

## CASENOTE

### LESSONS FROM *BAKKE*: THE EFFECT OF *GRUTTER* ON AFFIRMATIVE ACTION IN EMPLOYMENT

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#### I. INTRODUCTION

On June 23, 2003, the United States Supreme Court decided its first cases to address affirmative action in higher education admissions since the Court's decision in *Regents of the University of California v. Bakke*.<sup>1</sup> In a pair of cases concerning the University of Michigan,<sup>2</sup> the Court took up the issue of voluntary affirmative action in admissions by a public university. In *Gratz* the Court struck down the affirmative action plan adopted by the University of Michigan's College of Literature, Science and Arts, while in *Grutter* the court approved the affirmative action plan adopted by the University of Michigan Law School. The complementary holdings of these two cases provide guidance to institutions of higher education on the permissible contours of affirmative action in admissions, but do the *Gratz* and *Grutter* opinions shed any light on affirmative action in employment, particularly in private employment?

To answer this question, this casenote first briefly reviews the Court's decision in *Bakke* and how it influenced the parameters of affirmative action in employment. An examination of the experience under *Bakke* shows that it had a discernible effect on the law governing affirmative action in employment. The casenote then addresses the rationale

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1. 438 U.S. 265 (1978).

2. See *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

underlying the *Grutter* decision, which approved the law school's affirmative action plan, and examines whether that rationale is amenable to transference to employment law jurisprudence in light of the *Bakke* experience. The casenote concludes that although *Grutter* may have laid the foundation for a more expansive use of affirmative action in employment, particularly public employment, the paradigm currently used to examine the use of affirmative action in private employment may prevent *Grutter* from greatly affecting affirmative action in private employment in the near future.

## II. *BAKKE*

In *Bakke*, the Medical School of the University of California at Davis had adopted an affirmative action program which, in the relevant years, set aside sixteen places in its entering class for minority applicants.<sup>3</sup> The medical school rejected Allan Bakke's application in two successive years, while in each of those years admitting minority applicants whose grade point averages and MCAT scores were lower than Bakke's.<sup>4</sup> In the first year he applied, the medical school left four of the set aside slots unfilled.<sup>5</sup> After his second rejection, Bakke sued the medical school alleging a violation of Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

Justice Powell wrote an opinion in which he concluded that the school's First Amendment right to academic freedom was a countervailing constitutional interest to be weighed against Bakke's Equal Protection claim:

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.<sup>6</sup>

Having found that the medical school had a compelling interest in promoting a diverse student body, Justice Powell then turned to the issue of whether the school's affirmative action program was a necessary means to promoting that end. Because the program focused exclusively on ethnic

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3. See *Bakke*, 438 U.S. at 275.

4. See *id.* at 277 n.7.

5. See *id.* at 276.

6. *Id.* at 313; see also *id.* at 312 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of the university to make its own judgments as to education includes the selection of its student body.").

diversity and set aside a fixed number of places in each class, Justice Powell concluded that the plan did not pass constitutional muster.<sup>7</sup> He explained that “[t]he fatal flaw in petitioner’s preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment.”<sup>8</sup>

Four Justices agreed with Justice Powell’s conclusion that race conscious admissions are permissible under the Constitution,<sup>9</sup> although the rationale of this plurality was based on the Fourteenth, not the First, Amendment.<sup>10</sup> These four Justices agreed with Justice Powell that race could be used as a “plus” factor in decision making.<sup>11</sup> Four other Justices agreed with Justice Powell’s conclusion that the affirmative action program at issue did not pass constitutional or statutory muster because race was the decisive factor in rejecting Bakke’s application: “Race cannot be the basis of excluding anyone from participation in a federally funded program.”<sup>12</sup> Parsing the decisions in *Grutter*, Justice O’Connor concluded: “The only holding of the Court in *Bakke* was that a ‘State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.’”<sup>13</sup>

The effect of *Bakke* on employment law in the private sector may be properly subject to question. The Equal Protection Clause, under current law, cannot be read *in pari materia* with Title VII of the Civil Rights Act of 1964.<sup>14</sup> The differing levels of scrutiny utilized under the Equal Protection Clause to determine whether discrimination has taken place do not comport with Title VII’s blanket prohibition against discrimination “because of . . . race, color, religion, sex, or national origin” which applies the same level of scrutiny to each classification.<sup>15</sup> In addition, *Bakke* lacked a clear majority rationale for its outcomes, which would tend to undermine the persuasiveness of any reliance on it. That being said, it is clear that *Bakke* did have an effect on Title VII jurisprudence.

The Supreme Court decided eight affirmative action cases between 1978, when it decided *Bakke*,<sup>16</sup> and 1989, when it decided *City of*

7. *See id.* at 315-16.

8. *Id.* at 320.

9. *See id.* at 325-26.

10. *See id.* at 329.

11. *See id.* 326, 273 n.1.

12. *Id.* at 418.

13. 123 S. Ct. at 2336 (quoting *Bakke*, 438 U.S. at 320).

14. *See Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 628 n.6 (1987).

15. 42 U.S.C. § 2000e-2(a)(1) (1994); *cf. Harris v. Forklift Sys.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (noting the differing standards between the constitutional and statutory analysis); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 207 (1979) (construing Title VI of the Civil Rights as being coextensive with the Equal Protection Clause and concluding that “Title VII and Title VI . . . cannot be read *in pari materia*.”).

16. *See Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987); *United*

*Richmond v. J.A. Croson Co.*<sup>17</sup> In seven out of the eight, some element of *Bakke* was relied upon by at least one opinion writer.<sup>18</sup> Despite the lack of a clear majority, and the fact that it dealt with admissions in higher education and not employment, it can be safely said that *Bakke* became the logical foundation to the development of the Supreme Court's approach to affirmative action in employment. This can be seen in cases such as *Weber*, *Wygant* and *Johnson*.

In *Weber*, the Court was presented with a Title VII challenge to an affirmative action plan incorporated in a collective bargaining agreement. The plan was intended to "eliminate manifest racial imbalances in traditionally segregated job categories" by reserving fifty percent of the openings in the facility's craft-training program for African-Americans until the percentage of African-American skilled workers equaled the percentage of African-Americans in the local labor force.<sup>19</sup> A majority of the Court approved this affirmative action plan because its purposes mirrored "those of the statute" and it did "not unnecessarily trammel the interests of white employees."<sup>20</sup> In concurrence, Justice Blackmun noted that the plan at issue comported with the dictates of *Bakke* because it operated "as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance."<sup>21</sup> The *Weber* Court has been characterized as adopting "the *Bakke* plurality's position that traditional racial classifications are distinct from benign racial classifications and thus warrant a modified form of inquiry."<sup>22</sup>

In *Wygant*, a collective bargaining agreement between a teachers'

*States v. Paradise*, 480 U.S. 149 (1987); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

17. 488 U.S. 469 (1989). *Croson* is significant in that it was the first time that a majority of the Supreme Court had ever joined in one opinion addressing the constitutionality of governmental affirmative action programs and adopted the "strict scrutiny" standard. See Michael Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1731 (1989); cf. *Constitutional Scholars' Statement on Affirmative Action After City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711 (1989). For a review of the treatment of *Bakke* in construction contract "set aside" cases, see Akjil Reed Amar and Neal Kumar Katyal, *Symposium on Affirmative Action: Bakke's Fate*, 43 UCLA L. REV. 1745 (1996).

18. The only exception being *Local 93*. 478 U.S. 501 (1986).

19. *Weber*, 443 U.S. at 197.

20. *Id.* at 208.

21. *Id.* at 216 (Blackmun, J. concurring) (citing *Bakke*, 438 U.S. at 342 n.17); see *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1499 (11th Cir. 1987) ("The Court concluded that 'the Plan thus resembles the "Harvard Plan" approvingly noted by Justice Powell in [*Bakke*].'").

22. *Aiken v. City of Memphis*, 37 F.3d 1155, 1173 (6th Cir. 1994).

union and a school board required the school board, in the event of a reduction in force, to maintain the then current percentage of minority teachers on the faculty.<sup>23</sup> During a subsequent reduction in force, this provision would have required the layoff of tenured non-minority teachers and the retention of untenured minority teachers.<sup>24</sup> After the school board refused to follow the terms of the labor contract, the union and one of the laid off minority teachers sued to require the school board to adhere to the layoff provision, and prevailed in state court.<sup>25</sup> Consequently, non-minority tenured teachers were laid off while untenured minority teachers were retained. The non-minority tenured teachers then brought a claim under the Equal Protection Clause, Title VII, and Section 1983<sup>26</sup> claiming that the termination of their employment was discriminatory.<sup>27</sup>

The Court issued five opinions. Justice Powell wrote the judgment of the Court in which two Justices concurred entirely and Justice O'Connor concurred, except for its discussion of the effect of layoffs, as contrasted with hiring goals, on the legal analysis.<sup>28</sup> *Wygant* rejected the argument that a public school could utilize affirmative action in employment in order to provide appropriate role models for minority students.<sup>29</sup> In *Wygant*, Justices Powell and O'Connor relied on *Bakke* to support the principle that racial classifications must be subject to strict scrutiny even if those classifications favor a minority group.<sup>30</sup> In addition, Justice O'Connor relied on *Bakke* for the proposition that racial diversity may be a compelling government interest,<sup>31</sup> but that societal discrimination is not.<sup>32</sup> Justice Stevens wrote a dissent which seems to foreshadow the rationale subsequently adopted by the Court in *Grutter*, discussed below:

[I]t is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our

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23. *Wygant*, 476 U.S. at 270.

24. *See id.* at 271-72.

25. *See id.*

26. 42 U.S.C. § 1983 (1979) (amended 2004).

27. *Wygant*, 476 U.S. at 272.

28. *See id.* at 282-83 (“Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.”).

29. *See Wygant*, 476 U.S. at 274-76; *id.* at 288 (O'Connor, J., concurring).

30. *See id.* at 273, 285.

31. *See id.* at 286; *see also id.* at 301 (Marshall, J., dissenting) (citing *Bakke* for the proposition that race may be a permissible factor in governmental decision making).

32. *See id.* at 288.

famous ‘melting pot’ do not identify essential differences . . . .<sup>33</sup>

Like Justice Stevens, Justice O’Connor seemed inclined to consider that diversity on a faculty could constitute a compelling state interest justifying an affirmative action plan.<sup>34</sup>

Finally, *Johnson* concerned an affirmative action plan adopted by Santa Clara County. The plan, intended to increase both minority and female hiring, did not set aside a specific number of positions for either. Rather, the plan “authorized the consideration of ethnicity or sex as a factor when evaluating qualified candidates for jobs in which members of such groups were poorly represented.”<sup>35</sup> Johnson, a male, was rejected for promotion in favor of a woman. He sued, alleging that the application of the plan to the promotion decision violated his rights under Title VII.<sup>36</sup> The Court concluded that the plan did not violate the statute. Looking to *Weber*, the Court first determined that the plan had a permissible purpose because it sought to rectify historical discrimination.<sup>37</sup> The Court then determined that the plan did not unnecessarily trammel the rights of the majority, by relying on *Bakke* for the proposition that an affirmative action plan that merely provides a “plus” but does not insulate an applicant from competition with others, is permissible under the statute.<sup>38</sup>

Consequently, *Bakke* can be seen as establishing, in broad terms, the parameters of permissible affirmative action programs in both admissions and employment. As noted by Judge Easterbrook:

*Wygant* and *Johnson* follow up on the approach taken by Justice Powell, whose separate opinion in [*Bakke*] concluded that under an affirmative action plan race or sex may be a factor in a hiring decision but can not be dispositive—not, at least, unless the plan is designed to overcome the effects of past discrimination.<sup>39</sup>

The effect of *Bakke* can be seen in both the level of scrutiny applied to affirmative action plans and the manner in which a plan is tested for being “narrowly tailored.” This experience with *Bakke* indicates that *Grutter* should be expected to have some cognizable impact on the jurisprudence of affirmative action in employment.

However, the differences between Title VII and the Equal Protection Clause did limit *Bakke*’s impact on employment. In construing Title VII, the courts of appeals distinguished the underlying First Amendment/academic freedom concern expressed in *Bakke* from those considerations

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33. *Id.* at 315.

34. *Id.* at 288 n\*.

35. *Johnson*, 480 U.S. at 622.

36. *Id.* at 619.

37. *Id.* at 631.

38. *Id.* at 638.

39. *Hill v. Ross*, 183 F.3d 586, 588 (7th Cir. 1999).

generally found in the American workplace. For example, in *Taxman v. Board of Education*,<sup>40</sup> the Third Circuit concluded:

We are also unpersuaded by the Board's contention that Equal Protection cases arising in an education context support upholding the Board's purpose in a Title VII action. These Equal Protection cases, unlike the case at hand, involved corrective efforts to confront racial segregation or chronic minority underrepresentation in the schools. In this context, we are not at all surprised that the goal of diversity was raised. While we wholeheartedly endorse any statements in these cases extolling the educational value of exposing students to persons of diverse races and backgrounds, given the framework in which they were made, we cannot accept them as authority for the conclusion that the Board's non-remedial racial diversity goal is a permissible basis for affirmative action under Title VII.<sup>41</sup>

As discussed below, whether *Grutter's* central holding will be limited to the realm of higher education, as was Justice Powell's First Amendment/academic freedom analysis in *Bakke*, is subject to question.

### III. GRATZ AND GRUTTER

In light of the precedent concerning affirmative action, *Gratz v. Bollinger* is a relatively straight forward case. In *Gratz*, University of Michigan's College of Literature, Science and Arts, utilized an affirmative action plan in admissions pursuant to which minority applicants received twenty points, out of a total of one hundred needed to assure admittance.<sup>42</sup> The Court concluded that the granting of a set number of points to an applicant failed to pass constitutional muster because that grant "is not narrowly tailored" to meet the stated interest of achieving diversity.<sup>43</sup> In reaching this conclusion, the Court stressed the "importance of considering each particular applicant as an individual," and concluded that the failure to insure individualized consideration made the affirmative action plan overbroad in its reach.<sup>44</sup>

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40. *Taxman v. Bd. of Educ.*, 91 F.3d 1547 (3d Cir. 1996).

41. *Id.* at 1561; *cf.* *Hammon v. Barry*, 826 F.2d 73, 85 (D.C. Cir. 1987) ("Although the Court has recognized a legitimate, compelling governmental concern in state universities' seeking racial diversity in their student bodies for educational purposes, *see* [*Bakke*], it has never extended this approach beyond the academic setting."); *Britton v. South Bend Cmty. Sch. Corp.*, 775 F.2d 794, 809 (7th Cir. 1985) (citing *Bakke* for the proposition that "[t]here is not, however, any doubt that this interest [rectifying past discrimination] is substantial and important enough to support affirmative action plans.").

42. *Gratz*, 123 S. Ct. at 2419-20.

43. *Id.* at 2427-28.

44. *Id.* at 2428.

In contrast, in *Grutter v. Bollinger*, the Court considered the University of Michigan's Law School admissions policy that sought to admit a "'critical mass' of [underrepresented] minority students . . . to 'ensure their ability to make unique contributions to the character of the Law School.'"<sup>45</sup> As defined by the school, "critical mass" was a number sufficient to encourage minority students' participation and to ensure that they did not feel isolated or as spokespersons for their race.<sup>46</sup> A five member majority of the Court subjected the program to "strict scrutiny," i.e., was the program narrowly tailored to further compelling governmental interests, and concluded that the law school's admission policy passed constitutional muster.<sup>47</sup>

As in the medical school under consideration in *Bakke*, the *Grutter* court concluded that the law school had "a compelling interest in attaining a diverse student body."<sup>48</sup> In concluding for the majority that a compelling interest exists on the part of the law school, Justice O'Connor followed Justice Powell's *Bakke* analysis that such an interest is grounded in the First Amendment.<sup>49</sup> However, the basis of this interest is the "educational benefits that diversity is designed to produce."<sup>50</sup> Such benefits include "cross-racial understanding," the breaking down of stereotypes, and better preparation "for an increasingly diverse workforce and society."<sup>51</sup>

The Court identified a number of interests that are met by the law school's program. These interests can be roughly divided into two categories: (1) those interests that relate to the quality of the education provided by the school; and (2) those interests that contribute to society by educating a diverse population.

Turning to the initial group of interests, the Court first identified the interest of "major American business" that have needs for employees with skills "developed through exposure" to diversity in order to compete in the global marketplace.<sup>52</sup> Following American business is the interest of the United States military that requires a "highly qualified, racially diverse officer corps" in order to provide national security.<sup>53</sup>

This first group of interests seems closely tied to the *Bakke* analysis. With these interests, the focus is on the quality of the education. The underlying premise being that students, both minority and non-minority, who have experienced a diverse education will have a better education.

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45. *Grutter*, 123 S. Ct. at 2332.

46. *Id.* at 2333-34.

47. *Id.* at 2337-38.

48. *Id.* at 2339.

49. *See id.* at 2339.

50. *Id.*

51. *Id.* at 2340.

52. *Id.*

53. *Id.*

This premise goes to the heart of Justice Powell's concern in *Bakke* over academic freedom. In order to achieve the highest level of education, those responsible for educating should determine who will be taught and how they will be taught.<sup>54</sup> Had the Court rested on the interests found in this first group alone, it could be said that *Grutter* simply restates and reaffirms *Bakke*.

The interests identified in the second group, however, go well beyond *Bakke's* rationale. The interests addressed in the second category are concerned with meeting societal goals, not accommodating academic freedom. The Court notes that providing education to a diverse population sustains the country's "political and cultural heritage."<sup>55</sup> In addition, the Court states that education is the "very foundation of good citizenship . . . Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential . . ."<sup>56</sup> Finally, the law school's program is justified "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, [because] it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."<sup>57</sup>

In contrast to the first group of interests, those interests identified in the second group do not focus on the quality of the education. Indeed, the interests in the second group focus almost exclusively on matters that are far removed from the academic setting. In contrast to *Bakke*, the interests incorporated in the second group are not related to the choices a school makes concerning who to teach or how to teach them. The preeminent concern in this second group is the benefit received by society by providing an education to a diverse population. These interests are not grounded in concerns over academic freedom or the First Amendment.

#### IV. THE POTENTIAL EFFECT ON EMPLOYMENT

Certainly, the *Taxman* rationale for distinguishing higher education cases from those involving Title VII has been considerably undermined by the reasoning set forth by *Grutter*. By moving affirmative action in higher education admissions away from the First Amendment/academic freedom

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54. See *id.* at 2339 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions"); *Bakke*, 438 U.S. at 312 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential academic freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.")).

55. *Grutter*, 123 S. Ct. at 2339 (citing *Plyler v. Doe*, 457 U.S. 202, 221 (1982)).

56. *Id.* at 2340-41.

57. *Id.* at 2341.

underpinnings of *Bakke* to encompass broader societal considerations, the Court has raised the question of whether these other considerations may justify affirmative action in other contexts, such as employment. Indeed, the Seventh Circuit has already concluded that the *Grutter* analysis applies to hiring in public employment. In *Petit v. City of Chicago*,<sup>58</sup> that court concluded, in reliance on *Grutter*, that Chicago police executives, when considering the need of a police force, should be given the same deference when making determinations concerning police operations as universities are given when they make academic determinations.<sup>59</sup> Then, echoing the *Grutter* court's second category of interests, the court held that the Chicago Police Department "had a compelling interest in a diverse population at the rank of sergeant in order to set the proper tone in the department and to earn the trust of the community . . . ."<sup>60</sup>

Robert Post argues that there is a tension between the Court's holding in *Grutter*, which he maintains resembles the role model theory, and the Court's prior decision in *Wygant*.<sup>61</sup> As discussed above, *Wygant* rejected the "role model" theory as a compelling government interest warranting affirmative action. *Grutter*, however, should not be read to espouse a theory of role modeling. Under the role model theory, minority teachers provide minority role models for minority students to emulate.<sup>62</sup> *Grutter*'s rationale does not argue for diversity simply for the so-called betterment of minority students. Rather, *Grutter* focuses on the improvement made to education for all students by providing diversity (the category one interests), and the societal good achieved by having students educated in a diverse environment (the category two interests). In this regard, the closest *Grutter* comes to arguing in favor of the role model theory is: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."<sup>63</sup> But here, the good realized is the legitimacy of societal leadership, not models for minority students to follow.<sup>64</sup>

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58. 2003 U.S. App. LEXIS 25221 (7th Cir. Dec. 15, 2003).

59. See *id.* at \*8. Justice Scalia has voiced his view that *Grutter* could be seen as signaling "a new willingness to rely upon good faith" determinations of a compelling interest instead of insisting upon a "strong basis in evidence." *Concrete Works of Colo. v. Denver*, 2003 U.S. LEXIS 8547 (Nov. 17, 2003). The *Petit* decision seems to support that view.

60. *Id.* at \*11.

61. See Robert C. Post, *The Supreme Court 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 62, n.286 (2003).

62. See *Wygant*, 476 U.S. at 274.

63. *Grutter*, 123 S. Ct. at 2341.

64. *Grutter* and *Wygant* do clearly diverge on the issue of the importance of prior discrimination to the analysis. *Grutter* apparently jettisons past discrimination as a necessary element to the justification of an affirmative action plan, where in *Wygant* it was a

It is precisely because *Grutter* did not adopt the role model theory that it has had an almost immediate effect on public employment. The outcome in *Petit* depends upon the government's ability to demonstrate a compelling need to achieve a specific public good. Under *Grutter*, the Seventh Circuit had little trouble concluding that improving the relationship between the police and the citizens they interacted with met this standard. Had *Grutter* simply reversed *Wygant* and adopted the role model theory, the outcome in *Petit* would almost certainly have been different: the sergeants in *Petit* were not selected to act as role models.

Having already influenced the hiring of municipal police, it would not be surprising to see the *Grutter* decision affect other areas of public employment. The interests of the military, which figured prominently in the decision, would seem to meet the criteria for utilizing an affirmative action plan. Other federal, state, and local agencies would meet the criteria for much the same reasons as the police and military do. Public colleges and universities would also seem to meet the criteria—a strong argument can be made that a diverse faculty contributes to robust classroom discussion at least as much as a diverse student body.<sup>65</sup>

It is more difficult to discern *Grutter's* potential effect on private employment. *Bakke's* most notable impact on the law relating to private employment was in the Supreme Court's approach to determining whether the rights of the majority had been infringed. *Bakke* set the precedent that in particular circumstances race could be used as part of a decision making process without violating the Equal Protection Clause. This rationale was mirrored by the Court in both *Weber* and *Johnson*. *Bakke's* Equal Protection Clause analysis of whether a classification is "precisely tailored"<sup>66</sup> became the model for Title VII's analysis of whether an affirmative action plan "unnecessarily trammels" the rights of the majority.<sup>67</sup> If the doctrinal development of *Grutter* follows the same path as *Bakke*, we should expect to see a greater emphasis on individualized determinations and decision making, particularly in light of the holding in *Gratz*.<sup>68</sup>

*Bakke* had little effect on the acceptable reasons for which a private employer could adopt an affirmative action plan. In this regard, the doctrinal differences between *Bakke's* grounding in the Equal Protection

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necessary element of the plan. See *Wygant*, 476 U.S. at 275 (noting the "Court's focus on prior discrimination as the justification for, and limitation on, a State's adoption of race-based remedies.").

65. As noted above in the discussion of *Wygant*, Justice O'Connor has already indicated that she would entertain such an argument. See *Wygant*, 476 U.S. at 288 n\*.

66. *Bakke*, 428 U.S. at 299.

67. See, e.g., *Weber*, 443 U.S. at 208.

68. Cf. Post, *supra* note 61, at 69 (highlighting the importance of the individualized assessment in the *Grutter* analysis and tracing the roots of this requirement to *Bakke*).

Clause analysis and the Supreme Court's Title VII analysis kept *Bakke* distinct. Specifically, the Equal Protection Clause permits the government to act whenever it discerns a compelling need. Under Title VII, an employer may only act to redress past discrimination or a manifest imbalance in its work force.

Since *Weber*, the analysis of affirmative action undertaken by private employers has been linked to the remediation of past discrimination, either by society or the employer. *Weber* addressed a "manifest racial imbalance."<sup>69</sup> The *Johnson* Court approved the affirmative action plan before it because it addressed historic discrimination.<sup>70</sup> At least one court of appeals has concluded that in order to comply with Title VII, an affirmative action plan adopted by a private employer is required, "by controlling precedent," to have a remedial purpose.<sup>71</sup> The *Grutter* opinion does not address the past discrimination requirement of *Wygant* because it relies on *Bakke* and the First Amendment as its starting point.

At first blush, *Grutter's* influence on affirmative action in private employment may be limited. Neither of *Grutter's* categories of interests justifying affirmative action, those related to the quality of education or those related to societal improvement, fit within the Title VII analysis. Neither category relates to either past discrimination or the current majority/minority distribution in a population.<sup>72</sup>

However, *Grutter* may eventually have an effect on the required prerequisites to an affirmative action plan in private employment because *Grutter*, and now *Petit*, create an underlying conflict in accepted Equal

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69. *Weber*, 443 U.S. at 197.

70. *Johnson*, 480 U.S. at 631.

71. *Schurr v. Resorts Int'l*, 196 F.3d 486, 497 (3rd Cir. 1999).

72. This raises the question of whether the *Grutter* analysis has a definable limit on the use of affirmative action programs in employment. Such a limit may be found in the underlying premise of *Grutter*. Diversity is a compelling government interest in admissions *because* it improves the quality of the education provided. This rationale reflects two pre-existing tests already incorporated into Title VII, both of which examine the business need for the criteria selected by the employer. The first concerns bona fide occupational qualifications ("BFOQ"). See 42 U.S.C. § 2000e-2(e) (2004). Under the BFOQ provision, an employer is permitted to use certain protected classes as an employment qualification if the qualification is *inter alia*, "reasonably necessary to the normal operation of that particular business or enterprise." *Id.*; see also *Western Airlines v. Criswell*, 472 U.S. 400 (1985) (adopting a uniform approach to the BFOQ provisions of Title VII and the Age Discrimination in Employment Act); cf. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 203 (1991) (noting that a BFOQ defense must relate to the "central mission" of the enterprise). Similarly, in disparate impact cases an employer may defend, in part, a neutral practice that adversely affects a protected class if the practice is "job related" "and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2004). Under this analysis, *Grutter* would permit an employer to use "diversity" as an employment criteria where the employer can demonstrate that diversity is reasonably necessary to provide its product or service. Cf. *Petit v. City of Chicago*, 2003 U.S. App. LEXIS 25221 (7th Cir. Dec. 15, 2003).

Protection Clause/Title VII doctrine. The Equal Protection Clause has traditionally been interpreted as imposing greater constraints than Title VII on employers. As noted by the *Johnson* Court: "The fact that a public employer must also satisfy the Constitution does not negate the fact that the *statutory* prohibition with which that employer must contend was not intended to extend as far as that of the Constitution."<sup>73</sup> Similarly, central to the holding of *Weber* was that the case did "not present an alleged violation of the Equal Protection Clause of the Fourteenth Amendment."<sup>74</sup> Accordingly, the Court was free to conclude that "Title VII . . . was not intended to incorporate or particularize the commands of the Fifth and Fourteenth Amendments."<sup>75</sup>

As highlighted by the affirmative action plan approved in *Petit*, we are now left in the somewhat paradoxical situation of the Equal Protection Clause imposing fewer restraints on the government than Title VII imposes on private employers. Under current law, a private employer would not be permitted to adopt an affirmative action plan to better community relations, or referring more directly back to *Grutter*, to sustain the "political and cultural heritage," insure "[e]ffective participation by members of all racial and ethnic groups in . . . civic life," train "our Nation's leaders," or "to cultivate a set of leaders with legitimacy."<sup>76</sup> *Grutter's* ultimate effect on private employers depends on the manner in which the courts resolve this conflict.

## V. CONCLUSION

There is some basis to believe that the conflict between Title VII and the Equal Protection Clause created by *Grutter* and *Petit* will be resolved by modifying the Title VII analysis to conform to *Grutter*. Justice O'Connor, who wrote the *Grutter* opinion for the Court, has previously indicated that in her view the Equal Protection Clause analysis and the Title VII analysis should be the same. In her concurrence in *Johnson*, she stated: "In my view, the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause."<sup>77</sup> If the tension created by *Grutter* between the Equal Protection Clause and Title VII is resolved in the manner argued for by Justice O'Connor in her concurrence, there may

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73. *Johnson*, 480 U.S. at 628 n.6 (emphasis in original).

74. *Weber*, 443 U.S. at 200; see also *id.* at 201 (emphasizing "the significance of the fact that the . . . plan is an affirmative action plan voluntarily adopted by private parties . . .").

75. *Id.* at 206 n.6.

76. *Grutter*, 123 S. Ct. at 2340-41.

77. *Johnson*, 480 U.S. at 648.

an increase in the use of affirmative action plans by private employers.

Incorporating the *Grutter* approach into the Title VII analysis would permit a private employer to adopt an affirmative action plan if it was able to establish that the affirmative action plan yielded the same or similar societal good as the affirmative action plan utilized by the University of Michigan Law School. Institutions of higher education seeking to hire professors and lecturers would logically have the first claim to such a plan. As noted above with regard to public universities, it is only a small leap from *Grutter* to conclude that diversity among the faculty creates the same beneficial effect on education (the category one interests), and yields the same societal good embodied in the category two interests, that diversity among the student body creates. Any private employer that competes "in today's increasingly global marketplace" may have a legitimate claim to needing an affirmative action plan under the *Grutter* rationale.<sup>78</sup> *Grutter* signals this potential by listing the interests of "major American businesses" as the first benefit of a diverse student population.

On the other hand, the conflict between the Equal Protection Clause and Title VII may also be resolved by reducing the breadth and scope of the *Grutter* analysis. There is, perhaps, some doubt as to the long term vitality of the *Grutter* holding. Justice Powell's analysis in *Bakke* created symmetrical constitutional interests: the majority's right to Equal Protection Clause balanced against the medical school's First Amendment right to academic freedom.<sup>79</sup> The second category of interests adopted by *Grutter*, those interests addressing societal good, lacks this symmetry. The second category interests are not firmly grounded in a constitutional right, but rather the perceived betterment of society as a whole. Without a constitutional (or even statutory) base, the relevance of these interests to the Title VII analysis of the affirmative action plans of private employers may be in doubt.

The experience under *Bakke* demonstrates that changes in the law of affirmative action in admissions to public colleges and universities can have a significant ripple effect on affirmative action plans in employment, both public and private. *Gratz* and *Grutter* will clearly focus the affirmative action analysis on individualized decision making. However, it is still too soon to tell whether *Grutter* is a watershed for affirmative action in employment. *Grutter's* analysis is not as tightly tied to academia as the *Bakke* analysis. Therefore, there is greater potential for *Grutter* to have an impact on the circumstances under which an affirmative action plan may be adopted by employers outside of academia.

The conflict created by *Grutter* between its interpretation of the Equal

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78. *Grutter*, 123 S. Ct. at 2340.

79. *Bakke*, 438 U.S. at 313 (noting the medical school's "countervailing constitutional interest").

Protection Clause and the existing doctrinal parameters of the Title VII analysis of affirmative action plans must be resolved before the true effect of *Grutter* on private employers can be known. In the meantime, as demonstrated by *Petit*, the contours of the *Grutter* decision will be shaped by public employers.