2005

Affirmative Action and the Decline of Intellectual Culture

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> The most appropriate style in which to write history is *irony*.
> —Arthur Schopenhauer[1]

A recent symposium in the *Columbia Law Review* conveniently encapsulates the conventional, received wisdom on affirmative action.[2] Four of the five well-known authors intersperse war stories from the academic establishment amongst uncritical rehearsals of their own familiar views favoring "the pervasiveness of affirmative action in society" and "affirmative action to make ours a better country" (to quote the two moderates). A fifth contributor apparently runs out of things to say after six pages of asking "hard" but rudimentary questions about affirmative action's intellectual assumptions. That four-to-one ratio strikes me as just about right to convey the current tenor of this academic "debate" and its intellectual articles of faith.

But when it comes to affirmative action, almost nothing is what it seems to be. The issues at the forefront of public opinion often have little bearing on the legal discussion. The prevailing legal doctrines and principles turn out to be so ad hoc and undeveloped that major theoretical premises go unrefuted in competing briefs and opinions. And the whole debate is shrouded in a thick cloud of politics and ideology that makes any candid discussion unlikely. All in all, not a very fruitful field to till. And I would not attempt to till it either if it did not border on areas of the greatest importance, such as intellectual merit and the problem of informal discrimination.[3]

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I thank Tom Cotter, Jeff Harrison, Dick Hiers, Chris Slobogin, and Mark Tushnet for helpful comments, suggestions, and criticisms. Allison Landgraff provided valuable research assistance. The University of Florida College of Law supported much of my research and writing with a summer research appointment.

This essay was completed and submitted for publication in September 2003, well before this symposium was organized. See Charles W. Collier, Intellectual Authority and Institutional Authority, 42 J. Legal Educ. 151, 167–85 (1992); also published in 35 Inquiry 145, 157–69 (1992).

1. 1 Der handschriftliche Nachlass, ed. Arthur Hübscher, § 156 (Frankfurt, 1966) (1814).
2. On *Grutter* and *Gratz:* Examining "Diversity" in Education, 103 Colum. L. Rev. 1588 (2003).
3. See generally Charles W. Collier, Intellectual Authority and Institutional Authority, 42 J. Legal Educ. 151 (1992); Charles W. Collier, The New Logic of Affirmative Action, 45 Duke L.J. 559 (1995) [hereinafter New Logic].

I.

It is no accident that the furor over affirmative action has erupted once more in the academy, gatekeeper to the intellectual world. Here the general public has correctly noted how this gatekeeping function has taken an increasingly pragmatic, utilitarian, almost antiintellectual turn. Even disregarding affirmative action for the moment, it is truly amazing how little in a university setting actually turns on intellectual merit. And I do not mean this only in a negative sense.

To take a somewhat far-flung example, Paul Berman has written compellingly in the *New York Times Magazine* on the career of Sayyid Qutb, identified by the magazine as the "Egyptian Islamist [who] invented the terrorist jihad." It seems that Qutb composed his monumental, radical Qur'an commentary over more than a decade on scraps of paper in a jail cell, surrounded by forty common criminals, against the background of Nasser's recorded speeches blared by loudspeaker twenty hours a day. "[T]his gigantic study," Berman remarks, "must surely count as one of the most remarkable works of prison literature ever produced."[4] Whatever one may think of Qutb's ideas (and I don't think much of them at all), one has to admire his focus, fortitude, and determination, his single-minded perseverance in the face of adversity, his abiding belief in himself, indeed his inspiration.

One thinks also of Karl Marx, who, at a time when he could barely clothe his starving children or pay the rent, toiled away every day in the reading room of the British Museum on *Das Kapital* (the book "to which I have sacrificed my health, my happiness and my family"). According to a Prussian spy who dropped by for a visit:

> He lives in one of the worst and cheapest neighbourhoods in London. He occupies two rooms. There is not one clean or decent piece of furniture in either room, everything is broken, tattered and torn, with thick dust over everything . . . manuscripts, books and newspapers lie beside the children's toys, bits and pieces from his wife's sewing basket, cups with broken rims, dirty spoons, knives, forks, lamps, an inkpot, tumblers, pipes, tobacco ash—all piled up on the same table. . . . Sitting down is a dangerous business. Here is a chair with only three legs, there another which happens to be whole, on which the children are playing at cooking. That is the one that is offered to the visitor, but the children's cooking is not removed, and if you sit down you risk a pair of trousers. But all these things do not in the least embarrass Marx . . . .[5]

Of all the remarkable social critics and revolutionaries of the nineteenth century, observes Isaiah Berlin, there was "not one so rigorously single-minded, so absorbed in making every word and every act of his life a means towards a single, immediate, practical end, to which nothing was too sacred to be sacrificed."[6]

4. The Philosopher of Islamic Terror, N.Y. Times Magazine, Mar. 23, 2003, at 24, 27.

5. Isaiah Berlin, Karl Marx: His Life and Environment, 3d ed., 194 (New York, 1963) (quoting B. Nicolaievsky & O. Maenchen-Helfen, Karl Marx: Man and Fighter).

6. *Id.* at 19.

Somewhat in the same spirit, universities have long recognized that, while intellectual merit may be the coin of the realm, there are other valuable attributes. Admissions criteria have broadened to include such factors as personal achievement, leadership, service, work experience, musical talent, and athletic ability. Other factors commonly considered—such as socioeconomic disadvantage, residency in an underrepresented geographical region, and being an alumni child—seem to have nothing to do with merit or achievement. Is that fair? If affirmative action is fundamentally about fairness, then why not put race (and perhaps gender) into the mix as well?

"The true answer to this argument is, that it is irrelevant," C. C. Langdell once wrote.[7] In this context, musical talent, athletic ability, and alumni parentage have no legal or constitutional relevance. For example, the University of Michigan may, if it wishes, reconstitute itself as the Michigan College of Music and consider *only* musical talent in its admissions process. Or it may decide to become the Michigan Sports Academy and consider only athletic ability. It may even transform itself into the Michigan University for Alumni Children Only, without running afoul of the law in any way. (There is also no constitutional requirement that these factors be assessed in any particular way or against any particular "standard," so long as the assessment is not arbitrary or irrational.) What the State of Michigan *cannot* lawfully do, however, is to rename its university the All-White Institute of Supremacy Studies and exclude black students because of their race (and here the analysis must indeed be measured against an objective legal standard).

Of all the factors discussed above, *whether or not they reflect merit or achievement,* only race (and, to a lesser extent, gender) has legal or constitutional relevance in this context. Why is that? The short answer is that the Constitution says so: it confers no comparable relevance elsewhere, and its Thirteenth Amendment (slavery), Fourteenth Amendment ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws"), and Fifteenth Amendment (voting) have historically defined race as a uniquely "suspect" legal classification.

"Why is affirmative action in universities so unpopular," asks Ronald Dworkin, one of our greatest living liberal legal theologians, "when it seems to be working so well?"[8] (That is a little like asking, "Why is the guillotine so unpopular when it seems to be working so well?") Evidently, Dworkin has not been talking with people like Jennifer Gratz and Barbara Grutter, white plaintiffs in the University of Michigan cases. Imagine their puzzlement upon learning that the university's stated aspiration of "achiev[ing] that diversity which has the potential to enrich everyone's education"[9] did not apply to them. Affirmative action was "working so well" at Michigan that they could not participate in that resounding success at all. They could only watch it from outside in the cold, their noses pressed forlornly against the windowpanes of

7. A Summary of the Law of Contracts, 2d ed., § 15 (Boston, 1880).

8. Race and the Uses of Law, N.Y. Times, Apr. 13, 2001, at A17.

9. Grutter v. Bollinger, 123 S. Ct. 2325, 2332 (2003) (quoting the Michigan law school's official admissions policy).

the great university, left to gather what crumbs they could at less distinguished institutions. These plaintiffs say that they too have been excluded because of their race. In the face of this equal protection challenge, it will not do to say that affirmative action "seems to be working so well." Strong public policy presumptions render all racial classifications inherently suspect.

II.

Or at least that is how the argument would have gone, before the recent University of Michigan decisions. But now a powerful countervailing factor has been added to the arsenal of the state: its newly announced "compelling interest" in obtaining "the educational benefits that flow from a diverse student body."[10] That interest is hardly intuitively obvious; indeed one might have assumed much more plausibly that, if universities have any "compelling" interest at all, it is in selecting the most academically qualified students and faculty. But what was once a matter of educational policy has now been transformed into a constitutionally controlling factor. In the formulaic terms of constitutional parlance, if the state has a "compelling interest" in engaging in some form of racial discrimination, and if the racial classification at issue fits and furthers that interest "with greater precision than any alternative means,"[11] then the state's measure may be upheld even in the face of an equal protection challenge.

Previously the "compelling interest" designation had been reserved for matters of "pressing public necessity" like national security,[12] danger to life or limb,[13] and remedying past discrimination.[14] For example, a prison might temporarily segregate prisoners by race in order to head off a race riot, where there would otherwise be a very real chance that someone (perhaps many people) would be killed. The "compelling interest" here is in preventing deaths, so this measure should survive the "strict scrutiny" of classifications that involve racial discrimination.[15] But if a high school principal wanted to separate students by race at their graduation ceremony just because it "looked better," that would not be considered a compelling interest and the measure would not be upheld.[16]

The significance of this distinction can be seen in a case involving a federal prisoner's petition for special meals to accommodate his religious beliefs. As a

10. *Id.* at 2338 (quoting Brief for Respondents Bollinger et al. [hereinafter Respondents' Brief]).

11. *Id.* at 2365 (Rehnquist, C.J., dissenting) (quoting Wygant v. Jackson Board of Education, 476 U.S. 267, 280 n.6 (1986) (plurality opinion of Powell, J.)).

12. Cf. Korematsu v. United States, 323 U.S. 214, 216 (1944) ("Pressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can.").

13. Cf. Lee v. Washington, 390 U.S. 333 (1968).

14. Cf. Richmond v. J. A. Croson Co., 488 U.S. 469, 504 (1989).

15. Cf. *Washington*, 390 U.S. at 334 (Black, Harlan & Stewart, JJ., concurring) ("prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails").

16. This example is suggested by Paul Brest & Sanford Levinson, Processes of Constitutional Decisionmaking, 3d ed., 655 (Boston, 1992).

law clerk I drafted an order that wondered skeptically whether the prison had "any compelling reason" not to grant this seemingly simple request. Imagine our surprise in chambers when we received, almost by return mail, a full-fledged brief on the merits arguing that the correct standard was not the "compelling interest" test but some lower standard, easier for the prison to meet. At the time I marveled at the power of a law clerk's casual choice of terminology. But really it was the power of the formula at work, the standard of "compelling" interests I had inadvertently invoked.

In the Michigan law school case, the Court allowed the law school to consider applicants' race in assembling a sufficiently diverse entering class. But no one argues that Michigan has a compelling interest in racial diversity as such. That would be more of an aesthetic interest (as in the high school example above), an interest in proportionality for its own sake, an irrational obsession with symmetry. ("[O]utright racial balancing," the Court notes, "is patently unconstitutional."[17]) Instead, the compelling interest in diversity is really an interest in intellectual diversity, in the "diversity of viewpoints." The law school seeks to include students with "a perspective different from that of members of groups which have not been . . . historically discriminated against."[18] Even diverse *experiences* must somehow be translated into diverse *views* (perspectives, outlooks, beliefs, frames of reference, background assumptions, intellectual styles, worldviews, "ways of worldmaking," etc.) if they are to offer any conceivable educational benefits. (For educational purposes, experiences that leave no mark in the mind might just as well never have occurred; the mere "presence of persons who have *had* such experiences" does nothing, in and of itself, to "enrich[] the educational environment."[19]) "Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views," explains the Court, "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."[20] But rather than getting at those views directly, the law school is allowed to get at them indirectly (presumably because viewpoints are too complicated, obscure, or perhaps even unknowable) by considering and using race as a proxy.

And here we come to a fundamental premise of the whole argument, which may be stated in the form of a thesis.

Thesis: Race serves as a (good) proxy for viewpoint.

If this thesis were not valid, then the law school would have no reason to think minority students could offer "a perspective different from that of members of groups which have not been . . . historically discriminated against." There would be no reason to think underrepresented viewpoints were lurking in underrepresented racial groups: those underrepresented viewpoints could be found just as easily in any racial group.

17. *Grutter*, 123 S. Ct. at 2339.

18. *Id.* at 2334.

19. Respondents' Brief, *supra* note 10, at 24.

20. *Grutter*, 123 S. Ct. at 2341.

But merely to have stated this thesis is to have drawn attention to its flaws. It makes the very questionable assumption that viewpoints are associated with and ultimately determined by race. The proxy thesis holds that racial minorities, as a class, differ generically from nonminorities as to experiences and viewpoints; this group characteristic is supposed to be shared by all individuals in the class. The proxy thesis thus assumes—has to assume—that on any given issue there is something like a "black viewpoint," for example. Any such stereotype is an insult to the intelligence of free and independent-minded people of all races.

As the Court has repeatedly acknowledged, persons of all races can and do experience unlawful racial discrimination.[21] "Minority students draw as wide a range of conclusions from experiences like these," notes the law school, "as white students do from their own lives and influences."[22] In other words, viewpoints are no more determined by experiences—even racial experiences—than they are by race itself. Neither serves as a good proxy for viewpoint; and *viewpoints* (in the broad way I have defined them, as various forms shaping intellectual content) are what matter in education.

If the proxy thesis cannot be sustained, then perhaps its antithesis can.

Antithesis: Race does not serve as a (good) proxy for viewpoint.

This antithesis negates the whole rationale for using race as a way of getting at viewpoints in order to attain diversity of viewpoints. If viewpoints are not closely tied to race, then the use of race is not (to use the canonical terminology) a "narrowly tailored" way to attain this diversity. Instead it is a clumsy, crude, haphazard way, so affirmative action cannot satisfy the demanding terms of review outlined above or overcome the strong public policy presumptions against racial classifications.

The proxy thesis assumes that all racial minorities have at least one thing in common, that they differ significantly from nonminorities as to experiences and viewpoints. The antithesis assumes that individual minorities, as free and unique individuals, "draw as wide a range of conclusions" and differ just as much from one another as nonminorities do. *Both of these contradictory propositions are essential to the case for racial preferences;* both must be rejected, however, to make that case.

Here the very logic of affirmative action begins to unravel. If a thesis highly relevant to affirmative action's core assumptions cannot be sustained, and if the exact opposite of that thesis is also incompatible with those assumptions, then we are no longer in the realm of rational arguments. Instead we are dealing with an *ideology* (in the dictionary definition, "the body of doctrine, myth, belief, etc., that guides an individual, social movement, institution, class, or large group"[23]) that draws on deep sources in history, culture, and good intentions. As the University of Michigan acknowledges in its brief, racial

21. See, e.g., Gratz v. Bollinger, 123 S. Ct. 2411, 2427 (2003) (citing and quoting earlier cases).

22. Respondents' Brief, *supra* note 10, at 24.

23. The Random House Dictionary of the English Language, 2d unabridged ed., 950 (New York, 1987).

preferences are "woven into the fabric of our 'national culture.'"[24] When is the last time a rational argument was described that way?

The ideology of affirmative action is reflected in the practice of what I have elsewhere termed "informal discrimination."[25] The difference between formal and informal discrimination is the difference between Michigan's unconstitutional undergraduate affirmative action plan (which automatically penalized all white and Asian applicants 20 points, out of 150) and its constitutional law school plan (which operates without such an explicit penalty). I am not sure why the unguided (and hence unreviewable) discretion of an admissions officer is supposed to be an improvement over a 20-point racial penalty. And why would the Court trust the very same administrators who came up with the 20-point racial penalty not to mentally assign an even greater penalty under a purely discretionary scheme? Nicholas Lemann provides a clue: "[E]verybody from President Bush on down likes the result of an integrated leadership, but finds the way it was achieved distasteful and therefore doesn't want to know too much about the details."[26] In other words, the justices do not want to know, in any detail, how affirmative action plays out in real life; so they uphold a purely discretionary plan whereby the actual decision-making process remains unknowable (and hence unreviewable). In this way the Court has set itself up for another round of water-cooler jokes about the "nuanced, holistic consideration of race" in university admissions.[27]

But seriously, what would the "nuanced, holistic consideration of race" mean? And why would it matter, if intellectual diversity is the objective? An admissions official reviewing minority applications might reason as follows: "Candidate represents the black viewpoint very well; very articulate. *Admission recommended.*" But the same official might also reason in a different case: "Candidate doesn't represent the black viewpoint at all; very refreshing. *Admission recommended.*" Between these extremes there is no conceivable viewpoint that could not be used to justify the same result. (The Michigan law school, in its own words, "looks for minority applicants who say interesting things about the ways that race has, or has not, influenced their lives."[28] That certainly sounds like a win-win proposition.) In other words, the outcome is not determined by factual data or objective factors, by empirical evidence in the scientific sense.[29] The more "individualized" the inquiry, the more discretionary the result. In this context, statistical proof of discrimination (like that used in employment, jury service, voting, and redistricting cases) would be of

24. *Gratz*, Brief for Respondents Bollinger et al. 17.

25. See Collier, New Logic, *supra* note 3, at 573–78.

26. A Decision That Universities Can Relate To, N.Y. Times, June 29, 2003, § 4 (Week in Review), at 14.

27. See, e.g., *Grutter*, 123 S. Ct. at 2343, 2345; *Gratz*, 123 S. Ct. at 2432 (O'Connor, J., concurring), 2441 (Souter, J., dissenting).

28. Respondents' Brief, *supra* note 10, at 37.

29. Cf. Karl Popper, Conjectures and Refutations, 5th ed., 36–39 (London, 1989) (falsifiability as a fundamental criterion of scientific knowledge).

no avail, since the Court acknowledges that *some* degree of discrimination is permissible, but simply declines to specify that degree.

We can nevertheless plot out a rough spectrum of discretion as follows, from highest to lowest:

Choosing a spouse

Appointing a faculty member

Admitting a student

The discrimination, racial or otherwise, involved in choosing a spouse is of course in principle unreviewable; but it is also interesting to note the lack of any successful faculty appointments challenges at the college or university level.[30] Precisely where student admissions fits on this spectrum has deliberately been made obscure. But no money will be lost betting that it is now much closer to faculty appointments than it has ever been.

The rule of law entails what Learned Hand once described in correspondence thus:

> I myself think it is a little more manageable and quite adequate a distinction to say that there is an absolute and objective test to language. . . . Once you admit that the matter is one of degree . . . you give to Tomdickandharry, D.J., so much latitude that the jig is at once up. . . . I own I should prefer a qualitative formula, hard, conventional, difficult to evade.[31]

Objective, factual criteria and empirical falsifiability are the building blocks of that construct. Objective knowledge depends on general laws; the individual is, strictly speaking, unknowable. *Individuum est ineffabile.*

But perhaps, given the Court's unprecedented deference to the law school's "educational judgment," affirmative action has now been redefined as more of an art than a science. In that case, comparisons with the "opinion privilege" in First Amendment law would be apt. Justice Powell once wrote that "[u]nder the First Amendment there is no such thing as a false idea,"[32] a statement that now seems directly applicable to the inscrutable opinions of university admissions officers (at least those busily engaged in the "flexible assessment" and "highly individualized, holistic review"[33] of each applicant's file). Just as affirmative action was (according to that very same Justice Powell) never intended to remedy broad "societal" discrimination,[34] the new regime of informal discrimination is insulated from legal review precisely because it reflects a broad social ideology—"woven into the fabric of our 'national culture'"—rather than the invidious, factually demonstrable misapplication of standards by any particular individual. Now there are no enforceable standards to be

30. For an imaginative discussion of this issue, see Michael Stokes Paulsen, Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion, 71 Tex. L. Rev. 993 (1993).

31. See Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan. L. Rev. 719, 763, 770 (1975) (letters from Learned Hand to Zechariah Chafee Jr., Dec. 3, 1919 & Jan. 2, 1921).

32. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

33. *Grutter*, 123 S. Ct. at 2331, 2343.

34. See Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307–10 (1978) (opinion of Powell, J.).

applied or misapplied, except perhaps the "standard" of *chacun à son goût.* The admissions officer who proclaims "I know a good applicant when I see one" has satisfied all legal and constitutional requirements. *De gustibus non est disputandum.*[35] One cannot base a discrimination action on the generalized suspicion, however well founded, that most admissions officers view and interpret the world in a way favorable to minority applicants.

"[I]n the nature of things," explains the Court, the Fourteenth Amendment "could not have been intended to abolish distinctions based upon color."

> [T]here must necessarily be a large discretion on the part of the legislature.... [I]t is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.... Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation.

(That was from the case of *Plessy v. Ferguson,* vintage 1896.)[36]

Lurking in the background of the affirmative action debate was always the issue of intellectual standards. Some universities are now ending the use of standardized aptitude tests and admitting a set percentage of high school graduates, regardless of their qualifications. These trends should eventually converge to make traditional forms of affirmative action unnecessary. Thus, among both proponents of affirmative action and those who would replace it, there seems to be a broad social, political, and ideological consensus that intellectual standards are overrated and, in the present circumstances, dispensable.[37] Far from facing what the Michigan law school terms "a stark choice between racial diversity and radically lower academic standards and ambitions,"[38] we can actually have both!

III.

A huge number of amicus briefs were filed in the Michigan cases, many from business groups and governmental organizations. Justice O'Connor was obviously deeply impressed by what she saw as an outpouring of societal support for affirmative action. For example, she cites briefs from the 3M Corporation and General Motors Corporation for the proposition that "major American businesses have made clear that the skills needed in today's increas-

35. Cf. Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp., 784 F.2d 674 (5th Cir. 1986).

36. 163 U.S. 537, 544, 550–51 (1896).

37. See generally Jeffrey Rosen, How I Learned to Love Quotas, N.Y. Times Magazine, June 1, 2003, at 52 (arguing that "[b]ecause universities will take race into account regardless of what the court decides, the court should allow them to do so openly, in ways that won't destroy their admissions standards, rather than forcing them to lie, in ways that will harm society as a whole"); cf. *Gratz,* 123 S. Ct. at 2446 (Ginsburg, J., dissenting) ("One can reasonably anticipate . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor.").

38. Respondents' Brief, *supra* note 10, at 19.

ingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[39]

In a sense, the real basis for the decision is *society's* interest in diversity, not the university's. It goes (almost) without saying, however, that "society" is not a party in the case. And what would it mean for you or me or even the University of Michigan law school to have a "compelling interest" in the general welfare of society (or in "improving the racial mix of different dimensions of American leadership for everyone's benefit," as Dworkin puts it[40])? If that is a compelling interest, then so is "mak[ing] ours a better country"[41] or even "making the world a better place."

Justice O'Connor places special emphasis on an amicus brief filed by a group of retired military officers. ("Analogizing to the military was obviously a brilliant possibility," explains Lee Bollinger, lead defendant in both Michigan cases, "not only because of the respect accorded the military in society, but also, and in my judgment more importantly, because it emphatically reinforced the theme of the pervasiveness of affirmative action in society."[42]) These officers assert in their brief that, "[b]ased 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." The officers note that one of the primary sources for the nation's officer corps is the Reserve Officers Training Corps program based in the universities. According to the officers, however, "the military cannot achieve an officer corps that is *both* highly qualified *and* racially diverse unless . . . the ROTC use[s] limited race-conscious recruiting and admissions policies."[43]

It seems that during the 1960s and 1970s, while racial integration increased the percentage of minorities in the enlisted ranks, their representation in the officer corps remained low. "This deficiency in the officer corps and the discrimination perceived to be its cause . . . seriously threatened the military's ability to function effectively and fulfill its mission to defend the nation." The armed forces came to see the ROTC as "the 'obvious solution' to the problems created by the lack of minority representation in the officer corps," since the ROTC employs "an aggressive race-conscious admissions program."[44]

The Court explicitly endorses these military officers' conclusion 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." In other words, the success of the military's affirmative action programs depends upon affirmative action in the universities.

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

40. Ronald Dworkin, The Court and the University: An Exchange, N.Y. Rev. Books, Aug. 14, 2003, at 56, 57.

41. Jack Greenberg, Diversity, the University, and the World Outside, 103 Colum. L. Rev. 1610, 1621 (2003).

42. Lee C. Bollinger, A Comment on *Grutter* and *Gratz v. Bollinger,* 103 Colum. L. Rev. 1589, 1594 (2003).

43. Brief for Lt. Gen. Julius W. Becton Jr. et al. as Amici Curiae 5.

44. *Id.* at 6–7, 25.

> These institutions must have sufficient minority enrollment so that their ROTC programs can, in turn, train and educate substantial numbers of qualified minority officers and provide officer candidates with a racially diverse educational experience. . . . [R]acial diversity in higher education . . . is essential to ensuring an effective, battle-ready fighting force.[45]

The universities must therefore do their part, concludes the Court, "to cultivate a set of leaders with legitimacy."[46]

You know something is amiss when retired military officers are cited approvingly in a Supreme Court opinion about university law school admissions policies. Since when do we take our marching orders from those guys? Clearly, Justice O'Connor has aligned herself and the Court with "major American businesses" and tied the fate of the universities to the needs of what used to be called the "military-industrial complex." But since when is it *in any way* the universities' mission to shore up the "legitimacy" of the military-industrial complex or facilitate its efficient functioning? Since when is it the universities' role to provide "an effective, battle-ready fighting force"? And since when is the ROTC program their raison d'être?

Quite to the contrary, one of the key historic roles of the university has been to place openly in question the legitimacy and public morality of warfare, both in specific contexts and in general. Another main function of a university is to cultivate habits of independent thinking and encourage critical reexamination of materialistic values underlying the corporate and industrial worlds. This is the "critical thinking" our university catalogs routinely advertise (though apparently they do not want it to get *too* critical . . .). The point of a liberal education is to *change* military and corporate culture, not to learn how to fit in.[47]

Justice O'Connor thus gets it exactly backwards in viewing universities as part of the pipeline supplying a cadre of efficient, dutiful, and above all diverse administrators for the military-industrial establishment. These are not the kind of people who raise impertinent and unsettling questions or think out loud at impolitic times (on the battlefield, for instance). But Justice O'Connor *has* to have this vision of the universities in order to argue convincingly for their "compelling interest" (which is really society's interest) in diversity. The military connection transforms a high school civics lesson ("students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students"[48]) into what the Court accepts as a matter of "national security"—one of the traditional compelling interests.

The historic ideal of the university—patron of pure, basic research, advancing knowledge for its own sake, pursuing truth and beauty wherever they lead—was probably always to some extent a myth. The ideal flourished in the German research universities of the nineteenth century and in the liberal arts

45. *Id.* at 29, 28, 27.

46. *Grutter,* 123 S. Ct. at 2341.

47. Cf. Owen Barfield, Worlds Apart (Middletown, Conn., 1963); Karl Marx, Theses on Feuerbach (Leipzig, 1845).

48. *Grutter,* 123 S. Ct. at 2334.

colleges of Oxbridge and New England; but Hitler's Nazi universities provided the inevitable rude awakening.[49] Still, it is no argument against attempting to attain the ideal that it has never been or may never be perfectly realized. According to the logic of second-best, something short of perfection may in many contexts be the best possible outcome.[50] Certainly the fact that efforts to attain the ideal fall short of it should provide no excuse to abandon those efforts altogether.

An ideal university, Justice O'Connor seems to be saying, is a luxury we cannot afford or even aspire to. Instead, a better model would be that of the prison, which (as mentioned above) might have a "compelling interest" in temporarily segregating prisoners by race, in order to head off a (potentially lethal) race riot. Prisons are institutions that operate at a kind of subsistence level; they do not have the luxury of undertaking broad intellectual initiatives that might work at cross-purposes to their primary mission of keeping everyone within their walls (at least) alive. If, as Justice O'Connor suggests, universities are the handmaidens of the military, then their aspirations might justifiably be limited to reflect the more basic, utilitarian needs of their military masters. And if, as seems quite plausible, the legitimacy of military authority depends crucially on a diverse, multiracial officer corps, then who better to provide that legitimacy and authority than the universities?

Since Justice O'Connor raises the military connection herself, another comparison that might be pursued is our current efforts at nation building in the rather primitive conditions of Iraq. One of the main points of contention early on was the military's failure to protect irreplaceable cultural artifacts and antiquities in the National Museum of Iraq.[51] The military's eminently reasonable response was that it had more important things to do at the time, e.g., fight a war. Admittedly, a more fine-tuned military plan would have included specific measures for the protection of cultural artifacts. But from the perspective of the military, these are at best marginal issues as to how fine-tuned a plan to develop; the pragmatic exigencies of warfare do not allow for these to become core concerns. From the perspective of the cultural institutions involved, however, the safety of their collections is a fundamental premise and precondition of their very existence, not a luxury. A military may be needed to protect both museums and universities, but those institutions cannot flourish under conditions tied to the immediate demands of survival. They operate on a higher cultural plane.

49. See generally John Henry Newman, The Idea of a University, ed. I. T. Ker (Oxford, 1976) (1873); Robert Paul Wolff, The Ideal of the University (Boston, 1969); Fritz K. Ringer, The Decline of the German Mandarins: The German Academic Community, 1890–1933 (Cambridge, Mass., 1969).

50. See, e.g., Robert Axelrod, The Evolution of Cooperation (New York, 1984).

51. See, e.g., Alberto Manguel, Our First Words, Written in Clay, in an Accountant's Hand, N.Y. Times, Apr. 20, 2003, § 4 (Week in Review), at 10; Adam Goodheart, Missing: A Vase, a Book, a Bird and 10,000 Years of History, *id.*; John Tierney, Did Lord Elgin Do Something Right?, *id.*

IV.

Justice O'Connor's distant memories of higher education do not serve her well. There is plenty of blame to go around, however, and not all of it should be heaped indiscriminately upon her. The Court has never said that affirmative action is mandatory, only that it is permissible. And it is not quite accurate to say that Justice O'Connor has determined the universities' role or imposed one on them. In reality, it is a role they have willingly embraced. As Lemann observes, "Universities adopted affirmative action not just voluntarily, but enthusiastically and passionately."[52]

Toward the end of her opinion Justice O'Connor cautions that "racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands."[53] Undeterred by that danger, however, she then proceeds to a rather broad agenda of her own:

> It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.[54]

Justice O'Connor writes in the grand, majestic style of someone who has plenty of time, someone perhaps planning to fill out her golden years monitoring the progress of her extravagant cultural speculations. Presumably no one now alive will benefit much from the projected restoration of constitutional rights in 2028, but for those who are really, really patient I sound this note of agreement with Justice O'Connor. In 2028 affirmative action will indeed be a thing of the past; it will no longer be needed to ensure diversity, because the standards of merit and achievement that affirmative action circumvents will no longer be in general use. Legal scholars will still be admiring "the curvature of constitutional space," but the general public, led by its most insightful and inspiring movie stars, will have long since reached its own conclusions.

52. Lemann, *supra* note 26, at 14.

53. *Grutter*, 123 S. Ct. at 2346.

54. *Id.* at 2346–47.