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DID THE STOTTS DECISION REALLY SPELL THE END OF RACE-CONSCIOUS AFFIRMATIVE ACTION?*

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I. INTRODUCTION

The June 12, 1984 decision of the Supreme Court in *Firefighters Local Union No. 1784 v. Stotts*,[1] clearly limits the power of the federal courts to immunize persons who are not actual victims of discrimination from layoffs that result from the application of a *bona fide* seniority system. The *Stotts* decision also clearly reaffirms the policy of Section 706(g) of Title VII that "make-whole" relief (relief designed to put specific injured individuals in the place they would be if no injury had occurred) should be awarded only in favor of individual identifiable victims of discrimination.[2]

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1. 104 S. Ct. 2576 (1984).

2. *Id.* at 2588-89. "Make-whole" relief, as the term suggests, is relief designed to "make persons whole for injuries suffered (by them) on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Such relief may take the form of back pay, payment of the value of past fringe benefits and retroactive seniority. *See* Berkman v. City of New York, 705 F.2d 584, 596 (2d Cir. 1983).

What is not clear, however, is whether the *Stotts* decision applies beyond the seniority or make-whole relief contexts—or the extent, if any, to which it affects the unbroken string of cases holding that Section 706(g) authorizes the courts, in appropriate circumstances, to order affirmative race-conscious remedies to correct the effects of prior discrimination. Among the most vocal advocates of a broad reading of *Stotts* are high-ranking officials at the United States Department of Justice, who have suggested that the Supreme Court, in *Stotts,* barred all race-conscious affirmative relief not specifically limited to identifiable victims of discrimination. Obviously, the scope of the *Stotts* ruling is important to litigants on both sides of employment discrimination cases. Decisions to settle or not to settle, or strategies in lawsuits which turn out to have been based upon an incorrect assessment of the reach of *Stotts* could have significant fiscal and operational consequences.

This article will address two central questions:

1. Is it a fair reading of *Stotts* to conclude that the Supreme Court has barred *any* Title VII relief not specifically limited to identifiable victims?
2. What are the practical implications for Title VII enforcement if a victim-specific limitation is applied not only to the provision of make-whole relief, but also to all forms of Title VII relief, including race-conscious affirmative action?

II. In *Stotts* Did The Supreme Court Bar All Race-Conscious Relief Not Specifically Limited to Identifiable Victims of Discrimination?

For the past several years, some litigants, including the Justice Department, have argued in various courts that race-conscious, affirmative action remedies are illegal and unconstitutional. Most of the voluminous case law is to the contrary. But these litigants have now, in effect, declared victory by virtue of the *Stotts* decision. They suggest that in *Stotts* the Supreme Court held that Section 706(g) of Title VII of the Civil Rights Act of 1964[3] "precludes any award of affirmative equitable relief . . . that benefits individuals who have not been found to have

3. 42 U.S.C. § 2000e-5(g) (1982).

been actual victims of illegal discrimination."[4]

We submit that, regardless of what some might wish the Supreme Court to have held in *Stotts*, the case simply does not support the contention that the Court has now adopted a startling and radical change in longstanding employment discrimination law. On the contrary, the *Stotts* decision is a statement of the limitations that Section 703(h) of Title VII imposes on the relief available in the face of a *bona fide* seniority system; it is not a statement on the availability of affirmative race-conscious relief under Title VII as a general matter.

Quite apart from seeking to extend *Stotts* beyond the context of *bona fide* seniority systems, expansive readings of *Stotts* also ignore the well-established distinction in Title VII law between the availability of "make-whole" relief and affirmative race-conscious relief. That distinction is supported by extensive case law and has been recognized by the Supreme Court itself. The Court's discussion in *Stotts* and other cases of the victim-specific limitation on "make-whole" relief under Section 706(g) cannot be read to mean that all relief under Title VII must be limited to identified individual victims of discrimination. Such a change in the law would undermine crucial policies underlying Title VII, would be inconsistent with principles established by the Court in previous cases, and does not follow from the logic of the Court's opinion in *Stotts*. A proper reading of the opinions in *Stotts* does not support the "victim-specific" argument.

A. The Narrow Holding of Stotts

The holding of *Stotts* is clear. It is a narrow holding: Section 703(h) of Title VII prohibits a court from insulating blacks who are not proven victims of discrimination from layoffs that occur pursuant to the routine application of a *bona fide* seniority system. In order to understand the limited context of this holding, we will briefly review the history of the *Stotts* case.

Stotts was filed as a class action in 1977 by black employees of the Memphis, Tennessee, Fire Department. The complaint alleged widespread racial discrimination on the part of the fire department and city officials, in violation of Title VII of the Civil

4. Reply brief of United States at 7-8, Paradise v. Department of Public Safety, No. 84-7053 (11th Cir.), pending.

Rights Act of 1964, and 42 U.S.C. §§ 1981 and 1983.[5] After some discovery, but before trial, the case was settled by consent decree, which was approved and entered on April 25, 1980. Under the decree, the City was required to promote thirteen named individuals and to provide back pay to eighty-one others. The decree also established a long-term hiring goal of increasing minority representation in each job classification in the fire department to approximately the proportion of blacks in the labor force in Shelby County, Tennessee, as well as interim hiring and promotion percentage goals.[6]

In May 1981, the City announced that projected budget deficits would require a reduction of nonessential personnel employed by the City. Layoffs were to be based on the "last hired, first fired" rule incorporated in the City's memorandum with the union. At the plaintiffs' request, however, the district court issued a temporary restraining order forbidding the layoff of any black employee. The district court subsequently ruled that the City's seniority system was not *bona fide* within the meaning of Section 703(h)[7] and entered an order prohibiting the City from applying the "last hired, first fired" rule so as to decrease the percentage of blacks in certain job classifications within the fire department.[8]

On appeal, the Court of Appeals for the Sixth Circuit rejected the district court's conclusion that the City's seniority system was not *bona fide*,[9] but affirmed the order. The court reasoned that the consent decree itself had been properly approved by the district court[10] and that the order regarding layoffs was a measure to enforce the terms of that valid decree.[11] Alternatively, the court held that the district court's order was a

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5. 42 U.S.C. §§ 2000e *et seq.*

6. 104 S. Ct. at 2581.

7. 42 U.S.C. § 2000e-2(h) (1982). Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2(h).

8. *See* 104 S. Ct. at 2582.

9. Stotts v. Memphis Fire Department, 679 F.2d 541, 551 n.6 (6th Cir. 1982).

10. *Id.* at 551-56.

11. *Id.* at 561.

valid modification of the decree, based on new and unforeseen circumstances.[12]

The Supreme Court reversed. According to the Court, the central issue was "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."[13] In resolving that issue, the Supreme Court rejected the reasoning of the court of appeals that the layoff order was simply designed to enforce the terms of a valid consent decree. The Court did *not* rule that the underlying decree establishing the hiring and promotion goals was unlawful. Rather, the Court held that the consent decree, properly construed, did not contemplate a modification of the City's seniority-based layoff policy as a means of complying with those goals.[14]

The Court then went on to analyze the proposition that new and unforeseen circumstances justified the layoff order as a modification of the consent decree. In this connection, the Court noted that Section 703(h) of Title VII[15] immunizes *bona fide* seniority systems from challenge under Title VII, absent proof of intentional discrimination, and that the court of appeals had found the City's "last hired, first fired" policy to be part of a *bona fide* seniority system.[16] The Court reiterated the holdings of *Franks v. Bowman Transportation Co.*,[17] and *International Brotherhood of Teamsters v. United States*:[18] Remedial seniority under an existing seniority system may be awarded to identifiable individual victims of discrimination (even though remedial seniority would give such victims preferential rights over persons who have in fact been employed in the relevant position for a longer period); but such relief, when the provisions of Section 703(h) are applicable, may be awarded only to such victims.[19] Because the blacks whose jobs were protected under the district court's layoff order were not specifically proven victims of dis-

12. *Id.* at 562-63.
13. 104 S. Ct. at 2585 (footnotes omitted).
14. *Id.* at 2585-86.
15. 42 U.S.C. § 2000e-2(h) (1982).
16. 104 S. Ct. at 2587.
17. 424 U.S. 747 (1976).
18. 431 U.S. 324 (1977).
19. 104 S. Ct. at 2588.

crimination, the Court concluded that the layoff order imposed relief "that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed" but failed to show that the specific incumbents had been victimized by that discrimination.[20] On this basis, the Court held that the layoff order at issue was unlawful.

B. Expansion of the Court's Holding from the Context of Make-Whole Relief to All Affirmative Race-Conscious Relief is Unwarranted

Having held that Section 703(h) (immunizing *bona fide* seniority systems) required reversal of the court of appeals' judgment, the Court went on to note that this result "is consistent with the policy behind Section 706(g) of Title VII, which affects the remedies available in Title VII litigation."[21] That policy, according to the majority opinion, "is to provide *make-whole* relief only to those who have been actual victims of illegal discrimination." (emphasis added)[22]

Justice White's discussion of the policy behind Section 706(g) is limited to the "make-whole" relief context. The Court did *not* suggest that the victim-specific limitation that Section 706(g) places on "make-whole" relief prevents courts from granting any otherwise appropriate relief that might benefit persons not identifiable as individual victims of discrimination.

Those who argue that the Supreme Court, in *Stotts*, extended the victim-specific limitation to "any award of affirmative equitable relief" ignore the distinction, commonly accepted in the law of employment discrimination, between retrospective, victim-specific "make-whole" relief and prospective, race-conscious remedies. At bottom, this argument assumes that the Supreme Court's discussion of the policies limiting awards of "make-whole" relief was designed to overrule an overwhelming body of case law wholly unrelated to "make-whole" relief and that the Supreme Court did so without even referring to that case law or to the policies underlying it.

Section 706(h) of Title VII provides:

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20. *Id.*
21. *Id.* at 2588-89.
22. *Id.* at 2589.

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate . . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of Section 704(a) of this title.[23]

In determining what relief is "appropriate" under Section 706(g), it has long been recognized that "the scope of a district court's remedial powers . . . is determined by the purposes of the Act."[24] It is equally well-established that Title VII is propelled by dual purposes—(1) "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,"[25] and (2) "to make persons whole for injuries suffered on account of unlawful employment discrimination."[26]

Not surprisingly, these dual policies have prompted courts to fashion a variety of remedies for Title VII violations, tailored to the circumstances of particular cases. Thus, the "make-whole" policy of Title VII requires that individual victims of discrimination "be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."[27] Such "make-whole" relief may include back pay or an

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23. 42 U.S.C. § 2000e-5(g) (1982).

24. *Teamsters*, 431 U.S. at 364.

25. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

26. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). *See Teamsters*, 431 U.S. at 364; *Stotts*, 104 S. Ct. at 2593 (O'Connor, J., concurring).

27. *Franks*, 424 U.S. at 764 (quoting Section-by-Section Analysis of H.R. 1746, accompanying the Equal Employment Opportunity Act of 1972—Conference Report, 118

award of constructive seniority with its attendant competitive advantages.[28] On the other hand, and quite apart from the "make-whole" policy of Title VII, the courts of appeals have unanimously recognized that in some cases, the need to eradicate the effects of widespread discrimination calls for prospective, race-conscious affirmative relief.[29] The purpose of such relief is not to benefit the individual victims of prior discrimination, but to remedy the discrimination suffered by a class of persons.[30]

Class discrimination, by definition, means that persons were victimized based on their class characteristics, not their individual abilities. Indeed, class discrimination was so effective, in

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Cong. Rec. 7166, 7168 (1972) [hereinafter cited as Analysis of H.R. 1746], *reprinted in* Subcomm. on Labor of the Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, at 1844, 1848 (1972) [hereinafter cited as 1972 Leg. Hist.].

28. *See supra* note 2.

29. *See, e.g.*, Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir. 1982); Chisholm v. United States Postal Service, 665 F.2d 482, 499 (4th Cir. 1981); United States v. City of Chicago, 663 F.2d 1354 (7th Cir. 1981) (en banc); Firefighters Institute v. City of St. Louis, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); United States v. City of Alexandria, 614 F.2d 1358, 1363-66 (5th Cir. 1980); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-44 (10th Cir. 1979); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rios v. Enterprises Ass'n Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544, 553-54 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); United States v. I.B.E.W., Local No. 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970). It is worth noting that many of these and other similar cases were brought by the Justice Department. The Department had also traditionally argued, until almost a year after the current Administration took office, that affirmative race-conscious relief is more effective than make-whole relief, such as back pay. Thus, the Department of Justice is in the anomalous position of having sought and secured broad affirmative relief in numerous cases (in lieu of attempting to secure complete "victim-specific" relief) and now arguing that such relief is illegal because it is not "victim-specific."

30. In a law enforcement context, the operational needs of the law enforcement agency involved constitute an additional and compelling justification for affirmative race-conscious relief. The courts have recognized that effective crime prevention and solution depend on public support and cooperation and that such support will not exist if the black community perceives the law enforcement agency "as part of the white establishment with little interest in their problems." Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981); *see* Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); United States v. City of Chicago, 663 F.2d 1354, 1364 (7th Cir. 1981) (en banc). That perception will exist so long as the public is confronted with gross under-representation of blacks, especially in the higher ranks, in many law enforcement agencies.

many instances, that it is impossible to identify specific victims. The courts have repeatedly recognized that a widespread reputation for discrimination on the part of an employer deters otherwise qualified applicants from applying for employment.[31]

The last sentence of Section 706(g), which forbids courts to order the "hiring, reinstatement, or promotion of an *individual* as an employee, if such individual was . . . refused employment or advancement or was suspended or discharged for any reason other than discrimination . . . ." (emphasis added), has no bearing on affirmative race-conscious relief. That language merely precludes a court from ordering that a *particular* individual be hired, promoted or reinstated if an employer has refused to hire or promote him, or has discharged him, for nondiscriminatory reasons.[32] Affirmative race-conscious remedies do not require the hiring, promotion or reinstatement of any *particular* individual. They do not create a right to a particular job on behalf of any *particular* individual. Rather, they are designed to overcome past discrimination and prevent its recurrence.

As Justice Blackmun observed in *Stotts*, in commenting on race-conscious relief:

> The purpose of such relief is not to make whole any particular individual, but rather to remedy the present classwide effects of past discrimination or to prevent similar discrimination in the future. Because the discrimination sought to be alleviated by race-conscious relief is the classwide effects of past discrimination, rather than discrimination against identified members of the class, such relief is provided to the class as a whole rather than to its individual members. . . . The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a claim to it, and individual beneficiaries of the relief need not show that they were themselves victims of the discrimination for which the relief was granted.[33]

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31. *See, e.g.*, Lea v. Cone Mills Corp., 301 F. Supp. 97, 102-03 (M.D.N.C. 1969), *aff'd in relevant part*, 438 F.2d 86 (4th Cir. 1971).

32. EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 176 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

33. 104 S. Ct. at 2606 (Blackmun, J., dissenting); *see also*, Berkman v. City of New York, 705 F.2d 584, 595-96 (2d Cir. 1983). Justice Blackmun dissented from the major-

If Congress had meant, in Section 706(g), to forbid remedial preferences for blacks as a class in order to eliminate the effects of prior discrimination, it could have said so. But it did not. Indeed, when the opportunity to enact such a provision presented itself, Congress flatly rejected it. During the Senate's consideration of the Equal Employment Opportunity Act of 1972, Senator Ervin proposed an amendment providing that no agency or officer of the federal government shall require an employer to hire persons of a particular race "in either fixed or variable numbers, proportions, percentages, quotas, goals, or ranges."[34] Senators Javits and Williams spoke against the Ervin amendment, arguing that the amendment would deprive the courts of power to remedy discrimination under Title VII.[35] The amendment was defeated by a vote of 44 to 22.[36]

The use of race-conscious affirmative action to remedy the widespread effects of discrimination in appropriate cases is commonplace in employment discrimination law.[37] The permissibility of such relief was reiterated after the decision in *Stotts* by the Court of Appeals for the District of Columbia Circuit, when the government argued to the contrary.[38]

The distinction between such race-conscious relief and

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ity's treatment of the mootness issue in *Stotts* and from its treatment of the standards for granting a preliminary injunction. He also took issue with the Court's discussion of Section 706(g). Justice Blackmun, however, did not construe the majority opinion as barring all affirmative race-conscious relief and thus had no occasion to dissent from any such proposition. *See* 104 S. Ct. at 2610 (Blackmun, J., dissenting).

34. 118 CONG. REC. 1662 (1972), 1972 Leg. Hist., *supra* note 27, at 1039.

35. 118 CONG. REC. at 1675, 1972 Leg. Hist., *supra* note 27, at 1071 (remarks of Sen. Javits); 118 CONG. REC. at 1676, 1972 Leg. Hist., *supra* note 27, at 1072-73 (remarks of Sen. Williams).

36. 118 CONG. REC. at 1676, 1972 Leg. Hist., *supra* note 27, at 1073-75. Congress's rejection of the Ervin amendment must be understood as an endorsement of then-existing case law authorizing race-conscious relief benefiting others than identifiable victims of discrimination. Whatever may be said about Congress's intent to codify existing Title VII case law as a general matter, *see Stotts*, 104 S. Ct. at 2590 n.15, Congress plainly intended to continue in force the case law authorizing such race-conscious relief in appropriate circumstances. During the debate on the Ervin amendment, Senator Javits had printed in the Congressional Record two decisions granting and upholding relief. 118 CONG. REC., 1666-75 (1972), 1972 Leg. Hist., *supra* note 27, at 1048-70. Nevertheless, the Senate rejected Senator Ervin's effort to change the law.

37. *See supra* note 29; *see also* Williams v. City of New Orleans, 729 F.2d 1554, 1557 (5th Cir. 1984) (en banc).

38. Segar v. Smith, 34 Empl. Prac. Dec. (CCH) ¶ 34,488 at 34, 109-10, 35 Fair Empl. Prac. Cas. (BNA) 31, 63-64 (D.D.C. June 22, 1984).

"make-whole" relief, and the distinction between their policy underpinnings, are matters of hornbook Title VII law.[39] The Supreme Court has recognized the distinction.[40] In *Stotts*, however, the majority did not even allude to the distinction, much less announce its demise. Rather, the Court explicitly restricted its language pertaining to the victim-specific limitation of Section 706(g) to "make-whole" relief.[41] Any attempt to extend the Supreme Court's pronouncement on "make-whole" relief to the area of race-conscious remedies designed to eradicate the effects of past discrimination is simply wrong.

C. The Stotts Decision, Properly Read, Does Not Support the Argument that the Court Barred All Title VII Relief Not Specifically Limited to Identified Victims

A close reading of the opinions in *Stotts* establishes conclusively that the Supreme Court's decision simply does not support the argument that the Court struck down all Title VII relief that is not "victim specific." Although the Supreme Court has yet to address the question of what circumstances justify court-ordered affirmative race-conscious relief, it is clear that no majority of the Court has suggested, in *Stotts* or elsewhere, that such remedies are flatly prohibited.

Two of the six Justices who agreed with the result in *Stotts* expressly stated that the race-conscious relief afforded by the layoff order before the Court could have been sustained under appropriate circumstances. Justice Stevens took the view that the layoff order would have been permissible had it been an order enforcing the underlying consent decree, rather than a modification of the decree.[42] Justice O'Connor found that the order

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39. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1396-1412 (2d ed. 1983).

40. *See Teamsters*, 431 U.S. at 330-31 n.4, 361 n.47.

41. *See* 104 S. Ct. at 2589.

42. 104 S. Ct. at 2595 (Stevens, J., concurring). The argument that the majority in *Stotts* rejected Justice Stevens' view relies on a mischaracterization of the Court's opinion. The majority opinion of Justice White took issue with Justice Stevens' suggestion that Title VII is irrelevant to a case involving the administration of a consent decree, not with his statement that the relief involved would have been permissible if contemplated by the consent decree. *See* 104 S. Ct. at 2587 n.9. Indeed, Justice White's rebuttal of Justice Stevens' position is painstakingly limited to the issues raised by the district court's modification of the consent decree over the objection of one of the parties. The

requiring maintenance of a percentage of blacks in various job classifications within the Memphis Fire Department would have been justified if the plaintiffs had "presented a plausible case of discriminatory animus in the adoption or application of the seniority system."[43] The opinion of the Court in *Stotts*, in which Justice O'Connor joined, cannot plausibly be read to create an absolute ban against affirmative race-conscious relief.[44]

The majority opinion itself is inconsistent with the broad reading that *Stotts* barred all non-victim-specific Title VII relief. That interpretation would lead inexorably to irreconcilable inconsistencies and anomalies in the Court's decision.[45] The underlying consent decree in *Stotts* imposed percentage goals on the City, and the court of appeals, in analyzing the lawfulness of the district court's layoff order, was constrained to pass on the lawfulness of the underlying decree, which it upheld.[46] The Supreme Court, however, nowhere suggests that the goals imposed by the underlying decree were unlawful, a view that plainly would have rendered the Court's interpretation of the decree

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majority opinion may in fact be searched in vain for any suggestion that the same result would have been obtained if the district court's order had constituted enforcement, rather than modification, of the decree. The Court expressly withheld judgment on the question whether the race-conscious relief at issue would have been lawful if the defendant employer had agreed to it. *Id.* at 2590. Needless to say, if the Court were of the view that the layoff order could not lawfully have been imposed as a measure to enforce the decree, the whole portion of the opinion holding that the order went beyond the decree would have been meaningless surplusage. An opinion of the Supreme Court should not be construed to make much of it surplus. In any event, even if, as some argue, five Justices could be understood to have rejected the position of Justice Stevens referred to in the text, one of those five, Justice O'Connor, found that the layoff order could have been lawful under other circumstances. There is thus simply no majority of the Court prepared to hold affirmative race-conscious remedies flatly unlawful.

43. *Id.* at 2592 (O'Connor, J., concurring).

44. *See* NAACP v. Detroit Police Officers Ass'n, 35 Fair Empl. Prac. Cas. (BNA) 630 (E.D. Mich. July 25, 1984). As the district court noted in the *Detroit Police Officers* case, the Supreme Court, shortly after announcing its decision in *Stotts*, declined to review the decision in Arthur v. Nyquist, 712 F.2d 816 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 355 (1984), which had upheld affirmative race-conscious relief.

45. Indeed, Justice White, in the majority opinion, expressly recognized that in certain cases, a district court may award relief benefiting those who are not proven victims of discrimination: "Title VII precludes a district court from displacing a non-minority employee with seniority under the contractually established seniority system absent *either* a finding that the seniority system was adopted with discriminatory intent *or* a determination that such a remedy was necessary to make whole a proven victim of discrimination." 104 S. Ct. at 2587 n.9 (emphasis added).

46. *See Stotts*, 679 F.2d at 551-56.

and its discussion of Section 703(h) and the limits on "make-whole" relief—in effect, the body of its opinion—unnecessary. In view of the Court's recognition that "when a change in the law [brings] the terms of a decree into conflict with the statute pursuant to which it was entered, the decree should be modified . . . ,"[47] the absence of any suggestion that the underlying decree in *Stotts* should be modified must mean not only that the Court was not addressing, in its opinion, the lawfulness of affirmative race-conscious remedies as a general matter but also that it considered the decree lawful.

Thus, a broad reading of the *Stotts* case as a bar to all non-victim-specific relief is not a fair reading of what the Court decided. Given, however, that this view may indeed be followed in the future by some courts, government agencies or employers, we will next address the practical implications on Title VII enforcement of a victim-specific limitation on all Title VII relief.

III. The Practical Implications for Title VII Enforcement if a Victim-Specific Limitation Were Applied to All Title VII Relief

In this section, we will describe how a victim-specific limitation on all Title VII relief would impede the critical goals of Title VII. Already, this interpretation of the *dicta* in Justice White's opinion has provided an opportunity for some government agencies to avoid their duty to obey and enforce Title VII. Instead, these entities have been encouraged to ignore or even to retreat from the critical objective of Title VII—"to eliminate, so far as possible, the last vestiges" of discrimination.[48] A brief review of the context of the Alabama state troopers case, *Paradise v. Department of Public Safety*[49] will illustrate the devastating potential impact of such an overly-broad reading of *Stotts*.

The district court in *Paradise* found in 1972 that defendants had engaged in a blatant and continuous pattern of racial discrimination for thirty-seven years. During that period the Alabama Department of Public Safety had not had a single black

47. 104 S. Ct. at 2587 n.9 (citing System Fed'n No. 91 v. Wright, 364 U.S. 642, 651 (1961).

48. *See Albemarle Paper Co.*, 422 U.S. at 418.

49. *See supra* note 4.

trooper. In late 1978, nearly seven years after a hiring requirement was imposed in the case, the department did not have a single black corporal. By the end of December 1983, the Alabama Department of Public Safety did not employ a single black at any rank above corporal, and only four of its sixty-six corporals were black—these four having been promoted under a procedure agreed to in order to settle claims brought by plaintiffs.

Can it be seriously argued that the "last vestiges" of employers' discriminatory practices can ever be eradicated, if defendants in cases like the Alabama state troopers case are required to hire or promote only those blacks who can prove that, as individuals, they are victims of discrimination? Such a limitation on the remedial powers of the courts would simply ignore the realities of employment discrimination.

Many cases are not limited to findings of individual, discrete wrongs against a few identifiable black victims, which could be remedied by making such victims whole. In the real world of employment practices, there are cases that involve long-standing and blatant discrimination against *all* blacks.[50] The only effective remedy in such cases is one benefiting blacks as a *class*.[51] Indeed, limiting relief to identifiable individual victims of discrimination would only enable an employer bent on maintaining an all-white work force to succeed in its goal.

Where, as in the Alabama state troopers case, there has been blanket and widely-known discrimination against all blacks for a long period, it may be impossible to identify specific individuals who can prove they would have applied for and secured employment with defendants if not for their policy of discrimination.[52] Even if such victims could be identified, "make-whole" relief would be wholly unrealistic. Many of the blacks who might

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50. Indeed, as the Fifth Circuit has recognized, "racial discrimination is by definition class discrimination. . . ." Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968).

51. *See* United States v. Bethlehem Steel Corp., 446 F.2d 652, 660 (2d Cir. 1971).

52. *See* United States v. Louisiana, 225 F. Supp. 353, 397 (E.D. La. 1963), *aff'd* 380 U.S. 145 (1965). Similarly, where an employer uses a discriminatory testing procedure, it would be impossible to determine which of the blacks who have been denied jobs by virtue of that procedure would have been hired or promoted had a nondiscriminatory procedure been in place. In such cases, only class-based relief can ensure eradication of the effects of discrimination. *See, e.g.*, Ensley Branch, NAACP v. Seibels, 13 Empl. Prac. Dec. (CCH) ¶ 11,504, 14 Fair Empl. Prac. Cas. (BNA) 670 (N.D. Ala. Jan. 10, 1977), *cert. denied sub nom.* Martin v. Personnel Board of Jefferson County, 449 U.S. 1061 (1980).

have applied for jobs with the Alabama Department of Public Safety during the thirty-seven years of its notorious reputation for discrimination have undoubtedly gone on to other employment and are no longer interested in working for the Department of Public Safety;[53] still others may be dead. And as to those—if such exist—who can prove they would have been hired and are available for hiring now, it would be impossible in some cases to judge what positions they would have attained by now, had they been hired at some point since 1935. Despite these problems of proof, it is beyond doubt that, absent the department's policy of discrimination, *some* blacks would have been hired during that period, and *some* blacks would by now have been promoted.[54] The "last vestiges" of the department's discrimination cannot be eradicated unless they can be ordered to hire and promote *some* blacks now.

In view of the inefficacy of "make-whole" relief in cases such as the one just described, it is plain that an employer determined to continue in its practice of class-wide discrimination would have every incentive to do so, and to prolong employment discrimination litigation to which it is a party, if class-wide race-conscious relief were unavailable. In such circumstances, an employer might be faced with a hollow finding of liability but would not be required to do anything inconsistent with maintaining an all-white work force. If identifiable victims of discrimination did come forward, such an employer would be encouraged to prolong the litigation until the plaintiffs move away, seek and gain other employment or die. In short, we can only guess whether there would be a single black state trooper in Alabama today, were it not for the district court's order imposing a hiring goal in 1972—an order that those advocating a broad reading of *Stotts* would view as unlawful.

The Alabama state troopers case and many like it are not cases in which race-conscious relief was imposed simply to achieve a particular proportion of minority employees, as an end in itself.[55] Rather, they are cases in which the outrageous record of discrimination by defendants compels the conclusion that

53. *See* United States v. Sheet Metal Workers Int'l Ass'n, Local Union No. 6, 416 F.2d 123, 132 (8th Cir. 1969).

54. *See Teamsters*, 431 U.S. at 339-40, n.20.

55. *See* 42 U.S.C. § 2000e-2(j).

nothing short of affirmative race-conscious relief can even have a chance of erasing the grievous effects of defendants' practices. The course urged by those who would require proof of individual victimization, even in cases of clear discrimination, would have the effect, if not motivated by an intent, of ensuring the preservation and perpetuation of the effects of past discrimination and eliminating any realistic hope that, within the foreseeable future, blacks will be represented in the work forces of discriminatory employers in proportions even marginally approaching those that might have been expected were it not for the discriminatory practices.

The Supreme Court's treatment of race-conscious affirmative action in other contexts underscores the problems raised by an overbroad reading of *Stotts*. The Court has steadfastly held that race-conscious actions by public entities are not only constitutional but a most appropriate means of remedying the effects of past discrimination.[56] Yet to construe the Court as holding in *Stotts* that Congress somehow intended to constrain the remedial power of the courts within limits not required by the Constitution would fly in the face of the oft-repeated policy underlying Title VII remedies: "to make possible the 'fashioning [of] the most complete relief possible.' "[57]

In addition to undermining the "fashioning of the most complete relief possible," the victim-specific limitation would have serious adverse consequences with respect to the settlement of Title VII lawsuits, or at least for settlements prior to extensive discovery and litigation. If proof of discrimination against specifically identifiable victims is necessary before any relief can be effectuated, the incentive for settlement of Title VII class actions on the part of both counsel for plaintiffs and defendants would diminish sharply. Counsel for the plaintiffs, being held to a standard of proving discrimination against each

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56. *E.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978) (opinion of Powell, J.); *Id.* at 355-79 (opinion of Brennan, White, Marshall and Blackmun, JJ.); United Jewish Orgs. of Williamsburgh v. Carey, 430 U.S. 144 (1977); McDaniel v. Barresi, 402 U.S. 39 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969).

57. *See Albemarle Paper Co.*, 422 U.S. at 421 (quoting Analysis of H.R. 1746, 118 CONG. REC. at 7168, 1972 Leg. Hist., *supra* note 27, at 1848); *see* United States v. City of Chicago, 549 F.2d 415, 437 (7th Cir. 1977).

individual victim of discrimination, would tend to litigate the merits of those individual claims if they cannot rely on class-wide hiring and promotional goals.[58] Counsel for defendants would not be able to dispose of Title VII lawsuits via broad race-conscious relief without the intricate examination of, and the inevitable litigation of, the merits of hundreds or thousands of individual claims. Stage II relief hearings would be commonplace. Defense counsel may seek to prolong litigation until a court determines who, if anyone, is an identifiable victim of discrimination. Increased litigation of individual claims would, of course, lead to increased claims for attorneys' fees, which would in turn lead to increased attorneys' fees litigation. Thus, the victim-specific limitation, if adopted, would tend to increase the already lengthy period it takes to litigate a Title VII class action and attendant fee disputes and would decrease the chances of an early settlement of such cases.

IV. CONCLUSION

In summary, an expansive reading of *Stotts* which would limit all Title VII relief to individually identifiable victims is not only an incorrect reading of the holding of *Stotts,* but would constitute a significant retreat from the objectives of eradicating discrimination and of avoiding unnecessary litigation over such discrimination.

58. Even if the parties did agree on which persons are identifiable victims of discrimination (which we would submit is unlikely), given the number of identifiable victims who would need to be individually listed in a meaningful attempt to achieve complete relief, counsel for plaintiffs would be more inclined to seek court findings that such persons are victims of discrimination, if only to insulate the settlement agreement against attack by non-parties, such as unions, who may attack awards of remedial seniority which allegedly infringe on the rights of incumbent employees.