Public Employment and Reverse Discrimination: Will *Bakke* Bring an End to Voluntary Affirmative Action Plans?

PUBLIC EMPLOYMENT AND REVERSE DISCRIMINATION: WILL BAKKE BRING AN END TO VOLUNTARY AFFIRMATIVE ACTION PLANS? examines the California Supreme Court's decision in BAKKE v. REGENTS OF THE UNIVERSITY OF CALIFORNIA and considers the probable impact on affirmative action plans in California cities if the constitutional principles enunciated in the decision are extended to public employment.

California public employers face a dilemma of mounting proportions in developing and implementing affirmative action plans.[1] Since Title VII of the Civil Rights Act of 1964[2] became applicable to local governments,[3] employers have taken positive steps to include more

---

[1] "Affirmative action plan" as used in this article refers to any plan or program designed to take positive steps to eradicate or prevent racial discrimination against members of minority groups. "Minority groups" include any non-white racial groups such as blacks, Spanish-surname, Asian-American or Native American. "Nonminorities" refers to white Caucasian persons. Although this article uses the term "race," the authors recognize that "ethnic" may be the more accurate term. As the majority in Bakke v. Regents of the University of California noted, minority groups may be different in "physical, national, cultural, linguistic, religious or ideological" as well as racial characteristics. 18 Cal. 3d 34, 46, 553 P.2d 1152, 1160, 132 Cal. Rptr. 680, 688 (1976).

[2] Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. § 2000e (1970 & Supp. V 1975). Title VII makes it unlawful for an employer to discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (1970 & Supp. V 1975).

[3] The Equal Employment Opportunity Act of 1972 extended Title VII's coverage to public employers, including all state and local governments. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (*codified at* 42 U.S.C. § 2000e (1970 & Supp. V 1975)). *See generally* BUREAU OF NATIONAL AFFAIRS, THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (1973); Mitchell, *An Advocate's View of the 1972 Amendments to Title VII*, 5 COLUM. HUMAN RIGHTS L. REV. 311 (1973).

For source material on employment discrimination, *see generally Employment Practices Symposium*, 80 DICK. L. REV. 653 (1976); Werne, *A Guide to the Law of Fair Employment*, 10 U. RICH. L. REV. 209 (1976); *First Decade of Title VII of the Civil Rights Act of 1964: Past Developments and Future Trends*, 20 ST. LOUIS L.J. 225 (1976); Ewald, *Public and Private Enforcement of Title VII of the Civil Rights Act of 1964: A Ten-Year Perspective*, 7 URB. L. ANN. 101 (1974); *Employment Discrimination: A Title VII Symposium*, 34 LA. L.

members of minority groups in the public labor force.[4] Rules and regulations promulgated under the Act encourage voluntary compliance[5] and cities have implemented an array of affirmative action hiring programs in response. Recently, however, public employers have confronted reverse discrimination challenges to their affirmative action plans.[6] Some of the resulting court decisions reflect an increasing judicial intolerance for programs affording preferential treatment to minorities.

The dilemma facing public employers has become more acute as a result of a recent California Supreme Court decision holding a voluntary affirmative action plan invalid under the equal protection clause of the fourteenth amendment. In *Bakke v. Regents of the University of California*,[7] the court invalidated an affirmative action admissions

---

REV. 540 (1974); *In Pursuit of Fair Employment: A Symposium on Recent Developments*, 5 COLUM. HUMAN RIGHTS L. REV. 261 (1973).

[4] Besides the incentives to take affirmative action given to public employers under Title VII, incentives to eradicate discriminatory practices also are provided under 42 U.S.C. § 1981 (1970), 42 U.S.C. § 1983 (1970) and the equal protection clause, U.S. CONST. AMEND. XIV, § 1. For source material on the types of preferential relief that courts can award against public employers, *see generally* Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOY. CHI. L.J. 315 (1974); Larson, *Remedies for Racial Discrimination in State and Local Government Employment: A Survey and Analysis*, 5 COLUM. HUMAN RIGHTS L. REV. 335 (1973).

Various conditions have been attached to the receipt of state and federal funding as an additional incentive for cities to adopt affirmative action measures. For example, Title VI of the Civil Rights Act of 1964 prohibits employment discrimination in any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d (1970 & Supp. V 1975). Several agencies are involved in implementing such assistance programs and all have an affirmative duty to prevent discrimination. Funds from the Departments of Health, Education and Welfare, Housing and Urban Development, Interior and Agriculture are at stake. Funds can be withheld if a local government agency is not taking appropriate action to eliminate discrimination. *See, e.g.*, United States v. City of Chicago, 416 F. Supp. 788 (1976) (revenue sharing funds withheld because the city had not met its obligation to correct the effects of past discrimination in its hiring and promotion practices).

[5] *See, e.g.*, Equal Employment Opportunity Coordination Council, Affirmative Action Programs for State and Local Government Agencies - Policy Statement, 41 Fed. Reg. 38,814 (1976).

[6] *See, e.g.*, Brunetti v. City of Berkeley, 11 Empl. Prac. Dec. 7363 (N.D. Cal. 1975) (voluntary affirmative action plan to achieve proportional employment of minority groups held invalid under Title VII and the equal protection clause); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 248 (N.D. Cal. 1972) (voluntary affirmative action plan to promote minority personnel held invalid under Title VI, 42 U.S.C. § 1983 and the equal protection clause); Hiatt v. City of Berkeley, 9 Empl. Prac. Dec. 7047 (Alameda County, Cal., Super. Ct. 1975) (voluntary affirmative action plan to achieve proportional employment of minority groups held invalid under Title VII and the equal protection clause). *But see* Lindsay v. City of Seattle, 86 Wash. 2d 698, 548 P.2d 320 (1976) (voluntary affirmative action plan utilizing a rule that every one of three vacancies should be filled with minority applicants upheld under Title VII).

[7] 18 Cal. 3d 34, 533 P.2d 1152, 132 Cal. Rptr. 680, *modified* 18 Cal. 3d 252b, 553 P.2d 1172, 132 Cal. Rptr. 700 (1976), *cert. granted*, 97 S. Ct. 1098 (1977) (No. 76-811).

procedure at the University of California, Davis, medical school. As a major expression of policy in the emerging body of reverse discrimination case law, the decision may have far reaching consequences. Indeed, the future of affirmative action plans in California cities depends on whether courts will embrace the rationale of the decision in contexts other than school admissions.

This article discusses the likely impact if the constitutional principles announced in *Bakke* are applied to voluntary affirmative action plans in public employment.[8] The first part analyzes the *Bakke* decision and examines the standard of constitutional review that the court applied to the University's affirmative action plan. The article then considers why courts might extend the rationale of the case to public employment, including the relevance of an equal protection case in what is otherwise a Title VII setting. The second part examines the possible impact of the *Bakke* decision on affirmative action plans in California cities. The article divides the plans into three categories of affirmative action elements: measures to reduce barriers, recruitment measures, and selection procedures. The article assesses the vulnerability of each to a reverse discrimination challenge.

I. THE BAKKE DECISION

In 1969 the University of California, Davis, medical school implemented a "special admissions" program for the benefit of disadvantaged applicants.[9] The program reserved sixteen out of 100 spaces in

---

[8] The analysis in this article will focus on *race* discrimination problems that arise in public employee *hiring*. Problems posed by promotion, discharge, or seniority, and classifications based on sex, religion, nationality or illegitimacy are *not* discussed.

[9] The medical school administered the special admissions program by a committee separate from the regular admissions committee. The regular admissions committee first determined whether an applicant would be given a personal interview. Applicants with a college grade point average below 2.5 on a scale of 4.0 were summarily rejected. For those applicants with grade point averages over 2.5 who were granted an interview, the interviewer prepared a summary of the interview, reviewed the applicant's file and gave the applicant a score between zero and 100. The applicant's file, including a summary of the interview, was then reviewed by four other committee members and they each assigned the applicant a score between zero and 100. The combined numerical rating assigned to each applicant by the committee was used by the medical school in making the final admissions decision.

Unlike the regular admissions process, the special admissions committee initially screened applicants on the basis of whether they were disadvantaged. Disadvantaged applicants were considered for a personal interview while nondisadvantaged applicants were referred to the regular admissions committee. Unlike the regular admissions committee, the special admissions committee did not automatically disqualify disadvantaged applicants for an interview if they had grade point averages below 2.5. After the committee conducted interviews with those disadvantaged applicants it decided to interview, the applicants were rated. The special committee then prepared a written summary of an applicant's qualifications if it recommended the applicant for admission. The regular admissions committee actually determined whether to accept the recommendation,

each entering class for students from economically and educationally disadvantaged backgrounds. Both minority and nonminority students applied for admission under the program, but only minority applicants were admitted.[10] The medical school rejected the application of Allan Bakke, a nonminority applicant, both in 1973 and in 1974, although he had grades and test scores significantly higher than those of minority applicants admitted under the special admissions program.[11] Bakke challenged the program as a violation of the equal protection clause and the University filed a cross-complaint for declaratory relief.[12] Relying on the finding that no nonminorities had been admitted under the special admissions program, the trial court declared the program invalid.[13]

The California Supreme Court affirmed the decision of the trial court and declared the University's special admissions program unconstitutional under the fourteenth amendment to the United States Constitution.[14] The court found that the program classified on the basis of race, and imposed a minority "quota."[15] As administered, the program reserved sixteen spaces for minority applicants in each medical school class. This deprived better qualified nonminority applicants of a specific benefit, *i.e.* admission to the medical school, which they otherwise would have enjoyed. Because the program preferred "less qualified" minorities over "better qualified" nonminorities, the court held that the program imposed an unconstitutional detriment on nonminorities.[16]

---

but in practice the special committee's recommendations generally were followed until 16 applicants were admitted under the special program. Bakke v. Regents, 18 Cal. 3d 34, 39-44, 553 P.2d 1152, 1156-59, 132 Cal. Rptr. 680, 684-87 (1976).

[10] This was the finding of the trial court, and it was not challenged on appeal. *Id.* at 44, 553 P.2d at 1159, 132 Cal. Rptr. at 687.

[11] Bakke had a grade point average of 3.51 and his scores on the verbal, quantitative, science, and general information portions of the Medical College Admission Test (MCAT) in percentile scores were 96, 94, 97, and 72 respectively. Some minority students who were admitted in 1973 and 1974 had grade point averages below 2.5, and the mean percentage score on the MCAT test for minority students admitted under the special admissions program was below the 50th percentile in all four areas tested. *Id.* at 43-44, 553 P.2d at 1158-59, 132 Cal. Rptr. at 686-87.

[12] *Id.* at 39, 553 P.2d at 1155, 132 Cal. Rptr. at 683.

[13] *Id.* at 44, 553 P.2d at 1159, 132 Cal. Rptr. at 687.

[14] *Id.* at 62-63, 553 P.2d at 1171-72, 132 Cal. Rptr. at 699-700. The appeal from the trial court judgment was directly transferred to the California Supreme Court prior to a decision by the court of appeal because the supreme court decided that the importance of the issues in the case warranted such a procedure under CAL. CONST. ART. VI, § 12 and Rule 20, CAL. RULES OF COURT, *Id.* at 39, 553 P.2d at 1155, 132 Cal. Rptr. at 683.

[15] *Id.* at 62, 553 P.2d at 1171, 132 Cal. Rptr. at 699.

[16] *Id.* at 48, 63, 553 P.2d at 1162, 1171-72, 132 Cal. Rptr. at 690, 699-700. The dissent, however, objected to the majority's characterization of minority applicants as "less qualified." The dissent thought that there were several reasons why the medical school properly could use race or ethnic background in evaluat-

In holding the special admissions program invalid, the court stated that a showing of past discrimination would be necessary to justify the preference given to minorities. The court, however, found no evidence of past discrimination to justify the special admissions program.[17] Neither the University nor Bakke offered any evidence at trial as to the University's discrimination against minority applicants in the past.[18] *Amici curiae* urged the court to find past discrimination in the disproportionate number of minority applicants excluded by the traditional use of grade point averages and test scores in evaluating applicants.[19] The court, however, rejected the idea that the underrepresentation of minorities at the University alone was sufficient evidence of past discrimination. In dicta, the court stated that a showing of past discriminatory purpose would be necessary to justify minority preferences that imposed a detriment on nonminorities.[20]

Once the court found that the special admissions program effected a racial classification that resulted in detriment to a nonminority plaintiff and was not justified by past discrimination, it subjected the classification to the strict scrutiny standard of review. Under this standard, a racial classification will be invalidated unless it furthers a compelling state interest and is the least restrictive means of achieving that end.[21] Rejecting the notion that the equal protection clause affords a higher degree of protection for some races than it does for others, the court said strict scrutiny should be applied to classifications that benefit minorities just as it is applied to classifications that discriminate against them.[22] In the court's view, applying any lesser

---

ing the relative qualifications of applicants. First, traditional academic credentials were culturally biased against minorities and did not provide an equitable basis for comparison with other applicants. Second, minority applicants possessed a distinct qualification simply by virtue of their ability to enhance the diversity of the student body and to integrate the medical profession generally. The dissent emphasized that even if race was not considered a relevant factor, the special admissions program admitted only fully qualified minority applicants and did not admit unqualified applicants simply because they were minorities. *Id.* at 82-88, 553 P.2d at 1185-89, 132 Cal. Rptr. at 713-17.

[17] *Id.* at 59-60, 553 P.2d at 1169, 132 Cal. Rptr. at 697.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 59, 553 P.2d at 1169, 132 Cal. Rptr. at 697.

[21] *See* Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U. L. REV. 89, 90-92.

[22] 18 Cal. 3d 34, 50-51, 553 P.2d 1152, 1163-64, 132 Cal. Rptr. 680, 691-92. The dissent, however, contended that while it is appropriate to apply the strict scrutiny standard to "invidious" racial classifications, it is not the appropriate standard to apply when racial classifications benefit minorities. In the dissent's view, racial classifications that benefit minorities should be upheld if they are directly and reasonably related to the goal of achieving integration. The special admissions program seemed to be clearly directed towards achieving this goal, and under the rational basis standard it would be constitutional. The dissent stated that there were several reasons why the minority background of an appli-

standard to racial classifications had no support in prior case law, at least where such classifications result in detriment to a person because of race.[23]

Based on this rationale, the court applied the strict scrutiny test to the University's special admissions program. The court assumed *arguendo* that two of the goals that the University was seeking to serve through the program rose to the level of compelling state interests. It accepted the University's goals of increasing the number of minority students in the medical school and providing more doctors for minority communities.[24] The court then examined whether the special admissions program was the least restrictive means of implementing the University's goals. In the court's view, the University's goals could be achieved by several alternative means that were less detrimental to nonminorities. The court offered such proposals as increasing the number of available spaces in each medical school class and instituting aggressive recruitment programs as ways to further the University's integration goals without burdening nonminorities.[25] The court also suggested that clinical programs and courses directed to the medical needs of minorities were less burdensome means of furthering the goals of increasing the number of doctors serving minority communities.[26] Finding that the special admissions program was thus not the least restrictive means of achieving the University's goals, the court declared it unconstitutional under the equal protection clause.

The court applied the strict scrutiny test, however, in an unprece-

---

cant would be relevant to the applicant's qualifications for medical school and medical practice, and that it was reasonable for the medical school to take such factors into account in their admissions procedure. In light of California's sizable minority population and current underrepresentation of minorities in the medical profession, the allocation of 16 out of 100 spaces did not seem unreasonably large. The dissent emphasized that only fully qualified applicants were admitted under the program and that the medical school would not have accepted minority applicants simply to fill a "quota." In this respect, the 16 places represented a "goal" rather than a "quota." *Id.* at 80-89, 553 P.2d at 1184-89, 132 Cal. Rptr. at 712-17.

[23] *Id.* at 49-50, 553 P.2d at 1162-63, 132 Cal. Rptr. at 690-91.

[24] *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693. The court did not, however, approve of the University's goal of increasing the number of minority doctors available to serve minority communities. It rejected the assumption that black physicians would have a greater rapport with patients of their own race. *Cf.* Castaneda v. Partida, 97 S. Ct. 1272 (1977), where the Supreme Court rejected the similar idea that members of a minority group would give preferences to persons of their own race. The Court held that the Texas system of grand jury selection was discriminatory where minorities were shown by statistical evidence to have been systematically excluded from jury service, even though the court found that minorities constituted a majority of the Texas community.

[25] Bakke v. Regents, 18 Cal. 3d 34, 55, 553 P.2d 1152, 1166, 132 Cal. Rptr. 680, 694 (1976).

[26] *Id.* at 57, 553 P.2d at 1167, 132 Cal. Rptr. at 695.

dented manner. The court purported to subject racial classifications benefiting minorities to strict scrutiny, but the manner in which it actually did so is inconsistent with the traditional strict scrutiny test. Strict scrutiny is usually applied in equal protection cases when the court determines that there is a suspect classification. Classifications on the basis of race are suspect[27] and invoke the highest level of constitutional scrutiny.[28] When courts apply the traditional strict scrutiny test to racial classifications, they first consider whether the goals of the challenged practice are racially based.[29] If the state can offer no nondiscriminatory justification for racially segregationist policies, there is virtually no inquiry into the permissibility of the means. It is generally regarded that when strict scrutiny is applied to racial classifications, the result is a foregone conclusion and essentially no means to achieve a racially discriminatory goal can be upheld.[30]

In *Bakke*, the court faced a racially based goal. The University implemented the special admissions program to increase the number of minority students at the medical school. Yet instead of first deciding whether this racially based goal was permissible, as under the traditional strict scrutiny test, the court merely assumed that the goal furthered a compelling state interest. It then proceeded to invalidate the means the University had chosen by characterizing them as not the least restrictive means of achieving the University's goal.[31] Not only is this manner of applying strict scrutiny inconsistent with traditional strict scrutiny, however, it is also illogical. It makes no sense to invalidate the means used to further a goal without deciding whether the goal can even be pursued. Moreover, the court ironically invalidated the special admissions program because it classified applicants on the basis of race while it assumed that the University's racially based goal of increasing minority students at the medical school was

---

[27] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964) (held state statute prohibiting unmarried interracial couples from cohabiting to be unconstitutionally suspect under the equal protection clause). For a discussion of suspect classifications *see* Barrett, *supra* note 21, at 93-108.

[28] *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880) (held jury selection system that excluded blacks from jury service racially discriminatory within the prohibitions of the fourteenth amendment); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (city ordinance that prohibited laundries in buildings not made of stone or brick held invalid on the grounds that it was administered in a discriminatory manner against Chinese).

[29] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (held state anti-miscegenation law prohibiting interracial marriages invalid, concluding that the statute rested solely upon racial distinctions and therefore the state must show that the racial classification is necessary to accomplish some permissible state objective independent of racial discrimination).

[30] *See* Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 21-22 (1976).

[31] Bakke v. Regents, 18 Cal. 3d 34, 52-55, 553 P.2d 1152, 1164-66, 132 Cal. Rptr. 680, 692-94 (1976).

a compelling state interest.[32] This manner of applying strict scrutiny is disingenuous.[33] The most closely related means of achieving a legitimate racially based goal is through racially based means. In other words, if the medical school desires to increase its number of minority students, a racial classification is a uniquely appropriate means to achieve this end. Yet despite the appropriateness of such means, the court assumed that racial goals were permissible and at the same time said that it was unconstitutional to achieve them by racial means.

The manner in which the court applied strict scrutiny to the special admissions program seems to reflect the court's unwillingness to take the major and controversial step of condemning affirmative action directly by passing on the goals of voluntary affirmative action programs. The court merely assumed, without deciding, that such goals were compelling state interests and the constitutionality of voluntary affirmative action goals to benefit minorities thus remains unresolved. Nevertheless, while the *Bakke* court dealt ambiguously with the validity of voluntary affirmative action goals, the result the court reached as to the means that may be used to further them is clear. It is unconstitutional reverse discrimination to deny "better qualified" nonminority applicants admission to the Davis medical school by preferring minority applicants under a quota system because of their race.[34]

If the United States Supreme Court affirms the *Bakke* decision, the impact on affirmative action doubtless will be great. Unless the Court decides the case on narrow grounds, not only will affirmative action in school admissions be affected, but a broad statement of policy by the Court will have repercussions in other contexts as well. What will be the impact of such a decision in the public employment sector? Will courts apply the strict scrutiny standard of review to voluntary affirmative action plans that are challenged by nonminority plaintiffs under the equal protection clause?

A number of similarities between employment hiring and school

---

[32] *See* Brief of Sanford H. Kadish, Dean of the School of Law, University of California at Berkeley *et al.*, as Amici Curiae for Certiorari to the Supreme Court of the United States at 30-31, Regents of the Univ. of Cal. v. Bakke.

[33] The dissent criticized the majority for suggesting "impractical" and "disingenuous" alternatives to the special admissions program with no support from the record. For example, the majority's suggestion that the integration of the medical school could be accomplished by increasing the size and number of medical schools was regarded as unrealistic. The dissent characterized the belief that the enormous financial commitment necessary for increased facilities would be possible in the foreseeable future as a "cruel hoax" and "fanciful speculation." Bakke v. Regents, 18 Cal. 3d 34, 89-90, 553 P.2d 1152, 1189-90, 132 Cal. Rptr. 680, 717-18 (1976).

[34] For commentary on the Bakke decision *see* Comment, *Bakke v. Regents of the University of California: Preferential Racial Admissions, an Unconstitutional Approach Paved with Good Intentions?*, 12 NEW ENGLAND L. REV. 719 (1977).

admissions demonstrate that an affirmance of the *Bakke* decision by the United States Supreme Court will have consequences in the public employment context. Both admissions and hiring deal with entry level problems and both entail selective procedures that focus on personal qualifications and merit. Admissions and hiring also involve apportioning limited resources among individuals who meet certain minimum qualifications. These similarities, moreover, suggest that just as the *Bakke* court found racially based goals difficult to justify in school admissions, other courts also may find racially based goals difficult to justify in the employment context as well. Although race conscious preferential treatment may be the most effective way to achieve greater opportunity for disadvantaged persons, in one important respect affirmative action may be more unfair to nonminorities in employment and in school admissions than in other contexts.

Employment and school admissions both involve apportioning limited resources among individuals who meet certain qualifications. Preferring one individual for a job or for admission, therefore, necessarily entails denying another individual the same job or position in a class. These individuals suffer a readily identifiable detriment. In other contexts, such as school desegregation and voting, on the other hand, the benefits given to individuals are not from a necessarily finite set of resources. Conferring benefits on one individual does not deprive other individuals of an opportunity to receive a share. Children may suffer inconvenience because of efforts to integrate elementary and secondary schools, but no child is deprived of an education as a result.[35] Voters may not have district lines drawn the way that would best serve their political interests, but no individual is denied the right to cast his vote.[36] While nonminorities may argue that they

---

[35] For example, in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1971), the Court upheld a court-ordered school desegregation plan. The Court noted that the remedy for racial segregation in public schools "may be administratively awkward, inconvenient . . . and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system." *Id.* at 28. Also, the majority in Bakke stated:

> Whatever the inconvenience and whatever the techniques employed to achieve integration, no child is totally deprived of an education because he cannot attend a neighborhood school, and all students, whether or not they are members of a minority race, are subject to equivalent burdens. Bakke v. Regents, 18 Cal. 3d 34, 46-47, 533 P.2d 1152, 1160-61, 132 Cal. Rptr. 680, 688-89 (1976).

[36] For example, in United Jewish Organizations Inc. v. Carey, 97 S. Ct. 996, 1008 (1977), the Court upheld a reapportionment plan for state senate and assembly districts that split a Hasidic Jewish community between two districts to achieve a non-white majority in one of those districts. The Court held that the redistricting, which was accomplished pursuant to § 5 of the Voting Rights Act of 1965, did not abridge the right to vote by reason of race or color. The Court stated: "Furthermore, the individual voter in the district with a non-white majority has no constitutional complaint merely because his candidate has

suffer a detriment as a result of school desegregation and voting redistricting, courts have not recognized that such detriment deserves constitutional protection.

In employment and school admissions, however, the individuals denied a job or a position in a class may argue more easily that they suffer a constitutional detriment. Among a defined pool of job or admissions applicants, the individuals not hired or not admitted are readily identifiable. An identifiable individual who is denied a job does not necessarily suffer a constitutionally prohibited detriment, since such detriment only occurs if the denial is based on constitutionally impermissible criteria. But in the employment context, and particularly where a city has implemented an affirmative action plan to hire more minority personnel, the chances that this will occur are great. When the criterion for preferring one individual over another is his capability to perform the job, there is no problem. When the reason for imposing the burden of being denied a job is racially based, however, it is more difficult to justify.

The difficulty in justifying minority preferences in a context of limited resources is particularly evident where cities have implemented voluntary affirmative action plans. Voluntary plans are usually implemented in response to general social, political and legal pressures and are designed to remedy a broad-based, institutional discrimination in society as a whole. Unlike the situations where courts order race conscious remedies for segregation[37] or racial quotas to correct the effects of discriminatory practices,[38] voluntary affirmative action plans

---

lost out at the polls and his district is represented by a person for whom he did not vote." *Id.* at 1010.

[37] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 22-25 (1971) (upheld race conscious means to desegregate segregated school system). *Cf.* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 436-37 (1976) (held that school board, having once implemented a desegregation plan to remedy perceived constitutional violations, was not under a constitutional obligation to ensure that the desired racial mix be maintained in perpetuity).

[38] *E.g.*, Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F.2d 622, 625 (2d Cir. 1974) (upheld court ordered specific membership goal to reach a certain percentage of minority union membership within three years where the goal was ordered to remedy *de facto* past discrimination); Vulcan Soc'y of N.Y. City Fire Dep't v. Civil Serv. Comm'n, 490 F.2d 387 (2d Cir. 1973) (upheld interim court order to hire one minority for every three nonminorities until fire department developed nondiscriminatory testing procedures); Carter v. Gallagher, 452 F.2d 315, 330-31 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972) (upheld court order that one out of every three persons hired be a qualified minority individual until at least 20 minority persons were hired, modifying district court order that gave minorities an absolute preference for the next 20 positions). Also, *see* cases collected in Slate, *Preferential Relief in Employment Discrimination Cases*, 5 LOY. CHI. L.J. 315, 318-20; Comment, *Hiring Goals, California State Government and Title VII: Is This Numbers Game Legal?*, 8 PAC. L.J. 49, 53 n.42 (1977).

Several recent cases, however, have invalidated court ordered quotas on appeal. *E.g.*, Chance v. Board of Examiners, 534 F.2d 993 (2d Cir. 1976) (temporary

are not implemented to remedy specific instances of adjudicated past discrimination.[39] A judicial determination that preferential treatment is appropriate and limited to the length of time necessary to remedy the effects of past discrimination is absent in voluntary affirmative action programs.[40] The individual detriment caused by such programs is thus usually justified by no more than a need to remedy a generalized history of past discrimination. While compensating for this country's past racial injustices is philosophically laudable, asking one individual to go without a job because of something his predecessors may have done seems inequitable.[41]

---

quota to discharge nonminority employees before minority employees, regardless of seniority status, held invalid); Kirkland v. New York State Dep't of Correctional Serv., 520 F.2d 420, 428-30 (2d Cir. 1975) (permanent quota that "bumped" nonminorities from their positions on the employer's promotion eligibility list in favor of minorities held invalid, but interim relief upheld because it was temporary and did not mandate promotions); Weber v. Kaiser Alum. & Chem. Corp., 415 F. Supp. 761 (E.D. La. 1976) (quota to hire one minority for every nonminority hired until 39% minority representation was reached held invalid). *Cf.* Lige v. Town of Montclair, 72 N.J. 5, 367 A.2d 833 (1976) (held invalid a temporary hiring and promotion quota for city fire and police departments ordered, not by a court, but by State Division of Civil Rights).

See generally Blumrosen, *Quotas, Common Sense, and Law in Labor Relations: Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974); Note, *Continuing Quota Relief Inappropriate Remedy for Promotional Discrimination*, 22 WAYNE L. REV. 1263 (1976); Note, *Employment Discrimination: The Promotional Quota as a Suspect Remedy*, 7 RUT.-CAM. L.J. 506 (1976); Note, *Race Quotas as a Form of Affirmative Action*, 34 LA. L. REV. 552 (1974); Note, *Race Quotas*, 8 HARV. C.R.-C.L. L. REV. 128 (1973).

[39] The *Bakke* court, in invalidating the special admissions program, did not provide much guidance as to how specific the prior instances of past discrimination must be in order to justify a voluntary plan. The court did not indicate whether discrimination by the medical school itself, the Davis campus, the University as a whole with its nine campuses or the state, as owner of the school, would be sufficient to satisfy the requirement of past discrimination. The majority opinion indicated that the special admissions program would have been upheld only if the "University" had discriminated in the past. *Id.* at 59, 553 P.2d at 1169, 132 Cal. Rptr. at 697. Thus it remains unclear exactly what kind of proof must be presented to demonstrate past discrimination.

[40] Several recent cases have invalidated voluntary affirmative action measures. *E.g.*, Brunetti v. City of Berkeley, 11 Empl. Prac. Dec. 7363 (N.D. Cal. 1975) (voluntary affirmative action plan held invalid under Title VII and the equal protection clause); Anderson v. San Francisco Unified School Dist., 357 F. Supp. 243 (N.D. Cal. 1972) (voluntary affirmative action plan held invalid under Title VI, 42 U.S.C. § 1983 and the equal protection clause); Hiatt v. City of Berkeley, 9 Empl. Prac. Dec. 7047 (Alameda County, Cal., Super. Ct. 1975) (held voluntary plan invalid under Title VII and the equal protection clause); Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976) (court indicated that voluntary affirmative action procedure for medical school admissions would be invalid unless it furthered a substantial state interest that could not be achieved by a less objectionable means).

[41] For thorough treatment of the issues raised here *see generally* N. GLAZER, AFFIRMATIVE DISCRIMINATION (1975); Brest, *supra* note 30; Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

While the foregoing discussion of similarities between admissions and hiring demonstrate that the rationale of the *Bakke* decision may be extended into the public employment context, there is one difficulty with assuming that such an extension will occur. Most employment discrimination cases are brought under Title VII.[42] Title VII prohibits racial discrimination in public employment and provides specific remedies for both minority and nonminority discriminatees.[43] With Title VII available to nonminority discriminatees, however, a court could decide the permissibility of an affirmative action plan on Title VII grounds and not under the equal protection clause. The *Bakke* case, which was decided on equal protection grounds, may therefore have limited precedential value in the employment context.

It is not necessarily true, however, that all employment discrimination cases must be decided under Title VII. Nonminorities can bring an action for employment discrimination under either Title VII or the equal protection clause. A court may base its decision under either provision.[44] Even if a court decides a reverse discrimination action in public employment under Title VII, however, this does not necessarily mean that cases decided under the equal protection clause may be disregarded. Indeed, a recent Supreme Court decision illustrates that equal protection cases may have precedential value in Title VII actions. In *General Electric Co. v. Gilbert*,[45] the Court applied the reasoning of an equal protection case in a Title VII action and said that equal protection cases are useful in interpreting Title VII.[46] The Court noted that both the equal protection clause and

---

[42] Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. § 2000e (1970 & Supp. V 1975).

[43] In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280, 286-87 (1976), the Court held that whites have standing to sue under Title VII and 42 U.S.C. § 1981. Two white plaintiffs alleged discrimination when they were fired for misappropriating their employer's property while a black employee also involved in the impropriety was not fired. The Court said that the action could be maintained under Title VII and 42 U.S.C. § 1981 since both of these provisions should be available to whites just as they are available to blacks. The employer disclaimed that any of the allegedly discriminatory actions were part of an affirmative action plan, however, and the Court expressly stated that it was not considering the permissibility of affirmative action plans. *Id.* at 280-81 n.8.

[44] *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976), where the Court decided a public employment discrimination action on equal protection grounds because Title VII, at the time the action was brought, had not yet been extended to federal employers. *Id.* at 236 n.6.

[45] 97 S. Ct. 401, 404 (1976). General Electric was a sex discrimination action brought under Title VII in which the plaintiff challenged an employer's disability plan for excluding disabilities arising from pregnancy. The Court held that its decision in Geduldig v. Aiello, 417 U.S. 484 (1974), an equal protection case, was controlling. In Geduldig, the Court decided that it was not an impermissible gender-based classification to exclude disabilities arising from pregnancy from company disability benefits. *Id.* at 497.

[46] General Elec. Co. v. Gilbert, 97 S. Ct. 401, 407 (1976). The General Electric case, however, which supports the proposition that equal protection cases

Title VII are designed to achieve the same antidiscriminatory purposes.[47] Moreover, the definition of "discrimination" has evolved through equal protection cases and it should not be inferred that it means something different under Title VII.[48]

The availability of Title VII as a remedy for employment discrimination thus neither precludes a court from deciding the permissibility of an affirmative action plan on equal protection grounds nor prevents the *Bakke* decision from having precedential value in the employment context. Reverse discrimination challenges to voluntary affirmative action plans may be brought under the equal protection clause independently of Title VII, and even if they are brought under Title VII, equal protection cases may have precedential value. The *Bakke* decision is therefore certainly relevant in the public employment context. If it is extended to reverse discrimination cases in public employment, the impact will be significant. Every voluntary affirmative action hiring plan may be subject to challenge. The remainder of this article examines the possible impact of this extension on affirmative action plans in California cities.

II. AFFIRMATIVE ACTION PLANS: THE IMPLICATIONS OF *BAKKE*

A judicial determination that voluntary affirmative action plans in public employment are unconstitutional would cut deeply into the present employment practices of municipalities. Many California cities have voluntarily implemented affirmative action plans.[49] These plans include a variety of measures to increase the number of minor-

---

are applicable in Title VII actions, may be of far more significance than its narrow holding suggests. Indeed, the case may have an impact on the continuing viability of the Title VII standard of proof. In a Title VII action, as the law now stands, plaintiffs can prove racial discrimination by showing that an employment practice has a discriminatory effect upon a particular group. Griggs v. Duke Power Co., 401 U.S. 424 (1971). In Washington v. Davis, 426 U.S. 229, 238-39 (1976), however, the Supreme Court established a separate standard of proof for discrimination cases under the equal protection clause. In equal protection cases, discriminatory purpose rather than discriminatory effects must be shown to prove racial discrimination. General Electric may suggest that since the purposes behind both Title VII and the equal protection clause are the same, the standard of proof under each may have to be the same. The Court in General Electric did not reach the issue since it said that the plaintiff did not make out a case even under the lesser Title VII standard. General Elec. Co. v. Gilbert, 97 S. Ct. 401, 408-409 (1976). It seems inevitable, however, that the Court eventually will face this issue.

[47] General Elec. Co. v. Gilbert, 97 S. Ct. 401, 412-13.

[48] *Id.* at 413.

[49] California cities with populations over 70,000 (with the exception of Davis) were contacted for the purposes of this analysis. References herein are to the affirmative action plans of the 21 cities that responded: Berkeley, Chula Vista, Davis, Downey, Fresno, Long Beach, Los Angeles, Modesto, Oakland, Redding, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, Santa Barbara, Santa Monica, Stockton, Torrance, Vallejo, Whittier (copies of all the affirmative action plans referred to are on file with the U.C.D. L. REV.).

ity personnel in the public labor force.

For the purposes of analysis, the various means adopted by California cities to implement their affirmative action programs can be separated into three broad categories. First, affirmative action plans in nearly every city contain elements designed to reduce the barriers that exist to minorities seeking public employment. Second, there are elements designed not just to reduce barriers to minority employment, but actively to recruit minorities into the public work force. Finally, many cities have implemented selection procedures designed directly to hire more minority personnel.

Whether and to what extent any of the affirmative action measures within these categories will be vulnerable to a reverse discrimination challenge, however, depends on several factors. Assuming a court faces an equal protection claim by a nonminority and assuming it would apply the traditional strict scrutiny test to the challenged affirmative action measure, the court would first consider whether the measure classifies people by race. This can be determined either by what the program says on its face or by the way it is administered or applied.[50] If the challenged measure effects a racial classification in either of these ways, the court must determine whether the plaintiff purposefully was denied a job because of his race.[51] In other words, the plaintiff must show that he would have been hired but for his race, and that other individuals who were less qualified were hired instead. Unless the employer can show that there was a legitimate, nondiscriminatory reason why the plaintiff was not hired,[52] the court will conclude that the affirmative action measure imposed an unconstitutional detriment. The employer apparently then has the

---

[50] The "as applied" type of equal protection analysis was used in Yick Wo v. Hopkins, 118 U.S. 356 (1886) (city licensing ordinance that prohibited laundries in buildings not made of brick or stone unless consent of board of supervisors was obtained held invalid on the grounds that it was administered in a discriminatory manner against Chinese). The Court outlined one of the now generally recognized methods of proving *de jure* discrimination:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Id.* at 373-74.

[51] Washington v. Davis, 426 U.S. 229, 238-39 (1976) (minority plaintiffs had to show that police department personnel test was administered with a discriminatory purpose to sustain an equal protection claim).

[52] Franks v. Bowman Transp. Co. Inc., 424 U.S. 747, 772-73 (1976) (*cited as analogous in* Bakke v. Regents, 18 Cal. 3d 34, 63-64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976)). In Title VII cases, once the plaintiff has established a prima facie case of discrimination, the burden shifts to the employer to show that the challenged employment practice is related to job performance and fulfills a genuine business need, Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971), or that there was some legitimate, nondiscriminatory reason for the employee's rejection, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

burden of showing that the affirmative action measure is justified by past discrimination. If the *Bakke* decision is followed, this will mean that an employer will have to show specific instances of past discriminatory treatment. If this burden is not satisfied, the challenged affirmative action measure will be invalid. This basic analysis is applicable to each affirmative action category.

A. Barrier-reducing Measures

The elements of affirmative action plans designed to reduce barriers to minorities seeking public employment present no constitutional difficulties on their face. They vary in different cities from mere statements of hiring policy to actual job restructuring, but most of them are phrased in racially neutral terms. Cities use three basic means to reduce barriers to minority employment.

One method is to ensure that all qualifying tests, whether written, oral, or physical, are job-related.[53] The standards for determining job-relatedness are set out in Equal Employment Opportunity Commission (EEOC) regulations.[54] Most plans require conformance with these regulations to ensure that no test has a discriminatory impact on any one group of individuals.[55]

Second, many cities seek to reduce barriers to minority employment through job restructuring. Job restructuring eliminates arbitrary and unnecessary job prerequisites and retains only the education, experience, and physical qualifications necessary to perform a particular job.[56] The purpose is to eliminate job qualifications that have a discriminatory effect on minority or disadvantaged applicants. In order to make entry-level positions available to a greater range of

---

[53] "Job-related tests" are defined as those that are predictive or significantly correlated with important elements of work behavior relevant to the job for which candidates are being evaluated. EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1975), *as amended*, 41 Fed. Reg. 51, 984 (1976).

[54] *Id.* The EEOC Guidelines were accepted as the appropriate standard to determine whether a test is job-related in Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

[55] Most cities would prefer that all of their tests are job-related and nondiscriminatory, but given the current art of testing this is difficult to attain in practice. For this reason, employers may find strict compliance with EEOC Guidelines unworkable and unrealistic in some situations. For a discussion of this problem, *see* Johnson, *Albemarle Paper Co. v. Moody: The Aftermath of Griggs and the Death of Employee Testing*, 27 HASTINGS L.J. 1239 (1976); White and Francis, *Title VII and the Master of Reality: Eliminating Credentialism in the American Labor Market*, 64 GEO. L.J. 1213 (1976).

[56] Job restructuring can also include creating new entry level classifications with promotional ladders. Cities can create classifications for paraprofessionals, technical or semi-skilled jobs to accelerate the transition of minorities into management and professional categories. *E.g.*, City of Berkeley Affirmative Action Program (Draft May 4, 1976), at 15; City of Fresno Affirmative Action Program Implementation Guidelines (April 1975), at 7-8; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 15-16; City of Stockton Affirmative Action Plan (1973), at 11-12.

persons, strict educational and experience requirements are made more flexible[57] and job classifications are restructured to include more trainee positions.[58]

The third method cities use to reduce barriers to minority employment is through personnel education and training sessions.[59] These programs, also racially neutral, are designed to educate supervisors and managers about cultural and socio-economic differences among employees. Barriers are removed by reducing the intentional and unintentional discriminatory tendencies of hiring authorities that are the result of bias, ignorance and misinformation.

The constitutional permissibility of racially neutral means to reduce barriers to minority employment is predicated on the premise that barriers are reduced not just for minorities, but for members of the majority as well. Nonminorities suffer no detriment when barriers are reduced for all. Ensuring that tests and minimum qualifications are job-related potentially reduces barriers to both minorities and nonminorities. Educating hiring authorities to cultural differences tends to reduce or remove personal biases that should not be

---

[57] For example, high school equivalency certificates can be used to satisfy a job requirement for high school graduation, and education requirements can be stated in terms of course equivalents rather than degree attainments. Also, additional education can be substituted for the required experience, and volunteer work can satisfy experience requirements where appropriate. *E.g.*, City of Berkeley Affirmative Action Program (City Council Resolution No. 45, 257-N.S. revised to December 17, 1974), at 6; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 15-16; City of Torrance Affirmative Action Program (adopted by City Council Resolution No. 74-180 August 13, 1974), Affirmative Action Element No. 3, at 3.

[58] Trainee or apprenticeship classifications can be created to offer employment to a wider range of job applicants. Such classifications have lesser education and experience requirements and may be limited in duration, but they usually are intended to prepare persons to qualify for regular entry level positions. *E.g.*, City of Fresno Affirmative Action Program Implementation Guidelines (April 1975), at 8; City of Santa Barbara Affirmative Action Plan (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 7 and Appendix "C"; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 16-17; City of of Stockton Affirmative Action Program (adopted by City Council Resolution No. 74-180 August 13, 1974), Affirmative Action Element No. 7, at 1; City of Vallejo Affirmative Action Policy (adopted by City Council Ordinance No. 138 N.C. (2d) February 26, 1973), at 8-9.

[59] Special orientation sessions for department heads and other supervisory personnel usually are intended to improve the understanding of minority group cultures, increase sensitivity and awareness of the causes and effects of discrimination, and create a positive attitude towards the employment of minorities. Training sessions are conducted to explain the intent of the affirmative action plan to supervisory personnel and to inform them of their individual responsibility for its implementation. *E.g.*, Affirmative Action Program for the City of San Diego (1972), at 2; City of Santa Barbara Affirmative Action Plan (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 6; City of Vallejo Affirmative Action Policy (adopted by City Council Ordinance No. 138 N.C. (2d) February 26, 1973), at 6.

present in the hiring process in the first place.

In practice, however, these affirmative action measures may not merely reduce barriers to minority employment. They may afford preferential treatment to minorities in the way they are administered and thereby effect a classification on the basis of race. Admittedly, it would be an unusual situation in which a nonminority could complain of reverse discrimination because of the way an affirmative action measure to reduce barriers is administered. Measures to reduce barriers to minority employment largely achieve no more than an increase in the number of minority job applicants, and it would be difficult to show that such measures were the "but for" cause of a discriminatory hiring decision.

Nevertheless, certain measures to reduce barriers may be administered in ways that expose employers to reverse discrimination challenges. For example, while job qualifications legitimately may be restructured to reduce artificial barriers to employment opportunities, they also can be restructured to remove only the barriers that exist to minorities. If so, the practice may be vulnerable to an equal protection claim. If trainee jobs are made available only to minorities or if certain educational or experiential requirements are waived only for minority job applicants, an employer may be liable for administering a facially neutral affirmative action measure in a racially discriminatory manner. Nonminority job applicants excluded from the opportunities available only to minorities would have no difficulty showing that such practices effect a racial classification. They would then have to prove, however, that the employer purposefully denied them access to trainee positions or to a job because of their race. This possibly can be shown where the employer is administering the challenged employment practice as part of an affirmative action plan. Affirmative action plans often are implemented expressly for the purpose of including more minorities in the public work force. An employer's intent to discriminate against nonminorities can be inferred readily when he takes action pursuant to this purpose. If discriminatory purpose can be shown, the nonminority plaintiff then has a sound basis for arguing that he would have been hired but for his race. If the plaintiff also can show that he was not hired because the employer was hiring less qualified minorities instead, he can establish a prima facie case. A court would conclude that the nonminority plaintiff suffered an unconstitutional detriment by being denied a trainee position or a job by reason of his race. Unless the employer can prove that the plaintiff was rejected for some nondiscriminatory reason or that the employment practice was justified by past discrimination, the plaintiff will prevail. Depending on whether the plaintiff's action was for declaratory relief or for an injunction, the court either will invalidate the challenged affirmative action measure or order the employer to hire him.

B. Recruitment Measures

Like affirmative action measures to reduce barriers, active "outreach" and recruitment efforts to increase minority hiring pose constitutional problems only in unusual situations. In fact, the *Bakke* court indicated that the recruitment of minorities was a constitutionally acceptable alternative means to the special admissions program of achieving the integration of the medical school.[60] While these measures do classify people on the basis of race, in most situations they cause no identifiable detriment to nonminorities.

Recruitment measures in public employment vary in extent from merely advertising on the city letterhead and bulletins that the city is an "equal opportunity/affirmative action employer" to maintaining active liaison with minority organizations in the community. Job openings are often advertised by the use of mailing lists, newspapers, magazines and radio, with particular emphasis on media likely to reach the minority population. Vigorous outreach programs, on-site recruiting, and testing activities in areas of the city where minorities are a large percentage of the population also are implemented to improve the recruitment of minorities.[61]

Most recruitment and outreach affirmative action measures merely open up channels of communication which have never existed. This

---

[60] Bakke v. Regents, 18 Cal. 3d 34, 55, 553 P.2d 1152, 1166, 132 Cal. Rptr. 680, 694 (1976).

[61] Some cities also maintain active liaison with minority organizations or concerned community agencies to obtain employment referrals of minority applicants and to disseminate information about job openings. Summer, part-time and intern positions are used to encourage minorities to remain in school in order to later qualify for career positions. Cooperative planning with high school, colleges and training schools helps to tailor the curricula to job skill requirements and stimulate access to employment with the city. *E.g.*, City of Berkeley Affirmative Action Program (City Council Resolution No. 45, 257-N.S. revised to December 17, 1974), at 5 and (Draft May 4, 1976), at 11-13; City of Downey Affirmative Action Plan (approved by City Council Resolution No. 3109), at 115; City of Fresno Affirmative Action Program Implementation Guidelines (April 1975), at 8-9; Affirmative Action Program for the City of Long Beach Program Year 1976-1977 (adopted by City Council Resolution No. C-22095 June 15, 1976), at 91; City of Los Angeles Affirmative Action Program (adopted by City Council May 10, 1976), at 20-22; City of Modesto Affirmative Action Program (adopted by City Council Resolution No. 74-376), at 3; City of Oakland Affirmative Action Plan (Administrative Instruction 515, approved by City Council Resolution No. 51836 C.M.S., as amended July 20, 1976), at 5; Affirmative Action Plan for the City of Riverside (adopted by City Council Resolution No. 12227, as amended April 1976), at 6; Affirmative Action Program for the City of San Diego (1972), at 1; City and County of San Francisco Civil Service Commission Affirmative Action in Employment (August 1972), at 3; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 4-12; City of Stockton Affirmative Action Plan (1973), at 18; City of Torrance Affirmative Action Program (adopted by City Council Resolution No. 74-180 August 13, 1974), Affirmative Action Element No. 4, at 1-3; City of Vallejo Affirmative Action Policy (adopted by City Council Ordinance No. 138 N.C. (2d) February 26, 1973), at 5.

is usually accomplished through means that either already are utilized with respect to the majority or which are implemented for the benefit of the entire community. A nonminority complaining of reverse discrimination thus is not likely to challenge a recruitment measure directly.

Such measures, however, may provide a nonminority plaintiff with additional evidentiary support for his reverse discrimination challenge. Where cities are actively recruiting minorities as part of an affirmative action plan they are obviously doing so to increase the number of minorities in the public work force. A recruitment measure thus can manifest an intention on the part of a city to hire more minorities over nonminorities in filling job openings. Proving such an intention is an integral part of a nonminority's prima facie case of reverse discrimination. A rejected nonminority job applicant seeking injunctive or declaratory relief against a public employer is therefore likely to seize upon a city's minority recruitment campaign as additional evidence of purposeful discrimination.

One recruitment measure likely to offer the strongest evidentiary support for a nonminority's reverse discrimination claim against a city is the use of personnel sanctions.[62] In some cities the personnel director is subject to sanctions, such as formal reprimands or denials of merit increases, for failing to produce an applicant pool containing a certain racial mixture. A nonminority plaintiff is likely to point to the use of such sanctions as evidence that city officials are under great pressure to hire more minorities to reach affirmative action goals. Such evidence may permit a court to infer that a city engaged in purposeful discrimination.

C. Personnel Selection Procedures

While affirmative action measures to reduce barriers to minority employment and to increase the recruitment of minorities are important elements of city programs, personnel selection procedures are more direct means of effectuating affirmative action goals. As such, they are much more likely to receive careful judicial scrutiny.

Personnel are selected for public employment in California under a merit system.[63] The selection procedure at the core of this system is

---

[62] For example, Santa Barbara's affirmative action plan places the burden of improving both the volume and percentage of minority applicants for city employment on the Personnel Director. If the composition of the applicant pool fails to reflect within 20% the city population in terms of race, ethnicity, and sex for less than 80% of the time, remedial action will be taken. Failure by the Personnel Director to accomplish the goal of population parity in the applicant pool will constitute grounds for sanction by the City Administrator. City of Santa Barbara Affirmative Action Program (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 8-9.

[63] In California, the State Personnel Board is vested with responsibility for establishing and administering merit systems for personnel selection in local

the "rule of three." Under this procedure job applicants are given civil service tests and placed on a rank list according to their scores. The top three are taken from the list and "certified." Certification entitles the individual to a personal interview, after which the personnel director or hiring authority makes the final selection. The hiring authority may select any of the certified applicants. They are considered equally qualified. As an integral part of the merit system, the rule of three allows only "qualified" applicants to become eligible for hiring.

Problems may arise, however, when the civil service system is used to implement affirmative action plans. Viewed separately, both the civil service system and affirmative action plans are intended to promote equality and fairness. The civil service system provides an objective means of selecting qualified persons for a particular job. Affirmative action plans are intended to be an effective means of achieving equal employment opportunity. However, when the racially neutral civil service selection procedures are used to implement racially based affirmative action goals and timetables,[64] the limits of constitutional permissibility can be exceeded. In public employment, the problem arises when an affirmative action plan has highly specific goals and timetables, or when a city has adopted specific procedural means to increase minority certification.

---

government agencies. The Board has such authority where merit systems are required as a condition for receiving state funding or for participating in a federal grant-in-aid program. Approved Local Merit System Standards were adopted by the State Personnel Board and constitute the criteria that must be met by local agencies to qualify for state and federally funded programs. 2 CAL. ADMIN. CODE §§17010-17592 (*as amended* January 17, 1976). Local agencies can establish their own merit systems with personnel standards applicable to their own employees, but they must meet the state and federal standards to qualify for state and federal funds. CAL. GOV'T CODE §19802 (West Supp. 1976). For general State Civil Service Provisions *see* CAL. GOV'T CODE §§18500-19810 (West 1963 & Supp. 1976).

[64] Some cities simply state that their goal is to make the city work force reflect the racial, sexual and ethnic ratios in the overall city population. *E.g.*, Affirmative Action Program for the City of San Diego (1972), at 1; City and County of San Francisco Civil Service Commission Affirmative Action In Employment (August 1972), at 3; City of Vallejo Affirmative Action Policy (adopted by City Council Ordinance No. 138 N.C. (2d) February 26, 1973), at 2. Most cities, however, have more specific goals and timetables. Groups that are underrepresented in city government (*e.g.* blacks, Spanish-surname, Asian, Native American), are listed beside figures showing their percentage composition in the city population or the available labor market. The difference in representation constitutes the goal, and the timetable for reaching this goal may be set according to the number of employees in a department, the anticipated turnover, the anticipated new positions and the applicant pool structure. Some cities set short term goals to be reached in one year in addition to long term goals to be reached in 5-10 years. The detail and specificity of the goals and timetables varies from setting them out in percentage figures for each department to stating them generally for city employment as a whole. *E.g.*, City of Fresno Affirmative Action Program Implementation Guidelines (April 1975), at 4-7; Affirmative Action Program for the City of Long Beach Program Year 1976-1977 (adopted

1. Specific Goals and Timetables

A city may be subject to a reverse discrimination challenge when it outlines highly specific affirmative action goals and timetables. While some cities merely express their endorsement of the goal of equal employment opportunity,[65] many cities commit themselves to achieving fixed percentages of minority representation in the work force within certain periods of time.[66] Usually the goal is to achieve minority representation in the public work force on a parity with minority representation in the community or in the labor market for particular jobs.[67] Many cities specify that this will be achieved in as little time as five years.[68]

---

by City Council Resolution No. C-22095 June 15, 1976), at 24-90; City of Los Angeles Affirmative Action Program (adopted by City Council May 10, 1976), at 11-18, 47-147; Affirmative Action Plan for the City of Riverside (adopted by City Council Resolution No. 12227, as amended April 1976), at 9-11; City of Santa Barbara Affirmative Action Plan (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at Appendix B; Affirmative Action Program of the City of Santa Monica (approved by City Council August 1976), at 26-29; City of Stockton Affirmative Action Plan (1973), at 15-17.

[65] For example, Whittier has adopted no written affirmative action plan, but commits itself to the goal of equal employment opportunity. Whittier believes that the goals of affirmative action depend on good management practices rather than formalized plans. Letter from Louis G. Lopez, Ass't City Manager and Personnel Director, City of Whittier, to authors (January 25, 1977) (on file with U.C.D. L. REV.).

[66] For example, the City of Los Angeles has formulated quantitative affirmative action goals in some detail. As an illustration of the degree of specificity, a table from the Los Angeles Affirmative Action Plan for one category, protective services, is reproduced:

Total Number of Employees in Protective Services: 7864	Goals 1976-77		Goals 1977-78		Goals 1978-79		Goals 1979-80		% Change in Representation from 1974 - 1980
	No.	%	No.	%	No.	%	No.	%	
Black	1181	15.0	1316	16.7	1451	18.4	1586	20.1	+8.5
Span.-Surname	971	12.3	1095	13.9	1217	15.4	1336	16.9	+7.5
Asian-Amer.	158	2.0	198	2.5	238	3.0	278	3.5	+2.5
Amer. Indian	54	0.7	62	0.8	66	0.8	71	0.9	+0.3
Women	441	5.6	534	6.8	628	8.0	720	9.2	+5.9
TOTAL	2805		3205		3600		3991		

City of Los Angeles Affirmative Action Program (adopted by City Council May 10, 1976), at 17.

[67] Many cities use the representation of groups in the general population as the basis for setting goals. This may be a fairer method than basing goals on a group's availability in the labor force if a discrepancy in the two figures is partly due to discriminatory practices in the past. It may be more meaningful, however, to use availability in the labor force as a basis for setting goals when a job requires specialized knowledge or a highly technical skill and the number of qualified minorities in the labor force is far below population parity.

[68] For example, San Diego's goal for "eliminating any disparity between the minority composition of City employment and total City population" is to be reached in five years. Affirmative Action Program for the City of San Diego

Affirmative action plans administered under specific goals and timetables may have many of the characteristics of the minority "quota"[69] invalidated in *Bakke*. When a city commits itself to increasing the number of minorities in the public work force within a specific period of time, it may be under considerable pressure to hire minorities over more qualified nonminorities. The pressure will be particularly acute when a city uses sanctions to enforce affirmative action goals,[70] when the disparity between the proportion of minor-

---

(1972), at 1; Santa Barbara's goal to "bring the City work force composition to where it reflects the racial, sex and ethnic ratios in the overall City population" is to be reached in 10 years. City of Santa Barbara Affirmative Action Plan (July 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 3-5; Long Beach's goal to have "a work force which is representative of the race and sex mix within the labor market" is to be reached within 12-15 years. Affirmative Action Program for the City of Long Beach Program Year 1976-1977 (adopted by City Council Resolution No. C-22095 June 15, 1976), at 86; Modesto believes it can reach the goal of achieving "a representation of minority and disadvantaged persons in City employment at all levels and in all categories" within four years. City of Modesto Affirmative Action Program (adopted by City Council Resolution No. 74-376), at 5.

[69] Cities are very careful not to characterize their affirmative action goals as imposing minority "quotas." In fact, cities often have express disclaimers such as "these goals are not a quota system but merely indicate guidelines" or "these goals shall be considered as flexible targets and not as rigid standards." *E.g.*, City of Los Angeles Affirmative Action Program (adopted by City Council May 10, 1976), at 11; City of Modesto Affirmative Action Program (adopted by City Council Resolution No. 74-376), at 2; Affirmative Action Plan for the City of Riverside (adopted by City Council Resolution No. 12227, as amended April, 1976), at 9. Quotas are seen as devices to hire minorities just for the sake of their minority status and without regard for their qualifications. Hence, cities prefer to emphasize that their affirmative action plans merely impose "goals," and in support of this proposition they point out that through the operation of the civil service rule of three, only "qualified" minorities can be hired.

Whether this characterization actually will enable a city to avoid the problem encountered by the University in Bakke, however, is uncertain. The rule of three, by definition, only certifies "qualified" applicants. As in Bakke, however, a court is likely to make an inquiry into whether a minority with a lower test score actually was preferred over a nonminority with a higher score despite the rule of three. Moreover, the Bakke case prohibits discrimination among "qualified" applicants. The decision is not limited to prohibiting discrimination only as between qualified and non-qualified applicants.

[70] For example, Santa Barbara's affirmative action plan imposes sanctions on individual department heads and other hiring authorities if they are judged deficient in their responsibility to implement affirmative action goals. "Deficient" is defined as reaching less than 80% of planned accomplishment. Whenever any hiring authority performs under 80%, he must report to the City Administrator setting out the efforts he has made and the grounds for his performance deficiency. No merit increases in salary or authority will be granted to hiring authorities who have been judged deficient. If a particular hiring authority is found to be consistently remiss in meeting affirmative action goals, the City Administrator may (1) remove the individual for inattention to duty, (2) formally reprimand the individual and include an affidavit evidencing such reprimand in his personnel file, or (3) transfer the authority to make hiring decisions to an immediate superior, such as the Personnel Director or City Administrator. City of Santa Barbara Affirmative Action Program (July, 1974, revised July 1975, approved by City Council Resolution No. 8166 December 30, 1975), at 7-8. Similarly, Riverside's

ities in the work force and their representation in the community is exceptionally large, or when community pressure to hire more minorities is strong. Such pressure can result, like a quota, in discrimination against nonminorities in the hiring process. It increases the likelihood that at least some hiring decisions are made for the purpose of preferring minorities over nonminorities solely for their minority status.

When a city prefers minorities in hiring decisions in order to meet specific goals and timetables, a rejected nonminority job applicant may bring an equal protection claim. The plaintiff would allege that the city administered its personnel selection procedures in a discriminatory manner. A racial classification can be shown if the plaintiff proves that the employer considered race as a factor in making hiring decisions. The plaintiff must prove that he would have been hired but for the employer's purposeful use of racial criteria in hiring less qualified minorities over him. Discriminatory purpose can be demonstrated by showing that the employer's personnel selection procedures were administered pursuant to an affirmative action plan. Once the plaintiff establishes this prima facie case, the employer must either show some nondiscriminatory reason why the plaintiff was not hired, or prove that the city's personnel selection procedures were administered according to goals and timetables to correct specific instances of past discrimination. If this burden is not satisfied, a court may order that the plaintiff be hired and declare the city's selection procedures invalid as administered.

2. Certification Procedures

Charges of reverse discrimination also may arise when a city adopts specific procedural means to increase minority certification. In addition to the traditional civil service rule of three, some cities utilize selection procedures that are designed to increase the probable number of minorities within the group of certified applicants for a particular job. These procedures include what are known as the rule of five,[71] band certification[72] and selective certifica-

---

plan provides that:

> Every city employee shall be made aware that furthering equal employment opportunity is an integral part of his/her position and that their performance with respect to the Affirmative Action Program will be considered in performance appraisals and evaluation. It shall be the policy of the plan that any employee of the City of Riverside who wilfully violates the intent of this program shall be subject to appropriate disciplinary action including reprimands, suspension or dismissal. Affirmative Action Plan for the City of Riverside (adopted by City Council Resolution No. 12227, as amended April 1976), at 8.

[71] 2 CAL. ADMIN. CODE § 17522 (December 22, 1973).

[72] "Band certification" refers to the practice of certifying a certain number of

tion.[73] Each operates by broadening the number of certified applicants beyond the number certified under the rule of three. The rule of five simply increases the number of certified applicants from three to five. Band certification increases the spectrum even further than the rule of five by certifying a fixed number of applicants or by certifying all those who score above a certain mark on an employment test. Selective certification permits the hiring authority to certify minorities whenever and for whatever departments they are "under-utilized."[74]

The use of any of these certification procedures may discriminate against nonminorities in the hiring process. Band certification and the rule of five, which are racially neutral on their face, are not as susceptible to a finding of discrimination as is selective certification. Either procedure, however, may be administered or applied in a discriminatory manner that classifies job applicants by race.[75] Band certification and the rule of five certify a larger number of job applicants than the rule of three. This increases the chances that minorities will be within the group of certified job applicants. Indeed, a personnel director or hiring authority may decide to use band certification or the rule of five specifically to hire more minority job applicants. This may be especially likely where the personnel director or hiring authority is under pressure to hire minorities to meet an affirmative action goal or timetable. If these selection procedures

---

applicants (*e.g.* the top 35 scorers) or all applicants with a certain test score (*e.g.* all applicants with a test score of 80 or above). Band certification, in most instances, will certify more applicants then either the rule of three or the rule of five.

[73] *See, e.g.*, Sacramento Civil Service Rule 11.12 (August 3, 1971), which states, in part:

> [S]elective certification may be initiated by the Personnel Officer to increase employment of women and minority personnel at all levels. For the purposes of this regulation, minority personnel shall include blacks, Orientals, other non-Whites and Spanish-speaking/surname eligibles. Such selective certification may be initiated when the Personnel Officer determines that minority personnel are, in proportion to the total minority population of the City of Sacramento, underrepresented either within City employment as a whole or in an occupational area of employment.

[74] "Under-utilized" is defined in Berkeley's affirmative action plan as "having fewer minorities and women in a particular department, job classification or salary category than would be reasonably expected by their availability and representation in the Berkeley population." City of Berkeley Affirmative Action Program (City Council Resolution No. 45,257-N.S. revised to December 17, 1974), at 4-5.

[75] A city could argue, however, that both the rule of five and band certification operate like the rule of three, and are immune from constitutional challenge. Both procedures are racially neutral and both select only "qualified" individuals for employment. But, just as an affirmative action measure that operates through the rule of three may be challenged(*see* note 69 *supra*), the rule of five and band certification may be vulnerable if there is any chance that qualified minorities with lower test scores would be selected over qualified nonminorities with higher test scores.

are administered either under the pressure of affirmative action goals and timetables or for the specific purpose of hiring more minorities, however, a reverse discrimination challenge may be likely. A nonminority plaintiff may seek to have the procedures declared invalid as they are administered. He would merely have to prove that he would have been hired but for his race, and where a city uses the rule of five or band certification specifically for the purpose of increasing minority certification, this burden may not be too difficult to satisfy.

Selective certification, on the other hand, is not racially neutral on its face and is probably the most vulnerable element of many affirmative action plans. Some forms of this procedure are purely discretionary with the personnel director,[76] while other types of selective certification have a more mandatory character.[77] Whether the procedure is discretionary or mandatory, however, selective certification may be subject to an equal protection claim. On its face, selective certification calls for the certification of applicants on the basis of their minority status rather than their ranking on the civil service list. Selective certification thus effects a racial classification that benefits the minority at the expense of nonminorities in obtaining a job. Indeed, the mere use of the procedure manifests the type of discriminatory purpose that a nonminority plaintiff may seize

---

[76] *See, e.g.*, Sacramento Civil Service Rule 11.12, note 73 *supra.*

[77] For example, some cities use methods which insure that a certain percentage of minorities are granted an interview. The City of Davis has a "stratified random selection" procedure which assures that a proportional number of ethnic minorities and women are granted an interview, where the total number of screened and eligible applicants is far in excess of the number of persons who can be interviewed in one day. City of Davis Affirmative Action Program (City Council Resolution No. 1395, Series 1973, December 17, 1973), at 6. All applicants meeting minimum requirements are considered qualified applicants and the applicant pool is analyzed to determine ethnic and sex percentages. The ratios existing in the applicant pool are maintained in the groups of applicants invited to interview. Each qualified applicant has his/her name written on a lottery ticket. All tickets for each ethnic or sex category are placed in a bowl, thoroughly mixed, and the number of tickets allotted to that category are drawn. This process is used for each category until the total number of persons that can be interviewed in one day are drawn. Complaint filed by William L. Owen, City Attorney for the City of Davis against the Davis Peace Officers Association for a Declaratory Judgment in the United States District Court, Eastern District of California, Civ. S-77-116, February 24, 1977, Exhibit B.

Berkeley's affirmative action plan gives "hiring priority" to categories of applicants that are "under-utilized" in city employment. After applicants have taken a written test and oral interview, all qualified applicants are arranged on an appointment register in order of set hiring priorities, with the highest priority group appearing first on the list. Non-priority group applicants are considered only after a waiver from the city manager has been obtained for all priority groups on the appointment register. Appointments are to be made on this priority basis until departmental and city-wide affirmative action goals are reached and maintained. In Hiatt v. City of Berkeley, 9 Empl. Prac. Dec. 7047, (Alameda County, Cal., Super. Ct. 1975), the court invalidated this certification procedure, finding that it resulted in only minorities being granted an interview, since all priority applicants were considered before nonminority applicants.

upon to prove a case of reverse discrimination. Where a nonminority plaintiff can prove that he was denied a job because a city used selective certification, the procedure will be declared invalid.

Whether a city operates under the strong incentives of specific percentage goals and yearly timetables, sometimes enforced by sanctions, or adopts specific means of increasing the number of certified minorities, great potential exists for discrimination in favor of minorities in the hiring process. This potential may exist, as the *Bakke* case itself indicates, because of the way various selection procedures are administered, despite their facial neutrality. Whether a city's affirmative action hiring measures are discriminatory on their face or as they are administered, however, they will be subject to invalidation if a prima facie case of reverse discrimination can be made out against them in a particular factual situation.

Selection procedures such as band certification, the rule of five, and particularly selective certification are probably the most constitutionally vulnerable elements of an affirmative action plan. Cities may cease using them for this reason. The use of any of these selection procedures to implement highly specific affirmative action goals and timetables may make them even more constitutionally vulnerable, and a city will also either cease adhering to these goals or make them more flexible. The use of sanctions to enforce goals and timetables, moreover, is likely to be dispensed with altogether. The elements that are perhaps the most effective means of implementing affirmative action plans thus either may fall into disuse or be invalidated if challenged by nonminorities.

The barrier-reducing and recruitment aspects of many affirmative action plans also may be subject to challenge on their face or in the way they are administered, although it may be more difficult to prove that either of these measures impose any identifiable detriment on nonminority individuals. Discrimination against nonminorities is difficult to show where a city uses measures that are designed merely to increase the number of minority job applicants. Reducing barriers, moreover, is a racially neutral process, often designed merely to make job qualifications relate to job performance. Such a step reduces barriers to the employment of all individuals. It does not necessarily reduce barriers just for minorities. The need to recruit minorities for public employment likewise will endure. Pressure from the government and from the community to include more minorities in public employment will continue to have some influence on hiring decisions. Thus, as long as efforts to reduce barriers or to recruit minorities into public employment do not impose a detriment on nonminorities, both are likely to remain viable elements of affirmative action plans. Indeed, the barrier-reducing and recruitment aspects of affirmative action plans are the types of measures the *Bakke* court suggested were less restrictive alternatives to the special

admissions program.[78]

III. CONCLUSION

No equal protection issue in recent years has been more vexing, more fraught with emotional and political tension, and more difficult to resolve than the constitutionality of affirmative action. Minorities see affirmative action programs as long overdue measures to correct the effects of past prejudice. They are deeply concerned that the recent success of reverse discrimination suits threatens to take away what they believe is a long-denied opportunity to obtain their rightful place in society. Nonminorities, on the other hand, see affirmative action as a costly paternalistic effort on the part of an overly-intrusive government. They seriously question the merit of a policy that not only denies them any share of the benefits but imposes upon them the burden of paying the costs of past injustices, perpetrated not by them, but by their predecessors.

The *Bakke* decision represents a major expression of policy in this controversial area of the law and its practical impact is likely to have far reaching significance.[79] If the United States Supreme Court adopts the view that the Constitution is indeed color-blind, not only will school admissions be affected, but public employers are increasingly likely to encounter reverse discrimination suits as well. Since equal protection decisions may now have precedential value in what would otherwise be a Title VII setting, the dilemma public employers confront will become even more perplexing. Public employers can continue to implement affirmative action programs in response to the incentives of state and federal equal employment opportunity policies, or they can ignore these incentives altogether for fear of being charged with reverse discrimination. Local governments are likely to respond with an avowal of support for affirmative action goals but a failure to implement effective means to achieve them.

The prospective impact of *Bakke* on specific elements of affirmative action plans in effect in California cities illustrates such a response. Selection procedures, when used directly to increase minority representation in the work force, are likely to fall into disuse or be invalidated in reverse discrimination suits. Measures to reduce barriers and to recruit minorities into public employment, however,

---

[78] Bakke v. Regents, 18 Cal. 3d 34, 55, 553 P.2d 1152, 1166, 132 Cal. Rptr. 680, 694 (1976).

[79] Indeed, the majority opinion in Bakke condemned the special admissions procedure in broad strokes:

> To uphold the University would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality. *Id.* at 62-63, 553 P.2d at 1171, 132 Cal. Rptr. at 699.

are much less direct means of achieving affirmative action goals, and they are likely to survive, at least as long as they do not impose a detriment on nonminorities.

Applying a high level of constitutional scrutiny to affirmative action in public employment thus will have important consequences. Cities will be forced to reconcile affirmative action goals with reverse discrimination pressures to avoid burdening nonminorities. Such reconciliation may lead to hiring policies that give fewer advantages to minority individuals. At the same time, however, this could well result in perpetuating the advantages and opportunities of the white majority. How public employers will reconcile affirmative action goals with reverse discrimination pressures is uncertain. It is, however, a problem that public employers will inevitably face.

Barbara Detrich Linn
George Martin Reyes