Affirmative Action in the United States

Grutter v Bollinger 123 S Ct 2325 (2003)

The 5-4 decision of the Supreme Court in Grutter v Bollinger confirmed the constitutionality of some forms of affirmative action in the United States, although there are indications that this may change in the future.

For twenty-five years Regents of the University of California v Bakke has been the first point of reference in American discussions of the constitutionality of affirmative action. The Supreme Court has finally returned to the issue in Bakke: whether universities can consider race and ethnicity when granting admissions. Although the decisions in both cases are confined to public universities, it is widely felt that Grutter’s impact will extend, as did Bakke’s, to all public race-conscious recruitment programmes and even to similar private programmes.

The petitioner, Barbara Grutter, applied for admission to the prestigious Law School at the University of Michigan, Ann Arbor. She was eventually refused a place. The admissions programme involved a policy of ensuring a ‘critical mass’ of minority students. Grutter sued the Law School and the University claiming a breach of her rights under the Equal Protection Clause of the Fourteenth Amendment and under various statutory provisions which provided coextensive protection for that Clause. The Clause reads:

No State shall … deny to any person within its jurisdiction the equal protection of the laws.

Notwithstanding its wording, the Clause, in conjunction with the Due Process Clause of the Fifth Amendment, is now regarded as imposing the same obligations on federal, state and local authorities.

As is typical with American constitutional law, some outline of curial jargon is necessary before Grutter can be appreciated. Governmental distinctions based on race or ethnicity do not automatically contravene the Equal Protection Clause. They, along with distinctions based on religion, are considered inherently suspect and cause the courts to apply strict scrutiny to the distinction at issue. To pass strict scrutiny, the government must first indicate a compelling governmental interest, and secondly demonstrate that the measure in question is narrowly tailored to advance that interest. It makes no difference that the racial distinction

1 123 S Ct 2325 (2003) ("Grutter").
2 438 US 265 (1978) ("Bakke").
3 Hereafter the “Clause”.
in question is seen as "benign" rather than "malign";\(^5\) although liberal justices have often advocated a lower standard for "benign" distinctions.\(^6\) By comparison, quasi-suspect distinctions based on gender or legitimacy attracts a more relaxed intermediate level of scrutiny (a non-compelling government interest will suffice), while the judicial test for the constitutionality of all other types of distinction is only a rational basis test.

\textit{Bakke} was the obvious applicable authority for considering equal protection issues in university admission cases. The decision of Justice Powell is regarded as controlling because the other justices split into two blocks of four. The thrust of his argument follows.

Universities cannot have a compelling interest in remedying the effects of past discrimination because public authorities other than universities are better able to address that interest. Nevertheless, universities do have a compelling interest in attaining a diverse student body. However, the admissions programme at issue was not narrowly tailored because it involved two separate programmes; non-minority students could not compete for sixteen seats set aside for the special admissions programme. What is permissible is for a university to consider race as one of many factors of diversity that an applicant can bring to a university. Under such a scheme:\(^7\)

The applicant who loses out on the last available seat to another candidate receiving a 'plus' in the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right colour or had the wrong surname. It would mean only that his combined qualifications, which may include similar nonobjective factors, did not outweigh those of the other applicant. His qualification would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Therefore, the admissions programme in \textit{Bakke} was unconstitutional but the University was not completely barred from considering the race of applicants.

The petitioner in \textit{Grutter} argued that \textit{Bakke} was wrong in allowing universities to consider race. In the alternative, she argued that the respondent's programme violated the \textit{Bakke} standards.

Justice O'Connor wrote the opinion of the Court. She stated the first issue was whether obtaining 'the educational benefits that flow from a diverse student body' constituted a compelling state interest. The Court began by deferring to the judgment of the respondents and their amici that diversity is essential to their educational missions. The Court continued:\(^8\)

\footnotesize{\(^5\) \textit{Bakke}, supra note 2, 289-291 (1978); \textit{Adarand Contractors v Pena}, supra note 4, 213-227.  
\(^6\) \textit{Bakke}, supra note 2, 355-362 per Brennan, White, Marshall, and Blackman JJ (concurring in part and dissenting in part); \textit{Adarand Contractors v Pena}, supra note 4, 243-253 per Stevens J (dissenting).  
\(^7\) \textit{Bakke}, supra note 2 at 318.  
\(^8\) 123 S Ct 2325, 2339 (2003) [Internal citations omitted].}
As part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse” the Law School seeks to “enrol a ‘critical mass’ of minority students.” The Law School’s interest is not simply “to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.” That would amount to an outright racial balancing, which is patently unconstitutional (“Racial balance is not to be achieved for its own sake”). Rather, the Law School’s concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

The respondents viewed a “critical mass” as a meaningful representation sufficient to prevent the isolation of minority students.

The benefits of diversity cited by the court were cross-cultural understanding, breaking down racial stereotypes, and livelier and more interesting classroom discussion. The respondent’s amici emphasized that the benefits were not theoretical but real. Business and military leaders stressed the importance of employing individuals who, in addition to being well qualified, reflected a variety of backgrounds. The Court agreed that “it requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.” Given the importance of education in imparting civic responsibility and training leaders, the Court found that the respondents had demonstrated a compelling interest.

On the issue of narrow tailoring, the Court cited Justice Powell’s view that a University can only consider race or ethnicity as a ‘plus’ and must not insulate individuals from comparison with all other applicants; “individualized consideration demands that race be used in a flexible, non-mechanical way.” Quotas or separate admissions programmes are thus unconstitutional.

The fact that the Law School’s programme was not labelled a quota was not decisive. Strict scrutiny required that the Court examine the programme to see if it operated as a de facto quota system. Using the definition of ‘quota’ as “a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups” the Court concluded that paying attention to the numbers of minority students to be admitted did not transform the supposedly flexible admissions programme into a quota system. The Court found that the program adequately allowed for non-racial aspects of diversity to be considered, and consequently there was sufficient individualised consideration for the narrow tailoring requirement to be satisfied. Such individualised consideration meant “the Law School’s race-conscious admissions program does not unduly harm non-minority applicants.”

However, the Court went on to state that a “core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination

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9 Ibid 2340.
10 Ibid 2342.
12 Ibid 2346.
based on race”. Thus, all race-conscious programmes must have a logical end point. The Court accepted the Law School’s anticipation that a time would come when race would not be used in admission. The Court stated: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

The Law School’s programme was thus upheld. Because the respondents only chose to justify their policy on the grounds of diversity, the Court did not mention when, if ever, remedying either the effects of past state-sanctioned discrimination or ongoing racial inequality would constitute a compelling interest.

Chief Justice Rehnquist authored the leading dissenting opinion. He examined the respondent’s admission patterns of recent years and concluded:

[T]he Law School has managed its admissions program, not to achieve a ‘critical mass’, but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls ‘patently unconstitutional’.

By contrast, Justice O’Connor, writing for the Court, had adopted a different approach of simply looking at the admissions process to see if it involved genuine individualised consideration. The two justices simply looked at different things in apply strict scrutiny.

Chief Justice Rehnquist guardedly chose to base his dissenting opinion on a rejection of the Court’s opinion on limited grounds. He did not address whether the diversity rationale can constitute a compelling interest. Justice Kennedy by contrast explicitly accepted the Bakke precedent, but still condemned the Court’s application of strict scrutiny. He said the Court accepted the respondents’ arguments “in a review nothing short of perfunctory”. He argued that “the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas.” Of particular concern to Kennedy J was the narrow fluctuation in the percentages of minority applicants admitted over recent years.

Justices Scalia and Thomas also dissented, conforming to their previously articulated position that the Constitution abhors all classifications based on race. Justice Thomas was also concerned that the admissions programme was conditioned by the Law School’s desire to retain its status as an elite institution rather than by genuine concerns for diversity.

14 Ibid 2347.
15 Ibid 2369.
16 Ibid 2371.
17 Ibid.
A companion case delivered on the same day, *Gratz v Bollinger*\(^{19}\) applied *Grutter* to an undergraduate admissions programme of the same University. The programme differed from that in *Grutter*, involving a points system in which applicants were given twenty points by virtue of their being members of an underrepresented racial or ethnic minority. This was about one fifth the points usually required to gain admission. Chief Justice Rehnquist, writing for the majority of six, concluded that the narrow tailoring requirement was not satisfied and declared the programme unconstitutional. The automatic points-allocation was not flexible enough to allow for individualised consideration. The points system could still operate to vary the number of minority applicants admitted, but was nevertheless considered too close to a fixed quota. *Gratz* makes clear that universities cannot ascribe a preordained value to race. Justices Souter and Ginsburg dissented, stressing that because the automatic twenty point allocation could be overcome by other factors, there was not an impermissible racial quota. Souter and Ginsbury JJ also approved the clarity and openness of the University’s consideration of race, and still championed the view that benign racial distinctions should be treated more leniently by the courts than malignant distinctions. Justice Stevens dissented on issues of standing.

Consequently, the constitutionality of admissions programmes is currently determined by the fine line between the programmes at issue in *Gratz* and *Grutter*. The key determinants of unconstitutionality will be whether a race-conscious scheme operates so as to set aside a fixed percentage of places for a minority group, and whether minority candidates receive an automatic advantage over non-minority candidates. If the reviewing court adopts O’Connor J’s approach, the optimal approach for a university is to demonstrate a process that maximises individualised consideration. But the Kennedy/Rehnquist perspective seems to indicate that the most important consideration for a university is to avoid consistency in its approaches to minority admissions. However, because even O’Connor J’s approach shows the judiciary will look closely to seek whether a programme genuinely gives individualised consideration to applicants, the case was interpreted by some as restricting the ambit of affirmative action.

The deduction seems injudicious once it is acceptable that the Court’s deference to a Law School’s educational goals make strict scrutiny something of a misnomer. The Court presumed the respondents had acted in good faith when emphasising the importance of diversity; surely this does not represent the highest level of judicial review that strict scrutiny should entail. Both the compelling interest and the narrow tailoring requirements seemed compromised. If a university can state the importance of diversity without challenge, then the judiciary can hardly then find that the interest is not compelling. Similarly, if a university stresses the fundamental importance of diversity, the judiciary will presumably accept a wide variety of actions as narrowly tailored to that interest.

\(^{19}\) 123 S Ct 2411 (2003).
The main problem with *Grutter* concerns the Court’s view that a fixed quota system breaches the Equal Protection Clause, whereas the use of a critical mass standard does not. Justice Powell’s diversity rationale in *Bakke* was a deliberate distancing from quota systems. But by linking diversity to attaining a critical mass, the Court seems to have come full circle. If a university insists on developing a critical mass of minority students, what is this other than a quota with ill-defined boundaries? Just as seats were set aside for minorities in the *Bakke* program, the use of a critical mass standard will mean that some seats will not be contested by non-minorities. The only difference is that the number of seats in the *Bakke* programme was specified, whereas in the *Grutter* programme, it was left uncertain. This indefiniteness may operate to prevent blatant instances of poorly qualified candidates being admitted on the grounds of race; but if race was not meant to compromise other standards of merit, there would be no need to consider it. Thus, the practice that the Court condones does not seem to be a different kind of practice from a fixed quota system. Admission decisions under a critical mass standard still depend on race, although this may not be as decisive a factor as under an unambiguous quota.

With a hard-and-fast quota, one can at least establish exactly how many successful applicants benefit from race-conscious policies. Similarly, the *Gratz* programme specifically identified how influential the race factor was. The Court’s rejection of the *Gratz* programme sends a message that subjective assessment of diversity is preferable. This may defeat the purpose of limiting the use of race to the Court’s specification. Undisclosed views of the desirability of structuring universities along racial lines may prevail.

Given those problems, it is hard to read O’Connor J’s judgment without questioning the conclusion that the programme does not amount to unequal treatment on grounds of race. Whatever justification there is for doing so, under the *Grutter* programme, race is assessed as an aspect of an appellant’s merit. This has been allowed to happen because the Supreme Court’s strict scrutiny approach, unlike the usual trend in New Zealand rights jurisprudence, does not explicitly involve assessing the extent of the right in question and balancing it against the countervailing governmental interest. *Grutter* shows that there is nothing in “strict scrutiny” that actually prevents unambiguous racial discrimination; all that is required is a compelling interest that is narrowly tailored so as to avoid unnecessary discrimination.

If the individual rights of the petitioner were at issue, then courts must test every aspect of the relevant governmental interests against the importance of equal protection in order for it to be an effective constitutional guarantee. Even if attaining diversity is as important as the University claimed, the Court should have gone further and articulated reasons why this permitted a deviation from

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equal protection. The lesson for the New Zealand courts is that the adoption of catch phrases like ‘strict scrutiny’ in rights jurisprudence has the potential to cause judicial reasoning to veer from the actual question of the extent of individual rights.

*Grutter*, like *Bakke*, shows the Court purporting to explain away a problem by saying that there is equal protection even when race-conscious policies operate. The programmes that they condone can be reduced to the same essential attributes as the programmes that they condemn. Ultimately, it seems a truism that race-conscious policies treat people unequally on the grounds of race.

In *Grutter* the Court seemed aware of this problem when it concluded that the programme did not ‘unduly harm non-minority applicants’.

Although ‘unduly’ is often used as a mere flourish, its use seems to indicate that the Court views the *Grutter* programme as an acceptable restriction on the Equal Protection Clause.

This unequal treatment may well be justified, but it is improper for judges to deem it not to be unequal treatment. One may of course sympathize with the Court, because the alternative approach is a straight moral argument over when it is justifiable to treat people unequally on the grounds of race. This argument becomes even more problematic when the rationale for the limitation on equal protection is not remedying past discrimination but achieving diversity. This means that the deviation from unequal protection is not offset against some obvious harm. Such an argument is hardly of a judicial character. Thus it seems safer to prefer the New Zealand situation where issues of affirmative action are largely placed outside of judges’ hands.

The obvious benefit from *Grutter* is that lower courts now have a much clearer authority that *Bakke*, there having previously been uncertainty as to whether Justice Powell’s diversity rationale was binding. But neither *Grutter*, nor *Gratz*, nor even *Bakke* give any substantial indication as to how much reliance can be placed on race during an individualised consideration of an applicant. *Grutter* also gives little indication of when public authorities can use race-conscious measures for reasons other than educational diversity.

*Grutter* is best understood as confirming the constitutionality of affirmative action while slightly altering its ambit. What will certainly change is the jargon; the “meaningful individualised review” of race is likely to replace “single admission track” as the paradigmatic example of what the Equal Protection Clause allows; and ‘plus factors’ will likely be replaced by talk of a ‘critical mass’ in future cases. Justice Thomas branded this last appellation a “faddish slogan of the cognoscenti”. He certainly has a point in decrying how these buzz-words dominate Supreme Court jurisprudence, although one does get the feeling that “faddish slogan of the cognoscenti” is itself doomed to become a faddish slogan of the cognoscenti.

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21 Supra note 8, 2346.
22 Ibid 2350.
Justice Thomas's condemnation derives from his belief that the ambit of the Equal Protection Clause is determined by a race-blind principle. Proponents of affirmative action also base their arguments on principles underlying the Clause. They argue that the principle or racial equality means that all governments have a duty to eliminate socio-economic inequality between races and to actively champion the interests of vulnerable minorities.

The Supreme Court's continuing insistence that all racial classifications are subject to the highest possible standard of review suggests that it is strongly in favour of the race-blind principle. However, as Bakke and Grutter show, this principle is not all-persuasive. The reference to the limited duration of the programme in Grutter links affirmative action to addressing the preconditions for race-blind equality, and says that achieving these preconditions is itself an aspect of equality. But the actual reasons for infringing the race-blind principle in Grutter are not explicitly linked to addressing socio-economic inequality. Instead, the infringements are justified by the importance of diversity in education.

Perhaps this limitation on the race-blind principle is preferable to limitations directly addressing socio-economic inequality, which raised a vast array of difficulties, the most troubling being the ability of the judiciary to decide what constitutes a minority and what minorities deserve special treatment. Nevertheless, the effect is what the proponents of affirmative action wanted (they did after all, welcome Grutter) because it is now legitimate to build and sustain a critical mass of minorities.

This is not to say that the Court adopted an unpopular rationale. A record 107 amici briefs were filed in Grutter, and those in support of the respondents largely championed the diversity rationale rather than the need to address inequality.

Aside from the rather cryptic expectation that race-conscious policies will be unnecessary in twenty five years, there are two other reasons why the future of affirmative action is decidedly uncertain.

First, several states (including Florida and California) have already banned their universities from considering race at all, thus preventing Grutter from having any direct impact.

The second reason concerns the composition of the Supreme Court. A prospective federal judge's view on the constitutionality of affirmative action is an important issue when vacancies are filled, although it rates behind abortion and the exclusion of illegally obtained evidence as a litmus test of constitutional philosophy. President Bush is certainly more likely than a Democratic President to appoint an ardent opponent of affirmative action in the mould of Scalia and Thomas JJ.

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24 Supra note 8, 2346.
Some thought that O'Connor J's opinion was a valedictory, but she defied predictions by not resigning at the end of the Court's term. If we take Kennedy J as a supporter and Rehnquist CJ as an opponent of affirmative action, there would need to be a switch of two votes to prohibit affirmative action altogether. The odds seem to be against this happening in the next few years: the Justices continue to show no sign of resigning; Rehnquist CJ is tipped to be among the first of the current Court to retire; Democratic Congressmen are treating judicial appointments as their area of most active hostility to the Bush administration; and Bush himself could conceivably backtrack from his race-blind position (as he did by welcoming the Grutter decision) and appoint a pro-affirmative action justice as part of his policy of courting the decisive Hispanic vote.

Nevertheless, the future of constitutionality of affirmative action may be decided by the next few Supreme Court nominations. These are likely to be hotly contested, considering how Grutter and Lawrence v Texas, a case decided in the same week extending constitutional protection to homosexual sex between two consenting adults, have brought the Supreme Court back to the centre of the American cultural wars.

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The Demise of Consideration for Contract Variations

Antons Trawling Co Ltd v Smith [2003] 2 NZLR 23 (CA)

Introduction

In the last issue of this journal the present author argued that consideration should still be required for the variation of contracts. This Court of Appeal decision confirms that the New Zealand courts will follow the lead set by the controversial English case Williams v Roffey Brothers & Nicholls (Contractors) Ltd in watering down the traditional requirement of consideration in contract variation cases. The New Zealand Court of Appeal, in responding to academic criticism of that decision, in Antons Trawling Co Ltd v Smith actually go further and purport to do away with the requirement of consideration altogether. The decision is also noteworthy for its more general approach to the function of consideration. If this approach is to be applied more widely, then it could have much broader consequences for contract law. It is submitted that the decision is ill-considered and inconsistent with traditional contract doctrine.

Background Law

Consideration is one of the elements required for the formation of a legally enforceable contract. Consideration will normally be found in either the conferment of a benefit on the other party or the suffering of a detriment. To be sufficient in law it must be of some economic value and be something that is not already due. As consideration is required at the time of formation, which in the case of bilateral contracts is before performance is due, it usually takes the form of an exchange of promises each of which is valuable as it entails the assumption of legal obligations. The courts have dealt with variations of contract by applying formation principles, and have therefore required that consideration again be provided by both parties before a variation will be enforced. The non-enforcement of variations unsupported by consideration is expressed in two legal rules: the pre-existing duty rule and the part payment of a debt rule.

The pre-existing duty rule holds that a repeated promise to do something that you are already contractually bound to do will not amount to consideration for the

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3 [2003] 2 NZLR 23 (CA) (“Antons Trawling”).
4 For a more detailed discussion of the background law see Ulyatt, supra note 1, 884-889.
purpose of rendering a variation enforceable. The traditional authority for this proposition is Stilk v Myrick, which involved a sea captain's promise of extra wages to non-deserting crew. A related rule is the part payment of a debt rule which provides that payment of part of a sum owed will not satisfy a whole debt unless accompanied by an extra chattel. The traditional authorities for this proposition are Pinnel's Case and Foakes v Beer. While the two rules developed separately, they can be considered to express a broader rule that a gratuitous offer to reduce or increase one party's obligations will be unenforceable for want of consideration.

These rules were long considered problematic in variation cases because there often seemed to be factual benefits that the doctrine of consideration did not recognize. The decision in Williams v Roffey gave legal effect to those concerns. The English Court of Appeal required a much lower standard of only "factual" or "practical" benefit to constitute consideration despite the traditional view that such benefits are worthless in law. The case involved a promise of extra payment by a head-contractor to a carpenter sub-contractor who had become unable or unwilling to finish its carpentry work, in return for timely completion of the required work. In enforcing the promise, the English Court of Appeal asserted that it was not overruling Stilk v Myrick, but rather subjecting it to a process of refinement. This assertion has been criticised elsewhere. These criticisms need not be repeated here except to say that it is undeniable that Williams v Roffey greatly undermined the pre-existing duty rule.

The Facts

The fisheries legislation provided for permanent property rights in the fisheries resource. For the purposes of this note a simplified explanation of the regime that the legislation created will suffice. The legislation allows for the holding of quota defined as a percentage of the total allowable commercial catch ("TACC") in each quota management area. Effectively, the TACC will be the maximum amount of fish that can be caught on an ongoing basis without permanently depleting the resource. When the TACC is increased in respect of a species of fish in an area, a quota holder's entitlement automatically increases. However, a period of research would usually be required in order to prove that sufficient quantities of fish exist and that fishing is sustainable before more than a nominal TACC would be set, and this could involve substantial effort.

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6 (1809) 2 Camp 317; 170 ER 1168.
7 (1602) 5 Co Rep 117a; 77ER 237.
8 (1884) 9 AC 605.
9 See supra note 2, 16.
In 1989/90 the Antons group of companies ("Antons") had acquired 126 tonnes of Orange Roughy quota for an area known as Area 1. Antons had previously participated in a MAF research programme to evaluate the potential for commercial fisheries in the area. Between 1986 and 1993 a total of just 27 tonnes of Orange Roughy had been caught. The plaintiff Mr Smith ("Smith"), an experienced fisherman, joined Antons in April 1994 as the skipper of one of its vessels. Smith fished for Antons under the Auckland Share of Catch Agreement ("SOC Agreement"), which provided that the crew would be paid a percentage of the value of each catch (after specified cost deductions). Fishermen working under a SOC agreement would tend to earn more by fishing established areas as compared with unproven fisheries. Thus, the SOC Agreement also provided for the agreement of fixed daily rates to be paid when exploratory fishing is undertaken. Prior to the first voyage Smith asked the Managing Director of Antons about daily rates paid while undertaking exploratory fishing, and was told that it was not Antons’s policy to pay daily rates. Thus, the percentage formula always applied. The policy also provided that, inter alia, the areas to be fished would be at the direction of Antons.

When Smith joined in April 1994 he enjoyed immediate and unheralded success in Area 1. After a catch of 96 tonnes at a site known as the Mercury Knoll, Smith met with the Managing Director of Antons on June 8 to discuss the involvement of MAF in future fishing of Area 1 in order to carry out the research needed to have the TACC, and thereby Antons’s quota, increased. During the discussions Antons told Smith that if he undertook exploratory fishing and proved a commercial fishery then Antons would transfer to him 10% of any additional quota they obtained as a result. This agreement was the subject of the proceedings.

Smith then began to undertake the exploratory fishing programme, and results through to June 1995 were very promising. On 1 October 1995 an unforeseeable change in MAF policy occurred involving the declaration of a major increase in TACC. This increase was not the result of intense study and sustained catch histories but rather was attributable to a special statutory arrangement known as the Adaptive Management Programme ("AMP"). The TACC for Orange Roughy in Area 1 was increased from 190 tonnes to 1190 tonnes. Antons, as the owner of approximately 66% of Area 1 quota, received 663 tonnes of that increase. The purpose of the AMP was to allow commercial fishing to be carried out subject to strict research requirements in areas where it had been shown that there were fish but where a commercial fishery had not yet been conclusively established.

Smith continued to fish in accordance with the increased quota until 25 August 1996 when he left Antons’s employment. In 1995/96 and 1996/97 close to the entire quota was caught in Area 1 but catches thereafter dramatically declined. It was realised that the 1000 tonne allowance for the Mercury Knoll area was wholly unrealistic. This eventually led to a 30 tonne catch limit being imposed for the Mercury Knoll area. However, as a result of the AMP the rest of
Area 1 was more thoroughly explored and commercial fisheries were established. The TACC for Area 1 was increased to 1400 tonnes in 2001/02. Smith claimed to be entitled to 10% of the approximately 800 tonne overall increase in Antons’s Area 1 quota.

**The Decision in the High Court**

At trial, Rodney Hansen J found the existence of a contract upon the terms that if Smith proved a commercial fishery then he would receive 10% of any additional quota transferred to Antons. The proving of a commercial fishery was treated as a threshold issue, which once satisfied entitled Smith to 10% of all additional quota allocated to Antons. In this sense no causal link was required between the proving of the commercial fishery and the transferring of quota. Indeed Rodney Hansen J seemed to hold that the terms of the contract indicated that the granting of quota was to be the “key determinant” of whether a commercial fishery had been proved. Thus, the issuing of additional quota was expressly treated as prima facie evidence that a commercial fishery existed. Finally, His Honour rejected the argument that quota granted on the condition of compliance with an AMP does not amount to a commercial fishery. Having concluded that a commercial fishery now existed, Rodney Hansen J held that it had been proved by Smith because his efforts had led to a more extensive exploration of Area 1. Accordingly, Smith was held to be entitled to 80 tonnes. Notwithstanding the Court of Appeal’s later claim to be in agreement with the High Court on this point, absence of consideration did not arise as an issue at any point.

**The Decision in the Court of Appeal**

In its judgment (delivered by Baragwanath J) the Court of Appeal set out three “critical” issues for determination:

1. Whether the oral promise required proof of a commercial fishery or merely the awarding of quota to Antons;
2. Whether Smith had actually performed such that he was entitled to benefits;
3. Whether Smith’s claim was defeated by the absence of consideration.

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11 Smith v Antons Trawling Co Ltd (Unreported, 12 February 2002, High Court, Auckland Registry, CL40/98, Hansen J.
12 Ibid para [74].
13 Ibid.
14 Ibid para [81].
15 Ibid paras [86] and [90].
16 Ibid para [98].
17 Supra note 3, 25.
18 The other members of the court were Anderson and Paterson JJ.
19 Supra note 3, 26.
The Court materially departed from the High Court’s reasoning in their answers to both of the first two issues.

The Court of Appeal held that the contract, properly construed, would reward Smith upon the happening of two events: (1) Smith proving a commercial fishery; and (2) Antons thereby securing additional quota. The Court expressly treated the securing of additional quota as a second condition precedent whereas the High Court had only required the proving of a commercial fishery. Furthermore the Court of Appeal, through the use of the word “thereby” added a causation component: Antons would need to secure additional quota as a result of Smith proving a fishery before he would receive a reward (limited to that quota causally attributable to his efforts).

When considering the extent to which Smith had fulfilled these conditions the Court made a number of significant findings of fact. The Court held that it was the common expectation of the parties that for a commercial fishery to be established it needed to be demonstrated to MAF through the results of an exploratory research programme that catches of commercial quantities were sustainable without depleting the resource. In contrast to the High Court, this led the Court to hold that quota granted in accordance with an AMP was not the result of a proven commercial fishery. The purpose of the programme was held to be to “allow exploratory fishing” not to recognise a proven fishery. This different finding would seem to stem from the Court having the benefit of additional submissions as to the nature of the AMP.

As a result of the more onerous contractual requirements and the finding that only a resource demonstrated to be sustainable to MAF amounted to a proven commercial fishery, the Court found that the extent to which Smith’s efforts satisfied the contract was greatly reduced. Only the quota that pertained to the Mercury / Colville Box, which in 2001 had been reduced to 30 tonnes, was held to be attributable to Smith’s efforts. Accordingly Smith’s entitlement was reduced from approximately 80 tonnes of quota to approximately two tonnes. While the Court’s treatment of the first two issues differed from that of the High Court, it can be described as fairly unexceptional. It is the Court’s treatment of the third issue that is worthy of further comment, and which will be the subject of the remainder of this note.

Before giving the Court’s decision in relation to the third issue, whether Smith’s (reduced) entitlement was defeated by the lack of consideration, the Court set out the background law and briefly considered academic criticism, primarily that of Professor Coote, of the Williams v Roffey “practical benefit” approach.

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20 Ibid 42.
21 Ibid 34-35.
22 Ibid 39.
23 Ibid 42-43.
24 Although it was clearly very significant for the plaintiff.
26 Supra note 3, 45.
Professor Coote] argues with force that mere performance of a duty already owed to the promisee under a contract cannot constitute consideration and that the only principled way to such a result is to decide that consideration should not be necessary for the variation of contract.

The Court then concluded, in the most significant passage of the judgment, that:

We are satisfied that Still v Myrick can no longer be taken to control such cases as Roffey Bros, Attorney-General for England and Wales and the present case where there is no element of duress or other policy factor suggesting that an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected. On the contrary, a result that deprived Mr Smith of the benefit of what Antons promised he should receive would be inconsistent with the essential principle underlying the law of contract, that the law will seek to give effect to freely accepted reciprocal undertakings. The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement. Whichever option is adopted, whether that of Roffey Bros or that suggested by Professor Coote and other authorities, the result is in this case the same.

This passage contains a number of propositions and it is important to break them down to understand the precise effect of this judgment.

First, the Court brings to an end any doubt caused by the language of Williams v Roffey that Still v Myrick remains good law. Secondly, the Court signals that when deciding whether to uphold a contractual variation it will look for whether the variation was tainted by duress or “other policy factor[s]”. Thirdly, the Court described the “essential principle” underlying contract law as being that the law will give effect to freely accepted reciprocal undertakings and that the doctrine of consideration serves merely an evidential function ensuring that the parties truly intended to be bound. Finally, the Court made it clear that it viewed the practical benefit approach from Williams v Roffey and the abolition of consideration in variation cases as alternative methods of reaching the same result. Each of these propositions merits individual examination.

Comment

The abolition of the pre-existing duty rule

The decision in Antons Trawling to depart from the pre-existing duty rule as stated in Still v Myrick is not altogether surprising. It was foreshadowed in a number of earlier New Zealand decisions. In Newmans Tours Ltd v Ranier

27 Ibid 45-46.
Fisher J treated *Williams v Roffey* as well-settled authority and therefore assumed, without discussion, its application to New Zealand law. Later, in *Machirus Properties Ltd v Power Sports World (1987) Ltd*, the High Court applied *Williams v Roffey* to enforce a settlement of a debt made without fresh consideration. In doing so, *Machirus* dubiously reconciled *Williams v Roffey* with *Re Selectmove* (the subsequent English Court of Appeal decision that refused to apply *Williams v Roffey* to the part payment of a debt line of cases) on the basis that the latter is distinguishable because the absence of a continuing relationship between the parties precluded the existence of any additional benefit. Finally, the Court of Appeal was confronted with the issue for the first time in *Attorney-General for England and Wales v R*, a case governed by English law. In applying *Williams v Roffey*, the Court made a point of commenting that New Zealand law and English law were materially the same in the area. Yet *Antons Trawling* presents the first New Zealand case applying New Zealand law to apply *Williams v Roffey* at the Court of Appeal level.

One difficult aspect of the decision given the important precedent set is that on an initial reading it is not immediately clear why the court treated the agreement as a contract variation, or indeed how lack of consideration was an issue. In this respect it is noteworthy that in the High Court absence of consideration was not mentioned as an issue anywhere in the judgment. Indeed, in that court the relevant agreement was treated not as a contract variation but as a stand alone contract.

So how did the court come to treat the case as involving a contract variation unsupported by consideration? If the oral agreement of 8 June was treated as a variation of the written SOC Agreement alone, then consideration could be found in Smith giving up his right to have a daily rate agreed upon for exploratory fishing under that agreement. However, Antons had already made it clear to Smith that it was not their policy to pay daily rates when the crew undertook exploratory fishing. Rather, the crews were expected to find fish and would be paid their ordinary percentage in accordance with the SOC agreement formula. It seems that the court treated the oral agreement of 8 June 1994 as a variation of the agreement that Smith’s remuneration would always be based solely on the remuneration formula from the SOC agreement, even when undertaking an exploratory fishing programme. As Smith was already bound to undertake an exploratory fishing programme if so directed, on this understanding absence of consideration was very much a live issue. Regardless of whether one treats the variation as unilateral, as the Court did, or bilateral in nature, Smith did not promise to do anything he was not already bound to do nor did he actually do anything that he was not already bound to do.

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29 (1999) 4 NZ Conv C 193,066 (HC) ["Machirus"].
31 [2002] 2 NZLR 91 (CA).
The conclusive abolition of the pre-existing duty rule has a number of consequences. As Professor Coote himself has recognised, a contractual variation is usually treated as a separate discrete contract. The removal of the need for consideration has the effect that agreements to vary a contract will now attract the force of law more readily than normal contracts. It is hard to justify why gratuitous variations, the only variations that offended the pre-existing duty rule, are given the binding force of law when stand alone gratuitous promises are denied contractual force as gifts. Here many will point to the practical benefits that arise out of maintaining a pre-existing relationship, the basis of Williams v Roffey, as the distinguishing factor. Yet this argument is weak as “practical benefit” can usually be equated with “motive”, and all gratuitous promises have some motive.

Perhaps more importantly on a doctrinal level, the rationale for awarding expectation damages after a breach is undermined. The forward-looking contractual remedy, which places the innocent party in the position that he or she would have occupied had the contract been fully performed, differs considerably from the backward-looking compensation remedy the law ordinarily provides to a party who has been wronged. A party can usually argue that in being deprived of the other party’s performance, they have lost something that they purchased and that only expectation damages will compensate them. This is a simple application of the bargain rationale of contract that views consideration as the price paid for the other party’s promise. But in a scenario where the promisor gratuitously increases the benefit the other party is due to receive under a pre-existing contract, and then fails to provide this increased benefit, this rationale will not justify an increased expectation award. The increase is not purchased and so it is difficult to understand how there has been any additional “loss”. This is why it has been argued by some, including the present author, that a reliance based remedy is appropriate in respect of breached variations that were unsupported by consideration. Then, the innocent party receives the expectation damages that they originally purchased, but are also compensated for any additional losses incurred through reliance on the variation. Allowing expectation damages to be realised in respect of gratuitous variations therefore severely undermines the justification for the different contractual remedy.

Additionally, the removal of the requirement of consideration increases the scope for advantage-taking within contractual relationships. Yet the Court’s second proposition suggests that they had this problem in mind.

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33 Chen-Wishart, Practical Benefit, supra note 10, 127.
Preventing advantage-taking

The removal of the requirement of consideration opens the door to potential abuses of contract variations. As a result of this decision, entering into contractual relations with a party transforms that party into the only person that can impose unilateral obligations that the law will recognise. Yet it is unclear why the entering of a contract should have this consequence. This decision will only encourage sharp practices where the original contract is used as a tool for extortion. Indeed it becomes much easier to quote originally a low price, or submit a low tender, only to later increase the price when the other party is dependant on performance. Yet the Court of Appeal seemed to be alert to this consequence and signalled that the test for whether variations will be enforceable will turn upon the absence of duress or other policy factors.

Although the doctrine of consideration was a blunt tool for the purpose, leaving the prevention of advantage-taking to other doctrines raises practical difficulties. The residual policy factors that the Court mentions could presumably be an attempt to include other doctrines similar to duress, such as unconscionable conduct, and perhaps lesser types of illegitimate pressure not amounting to duress. In this respect the Court was careful not to commit itself to the test for economic duress as the sole determinant for when a variation will be given legal effect. This was wise. Leaving such issues to be dealt with through the doctrine of economic duress is inadequate. That doctrine is still developing and is currently unable to satisfactorily discriminate between those cases of illegitimate advantage-taking and mere hard bargaining. The dearth of cases where protests of economic duress have been upheld demonstrate that too few cases satisfy the demanding elements of this doctrine. But it remains to be seen how the Courts will be able to use these “policy factors” to identify those variations which ought not to be enforced. The failures of economic duress suggest that this will not be an easy task.

The “essential principle” and the role of consideration

The Court asserted that failing to hold Antons to their promise would be inconsistent with the essential principle of contract law that parties will be held to freely accepted reciprocal undertakings. The Court’s articulation of the underlying philosophy of contract law itself is uncontroversial, but it is difficult to see why the principle required that Antons be held to their promise. Far from requiring the decision, it seems that the principle does not sit well with the decision. The key word here was “reciprocal”. It is through the doctrine of

consideration that the law ensures that both parties are bringing something to the contractual arrangement. Where consideration is lacking, as here, the undertakings are hardly reciprocal. Smith promised to do nothing more than he was already bound to do. Legally, Antons gained nothing. Thus, it would seem that the underlying principle of contract law doctrine would have required the opposite result.

More controversial than the Court’s flawed application of the “essential principle” however, are the Court’s comments about the nature of the role played by consideration in contract law doctrine. In what appears to be a throwaway line, the Court asserts that consideration serves merely an evidentiary function in establishing that the parties intended to be bound. Yet this bald assertion (not backed up with any authority) is contrary to the received learning that consideration plays a substantive rather than evidential role in contract doctrine.

As Webb has already noted, this reasoning resembles that of Lord Mansfield during his eighteen century attacks on the doctrine of consideration. In Pillans v Van Mierop his Lordship denied that consideration was a substantive requirement for a contract to be legally binding, instead treating it as a means of demonstrating that the parties truly intended to be bound. On this account, if alternative “signals” that the parties intended to be bound were present, such as when the contract had been reduced to writing, then consideration was unnecessary. Yet just a few years later this proposition was soundly rejected. When one opens up any of the leading contract law textbooks the history of the assertion is raised and its swift defeat explained. Consideration does more than merely ensuring that parties have considered the consequences of making their promises legally enforceable and providing evidence of that intention. Consideration is said to serve several functions, including distinguishing between non-gratuitous and gratuitous promises and, as mentioned earlier in this note, justifying the award of expectation damages.

While the Court of Appeal’s reasoning was firmly aimed at variation cases, this assertion has potentially far-reaching consequences in that it could greatly undermine the role of consideration in formation cases. Indeed, it amounts to an additional attack on the doctrine of consideration in that it weakens the general function of consideration. If consideration performs merely an evidential role then it becomes arguable that it should not be a mandatory requirement but rather one that can be dispensed with in cases where the requisite intention is otherwise proved. There are numerous reasons why contracts unsupported by consideration, though clearly intended by the parties, should not be enforced. Thus, this comment can only be described as bold, and unnecessary, for a Court of Appeal sitting as a divisional court. It can only be hoped that it will not be followed.

37 (1756) 3 Burr 1663; 97 ER 1035.
38 Rann v Hughes (1778) 7 T.R. 350n; 4 Bro.P.C. 27; 2 ER 18.
39 For example, Chitty on Contracts vol I (1999), 167.
Practical Benefit vs Abandonment

The judgment treats the abandonment of consideration in variation cases, and the *Williams v Roffey* approach of requiring merely practical benefit, as alternative routes of reaching the same result. In doing so the Court frankly recognised that the effect of *Williams v Roffey* is to wholly overrule *Stilk v Myrick*, an admission that even the judges involved in *Williams v Roffey* were not prepared to make. This frankness is commendable. However, the source of the Court’s reasoning may have been misunderstood. Of the two routes the Court seems to prefer the complete abandonment of consideration, at least partly because of Professor Coote’s criticisms of the practical benefit approach.

Coote suggests that performance cannot amount to consideration for the purposes of creating legal obligations at the time of the exchange of promises because it comes too late. Yet, while Coote was indeed critical of the reasoning in *Williams v Roffey*, it is not entirely clear that he supported the wholesale abandonment of consideration in variation cases. The Court seems to attribute that view to Coote on the basis of a remark in the conclusion of that article:*

Theoretically, it may still be open to a court of final resort in a common law country to decide that consideration should not be necessary for the variation of a contract.... But what it is submitted no court of final resort could do without hopelessly compromising the doctrine of consideration would be to [follow *Williams v Roffey*.]

What I understand Coote to be saying is that the wholesale abandonment of consideration in variation cases would be more desirable than upholding *Williams v Roffey*. His comment is thus comparative in nature. Coote seemed to consider that by treating variation cases separately, less damage would be done to the doctrine of consideration as it applies to formation cases. By no means is it clear that if given the choice in a variation context between reinstating the requirement of *pre-Williams v Roffey* traditional consideration and the wholesale abandonment of consideration, Coote would choose the latter. Indeed in a later note published in the same journal Coote stated that his preference for resolving difficulties in this area of the law would be legislative reform.

Coote seemed to consider that the weakening of the doctrine of consideration in variation cases had occurred and could not be reversed. By doing away with the need for consideration altogether in variation cases, the weakening of the doctrine through the “practical benefit” approach can be prevented from spreading to formation cases. The practical benefit approach is tantamount to the removal of consideration anyway, and the need for concrete rules is clearly much more important for the formation of contracts than it is for variations. So in terms of containing the damage to the doctrine caused by *Williams v Roffey*, there is

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40 Coote, supra note 10, 26.
41 Ibid 28-29.
42 Coote, supra note 32, 129.
much to be said for this approach. However, given the indifferent treatment that
Williams v Roffey received in Re Selectmove and the lack of a definitive House of
Lords statement on the matter, it is perhaps a little premature to abandon the hope
that consideration will be reinstated in variation cases. In any case, the wholesale
abandonment of consideration places the law in a no worse position than under
the practical benefit approach. If formation cases have now been insulated from
that approach then the development should be welcomed.

Conclusion

Antons Trawling unequivocally dispenses with the pre-existing duty rule. All
contract variations will now be enforceable subject only to an enquiry as to the
existence of duress or other policy factors. In adding this enquiry the Court
seems to be alert to the increased potential for advantage taking that their decision
creates. In light of the failings of the doctrine of duress it is unclear how effective
the Court will be in preventing advantage taking. On the whole, this development
is unfortunate. There is much to be said for continuing to require full legal
consideration before variations will be enforced through contract law. In
particular, the rationale for awarding expectation damages in respect of variations
can only be justified by requiring consideration. Variations do sometimes create
additional legal benefits but these could be adequately dealt with through the
introduction of a reliance based remedy.

Yet the decision was not altogether unexpected and if the shift from
consideration as “practical benefit” to no consideration at all in variation cases
protects the doctrine in respect of formation cases, then at least in that respect the
development is positive. More concerning, the Court of Appeal suggests that
consideration plays merely an evidentiary role. While this is clearly inconsistent
with authority, it may lead to the more general erosion of the doctrine. Despite
Professor Coote’s first attempts to insulate the doctrine of consideration in
formation cases, it may yet need protection from this new attack. The doctrine of
consideration is a fundamental aspect of contract law and these attacks ought to
be resisted. It can only be hoped that this trend will be quickly curtailed,
otherwise the future for the doctrine looks bleak.

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