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False Alarm of Firefighters Local Union No. 1784 v. Stotts

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RECENT DEVELOPMENT

THE FALSE ALARM OF *FIREFIGHTERS LOCAL UNION NO. 1784 V. STOTTS*

INTRODUCTION

Employers often institute voluntary affirmative action programs in order to avoid or discontinue title VII[1] employment discrimination litigation.[2] Delineated in negotiated consent decrees,[3] these programs normally include plans for the hiring and promotion of minorities.[4] Layoffs in accordance with an established seniority system, however, can radically undermine the effectiveness of affirmative action plans. Because minority workers are typically among the most recently hired, they are also among the first to be fired.

In *Firefighters Local Union No. 1784 v. Stotts*[5] the Supreme Court

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1 42 U.S.C. §§ 2000e to 2000e-17 (1982). Title VII forbids employers, including state and local governments and government agencies, from discriminating on the basis of race, color, religion, sex, or national origin in the hiring or discharge of employees, or with respect to the "compensation, terms, conditions, or privileges of employment." *Id.* § 2000e-2(a). If an employer engages in any "unlawful employment practice," a court may enjoin the practice and may order "such affirmative action as may be appropriate," including hiring, reinstatement, or "any other equitable relief." *Id.* § 2000e-5(g).

For a further discussion of the protections title VII affords, see *infra* notes 80-85 and accompanying text; Jacobs, *A Constitutional Route to Discriminatory Impact Statutory Liability for State and Local Government Employers: All Roads Lead to Rome*, 41 OHIO ST. L.J. 301 (1980) (title VII cannot prohibit unintentional discrimination under the fourteenth amendment but may do so under the commerce clause); Note, *Rebutting the* Griggs *Prima Facie Case Under Title VII: Limiting Judicial Review of Less Restrictive Alternatives*, 1981 U. ILL. L. REV. 181 (1981) (discussing theories a plaintiff can use to prove unlawful discrimination).

2 In 1980, litigants filed 5,017 employment discrimination cases in district courts. C. RICHEY, MANUAL ON EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN THE FEDERAL COURT A-1 (1982).

"[T]he most persuasive reason for employers to back affirmative action plans is to avoid expensive . . . lawsuits." Such suits can cost "hundreds of thousands of dollars." Address by San Francisco attorney Gary Siniscalco to the Conference on Affirmative Action, reported in 3 EMPLOYEE REL. WEEKLY (BNA) 367 (1985).

3 For examples of consent decrees containing voluntary affirmative action plans, see Boston Chapter, NAACP v. Beecher, 679 F.2d 965 (1st Cir. 1982), *vacated*, 104 S. Ct. 3579 (1984); Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv., 588 F. Supp. 716 (D.N.J.), *vacated*, 588 F. Supp. 732 (D.N.J. 1984); *infra* notes 25-27 and accompanying text. Consent decrees may also be entered voluntarily in order to achieve other purposes, including the promotion of ethnic diversity in the labor force. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1158 (6th Cir. 1984), *cert. granted*, 105 S. Ct. 2015 (1985) (affirmative action agreement adopted to achieve multi-ethnic representation on the teaching faculty).

4 *See infra* notes 28-30 and accompanying text.

5 104 S. Ct. 2576 (1984).

addressed several issues related to the judicial interpretation and modification of an affirmative action consent decree. The Court concluded that a court may not modify an affirmative action plan, silent on the issue of layoffs, to override a bona fide seniority system[6] when work force reductions occur.[7]

The *Stotts* Court raised issues in addition to the proper judicial treatment of consent decrees in the face of layoffs. *Stotts* sparked inquiries into whether court-imposed quotas are valid and whether a title VII plaintiff must prove that he has been an actual victim of discrimination.[8] The Court also initiated speculation concerning whether parties can voluntarily agree to class-wide affirmative action relief, including grants of constructive seniority.[9] Some observers, however, have questioned the extent to which *Stotts* affected title VII at all.[10]

Within days of its announcement, *Stotts* received enormous publicity. Called "a source of greatest comment—and confusion,"[11] and "the most highly charged case involving alleged discrimination against whites to reach the Court in several years,"[12] the decision generated a spectrum of public reaction and debate regarding its meaning and scope. Some observers, including the Justice Department, considered *Stotts* the death knell of affirmative action.[13] Assistant Attorney General Reynolds claimed that the decision extended beyond mere protection of seniority systems, asserting that *Stotts* invalidated *any* court-imposed employment program giving minorities preferential treatment.[14] Other commentators maintained that the

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6 For a discussion of bona fide seniority systems, see sources cited *infra* note 84.

7 104 S. Ct. at 2587.

8 *See infra* notes 13-14, 54-57 and accompanying text.

9 *See infra* notes 54, 56 and accompanying text.

10 *See infra* notes 15, 63-90 and accompanying text.

11 *Much Ado About a Shift to the Right*, TIME, June 25, 1984, at 73.

12 N.Y. Times, June 13, 1984, § 1, at 1, col. 6.

13 The Justice Department hailed the decision as vindicating its position that the courts could not award minorities preferential treatment except to compensate actual victims of illegal discrimination. Pear, *Judges Continuing to Uphold Quotas*, N.Y. Times, Feb. 10, 1985, § 1, at 1, col. 5.

In addition, the Reagan administration "has argued that [*Stotts*] also struck down [all] preferential quotas in hiring and promotion," even those voluntarily adopted. Shenon, *U.S. Acts to Stop Quotas on Hiring in Indianapolis*, N.Y. Times, Apr. 30, 1985, § 1, at 1, col. 6.

14 2 EMPLOYEE REL. WEEKLY (BNA) 739 (1984) (statement of William Bradford Reynolds, Assistant U.S. Attorney General for Civil Rights).

Just weeks after the decision, the Justice Department filed successful motions in Ohio and New Jersey asking federal courts to overturn court orders issued to protect affirmative action programs from the undermining effects of layoffs which were to be carried out under established seniority system guidelines. *Id.* at 785. Further, the Justice Department "urged 50 states, counties and cities . . . to modify their affirmative action plans voluntarily to remove numerical goals and quotas," threatening judicial action if they did not comply. Shenon, *supra* note 13, at 1, col. 6. The United States Com-

decision was limited in scope, applying only to cases involving layoffs and the resulting conflicts between affirmative action programs and seniority systems.[15]

This Note argues that the narrowness of the Court's holding[16] and the facts and circumstances surrounding the *Stotts* consent decree[17] limit the decision's scope. Accordingly, minorities claiming employment discrimination can avoid *Stotts*-constructed obstacles through carefully drafted consent decrees[18] and through the use of different litigation strategies.[19] Thus, the practical effects of the decision on title VII and affirmative action will be minimal.

I
THE HISTORY OF *STOTTS*

A. The Lower Court Decisions

In 1977, Carl Stotts, a black captain in the Memphis Fire Department, filed a class action suit in federal district court,[20] claiming

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mission on Civil Rights, over the dissent of two democratic commissioners, praised *Stotts* as a reaffirmation of the principle that race and gender are not proper bases on which to reward or penalize any person. 2 EMPLOYEE REL. WEEKLY (BNA) at 783. On a more restrained note, the Chairman of the Equal Employment Opportunity Commission remarked to a United States House of Representatives panel that the "ambiguous" decision does not close the affirmative action door, but rather signals that the Court is "deeply troubled about the validity of affirmative action where there has been no prior finding of discrimination." *Id.* at 973.

15 A Women's Legal Defense Fund attorney explained that *Stotts* will only affect an affirmative action plan that conflicts with a bona fide seniority system. 2 EMPLOYEE REL. WEEKLY (BNA) at 739. Similarly, William D. Taylor, Director of the Center for National Policy Review at Catholic University of America, asserted that *Stotts* " 'doesn't affect the broad spectrum of affirmative action in the country. In most cases, you can assume that people hired will not be laid off.' " N.Y. Times, June 13, 1984, at B-12, col. 4. Likewise, Duke University Law Professor William Van Alstyne explained that *Stotts* was " 'quite a narrow decision,' " applying only in situations involving legitimate seniority systems. *Much Ado About a Shift to the Right, supra* note 11, at 63.

Civil rights attorneys predicted that even though affirmative action plans remain valid after *Stotts*, employers will negotiate fewer plans in the future. 2 EMPLOYEE REL. WEEKLY (BNA) at 740. Advocates of this view reasoned that because of potentially greater burdens of proof on title VII litigants, *see infra* notes 54-57 and accompanying text, courts would have less power to fashion broad affirmative action remedies. Consequently, employers might be less willing to voluntarily agree to plans that courts may not even be able to require. Because of this, the ruling would result in a mass of litigation. Proponents of this view noted that the litigation would be extensive because individuals would need to establish exactly who was a "victim" of the alleged discriminatory practice. 2 EMPLOYEE REL. WEEKLY (BNA) at 740 (1984). Finally, minorities would be forced to litigate to create a record of "hard findings" of illegal discrimination in order for certain remedies to apply. *Id.*

16 *See infra* notes 63-77 and accompanying text.

17 *See infra* notes 78-90 and accompanying text.

18 *See infra* notes 91-124 and accompanying text.

19 *See infra* notes 125-46 and accompanying text.

20 The action was brought under title VII, 42 U.S.C. § 2000e-2 (1982), and under 42 U.S.C. §§ 1981, 1983 (1982). The district court consolidated Stotts's class action

that the Fire Department and the city discriminated racially in their hiring and promotion practices. After three years of discovery and negotiations, the parties entered into a consent decree,[21] which the district court approved on April 25, 1980.[22] The parties negotiated the decree "to avoid the delay and expense of contested litigation" and "to insure that any disadvantage to minorities that may have resulted from past hiring and promotional practices be remedied."[23] The parties waived a hearing, findings of fact, and conclusions of law on every issue raised in the complaint.[24] Further, the Fire Department did not admit any "violations of law, rule, or regulation with respect to the allegations" Stotts made in his complaint.[25]

The parties intended the decree to "parallel and supplement the relief provided" in a 1974 affirmative action consent decree.[26] The earlier decree did not mention layoffs, expressly presuming that the existing seniority system would continue.[27] Although the 1980 decree provided specific relief in the areas of hiring,[28] promotions,[29] and back pay,[30] it also made no provisions for altering the city's seniority system in the event of layoffs or for awarding retroac-

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with an action brought by Fred Jones, a black private in the Memphis Fire Department. Jones claimed "that the Fire Department had denied him a promotion solely because of his race." Stotts v. Memphis Fire Department, 679 F.2d 541, 547 (6th Cir. 1982).

21 679 F.2d at 573-78 (appendix).

22 *Id.* at 548.

23 *Id.* at 573-74.

24 *Id.* at 574.

25 *Id.*

26 *Id.* at 548. The 1974 decree "affected employment practices in all divisions of the Memphis city government." *Id.* at 546. In the 1974 decree, the city had not admitted to any misconduct. *Id.* at 547.

27 Although the 1974 decree "committed the City to 'making significant progress in increasing the number of black and female supervisory personnel,' " *id.* at 547, and the city "agreed to undertake the 'goal of achieving throughout the work force proportions of minority and female employees in each job classification approximating their respective proportions' " in the labor force, *id.*, the decree specifically stated that seniority would be computed for "purposes of promotion, transfer and assignment . . . as the total seniority of that person with the city." *Id.* at 572. *See also id.* at 549 (city's seniority system "mentioned in . . . 1974 Decree").

28 The Consent Decree provided that "[t]he City shall, in meeting the long term goal for black employees, establish and attempt to meet an interim goal, in entry level classifications where the long term goal has not been met, of filling on an annual basis at least 50% of all vacancies with qualified black applicants." *Id.* at 576 (quoting 1980 Consent Decree at V(7)).

29 The city agreed to promote "[b]lack applicants to positions above the rank of private or other entry level job classification in proportion to their representation in the qualified applicant pool for each uniformed-rank or civil service classification" or "at least 20% for each [rank] as measured on an annual basis." *Id.* (quoting 1980 Consent Decree at V (8)).

30 The parties agreed to an award of $60,000 as back pay. *Id.* (citing 1980 Consent Decree at VI (10)).

tive seniority to minority workers hired under the affirmative action plan.[31]

In May, 1981, prompted by a deficit in the city's projected operating budget, Memphis officials announced their intention to lay off workers in accordance with the existing seniority system.[32] Concerned about the effect of the layoffs on the affirmative action plan,[33] Stotts obtained a temporary restraining order, preventing the city from "laying off or reducing in rank any minority employee in the Memphis Fire Department."[34] Subsequently, the district court granted a preliminary injunction, enjoining the city from applying its layoff system "insofar as it would decrease the percentage of black[s] . . . employed in [specific positions] in the Memphis Fire Department."[35]

The Court of Appeals for the Sixth Circuit affirmed the district court's holding, but rejected the lower court's rationale. The Sixth Circuit explained that "[t]he district court erred in ruling that the seniority system was non-bona fide" because the trial court specifically found that "the layoff policy was not adopted with a discriminatory purpose."[36] The court concluded, however, that the district court properly restrained the city from enacting its proposed layoff scheme; the consent decree mandated an "increase in the level of minority employment and promotion,"[37] and the lower court had the power to order specific performance of the terms of the decree.[38] The court also held that a consent decree may be modified "upon a showing that the decree is void or is no longer equitable,"[39] or on a showing that new conditions require the modification.[40]

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31 The consent decree made "no mention of layoffs or demotions . . . nor is there any suggestion of an intention to depart from the existing seniority system or from the City's arrangements with the Union." 104 S. Ct. at 2586.

32 679 F.2d at 549. The announced layoffs were the first in the city's history. *Id.*

33 "[N]early 60% of all firemen affected by [the city's plan of layoffs and reductions in rank] would have been minorities. Moreover, 55% of all minority Lieutenants and 46% of all minority Drivers would either have been laid off or demoted if the announced layoffs had occurred." *Id.* at 549-50. Further, it was "uncontroverted that the application of the layoff policy . . . would have virtually destroyed the progress belatedly achieved through affirmative action." *Id.* at 561.

34 *Id.* at 549.

35 *Id.* at 551. The injunction was modified on June 22, 1981, to include protection for minorities in additional positions. The district court reasoned that the injunction was appropriate because the proposed layoffs "would have a discriminatory impact and [thus] the seniority system was non-bona fide." *Id.* at 551 (footnote omitted).

36 *Id.* at 551 n.6.

37 *Id.* at 561.

38 *Id.* at 561-62.

39 *Id.* at 560.

40 *Id.* at 563.

B. The Supreme Court Decision

The Supreme Court granted certiorari and reversed the court of appeals.[41] After finding that the controversy was not moot even though the city had reinstated the employees,[42] the Court considered the case on its merits. Writing for the majority, Justice White asserted that the central issue was whether the district court had the power to issue an injunction "requiring white employees to be laid off, when the otherwise applicable seniority system would have called for the layoff of black employees with less seniority."[43] The Court held that the lower courts had improperly modified the consent decree.[44] It based its holding on the notion that " 'a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.' "[45] Because the decree made "no mention of layoffs or demotions," and because there was no suggestion that the parties intended to alter the city's existing seniority system,[46] the Court refused to read such a provision into the decree. The majority explained that if the parties intended to alter the seniority system, it would be "reasonable to believe that there would have been an express provision to that effect."[47]

The Court also rejected the district court's reasoning that the injunction was proper because it carried out the "purposes" of the

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41 104 S. Ct. at 2581, 2583 (1984).

42 *Id.* at 2583-85. The Court concluded that the case was ripe because the injunction was never vacated and thus "must be complied with in connection with any future layoffs." *Id.* at 2583. Further, the Court asserted that the lower court's decision to disregard the city's seniority system in pursuit of the "mandated result" of the consent decree was undisturbed, even if the injunction itself no longer applied. *Id.* Finally, because some non-minorities were laid off and some may have been demoted under the modified plan, the availability of back pay for the month during which the layoffs were in effect and the loss of seniority required judicial determination. The Court explained that "[a]s long as the parties have a concrete interest in the outcome of the litigation, the case is not moot notwithstanding the size of the dispute." *Id.* at 2584 (citation omitted).

43 *Id.* at 2585 (footnotes omitted).

44 *Id.* at 2590. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor joined in Justice White's opinion.

45 *Id.* at 2586 (quoting United States v. Armour & Co., 402 U.S. 673, 681-82 (1971).

46 *Id.*

47 *Id.* The Court further expounded, "This is particularly true since the decree stated that it was not 'intended to conflict with any provisions' of the 1974 decree . . . and . . . the latter decree expressly anticipated that the City would recognize seniority." *Id.* (citations omitted). The Court also emphasized the fact that the union and the non-minority employees were not involved in the suit when the 1980 consent decree was negotiated. Hence, they could not "be said to indicate any agreement" to the decree's terms. *Id.* Absent agreement to provisions "that might encroach on their rights, it seems highly unlikely that the City would purport to bargain away non-minority rights under the then-exisitng seniority system." *Id.* Thus, the district court could not justify its action as mere enforcement of the agreement of the parties. *Id.*

decree.[48] The decree provided for specific actions to remedy past hiring and promotion practices,[49] but it did not provide for the award of constructive seniority.[50] In rejecting the district court's expansive interpretation of its power to modify consent decrees, the Court stated that, absent an express provision to the contrary, it is reasonable to believe that the decree "would not exceed the bounds of the remedies that are appropriate under title VII."[51] The Court thereby reaffirmed title VII's specific protection of bona fide seniority systems, explaining that absent proof of an intent to discriminate, section 703(h) of the Civil Rights Act of 1964 allowed for the routine application of a seniority system.[52] Further, the majority explained that only when plaintiffs demonstrate that they actually have been victims of a discriminatory practice may a court award constructive seniority.[53]

The Court then hinted that proof that one has been a victim of discrimination is necessary for any title VII remedy.[54] According to the majority, title VII's legislative history does not authorize a court "to give preferential treatment to non-victims."[55] It explained that title VII does not permit the hiring, reinstatement, admission to membership of, or payment of back pay to any person unless the employer has discriminated against him in violation of the act.[56] Likewise, although a court may enjoin an employer from further discrimination and may require "the hiring or reinstatement of an employee," the majority asserted that " '*Title VII does not permit the ordering of racial quotas.*' "[57]

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48 *Id.*

49 *See supra* notes 28-30.

50 104 S. Ct. at 2586.

51 *Id.* The Court explained that "appropriate" remedies specially protect seniority systems under Section 703(h) of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(h) (1982); *see infra* notes 52-53 & 83-85 and accompanying text.

52 104 S. Ct. at 2587; *see infra* notes 83-85 and accompanying text.

53 104 S. Ct. at 2588. The Court reasoned that because there was no finding of discrimination against specific individuals, the court of appeals "imposed . . . something that could not have been ordered had the case gone to trial and the plaintiffs proved tbat a pattern or practice of discrimination existed." *Id.*

54 *Id.* at 2589. The Court explained that granting constrnctive seniority only to those who were actually victims of "illegal discrimination is consistent with the policy behind § 706(g) of Title VII [42 U.S.C. § 2000e-5(g) (1982)], which affects the remedies available in Title VII litigation." *Id.* at 2588-89 (footnote omitted). *See also infra* notes 55-57 and accompanying text.

55 *Id.* at 2589.

56 *Id.* at 2590 (quoting 110 CONG. REC. 14465 (1964), a sponsor-backed Senate newsletter issued during an attempted filibuster of title VII).

57 *Id.* at 2589 (quoting 110 CONG. REC. 6566 (1964), a memorandum distributed by House Republican sponsors discussing title VII's scope (emphasis added in Court's opinion)).

II
THE IMPACT OF *STOTTS*

Although the *Stotts* decision appears to have broad implications,[58] the actual holding is quite narrow; it only affects a court's power to interpret and modify a consent decree.[59] The decision can be further limited because it involved a consent decree modification that adversely affected a bona fide seniority system.[60] Future parties will be able to avoid the restrictions that *Stotts* imposes through the use of voluntary affirmative action plans drafted to avoid the *Stotts* decree's pitfalls.[61] Finally, litigants who can show intentional discrimination can avoid the restrictions and implications of *Stotts* by bringing suit under the equal protection clause of the fourteenth amendment.[62]

A. The Narrow Holding: A Court's Power to Modify a Consent Decree

The actual holding of *Stotts* is narrow, merely defining a court's power to modify a voluntary affirmative action consent decree.[63] The Court first examined whether the consent decree contained enforceable provisions regarding constructive seniority.[64] It determined that a consent decree must be interpreted " 'within its four corners,' "[65] asserting that the decree contained "no mention of layoffs or demotions . . . [nor] any suggestion of an intention to depart from the existing seniority system."[66] The majority explained that a court cannot interpret a decree by referring to the purposes of a party to the agreement, or by speculating on what the instrument would have included had the case been litigated.[67] Because the decree did not contain provisions indicating an intent to override the existing seniority system, the Court held that the lower court's injunction was not justified.[68] The Court further concluded that the lower courts were powerless to modify the terms of the vol-

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58 *See supra* notes 13-14, 54-57 and accompanying text.

59 *See infra* notes 63-77 and accompanying text.

60 *See infra* notes 78-90 and accompanying text.

61 *See infra* notes 91-124 and accompanying text.

62 *See infra* notes 125-46 and accompanying text.

63 The Court held: "We thus are unable to agree either that the *order entered by the District Court* was a justifiable effort to enforce the terms of the [consent] decree . . . or that it was a legitimate modification of the decree . . . ." 104 S. Ct. at 2590 (emphasis added).

64 *Id.* at 2586; *see also supra* notes 45-47 and accompanying text.

65 104 S. Ct. at 2586 (citing United States v. Armour & Co., 402 U.S. 673, 681-82 (1971)).

66 *Id.*

67 *Id.* at 2586; *see supra* text accompanying notes 48-51.

68 *See supra* notes 45-51 and accompanying text.

untary decree because a court must make findings of illegal discrimination before it can give any title VII relief.[69] The *Stotts* consent decree contained no such findings.[70]

The Court's discussion of title VII is dicta; the holding is limited to the judicial treatment of the consent decree. Justice Stevens's and Justice O'Connor's separate concurring opinions support this narrow reading of *Stotts*. Justice Stevens noted that the Court's holding involves only "the administration of a consent decree,"[71] reasoning that if the consent decree—as a legally enforceable obligation—had, by its terms, justified the lower court's injunction, then the Court would have had to uphold the judgment "irrespective of whether Title VII would authorize a similar injunction."[72] Thus, "what govern[ed] this case [was] not Title VII, but the consent decree."[73] Justice O'Connor[74] stated that the lower court's action would have been justified had it been "a reasonable interpretation of the consent decree or . . . a permissible exercise of the District Court's authority to modify that consent decree."[75] Setting forth the requirements for a valid court modification of a decree, she concluded that the respondent had not met his burden and, as a result, the modification was improper.[76]

Hence, the *Stotts* holding is narrow, only affecting the judicial interpretation of an affirmative action consent decree. A court must strictly construe and cannot judicially modify such an instrnment absent findings of illegal discrimination. The court's entire discussion of title VII and the act's implications on a court's authority in a litigated title VII action is "wholly advisory."[77]

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69 104 S. Ct. at 2588.

70 *Id.*

71 *Id.* at 2594 (Stevens, J., concurring). Justice Stevens, concurring in the judgment, further expounded that "the Court's discussion of Title VII is wholly advisory. This case involves no issue under Title VII. . . ." *Id.*

72 *Id.* (footnote omitted).

73 *Id.* at 2595. In a subsequent case Justice Stevens further criticized the Court's opinion in *Stotts,* saying that "the Court should abjure the practice of reaching out to decide cases on the broadest grounds possible." Berkemer v. McCarty, 104 S. Ct. 3138, 3154 (1984) (Stevens, J., concurring).

74 Justice O'Connor joined the Court's opinion but also filed a separate concurrence. 104 S. Ct. at 2591 (O'Connor, J., concurring).

75 *Id.* at 2592.

76 Justice O'Connor wrote that "a court may use its . . . power to modify a consent decree, only to prevent future violations and to compensate identified victims of unlawful discrimination." *Id.* at 2593.

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

B. The Factual Setting: Affirmative Action Consent Decrees in Conflict with Bona Fide Seniority Systems

1. *The Burden of Proof*

The constitutional standard regarding the burden of proof imposed on a plaintiff in an employment discrimination action is stricter than the standard imposed by title VII. The fifth and fourteenth amendments require a plaintiff alleging employment discrimination to prove that his employer intentionally or purposefully discriminated on account of race.[78] Under this standard, a practice is not unconstitutional "*solely* because it has a racially disproportionate impact."[79] Title VII, however, imposes a lower burden of proof on an employment discrimination plaintiff, requiring only that a litigant prove that an employer's policies produced discriminatory effects on a minority group. In enacting title VII, "Congress provided that when hiring and promotion practices . . . are challenged, discriminatory purpose need not be proved . . . ."[80] Thus, for a court to impose remedies under title VII,[81] a plaintiff can prove *either* intentional discrimination or practices that have discriminatory effects on a minority group.[82]

An exception to title VII's broad prohibition of employment practices having discriminatory effects is the act's protection of bona fide seniority systems.[83] A bona fide seniority system is one adopted

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78 Washington v. Davis, 426 U.S. 229, 238-45 (1976). *See also* H. ANDERSON & M. LEVIN-EPSTEIN, PRIMER OF EQUAL EMPLOYMENT OPPORTUNITY 76 (2d ed. 1982).

79 Washington v. Davis, 426 U.S. at 239 (emphasis in original).

80 *Id.* at 246-47. In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Court discussed the broad coverage of title VII pursuant to Congressional intent:

> Congress "proscribe[d] not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Thus, the Court has repeatedly held that a prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.

Id. at 349 (citations omitted); *see also* American Tobacco Co. v. Patterson, 456 U.S. 63, 64 (1982) (Court reaffirmed broad scope of title VII's protections against discriminatory effects).

81 Section 706(g) of the Civil Rights Act of 1964 enumerates the remedies available in title VII litigation:

> [T]he 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.

42 U.S.C. § 2000e-5(g) (1982).

82 Both American Tobacco Co. v. Patterson, 456 U.S. 63, 64 (1982) and International Bhd. of Teamsters v. United States, 431 U.S. 324, 349 (1977) confirm that title VII prohibits disparate impact as well as intentional discrimination.

83 Section 703(h) of the Civil Rights Act of 1964 provides:

> [I]t shall not be an unlawful employment practice for an employer to ap-

without intent to discriminate.[84] As the *Stotts* Court asserted, section 703(h) of the Civil Rights Act of 1964 permits the application of a seniority system that has discriminatory effects when the discrimination is not intentional.[85] As a result, when a title VII plaintiff challenges a seniority system, he has an increased burden of proof.

2. *The Special Circumstances of the* Stotts *Modification: Interference with a Bona Fide Seniority System*

The Court's holding in *Stotts*[86] will have a limited impact on voluntary affirmative action programs because of the special circumstances surrounding the modification of the *Stotts* consent decree. The lower court's alteration of the instrument disturbed the implementation of an existing bona fide seniority system.[87] Thus, *Stotts* may only restrict a court's power to interpret and modify a consent decree when the result would adversely affect a bona fide seniority system.[88]

In support of this position, the Ninth Circuit recently asserted that *Stotts* "simply holds that a court may not modify a pre-existing race-conscious consent decree in such a fashion . . . [as to] divest . . . employees of entitlements under a bona fide seniority sys-

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> ply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an *intention* to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h) (1982) (emphasis added).

84 For a discussion of the Supreme Court's interpretation and protection of bona fide seniority systems, see H. ANDERSON & M. LEVIN-EPSTEIN, *supra* note 78, at 80-82; Comment, *Employment Discrimination—Seniority Systems Under Title VII*, 62 N.C.L. REV. 357 (1984); Note, *Employment Discrimination*—American Tobacco Co. v. Patterson*: Section 703(h) of the Civil Rights Act of 1964 Extends a "Measure of Immunity" to Seniority Systems Adopted After the Enactment of Title VII*, 58 TUL. L. REV. 386 (1983); Note, *Bona Fide Seniority Systems: Guidelines for the Use of Disparate Impact in the* Teamsters *Analysis*, 31 U.C.L.A. L. REV. 886 (1984); Note, American Tobacco Co. v. Patterson*: A Pre-*Griggs *Approach to Seniority Systems Under Title VII*, 1984 WIS. L. REV. 831 (1984).

85 104 S. Ct. at 2587 (citing International Bhd. of Teamsters v. United States, 431 U.S. 324, 352 (1977)).

86 *See supra* notes 63-77 and accompanying text.

87 104 S. Ct. at 2585.

88 Justice Blackmun, concurring in United Steelworkers of Am. v. Weber, 443 U.S. 193, 215 (1979), explained that in interpreting title VII, the Court has traditionally limited the weight given certain legislative history documents (including the Senate memo cited by the *Stotts* majority, 104 S. Ct. at 2589). This restriction on the weight of the legislative history includes limiting the scope of the documents "to the protection of established seniority systems." 443 U.S. at 215 (Blackmun, J., concurring).

Similarly, "[a]lthough *Stotts* says that Title VII protects bona fide seniority plans, the extent to which the decision will apply when a seniority system is not in question has not yet been determined." 2 EMPLOYEE REL. WEEKLY (BNA) 1195 (1984) (citing speech by William H. Brown, former chairman of the Equal Employment Opportunity Commission, at the Seventh Annual Conference on Equal Employment Opportunity).

tem."[89] In either an original title VII litigation or in an action concerning interpretation or modification of a consent decree, a court acting in accordance with *Stotts* may order broad, race-conscious, employment procedures when a bona fide seniority system is not implicated.[90] As a result, the decision will have minimal impact on title VII and on court authority under the act.

C. Untouched Relief: Flexibility in Fashioning Voluntary Affirmative Action Consent Decrees

Although the *Stotts* Court stated that a court cannot modify a consent decree to grant retroactive seniority unless the plaintiff is a proven victim of a discriminatory practice,[91] the decision does not restrict the relief that parties to a consent decree can privately fashion. Employers and minority employees are often willing to negotiate voluntary affirmative action consent decrees in order to avoid litigation.[92] Although the Court in *Stotts* maintained that there might be differences between what employers in the public and private sectors can consent to, it did not impose any limitations on the powers of either.[93]

The *Stotts* decision neither expressly nor impliedly restricts what a private employer can include in a consent decree or a voluntary affirmative action program. The majority in no way qualified its de-

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89 Diaz v. American Tel. & Tel., 752 F.2d 1356, 1360 n.5 (9th Cir. 1985).

90 This view is further supported by the dissenting opinion of Justice White, author of the *Stotts* opinion, in Sosna v. Iowa, 419 U.S. 393 (1975). In that dissent Justice White clearly implied that title VII's remedies are broad and that one need not be an actual victim in order to be protected by the act:

> Since any discrimination in employment based upon sexual or racial characteristics aggrieves an employee or an applicant for employment having such characteristics by stigmatization and explicit or implicit application of a badge of inferiority, Congress gave such persons standing by statute to continue an attack upon such discrimination *even though they fail to establish particular injury to themselves* in being denied employment unlawfully.

Id. at 413 n.1 (emphasis added).

91 104 S. Ct. at 2588.

92 *See supra* notes 2-3.

93 In Tangren v. Wackenhut Servs., 658 F.2d 705, 707 (9th Cir. 1981), *cert. denied*, 456 U.S. 976 (1982), the court upheld a private employer's affirmative action plan, noting that "[s]eniority is merely an economic right which the unions may elect to bargain away."

The *Stotts* Court stated that "[w]hether the city, a public employer, could have [included retroactive seniority in the consent decree] without violating the law is an issue we need not decide." 104 S. Ct. at 2590. This statement implies that a *private* employer is not restricted in what he may include in a consent decree.

For an argument that private employers can validly construct voluntary affirmative action programs with seniority system overrides, see Note, *Voluntary Affirmative Action in the Private Sector—Are Seniority Overrides for Layoffs Permissible?*, 35 HASTINGS L.J. 379 (1983). For a survey of judicial review of voluntary affirmative action programs, see Jacobs, *Justice Out of Balance: Voluntary Race-Conscious Affirmative Action in State and Local Governments*, 17 URB. LAW. 1 (1985).

cision in *United Steelworkers of America v. Weber*,[94] where it upheld a private employer's right to fashion an affirmative action plan despite the reverse discrimination claims of non-minority workers.[95] The Court held that when an affirmative action plan is designed "to break down old patterns of racial segregation and hierarchy" and "does not unnecessarily trammel the interests of the white employees," it is permissible.[96] The *Weber* Court decided that an employer's agreement with the union to reserve fifty percent of the spaces of an in-house training program for black employees "falls within the area of discretion left by title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalances in traditionally segregated job categories."[97]

Indeed, lower courts have relied on *Weber* to uphold an employer's right to include retroactive seniority in a voluntary affirmative action consent decree. For example, in *Tangren v. Wackenhut Services*,[98] the Ninth Circuit upheld the legality of a seniority system override included in a voluntary affirmative action program negotiated between the employer and the union. The court asserted that "seniority rights are not vested property rights and . . . can be altered to the detriment of any employees or group of employees by a good faith agreement between the company and the union."[99] This concept of seniority rights is consistent with the traditional reluctance of courts to discourage voluntary affirmative action plans. Thus, courts place a heavy burden on plaintiffs who claim reverse discrimination.[100]

The legislative and case history of title VII indicates that the *Weber* standard for examining voluntary affirmative action plans is "applicable to public employers as well as private employers."[101] In

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94 443 U.S. 193 (1979). *See* Wygant v. Jackson Bd. of Educ., 746 F.2d 1152, 1158 (1984) (*Stotts* does not overrule *Weber*), *cert. granted*, 105 S. Ct. 2015 (1985).

95 Commentators view *Weber* as a broad endorsement of voluntary affirmative action. Indeed, "[a]ffirmative action as endorsed in *Weber* . . . does not depend on a finding of discrimination. Rather, it is regarded as a way to eliminate racial and sexual imbalances in employment without regard to how the imbalances came about." 2 EMPLOYEE REL. WEEKLY (BNA) 1209 (1984).

Although "the apparent scope of the *Stotts* decision has raised some question as to whether the Supreme Court would cut back on the approval of voluntary affirmative action plans that it gave in . . . *Weber* . . . [,] *Stotts* does not even mention *Weber*. Furthermore, the Court consistently refers in *Stotts* to what a court can do." *Id.*

96 443 U.S. at 208.

97 *Id.* at 209 (footnote omitted).

98 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 456 U.S. 916 (1982).

99 *Id.* at 707.

100 *See, e.g.*, *Weber*, 443 U.S. at 208; B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 854 (1983).

101 B. SCHLEI & P. GROSSMAN, *supra* note 100, at 840.

extending the Civil Rights Act of 1964 to public employers in its 1972 amendments,[102] "Congress indicated its general intent that the same title VII principles be applied to public and private employers alike."[103] Consistent with this congressional intent, circuit courts have applied the liberal *Weber* standard to all voluntary affirmative action plans.[104]

The *Stotts* Court, however, left open the question of whether a public employer can agree to retroactive seniority in a consent decree.[105] Nevertheless, the language and reasoning of the decision[106] and the subsequent case law[107] indicate that a public employer has this power.[108] The Court based its interpretation of the consent decree on the finding that the City of Memphis did not intend to grant retroactive seniority.[109] Thus, the Court did not need to address the question of whether the city had a right to agree to such a plan.[110] If the Court had seriously doubted the city's right to grant this type of award, it is reasonable to assume that it would have noted such a reservation, rather than leaving the question open. This conclusion is especially justified in light of the Court's willingness to set forth dicta potentially restraining the scope of title VII's protections.[111] Furthermore, by questioning whether the city had exercised this power, the Court implicitly assumed that the city had the power to agree to such a plan.

Lower courts have interpreted *Stotts* as allowing a public employer to award retroactive seniority. For example, *Wygant v. Jackson Board of Education*[112] a post-*Stotts* Sixth Circuit case, supports the contention that a public employer may consent to such an award. In *Wygant* the Jackson Teachers Association and the local Board of Education negotiated a provision in their collective bargaining contract modifying the city's seniority system to protect newly hired minori-

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102 Civil Rights Act of 1964, Pub. L. No. 92-261 § 2(1), 6 Stat. 103 (1972) (codified at 42 U.S.C. § 2000e(a) (1982)).

103 B. SCHLEI & P. GROSSMAN, *supra* note 100, at 840; *see also* Dorthard v. Rawlinson, 433 U.S. 321, 331-32 n.14 (1977).

104 *See, e.g.*, Valentine v. Smith, 654 F.2d 503, 507-08 (8th Cir. 1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 689 (6th Cir. 1979).

105 *See supra* note 93.

106 *See infra* notes 109-11 and accompanying text.

107 *See infra* notes 112-19 and accompanying text.

108 Nonetheless, officials in the Department of Justice maintain that public employers may not, consistent with the Constitution, voluntarily grant preferential treatment to minorities. Pear, *supra* note 13, at 1, col. 5.

109 "Had there been any intention to depart from the seniority plan in the event of layoffs . . . it is much more reasonable to believe that there would have been an express provision to that effect." 104 S. Ct. at 2586.

110 *See supra* note 93.

111 *See supra* notes 54-57 and accompanying text.

112 746 F.2d 1152 (6th Cir. 1984), *cert. granted,* 105 S. Ct. 2015 (1985).

ties in the event of layoffs.[113] The court held that it was "within the power and authority of the parties" to provide such special protections for the minority employees.[114] Although the court recognized that *Stotts* left this question open, it concluded, "[w]e do not read *Stotts* as barring this form of affirmative action."[115] The Sixth Circuit recently reaffirmed this notion that neither title VII nor *Stotts* restricts the relief to which a public employer can voluntarily agree;[116] the court asserted that title VII's protection of seniority systems and its limitations on judicial powers merely "provide a shield to an employer in defending a title VII action, not a sword to [a non-minority] employee claiming" title VII violations.[117] Similarly, in *United States v. Western Electric, Inc.*,[118] a non-title VII post-*Stotts* case involving the interpretation of a consent decree, the district court asserted that the *Stotts* Court clearly implied "that if the parties had [intended to grant retroactive seniority], the Court would have construed the decree in accordance therewith."[119]

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113 *Id.* at 1154. The contract provided:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, *except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.*

Id. (emphasis added by court).

114 *Id.* at 1157.

115 *Id.* at 1158. *See also* Vulcan Pioneers, Inc. v. New Jersey Dep't of Civil Serv., 588 F. Supp. 732 (D.N.J. 1984). In *Vulcan* the district court upheld a seniority system against a *Stotts*-like affirmative action consent decree, but asserted that the parties should reach an equitable agreement:

> The Supreme Court opinion prohibits a court from preferring minority rights over seniority rights. It does not, however, prohibit the parties themselves from reaching an accomodation of those rights. There need not be a choice between the two, unless those involved are unwilling to recognize the rights and legitimate claims and viewpoints of the other.

Id. at 734. The *Vulcan* court also declared that *Stotts*'s "declaration that minority rights cannot supplant seniority rights is not the end of the matter, but rather the beginning." *Id.* at 735. The court then directed the parties to "develop an agreement regarding layoffs not inconsistent with the Supreme Court ruling in *Stotts*." *Id.*

116 Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 486-87 (6th Cir. 1985).

117 *Id.* at 486.

118 592 F. Supp. 846 (D.D.C. 1984).

119 *Id.* at 858 n.41.

The ideological positions of the Justices also support the proposition that public employers can agree to retroactive seniority. It appears that a majority of the *Stotts* Court was willing to uphold a consent decree in which a public employer explicitly grants retroactive seniority as part of an affirmative action settlement. The three dissenters, Justices Blackmun, Brennan, and Marshall, by virtue of their positions regarding the outcome of the case, would have almost certainly held that the city has such power. Similarly, Justice Stevens indicated his respect for a consent decree awarding retroactive seniority, explaining that "[i]f the District Court . . . was merely enforcing the terms of the consent decree it was interpreting," he would have affirmed the ruling. 104 S. Ct. at 2595 (Stevens, J., concurring). Justice O'Connor also indicated that the district court's

Even if an award of constructive seniority were not included in a consent decree, future parties can specify individual "victims" of discrimination in the instrument. A court subsequently enforcing that consent decree would comply with *Stotts* by modifying the document to grant competitive seniority in order to protect minorities against layoffs.[120] Although identifying individuals is a politically sensitive endeavor, it might be a desirable alternative for an employer who is reluctant to grant the controversial constructive seniority award. The *Stotts* majority suggested this option when it implied that the modification would have been valid "had the parties in formulating the consent decree purported to identify any specific employee entitled to particular relief."[121] Further, the Supreme Court indicated that, under §§ 1981[122] and 1983,[123] an admission of intentional discrimination would also be sufficient for remedial action, including the granting of constructive seniority by a court.[124]

D. The Legal Context: Effects on Title VII Cases

The Court's holding in *Stotts* is further limited because it involves only title VII and not the equal protection clause of the fourteenth amendment,[125] an alternate route for minorities claiming job discrimination. Expressly stating that "this was Title VII litigation," the Court implied that *Stotts* does not apply outside the title VII con-

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preliminary injunction regarding the layoffs would have been justified had it been "a reasonable interpretation of the consent decree." *Id.* at 2592 (O'Connor, J., concurring). She asserted that "in negotiating the consent decree, respondents could have . . . possibly obtained . . . retroactive relief." *Id.* at 2593 (O'Connor, J., concurring).

120 "Courts have held that the requirement for a 'finding' of discrimination could be satisfied by stipulation in consent decrees or by the terms of conciliation agreements." B. SCHLEI & P. GROSSMAN, *supra* note 100, at 858 (footnotes omitted).

121 104 S. Ct. at 2588.

122 Section 1981 provides the following:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1982).

123 Section 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

124 104 S. Ct. at 2590.

125 U.S. CONST. amend. XIV ("nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws").

text.[126] The Court's reliance on title VII's legislative history provides additional support for this proposition.[127] Furthermore, the Court exclusively and explicitly relies on title VII[128] in its granting of protection to seniority systems[129] and in its dicta on the requirement that individuals be actual victims of discrimination.[130]

Because *Stotts* implicates only title VII and not the fourteenth amendment, employment discrimination plaintiffs may avoid the harshness of the holding in two respects. First, the special protection for bona fide seniority systems is available under title VII, but not under the fourteenth amendment. In a post-*Stotts* equal protection case, *NAACP v. Detroit Police Officers Association*,[131] after a judicial finding of intentional discrimination against blacks as a class and the subsequent imposition of an affirmative action plan, the district court prohibited the city from laying off blacks because the layoffs would have "a devastating effect upon the city's affirmative action plan."[132] The court justified overriding the city's seniority system, in light of *Stotts*, by explaining that "the Fourteenth Amendment provides no mention of bona fide seniority clauses . . . as a defense."[133] The court based its decision, in part, on the Supreme Court's denial of certiorari in *Buffalo Teacher's Federation v. Arthur*,[134] less than two weeks after *Stotts*. In *Buffalo Teacher's Association* the district court found that the local board of education had violated the fourteenth amendment by intentionally causing the racial segregation of faculty and administrative staffs in the public schools.[135] The district court later ordered a detailed remedial plan to achieve a ra-

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126 104 S. Ct. at 2587 n.9.

127 *See supra* notes 55-57 and accompanying text.

128 Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1982).

129 104 S. Ct. at 2587.

130 *See supra* notes 54-57 and accompanying text.

131 591 F. Supp. 1194 (E.D. Mich. 1984).

132 *Id.* at 1200.

133 *Id.* at 1201. The court continued:

> *Stotts* involved Title VII. 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. *Stotts* and the Title VII cases relied upon by the Supreme Court there rest on interpretations of Congressional intent in enacting Title VII, and contain no interpretation of the Fourteenth Amendment.

Id. at 1202 (footnotes omitted). "[T]his Court will not write 'bona fide seniority system' into the U.S. Constitution, as the city invites it to do." *Id.* at 1203 n.11.

134 104 S. Ct. at 3555 (1984). Although the court admitted that "[i]n general, no precedential effect should be given to a denial of certiorari," it nevertheless contended that the denial indicated that "*Stotts* presents no authority for changing this Court's determination of liability against the City of Detroit." NAACP v. Detroit Police Officers' Ass'n, 591 F. Supp. at 1203.

135 Arthur v. Nyquist, 415 F. Supp. 904, 946 (W.D.N.Y. 1976), *aff'd in part, rev'd in part*, 573 F.2d 134 (2d Cir.), *cert. denied sub. nom.* Manch v. Arthur, 439 U.S. 860 (1978).

cial balance in the Buffalo school system.[136] Although it set aside part of the plan as overly harsh, the Second Circuit held that judicial relief that infringes upon a seniority system is permissible, regardless of whether the system is bona fide, to rectify a violation of the equal protection clause.[137]

The *Stotts* Court's dicta asserting that one must be an actual victim also applies solely to title VII. In discussing whether a plaintiff must be an actual victim before a court may grant relief, the *Stotts* Court relied exclusively on the legislative history of title VII.[138] Under the fourteenth amendment, a litigant need not be an actual victim of discrimination in order to receive preferential treatment; rather, courts will grant relief on a class-wide basis. In *Fullilove v. Klutznick*[139] the Court upheld the constitutionality of a Congressional enactment requiring that ten percent of federal funds for work projects go to minority businesses; the act did not require any of the benefitted businesses to prove that they had been victims of discrimination. Lower courts have also permitted relief under the fourteenth amendment without requiring that the claimants be actual victims of discrimination. In *NAACP v. Detroit Police Officers Association*,[140] the court noted that "[i]t is well established by now that race-conscious remedies are permitted to redress constitutional violations."[141] As such, "[c]lass-wide relief . . . is . . . permissible without the individual members of the class having to prove that they were actual victims of past discrimination."[142] Similarly, in *Conair Corp. v. NLRB*,[143] a dissenting D.C. circuit judge asserted that *Fullilove* supports the contention that "courts clearly have the power to order race-conscious remedies [including quotas] for proven constitutional violations."[144] Therefore, the fourteenth amendment does not require an employment discrimination plaintiff to be an

136 Arthur v. Nyquist, 520 F. Supp. 961, 966-67 (W.D.N.Y. 1981), *aff'd in part, rev'd in part*, 712 F.2d 816 (2d Cir. 1983), *cert. denied sub nom.* Buffalo Teachers' Fed'n v. Arthur, 104 S. Ct. 3555 (1984).

137 Arthur v. Nyquist, 712 F.2d 816, 822, *cert. denied sub nom.* Buffalo Teachers' Fed'n v. Arthur, 104 S. Ct. 3555 (1984).

138 *See supra* notes 55-57 and accompanying text.

139 448 U.S. 448 (1980). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1971) (district court's use of racial quotas for school desegregation permissible because of prior constitutional finding of discrimination in segregation of schools); B. SCHLEI & P. GROSSMAN, *supra* note 100, at 1398, (Supreme Court decision in Regents of the Univ. of Calif. v. Bakke, 430 U.S. 265 (1978), "indicate[s] that at least five Justices [Powell, Brennan, White, Marshall, and Blackmun] accept the power of a court to set quotas benefitting persons other than identifiable victims of discrimination in order to correct past discrimination.") (footnote omitted).

140 591 F. Supp. 1194 (E.D. Mich. 1984); *see supra* note 131 and accompanying text.

141 591 F. Supp. at 1207 (citations omitted).

142 *Id.*

143 721 F.2d 1355 (D.C. Cir. 1983).

144 *Id.* at 1397 (Wald, J., dissenting) (footnote omitted).

actual victim of discrimination in order to receive preferential treatment by a court.[145]

Because *Stotts* is exclusively a title VII case, the decision does not affect actions brought under the equal protection clause. A litigant under the fourteenth amendment need not meet the *Stotts* burdens regarding either seniority system overrides or proof that he has actually been victimized by the illegal discrimination. Even though the constitutional standard is more onerous than title VII in requiring proof of intentional discrimination,[146] minorities claiming intentional employment discrimination can use the equal protection clause to redress grievances and avoid any *Stotts* restrictions.

CONCLUSION

Firefighters Local Union No. 1784 v. Stotts sets forth dicta indicating a conservative attitude in the interpretation of title VII. Nonetheless, the Supreme Court's actual holding is narrow, merely defining a court's power to interpret and modify voluntary affirmative action consent decrees. Moreover, the *Stotts* holding can be additionally confined to the facts of the case—the judicial modification of a consent decree where an affirmative action plan conflicts with a bona fide seniority system. Future employment discrimination litigants can also circumvent *Stotts* by carefully drafting consent decrees to account for possible layoffs. In addition, alternate judicial routes for employment discrimination litigants remain untouched by the *Stotts* dicta. Thus, in *Stotts* the Supreme Court simply sounded a false alarm by shouting *Firefighters* in a crowded workplace..

David Keith Fram

145 *See also* Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 900 (3d Cir. 1984) (asserting that Supreme Court recognizes fourteenth amendment as serving a "race conscious and remedial function").

146 *See supra* notes 78-82 and accompanying text.