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SOME THOUGHTS ON THE FUTURE OF REMEDIAL RACE AND GENDER PREFERENCES UNDER TITLE VII

PAUL N. COX*

"Wrong and remedy are best wed by candidly surfacing the targeted wrong"**

The question of affirmative action, or of reverse discrimination,[1] in employment has once again became controversial. It is likely to remain so for the foreseeable future for two reasons. First, the Supreme Court, in *Firefighters Local 1784 v. Stotts*,[2] recently addressed the question of federal court authority to order racial preferences as a remedy for employment discrimination. Second, the Reagan Administration, initially and most emphatically through the Justice Department, and more recently and indirectly in comments made and actions taken by the current chairman of the Equal Employment Opportunity Commission and by the Civil Rights Commission, has undertaken a sustained attack on a number of fronts against court ordered, governmentally imposed and voluntarily adopted race and gender preferences favoring minorities and women.[3]

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** P. Higginbotham, Circuit Judge, concurring in Williams v. City of New Orleans, 729 F.2d 1554, 1566 (5th Cir. 1984).

1. "Affirmative action" and "reverse discrimination" are partisan labels for the present subject matter. I will most often employ the term "preference" to describe that subject matter because, whatever one's position on these questions, "affirmative action" and "reverse discrimination" in fact entail race and gender preferences.

Candor nevertheless requires the disclosure that I have been in the past and remain an opponent of such preferences, at least where Congress has not expressly mandated them. *See* Cox, *The Question of "Voluntary" Racial Employment Quotas And Some Thoughts on Judicial Role*, 23 ARIZ. L. REV. 87 (1981).

2. 104 S. Ct. 2576 (1984).

3. For example, the EEOC has undertaken reviews of its directives regarding federal agency affirmative action plans in light of *Stotts* and has undertaken a study of "goals and timetables" and even of its employee selection guidelines in the private sector. *See* EMPLOYEE REL. WKLY. (BNA) (Jan. 18, 1985) at 111. The EEOC chair-

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This paper reviews the legal rationales which have been employed to justify race and gender preferences, examines *Stotts* and its implications for anti-discrimination theory, and examines the current viability of *United Steelworkers v. Weber*[4] in light of those implications.

I. A SUMMARY OF THE PRIOR LAW OF REMEDIAL PREFERENCES

It is initially necessary to rehearse some definitions and some prior case law. For present purposes, a race or gender preference is a decision rule that requires reference to the race or gender of persons subject to the rule to determine its application. For example, a hiring preference requiring that 50% of persons hired shall be women until a workforce is composed 50% of women requires reference to the gender of applicants for employment. A preference in this sense is to be distinguished from a compensatory preference requiring that some set of persons determined to have been harmed by identified acts of unlawful conduct be hired or promoted.[5] A compensatory preference requires reference to the victim or non-victim status of persons subject to the preference before applying it, but does not require reference to the race or gender, qua race or gender, of such persons.

There are a number of contexts in which race and gender preferences occur. A race or gender preference favoring minorities or women may be imposed by a court as a remedy. For example, federal courts have imposed goals and timetables designed to achieve proportional race and gender representation in a workforce following findings of unlawful employment discrimination under Title VII.[6] A race or

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man, Clarence Thomas, has repeatedly indicated his opposition to quotes, goals and timetables. *Id.* Nov. 19, 1984, at 1413. Members of the Civil Rights Commission have taken a similar position. *Id.* Oct. 15, 1984, at 1262. The Justice Department has repeatedly intervened in a number of actions, including *Stotts*, challenging the authority of courts to order preferences and the authority of local governments to enact preferences. *See, e.g.*, Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984); Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984).

4. 443 U.S. 193 (1979).

5. *See, e.g.*, Teamsters v. United States, 431 U.S. 324, 367-71 (1977); Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

6. *See, e.g.*, United States v. City of Chicago, 663 F.2d 1354, 1356 (7th Cir. 1981); Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 284-87 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1026-27 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Although it is occasionally stated that a defendant must engage in "clear

Cox: Some Thoughts on the Future of Remedial Race and Gender Preferenc

gender preference may be imposed by a government either on its own employment practices or on private employers. For example, a federal executive order imposes affirmative action obligations designed to achieve race and gender balance in the workforces of federal contractors.[7] A race or gender preference may be privately adopted. For example, a private employer might adopt a preference out of fear that failure to do so risks liability under Title VII; a racial imbalance in an employer's workforce may be used as evidence of discrimination.[8] Finally, a race or gender preference may be adopted in a settlement agreement or consent decree. For example, hiring and promotion goals were adopted in the consent decree at issue in *Stotts*.[9]

A race or gender preference, whether or not labeled benign or remedial, by definition requires disparate treatment "because of" race or gender. Title VII prohibits employment discrimination "because of" race or gender[10] and contains a specific provision stating that it does not "require" racial balance in a workforce.[11] Moreover, the equal protection clause of the Fourteenth Amendment or the equal protection component of Fifth Amendment due process prohibit the state, local and federal governments from discrimination motivated by race, absent compelling government interests,[12] and prohibit discrimination motivated by gender, unless the discrimination serves important government objectives and is substantially related to those objectives.[13] How, then, have the courts justified race and gender preferences favoring minorities or women?

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cut" or "egregious" discrimination to warrant preferences for non-victims, these phrases have not been limited to instances in which disparate treatment has been found. *See, e.g.*, Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); Davis v. County of Los Angeles, 566 F.2d 1334, 1343-44 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979); Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n, 482 F.2d 1333, 1336 (2d Cir. 1973).

7. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted at*, 42 U.S.C. § 2000e (1982). *See* 41 C.F.R. Pt. 60 (1984).

8. *See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 228-29 (5th Cir. 1977) (Wisdom, J. dissenting), *rev'd sub nom.*, United Steelworkers v. Weber, 443 U.S. 193 (1979).

9. *See* Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984).

10. *See generally* 42 U.S.C. § 2000e-2 (1982).

11. Title VII § 703(j), 42 U.S.C. § 2000e-2(j) (1982).

12. *See* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

13. Craig v. Boren, 429 U.S. 190 (1976).

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Preferences Judicially Imposed as Remedies Under Title VII

The lower federal courts have justified court-ordered preferences in the Title VII context on the theory that Title VII's substantive definitions of prohibited and permitted conduct do not limit or affect the character or scope of the remedies imposed for unlawful conduct. That is, race and gender preferences designed to achieve proportional allocation of employment opportunities among race or gender groups may be imposed where a court has concluded that an employer's conduct constituted unlawful discrimination, even though racial imbalance is not, as such, unlawful discrimination.[14]

Two points should be noticed about this rationale. First, racial preferences imposed as remedies under Title VII may benefit both actual victims of discrimination and non-victims.[15] For example, a quota remedy requiring that an employer hire a minimum percentage of minorities until its workforce achieves a particular composition benefits minority persons hired under that remedy whether or not those persons were victims of the employer's prior discriminatory practices. Second, to the extent that a remedial preference benefits non-victims, Title VII remedies do not comport with the traditional common law notion that a remedy must fit a violation.[16] If a Title VII violation is understood as a discrete wrongful act generating discrete harm to discrete individuals, the scope of the remedy exceeds the scope of the substantive violation on which it is based. However, to the extent that a violation is understood, instead, as a wrongful failure to correct misallocations of societal resources among race or gender groups, race or gender preferences rather tightly fit that understanding.[17] Formal definitions of unlawful discrimination under Title VII

14. *See, e.g.*, Association Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); Rios v. Enterprise Ass'n of Steamfitters, Local 638, 501 F.2d 622 (2d Cir. 1974).

15. To the extent that a remedial preference, such as a priority hiring order, applies only to persons found to be victims of discrete acts of employment discrimination, the remedy is compensatory and does not raise the issues treated in this article. *See* Association Against Discrmination In Employment, Inc. v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

16. *See* Brest, *Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 41 (1976).

17. *Cf.* Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971) (distinguishing discrimination as unequal treatment and discrimination as unequal achievement); Freeman, *Legitimizing Racial Discrimination Through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (comparing "perpetrator perspective" that focuses on discrete wrongful acts with the broader remedial perspective implicit in the disparate impact theory of discrimination).

do not directly treat such failures as a violation, but they may be viewed as indirectly doing so.

The disparate impact theory of discrimination illustrates the latter point.[18] Under that theory, an employer's use of a race and gender neutral employment criterion, such as an education requirement for hiring, constitutes unlawful discrimination if (1) it excludes minorities or women from an employment opportunity at a greater rate than it excludes whites or males, and (2) it is not shown to be "necessary" to the employer's business interests.[19] A central rationale for the disparate impact theory is that some race and gender neutral criteria give continuing effect to past societal discrimination.[20] For example, education and testing requirements having a disparate impact on minorities give present effect to historical discrimination in education.[21] To the extent, at least, that the business necessity defense is made difficult to establish, the disparate impact theory is functionally a prohibition of an employer's failure to do its part to correct past discrimination by foregoing non-essential business practices and by absorbing the costs of eliminating those practices.[22]

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18. The disparate treatment theory of discrimination may also result in indirect liability for imbalance because some proof schemes for establishing disparate treatment rely on disparities in workforce representation rates. *See* Hazelwood School District v. United States, 433 U.S. 299 (1977). To the extent, however, that courts rely upon representation rate disparities only as evidence of intentional discrimination and require proof of the race or gender composition of qualified labor pools for purposes of comparing representation rates in a workforce, this risk is minimized. *See id.*

The primary difficulty in this context lies in the allocation of the burden of proof. To the extent that a plaintiff can establish a prima facie case and therefore shift the burden of proof to a defendant on the basis of a comparison of general population data with workforce data, the absence of data regarding the composition of a qualified labor pool in a relevant geographical area operates to impose liability for workforce imbalances by rendering rebuttal ineffective. Of course, allocation of the burden of comparing workforce composition to qualified labor pool composition to a plaintiff in circumstances in which data regarding the latter composition is unavailable or questionable may result in underenforcement of the disparate treatment prohibition. *Compare* E.E.O.C. v. United Virginia Bank, 615 F.2d 147 (4th Cir. 1980) *with* Gay v. Waiters & Lunchmen's Union, Local 30, 489 F. Supp. 282 (N.D. Cal. 1980), *aff'd*, 694 F.2d 531 (9th Cir. 1982).

19. *See, e.g.*, New York Transit Authority v. Beazer, 440 U.S. 568 (1979); Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).

20. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

21. *Id.*

22. *See* Cox, *Substance and Process in Employment Discrimination Law: One View of the Swamp*, 18 VAL. U.L. REV. 21, 83-97 (1983).

Governmentally Adopted Preferences and the Constitution

The Supreme Court has justified governmentally adopted racial preferences in the face of constitutional attacks on a number of diverse rationales, no one of which can be said to have gained the support of a majority of the justices. Again central to all of these rationales, however, is the notion that a benign racial preference is remedial. Under one rationale, government may utilize a racial preference benefiting minorities where its objective is to remedy the "continuing effects of past discrimination" and where the preference does not absolutely exclude non-minorities and does not "stigmatize" as inferior either the persons benefited by or the persons excluded by the preference.[23] Under a second rationale, a competent governmental entity must make "findings" of discrimination and the preference employed to remedy that discrimination must be permissible in the sense that the preference cannot be permanent and cannot operate as an absolute bar to non-minorities.[24] Governmentally imposed racial preferences are therefore constitutionally permissible under these rationales because remedying the effects of past discrimination is a permissible and "compelling" or "important" objective, at least if the preferences are judicially characterized as narrowly tailored to that objective. The crucial distinction between the rationales is the question of the competence of the governmental fact finder; it is possible that some justices would require a legislative and, perhaps, a congressional "finding" of discrimination.[25]

Notice that the term "remedy" in both constitutional rationales has the broad meaning ascribed to the term when racial preferences are imposed by a court under Title VII: minority persons benefited need not establish that they are victims of an identified act of discrimination. These persons need only establish that they are members of the minority group defined by the preference, because the "dis-

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23. Fullilove v. Klutznick, 448 U.S. 448, 517-19 (1980) (Marshall, J. concurring); Regents of the University of California v. Bakke, 438 U.S. 265, 361 (1978) (Brennan, J. concurring). With respects to the question of whether a "benign" preference does or does not entail stigma, see Cox, *supra* note 22, at 35; Cox, *supra* note 1, at 150 n. 422.

24. Fullilove v. Klutznick, 448 U.S. 448, 495-517 (1980) (Powell, J. concurring); Regents of the University of California v. Bakke, 438 U.S. 265, 305-15 (1978) (Opinion of Powell, J.).

25. *See* Fullilove v. Klutznick, 448 U.S. 448, 508-10 (1980) (Powell, J. concurring). *Cf id.* at 476-78 (Opinion of Burger, C.J.) (emphasizing congressional authority to enforce the Fourteenth Amendment as a justification for a congressionally adopted preference). *But see, e.g.*, Detroit Police Officers Ass'n. v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

crimination" referenced in these rationales is historical societal discrimination against that group and the "present effects" remedied by the preference are racial imbalances in present allocations of opportunities or resources. In effect, racial status is used under the rationales as a proxy for victim status; membership in the racial group benefited by a remedial preference establishes membership in a group of "victims."

"Voluntary" Preferences

The Supreme Court has justified "voluntary" racial preferences in employment under Title VII on the theory that, although the "letter" of Title VII would prohibit them, its "spirit" does not.[26] More specifically, such a preference furthers Title VII's general objective of increasing minority employment and is therefore permissible if (1) it is a temporary measure designed to achieve rather than to permanently maintain racial balance, (2) it does not act as an absolute bar to non-minority employment and (3) it does not require discharge of non-minorities.[27] There is, perhaps, an additional requirement. In the case in which this scheme was announced, *United Steelworkers v. Weber*, the Supreme Court emphasized that the racial preference there in issue was designed to break down patterns of segregation generated by past discrimination on the part of trade unions.[28] It is possible to interpret that emphasis as requiring that an employer make "findings" of discrimination and of the "present effects" of that discrminiation before adopting a racial preference.

Two points should be noted about the Court's rationale in *Weber*. First, the rationale again relies on the notion of remedy and that notion is again the broad one employed in the other contexts summarized here. A voluntary preference under Title VII need not remedy identified acts of discrimination and may benefit persons not shown to have been the victims of identified acts of discrimination. Indeed, the employer need not act to remedy the effects of its own conduct; it may seek to remedy the discriminatory acts of third persons.

Second, it should be recognized that the meaning the Supreme Court assigns to the term "voluntary" in this context is peculiar at best. The primary motivation underlying a private employer's adoption of a remedial racial preference is to avoid racial imbalance in employee selection rates and in workforce representation rates. Such

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26. United Steelworkers v. Weber, 443 U.S. 193 (1979).
27. *Id.* at 208-09.
28. *Id.* at 198 n.1.

imbalances are often sufficient to make out a prima facie case of discrimination under the disparate impact and disparate treatment theories of discrimination. Preferences are therefore adopted to avoid the threat of liability imposed, prima facie, for racial imbalance and to avoid the litigation costs that would be incurred in attempting to justify that imbalance.[29]

There may therefore be a greater congruity between the scope of the substantive definition of prohibited discrimination and the scope of the "voluntary" racial preference employed as a remedy for discrimination than first appears. To the extent that the substantive definition can be characterized as *functionally* prohibiting race or gender imbalances, a voluntary remedial preference designed to achieve proportional allocation of opportunities and benefits rather tightly fits the scope of the possible violation that motivates adoption of the preference.

Preferences Under Conciliation Agreements and Consent Decrees

The final context in which race and gender preferences appear is in Title VII settlement or conciliation agreements and consent decrees. This phenomenon is a natural outgrowth of the judicial practice of imposing preferences as remedies and of the employer incentive structure generated by the threat of liability for race and gender imbalances. That is, a preference found in a consent decree may be justified both on the theory that it does no more than what a court could have done had the case been fully litigated and on the theory that it does no more than what the employer could have done "voluntarily" under *Weber*.[30] Settlement agreements and consent decrees containing race and gender preferences therefore confirm the interrelationships between substantive theories of Title VII liability and preferential remedies noted here in the other contexts in which preferences are employed. Preferential remedies will be agreed upon in settlement because settlement by definition occurs to avoid the costs of litigation and because settlement is most likely to occur where the risk of court imposed liability and court imposed remedies are perceived to be high. Those risks in the Title VII context are that liability will be imposed for race or gender imbalance and that preferences will be judicially mandated.

29. *See id.* at 209-16 (Blackmun, J., concurring); *id.* at 246 (Rehnquist, J., dissenting); Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 229-34 (5th Cir. 1977) (Wisdom, J., dissenting).

30. *See* Williams v. City of New Orleans, 729 F.2d 1554, 1581 (5th Cir. 1984) (Widsom, J., dissenting); Stotts v. Memphis Fire Dept., 679 F.2d 541 (6th Cir. 1982), *rev'd sub nom.*, Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984).

II. THE *STOTTS* DECISION

The Supreme Court's opinion in *Stotts* reflects fundamental and unresolved tensions in the Court's understanding of prohibited discrimination under Title VII and in the Court's understanding of the relationship between Title VII's prohibitions and remedies invocable to redress violations of those prohibitions. In *Stotts*, a governmental employer had entered into a Title VII consent decree containing a racial preference by which the employer was to "attempt to ensure" that 50% of job vacancies and 20% of promotions would be given to qualified black persons.[31] The objective of the preference was to increase the proportion of black persons in the employer's workforce approximately to the proportion of black persons in the labor force in the county in which the employer was located. Subsequently, the employer laid off employees pursuant to the "last hired, first fired" rule of seniority provisions contained in an agreement between the employer and the union representing the employer's employees.[32] As black employees hired under the consent decree were junior in seniority to white employees hired earlier, the layoff threatened the proportional racial representation objectives of the consent decree.

31. Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576, 2581 (1984).

32. *Id.* at 2581-82. The agreement between the city and union was unenforceable under state law, but the majority opinion in *Stotts* treated its unenforceability as irrelevant because the city's unilateral adoption of the agreement placed the seniority system in effect. *Id.* at 2585 n. 7. An implication of this treatment is that Section 703(h) preserves both collectively bargained and unilaterally adopted seniority systems.

Had the agreement been enforceable, white employees injured by layoffs in breach of the agreement may have had an action for backpay on the theory that the city undertook inconsistent contractual obligations. *See* W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983). That potential basis for compensating non-minority employees was, however, apparently viewed by the Supreme Court majority as irrelevant; the city's rights and interests under the decree and under Title VII were the focus of the Court's analysis.

The Court's focus is interesting in part because the Sixth Circuit had rejected an attempt by non-minority employees to intervene on the theory that the proposed intervenors sought to collaterally attack the consent decree. Stotts v. Memphis Fire Dept., 679 F.2d 541, 558-59 (5th Cir. 1982); Stotts v. Memphis Fire Dept., 679 F.2d 579 (6th Cir. 1982). That conclusion would threaten the possibility of any challenge to a court's post-decree interpretation or modification of a decree where a party (such as the city in *Stotts*) declined to object. *Cf.* Grann v. City of Madison, 738 F.2d 786 (7th Cir. 1984) (state fair employment agency order may not be attacked under Title VII by non-minorities). The difficulty with the Sixth Circuit's theory is that it treats intervention at a time at which a court makes a disputed interpretation or modification of a prior decree as a collateral attack. *See* Stotts v. Memphis Fire Department, 679 F.2d 579, 586 (6th Cir. 1982) (Martin, J., dissenting). *Cf.* W.R. Grace & Co. v. Local Union, 461 U.S. 757, 759 (1983) (employer liable for breach of collective bargaining agreement where breach occurred in compliance with Title VII conciliation agreement).

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However, the decree did not specifically address layoffs or seniority and did not award competitive seniority to the black employees hired or promoted under it.[33]

The District Court in *Stotts* enjoined layoffs of black employees and modified the consent decree to ensure that layoffs would not decrease the percentage of black employees employed prior to the layoff.[34] The modification resulted in the layoff of some white employees with greater seniority than some retained black employees.

The Court of Appeals affirmed on two theories. First, the modification merely enforced the original decree by requiring that the employer comply with its obligation to increase the percentage of black persons in its workforce.[35] Second, the modification was permissible even though it conflicted with the seniority provisions of the employer's agreement with the union.[36] The modification was permissible because the consent decree was a "settlement," and parties to litigation may by settlement agreement alter seniority systems.[37] Alternatively, the modification was permissible either because the consent decree did no more than a court could have done in altering seniority provisions as a remedy following a finding of discrimination,[38] or because the modification did no more than what the employer could have done "voluntarily" under *Weber*.[39]

The Supreme Court reversed in an opinion that rejected each of the Court of Appeals' theories. The Court first rejected the lower court's construction of the original decree: as that decree did not specifically address seniority or layoffs, the parties to the decree must not have intended to override the provisions of an agreement with a third party, the union, not a party to the decree.[40] The Court next rejected the lower court's arguments that the seniority provisions of the agreement between the city and the union could be overridden by modifying the consent decree. The lower court's settlement theory

33. 104 S. Ct. at 2586.

34. *Id.* at 2582. The dissenting justices in *Stotts* contended that the lower court merely issued a temporary injunction. *Id.* at 2600 (Blackmun, J., dissenting). Both the Supreme Court and the Sixth Circuit treated the district court's action as, in effect, a permanent modification. *Id.* at 2585 n.8; 679 F.2d at 551.

35. 679 F.2d at 557-58.

36. *Id.* at 564.

37. *Id.* at 564-66.

38. *Id.* at 566.

39. *Id.* at 566-67.

40. 104 S. Ct. at 2585-86.

was rejected on the ground that the consent decree did not address seniority: the modification did not enforce a settlement because there was no settlement regarding the disputed issue of layoffs pursuant to the seniority provisions of the agreement between the employer and the union.[41] The lower court's theory that the modification did no more than what a court could have done in remedying a violation was rejected on the theory that a court may not modify a seniority system to, in effect, grant extra seniority to black employees merely because they were black; a finding that black persons were victims of discrimination would be a prerequisite to such an award.[42] Finally, the lower court's theory that the modification did no more than the employer could have done under *Weber* was rejected as irrelevant; the employer did not in fact voluntarily adopt the modification.[43]

Stotts is currently controversial because the Supreme Court's argument that the modification exceeded the remedial powers of a court under Title VII appears to threaten racial preferences as remedies for discrimination established in litigation. That argument was grounded on two propositions. First, Section 703(h) of Title VII, which immunizes seniority systems from attack absent proof that they are created or used to intentionally discriminate,[44] precludes a remedy that would modify such a system except where an identified actual victim of an unlawful discriminatory practice is granted retroactive seniority as compensation for harm directly caused by that practice.[45] This proposition is a partial rejection of the notion that Title VII remedies are conceptually distinct from Title VII's definitions of prohibited conduct

41. *Id.* at 2487-88.

42. *Id.* at 2588-90.

43. *Id.* at 2590.

44. 42 U.S.C. § 2000e-2(h) (1982). *See* Pullman Standard v. Swint, 102 S. Ct. 1781 (1982); American Tobacco Co. v. Patterson, 102 S. Ct. 1534 (1982); Teamsters v. United States, 431 U.S. 324 (1977). Section 703(h) provides, in relevant part, that "it shall not be an unlawful employment practice for an employer to apply different standards or compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate. . . ." Title VII § 703(h), 42 U.S.C. § 2000e-2(h) (1982).

45. 104 S. Ct. at 2588:

> Here, there was no finding that any of the blacks protected from layoff had been a victim of discrimination and no award of competitive seniority to any of them. Nor had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief other than those listed in the exhibits attached to the decree. It therefore seems to us that in light of *Teamsters v. United States*, 431 U.S. 324 (1977) the Court of Appeals imposed on the parties as an adjunct of settlement

and is therefore a direct threat to a primary justification in lower court opinions for remedial preferences. Moreover, the proposition is a direct threat to the notion that the scope of Title VII's remedies need not fit the scope of formal definitions of substantive violations.

The Court's second proposition was that the policy underlying Section 706(g) of Title VII[46] "is to provide make-whole relief only to those who have been actual victims of illegal discrimination. . . ."[47] In support of this proposition the Court emphasized aspects of the 1964 legislative history in which Title VII's sponsors argued that the statute did not grant courts authority to impose quotas or to grant remedies to non-victims.[48] The Court's second proposition and its argument in support of the proposition is a direct assault upon judicially imposed racial preferences as remedies for Title VII violations.

The controversy surrounding *Stotts* emanates from uncertainty regarding whether the Court meant what it said about the remedial

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something that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed.

46. 42 U.S.C. § 2000e-5(g) (1982):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrmination on account of race, color, religion, sex, or national origin or in violation of § 2000e-3(a) of this title.

47. 104 S. Ct. at 2589.

48. *Id.* at 2588-89:

> Our ruling in *Teamsters* that a court can award competitive seniority only when the beneficiary of the award has actually been a victim of illegal discrimination is consistent with the policy behind § 706(g) of Title VII, which affects the remedies available in Title VII litigation. That policy, which is to provide make-whole relief only to those who have been actual victims of illegal discrimination, was repeatedly expressed by the sponsors of the Act during the congressional debates.

See id. at 2590:

> The Court of Appeals holding that the District Court's order was permissible as a valid Title VII remedial order ignores not only our ruling in *Teamsters* but the policy behind § 706(g) as well. Accordingly, that holding cannot serve as a basis for sustaining the District Court's order.

authority of the courts. One basis for this uncertainty is that the Court may be accused of issuing an advisory opinion regarding its interpretations of Sections 703(h) and 706(g). Recall that the issue in *Stotts* was whether the lower court's modification of a consent decree was warranted. The issue was not whether a court may impose a racial preference as a remedy after it finds a violation of Title VII. A second basis for this uncertainty is that it is not clear whether the Court's analysis regarding permissable remedies is confined to contexts in which race or gender preferences would conflict with seniority systems. Although that analysis rested in part upon a characterization of Section 706(g) remedial policy with broad implications, the analysis emphasized Section 703(h)'s protection of seniority.

There nevertheless remain reasons to believe that the Court's analysis in *Stotts does* mean that the Court is prepared to reject preferences as available judicial remedies. In the first place, the assertion that the Supreme Court issued an advisory opinion is questionable. That assertion rests on the arguments that Title VII was irrelevant to the issues in *Stotts* because those issues entailed only the interpretation of the consent decree and that, if those issues are treated instead as entailing a problem of judicial authority to modify a consent decree, the proper reference for that determination is the decree, rather than the statute.[49]

These arguments are unpersuasive. The Court of Appeals grounded its decision in the alternative; rejection of the Court of Appeals' construction of the decree did not obviate that court's conclusion that the district court had inherent authority to modify the decree. Nor is it true that the question of modification could be decided solely by reference to the decree or to the law of modification. Although the law of consent decrees is not distinguished by the clarity with which it has addressed the question of the relationship between such decrees and the statutes they are intended to enforce,[50] the Supreme Court squarely held in *Stotts* that a modification inconsistent with Title

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49. *See, id.* at 2594-95 (Stevens, J., concurring); *id.* at 2610 (Blackmun, J., dissenting).

50. *Compare* System Federation No. 91 v. Wright, 364 U.S. 642 (1961) (relied upon by the majority in *Stotts*) *with* United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) (relied upon by the dissent in *Stotts*). It is interesting to note, however, that *Continental Baking* itself recognized the "dual character" of consent decrees, 420 U.S. at 236 n.10, and that *Continental Baking* entailed a problem of determining a remedy for conduct conceded to violate the consent decree there in issue. The Court therefore distinguished cases in which the question was whether the consent decree had been violated. *Id.* at 237. *See* United States v. Atlantic Refining Co., 360 U.S. 19 (1959); Hughes v. United States, 342 U.S. 353 (1952). The latter cases re-

VII cannot be ordered.[51] That holding required a determination whether the modification in fact ordered was inconsistent with Title VII. It is possible to disagree with this holding, but disagreement is not a reason for concluding that the Court issued an advisory opinion. The Court would have issued an advisory opinion only if it had concluded that the district court's modification was not to be measured against the statute.

A second reason for questioning attempts at distinguishing *Stotts* is that, while the Supreme Court's opinion may legitimately be characterized as limited to the question of Section 703(h)'s effect on the availability of preferential remedies, the fact remains that the opin-

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quire reference to the consent decree rather than to underlying statutory purposes *because* the consent decree, as a compromise, is likely to impose *lesser* obligations than the statute it enforces. *See, Continental Baking,* 420 U.S. at 235-36.

Under the majority's characterization of the problem before the Court in *Stotts*, the consent decree did not itself impose the obligations imposed by the lower courts and the lower courts had sought to impose these obligations by reference to Title VII. Although it is possible to claim that the Court could simply have rejected the lower court's conclusions on the basis that they went beyond the decree, it is also possible to characterize the lower courts' analyses as interpreting the decree at issue in *Stotts* in light of Title VII. It may be that a consent decree is supposed to be interpreted from its "four corners", but, in fact, that is not a plausible understanding of the act of interpretation; the four corners of the decree were written within a context—most obviously within the context of the statute. On these premises, it was appropriate to look to the statute as a guide to interpretation of the decree precisely because parties to a settlement can be expected to impose lesser obligations by settlement than could have been possible through litigation. The irony in the lower courts' analyses is that those courts imposed, under the Supreme Court's conclusions, greater obligations by "settlement" than could have imposed through litigation.

51. 104 S. Ct. at 2587 n.9:

> The dissent seems to suggest, . . . and Justice Stevens expressly states, . . . that Title VII is irrelevant in determining whether the District Court acted properly in modifying the consent decree. However, this was Title VII litigation, and in affirming modifications of the decree, the Court of Appeals relied extensively on what it considered to be its authority under Title VII. That is the posture in which the case comes to us. Furthermore, the District Court's authority to impose a modification of a decree is not wholly dependent on the decree. "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *Systems Federation No. 91 v. Wright,* 364 U.S. 642, 651 (1961). In recognition of this principle, this Court in *Wright* held that when a change in the law brought the terms of a decree into conflict with the statute pursuant to which the decree was entered, the decree should be modified over the objections of one of the parties bound by the decree. By the same token, and for the same reason, a district court cannot enter a disputed modification of a consent decree in Title VII litigation if the resulting order is inconsistent with that statute.

ion addresses Section 706(g) at length and adopts a controversial definition of the scope of the remedial authority conferred by that Section. It is possible to adopt a limited understanding of the holding in *Stotts*, but Supreme Court holdings may be less important than is commonly imagined.[52] What may matter instead is that the Court has signalled its doubts about judicially imposed remedial preferences. That signalling may not compel a rejection of such remedies, but neither can the signal be ignored. The Court may in the future decide either to reject or to affirm the remedial authority of the lower courts in this context; the Supreme Court is not distinguished by the attention it pays to the logic of its prior opinions.[53] But the remedial issue, once thought squarely foreclosed by the unanimous opinion of the Courts of Appeals asserting authority to order preferences,[54] is clearly again on the table.

III. THE IMPLICATIONS OF *STOTTS*

There is an ironic twist to the controversy regarding *Stotts*. The controversy has for the most part ignored what should be the most controversial of the implications of the Supreme Court's analysis. As earlier noted, there is a fundamental linkage between race and gender preference as remedies for discrimination and functional definitions

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> Thus, Title VII necessarily acted as a limit on the District Court's authority to modify the decree over the objections of the City; the issue cannot be resolved solely by reference to the terms of the decree and notions of equity. Since . . . Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent either a finding that the seniority system was adopted with discriminatory intent or a determination that such a remedy was necessary to make whole a proven victim of discrimination, the District Court was precluded from granting such relief over the City's objection in this case.

It is possible to dispute my characterization of this excerpt as "holding." I think it "holding" for purposes of the case; whether it is "holding" in the sense of the doctrine of precedent is dependent upon one's view of the meaning of that doctrine. For example, compare E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949) pages 2-4 with pages 33 and 58-61. It should nevertheless be apparent that the very claim that the Court issued an advisory opinion is unintelligable absent some concept of holding and precedent, and quite probably a concept that accounts for the notion of a "rule."

52. *Cf.* P. BOBBITT, CONSTITUTIONAL FATE, 190-95 (1982) ("cueing function" of some Supreme Court decisions in constitutional law).

53. *See* Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1980).

54. *See* Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576, 2606 n. 10 (1984) (Blackmun, J., dissenting).

of discrimination.[55] Formal definitions of prohibited discrimination employed by the courts under Title VII do not purport to ground liability on race or gender imbalances. Indeed, formal definitions eschew such a notion.[56] Liability is formally imposed for intentional discrimination or for the insufficiently justified use of race and gender neutral criteria having a disparate impact on minorities or women; imbalance is mere evidence. To the extent, however, that imbalance is judicially viewed as extremely persuasive evidence, these formal definitions have quite different functional implications. The point is illustrated by the consent decree in *Stotts* and by the "voluntary" affirmative action plan in *Weber*: one may avoid the risk of liability imposed for reasons of the persuasive character of an imbalance by agreeing to correct that imbalance. What does the Court's analysis in *Stotts* portend for these functional implications?

Perhaps nothing; the Court addressed a remedy issue, not a liability issue. If, however, it is plausible that remedial preferences are compatible with functional definitions of discrimination under Title VII, a rejection of such preferences may well suggest movement away from the functional implications of formal definitions and toward the formal definitions themselves.

To put the matter more directly: if race and gender preferences designed to correct workforce imbalances are not an appropriate remedy for discrimination, then perhaps workforce imbalance is not an appropriate functional definition of discrimination. Imbalance is an appropriate functional definition if discrimination is understood as a failure to achieve Title VII's ultimate objectives—full employment of minorities and women. On that understanding, it is conceptually proper to predicate liability, operationally, on employer failures to remedy the "present effects of past discrimination." But if discrimination is understood instead in terms of the conception invoked by the Court's analysis in *Stotts*, as a discrete wrongful act having discrete remediable consequences, liability imposed merely for the disparate effects of an employer's race and gender neutral practices is a conceptual anomaly.[57] It is the anomalous character of such a basis for liability, given the conception invoked by the Court's analysis in *Stotts*, that should constitute the most controversial of the implications of the Court's opinion.

Perhaps this anomaly may be clarified by making it more concrete. The disparate impact theory of discrimination, under which race

55. *See supra* text following notes 17, 25, and 29.
56. *See* Teamsters v. United States, 431 U.S. 324, 339 n. 10 (1977).
57. *See generally* Freeman, *supra* note 17.

and gender neutral criteria may be challenged, can be viewed as serving one or more of three distinct functions.[58]

If the "business necessity" or "job relatedness" an employer must establish to justify a challenged employment practice is measured against a reasonableness criterion,[59] the disparate impact theory may be viewed as an approximation of a disparate treatment, or intentional discrimination, theory. To the extent that an employment practice is not reasonably related to some legitimate business interest and that the practice excludes from an employment opportunity a substantial proportion of minorities or of women, it may be inferred that the practice was adopted or maintained for an illicit reason, as a proxy for race or gender. An argument justifying this conception of the disparate impact theory is that the pretextual use of race and gender neutral criteria is difficult to establish directly and that this difficulty results in underenforcement of Title VII's prohibition of intentional discrimination. On this view, the disparate impact model is employed as an overinclusive means of precluding pretextual use of neutral criteria or as a means of precluding the "functional equivalent" of intentional discrimination—discrimination similar to but not synonymous with disparate treatment.[60]

Given this conception of the disparate impact theory, a finding of liability under the theory would warrant a compensatory remedy for actual victims of the use of an invalidated employment practice. As the theory's objective is to preclude employer action undertaken by reference to the race or gender of individuals, individuals harmed in fact by an employer's pretextual use of an employment practice should be made whole.

58. *See* Cox, *supra* note 22, at 45-97.

59. *See* New York Transit Authority v. Beazer, 440 U.S. 568, 587 n. 31 (1978); Washington v. Davis, 426 U.S. 229 (1976); United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).

60. *Compare* Brest, *supra* note 16, at 35; Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 551-53 (1977) (explaining disparate impact theory in terms of illicit motive theory) *with* Fiss, *supra* note 17, at 301-02 (explaining disparate impact theory on a functional equivalence rationale). Under Professor Fiss' explanation, a race and gender neutral employer rule generating disparate race or gender results is the functional equivalent of disparate treatment where (1) the disparity is such that the rule is more likely to exclude members of a minority group than non-minorities, (2) those excluded by the rule have no control over possession of the talent or quality measured by the rule, and (3) the rule is unrelated to productivity. *Id.* To the extent that the last of these elements is measured under a reasonableness standard—does the rule have a reasonable relationshp to employee productivity—the functional equivalence rationale would appear to be a fairly close approximation of a disparate treatment theory. *See* Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979).

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To the extent, however, that the business necessity or job relatedness defense requires proof that a challenged practice is essential,[61] or to the extent that the defense imposes substantial financial costs of quasi-scientific validation of employment criteria,[62] two alternative functions may be viewed as served by the disparate impact theory. If this more stringent standard is applied to employment practices likely to give effect to identifiable instances of societal discrimination—discrimination in education affecting relative access to educational credentials is an example—then the theory functions as a means of partially remedying that societal discrimination. On this premise, a racial quota may be viewed as an appropriate remedy following a finding of liability because it directly enforces an employer's functional obligation, under this version of the impact theory, to absorb a portion of the present costs of past societal discrimination. However, if this version of impact theory is viewed merely as proscribing the use of criteria which give effect to societal discrimination and not as directly compensating the presumed victims of that discrimination, a racial quota would not seem appropriate as a remedy. In that event, mere elimination of criteria generating unlawful effects would be the appropriate remedy,[63] at least unless an additional quota remedy is viewed as a means of deterring use of such criteria.

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61. *See, e.g.*, Johnson v. Uncle Ben's Inc., 657 F.2d 750 (5th Cir. 1981); Parsons v. Kaiser Alum. & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978), *cert. denied*, 441 U.S. 968 (1979). Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971). *But see, e.g.*, Wambheim v. J.C. Penney Co., Inc., 705 F.2d 1492 (9th Cir. 1983); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

62. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); 29 C.F.R. Pt. 1607 (1984).

63. *Cf.* Bronze Shields, Inc. v. New Jersey Dept. of Civil Service, 667 F.2d 1074, 1080-84 (3d Cir. 1981) (applying Title VII charge filing limitations period to impact claim). *But cf.* Guardians Ass'n of New York City v. Civil Service Comm'n., 633 F.2d 232, 249-51 (2d Cir. 1980) (employing continuing violation theory to avoid cutting off an impact claim), *cert. denied*, 452 U.S. 940 (1981). Identified persons actually affected by such criteria might nevertheless be compensated. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

It should be noted, however, that even this limited understanding of the objective underlying this version of impact theory may, as a practical matter, be compatible with proportional hiring or promotion by reference to race or gender. *See* Connecticut v. Teal, 457 U.S. 440, 463 (1982) (Powell, J. dissenting) (arguing that a legal standard requiring abrogation of race-neutral criteria compels adoption of quotas). Abrogation of race and gender neutral criteria requires that an employer substitute other criteria—often more subjective assessments. To the extent that representation rate disparities generated by subjective assessments are judicially treated as strong evidence of intentional discrimination, an employer is encouraged to adopt policies that will avoid generating such evidence. *See supra* note 18. Moreover, to the extent that an employer's defense to a disparate treatment claim founded upon representation rate disparities

Cox: Some Thoughts on the Future of Remedial Race and Gender Preferenc

Alternatively, if the more stringent business necessity defense is applicable to all employment practices, whether or not these practices give effect to identified instances of past discrimination, then the disparate impact theory functions as a means of enforcing an equal achievement objective: an employer's failure to proportionally allocate employment opportunities among race and gender groups is functionally prohibited. Under this view, race and gender preferences are clearly warranted, for they directly enforce a legal obligation of proportional allocation. Indeed, the third version of the impact theory may be viewed as indirect means of judicially imposing under Title VII an affirmative action obligation, and both the EEOC[64] and some lower federal court judges appear to have so viewed it.[65]

On the assumption that these alternative understandings of the disparate impact theory are for present purposes accepted, the implication of the Supreme Court's opinion in *Stotts* becomes more focused. *Stotts* may be viewed as a threat not merely to preferential remedies, but perhaps to the second and certainly to the third of the alternative versions of the disparate impact theory identified here. If the Court is serious about the conception of permissible remedies that its analysis invoked in *Stotts*, its opinion may confirm the tendency in other of its more recent cases[66] to confine the scope and content of Title VII's substantive definitions of prohibited discrimination.

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is to establish that a race and gender neutral criterion, rather than race or gender, "caused" the disparities, the employer's "defense" established a prima facie case of disparate impact liability. *See* Segar v. Smith, 738 F.2d 1249, 1265-73 (D.C. Cir. 1984). The functional consequence of this "catch-22" may be that employers are required to adopt proportional hiring and promotion policies even where the disparate impact theory is viewed as authorizing merely an injunction against further use of a challenged neutral criterion.

64. *Compare* 29 C.F.R. Pt. 1607 (1984) (employee selection guidelines) *with* 29 C.F.R. Pt. 1608 (1984) (affirmative action guidelines).

65. *See* Weber v. Kaiser Alum & Chem. Corp., 563 F.2d 216, 231-32 (5th Cir. 1977) (Wisdom, J. dissenting), *rev'd sub. nom.*, United Steelworkers v. Weber, 443 U.S. 193 (1979). *Cf.* Williams v. City of New Orleans, 729 F.2d 1554, 1581 (5th Cir. 1984) (Wisdom, J. dissenting) (reasonableness of preferences in consent decree should be measured in part by threat of litigation and liability if decree is not approved); Stotts v. Memphis Fire Dept., 679 F.2d 541, 566 (6th Cir. 1982) (permissible remedies in a consent decree are to be measured by permissible scope of remedies imposed by a court under Title VII following findings of discrimination, *rev'd sub. nom.*, Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984); Armstrong v. Board of School Directors, 616 F.2d 305, 312 (7th Cir. 1980) (same).

66. *See, e.g.*, Connecticut v. Teal, 457 U.S. 440 (1982) (rejecting "bottom line balance" as a defense to impact theory and therefore implicitly rejecting a group right to equal achievement as an explanation of the impact theory); New York Transit Authority v. Beazer, 440 U.S. 568, 587 n. 31 (1979) (relaxing the business necessity defense).

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IV. THE POST-*STOTTS* VIABILITY OF *UNITED STEELWORKERS V. WEBER*

A post-*Stotts* development should be of interest given this interpretation of *Stotts*. There appears to be some disagreement among the Third, Sixth, Seventh and Ninth circuits regarding the appropriate interpretation of the Supreme Court's opinion in *United Steelworkers v. Weber*[67] in the context of affirmative action plans voluntarily adopted by governmental employers. That disagreement appears at least partially influenced by judicial perceptions of the effect of the Supreme Court's analysis in *Stotts*.

The controversy is perhaps best introduced by examining a recent dissenting opinion, written by Justice Rehnquist and joined by the Chief Justice and Justice White, from denial of a writ of certiorari in *Bushey v. New York State Civil Service Commission*.[68] In that case, the State of New York adopted an affirmative action plan under which it adjusted civil service examinations scores of minority applicants to ensure that the examination did not generate a disparate impact on minorities. The Second Circuit, rely on *Weber*, held the plan lawful under Title VII in part on the theory that the state merely attempted to comply with the disparate impact theory of unlawful discrimination.[69] The Supreme Court denied certiorari, perhaps in part because the parties attacking the state's plan had not pressed the constitutional claim that interested Justice Rehnquist and the other dissenting justices.[70]

The claim that interested Justice Rehnquist, who dissented in *Weber*, was that *Weber* is inapplicable where a government's "voluntary" affirmative action plan is attacked under the equal protection clause. Justice Rehnquist's dissent strongly suggests that at least three members of the Court would insist on "findings of discrimination" and would insist that such findings cannot be predicated on a mere disparity in selection or representation rates.[71] Indeed, Justice Rehnquist argued in the dissent that a government employer, to justify a race or gender preference, must conclude that continued use of a criterion generating disparate impact cannot arguably be justified. The Justice's argument links the availability of *Weber* as a defense to disparate

67. 443 U.S. 193 (1979).
68. 105 S. Ct. 803 (1985).
69. Bushey v. New York State Civil Serv. Comm'n, 733 F.2d 220 (2d Cir. 1984). *See also* Wygant v. Jackson Bd. of Ed., 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3727 (U.S. April 15, 1985).
70. *See Bushey*, 105 S. Ct. at 806 (dissenting opinion).
71. *Id.* at 805.

Cox: Some Thoughts on the Future of Remedial Race and Gender Preferenc

treatment theory directly to the first version of disparate impact theory postulated in this paper.[72] Perhaps the dissenters would go further, for Justice Rehnquist makes the blanket statement in his dissent that "[s]tates should not be allowed to practice racial discrimination anew under the guise of atoning for past discrimination or because of the difficulties with mounting an otherwise legitimate defense to a lawsuit."[73]

The Seventh Circuit, in *Janowiak v. City of South Bend*,[74] held that a lower court had improperly granted summary judgment to the defendant city in a suit challenging an affirmative action plan under the equal protection clause and under Title VII. The circuit court's opinion echoes a strong theme in Justice Rehnquist's *Bushey* dissent: mere statistical disparities will not suffice to establish the "past discrimination" necessary to justify a remedial preference under either Title VII or the Constitution.[75]

However, the Ninth Circuit, in *Johnson v. Transportation Agency Santa Clara County*,[76] appears to have concluded that statistical disparities standing alone are sufficient to justify a government's adoption of a voluntary plan. Moreover, the Third Circuit, in *Kromnick v. School District of Philadelphia*,[77] upheld, in the face of constitutional and Title VII attacks, a teacher assignment policy, framed expressly in terms of a racial quota, on the theories that the policy remedied general racist attitudes in the community and furthered a congressional policy of ensuring integration in school faculties.[78] The Third Circuit's opinion therefore goes further than the Ninth Circuit's reliance on representation rate disparities as a justification for preferences. That opinion also distinguishes *Stotts* on the theory that *Stotts* is limited to instances of layoffs and judicially imposed overrides of seniority systems.[79]

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72. *Id.* at 806. *See supra* text accompanying notes 58-64. The suggestion is however inconsistent with the Court's conclusion, in *Weber*, that voluntary affirmative action need not be predicated on an employer's conclusion that it has arguably violated Title VII. United Steelworkers v. Weber, 443 U.S. 193, 208 n. 8 (1979).

73. *Id.*

74. 750 F.2d 557 (7th Cir. 1984).

75. *Janowiak*, 750 F.2d at 563, 564. *But cf.* Lehman v. Yellow Freight Systems, Inc., 651 F.2d 520, 527 (7th Cir. 1981) ("some type of statistical disparity" necessary to justify a preference).

76. 748 F.2d 1308 (9th Cir. 1984). *See also* Wygant v. Jackson Bd. of Ed., 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3727 (U.S. April 15, 1985).

77. 739 F.2d 894 (3d Cir. 1984), *cert. denied*, 53 U.S.L.W. 3483 (U.S. Jan. 7, 1985).

78. *Id.* at 904-06.

79. *Id.* at 911.

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The Sixth Circuit, in *Van Aken v. Young*,[80] upheld a city's voluntary affirmative action plan in the face of constitutional and Title VII attacks on the theory that the plan remedied "gross racial discrimination" on the part of the city, as established by representation rate disparities. *Stotts* was distinguished in *Van Aken* on the ground that it did not overrule *Weber*.[81] Finally, the Sixth Circuit, in *Vanguard of Cleveland v. City of Cleveland*,[82] distinguished *Stotts* and relied upon *Weber* in approving a consent decree containing preferences designed to increase the proportion of black and hispanic officers in a police force. As the city agreed to the preference, and as Section 703(h) merely permits rather than requires differentiations founded upon seniority, *Stotts* is, according to the Sixth Circuit, inapplicable to a voluntary assumption of affirmative action obligations in a consent decree.

Van Aken and *Vanguard of Cleveland* raise rather directly the tension between *Weber* and *Stotts*. In both Sixth Circuit cases, the preferences at issue were challenged by non-minorities or by a union affected under the preferences, rather than by parties to the preferences. To the extent that non-minorities and unions are treated as lacking protectable interests under Sections 703(h) and 706(g),[83] the statutory provisions relied upon in *Stotts*, the Supreme Court's conclusion, in *Weber*, that an employer may voluntarily adopt a preference

80. Janowiak, 750 F.2d 43 (6th Cir. 1984).

81. *Id.* at 45.

It should be noted that the lower courts have not enforced even *Weber*'s limited requirements for voluntary affirmative action. They have not required that remedial preferences be temporary measures designed to "attain" rather than to "maintain" racial balance. *See* Kromnick v. School Dist. of Philadelphia, 739 F.2d 894 (3d Cir. 1984); Tangren v. Wackenhut Services, Inc., 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982). They have not required that a preference remedy discrimination in "traditionally segregated job categories." *See* Electrical Workers, I.B.E.W. Local 35 v. City of Hartford, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981). They have not in at least some instances required that a preference be remedial. *See* Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982). *But see* Lehman v. Yellow Freight Systems, Inc., 651 F.2d 520 (7th Cir. 1981).

82. 753 F.2d 479 (6th Cir. 1985).

83. *See id.* at 486: "In short, these sections provide a shield to an employer in defending a Title VII action, not a sword to an employee claiming that certain conduct violates Title VII." *Cf.* Stotts v. Memphis Fire Department, 679 F.2d 579 (6th Cir. 1982) (denying that non-minorities have a protectable interest entitling them to challenge a consent decree modification); Grann v. City of Madison, 738 F.2d 786 (7th Cir. 1984) (state fair employment agency order cannot be attacked by non-minorities). *But cf.* W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983) (employer liable for breach of collective bargaining agreement required by compliance with Title VII conciliation agreement); Stotts v. Memphis Fire Department, 679 F.2d 579, 586 (6th Cir. 1982) (Martin, J., dissenting) (intervention is not a collateral attack).

would seem controlling both where the employer does so in a consent decree and where the employer does so independently of the legal process.[84]

The difficulty with this logic, in the context at least of consent decrees, is, however, that it permits an agreement in settlement of Title VII litigation inconsistent with the Supreme Court's characterization of Title VII policy in *Stotts*. The characterization may be circumvented on the obvious ground that the source of the characterization, Section 706(g), applies only to an order of the court requiring preferences,[85] but that circumvention ignores the rationale underlying the characterization. According to the Supreme Court in *Stotts*, Section 706(g)'s limitations on the remedial authority of the courts reflect a congressional distaste for quotas.[86] That distaste is arguably a substantive policy[87] both inconsistent with preferences adopted under a threat of litigation and a source of the legal protection for non-minorities denied in *Van Aken* and *Vanguard of Cleveland*.[88]

Nevertheless, *Stotts* did not overrule *Weber* or the Court's distinction between required preferences and permitted preferences in that case. It is possible, however, that the Court will modify or limit *Weber*. There are four techniques available for confining the scope of the *Weber* decision. The first is to conclude that a government lacks the discretion of a private employer because the Constitution requires findings of discrimination by a competent fact finder. On this theory, it would be possible to require more by way of findings than a simple reliance on statistical disparities and to require a legislative, or perhaps congressional fact finder.[89]

A union's or employee's stake in a collective bargaining agreement's seniority system would presumably be sufficient to invoke the protection of Section 703(h) where a consent decree modified that system. *See* Teamsters v. United States, 431 U.S. 324 (1977). *Cf.* W.R. Grace & Co. v. Local Union, 461 U.S. 757, 759 (1983). However, the Sixth Circuit in *Vanguard of Cleveland* characterized the decree there in issue as not affecting the applicable seniority system. 753 F.2d at 486. *But see id.* at 490 (Kennedy, J., dissenting). The argument supporting the proposition that non-minorities have no protectable interests under Section 706(g) is that the provision merely limits judicial authority; it confers no rights. This argument ignores a probable reason for Section 706(g)'s limitations on judicial authority: protection of the interests of non-minorities. *See* Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 782-91 (1976) (Powell, J., dissenting).

84. *But see* Vanguard of Cleveland v. City of Cleveland, 753 F.2d 479, 493 (6th Cir. 1985) (Kennedy, J., dissenting); *infra* text accompanying notes 98-100.

85. *Vanguard of Cleveland*, 753 F.2d at 487.

86. 104 S. Ct. at 2588-89.

87. *See* 42 U.S.C. § 2000e-2(j) (1982); United Steelworkers v. Weber, 443 U.S. 193, 245-46 (1979) (Rehnquist, J., dissenting).

88. *See supra* note 83.

89. *Compare* Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981), *cert.*

The second available technique is to impose a similar fact finding requirement under Title VII on both governmental and private employers. *Weber* could be interpreted to require more direct proof of past discrimination than statistical disparity[90] and to require that an employer establish a significant risk of liability under the disparate impact theory as a justification for adopting a preference. Such an interpretation would constitute a partial adoption of the "arguable violation" or unilateral settlement theory rejected in *Weber*,[91] but the interpretation could also be tied to a clarification of disparate impact theory. Specifically, the first version of impact theory postulated here[92] could be made the basis of a unilateral settlement rationale for affirmative action by requiring that an employer have no arguably reasonable defense to threatened liability. Otherwise, an employer could easily establish threatened liability as a justification for voluntary preferences by simply citing the difficulty of proving business necessity under strict versions of that defense.[93]

The third available technique is to treat the *Weber* affirmative action exception to disparate treatment liability under Title VII as an affirmative defense, thus shifting a burden of persuasion to the party relying on *Weber* to justify a preference.[94] The Ninth Circuit,

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denied, 454 U.S. 1145 (1982) *with* Associated General Contractors of Cal. v. San Francisco Unified Sch. Dist., 616 F.2d 1381 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980). The Supreme Court may decide this issue next term. Wygant v. Jackson Bd. of Ed., 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3727 (U.S. April 15, 1985) (No. 84-1340).

90. At least one Circuit has, however, concluded that no finding of past discrimination, or even of substantial disparity is required. *See* Electrical Workers, I.B.E.W., Local 35 v. City of Hartford, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

91. *See* United Steelworkers v. Weber, 443 U.S. 193, 208 n. 8 (1979). The arguable violation theory was postulated by Judge Wisdom in a dissent from the Fifth Circuit's opinion in *Weber*. Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977). Under that theory, voluntary affirmative action is viewed expressly as an employer response to threatened impact theory liability. *See* United Steelworkers v. Weber, 443 U.S. 193, 211 (1979) (Blackmun, J., concurring).

92. *See supra* text accompanying notes 59-60.

93. *See* Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

There is, however, an additional difficulty that would have to be faced if this limitation were adopted. To the extent that an employer is subject to Executive Order 11246 as a federal contractor, affirmative action preferences are adopted pursuant to that order and to Labor Department regulations implementing the order. *See* 41 C.F.R. Pt. 60 (1984). It would therefore be necessary either to recognize compliance with these regulations as a defense to a disparate treatment allegation or to invalidate the regulations as inconsistent with Title VII.

94. Justification might be framed in terms of the elements emphasized in *Weber*, *supra* text accompanying notes 26-28, or might be made more difficult by requiring substantial proof of past discrimination on the part of the party adopting a

Cox: Some Thoughts on the Future of Remedial Race and Gender Preferenc

over a strong dissent,[95] imposed the burden of persuasion on the plaintiff in *Johnson*,[96] as did the Sixth Circuit in *Van Aken*.[97] However, *Weber* recognizes a justification for disparate treatment, and justifications for otherwise unlawful conduct are generally treated by the law as affirmative defenses.

The final technique by which *Weber* may be limited is to concluded that *Stotts* applies to consent decrees and that *Weber* applies to voluntary preferences adopted outside the legal process.[98] This distinction would require an extension of *Stotts*. In *Stotts*, the Court held that a modification judicially imposed over the objection of a party to a consent decree must be measured against the relief obtainable under Title VII; the Court did not directly address the question whether a consent decree must itself be measured against that standard. However, *Stotts* would seem directly applicable to a consent decree "voluntarily" entered into by parties to litigation where the decree intrudes upon a seniority system in which intervening non-

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preference. The later alternative would, as a practical matter, gut *Weber*, because it is doubtful that employers would be interested in establishing a case against themselves or in therefore subjecting themselves to backpay claims. It should be noted, however, that employers who adopt affirmative action plans pursuant to the E.E.O.C.'s affirmative action guidelines, 29 C.F.R. Pt. 1608 (1984), may claim reliance on those guidelines as an alternative defense, at least unless the guidelines are judicially invalidated or are treated as not constituting a written interpretation of the E.E.O.C. *See* 42 U.S.C. § 2000e-12(b)(1) (1982); 29 C.F.R. § 1608.2 (1984).

95. Johnson v. Transportation Agency, Santa Clara County, Cal., 748 F.2d 1308, 1314-20 (9th Cir. 1984) (Wallace, J., concurring and dissenting).

96. 748 F.2d at 1310 n.2.

97. 750 F.2d at 44. *See also* Setser v. Novak Investment Co., 657 F.2d 962 (8th Cir.), *cert. denied*, 454 U.S. 1064 (1981); Parker v. Baltimore & Ohio R.R. Co., 652 F.2d 1012 (D.C. Cir. 1981).

These opinions impose a McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), scheme as a framework for analysis of affirmative action plans under *Weber*. A defendant seeking to uphold its plan must therefore "articulate" a "legitimate, non-discriminatory reason" for its plan. This is a rather obvious distortion of disparate treatment theory. *McDonnell-Dougals* and its progeny establish a proof scheme for inferring intentional discrimination from circumstantial evidence; a defendant's "articulation" of a legitimate reason for its actions under that scheme is a means of denying that intentional discrimination occurred. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). An affirmative action plan by definition distinguishes between persons by reference to race or gender and therefore by definition intentionally discriminates. *McDonnell-Douglas* is not even remotely relevant to the question of justification of intentional discrimination. *See* Trans World Airlines, Inc. v. Thurston, 53 U.S.L.W. 4024 (1985). The analysis of the circuit courts is a transparent attempt to ease the burden of justification imposed on defendants in this context by taking advantage of the Supreme Court's holding, in *Burdine*, that an employer has merely a burden of production of evidence where it denies that it has intentionally discriminated.

98. Vanguard of Cleveland v. City of Cleveland, 753 F.2d 479, 493 (6th Cir. 1985) (Kennedy, J., dissenting).

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minorities have enforceable interests and where those non-minorities challenge the decree. Moreover, *Stotts* could be extended to consent decrees in contexts in which Section 703(h) is not a factor by concluding that judicial action approving a proposed consent decree is an "order of the court" within the meaning of Section 706(g) and of the Supreme Court's interpretation of that Section's limitations on judicial remedial authority.[99] *Stotts* might also be extended by concluding that intervening non-minorities have protectable interests conferred by those limitations.[100]

This leaves the question whether the Supreme Court *will* confine *Weber*. Predicting the Court's behavior is, of course, a hazardous undertaking. However, there is a reason to believe that the Court may confine *Weber*. That reason is *Stotts*. As argued here earlier, remedial race and gender preferences are compatible with some understandings of functional definitions of unlawful employment discrimination and largely incompatible with formal definitions of unlawful employment discrimination. The Court's analysis in *Stotts* clearly emphasizes formal definitions and clearly rejects the implications of functional definitions in the remedial context. That rejection has substantive implications, as illustrated here earlier with respect to disparate impact theory.[101] An additional substantive implication is, however, that *Weber* is conceptually inconsistent with the Court's view of judicial remedial authority in *Stotts*. It is conceptually inconsistent because *Weber* authorized voluntarily adopted remedial preferences to correct past societal discrimination; *Stotts* may be read as rejecting judicially imposed remedial preferences to correct even a defendant's own acts of discrimination.

Now it is obvious that the cases are distinguishable. *Weber* entailed a private decision judicially characterized as voluntary; *Stotts* contemplated judicially ordered preferences. But the motivation for the privately adopted preference in *Weber* was the perceived structure and implications of the law;[102] *Stotts* threatens the accuracy of that perception and therefore diminishes the likelihood of private adoption.

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99. *Id.* at 492.

100. *But see supra* note 83. It should be noted that these theories would require a partial rejection of the notion that a consent decree is to be treated as a contract apart from the statute it enforces. *See supra* note 50.

101. *See supra* text accompanying notes 58-66.

102. However, in the context of governmental employers, it is possible that preferences are adopted less for reasons of threatened liability than for reasons of the political power of groups advocating such preferences. If this is an accurate speculation, removing the incentive structure underlying private adoption would not eliminate

Cox: Some Thoughts on the Future of Remedial Race and Gender Preferenc

Moreover, the decision in *Weber* was grounded upon a characterization of the policy of Title VII at least partially denied in *Stotts*. According to the Court in *Weber*, a privately adopted remedial preference complies with Title VII's policy of increasing minority employment—a form of compliance implicitly compelled by versions of disparate impact theory which impose stringent justification requirements on employers. According to the Court in *Stotts*, a judicially imposed racial preference is inconsistent with Title VII's policy of providing make whole relief only to actual victims of unlawful discrimination —a policy conceptually incompatible with a functional definition of discrimination that treats as unlawful an employer's failure to allocate employment opportunities proportionally among race and gender groups.

Perhaps this conceptual incompatibility is best illustrated by focusing upon an argument often employed in justifying both voluntary preferences under *Weber* and preferences adopted in settlement agreements and consent decrees. That argument is that there is a strong policy favoring "voluntary compliance" with Title VII.[103] The difficulty with this argument is that it often ignores the question of the content of the legal mandate with which voluntary compliance is to be encouraged. Race and gender preferences clearly constitute compliance if that mandate is proportional allocation of opportunities among race and gender groups, but the Supreme Court's conception of that mandate in *Stotts* is not compatible with proportional allocation. The Supreme Court's conception is instead that particular individuals are to be compensated for particular harm flowing from particular incidents of wrongful conduct. Neither voluntary preferences nor perferences adopted in settlement constitute compliance with this conception; they constitute compliance with a quite different understanding of Title VII.

It may be the case that voluntarily adopted preferences are distinct from judicially imposed preferences because voluntary preferences are not "required", but it is also the case that preferences

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the phenomenon. In that event, a policy of eliminating preferences would require invoking the Constitution to trump the political process or would require a formal overruling of *Weber*. Perhaps Justice Rehnquist's invocation of the Constitution to distinguish *Weber* in his *Bushey* dissent may be explained on this basis.

103. *See, e.g.*, Williams v. City of New Orleans, 729 F.2d 1554, 1581-82 (5th Cir. 1984) (Wisdom, J., dissenting); Stotts v. Memphis Fire Department, 679 F.2d 541, 566 (6th Cir. 1982), *rev'd sub. nom.* Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576 (1984); Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 230 (5th Cir. 1977) (Wisdom, J., dissenting), *rev'd sub. nom.* United Steelworkers v. Weber, 443 U.S. 193 (1979).

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are less likely to be adopted where they cannot be judicially compelled. They are even less likely to be adopted if *Stotts* foreshadows an effort to confine the disparate impact theory. In short, the Court need not directly overrule *Weber* to functionally overrule *Weber*. A functional overruling can occur by incrementally limiting *Weber's* scope and by reducing the litigation incentives which motivate adoption of "voluntary" race and gender preferences.

CONCLUSION

We are repeatedly reminded that the life of the law has not been logic; nor, perhaps, has the life of the law been conceptual symmetry. Certainly the law of Title VII is persuasive evidence for both propositions.[104] It is nevertheless possible that the Supreme Court may move in the direction of symmetry by modifying its interpretations of Title VII's substantive prohibitions to render them more compatible with its interpretation, in *Stotts*, of Title VII's remedial policy. Such a movement would be bad news for advocates of "affirmative action," understood as preferential treatment of minorities and women.[105]

Ironically, a direct attack merely upon the legitimacy of race and gender preferences would be bad news for employers and other potential defendants if it is not followed or preceded by an effort to limit the functional implications of substantive theories of unlawful discrimination. Although there has been substantial resistance to affirmative action, many employers may have embraced the concept as a relatively direct and certain means of complying with the functional implications of the disparate impact theory.[106] To the extent that *Stotts* casts doubt on *Weber*, and to the extent that the Supreme Court fails to resolve the tensions in its precedents in this area, employers are again faced with uncertainty about the mandates of antidiscrmination law.

104. *See generally* Cox, *supra* note 22.

105. *See* Employee Rel. Wkly (B.N.A.), Oct. 15, 1984, at 1262 (distinguishing "affirmative action" as "quotas" and "affirmative action" as outreach and recruitment efforts).

Although section 706(g), 42 U.S.C. § 2000e-5(g) (1982), authorizes "affirmative action", it is not clear that the phrase was viewed as including preferences when enacted. *Cf.* Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576, 2590 n. 15 (1984) (arguing that 1972 amendments to Section 706(g) did not authorize preferences). *But cf. id.* at 2609-10 (Blackmun, J., dissenting) (arguing that 1972 amendments did authorize preferences). It should be noted that there are other terms in Section 706(g) that have been given peculiar meanings by judicial interpretation. Although Section 706(g) authorizes remedies only for "intentional" discrimination, that phrase has been viewed as meaning that the intentional use of a race and gender neutral criterion is a remediable act. By contrast, the notion of intentional discrimination when used to described the disparate treatment theory of discrimination refers to illicit motive. *See* Cox, *supra* note 22.

106. *See* Connecticut v. Teal, 457 U.S. 440, 456-64 (1982) (Powell, J., dissenting).