1977

Affirmative Action: A Delicate Balance in Employment and Education

Carol A. Lieb

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol5/iss3/4

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
AFFIRMATIVE ACTION: A DELICATE BALANCE IN EMPLOYMENT AND EDUCATION

We have waited for more than 340 years for our Constitutional and God-given rights . . . Perhaps it is easy for those who have not felt the stinging darts of segregation to say, “Wait.” But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim . . . when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in an affluent society—then you will understand why we find it difficult to wait.

Dr. Martin Luther King, Jr.¹

Past inequities are not remedied by creating new inequities to be visited upon individuals in the non-minority groups.

Brief for Petitioners in

DeFunis v. Odegaard²

The propriety of affirmative action programs has been the center of heated debate in recent years.³ Characteristically, these programs aim to remedy previous discrimination through the advancement of discriminatees’ positions in employment⁴ or higher education.⁵ Nonprotected group members, however, often object to affirmative action, because preferential minority treatment necessarily restricts the positions available to nondiscriminates.

The purpose of this article is to examine the year’s⁶ developments concerning affirmative action⁷ and the judicial treatment

---

¹ Dr. Martin Luther King, Jr., as quoted in 27 N.Y.U. CONF. LABOR 128 (1974) (quoting CIVIL RIGHTS AND THE AMERICAN NEGRO 504-05 (A. Blaustein & R. Zangrande eds. 1968)).
³ The controversy is illustrated by the numerous newspaper articles and editorials centering on this topic. See, e.g., Ezorsky, Hiring Faculty Women, N.Y. Times, Oct. 11, 1976, at 27, col. 1; Vidal, Minority Admissions Still the Vexing Questions, N.Y. Times, Aug. 22, 1976, § 4 (News of the Week in Review), at 18, col. 1; Court Rules That City College Used Reverse Bias in ’74 Plan, N.Y. Times, Aug. 18, 1976, at 27, col. 7; Reverse Bias: Student Wins, N.Y. Post, July 29, 1976, at 53, col. 3.
⁴ See notes 35-140 infra and accompanying text.
⁵ See notes 141-162 infra and accompanying text.
⁶ The focus of this article is the October 1975 Term which covers the time span beginning October 1975 and ending June 1976.
⁷ Commentators note that “affirmative action” comes from the labor relations field.
of the competing interests of protected and nonprotected group members. Specifically, this objective will be approached through a discussion of (1) the conceptual and historical background of affirmative action programs, (2) the major decisions imposing or denying that remedy with particular emphasis on the heated controversy over the propriety of the imposition of quotas, and (3) the allegations of reverse discrimination resulting from the imposition of these programs, especially with regard to the so-called preferential admissions programs adopted by various medical and law schools.

BACKGROUND

Affirmative action encompasses several different procedures designed to remedy discrimination. In essence, affirmative action is a remedy and, as such, presupposes a finding of discrimination. The crucial aspect of affirmative action programs lies in the decision to go beyond the mere adoption of passive, prospective, nondiscriminatory principles and to focus on the active implementation of specific procedures designed to promote the sta-


8. The term “quota” indicates a mandatory result while “goal” usually indicates one that is desirable. See Pemberton, Quotas: Will Merit Be Lost in a Numbers Game?, EQUAL EMPLOYMENT OPPORTUNITY L. READER 1976, at 20-21.


10. Courts have adopted three categories of affirmative action remedies: “freedom now,” “rightful place,” and “status quo.” “Freedom now” places a discriminatee in the place in which he would rightfully have been but for the discrimination. The action is taken without regard to the adverse results the remedy has on others. See, e.g., Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir. 1976). In Patterson the circuit court modified the district court’s “freedom now” remedy. “Rightful place” remedies discrimination only to the extent that others are not hurt as a result. E.g., Local 189, United Papermakers v. United States, 416 F.2d 980 (6th Cir. 1969), cert. denied, 397 U.S. 919 (1970). “Status quo” changes the position of a person only if he has suffered from specific unlawful employment practices. E.g., Whitfield v. United Steelworkers Local 2708, 263 F.2d 546 (5th Cir.), cert. denied, 360 U.S. 902 (1959). See Rains, Title VII v. Seniority Based Layoffs: A Question of Who Goes First, 4 HOFSTRA L. REV. 49, 51 (1976).
tus or number of discriminatees in a given setting. The remedy may be instituted as a result of a judicial mandate upon a finding of a statutory violation, voluntary action taken by an institution due to self-perceived discriminatory behavior, and executive coercion, or a consent agreement, particularly following union-management negotiations.

In that judicial imposition of an affirmative action program presupposes a finding of discrimination, it is important to examine briefly the major provisions under which one may bring a cause of action for discrimination. The majority of cases rely on either Title VII of the Civil Rights Act of 1964 or the equal


'The Act is intended to make the victims of unlawful employment discrimination whole and . . . the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

118 CONG. REC. 7166, 7168 (1972).

Title VII is not the only remedy for employment discrimination against nongovernment workers. See Johnson v. Railway Express Agency, 421 U.S. 454 (1975). However, employment discrimination against federal employees may be redressed only by Title VII. See Brown v. General Servs. Administration, 425 U.S. 820 (1976). The Act does not purport to address all discriminatory practices. One noteworthy exception to Title VII's protection is for bona fide occupational qualifications. 42 U.S.C. § 2000e-2(e)(1) (1970 & Supp. V 1975). Interpretations of that exception indicate that the section should be narrowly construed. See, e.g., EEOC Guideline on Discrimination Because of Sex, 29 C.F.R.
protection clause of the fourteenth amendment to the Constitution. Title VII specifically forbids employment discrimination on account of race, religion, sex, or national origin and allows courts to "enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . . ." The equal protection clause is more general in scope in that it does not point to any one kind of discrimination but rather provides that no state shall "deny to any person within its jurisdiction the equal protection of the law." In some


If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).
cases the Civil Rights Act of 1866\textsuperscript{24} provides an alternative to Title VII in its prohibition of racial discrimination. Claims also may be based on state provisions,\textsuperscript{25} the Age Discrimination in Employment Act of 1967,\textsuperscript{26} and the National Labor Relations Act.\textsuperscript{27}

In light of the Supreme Court's recent decision in \textit{Washington} v. \textit{Davis},\textsuperscript{28} it is clear that the difference between invoking a statutory provision and invoking a constitutional amendment is crucial. In \textit{Washington} the majority held, \textit{inter alia}, that the Title VII "disproportionate impact"\textsuperscript{29} test is not appropriate for constitutional challenges. Rather, plaintiffs alleging constitutional infringements are required to meet a more rigorous "discriminatory intent"\textsuperscript{30} test to establish the existence of discriminatory practices for which they may recover.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{25} E.g., N.Y. Const. art. I, § 11 provides:
No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or any subdivision of the state.
\item \textsuperscript{27} 29 U.S.C. §§ 151-168 (1970).
\item \textsuperscript{28} 426 U.S. 229 (1976). In \textit{Washington}, black applicants to the District of Columbia Police Department challenged the constitutionality of the department's hiring procedures, because those practices allegedly had a disproportionate impact on minority group members. The majority found that the rigorous protections afforded by Title VII were not available to plaintiffs alleging constitutional violations. \textit{Id.} at 246-48.
\item \textsuperscript{29} Under the Title VII "disproportionate impact" test, employees or applicants may challenge an employer's practices without "concern[ing] themselves with the employer's possibly discriminatory purpose. . . . [I]nstead [employees or applicants] may focus solely on the racially differential impact of the challenged hiring or promotion practices." \textit{Id.} at 238-39. This test was articulated in \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971). \textit{See} note 52 infra.
\item \textsuperscript{30} Under the constitutional "discriminatory intent" test the plaintiff's burden is to prove that the challenged practice was instituted with an express purpose to discriminate. \textit{Washington v. Davis}, 426 U.S. 229, 239 (1976).
\item \textsuperscript{31} \textit{Id.} at 238-39. The Court justified the distinction between the Title VII and constitutional challenge standards as follows:
Under Title VII, Congress provided that when hiring and promotion prac-
the test applied often determines whether a court finds discrimination, the imposition or denial of affirmative action hinges on the particular causes of action invoked. The basis of the constitutional-legislative distinction drawn in Washington is somewhat questionable when one considers that a basic constitutional goal is to protect individuals against harms caused by discriminatory practices. Despite the uncertain validity of such a distinction, the practitioner must be keenly aware of the exact harms and remedies to which the different statutes and constitutional provisions address themselves.

**THE IMPOSITION OR DENIAL OF AFFIRMATIVE ACTION**

**Quotas**

Probably the most controversial remedy for discrimination is the judicially mandated quota. Those who oppose the use of quotas usually base their opposition on: sensitivity to the traditional use of quotas as a means of discriminating against minorities; a contention that the evils of discrimination eventually will

---


33. This is not to say that affirmative action will always be instituted upon a finding of discriminatory practices. Rather, it is the first major hurdle a plaintiff faces.

34. See Washington v. Davis, 426 U.S. 229, 256 (1976) (Brennan & Marshall, J.J., dissenting). Justice Brennan indicated a fear of the future results of the majority’s distinction: “[W]ith all respect I suggest that today’s decision has the potential of significantly weakening statutory safeguards against discrimination in employment.” Id. at 259.


36. This fear is alluded to in a letter dated Nov. 14, 1922, from Judge Learned Hand to Professor Charles Hall Grandget, chairman of the Committee of the Faculties of Har-
be fostered rather than averted; a fear that reverse discrimination will result; an interest in maintaining the status quo; and/or a belief that quotas are contrary to section 703(j) of Title VII, which states that "[n]othing contained in this subchapter shall be interpreted to require . . . preferential treatment to any individual or to any group because of . . . race, color, religion, sex or national origin . . . ."

In contrast, the proponents of affirmative action programs insist that quota systems are essential to remedy past discrimination, because it is naive to believe that a majority in a preferred position will act voluntarily to rid society of the evils involved.42 In defending the need for quotas, proponents argue that the system will apply only for a limited period of time, and they point out that the imposition of quotas is particularly appropriate in cases of employment discrimination because section 706(g) of Title VII allows a court to "order such affirmative action as may


39. An interest in maintaining the status quo is to be distinguished from a fear of reverse discrimination. The latter may be unlawful while the former may not.


Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area.

41. E.g., O'Neill, supra note 35; Blumrosen, supra note 35; Ely, supra note 35. 42. See note 41 supra.

be appropriate" upon a finding of an intentional, unlawful employment practice.

Although the Supreme Court has not yet dealt directly with the acceptability of quotas in the context of affirmative action, nine of the circuit courts have indicated that the remedy is proper at least in limited instances. However, it is unclear in precisely what circumstances quotas are appropriate and in what manner they are to be applied. Due to this lack of clarity, the considerations relevant to a given court's imposition or denial of a quota system will be discussed in detail through an examination of recent cases in this area.

In Crockett v. Green, the plaintiff, Green, brought a class action alleging that the defendants used employment practices that unlawfully denied blacks equal employment opportunities in the "skilled craft" positions in Milwaukee and on the Milwaukee Board of School Directors. The District Court for the Eastern District of Wisconsin found that the plaintiffs had established a prima facie case by having shown a "substantial disparity" between the percentage of blacks in Milwaukee (17.2%) and the percentage of blacks in the "skilled craft" positions (3.1%) and

45. The Court has found racial quotas valid when they are used to desegregate schools. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).
47. This discussion is not meant to be exhaustive of the year's decisions in the area. Rather, it is representative of various approaches and positions in the field.
49. The City Service Commission defined "skilled craft" as follows: Occupations in which workers perform jobs which require special manual skill and a thorough and comprehensive knowledge of the process involved in the work which is acquired through on-the-job training and experience or through apprenticeship or other formal training programs. Includes: mechanics and repairmen, electricians, heavy equipment operators, stationary engineers . . . .
50. Id. at 912, 914-15.
51. Id. at 917. The use of statistics is an accepted method of establishing whether a general pattern of discrimination exists. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).
by having demonstrated that the "apprenticeship" and "experience" prejob qualifications had the effect of excluding minorities disproportionately. A preliminary injunction required the defendants to hire one black for every two "skilled craft" vacancies until the percentage of blacks became equal to that of the city's population.

The Court of Appeals for the Seventh Circuit upheld the imposition of the injunction, noting: there was clear precedent in favor of ratio-type relief; the standard used when reviewing an appeal from a preliminary injunction is whether the district court abused its discretion; and the district court included a safeguard in its decree by providing that the defendants not be required to hire unqualified employees.

The District Court for the Western District of Pennsylvania reached a similar result in Pennsylvania v. Flaherty. In that case the defendant, the Pittsburgh Police Department, was charged with employing discriminatory practices in the hiring, appointment, promotion, and working conditions of female and black applicants and officers. Using techniques similar to those in Crockett, the court found that the plaintiffs had established a prima facie case of discrimination by showing "the disparity between the percentage of blacks and women on the force and their percentage in the total population and work force." Because the plaintiffs established a prima facie case, the defendants had the

---

54. Crockett v. Green, 534 F.2d 715, 718 (7th Cir. 1976). The court noted that the relief was neither a denial of equal protection nor an abuse of judicial discretion. Id.
55. Id. See generally cases cited in note 46 supra.
56. Crockett v. Green, 534 F.2d 715, 717 (7th Cir. 1976).
57. Id. at 719. However, the court did not answer the defendants' argument that their lower-level employees' expectations to be promoted would not be met. The argument can be met squarely in light of the Supreme Court's decision in Franks v. Bowman Transp. Co., 424 U.S. 747 (1976). In Franks the Court awarded discriminatees retroactive seniority rights despite the fact that that relief influenced the positions of other employees. The Court found that action necessary to reach the "make-whole" goal of Title VII. Id. at 764-66. See notes 114-122 infra and accompanying text.
59. Id. at 1028.
burden of justifying their procedures. The defendants failed to meet the burden. To remedy the discrimination against women and blacks, the court imposed a preferential hiring quota as preliminary injunctive relief. In so doing, the court noted its broad discretionary power when sitting in equity and the clear precedent favoring the use of quotas. It particularly emphasized the unique position of police officers as role models and the urgency of filling the posts immediately for safety reasons.

In EEOC v. Local 638 . . . Local 28 of the Sheet Metal Workers’ International Association, the district court found that racial discrimination by the defendant unions and apprenticeship programs violated section 703(c) and section 703(d) of Title VII. To remedy the discrimination, the court ordered, *inter alia*, that the union attain a twenty-nine percent minority membership by

---

60. *Id.* at 1029. The court reached this result using a standard *Griggs* analysis. See note 52 supra.


63. 401 F. Supp. 467 (S.D.N.Y. 1975), modified on other grounds, 532 F.2d 821 (2d Cir. 1976).

64. 401 F. Supp. 467, 487 (S.D.N.Y. 1976). Discrimination was found using a standard *Griggs* analysis. *Id.* at 487. See note 52 supra. The court found that the written examination excluded blacks and Puerto Ricans to a far greater extent than other groups. Thus, the burden was shifted to the defendant to establish sufficient job-relatedness. *Id.*

65. 42 U.S.C. §§ 2000e-2(c) to 2(d) (1970 & Supp. V 1975). Section 703(c) provides:

- It shall be an unlawful employment practice for a labor organization—
  - (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
  - (2) to limit, segregate, or classify its membership, or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual’s race, color, religion, sex, or national origin; or
  - (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(d) states:

- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.
It also required that one of three members of the all-white Joint Apprenticeship Committee be replaced by a minority representative to enforce internal compliance with Title VII. The Court of Appeals for the Second Circuit affirmed the quota remedy for the union but found “bumping” the committee member unwarranted.

In reaching its decision, the court of appeals considered the inherent tension between a scheme based on the belief that mathematical goals are the only effective manner in which to remedy past and present discrimination and one rooted in the assumption that such action has the potential of causing reverse discrimination problems. The court reconciled these opposing interests by adopting a two-pronged test based on its prior decision in *Kirkland v. New York State Department of Correctional Services.* According to the court in *EEOC v. Local 638,* the *Kirkland* test requires (1) “a ‘clear-cut pattern of long-continued and egregious racial discrimination’” and (2) “the effect of reverse discrimination must not be ‘identifiable,’ that is to say, concentrated upon a relatively small, ascertainable group of non-minority persons.”

The first part of the test was satisfied in that a clear pattern of racial discrimination was found in union and apprenticeship committee actions. However, only the union quota met *Kirkland’s* second prong; the “bumping” procedure did not meet the nonidentifiable effect test. In other words, the court of appeals upheld the union quota remedy, because its imposition would not have the effect of identifying the specific majority group members who would not obtain union positions solely on the basis of their majority group membership. However, the

---


67. *Id.* at 490.


69. *Id.* at 827.

70. 520 F.2d 420 (2d Cir. 1975), cert. denied, 97 S. Ct. 73 (1976). In *Kirkland* blacks and Hispanics challenged the civil service examination for sergeant in the New York State Department of Correctional Services as racially discriminatory. The Second Circuit held that the examination was discriminatory and upheld the district court’s order for a new examination. However, the court of appeals found the district court’s permanent quota imposition to be improper. *Id.* at 428. Other distinctions have been drawn approving quotas for hiring but denying those for promotion. See, e.g., *Bridgeport Guardians v. Civil Serv. Comm’n,* 482 F.2d 1333 (2d Cir. 1973).

“bumping” was not upheld, because if a person already had a position on the apprenticeship committee, and were replaced by a minority group member, the person who would be directly hurt by that action would be identifiable. Therefore, the remedy could not be imposed. Although the reason for the distinction is not specifically articulated by the court of appeals, this identifiable-nonidentifiable distinction is based on some notion of outrageousness—that some actions, even those designed to remedy evils, are just too far-reaching for courts to mandate. The justification for this position also may lie in a belief that because of a backlash of adverse feelings and resentments against minority group members, more harm than good would result from the imposition of quotas in the “identifiable” situation. Furthermore, a person has more of an interest in a job in which he is already employed than in one for which he is applying.

In United States v. International Union of Elevator Constructors Local 5, the District Court for the Eastern District of Pennsylvania imposed a quota remedy upon finding the defendant labor union’s violation of the antidiscrimination provision of section 703(c) of Title VII. The court ordered the union to adopt a thirty-three percent black membership referral quota until such time as it attained and maintained for one year the judicially mandated twenty-three percent black membership goal. On appeal the union argued that the membership goal and the referral quota were contrary to section 703(h) and section 703(j) in

---

72. The decision reflects a clear adoption of the “rightful place” remedy approach. See note 10 supra.


Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin.
that the remedy imposed by the district court resulted in unlawful preferential treatment. The Court of Appeals for the Third Circuit rejected both arguments and upheld the quota and goal remedies. It stated that section 703 defined violations and not potential judicial remedies. The court then looked to section 706 (which defines Title VII's enforcement provisions) and noted no prohibition on quota imposition. Rather, that remedy is sanctioned by the section 706(g) authorization for courts to order "such affirmative action as may be appropriate." The court found additional justification for this relief in the fact that most of the other circuits have found it permissible.

Because quota imposition is an extraordinary remedy, however, courts are far from enthusiastic about remedying discrimination with such relief. Heavy burdens often are placed on plaintiffs to demonstrate the absolute necessity of quotas to remedy proven discrimination. Because courts mandate this remedy only with great reluctance, quotas frequently are ordered in limited fashions, and, at times, they are not ordered at all. Such judicial hesitancy was demonstrated by the Seventh Circuit in United States v. City of Chicago. The case was a consolidation of four employment discrimination cases alleging that the hiring and related practices used by the defendants' police department violated several civil rights and equal employment opportunity statutes. In an attempt to settle the controversy out of court, a consent agreement was entered into whereby the defendants agreed to hire a specific number of minority group members on

---

79. Id. at 1018.
80. Id. at 1018-19.
83. 534 F.2d 708 (7th Cir. 1976).
each of three dates. The defendants initially notified the minority applicants to report on the agreed day but later informed them not to do so. The defendants' refusal to act pursuant to the consent agreement prompted the plaintiffs to bring the discrimination action.

The district court found a clear case of employment discrimination but indicated a basic reluctance to impose a quota. However, the court stressed that the quota remedy imposed arose from the original agreement between the parties themselves. The court stated: “Defendants have not offered any valid reason why they should not abide by their agreement. . . . Neither fraud nor impossibility have been alleged or proved. . . . And despite the court's reluctance to compel quota hiring in the preliminary injunctive order. . . . the remedy to which the parties agreed is not illegal . . . .” Despite these observations, the court only partially enforced the consent agreement. The applicants who had been called for appointment but later were told not to report were found to be entitled to the benefits of the agreement, because they had acted in reliance on the defendants' offer. However, the remaining two-thirds of the agreement was deferred until the results of a new officer selection procedure were made known.

The court's limited remedy appears to be founded in its previously articulated reluctance to impose quotas. Still, it is difficult to accept such hesitancy as the basis of the court's denial of the plaintiffs' request. If quota imposition is not illegal, as the court concedes, and if the remedy relieves the wrong, then the bilateral agreement, like any other contract, should be enforced.

In contrast, in *Weber v. Kaiser Aluminum & Chemical Corp.*, the District Court for the Eastern District of Louisiana struck down an entire affirmative action plan adopted in collective bargaining. The court found that the employer adopted the plan without examining the extent to which prior discrimination existed. Instead, the employer's primary motivation was to satisfy the Office of Federal Contracts Compliance requirements.

85. United States v. City of Chicago, 395 F. Supp. 329, 337 (N.D. Ill. 1976). The defendants claimed that they withdrew the offer due to the denial of revenue sharing funds. *Id.* The funds, however, were withheld from the defendants because of their discriminatory employment practices. *Id.* at 344.
86. *Id.* at 346. No reason was articulated for this position.
87. *Id.*
88. *Id.*
90. The Office of Federal Contracts Compliance is the division of the United States
and to avoid expensive minority litigation.\textsuperscript{91} The court also found error in the fact that it was the employer who adopted the remedy. It explained that even if quotas were appropriate to remedy discrimination, the power to sanction that relief was held by courts and not employers.\textsuperscript{92} The court then stated that even if employers do have the power to execute affirmative action programs, this collective bargaining program would have been invalid, because the black employees given preference over more senior white employees had never themselves been the subject of any unlawful discrimination during hiring. Rather, they “occupied their ‘rightful place’ in the plant.”\textsuperscript{93} The court’s position is subject to attack on several grounds. First, it may be desirable to encourage employers to reach agreements with unions to remedy discrimination.\textsuperscript{94} In that way needless lawsuits will be avoided. Secondly, it is not clear that a quota only may prefer the specific employees who were themselves the subject of unlawful discrimination. Indeed, under a “freedom-now” approach, a quota may be mandated under the Weber facts.\textsuperscript{95}

In \textit{Chance v. Board of Examiners},\textsuperscript{96} the Second Circuit also rejected a racial quota. In the district court the plaintiffs estab-
lished that although the defendant school system's "excessing" procedures were facially neutral, they had a disproportionate effect on minorities. 7 Based on prior holdings by the Second Circuit which affirmed the lower court's imposition of racial quotas to remedy racial discrimination in the hiring of supervisory personnel, 98 the district court found in the instant case that the imposition of an excessing quota was necessary to protect the employment of minorities. 99

The court of appeals reversed. It found that a facially neutral excessing plan which operates on the concept of "last hired-first fired" does not discriminate against minorities who merely are disproportionately affected. 100 The court noted that only a small number of those supervisors who would be protected by the excessing quota were actually victims of the defendants' discrimination. 101 Rather, the clear majority of the employees who would benefit from the remedy were not the subjects of prior discrimination by the defendants. The court found that preferential treatment might only be extended to the direct victims of a specific defendant's discriminatory policy. 102 Because the Board offered to remedy the effects of its discriminatory practices on the small number of specific discriminatees by giving them constructive seniority, the court reversed the excessing order. 103

The dissent criticized several of the majority's conclusions. First, it asserted that while the quota was not the only permissible relief, the court had equitable powers to protect its prior quota plan. 104 Secondly, a constructive seniority approach did not protect the larger proportion of discriminatees—the class of people who "have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination system to be discriminatory and unrelated to job performance." Thirdly, the quota did not result in unconstitutional

97. Chance v. Board of Examiners, 534 F.2d 993, 997 (2d Cir. 1976). The excessing procedure is the system under which the defendant transfers or releases lower priority personnel. Basically, it is a "last hired-first fired" seniority system. Id. at 995. The procedure is provided for in N.Y. EDUC. LAW § 2585 (McKinney 1970).
99. 534 F.2d 993, 997 (2d Cir. 1976).
100. Id. at 996-97.
101. Id. at 998.
102. Id. at 998-99.
103. Id. at 999.
104. Id. at 1000 (Oakes, J., dissenting).
105. Id. On rehearing, this group also was given constructive seniority. Id. at 1007.
reverse discrimination, because many of the nonprotected people would not have had their preferred seniority positions had it not been for the defendant’s prior discrimination against the minority group members. Finally, the Title VII, section 703(h) protection of bona fide seniority systems did not bar this relief, because this system adversely affected minority employees during layoffs. The dissent noted that the majority opinion impliedly recognized that fact in its grant of artificial seniority.

A district court’s imposition of a quota also was struck down by the Court of Appeals for the Fourth Circuit in Patterson v. American Tobacco Co. The court adopted its position despite the fact that it found that the evidence supported the district court’s findings of racial and sex discrimination in the defendants’ supervisory appointments. Although the Fourth Circuit Court of Appeals recognized for the first time that preferential treatment properly may be ordered under Title VII, it found no compelling need for its imposition in the instant case. In reaching that conclusion the court compared the percentage of blacks and women in the city’s standard metropolitan statistical areas who were in supervisory positions with the percentages of those minorities hired by the company to fill the supervisory positions since 1965 when Title VII became effective. Despite the defendants’ violations of the Act, the court found no compelling need for quota imposition, because the company’s appointments of minorities since 1965 had exceeded the percentage of what it considered “qualified” blacks and women in the work force.

Seniority Relief

Under section 703(h) of Title VII, an employer is permitted

---

106. Id. at 1003.
109. 535 F.2d 257 (4th Cir. 1976). The district court also ordered company-wide bumping and seniority to remedy racial and sex discrimination. Both were struck down by the court of appeals. Id. at 262-63.
110. The court appeared to be articulating a compelling state interest test to establish the propriety of the imposition of a quota. It said that such a remedy must be “carefully scrutinized” to ascertain whether there was a “compelling need” for its imposition. Id. at 274.
111. Id. at 275. The court’s analysis ultimately may perpetuate discrimination. By accepting that the percentage of “qualified” minorities should be measured by the number of minorities in supervisory positions in the locale as opposed to the percentage of minorities in all fields in the immediate area, the court assumes that all qualified people are in supervisory positions. That may not be the case. Such an approach can act to thwart a valid discrimination claim.
"to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona-fide seniority or merit system ... provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin. . . ." That provision has provided the impetus for many controversies. Because of an "intent to discriminate" requirement, a twofold issue arises. Is a seniority system in fact bona fide if it is facially neutral but results in discrimination, and if the system is not bona fide, what remedy may be applied properly?

In Franks v. Bowman Transportation Co., the Supreme Court confronted those issues. The petitioners in the class action were nonemployed black applicants for over-the-road truck driving positions who were denied jobs as a result of the respondent's discriminatory practices. To remedy the discrimination's impact, the Court of Appeals for the Fifth Circuit awarded the class backpay and affirmed the district court's order of priority considerations for the jobs. However, due to the court's denial of seniority relief the applicants petitioned for certiorari.

In the Supreme Court, the petitioners claimed, and the majority agreed, that the applicants would have enjoyed a higher seniority status but for the respondent's discriminatory refusal to hire them. Thus, full relief could not be granted without a seniority award retroactive to the date of the wrong. Justice Brennan,

---


113. In the early Title VII cases courts found that facially neutral seniority systems were not necessarily bona fide and thus were properly subject to the courts' intrusions. See, e.g., United States v. Jacksonville Terminal Co., 481 F.2d 418 (6th Cir. 1971), cert. denied, 406 U.S. 906 (1972); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). See generally Feerick, Labor Relations: Reverse Discrimination, N.Y.L.J. Oct. 2, 1976, at 1, col. 1.


writing for the majority, explained the necessity for retroactive seniority relief by stressing the pervasive effect of seniority rights on an individual employee. At Bowman, seniority ultimately determined the order of layoffs and recall of employees, job assignments, earnings, vacations, and pension benefits. Unless a discriminatee were placed into the position in which he belonged and would have been but for Bowman's discriminatory practices, he would not enjoy the benefit to which he was entitled. Because a denial of retroactive seniority would frustrate the "make-whole" objective of Title VII, the Court created a presumption in favor of retroactive seniority, just as it had done the Term before for backpay. Justice Brennan stated for the majority:

No less than with a denial of the remedy of backpay, the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible "only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 118

The Court also found that the relief was not barred by section 703(h) of Title VII, because that section is only definitional; it defines illegal employment practices, while section 706(g) describes appropriate remedial action. 119 Finally, the Court rejected the respondents' contention that retroactive seniority should not be awarded, because it would frustrate other employees' expectations. The Court recognized that there are always conflicts of

"Benefit"-type seniority refers to the use of a worker's earned seniority credits in computing his level of economic "fringe benefits." Examples of such benefits are pensions, paid vacation time, and unemployment insurance. "Competitive"-type seniority refers to the use of those same earned credits in determining his right, relative to other workers, to job-related "rights" that cannot be supplied equally to any two employees. Examples can range from the worker's right to keep his job while someone else is laid off, to his right to a place in the punch-out line ahead of another employee at the end of a workday.

Id. at 782 n.1.

All three dissenters indicated that in certain instances an award of "benefit"-type seniority would be valid for equitable reasons. However, "competitive"-type seniority rarely, if ever, could be applied because of the resulting unfairness to other employees. Id. at 788. It was the opinion of these Justices that backpay was more appropriate than retroactive "competitive"-type seniority. Id. at 787.

119. Id. at 771.
120. Id. at 788. The dissent argued that an award of "competitive"-type seniority goes beyond making others unhappy and in fact infringes upon the rights of others. Chief Justice Burger stated: "In this setting I cannot join in a judicial approval of 'robbing Peter to pay Paul.'" Id. at 781 (Burger, C.J., dissenting).
interest among employees. However, according to the Court the wrongs to which Title VII are addressed must be corrected, and it is no bar that a majority group of employees would be unhappy as a result of the remedies imposed.\textsuperscript{121} Furthermore, the Court noted that in reality the petitioners were not awarded complete relief. Although they were placed in the seniority system that was appropriate in the absence of discrimination, other employees benefited from the discrimination and enjoyed inflated seniority status. Thus, the petitioners' position vis-a-vis their coworkers was lower than it would have been in the absence of discrimination. In reality the two groups shared the burden of the past discrimination.\textsuperscript{122}

Seniority systems are subject to a different angle of attack when newly hired minorities are laid off on the basis of a facially neutral "last hired-first fired" seniority system. In \textit{Acha v. Beame},\textsuperscript{123} female New York City police officers were threatened with dismissals due to the City's fiscal crisis under a typical "last hired-first fired" layoff scheme.\textsuperscript{124} To avert that possibility, they brought a class action against the Mayor of New York City and its Police Commissioner to stay their threatened dismissal from the police force. They alleged that the dismissal was sex-discriminatory and affirmatively sought to advance their right to seniority credit from the date they would have been selected for the police force had the defendants not discriminated against women. The District Court for the Southern District of New York denied the plaintiffs' motion for a preliminary injunction and dismissed their compliant.\textsuperscript{125}

The Court of Appeals for the Second Circuit found that it lacked sufficient facts to rule.\textsuperscript{126} However, Judge Feinberg, writing for the court, indicated that if a female police officer could establish on remand that she was the victim of the defendants'
Affirmative Action

discriminatory practices such that she would have been hired at an early enough time to withstand the layoffs, then she would be entitled to seniority status retroactive to the time she would have been hired. The court relied on its earlier decisions in Chance v. Board of Examiners and United States v. Bethlehem Steel Corp. in ruling that the facially neutral seniority system used to select the employees laid off was not insulated from attack by section 703(h) of Title VII. As noted earlier in Chance, the court struck down a district court’s quota on a neutral excessing procedure, because the quota was not designed to aid the specific discriminatee; rather, it was broadly based in hopes of advancing the position of minorities in general. In Bethlehem Steel Corp. the court ruled, inter alia, that a seniority system was subject to attack when minorities were directly injured as a result of its discrimination. The Acha court read Chance and Bethlehem Steel Corp. as justifying the imposition of the appellants’ requested relief if each could demonstrate that she was the direct victim of the defendants’ discrimination. The court stated that the appellants would not be rendered undue preference. Judge Feinberg reasoned:

We are merely putting plaintiffs in their rightful place in [the seniority system]. Until the past discrimination against the particular plaintiffs is remedied by according them the seniority position to which they are entitled, the system cannot be considered “bona fide” and in fact represents a continuation of past intentionally discriminatory practices, and thus falls outside the terms of 703(h).

Thus, the case was remanded so that each police officer could attempt to prove her cause of action.

The decision of the Fourth Circuit in Patterson v. American Tobacco Co. is consistent with Acha. In Patterson the defendant operated three facilities in Richmond, Virginia, for the purpose of conducting its tobacco business. The plaintiffs alleged

127. Id. at 650.
128. 534 F.2d 993 (2d Cir. 1976), petition for cert. filed, No. 76-344 (Sept. 7, 1976).
129. For a discussion of Chance, see notes 96-108 supra and accompanying text.
131. 446 F.2d 652, 661 (2d Cir. 1971).
133. Id. at 655 (emphasis added).
that American's employment practices discriminated against them as women and minorities, in that the defendant's promotion practices for the higher paying jobs had disproportionately adverse impacts upon those groups. The District Court for the Eastern District of Virginia had found that the defendant discriminated against the plaintiffs and ordered relief in the form of company-wide seniority and "bumping."\(^{135}\)

The court of appeals sustained the district court's finding.\(^{136}\) The court concluded that section 703(h) of Title VII did not protect American from attack, because the application of different terms of employment to comparable employees did not constitute a bona fide seniority system.\(^{137}\) The court also found that American was precluded from claiming that its seniority system was bona fide because of its past intentional segregation.\(^{138}\)

However, the court overruled the district court's order of a company-wide seniority plan, because the relief was broader than necessary. The court held that the only people who could be remedied were the blacks and women who had applied for promotions but had been rejected because of the company's discriminatory policies.\(^{139}\) The court also rejected the lower court's "bumping" of senior white employees by women and minorities.\(^{140}\)

Thus, in the affirmative action area, one can see less consistency in the circuits' treatment of quotas than in that of seniority relief. Still, unresolved questions exist in the methods of imposing both forms of relief.

**REVERSE DISCRIMINATION: THE AFFIRMATIVE ACTION BACKLASH**

As a result of the imposition of quotas, retroactive seniority, "bumping," and other affirmative action procedures, a considerable amount of litigation has been commenced by nonprotected individuals alleging illegal infringements of their rights. Major attention first was focused on reverse discrimination claims when

---

135. *Id.*
136. *Id.* at 264. The court based this finding of discrimination on the lines of progression, lack of definite job descriptions, and barriers between the branches.
137. *Id.* at 266.
138. *Id.*
139. *Id.* at 265.
140. *Id.* at 266-67. The court indicated that the victims should be compensated with backpay. *Id.* at 269. The remedy is questionable in light of Title VII's "make-whole" remedy. In addition to the salary lost, discriminatees also are hurt in terms of their reputations, self-images, and interests in jobs.
the Supreme Court heard a white applicant's equal protection challenge to a law school's admission policy in *DeFunis v. Odegaard*.141 Because the *DeFunis* Court never addressed the question of majority group member rights,142 the propriety of preference programs in professional school admissions has been argued vigorously.143 In *Hupart v. Board of Higher Education of the City of New York*,144 the District Court for the Southern District of New York was faced with a class action alleging reverse discrimination in the defendants' admissions procedure to the Biomedical Program of the Center for Biomedical Education for the 1974 academic year. One of the program's major objectives was to "encourage and motivate minority students and women to enter medical careers."145 Although the committee responsible for admissions policies explicitly rejected a racial quota in the selection of acceptable students,146 actions taken by the committee responsible for the implementation of the policies were challenged by the plaintiffs as discriminating against Caucasian and Asian applicants in favor of blacks and Hispanics. In the findings of fact, Judge Frankel, speaking for the court, concluded that during the selection of the invitees, members of the plaintiff-class were rejected solely on the basis of race; that during the process of selecting the alternates, discrimination on the basis of race was practiced; and in making its acceptances, the subcommittee established a fifty percent goal for blacks and Hispanics.147 However, the court found the reverse discrimination issue did not


143. See note 3 supra.


145. *Id.* at 1091. The other objectives were to produce physicians to practice in the underserved urban centers and to accelerate the undergraduate-medical school education process. *Id.*

146. *Id.* at 1101.

147. *Id.* at 1103.
have to be addressed, because the defendants did not discriminate intentionally. Judge Frankel reasoned:

Whatever standard of scrutiny is ultimately fashioned in "reverse discrimination" cases, it is clear that the State cannot justify making distinctions on the basis of race without having first made a deliberate choice to do so. Whether the Board of Higher Education, the Faculty Senate of City College, or anyone else in authority might permissibly adopt a racial quota or some other means of discriminating by race, or whether that sensitive task must be left to the legislature, is not the issue.148

Thus, the court found that the racial distinction made by the defendants was discriminatory and could not be justified on equal protection grounds after the policy was implemented.

The New York State Court of Appeals also was confronted with a reverse discrimination challenge in Alevy v. Downstate Medical Center.149 The petitioner applied for admission and was placed on the waiting list for the 1974-1975 class at respondent Downstate Medical Center. When it became clear that the petitioner would not be accepted from the waiting list, Alevy brought a cause of action alleging that the respondent had violated his constitutional right to equal protection. He alleged that Downstate implemented a preferential admissions program under which it admitted minority students with lesser credentials than his. Unlike the respondent in Hupart, Downstate admitted that its policies were race-conscious in an attempt to be "responsive to the medical needs of the community's large black and Puerto Rican population," but "asserted that its policy and practice [was] 'to insure consideration for all aspects which bear upon a candidate's qualifications' for admission."150

In a unanimous decision the New York State Court of Appeals found that Downstate practiced reverse discrimination, because race was a vital consideration in the admission process.151 However, the court found it unnecessary to decide whether the respondent's reverse discrimination was constitutional, because the petitioner had not demonstrated a right to relief. The court noted that even if Downstate's preferential admissions program

148. Id. at 1106 (citations omitted).
150. Id. at 328, 348 N.E.2d at 540, 384 N.Y.S.2d at 85. This position appears to be consistent with that of Justice Douglas in his dissent in DeFunis v. Odegaard, 416 U.S. 312, 320 (1974).
were eliminated, Alevy would not be accepted due to his low alternate list ranking.\textsuperscript{152} Despite this finding the court indicated in dicta that under certain circumstances reverse discrimination is constitutional and adopted a middle-ground "substantial state interest" test to ascertain the validity of the admissions policy in question.\textsuperscript{153}

The reverse discrimination issue was met squarely by the California Supreme Court in \textit{Bakke v. Regents of the University of California}.\textsuperscript{154} The plaintiff, a Caucasian, applied for admission to the publicly funded\textsuperscript{155} University of California at Davis Medical School in 1973 and 1974 but was denied acceptance in both years. He brought suit charging that the university's admissions program violated his equal protection rights under the fourteenth amendment by affording minority applicants special admissions preference on the basis of race.\textsuperscript{156} The court found that Bakke had made out a prima facie case, because some white applicants were denied admission on the basis of race. The conclusion was drawn despite the fact that Bakke himself would not have been admitted if the university had not afforded minorities special consider-

\begin{footnotesize}
\begin{enumerate}
\item[152.] \textit{Id.}, 348 N.E.2d at 547, 384 N.Y.S.2d at 91.
\item[153.] \textit{Id.} at 336, 348 N.E.2d at 545, 384 N.Y.S.2d at 90. The court discussed the middle ground test in the following manner:

\begin{quote}
We are of the view that in deciding an issue of whether reverse discrimination is present, the courts should make proper inquiry to determine whether the preferential treatment satisfies a substantial State interest. In determining whether a substantial State interest underlies a preferential treatment policy, courts should inquire whether the policy has a substantial basis in actuality, and is not merely conjectural. At a minimum, the State-sponsored scheme must further some legitimate, articulated governmental purpose. However, the interest need not be urgent, paramount or compelling. Thus, to satisfy the substantial interest requirement, it need be found that, on balance, the gain to be derived from the preferential policy outweighs its possible detrimental effects.
\end{quote}

\textit{Id.}, 348 N.E.2d at 545, 384 N.Y.S.2d at 90. The approach is similar to that espoused in Gunther, \textit{Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 Harv. L. Rev. 1, 20-24, 44-48 (1972).

\item[155.] \textit{Id.} at 38, 553 P.2d at 1155, 132 Cal. Rptr. at 683. Use of public funds is a key requirement in a constitutional claim. When an applicant to New York University School of Law brought charges against that private university, the court found no claim stated. Stewart v. NYU, 44 U.S.L.W. 2481 (S.D.N.Y. March 16, 1976).
\item[156.] The university had a program whereby it admitted disadvantaged minorities under one procedure while all others were admitted under a different procedure. Each year, 18 places were reserved for applicants in the minority group. 18 Cal. 3d 34, 43, 553 P.2d 1152, 1158, 132 Cal. Rptr. 680, 686. Because the two procedures were instituted independently, applicants from one group were never compared with those from the other. \textit{Id.} at 41, 553 P.2d at 1157, 132 Cal. Rptr. at 685.
\end{enumerate}
\end{footnotesize}
The court then applied a "compelling state interest" test to determine if the program could withstand constitutional scrutiny. It found that the test was not met by the university's goals of integrating the student body, providing role models for minorities, and improving medical care for minorities.

The majority opinion, however, underscored the fact that universities are not precluded from expanding admission for the disadvantaged by considering factors other than grade point averages and test scores. Thus, "disadvantaged" appeared to turn on educational or economic impoverishment as opposed to racial factors.

In a strongly worded dissent, Judge Trobriner attacked the majority's findings on two grounds. First, he stated that the type of racial classification used by the university was not presumptively unconstitutional, because it was remedial rather than invidious. Secondly, he found a compelling state interest in the implementation of such a program due to the necessity of bringing minority group members into society's mainstream.

Clearly, the varying judicial approaches to reverse discrimination claims reflect both the complexity of the problem and its highly emotional overtones.

CONCLUSION

Judicial decisions during the past year are illustrative of divergent philosophies and consequent remedies in the affirmative


158. It is questionable whether a "compelling state interest" test is the proper test in reverse discrimination cases. See Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 336, 348 N.E.2d 537, 545, 384 N.Y.S.2d 82, 90 (1976); Redish, supra note 43, at 353.

159. It is enlightening to note that the court phrased part of the issue as "whether the rejection of better qualified applicants on racial grounds is constitutional." 18 Cal. 3d 34, 48, 553 P.2d 1152, 1162, 132 Cal. Rptr. 680, 690 (1976) (emphasis added). Because the court never defined "qualified," it begged the question. The majority also suggested that increasing the number of places in the medical schools was a possible remedy. Id. at 55, 553 P.2d at 1166, 132 Cal. Rptr. at 694. Of course, that assumes that the universities and the American Medical Association are willing to take that action. The court's suggestion clearly is too conditional.

160. Id. at 54-55, 553 P.2d at 1166, 132 Cal. Rptr. at 694. The court found the Title VII cases imposing preference to minorities on the basis of race not persuasive in the absence of a finding of past discrimination. Id. at 57-59, 553 P.2d at 1169-69, 132 Cal. Rptr. at 696-97. See generally Zimmerman, Will the Class of 1980 Be Lily White?, 5 Student Law. 16 (Jen. 1977).

161. 18 Cal. 3d at 65, 553 P.2d at 1173, 132 Cal. Rptr. at 701 (1976) (Tobriner, J., dissenting).

162. Id. at 84-86, 553 P.2d at 1191-92, 132 Cal. Rptr. at 714-15.
action-reverse discrimination field. Ultimately an affirmative action mandate or an unconstitutional reverse discrimination determination turns on interrelated issues. To what extent is it proper to remedy discrimination? May only identifiable discriminatees be compensated, or may the entire class be repaid? What form may the remedy take? Quotas? Backpay? If necessary, what burden may the majority be required to bear in the redress of abuses? Can they be denied positions in educational institutions or “bumped” from jobs they already hold?

These questions must be answered by focusing on the ultimate goal: the correction of the wrongs created by a society whose majority naturally puts itself above others. Such a society is not self-correcting. Affirmative action programs must play a role. Nonetheless, until guidelines are set institutions will be faced with a Hobson’s choice. Both majority and minority rights will be abused needlessly. The time has come for the Supreme Court to answer these basic and significant questions.

Carol A. Lieb