



The *Grutter*, *Gratz*, & *Costa* Rulings

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On June 23, 2003 the Supreme Court ruled on *Grutter v. Bollinger* and *Gratz v. Bollinger*. I discussed these cases in the October 2002, April 2003, and July 2003 issues of *TIP*, and I will discuss them just one more time (I think). *Grutter* and *Gratz* will likely dominate the landscape for years to come, and deservedly so. Colleges and universities have relied on Justice Powell's ruling in *Regents v. Bakke* (1978) to structure their diversity programs, and this is the first Supreme Court test of that ruling. In recent years, some lower courts have ruled that *Bakke* is bad law (e.g., *Hopwood v. Texas*, 1996; *Johnson v. Board of Regents*, 2001). The *Grutter* ruling overturns such opinions.

On June 9, 2003, prior to the above rulings, the Supreme Court ruled on *Desert Palace v. Costa*. Although received with less fanfare than *Grutter* or *Gratz*, *Costa* will also be influential for years to come. Since *Price Waterhouse v. Hopkins* (1989), and amendments to that ruling in the Civil Rights Act of 1991 (or CRA-91), lower courts have insisted that *direct evidence* of an illegal motive is needed to trigger the *mixed-motive defense*. In *Costa*, the Supreme Court unanimously ruled that *indirect* (or circumstantial) *evidence* is also a valid trigger for this defense.

Desert Palace v. Costa (2003)

In *Price Waterhouse v. Hopkins* (1989), Ann Hopkins was twice passed over for promotion to partner. She presented direct evidence of an illegal motive: that several male partners made sex-based derogatory remarks that her flawed "interpersonal skills" could be "corrected by a soft-hued suit or a new shade of lipstick," that she was "macho," and that she "overcompensated for being a woman." However, the defense countered with a *legal* motive for not promoting her, namely that she was brash and abrasive to staff and clients. The Supreme Court ruling was complex. The bottom line though, was that under rules *predating* CRA-91, Ann Hopkins received no relief because the defendant proved the legal motive with a preponderance of evidence.

Hopkins was then addressed in the Civil Rights Restoration Act of 1990, which was vetoed, and in CRA-91, which became law. The aborted 1990 Act

promised full equitable relief to plaintiffs if an illegal motive plays *any* role in a selection decision. Under these rules, Ann Hopkins was due equitable remedies such as declarative and injunctive relief, legal fees, backpay, and the promotion she was denied. However, CRA-91 bifurcated these remedies so that a plaintiff in Ann Hopkins' shoes is due declarative relief, injunctive relief, and legal fees for proving the illegal motive, but the defendant escapes liability for backpay and promotion for proving the legal motive.¹

Historically, facing *only* indirect evidence of an illegal selection decision, defendants have only had to *articulate* why the decision was made, forcing plaintiffs to prove that the statement made is a pretext (or cover up) for illegal discrimination. In this so-called "McDonnell-Burdine" scenario (see *McDonnell Douglas v. Green*, 1973), defendants need *never* offer proof. Thus, if forced into a mixed-motive scenario, defendants face a burden of proof that is *nonexistent* in the McDonnell-Burdine scenario. Lost in a maze of opinions in *Hopkins* was Justice O'Connor's lone view that *only* direct evidence of an illegal motive can force defendants to prove a legal motive. Since *Hopkins*, and in spite of CRA-91, lower courts have required proof of a legal motive only in the face of direct evidence of the illegal motive—until *Desert Palace v. Costa*.

Also of importance, before CRA-91, Title VII cases were tried by district court judges. CRA-91 ushered in *jury trials* for plaintiffs seeking newly available legal relief.² Before CRA-91, judges rendered discreet rulings, and a trial could end in *any* of three phases: (a) with plaintiff's failure to make a prima case, (b) with defendant's failure to counter the prima facie case, or (c) with plaintiff's success or failure to prove pretext. In jury trials, the evidence flows back and forth more continuously, and the judge instructs the jury on the burdens in these phases after *all* of the evidence is heard.

Catharina Costa, the only female employee in a warehouse, was terminated after a verbal and physical altercation with a male coworker. The coworker received only a 5-day suspension. Costa lacked direct evidence that her termination was gender-based, but she had indirect evidence; she was treated more harshly than the male coworker with whom she feuded and male coworkers in general. The defense countered that Costa was terminated because she was a repeat offender, whereas the suspended coworker was not. Had the judge used McDonnell-Burdine rules, the jury would have weighed the defense's *articulation* (that Costa was fired for cause) against the plaintiff's indirect evidence of pretext (harsher treatment than male coworkers). However, the trial judge gave the *mixed-motive* instruction, thereby forcing the defense to prove, *rather* than to simply verbalize, its legal motive. Accordingly:

¹ I am often reminded by attorneys themselves that attorney fees are invariably substantial and that they belong to the plaintiff, not the attorneys.

² Legal relief includes compensatory damages for pain and suffering and punitive damages for employers guilty of willful violations.

You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.... However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

The Supreme Court supported the trial judge. Speaking for a unanimous Court, Justice Thomas ruled:

In order to obtain a [mixed motive] instruction...a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that "race, color, religion, sex, or national origin was a motivating factor for any employment practice." Because direct evidence of discrimination is not required in mixed-motive cases, the Court of Appeals correctly concluded that the District Court did not abuse its discretion in giving a mixed-motive instruction to the jury.

For her part, Justice O'Connor joined this ruling because she believed, as did the other eight justices, that in CRA-91, "Congress codified a new evidentiary rule for mixed-motive cases arising under Title VII."

The *Grutter & Gratz* Rulings

In previewing these cases in April 2003, I felt the most important issue was: Is *Bakke* good law via 14th Amendment strict scrutiny rules? That means first deciding if diversity is a *compelling government interest* and then, presuming it is, deciding further if the admissions plans at issue are *narrowly tailored* to that interest. A "nay" answer on compelling interest ends all diversity programs in higher education. As it turned out, the *Grutter* Court ruled that diversity *is* a compelling government interest and that the law school plan *is* narrowly tailored to that interest. However, the *Gratz* Court ruled that the undergraduate plan is not narrowly tailored.

Briefly, the law school plan combines objective variables (e.g., GPA & LSAT) with "soft" variables (e.g., recommendation letters, quality of undergraduate school, leadership, work experience, unique talents, and overcoming social or economic disadvantage). The law school claims to seek **a critical mass** of underrepresented minority students in order to (a) make each class "stronger than the sum of its parts," (b) prevent minority students from feeling "isolated or like spokespersons for their race," and (c) prevent minority stu-

dents from feeling “uncomfortable discussing issues freely based on their personal experiences.” The law school also claims there is no hard and fast objective rule for admissions and no fixed percentage goal for the “critical mass.”

The undergraduate admissions (or UGA) plan uses a “selection index” of 150 points, with 100 points required for admission. Up to 12 points are awarded for standardized scores, up to 98 points for GPA, category of school attended, and strength or weakness of the curriculum, and up to 40 points for *other factors*. These other factors include up to 20 points for geographical location, alumni relations, outstanding essay, personal achievement, or leadership and service activity and up to 20 points for “*miscellaneous*” categories, including socioeconomic disadvantage, *racial and ethnic minorities*, athletic scholarship, and discretionary selection by the provost.

The Grutter Ruling

Justice O’Connor was the swing vote in a 5-4 ruling. Speaking for Breyer, Ginsburg, Souter, and Stevens, O’Connor ruled, “The Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is *not* prohibited by the Equal Protection Clause” of the 14th Amendment (and other relevant statutes). Quoting routinely from Justice Powell’s ruling in *Bakke*, O’Connor explained in detail why the law school’s admissions program *is* narrowly tailored. Accordingly:

The Law School’s admissions program bears the hallmarks of a *narrowly tailored plan*. To be narrowly tailored, a race-conscious admissions program cannot “insulate each category of applicants with certain desired qualifications from competition with all other applicants....” Instead, it may consider race or ethnicity as a “plus” in a particular applicant’s file; i.e., it must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight....” It follows that universities cannot establish quotas for members of certain racial or ethnic groups or put them on separate admissions tracks.... The Law School’s program, like the Harvard plan approved by Justice Powell, satisfies these requirements. Moreover, the program is flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature in the application.

O’Connor made several other intriguing (and ironic) points. Recall from the April 2003 preview that *Bakke* was *fragmented*. That is, Justice Powell was alone in his belief that the Davis Plan used an illegal quota *but* the Harvard Plan (and others like it) is narrowly tailored to a compelling government interest. Four justices cared only that the Davis Plan used an illegal quota,

and four others argued that the Davis Plan satisfied *moderate* scrutiny rules (a substantially related solution to an important interest). This fragmentation motivated some lower courts to evaluate *Bakke* in light of *Marks v. USA* (1977), where Justice Powell himself ruled:

When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Based on *Marks*, some lower courts actually struck down Powell's ruling in *Bakke*. For example, in *Johnson v. Bd. of Regents* (2001), the 11th Circuit ruled:

Justice Powell clearly identified diversity as a compelling interest that may be asserted by a university in defense of an admissions program that flexibly considers race as one of several factors in making admissions decisions. No other Justice, however, expressly endorsed that view.

The April 2003 preview was through the eyes of amicus briefs written by Solicitor General Theodore Olson for President George Bush. Olson conceded that diversity is a "*paramount government objective*" but asked the Supreme Court to ignore whether *Bakke* is good law and, instead, reject the Michigan plans because neither one is narrowly tailored. Or as stated by Olson:

The courts of appeals disagree as to whether any of the opinions in *Bakke* represents binding precedent under *Marks v. United States*.... The Court need not undertake the *Marks* analysis in this case and should instead directly resolve the constitutionality of race-based admissions standards by focusing on the availability of race-neutral alternatives.

Interestingly, the O'Connor majority did *not* do the *Marks* analysis, but *not* to placate Olson. As stated by O'Connor:

We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it."

Thus, *Marks* was killed, not *Bakke*, ending future lower court opinions on whether Supreme Court rulings are fragmented. Then, in another ironic twist, O'Connor used Olson's own words to defend diversity as a compelling interest. Accordingly:

The United States, as *amicus curiae*, affirms that "[e]nsuring that public institutions are open and available to all segments of American Society, including people of all races and ethnicities, represents a paramount government objective...[n]owhere is the importance of such openness more acute than in the context of higher education."

O'Connor then spoke to two other objections raised by Olson. Speaking to Olson's arguments on *race-neutrality*, O'Connor stated:

Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law school seeks. We disagree. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.... We agree with the Court of Appeals that the Law School sufficiently considered workable race-neutral alternatives.

And speaking to Olson's argument that the law school plan has no logical ending point, O'Connor ruled that, in effect, the law school should achieve its goal of diversity in about *25 years*, and it is OK to wait.

There was one concurrence and four dissents. In the lone concurrence, Justice Ginsburg, (for Breyer), claimed that educational opportunity for minorities and nonminorities is not equal and that "one may hope, but not firmly forecast, that over the next generations' span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." Thus, although concurring with the majority ruling, Ginsburg, believed there should be no time limit.

Among the dissents, no justice other than Thomas directly challenged Powell's ruling in *Bakke* that diversity is a compelling interest. For example, speaking for Scalia, Kennedy, and Thomas, Justice Rehnquist stated:

I agree with the Court that "in the limited circumstance when drawing racial distinctions is permissible," the government must ensure that its means are narrowly tailored to achieve a compelling state interest. Stripped of its "critical mass" veil, the Law School's program is revealed as a naked effort to achieve racial balancing.

Thus, Rehnquist echoed Olson's prayer; avoiding the issue of compelling interest and striking down the plan because it is not narrowly tailored. Rehnquist also noted that within the "critical mass," preference is accorded to African Americans over Hispanics and Native Americans, an issue agreed to by other justices.

Justice Kennedy (for himself) accepted *Bakke* as binding but argued that the majority failed to scrutinize the actual plan. He accused the majority of paying too much deference to the university's right to academic freedom and accused them of confusing "deference to a university's definition of its educational objective with deference to the implementation of this goal." Accordingly:

The separate opinion by Justice Powell in...[*Bakke*]...is based on the principle that a university admissions program may take account of race

as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny. . . . If strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way. The opinion by Justice Powell, in my view, states the correct rule for resolving this case. The Court, however, does not apply strict scrutiny.

Justice Scalia (for Thomas) did not directly challenge *Bakke*, but he came close. He sarcastically noted that the “good citizenship” and “educational benefit” components of the law school plan will not appear in transcripts or on bar exams, that “good citizenship” can also motivate diversity in the Michigan Civil Service, and that “nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of the skin color will surely understand.” He forecasted that the “*Grutter-Gratz* split double header” will generate lawsuits for years to come, including by “minority groups shortchanged in the institution’s composition of its generic minority critical mass,” a reference to disproportions *within* the “critical mass.” He concluded by stating that the “Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”

Finally, Justice Thomas made some points Scalia joined and some that Scalia did not join. Scalia agreed with Thomas that “Blacks can achieve in every avenue of American lives without the meddling of university administrators” and that rising educational standards have motivated nonminorities, but not minorities, to raise their skill levels. But Scalia did not join Thomas’s belief that a *Marks* analysis was called for to assess the “extent to which Justice Powell’s opinion in. . . *Bakke*. . . is binding.” In short, Thomas was the only dissenter who expressly challenged Powell’s *Bakke* ruling.

The Gratz Ruling

The *Gratz* ruling was what Solicitor General Olson wanted for both *Grutter* and *Gratz*. There was no mention of diversity as a compelling interest; the UGA plan was struck down solely because it was not narrowly tailored. In effect, the vote was 6-2 with one abstention.

Justice Rehnquist delivered the opinion of the Court. Speaking for O’Connor, Scalia, Kennedy, and Thomas, Rehnquist stated:

We find that the University’s [undergraduate] policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single “underrepresented minority” applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.

Rehnquist also noted that an admissions policy relying entirely on points cannot “offer applicants the individualized selection process described in

Harvard's example" (i.e., the "Harvard Plan" cited by Justice Powell in the *Bakke* case).

Justice O'Connor wrote a separate concurrence to articulate the difference between the UGA and law school plans. Accordingly:

Unlike the law school admissions policy...the procedures employed by the...Office of Undergraduate admissions do not provide for a meaningful individualized review of applicants.... The Law school considers the various diversity qualifications of each applicant, including race, on a case-by-case basis.... By contrast, the Office of Undergraduate Admissions relies on the selection index to assign *every* underrepresented minority the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant.

Justice Breyer added a sixth vote to strike down the UGA plan, but he refused to join the Court opinion, stating "I concur in the judgment of the Court though I do not join its opinion." He joined O'Connor's concurrence "except insofar as it joins that of the Court." He also joined part of Ginsburg's dissent (see below).

Justice Thomas also wrote a separate concurrence to note that the "State's use of racial discrimination in higher education admissions is categorically prohibited by the Equal Protection Clause." He also took a sarcastic shot at the *Grutter* ruling, stating that the UGA plan "does not suffer from the additional constitutional defect of allowing racial discrimination among the groups included within its definition of underrepresented minorities" (yet another reference to preference for African Americans over Hispanics or Native Americans within the "critical mass").

For his part, Justice Stevens (for Souter) dissented, but he never directly addressed the UGA plan. He argued instead that neither plaintiff (Jennifer Gratz nor Patrick Hamacher) had standing to sue because (among other reasons) "neither petitioner has a personal stake in this suit for prospective relief." The other arguments in this dissent are complex. In a nutshell, Stevens argued that Gratz had potential standing only because of Hamacher's claim, and Hamacher, himself, had no standing because he made a transfer application and the plan at issue was for freshmen admissions.

Justice Souter also wrote a separate dissent, part of which Ginsburg joined, and part of which she did not join. In the part Ginsburg did not join, Souter elaborated on his agreement with the Stevens dissent. In the part Ginsburg did join, Souter argued that the UGA plan "is closer to what *Grutter* approves than to what *Bakke* condemns." In explaining this viewpoint, he stated:

Subject to one qualification...[in the]...selection index system, all of the characteristics that the college thinks relevant to student diversity for every one of the student places to be filled fits Justice Powell's description of a constitutionally acceptable program; one that considers "all pertinent ele-

ments of diversity in light of the particular qualifications of each applicant” and places each element “on the same footing for consideration, although not necessarily according them the same weight”.... In the Court’s own words, “each characteristic of a particular applicant [is] considered in assessing the applicant’s entire application”.... An unsuccessful nonminority applicant cannot complain that he was rejected “simply because he was not of the right color;” an applicant who is rejected because “his combined qualifications...did not outweigh those of the other applicant” has been given an opportunity to compete with all other applicants.

Souter’s “one qualification” is that “membership in an underrepresented minority is given a weight of 20 points on a 150-point scale.” But even here, he suggested “the assignment of specific points does not set race apart from all other weighted considerations,” since “nonminority students may receive 20 points in the miscellaneous category for a variety of other reasons.” Also, Souter emphasized that according to Justice Powell, it is not necessary that each element of a plan be accorded the “same weight.”

Finally, Justice Ginsburg (for Souter) wrote separately, making two additional arguments on why the UGA plan is constitutional. In the first argument, joined also by Breyer (see above), Ginsburg argued that policies that *exclude* minorities require strict scrutiny, whereas policies that *include* minorities require less scrutiny. Second, Ginsburg reiterated her belief from *Grutter* that there are still compelling *remedial* interests for which the undergraduate plan is narrowly tailored.

Conclusions

I see two reasons why *Costa* is important. First, it closes the debate on direct versus indirect evidence started by the Supreme Court’s interpretations of *McDonnell Douglas v. Green* (1973), in *St. Mary’s v. Hicks* (1993), and *Reeves v. Sanderson Plumbing* (2000).³ In *Green*, Justice Powell gave equal weight to direct and indirect evidence in proving pretext. It appeared that direct evidence was accorded the greater weight in *Hicks*, a false impression corrected in *Reeves*. So now, the weight accorded to indirect evidence equals the weight accorded to direct evidence in any disparate treatment claim. This leads to my second point. As in mixed-motive cases before *Costa*, lower courts invariably required direct evidence to trigger *sexual harassment* claims. *Costa* implies that indirect evidence of harassment is sufficient here as well. Catharina Costa did claim she was sexually harassed, but the judge did not submit this question to the jury. What if a case like *Costa* emerges with stronger indirect evidence of harassment, enough so that the question is submitted to the jury? A jury could conclude (a) sex was a motivating factor,

³ The implication of *Reeves* for indirect evidence was discussed in detail in this column in the October 2002 issue of *TIP*.

that (b) rose to the level of sexual harassment, but (c) did not motivate the challenged selection decision. As in *Costa*, the plaintiff could get declarative and injunctive relief, and legal fees, but the defendant could escape liability for backpay or promotion. However, consistent with the run of sexual harassment cases, the plaintiff could be entitled to compensatory and punitive damages based on sexual harassment *alone*.

If you read (or re-read) what I wrote in the April 2003 column, you will know why I am neither shocked nor overwhelmed that the Supreme Court affirmed *Bakke*, supported the law school plan, but frowned on the UGA plan. No need to comment any further there. However, I was surprised and overwhelmed by the deference to Justice Powell. Clearly, the majority of five deferred to Powell, as did Kennedy. It may be added that Rehnquist implied confirmation, Scalia refused to share his feelings, leaving one lone doubting Thomas. I would add only that since the April 2003 column, I was told by more than one attorney that O'Connor would support Powell if for no other reason than she considered him to be her mentor.

Here's another thing. Beginning 2 weeks or so before the *Grutter* and *Gratz* rulings, there were reports in the news media that (a) both *Grutter* and *Gratz* were likely losers because of the fragmentation in *Bakke*, (b) the University of Michigan should have gone with remedial interests, *not* diversity, and (c) many colleges and universities have begun dismantling their diversity programs. Indeed, one of these was in a page-one spread in the *Wall Street Journal*.⁴

Also, I sampled some opinions from university folks, and one of them raised an interesting point. It is plausible for a law school with 3,000 to 5,000 applicants to scrutinize all or most of the applicants. However, it is implausible for an undergraduate program with 30,000 to 70,000 applications to do likewise.

Finally, as SIOP members, our strongest interest is business and industry. So what do *Grutter* and *Gratz* mean for us (i.e., why have you spent four of the last five columns on this beast)? One of the briefs cited by O'Connor was submitted by "65 Leading American Businesses"⁵ on why diversity is required to successfully compete within our own economy, and to successfully compete in a global economy. Therefore, I believe Justice Scalia is correct in his assumption that diversity lawsuits will now proliferate not only in higher education, but in business and industry as well.

⁴ I read the *Wall Street Journal* articles several times and put it in my save rack. But my son used it as dropping paper for the family dog. So if anyone has it, or subscribes to *Wall Street Journal* online, please feed me the exact date so I can cite it correctly as "unfinished business" in a future column.

⁵ Another influential brief cited by O'Connor (but not cited in my July 2003 column) was by General Becton on why diversity is important for the military.

Case Law Citations

Note: To locate the *Grutter*, *Gratz*, & *Costa* rulings: (a) go to www.findlaw.com, (b) click on “US Laws: Cases & Codes,” (c) click on “US Supreme Court–Opinions & Website” and (d) click on “2003 Cases.”

Hopwood v. Texas (CA5 1996) 78F.3d 932.

Johnson v. Board of Regents of Univ. of Georgia (CA11 2001) 263 F.3d 1234.

Marks v. United States (1977) 430 US 188.

McDonnell Douglas Corp. v. Green (1973) 411 US 792.

Price Waterhouse v. Hopkins (1989) 490 US 228.

Reeves v. Sanderson Plumbing (2000) 530 US 133.

Regents of Univ. of California v. Bakke (1978) 438 US 265.

St. Mary’s Honor Center v. Hicks (1993) 509 US 502.