Procedures and Preferences: Remedies for Employment Discrimination

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After Regents of the University of California v. Bakke and United Steelworkers v. Weber, preferences on the basis of race became a common remedy for employment discrimination. Bakke held that some preferences established by government were constitutional and Weber held that some preferences voluntarily established by private employers were permitted by Title VII of the Civil Rights Act of 1964. Although neither Bakke nor Weber held that judicially imposed or judicially approved preferences were consistent with the Constitution or Title VII, the lower federal courts interpreted the spirit, if not the letter, of these decisions to favor preferential relief. Bakke and Weber appeared to have settled the once controversial question of the legality of preferences to remedy employment discrimination. But in Firefighters Local Union No. 1784 v. Stotts, the Supreme Court disturbed this apparently settled understanding.

Stotts is all the more disturbing because the Court’s opinion is at once very narrow and very broad. Narrowly interpreted, it held only that a district court could not modify a consent decree to require layoffs according to race instead of seniority. Broadly interpreted, it also held that Title VII authorized awards of reme-

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dial seniority only to victims of discrimination, based on the broader policy, not limited to seniority, "to provide make-whole relief only to those who have been actual victims of illegal discrimination." But this broader policy, if accepted at face value, precludes all forms of preferential relief, not just preferential relief affecting layoffs and seniority. By definition, all forms of preferential relief benefit persons who are not proven victims of discrimination.

At least seven circuits have adopted a narrow interpretation of Stotts, applying it only to judicially ordered preferences affecting seniority rights for purposes of layoff and recall. The Supreme Court, however, has decided to review three of these decisions, which between them concern the constitutionality of preferences adopted by public employers and the power of a federal court under Title VII to impose any form of preferential relief, whether by court order or by approval of a consent decree. When the Supreme Court decides these cases later this term, Stotts may appear to mark a transition from cautious endorsement to strict examination of racial preferences. Alternatively, it may appear to be only another in a series of inconclusive decisions by the Supreme Court on preferential relief.

Instead of attempting to predict future decisions of the Supreme Court, this Article considers the effect of Stotts on past decisions that generally endorse preferences as a remedy for employment discrimination. It argues that Stotts requires greater protection for those adversely affected by preferences, but that it provides effective procedural protection only to employees represented by a union. Other employees and applicants for employment cannot be given equally effective representation in decisions to adopt, impose, or approve preferences. Part I examines Stotts against the background of prior substantive law, and in

5. Id. at 2589.
6. See infra notes 51 and 69.
particular, whether it drastically narrows the prior decision of the Supreme Court in *United Steelworkers v. Weber*. Part II examines the procedural questions raised by *Stotts*: whether preferential relief is more acceptable when imposed by settlement than when imposed by adjudication, and how actions might be structured to allow representation of those adversely affected by preferential relief. It concludes that employees represented by a union can be protected effectively by requiring the union to be joined as a party and by requiring its agreement to any settlement providing for preferential relief. Neither employees who lack union representation nor applicants for employment can be protected by any such simple procedural device. They must instead be protected by substantive principles, most plausibly derived from the theory of disparate impact under Title VII.

I. Substantive Restrictions on Preferential Relief

A. *Stotts*

*Stotts* raises the question whether Title VII authorizes any remedial preferences at all, either judicially imposed by an injunction or judicially approved in a consent decree. Standing alone, *Stotts* does no more than raise this question; it provides no answer. Another, broader decision of the Supreme Court would be necessary to overrule the many prior decisions endorsing preferences and preferential relief, foremost among them, *United Steelworkers v. Weber*. *Stotts* does repudiate any presumption in favor of preferential relief, a presumption reflected in the frequency with which such relief was awarded before *Stotts* was decided.

The preference at issue in *Stotts* arose from a consent decree, entered in 1980, settling a class action under Title VII and other federal laws, alleging racial discrimination in hiring and promotions in the Memphis Fire Department.\(^9\) The consent decree established a long-term goal of black representation in each job classification equal to the proportion of blacks in the labor force in the surrounding county. It also established an interim goal of selecting qualified blacks to fill fifty percent of entry level jobs and twenty percent of the promotions in each job classification each year. The long-term goal of proportional representation

\(^9\) 104 S. Ct. at 2581.
and the interim goal for hiring were modeled on an earlier consent decree, entered in 1974, that settled an action by the United States against the City of Memphis and that applied to employment practices throughout the city. Neither consent decree established preferences in layoffs or seniority; on the contrary, the earlier consent decree provided that seniority was to be computed on the basis of time employed by the city.

In 1981, the city announced that firefighters would be laid off in reverse order of seniority, according to the rule of "last hired, first fired." In response, the plaintiffs sought and obtained a temporary restraining order and an injunction against any layoffs that would reduce the proportion of blacks employed by the fire department. Over the objections of the city and the Firefighters Local Union, which intervened to oppose the injunction, the district court concluded that the seniority system was not bona fide, because layoffs according to seniority would have a discriminatory impact upon blacks. On appeal by the union and the city, the Sixth Circuit rejected the district court's conclusion that the seniority system was not bona fide but affirmed the lower court's injunction on other grounds. The Sixth Circuit reasoned that layoffs according to seniority would violate the city's explicit agreement to increase the proportion of blacks in supervisory positions. Moreover, independently of the city's agreement, the district court was authorized to modify the consent decree to avoid hardship to the plaintiffs caused by new and unforeseen circumstances. And finally, the injunction did not conflict with the immunity accorded to bona fide seniority systems by Title VII.

The Supreme Court initially held that the case was not moot. On the merits, the Court found no basis for the district

10. Id. at 2582.
11. Id. at 2582-83.
12. Id. at 2585, 2586-87.

The question of mootness arose because all of the employees laid off in 1981 had been rehired by the time the Supreme Court rendered its decision in 1984. The Court held that the case was not moot for three reasons: the district court's orders applied to all future layoffs by the fire department; the rulings of the district court and the court of appeals required the city to disregard the seniority system in making future layoffs; and the city might have been liable for back pay to laid-off white employees under its collective bargaining agreement with the union. Id. at 2583-85; see also id. at 2591-92 (O'Connor, J., concurring). The dissent effectively refuted the last two of these reasons: the rulings of the lower courts could be deprived of any effect by vacating the orders.
court's order in the consent decree. The city did not explicitly agree to abandon its practice, confirmed in a collective bargaining "memorandum of understanding" with the union, of laying off firefighters in reverse order of seniority according to the rule of "last hired, first fired." Relying on the principle that "the scope of a consent decree must be discerned within its four cor-

they had entered and the laid-off white employees had made no claim for back pay. *Id.* at 2597-2600 (Blackmun, J., dissenting). The dissent was less persuasive in arguing that the district court's orders applied only to the layoffs in 1981 because they were entered immediately after the layoffs were announced. *Id.* at 2597 & n.1; see *The Supreme Court, 1983 Term*, 98 Harv. L. Rev. 87, 273-74 (1984) (endorsing this argument). The orders, and the reasons given in support of them, applied equally well to future layoffs. The three orders entered by the district court, which concerned different job classifications but were otherwise identical, stated that the city could "not apply the seniority policy insofar as it will decrease the percentage of black [employees in specified positions] that are presently employed." *104 S. Ct.* at 2582; see *id.* at 2594 (Stevens, J., concurring in the judgment). The district court's reason for enjoining use of the seniority system was that it resulted in layoffs with an adverse impact on blacks. *Id.* at 2582. From the city's perspective, the terms of the district court's orders and opinion gave every indication that they prohibited all future layoffs with similar adverse impact.

In any event, a narrow interpretation of the district court's orders would only have shifted the question of mootness from interpretation of the orders to whether the case was "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Any layoffs according to seniority in the near future would have been likely to reduce the overall percentage of black employees because they were disproportionately represented among employees newly hired or promoted pursuant to the explicit preferences in the consent decree. Likewise, any employees laid off in the future might well have been recalled before a decision could be rendered by the Supreme Court, just like the employees laid off in 1981.


13. *104 S. Ct.* at 2582. There was some doubt about the enforceability of the memorandum of understanding under state law, but the city had unilaterally adopted the seniority system in 1973 before the memorandum of understanding was signed in 1975. *Id.* at 2585 n.7.
ners,"14 the Court found no implied obligation based on the city’s agreement to increase the proportion of blacks in the Fire Department. The Court also found no such obligation in the clause in the consent decree granting the district court continuing jurisdiction “for such further orders as may be necessary or appropriate to effectuate the purposes of this decree.”15 The purposes of the decree did not extend beyond the remedies that it explicitly ordered.

By itself, of course, the absence of provisions in the consent decree explicitly addressed to preferences in layoffs and seniority did not resolve, but only raised, the question whether it authorizes such preferences. Four reasons appear to have persuaded the Court that it did not.16 First, the consent decree provided that it was to be consistent with the earlier city-wide consent decree, which in turn provided for seniority according to length of employment with the city. Second, the city had adopted the seniority system by agreement with the union. Third, the city could be presumed not to depart from its agreement with the union because neither the union nor any adversely affected employees had been a party to the consent decree. And fourth, a remedy should not be implied in a consent decree if it could not be ordered by a court. These reasons share a common emphasis on collective bargaining and union participation in matters affecting seniority.

The Court elaborated on this theme in the next part of its opinion, which concluded that a judicially ordered preference affecting seniority would be contrary to the exception for seniority systems in section 703(h) of Title VII.17 Section 703(h) provides that a “bona fide” seniority system, not tainted by “an intention to discriminate,” does not violate Title VII.18 The Court easily found the seniority system to be bona fide despite its adverse impact on blacks. In its earlier decision in *International Brotherhood of Teamsters v. United States*,19 the Court had interpreted section 703(h) to require proof of intentional discrimination, not just ad-

15. *Id.* at 2585.
16. *Id.* at 2586-87.
17. *Id.* at 2587-88.
verse impact, to establish that a seniority system violated Title VII. Having found the seniority system to be bona fide, the Court reasoned that it could be modified only for the benefit of victims of discrimination. In doing so, it again followed Teamsters and a still earlier decision, Franks v. Bowman Transportation Co. 20 Under these decisions, remedial seniority under a bona fide seniority system can be awarded only to members of a plaintiff class who can show that they were adversely affected by some independent discriminatory act. The defendant has an opportunity to rebut this showing by proving that an individual class member would not have been selected for some independent, nondiscriminatory reason. Moreover, an award of remedial seniority takes effect only when a vacancy occurs in the position sought and it might be further limited by the district court's assessment of the equities. In Stotts, the Court held that these conditions restricted not only the award of remedial seniority to individual class members, but any judicial modification of bona fide seniority systems. Section 703(h) imposed general limits on judicial remedies affecting bona fide seniority systems. 21

The Court might have ended its opinion there, securely based on interpretation of the consent decree and protection of the seniority rights of present employees. Instead, in a few final paragraphs, the Court reasoned that the limits on awards of remedial seniority were supported by more general limits on judicial remedies under Title VII 22 Section 706(g) of Title VII

21. The Court has also relied on section 703(h) to interpret narrowly the prohibition against religious discrimination in Title VII. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 81-83 (1977).
authorizes injunctions against discriminatory practices and "such affirmative action as may be appropriate," including reinstatement, hiring, back pay, "or any other equitable relief as the court deems appropriate." The last sentence of section 706(g), however, prohibits awards of compensatory relief to any individual who "was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination" in violation of Title VII. The Court quoted four statements by prominent supporters of Title VII in the House and the Senate interpreting this provision to limit remedies under Title VII to actual victims of discrimination. Three of these equated this limitation with a prohibition against ""a racial quota"" or "'racial quotas,'" in precisely those terms. Taken at face value, these statements apply to all forms of preferential relief ordered by a court, whether or not they affect seniority.

Nevertheless, the Court did not address the strongest justification for preferential relief: in a concrete case, it may be the best among several imperfect remedies for discrimination. Several federal courts have ordered preferential relief against recalcitrant defendants because other remedies have not proven to be effective, and others have ordered preferential consideration of persons who failed or did poorly on a test found to be discriminatory as an approximation to compensatory relief. The last sen-
tence of section 706(g),\textsuperscript{28} from which the Court develops a
general prohibition against judicially ordered preferences, literally
prohibits only awards of compensatory relief to persons al-
ready rejected by an employer for nondiscriminatory reasons. It
is derived, like other provisions of section 706(g),\textsuperscript{29} from a cor-
responding provision in the National Labor Relations Act prohibiting
awards of compensatory relief to employees “suspended or
 discharged for cause.”\textsuperscript{30} The passages in the legislative history
quoted in \textit{Stotts} construe this sentence as a prohibition against
preferences,\textsuperscript{31} but it is doubtful that it could bear that construc-

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\textit{ation to compensatory relief}).

28. 42 U.S.C. § 2000e-5(g) (1982). This section provides in full:
No order of the court shall require the admission or reinstatement of an indi-
nual as a member of a union, or the hiring, reinstatement, or promotion of an
individual as an employee, or the payment to him of any back pay, if such indi-
nual was refused admission, suspended, or expelled, or was refused employ-
ment or advancement or was suspended or discharged for any reason other
than discrimination on account of race, color, religion, sex, or national origin
or in violation of section 2000(e)-3 of this title.

phrase “affirmative action” in the first sentence of section 706(g) refers, not to prefer-
ences, but to affirmative relief, as does the same phrase in the corresponding provision

30. 29 U.S.C. § 160(c) (1982). This section provides in full: “No order of the Board
shall require the reinstatement of any individual as an employee who has been sus-
pended or discharged, or the payment to him of any back pay, if such individual was
suspended or discharged for cause.” As the dissent in \textit{Stotts} points out, the phrase “for
cause” in the National Labor Relations Act was changed to “for any reason other than
discrimination on account of race, color, religion, sex, or national origin or in violation
of section 704(a)” in section 706(g) to make clear that good cause encompassed any
reason other than a violaton of Title VII. 104 S. Ct. at 2609 (Blackmun, J., dissenting)
(citing 110 Conc. Rec. 2567 (1964) (remarks of Rep. Celler)). \textit{See also} The Supreme Court,

31. The passages from the legislative history quoted in \textit{Stotts} imply that the last sen-
tence of section 706(g) was widely recognized as a prohibition against preferences. In
fact, most references to this provision in the legislative history simply quote or para-
phrase its language, like the passage from the memorandum by Senators Clark and Case
quoted in \textit{Stotts}: “No court order can require hiring, reinstatement, admission to mem-
bership, or payment of back pay for anyone who was not discriminated against in viola-
tion of [Title VII]. This is stated expressly in the last sentence of section [706(g)].”
tion in the absence of section 703(j), one of only two provisions in Title VII specifically addressed to preferences and the only provision in Title VII that disclaims any intent to require preferences. 32 Stotts did not cite section 703(j), probably because Weber states that section 703(j) concerns only substantive liability under Title VII, while section 706(g) concerns only remedies. 33

The Court also left open the question whether these limits on preferential relief apply to initial approval, as well as modification, of a consent decree. If a court cannot modify a consent decree to provide for preferential relief, how can it approve a consent decree, like the consent decree in Stotts itself, that expressly requires preferential relief? In two footnotes, 34 the Court stated that the limits on modification of a consent decree applied regardless of contrary provisions in the decree, relying on the broad principle that "the District Court's authority to adopt a consent decree comes only from the statute the decree is intended to enforce' not from the parties' consent to the decree." 35 Nevertheless, the Court carefully confined its remarks to contested modification of a consent decree and it apparently referred to provisions in the decree governing modifications, not to provisions explicitly establishing remedial preferences. In any event,

32 Stotts, 104 S. Ct. at 2589, (quoting 110 Cong. Rec. 7214 (1964)). The preceding sentences of the memorandum refer explicitly to the National Labor Relations Act:

The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices, 29 United States Code 160(b).

110 Cong. Rec. 7214 (1964). For other passages in the legislative history paraphrasing the last sentence of section 706(g), see H.R. Rep. No. 914, 88th Cong., 1st Sess. 29 (1963), 110 Cong. Rec. 6001 (1964) (remarks of Sen. Humphrey); id. at 7248 (remarks of Sen. Case); id. at 7386 (remarks of Sen. Young); id. at 8194 (remarks of Sen. Dirksen); id. at 9159 (remarks of Sen. McClellan); id. at 11,848 (remarks of Sen. Humphrey); id. at 12,819 (remarks by Sen. Dirksen); id. at 12,723-24 (remarks by Sen. Humphrey).


34. 104 S. Ct. at 2587 n.9, 2590 n.17.

35. Id. at 2587 n.9 (quoting Systems Fed'n No. 91 v. Wright, 364 U.S. 642, 651 (1961)). For criticism of the Court's reasoning on this point, see The Supreme Court, 1983 Term, supra note 12, at 275-77.
all of this reasoning was dictum, since the consent decree in Stotts neither authorized modifications nor provided for preferences in layoffs and seniority; instead, it contained only a bare provision for continuing jurisdiction by the district court.\textsuperscript{36} By contrast, two of the cases now pending before the Supreme Court concern preferences explicitly established by court order or by consent decree.\textsuperscript{37}

The narrow margin of the decision in Stotts suggests that the Court might well have decided the case differently had the question of judicial approval of consent decrees been presented. Only four other justices joined Justice White's opinion for the Court, and one of them, Justice O'Connor, filed a concurring opinion emphasizing the plaintiffs' failure to join the union and to obtain its agreement to the preference in layoffs and seniority.\textsuperscript{38} Justice Stevens concurred in the judgment, relying solely on interpretation of the consent decree and without reaching any question of statutory policy under Title VII.\textsuperscript{39} Justice Blackmun dissented, joined by Justices Brennan and Marshall, on the ground that the case was moot, and on the merits, that the district court's order was subject to a more lenient standard of review and that it was an appropriate remedy under Title VII.\textsuperscript{40} The narrow margin of the decision further magnifies the ambiguity of the opinion for the Court. Its full implications cannot be determined by reading it in isolation, but only by placing it in the context of earlier decisions, particularly United Steelworkers \textit{v.} Weber.

\textbf{B. Weber}

The prior decisions of the Supreme Court present several striking contrasts with Stotts. The contrasts begin with the questions decided by the Court. In both Bakke and Weber the Court decided questions that it deliberately avoided in Stotts. Bakke, of course, concerned the constitutionality of preferential admission

\textsuperscript{36} \textit{Id.} at 2585.
\textsuperscript{37} \textit{EEOC} \textit{v. Local 28, Sheet Metal Workers, 753 F.2d 1172 (2d Cir.), cert. granted, 106 S. Ct. 58 (1985); Vanguards v. City of Cleveland, 753 F.2d 479 (6th Cir.), cert granted \textit{sub nom. Local No. 93, International Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985).}}
\textsuperscript{38} 104 S. Ct. at 2592-93 (O'Connor, J., concurring).
\textsuperscript{39} \textit{Id.} at 2595 (Stevens, J., concurring in the judgment).
\textsuperscript{40} \textit{Id.} at 2596, 2600, 2606-10 (Blackmun, J., dissenting).
to medical schools. *Stotts* did not decide the constitutionality of preferences established by units of local government because the city had not agreed to the preference ordered by the district court. \(^41\) Weber held that Title VII did not prohibit preferences voluntarily established apart from litigation. *Stotts* concerned only preferences ordered by a court, either directly by an injunction or indirectly by modification of a consent decree. In two other decisions, the Court upheld fairly broad powers of the Federal Government to establish preferences, but with limited implications for employment discrimination law. In *Morton v. Mancari*, \(^42\) the Court held that a preference for promoting Indians, established by the Bureau of Indian Affairs, was consistent with both Title VII and the fifth amendment. \(^43\) And in *Fullilove v. Klutznick*, \(^44\) the Court held that Congress could establish an explicit, numerical preference that set aside a percentage of federally assisted contracts for minorities. In section 703(j), however, Congress explicitly stated that Title VII did not require preferences. \(^45\)

In *Bakke*, the Court both upheld the constitutionality of some forms of preferential treatment by government and held unconstitutional an explicit numerical preference for minorities in admission to a state medical school. Although the Court could not agree upon the standards for the constitutionality of racial preferences, five justices stated that preferences based on a finding of past discrimination and designed to eliminate racial imbalance caused by past discrimination were constitutional. \(^46\) The two opinions in *Bakke* that reached the constitutional question both discussed cases upholding preferences to remedy employment discrimination. In his separate opinion, Justice Powell distinguished cases approving preferences "as remedies for constitutional or statutory violations resulting in identified race-based

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41. Id. at 2590.
43. Id. at 548-55. The Court relied in part on special provisions for Indians in Title VII. Indian tribes are exempt from the prohibitions of Title VII by section 701(b), 42 U.S.C. § 2000e(b) (1982), and certain preferences for Indians on or near reservations are specifically allowed by section 703(i), 42 U.S.C. § 2000e-2(i) (1982).
44. 448 U.S. 448, 488-92 (1980).
46. 438 U.S. at 300-02, 307-09 (opinion of Powell, J.); id. at 366 n.42, 369 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).
injuries to individuals held entitled to the preference.\textsuperscript{47} He also distinguished cases upholding preferences imposed by an authorized legislative or administrative body based on a finding of past discrimination.\textsuperscript{48} The joint opinion of Justices Brennan, Marshall, White, and Blackmun took the stronger position that the Court’s decisions under Title VII established that “Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination,”\textsuperscript{49} even if Congress did not require a finding of intentional discrimination or a determination that only victims of discrimination would benefit from the preference.\textsuperscript{50}

In contrast to Bakke, Stotts decided no constitutional questions, but left one moot and several others open. It did not decide whether judicially ordered preferences affecting seniority and layoffs are constitutional. These preferences cannot be ordered under Title VII.\textsuperscript{51} As we have seen, however, Stotts did not hold that all remedial preferences are contrary to Title VII. First, judicially ordered preferences not affecting layoffs and seniority fall outside the narrow holding and some of the reasoning of the opinion. Second, judicially approved preferences in consent decrees were mentioned only in passing. And third, preferences established voluntarily by public employers were explicitly distinguished because the city had not agreed to the preference or-

\textsuperscript{47} Id. at 301 (opinion of Powell, J.).

\textsuperscript{48} Id. at 301-02; see also Fullilove v. Klutznick, 448 U.S. 448, 498-99 (1980) (Powell, J., concurring).

\textsuperscript{49} 438 U.S. at 366 (Brennan, White, Marshall, and Blackmun, J.J., concurring in the judgment in part and dissenting in part).

\textsuperscript{50} Id.

dered by the district court. Two cases now before the Supreme Court raise the question explicitly reserved in *Stotts*: whether the Constitution prohibits public employers from voluntarily establishing preferences affecting layoffs and seniority. The separate opinions in *Bakke*, representing the views of only five justices, do not clearly indicate how this issue will be resolved.

The opinion for the Court in *Weber* is more authoritative than the separate opinions in *Bakke*. It is also direct authority for the permissibility of preferences under Title VII, but for that reason, its authority is also likely to be limited by *Stotts*. In *Weber*, the Court held that a preference adopted by an employer and a union in collective bargaining was not prohibited by Title VII, either by the general prohibitions in section 703(a) and (d) against discrimination by employers and joint labor-management committees or by the explicit statement in section 703(j) that the statute does not “require” preferential treatment. Reading these sections in light of the legislative history, the Court concluded that Congress did not intend to prohibit voluntary efforts to remedy past discrimination. Section 703(a) and (d) does not prohibit racial classifications in remedial preferences, and section 703(j) simply states that the statute, of its own force, does not require preferences. According to the Court, preferences are permissible if they are “designed to break down old patterns of racial segregation and hierarchy” and if they do not “unnecessarily trammel the interests of the white employees.” The preference in *Weber* met the former requirement because it provided training for black employees for craft positions from which they had been excluded, not only at the employer’s plants, but

53. 104 S. Ct. at 2590.
54. *Weber* was a five-to-two decision. Two members of the Court, Justices Powell and Stevens, took no part in the consideration or decision of the case. 443 U.S. at 193.
57. 443 U.S. at 207-08.
58. *Id.* at 208.
throughout unionized industries. It met the latter requirement because it would be dismantled when the percentage of blacks in the relevant jobs approximated the percentage of blacks in the local labor market and because it allowed whites to compete for half of the positions in the training program.\textsuperscript{59} The Court also emphasized a feature of the preference in \textit{Weber} in direct contrast to the preferences in \textit{Stotts}: "The plan does not require the discharge of white workers and their replacement with new black hirees."\textsuperscript{60}

Because \textit{Stotts} holds that judicially imposed preferences in layoffs and seniority are contrary to Title VII, it necessarily limits the scope of \textit{Weber}. The preference in \textit{Weber} affected seniority as much as the preference in \textit{Stotts} because it awarded training positions to black employees instead of more senior white employees.\textsuperscript{61} If it had applied to layoffs and if it had been imposed by a district court, it would have been invalid under \textit{Stotts}. The holding of \textit{Stotts} limits the implications of \textit{Weber} at least to this extent. As we have seen,\textsuperscript{62} however, the language of \textit{Stotts} goes further. It casts doubt on all judicially imposed preferences, whether or not they apply to layoffs and whether or not they affect seniority. Even if \textit{Stotts} does not prohibit all judicially imposed preferences, \textit{Weber} can no longer be interpreted as a general endorsement of remedial preferences.

The most pressing question after \textit{Stotts} is whether \textit{Weber} continues to apply to preferences contained in settlements. In \textit{Weber}, the preference was established independently of litigation through collective bargaining, although only after the Office of Federal Contract Compliance had advised the employer that its federal contracts were in jeopardy for failure to fulfill the affirmative action obligations imposed by Executive Order 11,246.\textsuperscript{63} Although the Court treated the preference in \textit{Weber} as if it had been voluntarily adopted,\textsuperscript{64} like most preferences, it was not adopted independently of all legal compulsion. Employers may

\textsuperscript{59} \textit{Id.} at 199, 208-09.
\textsuperscript{60} \textit{Id.} at 208.
\textsuperscript{61} \textit{Id.} at 199.
\textsuperscript{62} \textit{See supra} text accompanying notes 19-24.
\textsuperscript{64} 443 U.S. at 200.
be required to establish preferences, either directly if they are federal contractors subject to Executive Order 11,246 or indirectly by the theory of disparate impact under Title VII. To be sure, on the spectrum from judicially imposed to voluntarily adopted, the preference in Weber stands at the opposite extreme from the preference in Stotts, but it does not lie beyond the influence of legal compulsion. Moreover, the practical significance of Weber depends heavily on legal compulsion. If judges cannot order preferential relief, then employers and unions are less likely to agree to preferences, either in settlement or in anticipation of litigation.

These uncertainties about the scope of Weber have their mirror image in uncertainties about the scope of Stotts. Although the holding of Stotts is confined to judicial modification of consent decrees, its reasoning can be easily extended to preferences in settlement agreements. By definition, remedial preferences confer benefits on persons not found to be victims of discrimination. Preferences are necessary only if relief cannot be awarded on the more precise basis of individualized findings. Settlements are the most common reason why such findings are not made. And indeed, the cost of individualized findings contributes to the reasons for settlement of class actions or pattern-or-practice actions, either before a finding of liability or before judicial imposition of a remedy. The expense, delay, and uncertainty of a long series of individualized hearings provide the parties with strong reasons to prefer a prompt and certain settlement. The desirability of approximate but effective remedies that support preferences imposed by court order provides still stronger support for preferences established by settlement. For all the questions that Stotts raises about Weber, the opinion in Stotts does not even cite Weber. It is doubtful that the Court meant to overrule Weber sub silentio, since the decision is too recent and too important to be overruled without explanation. Moreover, Justice White, the author of the opinion in Stotts, also joined the opinion in Weber. Although Stotts relies on passages in the legislative history of Title VII critical of preferences, it does not even cite the statutory

65. Meltzer, supra note 33, at 426-30; Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 947, 954 & n.24 (1982); see infra text accompanying notes 92-93.
66. 104 S. Ct. at 2588-90. Justice Rehnquist’s dissent in Weber also relied on similar
provision against quotas at the heart of *Weber*, section 703(j), which disavows any interpretation of Title VII that requires preferences. *Stotts* instead emphasizes section 706(g), which authorizes judicial remedies for employment discrimination. The only apparent explanation for these omissions is that the Court sharply, but silently, distinguished the problem in *Weber*—restrictions on private agreements—from the problem in *Stotts*—restrictions on judicial remedies.

The crucial question is where the lenient standards of *Weber* end and the strict limitations of *Stotts* begin. This distinction, in turn, depends upon the procedures for settlement and adjudication of class actions and pattern-or-practice actions. It does not correspond simply to the distinction between settlement and adjudication, which would result in almost no judicial supervision of preferences established by settlement. The procedures for settlement provide far less protection for nonparties, precisely the persons most likely to be burdened by preferential relief, than the procedures for adjudication. While the process of adjudication is conducted publicly on a full record, the process of settlement is conducted privately on an incomplete record, or, on

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no record at all. The very point of settlement, of course, is to allow the parties to avoid the costs of developing a full record at trial. The absence of a record is, however, an obstacle to representation of employees who cannot directly participate in settlement negotiations. Their interests would only be further neglected by applying the lenient standards of Weber to determine whether a consent decree should be approved. They would be better protected by the more formal process of adjudication, if only because their interests would be considered by a judge. But paradoxically, a judicially imposed preference would be subject to the stricter substantive requirements, if not the outright prohibition of Stotts.

The simplest way to eliminate this paradox is by making the deference accorded to settlements depend upon the procedural protection afforded to those adversely affected by preferential relief. The more procedural protection they receive, the less substantive protection they need. Following this principle, Weber would apply to preferences to which those adversely affected have agreed and the strict requirements of Stotts to preferences to which only the plaintiffs and the employer have agreed. This distinction has some basis in the decisions themselves. In Weber, the union was the collective bargaining representative of the employees, both those favored and those burdened by the preference.\textsuperscript{70} Although those opposed to the preference, such as Weber himself, were not adequately represented in litigation by the union, which had agreed to the preference, they were represented by the union in collective bargaining. It therefore made sense to allow them to challenge the preference only on the limited grounds specified in Weber. Conversely, in Stotts, those opposed to the preference were represented in the litigation only when the union intervened to oppose modification of the consent decree.\textsuperscript{71} Since the union took no part in the proceedings leading to the consent decree, it was entitled to rely on the strict requirements established in Stotts. This distinction between Weber and Stotts also has some basis in the statutory policy favoring settle-


\textsuperscript{71} 104 S. Ct. at 2582.
ment of Title VII claims but providing for litigation if settlement negotiations fail.\textsuperscript{72} On this interpretation, Stotts does not overrule the decisions of the lower federal courts imposing or approving preferential relief, but only qualifies and limits them.

These decisions generally favored preferences, relying in part on the constitutional standards in Bakke,\textsuperscript{73} but more heavily on the requirements under Title VII formulated in Weber.\textsuperscript{74} Indeed, after Weber, some circuit courts reversed and remanded district court decisions that had refused to approve settlements providing for preferential relief or that had found that voluntarily adopted preferences constituted illegal reverse discrimination.\textsuperscript{75} Apart from applying the broadly phrased standards of Bakke and Weber, relatively few opinions discussed the justification for preferential relief,\textsuperscript{76} and relatively few decisions refused to impose

\begin{itemize}
\item Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256, 279-84 (2d Cir.) (discussing factors for affirmative relief), cert. denied, 455 U.S. 988 (1981); Firefighters Inst. for Racial Equality v. City of St. Louis, 588 F.2d 235, 240-
\end{itemize}
preferences, even when it appeared that other forms of relief would be adequate.\textsuperscript{77} The lower federal courts concentrated instead on the scope and duration of preferences.\textsuperscript{78} Anticipating \textit{Stotts}, several courts modified preferential relief to reduce its adverse effects upon identifiable employees, particularly if it would deprive them of positions that they had already attained.\textsuperscript{79} Other courts reduced the magnitude of the preferences, for instance, by reducing the proportion of blacks among employees promoted

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41 (8th Cir. 1978) (discussing factors indicating need for preferential relief), \textit{cert. denied}, 443 U.S. 904 (1979).
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Other cases have stated that preferences are a remedy of last resort, but they have imposed or approved preferences without making a detailed examination of alternative remedies. \textit{E.g.}, United States \textit{v.} City of Alexandria, 614 F.2d 1358 (5th Cir. 1980); Davis \textit{v.} County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), \textit{vacated as moot}, 440 U.S. 625 (1979); Bridgeport Guardians, Inc. \textit{v.} Bridgeport Civil Serv. Comm'n, 482 F.2d 1333 (2d Cir. 1973), \textit{cert. denied}, 421 U.S. 991 (1975); Carter \textit{v.} Gallagher, 452 F.2d 315 (8th Cir.) (en banc), \textit{modified}, 452 F.2d 327 (8th Cir. 1971) (en banc), \textit{cert. denied}, 406 U.S. 950 (1972); United States \textit{v.} Local No. 38, IBEW, 428 F.2d 144 (6th Cir.), \textit{cert. denied}, 400 U.S. 945 (1970).


78. \textit{See}, \textit{e.g.}, Kirkland \textit{v.} New York State Dept. of Correctional Serv., 711 F.2d 1117, 1134-36 (2d Cir. 1983), \textit{cert. denied}, 104 S.Ct. 997 (1984); United States \textit{v.} City of Alexandria, 614 F.2d 1358, 1365-67 (5th Cir. 1980); United States \textit{v.} N.L. Indus., Inc., 479 F.2d 354, 377-78 (8th Cir. 1973).

from forty to twenty-five percent. These decisions demonstrate judicial willingness to reduce the unduly burdensome effects of preferences, but since they consist largely of approval of proposed settlements, they also reveal a stronger trend. Judges generally leave the decision to impose preferences entirely to the agreement of the parties. This trend follows the policy against government interference that Weber found in the legislative history of Title VII, but it also calls attention to the need for interested parties to participate in the settlement process, and as in Stotts, to the consequences of failure to join these parties and to obtain their agreement.

II. Procedural Restrictions on Preferential Relief

A. Settlement

The importance of procedures for reaching and approving settlements extends beyond the fact that preferential relief is usually imposed by settlements, either of an entire case or of its remedial phase after a finding of liability. The procedures governing settlement illustrate the desirability, and the difficulty, of providing representation for all those affected by preferential relief. The obvious solution of simply joining everyone with a substantial interest poses the equally obvious problem of complicating negotiations so that agreement is virtually impossible, particularly if the agreement must be unanimous. This problem becomes still more serious when those opposed to preferences are joined in the litigation. Those opposed to preferences may have nothing to gain, but much to lose, from a settlement. Unlike plaintiffs, they do not seek any affirmative relief; unlike defendants, they do not seek to limit their overall liability; and unlike both parties, they do not face a heavy burden of proof at trial or mounting attorney’s fees if the litigation is prolonged.

Equally difficult problems arise, however, if those opposed to preferential relief are not represented in settlement negotiations. They are not adequately represented by the plaintiffs, of course, who seek the relief that they oppose, or by the defendants, who may agree to preferential relief to limit their liability in other re-

80. E.g., United States v. City of Chicago, 663 F.2d 1354, 1361 (7th Cir. 1981) (en banc).
pects. If they are to be represented by anyone at all, it must be by the district judge, through her examination of the settlement for its consistency with public policy or its effects on third parties. But a thorough examination of the settlement by the district judge has two drawbacks. First, it requires that she participate in the settlement process, sacrificing her impartiality. Second, it requires a hearing on the merits of the plaintiff’s claims and the extent of relief provided in the settlement, which is precisely what the settlement was designed to avoid.

The body of law that deals most fully with these problems concerns settlement of Title VII class actions under Federal Rule of Civil Procedure 23. It provides more than a solution by analogy to the problems of representation of those adversely affected by preferences because, as we shall see in the next section, rule 23 can be applied directly to intervenors opposed to preferential relief.

Rule 23 requires that settlement of class actions be preceded by notice to class members and approval by the district court. Typically, the settlement is approved only after a hearing at which class members have an opportunity to object to the settlement. The standards for reviewing settlements usually require examination of several loosely related factors: (1) the relief provided by the settlement; (2) the strength of the plaintiff’s case; (3) the extent of discovery already completed; (4) the cost and complexity of trial; (5) the judgment of experienced counsel for the parties; (6) whether the settlement has been approved by the EEOC; (7) the number of objecting class members and the nature of their objections; and (8) any evidence of collusion between the named plaintiffs and the defendant at the expense of the class. Because the district court cannot transform the settlement hearing into a trial on the merits, examination of these

82. Fed. R. Civ. P. 23(e) provides: “A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”


84. See Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983); Alaniz v. California Processors, Inc. 73 F.R.D. 269, 278 (N.D. Cal. 1976), aff’d per curiam sub nom. Alaniz v. Tillie Lewis Foods, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978); B. Schlei & P. Grossman, supra note 83, at 1267-68.
factors seldom results in disapproval of proposed settlements. Indeed, these factors do little to counteract the momentum toward approval after a proposed agreement has been reached. Several of the factors invariably support approval of the settlement, such as the cost and complexity of trial and the judgment of experienced counsel for the parties. Others, including the extent of discovery, which is usually substantial, and the number of objecting class members, which is usually small, generally support approval. Those class members who do take the trouble to object generally cannot gain the familiarity with a complex case acquired by counsel for the parties. Evidence of collusion or conflict of interest also is not likely to be available, except in a rare case. Even so, objections by a large segment of the class

85. Plaintiff’s attorneys who are assured of a favorable settlement are also assured of an award of attorney’s fees proportional to the time spent on the plaintiff’s meritorious claims. Hensley v. Eckerhart, 461 U.S. 424, 434-37 (1983). Consequently, they have financial incentives to engage in discovery in support of those claims before settlement. See Rowe, Predicting the Effects of Attorney Fee Shifting, 47 L. & CONTEMP. PROB. 139, 160 (1984); Coffee, Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter is Not Working, 42 Md. L. REV. 215, 247-48 (1983). But cf. Cotton v. Hinton, 559 F.2d 1326, 1332 (5th Cir. 1977) (sufficient informal discovery made up for little formal discovery, which can be costly to parties and court).


87. See Holmes v. Continental Can Co., 706 F.2d 1144, 1150 (11th Cir. 1983) (class attorney not aware of claims of class members); see also Plummer v. Chemical Bank, 668 F.2d 644, 659-60 (2d Cir. 1982) (adequacy of counsel).


89. Reed v. General Motors Corp., 703 F.2d 170, 174-75 (5th Cir. 1983) (affirming approval of settlement to which 23 of 27 named plaintiffs and 40% of the 1517 class members objected); Elliott v. Sperry Rand Corp., 680 F.2d 1225, 1226-27 (8th Cir. 1982) (per curiam) (affirming approval of settlement to which all named plaintiffs and over 25% of class objected); Cotton v. Hinton, 559 F.2d 1326, 1332-33 (5th Cir. 1977) (50% of defendant’s active black employees objected); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799, 803 (3d Cir.), cert. denied, 419 U.S. 900 (1974) (20% of class objected); EEOC v. Hiram Walker & Sons, 768 F.2d 884, 891-92 (7th Cir. 1985) (39 out of 253 class members objected); see Schwarzschild, Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform, 1984 DUKE L.J. 887, 901, 915-16; Floyd, Civil Rights Class Actions in the 1980’s: The Burger Court’s Pragmatic Approach to Problems of Adequate Representation and Justiciability, 1984 B.Y.U. L. REV. 1, 29-31. But see Ficalora v. Lockheed California Co., 751 F.2d 995, 997 (9th Cir. 1985) (per curiam) (vacating approval of settlement because of objections by named plaintiff); Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1214-18 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979) (reversing district court’s approval of back pay settlement where 70% of back pay subclass and all three named plaintiffs objected); Amalgamated Meat Cutters
or favorable treatment of the named plaintiff may not defeat approval of a settlement.

Two principles are constantly invoked to justify approval of settlements: settlements are generally favored because they reduce the expense of litigation and because they increase the defendant’s willingness to comply with the resulting judgment, and they are especially favored in Title VII cases because Title VII requires attempted conciliation by the EEOC as a prerequisite to suit. The theory of disparate impact also exercises a more subtle, but more pervasive, influence favoring settlement, especially on consent decrees requiring preferential relief. Even if the plaintiff does not present compelling evidence of disparate impact, the parties can present sufficient evidence to justify a settlement on the ground that the plaintiff might have prevailed at trial; the plaintiff might have proved disparate impact and the defendant might have been unable to prove business necessity or job relationship in rebuttal. A settlement justified on this

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Conciliation by the EEOC is required after a finding of reasonable cause by 42 U.S.C. § 2000e-5(b) (1982).

92. The theory of disparate impact requires the plaintiff only to prove disparate impact, instead of intentional discrimination. If the plaintiff carries this burden, then the burden shifts back to the defendant to justify the disputed employment practice. See Dothard v. Rawlinson, 433 U.S. 321, 329-31 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971). But see Croker v. Boeing Co., 662 F.2d 975, 991 (3d Cir. 1981) (the burden of persuasion remains with the plaintiffs). If the defendant carries this burden, then the burden shifts back to the plaintiff to show pretext, which is simply proof of intentional discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

93. E.g., Kirkland v. New York State Dept. of Correctional Serv., 711 F.2d 1117,
ground easily lends itself to preferential relief because disparate impact is most easily remedied by a preference.

The trend favoring approval of settlements raises a crucial question: How much are settlements favored? At one extreme, they may be treated like collective bargaining agreements under the National Labor Relations Act, which are immune from judicial and administrative interference in most aspects of formation and enforcement. At the other, they may be treated like the same agreements under Title VII and other laws prohibiting discrimination in employment, which are subject to full judicial review for compliance with the law. Whether settlements are to be treated more in accord with one extreme or the other depends on how the class action is structured to assure adequate representation of absent class members. The greater the assurance of adequate representation, the more the agreement of the named plaintiff and her attorney resembles the agreement of a union in collective bargaining. The less the assurance, the more it resembles an agreement alleged to violate Title VII. When those adversely affected by preferential relief are without representation, settlements should receive full judicial review for compliance with Title VII.

Of course, class members differ from nonparties because they are bound by an approved settlement; whereas, nonparties, unless they are in privity, are not. According to traditional princi-


For an argument that Stotts may undermine the theory of disparate impact, see Cox, supra note 22, at 815-19.


96. Some courts, nevertheless, have held that opponents of preferential relief are
amples of preclusion, opponents of preferential relief who are neither joined in the litigation nor in privity with existing parties are not bound by the resulting settlement or judgment.\(^{97}\) Under these principles, the difference between class members and non-parties affects both the timing and the standard of judicial review of settlements. Because they are not bound by the settlement, non-parties can challenge it in separate reverse discrimination actions without any presumption arising from prior judicial approval. A recent decision of the Supreme Court, *W.R. Grace & Co. v. Local Union 759*,\(^{98}\) to be discussed in the next section,\(^{99}\) has reached this result in limiting the preclusive effect of a conciliation agreement between an employer and the EEOC.

Settlement of actions by the EEOC or the Attorney General is essentially similar to settlement of class actions. Government actions are usually settled by consent decrees\(^{100}\) which, like settlement of class actions, require prior judicial approval.\(^{101}\)


Settlements by the government receive somewhat more deference than settlements by private parties because the government has a stronger claim to represent the public interest.\textsuperscript{102} Even so, the Supreme Court has stated that the judgment in a government action is not binding on the beneficiaries for whom it was brought because the public interest might diverge from their personal interest.\textsuperscript{103} Although the government represents the public, it cannot adequately represent all of the conflicting interests in a pattern-or-practice action. Those with independent claims or defenses are entitled to an opportunity to be heard.\textsuperscript{104}

Decisions on settlement of class actions also reveal the futility of according opponents of preferential relief the same status as absent class members. Objections by absent class members seldom defeat approval of proposed settlements.\textsuperscript{105} If they have any effect at all, it is in modifying proposed settlements before they are approved.\textsuperscript{106} Only in rare cases do absent class members succeed in fundamentally altering the structure of proposed settlements or in obtaining complete rejection of a proposed settlement, or in extreme cases, in ousting the named plaintiff and his attorney as representatives of the class.\textsuperscript{107} These objections concern defects in party structure, not just the overall level of

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\item[102.] United States v. City of Miami, 614 F.2d 1322, 1392 (5th Cir. 1980), \textit{modified}, 664 F.2d 435 (1981). When the EEOC or the Department of Justice has agreed to a settlement, it necessarily has approved the settlement and thereby satisfied one of the factors supporting judicial approval. \textit{See supra} note 91 and accompanying text.
\item[103.] General Tel. Co. v. EEOC, 446 U.S. 318, 332-33 (1980).
\end{enumerate}
\end{footnotesize}
relief awarded to the class. For instance, settlements that confer disproportionate advantages upon the named plaintiff and the class attorney reveal a conflict of interest between the class representatives and the class, not just an inadequate level of benefits conferred upon the class.\textsuperscript{108} Nevertheless, even such settlements have been approved,\textsuperscript{109} and even favorable settlements often result in awards of compensatory relief that are fairly modest when averaged over an entire class.\textsuperscript{110} Likewise, class actions settled before certification are subject to more searching review because of the risk that the named plaintiff and his attorney may have obtained more favorable treatment for themselves at the expense of the class.\textsuperscript{111} Judicial review of settlements is not a denatured form of decision on the merits, but a part of the district court’s ongoing duty to monitor representation of the class. Like other aspects of this duty, it is best accomplished by changes in party structure to assure adequate representation.\textsuperscript{112} The very absence of class members from the ongoing proceedings leaves them in a poor position to carry the heavy burden of blocking a proposed settlement. Typically they lack the independent organizational structure necessary to retain an attorney and to monitor the class

\textsuperscript{108} E.g., Holmes v. Continental Can Co., 706 F.2d 1144, 1147-51 (11th Cir. 1983); Plummer v. Chemical Bank, 668 F.2d 654, 659-60 (2d Cir. 1982). For the same reason, simultaneous negotiation of an award of attorney’s fees and a settlement on the merits often creates a conflict of interest between the class attorney and the class. E.g., Moore v. National Ass’n of Securities Dealers, Inc., 762 F.2d 1095, 1100-06 (D.C. Cir. 1985).

\textsuperscript{109} Garza v. Deaf Smith County, 604 F. Supp. 46, 50 (N.D. Tex. 1985) (approving settlement of $60,000 for class and $8,500 to named plaintiff and awarding $56,500 to attorney); Block v. Revlon, Inc., 37 Fair Empl. Pract. Cas. (BNA) 1327, 1333 (S.D.N.Y 1985) (approving settlement of $300,000 to class and $25,000 to each named plaintiff and awarding $225,000 to attorney).


\textsuperscript{111} See Plummer v. Chemical Bank, 668 F.2d 654, 658 (2d Cir. 1982); Shelton v. Pargo, Inc., 582 F.2d 1298, 1305-06, 1314-15 (4th Cir. 1978).

action from its inception. By the time they receive notice of a proposed settlement, they are far behind in knowledge of the evidence and legal theories in the case, let alone of the settlement negotiations.

Opponents of preferential relief stand in even greater need of representation through a party who participates in the settlement process. Ideally, their interests are best represented by a party equally opposed to preferential relief. Employers sued for employment discrimination do not fit this description. They may agree to preferential relief, even if they are opposed to it, to avoid the expense of compensatory relief and continued litigation. Unions which are sued are in a similar position, although with weaker conflicting incentives. Unions can be held directly liable for back pay and attorney's fees, but usually they are held jointly liable with employers.\footnote{See B. Schlei & P. Grossman, supra note 83, at 631.} Employers are generally a better source for collecting a judgment, particularly a large judgment typical of a class action or pattern-or-practice action; and if they pay more than their share of the judgment, they cannot bring an action over against the union for contribution.\footnote{Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 93, 98 (1981).} The principal incentives for a union to agree to a settlement are the adverse effects of a judgment on present employees, for instance, awards of remedial seniority or changes in promotion procedures that work to their disadvantage, and the cost of avoiding these effects through continued litigation. These incentives closely resemble the union's incentives in collective bargaining, and indeed, they apply equally well to a union's decision to agree to a preference in collective bargaining. In both settlement negotiations and collective bargaining, the union must assess the desirability of the employment practices favored by current employees against the undesirability of preferential relief. Insofar as the union is willing to make any concession at all on the issue of preferential relief, of course, its interests will conflict with the interests of employees irrevocably opposed to such relief, who have no exposure to liability and exposure to litigation expenses only on the narrow question of preferential relief itself.\footnote{Title VII imposes liability upon employees only if they are agents of a covered employer or labor organization. 42 U.S.C. §§ 2000e(b), (d), 2000e-2(a), (c), (d) (1982).} The principal in-
centive for those opposed to preferential relief, including unions, to agree to a preference is the risk that a court will order a more severe preference. Insofar as Stotts restricts the court's power to order preferential relief, it correspondingly reduces these incentives to agree to preferences.

The search for a perfect representative of opponents of preferential relief, apart from the opponents themselves, is bound to end in failure. The same incentives that lead an employer or a union to agree to a settlement also cause its interests to diverge from those of opponents of preferential relief. Relying on this divergence of interests, opponents of preferential relief can always argue that they are not bound by a settlement because they did not receive constitutionally adequate representation.\textsuperscript{116} In strictly procedural terms, this argument is difficult to refute. The lesson of the decisions on settlement of class actions is that representation by a party with congruent interests provides better representation than supervision of the settlement process by the district court, whether it is distant and belated or close and coercive.\textsuperscript{117} Even if adequate representation might be found in a particular case, the settlement could still be denied preclusive effect for lack of privity.\textsuperscript{118} Opponents of preferential relief have no relationship with employers or unions authorizing litigation on their behalf. They are free to represent themselves in litigation.

They are not, however, free to represent themselves in collective bargaining. The union is the exclusive representative of the employees that it represents in collective bargaining, and in this

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\item Honsberrry v. Lee, 311 U.S. 32, 42-45 (1940).
\item See Fiss, supra note 86, at 1078-82; Rutherglen, Notice, supra note 112, at 37-38.
\item See supra note 97.
\end{enumerate}
\end{footnotesize}
role, it is subject to a corresponding duty of fair representation: to represent all the employees "without hostile discrimination, fairly, impartially, and in good faith." 119 Although the procedural consequences of a settlement do not preclude them from asserting subsequent claims of reverse discrimination against either their employer or their union, the substantive consequences of the settlement may determine the standards by which such claims are judged, and in particular, whether they should be judged by the standards of Stotts or Weber. A union's agreement to preferential relief in settlement does not differ significantly from its agreement to a preference in collective bargaining. Both are subject to individual claims of reverse discrimination, but both should be judged under the standards of Weber, which approximate the standards for judging collective bargaining agreements under the duty of fair representation. As under the latter, the union's representation of a majority of its constituents in negotiations should rarely be found inadequate. 120 The majority does not need judicial protection through strict review of adequacy of representation because it can protect itself through the majoritarian processes of representation and internal union elections. If a union represents a majority of white employees, 121 or employees from other groups which do not benefit from the preference, then joining the union and obtaining its agreement to a settlement is sufficient to protect their interests under the lenient standards of Weber. If not, or if no union represents the affected employees, then stricter substantive standards are necessary to protect their interests.

B. Joinder

The devices for joining parties to litigation work most effec-

119. According to the standard formulations, the duty of fair representation prohibits only actions which are "arbitrary, discriminatory, or in bad faith," Vaca v. Sipes, 386 U.S. 171, 190 (1966), or, stated affirmatively, requires the union "to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192, 204 (1944).


tively when a union represents employees adversely affected by preferential relief. A union can be joined in various ways, either through permissive joinder, as a necessary party, or through intervention.\textsuperscript{122} After the Supreme Court’s decision in \textit{W.R. Grace \& Co. v. Local Union 759},\textsuperscript{123} plaintiffs are likely to join the union in order to obtain complete relief, and if they do not, the union can readily be joined as a necessary party or intervene itself. The principal obstacles to joinder of the union do not depend so much on the particular procedural device used to bring the union into the action as on both the independent statutory requirement of exhaustion of administrative remedies\textsuperscript{124} and the need to notify the union of its interest in the action.\textsuperscript{125} When no union represents employees adversely affected by preferential relief, these joinder devices do not work nearly as well, if they work at all. In the absence of a union, there is no one to be joined in the action, either permissively or as a necessary party. Even if opponents of preferential relief intervene as individuals, or as an ad hoc committee formed in response to the litigation, it is difficult to avoid giving them too much power or too little. If they are given a veto over settlements, they will usually exercise it because they have little stake in avoiding further litigation. But if they are given only the right to object to settlements, their objections to preferential relief, like those of class members to proposed settlements, will usually be overruled. Moreover, even if they agree to a settlement, it is difficult to make it binding on individuals who do not intervene. Procedural devices cannot create a union where none exists in fact.

1. Unions.—In actions alleging discrimination or seeking relief related to the collective bargaining agreement, the union can be joined permissively under the liberal provisions of Federal Rule of Civil Procedure 20(a). Rule 20(a) allows joinder of defendants if the plaintiff asserts against them “any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or

\textsuperscript{122} \textit{Fed. R. Civ. P.} 19(a), 20(a), 24.
\textsuperscript{123} 461 U.S. 757 (1983).
\textsuperscript{124} See infra notes 136-149 and accompanying text.
\textsuperscript{125} See infra note 157 and accompanying text.
fact common to all defendants will arise in the action." 126 These requirements are satisfied if the plaintiff asserts claims against the employer and the union "in respect of or arising out of" the collective bargaining agreement and raising the common question whether the agreement violates Title VII or whether it should be modified.

The union can also usually be joined under the more restrictive provisions for joinder of necessary parties in Federal Rule of Civil Procedure 19(a). Rule 19(a) requires joinder of a party if the following conditions are met:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. 127

In addition, the Supreme Court has required a motion under subdivision (ii), based on prejudice to an existing party, to be made in a timely fashion, no later than the trial on the merits. 128 Of the explicit conditions for joinder of a necessary party, at least one will be satisfied if the action is likely to affect the collective bargaining agreement. If relief affecting the agreement cannot be ordered in the union's absence, then complete relief cannot be afforded to the plaintiff. On the other hand, if relief is ordered, then it will either prejudice the union's interest in preserving the agreement or it will subject the employer to obligations inconsistent with its obligations under the agreement.

In W.R. Grace & Co. v. Local Union 759, 129 the Supreme Court essentially decided in favor of the latter alternative. In that case, the employer had entered into a conciliation agreement with the EEOC that required it to maintain the existing proportion of women in its plant in the event of layoffs. The employer's collective bargaining agreement with the union, however, required layoffs

to be made in reverse order of seniority. When the employer made layoffs in compliance with the conciliation agreement, but in violation of the collective bargaining agreement, the union filed grievances, one of which resulted in an arbitration award in favor of a senior male employee who had been laid off instead of a junior female employee. The employer sued to vacate the award, but the Supreme Court held that the employer remained bound by the collective bargaining agreement because it had failed to obtain the union's consent to the conciliation agreement. Although *W.R. Grace* concerned a conciliation agreement, its reasoning applies directly to settlement agreements in litigation. "Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union's consent." The Court reserved the question of the effect of judicially ordered remedies on collective bargaining agreements, but the same interest of the union that requires its consent to a conciliation agreement also requires its participation in litigation. In *Stotts*, the Court emphasized the union's absence from the action settled by the consent decree, and in earlier cases, the Court has cited rule 19(a) as a basis for joining the union if judicially imposed remedies might affect the collective bargaining agreement. In fact, the union in *W.R. Grace* had been invited to join in the process of conciliation but had not been named as a respondent in the charge filed with the EEOC. Thus, the Court's decision requires actual joinder of the union, not just an opportunity for the union to intervene, to make modifications of the collective bargaining agreement binding upon it.

130. *Id.* at 771.


132. 461 U.S. at 767 n.9.

133. 104 S. Ct. at 2586; *id.* at 2595 (O'Connor, J., concurring).


135. 461 U.S. at 759.
In Title VII actions, the only significant obstacle to joinder is exhaustion of administrative remedies. Under the standard interpretation of Title VII, the plaintiff must name each defendant in the charge filed with the EEOC.\textsuperscript{136} This requirement provides the EEOC with an opportunity to investigate the allegations against each defendant and to attempt conciliation between each defendant and the plaintiff. In many cases, however, the plaintiff does not foresee the need to join the union in subsequent litigation when he first files a charge with the EEOC. When he later seeks to join the union permissively, or the defendant moves to join the union as a necessary party, the union objects that it was not named in the charge. This objection transforms the relatively simple question whether the union may be joined permissively or as a necessary party into the more difficult question whether the action should be dismissed because it is an indispensable party who cannot be joined at all.\textsuperscript{137}

Faced with this question, some courts have departed from the standard interpretation of Title VII and have allowed the union to be joined despite the plaintiff's failure to exhaust administrative remedies.\textsuperscript{138} Typically, they have emphasized the desirability of joining the union to afford full relief to the plaintiff and to avoid multiple or inconsistent adjudications, but they have limited relief against the union to modification of the collective bargaining agreement.\textsuperscript{139} These reasons are not entirely


\textsuperscript{137} Fed. R. Civ. P. 19(b).

\textsuperscript{138} See B. Schlei & P. Grossman, supra note 83, at 1096-99.


The cases dismissing claims against a union for failure to exhaust administrative remedies generally concern two distinguishable situations. The first is joinder of the union as a full-fledged defendant, liable for monetary as well as injunctive relief. \textit{E.g.}, Jones v. Truck Drivers Local Union No. 299, 36 Fair Empl. Prac. Cas. (BNA) 569, 570-71 (6th Cir. 1984); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969); Johnson v. Thomson Brush Moore, Inc., 7 Fair Empl. Prac. Cas. (BNA) 921, 924 (N.D. Ohio 1984); Hawkins v. Allis-Chalmers Corp., 527 F. Supp. 895, 897 (W.D. Mo. 1981). The second is when the union is not a necessary party, usually because the plaintiff has
convincing. They establish only that the requirements of rule 19(a) are satisfied, not that the failure to exhaust administrative remedies against the union should be excused. A union not named in a charge filed with the EEOC loses the benefit of the short statutes of limitations applicable to Title VII claims, both for filing charges with the EEOC and filing actions in court, and the related benefit of early notice of the charges against it. In the ordinary case, failure to comply with the statute of limitations provides the defendant with an absolute defense, subject only to narrow exceptions unrelated to the desirability of joining the defendant as a party. Filing a charge against the employer does not provide notice to the union of its potential liability. The EEOC must issue notice of a charge, within ten days after it is filed, only to the respondents named in the charge. Limiting the relief against the union more effectively protects its interests, but it can do so only partially. If joinder of the union results in modification of the collective bargaining agreement, then the union must inevitably be held liable to that extent. Even if the union is not liable for back pay, it will lose its own rights, or those of the employees that it represents, to the extent of any modification of the collective bargaining agreement.

The decisions allowing joinder of the union without exhaustion of administrative remedies seem to be motivated less by the unconvincing reasons articulated in the opinions than by skepticism about the effectiveness of EEOC procedures of investigation and conciliation, especially after they have failed to resolve the claims against the existing defendants. Although skepticism

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exhausted administrative remedies against an affiliated union and has joined it as a defendant. E.g., Le Beau v. Libby-Owens-Ford Co., 484 F.2d 798, 801-02 (7th Cir. 1973). But see Eggleson v. Chicago Journeymen Plumbers Local No. 130, 657 F.2d 890, 904-08 (7th Cir.) (charge against one of two affiliated unions or apprenticeship committees exhausts remedies against both), cert. denied, 455 U.S. 1017 (1981); Gibson v. Local 40, Super cargoes & Checkers, 543 F.2d 1259, 1263 n.1 (9th Cir. 1976); Evans v. Sheraton Park Hotel, 503 F.2d 177, 180-84 (D.C. Cir. 1974); Stevenson v. International Paper Co., 432 F. Supp. 390, 397-98 (W.D. La. 1977).


141. The EEOC is required to notify the respondent named in a charge within ten days after it is filed. 42 U.S.C. § 2000e-5(b) (1982).


about the effectiveness of investigation and conciliation as administrative remedies is warranted,\textsuperscript{144} it was insufficient to persuade Congress to grant the EEOC greater enforcement authority in the form of cease-and-desist orders.\textsuperscript{145} Instead, Congress compromised on a hybrid scheme of administrative and judicial enforcement. Predictably, this compromise, which was politically necessary for enactment of the statute, has proved to be cumbersome in practice. Creating an exception to this scheme for necessary parties may be justified in the abstract, but creating an exception whenever exhaustion of administrative remedies would be ineffective would undo the congressional compromise entirely.

If the plaintiff has not exhausted administrative remedies against the union, systematic modification of the collective bargaining agreement should not be ordered over the union’s objection. Changes in the collective bargaining agreement, especially by way of preferences, may do more harm to the union than liability for back pay, which clearly requires exhaustion of administrative remedies. Moreover, plaintiffs are already limited in their ability to obtain preferential relief in the absence of the union. After \textit{Stotts}, some forms of preferential relief cannot be ordered by the district court under any circumstances,\textsuperscript{146} and after \textit{W.R. Grace}, an employer can agree to preferential relief without the union’s consent only at the risk of liability under the collective bargaining agreement.\textsuperscript{147} To be sure, the Supreme Court has acknowledged that injunctive relief may be issued with ancillary or minor effects upon a nonparty,\textsuperscript{148} and it has reserved the question whether an award of remedial seniority to a victim of discrimination has such effects on unions or employees not joined in


\textsuperscript{145} This was the central issue in the debate over enforcement of Title VII, both when it was originally enacted in 1964 and when it was amended in 1972. Rutherglen, \textit{Title VII Class Actions}, 47 U. CHI. L. REV. 688, 692-96, 713-20 (1980); see Sape & Hart, \textit{Title VII Reconsidered: The Equal Employment Opportunity Act of 1972}, 40 GEO. WASH. L. REV. 824, 836-45 (1972); Vaas, \textit{Title VII: Legislative History}, 7 B.C. IND. & COMM. L. REV. 431, 436-87 (1966).

\textsuperscript{146} See supra text accompanying notes 22-33.

\textsuperscript{147} See supra text accompanying notes 129-135.

the action. But in Stotts and W.R. Grace, the Court has reached the common sense conclusion that the adverse effects of a preference on seniority rights to avoid layoff are hardly ancillary.

If the union is not joined, either permissively or as a necessary party, then it should be allowed to intervene under Federal Rule of Civil Procedure 24. The requirements for intervention as of right under rule 24(a) are similar to those for joinder of a necessary party under rule 19(a)(2)(i). In addition, rule 24(a) requires timely application and inadequate representation of the applicant by existing parties. Permissive intervention under rule 24(b) requires only timely application and that “an applicant’s claim or defense and the main action have a question of law or fact in common.” Unlike joinder of the union by another party, intervention by the union itself raises few problems of failure to exhaust administrative remedies. By applying to intervene, the union has necessarily waived exhaustion of administrative remedies. Nevertheless, the union should not be exposed to greater liability as an intervenor than as a necessary party because greater exposure would only deter unions from applying to intervene.

Apart from timely application, the other requirements for intervention are easily met. For intervention as of right, the union’s interest in the enforcement of the collective bargaining agreement constitutes an interest relating to the subject of the action. This interest will be impaired as a practical matter by any remedy affecting the agreement, even by a limited remedy that makes no systematic change in the collective bargaining agreement. Any remedy that affects the rights of the union under the collective bargaining agreement, or more likely, of the employees that it represents, has an adverse effect as a practical matter on

150. Fed. R. Civ. P. 24(a) states: “the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . .”
151. Id.
153. By analogy, intervenors cannot question venue or personal jurisdiction. 7A C. Wright & A. Miller, supra note 128, at § 1918, p. 608 (1972 & Supp. 1985); see also id. at § 1920, p. 491 (1985 Supp.).
the union's interest in enforcing the agreement. 154 Finally, the interests of the union are not adequately represented by the existing parties, either by the employer, the union's adversary in collective bargaining, or, of course, by the plaintiff, who seeks relief affecting the collective bargaining agreement. 155

For permissive intervention, the only requirement, apart from timely application, is a common question or law or fact, which is obviously satisfied by the union's objections to relief affecting the collective bargaining agreement. Permissive intervention should be granted for the same reasons that support intervention as of right. 156 Even if the district court finds that these reasons do not justify intervention as of right, it should find them sufficient to justify the exercise of its discretion to permit intervention.

The principal obstacle to intervention is timely filing of an application to intervene. Although framed as a problem of timing, it usually arises from lack of notice. Since the would-be intervenor is not a party to the action, he receives no notice of how far it has progressed, what outcome is likely to result, or even that it was filed at all. Consequently, judgments about when the intervenor knew of his interest in the action and should have applied to intervene inevitably are indefinite and imprecise. Joinder of the union as a necessary party avoids this problem, simply by joining the union first and providing notice immediately thereafter. An alternative both to ordinary intervention and joinder as a necessary party is to notify the union of the action and to invite it to intervene. 157 The union is in a better position to assess its interest in participating in the action than the court or the existing parties. Inviting the union to intervene would have the additional advantage of mooting the question whether the union was a necessary party, if the union decided to intervene, and of

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156. District courts have frequently granted intervention on the alternative grounds that it was as of right and that it was permissive in the court's discretion. 7A C. WRIGHT & A. MILLER, supra note 128, at § 1902, p. 467 (1972).

157. Solicited intervention has been used to remedy procedural defects in class actions. Rutherglen, Notice, supra note 112, at 74 & nn.252, 253.
precluding most later applications to intervene on grounds of untimeliness, if the union decided not to intervene earlier.

The leading decision on timeliness confirms the close connection between timeliness and notice. In *United Airlines, Inc. v. McDonald*, the Supreme Court held that an application to intervene after final judgment was timely. An unnamed class member applied to intervene in order to appeal the denial of certification of a class in an action alleging sexual discrimination in employment. The Supreme Court held that the application was timely because it was filed "as soon as it became clear to the [intervenor] that the interests of the unnamed class members would no longer be protected by the named class representatives." An earlier application to intervene could not have been filed because an order denying certification of a class is not appealable, and because the named plaintiffs had given no indication that they would not appeal on that ground before an appealable final judgment was entered. Although *United Airlines* concerned only intervention by unnamed class members, it stands for the broader proposition that the timeliness of an application to intervene must be determined from the date that the intervenor learned that her interest in the action was not adequately protected by existing parties.

The leading lower court decision, *Stallworth v. Monsanto Co.*, applied this broad principle to a case closely resembling *Stotts*. White employees of Monsanto applied to intervene in a class action alleging racial discrimination in order to oppose a consent decree, reached by agreement between the named plaintiffs and the employer, that changed a seniority system from one based on departmental seniority to one based on plant seniority. The white employees applied to intervene one month after the consent decree was approved by the district judge, who then denied their application because it was not timely. After stating that the district judge's decision could be reviewed only for abuse of discretion, the Fifth Circuit articulated four factors for determin-

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159. Id. at 394.
160. Id. at 388 n.4.
161. Id. at 393-94.
162. 558 F.2d 257 (5th Cir. 1977).
163. Id. at 261.
164. Id. at 263.
ing timeliness:

Factor 1. The length of time during which the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene.

Factor 2. The extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as he actually knew or reasonably should have known of his interest in the case.

Factor 3. The extent of the prejudice that the would-be intervenor may suffer if his petition for leave to intervene is denied.

Factor 4. The existence of unusual circumstances militating either for or against a determination that the application is timely.165

Applying these factors, the court concluded that the district judge had abused his discretion. It found that the first factor strongly favored a finding of timeliness because the intervenors had acted within one month of learning that their seniority rights were affected by the consent decree. The second factor similarly favored a finding of timeliness because little prejudice, if any, resulted to the existing parties from this short delay. As the court emphasized, the prejudice to existing parties relevant to a determination of timeliness is not the prejudice from intervention late in the action, but the prejudice only from the applicants' delay in applying to intervene after they have learned of their interest in doing so.166 The court also reasoned that the fourth factor, unusual circumstances, favored a finding of timeliness because the employer had been denied permission, at the urging of the named plaintiffs, to notify its employees of the effect that the action might have on their seniority rights. In light of these factors favoring a finding of timeliness, the court did not see any need to discuss the third factor, prejudice to the intervenors from denial of intervention.

The four-factor analysis in Stallworth has been widely followed,167 but the case itself differs from most cases of union in-

165. Id. at 264-66 (original emphasis deleted).
166. Id. at 265, 267.
167. United States v. Jefferson County, 720 F.2d 1511, 1516 (11th Cir. 1983); United
tervention in two respects. First, the question of notice to the union or to other employees is not usually raised and decided early in the action, as it was in *Stallworth*. Explicit consideration of this question, as the Fifth Circuit recognized, undercuts any claim of prejudice by the party who had opposed notice, and to that extent, transforms the question of timeliness into the easier question of notice. Second, unions can be expected to exercise greater diligence than individual employees in keeping track of litigation that is likely to affect their interests. Unlike the individual employees in *Stallworth*, who were not represented by a union, a union is more likely to learn of major litigation over employment practices, and, more importantly, to be on notice that such litigation usually affects the collective bargaining agreement in one way or another. Both of these distinguishing facts take on added significance when the union tries to intervene in the action only after a consent decree has been proposed by the parties or approved by the district court. The momentum toward final judgment created by a settlement inevitably predisposes the court against a finding of timeliness. This predisposition persists despite the Supreme Court’s holding in *United Airlines* that timeliness is to be determined from the date that the applicant learned of its interest in intervening and the Fifth Circuit’s caution in *Stallworth* that prejudice to existing parties is not to be judged by the stage of the proceedings at which intervention is sought. Apparently for this reason, the decisions are split on the timeliness of a union’s application to intervene to object to a consent decree, although several have avoided confronting the question by allowing the union to intervene to present objections to the

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consent decree but not to veto it. The problems posed by late intervention are better avoided by requiring joinder of the union or notice soliciting intervention by the union, placing the burden of informing the union on the existing parties. The union, precisely because it is not a party, is less likely to know of its interest in the action. Following the reasoning of Stallworth, the absence of these steps early in the action should usually excuse a union’s application to intervene late in the action.

2. Employees and Ad Hoc Groups.—If no union represents the employees who might be adversely affected by a remedial preference, the range of available joinder devices is limited to intervention. The insurmountable obstacle to permissive joinder or joinder of a necessary party is that there is no representative of adversely affected employees and applicants of employment to join. The only way to allow them to participate in the action is by intervention, either by ad hoc groups formed in response to the litigation or by individual employees. Ad hoc groups resemble temporary, narrowly focused unions with a limited constituency, but they differ from unions in three important respects: the parties and the court cannot be expected to learn of their existence and provide them with notice of the action; they have less reason to agree to preferences as a compromise on other issues; and they do not represent employees in collective bargaining. Individual employees present even greater problems, not of notice, but of preclusion and settlement, and future applicants for employment, of course, cannot be joined at all. All of the defendant’s employees can be notified of a class action, but those who did not intervene would not be precluded by the resulting judgment or settlement. The employees who did intervene, like ad hoc groups, would have little reason to agree to a settlement. They amount, in essence, to single-issue interest groups whose


This compromise does not effectively protect the interests of the union and the employees that it represents. The union must also be allowed to object to the settlement because it fails to meet substantive requirements. For instance, in Stotts, intervention only provided the union with a procedural vehicle for objecting to modification of the consent decree. 104 S. Ct. at 2582. It did not affect the substantive standard by which its objection was to be judged.
only concern is opposing preferential relief. Except in rare cases, they have no interest in any other issue, such as personal liability for back pay, that would lead them to accept a compromise on preferential relief.

The decisions on intervention by ad hoc groups and employees recognize these problems by denying intervention, usually on grounds of timeliness. If intervention is granted, the intervenors are generally limited to objecting to the settlement. As we have seen, decisions on the timeliness of applications to intervene are also decisions on notice. The time to intervene runs from the date when the intervenors were on notice of their interest in the action and the need to intervene. If ad hoc groups or individual employees are not on notice, or if it is difficult to determine when they were put on notice, all employees can be notified of the action and of its likely consequences, either by publication, posting, or individual notice.

The problem of defining the intervenors' role in the action, once intervention has been granted, is more difficult to solve. If ad hoc groups or individual employees are made full parties to the action, with a veto over proposed settlements, then they will almost always exercise their veto to express their opposition to preferential relief. The cases in which a settlement has provided for preferential relief, almost invariably, are cases in which a union has agreed to the settlement, either as a defendant or as an intervenor. In the rare case in which an ad hoc group or indi-


individual employees have agreed to preferential relief, they appear to have done so out of fear that a harsher preference would be imposed by court order.\textsuperscript{175} \textit{Stotts}, however, diminishes the risk of such an order.\textsuperscript{176} On the other hand, if ad hoc groups and individual employees are treated like unnamed class members, with only the right to object to proposed settlements, they are placed at a severe tactical disadvantage, particularly if they intervene late in the action.

Even if a settlement can be reached, or a judgment otherwise imposed, that is binding on the intervenors, the question remains whether it is binding on the employees and applicants for employment who did not, or could not, intervene. Unlike a union's authority to negotiate on behalf of the employees that it represents, ad hoc groups and individual employees have no authority to alter the terms and conditions of employment of other employees. Even if they are an adequate representative of other employees, they are not in privity with them.\textsuperscript{177} Nevertheless, a handful of decisions have taken the drastic step of making settlements binding on other employees who did not intervene in the action but had an opportunity to do so.\textsuperscript{178}

Certification of a class of intervenors is a less drastic and more justifiable means to the same end. It is the only feasible way to create privity after the action has been commenced.\textsuperscript{179} It also allows the district court to determine whether all the prerequisites for preclusion have been met and, if they have not, to take steps to make sure that they are. The disadvantage of certification is that the requirements for certification of a class are complex,\textsuperscript{180} and they are usually applied to classes of plaintiffs, not classes of defendants or intervenors.\textsuperscript{181} Intervenors may be unwilling, and

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176. See supra text accompanying notes 22-33.
177. See supra note 97.
178. See supra note 96.
179. Fed. R. Civ. P. 23; Restatement (Second) of Judgments § 41(3) (1980); 7A C. Wright & A. Miller, supra note 128, at § 1789.
therefore inadequate, representatives of a class.\textsuperscript{182} Also, intervenor’s attorneys, unlike plaintiff’s attorneys, have no incentive to seek certification of a class in order to obtain an increased award of attorney’s fees.\textsuperscript{183} Although most intervenors who oppose preferential relief do so on grounds generally applicable to a class, their overriding interest may be in obtaining relief for themselves instead of all similarly situated employees. These uncertainties add to the complexity of a class action by requiring increased judicial supervision to assure adequate representation of the class. Judges faced with a complex class action on the plaintiff side may well be reluctant to make it even more complex by certifying a class of intervenors.

These reasons reinforce another powerful, if unarticulated, argument against certifying a class of intervenors. Formal preclusion by certification is not necessary if collateral attack is effectively precluded for other reasons. In particular, the failure of a single intervenor’s objections to preferential relief may deter other employees from making similar objections. The risk of collateral attack may be too small to warrant the added complexity of certification of a class, especially if the preference is to be judged under the lenient standards of Weber. On the other hand, if the risk materializes, the cost of failing to certify a class should not be imposed on the employees making the collateral attack. Their claims should not be precluded in the absence of privity. Only certification of a class can eliminate the risk of collateral attack, but only at considerable cost.

Similar problems beset two other ways in which class actions might be used to bind employees who do not participate directly in litigation over preferences. In litigation seeking to impose a preference as a remedy, adversely affected employees and applicants for employment might be certified as a class of necessary parties under rule 23(b)(1)(A). Although certification of a class of necessary parties avoids the problem of waiting for an employee to make a timely application to intervene, it requires certi-

\textsuperscript{182} 7A C. Wright & A. Miller, supra note 128, at § 1770; Note, supra note 181, at 647-50.

\textsuperscript{183} Intervenors rarely obtain any award of attorney’s fees at all, probably because they are in the posture of defendants who are entitled to an award only if the plaintiff’s claim is “frivolous, unreasonable, or without foundation.” Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978); see supra note 115.
fication of a class in the absence of any representative at all. As with intervention by unions, notice to employees inviting them to intervene may reduce the problem of untimely applications to intervene without forcing the intervenor into the action unwillingly. It requires, however, notice to potential class members before any class is certified. In a reverse discrimination action challenging a preference, established either in a prior action or independently of litigation, a class of plaintiffs might be certified under rule 23(b)(2). This class, too, encounters the problem of the unwilling and inadequate class representative. The underlying problem is that the procedural rules of preclusion cannot achieve the same binding effect as the substantive rules that make a union the exclusive representative of employees in collective bargaining. A union’s actions, whether in litigation or in collective bargaining, are not binding on employees because of the preclusive effect of a judgment or settlement, but because of its status as the exclusive representative of the employees, subject only to its duty of fair representation.

III. Conclusion

*Stotts* and *Weber* can be reconciled on the basis of union representation: the union did not agree to the preference in *Stotts*, but it did in *Weber*. This rationale for the decisions is satisfactory, but it is not perfect. Unions are adequate representatives of current employees and some former employees, for instance, employees recently laid off or retired. They are less than adequate representatives of applicants for employment. The constituency of union leadership is largely confined to current and recent employees, who vote in representation elections, or if they are union members, in union elections. Few applicants for employment are union members, except, for instance, in the construction trades in which unions control referral of employees through hiring halls. Moreover, a rationale based on union representation does not apply at all to preferences imposed by an employer.

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184. See supra text accompanying note 157.
185. See supra text accompanying notes 119-121.
in the absence of a union. The language of Weber is broad enough to encompass such preferences, but only by sacrificing the interests of adversely affected employees. Like the employees in Stotts who were represented by a union which did not agree to the preference in dispute, employees unrepresented by a union have not agreed to the preference through an authorized representative. They should not bear the burden of preferences because they have no union to object on their behalf.

Nevertheless, the weight of judicial decisions and administrative regulations, in addition to the language of the opinion, support the application of Weber to preferences established in the absence of a union. Before Stotts, the lower federal courts followed the broad language of Weber in permitting a wide range of preferences, and in the initial decisions after Stotts, they have narrowly interpreted its restrictions on preferential relief. In its Guidelines on Affirmative Action, the EEOC has also applied standards similar to those in Weber to a wide range of preferences. Because of the form in which they were promulgated, the Guidelines will continue to deter reverse discrimination actions after Stotts. The Supreme Court has occasionally, if not consistently, accorded guidelines promulgated by the EEOC "great deference" and section 713(b)(1) of Title VII provides a complete defense to claims of discrimination based on employment decisions made "in good faith, in conformity with, and in reliance

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188. The Court reasoned that a prohibition against all voluntary preferences "would augment the powers of the Federal Government and diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals." Weber, 443 U.S. at 197.

189. See supra notes 72-80.

190. See supra notes 51 & 69.

191. 29 C.F.R. §§ 1608.1-.12 (1985). The central requirements of the Guidelines are that an affirmative action plan must be dated and in writing, and it must contain three elements: "a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action." Id. at § 1608.4. Preferences not meeting these requirements may also support a defense under section 713(b)(1), if established in compliance with other prohibitions against employment discrimination or in enforcement proceedings or if the EEOC finds no reasonable basis for a charge of reverse discrimination. Id. at §§ 1608.5-.10. The Guidelines, however, confer a defense under section 713(b)(1) only to claims of reverse discrimination. See id. at § 1608.11.

on any written interpretation or opinion of the Commission."  193  Although the EEOC has limited section 713(b)(1) to written interpretations or opinions that explicitly state that they give rise to a defense under section 713(b)(1), 194 the Guidelines on Affirmative Action contain several such statements.  195  Unless the Supreme Court holds the Guidelines invalid, they will continue to support a broad interpretation of Weber.

Indeed, between them, Stotts and Weber may have created one law for unionized employees and another for applicants and employees not represented by a union.  Preferences might never be imposed on unionized employees because their union will not agree to them, particularly if Stotts is interpreted to prohibit most judicially ordered preferences.  On this interpretation of Stotts, unions will have no reason to agree to preferences in settlement negotiations or in collective bargaining in order to avoid harsher preferences imposed by judicial order.  By contrast, preferences are more likely to be imposed on applicants for employment and employees not represented by a union because they have no one to represent their interests.  Unions are likely to subordinate the interests of applicants for employment to the interests of present employees and employers are likely to subordinate the interests of unrepresented employees to their own interest in avoiding liability.

This disparity in protection might be tolerable, but only as between unionized employees and applicants for employment.  Applicants for employment have greater mobility in seeking other jobs than incumbent employees.  196  In general, they have less to lose from the adverse effects of preferences, although in a labor market with high unemployment, they may be in a much worse position overall.  By the same token, however, employees who are not represented by a union deserve the same protection from the adverse effects of preferences as employees who are.  Unrepresented employees have much the same expectations as represented employees for job security and advancement derived from the internal labor market of an employer based on informal

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195. Id. at §§ 1608.1(d), .2, .4(d)(2), .5(b), .6(b), .7(b), .10, .11.
custom or formal organization of the employer.\textsuperscript{197} Because their expectations are not based on a collective bargaining agreement, they are vulnerable to an employer's calculation of its own interests in settling or avoiding claims of discrimination. Of course, the same reasons that lead an employer to foster these expectations in the first place will lead him to avoid frustrating them, but his interest in avoiding liability may alter his assessment of what is in his interest overall.

The disparity between the nearly complete protection afforded to unionized employees and the nearly complete absence of protection for applicants and other employees can only be narrowed by strengthening the substantive requirements for permissible preferences. These requirements are best developed from the theory of disparate impact to require evidence, first, that the employer's work force reflects the adverse impact of employment practices with no business justification, and second, that the adverse impact cannot be corrected by means other than preferences. This standard has difficulties, several of them noted in Justice Blackmun's concurring opinion in Weber.\textsuperscript{198} It has the advantage, however, of connecting the requirements for permissible preferences with a theory of liability under Title VII. At some point, the requirements for preferences that purport to remedy past discrimination must be based on a theory of liability, if only to determine what constitutes the discrimination to be remedied. The theory of disparate impact provides both the broadest basis for liability under Title VII and the basis most closely related to preferential relief. It also provides a more enduring framework for evaluating preferences than any simple procedural requirement, such as representation of those adversely affected by preferences. In Stotts and Weber, the Supreme Court reached the limits of a procedural approach to preferences.

\textsuperscript{197} See P. Doeringer & M. Piore, supra note 196, at 35.