JUDICIAL, LEGISLATIVE & ADMINISTRATIVE
ACTIVITY AFFECTING EMPLOYMENT
DISCRIMINATION IN EDUCATION

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A superficial reading of two 1984 Supreme Court decisions would suggest that national policy aimed at eliminating employment discrimination -- and its effects -- is undergoing substantial retrenchment at the federal level. Despite the fact that the Constitution does not say, and the Supreme Court has never held, that racial classifications are always invalid, Assistant Attorney General William Bradford Reynolds has said recently that the United States is now "following the path that is blind to color differences." In addition (and over the dissent of Commissioners Blandina Cardenas Ramirez and Mary Frances Berry) the chairman of the U.S. Commission on Civil Rights, Clarence Pendelton, has said that all race-conscious timetables and goals are discriminatory and that affirmative action plans are legally unjustifiable. Affirmative action, he said, "erodes support for civil rights understood as a policy of equality of opportunity, not a contrived, arbitrary equality of result."

It is vitally important for public and private education that recent Supreme Court decisions affecting employment, along with subsequent legislative and judicial activity related to them, be accurately understood. If they are not, gains by minority groups, women, the handicapped, and those discriminated against because of age may be severely compromised. Perhaps most important in this regard, the relatively recent integration of many education faculties could be expected to regress, resulting in fewer role models for black students who, by virtue of their racial identity alone, historically have been excluded from
education and from the mainstream of American life. Thus, an important public policy consideration for education, and one that does not affect other areas of employment to the same degree, is the indirect effect on the perceptions of students of all races that would result from the disproportionate underrepresentation of minorities in the education workforce.

Unless its effects are reversed by congressional action, the case of Grove City College v. Bell will severely limit the authority of the federal government to investigate and enforce the anti-discrimination provisions of several important federal statutes: anti-discrimination provisions reaching all educational institutions receiving federal funds and having a direct impact on employment policies. Likewise, unless the case of Firefighters Local Union No. 1784 v. Stotts is understood only as a limitation on the power of federal courts to order affirmative action remedies (in the absence of proven discrimination) rather than as a limitation on voluntary employer-employee initiatives, it could have the effects envisioned by Attorney General Reynolds and Commissioner Pendleton.

The Grove City Case

The major holding of the Supreme Court in Grove City College v. Bell was that the College must agree to comply with the federal law prohibiting sex discrimination because its students received federal financial aid. Although the College argued that it was not a "recipient" of federal assistance under Title IX,
the Court rejected the distinction between direct and indirect
aid, saying that Congress had not

elevated form over substance by making the application
of the nondiscrimination principle dependent on the
manner in which a program or activity receives federal
assistance. There is no basis in the statute for the
view that only institutions that themselves apply for
federal aid or receive checks directly from the federal
government are subject to regulation.7

Therefore, even though the College had never discriminated on the
basis of sex, it had to file an assurance of compliance form if
its students were to continue to receive federal financial
assistance. Moreover, if discrimination were found in the
"program or activity" receiving aid, the aid could be terminated.
The major question remaining for the Court was what constituted
the program or activity receiving the federal assistance. Did
the anti-discrimination provisions extend to the entire
institution, including its employment practices, or only to the
financial aid program?

Finding "no persuasive evidence suggesting that Congress
intended that... regulatory authority follow aided students from
classroom to classroom, building to building, or activity to
activity," the Court concluded that only the financial aid
program was covered by federal law. It did not matter that the
funds received by the students were added to the general
operating budget of the College; the Court found that Congress
intended only that individual programs be covered. Thus, only
student financial aid and employment practices in that program
were subject to federal authority.

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The Supreme Court applied the controversial program specific conclusion of **Grove City** to the federal statute that limits discrimination against the handicapped on the same day that it decided the **Grove City** case. "Section 504 of the Rehabilitation Act of 1973, by its terms, prohibits discrimination only by a 'program or activity receiving Federal financial assistance.' Clearly, this language limits the ban on discrimination to the specific program that receives federal funds." In addition, the Department of Education's Office for Civil Rights has said that the program specific holding of **Grove City** also applies to the federal statutes limiting discrimination on the basis of "race, color, or national origin" under Title VI and to discrimination on the basis of age under the Age Discrimination Act of 1975.

The Court's holding in **Grove City** was attacked from two sides - private, independent colleges asserting that indirect federal financial assistance would subject them to administrative burdens that might conflict with their educational philosophy and desired level of institutional autonomy, and civil rights supporters alleging that the Court had gravely misinterpreted congressional intent when it "narrowed" the scope of coverage from the institution as a whole to particular programs.

Less than two months after the **Grove City** decision was handed down by the Court, a bill was introduced in the House of Representatives "to reaffirm pre-Grove City College judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the...antidiscrimination provisions." The four major civil rights statutes affected by
Grove City would have been amended by deleting the term "program or activity" and substituting the term "recipient," along with a definition of that term. Fund termination provisions of the statutes would nevertheless have been "pinpointed" and "limited to the particular political entity, or part thereof, or other recipient" determined to be in non-compliance. An identical senate bill never reached the senate floor; and despite congressional and public support for the house civil rights bill, it was withdrawn before the 98th Congress adjourned.

Because of the continued importance of the issues raised by the Grove City case, the 99th Congress has also acted to reverse some of its effects. On January 24, 1985, a bill was introduced in the Senate entitled the "Civil Rights Amendments Act of 1985 (S. 272);" a broader bill was introduced in the House of Representatives the same day -- the "Civil Rights Restoration Act of 1985" (H.R. 700). Both bills were referred to house and senate committees, but no hearings had been held as of the end of February.

The approach taken by the senate bill is to retain the "program or activity" language of the civil rights statutes but to clarify that, despite Grove City, "the phrase 'program or activity' shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution." It thus attempts to resolve a major controversy engendered by bills introduced in the 98th Congress by avoiding the word "recipient" and its attendant, complex definition. The bill's coverage is narrower than that proposed in 1984, however,
because it applies only to education. Furthermore, it is not to be "construed to expand or narrow the meaning of the phrase 'program or activity'" when applied to entities other than education institutions. That caveat is complicated by the further provision that the Grove City case should not be considered when the phrase "program or activity" is interpreted in the future. If this is not an indirect attempt to broaden civil rights coverage when private businesses or local governments are the entities involved, as it surely must not be, then it will revive the same pre-Grove City uncertainty as to the meaning of "program or activity" when controversies arise outside of education. Even if institution-wide coverage is effectively extended throughout education, the judiciary will be left to construe "program or activity" in other contexts with only ambiguous guidance from Congress.

Although the senate bill does not attempt to deal with those critics who argue that indirect federal financial aid should not trigger coverage at all, Senator Hatch has introduced two amendments to the proposed legislation that would provide (1) a partial religious exemption, when religious tenents of educational institutions conflict with federal requirements, and (2) a complete exemption for about twenty-five institutions that only receive indirect aid in the form of federal grants to students. Such exemption would be lost, however, if the institutions failed to maintain their tax exempt status because of race discrimination.
The house bill, which has been referred to the house Education and Labor Committee and the house Judiciary Committee, takes a broader approach to solving the problem of discrimination on the basis of sex, race, handicap, and age by amending the four relevant federal statutes to broadly define the phrase "program or activity." Under this measure, if a local or state government agency were to receive federal funds, the entire agency would be covered. The same would be true of a local education agency, a university or college, or a higher education system: the entire entity receiving the funds would be covered. The definition also expressly extends to private organizations and to any other entity not covered by the definition. Sponsors hope that the proposed house bill will eliminate some of the controversy that was caused by the term "recipient" in bills introduced in 1984.

It should be made clear that neither the senate nor the house bill attempts to eliminate the pinpointing concept associated with terminations of federal funds, but only to extend the scope of coverage following the Grove City case. It does not appear that eliminating the controversial term "recipient" from bills proposed this year will resolve the problems engendered by the 1984 bills: the terms "educational institution" and "entity" are not free from ambiguity. Therefore, the new bills likely will be as controversial as those proposed in the 98th Congress. Indeed, Senator Kennedy from Massachusetts and Senator Weicker from Connecticut have also introduced legislation to enlarge the coverage of the various
civil rights measures affected by Grove City. Even though problems remain, there will be more time in the 99th Congress than there was in the 98th to discuss and resolve remaining questions. Passage of relevant legislation is likely; the form that it will take is uncertain.

The Stotts Case

Despite the fact that Grove City was misinterpreted by the press and thus misunderstood by the public, there is no doubt that its consequences, if unchecked, will limit federal authority to promote just employment practices in education. Another 1984 Supreme Court decision, Firefighters Local Union No. 1784 v. Stotts, which also has been misunderstood and misinterpreted, possibly will have less impact on efforts to remedy manifestations of societal discrimination appearing in institutions of education. However, this lesser impact largely depends on understanding what the Stotts decision means and what it does not mean.

The implications of Stotts, rather than being directed at federal authority to coerce compliance with anti-discrimination provisions, as in Grove City, have been said to reach corresponding efforts to eliminate the effects of discrimination through voluntary, local, employer- and/or employee-initiated activities and policies. Although Stotts stands for the proposition that federal courts cannot modify a voluntary affirmative action plan to impose race-conscious remedies not agreed to by the parties involved -- at least in the absence of
proven discrimination, it has been thought to have implications for the outer limits of voluntary affirmative action plans in general. Available evidence suggests, however, that any such implications may be limited.

The facts in Stotts show that the Memphis, Tennessee Fire Department and the City of Memphis, although admitting no discrimination, entered into a consent decree to increase the number of minority workers in the Fire Department by means of certain hiring and promotion goals. A year later, when unforeseen budget deficits required lay-offs, the federal district court enjoined seniority-based lay-offs in favor of a plan designed to protect relatively recently hired black employees. The injunction was challenged by the Department and the firefighters union but was affirmed by the court of appeals. The Supreme Court, however, held that the district court was without authority to alter a seniority system that had not been abrogated in the antecedent consent decree and, the continued legitimacy of which, had been assumed by the City, the Department and many employees. Title VII, which prohibits race discrimination in public and private employment, expressly approves of bona fide seniority systems. Therefore, absent proof of intentional discrimination against individual members of a disadvantaged class, a court is not authorized to award preferential seniority. In effect, in Stotts, the district court had mandated a remedy that it legally could not have provided even if the black employees initially had proven (which they did not) that there was a pattern or practice of discrimination
against blacks as a group. However, the Court made clear, in dicta, that under Title VII "if individual members of a plaintiff class demonstrate that they have been actual victims of the discriminatory practice, they may be awarded competitive seniority and given their rightful place on the seniority roster...[E]ach individual must prove that the discriminatory practice had an impact on him." 27

Although the focus of this paper is not upon the types of affirmative action relief a court may order when actual employer discrimination has been proven, the implications of Title VII's express protection of bona fide seniority systems are relevant to the topic of voluntary affirmative action. It is precisely because of guaranteed employer discretion in maintaining a bona fide system that judicial remedies in pattern or practice cases are limited. Seniority can be overridden judicially only to remedy the effects of discrimination against individuals. On the other hand, no such protection for seniority systems exists under the equal protection clause, so that when class-based discrimination in the public sector has been challenged and proven under the Constitution, courts will be free to abrogate seniority rights if necessary to remedy the effects of prior discrimination. 28

This broader judicial authority under the Constitution may aid non-minority plaintiffs challenging voluntary affirmative action policies as well. If judicial remedies for alleged employment discrimination are narrower under Title VII, public employees may get more extensive relief under a constitutional
claim of "reverse discrimination". However, under the equal protection clause, plaintiffs may have to prove that the employer discrimination was intentional. It is possible that a court might find that some or all voluntary affirmative action policies simply do not amount to intentional discrimination. Although at least one court has suggested as much; as will be shown later, most courts analyzing alleged constitutional violations have ignored or taken intent for granted and have gone on to justify race-conscious policies.

Central to the focus of the discussion here, which involves voluntary measures undertaken within the workplace itself, is the question left open by the Supreme Court in Stotts: Can a public employer unilaterally adopt a preferential seniority system without violating Title VII? A related question, with equal import for education, is whether an employer and an employee union can, by mutual agreement, adopt a preferential seniority system or prefer workers of one race over another in remedial decisions affecting hiring or layoff. And, most important, will affirmative action plans in the public sector violate constitutional equal protection provisions even if they do not conflict with Title VII guidelines?

It is clear from the 1979 Supreme Court case of United Steel Workers of America v. Weber, that Title VII does not forbid "private employers and unions from voluntarily agreeing upon bona fide affirmative action plans that accord racial preferences" designed to remedy racial imbalances in the workforce. Although Title VII protects white as well a black workers against
discrimination, the Court in Weber declined to read the federal law in a way that would frustrate its major purpose: to remedy "the plight of the Negro in our economy" by opening "employment opportunities for Negroes in occupations which have traditionally been closed to them." In addition, the Court noted that Congress chose to maximize employer and employee freedom by expressly not requiring and impliedly permitting voluntary racial preferences to remedy unintended racial imbalances in the workforce.

The Supreme Court in Weber, however, did not "define in detail the line of demarcation between permissible and impermissible affirmative action plans." Stotts sheds very little additional light on this important question except to suggest that unilateral abrogation of contractually based seniority rights by a public employer might violate the law.

We are left to wonder whether the question of a constitutional violation might arise even if such an action by a public employer did not violate Title VII. Because Weber concerned private rather than governmental action, and mutual agreement between employer and employee rather than unilateral decisionmaking, several questions need to be answered before the implications of Weber and Stotts for education, and especially public education, will be clear:

1. Does the holding in Weber that Title VII allows private, bilateral affirmative action policies extend to the public sector?
2. If so, might these policies nevertheless conflict with the equal protection guarantees of the fourteenth amendment?

3. May an employer -- whether public or private -- unilaterally adopt affirmative action measures under Title VII?

4. If so, would unilateral affirmative action violate equal protection provisions if adopted by a public employer?

5. And lastly, what are the limits to voluntary affirmative action -- whether public or private, bilateral or unilateral? Must policies operate prospectively or might there be sufficient justification for the abrogation of seniority rights, for example, in promotion or layoff situations?

With regard to the last question, it is important to discover to what extent the judiciary will consider the Weber guidelines in otherwise permissible voluntary affirmative action cases. These guidelines can be expressed as follows:

1. A voluntary affirmative action plan should be designed to effectuate statutory purposes.

2. The interests of non-minority employees should not be foreclosed absolutely nor infringed upon unnecessarily.
3. The plan should be designed as a temporary measure to "eliminate a manifest racial imbalance" rather than to "maintain racial balance."

If one were to look only at statements made by Assistant Attorney General William Bradford Reynolds following the Stotts decision, it might appear that all voluntary affirmative action measures in the employment context were in doubt. If one looks at subsequent cases, however, a different picture emerges. Discussion of these cases will proceed by attempting to discover how the courts have answered, or might have answered, the questions posed above. Particular attention will be given to voluntary, race-conscious practices in education.

Post-Stotts Judicial Activity: Affirmative Action in Public Education

There is no reason to believe -- from Weber or subsequent cases -- that the Supreme Court's holding in the Weber case, which involved a private corporation, turned on the distinction between private and public employment. Indeed, the validity of the voluntary affirmative action measures agreed to by the employer and the employee union in the Stotts case were apparently never questioned, despite the fact that public sector employment was clearly involved. It appears that the extension of Weber's approval of voluntary, affirmative action to public employment and to alleged constitutional violations, which was
accomplished by the Sixth Circuit in Detroit Police Officers' Association v. Young, generally has been accepted by the lower federal courts.

In the appeals court case of Kromnick v. School District of Philadelphia, decided a little more than a month after Stotts, the fact that a public employer was involved was not pivotal in the court's analysis. Kromnick involved a board-adopted policy, later incorporated into a collective bargaining agreement, whereby de facto faculty segregation was to be ameliorated by reassigning teachers so that each school would have a representative proportion of the system's white and black teachers. Race, seniority, and the needs of each school were considered, resulting in the transfer of both black and white teachers. The plan was, therefore, race-conscious but not preferential.

The Third Circuit considered both Title VII and constitutional claims. It was noted in the court's statutory analysis that race-conscious plans might fall within express statutory prohibitions against classifying employees on the basis of race in a way that would deprive them of opportunities -- in this case the opportunity to choose to transfer or remain at a particular school. Nevertheless, relying on the Weber court's admonition that Title VII should be construed so as to achieve its "broad remedial purposes," the court held that the voluntary, bilateral, non-preferential agreement did not violate Title VII. The plan permitted flexibility in assignment, it "was a means to
improve education and to undo the effects of past societal discrimination," and there was no evidence that it was a permanent arrangement not subject to renegotiation.

The Kromnick case does not provide definitive guidance on the question of whether or not voluntary affirmative action policies in public education might conflict with equal protection guarantees under the fourteenth amendment because, as the court noted, the plan "creates no preference of the type usually associated with claims of 'reverse discrimination.'" The plan affected only teacher assignment, which is traditionally within the discretionary authority of the board; and the impact fell on both black and white teachers. Although the court labeled the plan "racially neutral," it clearly was not neutral in the sense that considerations of race were involved in assignments.

Relying on guidelines derived from the two leading Supreme Court cases where race-conscious affirmative action measures were approved, the court looked at "(1) the importance and validity of the remedial aim, (2) the competence of the agency to choose such a remedy, and (3) the tailoring of the remedy so as to limit the burden suffered by others." The Court accorded special status to educational institutions when it construed the remedial aim as the long-term improvement of educational opportunity rather than the short-term aim of racial balance in staffing. The competency of school authorities to effectuate plans leading to racial balance was also broadly construed. Because the remedy burdened both black and white teachers, was likely to be
reconsidered at least biennially, and did not impose an exact quota on preferred race proportions, it was held not violative of equal protection.

Other recent cases -- from a federal district court and the Sixth Circuit respectively -- also focused on possible equal protection violations engendered by public education affirmative action plans. Like Kromnick, these cases involved voluntary, bilateral affirmative action plans designed to achieve faculty integration; unlike Kromnick, the remedies involved were not only race-conscious, they had a disproportionate negative effect on the contract and other employment rights of white teachers. In anticipation of layoffs, and in an attempt to maintain a relatively high percentage of minority teachers on the teaching staff, these plans involved job protection for blacks that was not afforded to whites.

The federal district court case of Britton v. South Bend Community School District, which was appealed to the Seventh Circuit on October 24, 1984, presents the question of the legality of a bilateral, district-union agreement that in the event of necessary teacher lay-offs, "(n)o minority bargaining unit employee shall be laid off." Because a reduction in force was anticipated sometime during the three year duration of the contract, the lay-off provision was thought necessary to maintain the results of recent hiring measures that had increased the percentage of black teachers from about 10% to about 13% (compared with a student population that was approximately 21% black). Despite the fact that teachers had overwhelmingly
approved the lay-off provision, when lay-offs became necessary because of fewer students in attendance and greater expenses, white plaintiffs claimed that the affirmative action measure violated their legal rights. Although noting the various alleged federal statutory violations (including Title VII), the court analyzed only the alleged violation of the equal protection clause of the federal constitution. "It is clear that affirmative action plans which do not violate the equal protection clause do not violate those federal statutes."  

Despite the fact that the plaintiff teachers believed that Stotts required findings of actual discrimination by school officials before an affirmative action plan could be valid, the court found Stotts inapplicable. In the Britton case the plan was approved by the teachers and the board and it was not mandated by federal judicial authority; in Stotts, it was the court itself that enjoined minority lay-offs.

The Britton court next turned to a Sixth Circuit opinion, Detroit Police Officers Association v. Young, for guidance on the test to be applied in examining the claim of reverse discrimination. The Sixth Circuit had given judicial expression to the intuitive feeling that there is an important difference between claims of discrimination brought by whites as opposed to blacks. White people have not been subjected to the invidious discrimination and racial prejudice that black people have endured historically. Constitutional provisions and federal statutes, in addition to concerted national policy, have
coalesced around the notion that race discrimination (but not necessarily race-consciousness for remedial purposes) must be eliminated. "When claims are brought by members of a group formerly subjected to discrimination the case moves with the grain of the Constitution and national policy. A suit which seeks to prevent public action designed to alleviate the effect of past discrimination moves against the grain." Applying this philosophy, the Britton court selected a "reasonableness" test to determine that the lay-off policy was constitutional. This conclusion was based on the fact that substantial racial imbalance had been documented (indeed without the policy nearly all gains in minority hiring would have been lost); white teachers were in no way stigmatized; the discharges were not necessarily permanent (all except twenty laid-off teachers had been rehired); and the policy was, by virtue of its incorporation into a three-year collective bargaining agreement, temporary.

It is worth noting that the guidelines derived from the Weber case were followed even though Weber concerned a private corporation and was decided under the dictates of Title VII. The Britton court looked to the purpose behind the Constitution, as the Weber court had looked to the purposes of Title VII; there was no absolute bar to reemployment nor were the interests of white employees infringed without necessity; and the plan was a temporary one designed to eliminate racial imbalances in the teaching force. It is clear that courts are looking for guidance to a variety of cases involving voluntary affirmative action.
Mirroring the reasoning and the result of the Britton case is the Sixth Circuit decision in Wygant v. Jackson Board of Education, decided on October 25, 1984, and accepted for review by the Supreme Court on April 16, 1985. In Wygant, the school board and the teachers had agreed to a lay-off plan designed to apportion lay-offs on the basis of the racial composition of the faculty. Rather than having the effect of increasing the relative proportion of minority teachers, as in Britton, such a plan would maintain the proportions existing prior to the lay-offs. Thus, teachers of all races might be laid off, and seniority provisions might be abrogated in some instances.

Also following the case of Detroit Police Officers' Association v. Young, which extended the Weber guidelines to public employment and to alleged constitutional violations, the court determined that lack of prior employer discrimination did not necessarily preclude race-conscious remedial measures. Because it found that minority underrepresentation on the teaching staff was substantial and chronic and the means chosen to improve the situation were reasonable, the court held the plan constitutional. The Stotts case was explicitly found inapplicable because it involved a court order rather than the type of voluntary affirmative action illustrated by the Weber and Young cases.

Among the notable aspects of the Wygant case is the court's explication of the legitimate interest justifying the preferential, race-conscious plan: "eliminating historic discrimination, promoting racial harmony in the community and
providing role models for minority students." Aimed as these interest are at the development of a more just society, they provide strong support for voluntary affirmative action even if they might be insufficient to justify a court-ordered remedy.

Another interesting feature is the Wygant court's approval of a plan that looks to the percentage of minority students in order to determine a reasonable goal for minority faculty. Thus, if the percentage of minority students were 15%, as it was in this case, and the percentage of minority faculty in the labor market were lower, it would not affect the goal of recruiting and retaining at least a 15% minority faculty. Quoting from Judge Joiner's district court opinion, the court of appeals affirmed that "teaching is more than just a job. Teachers are role-models for their students. More specifically, minority teachers are role-models for minority students. This is vitally important because societal discrimination has often deprived minority children of other role-models." It is this type of argument that might justify even greater flexibility in fashioning voluntary remedial measures in the context of education than in other work environments.

Despite the fact that institutions of education are perhaps uniquely situated to remedy the effects of societal discrimination, an important ethical issue clearly is involved when innocent members of a non-minority racial group are disfavored by voluntary affirmative action measures. Because this burden does not always offend federal statutory or constitutional provisions, a balancing of interests must occur.
The limitations on federal court authority suggested by \textit{Stotts} entails, by negative implication, the proposition that broader affirmative action measures may be appropriate when instituted voluntarily. This is intuitively reasonable and comports with fundamental liberal, democratic principles. This proposition may especially be true under Title VII where federal remedial powers are restricted by the explicit protection of employer-desired bona fide seniority plans.

By extension, it is also reasonable to assume that greater discretion in the formulation of race-conscious policies might be justified where members of the majority race were represented in negotiations leading to agreements denying their personal interests in favor of societal interests. Although a union cannot bargain away members' constitutional rights, workers do not have a constitutional right that seniority be considered in promotion or lay-off decisions. As one court said: Seniority is "an economic right which the unions may elect to bargain away."

Recent cases do not definitively answer the difficult question of whether employers may unilaterally adopt affirmative action policies without violating Title VII and relevant constitutional guarantees. In \textit{Detroit Police Officers' Association v. Young}, voluntary, preferential promotion practices were instituted pursuant to a special commission's finding of past and present police force discrimination. Relying on the \textit{Weber} case, the court found sufficient evidence of discrimination to justify voluntary affirmative action measures under Title VII even though the discrimination "might not give
rise to legal liability." Moreover, it was not necessary, according to the court, for the city to "prove specific acts of discrimination and produce the individual victims of these acts." Thus, by comparison with the Stotts case, permissible remedial actions by employers -- even when taken unilaterally and in the face of seniority agreements -- may be much broader than actions a court could impose: voluntary affirmative action may be instituted to remedy the general effects of discrimination, at least where prior employer discrimination is evident. Even though Stotts was decided subsequent to the Young case, there is little reason to doubt the latter conclusion: the purpose of Title VII's protection of bona fide seniority systems is to prevent their judicially mandated abrogation and not necessarily to prohibit employers from taking voluntary corrective measures.

The question of whether or not public employers may unilaterally adopt affirmative action measures without violating equal protection guarantees is even less clear. The court in Young turned for guidance to Regents of the University of California v. Bakke, where the Supreme Court had approved unilateral race-consciousness in medical school admissions while disapproving exact quotas. The problem with relying on Bakke is that the Court did not agree on the level of scrutiny to be applied in such cases. In addition, Bakke concerned admission, where applicants have no pre-existing rights, whereas unilateral employer-initiated affirmative action generally would have an impact on employee contract rights. Nonetheless, the Young court gave the opinion that equal protection would not be violated if a
competent body, such as the special Detroit commission involved in the Young case, found past intentional racial discrimination and if the following were shown: (1) substantial and chronic racial imbalance, (2) limited job access for minorities, (3) lack of stigma attached to non-minorities, and (4) a reasonable and necessary race-conscious plan.

It is not known whether the Supreme Court would approve of the approach taken in the Young case, or even go beyond it by allowing unilateral employer-initiated affirmative action with no evidence of past discrimination. It is clear that other federal courts are taking a liberal approach to voluntary affirmative action, at least when bilateral affirmative action agreements or actual employer discrimination are involved. Unilateral employer discretion may be somewhat circumscribed in the public sector, depending upon how principles derived from Bakke are interpreted and applied in the future. What does seem certain from the result in Bakke is that voluntary, race-conscious remedies in the public sector do not need to be justified by a showing of intentional prior discrimination against particular individuals. Whether and to what extent actual discrimination will have to be shown to justify voluntary affirmative action is an open question; it was not required in the Bakke case, which concerned college admissions rather than employment. Furthermore, there are good arguments for allowing maximum employer discretion in education where, under competent tutelage from a racially diverse faculty, racial prejudice might be significantly reduced.
Nevertheless, the impact of affirmative action measures on non-minority employees is certain to be considered when race-conscious policies are challenged in the future, with actions or policies having an impact on contract rights (e.g., abrogation of seniority-based lay-offs or promotions) being carefully scrutinized.

In general, and despite suggestions that Stotts prohibits all affirmative action, the courts appear hospitable to limited, voluntary efforts to deal with the effects of prior societal discrimination. That some innocent persons may volunteer or be asked to bear a disproportionate burden (relative to prior expectations that lay-off decisions might be based on seniority) is justified not because they deserve the burden, any more than those individuals who may benefit necessarily deserve the benefit, but to achieve a more just society in the long run. Perhaps realizing that desert is not necessarily relevant where voluntarism is concerned, courts to date, in these types of cases, have deemphasized the documentation of employer responsibility for racial imbalances in the education workforce. Rather, the judiciary has recognized that where the education of children and youth is the paramount concern, racial preference does not necessarily amount to racial discrimination. Courts are not forcing this preference—educators are still free to consider teacher quality and effectiveness and/or seniority, etc.—but the judiciary is deferring to the primary expertise of those most closely attuned to community needs and the educational process.
The Supreme Court will have an opportunity to examine these issues when it hears the Sixth Circuit case of *Wygant v. Jackson Board of Education* during the 1985-86 Term. The *Wygant* case, discussed above, presents the Court with an opportunity to clarify the applicability of all leading affirmative action precedents to voluntary, affirmative employment measures in public education. If the Supreme Court follows the lead of other federal courts, it will give serious consideration to educational needs, to local discretion, and to the nation's long-term commitment to racial equality. Despite the present Administration's declared opposition to many affirmative action measures, the lower federal courts, the Congress, and the public do not appear hospitable to substantial reversals in this area of public policy. If the Supreme Court agrees, and if Congress acts to reverse the program-specific effects of *Grove City College v. Bell*, there will be little retrenchment in national policy affecting employment in education or elsewhere.
FOOTNOTES


2. See Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (plurality opinion) and id. at 355-56 (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting).

3. Speech to the Florida Bar Association, quoted in the Houston Chronicle, Feb. 9, 1985, at Sec. 1 p. 9, col. 4.


7. Grove City, 104 S. Ct. at 1217 (citations omitted).

8. Id. at 1222.


10. Singleton, Analysis of the Decision in Grove City College v. Bell and Initial Guidance on its Application to OCR Enforcement Activities 6 (July 31, 1984) (available from the Office of Civil Rights, Department of Education).


13. Id. at 41.


18. Id.


22. *Id.*


26. Section 703 (h) of Title VII says that an employer may "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..." *Id.* at Sec. 2000e-2(h).

27. Stotts, 104 S.Ct. at 2588 (citations omitted).


30. *See Stotts, 104 S.Ct. at 2590.*


32. *Id.* at 200.


34. Weber, 443 U.S. at 202-03 (quoting from remarks of Senator Humphrey, 110 Cong. Rec. 6548 (1964)).

35. *Id.* at 205-06.
36.  Id. at 208.

37.  Stotts, 104 S.Ct. at 2590.

38.  See Weber, 443 U.S. at 208.


41.  Id. at 909.

42.  Id. at 911-12.

43.  Id. at 902.

44.  Id. at 903.

45.  Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (considerations of academic freedom and racial diversity in the student body held sufficiently compelling to justify race-conscious admissions policy but not racial quota) (plurality opinion); Fullilove v. Klutznick, 448 U.S. 448 (1980) (congressional efforts to remedy discrimination in contracting opportunities held not violative of equal protection or Title VI).

46.  Kromnick, 739 F.2d at 904.


48.  Id. at 1226.

49.  Id. at 1229.

50.  Young, 608 F.2d 671.

51.  Id. at 697.

52.  Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984), cert. granted 53 U.S.L.W. 3727 (Apr. 16, 1985). See also the pre-Stotts case of Marsh v. Board of Educ., 581 F. Supp. 614 (E.D. Mich. 1984) (demotion from school counselor to teacher pursuant to voluntary, bilateral affirmative action plan not violative of equal protection where prior discrimination shown, whites not stigmatized, and plan reasonable). The court had considered the factual issues in the Sixth Circuit's Stotts opinion, but found them "markedly different." Id. at 620 n.25.
53. Young, 608 F.2d at 694 & 697.

54. Wygant, 746 F.2d at 1157.


56. Tangren V. Wackenhut Services, 658 F.2d 705, 707 (9th Cir. 1981).

57. Young, 608 F. 2d 671. See also Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981) (challenge to race-conscious hiring decision rejected under Title VII in view of judicial and administrative findings of prior discrimination).

58. Young, 608 F.2d at 689.

59. Id. at 694.


