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NAACP v. Detroit Police Officers Association - The Demarcation of Title VII and the Fourteenth Amendment in Employment Discrimination

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NOTE

NAACP v. Detroit Police Officers Association—The Demarcation of Title VII And The Fourteenth Amendment in Employment Discrimination

INTRODUCTION

Affirmative action, preferential treatment given to one group of people to remedy a particular disadvantage, has increasingly come under fire in recent years. Affirmative action has consistently been used as a remedial measure in employment discrimination litigation.[1] For example, affirmative action programs have been used to remedy gross racial imbalances in certain job situations where the "underrepresented" race has effectively proven that the imbalance was due to racially discriminatory practices. While admitting past racially discriminatory acts, the "overrepresented" race sometimes will contend that a particular affirmative action program is invalid, because such program discriminates against them. The question then becomes whether all types of racial discrimination, either benign or invidious, should be held unconstitutional.

In July 1984, the United States District Court, Eastern District of Michigan, decided *NAACP v. Detroit Police Officers Association* (*DPOA II*).[2] The court was asked to decide whether the City of Detroit violated the fourteenth amendment by laying-off large numbers of black police officers pursuant to a seniority clause provision.[3] It held that numerical employment goals[4] established as a result of prior findings of racial dis-

1. Affirmative action applies to sex as well as to race. *See generally* 42 U.S.C. §§ 2000e to 2000e-17 (1982).

2. 591 F. Supp. 1194 (E.D. Mich. 1984).

3. *Id* at 1196.

4. "Affirmative action concentrates on goals and ratios and not on quotas." CITIZENS' COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY—A POLICY OF FAIRNESS AND COMPASSION THAT HAS WORKED 69 (1984) (hereinafter cited as CITIZENS' COMM'N).

> Goals are . . . numerical objectives fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market. Thus, if through no fault of the employer, he has fewer vacancies than expected, he is not subject to sanction because he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if he has demonstrated every good faith effort to include persons from the group being considered for selection, but has been unable to do so in sufficient numbers to meet his goal, he is not subject to sanction.

Id. at 58 (quoting Permissible Goals and Timetables in State and Local Government Employment Practices 3-4 (March 23, 1973) (unpublished memorandum)).

> A hiring ratio is . . . a numerically expressed estimate of the number or percentage of new employees expressed as a ratio . . . In practice, the ratio remedy is more vigorous than a goal

crimination may override bona fide seniority plans.[5] DPOA II is an equal protection decision.

The court rejected the City's contention that *Firefighters Local Union No. 1784 v. Stotts*[6] was controlling.[7] *Stotts* is a title VII[8] case which involved a consent decree that disclaimed liability for past discrimination. *Stotts* is the only decision rendered by the Supreme Court addressing the issue of whether numerical hiring goals can override bona fide seniority systems over the objections of public employers, under title VII. In *Stotts* the Court held in the negative.[9]

DPOA II addresses several questions unanswered by *Stotts*.[10] The first such question is whether a public employer may voluntarily override its bona fide seniority system, pursuant to the fourteenth amendment, in an attempt to eradicate the vestiges of past or present racial discrimination. The *DPOA II* court indirectly addressed this issue by discussing the inapplicability of *Stotts* to similar cases involving liability under the Constitution.[11] Moreover, the fact that the court upheld a voluntary affirmative action program negotiated by the City of Detroit,[12] is tantamount to an affirmative reply to this first question. The second question is whether a court may cause a consent decree to override a bona fide seniority system over the objections of a party to the action, pursuant to the equal protection clause.[13] In answering this question, *DPOA II* held that a court may cause consent decrees, entered into pursuant to court findings of fourteenth amendment violations, to override bona fide seniority systems.

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because it focuses on each hiring decision rather than on the overall results achieved over time by hiring practices . . . Failure of an employer to achieve a hiring ratio, in and of itself, does not subject the employer to sanctions.

CITIZENS' COMM'N, *supra* at 68.

Quotas are absolute requirements that impose a fixed number or percentage which must be attained, or which cannot be exceeded. The number to be attained is fixed without regard to the number of potential qualified applicants. Failure to achieve a desired quota will subject an employer to sanctions, regardless of whether the quota was initially unrealistic, insufficient vacancies existed, or qualified applicants were scant. CITIZENS' COMM'N, *supra* note 4, at 59.

5. *DPOA II*, 591 F. Supp. at 1202. A bona fide seniority system is: (1) one wherein its provisions are neutral on their face as to race; and, (2) neutral as to race in the administration of its seniority awards. Kromnick v. School Dist., 739 F.2d 894, 911 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985).

6. 104 S. Ct. 2576 (1984). "[T]he United States Supreme Court issued its opinion in . . . *Stotts* during the trial of [*DPOA II*]." *DPOA II*, 591 F. Supp. at 1202.

7. *DPOA II*, 591 F. Supp. at 1202.

8. Civil Rights Act of 1964, §§ 701-716, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

9. *Stotts*, 104 S. Ct. at 2590.

10. The question expressly left open in *Stotts*, and not addressed in DPOA II, was whether in attempting to eradicate the vestige of past racial discrimination, a public employer may lawfully adopt a voluntary affirmative action plan that is race-conscious in its application and remedial in its nature. *Id.*

11. *DPOA II*, 591 F. Supp. at 1202-04.

12. *Id.* at 1197.

13. The Supreme Court in *Stotts* hinted at the possible implied constitutional questions. *Stotts*, 104 S. Ct. at 2590 n.16.

Judge Gilmore stated, "This case involves liability under the Fourteenth Amendment. Title VII contains a clause specifically exempting bona fide seniority systems from attack. The Fourteenth Amendment contains no such restrictions."[14]

This Note will focus on the shrinking legal battlefield upon which the fight against racial discrimination in employment traditionally has been waged.[15] The sole concern here is with numerical relief[16] enforcement pursuant to the fourteenth amendment. The goal herein is to highlight the reasons why *Stotts* is not controlling in a fourteenth amendment situation such as *DPOA II*. Part I of this Note analyzes *DPOA II*. Part II surveys the origins of numerically expressed affirmative action enforcement and the history of title VII. Part III addresses the question whether a demarcation has occurred between title VII and fourteenth amendment modes of enforcing numerical relief. This Note concludes that *Stotts* does not control in a *DPOA II* (equal protection) situation.

I. THE HISTORY BEHIND DPOA II

In 1974, Detroit, Michigan adopted a voluntary affirmative action plan (Detroit Plan) for its police department which called for a fifty-fifty, black-white ratio in hiring and promotions for its police force.[17] In 1978, the Detroit Police Officers Association (DPOA) and several white police officers challenged the validity and constitutionality of the Detroit Plan. *DPOA* alleged, *inter alia*, that the Detroit Plan violated title VII and the equal protection clause of the fourteenth amendment. The United States District Court for the Eastern District of Michigan agreed with the DPOA, holding the Detroit Plan invalid pursuant to title VII and unconstitutional pursuant to the equal protection clause of the fourteenth amendment. The court enjoined continued use of the Detroit Plan.[18]

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14. *DPOA II*, 591 F. Supp. at 1202.

15. The Departments of Labor and Justice and the Equal Employment Opportunity Commission (EEOC) have the major responsibility for enforcing federal affirmative action policy in employment. During Reagan's tenure as President, the departments' enforcement resources previously used to implement the policy have been weakened. CITIZENS' COMM'N, *supra* note 4, at 89. Although its effectiveness has been severely hampered, the EEOC is the only federal enforcement agency that has remained totally faithful to the principles of affirmative action developed over the past twenty years. *Id.* at 96-97.

16. The term numerical relief will be used interchangeably throughout this Note with the terms "hiring goals," and "hiring ratios." Numerical relief in this context does not mean quota, although some courts use the term loosely, allowing "quota" to represent numerical relief. *See generally* CITIZENS' COMM'N, *supra* note 4.

17. *See generally* Baker v. City of Detroit, 483 F. Supp. 930, 940-52 (E.D. Mich. 1979), *aff'd sub nom.* Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). This was one of Detroit's many desegregation reforms adopted after the 1967 riots. It became evident to the City that its severe, racially imbalanced, segregated police force was unacceptable to the community such force served. *Baker*, 483 F. Supp. at 940-52.

18. *See generally* Detroit Police Officers Ass'n v. Young, 446 F. Supp. 979 (E.D. Mich. 1978).

On October 12, the Sixth Circuit Court of Appeals reversed the district court in *Detroit Police Officers Association v. Young*.[19] The court held that the Detroit Plan did not violate title VII or the equal protection clause as found by the district court. The court remanded the case for further consideration of the constitutional issues.[20] On October 1, 1979, eleven days before the Sixth Circuit Court of Appeals rendered its decision in *Young*, the United States District Court for the Eastern District of Michigan decided *Baker v. City of Detroit*.[21] *Baker* involved the lieutenant's and sergeant's police associations and individual white police officers' challenge to the Detroit Plan. Their challenge, based upon title VII and equal protection theories was rejected.[22] the court upheld the Detroit Plan. On appeal in 1979, the Sixth Circuit, in *Bratton v. City of Detroit*,[23] affirmed *Baker*. The *Bratton* court espoused several factors which are important in a court's consideration of whether a particular affirmative action program is constitutionally sound. Judge Jones, writing for the court, stated in substance that: (1) if there is a need for the remedial measures; (2) if the government has an interest in the remedial measures' implementation;[24] and (3) if the remedial measures are reasonable,[25] then the particular affirmative action program is constitutionally sound. Judge Jones found the *Baker* affirmative action plan to be constitutionally sound.[26]

In 1979 and 1980, the City of Detroit implemented large-scale layoffs of city employees. Detroit laid off approximately 1,100 police officers. Seventy-five percent of those laid off were black.[27]

On February 22, 1984, the NAACP and a class of black police officers, among others, sued the City of Detroit in federal district court.[28] The plaintiffs in *DPOA I* claimed that the defendant violated the equal protection clause of the fourteenth amendment when defendant laid off the

19. 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

20. *See generally id.*

21. 483 F. Supp. 930 (E.D. Mich. 1979).

22. *See generally id.*

23. 704 F.2d 878 (6th Cir. 1983).

24. *Id.* at 886.

25. *Id.* at 887. The *Bratton* court further stated that the question–whether the remedial measures are reasonable–"includes an examination of (1) whether any discrete group or individual is stigmatized by the program and, (2) whether racial classifications have been reasonably used in light of the program's objectives." *Id.* (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 372-76 (1978); Fullilove v. Klutznick, 448 U.S. 193 (1979)).

26. *Bratton*, 704 F.2d at 897-98. Compare the *Bratton* factors with the Brennan factors discussed *infra* in the text accompanying note 96.

27. NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. at 1197.

28. *DPOA I* is an unreported decision, but the decision is discussed in *Id.* at 1199. This racial employment discrimination action was brought "by the Detroit Branch of the NAACP, The Guardians, Inc., and ten named individual black police officers against the City of Detroit, its mayor, its police department, its police commissioners, its police chief, the Detroit Police Officers Association (DPOA), and David Watroba, President of the DPOA." *Id.* at 1196.

plaintiff class of black police officers. The district court awarded plaintiffs a partial summary judgment on the equal protection issue.[29]

The United States Supreme Court handed down a title VII decision in *Firefighters Local Union No. 1784 v. Stotts*[30] on June 12, 1984. *Stotts* involved an appeal initiated by Firefighters Local Union No. 1784 (Union) and several white firemen who had been laid off pursuant to a federal district court modification of an affirmative action program.[31]

Memphis, Tennessee, adopted a voluntary affirmative action plan (Memphis Plan) which was part of a consent decree entered into out-of-court without any findings or admissions of racial discrimination. The Memphis Plan was void of provisions that allowed for layoffs, reductions in rank, or competitive seniority.

After the Memphis Plan had been entered into, the City of Memphis experienced a budgetary shortfall promoting a layoff of some of the City's employees, including firemen. A seniority system that applied to all of the City's employees was already in existence. Memphis attempted to use the seniority system[32] in determining which firemen would be laid off. Pursuant to a petition, by Stotts, a black fireman, and others similarly situated, the district court enjoined the City from following the seniority system. The court reasoned that the operation of the seniority system would have a racially discriminatory effect.[33] The Sixth Circuit affirmed the district court, while holding the seniority system to be bona fide.[34]

On appeal, the Supreme Court agreed with the court of appeals holding that the seniority system was bona fide; however, on every other point the Court reversed. The Court held that a consent decree, entered into out-of-court without any findings or admissions of racial discrimination, cannot override a bona fide seniority system pursuant to title VII.[35] The Court did not address any constitutional issues. Justice White, writing for a divided Court, expressly left open the question whether a public employer may legally engage in voluntary race conscious relief pursuant to title VII.[36]

On July 25, 1984, the United States District Court, Eastern District of Michigan, decided *NAACP v. Detroit Police Officers Association*.[37] *DPOA*

29. *Id.* at 1199. The district court based its decision upon the findings of intentional past discrimination against blacks in the Detroit Police Department previously found in *Baker*. *Id.*

30. 104 S. Ct. 2576 (1984).

31. *Id.*

32. *Id.* at 2581.

33. The seniority system provided that in the event of layoffs the last hired, would be the first fired. *Id.*

34. *Id.* at 2582. The district court found also that the seniority system was not bona fide. *Id.*

35. *Id.* at 2582-83.

36. *Id.* at 2585-90.

37. 591 F. Supp. 1194 (E.D. Mich. 1984).

II is the judicial end-result of Detroit, Michigan's gamble[38] during a budgetary crisis which began in 1979.[39] The City's large-scale layoffs of its employees effected the layoff of Detroit police officers below the rank of sergeant.[40] The police officers were laid off pursuant to article 10(e) of the collective bargaining agreement between the Detroit Police Officers Association (DPOA) and the City. Article 10(e) included a seniority clause which required seniority to be strictly applied in the event of layoffs.[41] An overwhelming majority of black police officers employed by the City before the layoffs in 1979 had been hired pursuant to a voluntary affirmative action plan initiated by the City in 1974.[42]

The plaintiffs[43] argued that the defendant City's adherence to the strictures of article 10(e)'s seniority clause[44] violated the City's affirmative duties imposed by prior findings of constitutional violations in *Baker*. The courts in *Baker* and *Bratton* both found that the City of Detroit "employed a consistent overt policy of intentional discrimination against blacks in all phases of its operations," within the police department at least until 1968.[45] However, *Baker* and *Bratton* concerned suits by white officers challenging the City's voluntary affirmative action plan.[46] There-

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38. *Id.*

39. "[T]he City concedes: . . . they (the city defendants) clearly would have preferred to depart from seniority based layoffs, yet chose not to because they believed that a court would be more likely to award back pay to prevailing white plaintiffs than it would to prevailing black plaintiffs." *Id.* at 1202 n.8. The City's political wisdom paid off. The court stated:

> The wrong in this case was . . . individual discrimination. It was also a collective wrong, a wrong to the expectations of the citizenry and the black police of the City of Detroit . . . The collective interests outweigh the admittedly important private interest in back pay . . . and merit denial of back pay. In view of the fact that the violation here was to the collective interests of the laid-off officers and the citizens of Detroit, this court believes justice will not be served by a massive back pay award, and therefore, back pay will be denied.

Id. at 1209-10.

40. *Id.* at 1197.

41. *Id.* "On October 13, 1979, the City laid off 400 police officers, of whom 71 percent were black and in 1980 an additional 690 police officers were laid off, 75 percent of whom were black." *Id.*

42. *Id.* "The first collective bargaining agreement between the DPOA and the City of Detroit was entered into in 1967. A seniority clause was bargained in at that time, and this clause has remained in effect in all agreements since." *Id.* at 1198.

43. The affirmative action program resulted in an accelerated hiring rate for blacks in the Detroit Police Department (DPD). In 1975, out of 393 appointments to the . . . [DPD], 250 or 63 percent, were black. In 1976, there were no appointments. In 1977, out of 1,245 appointments, 949, or 76 percent, were black, and in 1978, the last year in which hiring has taken place in the . . . [DPD], out of 227 appointments, 179, or 78 percent, were black.

Id. at 1197. "In 1967 . . . the City of Detroit was 40% black and the Detroit Police Department was only 6% black." *Id.* at 1199. On December 31, 1978 blacks held 34.6% of the total positions in the department. *Id.* at 1197.

44. *See supra* note 28 and accompanying text.

45. The City's adherence to the seniority clause provisions reduced the total number of blacks in the police department to twenty-eight percent. *DPOA II*, 591 F. Supp. at 1197. Thus, the 1979 and 1980 layoffs wiped out most of the 1978 affirmative action recruiting of blacks. *Id.*

46. *Id.* at 1199. In *Baker* the court found, *inter alia*, that: (1) in 1967 the City of Detroit was 40% black, but the Detroit Police Department (DPD) was only six percent black; (2) before 1967

fore, neither court was required to find that the City's past overt acts of intentional and invidious discrimination were in violation of the fourteenth amendment.[47] Because the *Baker* and *Bratton* courts did not specifically state that a fourteenth amendment violation was found, the City argued that the court should reconsider its February 22, 1984, award of partial summary judgment for plaintiffs.[48]

In *DPOA II*, as in *DPOA I*, the district court found for the plaintiffs, holding that the City had notice[49] of the judicial findings of past discrimination as of October 1, 1979, when the *Baker* opinion was issued.[50] Therefore, Judge Gilmore reasoned, due to the City's knowledge of its affirmative obligation to eliminate the continuing effects of past racial discrimination, the City breached its affirmative duty in 1979 during its massive layoff of black officers.[51] Moreover, during the trial, City officials admitted that the police department had intentionally discriminated against blacks in the past.[52]

The City argued that its obligation to the DPOA under article 10(e)'s seniority clause was unclear in 1979.[53] The court curtly dismissed the

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the DPD was segregated, (a) blacks were assigned to patrol exclusively black areas, (b) scout cars were segregated, and (c) almost every phase of the police department's operation, from patrols to investigations to supervisory functions, was segregated; and (3) this discrimination had very harmful effects upon relations between the police and the black community, (a) observers characterized the relationship as one of deep hostility, (b) the City's riots of 1943 and 1967 have been intimately associated with this mass of hostility. *Id.* at 1199-1200.

47. *Id.* at 1199. The voluntary affirmative action plan basically ensured that an equal number of white and black officers would be promoted from the rank of sergeant to lieutenant. The previous promotional plan did not use race as a factor but used other factors that consistently kept an overwhelming majority of the black candidates at the non-promotional end of the eligibility list. *Baker*, 483 F. Supp. at 936. *See also* Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

48. *DPOA II*, 591 F. Supp. at 1199. Because "[t]he record in *Baker* is 'replete with evidence' . . . of invidious racial discrimination against blacks in the Detroit Police Department . . ." there was no need for the *Baker* or *Bratton* court to state that the evidence proved a violation of the fourteenth amendment. *Id.* (citations omitted). "[T]he fourteenth amendment . . . prohibits all invidious racial discrimination." *Id.* (citations omitted).

49. *Id.* at 1201. On February 22, 1984, the district court found that Detroit's police department had engaged in invidious racial discrimination against blacks. *Id.* at 1199.

50. Detroit Mayor Young's letter to David Watroba, President of the DPOA, estops the defendants from effectively asserting a defense of lack of notice at the time of the 1979 layoffs. *Id.* at 1201. The letter reads in part:

> In closing, let me remind you that affirmative action as a concept is not negotiable. It is mandated not only by the City Charter, but also by state and federal law and the courts as well. It is also my opinion that the duty to implement affirmative action does not stop just because we have found more equitable ways to hire new police officers. Rather, we have a double duty–and we are now challenged to find equitable ways to implement the September 5 layoffs.
>
> The fact that we have found ways to remove hiring barriers at the front door does not relieve us of our obligation to find ways to remove comparable barriers at the back door, now that the circumstances require it.

Id.

51. *Id.* at 1200.

52. *Id.*

53. *Id.*

City's contention. Judge Gilmore stated, "It is well established that good faith is not a defense by a municipality to a constitutional violation."[54] The City further argued that *Stotts* is mandatory authority, holding that an affirmative action plan cannot override a bona fide seniority system in the event of layoffs.[55] The court found that *Stotts* was not controlling because that case involved only title VII which specifically provides an exemption for bona fide seniority clauses.[56] Judge Gilmore stated further that "*Stotts* involved a consent decree that specifically disclaimed liability for past discrimination. [*DPOA II*] . . . involves prior judicial determinations of past intentional discrimination."[57] In summation, the court stated that *DPOA II* involves only fourteenth amendment interpretations which contain neither seniority clause exemptions nor defenses for contractual obligations.[58] The court reaffirmed its February 22, 1984, determination that the City breached its affirmative obligations, thus violating plaintiffs' fourteenth amendment rights.[59]

II. BACKGROUND

A. *Origins of Numerical Relief Enforcement*

The Supreme Court and lower federal courts have used a trilogy of Court decisions when ascertaining the validity of a particular numerical relief remedy.[60] This trilogy is composed of *Regents of the University of California v. Bakke*,[61] *United Steelworkers v. Weber*,[62] and, *Fullilove v.*

54. *Id.* at 1201. Article 10(e) is the collective bargaining agreement between DPOA and the City which included a provision requiring the article's seniority clause to be applied in the event of layoffs. *Id.* at 1198.

55. *Id.* at 1201. The court stated further that "parties cannot by contract limit their liability for preexisting constitutional violation." *Id.*

56. *Id.* at 1202-03.

57. *Id.* For post-*DPOA II* cases holding that *Stotts* does not prohibit modification of all consent decrees, see Vanguards v. City of Cleveland, 753 F.2d 479 (6th Cir.), *cert. granted sub nom.* Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985); EEOC v. Local 638, 753 F.2d 1172 (2d Cir.), *cert. granted sub nom.* Local 28 of the Sheet Metal Workers' Int'l Ass'n, v. EEOC, 106 S. Ct. 58 (1985); Van Aken v. Young, 50 F.2d 43 (6th Cir. 1984); Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985); Janowiak v. Corporate City of South Bend, 750 F.2d 557 (7th Cir. 1984) *petition for cert. filed*,s 54 U.S.L.W. 3016 (U.S. July 16, 1985).

58. *DPOA II*, 591 F. Supp. at 1202.

59. *Id.* at 1201-02.

60. *Id.* at 1203-04. Although the plaintiffs prevailed in *DPOA II* on the substantive issues the court was very reserved on the question of possible remedies. The court granted reinstatement but denied the plaintiffs a back-pay remedy basing the denial upon equitable grounds. *See supra* note 41 and accompanying text.

Subsequent to the decision rendered in *DPOA II*, Judge Gilmore ordered a recall of all laid off black officers and any laid off white officer possessing greater seniority than the black officer with the lowest seniority. *See* NAACP, Detroit Branch v. DPOA, 36 Fair Empl. Prac. Cas. (BNA) 434 (E.D. Mich. 1984).

61. South Fla. Chapter ETC. v. Metropolitan Dade City, 552 F. Supp. 909, 928-29 (1982), *modified*, 723 F.2d 846 (11th Cir. 1984).

Klutznick.[63]

The first case of this trilogy was *Regents of the University of California v. Bakke*.[64] In *Bakke*, a white male challenged an admissions program adopted by the medical school of the University of California at Davis (UCD).[65] The admissions program consisted of a total of one hundred seats reserved for the total incoming class.[66] Out of the available one hundred seats, sixteen were set aside for economically and/or educationally disadvantaged minorities.[67] Thus, white applicants could compete for only eighty-four seats while minority applicants could compete for each of the one hundred seats.[68] After two unsuccessful attempts to gain admission, despite his high scores on the admissions criteria, Bakke filed suit alleging that UCD's special admissions program operated to exclude him on the basis of race, thus violating his equal protection rights under the fourteenth amendment.[69] UCD argued that the special admissions program was constitutional and necessary to the safeguarding of the school's interests.[70]

In the Court's plurality opinion,[71] Justice Powell agreed that a state may use race as a factor in its school admissions programs. However, the "State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."[72] Justice Powell held UCD's interest of countering the effects of societal discrimination invalid[73] because there had been no finding of ra-

62. 438 U.S. 265 (1978).

63. 443 U.S. 193 (1979).

64. 448 U.S. 448 (1980).

65. 438 U.S. 265 (1978).

66. *Id.* at 269.

67. *Id.* at 272. The "program" was really two separate and distinct admissions programs. The regular program contained a cutoff at 2.5 on a 4.0 grade point average. The special program did not have a 2.5 cutoff and did not compare special with regular program applicants. *Id.* at 273-75.

68. *Id.* Minority included Blacks, Chicanos, Asians, and American Indians. *Id.*

69. *Id.* at 289.

70. *Id.* at 277-78.

71. *Id.* at 305-06. UCD's stated interests safeguarded by the admissions program are: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (2) countering the effects of societal discrimination; (3) increasing the number of physicians who will practice in communities currently underserved; and, (4) obtaining the educational benefits that flow from an ethnically diverse student body." *Id.*

Justice Powell found UCD's first and third stated interests to be invalid. *Id.* at 310-11.

72. Justice Powell wrote a concurring opinion, wherein he allowed race to be used as a factor in establishing affirmative action programs. *Id.* at 314-15, 317-18 (Powell, J., concurring). Justice Brennan wrote an opinion concurring with Justice Powell's determination that race could be used as a factor in affirmative action programs. Justices Marshall, Blackmun, and White joined. *Id.* at 324-26 (Brennan, J., concurring, dissenting in part). Justice Powell's opinion used a stricter standard of review than Justice Brennan's, therefore, Justice Powell's opinion is considered to be controlling.

73. *Bakke*, 438 U.S. at 305 (quoting Loving v. Virginia, 388 U.S. 1, 11 (1966)).

cial discrimination by a competent body.[74] He further stated that although UCD had a valid and substantial interest in wanting to obtain the educational benefits that flow from an ethnically diverse student body,[75] the school's special admissions program was still invalid.[76] Justice Powell reasoned that the program's fatal flaw was its disregard of individual rights as guaranteed by the fourteenth amendment.[77] In other words, the special admissions program used race as the only factor and not one of many factors.[78] The Court held that Bakke was entitled to be admitted into UCD. Although UCD's special admissions program was invalid, UCD could use race as a factor in a properly devised admissions program.[79]

The second case in the trilogy is *United Steelworkers v. Weber*.[80] *Weber* did not involve a constitutional issue but rather an interpretation of a statute.[81] The controversy involved a voluntary collective bargaining agreement between Kaiser Aluminum & Chemical Corporation (Kaiser) and the United Steelworkers of America (Union).[82] The agreement between Kaiser and the Union contained an affirmative action program which covered terms and conditions of employment at fifteen Kaiser plants.[83] It was designed to eliminate conspicuous racial imbalances in the plants.[84]

Because blacks had been excluded from craft unions, only five blacks out of 273 skilled craftworkers were employed at the Gramercy plant prior to 1974. Gramercy's work force was thirty-nine percent black.[85] Because of this gross racial imbalance, Kaiser and the Union agreed to create an in-plant training program. As a result, selection of craft trainees was made on the basis of seniority.[86] The agreement provided for a temporary new-trainee ratio wherein the new craftworker trainees were to be composed of a group of at least fifty percent black. The new-trainee ratio was to remain in effect until the Gramercy plant's percentage of

74. *Id.* at 309. Justice Powell stated, "A government body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination." *Id.*

75. *Id.* at 301, 305, 309. The competent body may be a court, legislature or a responsible administrative agency. *Id.* at 301, 305.

76. *Id.* at 311-12.

77. *Id.* at 320.

78. *Id.*

79. *Id.* at 315-19.

80. *Id.* at 320.

81. 443 U.S. 193 (1979). Assistant Attorney General William Bradford Reynolds has declared his intention to seek a reversal of *Weber*, because in his opinion *Weber* was wrongly decided. CITIZENS' COMM'N, *supra* note 4, at 100 (citing The Wall St. J., Dec. 8, 1981, at 1, col. 1).

82. Civil Rights Act of 1964, §§ 701-716, 42 U.S.C. §§ 2000e to 2000e-17 (1982). The sections referred to here are the unlawful employment practices section of the Act, comprising title VII.

83. *Weber*, 443 U.S. at 197-98.

84. *Id.* at 198.

85. *Id.*

86. *Id.* at 198-99.

black skilled craftworkers approximated the percentage of blacks in the labor force.[87] Thirteen craft trainees, seven black and six white, were selected from Gramercy's production work force during the first year of Kaiser's affirmative action plan. The black selected with the most seniority was junior to several white workers who were rejected.[88] Shortly thereafter, Weber, a white worker filed suit alleging that Kaiser's affirmative action plan discriminated against him and violated section 703(a) and (d) of title VII.[89] The lower federal courts agreed with Weber and permanently enjoined Kaiser from further use of the plan.[90] Weber argued that Congress intended to prohibit all race-conscious affirmative action plans when title VII was enacted.[91]

However, on appeal the Supreme Court disagreed with the lower court. The Court held that "Congress did not intend to prohibit the private sector from taking effective steps to accomplish the goal that Congress designed Title VII to achieve."[92] The Court stated that section 703(j)[93] "provides that nothing contained in Title VII 'shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of' a de facto racial imbalance in the employer's work force." But section 703(j) does not state that title VII cannot be interpreted to permit such voluntary preferential treatment.[94] The Court stated that the Kaiser plan fell

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87. *Id.*

88. *See id.*

89. *Id.*

90. *Id.* at 199-200. The relevant portions of § 703(a) and (d) of title VII are as follows:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race . . .; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race. . . .

. . .

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(a), (d) (1982).

91. *Weber*, 443 U.S. at 200.

92. *Id.* at 201.

93. *Id.* at 204. The Court noted that Congress designed title VII "to break down old patterns of racial segregation and hierarchy, stating that it was . . . structured to open employment opportunities for Blacks in occupations which have been traditionally closed to them." *Id.* at 208, (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

94. The relevant portion of § 703(j) of title VII is as follows:

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race . . . 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

on the permissible side of the line between permissible and impermissible affirmative action plans.[95] The Court refused to disclose what entails a generally permissible or impermissible affirmative action plan. However, Justice Brennan laid out several factors that made the Kaiser plan a permissible one: (1) the plan does not unnecessarily trammel the interests of the white employees; (2) the plan is temporary; (3) the plan is designed to eliminate a manifest racial imbalance, and; (4) the plan is used in traditionally segregated jobs.[96]

The last case comprising the trilogy of numerical relief enforcement cases is *Fullilove v. Klutznick*.[97] In *Fullilove*, plaintiffs, a group of construction contractors and subcontractors, and a firm engaged in heating, ventilation, and air conditioning work[98] facially challenged the constitutionality of a congressional spending program.[99] Section 103(f)(2) of the 1977 Act (MBE provision)[100] provided that "absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the State or local grantees to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups."[101] Plaintiffs filed a complaint seeking declaratory and injunctive relief to enjoin enforcement of the MBE provision[102] alleging that the enforcement of the ten percent MBE requirement caused them economic injury.[103] They further alleged that the MBE provision facially "violated the equal protection clause of the fourteenth amendment and the equal protection component of the due process clause of the fifth amendment."[104]

The Court noted that Congress determined that the present effects of

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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. . . .

42 U.S.C. § 2000e-2 (1982).

95. *Weber*, 443 U.S. at 205-06.

96. *Id.* at 208.

97. *Id.*

98. 448 U.S. 448 (1980). This is a fourteenth amendment case wherein the Court combined the permissible race element in *Bakke* and the Brennan factors laid down in *Weber* to uphold a federal statute that contained a race conscious numerical relief remedy.

99. *Id.* at 455.

100. *Id.* at 453. This congressional spending program is provided for in Public Works Employment Act of 1977, 42 U.S.C. §§ 6701-6710 (1982).

101. A bona fide Minority Business Enterprise (MBE) is a business where at least fifty percent of it is owned by minority group members, or where at least fifty percent of the stock of a publicly owned business is owned by minority group members. *Fullilove*, 448 U.S. at 454.

102. *Id.* The statutorily identified minority groups are "citizens of the United States who are Black, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.*

103. *Id.* at 455.

104. The plaintiffs basically challenged the fact that "contracts would be awarded to available, qualified, bona fide MBE's even though they . . . would not be the lowest competitive bidders, so long as their higher bids, when challenged, were found to reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination." *Id.* at 481.

past discrimination have impaired the competitive position of minority owned and controlled businesses.[105] The purpose of the MBE provision was to remedy this situation.[106] Chief Justice Burger writing for a divided Court,[107] rejected the plaintiff's economic injury claims and constitutional challenges. In upholding the validity of the MBE provision he stated, "It is not a constitutional defect for an affirmative action . . . program . . . to disappoint the expectations of non-minority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is . . . [permissible]."[108] As to the racial and ethnic criteria used in the MBE provision, the Chief Justice reasoned that the program "provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress . . . ."[109] Justice Powell, in a concurring opinion upholding the MBE provision, stated in more definite *Weber* terms that the set-aside is temporary, and the effect of the set-aside does not unnecessarily trammel innocent whites' ability to compete for the vast majority of construction funds.[110] Justice Powell noted that Congress, being a competent body, did make findings of past racial discrimination.

B. *Affirmative Action Through Title VII*

Federal affirmative action programs designed to prevent racial discrimination in employment had their beginnings in anti-discrimination executive orders.[111] The first such order was number 8802[112] signed by President Roosevelt on June 25, 1941. Executive order 8802 was President Roosevelt's response to Black American protests and was designed to prevent A. Phillip Randolph's planned march on Washington.[113] Executive order 8802 was mere "lip service" to the monumental problem of providing equal employment opportunity for all races of people. The ex-

105. *Id.* at 455.
106. *Id.* at 487.
107. *Id.* at 513.
108. Chief Justice Burger's opinion received only three votes from the Court, the same number as Justice Marshall's opinion received. Because Chief Justice Burger's opinion embraced a tougher standard of review than did Justice Marshall's, Chief Justice Burger's opinion is considered by many to be controlling. An analysis that would satisfy Chief Justice Burger's standard would automatically satisfy that of Justice Marshall.
109. *Id.* at 484.
110. *Id.* at 487.
111. *Id.* at 513-15.
112. The first use of the term "affirmative action" came about early in the federal government's development of trade union regulations for private sector employment practices. However, the regulations did not involve discrimination, but were concerned with the rights of trade union members. *See generally* National Labor Relations Act of 1935, 29 U.S.C. § 160(c) (1982); Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940). *See also* CITIZENS' COMM'N, *supra* note 4, at 29.
113. CITIZENS' COMM'N, *supra* note 4, at 32-33.

ecutive order provided prohibitions for racial discrimination in employment but lacked an enforcement mechanism.[114]

Although the Supreme Court ushered in the "beginning to the end" of governmentally sanctioned discrimination in *Brown v. Board of Education*[115] decision in 1954,[116] no broad civil rights legislation was enacted in the fifties.[117] This was mainly due to the fact that President Eisenhower "did not believe that discrimination generally could be eliminated by law."[118]

President Kennedy initiated the drafting of the Civil Rights Act of 1964.[119] Originally, title VII of the Act was weak.[120] Although Kennedy's assassination bolstered the Act's chances for passage,[121] the diligent efforts of President Johnson finally ensured its enactment.[122] Public reaction to white racial violence in the sixties contributed to the passage of the Act.[123] In 1963, Dr. Martin Luther King, Jr. led the long awaited civil rights "march on Washington." Within a year Congress enacted title VII, its first comprehensive response to the problem of employment discrimination.[124]

Title VII is the unlawful employment practices section of the Civil Rights Act of 1964.[125] One of title VII's main goals was "to break down old patterns of racial segregation and hierarchy"[126] and was structured in such a way as to "open employment opportunities for [Blacks] in occupations which have been traditionally closed to them."[127] Congress' pri-

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114. The executive order "declared that there shall be no discrimination on the basis of race, creed, color, or national origin in employment industries engaged in defense production." *Id.* The only hint of an enforcement mechanism within the executive order was that the order "required agencies and departments to include in their defense contracts a clause under which the contractors would pledge nondiscrimination in employment in the government project." *Id.*

115. 347 U.S. 483 (1954) ("separate but equal" held unconstitutional).

116. 3 A. LARSON & L. LARSON, EMPLOYMENT DISCRIMINATION § 66.44, at 12-36 (1984).

117. *Id.* at 12-37.

118. *Id.* Eisenhower "belonged to the 'hearts and minds' school of thought: to erase discrimination, you must first change people's hearts and minds, and, until you do, legislation cannot do the job." *Id.*

However, in 1957, President Eisenhower did push through Congress the Civil Rights Act of 1957 which created the Civil Rights Commission and the Civil Rights Division in the Justice Department. *Id.*

119. *Id.* at 12-38.

120. *Id.* "Title VII as originally proposed . . . merely supplied congressional authorization for the government contracts program that was already operating under an executive order." *Id.*

121. *Id.*

122. *Id.* at 12-39. In 1957 President Johnson, then Senate Majority Leader, was firmly against all civil rights legislation. *Id.* He tried to block the passage of Eisenhower's 1957 civil rights legislation. *Id.* at 12-38.

123. 3 A. LARSON & L. LARSON, *supra* note 116, § 66.44, at 12-36.

124. *See* CITIZENS' COMM'N, *supra* note 4, at 39.

125. Civil Rights Act of 1964, §§ 701-716, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

126. United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

127. *Id.* (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey). Judge J. Skelly Wright expressed the purpose of the Civil Rights Act of 1964 as follows:

mary concern in enacting the prohibition against racial discrimination in Title VII . . . was with 'the plight of [Blacks] in our economy.' "[128] "In 1947, the non-white unemployment rate was only 64% higher than the white rate; in 1962, because of automation it was 124% higher."[129]

With executive order 11246,[130] President Johnson created the Office of Federal Contract Compliance (OFCC) in 1965. Through the OFCC, equal employment opportunity programs for federal contractors were institutionalized.[131] The first use of numerical employment goals to remedy and prevent discrimination was in 1967 when the OFCC announced its affirmative action program for Cleveland, Ohio.[132] In 1972 Congress authorized civil suits under title VII by the Equal Employment Opportunity Commission (EEOC) through an amendment to title VII.[133]

The above account illustrates that the federal government has made great strides to develop workable solutions to the equal employment opportunity problem. However, President Reagan's Justice Department has embarked upon a course of action[134] and embraced an interpretation

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The purpose of the legislation cannot be denied: to help blacks and members of other minority groups overcome the prejudice that oppresses them. Its effect is to give special advantage to those minority groups. To call such legislation 'color-blind' is a meaningless abstraction. Legislation against invidious discrimination helps one race and not the other because one race and not the other needs such help.

Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. CHI. L. REV. 213, 220-21 (1980). Judge J. Skelly Wright sits on the bench of the District of Columbia Circuit Court of Appeals.

The Justice Department has asked the Supreme Court in several certiorari petitions for review to adopt a 'color-blind' interpretation of the Constitution. *See* Kilpatrick, *Toward A Color-Blind Constitution*, Durham Morning Herald, Sept. 3, 1985, at A5, col. 1.

128. *Weber*, 443 U.S. at 202. Whites have standing to sue under title VII under McDonald v. Santa Fe Trail Transp., 427 U.S. 273 (1976).

129. *Weber*, 443 U.S. at 202 (quoting 110 CONG. REC. 6547 (1964) (remarks of Sen. Humphrey)).

130. Exec. Order No. 11,246, 3 C.F.R. 339 (1965), *reprinted in* 42 U.S.C. § 2000e, at 28 (1982), amended by, Exec. Order No. 11,345, C.F.R. 654 (1967), *reprinted in* 42 U.S.C. § 2000e, at 28 (1982).

131. CITIZENS' COMM'N, *supra* note 4, at 40.

132. *Id.* at 43.

133. *Id.* at 51.

The EEOC has outlined three circumstances under which voluntary affirmative action is appropriate: (1) where analysis of an employer's employment practices reveals facts constituting actual or potential adverse impact; (2) to correct the effects of prior discriminatory practices; or (3) if because of historic restrictions by employers, labor organizations, and others, the availability pool, particularly of qualified minorities . . . , employment or promotional opportunities is artificially limited.

Id. at 63.

134. "Since December 1984 the Justice Department has sought to persuade or coerce more than 40 cities, counties and states to seek elimination of court-imposed . . . numerical relief governing hiring and promotion of public employees. Most of the . . . numerical relief originally had been imposed at the request of the Justice Department under earlier presidents." Charlotte News, Aug. 16, 1985, at A3, col. 4. At least one state, North Carolina, took heed of the Justice Department's urgings. Under Governor Jim Martin, the state is in the process of dismantling its affirmative action plans for public employees. *See* The Salisbury Post, April 7, 1985, at C13, col. 1; The Salisbury Post, May 16, 1985, at A8, col. 1. In its attempt to dismantle the progress made by the federal government in overcoming the equal employment opportunity problem, the Reagan Administration has

of title VII's purpose so as to make the Act a complete nullity.[135]

III. THE DEMARCATION

The foregoing "trilogy" discussion seems to suggest that numerical relief enforcement under title VII and the fourteenth amendment are "close cousins."[136] Lower federal courts, in decisions such as *Williams v. New Orleans*,[137] and *Bratton v. City of Detroit*,[138] consistently have expressed this "close cousins" analysis in cases involving racial discrimination in employment. In *Williams* and *Bratton*, the courts used the "close cousins" analysis in deciding a title VII and a fourteenth amendment dispute, respectively.[139]

A legal observer reasonably may take note of the "close cousins" analyses emanating from the "trilogy" and subsequent lower federal court decisions to assume that if the "trilogy" created "close cousins" in an attempt to bolster numerical relief enforcement, then when the "trilogy's" creator[140] limits one cousin, the same limitation should therefore

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adopted various avenues of attack. One tactic is where the Justice Department attempts to repudiate consent decrees that they themselves have previously signed. *See* Durham Morning Herald, Sept. 5, 1985, at A9, col. 4. Another, highly damaging tactic is that "the White House staff has drafted an executive order rescinding rules that require government contractors . . . to set numerical goals for minorities and women." Pear, *Hiring Goals Might Be Rescinded*, The Charlotte Observer, Aug. 15, 1985, at A1, col. 5.

135. The Justice Department has embraced an interpretation of title VII that would require relief under the title to be given only to victims of actual discrimination. *See* Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984) (en banc). For a court to adopt the Justice Department's requirement of actual victim discrimination under title VII would create an almost impossible standard, due to the type of evidence that would be required and its obvious unavailability. *See id.* at 1572 n.6 (Wisdom, J., dissenting). It is interesting to note that the Justice Department could not convince the eleven federal circuits to adopt this actual victim standard.

136. The term "close cousins" is used here in an attempt to conceptualize the nexus between the title VII and fourteenth amendment modes of numerical relief enforcement. The term denotes the fact that some courts, including the Supreme Court, have used factors from both modes in an attempt to settle disputes in employment discrimination. *See infra* notes 140 and 143 and accompanying text. The primary ("trilogy") Supreme Court decisions used in deciding the validity of numerical relief are: Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (a fourteenth amendment case that recognized the use of race as a factor in affirmative action programs); United Steelworkers v. Weber, 443 U.S. 193 (1979) (a title VII case upholding the use of a racial hiring goal in voluntary situations pursuant to certain given factors); and, Fullilove v. Klutznick, 448 U.S. 448 (1980) (a fourteenth amendment case that combined the race element in *Bakke* and the factors laid down in *Weber* to uphold a federal statute that contained race-conscious numerical relief).

137. 729 F.2d 1554 (5th Cir. 1984) (en banc).

138. 704 F.2d 878 (6th Cir.) (en banc); 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

139. Both *Williams* and *Bratton* used "theory intermingling" of title VII and fourteenth amendment principles in the disposition of racial discrimination suits. *Williams* is a title VII decision, using a combination of factors taken from United Steelworkers v. Weber, 443 U.S. 193 (1979) (title VII), and Fullilove v. Klutznick, 448 U.S. 448 (1980) (fourteenth amendment). *Williams*, 729 F.2d at 1560-64. *Bratton*, a fourteenth amendment decision, recognized that title VII and the fourteenth amendment may employ different analyses. However, the court combined the two analyses for purposes of resolving the dispute in this fourteenth amendment decision. *Bratton*, 704 F.2d at 887.

140. The term "creator" refers to the particular court that rendered the judicial decision.

apply to the other cousin. However, the legal observer's assumption is erroneous, because the limitations placed on title VII by *Stotts* do not apply to the fourteenth amendment. The corollary of such an erroneous assumption is, pursuant to *DPOA II* and *Stotts*, that the *Stotts* decision represents a dismantling of the "close cousins" approach to numerical relief enforcement.

Stotts, an employment discrimination decision, involves liability under title VII. In *Stotts*, the Court held that a consent decree, entered into out-of-court without any findings or admissions of racial discrimination, cannot override a bona fide seniority system under title VII.[141] Instead of using a "close cousins" analysis in the disposition of the case, the Court chose to use a pure statutory interpretation analysis. The Court did not pay "lip-service" to the "trilogy." Therefore, the question now presented is whether *Stotts* demarcated the "close cousins" theory between the title VII and fourteenth amendment modes of numerical relief enforcement. In substance, *DPOA II* answered the demarcation question in the affirmative.

DPOA II, an employment discrimination decision, involved liability under the fourteenth amendment. The question in *DPOA II* was whether a consent decree supported by (1) judicial findings of invidious racial discrimination and (2) admissions of such discrimination by the discriminating party can override a bona fide seniority clause under the fourteenth amendment. The *DPOA II* court answered this question in the affirmative.[142] The City-defendants, who very well could be our mythical legal observer, claimed that *Stotts* was mandatory authority in racial discrimination in employment actions, pursuant to the fourteenth amendment.[143] Therefore, claimed the City, a consent decree cannot override a bona fide seniority clause even under the fourteenth amendment.[144] The court, in an attempt to dispel the notion that the limits put upon title VII numerical relief enforcement by *Stotts* applies equally well to fourteenth amendment numerical relief enforcement, distinguished *Stotts* from fourteenth amendment (*DPOA II*) situations. In *DPOA II*, Judge Gilmore stated that "*Stotts* involved a consent decree that specifically disclaimed liability for past discrimination. [*DPOA II*] . . . involves prior judicial determinations of past intentional [racial] discrimination."[145] The court reasoned further that *Stotts* was not controlling, because the case involved only title VII which specifically provides an exemption for bona fide seniority clauses.[146] Judge Gilmore surmised

141. *See Stotts*, 104 S. Ct. at 2585-90.
142. *DPOA II*, 591 F.2d at 1202.
143. *See generally id.* at 1202-03.
144. *Id.*
145. *Id.* at 1202.
146. *Id.* at 1202-03.

that *DPOA II* involves only interpretations of the fourteenth amendment, which does not contain exemptions for any type seniority clause.[147] Therefore, reasoned the court, *Stotts* does not control in a fourteenth amendment situation.[148]

Both *Stotts* and *DPOA II* involved a voluntary affirmative action plan's use in overriding a bona fide seniority system despite the objections of a public employer. However, the two decisions contain contradictory holdings if viewed from a "close cousins" point of reference. Thus, *Stotts* demarcated the title VII and fourteenth amendment modes of numerical relief enforcement. However, the demarcation was limited to a court's authority in overriding bona fide seniority clauses, by consent decrees, over a public employer's objections.

CONCLUSION

The Supreme Court in *Stotts* apparently has defined the boundaries of affirmative action-numerical relief enforcement pursuant to title VII, at least in situations where public employers are forced to override bona fide seniority clauses, by consent decrees. Under title VII, absent express provisions stating so, a court cannot force a modification of a consent decree to override a bona fide seniority clause unless it finds that the seniority clause is tainted with discrimination or that discrimination has victimized an identified person.

The Court in *Stotts* did not address any constitutional issues, but *DPOA II* seems correctly to have read this silence as being a green light to continued modification of consent decrees, pursuant to the fourteenth amendment. The main qualification is that there must be findings of intentional discrimination by a competent body. The new problem created is that victims will be forced to take their claims of discrimination into court and not settle them out-of-court. A discriminating employer's legal theory need only include (1) a budgetary shortfall, whether self-created or not, and (2) a pre-existing seniority system that is neutral on its face as to race. The foregoing point was demonstrated in the *Stotts* decision.

The main thrust of the *DPOA II* decision is that employers have an affirmative obligation to eliminate identified racial discrimination in the work place.[149] This obligation is commensurate to the obligation imposed upon the Nation's educational systems to eliminate the dual, race-based school systems in the early 1950's, by the Supreme Court's *Brown*

147. *Id.* at 1201-02.
148. *See id.* at 1201-03.
149. *DPOA II*, 591 F.2d at 1201-04.

decisions;[150] and, the obligation imposed upon the States to open their electorial processes to blacks by such Court decisions as *Harper v. Virginia Board of Elections*[151] and *Rogers v. Lodge*.[152]

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150. *See* Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II); Brown v. Board of Educ., 347 U.S. 483 (1954) (Brown I).
151. 383 U.S. 663 (1966).
152. 458 U.S. 613 (1982).