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The Effect of the University of Michigan Cases on Affirmative Action in Employment: Proceedings of the 2004 Annual Meeting, Association of American Law Schools, Section on Employment Discrimination Law, Labor Relations and Employment Law, and Minority Groups

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Recommended Citation

8 Emp. Rts. & Emp. Pol'y J. 127 (2004)

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THE EFFECT OF THE UNIVERSITY OF MICHIGAN CASES
ON AFFIRMATIVE ACTION IN EMPLOYMENT:
PROCEEDINGS OF THE 2004 ANNUAL MEETING,
ASSOCIATION OF AMERICAN LAW SCHOOLS, SECTIONS
ON EMPLOYMENT DISCRIMINATION LAW, LABOR
RELATIONS AND EMPLOYMENT LAW, AND MINORITY
GROUPS

Professor Monique C. Lillard*: Welcome. My name is Monique Lillard. I teach at the University of Idaho College of Law and I'm the Chair of the Section on Employment Discrimination Law of the AALS. On behalf of that section, the Section on Minority Groups, and the Section on Labor Relations and Employment Law, I'd like to welcome you to this session.

As all of you know, earlier this year the United States Supreme Court decided cases on the University of Michigan's affirmative action admissions program. In *Grutter v. Bollinger*,¹ the use of race in law school admissions was allowed. In *Gratz v. Bollinger*,² the use of race in admissions to the undergraduate school was not allowed because the procedures were insufficiently individualized. Those cases were decided under the Equal Protection Clause of the United States Constitution and involved admission of students to public educational institutions.

Our goal today is to consider application of the University of Michigan cases to employment law rather than education law, in both the public and private sectors. I want to thank past Section Chair Cyndi Nance and current Chair-elect Joe Slater for their suggestions concerning this panel, along with Marley Weiss, Doug Scherer, Sharon Hoffman and others on the Executive Committee of the Section, and also Beverly Moran of the Section on Minority Groups, because we spent a lot of time thinking about who should be on this panel and what should be discussed. I should let you know that this session is being taped and will be published in the *Employee Rights*

* Professor of Law, University of Idaho College of Law, Program Moderator, and Chair, AALS Section on Employment Discrimination Law.

1. 539 U.S. 306, 123 S. Ct. 2325 (2003).

2. 539 U.S. 244, 123 S. Ct. 2411 (2003).

and *Employment Policy Journal*, which is co-published by Chicago-Kent College of Law and Workplace Fairness.

What I'm going to do now is introduce the panelists in the order that they will speak, then we will quickly proceed to the first speaker. I could take a whole hour and a half just talking about the credentials of our panelists, but I will be brief. The first panelist will be Deborah Malamud, who teaches at NYU. She was teaching at Michigan at the time of these cases. The second will be Miranda Oshige McGowan, who teaches at the University of Minnesota. She has been thinking and writing about affirmative action for some time. Third will be Charles Shanor, who teaches right here in Atlanta at Emory. He served as General Counsel for the EEOC from 1987 to 1990. And finally we have Robert Belton, who teaches at Vanderbilt and worked on the *Griggs*³ and *Albemarle Paper Company*⁴ cases when they were litigated, and now is working on a book about *Griggs*. So, I will turn it over now to Deborah Malamud.

Professor Deborah C. Malamud*: One thing I'll say anecdotally before I get serious is that most of the writing that I've done on affirmative action, in fact I think I can safely say all of it, has been in an area that was potentially very important in the *Grutter* case, and did actually show up in dissenting opinions. It was the question of issues of class and affirmative action: how one should think about the class composition of the group of affirmative action beneficiaries, etc. We all awaited these cases for their public significance but also for their personal significance, and I was just sitting there with a crash helmet hoping that an opinion would not come down saying that the reason the University of Michigan Law School failed is that it believed Malamud when she said that class based alternatives wouldn't work. So, I had my own particular nervousness there, and that turned out not to be a central issue in Justice O'Connor's opinion at all.

I am going to just briefly introduce some of the themes that I think will be coming out in other people's talks and also introduce Justice O'Connor's opinion in *Grutter* itself. I want to flag the little bit that's clear in Justice O'Connor's opinion and the many important things that are not clear. I then will talk about some of the ways in which the higher education admissions context and the context of

3. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

4. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

* Professor of Law, New York University School of Law.

non-higher education employment differ from each other, and then talk about the ways one might see the clarities and ambiguities in *Grutter* playing themselves out across the differences between the admissions and the employment settings, using one of the very few cases that's actually been decided in the employment setting post-*Grutter* as an example. Since time may run short, the most important thing that I'm going to be doing is introducing *Grutter* and leaving the rest of the hard work to everyone else.

So, here's the one thing that you know that's clear about *Grutter*, and I think it will be clear to most of you immediately why this will be so significant in thinking about the employment context. The thing that is clearest about *Grutter* is its contrast with the opinion of the Court in *Gratz*, in which the undergraduate institution's affirmative action program was quite soundly rejected. The difference is what O'Connor needed and got in the law school case, but did not get in the undergraduate case, which is chiefly, highly individualized decision-making as to each individual candidate. This was stressed throughout her opinion. What the law school presented was decision-making that Justice O'Connor was prepared to acknowledge was individualized, quite non-standardized, quite subjective, and very non-quantitative,⁵ which matched an ideal that she had already expressed in other affirmative action cases,⁶ and in some employment cases as well,⁷ which is an ideal of purely individualized non-stereotyped decision-making. She complained about the lack of this in a case like *Croson*,⁸ celebrated the presence of it here, and complains about its absence any time she talks about the problems of unconstitutional discrimination being problems of improper stereotyping. So the lack of stereotyping becomes very important here, and I'll talk about how it manifests itself in the affirmative action setting in higher education and might be difficult to see happening in the employment setting.

That's what's clear, I think. What's ambiguous actually is more important. The decision's more ambiguous than clear and it's on the

5. *Grutter*, 123 S. Ct. at 2343-45.

6. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94, 508 (1989); *Johnson v. Transp. Agency*, 480 U.S. 616, 655-56 (1987) (O'Connor, J., concurring); *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 493-95 (1986) (O'Connor, J., concurring in part and dissenting in part).

7. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 87 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610-11 (1993).

8. 488 U.S. at 469.

ambiguous issues that the battles are going to be fought. Most of the ambiguities I'll be talking about have to do with what exactly we mean by diversity, to what extent exactly the decision in *Grutter* turned on principles of deference and what those principles of deference really were.

Ambiguity number one in the area of diversity is diversity of what? Diversity's going to be said to be a compelling interest. What exactly is diversity supposed to be? And, one way of asking that question – there are many but the one that I'll pick for these purposes – is to say, within a particular minority group, let's say African-Americans, is every member of that group equally capable of satisfying the institution's diversity needs? Is the plus factor for diversity one that simply adds a plus to every member of the qualified minority groups or does there need to be something more individualized than that in the understanding of what diversity is? And, of course, there have always been debates about whether *Bakke*-esque⁹ diversity is about viewpoint, whether it's about experience, whether the whole point of diversity is to teach everybody that there is no such thing as a common minority viewpoint or experience. And, in a way, the way to test what diversity concepts you're working with is simply to ask whether every member of this group counts? Is it appropriate for an institution to operate a diversity program in which every member of the group counts, or does there need to be something more finely tuned aimed at what this diversity goal really is?

This is not entirely clear in the opinion in *Grutter*, although one thing I certainly can say is that the position of the law school, and I believe that Justice O'Connor picks up on this to some extent, is that it does not give the same plus to all members of whatever particular minority group is involved; that it is a far more finely tuned question about what – in terms of experience, because it's always important not to say viewpoint – what in terms of experience related to membership in that particular group a particular person brings.

The questioning in trial never pushed on this question enough for there to be a record on who exactly you have to be for your membership in a group not to count or how these individualized decisions are made; but it was in the record that they were in fact more individualized than merely group membership. One of the

9. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

ambiguities in the opinion is whether that's necessary – whether the stress on individualization of decision-making requires not merely that race, in addition to other factors, be considered – but how much race is going to count as a factor, or whether it will count at all. In my view, that is what needs to be individualized.

Another area of ambiguity that I think will have significance in the employment setting is the question of diversity for what purpose, or what is the diversity interest itself exactly? As the case was litigated, as you well might imagine, *Bakke* was quite central, and one of the ambiguities in Justice O'Connor's opinion is whether she was following *Bakke* or making it up. She says she's not relying on *stare decisis*, but she sure talks a lot about Justice Powell's opinion in *Bakke*.¹⁰ That matters less for our purposes, but the fact that there is a lack of clarity about that also suggests that there is a lack of clarity about whether the particular diversity interest she's endorsing is precisely the diversity interest that Justice Powell was clearer in endorsing and distinguishing in his opinion in *Bakke*. Justice Powell, in *Bakke*, made it quite clear, in the setting of that case, that the interest he was endorsing was an interest based on the institution's own internal educational environment:¹¹ diversity of discussion in the classroom; or diversity of exchange of ideas and experience in a campus at large, as distinct from, for example, another interest University of California at Davis' Medical School raised but rejected, which is an interest in making sure that medical schools train doctors that will serve minority communities, or other kinds of interests that I would define here as end user interests, interests that are not so much defined by the university's own privileged internal processes, but by the university's judgment of what it means to produce for a market out there.

Justice Powell was quite clear that he was endorsing one of these and not the other. I think in reading Justice O'Connor's opinion in *Grutter* there are times that she seems to be talking about the *Bakke* classroom diversity justification and, in fact, cites social science data that was brought into the case by the university to defend that sort of diversity,¹² but the rhetoric of the opinion, at least, goes beyond that and talks about the importance of training lawyers to participate in

10. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 2339, 2342-45 (2003).

11. *Bakke*, 438 U.S. at 311-15.

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

public life, coming from all groups within a society,¹³ questions that Miranda will talk about as questions of democratic legitimacy. Are they part of the rationale or are they window dressing? It's actually very difficult to tell that from the opinion, and, given the move into the employment context, it will be important to know whether diversity is only going to count if you happen to have an employment setting that is structured for the free exchange of ideas. There are different views about what the American workplace really is structured for, but I think many of us think it's not quite structured for that, although many of us have aspirations that it should be. The view of what exists on the ground might be a more pessimistic one, and, therefore, what diversity to reach what goal matters as to whether there ought to be any carryover from *Grutter* into the employment setting.

Ambiguities three, four and five that I'll flag all have to do with the question of deference and how the issue of deference plays out in the O'Connor majority opinion in the *Grutter* case. One has just to note that there is a lot of talk in this opinion about deference, the deference that the university is due in its judgment of what its interests are and their compellingness,¹⁴ and in the means chosen to address the university's perceived needs.¹⁵ But there's also, because I'm talking about ambiguities, lots of language in the opinion that suggests that it really isn't a deference-based opinion at all. Because Justice O'Connor will say things like, we defer to the university's judgment and, by the way, we agree and not only do we agree but so do Fortune 500 companies and so does the military.¹⁶ To the extent the discussion is structured that way, it's difficult to see it as a First Amendment university deference decision. Again, this is going to matter because if you're not a university with privileged First Amendment status, it is unclear whether you are going to get deferred to. And this is an area of ambiguity in the opinions, because just like we seem to be following *Bakke* but are not, there seems to be deferring and deferring, not just because of some temporal judgment about the importance of universities, but because of First Amendment interpretations that have said that we must defer to universities because of principles of academic freedom when it comes

13. *Id.* at 2341.

14. *Id.* at 2339.

15. *Id.* at 2344-46.

16. *Id.* at 2340.

to defining their own educational missions. Not many employers will be able to claim special entitlement to deference of this sort and, in fact, given strict scrutiny, there are certainly four members of the court who were quite shocked to see even universities being given this deference in this particular setting.

Another ambiguity as to deference is deference to whom? Who do we see the decision-maker being that we're deferring to? Does it matter at which level of an organization, for example, decisions are being made? And one way to raise this puzzle, something not raised in the case at all, is in the Michigan law school case. There's a great deal of back and forth between the majority and dissenting opinions about whether Michigan created its own problems by insisting on being both a diverse law school and an elite law school, and Justice O'Connor ultimately agrees with the law school that part of this realm in which deference is appropriate is to the university's decision to be both elite and diverse.¹⁷ But you might want to ask yourself whether it's really quite accurate to see that as the decision of the university, which is the bearer of the entitlement to First Amendment deference. On some level they may really just be decisions of state legislatures, because after all how much money you allocate from a state budget to higher education and how you allocate that budget among your state universities is shaped by the decision that's really at issue here, which is the decision of whether you're going to have an elite flagship. Something that the majority opinion simply doesn't discuss, and it's not really discussed by the dissenters either, is the question of whether ultimately we are deferring to a university's judgment here or whether we're deferring to the political judgment of the state legislature. If the former, we have the first amendment; if the latter, we have a direct conflict with *Croson* which has said the state legislatures are entitled to absolutely zero deference when it comes to any issues having to do with race discrimination.¹⁸ And, of course, the question of the identity of the decision-maker who might get deference would show up in the employment setting as well.

Ambiguity number five is deference as to what, and I've raised this a little bit too. Is it deference to the university's or other employer's own understanding of the needs of its internal operations? Is it deference to its understanding of its societal role? There's an area of ambiguity too.

17. *Id.* at 2339, 2345.

18. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989).

The final ambiguity is in a different area and that's the question of how long you can do affirmative action. There is the magical hope and expectation that it will continue indefinitely, notwithstanding Justice O'Connor's statement that twenty-five years really ought to be enough.¹⁹ And there are lots of questions about what you're doing when you're thinking about time limitation of affirmative action cases.

Very, very quickly, what I want to do now is just flag some of the ways in which employment situations and higher education situations are different ways that will have these ambiguities playing out. I won't talk about the particular case I was going to talk about because I think others will, and it will come up anyway. One is what employers do, particularly what large employers do, and this area is generally numbers driven. It is not a sort of philosophically interesting or metaphysically interesting concept of critical mass. They're usually only interested in numbers. It is not at all clear whether that will fly, or what side of the *Grutter-Gratz* distinction we'll be on there. Something that might be significant is that part of the chemistry that the critical mass concept was built around in higher education is the idea that you are admitting a class which has a kind of corporate identity, and you're looking to strike a particular balance within it. Will incremental hiring decisions into a larger work force be seen as areas where the same kind of thinking and judgment can operate? You certainly have tendencies, particularly in larger bureaucratized employment settings, for employment decision-making to be standardized, quantified through testing, versus individualized and subjective. This, Vicki Schultz would say, is related in large part to the command position of the personnel management field and its way of exercising control over line supervisors.²⁰ If what you need for affirmative action is very subjective open-ended decision-making, you might well not find it because it's not in the interest or structure of businesses on these principles to have it.

We have the issue I've already flagged, which is will diversity-type principles apply only in environments where the facilitation of open expression is the institutional mission? In most workplaces that is not the institutional mission, and it is tolerated only at the margins. How will that be dealt with in deciding whether this is a diversity

19. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 2346-47 (2003).

20. Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

bearing kind of institution? And then, finally, there are others I could list, but the last one I'll raise is, in any kind of narrow tailoring discussion you have to ask yourself whether the particulars of who your diversity-eligible groups are match whatever it is you say your compelling need is.

And I'll just end with this because it's provocative, nasty and hopefully will trigger some discussion. If you have Fortune 500 companies saying, as they said in their briefs, that it's extremely important to have a diverse work force in order to function in a global marketplace – I mean this is almost the slogan – ask yourself which part of the global marketplace is most likely to be viewed by American businesses as a major area of growth and opportunity. And I think except maybe for South Africa, the entire content of Africa would not come up on that list. So if you are Fortune 500 business trying to shape a diversity policy based on your global need, wouldn't you be looking to vastly over-represent Chinese-Americans or speakers of Asian languages, wouldn't you care not very much at all to have African-Americans, long removed from their African roots, because what does that have to do with globalization? The question of whether one type of cultural diversity within a workplace will be accepted as narrowly tailored for achieving needs that may require a very different type of cultural diversity is one of the ways in which employment cases will test what the meaning of the diversity concept in *Grutter* actually is.

Professor Miranda Oshige McGowan*: Thank you very much and good afternoon. First, I want to thank Monique so much for including me in this panel. I very much appreciate it.

What I'd like to do today in talking about what effect *Grutter* has on employment discrimination law, affirmative action in the employment context, is focus on two major aspects of *Grutter* and employment discrimination law. The first main area that I want to explore is that *Grutter* is an equal protection case. In the employment law context we not only have equal protection as the governing law in the public employer context, but we also have Title VII, which governs private employers. I'm going to be talking a little bit about how I think Title VII really handles affirmative action and will continue to handle affirmative action quite differently than the Supreme Court's equal protection jurisprudence. Then the second

* Associate Professor of Law, University of Minnesota.

main area that I want to talk about, and this continues on with some of Deborah's points, is the diversity interest in the context of the admission to law school – are there any corollaries that we can draw in the employment context.

When I'm talking about what *Grutter's* admissions context has to say for the employment context more generally, I'd like to leave aside the area of employment law that we're all most familiar with, faculty hiring, because I think that most of you have probably thought longer and more deeply about it than I have. I will focus instead on the private employment context and on a recent case that Deborah didn't get to, *Petit v. City of Chicago*,²¹ which is a public employer police department case.

First let me talk a little about *Grutter* and its jurisprudence, equal protection, and what if anything, I think it has to say for Title VII law. After *Grutter*, and reading the court's affirmative action equal protection jurisprudence as a whole, I think that it's pretty clear that when you are a public institution you have two possible permissible compelling state interests. The first one is remedying past discrimination within a given institution, and the second one is diversity. It's not diversity of viewpoints, because Deborah is right, that is a third rail and runs into race essentialism, gender essentialism, and stereotyping; instead it is this notion of diversity of life experience and how that kind of diversity might affect a given institution.

Title VII is really quite different from the Equal Protection Clause in this respect. Affirmative action under Title VII doesn't count as discrimination if it's part of a valid affirmative action plan. So, if you use race or gender as part of a valid affirmative action plan you haven't discriminated. But, on the other hand, there's really only one permissible reason, as far as I can tell, that an employer can actually engage in affirmative action pursuant to a valid affirmative action plan under Title VII. That is a remedial purpose. That is, you as an employer are trying to remedy past discrimination including perhaps, and this is slightly broader than the equal protection context, the effects of societal discrimination on the labor pool or your current employee pool. There are also a number of other factors for a valid affirmative action plan, which do have some analogues to the equal protection context. You must have individualized assessment; the

21. 352 F. 3d 1111 (7th Cir. 2003).

affirmative action measures must be temporary; there has to be a single yardstick for all candidates; and you can't have the goal of achieving racial balance. But I think the main thing to take away from here is that the permissible goal in the Title VII context is really just this remedial one. Diversity just has not been developed as a permissible reason for adopting an affirmative action plan under Title VII. Here I really rely on the opinions of Justice O'Connor. Her jurisprudence has really hammered this remedial justification. She has said that she sees affirmative action as an *exception* to Title VII: the text of Title VII is actually clear, it would ban affirmative action because affirmative action is discrimination on the basis of race. But because the purpose of Title VII is to efface the persisting effects of discrimination, you can't have the absurd result of prohibiting employers from actually trying to ameliorate past discrimination.²² So in this narrow remedial context she's willing to allow affirmative action.

Let me just wrap up this first area. My sense is that *Grutter* really doesn't have a lot to say about Title VII law because it's really focused, not on the remedial aspects of affirmative action or on the remedial purpose of affirmative action, but rather on the diversity context. And so far I have just not seen diversity developed in the case law (except in this *Petit* case, which I'll talk about in a bit), and I don't expect to see it with Justice O'Connor on the Court.

The second major area that I'd like to talk about today is the analogy of the university context to the employment context. Here, I might be able to offer some caveats to my dour prediction that *Grutter* doesn't have anything to say about Title VII and doesn't expand Title VII. Let me flag what I think are the two most fascinating aspects of the *Grutter* opinion.

The first thing that I found just absolutely fascinating about *Grutter* was the amount of deference the Court says that it's giving to the university to define its mission, to design the kind of affirmative action plan that the University of Michigan actually employed, and to decide what education is for and what educational methods are actually best.²³ The second thing that I found really fascinating about the *Grutter* opinion was the Court's excitement about the Fortune 500 and General Motors brief, and the retired general's brief, which all talked about how very important diverse workforces are to competing

22. See *Johnson v. Transp. Agency*, 480 U.S. 616, 647 (1987) (O'Connor, J., concurring).

23. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 2339 (2003).

in a global marketplace and also to harmony in the workplace.²⁴ One fascinating thing about the *Grutter* opinion is, does the fact that the Supreme Court seems to be so seduced by the GM brief, the Fortune 500 brief, and the retired general's brief signal that employers may also receive some greater deference in the amount of leeway that they're given in defining their affirmative action plans? In other words, might they be able to do affirmative action for something other than remedial purposes? I have to say that I don't think that it signals any such thing. For most employers in the service and manufacturing industries, as for most private employers, I don't think that the Supreme Court has signaled in *Grutter* that it's going to be paying them any greater deference than it has in the Title VII context generally. As Deborah mentioned, I think that the key to the reason why the Supreme Court is paying the University of Michigan so much deference in the *Grutter* case is that the university's definition of its educational mission is very much tied up in the notions of academic freedom and the First Amendment, and the Supreme Court would like to steer clear of that. I also think that the Supreme Court is concerned about the appearance of democratic legitimacy and the appearance that channels to power remain open. The university serves an important gate-keeping function in minting the new leaders of the next generation.

I don't think these concerns are really present in most workplaces. Most workplaces that are involved in services or manufacturing don't have First Amendment concerns. They're not expressive workplaces; they're concerned with making products or delivering some service to a customer. And most private employment situations don't really have any connection to democratic legitimacy in the way that the university gate-keeping function does. Moreover, I think that the Supreme Court in its Title VII jurisprudence has really signaled that it doesn't see any reason at all ever to give employers deference when they're defining what their business is about, or really even on how they ought to be carrying on their businesses. I'm thinking here of the BFOQ cases, where the Supreme Court has really, really taken a strong hand in telling employers what the essence of their business is, and telling them what the essence of their business isn't, and telling employers how they can use national origin selection and gender-based employment rules to facilitate

24. *Id.* at 2340.

those business ends.²⁵ The Supreme Court has taken a pretty dim view of employers' motives in these cases. It has felt pretty free to examine closely what employers' businesses are about and tell them how they ought to conduct their business.

There's one major caveat to what I've said. There may be one area in employment law, mostly in the public employment law context, where both the diversity rationale will be possible and where we might expect to see the Court pay more deference to an employer's definition of what its business is and how race-specific policies, national-origin-specific policies, or sex-specific policies might actually facilitate those ends. I think that major area will be in the police context and in the corrections context. Here, racial diversity might actually have some traction.

There was a very fascinating case that came down in November from the Seventh Circuit. It's called *Petit v. City of Chicago*.²⁶ It has a tortured history. The case started in the early 1980s and actually reaches back into the 1970s. It concerned the administration of, basically, a verbal test to officer candidates in the Chicago Police Department. This test could not be validated either as a predictor of performance as a general matter or validated in terms of rank ordering.²⁷ So, higher performance on this test didn't necessarily predict that you'd be a better police sergeant. There had been some discussion by the African American police officers that they would challenge this test if the City of Chicago didn't do something to ameliorate what seemed to be a pretty severe disparate impact that this test had on African American officers seeking promotion to the officer corps in the City of Chicago Police Department.

What the City of Chicago did in the early 1980s was to race norm the test.²⁸ They picked a different mean for each of the tests, and since this was pre-1991 Civil Rights Act, they were able to do this legally. The test also was challenged under the Equal Protection

25. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (employer could not prohibit women from jobs involving lead exposure because industrial safety and the welfare of future generations was not the essence of employer's business); *c.f.* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (where the essence of the job is to maintain prison safety, height and weight requirements that excluded most women from position as correctional counselor did not meet the BFOQ exception); see also *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985) (though safe transportation of passengers was the essence of employer's business, employer failed to show that age was a legitimate proxy to determine flight engineers' ability to safely perform job duties).

26. 352 F.3d 1111 (7th Cir. 2003).

27. *Id.* at 1117.

28. *Id.*

Clause. So there wasn't a race norming violation as there would be today. Once they race-normed these tests, they ended up with a promotion list whose racial composition roughly mirrored the applicant list. So they had a really nice set of racially balanced officer candidates coming out of the tested population.

The white candidates who had been denied promotion challenged this as an invalid affirmative action plan. But the Seventh Circuit recently upheld this plan and upheld the idea that affirmative action is an appropriate remedy in this context, mostly on the basis of a diversity rationale. The city's argument was, and this is a nice analogy to the retired general's brief, that diversity in a police department and in the officer corps of a police department is very important to the operational interests of a police department in two different ways: with regard to internal relations and the ability of officers to supervise effectively rank and file police officers; and with regard to external relationships with communities.²⁹ If you had a police department that at its officer level was very racially segregated, and you had precincts that were racially segregated along housing lines, like they are in Chicago, you might actually create a lot of needless tension that could be ameliorated by a more racially diverse police department.³⁰ There was some evidence that the communities believed that having minorities in substantial numbers in sergeant positions and in other positions that interface with communities was actually very important. There was also a lot of discussion about how important it was to have racial representation among precinct captains and sergeants because it set a tone for relationships between the police and the community, as well as within the police officer ranks. This police officer context parallels the university context in the sense that there's a lovely analogy to democratic legitimacy. If the people with guns are all white and they tend to use them against minority populations, we have a real democratic legitimacy problem or, at least in O'Connor's words, an appearance of a democratic legitimacy problem. And racial representation in the officer corps in the City of Chicago cures at least the appearance of the problem of democratic illegitimacy.

29. *Id.* at 1114-15.

30. *Id.* at 1115.

Professor Charles A. Shanor*: Thank you very much Monique for inviting me to participate in this panel discussion. Before I move into my substantive remarks, I would like to make one comment as the local boy on the panel and that is that some of you may know, and others of you may not know: our location is where the old Heart of Atlanta Motel was located. This very tract of land has historical significance. Once the case was lost in the Supreme Court the owner, who is also a lawyer and who unsuccessfully argued his case before the Supreme Court, sold his property. He sold it to the Hilton Corporation for the highest price paid in Atlanta for any commercial tract of land at the time.

Some of you also will be interested to know, in the just desserts arena, that not only did he lose the case, but he subsequently met on harder times and filed for bankruptcy. So anyway, this is an historic tract of land, and we from Atlanta are delighted to have you here to celebrate the change from the Heart of Atlanta days to the Hilton Hotel days. For those of you who teach Constitutional Law, once you've been in this location or even seen a picture of the old Heart of Atlanta Motel, you can't imagine how the Supreme Court would have had any doubt that this was an enterprise in interstate commerce.

I would like to talk about two things. I don't know that they tie together terribly well, but I'll address them anyway. One is to talk about *Grutter* and *Gratz* on more of a theoretical plane in terms of the relationship between the theory of the case and the employment context. Since much that I have to say plays on things Deborah and Miranda have already said, I'll try not to be repetitive. The second thing that I want to do is talk about practical effects on the communities responsible on the ground for administering employment decisions in the workplaces of America, trying to get internal to those who are making decisions post-*Grutter* and *Gratz* that relate to employment issues.

I will back up for one minute to the core of the holdings of the Supreme Court in these two cases. Holding one, of course, is that diversity is a compelling governmental interest at least with respect to higher education admissions.³¹ Beyond that we don't know how far that compelling interest goes even in the equal protection context, much less the Title VII context. Holding two is that individualized considerations can be considered narrow enough tailoring, whereas

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31. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 2329 (2003).

group based decision making, adding on numbers to scores, isn't narrow tailoring.³² When individualized consideration is narrow tailoring, the Court is fairly careful to say, it is done by educational experts. Educational experts, of course, are problematic – the folks who are making admissions decisions are not necessarily those who are setting admissions policies. They are not the higher ups in the educational enterprise. They tend to be staff employees who are doing things in ways that they are hopeful will follow the policy because, if not, their jobs could be in jeopardy or, at least, their kudos for how they do their jobs. But at any rate, that's the pattern of the two holdings – one on diversity as a compelling governmental interest and the other on individualized consideration of applicants as narrow tailoring. With respect to admissions versus employment, most of us who deal with employment decisions are likely to respond that individualization is the essence of most employer hiring and promotion decisions. Sure, tests are used as a component of individualized decision making. We might take a person who scores high on a job related test as opposed to someone who scores low on a job related test. Typically, we are not talking about getting a class of people into a job, so individualization is something that is the every day bread and butter of hiring and promotion decisions. I don't think we're going to see the factor that distinguished *Gratz* and *Grutter* lead to different outcomes, or being much of an issue, in the employment context.

Now we do, of course, have classes of police officers and police promotional candidates, and I can tell you from having spent many hours litigating such cases in the mid-80s, in the middle of those kinds of wars, that's not a typical employer, but it is an important employer and it is important precisely because, as Miranda says, it has to do with democratic legitimacy or at least the appearance thereof.

So, what I'd like to focus more on is the diversity rationale. What I tend to do – we're all sort of victims of our own analogical categories – is to compare the diversity rationale with the notion of remedial purpose, manifest imbalance, in the Title VII area. Now, manifest imbalance is an interesting concept as a trigger for an affirmative action program – interesting because it relates to defensive considerations of an employer. Can I defend against a disparate impact claim? Am I really out on a limb in terms of exposure, if not to liability, at least to the cost of litigation and possible settlement?

32. *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 2427-28 (2003).

Diversity, on the other hand, is not a defensive formulation for an affirmative action plan, but is a positive statement. It's a positive statement in *Grutter* and *Gratz*. It's also a positive statement in terms of what the Fortune 500 companies and retired generals were saying: "we need a rainbow of racial groupings within our companies that not only reflect the society from which employees come, but also reflect the customers to whom our business is directed." Taking the diversity rationale as it's presented in these cases seems to me to be a movement from the notion of defensive considerations rooted, of course, in remedial purposes, to a positive statement. Will that happen in the employment context? It could happen, at least with respect to some places of employment, and I agree that police hiring is the most likely sort of setting for that to happen.

Two, there's a component to the diversity rationale that we haven't yet discussed very much and that's the notion of critical mass. Diversity and critical mass of diverse racial groupings are tied together in the University of Michigan cases. I'm wondering, as I think about critical mass, what does that mean? Does it give some content, some further definition, to the ambiguous notions of diversity that we've talked about so far? I can see it as being used in possibly two ways. One is to say that critical mass is the driver for diversity, a *rationale* for an affirmative action plan. That is, we need to have a critical mass even if that is above parity of work force statistics versus labor market statistics, because even if the labor market is small for Aleuts, as in the *Croson* case,³³ it may be that a critical mass of those folks in a particular employment setting is important. Of course, the other way critical mass can work is to say that it is a *limitation on the rationale of diversity*. Once Coca-Cola gets a critical mass of, say, Chinese or Hispanics or some other group with whom they are doing business, once there is a critical mass, does Coca-Cola have the ability to engage in diversity based affirmative action that will go beyond the level of critical mass within their particular workforce? I don't know.

A third consideration to the diversity rationale is simply how far can it go in terms of mirroring the racial rainbow that we have in this country or that we see internationally? There is a case called *Frank v. Xerox Corp.*³⁴ that Monique was kind enough to point out to me in which the Fifth Circuit said that you can't go that far; that's like the

33. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989).

34. 347 F.3d 130 (5th Cir. 2003).

blind hiring by the numbers prohibited in the *Johnson v. Transportation Agency* case.³⁵ So, I'm not sure that employers really will go so far as to say we're going to mirror the rainbow within society or within the cultures we're trying to sell to. But *Frank v. Xerox Corp.* is, at a minimum, a warning about taking it that far.

The final point on the theory, and this ties in with what Miranda said, is the centrality of diversity of the workforce to the mission of the employer. Police departments are very different from the types of employers that we often see. Consider a local kosher meat market. Can you imagine diversity of employment as a rationale for hiring gentiles to work in the kosher meat market? Not likely. How about a specialized internet company whose only direct dealings with the public are over the internet, where none of us see race or gender or anything else in terms of the people who work for the internet based company. In the first context, the kosher meat market, we might say there's an anti-diversity rationale. In the second one we've got not only a faceless, but a raceless employer in terms of the external presentation of that employer to the public.

Now, a little final point on this is there are some cases that aren't affirmative action cases that may have something to say about affirmative action in the workplace. BFOQ, for example. There are some cases that even allow a racial BFOQ. I know Bob has been around in this field long enough to know about the *Texas Board of Barber Examiners* case.³⁶ It's an old Fifth Circuit case where authenticity and BFOQ reject diversity to present oneself and one's products to customers.

Business necessity and diversity also tie in together. As I read those briefs, business necessity is essentially what was argued by the Fortune 500 companies. Business necessity doesn't justify intentional discrimination, but certainly serves as a defense in disparate impact cases. It's less helpful, I think, in the context of a diversity rationale for affirmative action programs than some of the other concepts.

Anyway, let me talk for a minute about practical changes in the employment area as a result of the University of Michigan cases. If the cases had come out the opposite way and Michigan had been slapped on the hand for what it did, it would have had an effect in the workplace. It would have been a signal to employers to cut back on affirmative action. With the result that came out, I don't see a

35. *Id.* at 137; see *Johnson v. Trans. Agency*, 480 U.S. 616, 637-38 (1986).

36. *Miller v. Tex. St. Bd. of Barber Examiners*, 615 F.2d 650 (5th Cir. 1980).

likelihood of much change. I have a good friend, with whom I was on a panel a couple of weeks ago. He represents large employers and said his clients are going to do the OFCCP stuff the same the day after as the day before. The cases hadn't changed what his clients will do. If anything, the cases were viewed as validating what they're doing. They're already doing individualized considerations.

Small employer representatives and plaintiff's lawyers on the same panel had this to say: We never argue affirmative action in our litigation – never, ever. The plaintiff, black or white, who says I was discriminated against, doesn't say it was because of the affirmative action plan. What they tend to say is "I was discriminated against because of my race or color. I wasn't treated fairly. I was the better person for the job." The employer defends not by saying "we gave the nod to someone else because of affirmative action." The employer defends by saying "we picked the better qualified candidate." Here's why. With a hundred different qualifications, surely you can find some ways in which the person picked was, in fact, superior to the one who wasn't, even if in other ways of course the other person was superior.

Anyway, one last thought that troubles me about this whole practical impact is we really have two communities who are administering and deeply involved on the ground with employment discrimination situations. The first community consists of professionals who call themselves human resources personnel. These folks are tied to affirmative action plans very carefully. They draw up the plans, they administer the plans, they talk to the decision makers, non-lawyers generally, about taking into account these factors in making the decisions. They're the ones who see if things are getting too far out of balance for one or another racial or gender group. These folks, I think, aren't going to do business differently. They get, as I said, a little bit of validation from the University of Michigan cases, but they're going on doing what they're doing. On the other hand, we have these litigation groups that I mentioned a while back. They are going to see this as essentially irrelevant to what they do. So you've got one community of folks involved in administering the law that's looking at affirmative action stuff day in and day out and the other group who, when something goes wrong, ignore it day in and day out. I think that's very interesting.

Professor Robert Belton: When I first received the invitation to

* Professor of Law, Vanderbilt University Law School. These comments have been

participate on this panel I was pleased. When I woke up this morning and realized that I had left my notes in Nashville, Tennessee, I was not so pleased. So, I spent the greater part of the day trying to reconstruct the points I wanted to make in connection with this presentation. Let me start the presentation by raising a very important subject: the issue of definition. What do we mean by affirmative action? I have not seen a Supreme Court decision yet that gives us a definition of what affirmative action is, and because we do not have some working notion, some common notion, of what we mean by "affirmative action," we tend to talk past each other on this subject matter. So what I intend to do is try to define that concept in the sense that I use it. I tend to think about affirmative action in terms of a plan that takes race and sex into account as one factor as a remedy for past, present or continuing discrimination. And, of course, that definition embraces within it some notion of societal discrimination.

Another observation that I want to make focuses on this notion of diversity, which is very big in the *Grutter* case. The thing that intrigues me about the notion of diversity, and again I am not so sure we have a working definition of what that means for the purpose of a meaningful discussion, but the thing that intrigues me about this notion of diversity is that it is a concept that began to take on a life of its own after policies of affirmative action became controversial. We do not like to use the term "affirmative action" any more because it has such a negative connotation. Therefore, we tend to see the word "diversity" being used more frequently now than we do the term "affirmative action."

A third preliminary point I want to make is that we speak about our national policy as one embracing the notion of equality. One conception of this notion of equality is that race or sex should not be a factor in the allocation of goods and services in our society. That is a very popular conception in this notion of equality. And when we compare that notion of equality with a concept of diversity, I think all of us accept the fact that the notion of diversity that says it is okay under some circumstances to take race and sex into account. Arguably these conflicting approaches – equality and diversity – raise and the question of whether these policies can peacefully coexist. One says race and sex can not be taken into account, and the other says it is okay. The question becomes, when you take a look at a case

like *Grutter*, is there any way to accommodate both the emphasis on equality, as I've defined it, and diversity, as I've defined it as well?

My major comments focus primarily on whether *Grutter* has any relevancy to the private sector. At one level, I think the answer is yes, looking at it from the perspective of Title VII. The answer is yes because, to the extent we are talking about a public employer, we all know that public employers are subject to the Equal Protection Clause of the Fourteenth Amendment. What the Court had to say both in *Gratz* and *Grutter* has some relevancy to public employers. We also know that the mistake that the plaintiff in *Johnson v. Transportation Agency*³⁷ made was to not include a count under the Equal Protection Clause. Any lawyer who would represent a *Johnson*-type plaintiff in the future affirmative action case would be subject to disbarment if that lawyer did not include a claim under the Equal Protection Clause. But I want to put that type of case aside because I think some of the problems that we have discussed already would be applicable to public employers in that context.

I want to look at the purely private side from a perspective of Title VII, and the question could be framed in terms of, to what extent does *Grutter* displace or make irrelevant the jurisprudence on affirmative action from the Title VII perspective? I think the answer is that with the model I'm talking about now, it does not make any difference. In the leading cases on the Title VII side, *Steelworkers v. Weber*³⁸ and *Johnson*, the Court enunciated a different test for determining the legality of voluntary affirmative action when challenged on Title VII grounds alone, and the *Weber-Johnson* test is entirely different from the strict scrutiny test that is applied in equal protection cases.

There are a couple of sections of Title VII that are relevant to my point about *Grutter* not having that much relevance in the purely private cases. It seems to me that if the Court is going to displace its Title VII jurisprudence on affirmative action that it adopted in the *Weber* and *Johnson* cases, it is going to be necessary for the Court to revisit its decision in *Washington v. Davis*.³⁹ Let me tell you why I say that. We all know that the basic proposition from *Washington v. Davis* is that the disparate impact theory is inapplicable to claims

37. 480 U.S. 616 (1987).

38. 443 U.S. 193 (1979).

39. 426 U.S. 229 (1976).

based on the Equal Protection Clause.⁴⁰ But the thing that has always troubled me about *Washington v. Davis* is the underlying rationale that the Supreme Court relied upon in reaching its result. The clear implication to me is that the Court is saying it was not going to apply disparate impact theory to claims based on the Equal Protection Clause because it thinks the nature of the discrimination that is prohibited under the Equal Protection Clause is different from the nature of discrimination that is prohibited under Title VII. And my interpretation of *Washington v. Davis*, along this line, has always troubled me. I want to take this line of reasoning even further. In adopting the intent or purposeful discrimination standard in *Washington v. Davis*, the Court raises the question of whether that standard is different from the intent theory that we have in Title VII. I am not so sure that we have a clear answer to that question, but it seems to me the Court is saying that we are going to treat the nature of discrimination under the Equal Protection Clause as different from the nature of discrimination that is prohibited by Title VII. And if there is merit to that reading of *Davis*, and I think there is, it seems to me that the Court is going to have to go back and revisit its rationale in *Davis* in deciding whether it is going to apply *Grutter*,⁴¹ *Gratz*,⁴² *Croson*,⁴³ and *Adarand*⁴⁴ in full force to the Title VII private sector discrimination cases.

The other point I want to make, again looking at the Title VII statute, focuses on Civil Rights Act of 1991, Section 116. Section 116 provides that the 1991 amendments were not intended to overrule, among other things, affirmative action that is in accordance with the law.⁴⁵ The key phrase is "in accordance with the law." There's a big debate now as to the meaning of "in accordance with the law," and the key question is what does this phrase means. Also part of the debate is grounded in another provision in the 1991 Civil Rights Act, section 703(m). Section 703(m) says that if a plaintiff proves that race or sex was a *motivating factor*, that's the key phrase, then you establish a violation and you go on to talk about the appropriate remedy.⁴⁶ There was some argument that section 703(m) sounded the

40. *Id.* at 239.

41. *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325 (2003).

42. *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411 (2003).

43. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

44. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

45. Pub. L. No. 102-166, § 116, 105 Stat. 1071, 1079 (1991).

46. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(B)(2002).

death knell for affirmative action plans, because affirmative action plans, by definition, necessarily take race and sex into account in the allocation of jobs, of goods and services in our society. So, again the question becomes, how do we factor these statutory provisions into a discussion about the applicability of *Grutter* and *Gratz* to the private sector?

There is yet another provision in Title VII that we have to take into account as we think through the implications of *Grutter* for the private sector, and that is section 703(j), the so-called anti-preferential treatment provision of Title VII.⁴⁷ I do not know where the Court stands on the proper interpretation of 703(j), since the Court has given two or three different interpretations of section 703(j).⁴⁸ And let me say this about Justice O'Connor, and it shows up in a couple of her opinions in terms of interpretations of section 703(j). Justice O'Connor said in *Price Waterhouse*,⁴⁹ and said very clearly in *Watson*,⁵⁰ that she is not going to construe section 703(j) to mean that employers are going to have to engage in quotas to stay out of trouble. I don't know how she would ultimately come out in an attempt to harmonize her views on section 703(j) and section 116. But we do have to take into account these provisions that I've just indicated in trying to think through what the implication of *Grutter* is for the private sector.

I think one of the big differences between equal protection, on the one hand, and Title VII, on the other hand, has to do with the legitimacy of the rationale for an affirmative action plan. More specifically, concerning this notion of societal discrimination, I am always intrigued by the fact that often when I see that term used by the Supreme Court in equal protection or civil rights cases, it is in quotes. But the bottom line for me, as I said before, is that unless the Supreme Court is willing to go back and redo a lot of the Title VII jurisprudence, I am not so sure that *Grutter* will have that much implication for the Title VII side.

And Charles, I must on this diversity issue just mention this. Two situations. A police department wants to do an investigation of the Ku Klux Klan and I am, as an African-American, a member of

47. *Id.* § 2000 e-2(j).

48. *Compare, e.g.,* *Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977) (liberally construing section 703(j) in favor of plaintiffs) *with* *Wards Cove Packing Co., v. Atonio*, 490 U.S. 642, 652 (1989) (construing section 703(j) in favor of employers).

49. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 230 (1989).

50. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 993 (1988).

that police department. The department is not going to send me. Right? Is that diversity? Or, if the police department wants to do an investigation of the Nation of Islam, are they going to send my co-panelist, Professor Charles Shanor, a white male? Is that diversity?