



***Grutter* Goes To Work: The 7th Circuit Court's Ruling in *Petit v. City of Chicago* (2003)¹**

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The strict scrutiny analysis in constitutional claims features two prongs: (1) a compelling government interest and (2) a policy narrowly tailored to that interest. In June 2003, the Supreme Court evaluated the Law School and undergraduate admissions policies at the University of Michigan. The Court ruled that student diversity is a compelling interest, but the Law School policy (*Grutter v. Bollinger*, 2003) was deemed narrowly tailored, whereas the undergraduate school policy (*Gratz v. Bollinger*, 2003) was not. As important, the *Grutter* Court upheld *Regents v. Bakke* (1978), where Justice Powell was alone in declaring that student diversity is a compelling interest in higher education and that flexible admissions policies (e.g., the “Harvard Plan”) may be narrowly tailored to that interest.² The issue addressed below is the December 2003 ruling by the 7th Circuit in *Petit v. City of Chicago* endorsing race-based promotions by the Chicago Police Department. In essence, the 7th Circuit used *Grutter* to support what amounts to subgroup norming.

Background Information

Diversity as a compelling interest (or “operational need”) did not simply emerge in 1978 in *Bakke* and then reemerge out of the blue in 2003 in *Grutter* and *Gratz*. There was plenty of action on this issue during the intervening years, including key lower court rulings, quotes by three Supreme Court justices in parallel cases, and proclamations of support by Clinton’s Department of Justice (DOJ).³

Detroit Police v. Young (1979) is a key lower court ruling in which race-based selection was upheld. That ruling was based on four federal commission reports citing the need for a diverse police force in improving community support and law enforcement effectiveness. There was also supporting

¹ I want to thank Bryan Baldwin of the California Department of Justice for alerting me to this ruling.

² The key issues in *Bakke*, *Grutter*, and *Gratz* are discussed by this author in the October 2002 and April, July, and October 2003 issues of *TIP*.

³ Of course, in the ensuing Bush Administration, the DOJ switched sides on this issue.

testimony by the former police chief, the (then) current police chief, and a deputy chief (with a PhD in sociology). The 6th Circuit supported this concept of “operational needs,” ruling:

The argument that police need more minority officers is not simply that Blacks communicate better with Blacks or that a police department should cater to the public’s desires. Rather, it is that effective crime prevention and solution depend heavily on public support and cooperation, which result only from public respect and confidence in the police.

In a similar case, *Talbert v. City of Richmond* (1981), the 4th Circuit endorsed a race-based promotion from captain to major in the Richmond Police Department. Several candidates were deemed qualified, and race was only one of several factors figuring into the promotion decision. The 4th Circuit saw “harmony” between the at-issue promotion decision here and Justice Powell’s ruling in *Bakke*. The 4th Circuit also paid tribute to the Detroit Police ruling, citing verbatim, the aforementioned quote on operational needs.

The three Supreme Court Justices supporting diversity in parallel cases were O’Connor, Stevens, and Ginsburg. In each case, the support was in the context of a ruling against race-based selection. In *Wygant v. Jackson* (1986), O’Connor was the deciding vote in a ruling striking down “role modeling” as a basis for race-based termination. Nevertheless, she took time to cite and support Powell’s ruling in *Bakke*, stating:

Although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently “compelling” at least in the context of higher education, to support use of racial considerations to further that interest.

O’Connor also stated that “a plan need not be limited to remedying specific instances of identified discrimination” to pass the strict scrutiny test.

Stevens’ support came in *City of Richmond v. Croson* (1989), a case in which the Supreme Court overturned a race-based government set-aside. Although he agreed with the overall ruling, Stevens, writing separately, noted that the “remedy for past wrong is not the exclusive basis upon which racial classifications may be justified.” Ginsburg’s support came in *O’Donnell v. D.C.* (1992). As a (then) member of the D.C. Circuit Court, Ginsburg supported the main ruling of that court to strike down a race-based set-aside. However, writing separately, she noted that “in his separate opinion in *Croson*, Justice Stevens reasoned, and I agree, that the remedy for past wrong is not the exclusive basis upon which racial classifications may be justified.”

Support from Clinton’s DOJ came in two key documents. The first one, entitled “Post-*Adarand* Guidance on Affirmative Action in Federal Employment,” was written as a “Memorandum to General Counsels” on February 29, 1996. Its purpose was to interpret *Adarand v. Peña* (1995), a complex ruling

involving federal set-aside programs.⁴ In the memorandum, the DOJ referenced operational needs, asserting that:

There has never been a majority opinion for the Supreme Court that addresses the question whether and in what circumstances [operational needs] can constitute a compelling interest. Some members of the Court and several lower courts...have suggested that, under appropriate circumstances, an agency's operational need for a diverse workforce could justify the use of racial considerations. This operational need may reflect an agency's interest in seeking internal diversity in order to bring a wider variety of perspectives to bear on a range of issues with which the agency deals. It also may reflect an interest in promoting community trust and confidence in the agency.

The second key DOJ document was an amicus brief⁵ relating to the 3rd Circuit's ruling in *Taxman v. Piscataway* (1996), a Title VII case. In *Taxman*, a Black teacher and a White teacher were deemed equal in seniority and performance. Needing to terminate one of the two for economic reasons, the school board assumed it could legally terminate the White teacher based on affirmative action principles. However, in an en banc decision, 9 of 13 judges ruled that race-based preference failed *both* prongs established for Title VII cases in *United Steelworkers v. Weber* (1979). The *Weber* test calls for (1) a remedial purpose, and (2) temporary solutions that do not "unnecessarily trammel" nonminority rights. By 1996, it was fair to assume that the strict scrutiny and *Weber* tests were in perfect harmony, meaning a temporary, non-trammeling solution for a remedial purpose *is* a narrowly tailored solution for a compelling government interest. Indeed, the Supreme Court had already interchanged terms from the strict scrutiny and the *Weber* tests in prior rulings (e.g., *Local 28 v. EEOC*, 1986 & *United States v. Paradise*, 1987). What stirred the DOJ was the implication in *Taxman* that the *Weber* test applies only to remedial interests and, therefore, not to operational needs.

The DOJ wrote its brief when it appeared the Supreme Court was slated to review *Taxman*. Believing the case was too weak to decide so important an issue, the DOJ conceded the termination in *Taxman* was illegal based solely on Prong 2 of either strict scrutiny or *Weber* (i.e., it was neither temporary and nontrammeling nor narrowly tailored). In the brief, the DOJ emphasized that "diversity" was not a code word for "role modeling," a concept outlawed by the Supreme Court in several cases. It gave as an example *Wittmer v. Peters* (1996), where a boot camp commander made a race-based promotion of a

⁴ The *Adarand* Court ruled that strict scrutiny applies to federal race-based set-aside programs, thus striking down its own prior ruling in *Metro v. FCC* (1990), which endorsed moderate scrutiny for federal set-asides.

⁵ The DOJ brief was reproduced and discussed by Sharf in the January 1998 issue of *TIP*.

lower scoring Black correctional officer to lieutenant, prompting higher scoring White officers to sue. The 7th Circuit, supported this promotion, ruling:

We are mindful that the Supreme Court has rejected the “role model” argument for reverse discrimination [see *Croson & Wygant*]....There are many weak arguments for discrimination, and the “role model” theory is one [of them]....The Black lieutenant is needed because the Black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some Blacks in authority in the camp.

The DOJ also cited the *Detroit* and *Richmond* cases discussed earlier to support the operational need for a diversified police force, particularly in times of racial tension.

A final point to note about the history of diversity as a compelling interest is that the Clinton DOJ ultimately got its wish in *Grutter*, albeit posthumously, when Justice O’Connor made it clear that its ruling applies to all parallel statutes. It would be a hollow victory for proponents of diversity if diversity were an acceptable premise in the 5th and 14th Amendments but not in other statutes that cover federal, state, and local governments.

***Petit v. City of Chicago* (2003)**

Petit is the first application of *Grutter* to the workplace, though not necessarily the best. There are several potentially confusing issues. First, it features a promotional exam (for sergeant) administered between 1985 and 1988. Second, parts of this case were spun off to parallel cases, most notably *Majeske v. City of Chicago* (2000) and *Reynolds v. City of Chicago* (2002), and these parallel cases feature complex tangential issues. Third, at one point, the primary basis for race-based promotion was remedial need, and it became diversity when it was clear the city of Chicago could no longer argue it was making up for past discriminatory acts from the 1970s and before. Finally, and most importantly, one has to sift through the parallel cases and several district court rulings to figure out what the city of Chicago actually did, and why its actions were deemed narrowly tailored.

The one crystal clear ruling in *Petit* relates to the compelling interest (Prong 1) in the strict scrutiny test. Comparing the compelling interests of a university to a police force, the 7th Circuit concluded:

It seems to us that there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago. Under the *Grutter* standards, we hold, the city of Chicago has set out a compelling operational need for a diverse police department.

Furthermore, like the Supreme Court, which paid “deference to a university’s academic decisions,” the 7th Circuit paid deference to the “views of experts and Chicago police executives that affirmative action was warranted to enhance the operations of the CPD.” The court cited other expert opinions, including Tom Potter, the well-known former chief of the Portland, Oregon PD, who earlier in this case testified to the “necessity of diversity among police supervisors, both for the community’s perceptions of police departments, but also internally in changing the attitudes of officers.”

The 7th Circuit also favored the Chicago PD on Prong 2 (narrowly tailoring), but as noted above, the “what” and “why” parts are confusing. The “what” part is confusing because the 7th Circuit described the promotional procedure as “standardization” without defining the term. As written, it could have reflected either banding or subgroup norming. The only clear indication it is subgroup norming is from the various district court rulings in this case.⁶ Now for the fun part. A consultant to the Chicago PD assumed that racial discrimination in the Chicago PD was eliminated by 1975. Comparing percentages of minorities on the PD versus the city of Chicago for 1975 through 1990, the consultant inferred the number of minorities that would have been hired from 1950 through 1974, absent discrimination. He applied these expected values to internal promotion data from 1987 through 1991, noting all promotions to sergeant were from within. Chi Square analyses revealed significant differences in actual versus expected promotions for African Americans and Hispanics (and women). Means and standard deviations were computed for Caucasians, African Americans, and Hispanics, and separate cutoff scores were established. As best as I could determine, the Z score for the cutoff for Caucasians was applied to African Americans and Hispanics, and strict ranking-order promotions were made based on the standardized scores, irrespective of group.⁷

As a result, using a cutoff of 70 (out of 100) as a passing score, 2,000 candidates were deemed qualified for promotion. Among the top 500 standard scores, 332 were for Caucasians, 138 for African Americans, and 30 for Hispanics. The absolute score of the 332nd Caucasian was 82.98, as compared to 80.70 (standardized = 82.82) for the 138th African American and 80.95 (standardized = 83.43) the 30th Hispanic. The court reasoned that these differences were within the “margin of error”(the standard error of the mean), which was estimated to be least 3 points (if not higher). Ultimately, 458 promotions were made, of which 402 would have been made based on strict rank

⁶ These rulings can be viewed on Findlaw.com. Go to “US Law Cases & Codes”, then “US District Courts” and then “Northern District of Illinois.” Then select “Recent Opinions” and use “90” for year, “cv” for type and “4984” for the case number.

⁷ That’s my best reading of the procedures used. If anyone sees it any differently, please let me know.

ordering of the absolute scores. Therefore, a total of 56 out-rank-promotions were attributable to the standardization process.

The 7th Circuit gave four major reasons why this promotion scheme was narrowly tailored. First, the test itself was never standardized. Of course, this provided the motivation for the Chicago PD to standardize, since they did not want to face an adverse impact challenge. Second, the promotion scheme was seen as consistent with *Grutter* (and *Bakke*), with race as “plus factor in the context of individualized consideration,” as opposed to the “mechanical, predetermined diversity bonuses” struck down in *Gratz*. Third, it was viewed as temporary because it was not used after 1991 in exams given in 1993, 1998, and 2004. Finally, even though it was estimated that 50 or more Caucasians had their promotions delayed, the 7th Circuit reasoned:

While we do not minimize the loss that those who were not promoted suffered, we find that the procedures met the *Grutter* standard for minimizing harm to members of any racial group.

The court also reasoned that “standardizing the scores can be seen not as an arbitrary advantage given to the minority officers but rather as eliminating an advantage the White officers had on the test.”

Conclusions

Taken together, the *Grutter* and *Gratz* rulings establish boundary conditions for narrowly tailored policies for compelling government interests. *Grutter* tells us Justice Powell had it right when he advocated race as a “plus” factor, and therefore, a potential tiebreaker, but only when diversity is a compelling interest. Such a scheme presupposes a flexible selection system affording applicants individualized assessment at some point in the process. In comparison, *Gratz* tell us a mechanized system done by the points is suspect, particularly if too many points are awarded for race. Against this background, *Petit* is on firm footing only with respect to diversity as a compelling interest in police forces. It is unclear where it stands on the continuum between *Grutter* and *Gratz* on narrow tailoring. It is certainly not in the image of *Grutter*. There was no individualized assessment. But neither it is a snapshot of *Gratz*. The points added in *Gratz* were 20% of the total needed for acceptance, whereas the points added in *Petit* were well within the boundaries of the standard error of the mean. It will be interesting to see how other courts treat cases like *Petit*, where the primary manipulation is statistical in nature. It will also be interesting to see how diversity as a compelling interest plays out in nonsafety-sensitive jobs, particularly in the private sector.

Case Law Citations

Adarand v. Peña (1995) 115 S.Ct 2097.
City of Richmond v. Croson (1989) 488 US 469.
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