No. 84-1999

In the Supreme Court of the United States

OCTOBER TERM, 1985

LOCAL NUMBER 93, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, C.L.C., PETITIONER

v.

CITY OF CLEVELAND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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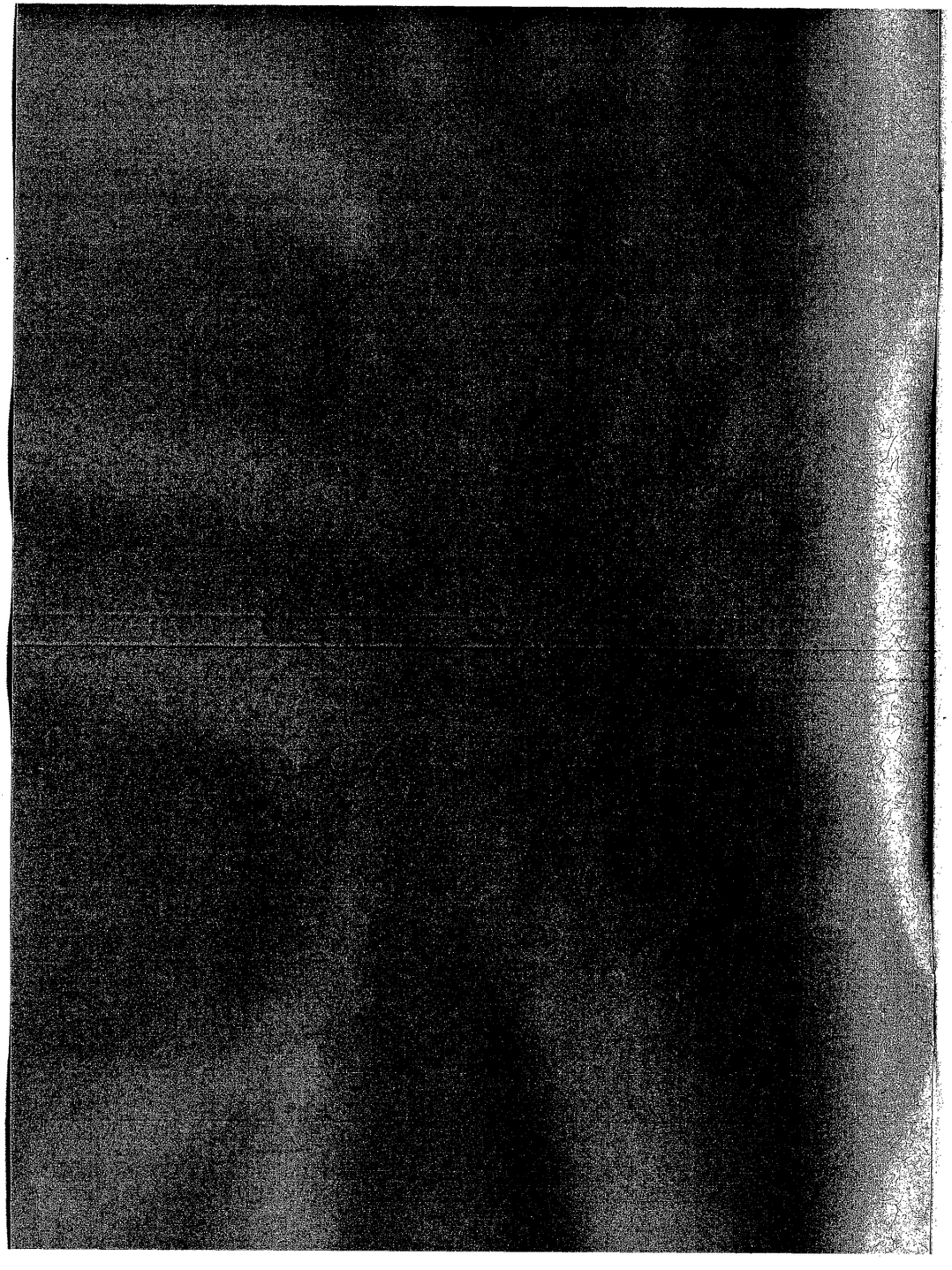

QUESTIONS PRESENTED

1. Whether a judgment entered with the consent of a defendant public employer in an action brought under Title VII of the Civil Rights Act of 1964 may award racial preferences in promotions to persons who are not the actual victims of the employer's discrimination.

2. Whether a consent judgment may be entered over the objection of an intervenor of right whose interests are adversely affected by the terms of the consent judgment.

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INTEREST OF THE UNITED STATES

This Court's resolution of the issues presented in this case will have a substantial effect on the Attorney General's enforcement responsibilities under Title VII of the Civil Rights Act of 1964, 42 U.S.C. (& Supp. I), 2000e-5(f)(1). The federal government also is subject to the requirements of Title VII in its capacity as an employer. 42 U.S.C. 2000e-16.

STATEMENT

We summarized the factual and procedural background of this case in the brief we filed at the petition stage. Only one additional factual matter requires mention here. In their brief in opposition (at 17-18), the Vanguards argued that the record does not contain any collective bargaining agreement between the union and the city. If the Vanguards meant to suggest that there was no such agreement, they are wrong. There was a memorandum of understanding between the union and the city governing seniority and promotions. Under that memo-

randum and the civil service rules, as Judge Kennedy noted in dissent (Pet. App. A22), "promotions were based on a combination of factors that included seniority and examination scores." It seems fair to assume that the absence of the collective bargaining agreement from the record is due to the improper procedures followed by the district court, *i.e.*, the entry of a judgment without a proper adjudication and over the objection of one of the parties (petitioner, which intervened of right).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the legality under Section 706(g) of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(g))[1] of a so-called "consent" decree that provided preferences in promotions in the Cleveland Fire

[1] The Vanguards asserted in their brief in opposition (at 14-17) that the "consent" decree in this case rests upon the Fourteenth Amendment as well as Title VII. The court of appeals, however, did not rely upon the Fourteenth Amendment in affirming the decree, and thus the constitutional issue need not be reached by this Court. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Ramsey* v. *Mine Workers*, 401 U.S. 302, 312 (1971); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Moreover, it is uncertain whether *intentional* discrimination, a necessary prerequisite to relief under the Constitution, was either found or admitted in this case. *Washington* v. *Davis*, 426 U.S. 229 (1976); see *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), slip op. 19 n.16. The consent decree merely stipulated that there had been past "discrimination" in the fire department (see Pet. App. A.29-30). Since promotions in the relevant past were based exclusively on written examinations and other facially neutral objective criteria, it seems likely that the "discrimination" referred to was the disparate impact type. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In any event, this question should not be resolved in this Court in the first instance. The Vanguards' argument also ignores the principle (see pages 6-7, *infra*) that equitable remedies must be tailored to fit the scope of the constitutional violation they are imposed to correct. Indeed, as we have argued this Term in our brief in *Wygant* v. *Jackson Board of Education*, No. 84-1340, the Fourteenth Amendment does not permit a public employer to award racial or ethnic preferences to non-victims. We are serving a copy of our brief in *Wygant* upon the parties in this case.

Department to individuals not shown to be the actual victims of discrimination.[2] This decree was entered with

[2] In their brief in opposition (at 19-20), the Vanguards asserted that all of the individuals given preference under the "consent" decree were in fact actual victims of past discrimination by the Fire Department. The decree provides for racial and ethnic preferences in promotions beginning in February 1983 and continuing until December 1987. The Vanguards' argument is that every minority employee who has received or will receive such a preference is an actual victim of discrimination because he or she is likely to have been a member of the Fire Department prior to entry of the consent decree. This contention has no substance.

Although petitioner argued below that preferential relief is required to be victim-specific, the lower courts did not inquire whether the beneficiaries of the quotas were victims of past discrimination. To the contrary, the lower courts upheld the quota relief on the ground that victim-specificity was not required. Thus, if this Court holds that the lower courts' analysis of this legal question was erroneous, the Vanguards should be required to substantiate their new victim-specific claim in the district court on remand.

Moreover, it seems apparent from the face of the decree that the beneficiaries of the quotas are not necessarily victims of past promotional discrimination by the Department. Contrary to the Vanguards' assumption, the fact that a particular minority employee was on the workforce at the time the decree was entered provides no basis for assuming that that person would have received a promotion but for discrimination. As Judge Kennedy correctly noted below, "[m]any of the minority firefighters affected by the decree had never been eligible for promotion before the decree was entered, and thus could not have been the victims of discrimination in promotions" (Pet. App. A23). For example, since the decree requires a minimum of three years' service in the Department's lower ranks for promotion to lieutenant, only those minority firefighters hired by 1978 were eligible for promotion at the time of the last allegedly discriminatory act (the 1981 promotion exam). But by 1987, when the decree expires, many minority employees who joined the force after 1978 will have completed the time needed for promotion to lieutenant and thus will benefit from the racial and ethnic preferences awarded by the decree. Indeed, minority employees who joined the Department in 1984—*after the decree was adopted*—will be eligible for preferential quota promotions in 1987. Furthermore, although the 1981 exam has been alleged to be discriminatory, the last examination *from which promotions were made*—and thus the primary, if not exclusive, cause of whatever discrimination occurred—was given in 1975 and thus could have

the consent of the employer and the minority employees who initiated the suit but over the strenuous objection of the union, which intervened of right to protect the interests of its members. This decree is unlawful.

Section 706(g)—the sole provision of Title VII governing judicial remedies—authorizes a wide range of affirmative equitable relief to make whole those individuals subjected to employment discrimination. But the final sentence of Section 706(g) states in language that could hardly be clearer that "[n]o order of the court" shall grant such relief to an individual who "was refused employment or advancement or was suspended or discharged for any reason other than discrimination." The plain meaning of this provision is that a court may not enter an order imposing a quota, because a quota awards benefits solely on the basis of race or ethnicity rather than the individual's status as a victim of discrimination.

The legislative history of Section 706(g) unmistakably shows that it was intended to preclude the imposition of quotas by Title VII courts. Both in the House and the Senate, the chief proponents and supporters of the 1964 Civil Rights Act made this point repeatedly. Section 706(g) was slightly amended in 1972, but it is quite clear that this amendment was not intended to authorize the imposition of quotas.

This Court's prior decisions construing Section 706(g)—most notably, *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *Teamsters* v. *United States*, 431 U.S. 324 (1977); and *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984)—have recognized that "the policy behind [Section] 706(g) * * * is to provide make-whole relief only to those who have been

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adversely affected only those quota beneficiaries who were on the force years earlier.

The Vanguards also seem to argue that every minority individual who took the test for promotion in November 1981 was an actual victim (Br. in Opp. 19-20). Again, this is not possible, because the district court impounded the 1981 test results before they were used (see Pet. App. A33).

actual victims of illegal discrimination" (slip op. 16-17). This policy, moreover, is not limited to cases involving seniority rights. Section 706(g) by its terms applies to all court-ordered remedies. Another provision of Title VII—Section 703(h), 42 U.S.C. 2000e-2(h)—expresses a strong policy in favor of protection of bona fide seniority rights, but Section 703(h) is exclusively concerned with liability and consequently provides no basis for narrowing the remedial principle contained in Section 706(g).

Similarly, Section 706(g) is not restricted to litigated decrees but applies with equal force to consent decrees. The language of Section 706(g) states without qualification that "[n]o order of the court" shall impose quota relief. There is no doubt that a consent judgment is a court order. Moreover, there are strong reasons for insisting that this remedial principle be honored in consent decrees because the rights of innocent nonminority employees may be sacrificed. In the present case, the abridgment of the rights of non-minority employees was particularly striking, because here the union representing all of the employees intervened of right, only to have the so-called "consent" decree entered over its objection. This was a flagrant violation of due process, for it is firmly established that a party cannot be bound to a consent decree unless that party in fact consents.

Recognition that Section 706(g) applies to consent decrees will not frustrate the settlement of Title VII suits. Techniques routinely applied in settling other types of class actions will permit the settlement of Title VII suits on terms that fully respect Section 706(g) but do not require a concession of discrimination by the defendant. Instead, the settling parties can reach agreement regarding the allegedly discriminatory practices upon which the settlement is to be based. They can then assess (or agree that an arbitrator or magistrate will assess) the effect of those practices on individual class members. In recent years, the government has entered into numerous Title VII consent decrees that adhere to Section 706(g)'s remedial principle.

ARGUMENT

THE "CONSENT" JUDGMENT IN THE PRESENT CASE IS UNLAWFUL BECAUSE IT VIOLATES THE REMEDIAL PRINCIPLE EXPRESSED IN SECTION 706(g) OF TITLE VII AND WAS ENTERED OVER THE OBJECTION OF AN INTERVENOR OF RIGHT WHOSE MEMBERS WERE ADVERSELY AFFECTED

A. It Is A General Principle Of Equity Jurisprudence That A Court's Remedial Authority Extends Only As Far As Necessary To Remedy The Violation Of Law

Section 706(g) of Title VII, as we will show (see pages 7-14, *infra*), specifically limits relief to those who have been actual victims of discrimination. This remedial limitation, carefully spelled out by Congress, accords with the established principle of equity jurisprudence that courts are "required to tailor 'the scope of the remedy' to fit 'the nature and extent of the *** violation.'" *Hills* v. *Gautreaux*, 425 U.S. 284, 293-294 (1976), quoting *Milliken* v. *Bradley* (*Milliken I*), 418 U.S. 717, 744 (1974). Accord, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). This means, the Court has explained, that the remedial powers of a federal court can "be exercised only on the basis of a violation of the law and [can] extend no farther than required by the nature and the extent of that violation." *General Building Contractors Ass'n* v. *Pennsylvania*, 458 U.S. 375, 399 (1982).

The Court has applied these "fundamental limitations on the remedial powers of the federal courts" (*ibid.*) in cases involving claims of unlawful racial discrimination. For example, in *Milliken I*, in striking down a school desegregation remedy that extended beyond the jurisdiction in which discrimination had been found, the Court wrote (418 U.S. at 746 (emphasis added)):

> [A desegregation] remedy is necessarily designed, *as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.* Disparate

> treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.

See also, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Milliken* v. *Bradley* (*Milliken II*), 433 U.S. 267, 280, 282 (1977); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

B. Congress Adopted This Remedial Principle When It Enacted Title VII

1. When Congress adopted Title VII, it unequivocally incorporated the fundamental equitable principle that remedies must correct the violation but may not exceed its scope. By its terms, Title VII protects the personal right of each individual to be free from employment discrimination.[3] Title VII "precludes treatment of individuals as simply components of a racial * * * class" and, thus, "requires that [courts] focus on fairness to individuals rather than fairness to classes." *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 708, 709 (1978). Accord, *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1080 (1983) (opinion of Marshall, J.); *id.* at 1103 (opinion of Powell, J.); *id.* at 1108 (O'Connor, J., concurring); *Connecticut* v. *Teal*, 457 U.S. 440, 453-454 (1982) ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.").

The section of Title VII governing judicial remedies—Section 706(g)—similarly focuses on the rights of individuals. The first sentence of Section 706(g) authorizes a broad range of affirmative relief to remedy discrimination, including "reinstatement or hiring of employees, with or without back pay * * * or any other equitable

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[3] Section 703(a)(1) makes it unlawful for an employer "to fail or refuse to hire or to discharge *any individual*, or otherwise to discriminate against *any individual* with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race." 42 U.S.C. 2000e-2(a)(1) (emphasis added).

relief as the court deems appropriate."[4] But the final sentence of Section 706(g) provides:

> No order of the court shall require * * * 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 * * *.

The plain meaning of these provisions is that a court, upon finding that an employer has engaged in unlawful employment discrimination, may order such affirmative relief as is necessary to make victims whole but may not award relief to individuals whose rights under Title VII were not violated.[5] A quota remedy, which inevitably provides employment preferences to individuals who were not "refused employment or * * * suspended or discharged" as a result of discrimination by the employer violates this provision.

[4] The phrase "any other equitable relief as the court deems appropriate" was added in 1972. For its meaning, see pages 11-12, *infra.*

[5] The wording of Section 706(g) was based on Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), which directs the Labor Board, on finding an unfair labor practice, to order "affirmative action including reinstatement of employees with or without back pay." Decisions interpreting this provision of the NLRA have therefore been recognized as reliable guides to the intended meaning of Section 706(g). See, *e.g., Ford Motor Co.* v. *EEOC,* 458 U.S. 219, 226 n.8 (1982).

Decisions construing Section 10(c) make clear that "the thrust of 'affirmative action' redressing the wrong incurred by an unfair labor practice is to make 'the employees whole, and thus restor[e] the economic status quo that would have obtained but for the company's wrongful [act].'" *Franks* v. *Bowman Transportation Co.,* 424 U.S. at 769, quoting *NLRB* v. *Rutter-Rex Mfg. Co.,* 396 U.S. 258, 263 (1969). Indeed, by 1964 it was well settled that the Labor Board's authority under Section 10(c) to order affirmative action is remedial only and thus limited to those measures necessary to make whole "the victims of discrimination." See, *e.g., Carpenters Local* v. *NLRB,* 365 U.S. 651, 655-656 (1961); *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 194, 197-198 (1941); *Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 9-10 (1940). See also Comment, *Preferential Relief Under Title VII,* 65 Va. L. Rev. 729, 747 (1979).

2. a. The legislative history unmistakably supports this interpretation of Section 706(g). In introducing in the House the bill that ultimately became the 1964 Civil Rights Act, Representative Celler, floor manager of the bill and a principal draftsman of Section 706(g) (see 110 Cong. Rec. 2567 (1964) (Rep. Celler)), expressly responded to the charge that federal courts and agencies would order quotas and other forms of preferential treatment under Title VII. Noting that a court order could be entered only on proof "that the particular employer involved had in fact, discriminated against one or more of his employees because of race," Representative Celler emphasized that "[e]ven then the court could not order that any preference be given to any particular race * * *, but would be limited to ordering an end to discrimination." 110 Cong. Rec. 1518 (1964). Representative Celler's understanding of Title VII was repeated by other supporters during the House debate.[6]

Supporters of Title VII in the Senate took a similar view. Senator Humphrey, the Democratic floor manager, stated that "nothing in the bill would permit any official *or court* to require any employer or labor union to give preferential treatment to any minority group." 110 Cong. Rec. 5423 (1964) (emphasis added). In an interpretive memorandum often cited by this Court as an "authoritative indicator" of the meaning of Title VII (see, *e.g., American Tobacco Co.* v. *Patterson,* 456 U.S. 63, 73 (1982)), Senators Clark and Case, the bipartisan floor

[6] See 110 Cong. Rec. 1540 (1964) (Rep. Lindsay) (Title VII "does not impose quotas or any special privileges."); *id.* at 1600 (Rep. Minish). Similarly, an interpretive memorandum prepared by the Republican Members of the House Judiciary Committee defined the scope of permissible judicial remedies under Title VII as follows (*id.* at 6566 (emphasis added)): "[A] Federal court may enjoin an employer * * * from practicing further discrimination and may order the hiring or reinstatement of an employee * * *. But, [T]itle VII *does not permit the ordering of racial quotas* in businesses or unions."

"captains" responsible for explaining Title VII, provided a detailed description of the intended meaning of Section 706(g). After observing that a "court could order appropriate affirmative relief," Senators Clark and Case stressed (110 Cong. Rec. 7214 (1964) (emphasis added)):

> No court can require hiring, reinstatement, admission to membership, or payment of back pay for anyone *who was not discriminated against in violation of this title.* This is stated expressly in the last sentence of section 707(e) [enacted, without relevant change, as Section 706(g)], which makes clear what is implicit throughout the whole title; that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, color, religion, sex, or national origin.

This point was restated, in virtually identical language, by Senator Humphrey. See *id.* at 6549. And to dispel all doubt on this score, Senator Humphrey went on to address the claims of opponents regarding quota remedies (*ibid.*):

> Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power * * * to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance.

Other key supporters of the bill were equally clear in their understanding that Title VII's remedial provisions would not permit judicial imposition of racial preferences.[7] Indeed, every Representative and every Senator

[7] Senator Kuchel, Republican floor leader of the bill, addressed the issue squarely (110 Cong. Rec. 6563 (1964) (emphasis added)):

> If the court finds that unlawful employment practices have indeed been committed as charged, then the court may enjoin the responsible party from engaging in such practices and shall order the party to take that affirmative action, such as the reinstatement or hiring of employees, with or without back pay, which may be appropriate.
>
> * * * * *
>
> *But the important point,* in response to the scare charges which have been widely circulated to local unions throughout America, *is that the court cannot order preferential hiring or promotion consideration for any particular race, religion, or other group.* Its power is solely limited to ordering an end to the discrimination which is in fact occurring.

Similarly, Senator Clark inserted into the Congressional Record a memorandum prepared by the Justice Department expressly denying that a violation of Title VII could be remedied by quota relief. The memorandum stated (110 Cong. Rec. at 7207 (1964) (emphasis added)): "There is no provision either in Title VII or in any other part of this bill, that requires *or authorizes* any Federal agency *or Federal court* to require preferential treatment for any individual or any group for the purpose of achieving racial balance".

Throughout the Senate debate, the principal Senate sponsors prepared and delivered a daily Bipartisan Civil Rights Newsletter to supporters of the bill. The issue of the Newsletter published two days after the opponents' filibuster had begun declared: "Under title VII, *not even a court,* much less the Commission, *could order racial quotas* or the hiring, reinstatement, admission to membership or payment of back pay *for anyone who is not discriminated against in violation of this title.*" 110 Cong. Rec. at 14465 (1964) (emphasis added).

[8] See Comment, *supra,* 65 Va. L. Rev. at 738.

[9] The language added in 1972 had its origin in an amendment introduced by Senator Dominick, who opposed a provision in the Labor Committee bill to confer "cease and desist" authority on the EEOC; the committee bill proposed to make no change in either

to address the issue decried the use of quota remedies; and the drafters, sponsors, and supporters of Title VII uniformly and unequivocally assured their colleagues that racial quotas and other forms of class-based preferential treatment could not be imposed by courts.[8]

b. This clear congressional intention was not reversed when Congress amended Title VII in 1972. The only arguably relevant change in Section 706(g) was the addition of language making clear that discriminatees may be awarded not only the specific types of relief expressly mentioned in the section, but also "any other equitable relief as the court deems appropriate."[9] The Section-by-

Section analysis of the conference bill made clear, however, that this addition to the first sentence of Section 706(g) was not meant to expand judicial remedial authority beyond traditional limits. Prepared by Senator Williams, the Senate manager of the legislation, the Section-by-Section Analysis explained that "the scope of relief under [Section 706(g)] is intended to make *the victims of unlawful discrimination whole*, * * * [which] requires that *persons aggrieved* by the consequences and effects of the unlawful employment practice *be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*" 118 Cong. Rec. 7168 (1972) (emphasis added) (Senate); *id.* at 7565 (House).

Some courts seeking justification for the imposition of quota relief have relied on the Senate's refusal in 1972 to adopt two amendments offered by Senator Ervin to prohibit federal agencies from imposing quotas. See, *e.g.*, *United States* v. *Int'l Union of Elevator Constr.*, 538 F.2d 1012, 1019-1020 (3d Cir. 1976). This argument is doubly flawed. First, it ignores elementary constitutional principles. A law (such as the final sentence of Section 706(g)) can be amended or repealed only by the subsequent enactment of another law; it cannot be changed by Congress's failure to pass a bill. See *INS* v. *Chadha*, 462 U.S. 919, 954 (1983) ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I."). Second, the Senate's rejection of Senator Ervin's amendments is not even convincing evidence of Congress's attitude in 1972 toward court-ordered quotas. Congress's failure to enact proposed legislation does not

Section 703 or Section 706(g). Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess., *Legislative History of the Equal Employment Opportunity Act of 1972*, at 553-558, 676-678 (Comm. Print 1972) [hereinafter cited as *Leg. Hist.*]. Senator Dominick's filibuster of the committee bill ended with adoption of his amendment, which denied the EEOC independent enforcement authority but granted it power to institute lawsuits in federal court. The purpose of the language added to the first sentence of Section 706(g) was not explained, or even discussed, by Senator Dominick or anyone else during the debate.

necessarily signify disapproval of its provisions. See, *e.g.*, *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970); *Girouard* v. *United States*, 328 U.S. 61, 69 (1946); Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L.J. 515, 530-531 (1982). A bill may be voted down because of form, timing, draftsmanship, the belief that it merely duplicates existing law, the desire for further study or reflection, the identity or party of the sponsor, disagreement with some but not all of its terms, or many other reasons. Moreover, it is clear from the language of the amendments (118 Cong. Rec. 1662, 4917 (1972)) and from their sponsor's explanation (*id.* at 1663-1664, 4917-4918) that the amendments had nothing to do with the remedial authority of courts but were instead concerned solely with the conduct of federal agencies, particularly the Office of Federal Contract Compliance.[10] And finally, whatever the

[10] Senator Ervin's first amendment, one of many that he offered during a filibuster, would have prohibited any "department, agency, or officer of the United States" from requiring employers to practice "discrimination in reverse." *Leg. Hist.* 1017. Senator Ervin's principal target was the Office of Federal Contract Compliance's Philadelphia Plan, which he termed "[t]he most notorious example of discrimination in reverse." *Id.* at 1043. The amendment was necessary, he said, because officials of the OFCC and EEOC "could not understand the plain and the unambiguous words of Congress" in Section 703(j). *Leg. Hist.* 1042. As he explained, the amendment would merely have extended to all federal executive agencies, particularly the OFCC, Section 703(j)'s prohibition against requiring employers to engage in racially preferential hiring to rectify racial imbalance in their work forces. This Court has recognized (*United Steelworkers* v. *Weber*, 443 U.S. 193, 205 n.5 (1979)), that Section 703(j) speaks only to substantive liability under Title VII, not to the scope of judicial remedial authority, which is governed solely by Section 706(g). Thus, notwithstanding the contrary statements of Senators Javits and Williams, who spoke against the amendment (see *Leg. Hist.* 1046-1048, 1070-1073), it is clear that Senator Ervin's amendment did not seek to alter Section 706(g) and was not concerned with the remedial authority of courts.

Senator Ervin's second amendment makes this intent even clearer. That amendment would have simply amended Section 703(j) to

view of the Senate in 1972, the House expressed continued and unmistakable opposition to quota relief.[11]

extend its coverage to executive orders and statutes other than Title VII. *Leg. Hist.* 1714.

[11] The history of the 1972 amendments began in the House, where Representative Hawkins introduced a bill designed, among other things, to give the EEOC "cease and desist" powers and to transfer the administration of Executive Order 11246 from the Labor Department's Office of Federal Contract Compliance (OFCC) to the EEOC. H.R. Rep. 92-238, 92d Cong., 1st Sess. 1 (1972). Because the OFCC had imposed quotas in its enforcement of the executive order, many congressmen feared that the bill would confer on the EEOC authority to order employment quotas.

Before debate commenced, Representative Dent, the bill's floor manager, proposed an amendment that "would forbid the EEOC from imposing any quotas or preferential treatment of any employees in its administration of the Federal contract-compliance program." *Leg. Hist.* 190. The amendment did not address the remedial power of courts under Title VII because, according to Representative Dent, "[s]uch a prohibition against the imposition of quotas or preferential treatment already applies to actions brought under title VII" (*ibid.*). During the ensuing debate, Representative Hawkins stated: some say that this bill seeks to establish quotas * * *. Title VII prohibit[s] this * * *." *Id.* at 204. Hawkins then acknowledged his support for the Dent amendment, reiterating that Title VII already prohibited the establishment of quotas. *Id.* at 208-209.

It is also noteworthy that the 1972 Congress refused to delete the final sentence from Section 706(g), which, as previously discussed (pages 7-11, *supra*), makes clear that a court's affirmative equitable powers to remedy a violation extend no further than is necessary to make victims whole. The House and the Senate passed two differing versions of Section 706(g) in 1972. The House bill (H.R. 1746, 92d Cong., 1st Sess. (1972)) left the 1964 provision largely unchanged, except for the addition of a provision limiting back pay awards. See *Leg. Hist.* 331-332. The bill that passed the Senate (S. 2515, 92d Cong., 2d Sess. (1972)), however, eliminated from Section 706(g) the final sentence contained in the 1964 Act. See *Leg. Hist.* 1783. The bill that ultimately became law emerged from the House-Senate conference with the original final sentence of Section 706(g) restored. S. Conf. Rep. 92-681, 92d Cong., 2d Sess. 5-6, 18-19 (1972); H.R. Conf. Rep. 92-899, 92d Cong., 2d Sess. 5-6, 18-19 (1972).

C. This Court's Prior Decisions Have Recognized That Title VII Relief May Be Given Only To The Actual Victims Of Discrimination

This Court's decisions have recognized that Title VII relief may be awarded only to make whole the actual victims of discrimination. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), the Court held that it was appropriate under Section 706(g) to grant retroactive seniority to individuals whom the employer had discriminatorily refused to hire at an earlier date. The Court observed (424 U.S. at 764 (emphasis added; citation omitted)) that Title VII " 'is intended *to make the victims of unlawful employment discrimination whole*' " and that " 'the attainment of this objective * * * requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, *restored to a position where they would have been were it not for the unlawful discrimination.*' "

This remedial principle was applied in *Teamsters* v. *United States*, 431 U.S. 324 (1977). After affirming the lower courts' findings that the employer had engaged in a pattern or practice of excluding blacks and Hispanics from desirable positions as over-the-road (OTR) truck drivers (*id.* at 334-343), the Court considered what remedy was appropriate under Section 706(g). The Court rejected the company's argument that retroactive seniority should be restricted to those individuals who had actually applied for OTR positions (431 U.S. at 362-371). Instead, the Court held (*id.* at 363-368) that individual nonapplicants should be allowed to prove that they were qualified for an OTR position but were deterred from applying because of the company's discrimination. The Court likewise rejected the contention that all nonapplicants should be regarded as presumptive victims (*id.* at 363, 367-373). "A nonapplicant," the Court stated (*id.* at 367), "must show that he was a potential victim of unlawful discrimination." The Court then explained "[t]he task remaining for the District Court on remand" (*id.* at 371-372 (emphasis added)):

> Initially, the court will have to make a substantial number of individual determinations in deciding *which of the minority employees were actual victims* of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, " *'recreate the conditions and relationships that would have been had there been no'* " *unlawful discrimination. Franks,* 424 U.S., at 769.[12]

Most recently, in *Firefighters Local Union No. 1784* v. *Stotts,* No. 82-206 (June 12, 1984), this Court clearly reiterated that Title VII relief is restricted to the actual victims of discrimination. In *Stotts,* the district court modified a Title VII consent decree over the objection of the employer, the City of Memphis. This modification prohibited the city from following its seniority system in determining who must be laid off insofar as application of that system would decrease the proportion of black employees. As a result, some "non-minority employees with more seniority than minority employees were laid off or demoted in rank" (slip op. 4). The court of appeals approved the district court's modification (*id.* at 4-5).

This Court reversed. After first holding (*Stotts,* 10-12) that the modification went beyond merely enforcing the agreement of the parties as reflected in the consent decree, the Court concluded (*id.* at 11-20) that the layoff quota was a type of 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" (*id.* at 16). Expressly reaffirming its ruling in *Franks* and *Teamsters* that the policy underlying Section 706(g) "is to provide make-whole relief only to those who have been actual victims of illegal discrimination" (*Stotts,* slip op. 16-17), the Court held that it was

[12] Similarly, in *Ford Motor Co.* v. *EEOC,* 458 U.S. at 234 (citation omitted), the Court rejected an interpretation of Title VII that "would not merely restore [the alleged discriminatees] to the 'position where they would have been were it not for the unlawful discrimination' * * it would catapult them into a better position than they would have enjoyed in the absence of discrimination."

improper under Section 706(g) for the district court to award protection against layoffs to individuals simply because of their membership in the disadvantaged class (slip op. 15-20). The Court also canvassed and relied upon the legislative history that we have set out at somewhat greater length in this brief (*id.* at 16-18).

2. The courts of appeals have not heeded what we believe is the clear meaning of this Court's decision in *Stotts* but have instead constructed numerous arguments that seek to distinguish and limit *Stotts.* The two grounds upon which the court of appeals in this case relied have been employed most frequently. First, the court below held that *Stotts* does not apply to consent decrees.[13] We will discuss this question below (see pages 19-27, *infra*). In addition, the court of appeals held that *Stotts* applies only when seniority rights are abridged.[14] As Judge Kennedy noted in dissent below, seniority rights *were* infringed in the present case (Pet. App. A22). In any event, this basis for distinguishing *Stotts* is legally unsound. The pivotal issue in *Stotts* was the type of relief that a court may award in a Title VII suit. Section 706(g) is the sole provision of Title VII defining the remedies that a court may order upon finding a violation of the statute, and as the Court stated in *Stotts,* Section 706(g) empowers federal courts in Title VII cases "to provide make-whole relief *only* to those who have been actual victims of illegal discrimination." *Stotts,* slip op. 16-17 (emphasis added).

[13] Pet. App. A13-A20; see also *Paradise* v. *Prescott,* 767 F.2d 1514, 1529 (11th Cir. 1985); *Deveraux* v. *Geary,* 765 F.2d 268, 273 (1st Cir. 1985), petition for cert. pending, No. 85-492; *Turner* v. *Orr,* 759 F.2d 817, 824 (11th Cir. 1985), petition for cert. pending, No. 85-177.

[14] Pet. App. A13; see also *Turner* v. *Orr,* 759 F.2d at 824; *EEOC* v. *Local 638,* 753 F.2d 1172, 1186 (2d Cir. 1985), cert. granted, No. 84-1656 (Oct. 7, 1985); *Diaz* v. *AT&T,* 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (dicta); *Van Aken* v. *Young,* 750 F.2d 43, 45 (6th Cir. 1984) (dicta); *Kromnick* v. *School District,* 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-606 (Jan. 7, 1985) (dicta); *Grann* v. *City of Madison,* 738 F.2d 786, 795 n.5 (7th Cir. 1984), cert. denied, No. 84-304 (Oct. 15, 1984) (dicta).

In limiting *Stotts* to relief infringing seniority rights, the courts of appeals have pointed to *Stotts'* discussion of Section 703(h), which provides that it is not unlawful for an employer to abide by a bona fide seniority system. See Pet. App. A14; *Turner* v. *Orr*, 759 F.2d 817, 824 (11th Cir. 1985), petition for cert. pending No. 85-177; *Kromnick* v. *School District*, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-606 (Jan. 7, 1985). But as this Court expressly held in *Franks* (424 U.S. at 758), Section 703(h) merely "delineates which employment practices are illegal * * * and which are not"; it does not "proscribe relief otherwise appropriate under the remedial provisions of Title VII, § 706(g), * * * where an illegal discriminatory act or practice is found."

Both the majority and dissenting opinions in *Stotts* reflect this understanding of the meaning of Sections 703(h) and 706(g). The majority discussed Section 703(h) in connection with the question whether the seniority system was bona fide (*Stotts*, slip op. 13-14), but the portion of the majority opinion devoted to the type of relief allowed under Title VII (slip op. 14-20) repeatedly referred to Section 706(g) and made only one passing reference in a footnote to Section 703(h).[15] Similarly, the relevant portion of the dissenting opinion (slip op. 19-29) extensively discussed Section 706(g), while making no reference to Section 703(h).[16]

[15] See *Stotts*, slip op. 20 n.17. The Court referred to "statutory policy * * * here, §§ 703(h) and 706(g) of Title VII."

[16] While the relevant portion of the majority opinion in *Stotts* did rely significantly on *Franks* and *Teamsters*—cases involving both Sections 706(g) and 703(h)—it seems clear that the majority was referring solely to the portions of those decisions concerning the remedial question governed by Section 706(g). In *Teamsters*, Part II of the opinion of the Court (431 U.S. at 334-356) discussed the legality of the conduct of the employer and the union, as well as the validity of the seniority system. It was in this portion of the opinion that Section 703(h) was discussed. Part III of the opinion (431 U.S. at 356-377), which discussed the remedial question, made no reference to Section 703(h), but instead made repeated references (431 U.S. at 359, 362, 364, 366, 372) to the sections of *Franks* concerning Section 706(g) (see 424 U.S. at 762-779). The *Stotts* majority cited only Part III of *Teamsters* (*Stotts*, slip op. 16, citing 431 U.S. at 367-371, 371-376).

D. Section 706(g) Applies To Consent Judgments As Well As To Litigated Decrees

1. If we are correct that Section 706(g) prohibits quota relief, the only remaining question that needs to be decided in this case is a simple one: Is a consent judgment a court order within the meaning of Section 706(g)? As previously noted, the final sentence of Section 706(g) provides (emphasis added):

> *No order of the court* shall require * * * the hiring, reinstatement, or promotion of an individual as an employee * * * if such individual * * * was refused employment or advancement * * * for any reason other than discrimination on account of race * * *.

Thus, if a consent decree is a court order within the meaning of this provision, such a decree, no less than a judgment entered in a litigated case, must comply with Section 706(g).

That a consent decree is a court order seems almost too obvious to require discussion. This Court has affirmed that "[a] judgment upon consent is 'a judicial act.'"[17] *Pope* v. *United States*, 323 U.S. 1, 12 (1944) (citation omitted); accord, *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932). A consent decree is signed and entered by the court. It is treated like any other final judgment for purposes of appeal. See *Stotts*, slip op. 2 (Stevens, J., concurring); *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981). Indeed, the court of appeals in the present case, in holding that the consent judgment was appealable, acknowledged (Pet. App. A9): "A consent decree, although founded on an agreement of the parties, is a final judgment." A consent decree also has the same binding effect as any other judgment and thus enjoys a status far different from a mere contract. As Judge

[17] Indeed, the court below itself acknowledged (Pet. App. A20 n.10): "To be sure, a consent decree is a judicial order."

Kennedy explained in dissent below (Pet. App. A26), non-compliance with a consent decree is punishable by contempt. See also *SEC* v. *Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). In addition, the "consent" decree in this case contains a provision superseding the constitution, statutes, and regulations of the State of Ohio, as well as all conflicting local laws (Pet. App. A37). Only a judgment whose force derives from federal law can have such preemptive effect.

Although several courts have held that *Stotts* does not apply to consent decrees (see page 17, *supra*), only the court of appeals in the present case ventured to explain the basis for the distinction. That court appeared to advance three arguments, but none is sound.

The court's first argument was a play on the word "require" in Section 706(g). Section 706(g), as noted, provides (emphasis added) that "[n]o order of the court shall *require*" the "hiring, reinstatement, or promotion" of an employee pursuant to a quota. The court of appeals suggested (Pet. App. A15-A16) that Section 706(g) does not apply to a consent decree because an employer is not required to enter into the decree. But Section 706(g) is not concerned with protecting an employer from being "require[d]" to enter into a consent decree; the Due Process Clause does that. Rather, Section 706(g) prohibits the entry of a court order that requires the implementation of quotas. This prohibition plainly applies to consent decrees, as well as litigated decrees, because once a consent decree is entered the order and the enforcement power of the court require the parties to abide by the decree's terms.

Second, the court of appeals contended (Pet. App. A17) that if a consent decree cannot award quota relief, then "*Stotts* sub silentio overruled [*United Steelworkers* v. *Weber*, 443 U.S. 193 (1979)]." This argument confuses the question of what relief a court may order (the question governed by Section 706(g)) with the question of what an employer may do in a collective bargaining agreement or other private undertaking (the question

addressed in *Weber*). Clearly the *Weber* Court viewed these as very different questions, for in holding that racial preferences in a collective bargaining agreement are not always prohibited by Title VII, the Court saw no need to grapple with Section 706(g), which by its terms applies to court orders, not to negotiated union contracts.[18]

Finally, the court of appeals relied (Pet. App. A18) upon the broad proposition that generally a consent decree may "provide[] relief beyond that authorized in the underlying statute." But whatever the validity of this argument, it does not apply here. Regardless of whether a consent decree can go beyond the remedy that a statute *authorizes*, it certainly cannot grant relief that a statute expressly *forbids*.[19] Thus, there is no need to confront larger issues regarding the permissible scope of relief in consent decrees entered pursuant to statutes that do not include explicit limitations on courts' remedial authority. If such issues are addressed, however, we believe that, under *System Federation No. 91* v. *Wright*, 364 U.S. 642 (1961), a consent decree must not only obey express statutory prohibitions such as Section 706(g) but must also conform "with statutory objectives" (364 U.S. at 651).

In *System Federation*, employees had brought suit some years earlier under a provision of the Railway Labor Act prohibiting discrimination by employers against nonunion employees, and the defendants—a railroad company and several unions—had agreed to a consent decree

[18] *Weber* dismissed Section 706(g) in a footnote as a provision concerned with remedies. 443 U.S. at 205 n.5.

[19] Judicial entry of a Title VII consent decree granting preferences to nonvictims is no different in principle from the entry of a consent decree contravening any other congressionally imposed limitation on statutory relief. For example, a provision of the Norris-LaGuardia Act, 29 U.S.C. 104, prohibits federal courts from issuing certain injunctive relief in labor disputes. It seems clear that the parties to a lawsuit brought under the Norris-LaGuardia Act cannot by their consent grant to a federal court remedial power to issue an injunction exceeding the restrictions statutorily imposed by Congress.

forbidding such discrimination. The statute subsequently was amended to permit union shops, and a union moved to modify the decree to reflect this amendment. The lower courts denied the motion, reasoning that since non-union shops remained legal, the parties' agreement could be enforced.

This Court reversed, holding that to fail to modify the decree "would be to render protection in no way authorized by the needs of safeguarding statutory rights" (364 U.S. at 648). The Court explained that the parties' agreement and consideration were not enough to sustain the decree because "it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. * * *. The parties have no power to require of the court continuing enforcement of rights the statute no longer gives" (*id.* at 651-652). The Court concluded (*id.* at 652-653): "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree * * * [The court was not acting to enforce a promise but to enforce a statute."

The *Stotts* decision reaffirmed this principle, stating (slip op. 13 n.9):

> "[T]he District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce," not from the parties' consent to the decree. *System Federation No. 91* v. *Wright*, 364 U.S. 642, 651 (1961).[20]

From the principle recognized in *System Federation* and reaffirmed in *Stotts* it follows, we believe, that a

[20] In *Stotts*, both the three dissenting Justices and Justice Stevens, in concurrence, interpreted the majority opinion as saying that a consent decree cannot provide relief that would be unavailable after trial. See slip op. 20 n.9 (Blackmun, J., dissenting) ("The Court's analysis seems to be premised on the view that a consent decree cannot provide relief that could not be obtained at trial."); *id.* at 2 n.3 (Stevens, J., concurring) ("The Court seems to suggest that a consent decree cannot authorize anything that would not constitute permissible relief under Title VII.").

Title VII consent decree must conform to the policy of Section 706(g), which is "to provide make-whole relief *only* to those who have been actual victims of illegal discrimination" (*Stotts*, slip op. 16-17 (emphasis added)). This is precisely what we understand this Court to have meant in *Stotts* when it stated that awarding preferences to nonvictims would be "inconsistent with" Title VII (slip op. 13 n.9) and "counter to statutory policy" (*id.* at 20 n. 17). And in the case of Title VII, it is not only statutory policy but the express terms of Section 760(g) that prohibit quota relief. Thus, our argument follows a fortiori from *System Federation*. In *System Federation*, the consent decree did not violate any express statutory prohibition; no provision of the Railway Labor Act forbade a consent decree guaranteeing an open shop. It was therefore necessary for the Court to consider whether the consent decree conflicted with statutory policy.[21] Here the issue is much simpler be-

[21] This distinction is important because it exposes the error in the court of appeals' attempt to distinguish *System Federation* from the instant case. The court of appeals apparently believed that a consent decree is "in conflict with statutory objectives" within the meaning of *System Federation*, 364 U.S. at 651, only if it affirmatively violates the substantive rights secured by the relevant statute. Such a rule, however, is contrary to the holding and analysis in *System Federation* because in that case the consent order did not require conduct that violated the substantive provisions of the Railway Labor Act. As amended, the Railway Labor Act did not *require* the employer to discriminate against nonunion members; it simply permitted it voluntarily to enter into a collective bargaining agreement that so discriminated. See 364 U.S. at 644-645. Thus, the order to which the employer consented (guaranteeing nondiscrimination) simply required the employer to take action that it could have voluntarily taken without violating any statutory rights of its union employees. The lower courts in *System Federation* (see page 22, *supra*), like the court of appeals in the present case, held that this provision of the consent decree was a permissible remedial order because the employer was simply consenting to do something that was not prohibited by the substantive provisions of the statute in question. This Court's reversal, however, demonstrates that a consent decree that requires an employer to take

cause consent orders awarding quota relief are expressly barred by statute.

b. The remedial restriction in Section 706(g) serves an important function in consent decrees because the vital interests of innocent nonminority employees and potential employees are at stake. It is one thing for consenting parties to enter into a consent decree affecting only their own rights. But a Title VII consent decree awarding preferences in hiring, promotions, seniority, or lay-offs to "minority" employees or prospective employees necessarily disadvantages those individuals who are not preferred. Neither the plaintiffs who sought such relief nor the employer who acceded to it can be counted on to protect the interests of the individuals who are disadvantaged by the decree. The employer may be all too willing to sacrifice the rights and interests of some employees or prospective employees in order to settle burdensome and costly litigation. Indeed, the employer may find it advantageous to barter away the rights of some present or prospective employees in exchange for relinquishment by the plaintiffs of their monetary claims. In addition, a public employer responsible to an electorate in which "minorities" are politically powerful may have a strong incentive to enter into a consent decree awarding preferential treatment to "minority" group members. If the relief available in a Title VII consent judgment is not subject to statutory limitations and if the courts do not police those limitations, the legitimate rights and interests of employees who do not belong to the favored groups will frequently be sacrificed.

action that does not violate its employees' statutory rights may nonetheless be inconsistent with the underlying statutory scheme. In *System Federation,* this Court perceived such an inconsistency because the order granted rights to certain employees that were in no way provided by the statute and thus deprived other employees of opportunities that the statute intended to make available to them. The consent order at issue in this case suffers from an identical deficiency since nonvictims of discrimination have no right to preferential treatment and such preferences similarly circumscribe the opportunities that Congress intended to make available to other employees. In any event, as noted above, the defect in the order entered here is more basic because, unlike *System Federation,* it directly conflicts with an express statutory prohibition.

In a related context, this Court has emphasized that an employer may not unilaterally bargain away in a Title VII conciliation agreement the employment opportunities of its non-minority employees, particularly where, as here, those opportunities have been contractually protected in a collective bargaining agreement. In *W.R. Grace & Co.* v. *Rubber Workers,* 461 U.S. 757, 771 (1983), the Court stated:

> [A]lthough the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent.

See also, *Stotts,* slip op. 6 n.3 (O'Connor, J., concurring).

In the present case, the abridgment of the rights of non-minority employees is particularly striking, for here the union representing all the employees intervened of right, thereby agreeing to be bound by the court's judgment, and strenuously objected to the entry of the consent degree.[22] Nevertheless, the court entered the decree. The court did not adjudicate the lawfulness of the provisions of the decree abrogating portions of the union's collective bargaining agreement and significantly disadvantaging its non-minority members. The court issued no findings of fact or conclusions of law. None of the

[22] For this reason, the court of appeals' attempt to distinguish *Stotts* from the instant case on the ground that *Stotts* involved "a *disputed modification* of a consent decree" (Pet. App. A18, quoting *Stotts,* slip op. 13 n.9 (emphasis supplied by *Vanguards* opinion)) is clearly unavailing. Entry of the consent decree here, like modification of the consent decree in *Stotts,* was vigorously "disputed" by petitioner, a full party to the case and the only one whose interests were directly affected by the contested quota provision. Accordingly, even assuming that *Stotts'* application of the *System Federation* principle did not reach true consent decrees (in the sense that all affected parties had consented), the consent order at issue in this case is invalid under *Stotts* because entry was disputed by petitioner.

procedures generally required by due process was followed. All of this was dispensed with because the judgment was labeled a "consent" decree. But this label is a misnomer because those who must bear the brunt of the decree, the union and the non-minority employees, did not consent.

It is elementary that a party cannot be bound to a "consent" decree unless that party in fact consents. For example, in *United States* v. *Ward Baking Co.*, 376 U.S. 327 (1964), the Court held that a district court could not enter a "consent" judgment without the consent of the United States, which had initiated the suit. See also, *e.g.*, *Hughes* v. *United States*, 342 U.S. 353, 357-358 (1952) (consent decree cannot be substantially modified without consent of all parties or judicial adjudication); *Centron Corp.* v. *United States*, 585 F.2d 982, 987 (Ct. Cl. 1978); 49 C.J.S. *Judgments* § 174(b) at 311 (1947) ("Judgment by consent may be rendered only on consent of all parties interested and to be bound, or their duly authorized agents."); cf. *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971).

The same rule applies to intervenors, who are parties and are therefore bound by the judgment.[23] See, *e.g.*, *United States* v. *Oregon*, 657 F.2d 1009, 1014 (9th Cir. 1981); *In re First Colonial Corp. of America*, 544 F.2d 1291, 1298 (5th Cir.), cert. denied, 431 U.S. 904 (1977); 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1920 (1972); 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.16[6], at 24-180 to 24-182 (2d ed. 1985). As Professor Moore states (*id.* at 24-181): "Once

[23] We do not address the rights of permissive intervenors (Fed. R. Civ. P. 24(b)). Permissive intervention is discretionary and may be denied if it "will unduly delay or prejudice the adjudication of the rights of the original parties." Accordingly, we believe that permissive intervention could properly be denied or terminated to permit the entry of a consent judgment between the original parties. In the present case, however, petitioner's right to intervene under Fed. R. Civ. P. 24(a)(2) is beyond serious dispute. This case threatened both the existing collective bargaining agreement and petitioner's ability to negotiate important terms and conditions of employment in future contracts.

intervention has been allowed the original parties may not stipulate away the rights of the itnervenor." [24]

[24] These fundamental principles have been applied by the Fifth Circuit in a series of employment discrimination decisions. See *EEOC* v. *Safeway Stores, Inc.*, 714 F.2d 567, 576-580 (1983), cert. denied, No. 83-1257 (May 21, 1984); *United States* v. *City of Miami*, 664 F.2d 435 (1981); *High* v. *Braniff Airways, Inc.*, 592 F.2d 1330 (1979); *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891, 896 (1977). However, a number of courts have approved the practice of entering nonconsent consent decrees such as that at issue here. See, *e.g.*, *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d 1117, 1126 (2d Cir. 1983); *Stotts* v. *Memphis Fire Dep't (Stotts II)*, 679 F.2d 579, 584 n.3 (6th Cir.), cert. denied, 459 U.S. 969 (1982); *Stotts* v. *Memphis Fire Dep't (Stotts I)*, 679 F.2d 541, 554 (6th Cir. 1982), rev'd on other grounds, No. 82-206 (June 12, 1984); *Dawson* v. *Pastrick*, 600 F.2d 70, 74-76 (7th Cir. 1979); *Airline Stewards* v. *American Airlines, Inc.*, 573 F.2d 960, 964 (7th Cir. 1978); see also *United States* v. *City of Miami*, 664 F.2d 435, 461-462 (5th Cir. 1981) (Johnson, J., concurring and dissenting in part, joined by six other judges). There is no justification for this practice.

It has been stated that an objecting union or non-minority employee may not resist entry of a consent decree if the court concludes (albeit without following the procedures that would be required before entering judgment in a contested case) that the decree does not unlawfully affect the intervenor's rights. See *Kirkland*, 711 F.2d at 1126; *United States* v. *City of Miami*, 664 F.2d at 462 (Johnson, J., concurring and dissenting in part); *Stotts II*, 679 F.2d at 584 n.3. This argument must fail because it justifies the failure to adjudicate the lawfulness of the relief awarded in the decree by assuming at the outset that the relief is lawful. See *United States* v. *City of Miami*, 664 F.2d at 452 (Gee, J., concurring and dissenting in part, joined by 10 other judges).

A second argument is that a rule enabling the union or non-minority employees to veto a proposed consent decree would hamper efforts to settle Title VII cases. *Kirkland* v. *New York State Department of Correctional Services*, 711 F.2d at 1126; *Dawson* v. *Pastrick*, 600 F.2d at 75-76; *Airline Stewards*, 573 F.2d at 963-964. But the policy favoring voluntary settlement does not justify "ramming a settlement between two consenting parties down the throat of a third and protesting one." *United States* v. *City of Miami*, 664 F.2d at 451 (Gee, J., concurring and dissenting in part); see *Stotts*, slip op. 7 n.4 (O'Connor, J., concurring).

Finally, it has been suggested that unions and employees who object to a proposed Title VII "consent" decree are not due anything more than an opportunity to voice their objections before the decree

E. Application Of The Remedial Principle In Section 706(g) Will Not Frustrate The Settlement Of Title VII Suits But Will Ensure That The Interests Of All Affected Are Honored

Recognition that the remedial principle in Section 706(g) applies to consent decrees as well as litigated decrees will not frustrate the settlement of Title VII suits. As previously noted, it is a general rule that equitable remedies should be tailored to fit the underlying violation of law. Thus, the problem of crafting victim-specific relief in Title VII class actions is not different in kind from the problem of determining appropriate relief in other class action settings.

Courts have developed a wide variety of practical approaches to the remedial phase of litigated class actions. In some instances, individualized relief determinations can be made mechanically once threshold issues of law common to the class are decided. In other cases, it may be necessary for a magistrate to make certain factual determinations as to individual class members within a legal framework developed by the district court. Similar techniques can be and are routinely applied in the consensual resolution of the remedial phase of class actions. In a settlement context, the parties agree on a formula for identifying class members who have been injured and for determining the degree of their injury.[25]

There is no reason why these same well-established techniques cannot be successfully used in Title VII cases

is entered. See, *e.g.*, *Kirkland*, 711 F.2d at 1126; *Airline Stewards*, 573 F.2d at 964. This argument amounts to the contention that the objectors have no substantive rights to be considered, and thus that due process is satisfied if a party is given a right of allocution before judgment is pronounced.

[25] If the formula is simple and mechanical, the parties will have no trouble applying it themselves. Even if the formula is complex or requires judgments about the facts relating to individual claims, the parties may still be able to settle the case without outside assistance if their counsel are able to develop a cooperative relationship. Alternatively, a wide variety of techniques are available to help parties sort through individual claims once ground rules for settlement are agreed upon. For example, individual claims may be presented to a magistrate or an arbitrator chosen by the parties.

to frame consensual relief that satisfies Section 706(g). The defendant employer need not concede discrimination any more than a concession of liability is needed to settle other types of cases. Nor is it necessary for there to be a judicial or quasi-judicial determination of whether and to what extent each class member is an actual victim of discrimination. Rather, the parties may identify those entitled to relief by assessing the nature and effect of the allegedly discriminatory practices and applying that assessment to the facts of individual cases. This process would involve establishing criteria for determining whether a member of the affected class would have received the relevant employment benefit absent the challenged practice.[26]

The government's experience, both as plaintiff and defendant, in crafting victim-specific relief in cases involving a pattern or practice of discrimination under Title VII demonstrates that a properly tailored settlement is not particularly difficult to formulate or obtain. In recent years, the United States, as plaintiff, has entered into at least 33 Title VII consent decrees that provide exclusively victim-specific relief. In *United States* v. *Fairfax County*, No. 78-862-A (E.D. Va.), for example, the parties agreed in a consent decree upon monetary compensation of $2,750,000 and priority job offers to 650 claimants. The government's experience also shows that an employer's desire not to concede discrimination is no roadblock to settlement under the proper remedial principle. For example, in *United States* v. *Nassau County*, Civ. No. 77-C-1881 (E.D.N.Y.), a settlement involving several hundred individual claims was reached between

[26] A requirement that settling parties abide by the principle of victim-specificity will not only protect the interests of innocent non-minority employees but will ensure that the claims of the actual victims of the discrimination are not sacrificed in favor of quota relief for a larger class of non-victims. For example, an individual class member who is entitled to back pay and an immediate promotion would not be well served by a remedy providing only future quota relief.

the government and the county prior to trial and without any admission of liability.

It goes without saying that application of Section 706(g) to consent decrees will not interfere with the ability of courts to grant prospective relief enjoining the use of discriminatory practices. Finally, it should be noted that private parties wishing to escape the strictures of Section 706(g) can always settle a case on their own terms by filing a stipulation of dismissal under Fed. R. Civ. P. 41(a)(1). Such a disposition is not governed by Section 706(g) because the settlement is not embodied in a court order and thus "will not affect (not demonstrably, anyway) third parties or involve the judge in carrying out the underlying settlement." *Donovan* v. *Robbins*, 752 F.2d 1170, 1176 (7th Cir. 1985). Of course, Title VII litigants frequently prefer to encase quota relief in a consent decree, rather than a private settlement agreement, precisely because they want to foreclose subsequent legal challenge by non-minority employees who are adversely affected. But if non-minority employees "are to be required to make any sacrifices in the final consent decree, they must be represented and have * * * full participation rights in the negotiation process." *Stotts*, slip op. 6 n.3 (O'Connor, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

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