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University Dons and Warrior Chieftains: Two Concepts of Diversity

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* Associate Professor, Fordham University School of Law. A.B., A.M., J.D., Harvard. I thank Martin Flaherty for comments, Andrew Sparkler (Fordham Law '05) for able research assistance, and Fordham Law School for a summer writing grant. My intent has been to write a short, readable essay on one aspect of a complicated social and legal issue. An unfortunate byproduct of brevity is spare citation to the rich and copious existing literature. Errors or omissions are mine alone.

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INTRODUCTION

By deciding in *Grutter v. Bollinger*¹ to “endorse Justice Powell’s view that student body diversity is a compelling government interest that can justify the use of race in university admissions,”² the Supreme Court has ended one debate but invited another. The burning question whether Justice Powell’s opinion in *Regents of the University of California v. Bakke*³ is binding on the point⁴ is now moot. But just how far the diversity rationale can justify race-conscious policies in educational and non-educational contexts is certain to be a focus of future cases and controversy.⁵

This essay proposes a framework for clarifying the diversity rationale in *Grutter*. The Court itself gave the first clue. It is not the mere fact of student body diversity that is the compelling interest, but rather, “obtaining the educational benefits that flow from a diverse student body.”⁶ This formulation, however protean, does suggest a substantive doctrinal test when viewed in conjunction with the *Grutter* Court’s analysis of the compelling interest in student body diversity. Such a “benefits” test would turn on three elements. A compelling state interest exists when the university (1) identifies “the

¹ 123 S. Ct. 2325 (2003).

² *Id.*, at 2337.

³ 438 U.S. 265, 311-12 (1978) (“[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.”).

⁴ *Compare, e.g., Smith v. University of Washington Law School*, 233 F.3d 1188, 1201 (9th Cir. 2000) (“Thus at our level of the judicial system, Justice Powell’s opinion remains the law.”); *Grutter v. Bollinger*, 288 F.3d 732, 741 (6th Cir. 2002) (en banc) (same), *with Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234, 1248 (11th Cir. 2001) (“[T]he fact is inescapable that no five Justices in *Bakke* expressly held that student body diversity is a compelling interest under the Equal Protection Clause.”); *Hopwood v. Texas*, 236 F.3d 256, 274-75 (5th Cir. 2000) (same).

⁵ In light of the Court’s companion holding in *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427-28 (2003), striking down the University of Michigan’s undergraduate admissions policy for lack of individualized inquiry to achieve the compelling interest in diversity, the question of narrow tailoring will also be much contested.

⁶ *Grutter*, 123 S. Ct., at 2338 (internal quotation marks omitted).

educational benefits that [student body] diversity is designed to produce;”⁷ (2) shows that attaining those benefits is “essential to its educational mission;”⁸ and (3) makes a showing that a diverse student body “will, in fact, yield [those] educational benefits.”⁹

The Court professed deference to the university institution in articulating its educational mission of fostering discourse on campus and to its “educational judgment that [student body diversity] is essential to its education mission.”¹⁰ It then gave a laundry list of the educational benefits that flowed from a diverse student body in light of that mission: “cross-racial understanding, . . . break[ing] down racial stereotypes, enabl[ing] students to better understand persons of different races, [and] classroom discussion [that] is livelier, more spirited, and simply more enlightening and interesting.”¹¹ The Court continued by enumerating other “benefits” of student body diversity suggested by *amici* that were “educational” not in the sense of “pedagogical” or pertaining to the educational setting like the prior list of benefits, but in the different but seemingly valid sense of lessons learned at school applied to society and life at large.¹²

The Court’s reasonable recognition that, for purposes of the compelling interest test, the university aims to effect such general societal “benefits” realized beyond the academic setting and that such benefits are in fact produced by student body diversity led it to accept another, more dubious claim for the student-body diversity rationale. It was powerfully influenced in this regard by an *amicus* brief filed by twenty-nine retired

⁷ *Id.*, at 2339.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*, at 2339-40 (internal citations omitted).

¹² “[S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workplace and society, and better prepares them as professionals.” *Id.*, at 2340 (citations omitted).

military officers and civilian leaders of the U.S. armed forces.¹³ The military leaders argued that “based on their decades of experience, a highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security.”¹⁴ The military’s claim was that the military academies and Reserve Officers Training Corps (ROTC) programs at civilian colleges sought diverse student bodies because students will automatically become leaders of the armed forces upon graduation, and a diverse officer corps is essential to national security. The Court agreed that “[i]t requires only a small step from this analysis to conclude that our country’s other most selective institutions must remain both diverse and selective.”¹⁵

The Court thus specified two categories of related but distinct educational benefits arising from student body diversity at our nation’s finest institutions of higher learning. On the one hand, there are benefits to students, the university, and society, arising from the discourse and interactions *all* students will have on a racially diverse academic campus. On the other, there are benefits realized by society once *minority* students are graduated from the few highly selective “gate-keeping” schools that employ race-based admissions policies (only 20 percent of the nation’s colleges and universities)¹⁶ and assume professional positions of leadership in nationally sensitive non-educational

¹³ Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et al., as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, *Gratz v. Bollinger*, Nos. 02-241, 02-516, 2003 WL 1787554 [hereinafter “Military Brief”].

In my pre-legal career as a U.S. naval officer, I served, in 1994 and 1995, on the personal staff of one of the *amici*, Admiral Archie Clemins, who was then Commander, U.S. Seventh Fleet. This essay does not reflect the views of Admiral Clemins.

¹⁴ *Grutter*, 123 S. Ct., at 2340.

¹⁵ *Id.*

¹⁶ See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER*, 15 & n.1 (1998); Daria Witt, Mitchell J. Chang, Kenji Hakuta, *Introduction* to *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES* 9 (Mitchell J. Chang, et al., eds., Stanford University Press (citing regression analysis indicating that “only the top 20 percent of colleges and universities have an admissions policy that employs a significant degree of racial preference”) [hereinafter *COMPELLING INTEREST*]).

institutions like the military officer corps,¹⁷ “major American businesses,”¹⁸ Congress,¹⁹ and the federal judiciary.²⁰

The thesis of this essay is that there is marked variation in the extent to which higher educational institutions seek to, and in fact, confer these two sorts of benefits.²¹ Accordingly, the compelling interest test as formulated in *Grutter* should, by its own terms, take account of this variation in mission and causation, with the logical consequence that student body diversity might not suffice as a compelling government interest in every single higher educational context. Liberal-arts colleges represent the strongest case for the discourse benefits of student body diversity. The selective military academies represent the strongest case for the gate-keeping leadership benefits of student body diversity.

The Court casually assumed that elite civilian colleges likewise stake a persuasive claim to leadership benefits,²² but this is a questionable assumption. It is debatable, first, because unlike military academies and professional schools, selective colleges do not claim that specialized professional training, even in an institutional leadership capacity, is one of their principal educational missions, unlike the exchange of ideas among diverse students which is at the “very core” of their educational mission.²³ Second, in today’s

¹⁷ *Grutter*, 123 S. Ct., at 2340.

¹⁸ *Id.*

¹⁹ *Id.*, at 2341.

²⁰ *Id.*

²¹ *Cf. id.*, at 2349 (Scalia, J., concurring in part, dissenting in part) (“Other lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity. (That issue was not contested in *Grutter* and while the opinion accords a ‘degree of deference to a university’s academic decisions, deference does not imply abandonment or abdication of judicial review.’)”). (internal citations omitted).

²² *Id.*, at 2341.

²³ Brief for Respondents, *Grutter v. Bollinger et al.*, No. 02-241, 2003 WL 402236, at *28-*29 (discussing law school mission) [hereinafter *Grutter* Respondents’ Brief]. See also Brief for Respondents, *Gratz v. Bollinger et al.*, No. 02-516, 2003 WL 402237, at *22-*26 [hereinafter *Gratz* Respondents’ Brief]; Neil L Rudenstine, *Student Diversity and Higher Learning*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE*

America, those who seek leadership in nationally essential institutions must increasingly obtain further training at graduate and professional schools that do seek to provide such tailored training,²⁴ and this necessarily dilutes the causal claim of undergraduate institutions to leadership benefits. Third, with the exception of the officer corps, the individuals and electorates who appoint such leaders have complete discretion in choosing minority and other candidates, including the freedom to disregard whether he or she was admitted and completed an undergraduate program of study at an elite school. This further dilutes the causal claim of elite civilian colleges to leadership diversity benefits. Prestigious colleges may supply a disproportionate share of the nation's leaders, and they may claim that they mold leaders in a broad sense, but correlation is not causation and generalized aspiration is not educational mission.

This leads to an interesting question: if institutional leadership or professional benefits are not central to the mission of elite undergraduate schools, and student body diversity at elite undergraduate schools does not cause these benefits in a meaningful way, *i.e.*, in a way comparable to the gate-keeping military academies and specialized graduate and professional schools, is it still a compelling government interest in light of the many direct and indirect benefits of diverse discourse on campus, which is the core of their mission? The question appears to be settled as a doctrinal matter. The Court, in *Gratz v. Bollinger* relying on *Grutter*, summarily accepted that student body diversity at the University of Michigan's College of Literature, Science, and the Arts, was a

IMPACT OF AFFIRMATIVE ACTION 38-39 (Gary Orfield, ed., 2001) [hereinafter DIVERSITY CHALLENGED]; Part II, *infra* (comparing educational mission statements of highly selective military academies and similarly selective civilian colleges).

²⁴ See BOWEN & BOK, *supra* note 16, at 91; *infra* Part II.

compelling government interest.²⁵ But I am not so sure that this was right, both on the terms of the *Grutter* “benefits” test and as a matter of education policy. The robust exchange of diverse ideas on campus is certainly essential to the elite college’s educational mission. But if, because of the benefits of diverse campus discourse, student body diversity is a compelling state interest for the 20 percent of the nation’s colleges that use affirmative action, then surely it must be so for the 80 percent of colleges that do not. And affirmative action, to the extent it ensures that our most selective colleges, as a class, can enroll the “highly qualified” minority students that they could not have admitted but for race-based admissions programs, would necessarily set back the compelling interest in student body diversity at non-elite colleges as a group. The bottom line is that absent a claim to gate-keeping leadership benefits, the elite colleges’ claim to compelling interest in student body diversity for discourse benefits alone stands on shaky ground.

In the first part of this essay, I describe the discourse benefits of student body diversity. In the second, I explain the contrasting logic of leadership benefits. The third part summarizes how different educational institutions seek to, and in fact, bring about one sort of benefit and/or the other. A brief conclusion follows.

I

What I have called “discourse” benefits are the core “educational benefits” of student body diversity, and they are, unsurprisingly, grounded in “the expansive freedoms

²⁵ See *Gratz*, 123 S. Ct., at 2426-27 (“Petitioners . . . argue that diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means. But for the reasons set forth today in *Grutter v. Bollinger*, the Court has rejected these arguments of petitioners.”) (citations omitted).

of speech and thought associated with the university environment.”²⁶ The premise is that the university is a special First Amendment community, whose fundamental mission is the “robust exchange of ideas.”²⁷ And the university leadership, as the moderator of this community, may exercise within a roomy but reasonable zone of discretion, “the right to select those students who will contribute the most to the ‘robust exchange of ideas.’”²⁸

This is just what the university has done in implementing race-based admissions policies. It has made an “educational judgment”²⁹ that the presence of certain minority students who would not be enrolled but for affirmative action is “essential to its educational mission”³⁰ of promoting discourse on campus. There is evidence that the fact of being a minority affects a person’s life experiences and the conclusions she draws from them.³¹ “[T]he presence of persons who have had such experiences enriches the educational environment, if only because it is human nature to undervalue or fail to see burdens that we haven’t truly experienced ourselves.”³² This sort of sharing occurs not only in the classroom, where a variety of backgrounds will make discussion “livelier, more spirited, and simply more enlightening and interesting,”³³ but through the myriad

²⁶ *Grutter*, 123 S. Ct., at 2339.

²⁷ *Id.*

²⁸ *Bakke*, 438 U.S. at 313 (quoting *Keyishian v. Bd of Regents*, 385 U.S. 589, 603 (1967)). (quoted in *Grutter* 123 S. Ct., at 2339).

²⁹ *Grutter*, 123 S. Ct., at 2339.

³⁰ *Id.*

³¹ *See id.*, at 2341 (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”); *Grutter* Respondents’ Brief, *supra* note 23, at *22-24; *Gratz* Respondents’ Brief, *supra* note 23, at *25 (“Racial and ethnic diversity is educationally important because, notwithstanding decades of progress, there remain significant differences in our lives and perceptions that are undeniably linked to the realities of race.”).

³² *Grutter* Respondents’ Brief, *supra* note 23, at *24. *See also Bakke*, 438 U.S. at 312, n. 48 (“People do not learn very much when they are surrounded by the likes of themselves.”) (comments of the then-president of Princeton University on the benefits of a diverse student body).

³³ *Grutter*, 123 S. Ct., at 2339-40, (citing district court opinion).

informal interactions that take place on campus.³⁴ And in order to ensure that minority perspectives aren't reduced to single voice-in-the-wilderness stereotypes, it is necessary to admit minority groups in sufficient numbers ("a critical mass") to impart the confidence to speak out and to stay faithful to differences within the groups.³⁵

The Court, while relying on the "countervailing constitutional interest"³⁶ of the university's free-speech rights, did not speak of particular doctrines and otherwise remained noticeably vague on the issue of deference on First Amendment grounds. Justice Thomas, joined by Justice Scalia, fairly called the majority to task on the point.³⁷ An attempt at specification may help in understanding why the Court deferred to the university's judgment that the discourse benefits of student body diversity were compelling enough to require a race-based admissions policy.

Three different free-speech doctrines seem relevant as analogies—lines of cases concerning public fora, the government as subsidizer of speech, and the government as educator. Public-forum doctrine allows the state to impose conditions on speech occurring on certain public property so long as its regulation is not content-based. As a subsidizer of speech, the government may "encourage certain activities it believes to be in the public interest"³⁸ provided that it does not discriminate based on viewpoint.³⁹ As

³⁴ See *Bakke*, 438 U.S. at 312, n. 48.

³⁵ See *Grutter*, 123 S. Ct., at 2341 ("The Law School does not premise its need for critical mass on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission. And one that it cannot accomplish with only token numbers of minority students.").

³⁶ *Bakke*, 438 U.S., at 313.

³⁷ See *Grutter*, 123 S. Ct., at 2357 (Thomas J., concurring in part, dissenting in part).

³⁸ *Rust v. Sullivan*, 500 U.S. 173, 192 (1991).

³⁹ See *id.*

educator, the government is allowed leeway in how it manages the educational setting, even when it exercises considerable editorial discretion over student speech.⁴⁰

No case has ever held, nor did the University of Michigan and its friends argue, that the university campus is itself a public forum,⁴¹ and my point is not that it should be. Rather, the public-forum rubric is important as an analogy. A basic intuition behind the doctrine⁴² is that the government has an obligation to permit and protect a robust exchange of ideas in public parks, streets, and sidewalks—traditional venues accessed typically by those lacking the wherewithal to publicize their ideas by other means.⁴³ Restrictions on under-resourced speech in public fora, like censorship of it, would snuff out the desired communication for all time, to the detriment of a democratic society whose legitimacy lies in the responsiveness of the political process to the voices of all of its citizens. This idea of basic access to the marketplace of ideas, made imperative by the implicit risk of non-substitutability by transmission in another medium, is an enduring First Amendment theme that has appeared in contexts other than public fora.⁴⁴

⁴⁰ See *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (“The principal’s decision was reasonable under the circumstances as he understood them.”); compare *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969) (high school cannot discipline students who wore black armbands to protest Vietnam War), with *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (high school can discipline student for “offensively lewd and indecent speech”).

⁴¹ Cf. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270 (1988) (high-school newspaper not a public forum); *Southeastern Promotions, Ltd. V. Conrad*, 420 U.S. 546 (1975) (community theater a public forum).

⁴² Another premise of the doctrine – more clearly associated with the restriction on content-based regulation in public forums—is equal access: once the government has set up a public forum, it cannot pick and choose the content of the speech that will take place, although it may engage in regulation of the forum for reasons unrelated to speech, such as public order and safety. Just as the norm of equal access, however problematic its application to cases may be, compels content-neutrality in avowedly non-speech regulation that the government may undertake, the state’s promulgation of affirmative action for the sake of all the “educational benefits” (not just the First Amendment-associated ones discussed here) of a racially diverse student body, does not on its face disadvantage any specific content in the campus exchange of ideas.

⁴³ See *Hague v. CIO*, 307 U.S. 469 (1939).

⁴⁴ See *City of Ladue v. Gilleo*, 512 U.S. 43, 44 (1994) (Residential “signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.”)

The analogy applies to the university affirmative-action cases in a straightforward way. Without affirmative action, there would not be enough “under-represented minorities” on elite campuses to ensure an accurate communication of minority student perspectives in the university marketplace of ideas, just as, without the provision and protection of public forums, the voices of under-resourced citizens might similarly go unheard. The “token numbers”⁴⁵ of certain minorities in the student body that would result from a race-blind admissions process might refrain from speaking without the safety and moral support of numbers,⁴⁶ or stereotyped by the majority when they do.⁴⁷ Campus exchanges, absent affirmative action, would accordingly be an imperfect marketplace of ideas,⁴⁸ unfaithful to the multi-racial democratic society that the university is seeking to serve, in the same way that freedom of speech would be a sham if under-resourced citizens with no other options were denied basic access to public fora.

Or the Court may have been thinking about the First Amendment right of the state as subsidizer of speech. The government in this capacity may promote a desired activity—such as cross-racial discourse—so long as it doesn’t discriminate against certain viewpoints.⁴⁹ The University of Michigan and its friends went to great lengths to point out that their affirmative-action programs did not discriminate on the basis of the

⁴⁵ *Grutter*, 123 S. Ct., at 2341.

⁴⁶ *See Bakke*, 438 U.S., at 323 (“Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their principal”) (Harvard College Admissions Program statement, appendix to Justice Powell’s opinion).

⁴⁷ *See Gratz Respondents’ Brief*, *supra* note 23, at *28 (“Put bluntly, teaching that not all blacks think alike will be much easier when there are enough blacks around to show their diversity of thought.”) (internal citation and quotation marks omitted).

⁴⁸ *See Mitchell J. Chang, The Positive Educational Effects of Racial Diversity on Campus*, in *DIVERSITY CHALLENGED*, *supra* note 23, at 199.

⁴⁹ *See National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998); *cf. Rosenberger v. University of Virginia*, 515 U.S. 819, 829 (1995).

viewpoints held by the minorities who were benefited.⁵⁰ In fact, the idea of the “critical mass” envisions the selection of minority students of various viewpoints, to cancel stereotypes and to be faithful to variation of views within the minority group.⁵¹

The idea of the government as educator is not so different from the view of it as subsidizer of speech, the main difference being the greater degree of deference owed to the state when it is actually running the educational enterprise. The basic premise is that public schools are allowed discretion in going about their educational missions, indeed, in defining those missions, even when the result is the substantial restriction or elimination of student speech. Although the case law acknowledging this deference developed in the context of high-school students whose countervailing free-speech rights might plausibly be more restricted than those of adult university students,⁵² the state as educator in our case is using affirmative action to encourage speech, not to restrict it, albeit exerting editorial discretion in the form of promoting a certain kind of race-inflected speech.

The distinction between deference to the state as subsidizer of speech and the greater deference due to it as educator in its own right logically gives rise to a distinction in compelling government interest analysis between public and private universities. On the one hand, when the state or federal government is educator, it may have to look to the benefits of the public-education enterprise as a whole, whether state- or nationwide,

⁵⁰ See, e.g., *Grutter* Respondents’ Brief, *supra* note 23, at *30 (The Law School’s need for a critical mass of minority students is not based on a “belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.”).

⁵¹ See *Grutter*, 123 S. Ct., at 2341. Of course, viewpoint neutrality in fact would be contingent on existing diversity of viewpoints in the minority group—if, for example, 95% of the minority group hold a “progressive” viewpoint, then, theoretical neutrality between progressive and conservative views would be a near-dead letter.

⁵² See, e.g., cases cited in *supra* note 40.

rather than to what is best for a particular public school in the system.⁵³ By contrast, the private institution of higher learning necessarily formulates its compelling interests more narrowly in terms of what is good for itself alone. Accordingly, to the extent that affirmative action at elite public universities promotes diversity on those campuses at the cost of racial diversity at other less prestigious schools in the state, the compelling government interest test should take account of the trade-off. Moreover, when the government funds a private institution of higher education rather than running it, one would think the institution ought to receive greater deference to its First Amendment rights as educator because of its private status.

To be accurate, when a public university uses affirmative action to promote the exchange of ideas on campus, it does engage in a form of content-based, viewpoint discrimination, in tension with the doctrines of public fora and the state as subsidizer of speech. That is to say, the university is making a judgment that ideas shaped by minority racial experiences have an especially high value in the campus exchange of ideas, say, as compared to ideas influenced by religious, socioeconomic, or ideological differences, and should accordingly be subsidized in the form of race-conscious admission policies. This is where the Court's insistence on deference to the "Law School's educational judgment that such diversity is essential to its educational mission"⁵⁴ appears to lean very heavily on the discretion of the state as educator—with respect to a university's threshold determination that racial diversity should be privileged over other sorts of diversity in

⁵³ *Cf. Grutter*, 123 S. Ct., at 2354-56 (Thomas, J., concurring in part, dissenting in part) (arguing that Michigan does not have a compelling state interest in maintaining an elite law school); *id.*, at 2348-49 (Scalia, J., concurring in part, dissenting in part) ("I find particularly unanswerable [Justice Thomas's] central point: that the allegedly 'compelling state interest' at issue here is not the incremental 'educational benefit' that emanates from fabled 'critical mass' of minority students, but rather Michigan's interest in maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities.").

⁵⁴ *Grutter*, 123 S. Ct., at 2329.

campus discourse.⁵⁵ It follows naturally that a school, for instance a historically black college, might within its discretion choose not to privilege racial diversity at all, if based on a good-faith judgment that a diverse student body was not essential to its educational mission, even though other schools think it a compelling interest.⁵⁶

II

I have sought so far to describe a universal, discourse-focused argument that universities as a class make about why the state's interest in a diverse student body is compelling. The "robust exchange of ideas" is the core of the university's mission. Student body diversity promotes campus exchange of ideas informed by race, and, as a result, imparts an appreciation of racial diversity that will reverberate through life. These "educational benefits" are documented by evidentiary studies.⁵⁷ Such benefits are central to a university's conceptualization of its educational mission, the pedagogical strategies it chooses to accomplish that mission, and, ultimately, its underlying First Amendment rights. Consequently, the university is entitled to deference in its decision to privilege

⁵⁵ Professor Abner Greene has made the same conclusion in the broader context of government speech and subsidies of speech in non-educational contexts. "Government both may and should promote contested conceptions of the good, through direct speech acts and through funding private speech with conditions attached." Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 68-69 (2000). While I can afford to remain agnostic on the generalized point (*i.e.*, assuming away the crutch of educational institutional deference) for the purposes of this essay, I find his argument compelling both as a lens for understanding the doctrine, and as a normative, neo-Platonic conceptualization of the state's purpose.

⁵⁶ See 123 S. Ct., at 2358 (Thomas, J., concurring in part, dissenting in part) ("The majority grants deference to the Law School's assessment that diversity will, in fact, yield educational benefits. It follows, therefore, that an [historically black college's] assessment that racial homogeneity will yield educational benefits would similarly be given deference.") (internal citations omitted). See also Rudenstine, in DIVERSITY CHALLENGED, *supra* note 23, at 38 ("institutions may choose on their own to take less account of race, ethnicity, and gender in admissions."). Another place where deference to the university (as educator) does special work concerns the actual numerical determination of the "critical mass of underrepresented minorities" necessary to achieve the compelling government interest in diversity, but that is more a question of narrow tailoring. Compare *Grutter*, 123 S. Ct., at 2342 -44 (majority opinion), with *id.*, at 2365-69 (Rehnquist, C.J., dissenting).

⁵⁷ See *id.*, at 2340.

race-inflected discourse over other sorts of idea exchange by deploying a race-based admissions policy.

One plausible post-educational, second-order benefit of student body diversity, which Justice Powell mentioned in his *Bakke* opinion, was the exposure of future leaders to diverse discourse on campus. Quoting *Keyishian v. Board of Regents*,⁵⁸ he opined that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.”⁵⁹ His implicit assumption was that a university education was necessary to attain a position of national leadership. Consequently, any discourse benefits delivered by a university education would be reflected in the attitudes and qualifications of the leadership class, *regardless of the racial make-up of that class*. That is to say, the discourse benefit to national leadership can, in theory and logic, be realized without leadership diversity.⁶⁰

But in *Grutter* the Court endorsed a subtly, but importantly, different claim: diverse discourse on campus and its societal reverberations notwithstanding, student body diversity at a particular educational institution is sought to produce, and in fact produces, not just racial-majority leaders who are open to diverse perspectives, but actual and substantial racial diversity in the leadership ranks of important non-educational institutions. As Justice Breyer put it during oral argument to counsel for petitioner Barbara Grutter: “among other things that they tell us on the other side is that many

⁵⁸ 385 U.S. 589, 603 (1967).

⁵⁹ *Bakke*, 438 U.S., at 312-13.

⁶⁰ The point might be made clearer by thinking of ideological diversity. Indubitably an exposure to Karl Marx’s philosophy of history at the university, including by interaction with Marxist scholars and student organizations like the Spartacus League will benefit a student’s understanding of various social, economic, and political issues. It is quite a different thing to say that ideological diversity requires that we have some Marxists in leadership positions that require university education as a qualification.

people feel in the schools, the Universities, that the way—the only way to break this cycle [of minority impoverishment and under-schooling] is to have a leadership that is diverse, you have to train a diverse student body for law, for the military, for business, for all the other positions in this country that will allow us to have a diverse leadership in a country that is diverse.”⁶¹

The Court was quite clearly influenced in this belief by the military brief, which convincingly defended the affirmative-action policies of the military service academies and ROTC programs—the truly unique context in which diverse undergraduate student bodies do automatically produce racial diversity in the leadership ranks of a nationally essential non-educational institution. And, as the Court noted, the military leaders argued that “based on their decades of experience, a highly qualified, racially diverse *officer corps* . . . is essential to the military’s ability to fulfill its princip[al] mission to provide national security.”⁶²

The military brief was delivered, like a precision-guided munition, under circumstances certain to maximize its effect. *Grutter* was argued on April 1, 2003. That same day, poignantly, the very junior officers discussed in the abstract by the military brief were putting their lives at risk for their country in Iraq, with the outcome of the war much in doubt.⁶³ Americans did not feel safe even at home in the wake of the September

⁶¹ Oral Argument Transcript, *Grutter v. Bollinger*, No. 02-241, 2003 WL 1728613, at *14. *See also Grutter*, 123 S. Ct., at 2341 (“[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”) The Court cited *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), in support of this statement, but the passage quoted made the distinguishable point that law school is a “proving ground for legal learning and practice.”

⁶² *Grutter*, 123 S. Ct., at 2340 (emphasis added).

⁶³ See John F. Burns, *A Nation At War: Baghdad; Warning of Doom, Edgy Iraqi Leaders Put On Brave Front*, NEW YORK TIMES, Apr. 1, 2003, at A1 (“Iraqi leadership puts on show of redoubled defiance and promises American troops ‘death in the desert,’ even as American forces advance towards Baghdad.”), Rick Atkinson, *As Battle Escalates, Holy Site Is Turned Into A Stronghold*, WASHINGTON POST, Apr. 1, 2003 at A1 (“The assault is proving problematic for the Army, which finds itself entangled in precisely the

11 bombings and the persistent threat of more terrorist attacks. Unlike the civilian proponents of affirmative action in the case, these *amici* were of the warrior class, many politically conservative. Deference to the military was particularly likely given that the Court itself comprised men and women of limited familiarity with the modern military institution and specifically its officer corps.⁶⁴

It is clear from the record and the majority opinion in *Grutter* that the military brief was, in the apt word of one esteemed commentator, a “showstopper.”⁶⁵ The Court quoted extensively from the military brief in its analysis of the compelling interest in student body diversity.⁶⁶ During the oral argument in *Grutter* Justices referred repeatedly to the military brief,⁶⁷ at one point referring to it as “Carter Phillips’s brief,” despite the fact that Mr. Phillips, a former law clerk to Chief Justice Warren Burger and

sort of urban combat that military planners hoped to avoid.”), John Friedman, *Stocks Tumble on War, Economy Fears*, LOS ANGELES TIMES, Apr. 1, 2003, at C6.

⁶⁴Five Justices never served in the U.S. armed forces (Justice Scalia did attend St. Francis Xavier, a Catholic military high school at the time). Justice Breyer and Chief Justice Rehnquist were enlisted draftees, and Justice Kennedy was a California National Guardsman. Only Justice Stevens, who was commissioned out of a wartime officer-candidate program, had experience in the Second World War as a naval cryptology officer in a navy that was, albeit, very different from the naval force of today.

⁶⁵James M. O’Neill, *Supreme Court Experts Say Affirmative Action Looks Safe, Justices Focus On Military Briefs*, COLUMBIA CHRONICLE, Apr. 14, 2003 (quoting Columbia Law Professor Samuel Issacharoff who called the military brief “a showstopper” that “impressed on the court the significance not only of the legal principles at stake but the broader social impact of a poorly thought-out decision.”). See Charles Lane, *Affirmative Action for Diversity Is Upheld; In 5 to 4 Vote, Justices Approve U-Mich. Law School Plan*, WASHINGTON POST, June 24, 2003 at A1, James M. O’Neill, *Court Upholds Use of Race in Admissions*, PHILADELPHIA INQUIRER, June 24, 2003, at A1 (“Legal experts said that the military brief was a masterful stroke”), David G. Savage, *Court Affirms Use Of Race In University Admissions*, LA TIMES, June 24, 2003, at A1.

⁶⁶See *Grutter*, 123 S. Ct., at 2340.

⁶⁷See, e.g., Oral Argument Transcript, *Grutter v. Bollinger*, No. 02-241, 2003 WL 1728613, at *7 (“Mr. Kolbo, may I call your attention . . . to the brief that was filed on behalf of some retired military officers who said that to have an officer corps that includes minority members in any number, there is no way to do it other than to give not an overriding preference, but a plus for race?” (Justice Ginsburg to Mr. Kolbo, on behalf of petitioner Barbara Grutter); *id.*, at 10 (“The issue as I understand it is not whether without preferences there can be a military academy population with some minorities, the question is whether without the—the weighting of race that they do in fact give, they can have an adequate number of minorities in the academies to furnish ultimately a reasonable number of minorities in the officer corps, that’s the issue, isn’t it?”) (Justice Stevens[?] to Mr. Kolbo); *id.*, at *12 (“Well, let me ask you this, it’s about the military brief that you didn’t come here to argue about, but it will maybe get you back to your case.”) (Justice Kennedy to Mr. Kolbo). Indeed, well over half of Mr. Kolbo’s argument time, see *id.*, at *7-*17, of *3-*18 total pages, was taken up by questions regarding the military brief.

counsel of record on the military *amicus* brief, was not himself allotted any argument time, to the apparent perplexity of those who were.⁶⁸

The military brief's argument was clear and simple. It is important to have a racially diverse student body at selective military academies and ROTC programs because students are commissioned as junior officers, the front-line leaders of the armed forces, on the day they graduate. Our enlisted ranks have many minorities (including 21.7% African Americans, 9.6% Hispanic, 1.2% Native Americans),⁶⁹ and it is necessary for good order and discipline that they see highly qualified officers of color in positions of leadership.⁷⁰ We know this is true based on evidence from the troubled history of race and the military institution in this country,⁷¹ and, in any event, second-guessing the military's own prediction for what is necessary to perform its mission poses an unacceptable risk to our national security in perilous times.⁷²

The brief continued: "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. Like our military security, our economic security and international competitiveness depend upon it."⁷³ The Court accepted this "small step" without question;⁷⁴ my basic point here is to question it.

⁶⁸ "General Olson, just let me get a question out and you answer it at your convenience. I'd like you to comment on Carter Phillips's brief. What is your view of the strength of that argument?" Oral Argument Transcript, *Grutter v. Bollinger*, No. 02-241, 2003 WL 1728613, at * 19 (Justice Ginsburg to Solicitor General Theodore Olson after the words "First, it is"). General Olson responded: "Well, I'm not sure." *Id.*

⁶⁹ Military Brief, *supra* note 13, at *12-*13.

⁷⁰ *Id.*, at * 14-*17.

⁷¹ *Id.*

⁷² *Id.*, at *17, *29-*30.

⁷³ *Id.*, at *28-*29.

⁷⁴ *Grutter*, 123 S.Ct., at 2345 ("We agree that '[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective.'")

A useful starting point to understanding the difference between why the military seeks student body diversity and why their civilian counterparts do is to compare what each sort of institution asserts as its educational mission. West Point's mission is:

To educate, train, and inspire the Corps of Cadets so that each graduate is a commissioned leader of character committed to the values of Duty, Honor, Country; professional growth throughout a career as an officer in the United States Army; and a lifetime of selfless service to the nation.⁷⁵

The Naval Academy seeks to give “young men and women the up-to-date academic and professional training needed to be effective naval and marine officers in their assignments after graduation.”⁷⁶ It seeks a few good men and women with a certain mentality and ambition: “If you have a strong will to achieve, desire a real challenge, and want to be a leader serving your country, the opportunity of a lifetime could begin for you at the United States Naval Academy.”⁷⁷ And the Air Force Academy aims high to “[i]nspire and develop outstanding young men and women to become Air Force officers with knowledge, character and discipline; motivated to lead the world's greatest aerospace-force in service to the nation.”⁷⁸

Compare those statements with representative samples from three civilian colleges with roughly similar acceptance rates to the military academies. In line with their more generalist and intellectual approach, none of these civilian institutions have articulated a “mission” *per se*. A former president of Williams College described its institutional purpose thusly (in the longest sentence I've read since Gibbon):

⁷⁵United States Military Academy Mission Statement, available at <http://www.usma.edu/mission.asp> (Aug. 26, 2003).

⁷⁶United States Naval Academy Mission Statement, available at <http://www.usna.edu/about.htm> (Aug. 26, 2003).

⁷⁷“Let the journey begin . . .,” at <http://www.usna.edu/Admissions/>.

⁷⁸United States Air Force Academy Mission Statement, available at <http://www.usafa.af.mil/misvis/> (Aug. 26, 2003).

The most versatile, the most durable, in an ultimate sense the most practical knowledge and intellectual resources which [can] now be offered are those impractical arts and sciences around which the liberal arts education has long centered: the capacity to see and feel, to grasp, respond and act over a widening arc of experience; the disposition and ability to think, to question, to use knowledge to order an ever-extending range of reality; the elasticity to grow, to perceive more widely and more deeply, and perhaps to create; the understanding to decide where to stand and the will and tenacity to do so; the wit and wisdom, the humanity and the humor to try to see oneself, one's society, and one's world with open eyes, to live a life usefully, to help things in which one believes on their way. This is not the whole of a liberal arts education, but as I understand it, this range of goals is close to its core.⁷⁹

And a former president of Williams's archrival Amherst once remarked:

A university or a liberal arts college, quite apart from any religious affiliations, is pledged to a special faith of its own. It believes first that men and women can live together in a community where they teach and learn from each other A good college seeks not merely a coterie of the like-minded, to reinforce convictions already formed, but seeks out every vein of talent and opinion from every possible background, so that from the ferment of ideas freely exchanged it can advance to new conclusions.⁸⁰

Brown University's website provides:

The goal of the Brown Curriculum is for students to work toward a liberal education, in which students learn the knowledge and ways of thinking in a range of academic disciplines, in which they practice habits of self-reflection and empathy for others, and in which they are challenged to articulate and examine the moral convictions that will guide them through life.⁸¹

Nor, for that matter, can civilian undergraduate colleges, or indeed, any civilian institution of higher learning, assert the sort of robust causal claim that the military academies can, that diverse student bodies will necessarily cause leadership diversity in

⁷⁹ Williams College Information, available at <http://www.williams.edu/admin-depts/registrar/geninfo/mission.html>. (Aug. 26, 2003).

⁸⁰ "About the Philosophy of Amherst College," available at http://www.amherst.edu/about_amh/philosophy/ (Aug. 26, 2003).

⁸¹ Statement of Dean of the College, Brown University, available at http://www.brown.edu/Administration/Dean_of_the_College/DOC/s2_brown_curriculum/ (Aug. 26, 2003).

the target institution. The military service academies and officer training programs are unique gate-keeping institutions insofar as they are a sufficient condition⁸² for direct entry into leadership of an important public institution—the officer corps of the nation’s armed forces.⁸³ Indeed, in functional terms, the military academy case provides the rare circumstance in which a racially diverse student body *equals* a racially diverse leadership group in a nationally sensitive non-educational institution: over 99 percent of graduates from the academies are commissioned as active-duty military officers.⁸⁴ It seems fair, therefore, to conclude that if the compelling government interest at issue is “obtaining the educational benefits of a diverse student body,” one should include in the calculus for the military academies the “benefit” of leadership diversity in the armed forces.

No civilian institution of higher learning, however prestigious, can claim to be a true gate-keeper in the sense of being a sufficient condition for entry into the leadership of public or private non-educational institutions of the sort that the Court mentioned in *Grutter*— state governorships,⁸⁵ the United States Congress,⁸⁶ the federal judiciary,⁸⁷

⁸² They are not a necessary condition because officers may also be commissioned through ten-to-fourteen week post-undergraduate officer candidate schools and enlisted commissioning programs. In my experience, however, minority officers who are commissioned out of the military service academies command a special respect from the enlisted ranks because academy graduates have traditionally formed the backbone of the professional officer corps. It is, in this sense, a particularly poignant statement about the fairness, openness, and legitimacy of leadership access for enlisted to see minority officers commissioned out of the highly selective service academies.

⁸³ As a mark of their importance to the nation, all commissioned officers have their commissions signed by the President of the United States. *See* U.S. CONST. art. II, §3 (The President “shall Commission all the Officers of the United States.”).

⁸⁴ The service academies permit cadets and midshipmen to resign after the second year without incurring an active-duty service obligation. Officer candidates in ROTC programs can resign after their first year without incurring a service obligation. Those who drop out after that point must serve an enlisted tour or go to jail, unless it is determined that there was a compelling reason in which case authorities may permit repayment of scholarship monies with interest. All who graduate are commissioned as officers and serve some active duty, absent a medical or other exception rarely granted.

⁸⁵ *See Grutter*, 123 S.Ct., at 2341.

⁸⁶ *Id.*

⁸⁷ *Id.*

and “major American businesses.”⁸⁸ There is no such thing as a State Governors’ School, a U.S. Congress academy, a federal judge academy, or a corporate chief executive officer (CEO) academy, to which anyone with qualifications can apply and acceptance to which guarantees a gubernatorial mansion, a Senate or House seat, a federal judgeship, or a CEO job upon graduation.⁸⁹

Of course, certain professional and graduate schools, notably the selective law schools and business schools, do seek to groom institutional and professional leaders, and can also empirically claim disproportionate access by graduates to prominent non-educational institutions that would perform better with racial diversity in their leadership ranks. The Court pointed out that “[i]ndividuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives.”⁹⁰ The Court continued that “[t]he pattern is even more striking when it comes to highly selective law schools. A handful of these schools account for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.”⁹¹ Modesty likely prevented the Court from observing that the same “handful” accounted for all nine of its Members.⁹² We might add that 10 more

⁸⁸ *Id.*, at 2340.

⁸⁹ The FBI Academy and state police academies are similar to the military academies in terms of sufficiency for entrance into an institution benefited by racial diversity in composition, but they are not undergraduate, graduate, or professional schools in the common sense. Nor are they the sort of nationally prominent institutions the Court seems to have had in mind when talking about leadership diversity. The analysis of affirmative action in those contexts, then, should turn on a direct analysis of diversity as a compelling interest in the non-educational institution—the FBI or the state police as appropriate—without couching it in terms of the gate-keeping “educational” institution. *Cf.* *Washington v. Davis*, 426 U.S. 229 (1976).

⁹⁰ *Grutter*, 123 S. Ct., at 2341.

⁹¹ *Id.*

⁹² Harvard (Justices Scalia, Kennedy, Souter, and Breyer); Stanford (Chief Justice Rehnquist and Justice O’Connor); Northwestern (Justice Stevens); Yale (Justice Thomas); and Columbia (Justice Ginsburg).

state governors have advanced degrees (including 5 MBA's);⁹³ 30 more Senators have JD's from law schools other than the "handful" the Court mentioned and at least 22 others have advanced degrees (including 6 MBA's and 1 medical degree (MD)).⁹⁴ And at least 63 of the CEOs of the Top 100 companies in the Forbes 500 have some sort of advanced degree (25 MBA's; 9 JD's; 1 MD).⁹⁵

Indeed, a law degree is a prerequisite to become a federal or state judge, prosecutor, or defense lawyer—legal sub-institutions in which racial diversity would seem to be highly desired given the numbers of minorities who are victims, perpetrators, and litigants in the American justice system. Consequently, the Court in *Grutter* was correct to have factored the educational benefit of leadership diversity in its compelling-interest analysis as to the University of Michigan Law School⁹⁶ (albeit in a much diluted form than in the military-academy context). The Court's implicit acceptance of the same conclusion as to the University's college,⁹⁷ however, is a different matter.

In today's America, bachelor's degrees, even from the most elite colleges, no longer command a leadership gate-keeping role, in large part because graduate and professional degrees have become so common.⁹⁸ While there are 1,995 schools that confer undergraduate degrees, there are presently an astonishing 1,499 educational

⁹³ Governors of the United States Biographical Information, available at <http://www.nga.org/governors/> (Aug. 26, 2003).

⁹⁴ Senators of the United States Biographical Information, available at http://www.sentate.gov/general/contact_information/senators_cfm.cfm (Aug. 26, 2003).

⁹⁵ For the Forbes 500 companies, see Forbes 500 List, available at <http://www.forbes.com/lists/> (Aug. 26, 2003). For the educational background of CEOs, see Standard & Poor's Biographical Register, available at http://web.westlaw.com/welcom/company_information/ (Aug. 26, 2003).

⁹⁶ See *Grutter*, 123 S. Ct., at 2341.

⁹⁷ See *Gratz*, 123 S. Ct., at 2426-27.

⁹⁸ Empirical research might illuminate the validity of this conclusion. For instance, one might design a multivariate regression model to assess the causal effect of a degree from a selective undergraduate college as compared to other variables such as graduate education and institution, socio-economic background, work experience and so forth. My guess would be that such analysis might reveal a statistically coefficient for a very small class of super-elite colleges, such as Harvard, Yale, Princeton, and Stanford.

institutions that confer master's degrees too, 535 of which also grant doctorates,⁹⁹ and, on top of that, 188 law schools accredited by the American Bar Association.¹⁰⁰ According to 2000 U.S. census data, 28,317,792 of the nation's population 25 years and over have a bachelor's degree only; 16,144,813 have an additional advanced degree.¹⁰¹ A former president of Harvard University and noted education-policy expert summed it up nicely:

An excellent undergraduate education is an enormous advantage in life. But we know that a college degree, by itself, is increasingly seen as inadequate preparation for many careers for which it once sufficed. Graduate training has long been necessary for aspiring doctors, lawyers, educators, scholars, research scientists, and clergy; in today's world, advanced degrees are also seen as highly desirable, if not essential, for many other callings, including leadership positions in business, public affairs, and the not-for-profit sector.¹⁰²

Nor is specialized job training, even in a leadership capacity—to be a military officer, a corporate executive, a judge, a politician, or even a non-profit administrator—a principal mission of the typical elite undergraduate institution, which, in the liberal-arts tradition, is more concerned with teaching students how to think critically in a generalist way, with one's "major" more a matter of emphasis than specialization.¹⁰³

As a final attempt to understand the difference between leadership and discourse benefits, it may be helpful to engage in a counter-factual thought experiment. If the military academies were to allow cadets and midshipmen to participate in every aspect of academy life yet opt for civilian jobs upon graduation, and most of the minority students underrepresented in the officer corps were to choose civilian life, then student body diversity would produce robust discourse benefits without leadership benefits.

⁹⁹ "Fall Enrollment, 1999" Survey, available at <http://nces.ed.gov/peds/ef9899/> (Aug. 26, 2003).

¹⁰⁰ "Number of Law Schools," available at <http://www.abanet.org/legaled/approvedlawschools/approved.html> (Aug. 26, 2003).

¹⁰¹ 2000 U.S. Census, available at <http://factfinder.census.gov/servlet/Basicfactservlet/> (Aug. 26, 2003).

¹⁰² See BOWEN & BOK, *supra* note 16, at 91.

¹⁰³ See civilian college mission statements *supra*.

Conversely, if selective civilian schools allowed underrepresented minorities to enroll exclusively in courses with overwhelming minority populations, to reside in racially concentrated housing, to participate exclusively in minority-centric extracurricular activities, and informally to avoid even casual interaction with non-minorities on campus, and a large proportion of underrepresented minorities in fact chose to segregate themselves in these ways, then there would be no discourse benefits to student body diversity,¹⁰⁴ but the satisfaction of an interest gauged by racial diversity in the numbers of graduates assuming leadership positions in nationally prominent non-educational institutions would be unaffected.

III

Let's return to the doctrinal clarification of the diversity test I offered at the beginning of this essay. A compelling state interest in student body diversity exists when the higher educational unit (1) has identified the "educational benefits" diversity is "designed to produce" and shows (2) that attaining those benefits is "essential to its educational mission," and (3) that student body diversity does in fact produce those mission-essential benefits. With respect to discourse benefits, the test seems easily satisfied: "the robust exchange of ideas" is at the core of a university's (in the ideal, universal sense) educational mission and such discourse produces documented educational benefits on campus and beyond.

¹⁰⁴ Cf. *Grutter*, 123 S. Ct., at 2350-51 (Scalia, J., concurring in part, dissenting in part). ("Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority student centers, even separate minority-only graduation ceremonies.").

It should be evident that certain kinds of educational units can make a better claim to discourse benefits than others because their educational mission is more closely associated with the exchange of ideas in which differing racial perspectives would be relevant. For example, the curricula at liberal-arts colleges, law schools, public-policy schools, business-management schools, or graduate departments in sociology and comparative literature, deal with issues and subject matter to which different racial experiences are deeply relevant. By contrast, undergraduate engineering schools, military academies, graduate programs in theoretical physics or mathematics, and medical schools are not so focused on subjects usefully illuminated by racial inflections. As Justice Powell put it in *Bakke*: “It may be argued that there is greater force to these views [in the value of student body diversity] at the undergraduate level than in a medical school where the training is professional competency.”¹⁰⁵

Of course, that is not to say that a school in the latter category can make no claim whatsoever to seeking and conferring the discourse benefits of a diverse student body. No educational institution, not even a military academy, which is simultaneously an educational and a military installation,¹⁰⁶ says that its mission does not value the discourse benefits of student body diversity at all. And, as Justice Powell observed with respect to medical schools:

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background – whether it be

¹⁰⁵ 438 U.S., at 313.

¹⁰⁶ As such, the military service academy occupies an interesting intersection between the civilian university institution and its robust First Amendment rights, *see supra* Part I, and the military base, where national security trumps most First Amendment rights. *See, e.g., Greer v. Spock*, 424 U.S. 828 (1976) (“The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens [is] historically and constitutionally false.”); *id.* (Powell, J., concurring) (The “enclave of the [military] system that stands apart from and outside of many of the rules that govern ordinary civilian life in our country.”). *See also* *United States v. Albertini*, 472 U.S. 675 (1985).

ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.¹⁰⁷

Likewise, the experiences and views of minority cadets and midshipmen, while not so important in close-order drill, naval propulsion systems class, or celestial navigation, are certainly valuable in academy and ROTC classes on leadership, ethics, politics, and history. Furthermore, there is always interaction on campus outside of the classroom, at the dormitory, or through sports or other extracurricular activities. All of this, however, is consistent with my point: depending on the nature of a specific educational institution, there is variation in the degree to which student body diversity is sought to produce and in fact produces discourse benefits.

Determining the leadership diversity benefits of a diverse student body at different sorts of institutions is more complicated in certain respects and easier in others. It would be easier, as we have seen, if we look to institutional articulations of mission and apply a strict causal test, limiting the claim to leadership benefits to educational units that assert diverse student bodies as a necessary (like law schools) or a sufficient (like military academies) cause of racially diverse leadership in nationally sensitive non-educational institutions. (One self-evident additional element of the benefits test in the leadership context being the requirement of postulating a compelling need for racial diversity in the leadership of the target non-educational institution or profession.)

A successful claim under this “strict” test would be something like the following. The mission of the military academies is to train officers. Military academy cadets and midshipmen automatically become officers upon graduation. A diverse officer corps is a

¹⁰⁷ *Bakke*, 438 U.S., at 314.

compelling need for the military to perform its nationally sensitive mission. Or, the mission of law schools is to train lawyers, who form the exclusive pool of those who may become federal judges. Law school students become lawyers upon graduation (when they pass the bar). There is a compelling need for a diverse federal judiciary given the diverse social context in which legal issues arise.

A closer call under a strict test would be the sort of claim that business schools might make. A principal mission of the business school is to train corporate managers. If we are to have a racially diverse corporate leadership, we must have racially diverse student bodies at selective business schools. It is nationally important to have racially diverse corporate leadership because many corporate workers are minorities and because the global business environment is a multi-racial one. A closer case yet might be medical schools. Medical doctors must graduate from medical school. Diverse student bodies are therefore necessary for a racially diverse medical profession, but is a diverse medical profession a compelling national need? Perhaps so, because medical treatment is as much about social understanding and wisdom as it is about science.

To be fair, one could imagine a more general form of “strict” test for the 20 percent of the nation’s top colleges that use affirmative action. That is to say, a principal mission of selective colleges like the members of the Ivy League, is to train leaders of society at large in a general way. If we are to have racial diversity in the leadership of the nation, we must have racial diversity at the Ivy League.

The crucial difference between this articulation and the others is the inability of the civilian college educational unit to make a more precise claim of leadership mission and effect, that a diverse student body will lead to diversity in the leadership of a specific

institution or profession in which there is a compelling need for racial diversity. The claim has an undeniable commonsense appeal, and it may be causally accurate, albeit in a weak sense.¹⁰⁸ But this sort of generalized, open-ended claim to *prospective* social benefit, like its *retrospective* remedy counterpart—the interest in remedying “societal” vice institutional discrimination that was held to be unconstitutional in *Wygant v Jackson Bd. Of Education*,¹⁰⁹ is simply too protean to merit incorporation in a substantive legal test, particularly one that is meant to be as exacting as the compelling interest standard. If an argument for student body diversity is decisive on the basis of an assertion of prospective general societal benefit, it is hard to see the conditions under which that argument might fail.

To sum up, then, different institutions of higher learning seek and confer the educational benefits of student body diversity to varying degrees. Military academies seek diverse students for a diverse officer corps and in fact produce it, but they are not so much interested in the discourse benefits of student body diversity though it is part of their mission. Law schools strongly seek and produce both the discourse and institutional leadership benefits of a diverse student body; business schools as well, although possibly less so on both dimensions. Medical schools make the weakest argument of the professional schools to both institutional leadership and discourse benefits, but they can field an argument on both fronts nonetheless. Colleges can make the strongest claim to discourse benefits, but no real claim to institutional or professional leadership benefits.

Should those discourse benefits be enough to find a compelling government interest in student body diversity at the few selective public and private colleges that use

¹⁰⁸ See *supra* note 98.

¹⁰⁹ 476 U.S. 267, 276 (1986). The *Grutter* Court did not purport to disavow *Wygant*.

affirmative action? The Court in *Gratz* assumed so,¹¹⁰ and Justice Powell in *Bakke* said so,¹¹¹ but neither considered the broader context of the enterprise of higher education in the United States, specifically, the accelerating proliferation of graduate and professional schools that are the gate-keepers to leadership in our increasingly specialized society, and the fact that there are many more non-selective colleges which as a group lose highly qualified minority candidates to the select group of prestigious undergraduate schools.

CONCLUSION

“Diversity,” understood in the normative sense as an associative virtue,¹¹² is the paradoxical celebration of difference under the common and equal condition of humanity. Racial or ethnic diversity is the celebration of difference in race or ethnic origin among human beings. It is a relative newcomer to the Western canon of values,¹¹³ coincident with the post-Second World War, post-colonial acceptance of racial diversity as an inalterable yet benign (*i.e.*, consistent with fundamental equality) fact of the human

¹¹⁰ See *Gratz*, 123 S. Ct., at 2426-27.

¹¹¹ See *Bakke*,

¹¹² I call “diversity” an associative virtue because it is a good achieved only in the context of mutual interaction, like “friendship” by contrast to virtues like “self-mastery” which are personally realized though in a social or political context. That is not to say that diversity as an associative value does not have its analogue in strictly personal virtues, such as the idea of human dividedness at the root of Isaiah Berlin’s thought.

¹¹³ The first chief justice of the Supreme Court was one of many founders who believed that homogeneity, and not diversity, was the desired norm. “Providence has been pleased to give this one connected country, to one united people, a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs This country and this people seem to have been made for each other, and it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous and alien sovereignties.” THE FEDERALIST No. 2, at 9 (John Jay) (Jacob E. Cooke ed., 1961). Early twentieth-century American immigration statutes, which established quotas on immigration by national origin that discriminated most against Asian immigrants, reflected to some extent the resilience of the countervailing norm of racial homogeneity. The national-origin system continued to be a prominent feature of the 1952 Immigration and Naturalization Act, and was only abolished in 1965. Similarly, state-sponsored segregation enforced a *de facto* hierarchical accommodation of racial diversity that is inconsistent with the fundamental human equality across races that is a premise of the present multi-racial diversity norm.

Indeed, the Graeco-Roman and Judaeo-Christian traditions that are the cultural heritage of Western civilization rejected diversity, in the closely related sense of multicultural equality, as an invitation to chaos, choosing to embrace instead cultural unity and hierarchy centered upon the prevailing civilization.

condition and qualified rejection of its antinomy, racial homogeneity, as a normatively compelling form of social ordering.¹¹⁴

The sense of diversity as a virtue has special importance for a multi-racial nation. All nations, whether racially heterogeneous or homogeneous, must deal with the *external* descriptive condition of racial diversity in the world community at large, but a multi-racial nation must confront it as an issue of *internal* governance.¹¹⁵ The issue takes on particular salience when racial differences correlate to inequalities of socioeconomic wealth and political power, and it is even more urgent when the dynamics of population growth are such that have-not races are reproducing at greater rates than the haves. Uncorrected, race-correlated material inequities might lead to social instability and national decline. Skillfully managed, the condition of stable internal racial diversity should also give the multi-racial nation a comparative advantage over non-diverse nations in its external relations with a diverse yet increasingly intertwined world.

Our institutions of higher learning, as a class, occupy a special place in the potential for realization of racial diversity (in its normative sense) for two related reasons. They are a principal means by which citizens are taught social values such as the virtue of racial diversity. These are the discourse benefits I have talked about, and they have to do with how all citizens, regardless of race, view society and life. Our universities are also an important training ground for the leaders of a racially diverse society in which higher education is a virtual necessity for significant socioeconomic and political advancement. This gate-keeping function means that for the nation to have the benefit of leadership

¹¹⁴ “Qualified,” because racial or ethnic group self-determination may be the only option in the context of states with intractable histories of inter-ethnic tension.

¹¹⁵ See Susan Sturm & Lani Guinier, *the Future of Affirmative Action*, 84 CAL. L. REV. 953, 1024-25 (1996).

diversity, it must have minorities at its universities. It follows as a logical matter that racial diversity among student populations at our colleges and universities is potentially a compelling government interest, to ensure representation both of minority viewpoints and experiences on campus and of racial minorities in our leadership elites upon graduation. The very best schools say that they must have race-based admissions policies to enroll the highly qualified minority applicants necessary to achieve the compelling interest in racially diverse student bodies.

But these same elite educational institutions have marked differences in mission and emphasis, owing to the many needs of the society they serve and the corresponding scale of the higher educational enterprise as a whole. The highly selective military academies, for example, seek student body diversity more for the sake of leadership diversity in the nation's armed forces than for the benefit of a robust exchange on campus of ideas formed by racially diverse experiences, which is the principal aim of the selective undergraduate schools that are their civilian counterpart. And while selective civilian undergraduate institutions may convincingly claim that they seek student body diversity to produce the campus and societal benefits of diverse discourse on the academic campus, and that courts should defer to their educational judgment that these benefits are compelling, they are not so clearly entitled to claim that they consciously seek to train institutional and professional leaders—officers, judges, politicians, corporate executives—and that undergraduate student body diversity causes the benefit of institutional and professional leadership diversity in anything other than a very general, hence legally suspect, way. Not only is such specialized training in tension with the fundamental mission of the liberal-arts college institution, the individuals or electorates

who govern access to leadership in nationally sensitive institutions like the federal judiciary, the Senate, and corporate boardrooms, (the nation's officer corps being the unique and important exception), may promote racial diversity on their own without regard to whether a person went to an elite college, and, more important for our purposes, it is increasingly the case that those who seek leadership positions in institutions of national importance must obtain further, specialized training at graduate and professional schools who have, as a class, the narrow educational mission of leadership and professional diversity.

But even in terms of the admittedly important benefit of diverse discourse, the case for a compelling government interest in student body diversity at elite colleges is problematic, notwithstanding the Court's summary acquiescence on the point in *Gratz*.¹¹⁶ The self-interested argument of the few selective public and private undergraduate schools that employ affirmative action is that without it, they must reject highly qualified minority applicants at the cost of meaningful student body diversity on their campuses. This means that with affirmative action at the elite colleges, that proportion of less selective colleges (80 percent of all colleges) with very few minority students have no chance to enroll these same highly qualified minority candidates, at the expense of their own presumptively compelling interests in student body diversity. And even those less selective undergraduate programs with diverse student populations will suffer a qualitative loss in their campus discourse because of the flight of *highly qualified* minority students to elite colleges engineered by affirmative action. It might not be fair to put a private college with government funding to answer for the costs of this tradeoff between the elite and non-elite colleges in compelling government interest analysis, but

¹¹⁶ See *Gratz*, 123 S. Ct., at 2426-27.

surely, a state with a portfolio of public institutions of higher learning ought not be afforded the same latitude.¹¹⁷ And if the benefit of diverse discourse at elite public colleges alone does not suffice as a compelling state interest, it seems necessary to reach the same legal conclusion for their private counterparts, to preempt the latter from cherry picking all highly qualified minority college students.

Is it better, then, to allow affirmative action at our most prestigious colleges so that they may each achieve robust student body diversity, or to dilute the concentration of highly qualified minority candidates at elite colleges, sharing them with less prestigious schools and doing away with affirmative action altogether at the undergraduate level? This seems to me a very hard question. On the one hand, to the extent that the causal claim of elite colleges to leadership diversity is right,¹¹⁸ the latter choice would diminish the direct representation of racial minorities in the leadership of nationally sensitive institutions and, also, would lessen the exposure to undergraduate-campus diversity of white and other students not benefited by affirmative action who later become such leaders.

On the other hand, to the extent that graduate and professional schools have displaced selective colleges as the crucial gate-keeping educational units for leadership diversity (again, with the exception of the military academies and ROTC for the military officer corps), getting rid of undergraduate affirmative action while keeping it at the graduate level would have little effect on leadership diversity but considerable salutary

¹¹⁷ I would think that how this plays out in practice is complicated, because a State might reasonably choose to invest in a nationally prominent “flagship” university, including its undergraduate arms, as opposed to its other state institutions of higher learning. That logic is somewhat undermined to the extent a national reputation is made by the research and scholarship conducted by the faculty and students of a public university’s graduate and professional schools, which could continue to employ affirmative action. Indeed, those graduate and professional programs might be benefited by greater parity in state colleges and undergraduate programs, which could serve as in-state feeder institutions to those programs.

¹¹⁸¹¹⁸ See *supra* note 98.

effect for the national educational enterprise as a whole. For one, it would give less prestigious colleges a better chance at attracting highly qualified minority candidates to shore up their own compelling interest in student-body diversity for its discourse benefits. Such a two-tiered system would also encourage the top graduate and professional schools to look for minority applicants from a more diverse universe of undergraduate institutions, for example, historically black institutions like Hampton University, or less prestigious public schools with large populations of under-represented minority students like Virginia Commonwealth University¹¹⁹ and private such schools like Temple University.¹²⁰ And in so doing, elite graduate and professional schools might develop a familiarity with these undergraduate programs that would increase the chances of outstanding non-minority graduates to get in. The end result would be greater diversity in the undergraduate backgrounds of minority and non-minority students at the very best graduate and professional schools—the new gate-keepers to leadership diversity, an important corollary of which would be elimination of the “double-counting” effect of affirmative action, *i.e.*, the cultivation of a super-elite of minority students benefiting from affirmative action twice by being accepted at an elite college and again at an elite graduate or professional school.¹²¹

¹¹⁹ Virginia Commonwealth University Freshman Profile, *available at* http://www.vcu.edu/ugrad/admissions101/freshm_profile.html (reporting that 22 percent of incoming freshmen in 2003 are African American) (Aug. 26, 2003).

¹²⁰ Temple University Freshman Profile, *available at* <http://www.temple.edu/factbook/profile02/profile.html> (reporting that 19 percent of incoming freshmen in 2002 were African American) (Aug. 26, 2003).

¹²¹ A cursory examination suggests that the concentration of elite college graduates (presumably including many minority students for which no data is publicly available) at top graduate schools may be staggering. Harvard Law School, for instance, reported 1,683 full-time J.D. students enrolled in 2002-2003, with 278 undergraduate schools represented. *See* “JD: Undergraduate Schools of J.D. Students Enrolled at HLS in 2002-2003,” *available at* <http://www.law.harvard.edu/admissions/jd/body.php> (Aug. 26, 2003). But an astonishing 46 percent of the student body (767 students) were graduated from 11 colleges: the 8 Ivy League schools, Stanford, Duke, and Berkeley. Indeed, Harvard (189) and Yale (101) Colleges together accounted for more students (290) than 190 undergraduate schools *combined* (289).

The Court's lack of clarity about the diversity rationale illuminates just how difficult it is to operationalize an important social value like "diversity" into a workable legal rule that can in turn be applied to a vast, shifting social institutional landscape while remaining faithful to the underlying value. The difficulty is compounded by the powerful, seemingly countervailing norm of formal racial equality, guarded by its own formidable doctrine, the Equal Protection Clause.¹²² It is no wonder, then, that the Court, inspired by the virtues of diversity and the specific value of student body diversity lauded by forces as disparate as university dons and warrior chieftains, articulated a doctrine that doesn't quite fit the rich fabric of fact. This essay has been an attempt at fresh analysis, but, at bottom, its theme is wholly unoriginal: "Context matters when reviewing race-based governmental action under the Equal Protection Clause."¹²³

¹²² No State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. 14, § 2.

¹²³ *Grutter*, 123 S. Ct., at 2338. (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44 (1960) ("[I]n dealing with claims under broad provision of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.")).