup> The Congressional set-aside withstood the constitutional challenge; the Davis program did not. The reason the Court reached opposite holdings can be explained by a number of facts. In *Fullilove*, the Court was dealing with a *Congressional* enactment rooted in not one but three separate sources of constitutional authority: the spending power, the commerce clause

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153. This is precisely what happened in *Stotts*. 104 S. Ct. at 2586.

154. 438 U.S. at 275.

155. Pub. L. No. 95-28, title 1, § 103, 91 Stat. 116 (1977) (codified at 42 U.S.C. § 6705(f)(2) (1982)). Section 6705(f)(2) defines the term “minority business enterprise” as “a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members.” *Id.* “[M]inority group members” are defined as “citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.” *Id.*

and section 5 of the fourteenth amendment.<sup>156</sup> While the means Congress selected were startling, since no other piece of federal legislation had ever bestowed benefits based on a strict racial quota, previous programs designed to aid racial groups suffering from economic disadvantage had failed.<sup>157</sup> In denying the plaintiffs' facial challenge to the statute's constitutionality, the Supreme Court emphasized that the statute effected a one-time infusion of federal funds into the construction industry; that the amount of money reserved for minorities was de minimis in comparison to the amount spent nationally each year for construction projects; that a waiver procedure was available if no qualified MBE's could be found for a particular project; and that an administrative mechanism was available to weed out fraudulent MBE's.<sup>158</sup>

In contrast, the Davis program was adopted and administered by the Board of Regents of California, a body having no particular responsibility for the elimination of discrimination. The program was a continuing one, and because of the way it was administered, it totally excluded non-minority applicants from consideration for admission.<sup>159</sup>

For purposes of this Article, two critical principles emerge from these decisions: first, that a race-conscious program can be a constitutionally valid means to remedy prior discrimination; and second, that there is no constitutional requirement that such a remedy be tailored to benefit only actual victims of discrimination. A polling of the individual Justices' opinions demonstrates the firm support of the Court, as an institution, for both of these propositions. In *Bakke*, Justices Brennan, White, Marshall and Blackmun held that the purpose of title VI (Title VI) of the Civil Rights Act of 1964 was co-extensive with that of the equal protection clause of the fourteenth amendment and did not bar preferential treatment of minorities as a means of remedying past societal discrimination.<sup>160</sup> In reviewing

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156. 448 U.S. at 473-80.

157. *Id.* at 463-67. Roughly the same groups had been the beneficiaries of the section 8(a) program of the Small Business Act of 1958. 15 U.S.C. § 637 (1982). That program, however, was designed to aid small businesses owned by "socially or economically disadvantaged persons," 448 U.S. at 465-66 (citation omitted), and thus benefited other racial and ethnic groups as well.

158. There is no majority opinion. A careful reading of the opinion filed supporting the Court's judgment shows, however, that these factors were relied upon by a majority of the justices in upholding the statute's constitutionality. *See id.* at 463-72, 484-85 n.72, 487-89 (Burger, C.J.); *id.* at 503-06, 511-13 (Powell, J., concurring).

159. 438 U.S. 408-21 (Stevens, J., concurring).

160. *Id.* at 361.

race-conscious remedies, these Justices would ask two questions: is there "an important and articulated purpose" for use of the racial classification and does the classification avoid "stigmatiz[ing] any group or . . . singl[ing] out those least well represented in the political process to bear the brunt of a benign program?"<sup>161</sup> If the answer to both questions is affirmative, the program or statute would meet their approval. Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist disagreed with the "Brennan group"; they maintained that Title VI proscribed the Davis minority admissions program because it excluded Bakke, a white male applicant, from consideration on account of his race.<sup>162</sup>

With the Court thus equally divided, Justice Powell became the swing vote. He agreed with the Brennan group respecting the coextensiveness of Title VI and the fourteenth amendment. However, he rejected its intermediate standard of review in favor of strict scrutiny.<sup>163</sup> Since none of the reasons articulated by the Regents to support the Davis quota system withstood Justice Powell's strict scrutiny analysis, his vote broke the 4-4 split and the Davis program was invalidated.<sup>164</sup> In sum, the "arithmetic" of the Justices' opinions shows that at least five of them, Brennan, White, Marshall, Blackmun and Powell, shared the common view that race-conscious remedies are a legitimate means of remedying an equal protection violation.

As for the issue of group relief, the Brennan group had little difficulty in not requiring actual victimization as a predicate to the government's conferring of benefits.

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.<sup>165</sup>

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161. *Id.*

162. *Id.* at 408-21.

163. *Id.* at 305-20. See generally Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21 (1979); McCormick, *Race and Politics in the Supreme Court: Bakke to Basics*, 1979 UTAH L. REV. 491 (1979); O'Neil, *Bakke in Balance: Some Preliminary Thoughts*, 67 CALIF. L. REV. 143 (1979); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1043-50 (1979); Stone, *Equal Protection in Special Admissions Programs: Forward from Bakke*, 6 HASTINGS CONST. L.Q. 719 (1979); Sultan, *Legal Logic, Judicial Activity, and the Bakke Case: Mr. Justice Powell and the Integrity of Constitutional Principle*, 30 AM. J. COMP. L. 51 (Supp. 1982).

164. 438 U.S. at 287-324.

165. *Id.* at 362.

To support this view Justice Brennan first turned to the school desegregation cases in which race-conscious remedies had been frequently approved.<sup>166</sup> He turned next to Title VII.

Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976); *Teamsters v. United States*, 431 U.S. 324 (1977). Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. See *id.*, at 357-362. Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities.<sup>167</sup>

Justice Powell's view of the constitutionality of "group relief" is more troublesome. One of the reasons advanced by Davis in support of its special admissions program for minorities was the need to remedy societal discrimination.<sup>168</sup> Justice Powell had no tolerance for this argument since, in his view, it would result in converting "a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination."<sup>169</sup> However, as Professor Sedler has so capably pointed out, what Justice Powell called

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166. *Id.* at 362-63. "In each [case], the creation of unitary school systems, in which the effects of past discrimination had been 'eliminated' . . . was recognized as a compelling social goal justifying the overt use of race." *Id.* at 363 (citation omitted).

167. *Id.*

168. *Id.* at 306-10.

169. 438 U.S. at 310. Justice Powell did not participate in the *Weber* decision. See *supra* note 114 and accompanying text. His hostility towards recognizing the eradication of societal discrimination as a valid governmental goal on a constitutional level suggests that he would have found the Kaiser/USWA program inconsistent with Congress' purpose in enacting Title VII. His view in *Bakke* is certainly consistent with his subscribing to Justice White's opinion in *Stotts*. However, in *Fullilove*, he sustained the validity of the 10% set aside although Congress enacted the statute to eradicate the effects of societal discrimination in the construction industry. Justice Powell had not yet joined the Court when *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was decided. Clearly, the *Griggs* Court intended to compel employers to remedy the effects of societal discrimination in education manifested by low scoring test results. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973), Justice Powell commented: "*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious

“societal discrimination” is nothing more than an accumulation of wrongs on the part of governmental and private entities that cannot be identified with particularity at the present time. But their consequences are no less enduring because they cannot be so identified. The non-identifiable nature of the discrimination does not obviate the government’s valid and substantial interest in redressing its consequences.<sup>170</sup>

Justice Powell’s view is tempered, however, by his references to Title VII. He specifically stated that *Bakke* “does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII.”<sup>171</sup> He viewed the *Griggs* disparate impact test as being “based on legislative determinations . . . that past discrimination had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination.”<sup>172</sup>

Moreover, one can read Justice Powell’s opinion in *Bakke*, especially in light of *Fullilove*, as supporting the proposition that the deplorable statistics cited at length by Congress in 1964, which reflect the limited minority participation in the American economy, constitute a Congressional finding of discrimination sufficient to justify race-conscious remedies.<sup>173</sup> This view is reinforced by his citation to two circuit court opinions approving race-conscious remedies, implemented pursuant to E.O. 11246, even though no court or agency had made a finding of discrimination against the employer.<sup>174</sup> In sum, while Justice Powell can hardly be counted in the Brennan group as a wholehearted supporter of group relief for non-victims, his opinion in *Bakke* is more nuanced than it appears on a first reading and displays a potential receptivity to the argument.

A “head count” of the Justices in *Fullilove* shows these same two principles winning the support of the majority of Justices. There

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burden on such citizens for the remainder of their lives.” It has been suggested that the distinction between “identified” discrimination and “societal” discrimination is essentially meaningless “because ‘societal discrimination’ is largely an aggregate of individual instances of constitutional or statutory violations that have not been identified with particularity.” Sedler, *Beyond Bakke: The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L. L. REV. 133, 168 n.149 (1979) [hereinafter cited as Sedler].

170. Sedler, *supra* note 169, at 157.

171. 438 U.S. at 302 n.41.

172. *Id.* at 308 n.44.

173. See *United States v. City of Miami, Fla.*, 614 F.2d 1322, 1337 (5th Cir. 1980), *modified*, 664 F.2d 435 (5th Cir. 1981) (en banc) (per curiam).

174. *Id.* (citing Justice Powell’s citation to *Contractors Ass’n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), and *Associated General Contractors of Massachusetts, Inc. v. Altschuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974)).

was no majority opinion for the Court.<sup>175</sup> Both concurring opinions were used by their authors to expand further on the position each advocated in *Bakke* regarding the standard of review to be used in measuring the constitutionality of race-conscious remedies.

As might be expected, Justices Brennan, Marshall, and Blackmun<sup>176</sup> stuck to their *Bakke* standard: legislation which employs a racial classification is constitutional if the government can demonstrate “ ‘an important and articulated purpose for its use’ ” and the legislation does not “ ‘stigmatiz[e] any group or . . . singl[e] out those least well represented in the political process to bear the brunt of a benign program.’ ”<sup>177</sup> In their view, “the 10% minority set-aside provision at issue in this case is plainly constitutional. Indeed, the question is not even a close one.”<sup>178</sup> The Chief Justice found it unnecessary to elect between Justice Powell’s strict scrutiny test and the intermediate test propounded by the Brennan group in *Bakke* since he concluded that the statute satisfied both formulae.<sup>179</sup> While remaining faithful to his view in *Bakke* that Congress, in enacting Title VI, explicitly intended to prohibit programs such as the one at Davis, the Chief Justice examined the flip side of Title VI and concluded that Congress, if it so elected, could adopt race-conscious programs in an attempt to eradicate the vestiges of discrimination.<sup>180</sup>

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175. Chief Justice Burger announced the judgment and wrote an opinion in which Justices White and Powell joined. 448 U.S. 448, 453 (1980). Justice Powell also filed a concurring opinion as did Justice Marshall who was joined by Justices Brennan and Blackmun. *Id.* at 495, 517. Justice Stewart wrote a dissenting opinion in which Justice Rehnquist joined. *Id.* at 522. These dissenting Justices adhered to their position in *Bakke*, that the Constitution is color-blind and that accordingly all race-conscious government actions are per se unconstitutional even if intended to aid minorities rather than to stigmatize them. 448 U.S. at 522-32 (Stewart, J., dissenting). Justice Stevens also dissented in a separate opinion in which he specifically refused to join with Justices Stewart and Rehnquist in calling for a totally color-blind constitution. *Id.* at 532, 548, 552 (Stevens, J., dissenting). His opinion focused on the legislative process leading up to the statute’s enactment which he found to be defective due to Congress’ failure to consider carefully the need for the racial classification, the composition of the ethnic groups benefiting from the set-aside and the amount of the set-aside. *Id.* at 532-54.

176. Why Justice White abandoned the “Brennan” group and joined only in the Chief Justice’s opinion is a mystery. Professor Choper suggests that he did so as a matter of politics “to lend sufficient numerical strength to the Burger opinion so as to allow the Chief Justice to announce the judgment of the Court.” Choper, *The Constitutionality of Affirmative Action: Views from the Supreme Court*, 70 Ky. L.J. 1, 5-6 n.30 (1981).

177. 448 U.S. at 519 (Marshall, J., concurring) (citation omitted).

178. *Id.*

179. *Id.* at 492.

180. *Id.* at 473-78, 492 n.77. A compelling argument can be made that the legislative branch, not the judicial branch, is constitutionally charged with the responsibility for determining whether the fifth and fourteenth amendments demand absolute neutrality or permit race-conscious remedies. See Cox, *The Question of*

The parallels between the Chief Justice's opinion in *Fullilove* and Justice Brennan's opinion in *Bakke* are striking: both generally cite the same Title VII and school desegregation cases.<sup>181</sup> Although he did not address the issue of group relief as directly as Justice Brennan, the Chief Justice, in *Fullilove*, found no constitutional infirmity in the absence of a statutory requirement of proof of victimization. The Chief Justice did cite guidelines promulgated by the Economic Development Agency in administering the program which arguably limited participation to MBE's who had suffered discrimination, but the guidelines' vagueness leaves little doubt that actual victimization was not a prerequisite to participating in the set-aside.<sup>182</sup>

Justice Powell's separate concurring opinion echoes the themes of the Chief Justice's opinion, in which he also joined. Applying the strict scrutiny test to the ten percent set-aside, he concluded "[i]n this case, where Congress determined that minority contractors were victims of purposeful discrimination and where Congress chose a reasonably necessary means to effectuate its purpose. I find no constitutional reason to invalidate § 103(f)(2)."<sup>183</sup> Like Chief Justice Burger, he had no problem with the formulation of race-conscious remedies to rectify violations of a constitutional magnitude.<sup>184</sup> For Justice Powell, the predicate to such relief is a finding of discrimination by a governmental body having "the authority to act in response to identified discrimination."<sup>185</sup> Referring to Title VII, he noted that Congress enacted that statute "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."<sup>186</sup> He also cited *Franks v. Bowman Transportation Co.* for the proposition that

[a]cting to further the purposes of Title VII Congress vested in the federal courts broad equitable discretion to ensure that "persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."<sup>187</sup>

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"Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role, 23 ARIZ. L. REV. 88, 159-78 (1981); Walker, *The Exorbitant Cost of Redistributing Injustice: A Critical View of United States Steelworkers v. Weber and the Misguided Policy of Numerical Employment*, 21 B.C.L. REV. 1, 78 (1979).

181. Compare *Bakke*, 438 U.S. at 362-63 with *Fullilove*, 448 U.S. at 483.

182. 448 U.S. at 468-72.

183. *Id.* at 516-17 (Powell, J., concurring) (footnote omitted).

184. *Id.* at 496-97 n.1.

185. *Id.* at 498 (citation omitted).

186. *Id.* at 499 (citation omitted).

187. *Id.* at 499-500 (citation omitted).

This perception of the link between the statute's purpose and the Court's remedial powers may explain why Justice Powell joined Justice White's majority opinion in *Stotts*.

Justice Powell, however, has not been an intractable ideologue regarding the use of race-conscious remedies. After all, in *Fullilove* he approved of Congress' employment of racial quotas to correct the impact of societal discrimination in the construction industry despite his ringing condemnation of racial quotas in *Bakke*.<sup>188</sup> Perhaps if he examined Title VII's legislative history from a broader perspective, as urged in this article, his attention would shift from Congress' concern for "individuals" affected by racial prejudice to Congress' overriding goal of bringing minorities into the economic mainstream of American life. Moreover, he has already acknowledged that congressional findings of discrimination can support racial quotas. In making that judgment he demanded very little of Congress. In contrast, the House and Senate reports and the congressional debates of the 1964 Act and of its 1972 Amendments are crammed with statistic after statistic showing the bleak economic condition of blacks caused by "across-the-board" discrimination in employment.<sup>189</sup> If a legislative determination of discrimination is a necessary predicate to group relief, then the legislative history of Title VII is a powerful indictment.<sup>190</sup>

#### IV. The Legislative History of the 1964 Act

As the earlier discussion of sections 703(j) and 706(g) illustrated, Title VII, on its face, offers no immediate resolution of the issue whether a court may order affirmative relief for non-victims.<sup>191</sup> Traditional principles of statutory construction then refer us to the

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188. Compare *Fullilove*, 448 U.S. at 496-516 (Powell, J., concurring) with *Bakke*, 438 U.S. at 287-99.

189. E.g., 110 CONG. REC. 6562, 7204-06, 13,080, 13,084, 13,091. The opponents of the Civil Rights Bill challenged these statistics, claiming that black unemployment was more prevalent in states which had adopted fair employment practices laws. E.g., *id.* at 13,083-84; see also *id.* at 8619.

190. In passing, one can only speculate about the impact of this vast legislative history on Justice Stevens. As noted earlier, he did not participate in *Weber*. Nor did he reach the constitutionality of the Davis special admissions program in *Bakke*, viewing Title VI as a complete bar to its operation. He dissented in *Fullilove*, judging the congressional record inadequate to support a program of racial preferences. See 448 U.S. at 532-54 (Stevens, J., dissenting). However, in *Fullilove*, he agreed that race-conscious remedies were appropriate to remedy constitutional violations. *Id.* at 553-54. These two factors coupled with the detailed legislative history of Title VII may account for Justice Stevens' staunch resistance—on and off the bench—to the majority's using *Stotts* to limit relief to actual victims of discrimination.

191. See *supra* notes 60-73 and accompanying text.



statute's legislative history to ascertain, if at all possible, Congress' intent.<sup>192</sup>

Very often that intent is manifested most clearly in the House and Senate reports which accompany the act throughout the legislative process. Especially useful are reports issued by a joint House and Senate committee which irons out the differences between the two houses' versions of the same legislation. Unfortunately, there are no such interperative documents available for Title VII. As discussed below in more detail, no House committee or sub-committee held hearings specifically directed to the Civil Rights Bill, the key predecessor of Title VII. The Senate, moreover, substantively modified the House bill. It did so, however, not through a Senate committee, but through informal bi-partisan conferences. Subsequently, the House voted directly on the Senate bill, thereby obviating the need for a joint House-Senate conference committee and report. As the result of Title VII's highly unusual legislative history,<sup>193</sup> one can attempt to ascertain Congress' intent only through the statements reported in the Congressional Record. Such a task cannot be undertaken lightly, however, and is likely to end in confusion because nowhere during the extensive debate on Title VII were there posed the direct questions: how do sections 703(j) and 706(g) relate to one another; how, if at all, do they limit a court's authority to fashion a remedy containing race-conscious relief for non-victims, following a finding of discrimination; how, if at all, do they limit a court's authority to approve a consent judgment authorizing such relief? Since these questions were never raised, expecting to find a satisfactory answer to them in the debates is misguided.<sup>194</sup> As Professor Schatzki has

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192. 2A J. SUTHERLAND, STATUTORY CONSTRUCTION §§ 48.02-.20 (C. Sands 4th ed. 1984); see Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975). See generally R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 67-197 (1975); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21 (1970). For a short but interesting analysis of the "plain meaning" rule in the context of *Weber* and *Bakke*, see Belton, *supra* note 116, at 591.

The complete legislative history of Title VII is contained in EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 (1967). For an extended discussion of the statute's history, see Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966) [hereinafter cited as Vaas]. The legislative history of sections 706(g) and 703(j) is meticulously detailed in *Preferential Relief*, *supra* note 93.

193. See *supra* note 192.

194. Justice Powell correctly observed in *Bakke* that: "[t]here simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing

so aptly opined, "the legislative history is overwhelmingly inconclusive."<sup>195</sup>

In placing excessive reliance on the give-and-take of the Congressional debates, moreover, the courts have overlooked four facts which account for the unsatisfactory nature of this mode of interpretation. First, it sharply separates Title VII from the six titles which precede it and the four which follow it. Title VII, however, was never attacked or defended in true isolation. It was part and parcel of a sweeping legislative package. In interpreting Title VII the courts have repeatedly looked only to the debate specific to it. Such a narrow approach directly conflicts with Congress' far broader perspective. In enacting the Civil Rights Act of 1964, Congress was concerned with the dismal political and social predicament of blacks as well as their economic straits. Through various mechanisms of federal enforcement, Congress intended to end the status of blacks as this country's perpetual underclass via the opening of political, social and economic vistas previously closed. Accordingly, Title VII should be examined organically, not functionally, by the courts. The *Weber* decision represents a right step in this direction but does not go far enough. Second, related to the courts' "tunnel vision" is their failure to appreciate the linguistic/jurisprudential handicap under which Congress was suffering. The Act was clearly aimed at blacks as a group. Supporters of the bill, however, frequently expressed the statute's (and especially Title VII's) purpose as protecting the *individual* from discrimination.<sup>196</sup> Such references have led the courts erroneously to shun group relief as inconsistent with Congress' intent. Their conclusion, however, ignores the philological impediment burdening Congress: while clearly intending to aid blacks as

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problem of how to guarantee those citizens equal treatment." *Regents of the University of Cal. v. Bakke*, 438 U.S. 265, 285 (1978). Similarly, Justice Stevens, in an opinion joined by Justice Rehnquist, observed that "[n]o doubt, when this legislation was being debated, Congress was not directly concerned with the legality of 'reverse discrimination' or 'affirmative action.' Its attention was focused on the problem at hand, the 'glaring . . . discrimination against Negroes which exists throughout our Nation . . .'" *Id.* at 413 (Stevens, J.) (citing H.R. REP. NO. 914, Part I, 88th Cong., 1st Sess. 18 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2393).

195. Schatzki, *supra* note 103, at 67.

196. *E.g.*, 110 CONG. REC. 7213 (1964) (interpretive memorandum submitted by Sens. Clark and Case); *id.* at 7253 (remarks of Sen. Case); *id.* at 8921 (remarks of Sen. Williams); *see also* *Connecticut v. Teal*, 457 U.S. 440, 454-55 (1982); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978); *infra* note 208; *cf. infra* notes 216-54 and accompanying text (both Title VII's opponents and supporters were opposed to proportional distribution of jobs according to race).

a group, it lacked the legal terminology to express that intent. The jurisprudential concept of "group" relief was in its infancy in 1964.<sup>197</sup>

Third, the courts' narrow focus loses complete sight of the political and social environment of the debate. The drama of antecedent events such as the Reverend Martin Luther King's march in Birmingham, Bull Connor's brutal response and the sit-ins at lunch counters throughout the South had an unmistakable impact on the Congressmen.<sup>198</sup> Contemporaneous events such as the prayer-a-thon at the Lincoln Memorial, the intense lobbying by coalitions of religious and labor groups and unprecedented public support for enactment of a civil rights bill transformed the tone of the debate from a political one to a moral one.<sup>199</sup>

Fourth, the Senate debate, especially that surrounding the cloture motion, took place in a highly charged environment. The key legislators, whose remarks are often cited by courts, were frequently physically and psychologically frayed.<sup>200</sup>

Part of the reason for the third and fourth failures lies in the absence of any comprehensive independent study of the political process culminating in the passage of the Civil Rights Act of 1964. The absence of such a study has been particularly frustrating because the Act was the quintessential product of wheeling and dealing among the White House, civil rights activists and members of Congress. Only recently has this aspect of the political dimension been the subject of scholarly analysis.<sup>201</sup>

In sum, gleaning the intent of Congress from isolated passages emasculates their complete meaning. Picking and choosing among statements only leads to selective advocacy. The fact of the matter is that the debates offer solace to those who defend judicial relief to non-victims, as well as to those opposed to such relief. Bearing in mind the debate's ambiguity on this issue and subject to the

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197. See *supra* text accompanying notes 368-79.

198. SCHLEI & GROSSMAN, *supra* note 12, at viii.

199. E.g., 110 CONG. REC. 14,328 (remarks of Sen. Muskie); *id.* at 14,509-11 (remarks of Sen. Dirksen); see SCHLEI & GROSSMAN, *supra* note 12, at xi.

200. C. & B. WHELAN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 124-217 (*passim*) (1985) [hereinafter cited as THE LONGEST DEBATE].

201. THE LONGEST DEBATE, *supra* note 200, represents the first full-scale examination of the political and social dimensions of the Act's passage. The authors are to be congratulated for their exhaustive research. While the courts are loath to consider secondary sources treating a topic of legal interest from a historical and political science perspective, their reluctance should diminish in the instance of Title VII, in light of the absence of traditional source material such as committee hearings and House and Senate Reports.

criticisms articulated above, it is nonetheless appropriate to review the legislative origins of Sections 703(j) and 706(g). What follows constitutes an attempt to distill meaning from the key events surrounding their enactment. The analysis is based upon the pronouncements of the participants during the debate and contemporaneous documents. It specifically eschews relying on subsequent judicial interpretation.

In February, 1963, President Kennedy sent a message to Congress announcing the Administration's intention to propose a series of sweeping reforms in the area of civil rights.<sup>202</sup> No specific recommendation was made regarding employment discrimination. The President's message merely outlined what steps the Executive branch was taking to insure equality of employment opportunity in the federal government and in the portion of the private sector affected by government contracts.<sup>203</sup> In June, he forwarded a second message accompanied by a draft text. The draft, however, did not contain any provision establishing federal remedies for employment discrimination.<sup>204</sup>

Earlier proposals before Congress did contain such provisions, and it was quickly agreed among civil rights advocates that the Administration's bill was deficient without a federally enforceable right to equal employment opportunity. As several members of the House Committee on the Judiciary observed:

The right to vote, however, does not have much meaning on an empty stomach. The impetus to achieve excellence in education is lacking if gainful employment is closed to the graduate. The opportunity to enter a restaurant or hotel is shallow victory where

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202. H.R. Doc. No. 75, 88th Cong., 1st Sess. 1 (Feb. 28, 1963), *reprinted in* 1963 U.S. CODE CONG. & AD. NEWS 1507. Ironically, the message began with a statement that is often the rallying cry of those opposed to preferential relief for non-victims.

"Our Constitution is colorblind," wrote Mr. Justice Harlan before the turn of the century, "and neither knows nor tolerates classes among citizens." But the practices of the country do not always conform to the principles of the Constitution. And this message is intended to examine how far we have come in achieving first-class citizenship for all citizens regardless of color, how far we have yet to go, and what further tasks remain to be carried out—by the executive and legislative branches of the Federal Government, as well as by State and local governments and private citizens and organizations.

*Id.*

203. *Id.* at 1512-13.

204. H.R. Doc. No. 124, 88th Cong., 1st Sess. 7-11 (1963), *reprinted in* 1963 U.S. CODE CONG. & AD. NEWS 1526-36.

one's pockets are empty. The principle of equal treatment under law can have little meaning if in practice its benefits are denied the citizen.<sup>205</sup>

The day after the President's second message, Congressman Celler of New York introduced the Administration's omnibus bill.<sup>206</sup> Between May 2 and August 3, a subcommittee of the House Judiciary Committee held exhaustive hearings on this and several other civil rights bills. After the hearings were completed, Congressman Celler proposed a substitute bill.<sup>207</sup> Amid bitter complaints of "political opportunism," "steamroller tactics" and "railroading," the substitute bill was reported by the Judiciary Committee to the full House. This bill included a "Title VII," outlawing employment discrimination on the basis of race.<sup>208</sup>

The assassination of President Kennedy shortly thereafter raised grave doubts about the bill's future. Those doubts were dispelled, however, when President Johnson adamantly stated that passage of comprehensive civil rights legislation was one of the highest priorities of his administration.<sup>209</sup>

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205. HOUSE COMMITTEE ON THE JUDICIARY, CIVIL RIGHTS ACT OF 1963, H.R. REP. NO. 914, 88th Cong., 1st Sess. 26 (1963), reprinted in 1964 U.S. CODE CONG. & AD. NEWS 2513.

206. This version of H.R. 7152 is reprinted in *Hearings on Civil Rights Before Subcomm. No. 5 and the House Comm. on the Judiciary*, 88th Cong., 1st Sess., Part I, 649-60 (1963). In keeping with the President's June message, no provisions were suggested to outlaw private acts of employment discrimination.

207. See HOUSE COMMITTEE ON THE JUDICIARY, CIVIL RIGHTS ACT OF 1963, H.R. REP. NO. 914, 88th Cong., 1st Sess. 17-18 (1963), reprinted in 1964 U.S. CODE CONG. & AD. NEWS AT 2392-93.

208. *Id.* at 26-32, reprinted in 1964 U.S. CODE CONG. & AD. NEWS at 2401-08. The "steamrolling" accusation is disingenuous. Although no hearings were held in either House specifically addressing H.R. 7152, numerous hearings were conducted on other similar bills. These hearings leave no doubt that Congress was preeminently concerned with the economic and social plight of blacks as a *group*. Remedying individual instances of discrimination was not its goal. See, e.g., *Hearing on Equal Opportunity Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 3, 12-15, 47-48, 53-55, 61-63 (1963); *Hearing on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 230-303 (1963); *Hearings on Equal Employment Opportunity Before the Subcomm. on Employment and Manpower of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 116-17, 321-29, 426-30, 449-52, 492-94 (1963).

209. President Johnson addressed a joint session of Congress less than a week after President Kennedy's assassination. His cry for civil rights legislation was valiant.

This is our challenge—not to hesitate, not to pause, not to turn about and linger over this evil moment but to continue on our course so that we may fulfill the destiny that history has set for us. Our most immediate

The House debate on the substitute bill<sup>210</sup> focused principally on enforcement mechanisms. Should Congress give the agency charged with the responsibility of enforcing Title VII cease and desist powers, like the NLRB's, or should it give the courts the primary responsibility for enforcing the statute?<sup>211</sup>

The newly constituted bill (the Civil Rights Bill) did not contain language analogous to the "no preference" wording of section 703(j). It did, however, contain the earliest version of section 706(g). As originally proposed, the last sentence of section 706(g) read:

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 cause*.<sup>212</sup>

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tasks are here on this Hill.

First, no memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long. We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter—and to write it in the books of law.

109 CONG. REC. 22,838, 22,839 (1963).

210. This substitute bill was also numbered H.R. 7152.

211. A great deal of the criticism directed to H.R. 7152 both in the House and the Senate concerned the statute's proposed enforcement mechanism. The House and Senate proposed two radically different enforcement mechanisms. In the House version, jurisdiction to enforce the substantive rights created by the statute was vested in the federal district courts. H.R. REP. NO. 914, 88th Cong., 1st Sess. 28-29 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2404-05. In the Senate version, complaints of discrimination were to be prosecuted by the Department of Labor before an independent agency called the Equal Employment Opportunity Board. Modeled on the National Labor Relations Board, this agency had the power to issue cease and desist orders. Judicial review was vested in the court of appeals. SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, EQUAL OPPORTUNITY ACT, SEN. REP. NO. 867, 88th Cong., 2d Sess. 10-15 (1964). The Senate ultimately rejected this proposal. As finally adopted, private plaintiffs were given the responsibility for pursuing their individual claims in federal district courts if EEOC conciliation efforts failed. The Attorney General's authority was limited to "pattern or practice" cases. Congress significantly amended Title VII in 1972 to give the EEOC broad litigating authority. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103 (1972) (amending 42 U.S.C. § 2000e-5(f) (1970)).

Part of the ambiguity during the debate concerning "racial balancing" is attributable to the then unresolved issue of the powers of the enforcing agency. The bill's opponents repeatedly hurled accusations that "federal inspectors" would take over all hiring and promotion decisions, dismissing white employees, refusing to hire white applicants, and setting quotas in order to achieve racial balance. 110 CONG. REC. 1518, 5094, 6563; *see also id.* at 8500, 9034-35, 9943-44, 10,513.

212. H.R. REP. NO. 914, 88th Cong., 1st Sess. 29 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2405.

During the House debate the word "cause" was deleted, and an amendment was adopted substituting in its place "any reason other than discrimination on account of race, color, religion, or national origin."<sup>213</sup> The remarks of Representative Celler, the amendment's sponsor, strongly supported the proposition that it was not intended to limit a court's remedial authority; at a minimum, his remarks reflect the "violation/remedy" ambiguity discussed earlier.<sup>214</sup> Congressman Gill made similar comments.<sup>215</sup>

Problems interpreting section 706(g) also arise from the members' apprehension of "racial balancing." While eager to open economic opportunities previously closed to blacks, they feared that employers and the overseeing federal agency would interpret Title VII as mandating that an employer's workforce mirror the racial composition of the surrounding labor market.<sup>216</sup> In part this fear sprang from the absence of a statutory definition of "discrimination." During both the House and Senate debates, the specter of "federal inspectors" usurping management prerogatives and basing Title VII violations on racial imbalance was never very far from opponents' parade of horrors.<sup>217</sup> The minority report of the House Judiciary Committee, which accompanied the Committee's favorable report on the Civil Rights Bill, labelled Title VII "racism-in-reverse" and stridently proclaimed that it would compel employers "to hire in a 'racially balanced' manner."<sup>218</sup>

213. 110 CONG. REC. 2567-71 (1964).

214.

[T]he court, for example, cannot find any violation of the act which is based on facts other—and I emphasize "other"—than discrimination on the grounds of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment.

*Id.* at 2567.

215.

[O]ur purpose is to pinch down the orders that can be issued by the court to a more narrow range. Thus, we would not interfere with discharges for ineptness, or drunkenness. We would not interfere with unfair labor practices that are covered under other acts. We would limit orders under this act to the purposes of this act.

*Id.* at 2570.

216. H.R. REP. NO. 914, 88th Cong., 1st Sess. 66-69 (1963); 110 CONG. REC. 1518, 1540, 1600, 2557-58, 4764, 5092, 6549, 6553, 6563-64, 7207, 7273, 7420, 8618-19, 9113, 9881-82, 10,520, 11,768.

217. *Id.* at 5094 (remarks of Sen. Humphrey); *id.* at 12,617-18 (remarks of Sen. Muskie).

218. H.R. REP. NO. 914, 88th Cong., 1st Sess. 69-75 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2437-43.

In response to the minority report, seven Republican proponents of the Civil Rights Bill, led by Representative McCulloch, the ranking Republican member of the Committee who played a key role in Title VII's enactment, issued a statement assuring that under Title VII "management prerogatives, [sic] and union freedoms are to be left undisturbed to the greatest extent possible;"<sup>219</sup> it also cautioned the Commission against "promoting equality with mathematical certainty" and forcing "racial balance upon employers or labor unions."<sup>220</sup>

Accusations similar to those contained in the Minority Report were repeated on the floor of the House.<sup>221</sup> Supporters of the bill insistently denied them. For example, Representative Lindsay observed: "[the Civil Rights Bill] does not impose quotas or any special privileges . . . . There is nothing whatever in this bill about racial balance as appears so frequently in the minority report of the Committee."<sup>222</sup> Similarly, Representative Healy stated: "Opponents of the bill say that it sets up racial quotas for job[s] . . . . The bill does not do that."<sup>223</sup> Representative Goodell said: "There is nothing here as a matter of legislative history that would require racial balancing . . . . We are not talking about a union having to balance its membership or an employer having to balance the number of employees. There is no quota involved."<sup>224</sup>

These salvos and retorts reflect the confusion characterizing both Houses' understanding of sections 703(j) and 706(g). Clearly, "racial balancing" or the imposition of "quotas," whether undertaken independently by an employer or compelled by a federal agency, was

219. *Id.* at 2516. Without the assistance of Representative McCulloch, it is unlikely that an effective civil rights bill could have emerged from the House. In exchange for his support, leaders of the Democratic Party promised not to introduce any amendments to H.R. 7152 without his specific permission. McCulloch was later castigated by the bill's opponents as the "Czar of the Senate." 110 CONG. REC. 7203, 7215 (1964) (remarks of Sen. Clark).

220. H.R. REP. NO. 914, 88th Cong., 1st Sess. 29 (1963), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2516.

221. *E.g.*, 110 CONG. REC. 1518 (1964) (remarks of Rep. Celler); *id.* at 1620 (remarks of Rep. Abernathy); *id.* at 1633, 2557-58 (remarks of Rep. Dowdy); *id.* at 1644 (remarks of Rep. Cleveland).

222. *Id.* at 1540. Representative Minish observed:

Under title VII, employment will be on the basis of merit, not of race.

This means that no quota system will be set up, no one will be forced to hire incompetent help because of race or religion, and no one will be given a vested right to demand employment for a certain job.

*Id.* at 1600.

223. *Id.* at 1994.

224. *Id.* at 2558.



an anathema. The scope of a court's remedial authority, however, presents an analytically distinct issue, one not considered by the majority of speakers. Representative Celler was the only Congressman who directly addressed this issue during the House debate. He stated:

[n]o order could be entered against an employer except by a court, and after a full and fair hearing, and any such order would be subject to appeal as is true in all court cases.

Even then, the court could not order that any preference be given to any particular race, religion or other group, but would be limited to ordering an end to discrimination.<sup>225</sup>

The meaning of this statement is not crystal clear. What is a "preference"? Does the court award a preference if it orders an employer: to promote black employees in a fixed ratio to white employees; to hire black applicants in a fixed ratio to white applicants; to provide special training programs for blacks; or to establish recruitment programs directed at the minority community? Read literally, his statement would seem to preclude a court from granting "make-whole" relief to discriminatees. To limit a court's authority "to ordering an end to discrimination" would have made Title VII a paper tiger, a result quite obviously at odds with Representative Celler's purpose. A careful reading of the entire House debate suggests that "preference" is somehow linked to "racial balancing," a practice which the bill's supporters insisted was not their intent to legislate.<sup>226</sup>

In sum, the clear consensus of the Civil Rights Bill's supporters was that, if enacted, Title VII would not require employers and unions to hire and promote based on race. Only Congressman Celler's remarks arguably address the scope of a court's remedial authority. The remainder of the debate is unfocused; accusations of compulsory racial balancing by the bill's opponents and denial by its supporters are directed to the Civil Rights Bill's substantive effect, apart from judicial enforcement. In other words, the comments, with the one exception noted, revolve around the question: if enacted, will the Civil Rights Bill require employers and unions to balance their respective work force and membership to reflect a community's racial composition?

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225. *Id.* at 1518. Representative Celler made similar statements about the EEOC: "It is likewise not true that the Equal Employment Opportunity Commission would have the power to rectify existing 'racial or religious imbalance' in employment by requiring the hiring of certain people without regard to their qualifications simply because they are of a given race or religion." *Id.*

226. *See supra* note 221.

Senate consideration of the Civil Rights Bill took place in three stages.<sup>227</sup> The first stage involved the efforts of the bill's opponents to have it referred to the Judiciary Committee. Not unexpectedly, much of the debate focused on the bill's merits.<sup>228</sup> Due to that Committee's open and notorious hostility to civil rights legislation, a successful vote would have sounded the death knell for the Civil Rights Bill.<sup>229</sup> Defeat of this motion heralded phase two: the formal debate on the bill's substance. The third phase consisted of the debate on Senator Mansfield's cloture motion and the final debate following cloture. The Senate's deliberations lasted sixty-three days, during which time virtually all other Senate business was suspended.

Accusations similar to those raised in the House regarding racial balancing were repeated in the Senate. For example, Senator Hill castigated the bill for compelling "racial balance" and replacing the principle of nondiscrimination with "preferential treatment."<sup>230</sup> Senator Robertson graphically emphasized these views, saying:

It is contemplated by this title that the percentage of colored and white population in a community shall be in similar percentages in every business establishment that employs over 25 persons. Thus, if there were 10,000 colored persons in a city and 15,000 whites, an employer with 25 employees would, in order to overcome racial imbalance, be required to have 10 colored personnel and 15 white.<sup>231</sup>

At least ten other Senators shared this view.<sup>232</sup>

In response to Senator Robertson, Senator Humphrey had published in the Congressional Record a Justice Department analysis of

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227. See Vaas, *supra* note 192, at 443-57; see also *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 235-51 (1979) (Rehnquist, J., dissenting).

228. Compare 110 CONG. REC. 5423, 6001 (1964) (remarks of Sen. Humphrey) with *id.* at 5092 (remarks of Sen. Robertson); *id.* at 5877-78 (remarks of Sen. Byrd).

229. THE LONGEST DEBATE, *supra* note 200, at 11.

230. 110 CONG. REC. at 486-89 (1964).

231. *Id.* at 5092. Senator Humphrey was so incensed by these remarks that he interrupted Senator Robertson to insist "The bill does not require that at all. If it did, I would vote against it . . . . There is no percentage quota." *Id.*

232. See, e.g., *id.* at 4764 (remarks of Sens. Hill and Ervin); *id.* at 5877-78 (remarks of Sen. Byrd); *id.* at 7091, 9034-35 (remarks of Sen. Stennis); *id.* at 7774, 7778, 9034-35 (remarks of Sen. Tower); *id.* at 7878-79 (remarks of Sen. Russell); *id.* at 8175, 8500 (remarks of Sen. Smathers); *id.* at 8500, 8618-19, 13,076 (remarks of Sen. Sparkman); *id.* at 9943-44 (remarks of Sens. Long and Talmadge).

In responding to the claims of Senator Smathers, Senator Humphrey again said "[t]here is no enforced quota. The quota system which has been discussed is nonsense. Everyone knows that it is not in the bill . . . ." *Id.* at 6001.

the bill, which asserted that "[t]he bill would not authorize anyone to order hiring or firing to achieve racial or religious balance."<sup>233</sup> When the opponents of Title VII published a newspaper advertisement reiterating the same claims, Senator Humphrey emphatically responded that Title VII did not "in any way authorize the Federal Government to prescribe as the advertisement charges, a 'racial balance' of job classifications or office staffs or 'preferential treatment of minorities.'"<sup>234</sup> He further stated "[N]othing in the bill would permit any official or court to require any employer or labor union to give preferential treatment to any minority group."<sup>235</sup> While superficially appealing to those who would limit a court's remedial authority to "make-whole" relief for identified victims of discrimination, Senator Humphrey's intertwining of racial balancing, preferential treatment, and a court's authority weakens the force of this statement.

At the end of the seventeen days of debate on the motion to refer the Civil Rights Bill to the Judiciary Committee, the Senate defeated the motion and considered the bill on the merits.<sup>236</sup> The debate's second stage occurred in two phases. Initially, the floor leaders for the Democratic and Republican parties, Senators Humphrey and Kutchel, respectively, discussed the bill's goals and scope.<sup>237</sup> After their remarks, bipartisan "captains," working in teams, argued separately in support of each title. Senators Case and Clark were responsible for Title VII.<sup>238</sup>

Senator Humphrey's opening remarks touched upon the scope of a court's remedial authority:

The relief sought in [a Title VII] suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay . . . . No

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233. *Id.* at 5094. The reference to "anyone" is unclear. The Justice Department directed its analysis to the ten most common objections to Title VII, one of which was that the statute authorized "federal 'inspectors' " to compel employers to hire by race. *Id.* Its response to this objection was that "the Commission may take its case to a Federal judge, leaving it to him to decide if a violation did in fact take place and what the remedy should be." *Id.* "Anyone" most likely refers to the "federal inspector" and the Commission rather than the court. Once again, the confusion over "racial balancing" is self-evident.

234. *Id.* at 5423.

235. *Id.*

236. *Id.* at 6417; see *Weber*, 443 U.S. at 235 (Rehnquist, J., dissenting); Vaas *supra* note 192, at 443-44.

237. 110 CONG. REC. at 14,464.

238. 110 CONG. REC. 6528 (1964); Vaas, *supra* note 192, at 444-45.

court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e) [subsequently enacted as section 706(g)], which makes clear what is implicit throughout the whole title: namely, that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin . . . .

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.<sup>239</sup>

Senator Humphrey's remarks reflected the same "violation/remedy" confusion which characterized his earlier statement. While initially his remarks appear emphatic, the language in the second paragraph referring to "racial balance" undercuts the first paragraph's strength.

The statements of the bill's Republican supporters, however, are more precise than those of Senator Humphrey. Senator Kutchel, the Republican floor leader for Title VII, said:

[T]he important point, in response to the scare charges which have been widely circulated to local unions throughout America, is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group. Its power is solely limited to ordering an end to the discrimination which is in fact occurring.<sup>240</sup>

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239. 110 CONG. REC. at 6549. In concluding his speech Senator Humphrey struck a similar theme. "It is claimed that the bill would require racial quotas for all hiring, when in fact it provides that race shall not be a basis for making personnel decisions." *Id.* at 6553.

240. *Id.* at 6563. In describing the Court's power, he said:

[i]f the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without back pay, which may be appropriate.

*Id.*

Senators Humphrey and Kutchel also co-authored a Bipartisan Civil Rights Newsletter. In Newsletter #28, they wrote: "[u]nder title VII, not even a court, much less the Commission, could order racial quotas or the hiring, reinstatement, admission to membership or payment of back pay for anyone who is not discriminated against in violation of this title." *Id.* at 14,465; see also Vaas, *supra* note 192, at 445.

He also introduced a memorandum prepared by Republican House members reflecting the same understanding.<sup>241</sup>

After these opening remarks, the "floor captains" addressed Title VII's merits. Their discussion, however, failed to make clear whether they were addressing the scope of a court's authority following a finding of liability or simply saying that racial imbalance did not trigger a Title VII violation. Each Senator denied that Title VII would require "racial balancing."<sup>242</sup> At Senator Clark's request, a Justice Department memorandum was introduced as further evidence of Title VII's limited scope:

[I]t has been asserted title VII would impose a requirement for "racial balance." This is incorrect. There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance.<sup>243</sup>

While this document arguably was addressing a court's remedial authority, the "Interpretative Memorandum" jointly submitted by Senators Clark and Case clearly referred to the substantive issue of whether racial imbalance *per se* would constitute a violation.<sup>244</sup> Also introduced was a second document modeled on one discussed earlier and fashioned in the style of "objections" and "answers" asserting that quotas "are themselves discriminatory."<sup>245</sup>

241. 110 CONG. REC. at 6565-66.

242. *See id.* at 7207 (remarks of Sen. Clark) ("The suggestion that racial balance or quota systems would be imposed by this proposed legislation is entirely inaccurate"); *id.* at 7253 (remarks of Sen. Case) (denying that the bill would require racial hiring); *see also id.* at 13,080 (remarks of Sen. Clark) ("The bill does not make anyone higher than anyone else. It establishes no quotas."); *id.* at 14,484 (remarks of Sen. Moss) ("The bill does not accord to any citizen advantage or preference—it does not fix quotas of employment . . .").

243. *Id.* at 7207. Other supporters of the bill made similar observations. *See id.* at 9113 (remarks of Sen. Keating); *id.* at 9881-82 (remarks of Sen. Allott); *id.* at 10,520 (remarks of Sen. Carlson); *id.* at 11,768 (remarks of Sen. McGovern).

244.

[I]f a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies . . .

*Id.* at 7213. The Supreme Court has refused on at least one occasion, however to give controlling weight to the Clark/Case memorandum. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434-36 (1971); *see also United Steelworkers of Am. v. Weber*, 443 U.S. 193, 215 (1979) (Blackmun, J., concurring).

245. "Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.

The filibuster on Title VII stretched out over two months. Again and again opponents raised the specter of mandatory "racial balancing" in work places and unions.<sup>246</sup> Recognizing that their own assurances were insufficient, the bill's proponents finally suggested that an explicit disclaimer be inserted to allay their opponents' fears.<sup>247</sup> Section 703(j) was part of the Dirksen-Mansfield substitute for the Civil Rights Bill.<sup>248</sup>

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Answer: Quotas are themselves discriminatory." 110 CONG. REC. at 7218.

Other supporters of the bill repeatedly gave the same assurances. *See, e.g., id.* at 9113 (remarks of Sen. Keating); *id.* (remarks of Sen. Williams); *id.* at 10,520 (remarks of Sen. Carlson); *id.* at 11,471 (remarks of Sen. Javits); *id.* at 11,768 (remarks of Sen. McGovern); *id.* at 11,848 (staff memorandum of Sen. Humphrey); *id.* at 14,331 (staff memorandum submitted by Sen. Williams).

246. In many respects the filibuster lacked virtually all characteristics of a "dialogue." Rather than presenting an opportunity for open discussion, reflection and persuasion, it often degenerated into pointless exchanges with each side resolutely standing by its original position. For example, when Senator Robertson persisted in claiming that H.R. 7152 would compel "percentage hiring," it fell to Senator Humphrey to repeat still once more that this consequence could not flow from the bill's enactment: "If the Senator can find in title VII . . . any language which provides that an employer will have to hire on the basis of percentage or quota related to color, race, religion, or national origin, I will start eating the pages one after another, because it is not in there." *Id.* at 7420.

Ironically, in light of subsequent judicial opinions, Robertson replied, "I find it in the possible ruling of a bureaucrat and then confirmed by a court that does not operate in a way that I approve." *Id.* Barely controlling his sense of exasperation, Humphrey retorted: "Mr. President, I enjoy these debates, because I know when I engage in them with the Senator from Virginia, he becomes more eloquent, moving, and persuasive every moment." *Id.*; *see also id.* at 5092 (similar dialogue).

Despite the adamant denials by the bill's supporters other senators repeated these accusations. *See, e.g., id.* at 7778 (remarks of Sen. Tower); *id.* at 7800 (remarks of Sen. Smathers).

247. Senator Humphrey first raised this possibility in an exchange with Senator Smathers:

Mr. Humphrey[:] Would the Senator from Florida be more pleased if we included in the bill an amendment which provided that there should be no quota system?

Mr. Smathers[:] I think the bill would be improved.

Mr. Humphrey[:] That might be a good Amendment. It is only to satisfy those who are doubters, because if we do not expressly provide for a quota system, obviously it will not be included. But since we do provide in other sections of the bill—for example, in title VI—that the withdrawal of Federal funds should not relate to insured activities or guarantees, we might very well want to include that sort of restraint in the bill.

I have heard this argument made again and again. If there is that legitimate fear, which I do not see in the bill, but which others may see, perhaps we ought to remedy the alleged defect. I do not believe in a quota system.

*Id.* at 7800.

248. For a general discussion of the substitute bill, see Vaas, *supra* note 192, at 446-47.

The Dirksen-Mansfield bill was a compromise bill hammered out behind the scenes by Attorney General Robert Kennedy and Senators Dirksen, Mansfield, Humphrey and Kutchel. In explaining its inclusion, Senator Humphrey said:

A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning.<sup>249</sup>

This statement, like so many others in the course of the debate, also fails to distinguish between "remedies" and "violations." It addresses employers, not courts.

On June 17, the Senate adopted Title VII by a vote of 73 to 27.<sup>250</sup> Once again, the usual legislative procedures were not followed. The two houses should have set up a conference committee to iron out the bills' differences. Instead, the House voted directly on the Senate version and, after one hour of debate, passed it by a vote of 289 to 126.<sup>251</sup> During the debate, three backers of the bill resurrected the charges of "racial balancing" and "quotas" for the purpose of putting them to their final rest. Representative Lindsay, one of the Act's key Republican supporters, said, "[W]e wish to emphasize also that this bill does not require quotas, racial balance, or any of the other things that the opponents have been saying about it."<sup>252</sup> Representative MacGregor observed:

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249. 110 CONG. REC. at 12,723.

The court shall not find, in any civil action brought under this title, that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint solely on the basis of evidence that an imbalance exists with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin [sic] employed by any employer . . . in comparison with the total number or percentage of such persons of such race, color, religion, sex, or national origin in any community, state, section or other area . . . without supporting evidence of another nature that the respondent has engaged in or is

*Id.* at 9881-82.

The amendment may have been intended to have "remedial" motives as well. Senator Allott said the amendment grew out of his and Senator Humphrey's opposition to "quotas." *Id.* at 8618.

250. *Id.* at 14,511.

251. *Id.* at 15,893.

252. *Id.* at 15,876.

Important as the scope and extent of this bill is, it is also vitally important that all Americans understand what this bill does not cover.

Your mail and mine, your contracts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about . . . preferential treatment or quotas in employment. There is a mistake belief that Congress is legislating in these areas in this bill.<sup>253</sup>

Representative McCulloch offered assurances that “[t]he bill does not permit the Federal Government to require an employer or union to hire or accept for membership a quota of persons from any particular minority group.”<sup>254</sup>

With these three remarks, the legislative circle was closed precisely at the point where it began. Congressional supporters remained as confused as they were one year and thirteen days before, when the Civil Rights Bill was introduced.

Two observations emerge clearly from the tortured days of debate. First, Congress intended, as it spelled out in section 703(j), that Title VII not require “any employer . . . 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”<sup>255</sup> for the purpose of creating racial balance in the employer’s work force. In other words, since racial imbalance did not constitute a violation of Title VII, neither a federal “inspector” nor a court possessed the authority to order quota-based hirings or promotions to create a balance. Second, while section 706(g), on its face, appeared to restrict a court’s authority to ordering relief for identified victims who were “refused admission, suspended, or expelled [from a union] or . . . refused employment or advancement or . . . suspended or discharged . . . on account of race, color, religion, sex, or national origin . . . ,”<sup>256</sup> the comments of the bill’s supporters in both houses left the meaning of that section far from settled.

## V. The Legislative History of the 1972 Amendments

In 1972, Congress amended Title VII in several significant respects, most of which are not directly pertinent to this discussion.<sup>257</sup> One

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253. *Id.* at 15,893.

254. *Id.*

255. 78 Stat. 257 (1964) (codified as amended at 42 U.S.C. § 2000e-2(j) (1982)).

256. *Id.* § 2000e-5(g).

257. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified at and amended by 42 U.S.C. §§ 2000e-2000e-17 (1982)). The most radical change involved the expansion of the authority of the EEOC. Under



amendment, however, does merit analysis. That amendment, as illustrated by the italicized language, modified the language of section 706(g) to authorize a court to order "such affirmative action as may be appropriate, which may include, *but is not limited to*, reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate."<sup>258</sup> By inserting this language Congress clearly intended "to give the courts wide discretion . . . to fashion the most complete relief possible."<sup>259</sup> The sponsors of the amendment specifically emphasized the need for comprehensive "make-whole" relief for actual victims.<sup>260</sup> Nowhere, however, did they express the view that such relief excluded race-conscious remedies for non-victims. Indeed, their rejection of three other amendments supports a contrary conclusion.

The first of these rejected amendments was introduced by Congressman Erlehorn to severely limit the use of class actions in Title VII cases. The implications of that proposal and its defeat are discussed separately.<sup>261</sup>

The second and third rejected amendments would have barred both the judicial and executive branches from ordering race-conscious relief for non-victims. To appreciate the significance of these proposals some background information must be supplied. In 1965,

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the 1964 Act, the EEOC had no independent litigative authority. The 1972 amendment authorized the agency to bring suit in its own name directly against employers in cases involving individual instances of discrimination and in "pattern and practice" cases. *Id.* at 105 (codified at 42 U.S.C. § 2000e-5(f)(1)(1982)). The Attorney General, however, retained the exclusive jurisdiction to bring suit against a state government, governmental agency or political subdivision. *Id.* A second radical change consisted of broadening the scope of the Act's coverage by including federal employees and employees of state and local governments. *Id.* at 104-05 (codified at 42 U.S.C. §§ 2000e-5(c), 2000e-16 (1982)). See generally Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824 (1972).

258. 42 U.S.C. § 2000e-5(g) (1982) (emphasis added).

259. 118 CONG. REC. 7168 (1972).

260. The purpose of the amendment was explained as follows:

The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

*Id.*

261. See *infra* notes 311-13 and accompanying text.

President Johnson issued an executive order<sup>262</sup> which made broad findings of race and sex discrimination in the construction industry. To remedy what was essentially societal discrimination similar to that which later prompted Congress to include the ten percent set-aside for minority businesses in the Public Works Employment Act of 1977,<sup>263</sup> the order required federal contractors to establish affirmative action programs containing "goals" for minority employment.<sup>264</sup>

Prior to the debate on the 1972 amendments, the Court of Appeals for the Third Circuit had rejected a multi-pronged attack on this executive order, made in the context of a challenge to the "Philadelphia Plan."<sup>265</sup> It specifically held that the restrictive language of Section 703(j) did not apply to actions taken under the executive order.<sup>266</sup> The court's decision caused considerable consternation among the Congressmen opposed to all forms of race-conscious relief. These Congressmen focused their attention on two issues. First and foremost was the fundamental question of the propriety of such relief. The debate on this issue principally pitted Senator Sam Ervin, a vigorous opponent of racial preferences, against Senator Jacob Javits, the floor-manager of the proposed bill. Their exchanges centered on the philosophical and legal justifications for employment preferences based on race.<sup>267</sup>

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262. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965 Compilation), *reprinted as amended in* 42 U.S.C. § 2000e (1982). *See generally* K. McGUINNESS, *PREFERENTIAL TREATMENT IN EMPLOYMENT* (1977); Jones, Jr., *Twenty-one Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246, as amended*, 59 CHI-KENT L. REV. 67 (1982); Lenhoff, *Voluntary Affirmative Action and the Office of Federal Contract Compliance Programs*, 54 TEMP. L.Q. 762 (1981); Nash, *Affirmative Action Under Executive Order 11,246*, 46 N.Y.U. L. REV. 225 (1971); Note, *Executive Order 11,246 and Reverse Discrimination Challenges: Presidential Authority to Require Affirmative Action*, 54 N.Y.U. L. REV. 376 (1979); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972).

The use of "affirmative action" to remedy employment discrimination has its genesis in Executive Order 10,925 issued by President Kennedy in 1961. Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961). It mandated that all contracts entered into by the federal government contain the following language: "The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." *Id.* It was later amended to include discrimination on the basis of sex. Exec. Order No. 11,375, 32 Fed. Reg. 11,375 (1967).

263. *See supra* text accompanying note 155.

264. *See supra* note 262.

265. *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 172 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

266. *Id.*

267. 118 CONG. REC. 1662-76 (1972) (*passim*).

The second and more subtle issue reflected the unavoidable and ever present tension between the legislative and executive branches. Several Congressmen were disturbed because they read the Third Circuit's decision as permitting the executive branch to impose quotas via the "back door" after Congress had deliberately barred the front door in section 703(j).<sup>268</sup>

Senator Ervin first proposed an amendment that read, in part: "No department, agency, or officer of the United States shall require an employer to practice discrimination in reverse by employing persons of a particular race . . . in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges."<sup>269</sup> He made it perfectly clear that the Philadelphia Plan was the target of his amendment, although he drafted the amendment in the broadest terms possible in order to include all government agencies.<sup>270</sup>

Senator Javits spoke out forcefully against the proposal.<sup>271</sup> He stated that a vote for the amendment would result in dismantling the executive order and "deprive *the courts of the opportunity to order affirmative action under title VII* of the type which they have sustained in order to correct a history of unjust and illegal dis-

268. *Id.* at 1662-63. SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 2d Sess., Legislative History of the Equal Employment Opportunity Act of 1972 at 1525-26 (1972).

269. 118 CONG. REC. at 1662 (Amendment 829) (1972).

Representative Dent proposed a similar amendment in the House to "forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program." 117 CONG. REC. at 31,784 (1971). The amendment was directed to the EEOC rather than the Office of Federal Contract Compliance ("OFCC") because the bill then under consideration contemplated the transfer of that agency's jurisdiction to the EEOC. In Representative Dent's view, there was no need to extend the amendment to the courts' remedial authority since "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII." *Id.* The House never voted on Dent's amendment because a substitute bill was adopted which did not transfer the OFCC's jurisdiction.

270. 118 CONG. REC. at 1663.

271.

[T]he depth of this amendment is much greater than is apparent on the surface because it would purport not only to inhibit in given respects the officers of the United States but also the courts of the United States through whom, once they make a finding or a judgment, the officers of the United States are moved.

I make that analysis because it is clear that what is sought to be reached is, first the Philadelphia plan and similar plans in other cities, and beyond that, the whole concept of "affirmative action" as it has been developed under Executive Order 11246 and as a remedial concept under Title VII.

*Id.* at 1664.

crimination . . . .”<sup>272</sup> To emphasize this point he had printed in the Congressional Record both the Third Circuit’s opinion and a decision by the Ninth Circuit affirming the imposition of race-conscious relief for non-victims.<sup>273</sup> In addition, Senator Javits referred to two consent judgments only recently obtained by the Department of Justice authorizing such relief.<sup>274</sup> In commenting upon them, he said:

[This amendment] would torpedo orders of courts seeking to correct a history of unjust discrimination in employment on racial or color grounds, because it would prevent the court from ordering specific measures which could assign specific percentages of minorities that had to be hired, and that could apply to government as well as private employers . . . .<sup>275</sup>

Clearly, in Senator Javits’ view, Title VII authorized the imposition of race-conscious relief irrespective of the context in which the remedy was fashioned, i.e., a judgment entered after a trial or a judgment entered upon the parties’ consent. Justice Stevens’ concurring opinion in *Stotts* intimates that this distinction may prompt a different result.<sup>276</sup>

Arguments similar to those made by Senator Javits were also made by Senator Williams, who said that the amendment would effectively “strip title VII . . . of all its basic fiber. It can be read to deprive *even the courts* of any power to remedy clearly proven cases of discrimination . . . . [It] raises the real threat of destroying any potential for effective law enforcement.”<sup>277</sup> Significantly, Senator Ervin never disputed his opponents’ description of the reach of his proposed amendment.

The Ervin amendment was defeated by a margin of two to one.<sup>278</sup> Undaunted, Senator Ervin proposed a second amendment extending section 703(j)’s prohibition against racial preferences to “Executive Order Numbered 11246, or any other statute or executive order.”<sup>279</sup> After a brief debate, it too was resoundingly defeated.<sup>280</sup>

272. *Id.* at 1665 (emphasis added).

273. *Id.* at 1665-75 (reprinting *Contractors Ass’n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), and *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971)).

274. *Id.* at 1675.

275. *Id.*

276. 104 S. Ct. at 2594 n.3; *see also id.* at 2605 (Blackmun, J., dissenting). Justice White disagrees. *Id.* at 2587 n.9.

277. 118 CONG. REC. 1676 (1972) (emphasis added).

278. *Id.* at 1676 (44 nays and 22 yeas).

279. *Id.* at 4917-18.

280. *Id.* at 4918 (60 nays, 30 yeas).

Coupled with the amendment to section 706(g) emphasizing the broad scope of a court's remedial authority, the Senate's rejection of these amendments strongly suggests Congress' approval of judicially imposed race-conscious relief for non-victims.<sup>281</sup>

This conclusion, moreover, is reinforced by the report of the Conference Committee which accompanied the 1972 amendments. "In any area where the new law does not address itself, or in any area where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."<sup>282</sup>

It should be noted, in passing, that Justice White, writing for the majority in *Stotts*, rejected any argument based on the sponsors' expressed intention in amending section 706(g).<sup>283</sup> He correctly describes their purpose as encouraging the courts to award "make-whole" relief to the actual victims of employment discrimination.<sup>284</sup> What he fails to appreciate, however, is that such relief does not contradict or undercut the viability of race-conscious remedies for non-victims. There is nothing inherently inconsistent between the two forms of relief. Indeed, it is more logical to assume that in rejecting the Ervin amendments the Senate was showing its approval of the courts' adoption of race-conscious relief, but in amending section 706(g) it was expressing its disapproval of their too limited relief to actual victims.

While none of the foregoing is conclusive, the legislative history of the 1972 amendments shows Congress' awareness of the imposition of race-conscious remedies benefiting non-victims by both the executive and legislative branches. In light of the highly controversial nature of such relief, Congress' silence and its outright refusal to act is best interpreted as confirmation that sections 706(g) and 703(j) do not preclude such preferential relief.

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281. Relying in part on this same legislative history, Justice Brennan observed in *Bakke*: "Executive, judicial, and congressional action subsequent to the passage of Title VII conclusively established that the Title did not bar the remedial use of race." 438 U.S. 265, 353 n.28 (1978) (Brennan, J., concurring in part and dissenting in part). Ironically, Justice White, the author of the majority opinion in *Stotts*, joined in Justice Brennan's opinion.

282. 118 CONG. REC. at 7166. Significantly, Senator Williams and Congressman Perkins, managers of the 1972 bill amending Title VII, had the Conference Committee Report containing this language inserted in Senate and House volumes of the Congressional Record. *Id.* at 7166, 7564.

283. 104 S. Ct. at 2590 n.15 (quoting 118 CONG. REC. at 7167).

284. *Id.*

## VI. The Court's Endorsement of Rule 23(b)(2) Certification and the Use of Statistical Evidence

### A. Class Actions

That racial discrimination is essentially a group wrong, collective in nature, finds support in the procedural mechanism most frequently used in litigating disparate treatment and adverse impact cases: class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure.<sup>285</sup> When Title VII cases first began to reach the courts,

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285. Rule 23 of the Federal Rules of Civil Procedure provides in part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(a)-(b).

The relationship between Title VII and Rule 23 has been a fertile field for legal scholars. Some of the more stimulating recent articles include: Bridgesmith, *Representing the Title VII Class Action: A Question of Degree*, 26 WAYNE L. REV. 1413 (1980); Greene, *Title VII Class Actions: Standing at Its Edge?*, 58 U. DET.

it was frequently observed that “[r]acial discrimination is by definition class discrimination.”<sup>286</sup> In the years that followed, the courts did not distinguish between the substance of a Title VII claim, discrimination against a class, and the procedural device used to press the substantive claim, Rule 23. Their lack of precision fostered an uncritical approval of most class action allegations.

Although the Supreme Court has since condemned such routine certifications, it has in the same context acknowledged that racial discrimination is by definition a group wrong.<sup>287</sup> Given this acknowledgment, denying a court the authority to impose a group remedy seems highly unreasonable. This is not to say that Congress could not deny a court such authority; having the power to create the right, it certainly is free to frame the remedy. However, in light of the Court’s jurisprudence of affirmative action as reflected in *Bakke*, *Weber* and *Fullilove*, and in light of the legislative history of the 1964 Act and the 1972 amendments, the Court’s interpretation of section 706(g) appears even more strained when viewed against its pronouncements concerning the application of Rule 23 to Title VII. As demonstrated below, the use of a “class” procedure to establish a “class substantive” claim further illustrates the propriety of relief for non-victims of discrimination.<sup>288</sup>

Congress did not, at the time of the statute’s enactment, foresee

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J. URB. L. 645 (1981) [hereinafter cited as Greene]; Karro, *The Importance of Being Earnest: Pleading and Maintaining a Title VII Class Action for the Purpose of Resolving the Claims of Class Members*, 49 FORDHAM L. REV. 904 (1981) [hereinafter cited as Karro]; Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688 (1980) [hereinafter cited as Rutherglen]; Warren, *Title VII of the Civil Rights Act of 1964 and Class Action Litigation*, 34 BAYLOR L. REV. 1206 (1982).

286. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (5th Cir. 1968); *accord Gay v. Waiters’ and Dairy Lunchmen’s Union, Local No. 30*, 549 F.2d 1330, 1333 (9th Cir. 1977) (“[s]ince the purpose of Title VII is to eliminate . . . class based discrimination, class actions are favored in Title VII actions for salutary policy reasons”); *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976) (“[b]ecause [Title VII] attacks class-based discrimination, it is particularly appropriate that suits to remedy violations of the Act be brought as class actions”), *aff’d sub nom. United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Senter v. General Motors Corp.*, 532 F.2d 511, 524 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976) (“[r]ace discrimination is peculiarly class discrimination”); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 547 (4th Cir. 1975) (“[v]iewed broadly, Barnett’s suit is an ‘across the board’ attack on all discriminatory actions by defendants on the ground of race, and when so viewed it fits comfortably within the requirements of Rule 23(b)(2)”; *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 428 (8th Cir. 1970) (“The very nature of a Title VII violation rests upon discrimination against a class characteristic, i.e., race, religion, sex or national origin”).

287. See *infra* notes 315-37 and accompanying text.

288. *Id.*

the important role class actions were to play in Title VII litigation. Although the Act authorized the Attorney-General to file "pattern and practice" suits,<sup>289</sup> it did not contain an analogous procedure for private actions. While Congress clearly anticipated the important role of the private plaintiff,<sup>290</sup> it did not analyze in any detailed manner the mechanism of this aspect of the statute's implementation.<sup>291</sup> Its silence is in part attributable to the then pervasive dissatisfaction with the rule governing class actions, dissatisfaction which prompted its amendment in 1966. In 1964, Rule 23 was bogged down in ephemeral distinctions among "true," "hybrid" and "spurious" classes and was not operating efficiently.<sup>292</sup> The new rule abandoned this scheme altogether; it explicitly recognized as appropriate for class action treatment cases in which "the party opposing the class has acted or refused to act on grounds generally applicable to the class."<sup>293</sup> The Rule's commentators, in describing the kinds of cases appropriate for certification under this subsection, said: "[i]llustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."<sup>294</sup>

From both the plaintiff's and defendant's perspective, the advantages of class action certification are significant. In Title VII actions, as in other kinds of litigation, the class action device avoids multiple suits and eliminates judicial and administrative waste. It fashions a vehicle whereby individuals with small dollar claims can obtain

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289. Civil Rights Act of 1964, Pub. L. No. 88-352, § 707, 78 Stat. 253, 261-62 (1964) (codified at 42 U.S.C. § 2000e-6 (1982)).

290. Thus, Congress provided for an award of attorneys' fees to the prevailing party, Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(k), 78 Stat. 253, 261 (codified at 42 U.S.C. § 2000e-5(k) (1982)), and for the appointment of an attorney for the charging party and a waiver of fees, costs and security. *Id.* § 706(e), 78 Stat. 253, 260 (codified at 42 U.S.C. § 2000e-5(f)(1) (1982)).

291. Interestingly, Congress refused to permit the filing of class claims with the EEOC. The House bill originally authorized private individuals to file charges "on behalf of" discriminatees. The Senate, however, deleted the language. 110 CONG. REC. at 8193 (1964) (remarks of Sen. Dirkson); *id.* at 7217 (remarks of Sen. Clark); Vaas, *supra* note 191, at 446-47, 452-53; see Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(a), 78 Stat. 259. In 1972 Congress reversed itself. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4(a), 86 Stat. 103, 104 (codified at 42 U.S.C. § 2000e-5(b) (1982)).

292. *Hall v. Werthan Bag Corp.*, 251 F. Supp. 184 (M.D. Tenn. 1966), the first reported Title VII class action, was decided under the original Rule 23.

293. FED. R. CIV. P. 23(b)(2).

294. FED. R. CIV. P. 23 advisory committee note to 1966 Amendment, subd. (b)(2) [hereinafter cited as Adv. Comm. Notes]; accord, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967).



judicial redress which would otherwise be unavailable.<sup>295</sup> It binds not only the specific parties to the action, but also absent class members.<sup>296</sup> Additionally, certain claims common to many Title VII suits, such as challenges to height and weight requirements, testing procedures, and subjective promotion decisions, lend themselves to class action treatment.<sup>297</sup>

Almost without exception, the courts heeded the commentators' suggestion and certified Title VII class actions pursuant to subsection (b)(2).<sup>298</sup> In so doing they treated the employees' demand for monetary relief, generally in the form of back pay, as "ancillary" to the prayer for injunctive and/or declaratory relief.<sup>299</sup> There was no ceiling to this "ancillary" relief, of course, and it could amount to hundreds of thousands of dollars, and thereby dramatically affect the employer's financial well-being.<sup>300</sup>

The courts were quick to seize on the concept of discrimination as inherently class-based, and therefore, they demanded far less of

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295. 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, ¶ 1782, at 101-02 (1972) and at 127-29 (1985 Supp.).

296. 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.60 (2d ed. 1985) [hereinafter cited as MOORE'S FEDERAL PRACTICE]; 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, ¶ 1789, at 171 (1972).

297. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 328-32 (1977) (height and weight requirements); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (employment tests); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (same).

298. See, e.g., *Sperry Rand Corp. v. Larson*, 554 F.2d 868, 874-75 (8th Cir. 1977); *Cross v. National Trust Life Ins. Co.*, 553 F.2d 1026, 1029-30 (6th Cir. 1977); *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 919 (7th Cir. 1976), *aff'd sub nom. United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 339-42 (10th Cir. 1975); *Barnett v. W. T. Grant Co.*, 518 F.2d 543, 547-48 (4th Cir. 1975); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 250-53 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32-35 (5th Cir. 1968); Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868 (1979); see MOORE'S FEDERAL PRACTICE, *supra* note 296, at ¶ 23.50.

299. E.g., *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 251-52 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *accord Marshall v. Kirkland*, 602 F.2d 1282, 1295-96 (8th Cir. 1979); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 256-58 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115 (1979); *Head v. Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 802-04 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719-20 (7th Cir. 1969).

300. In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court said: "given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421 (footnote omitted). Consequently, the lower courts rarely deny back pay relief.

Title VII plaintiffs by way of conformity with Rule 23's requirements<sup>301</sup> than they did of plaintiffs pressing other types of claims.<sup>302</sup> This double standard prompted harsh criticism in academic circles, but the courts were not without defenders.<sup>303</sup> The courts often justified this less than rigorous scrutiny by pointing to the possibility of decertification<sup>304</sup> as a basis for granting class action status to Title VII claims.<sup>305</sup> The scope of the class certified, moreover, was frequently so broad as to be omnivorous.<sup>306</sup> Representation was not

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301. Requirements are of typicality and numerosity among others. FED. R. CIV. P. 23.

302. For example, the requirements of Rule 23 are applied more demandingly by the courts to shareholders in Rule 10b-5 actions. *Gert v. Elgin Nat'l Indus., Inc.*, 773 F.2d 154, 159 (7th Cir. 1985); *Eisenberg and Nissen v. Gagnon*, 766 F.2d 770, 784-85 (3d Cir.), *cert. denied*, 106 S. Ct. 342 (1985).

303. Compare *Karro*, *supra* note 285, at 904-05; Meyers, *Title VII Class Actions: Promises and Pitfalls*, 8 LOY. U. CHI. L.J. 767, 788 (1977); Smalls, *Class Actions Under Title VII: Some Current Procedural Problems*, 25 AM. U.L. REV. 821, 874 (1976); Comment, *The Proper Scope of Representation in Title VII Class Actions: A Comment on East Texas Motor Freight System, Inc. v. Rodriguez*, 13 HARV. C.R.-C.L. L. REV. 175, 197-99 (1978) with *Connolly & Connolly, Qualifying Title VII Class Action Discrimination Suits: A Defendant's Perspective*, 9 ST. MARY'S L.J. 181, 212-13 (1977); Greene, *supra* note 285, at 648-49; Miller, *Class Actions and Employment Discrimination Under Title VII of the Civil Rights Act of 1964*, 43 MISS. L.J. 275, 280-85 (1972); Shawe, *Processing the Explosion in Title VII Class Action Suits: Achieving Increased Compliance with Federal Rule of Civil Procedure 23(a)*, 19 WM. & MARY L. REV. 469, 517-18 (1978).

304. Rule 23(c)(1) permits conditional certification and authorizes the court to alter or amend the order certifying the class "before the decision on the merits." FED. R. CIV. P. 23(c)(1); see Adv. Comm. Notes, subd. (c)(1) *supra* note 294; *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 273-76 (4th Cir. 1980); *Scott v. University of Del.*, 601 F.2d 76, 85 n.18 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979). See generally MOORE'S FEDERAL PRACTICE, *supra* note 296, at ¶ 23.50.

305. See *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 896 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Stastny v. Southern Bell Tel. & Tel.*, 628 F.2d 267, 275-76 (4th Cir. 1980); *Scott v. University of Del.*, 601 F.2d 76, 85-88 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); cf. *Lamphere v. Brown Univ.*, 553 F.2d 714, 719-20 (1st Cir. 1977) (analyzing the advantages of maintaining a Title VII action as a class action rather than decertifying).

306. See *United States Fidelity and Guar. Co. v. Lord*, 585 F.2d 860, 862-63 (8th Cir. 1978) (all past, present and future women employed by the defendant at any of its offices in the United States and all past, present and future female applicants for employment at any of the defendant's offices in the United States), *cert. denied*, 440 U.S. 913 (1979); *Dickerson v. United States Steel Corp.*, 582 F.2d 827, 828 (3d Cir. 1978) (all past, present and future black employees and applicants for employment); *Williams v. TVA*, 552 F.2d 691, 693 (6th Cir. 1977) (all blacks presently employed by the TVA or formerly employed and presently laid off); *Wilson v. Allied Chem. Corp.*, 75 F.R.D. 45, 47 (E.D. Va. 1977) (all past, present and future female employees). Ultimately, the class certification was denied, 456 F. Supp. 249, 256 (E.D. Va. 1978); cf. *Penn v. Schlesinger*, 490 F.2d 700, 707-08 (5th Cir. 1973) (Godbold, J., dissenting), *rev'd en banc per curiam on other grounds*, 497 F.2d 970 (5th Cir. 1974), *cert. denied*, 426 U.S. 934 (1976).

limited to a single facility operated by the defendant or integrally related employment practices. Class action plaintiffs often challenged the defendant's alleged discriminatory conduct at multiple sites<sup>307</sup> and in all aspects of its operations<sup>308</sup> and at all levels of employment.<sup>309</sup> These sweeping attacks quickly earned the sobriquet of "across-the-board" complaints.<sup>310</sup>

If the courts entertained any doubts about the propriety of class actions in Title VII litigation, these doubts were laid to rest by the 1972 amendments. The House version of the proposed bill amending Title VII specifically restricted the use of class actions.<sup>311</sup> The Senate, however, apparently prompted by the position of the Department

307. See, e.g., *United States Fidelity and Guar. Co.*, 585 F.2d at 862 ("at any of its offices in the United States"); *Penn.*, 490 F.2d at 707-08 (seventeen federal agencies operating in Alabama).

308. See, e.g., *Taylor v. Safeway Stores, Inc.*, 365 F. Supp. 468, 471 (D. Colo. 1973), *aff'd in part, rev'd in part*, 524 F.2d 263 (10th Cir. 1975) (hiring, training, and employment practices).

309. See, e.g., *Dickerson*, 582 F.2d at 828-29; *Wilson v. Allied Chem. Corp.*, 75 F.R.D. 45, 47 (E.D. Va. 1977).

310. See, e.g., *Rosario v. New York Times Co.*, 84 F.R.D. 626, 628 (S.D.N.Y. 1979). It has been defined "as permitting any person 'claiming to be aggrieved by any particular discriminatory employment practices of an employer alleged to be part of an overall pattern of class based discrimination to sue to end all forms of discrimination by that employer against the class.'" *Id.* at 628-29 (emphasis added) (quoting *Groves v. Insurance Co. of North Am.*, 433 F. Supp. 877, 883 (E.D. Pa. 1977)); cf. *Gramby v. Westinghouse Elec. Corp.*, 84 F.R.D. 655, 659 (E.D. Pa. 1979) (approving an across-the-board class at a single facility but disapproving it for multiple sites).

The Court of Appeals for the Fifth Circuit is the principle architect of "across-the-board" class certifications. See *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968). It has played a critical role in fostering an expansive interpretation of Title VII's scope and remedies. Its leadership in this area parallels its leadership in compelling desegregation. See generally C. HAMILTON, *THE BENCH AND THE BALLOT: SOUTHERN FEDERAL JUDGES AND BLACK VOTERS* (1973); J. PELATSON, *FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION* (1961); F. READ & L. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* (1978); J. WILKINSON, *FROM BROWN TO BAKKE* 111-18 (1979).

Most circuit courts of appeals favored the Fifth Circuit's "across-the-board" approach. See, e.g., *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1372-73 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *Lamphere v. Brown Univ.*, 553 F.2d 714, 719 (1st Cir. 1977); *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 549 F.2d 1330, 1333-34 (9th Cir. 1977); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 339-42 (10th Cir. 1975); *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 723 (8th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446-47 (3d Cir. 1971).

Many scholars, however, were less accepting. See *supra* note 303 and accompanying text; see also Rutherglen, *supra* note 285, at 724-40.

311. H.R. 9247, 92d Cong., 1st Sess. § 3(e) (1971), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92d Cong., 2d

of Justice, rejected this restriction.<sup>312</sup> In approving a provision permitting the administrative filing of charges "by or on behalf of a person claiming to be aggrieved," it noted that "[t]his section is not intended in any way to restrict the filing of class complaints. The committee agrees with the courts that Title VII actions are by their very nature class complaints, and that any restriction on such actions would greatly undermine the effectiveness of Title VII."<sup>313</sup>

Treating the legislative history of the 1972 amendments as an explicit endorsement by Congress of a liberal approach to class certification, the courts continued to approve "across-the-board" class action complaints.<sup>314</sup> The broad sweep of these complaints was cut short, however, by the Supreme Court's decision in *East Texas Motor Freight System, Inc. v. Rodriguez*.<sup>315</sup> In that case, three Mexican-American employees of a trucking company filed a complaint challenging both the employer's refusal to transfer them from their position as "city drivers" to "line drivers" and the employer's seniority system.<sup>316</sup> Despite the complaint's class action allegations,

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Sess., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 147 (1972) [hereinafter cited as 1972 LEGISLATIVE HISTORY]; see Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 841-45 (1972) [hereinafter cited as Sape & Hart].

312. See Sape & Hart, *supra* note 311, at 841-45.

313. S. REP. NO. 415, 92d Cong., 1st Sess. 27 (1971) (footnote omitted), *reprinted in* 1972 LEGISLATIVE HISTORY, *supra* note 311, at 436. Interestingly, the footnote cited *Crown Zellerbach Corp.* and *United Gas Corp.*, two seminal "across-the-board" actions decided by the Fifth Circuit. See *supra* note 308 and accompanying text. During the Senate debate on the proposed amendments Senator Williams observed:

[I]t is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure. The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class action complaints and that, accordingly, it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief.

1972 LEGISLATIVE HISTORY, *supra* note 311, at 1847 (remarks of Sen. Williams). He made a similar remark in the course of analyzing the conference committee bill. 118 CONG. REC. at 7168 (1972) (remarks of Sen. Williams); *accord id.* at 7565 (remarks of Rep. Perkins), *reprinted in* 1972 LEGISLATIVE HISTORY, *supra* note 311, at 1847.

314. For cases specifically citing the legislative history for support of "across-the-board" allegations, see, e.g., *Bauman v. United States Dist. Court*, 557 F.2d 650, 662-64 & n.1 (9th Cir. 1977) (Hufstедler, J., concurring); *Williams v. TVA*, 552 F.2d 691, 696-97 (6th Cir. 1977); *Gay v. Waiters' and Dairy Lunchmen's Union*, 549 F.2d 1330, 1333-34 (9th Cir. 1977).

315. 431 U.S. 395 (1977).

316. *Id.* at 398-400.

they failed to move for certification and limited their proof at trial to the plaintiffs' individual claims.<sup>317</sup> The district court dismissed the class action claims and ruled against each plaintiff on the merits.<sup>318</sup> On appeal, the Court of Appeals for the Fifth Circuit reversed the dismissal of the class action claims, holding it was the responsibility of the district court, not the parties, to initiate a class action determination.<sup>319</sup> The appellate court thereupon certified the class and ruled in the plaintiff-class's favor on the basis of proof offered during the trial of the individual plaintiffs' claims.<sup>320</sup> To say the least, the Fifth Circuit's opinion pushed the scope of class relief to its outermost limits.<sup>321</sup> Not surprisingly, the Supreme Court vacated the judgment since the trial court had determined that the plaintiffs "were not members of the class of discriminatees they purported to represent."<sup>322</sup> The Court sternly admonished the court of appeals, insisting "[a]s this Court has repeatedly held, a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."<sup>323</sup>

The majority of the lower courts, not without some reluctance, interpreted *Rodriguez* as squarely undercutting the "across-the-board" class action complaint.<sup>324</sup> A few courts and at least one commentator, however, read *Rodriguez* as doing no more than rejecting "an extreme application of the presumption in favor of certification."<sup>325</sup> For our purposes, however, the importance of *Rodriguez* lies in the Court's express acknowledgment that the discrimination proscribed by Title VII is inherently class discrimination. "We are not unaware that

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317. *Id.* at 399-400.

318. *Id.* at 400.

319. *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 49-50 (5th Cir. 1974), *vacated*, 431 U.S. 395 (1977).

320. *Id.* at 52-60.

321. Greene, *supra* note 285, at 680.

322. 431 U.S. at 403.

323. *Id.* (citations omitted).

324. *See, e.g.*, *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 273 n.7 (4th Cir. 1980); *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1312 (9th Cir. 1977); *Wilson v. Allied Chem. Corp.*, 456 F. Supp. 249, 254 (E.D. Va. 1978); *Hubbard v. Rubbermaid, Inc.*, 25 Fed. R. Serv. 2d 189, 198, 201 (D. Md. 1978); *Carpenter v. Herschede Hall Clock Div., Arnold Indus.*, 77 F.R.D. 700, 701 (N.D. Miss. 1977).

325. *Rutherglen, supra* note 285, at 723; *see, e.g.*, *Ford v. United States Steel Corp.*, 638 F.2d 753, 761 n.22 (5th Cir. 1981); *Scott v. University of Del.*, 601 F.2d 76, 86-88 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979); *Alexander v. Aero Lodge No. 735*, 565 F.2d 1364, 1373 (6th Cir. 1977), *cert. denied*, 436 U.S. 946 (1978); *Dickerson v. United States Steel Corp.*, 439 F. Supp. 55, 61-62 (E.D. Pa. 1977), *vacated sub. nom. Worthy v. United States Steel Corp.*, 616 F.2d 698 (3d Cir. 1980); *cf. Payne v. Travenol Laboratories, Inc.*, 565 F.2d 895, 900 (5th Cir.), *cert. denied*, 439 U.S. 835 (1978) (certifying a sweeping "across-the-board" class without any mention of *Rodriguez*).

suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs."<sup>326</sup> *Rodriguez* stands solely for the proposition that lower courts must insist on compliance with the procedural rule governing the maintenance of a Title VII class action claim. In no way does the opinion disagree with the substantive characterization of the claim as consisting of "classwide wrongs."

The validity of this view is reinforced by the Supreme Court's holding in *General Telephone Company of the Southwest v. Falcon*.<sup>327</sup> In that case, the plaintiff challenged his employer's denial of a promotion on the grounds that he was discriminated against because he was of Mexican-American origin.<sup>328</sup> He claimed that his employer's "employment, transfer, promotional, and seniority system" adversely affected Mexican-Americans as a class.<sup>329</sup> The complaint contained no factual allegations respecting the employer's hiring practices. Nonetheless, the district court, in a pre-trial order, certified an "across-the-board" class, consisting of Mexican-Americans who had applied for employment but who had not been hired.<sup>330</sup> The issues for resolution at trial thus revolved around the impact of the employer's hiring and promotion practices both on Falcon individually and the class he represented.<sup>331</sup> With respect to Falcon's individual claims, the district court held that he failed to establish liability as to the employer's hiring practices, but established liability as to its promotion practices. Finding liability as to hiring practices, but no liability as to promotion practices, the district court reached the opposite result regarding the class action claims.<sup>332</sup> On appeal, the employer attacked the class certification, arguing that Falcon could not represent both employees and persons seeking employment.<sup>333</sup> The court of appeals affirmed the district court's holding of disparate treatment in promotion but held that the plaintiff had not met his burden of proof in establishing disparate impact in hiring.<sup>334</sup> Relying on *Rodriguez* the Supreme Court reversed, holding the district court's certification of the plaintiff-employee as a representative of a class alleging discrimination in hiring violated the strictures of Rule 23.<sup>335</sup>

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326. 431 U.S. at 405.

327. 457 U.S. 147 (1982).

328. *Id.* at 149.

329. *Id.* at 150-51 n.1.

330. *Id.* at 152 n.5.

331. *Id.* at 152.

332. *Id.*

333. 626 F.2d 369, 374 (5th Cir. 1980).

334. *Id.* at 369-82.

335. 457 U.S. at 156-61.

It vigorously cautioned against permitting a Title VII plaintiff to cast a wide net in drafting class action allegations.<sup>336</sup> Once again, however, the Court resoundingly affirmed its earlier jurisprudence concerning the class nature of discrimination.<sup>337</sup>

In sum, although at first glance the Court's narrowing of the circumstances under which class action certification is appropriate might be interpreted as indicating a more conservative approach to the substance of Title VII, an analysis of *Rodriguez* and *Falcon* shows the Court to be concerned only with assuring adherence to the procedural requirements of Rule 23. No one can argue that, standing alone, the Court's comments in these cases seriously undercut its dicta in *Stotts* limiting the scope of remedies available under section 706(g). The willingness of the Court to recognize the group character of racial discrimination in this context, however, reveals that the issue of race-conscious relief is not as open and shut as *Stotts* suggests.

## B. The Use of Statistical Evidence

Statistical evidence has come to play as key a role in Title VII litigation as it has in class actions. Class actions and statistical evidence, moreover, are firmly coupled. Although on occasion statistics can establish a prima facie case in disparate treatment<sup>338</sup> or adverse impact<sup>339</sup> cases brought on behalf of an individual, they are "the crucial form of evidence" in class actions.<sup>340</sup>

336. *Id.* at 156.

337. "We cannot disagree with the proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination." *Id.* at 157 (footnote omitted).

338. See, e.g., *Davis v. Califano*, 613 F.2d 957, 962-63 (D.C. Cir. 1980); *Kinsey v. First Regional Sec. Inc.*, 557 F.2d 830, 839 (D.C. Cir. 1977); *Kaplan v. I.A.T.S.E., Local 659*, 525 F.2d 1354, 1358 (9th Cir. 1975). But see *Hudson v. IBM*, 620 F.2d 351, 355 (2d Cir.), cert. denied, 449 U.S. 1066 (1980); *Harper v. Trans World Airlines, Inc.*, 525 F.2d 409, 412 (8th Cir. 1975) ("statistics may not be a determinative factor in an individual, as opposed to a class action, discrimination case . . . [but] they may often be probative and supportive of an individual employee's allegation that an employer has discriminated against him or her on impermissible grounds"); *King v. Yellow Freight Sys., Inc.*, 523 F.2d 879, 882 (8th Cir. 1975) ("statistical evidence of a pattern or practice of discrimination is of probative value in an individual discrimination case for the purpose of showing motive, intent, or purpose . . . [but] it is not determinative of an employer's reason for the action taken against the individual grievant") (quoting *Terrell v. Feldstein Co.*, 468 F.2d 910, 911 (5th Cir. 1972)).

339. See, e.g., *Coe v. Yellow Freight Sys. Inc.*, 646 F.2d 444, 450-51 (10th Cir. 1981); *Chrisner v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1258-59 (6th Cir. 1981); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1018 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981); *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970), modified, 472 F.2d 631 (9th Cir. 1972).

340. SCHLEI & GROSSMAN, *supra* note 12, at 11. For an exhaustive analysis of

In a disparate treatment class action, statistics are used to establish and/or rebut the claim of a racially-based employment practice or policy.<sup>341</sup> In an adverse impact class action, statistics are generally the only means available to analyze the effect of the challenged practice or policy on a protected group.<sup>342</sup> Underlying the coupling of the class action and statistical evidence is the implicit recognition that Title VII focuses on groups, not individuals. Both suggest that the nature of the wrong lies in an employment practice or policy specifically directed toward, or adversely impacting upon, a protected group. The individual suffers solely because he or she is a member of the group.

The reason the focus of Title VII litigation has expanded from the "individual" mentioned in the statute itself<sup>343</sup> and in the legislative history,<sup>344</sup> to the "group," is attributable to a more precise understanding of the nature of employment discrimination.

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Experience has shown this view to be false.

Employment discrimination as viewed today [1972] is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the

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the use of statistics in Title VII cases, see *id.* at 1331-91 and CONNOLLY & PETERSON, *USE OF STATISTICS IN EQUAL OPPORTUNITY LITIGATION* (1985). Especially useful in the latter text is an extensive bibliography identifying and briefly describing articles and books on statistics in employment discrimination litigation. CONNOLLY & PETERSON, *USE OF STATISTICS IN EQUAL OPPORTUNITY LITIGATION* B-1 to B-27 (1985).

341. See, e.g., *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977); *Falcon v. General Tel. Co. of Southwest*, 626 F.2d 369, 380 (5th Cir. 1980), *vacated*, 450 U.S. 1036 (1981), *on remand*, 647 F.2d 633 (5th Cir. 1981), *rev'd*, 457 U.S. 147 (1982).

342. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (national statistics as to comparative height and weight of men and women used to show that Alabama statute requiring all prison guards to meet minimum weight requirement of 120 pounds and minimum height requirement of five feet two inches would exclude over 40% of female population but less than 1% of male population); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (validation study to determine whether employment test was discriminatory); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (statistical evidence used to show lack of correlation between job performance and educational and test score requirements for employment). It has been observed "[t]hat the use of statistics remains the dominant method of establishing a prima facie adverse impact case." SCHLEI & GROSSMAN, *supra* note 12, at 152 (2d ed. Supp. 1983).

See generally Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis under Title VII*, 56 TEX. L. REV. 1 (1977).

343. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1), (b), (c), -3(a) (1982).

344. See *supra* notes 196, 208 and accompanying text.



literature on the subject is replete with discussion of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.<sup>345</sup>

Because statistics so readily lend themselves to an examination of "systems" and easily reveal the similarities and differences among classes of people, they are invaluable tools to both plaintiffs and defendants. Thus, as frequently observed "[i]n cases concerning racial discrimination, 'statistics often tell much and Courts listen'."<sup>346</sup>

It is beyond the scope of this article to analyze any specific issue involved in use of statistics in Title VII cases. The purpose here is simply to show how wholeheartedly the Supreme Court has endorsed their use and to question whether the Court has fully understood the implication of its endorsement.

The first significant case involving statistical evidence to reach the Court was *Griggs v. Duke Power Co.*<sup>347</sup> Writing for a unanimous Court, Chief Justice Burger accepted without reservation the statistical evidence introduced by the plaintiffs which consisted primarily of census data and black/white passing rates on general intelligence tests.<sup>348</sup> These statistics constituted the basis for his conclusion that the defendant's diploma and test requirements constituted "built-in headwinds" for minority *groups* and are unrelated to measuring job capability.<sup>349</sup> The opinion did not, however, address the theoretical underpinnings for the admission of evidence.

The Court remained silent concerning the role of statistical evidence in Title VII until 1977, when it pointedly addressed this issue in three near unanimous opinions, each of which was written by Justice Stewart.<sup>350</sup>

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345. S. REP. NO. 91-1137, 91st Cong., 2d Sess. 4 (1970); see also S. REP. NO. 92-415, 92d Cong., 1st Sess. 5 (1971). See generally Blumrosen, *Strangers In Paradise: Griggs v. Duke Power Co., and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

346. *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 426 (8th Cir. 1970) (quoting *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962)).

347. 401 U.S. 424 (1971). All the members of the Court joined in the Chief Justice's opinion except Justice Brennan who took no part in the consideration or decision of the case. Given Justice Brennan's liberal approach to Title VII litigation in general and his position in subsequent cases involving statistics, it is quite obvious that he endorses the Chief Justice's reliance on generalized statistics.

348. *Id.* at 430 n.6.

349. *Id.* at 432 (emphasis added).

350. See *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977).

In *International Brotherhood of Teamsters v. United States*,<sup>351</sup> the employer challenged the lower court's reliance on statistical evidence as proof of discrimination in a "pattern or practice" suit brought by the Attorney General. Although the Court acknowledged that this evidence was supplemented with the testimony of individuals who brought "the cold numbers convincingly to life,"<sup>352</sup> the opinion wholeheartedly endorsed the Government's use of statistics. It pointedly commented that "'[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."<sup>353</sup> In part, the employer based his challenge on section 703(j), contending that the use of statistics was improper since Title VII specifically stated that an employer is not required to maintain a racially balanced work force. Although the Court acknowledged the validity of the employer's interpretation, it firmly rejected the employer's proffered conclusion.<sup>354</sup>

The Court's endorsement of statistical evidence, however, was tempered by its warning: "[w]e caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."<sup>355</sup>

Having endorsed their use in general, the Court next confronted the issue of which types of statistics were relevant. In *Dothard v. Rawlinson*,<sup>356</sup> a female applicant for a prison guard position introduced "national statistics" to challenge the state employer's height and weight requirements. Reaffirming its observations in *Teamsters*, the Court approved their use because there was "no reason to suppose that the physical height and weight characteristics of Alabama men and women differ markedly from those of the national population."<sup>357</sup>

On the same day that *Dothard* was decided, however, the Court's words of caution in *Teamsters* bore fruit. *Hazelwood School District v. United States*<sup>358</sup> was also a "pattern or practice" suit brought by the Attorney General, alleging that the school district unlawfully denied employment to black teachers. In reversing the district court's judgment in favor of the defendant, the Court of Appeals for the

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351. 431 U.S. 324 (1977).

352. *Id.* at 339.

353. *Id.* (quoting *Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620 (1974)).

354. *Id.* at 339-40 n.20.

355. *Id.* at 340.

356. 433 U.S. 321 (1977).

357. *Id.* at 330; *see id.* at 337-40 (Rehnquist, J., concurring.)

358. 433 U.S. 299 (1977); 534 F.2d 805, 810-13 (8th Cir. 1976).

Eighth Circuit had placed great reliance on statistics, comparing the number of black teachers employed by the school district and the number of black teachers in the relevant labor market, including the neighboring St. Louis School District.<sup>359</sup> That district had undertaken a very aggressive policy of recruiting to maintain a fifty-fifty black/white teacher ratio.<sup>360</sup> Citing *Teamsters* the Court endorsed, in principal, the court of appeals' analysis of the comparative work force statistics.<sup>361</sup> However, it vacated the appellate court's finding of Title VII liability and remanded the case to the district court for further proceedings because of (1) the possibility that the inclusion in the labor pool of St. Louis School district distorted the statistics and (2) the appellate court's failure to perform a separate statistical analysis of the district's hiring of black teachers, after 1972, the year the district became subject to Title VII.<sup>362</sup>

*Hazelwood's* emphasis on the need for refined rather than gross statistics makes sound practical sense. In no way does it qualify or condition the Court's general approval of this kind of evidence.<sup>363</sup> Once again Justice Stewart's opinion for the majority, insofar as it touched upon the use of statistics, received unanimous approval by the other members of the Court.<sup>364</sup>

As noted earlier, the problem alluded to in *Stotts* arises with respect to the benefits awarded in class actions and pattern or practice suits to individuals who are unable to prove that they suffered from specific acts of discrimination.<sup>365</sup> The majority opinion in *Stotts* suggests that section 706(g) prohibits relief for these "non-victims."<sup>366</sup> The incongruity between the statistical evidence of discrimination established at trial and a court's ability to remedy it is self-evident. In such a Title VII case, the plaintiff would have demonstrated a

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359. 534 F.2d 805, 810-13 (8th Cir. 1976).

360. 433 U.S. at 303.

361. *Id.* at 307-08.

362. *Id.* at 308-13.

363. Unfortunately, it has also caused Title VII cases to "develop into 'contests between college professor statisticians who revel in discoursing about advanced statistical theory' and propounding increasingly complex statistical models." EEOC v. Federal Reserve Bank, 698 F.2d 633, 645 (4th Cir. 1983) (quoting Otero v. Mesa County Valley Sch. Dist. No. 51, 470 F. Supp. 326, 331 (D. Colo.), *aff'd*, 628 F.2d 1271 (10th Cir. 1980)), *rev'd sub nom*, Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984).

364. Only Justice Stevens dissented in *Hazelwood*. But he did so, in part, on the grounds that the *statistics* demonstrated a prima facie case of discrimination. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 314-20 (1977) (Stevens, J., dissenting).

365. See *supra* text accompanying note 95.

366. 104 S. Ct. at 2588-90; *cf. id.* at 2592-94 (O'Connor, J., concurring).

statutory violation by offering "nameless, faceless," non-individualized proof. The trial court, however, would be powerless to order hiring or promotion relief to counterbalance the employer's wrongful conduct vis-a-vis the group at which it was directed. The incongruity heightens if the judgment is one entered upon consent. If an employer becomes convinced, based on statistical evidence unearthed during the discovery process, that he is treating a class of employees differently based on their race or that he has adopted a practice or policy which adversely impacts minority-employees, why should he be precluded from remedying the wrong by advantaging the injured group? The incongruity becomes intolerable when it is recalled that under *Weber* the same statistical evidence would be sufficient to justify a private affirmative action program under both Justice Brennan's "traditionally segregated job category" test and Justice Blackmun's "arguable violation" test.<sup>367</sup>

In sum, in interpreting section 706(g) to preclude hiring or promotion relief for non-victims, the majority in *Stotts* failed to see the inexorable link between the nature of the substantive violation, on the one hand, and the class action device and statistical evidence, on the other. These key procedural and evidentiary mechanisms, which play such a significant role in employment discrimination litigation, point directly to the "group" character of a Title VII injury. Denying a "group" remedy is both unseemly and nonsensical.

### VII. "Group" Interest, A Jurisprudential Overview

As indicated earlier, the purpose of this article is to express serious reservations about whether the dicta in *Stotts* are correct in limiting a court's authority to award race-conscious relief to non-victims. An in-depth analysis of the jurisprudential considerations supporting such relief is beyond the scope of this article. A brief overview will be provided, however, to show that they are not insubstantial.<sup>368</sup>

Only recently have courts and legal commentators perceived "groups" as being competent to enter the legal arena and demand relief. Roscoe Pound characterized legally cognizable claims as furthering "individual," "public" or "societal" interests. According to

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367. See *supra* notes 114-18, 124-28, 134-35 and accompanying text.

368. In addition to the sources cited in notes 4 and 104 *supra*, see generally EQUALITY AND PREFERENTIAL TREATMENT (M. Cohen, T. Nagel and T. Scanlon, eds. 1977); REVERSE DISCRIMINATION (B. Gross ed. 1977); J.C. FOSTER, ELUSIVE EQUALITY: LIBERALISM, AFFIRMATIVE ACTION AND SOCIAL CHANGE IN AMERICA (1983). For an extended discussion of the jurisprudence of group interests and Title VII, see Blumrosen, *supra* note 45.

Pound, an interest is "a demand or desire which human beings either individually or in groups seek to satisfy, of which, therefore, the ordering of human relations in civilized society must take account."<sup>369</sup> Individual interests are self-explanatory; public interests are the "demands or desires involved . . . in a politically organized society, asserted in title of political life . . . ;" social interests are "those wider demands or desires involved in . . . social life in civilized society and asserted in title of social life."<sup>370</sup> In other words, the legal system was a boxing arena of sorts whose featured bouts promoted contests among these competing interests. Pound's neat vision depended in large measure on an extremely broad vision of "society." Analytically, it was telescopic rather than microscopic in range.

Prompted in part by the impact of the New Deal's economic legislation, technological advancements, and the civil rights movement, groups having interests distinct from those of individuals and society began to spring up, taking on a force and vitality of their very own. In 1958, Professor Cowan proposed modifying Pound's theory and introducing the concept of "group" interest.<sup>371</sup> The concept rested on Cowan's observation that "[m]odern life is lived associatively. The new democracy is an aggregation of sub-groups, not primarily of individuals."<sup>372</sup>

*Brown v. Board of Education*<sup>373</sup> was the quintessential group interest litigation. *Brown* was not a case about particular black

369. R. POUND, *OUTLINES OF LECTURES ON JURISPRUDENCE* 96 (5th ed. 1943) [hereinafter cited as POUND]. For a provocative linking of Pound's interpretation of equality and class actions in Title VII, see Greene, *supra* note 285, at 698.

370. POUND, *supra* note 369, at 97.

371. " 'By group interests,' I mean interests urged, not in the name of individuals nor of society as a whole, but in the name of what sociologists call 'secondary groups'—associations, unions, societies, clubs, boards, councils, professions." Cowan, *Group Interests*, 44 VA. L. REV. 331 (1958) [hereinafter cited as Cowan]; see also Cowan, *The Impact of Social Security on the Philosophy of Law: The Protection of Interests Based on Group Membership*, 11 RUTGERS L. REV. 688 (1957). See generally *A Symposium on Group Interests and the Law*, 13 RUTGERS L. REV. 427 (1959). Cowan's prescience is startling. He clearly foresaw the conflict inherent in reverse discrimination. "Individual interests, to be preserved, must increasingly array themselves against group interests." Cowan, *supra*, at 331. For criticism of the "group" theory, see Cowan, *Inverse Discrimination*, 33 ANALYSIS 10, 12 (1972); Goldman, *Limits to the Justification of Reverse Discrimination*, 3 SOC. THEORY & PRAC. 289 (1975); see also Taylor, *Reverse Discrimination and Compensatory Justice*, 33 ANALYSIS 177 (1973). See generally Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866-67 (1977).

372. Cowan, *supra* note 371, at 331. For an interesting application of Cowan's theory to procedure, see Note, *Antidiscrimination Class Actions Under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2)*, 88 YALE L.J. 868, 885-88 (1979).

373. 347 U.S. 483 (1954).

students' right to attend an integrated school. What triggered the decision was the impact of segregation on black students in general.<sup>374</sup> The strongest influences on the Court were the sociological studies referred to in famous footnote 11.<sup>375</sup> As Professor Fiss, in his seminal article on structural reform, so aptly observed,

The victim of a structural suit is not an individual, but a group. In some instances the group is defined in terms of an institution: the inmates of the prison or welfare recipients. Or the victim may consist of a group that has an identity beyond the institution: in a school desegregation case, for example, the victims are not the pupils, but probably a larger social group, blacks. In either instance, it is important to stress two features of the group. First, it exists independently of the lawsuit; it is not simply a legal construct. Wholly apart from the lawsuit, individuals can define themselves in terms of their membership in the group, and that group can have its own internal politics, struggles for power, and conflicts. Secondly, the group is not simply an aggregation or collection of identifiable individuals . . . . The group exists, has an identity and can be harmed, even though all the individuals are not yet in being and not every single member is threatened by the organization.<sup>376</sup>

374. See generally Fiss, *The Fate of an Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade After Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974); Greenberg, *Race Relations and Group Interests in the Law*, 13 RUTGERS L. REV. 503 (1959); Horowitz, *The Jurisprudence of Brown and the Dilemma of Liberalism*, 14 HARVARD C.R.-C.L. L. REV. 599 (1979).

375. 347 U.S. at 494.

376. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 19 (1979) (footnotes omitted). See generally Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 240-44 (1979).

Professor Brodin makes a similar point in arguing against the application in Title VII cases of the causation principle enumerated in *Mt. Healthy City School District Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In his view, such an application rests on two highly dubious assumptions. The first is that title VII's only goal is compensating "victims"; the second is that the only concerned parties in a title VII action are the plaintiff and defendant at bar. The result is a formulation that confuses the issue of defining a violation with the very separate issue of fashioning appropriate relief.

The first assumption flies in the face of congressional and judicial pronouncements that the primary objective (or at least one primary objective) of title VII is the elimination of discrimination in employment opportunities. With this deterrence goal in mind, why should a plaintiff be required, in order to establish a violation, to go beyond proving that race or another forbidden criterion was a motivating factor in the decision? . . .

The second assumption that seems to underlie the *Mt. Healthy* construct—that the court need concern itself only with the equities running

If *Brown* represents the judicial embodiment of Cowan's theory, then certainly the Civil Rights Act of 1964 represents the legislative embodiment. A purer "group" statute cannot be found. The formidable task the legislators set for themselves was to improve the political, educational, and economic rights of blacks. "Improve" in this context is too mild a word—"radicalize," "revolutionize" would be far more accurate. Congress intended nothing short of a restructuring of American life (Pound's "society") to accommodate the moral demands of blacks (Cowan's "group").<sup>377</sup>

As noted earlier, the courts have only to look to the *complete* history of the Civil Rights Act of 1964 to realize that in enacting Title VII Congress made the same kind of finding of pervasive discrimination in employment that the Supreme Court accepted in *Fullilove* as a constitutional precedent for the ten percent set-aside, a paradigmatic form of group relief.<sup>378</sup> The long and the short of the matter is that blacks were being denied equal employment opportunities and that Congress intended to outlaw practices precluding their full participation in the labor force. That the Supreme Court has suffered from tunnel vision in its interpretation of Title VII is partially the fault of the legal environment in which many members of the Eighty-eighth Congress were raised. Cowan's extension of Pound's theory of interests was in its infancy in 1964. The legislators' repeated references to "individuals" (which the Court found so persuasive in *Stotts*) reflects the infirmities of their legal vocabulary. The concept of "group" rights had not filtered from the halls of academia to the floor of Congress.<sup>379</sup>

Related to this paucity of vocabulary is the problem of statutory interpretation itself. As noted earlier, there are no House, Senate

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between the parties at bar—overlooks the fact that "claims under Title VII involve the vindication of a major public interest." The statute was enacted against a background of hundreds of years of racism and racial violence and represents a congressional determination that continued discrimination in employment is against the public interest. In focusing solely on the impact of discrimination on the litigant who has chosen to challenge it, the same-decision standard represents "an attempt to individualize or personalize an evil or wrong that is basically an institutional wrong." Congress has relied primarily on private litigants for the judicial enforcement of title VII, thus imbuing these private actions with a social function unaddressed by the *Mt. Healthy* theory of causality.

Brodin, *The Standard of Causation in the Mixed-Motive Title VII Action: A Social Perspective*, 82 COLUM. L. REV. 292, 317-20 (1982) (footnotes omitted).

377. See *supra* text accompanying notes 196-98.

378. See *supra* text accompanying notes 157, 173; *infra* text accompanying note 392.

379. *Employment After Weber*, *supra* note 116, at 3, 13.

or Joint Committee reports dealing with Title VII.<sup>380</sup> The courts have relied principally on the comments of individual Congressmen during the Senate debate on cloture or the debates in both Houses on the Civil Rights Bill itself. This "hunt and pick" method, however, distorts the sense of Congress' purpose. It ignores the numerous committee proceedings and hearings which laid the groundwork for the statute's enactment. It ignores the general unrest sweeping the country as civil rights marchers demanded "deliberate speed" now. It ignores the brutality of the white segregationist response. And perhaps most seriously of all, it ignores the impact of television, which each evening brought these troubling events into the homes of most Americans.<sup>381</sup>

The 1964 Act was not a routine statute whose genesis can be traced to a particular Congressman or triggering event. Preceding the introduction of the Civil Rights Bill was a massive compendium of studies, data, and testimony detailing the political and economic plight of blacks. Overlooking these materials in favor of exchanges on the House and Senate floor distorts the statute's legislative history. While there were many references during the debates to Title VII's protection for individuals, these other materials clearly show a broader Congressional intent: the individuals merited relief precisely because they were members of a group against whom a grievous injustice had been perpetrated.<sup>382</sup>

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380. See *supra* text accompanying notes 192-93, 202-54.

381. SCHLEI & GROSSMAN, *supra* note 12, at vii; THE LONGEST DEBATE, *supra* note 200, at xviii-xix.

382. See *supra* notes 196, 208 and accompanying text; see also Blumrosen, *supra* note 45, at 120-21. Connecticut v. Teal, 457 U.S. 440 (1982), may represent the apogee of the Supreme Court's protection of the "individual" under Title VII. In that case, Connecticut, in selecting employees for promotion to a supervisory position, required the candidates to pass a written test. *Id.* at 443. Although the test clearly had a disparate impact judged by the standards the Supreme Court laid down in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the percentage of minority employees promoted exceeded by far the percentage of white employees promoted. 457 U.S. at 444. Thus, the "bottom line" result of the promotional process produced an appropriate racial balance despite the disparate impact of one of its component parts. In a 5-4 decision the Supreme Court held that a racially balanced "bottom line" did not preclude employees from establishing a prima facie case, nor did it provide a defense to such a case. *Id.* at 442. Writing for the majority, Mr. Justice Brennan hinged his opinion on Congress' intent to protect individuals from "'built-in headwinds,'" *id.* at 448, a phrase borrowed from Griggs.

Section 703(a)(2) prohibits practices that would deprive or tend to deprive "any individual of employment opportunities." [§ 703(a)(2) 79 Stat. 255, as amended, 42 U.S.C. § 2000e-2(a)(2)]. The principal focus of the statute is the



The circumstances under which the House and Senate exchanges were uttered discounts their value as well. It is particularly unfair to give overriding consideration to the remarks in debates. While many of them were undoubtedly carefully thought out before being uttered, many others were simply part of the political hurly-burly. In most instances it is difficult, if not impossible, to discern between the two.

Three theories have been advanced to justify the awarding of benefits to members of disadvantaged groups who themselves were not specific victims of discrimination: compensatory justice, distributive justice and social utility.<sup>383</sup> As its name suggests, compensatory justice is designed to "make-whole" discriminatees by putting them

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protection of the individual employee, rather than the protection of the minority group as a whole. Indeed, the entire statute and its legislative history are replete with references to protection for the individual employee. *See, e.g.*, §§ 703(a)(1), (b), (c), 704(a), 78 Stat. 255-57, as amended, 42 U.S.C. §§ 2000e-2(a)(1), (b), (c), 2000e-3(a) [42 U.S.C. §§ 2000e-2(a)(1), (b), (c), 2000e-3(a)]; 110 CONG. REC. 7213 (1964) (interpretive memorandum of Sens. Clark and Case) ("discrimination is prohibited as to any individual"); *id.*, at 8921 (remarks of Sen. Williams) ("Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job").

*Id.* at 453-54 (emphasis in original).

The "line up" of the Justices in *Teal* is curious. Justices Brennan, Marshall, Blackmun, Stevens and White formed the majority block. *Id.* at 441. Justice White's position in *Teal* is, of course, consistent with his opinion in *Stotts*, limiting Title VII relief to actual victims of discrimination. 104 S. Ct. at 2588-90. Justices Brennan, Marshall, and Blackmun have a more complex view of Title VII, however, than Justice White. In *Teal*, they are emphasizing the individual's right to relief in the absence of a "bottom-line" injury to the group. 457 U.S. at 453-56. In *Stotts*, they argue that Title VII commends relief for members of the group as well as individual victims. 104 S. Ct. at 2605-07 (Blackmun, J., dissenting). Justices Powell, Burger, Rehnquist and O'Connor, who had joined in Justice White's opinion in *Stotts*, look to the disparate impact of challenged tests on the group in *Teal*. 457 U.S. at 456-64 (Powell, J., dissenting). Finding "no adverse effect on the group," they conclude that "Title VII has not been infringed." *Id.* at 460 (Powell, J., dissenting). The practical effect of disregarding a "bottom line" defense clearly troubled the dissenting Justices, who foresaw two impediments to Title VII resulting: first, to avoid spending large sums of money to validate tests, a difficult process in itself, an employer might resort to quota hiring; and second, an employer might manipulate its hiring and promotion decisions to reflect the percentage of minorities in the labor pool, thereby actually decreasing the number of minorities otherwise in its work force. *Id.* at 463-64. These same Justices, however, seem indifferent to the argument that the practical effect of *Stotts* is to discourage settlements. *See supra* notes 151-53 and accompanying text.

383. For an extended analysis of these three theories, see Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534 (1975) [hereinafter cited as Nickel]. Professor Nickel's analysis is reexamined in Duncan, *The Future of Affirmative Action: A Jurisprudential/Legal Critique*, 17 HARV. C.R.-C.L. L. REV. 503 (1982) [hereinafter cited as Duncan].

where they would have been absent the offending conduct. The Supreme Court has never disputed the validity of "make-whole" relief. Indeed, subject to a few limiting caveats to protect the vested interests of white employees, the Court has consistently insisted that Title VII demands "make-whole" relief for actual victims.<sup>384</sup> This is the precise message of the majority opinion in *Stotts*.<sup>385</sup>

Theoretically, however, there is no need to limit compensatory justice to actual victims. Where the fabric of society is woven in such a manner that all members of the group have suffered injury solely by virtue of their membership, then the theory of compensatory justice demands remedial awards without the traditional elements of proof associated with an adversary system. It is this theory that underlies Justice Marshall's separate opinion in *Bakke*. "It is unnecessary in 20th century America to have individual Negroes demonstrate that they have been the victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact."<sup>386</sup> Justice Stevens, although dissenting on the merits, wholeheartedly embraced its validity in *Fullilove*, stating that in Justice Marshall's "eloquent" separate opinion in *Bakke* he "recounted the tragic class-based discrimination against Negroes that is an indelible part of America's history. I assume that the wrong committed against the Negro class is both so serious and so pervasive that it would constitutionally justify an appropriate class wide recovery measured by a sum certain for every member of the injured class."<sup>387</sup>

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384. See, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 364-65 (1977); see also *Ford Motor Co. v. EEOC*, 458 U.S. 219, 236-40 (1982). "Make-whole" relief, which has also been called "restorative justice," does not confer benefits because of race; it confers them because a legally cognizable wrong was committed. The wrong triggering the need for the remedy was based on race. See Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 431-34 (1980); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419-22 (1975).

385. *Firefighters Local Union 1784 v. Stotts*, 104 S. Ct. 2576, 2588-90 (1984).

386. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 (1978); Duncan, *supra* note 381, at 511-20; see Bayles, *Compensatory Reverse Discrimination in Hiring*, 2 SOCIAL THEORY AND PRACTICE 301 (1973); Blackstone, *Reverse Discrimination and Compensatory Justice*, 3 SOC. THEORY AND PRAC. 265 (1975); Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348, 357 (1973); Sher, *Justifying Reverse Discrimination in Employment*, 4 PHIL. & PUB. AFF. 159, 164 (1975); Taylor, *Reverse Discrimination and Compensatory Justice*, 33 ANALYSIS 177, 179 (1973). *But see* Nickel, *supra* note 381, at 538; Nickel, *Should Reparations be Paid to Individuals or to Groups?*, 34 ANALYSIS 154, 160 (1974).

387. *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting) (citing *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., concurring)).

In contrast to compensatory justice, which (as Justices Stevens and Marshall suggest) focuses on the past wrongs perpetrated on the group, distributive justice emphasizes the present effect of the past wrong.<sup>388</sup> It can be argued that the decisions and actions prompting the defendants' conduct in *Bakke*, *Fullilove* and *Weber* represent a form of distributive justice because, in each instance the entity conferring the benefit intended to contribute to the eradication of the present effect of discrimination.<sup>389</sup> In *Bakke*, the Board of Regents was attempting to increase the number of minority physicians by accepting applicants who, because of the vestiges of racism in education, were unable to compete unassisted for the limited number of seats available in medical schools.<sup>390</sup> In *Weber*, the employer was similarly seeking to overcome educational deficiencies resulting from a segregated school system which left minority workers without the skills necessary to hold craft positions.<sup>391</sup> In *Fullilove*, Congress had determined that minority contractors were foreclosed from government contracts because of the pervasive effect of racism in the construction industry.<sup>392</sup> Advocates of the distributive theory of justice ask whether there exists a continuing deprivation of equal opportunity.<sup>393</sup> An affirmative answer justifies the distribution of benefits according to race.

The social utility theory takes an approach quite different from the theories just discussed. Based on arguments developed by Jeremy Bentham and John Stuart Mill, it judges the value of affirmative action by its impact on society as a whole.<sup>394</sup> Proponents of this

388. Duncan, *supra* note 380, at 521. Several courts in approving quotas or goals benefitting individuals who were not actual victims of discrimination have adopted the rationale that such action is necessary to eradicate the "present effects" of discrimination. See, e.g., *Morrow v. Crisler*, 491 F.2d 1053, 1056 (5th Cir.) (en banc), *cert. denied*, 419 U.S. 895 (1974); *Carter v. Gallagher*, 452 F.2d 315, 328-31 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972).

389. See generally B. BITTAKER, *THE CASE FOR BLACK REPARATIONS* (1973); Bayles, *Reparations to Wronged Groups*, 33 *ANALYSIS* 182 (1973); Hughes, *Reparations for Blacks?*, 43 *N.Y.U. L. REV.* 1063 (1968).

390. See *supra* notes 154-59, 165, 169-70 and accompanying text.

391. 443 U.S. at 212 n.\*, 214-15 (Blackmun, J., concurring); see *supra* notes 119-23 and accompanying text.

392. See 448 U.S. at 460-68; *supra* note 157 and accompanying text.

393. See Duncan, *supra* note 381, at 528. See generally Rawls, *Distributive Justice*, in *PHILOSOPHY, POLITICS AND SOCIETY* 58 (P. Laslett & W.G. Runciman, eds. 1967); Rawls, *Distributive Justice: Some Addenda*, 13 *NAT. L.F.* 51 (1968) (supplementing the distributive justice theory).

394. See J. BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1876); J.S. MILL, *Utilitarianism*, in *SELECTION OF ESSAYS BY MILL* (P. Wheelwright ed. 1935). See generally Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 *VA. L. REV.* 955 (1974); Nickel, *Discrimination and*

theory advance three arguments to support affirmative action programs: first, it develops role models who, in turn, inspire educational and economic advancement by other group members; second, it exposes members of the majority group to vicarious experiences otherwise denied to them; and third, it may result in the delivery of better services to minority neighborhoods, as many minority professionals and blue and white collar workers are likely to return to these communities to establish their careers.<sup>395</sup> In the proponents' view, the overall benefits to society as a whole outweigh any individual instances of injustice or hardship which occur to members of the majority group by operation of the affirmative action program.

If "groups" are a legally cognizable entity existing apart from the individuals who make up their membership and from society, and if a coherent theory of justice compels the granting of relief to such groups, the question which obviously follows is what feature characterizes the group to the exclusion of other groups also demanding relief. Congress answered the question in Title VII itself: race. The predominant, if not exclusive, concern of Congress in enacting Title VII was the political and economic plight of blacks.

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*Morally Relevant Characteristics*, 32 ANALYSIS 113 (1972). The theories of compensatory and distributive justice can be traced to Aristotle. ARISTOTLE, *THE NICHOMACHEAN ETHICS*, Book Five (D.P. Chase trans. 1911).

395. See Duncan, *supra*, note 381, at 525-28. See generally Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348 (1973). One justification offered by the Davis Medical School for its decision to reserve 16 out of 100 places exclusively for minority students was increasing the number of physicians practicing in minority communities. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 306 (1978). Significantly, Justice Powell did not flatly reject this justification as constitutionally insufficient to support an equal protection analysis. He rejected it because of the paucity of data in the underlying record to support the University's argument. *Id.* at 310-11. Justice Powell did flatly reject Davis' alleged right of "countering the effects of societal discrimination." *Id.* at 306 n.43. His rejection was grounded on two objections: first, to implement a race-conscious remedy there must be a finding of discrimination by a competent judicial, legislative or administrative tribunal and the Board of Regents was not so qualified; and second, the disadvantages imposed by such a system on innocent third parties were too severe. *Id.* at 309-10.

Justice Powell accepted the second argument described in the text, however, because he agreed that the University's need for a "diverse student body" was a compelling state interest sufficient to withstand a strict scrutiny analysis. *Id.* at 311-15. Of course, in the long run, he voted with the "Stevens" group to invalidate the Davis program; but his vote was prompted by the fact that he found that the "means" used by the Board of Regents (*i.e.*, a strict racial quota) did not fit the state's interest tightly enough. *Id.* at 315-19.

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), Justice Powell seemed to acknowledge the constitutional validity of all three arguments, at least when they are offered to justify congressional legislation employing race-conscious criteria. *Id.* at 497, 499-500, 502-10 (Powell, J., concurring).

Congress was not unmindful of the pervasive discrimination in American society against other racial groups and against women. That discrimination, however, was not its overriding motivation. As has been observed, "[t]he historical fact is . . . that Title VII never would have been passed without notice of the obvious state of affairs that black people, specifically, were systematically prevented from participating usefully and gainfully in our culture."<sup>396</sup> Of course, the fact that Congress' attention was riveted on blacks does not threaten Title VII's protection of other groups. *Fullilove* teaches that the Court regards the selection of particular ethnic groups and of women for government benefits as a political decision which is virtually non-reviewable.<sup>397</sup>

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396. Schatzki, *supra* note 103, at 56. Similarly, Professor Belton has commented, "[i]ndeed, it is probable that in the absence of the historical mistreatment of blacks, Congress would not have perceived a need for Title VII or similar civil rights statutes at all." Belton, *supra* note 116, at 596.

There is universal sentiment among proponents of group relief that at a minimum blacks, by virtue of this country's history of slavery and segregation, are entitled to compensation. Duncan, *supra* note 381, at 511; *see also* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

397. The bubble of non-reviewability surrounding such congressional decisions could easily be burst, however, if Congress conferred benefits on a group not generally acknowledged to have suffered from pronounced and pervasive discrimination, such as Scandinavians, Italians, or Irishmen. *See generally* Boyd, *supra* note 116, at 52-58; Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton and Columbus*, 1979 SUP. CT. REV. 1, 5-6 (1979).

For arguments supporting relief for women, the American Indians and the racial groups selected by Congress in *Fullilove*, *see* Duncan, *supra* note 381, at 546-47 & nn.137-39.

Ironically, Title VII's inclusion of women as a protected group resulted from the attempts of Southern Congressmen to defeat the bill. 110 CONG. REC. 2577-84 (1964); Vaas, *supra* note 192, at 441-42; THE LONGEST DEBATE, *supra* note 200, at 115-18. During the course of amending Title VII in 1972 it was observed:

While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics. Both categories involve large, natural classes, membership in which is beyond the individual's control; both involve highly visible characteristics on which it has been easy to draw gross, stereotypical distinctions. The arguments justifying different treatment of the sexes were also historically used to justify different treatment of the races

. . . .

[D]espite the effort by the courts and EEOC, discrimination against women continues to be widespread; and is regarded by many as either morally or physiologically justifiable.

SEN. SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, S. REP. NO. 92-415, 92d Cong., 1st Sess. at 416-17.

In sum, as this brief overview suggests, granting relief to non-victims of employment discrimination rests on three solid jurisprudential concepts of justice. Correcting the racial imbalance in a work force resulting from an employer's discriminatory conduct furthers, rather than frustrates, Congress' intent to bring blacks as a group into the political and economic mainstream.

### VIII. Conclusion

Very few topics have generated more controversy at every level of American society than the use of race as a selection criterion in hiring and promotion decisions. While most courts, scholars, and members of the public at large acknowledge the fairness of preferences for individuals specifically subjected to an employer's discriminatory conduct, that unanimity dissolves if the preferences are extended to non-victims. In *Stotts*, the Supreme Court suggested that Title VII prevents a court from awarding a preference to non-victims either as part of a consent judgment or as part of a judgment entered after a trial on the merits.

The *Stotts* dicta are seriously flawed and merit reconsideration. The 1964 legislative history which Justice White, author of the majority opinion found so persuasive, cannot support the great weight which he and Justice O'Connor in her concurring opinion attach to it. It is incapable of answering the question whether a court can impose such a preference under Title VII because neither the statute's supporters nor its opponents anticipated the inquiry. The 1972 Amendments are more helpful, although clearly not dispositive, since Congress firmly rejected Senator Ervin's two attempts to prevent the courts from awarding preferences to non-victims.

The answer to the question lies in the "spirit of Title VII" which animated Justice Brennan's opinion for the majority in *Weber*, sustaining the legality of such a preference contained in a private voluntary agreement. It is hard to imagine that "spirit," motivated by Congress' goal of bringing blacks into the mainstream of American society, withholding from the courts the precise power it conferred on private individuals. Such a denial makes neither legal nor political sense. It also contradicts common sense because it discourages black employees and applicants from suing while encouraging employers to litigate, a result clearly at odds with Congress' repeatedly expressed purpose of encouraging voluntary settlements.

The "spirit" of Title VII, moreover, has taken a procedural and evidentiary substance through the class action device and the use of statistics to establish a prima facie case. Their key role in the development of Title VII jurisprudence has demonstrated that em-

ployment discrimination is inherently a group wrong. Viewed from this perspective, the distinction between a "victim" and a "non-victim" breaks down. A "victim" is merely a member of the group fortunate enough to be able to demonstrate that the employer was specifically aware of his existence. A "non-victim" is unable to make this showing. Of course, if the non-victim's existence had come to the employer's attention, he too would have received the *same* discriminatory treatment for the *same* reason—his membership in the group. The employer's discrimination has nothing to do with the "individual;" it has everything to do with the "group."

The employer stands to benefit from his own wrongdoing, moreover, if a court is unable to order hiring preferences for non-victims. The employer who discards applications after a month as "inactive," the employer who recruits through word-of-mouth, and the employer who keeps scanty records of promotion or transfer requests, can maintain a work force with insignificant minority participation long after he is ordered to stop discriminating. In an industry or establishment where there is little employee turn-over, the projected date by which the employer's work force will reflect the racial composition of the appropriate labor pool is likely to be so far in the future as to render it meaningless. Even if identified victims can be located, a variety of personal considerations may prompt them to turn down an offer of employment. For example, their present position may pay more, be situated in a more accessible location or have greater potential for advancement. Many of them may refuse simply because they were victims of the employer's original discrimination and are fearful of thrusting themselves into a hostile environment.

The *Stotts* dicta, when viewed in light of these practical consequences totally devitalizes Title VII. Their effect is to discourage settlement, encourage litigation and dishearten potential Title VII plaintiffs, consequences completely frustrating Congress' expressed intent in enacting Title VII.

In sum, the "spirit" which motivated *Weber* is the same "spirit" which prompted the members of the Eighty-eighth Congress in 1964 to begin the long overdue task of bringing blacks into the mainstream of American life. In *Stotts*, the Court drained the "spirit" from Title VII by fashioning dicta whose legal reasoning is faulty and whose vision is benighted.