Assuring the Public Interest in Equal Employment Opportunity after *Firefighters Local 1784 v. Stotts*

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Notes

ASSURING THE PUBLIC INTEREST IN EQUAL EMPLOYMENT OPPORTUNITY AFTER FIREFIGHTERS LOCAL 1784 v. STOTTS

The conflict between affirmative action programs and seniority rights in the workplace has intensified in recent years. This conflict arose in Firefighters Local 1784 v. Stotts, in which a district court issued a temporary injunction against the layoffs of black workers, pursuant to an affirmative action consent decree. The Supreme Court, in striking down the injunction, established an apparent predominance of seniority agreements over affirmative action consent decrees. This Note criticizes the Supreme Court's approach taken in Stotts, by examining the history of affirmative action, case development, and the basic policy justifications underlying workplace integration. An alternative to the all or nothing approach taken in Stotts is advanced, in which neither the seniority rights of the majority nor the rights of minority workers are impinged.

INTRODUCTION

AFFIRMATIVE ACTION programs and seniority rights in the workplace are well accepted concepts in their respective areas of the law. Discrimination in employment has been expressly prohibited by federal law for twenty years. Yet, minorities are still subjected to discrimination in the operation of the laws, the avarices of private industry, and the subtle prejudices of a white dominated society. Affirmative action programs are at the center of prospective efforts to integrate the workplace.

1. It shall be an unlawful employment practice for an employer— (1) . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, . . . (2) to limit, segregate or classify his employees in any way which would deprive . . . any individual of employment opportunities . . . because of such individual's race . . . .

2. The term "affirmative action" is used in this Note to describe a temporary, race-conscious remedy that requires an employer either to achieve a racially representative workforce within a specified time or, failing that, to fill a certain percentage of vacancies in hiring or promotion until minority workers are fairly represented in the employer's workforce. Fair representation can, but does not necessarily mean, the percentage of minority workers available from the surrounding area. Under no circumstances will an employer be required to hire or promote any person who is unqualified for the position. Voluntary affirmative action programs are those which are developed by legislation, executive order or private initiative as opposed to those which are created by a decree of a court or by an Equal Employment Opportunity Commission (EEOC) conciliation agreement. Public affirmative action means any such program adopted by a governmental body.
Seniority rights in the workplace have long been hailed as a primary foundation of modern American unionism and as a basic right incident to employment. In an era of continuing high unemployment, seniority rights have tended to become one of the most valued aspects of continuing employment. When seniority expectations come into direct conflict with the laws, those expectations must generally bow to the legislative prohibitions. When seniority rights confront affirmative action obligations, however, the conflict can result in a heavily litigated battle, with an unpredictable conclusion.

This Note examines the seniority-equal opportunity confrontation in the context of the Supreme Court decision in Firefighters Local 1784 v. Stotts. Although the Court's decision that seniority rights take precedence over affirmative action obligations is perhaps defensible, the language, tone and style of the opinion may evoke far reaching and fundamental changes to affirmative action programs. The Justice Department deems that it must now review past equal employment opportunity negotiations to make them conform to its interpretation of Stotts. This Note will first discuss the history of


4. Seniority is used to calculate eligibility for benefits and as a factor in deciding status for transfers and promotions. See, Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962). Aaron postulates that seniority is purely a product of organized labor, specifically collective bargaining, and could not survive the termination of the agreement that created it. Seniority rights, after all, have none of the appurtenances of property rights; they cannot be bought, sold or assigned. Id. at 1534-40. The term "seniority rights," as used in this Note, is merely a term of convenience and not a term of art.


8. Assistant Attorney General William Bradford Reynolds has initiated a review of affirmative action programs negotiated by the Justice Department pursuant to a promise he made immediately following the Supreme Court's decision in Stotts. Upon completion of the review, the Justice Department has asked federal courts in selected cases to revise consent decrees to comply with the holding of Stotts. Neely, Government Role in Rooting Out, Remediying Discrimination is Shifting, 16 Nat'l J. 1772 (1984). See also, Tufani, U.S. Takes New Tack Against Use of Quotas, Washington Post, March 1, 1985, at A3, col. 3; Washington Post, April 30, 1985, at A8, col. 1. The reaction to this move has been negative. See, e.g., Washington Post, May 25, 1985, at A2, col. 1 (BNA survey reveals vast majority of state and local government employers are resisting Justice Department proposals); N.Y. Times, June 19, 1985, at A22, col. 1 (indicating that Justice Department switch undermines existing court
affirmative action programs and their conflicts with seniority rights,9 followed by an in depth description of the Stotts case.10 Part III includes analysis and criticism of the Supreme Court’s opinion in Stotts,11 with the final section emphasizing the importance of integration in the workplace.12

I. EQUAL EMPLOYMENT OPPORTUNITY AND BONA FIDE SENIORITY SYSTEMS

A. Significant Cases and Legislation Prior to Stotts

Affirmative action programs have become a widely accepted employment practice in the United States. An affirmative action program can be described as a temporary, race-conscious remedy in which an employer takes positive steps to make its workforce racially representative.13 Title VII of the Civil Rights Act provides for affirmative action remedies to correct intentional discrimination.14 Additionally, such programs have been authorized by Executives,15 enacted by various legislatures,16 including Congress,17 and implemented by private industry.18 These programs have generally been upheld as constitutional by the courts.19
Despite their widespread use, affirmative action programs have come under increasing attack.\textsuperscript{20} Some have even commented that the very notion of race-conscious action is abhorrent to the Constitution.\textsuperscript{21} The primary judicial challenge has come in the form of reverse discrimination suits, in which whites assert that a race-conscious remedy has denied them equal protection of the laws. The most important reverse discrimination case, \textit{Regents of the University of California v. Bakke},\textsuperscript{22} was brought not under Title VII, but under Title VI of the Civil Rights Act,\textsuperscript{23} which prohibits discrimination in federally assisted programs. A fractured Court\textsuperscript{24} upheld an injunction that struck down an affirmative action program which specifically reserved a set number of positions for minority students.\textsuperscript{25} Yet, the Court found that carefully restricted, race-conscious remedies for discrimination were constitutional.\textsuperscript{26} The Court


\textsuperscript{22} 438 U.S. 265 (1978).


\textsuperscript{24} Justices Powell, Brennan, White, Marshall, Blackmun and Stevens each filed a separate opinion. \textit{Bakke}, 438 U.S. at 265.

\textsuperscript{25} \textit{Id.} Justice Powell, with Chief Justice Burger and Justices Stewart, Rehnquist and Stevens, concurring in the judgment, found that the specially reserved positions for minorities were invalid as a denial of equal protection. \textit{Id.} at 270-71. The finding was based on the fact that the program was implemented by the university's Board of Regents, a group legally incapable of indentifying and remedying discrimination. \textit{Id.} at 307-10. Certain purposes of the admissions program that were offered as justifications, such as improving health care services in minority neighborhoods and attaining a diverse student body, did not have the necessary connection to the program to justify its impact upon Bakke. \textit{Id.} at 310-15.

\textsuperscript{26} \textit{Id.} at 315-19. Justice Powell, with Justices Brennan, White, Marshall and Blackmun concurring in the judgment, found that the California Supreme Court decision to enjoin the school from ever considering an applicant's race was improper. \textit{Id.} at 272, 320. Justice Powell found such consideration acceptable as long as the entire admission process did not
held two years later that Congressionally authorized affirmative action for minority contractors was not improper.27

Moreover, in United Steelworkers v. Weber,28 the Court held that Title VII does not prohibit all private, voluntary affirmative action programs.29 Justice Brennan set forth the standards for such a program,30 but cautioned that he was not defining a "line of demarcation between permissible and impermissible affirmative action plans." The Weber standards have, nevertheless, been applied to affirmative action programs in a wide array of circumstances.31 These rules have often been interpreted by the lower federal courts as permitting the preferential treatment of minorities to stand in the face of reverse discrimination claims.32

hinge upon the applicant's race. Id. at 320. Justice Brennan reasoned that Title VI "does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." Id. at 328.

27. Fulilove v. Klutznick, 448 U.S. 448, 492 (1980) (minority set asides for federal contracts are permissible because Congress may find and remedy past discrimination).
29. Id. at 206. "The natural inference is that Congress chose not to forbid all voluntary, race-conscious affirmative action." Id.
30. Id. at 208. For a voluntary, private-sector affirmative action program to be legitimate, its purposes must mirror those of Title VII. It must not unnecessarily trammel the interests of white employees, and it must be a temporary measure to eliminate a manifest racial imbalance. Id. See Kreiling & Mercurio, Beyond Weber: The Broadening Scope of Judicial Approval of Affirmative Action, 88 DICK. L. REV. 46, 56 (1983) (suggesting that Brennan utilized five standards). But see Meltzer, The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment, 47 U. CHI. L. REV. 423 (1980) (suggesting that it is improper to comply with Title VII by violating it with affirmative action).
33. See, e.g., Williams v. New Orleans, 694 F.2d 987, 992-99 (5th Cir. 1982) (merely demonstrating that other measures may eventually end discrimination insufficient to overturn use of affirmative action plan); Talbert v. City of Richmond, 648 F.2d 925, 931-32 (4th Cir. 1981) (plaintiff failed to prove that city acted with discriminatory intent in promoting minority officer before him); Valentine v. Smith, 654 F.2d 503, 511 (8th Cir. 1981), cert. denied, 454 U.S. 1124 (1981) (plan for faculty assignments upheld where plan was temporary, substantially related to its objectives, and did not require the hiring of unqualified persons); Dennison v. City of Los Angeles, 658 F.2d 694, 696 (9th Cir. 1981) (suit attacking consent decree affirmative action program barred as collateral attack on decree); United States v. Buffalo, 633 F.2d 643, 648 (2d Cir. 1980) (after proper selection procedures established, hiring re-
Preceded in several states by fair employment practice legislation,\textsuperscript{34} Title VII of the Civil Rights Act of 1964,\textsuperscript{35} was intended to rid the nation of employment discrimination.\textsuperscript{36} In 1972, the Equal Employment Opportunity Act\textsuperscript{37} expanded both the reach of Title VII, to include public employers, and the remedies available under it.\textsuperscript{38} During the enactment of Title VII, competing societal and political interests forced compromise upon the proponents of a complete elimination of employment discrimination.\textsuperscript{39}

One such compromise, section 703(h),\textsuperscript{40} was enacted in response to charges that Title VII would gut the practice of seniority. This section specifically protects "bona fide seniority systems." Despite the many comments and a lengthy interpretative memorandum,\textsuperscript{41} the term "bona fide seniority system" remains vague and undefined even today.\textsuperscript{42}
The Supreme Court, in *International Brotherhood of Teamsters v. United States*, stated that bona fide seniority systems are those which were adopted without discriminatory intent. Limiting the opinion to seniority systems adopted prior to the enactment of Title VII, the Court's ruling permits a seniority system to stand despite a tendency to perpetuate past discrimination. Recently, the Court extended protection to all bona fide seniority systems, including those adopted after the passage of Title VII.

### B. Seniority vs. Affirmative Action Obligations

Seniority and equal employment rights can conflict in a number of ways. A highly litigated area of conflict, however, has involved layoffs of minority workers pursuant to a seniority system. In last hired, first fired layoffs, affirmative action gains can be decimated. Since minorities are often the last hired, they are inevitably the first to lose their jobs.

Courts faced with a seniority-affirmative action conflict, first turn to the agreements to determine whether they provide a scheme of action for layoffs. When such a provision is present, a court's role is to assure the scheme's constitutionality and to govern its enforcement. Unfortunately, such schemes and explanations are frequently bargained away or simply not considered.

When the agreements lack layoff provisions, the courts are confronted with

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44. Id. at 353-54. The Court did not question that the proven post-Act discrimination in the seniority system could be remedied by injunction, retroactive seniority and other appropriate relief for those injured by the policy. Id. at 347-48.
45. Id. Without a showing of discriminatory purpose behind a seniority system, no challenge to the pre-Act conduct can be maintained. Id. at 352-53.
46. American Tobacco Co. v. Patterson, 456 U.S. 63, 77 (1982) (limiting section 703(h) to systems enacted before Title VII is contrary to the plain language of the statute, inconsistent with case law and against labor policy).
47. Presumably, the right to keep one's job is more dear than the right to raises or promotions, thus layoff situations would naturally create more litigation. See Aaron, supra note 4, at 1542.
49. Both boilerplate denials and outright admissions of discrimination are quite rare in consent decrees, especially in civil rights cases, because of the ambiguous nature of the decrees. See infra notes 163-65 and accompanying text.
the difficult task of balancing important social interests. One court allowed proportional layoffs to prevent the loss of affirmative action gains. Proportional layoffs, however, may do no better than antagonize both whites and minorities.

The "rightful place" theory, which was purported to represent an equitable middle ground for both sides, first found acceptance in the Fifth Circuit. The theory, created mainly for promotion conflicts, suggested that for the fastest and fairest implementation of Title VII, minorities with seniority should be given the first option on newly opened positions and promotions. Yet, at no time could a minority replace a white with actual seniority.

The Supreme Court, in *Franks v. Bowman Transportation Co.*, adopted the rationale underlying the rightful place theory. The Court held that although actual victims of discrimination could receive remedial seniority, incumbent white workers could not be deprived of the seniority which they had earned. In the final analysis, both blacks and whites would be in their rightful places. But this method of dealing with seniority-affirmative action conflicts is limited in the layoff context. It simply does not address

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50. Tangren v. Wackenhut Services, 480 F. Supp. 539, 549-50 (D. Nev. 1979), aff'd 658 F.2d 705, 706 (9th Cir. 1981). The district court ruled that seniority cannot vest as a property right, since it is merely an economic expectation. The court of appeals, in affirming, noted that neither Title VII nor case law required that seniority be immunized from all affirmative action.

51. *See infra* notes 250-53 and accompanying text.

52. *See Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 HARV. L. REV. 1260, 1268 (1967).*

53. *See, e.g., James v. Stockham Valves & Fittings Co., 559 F.2d 310, 358 (5th Cir. 1977) (front pay relief calculated to terminate on date worker attains opportunity to move to his rightful place); Sagers v. Yellow Freight System, 529 F.2d 721, 731-34 (5th Cir. 1976) (qualification-date formula for calculating rightful place seniority); Mims v. Wilson, 514 F.2d 106, 106 (5th Cir. 1975) (workers must be restored to the economic position in which they would have been but for the discrimination); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 252-53 (5th Cir. 1974) (absent special circumstances, back pay should be awarded to restore injured workers to their rightful place); United States v. Georgia Power Co., 474 F.2d 906, 927 (5th Cir. 1973) (rightful place theory applied to present effects of past discrimination); Local 189, United Papermakers v. United States, 416 F.2d 980, 988-99 (5th Cir. 1969) (rightful place theory first adopted by Fifth Circuit).*

54. *Note, supra* note 52, at 1268-69.

55. *Id.*


57. *Id. at* 778. In its next term, the Court upheld a seniority system as bona fide but awarded remedial seniority to identified victims. *International Blvd. of Teamsters v. United States, 431 U.S. 324, 347-48 (1977).*

58. At least one court did seem to have applied the "rightful place" theory to a layoff situation. *See Guardians Ass'n v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980), cert. denied, 103 S. Ct. 3568 (1983).*
the problem of the destruction of affirmative action gains when an employer chooses to lay off employees.

C. Public Safety Layoff Cases

Prior to Stotts, a series of factually similar cases were tried before the lower federal judiciary. These cases were prompted by layoffs in public safety departments, due to municipal fiscal crises. In deciding these cases, three courts of appeals upheld injunctions prohibiting the cities from laying off minorities in order to preserve affirmative action gains.59

In Guardians Association v. Civil Service Commission,60 black and Hispanic police officers in New York City obtained an injunction by alleging that last hired, first fired layoffs would have a discriminatory effect on them. Their original hiring was found to be based on a discriminatory entrance examination, and, but for that test, the minority applicants would have been hired earlier.61 The Second Circuit Court of Appeals, in affirming an award of compensatory seniority, held that section 703(h) would not apply because the seniority system was based on a discriminatory test and, therefore, could not be bona fide.62 The new seniority was based on the date that the members conclusively indicated that they would have been hired, if the discriminatory test had not been used.63 New layoffs were then to be based upon the modified seniority system. Guardians is unique among the public safety layoff cases, in that actual discrimination was found, and was subsequently used to structure the appropriate relief.64

The case of Brown v. Neeb65 arose when black and Hispanic firefighters in Toledo, Ohio, plaintiffs to a consent decree affirmative

60. 633 F.2d 232 (2d Cir. 1980), cert. denied, 103 S. Ct. 3568 (1983).
61. Id. at 246. The district court found that the hiring examinations had a disparate impact on minority applicants. Id. at 240. Since the examinations lacked the requisite job relatedness, the Commission could not overcome this prima facie proof of discrimination. Id. at 241-42. Thus, the court of appeals did not feel compelled to follow the apparently adverse holding of the Supreme Court in Washington v. Davis, 426 U.S. 229 (1976), that disparate impact alone in a hiring examination did not make prima facie discrimination. See infra notes 186-87 and accompanying text.
63. Id. at 251.
64. Id. at 268-69. The plaintiffs' causes of action in Title VI and in § 1981 were left undecided, yet the dicta would seem to indicate that the court would not find a cause of action without proof of discriminatory intent. Id. at 262-63. The Supreme Court affirmed the denial of Title VI relief. Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221 (1983).
65. 644 F.2d 551 (6th Cir. 1981).
action program, secured an injunction to prevent proposed layoffs from lowering their percentage in department personnel. The layoffs, which were to be last hired, first fired, were pursuant not only to a collective bargaining agreement but also to Ohio law. The Sixth Circuit Court of Appeals affirmed the injunction of the layoffs. The court reasoned that the consent decree, read as a contract, reflected the goal of prompt integration of city services. Given the glacial progress towards this goal and the fact that the layoffs threatened the existing gains, the preliminary injunction was held to be proper. Even though the consent decree made no mention of layoffs, the court did not consider the absence dispositive. It reasoned that the decree required affirmative action and that the layoffs, if anything, were negative action.

Citing Brown extensively, the First Circuit, in Boston Chapter, NAACP v. Beecher, held that a district court's injunction of the layoff of minority police and firefighters was an appropriate way to prevent a “state of precipitous racial imbalance.” Minority gains made as a result of a consent decree were threatened by the layoffs. The court of appeals held that the trial court had the authority to modify the consent decree when time and experience demonstrated that the decree had failed to reach its intended re-

66. For a general discussion of the applicability of consent decrees, see infra notes 153-65 and accompanying text.
67. Brown, 644 F.2d at 557.
68. “When it becomes necessary in a police or fire department, through lack of work or funds, . . . to reduce the force in such department, the youngest employee in point of service shall be first laid off.” OHIO REV. CODE ANN. § 124.37 (Page 1984). In addition, there was precedent that the injunction was not proper. Youngblood v. Dalzell, 568 F.2d 506, 508 (6th Cir. 1978) (per curiam) (reliance on consent decree goals alone in face of boilerplate denial of discrimination will not support an injunction of minority layoffs).
69. Brown, 644 F.2d at 564.
70. Consent decrees have the aspects of both contracts and judgments. See infra notes 158-61 and accompanying text.
71. Brown, 644 F.2d at 558.
72. Id. at 559.
73. Id. at 558. Interestingly, this action was not brought under Title VII but pursuant to the procedurally more burdensome 42 U.S.C. §§ 1981 and 1983 of the civil rights statutes. Id. at 564. In response to the plaintiffs' suggestions for less preferential schemes than layoffs to cut Toledo's budget, the court of appeals declined to correct the budgetary decisions of the city's elected officials. Id. at 563. But see infra notes 248-60 and accompanying text.
74. 679 F.2d 965 (1st Cir. 1982), vacated as moot, 103 S. Ct. 2076 (1983). Beecher was actually decided four days after the Sixth Circuit announced its decision in Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir. 1982).
75. Beecher, 679 F.2d at 977.
76. Id. at 972. The court of appeals noted that there was no Supreme Court precedent concerning a public employment situation. Id. at 976.
Considering the importance of prompt integration, such a modification even took preference over the state law requiring seniority based layoffs.

The trend in the courts of appeals was clearly towards allowing consent decree modifications, in order to prevent layoffs from reducing minority employment. No longer a case of first impression in the Sixth Circuit, the question of layoffs in the Memphis Fire Department came before the courts.

II. THE MEMPHIS FIREFIGHTERS CASE

A. Stotts v. Memphis Fire Department

The 1984 Supreme Court decision in Stotts was a culmination of ten years of legal confrontations between the city of Memphis, Tennessee, and those concerned with minority employment. In 1974, the United States Justice Department sued Memphis on various statutory and constitutional grounds, alleging discrimination in the hiring and promotion of minorities in city services. As with many equal employment opportunity cases, the suit was settled before trial. Memphis admitted that its past practices may raise an inference of discrimination, but denied any actual or intentional discrimination. In this consent decree, Memphis agreed to the goal of employing approximately the same percentage of qualified minorities as their percentage in the general workforce of Shelby County.

A black firefighter, Carl Stotts, filed a class action suit in 1977, alleging that the city had continued to discriminate in violation of

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77. Id. at 972.
78. The court considered important the fact that the public interest demands a racially balanced police force. Id. at 977. See infra notes 217-27 and accompanying text.
79. "If permanent employees . . . are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall . . . be separated from employment according to their seniority. . . ." MASS. GEN. LAWS ANN. ch. 31, § 39 (West 1979).
82. Id. at 547.
83. The city's motivation in entering the 1974 decree was the desire to remedy past discrimination as well as to avoid the delay and expense of future litigation. Id.
84. Id. at 570-71 app.
85. Id. at 571-73 app.
the 1974 consent decree. Memphis, apparently realizing that the decree's goals were not being met, settled the suit again before trial. The 1980 consent decree incorporated an affirmative action plan, which specifically required that one-half of all future vacancies in the fire department be filled by qualified minority applicants until the representative racial balance was achieved. The decree failed to anticipate or address the possibility of layoffs. It did provide, however, that the district court retain jurisdiction to make any orders necessary to effectuate the purposes of the decree. Although given the opportunity, the firefighters union did not voice any objections to the decree, nor did it attempt to intervene in the action.

In the midst of a fiscal crisis in May of 1981, Memphis announced the first layoffs in the city's history. The proposed layoffs were to be on a citywide, last hired, first fired basis. Stotts succeeded in obtaining a temporary restraining order, preventing the layoffs as planned. Following an evidentiary hearing which revealed that nearly 60 percent of the minority firemen would be affected under the city's plan, the district court preliminarily enjoined the city from laying off blacks below the percentage of

86. Id. at 547. Stotts' class action suit alleged that the department's hiring and promotion practices violated Title VII and §§ 1981 and 1983. In 1979, firefighter Fred Jones filed a separate action against the city alleging an improper discriminatory denial of his promotion. At that time, the cases were consolidated. Id. The city's record in hiring and promoting minorities was considerably below the goals of the 1974 decree. See id. at 550 n.5.
87. Id. at 548. The consent decree also required the city to ensure that 20% of the department's promotions would go to qualified minority applicants. The decree provided back pay and promotions for class members, including Stotts and Jones. Id.
88. Id.
89. The proposed decree was posted for comments and objections in each Memphis fire station for 15 days. Id. See Note, Timeliness of a Motion to Intervene: Stotts v. Memphis Fire Department, 1984 B.Y.U. L. Rev. 219, 226-30 (1984).
90. Memphis Fire Dep't, 679 F.2d at 548. Two days after the posting period had expired, eleven nonminority firefighters objected to the decrees and filed a motion to intervene, which the district court denied. Id. In a separate decision, the court of appeals affirmed the denial of intervention, finding not only that the district court had given a reasonable amount of time to object, but that intervention would delay implementation of the 1980 decree and be deleterious to both the parties and the public. Id. at 581-85. For the adequacy of notice in similar civil rights cases, see Alliance to End Repression v. City of Chicago, 91 F.R.D. 182, 195 (N.D. Ill. 1981) (one month's notice is timely); Air Line Stewards v. American Airlines, Inc., 455 F.2d 101, 108 (7th Cir. 1972) (three weeks' notice considered timely).
91. Memphis Fire Dep't, 679 F.2d at 549.
92. Memphis based its layoff policy on citywide seniority rather than seniority within each service or department. Id. Seniority is mentioned in the 1974 decree, but not in the context of layoffs. Id. at 573 app. Seniority was incorporated in the city's memorandum of understanding with the union. Id.
93. Id. at 549.
minority firefighters employed at the time layoffs were announced.\textsuperscript{94} As a result, Memphis chose to lay off three white firefighters, ostensibly with greater seniority than blacks who were retained.\textsuperscript{95}

On appeal from the preliminary injunction, the Sixth Circuit found that even though the seniority system was bona fide,\textsuperscript{96} the district court did not abuse its discretion in modifying the consent decree to prevent the layoffs from substantially affecting minority employment.\textsuperscript{97} The court offered three rationales. First, the modification was correct to prevent the city from breaching its consent decree "contract."\textsuperscript{98} Second, the modification was a proper response to an unforeseen circumstance which would cause hardship to one of the parties and frustrate the purpose of the decree.\textsuperscript{99} Finally, the court rejected the argument that section 703(h) protected the seniority system, citing three reasons. First, the high priority of encouraging settlements in Title VII cases allows a consent decree to alter existing seniority practices.\textsuperscript{100} Second, it would be incongruous and counterproductive to limit the court's remedial authority by existing seniority systems.\textsuperscript{101} Last, the court, acting under its authority to enter supplemental orders under the decree, was simply doing what the city was empowered to do.\textsuperscript{102}

\textsuperscript{94} Id. at 551.

\textsuperscript{95} Firefighters Local 1784 v. Stotts, 104 S. Ct. 2576, 2582 n.2 (1984). The actual seniority of the three whites may be questioned since it was alleged that they and the three blacks who were not laid off were all hired on the same day. Brief for Respondents on Writs of Certiorari at 21, Stotts, 104 S. Ct. at 2576. See also Spann, Simple Justice, 73 Geo. L.J., 1041, 1047-55 (1985) (suggesting that because the mootness question could have been supported as simply in the opposite manner, that the Justices' subjective values were involved in the ostensibly objective opinion).

\textsuperscript{96} Stotts v. Memphis Fire Dep't, 679 F.2d 541, 565-66 (6th Cir. 1982). See also id. at 551 n.6. Cf. supra notes 40-43, for the continuing debate over the meaning of "bona fide seniority system."

\textsuperscript{97} The court of appeals also found that the injunction was not impermissible reverse discrimination. Memphis Fire Dep't, 679 F.2d at 567.

\textsuperscript{98} Id. at 556-57. The Sixth Circuit held that Memphis could not simultaneously benefit from the decree by avoiding the affirmative responsibilities imposed by a judicial finding of discrimination and ignore the decree's obligations. The city countered with the argument that it was entitled to breach the agreement because of the unanticipated economic crisis. The court noted, however, that economic hardship is never an excuse for noncompliance with the terms of a contract. Id. at 561.

\textsuperscript{99} Id. at 563-64. The court relied heavily upon its earlier reasoning in Brown, supra notes 65-73 and accompanying text.

\textsuperscript{100} Memphis Fire Dep't, 679 F.2d at 564-65.

\textsuperscript{101} Id. at 566.

\textsuperscript{102} Memphis could have altered a collective bargaining or other seniority agreement to conform to the consent decree. Id. at 566-67.
B. Firefighters Local 1784 v. Stotts

The Supreme Court reversed the Sixth Circuit, holding that the injunction could be justified neither as an effort to enforce the consent decree nor as a valid modification thereof.

Writing for the Court, Justice White first determined that the case was not moot. The Court then looked to the possibility of relief for the white firefighters who had lost pay and seniority.

The Court formulated the "issue at the heart of this case [as] whether the District Court exceeded its powers in entering 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." The injunction was held impermissible as an attempt to specifically enforce the consent decree. Reading the consent decree strictly as a contract, the Court required that relief and remedies be available from within the four corners of the document. Since modification of the seniority system because of a layoff situation was not contemplated by the original document, the Court exceeded the decree's boundaries. Moreover, Title VII does protect bona fide seniority systems, "and it is inappropriate to deny an innocent employee the benefits of his seniority in order to provide a remedy in a

104. Stotts, 104 S. Ct. at 2581.
105. Id. Each white laid off was called back within one month and offered his previous position. The Court first posited that the injunction remained in force and must be honored with respect to any future layoffs. Id. at 2583. Even if the injunction was limited to the 1981 layoffs, the modification of the consent decree continued to impact upon the parties. The majority was also concerned with the respondents' apparent inconsistency in urging mootness on the one hand and the continuing validity of the injunction on the other. Id. at 105. The importance of the back pay and competitive seniority issues can be questioned since none of the three white workers laid off were parties to the suit. The factual improprieties taken by the majority in Stotts have been criticized. E.g., Note, "Last Hired, First Fired"—Rights Without Remedies: Firefighters v. Stotts, 1985 DET. C.L. REV. 213 (1985) "The case is troubling for several reasons: (1) jurisdiction to review the lower court decision was questionable from the outset; (2) the Court reached the merits of the case although there had been no trial; (3) the majority misstated and ignored very critical facts contained in the record; . . . ." Id. at 239. Casenote, Labor Law—Has the Supreme Court Put Out the Fire on Court Ordered Affirmative Action? Firefighters Local Union No. 1784 v. Stotts, 18 CREIGHTON L. REV. 737, 764-65 (1985) (Court's analysis fraught with error).
106. Stotts, 104 S. Ct. at 2585.
107. Id. at 2585-86.
108. Id. at 2586 (citing United States v. Armour & Co., 402 U.S. 673, 681-82 (1971) ("[S]cope of 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.").
pattern or practice suit such as this."\(^{110}\) Finally, the Court found that a consent decree is binding only upon those who are parties to it. Since the union was not a party, an injunction pursuant to the decree which affected the union was improper.\(^{111}\)

The injunction was also held to be an improper modification of the consent decree since it impermissibly altered a bona fide seniority system.\(^{112}\) The Court found unpersuasive the three rationales asserted by the Sixth Circuit in upholding a change in the seniority system. First, the encouragement of settlements is not applicable since an enforced injunction is by definition not a settlement, and in this case there was no settlement regarding seniority.\(^{113}\) Second, the Court cited Teamsters for the proposition that the district court did not have the remedial authority to change the seniority system because there had been neither a finding of actual discrimination, nor had there been a previous award of competitive seniority.\(^{114}\) Finally, the Court held that the district court could not temporarily override the seniority system, as Memphis could have done, because this was not a case of unilateral voluntary affirmative action by the city. The consent decree was, in fact, entered over the city’s objection.\(^{115}\) Justice White expressly limited the reach of the opinion by saying that the Court need not decide whether the city could voluntarily undertake such an affirmative action program.\(^{116}\)

\(^{110}\) Id.

\(^{111}\) Id. But the union neither protested to the consent decree, nor attempted to intervene earlier. It would be deleterious to the policy favoring civil rights settlements if an affected party could emasculate a consent decree by not joining in its inception and objecting when the decree was to be enforced. See supra notes 89-90 and accompanying text (discussing the union’s nonintervention); see also Spann, supra note 95 at 1056-60 (very nature of consent decree may require judge to resort to subjective views in balancing competing societal interests).

\(^{112}\) Stotts, 104 S. Ct. at 2586-90.

\(^{113}\) Id. at 2587-88.

\(^{114}\) Id. at 2588. Although it is true that there was no finding of actual discrimination or a discriminatory animus, there was no opportunity for such a finding. The adjudication was cut off at the trial level by settlement through the two consent decrees. There are two substantial issues thus at odds: the interest in expeditious settlement and implementation and the importance of finding actual discrimination. To resolve this dispute cursorily without offering the underlying rationales used in the decision can only lead to more protracted negotiation and litigation. Cf. infra notes 191-94 and accompanying text. See also Spann, supra note 95 at 1066-67 (technical absence of finding a pattern or practice of discrimination is not significant in face of record replete with statistical evidence inferring intentional discrimination).

\(^{115}\) Stotts, 104 S. Ct. at 2590. This finding by the Court may place the district court in the anomalous position of being able to modify that in which it took no part, a voluntary agreement, yet being precluded from further participation in that in which it expressly retained jurisdiction. Cf. infra notes 165-66 and accompanying text.

\(^{116}\) Stotts, 104 S. Ct. at 2590. This concession by the majority has important ramifica-
Engaging in an animated dissent, Justice Blackmun attacked the majority opinion on all fronts. Criticizing each aspect of the Court's mootness rationale, Blackmun concluded, "today's decision is provided on the theory that it might affect a defense that the city has not brought, to enforce contractual rights that may not exist." Proceeding to the Court's standard of review, Blackmun repeatedly emphasized that what was in question was a preliminary injunction, and chided the Court's treatment of it as permanent. As to Justice White's "issue at the heart of this case," Justice Blackmun found it incorrect in that the district court had not ordered the layoff of whites but had merely enjoined the city from laying off

117. Stotts, 104 S. Ct. at 2595 (Blackmun, J., dissenting). Justice Blackmun was joined by Justices Brennan and Marshall.

Justice O'Connor concurred in the opinion, emphasizing several points. She found that when the collateral effects of a dispute continue to affect the relationship of the parties, the case cannot be moot. O'Connor underscored the importance of finding a discriminatory animus in Title VII actions and emphasized that there could be no such finding here because the respondents settled before a judicial determination of the issue.

Justice Stevens concurred in the judgment only, on the narrow grounds of abuse of discretion by the district court. Stevens considered the majority's entire Title VII discussion as completely advisory.

118. Id. at 2600. Justice Blackmun attacked each of the majority's justifications for not finding the case moot, opining that the Court misinterpreted the preliminary injunction. Justice Blackmun also considered the suggestion that the injunction would have a res judicata effect to be ludicrous. Blackmun also objected to the observation that the unraised issues of back pay and seniority had somehow kept the case alive, because the affected whites were not parties to the case. Finally, Blackmun indicated that the Court had rendered only an advisory opinion as to the effects of Title VII.

119. Justice Blackmun charged the Court with treating the preliminary injunction as permanent by reviewing it under more than an abuse of discretion standard. This is a point of great force, since viewing the injunction as permanent fundamentally changes the Court's view of the dispute by reading a mere probability as a final adjudication. In reviewing a preliminary injunction, the only issue is the propriety of the interim decision, and the court's only manner of correcting it is by vacating the injunction. See University of Texas v. Camenisch, 451 U.S. 390, 394 (1981). A review based on an abuse of discretion is quite different from a review on the merits. A review of abuse of discretion by the granting of a preliminary injunction considers the same four factors that a district court must consider in originally granting the injunction: whether the plaintiff will be irreparably harmed if the injunction does not issue; whether the defendant will be harmed if it does issue; whether the public interest will be served by the injunction; and whether the plaintiff is likely to prevail on the merits.

The Court in Stotts considered the preliminary injunction still to be in force three years later, perhaps looking only to the second inquiry, whether the city would be harmed. In applying the other three elements, a preliminary injunction may have been proper. First, a 60% adverse effect on minorities may be an irreparable harm. Second, the public interest is in integrated employment. Finally, the likelihood of the plaintiff's success on the merits depends upon a showing of discrimination, an inquiry which was cut short by the imposition of both consent decrees.
blacks. Finally, Blackmun reviewed and found appropriate race-conscious remedies in Title VII actions.

III. THE COURT'S QUESTIONABLE APPROACH TO STOTTS

The end result arrived at by the Supreme Court in Stotts is defensible. The respondents never proved discrimination in either hiring or in the layoffs. Therefore, the seniority system, being classified as bona fide, could not be disturbed under section 703(h).

The opinion, however, cuts far too broadly, proceeding with an apparent disregard for the possible consequences of its decision. The Court achieved the desired result, but the language and tone of the opinion may damage affirmative action programs, the effective center of efforts toward equal employment opportunity. The opinion has already been criticized for its loose language and lack of discipline.

This section of the Note examines the Court's refusal to utilize a solution that the Court itself created one year earlier and its near-sighted consideration of the possibilities of consent decrees. Next, the Court's opinion is examined in the context of the federal role in civil rights litigation, and this section concludes with an examination of the possible consequences of the Court's judgment.

120. Stotts, 104 S. Ct. at 2602.
121. Justice Blackmun points out that the Court ignored the vast applications of remedies held appropriate under § 706(g) of Title VII. Id. at 2605. The possibilities for affirmative, class-based relief were repeatedly emphasized. Id. at 2606.
122. Without a finding of actual discrimination against individual minority members, a grant of remedial seniority would be improper. International Bhd. of Teamsters v. United States, 431 U.S. 324, 353 (1977). Further, even though the district court found a disparate impact, Stotts v. Memphis Fire Dep't, 679 F.2d at 541, 551 (6th Cir. 1982), neither the court of appeals nor the Supreme Court affirmed that holding.
123. The Sixth Circuit overturned the district court's finding that the seniority system was not bona fide, Memphis Fire Dep't, 679 F.2d at 551, and the Supreme Court affirmed, Stotts, 104 S. Ct. at 2587.
124. See generally Wright, Color Blind Theories and Color Conscious Remedies, 47 U. CHI. L. REV. 213, 216 (1980) (not until race and ethnicity cease to correspond and begin to conflict with economic and social divisions will racial politics be subordinated).
125. E.g., The Supreme Court, 1983 Term, 98 HARV. L. REV. 87, 268-69 (1984) (Court unwilling to embrace the results of its far-reaching language); Spann, supra note 96, at 1066; Note, supra note 105, at 239.
126. See infra notes 134-52 and accompanying text.
127. See infra notes 153-66 and accompanying text.
128. See infra notes 167-82 and accompanying text.
129. See infra notes 183-212 and accompanying text.
A. "The Issue at the Heart of this Case"

Justice White found the issue at the heart of Stotts to be whether the district court could order white employees to be laid off instead of black employees. This statement may be very misleading and could have a deleterious effect on improving equal employment opportunity. By framing the issue in this fashion, the Court characterized the city as having an either/or choice; either breach the consent decree by laying off blacks, or lay off whites and breach its seniority agreement. Yet, the district court did not order the city to lay off white employees in lieu of black employees. Memphis chose to do so on its own. The district court simply ordered the city not to lay off more than a certain percentage of minority workers. It decreed an injunction, not affirmative relief.

The irony of the Court's framing of the issue in the manner which it did, is that in its previous term, the Court, in a similar situation, refused to make such an either/or choice. In W.R. Grace & Co. v. Local 759, the employer, who had a long history of discrimination against blacks and women, agreed in an EEOC conciliation agreement to maintain a specified percentage of minorities in its workforce. Amidst a business slump, W.R. Grace and Company laid off workers according to the terms of the conciliation agreement. White males with greater seniority, who had been laid off, filed grievances and received an arbitrator's award. The company sued for relief from the award, citing its compliance with

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130. Supra note 106 and accompanying text.
131. A logical defendant for the laid off whites is not the respondents, but the city of Memphis, which breached the memorandum of understanding with the firefighters union. It was the city's layoff policy, not the preliminary injunction that prevented the laid off workers from accruing seniority. See Stotts, 104 S. Ct. at 2599 n.3 (Blackmun, J., dissenting). See also Note, supra note 105, at 242 (union and Memphis had best of both worlds by operating as partners in a suspect joint venture).
132. In fact, several interested parties, including the union, attempted to dissuade the city from layoffs entirely by reducing the working hours of all department employees. Stotts, 104 S. Ct. at 2602.
133. The court of appeals characterized the injunction as follows: "The court enjoined the City from applying the layoff policy based on seniority insofar as it would decrease the percentage of black lieutenants, Drivers, Inspectors and Privates employed at the Memphis Fire Department." Memphis Fire Dep't, 679 F.2d at 551.
134. 103 S. Ct. 2177 (1983).
135. The EEOC district director determined that the company had discriminated against blacks and women and that the seniority systems were unlawful because they perpetuated past discrimination. Id. at 2180.
136. Id. For a brief description of the conciliation procedure, see M. Anderson & H. Levin-Epstein, Primer of Equal Employment Opportunity 96-97 (2d ed. 1982).
137. W.R. Grace, 103 S. Ct. at 2181.
138. Id. at 2181-82.
the conciliation agreement.\textsuperscript{139}

A unanimous Supreme Court refused the company relief from either the burden of its conciliation agreement or its collective bargaining agreement.

[It is undeniable that the Company was faced with a dilemma: it could follow the conciliation agreement as mandated by the District Court and risk liability under the collective bargaining agreement, or it could follow the bargaining agreement and risk . . . Title VII liability. The dilemma, however, was of the Company's own making. The Company committed itself voluntarily to tow conflicting contractual obligations.\textsuperscript{140}

The Court reformulated the issue from which of the two sets of employees should bear the burden of layoffs, to whether the burden should be borne by the employer or by one of the classes of employees. In bringing the employer into the debate, the Court focused on the innocence of the employees who shared no responsibility in the original discrimination.\textsuperscript{141}

Like W.R. Grace, the City of Memphis entered conflicting contractual obligations: the two consent decrees\textsuperscript{142} and the seniority agreement.\textsuperscript{143} By a \textit{W.R. Grace} analysis, the city's prayer for relief would go unanswered. The court would not allow an employer to breach one agreement for the sake of the other.\textsuperscript{144} The case comparison is strengthened by recognizing that a consent decree, with the imprimatur of an overviewing court, would seem more binding than a conciliation agreement, overseen by an EEOC regional director.\textsuperscript{145} Additionally in \textit{W.R. Grace}, Local 759 had an ironclad collective bargaining agreement,\textsuperscript{146} as compared with one of doubtful legality in \textit{Stotts}.\textsuperscript{147}

\textsuperscript{139} \textit{Id.} at 2182. The federal district court entered summary judgment for the company. \textit{Id.} The Fifth Circuit reversed. W.R. Grace \& Co. v. Local Union No. 652, 759 F.2d 1248 (5th Cir. 1981).

\textsuperscript{140} \textit{W.R. Grace}, 103 S. Ct. at 2184.


\textsuperscript{142} \textit{See supra} notes 81-93 and accompanying text.

\textsuperscript{143} \textit{See supra} note 92.

\textsuperscript{144} \textit{See} 1982 Term, supra note 141 at 277-78 (suggesting that \textit{Stotts} would have been the perfect opportunity to extend \textit{W.R. Grace} to the public employment setting).

\textsuperscript{145} \textit{See generally} M. ANDERSON \& H. LEVIN-EPSTEIN, supra note 136, at 96-97.

\textsuperscript{146} \textit{W.R. Grace}, 103 S. Ct. at 2180.

\textsuperscript{147} The union's collective bargaining agreement may have been unenforceable. \textit{See} Fullenwider v. Firefighters Ass'n Local 1784, 649 S.W.2d 268, 270 (Tenn. 1982) (city firefighters'
Under the *W.R. Grace* analysis, the city would have had to find another way to solve its fiscal crisis. Layoffs are an undoubtedly expedient method, but would be precluded.\footnote{148}{The city was caught between conflicting obligations. But the city’s choice was not necessarily to breach one agreement or the other. Since the cause behind the layoffs was the fiscal crisis, the city could have honored both obligations by finding another way to balance its budget. Layoffs were simply the most expedient choice, not the only one. See infra notes 248-60 and accompanying text.} Perhaps the one difference that could account for the Court’s refusal to apply *W.R. Grace* was that it involved a private employer as opposed to the public employer in *Stotts*.\footnote{149}{E.g., Kahn & Moorehead, *Stotts: Death Knell of Affirmative Action or Wishful Thinking By the Reagan Administration?*, 8 CORP. L. REV. 251, 265 (1985). The authors cite a denial of certiorari by the Supreme Court as a rejection of a chance to deal with the public employer distinction in *Bushey v. New York Civil Serv. Comm’n*, 105 S. Ct. 803 (1985).} Since Title VII was extended to include public employers in 1972, this difference is not a convincing one.\footnote{150}{In light of the *Stotts* decision, the Court framed the issue by viewing the district court as having too much power. By comparison, in reviewing the consent decree, the district court would seem to have too little.} In light of the *Stotts* decision, the Court framed the issue by viewing the district court as having too much power. By comparison, in reviewing the consent decree, the district court would seem to have too little.\footnote{151}{Comparing *W.R. Grace* with *Stotts* reveals another anomaly. An arbitrator’s finding is specifically protected from judicial review other than to its propriety. *W.R. Grace*, 103 S. Ct. at 2183. Apparently in *Stotts*, however, the findings of a federal district court are not due the same deference.}

B. Consent Decrees; Useful Tools in Civil Rights Litigation

The opinion in *Stotts* does not sufficiently recognize the importance of consent decrees in ending discrimination in the workplace. Along with conciliation agreements, consent decrees are among the most useful tools available to courts and agencies in equal employment opportunity cases.\footnote{152}{"This burgeoning area of the law is a promising development in the ongoing attempt to resolve the seemingly intractable problems presented by modern bureaucratic society." Anderson, The Approval and Interpretation of Consent Decrees in Civil Rights Class Action Litigation, 1983 U. ILL. L. REV. 579, 583 (1983).} More so than any judge, the parties are intimately familiar with the facts and problems of the suit and are thus able to assert and include in the remedy those issues which they consider to be important.\footnote{153}{Id. Settling civil rights suits not only binds the open wounds but helps to restrain litigation. *Id.* The consent decrees in *Stotts* are typical. The employer is generally unwilling to admit to a discriminatory purpose, but rather than risking an adjudicated defeat on the issue, will admit to a pattern of past discrimination. The alleged discrimination victims are often willing to bargain away the opportunity to prove intent in exchange for a quick settlement. As an illustration, see the 1980 *Stotts* decree, *Memphis Fire Dep’t*, 679 F.2d at 570-79} Such decrees result not only in
savings of time and money, but may bring about better post-decree implementation. For an employment discrimination defendant, consent decrees can operate to defuse potentially expensive and embarrassing revelations. Finally, the decrees may have the effect of clearing crowded federal dockets.

The Court revealed its limited impression of the efficacy of consent decrees in its treatment of the 1980 decree in Stotts. The Court cited a consent decree's contractual aspects to justify limiting its investigation under the "four corners" rule. Besides being a dated form of contract interpretation, analyzing the decree in this manner denied the importance of the judgment aspects of a consent decree. Quoting an antitrust case as further justification, the Court failed to mention that a later case modified the strict "four corners" rule in consent decrees, to include other appropriate interpretative modes. Additionally, in interpreting consent decrees in civil rights cases, several courts have not felt bound by the terms of the decree.

Such an expansive interpretation is required by the very nature of the decrees. Rare is the consent decree that escapes ambiguity. Many important contingencies are overlooked, forgotten or left un-

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154. Better implementation is likely because the parties would act as a lubricant, rather than a brake on change. Anderson, supra note 153 at 580.

155. Id. at 581.

156. No one denies that there has been an explosion of civil rights litigation. See, e.g., Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem," 92 HARV. L. REV. 664, 670-72 (1979). For instance, more than one half of the federal class action suits filed deal with civil rights. Id. at 692 n.125.

157. Stotts, 104 S. Ct. at 2586.

158. "A consent decree is a judicial act, and should be treated as such." It is the equivalent of a judgment and a form of equitable relief. Anderson, supra note 153, at 585.


161. Anderson cites several examples of courts in civil rights cases stepping beyond the "four corners" rule. He finds additional interpretive aids to be particularly useful in discerning the purpose of the decree, such as comparing possible interpretations of the same decree as a contract only with those viewing the decree as a joint contractual and judicial act. Anderson, supra note 153, at 622-28.

162. A consent decree can be particularly prone to ambiguity as the competing interests vie for interpretation. Ambiguous language is often inserted in anticipation of an impasse in negotiations. Id. at 615-16.
considered. Ambiguity can be especially prevalent in those areas where the law is evolving quickly.\textsuperscript{163} To counteract this lack of foresight, the issuing court often maintains jurisdiction to remedy the unforeseen.\textsuperscript{164} The district court in \textit{Stotts} did just that in modifying the 1980 decree. With its informed view of the controversy, the court realized that the decree was vague regarding layoffs, and therefore made the appropriate modifications.\textsuperscript{165} In striking these changes, the Supreme Court overlooked the fact that, to be effective, consent decrees must often be amended. In striking down the district court's action so summarily, the Court has cast doubt upon the continued use of the consent decree in future employment discrimination litigation.

\section*{C. The Chilling Effect on Other Forms of Judicial Relief}

The Supreme Court did not stop at consent decrees but went on to comment upon what the district court could have done pursuant to Title VII.\textsuperscript{166} Injunctive relief has long been within the protected discretion of trial courts. It is expressly prescribed by Title VII as a proper remedy in employment discrimination cases.\textsuperscript{167} Earlier still, in all manner of civil rights litigation, injunctive relief has been the norm when schools,\textsuperscript{168} corporations,\textsuperscript{169} and state and local governments\textsuperscript{171} have been charged with and have been found to have discriminated against minorities. Viewed with this history, and with the knowledge that the court's action was a preliminary injunction that did not mandate affirmative action,\textsuperscript{172} it is difficult to

\begin{footnotes}
\item[163.] Id. at 628.
\item[164.] Id. at 615-16.
\item[165.] \textit{Memphis Fire Dep't}, 679 F.2d at 549-51.
\item[166.] \textit{Stotts}, 104 S. Ct. at 2588-90.
\item[167.] "If the court finds that the respondent . . . is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice . . . ." Civil Rights Act of 1964, Title VII, § 706, 42 U.S.C. § 2000e-5(g) (1982).
\item[168.] See, e.g., Bolling v. Sharpe, 357 U.S. 497 (1954) (enjoining the public schools of the District of Columbia from segregating school children on the basis of race).
\item[172.] Rejection of this argument would leave the narrow question of abuse of discretion
accept the view that the district court went beyond its relief authority.

Although class-based affirmative relief was not ordered by the district court in *Stotts*, the effect of its order in conjunction with the city’s action, appeared to the Court to afford similar gains.\(^\text{173}\) Even if the court had ordered affirmative relief, it can be argued, that it did not go beyond its authority.\(^\text{174}\) Affirmative relief is suggested as proper by Title VII,\(^\text{175}\) and classwide affirmative relief has been approved in every circuit.\(^\text{176}\)

It is contrary to the established pattern of federal intervention to decrease judicial power and authority in civil rights cases. Since the turn of the century, federal courts have consistently been the cham-

\(^{173}\) Although Justice White characterized it as the effect of the district court’s order, in no way was the layoff of white workers with greater seniority the direct result of the court’s order. *Stotts*, 104 S. Ct. at 2585. Instead, it was the city’s choice in reacting to the district court order that brought about the layoffs. See *supra* notes 131-33 and accompanying text. Perhaps it is these differing views of the same problem which cause the public’s dichotomous view of equal employment opportunity. Most would agree that integration is necessary in American society. See *infra* notes 237-46 and accompanying text. But the public may also view a court order as discriminating against whites. See, e.g., *supra* note 20.

\(^{174}\) The Court discussed the propriety of make-whole relief in seniority questions under Title VII despite the fact that the district court ordered no affirmative relief. *Stotts*, 104 S. Ct. at 2588-89.

\(^{175}\) *Supra* note 14.

\(^{176}\) Justice Blackmun provided a list. See, e.g., Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (approval of district court plan to integrate fire department providing relief to class of minority job applicants); Rios v. Enterprise Ass’n Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974) (class of prospective union applicants entitled to union membership); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) (consent decree initiated affirmative action relief need not be limited to individuals who proved discrimination, but is available to class of employees); Chisolm v. United States Postal Service, 665 F.2d 482, 499 (4th Cir. 1981) (affirming grant of affirmative relief to class of postal service employees subject to past discrimination); United States v. City of Alexandria, 614 F.2d 1358, 1363-66 (5th Cir. 1980) (consent decree allowing preferential hiring until class of minorities are properly represented, affirmed); United States v. I.B.E.W. Local 38, 428 F.2d 144, 149 (6th Cir. 1970), *cert. denied*, 400 U.S. 943 (1970) (district court erred in refusing to allow class-wide affirmative relief in pattern or practice case); United States v. City of Chicago, 663 F.2d 1354, 1360-61 (7th Cir. 1981) (class-wide affirmative action relief modified but approved in theory); Firefighters Inst. v. City of St. Louis, 616 F.2d 350, 362-63 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981) (class-wide relief held proper given history of discrimination); United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971) (upon showing Title VII violation, court is vested with broad remedial powers to remove vestiges of past discrimination and to assure lack of future barriers to class of qualified minority workers); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 944 (10th Cir. 1979) (absent showing that hiring patterns have improved, class-wide affirmative relief is proper). *Stotts*, 104 S. Ct. at 2606 n.10.
pions of individuals' civil rights. Antimajoritarian by their nature, the federal courts are the forum where an individual or a discrete minority can be heard.

Stotts may have a chilling effect on federal trial courts' discretion in future discrimination cases. Knowing that their decisions are to be subjected to such an extensive perusal, many judges are likely to adopt conservative approaches. This caution may further limit relief for victims of discrimination.

D. The Fundamental Misconception of Stotts

The Court has not yet determined whether discriminatory hiring and firing may be best considered under the same standard in a Title VII action. The bona fide occupational qualification is a necessary exception to absolute equal employment opportunity. Because of it and other reasons, it is extremely difficult for a Title VII plaintiff to prove a discriminatory animus. A hiring or personnel officer may, with minimal effort, find or rationalize a legitimate reason for an employment decision regarding an individual. Such legitimate reasons mask the inappropriate ones and shield the employer from liability. Possibly with this in mind, Congress declined to include a clause in Title VII that would allow any em-

177. The theoretical genesis of this trend was in Justice Field's dissent to the Supreme Court's abdication of this role in The Slaughterhouse Cases, 87 U.S. (16 Wall.) 36, 83 (1873). Federal courts began to be recognized as the primary protectors of individual liberties in the growth of the due process and equal protection clauses.


179. Such a result could have tragic consequences since many see the federal district courts as the "front line" of civil rights cases. Since the mid-1950's, the federal dockets have been increasingly filled by cases seeking the vindication of individual rights. See Miller, supra note 157 at 670-71.

180. In the face of uncertain Supreme Court precedent, federal district courts have, in many cases, applied conservative tests and thus have indicated that they will not go far in stretching precedent. Comment, Bona Fide Seniority Systems: Guidelines For the Use of Disparate Impact in the Teamsters Analysis, 31 UCLA L. REV. 886, 906-13 (1984).

181. Id.

182. "[I]t shall not be an unlawful employment practice for an employer to hire . . . on the basis of . . . religion, sex or national origin, . . . where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business . . . ." Civil Rights Act of 1964, Title VII, § 703(e), 42 U.S.C. § 2000e-2(e) (1982).


184. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973) (remanding to the trial court to determine whether respondent was not recalled from layoff because of his race or because of his participation in a "stall in").
ployer to terminate an employee "for cause." Regarding the same dilemma, the Supreme Court formulated the effects tests of disparate impact and disparate treatment as prima facie evidence of Title VII violations.

*Stotts* stops short of establishing disparate treatment. Possibly, a black could construct disparate treatment by showing that he was last hired, thereby being the first to be laid off, because he is black. The Court, however, would require proof of discriminatory intent, even when the black firefighter did not request affirmative relief.

Similarly, section 703(h) effectively eliminates disparate impact by requiring proof of discriminatory animus. Plaintiffs facing a bona fide seniority system that preserves a discriminatory status quo are often left with a futile search for evidence of discriminatory purpose. This requirement has greatly limited redress for impact victims. The effect of *Stotts* thus makes it worthwhile for a discriminating employer to avoid pretrial resolution, for it is now effectively sheltered from anything less than an adjudicated finding of discriminatory intent.

This dilemma may be the result of the Court's distinction between standards for discrimination in hiring and firing. One commentator avoids this problem as follows:

185. 110 CONG. REC. 2567 (1964) (remarks of Rep. Celler). Such a clause would be explicitly contradictory to the basic intent of Title VII as compared to the situationally contradictory nature of the bona fide seniority clause. See supra notes 45-48 and accompanying text.


187. The result in *Guardians*, however, was premised on the finding first that the hiring test was discriminatory. See supra notes 60-64, 67 and accompanying text. *Supra* note 67 and accompanying text. In *Stotts*, the minority firefighters were twice stopped short of proving actual discrimination or attaining any adjudication of the issue because of the imposition of the two consent decrees. Thus, the necessary "primary cause" was missing. *Supra* notes 84 and 87 and accompanying text.

188. *Stotts*, 104 S. Ct. at 2588 (respondents must show actual discrimination before receiving competitive seniority).

189. See supra notes 131-33 and accompanying text.

190. *Supra* note 44.


192. See, e.g., Comment, supra note 181.

193. Thus, in the future, the settlement rationale for upholding the decision of the court of appeals may be unpersuasive, for the Court effectively gutted it. *Stotts*, 104 S. Ct. at 2586-87. Yet, realizing that intent is so difficult for a Title VII plaintiff to prove, an employer may be willing to risk the costs of litigating the intent question. *But see supra* notes 153-57 and accompanying text.
To regard a limitation on the layoff of minority workers as a remedy for discontinued past hiring discrimination makes the layoff irrelevant, and transforms the case into a postponed hiring discrimination suit. Otherwise, a limitation on minority layoffs would have to be regarded as a remedy for the imbalance itself—a result which courts have indicated is barred. 

It is not difficult to envision *Stotts* as a delayed hiring discrimination case, for the consequences of discrimination in hiring and in layoff are substantially equal: gross underrepresentation of employed minorities. The two consent decrees indicate, at the very least, that disparate impact and treatment of minorities were a continuing concern. A hiring system in which sixty percent of blacks were adversely affected, as compared with seven percent of the whites, would not withstand judicial scrutiny under any circumstances.

Finally, the Court applied a long-term solution to what is purported to be a short-term problem. Affirmative action programs are, by definition, temporary. Once integrated employment is achieved the need for such programs is gone. Merit-based promotion and hiring can be reestablished; seniority-based layoffs can be legitimately revived. Employers are not “doomed” to affirmative action for all time, just until they integrate.

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194. Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1568 (1975). The author also suggests that the holding of *Griggs* indicates that courts may look to the express goal of nondiscrimination without feeling overly constrained by the legislative history of Title VII. *Id.* at 1552. Nevertheless, most of the major decisions of the area cite some part of the legislative history. *See supra* notes 39-40 and accompanying text.

195. *Memphis Fire Dep't*, 679 F.2d at 570-79 app.

196. *Id.* at 549.

197. Of course, there is no way to determine how many whites were adversely affected. Sixty percent of the blacks would have been adversely affected and they made up 11% of department personnel at the time of the layoffs. *Id.* at 550, n.5. One may estimate the number of whites affected by assuming a one-to-one adverse affect because of the one-to-one hiring ratio of the 1980 consent decree. *Id.* at 576 app. Given such an assumption, roughly seven percent of the whites would be so affected.

198. *Supra* note 2. *See also* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979) (affirmative action is a temporary measure, not intended to maintain a racial balance but to eliminate a manifest racial imbalance).

199. Strictly speaking, seniority-based layoffs were not eliminated, but simply broken down along racial lines. Such a classification is constitutionally permissible so long as there is a compelling state interest necessarily connected to the classification. In Regents of the University of California v. Bakke, 438 U.S. 265, 305-06 (1978) (opinion of Powell, J.), the “Brennan Four,” including Justice White, would allow such a classification if favorable to minorities and if there was an important and substantial state interest closely related to the classification. *Bakke*, 438 U.S. at 362 (Brennan, J., concurring in the judgment in part and dissenting). One example of a compelling state interest is the operational needs of a public safety department. *See infra* notes 221-24 and accompanying text.

200. There is a large body of opinion, however, that is concerned that, once in place, affirmative action programs will become permanent institutions. *See e.g.*, Van Alstyne, *Rites*
For the proponents of affirmative action, the encouraging note of *Stotts* is that it did not extend its holding to include voluntary affirmative action. The doctrine established in *United States Steelworkers v. Weber* remains alive. The Court does have the opportunity to clarify the *Weber* doctrine in its forthcoming decision in *Wygant v. Jackson Board of Education*. At issue in this case is whether the collective bargaining agreement between the Board and the teachers union can include a voluntary plan that would allow proportional layoffs. Because it was a voluntary program the Sixth Circuit Court of Appeals explicitly found that *Stotts* would not affect its decision. The Court may, however, take *Wygant* as an opportunity to expand *Stotts*, in light of recent cases distinguishing it in a variety of equal employment questions.

*Stotts* was to be limited to private, voluntary affirmative action, some courts have utilized it to approve public employment programs. Although *Weber* was to be limited to private, voluntary affirmative action, some courts have utilized it to approve public employment programs. The Court did not decide whether the city could have achieved the same result without violating the law by adopting an affirmative action program. *Stotts*, 104 S. Ct. at 2590.

The court of appeals quoted the opinion of the federal district judge quite liberally in finding that a voluntarily adopted layoff plan violated neither Title VII nor the equal protection clause of the fourteenth amendment. *Id.* at 1154-57. Dispositive to the Sixth Circuit was that the program was voluntarily initiated, by a vote of union membership, and was further subject to collective bargaining safeguards. *Id.* at 1158.

*Stotts* distinguished because no contention that bona fide seniority system was affected, no third party rights involved and voluntarily entered consent decree; EEOC v. Local 28 of Sheet Metal Workers Int'l Ass'n, 753 F.2d 1172 (2d Cir. 1985), cert. granted, 54 U.S.L.W. 3223 (U.S. Oct. 8, 1985) (No. 84-1656) (*Stotts* distinguished because no bona fide seniority plan, did not address prospective relief and defendants found to have intentionally discriminated against plaintiffs); Vanguards v. City of Cleveland, 753 F.2d 479, 485-89 (6th Cir. 1985) (*Stotts* distinguished because district court here did not interfere with existing seniority system and city here agreed to adopted plan); Boston Chapter, NAACP v. Beecher, 749 F.2d 102, 104 (1st Cir. 1984), cert. denied, 105 S. Ct. 2154 (1985) (*Stotts* distinguished on no seniority issue, no back pay controversy, no dispute on merits and no need to resurrect dead order); Hammon v. Barry, 606 F. Supp. 1082, 1094-95 (D.D.C. 1985) (no bona fide seniority plan); Britton v. South Bend Community School Corp., 593 F. Supp. 1223, 1230-31 (N.D. Ind. 1984) (involving voluntary affirmative action); NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194, 1202-03 (E.D. Mich. 1984) (distinguished because of prior judicial determination of past intentional discrimination and liability under the fourteenth amendment, in contrast to *Stotts* which involved Title VII);
about the future of voluntary, public affirmative action after *Stotts*.

Indeed, voluntarily assuming such a program may be the only effective way to shield it from review.

What is at risk are the many affirmative action programs initiated and overseen by consent decrees and conciliation agreements. *Stotts*’ attack on the district court’s resolution throws all such programs into question, unless *Stotts* is narrowed. The decision could be read as being limited to those consent decrees that are incomplete for some substantial reason, such as a lack of necessary parties, or to those which grant completely inappropriate relief. If so read, *Stotts* may come to mean only that the Court will not tolerate anything less than carefully crafted consent decrees. In future decisions the Supreme Court should leave intact self-curting decrees by reestablishing the judicial discretion in appellate review of trial court decisions.


207. Some have commented that *Stotts* will prove to be the undoing of voluntary affirmative action as well. See Neely, supra note 8, at 1775. It may instead sponsor a cautious promotion of voluntary programs in the public sector. So long as a politically responsible body, such as a city council or a state legislature, makes a finding of discrimination, that body can take affirmative steps to remedy the discrimination. If a politically responsive governmental body adopts a program that is deleterious to the majority, such a program will be spared heightened judicial scrutiny. Note, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 VA. L. REV. 1235, 1245-46 (1981). The Sixth Circuit found even a mayor’s task force to be such a politically responsive body. Detroit Police Officers’ Ass’n v. Young, 608 F.2d 671, 694 (6th Cir. 1979).

208. It has been estimated that 40% of the private sector’s employees are covered by the federal contract requirement of Executive Order 11,246 alone. OFCCP AND FEDERAL CONTRACT COMPLIANCE 7 (D. Copus & L. Rosenzweig eds. 1981).

209. The Court found the absence of the firefighters’ union as crucial to its interpretation of the consent decree. *Stotts*, 104 S. Ct. at 2586. But see supra note 111.

210. An award of back pay and competitive seniority could be inappropriate without a showing of actual discrimination. See supra notes 44-45.

211. *E.g.*, *The False Alarm of Firefighters Local Union No. 1784 v. Stotts*, 70 CORNELL L. REV. 991, 1006-09 (1985) (characterizing *Stotts*’ Title VII language as merely dicta). Contrary to the contentions of Assistant Attorney General Reynolds, participation by the Justice Department in the negotiation of various consent decrees may not be enough to call the validity of the decrees into question. Several critics have noted that the Justice Department’s attempt to retrospectively apply *Stotts* to those consent decrees in which it participated may be a conflict of interests. Neely, supra note 8, at 1773. At least one court has addressed the Justice Department’s about-face, allowing it to realign itself with Title VII defendants, but precluding it from asserting a position inconsistent with its consent decree obligations. *In re Birmingham Reverse Discrimination Employment Litigation*, 37 Fair Empl. Prac. Cas. (BNA) 1, 8 (N.D. Ala. 1985).
IV. THE PUBLIC INTEREST IN INTEGRATED PUBLIC EMPLOYMENT

A major reason for upholding affirmative action in public employment is the public's substantial interest in integration of the workplace. In some areas of public employment, the interest emerges as the need to employ persons who are familiar and can empathize with the specific concerns of those whom they are serving. In other areas the interest is in the wise and efficient use of tax revenues. Pervasive throughout, is the interest in protecting the fundamental rights of insular minorities. Overall, is the view that life is richer and more rewarding in a fully integrated society.

In public safety departments, the interest takes on an additional importance because what is at stake is the health and safety of the community as a whole. The overwhelming interest in integrated police departments can be amply shown. The Detroit police cases, linking both crime and public dissatisfaction with the racial makeup of urban police forces, are examples of this substantial public interest.

A. Police Departments

There are numerous substantiated examples of how police activity is directly affected by the racial mix of police departments. Racial makeup affects both the public's perception of the police and the department's own view of its constituent public. Race has been linked to the use of violence by police and to officer discretion. It has also been shown to be a substantial contributing fac-

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212. See infra notes 217-21 and accompanying text.
213. See infra note 230 and accompanying text.
214. See infra notes 217-36 and accompanying text.
215. Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979); Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983).
216. See, e.g., Smith & Hawkins, Victimization, Types of Citizen-Police Contacts, and Attitudes Toward the Police, 8 L. & Soc'y Rev. 135 (1973). Although Smith and Hawkins did not set out to link race and perceptions of the police, the import of their figures is undeniable; blacks' perception of the police is far more negative than is the whites'. White & Menke, On Assessing the Mood of the Public Towards the Police: Some Conceptual Issues, 10 J. of Crim. Just. 211, 213-14 (1982). This study was primarily a criticism of past attitudinal studies of the police-public perception, but it would not deny the effect of race on that perception.
217. Fyfe, Who Shoots? A Look at Officer Race and Police Shooting, 9 J. of Police Sci. & Ad. 367, 381 (1981). Fyfe found that black and Latino officers are more likely to fire a weapon, but that it could be attributed to racially varying assignments, socialization and residence.
218. Powell, Race, Rank and Police Discretion, 9 J. of Police Sci. & Ad. 383, 386
tor in many race riots.219

Several studies have hypothesized that an integrated police department is crucial for effective crime prevention.220 Indeed, several cases suggest that the public interest demands integration.221 The modern urban public demands more than highly effective law enforcement for the improvement of police community relations.222 Once this threshold of mutual trust has been passed, police efficiency will increase as a greater percentage of crimes will be reported and correspondingly, investigations are pursued with greater vigor. Many police departments are thus attempting to implement their own affirmative action programs.223

It is undisputed that, as a body, the police have more day-to-day opportunities to interact with the public than any other government entity.224 Such interactions run the gamut of interpersonal communications.225 Yet, the fact that police discrimination is more poten-

(1981). Powell hypothesized that “where there is a more racially balanced police department, there will be a more equal dispensation of discretion on the part of police.” Id. at 389 (emphasis in original).

219. Comment, Detroit Police Officers’ Association v. Young: The Operational Needs Justification For Affirmative Action in the Context of Public Employment, 7 BLACK L. J. 200, 201 (1982) (indicating that the hostility between Detroit’s black community and the then predominantly white police force was a substantial contributing factor to that city’s 1967 race riots). Berg, True & Gertz, Police, Riots, and Alienation, 12 J. OF POLICE SCI. & AD. 186 (1984). In a study made after Miami’s 1980 riots, these researchers found that black officers tend to be far less alienated from the community than white officers.

220. E.g., Note, Race as an Employment Qualification to Meet Police Department Operational Needs, 54 N.Y.U. L. REV. 413 (1979) (proposing an amendment to Title VII to allow race-conscious hiring in the public interest).

221. E.g., United States v. City of Chicago, 663 F.2d 1354, 1364 (7th Cir. 1981) (police force strained by discrimination is ineffective to the extent that discrimination renders it an alien body, not fairly representative of the community it serves); Castro v. Beecher, 365 F. Supp. 655, 659-60 (D. Mass. 1973) (consent decree affirmative action more likely to give people effective, nondiscriminatory police).


224. Unfortunately, these encounters are often marred by a lack of communication. Many civic leaders note the lack of empathy in the rank and file of police officers for the victims of crime and the elderly. GREATER CLEVELAND ROUNDTABLE, ACHIEVING BET- TER POLICE/MEDIA/COMMUNITY RELATIONS IN CLEVELAND 5-6 (1983).

225. Chief Justice Warren once characterized the range of police-community encounters as follows:

Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin
tially blatant and violent does not diminish the fact or effect of discrimination by other government employees.

B. The Public Employment

Elsewhere in the criminal justice system, the interest in integration is similar to that of the police departments. The large proportion of blacks arrested indicates a need for representative public defenders, probation officers and others to help ensure fairness.

The public interest in integration extends further still. Other agencies with a high number of societal interactions include welfare and other public relief and assistance organizations. Of course, the interest in a racial mix in these agencies does not extend because of the possibility of violence, or necessarily even for an efficient expenditure of funds, but for the requirements of the truly needy. An empathetic case worker is potentially better able to provide the assistance and advice needed to help assure that the less fortunate of society are afforded a modicum of human decency and dignity. Additionally, schools play a crucial role in the socialization of all youth. In multiracial school districts appropriate role models for minority students are critically important. Such role models both encourage minority students to higher aspirations and dispel stereotypes about race. Teacher role models can be especially critical because poor minority students are often deprived of other role models.

in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.

Terry v. Ohio, 392 U.S. 1, 13 (1968) (footnote omitted).

226. Supra notes 217-20 and accompanying text.

227. Supra notes 221-24 and accompanying text.

228. Bordua & Tift, Citizen Interviews, Organizational Feedback, and Police-Community Relations Decisions, 6 L. & Soc'y Rev. 155, 162-63, 167 (1971). Black youths were far more likely to resent being stopped by the police. Id.

229. Although economic efficiency is a compelling reason for integration, “the primary purpose of the Civil Rights Act of 1964... is the vindication of human dignity and not mere economics.” Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 291 (1964) (Goldberg, J. concurring).


231. Wygant, 746 F.2d at 1152.
Fire departments should be fully integrated if for no other reason than efficiency. The most serious potential result of a segregated fire department would be to avoid interaction with unfamiliar minorities altogether, by letting their homes burn. But fire departments have many opportunities for non-firefighting societal interactions, such as fire safety programs, fire inspections, arson investigations and paramedical emergency services. The greater the opportunity to interact, as indicated by the police example, the greater the opportunity for abuse of discretion and thus the importance of integration.

C. An Emerging Interest in an Integrated Society

Society has begun to recognize that integration is often an end in and of itself. The Supreme Court found that a suit for an integrated neighborhood may be brought by a white as well as by a black. If Title VIII remedies are not limited by race, then Title VII should not be so limited. When one may sue to integrate an apartment complex, then one should be able to bring a suit to integrate the workplace. Victimization in discrimination is not limited to minorities alone.

Actual victims of employment discrimination can demand affirmative relief. The courts have also held that such relief is appropriate in a class action suit in employment and elsewhere. When the goal of legislation is integration, not merely non-discrimination, it is counterproductive to adopt a policy that only proven

232. See, e.g., MANAGING FIRE SERVICES 322-24 (J. Bryan & R. Picard eds. 1979) (integrating fire departments may ultimately depend on society's goodwill).
234. See MANAGING FIRE SERVICES, supra note 233, at 145-266 (documenting the wide variety of fire department services).
235. Supra notes 217-27 and accompanying text.
238. As did the plaintiffs suing for an integrated apartment complex, a white worker may allege a loss of the benefit of interracial associations if an employer denies work to minorities. Traficante, 409 U.S. at 209-10.
239. Supra note 14.
240. Supra note 177 and accompanying text.
241. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (district court may order affirmative relief when local authorities have not met their obligation to proffer acceptable remedies in school desegregation).
victims of discrimination are "deserving" of affirmative relief.\textsuperscript{242} Such a policy is contrary to the long history of the federal government as the prime protector of minorities' rights,\textsuperscript{243} a thirty-year history of judicial intervention\textsuperscript{244} and twenty years of explicit legislation.\textsuperscript{245} Yet, the Reagan administration and the Supreme Court seem determined to reverse the underlying policy goals of their own cases, legislation and the public sympathy.\textsuperscript{246}

D. Alternatives to Seniority-Based Layoffs

Unlike those that the steel and automobile workers have experienced, layoffs of public employees, particularly municipal employees, can be seen as a reaction to an immediately pressing fiscal crisis rather than a massive economic retrenchment.\textsuperscript{247} Alternatives to these layoffs appear to be difficult to formulate as the legislatures have been unable to create equitable solutions, and the courts have been unwilling to suggest any.\textsuperscript{248} One commentator has divided the possible alternatives into preferential and non-preferential alternatives.\textsuperscript{249} Preferential alternatives are those remedies that are specifically race or agreement conscious.\textsuperscript{250} Proportional layoffs are an

\begin{footnotesize}
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  \item 242. Neely, supra note 9, at 1773; Assault on Affirmative Action, supra note 20, at 19.
  \item 243. Supra notes 178-79 and accompanying text.
  \item 244. See, e.g., Castaneda v. Partida, 430 U.S. 482 (1977) (grand jury indictments held invalid where jury rolls systematically underrepresented persons of defendants' races); Hunter v. Erickson, 393 U.S. 385 (1969) (city ordinance requiring housing alliances dealing with race held unconstitutional); Loving v. Virginia, 388 U.S. 1 (1967) (antimiscegenation statute violates equal protection); Anderson v. Martin, 375 U.S. 399 (1964) (statute requiring candidate's race to be on ballot violates equal protection).
  \item 246. See generally Nickel, Preferential Policies in Hiring and Admission; A Jurisprudential Approach 75 COLUM. L. REV. 534, 537-42 (1975) (defending preferential policies like affirmative action programs by three general justifications; compensatory justice, the public belief that recipients ought to be compensated for disadvantages; distributive justice, counterbalancing disadvantages with special opportunities; and utility, promotion of public welfare by better and more equitable utilization of public resources); Duncan, The Future of Affirmative Action: A Jurisprudential/Legal Critique, 17 HARV. C.R.-C.L. L. REV. 503, 552 (1982) (of Nickel's three rationales, the distributive justice model indicates the greatest amount of acceptability and should be utilized as foundation for affirmative action programs); Wright, supra note 124.
  \item 247. The steel and automobile industries have recently undergone massive layoffs caused by a basic economic retrenchment. Unlike these basic industries, it does not seem likely that our public safety departments will undergo a similar permanent layoff. Neither department appears likely to downscale operations and automation may eliminate selected positions only.
  \item 248. E.g., supra note 79.
  \item 250. Race-conscious alternatives involve an overt preference in that they offer the benefit
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example. Although they have received some favorable scrutiny and application, proportional layoffs seem an unhappy choice, because they run the risk of antagonizing both sides. Similarly, a preferential alternative based on a preexisting agreement, such as a memorandum of understanding, may exacerbate tensions along pre-existing seniority, and thus, racial lines.

Non-preferential alternatives seek to resolve conflicts equitably among the parties. The W.R. Grace solution of shifting the burden from between the employee groups back to the employer is an excellent example. Neither group is held out as more protected than the other. Some non-preferential alternatives, such as various seniority modifications, have already been enacted by private industry. Other suggestions include work sharing and wage and work concessions. The success of these suggestions depends upon a municipality's willingness to forego a "quick fix" layoff, for a far-reaching and equitable solution.

of job security by virtue of race. Id. at 538. Agreement-conscious alternatives, by comparison, offer an overt preference by the agreement that those who have the most seniority will have the benefit of job security. Id. at 544-45. See also Aaron, supra note 2, at 1534.


252. One commentator suggested that proportional layoffs are impermissible even under the Weber standards since they would fail most of the standards. Note, supra note 250, at 542-43.

253. This assumes that the preexisting agreement either actually discriminates or tends to discriminate along racial lines. See supra notes 43-46 and accompanying text.

254. Non-preferential alternatives benefit or burden all workers equally; they do not violate Title VII and are compatible with collective bargaining. Note, supra note 250, at 543.

255. Supra notes 134-42 and accompanying text.

256. Seniority modifications include the consolidation of seniority lists at different plants or stations of the same employer and from department to plantwide seniority systems. Note, supra note 250, at 545-56. The EEOC is actively requesting information and suggestions for further alternatives. Layoffs and Equal Employment Opportunity, 45 Fed. Reg. 60,832 (1980).

257. Such modifications would have been useless in Stotts, where Memphis set its layoff policy on a citywide basis. Stotts, 679 F.2d at 549.


259. Note, supra note 250, at 544-45; See also, Burke & Chase, Resolving the Seniority/Minority Layoffs Conflict: An Employer-Targeted Approach, 13 HARV. C.R.-C.L. L. REV. 81, 95-97 (1978) ("full payroll remedy" that requires employers to continue benefits and otherwise uncompensated pay to laid-off workers with seniority and keep minority affirmative action hires employed).
V. CONCLUSION

The Supreme Court has determined that minority rights to equal employment opportunity must take a back seat to legitimate seniority expectations. The end result, on its face, is defensible, but its possible ramifications are not. The Court may only have indicated that greater care should be taken in formulating consent decrees, but the language of the decision suggests that the Court said far more. The decision may be defended because there was no adjudicated, final showing of actual discrimination\(^{260}\) and because an arguably necessary party to the decree was not joined.\(^{261}\) Precedent suggested, at the very least, that the case deserved a special investigation of all the interests involved that would lead to a precise and narrow decision.\(^{262}\)

Instead, the Court chose to paint in broad strokes, mischaracterizing the very heart of the case and the relief sought.\(^{263}\) The Court's somber opinion of affirmative action puts that remedy in a dim light. The Court seemed to ignore years of precedent and legislation upholding minority rights.\(^{264}\) The tone of the opinion was noticed by a conservative President, whose enforcement of its interpretation of the case may sweep even wider than the Court intended.\(^{265}\) Given that possibility and the public interest in integration,\(^{266}\) the Court should grasp the next opportunity to confine \textit{Stotts} to those aspects that made the decision defensible.

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\begin{itemize}
\item \textit{Stotts}, 104 S. Ct. at 2588.
\item \textit{Id.} at 2586.
\item \textit{See supra} notes 59-79 and accompanying text.
\item \textit{See supra} notes 167-82 and accompanying text.
\item \textit{See supra} notes 237-47 and accompanying text.
\item \textit{See supra} notes 8 and 247 and accompanying texts.
\item \textit{See supra} notes 213-47 and accompanying text.
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