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David Orentlicher

*University of Nevada, Las Vegas -- William S. Boyd School of Law*

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# Diversity: A Fundamental American Principle

David Orentlicher\*

## I. INTRODUCTION

In the debate preceding and following the U.S. Supreme Court's affirmative action decisions in June 2003, many commentators have criticized the use of diversity as a basis for justifying affirmative action in higher education. In their view, the Court should have abandoned the diversity rationale of Justice Lewis Powell's opinion in *Regents of the University of California v. Bakke*<sup>1</sup> and either rejected the use of affirmative action by universities entirely<sup>2</sup> or upheld affirmative action policies under a different rationale.<sup>3</sup>

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\* Samuel R. Rosen Professor of Law, Indiana University School of Law-Indianapolis. J.D., Harvard Law School, 1986; M.D., Harvard Medical School, 1981. I am grateful for the comments of Judy Failer and Nicholas Georgakopoulos. The writing of this article was supported by a summer research grant from Indiana University School of Law-Indianapolis.

1. 438 U.S. 265 (1978). In Justice Powell's opinion for the Court in *Bakke*, he wrote that racial classifications are inherently suspect and therefore subject to the "most exacting" judicial scrutiny (i.e., strict scrutiny). 438 U.S. at 291. In identifying potential state interests that would be compelling enough to satisfy strict scrutiny, Powell recognized the promotion of diversity in a medical school's student body as a sufficiently compelling state interest, but found other proffered interests insufficient. *See Bakke*, 438 U.S. 265. He observed that a medical school could not justify an affirmative action program and the disadvantages it would impose on innocent individuals who were disfavored by the program on the basis of trying to remedy general, societal discrimination. *Id.* at 320. Rather, the school would have to point to specific acts of discrimination that it was trying to remedy, something the school could not do in *Bakke*. *Id.* at 309-10.

With regard to the goal of increasing the availability of physicians in medically underserved areas, Justice Powell noted that the medical school had not shown that a policy of racial preferences was either geared to such a goal or necessary to its achievement. *Id.* at 310-11. In other words, the school's affirmative action policy failed the requirement of strict scrutiny that the state's policy be narrowly tailored to the promotion of the state's compelling interest.

As to having a more diverse student body, Justice Powell approved that goal of affirmative action, noting that universities enjoy a First Amendment interest in academic freedom, including the freedom to decide the composition of their student bodies. *Id.* at 311-12. In addition, wrote Powell, a diverse student body makes for a higher quality educational experience. *Id.* at 312-13.

2. *See* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996); Carl Cohen, *Preference by Race in University Admissions and the Quest for Diversity*, 54 WASH. U. J. URB. & CONTEMP. L. 43 (1998); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059 (1996). For a more recent critique of the diversity rationale by an opponent of affirmative action, see Lino A.

Instead, the Court reaffirmed its view that universities have a compelling interest<sup>4</sup> in promoting the diversity of their student bodies<sup>5</sup> and, therefore, permitted limited affirmative action policies on that basis. According to the Court in *Grutter v. Bollinger*, schools may seek a racially or ethnically diverse student body just as they seek artistically, athletically, economically, or geographically varied student bodies.<sup>6</sup> However, schools may not use quo-

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Graglia, *Grutter and Gratz: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity,"* 78 TUL. L. REV. 2037 (2004).

3. See, e.g., Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 4 (2002) (supporting affirmative action by private entities and opposing affirmative action by government except under limited conditions); Charles R. Lawrence III, *Essay: Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001) (advocating a more radical view of equality in which universities assume greater responsibility for correcting racial inequality in society); Elizabeth Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1220-1228 (2002) (arguing that racial diversity does not enhance education in the way that was assumed by Justice Powell and that affirmative action should be justified in terms of promoting a truly integrated society). Other scholars have called for a different understanding of diversity. See, e.g., Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of Diversity*, 1993 WIS. L. REV. 105 (1993) (arguing for a stronger version of diversity that opens up power to members of groups that have been historically disadvantaged). For a post-*Grutter* critique of the diversity rationale by a proponent of affirmative action, see Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622 (2003).

4. According to the Court's jurisprudence, the Fifth and Fourteenth Amendments do not permit state-sponsored affirmative action unless the policy can survive "strict scrutiny," including the requirement that the affirmative action policy serve a "compelling" state interest, not merely an "important" or "legitimate" state interest. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-498 (1989); *Adarand Constructors v. Peña*, 515 U.S. 200, 221-227 (1995); *Grutter v. Bollinger*, 539 U.S. 306, 330-333 (2003).

In its workplace cases, the Court has concluded that states, cities or other public entities may employ affirmative action to remedy the effects of their past discrimination or to dismantle a private system of discrimination in which they had become a "passive participant" through the expenditure of public dollars. See, e.g., *Croson*, 488 U.S. at 492. However, states, cities or other public entities may not use affirmative action to remedy "society-wide" discrimination, *id.* at 490-91, and the Court has generally rejected the use of quotas in affirmative action policies. As to the latter, the Court has called for preferences that do not reserve some admission slots or job positions for a particular minority but instead ensure that everyone has an opportunity to compete for admission or employment. *Bakke*, 438 U.S. at 317; *Grutter*, 539 U.S. at 334. The Court also will consider whether race-neutral methods to promote diversity have been tried first and whether the policy is temporary in duration. *Adarand*, 515 U.S. at 237-38.

5. *Grutter*, 539 U.S. at 330.

6. 539 U.S. at 315.

tas in the admissions process,<sup>7</sup> and must judge the diversity of their applicants on a case-by-case basis.<sup>8</sup>

The Court rested the freedom to use limited affirmative action policies on the importance of diverse student bodies in higher education.<sup>9</sup> It reasoned that diversity in the university not only enhances the classroom experience, but also ensures that higher education is accessible to all persons.<sup>10</sup>

This article argues that both the Court in its defense of diversity and the commentators in their critiques of the diversity rationale have misjudged the public interest in diversity. Rather than having insufficient weight to justify affirmative action or reflecting a limited educational interest,<sup>11</sup> diversity is a critical principle for much of American constitutional and social structure.<sup>12</sup> In particular, the federalist system of government rests in large part on the belief that a diversity of approaches by the fifty states will lead to better government than would a single approach by the national government.<sup>13</sup> Similarly, the American capitalist economic system is premised on the belief that the economy will flourish through a diversity of individual entrepreneurial activities rather than through a system of central control by the government.<sup>14</sup> Not much is more American than the fostering of diversity.<sup>15</sup>

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7. *Id.* at 330. That is, the *Grutter* Court restated its conclusion from *Bakke* that a college may not set aside a certain percentage of seats only for black applicants. *Id.* at 329-30; see *Bakke*, 438 U.S. at 315-19 (striking down a policy at the University of California, Davis School of Medicine of reserving 16 percent of the seats for minority students).

8. Thus, in *Gratz v. Bollinger*, the Court rejected the affirmative action program at the University of Michigan's undergraduate college. 539 U.S. 244 (2003). Under that program, all black applicants were given 20 points on a 150 point scale with no consideration of the fact that not all blacks would bring the same degree of diversity to the freshman class. *Id.* at 255.

9. *Grutter*, 539 U.S. at 327-33.

10. See *infra* text accompanying notes 33-40.

11. See, e.g., Akhil Reed Amar and Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1748-49, 1773-75 (1996) (distinguishing the value of affirmative action in higher education from its value in marketplace opportunities); Chen, *supra* note 2, at 1862 (observing that Supreme Court doctrine leaves room for the diversity rationale for affirmative action only in areas involving speech and expression).

12. Some of the recent scholarship on the *Grutter* decision has observed how the Supreme Court's rationale has implications outside of the academic setting. See, e.g., Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 KY. L.J. 263 (2003/2004) (discussing how *Grutter* might allow for affirmative action in employment); Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 73-74 (2004) (discussing how *Grutter* might apply to public funding decisions or hiring decisions by police departments).

13. See *infra* Part III.A.

14. See *infra* Part III.B.

15. Although this article looks at diversity in settings beyond those in which diversity has been considered by the Supreme Court, it employs a similar understanding of

Diversity is central to the American legal and economic systems because diversity both promotes good outcomes and discourages bad outcomes. Diversity promotes good outcomes by multiplying options. This multiplication leads to optimal results because of society's inability to accurately predict which public policies or private activities will succeed and which will fail. Will an increase in the minimum wage help the poor by giving them a higher income, or will it hurt the poor by making it more costly for employers to hire new workers? Will the creation of private savings accounts generate greater wealth for recipients of Social Security or will it leave many recipients with

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diversity. When the Court used the term "diversity" in its higher education cases, *Bakke*, 438 U.S. 265, and *Grutter v. Bollinger*, 539 U.S. 306 (2003), it talked about universities seeking a student body whose members had different personal traits and abilities, came from different backgrounds, and had different experiences. More specifically, the Courts spoke about a student body that represented "both sexes; . . . different races, religions, and backgrounds; [and] who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives." *Bakke*, 438 U.S. at 312 n.48. Diversity might be accomplished by admitting students with qualities of "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [or] ability to communicate with the poor." *Id.* at 317. Similarly, a school might credit applicants who have "lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields." *Grutter*, 539 U.S. at 338.

This article draws upon two key aspects of the idea of diversity in a student body, workforce or other group of people. First, it is important that there are multiple persons involved. Students, for example, learn more if there are other students with whom they may interact. *Bakke*, 438 U.S. at 312 n.48. Second, it is important that the multiple persons are different, that they bring a heterogeneity of traits, abilities, backgrounds, and experiences. These differences are likely to result in people with a variety of perspectives and/or interests. *Id.* The quotes from *Bakke* and *Grutter* in the preceding paragraph of this note illustrate the role of diversity in academia. In addition, consider how the U.S. Constitution embodies a tripartite government of multiple branches with different compositions and authorities. The Senate and House, with their different terms of office and district sizes, often approach issues differently, and a 535-member Congress may take different views and have different interests than does a single President or a 9-member Supreme Court. *See, e.g.,* GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 21 (5th ed. 2005) (discussing how longer terms and larger districts make Senators more likely to promote the broader public good with Representatives more likely to press the parochial interests of their districts). The Constitution also establishes a sharing of authority among one national government and fifty different state governments, and differences in interest are common not only between a national government and a state government but also among different state governments. *See, e.g.,* THE FEDERALIST NO. 10 (James Madison) (observing that members of Congress will be inclined to "pursue great and national" interests while state legislators will occupy themselves more with "local circumstances and lesser interests").

As for why it is important to have multiple, different persons involved (i.e., why diversity is valuable), this article addresses that question in subsequent sections.

an empty retirement fund from unwise investments or a downturn in the stock market? Will a new biotechnology company develop a breakthrough in cancer treatment, or will it slide into bankruptcy? When fifty states can pursue individual responses to social challenges, or when multiple competitors can market their own ideas, society enhances its likelihood of identifying optimal approaches. More options will be explored and more opportunities will be exploited than if a single government entity controlled all public and private operations.

Enhancing diversity, then, compensates for the gaps in society's understanding of cause and effect. When it is impossible to know which path to take, society does better when it explores multiple paths rather than committing itself in a single direction. In the absence of measurable criteria for predicting good results, the promotion of diversity is turned to as a method to increase the opportunities for the best options to emerge. In other words, the pursuit of diversity is an all-purpose strategy that promotes success throughout the public and private spheres, regardless of the specific policy or activity at stake.

Diversity not only promotes good outcomes, it also discourages bad outcomes. Indeed, the benefits of diversity are well known to Wall Street professionals. According to a cardinal principle of investment strategy, people can maintain their expected profits and decrease their risk of loss by purchasing a diversified portfolio of stocks rather than putting all of their money in one stock.<sup>16</sup> In addition, diversity discourages bad outcomes in other private sector settings or in government by preventing the concentration of power. Multiple state governments protect the public from the tyranny that might well develop from a national government not subject to adequate restraint. Similarly, the diversity of branches within the national or state governments checks the possibility of both national and state governmental tyranny. In the private sector, diversity protects society from the inefficiency that can result when a monopolist - public or private - is insulated from competition. Without competitive pressure to innovate and improve, a monopolist may tend toward stagnation. In a market with multiple companies, on the other hand, each business faces competitive pressures to innovate and improve.

The *Grutter*<sup>17</sup> and *Gratz*<sup>18</sup> decisions left open an important question: Can the goal of diversity justify affirmative action not only in higher education but also in other settings, including the workplace? By acknowledging the full depth and breadth of diversity's importance, there is an affirmative answer to that question. Just as diversity promotes good outcomes and discourages bad outcomes in government and private economic activity, it enhances the quality of workforces and other groups.

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16. Frank J. Fabozzi, *Fundamentals of Investing* in THE HANDBOOK OF FINANCIAL INVESTMENTS 15, 20-21 (Frank J. Fabozzi ed. 2002).

17. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

18. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

## II. THE SUPREME COURT'S OPINIONS

In *Grutter v. Bollinger*<sup>19</sup> and *Gratz v. Bollinger*,<sup>20</sup> the Supreme Court clarified the acceptable uses of affirmative action in higher education, indicating which types of affirmative action are permissible and which types are not.

### *A. Factual Background*

In *Grutter*, Barbara Grutter sued the University of Michigan after being denied admission to its law school, claiming that her rejection resulted from the unconstitutional use of affirmative action<sup>21</sup> by the law school's admissions office. The law school gave great weight to an applicant's undergraduate grade-point average (GPA) and score on the Law School Admissions Test (LSAT). However, it also took into account measures of diversity, including work experience, unusual talents or experiences, and membership in racial or ethnic groups that have historically been subject to discrimination.<sup>22</sup> Thus, for example, an applicant's chances for admission increased if he spoke five languages, had previously had a successful career as a concert pianist, or was African-American.<sup>23</sup>

Ms. Grutter argued that the admissions policy wrongly used "race as a 'predominant' factor, giving applicants who belong to certain minority groups 'a significantly greater chance of admission than students with similar credentials from disfavored racial groups.'"<sup>24</sup> Given the law school's use of diversity as an important factor weighing in favor of admissibility, it is likely that a minority candidate with Ms. Grutter's GPA and LSAT score would have been accepted by the law school, while Ms. Grutter herself was not.<sup>25</sup>

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19. 539 U.S. 306.

20. 539 U.S. 244.

21. 539 U.S. at 316-17.

22. *Grutter v. Bollinger*, 288 F.3d 732, 736-37 (6th Cir. 2002), *cert. granted*, 537 U.S. 1043 (2002), *aff'd*, 539 U.S. 306 (2003).

23. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 826-29 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (2002), *cert. granted*, 537 U.S. 1043 (2002), *aff'd*, 539 U.S. 306 (2003). Some of the students who benefited from the emphasis on diversity were a graduate of Harvard College who "was born in Bangladesh . . . received 'outstanding references' from his professors, and had a 'truly exceptional record of extracurricular activity,'" "a single mother from Argentina who worked successfully in business for several years, graduated from college summa cum laude, received 'glowing references,' and was fluent in four languages;" and an applicant who "had excellent grades and a good LSAT score" and "'diversity considerations' further strengthened her application because her parents were Greek immigrants, she was 'immersed in a significantly ethnic home life,' she had studied and traveled in Europe and was fluent in three languages." *Id.* at 827.

24. *Grutter*, 539 U.S. at 317.

25. *See id.* at 320.

In *Gratz*, Jennifer Gratz challenged the undergraduate admissions policy at the University of Michigan after being denied a spot in the Class of 1999.<sup>26</sup> The college ranked applicants on a scale of 0 to 150, awarding points for GPA, SAT score,<sup>27</sup> athletic prowess, and other factors.<sup>28</sup> Like Barbara Grutter, Ms. Gratz argued that the university unconstitutionally used an applicant's race to increase her chances for admission to college.<sup>29</sup> The school's policy of adding 20 points to the score of all applicants who were members of an underrepresented racial or ethnic minority group was of particular concern to Ms. Gratz.<sup>30</sup>

### *B. Diversity in Higher Education*

In *Grutter* and *Gratz*, the Court upheld the law school's affirmative action policy<sup>31</sup> but rejected the policy at the undergraduate college,<sup>32</sup> reiterating a view enunciated twenty-five years earlier by Justice Lewis Powell in *Bakke*.<sup>33</sup> In *Bakke*, Justice Powell recognized diversity as a compelling governmental interest underlying affirmative action in academia, holding that the First Amendment's concern with freedom of speech and thought includes a principle of "educational autonomy" to ensure that universities can "select those students who will contribute the most to the 'robust exchange of ideas.'"<sup>34</sup> Likewise, in *Grutter*, the Court reasoned that a diverse student body results in a more enlightening classroom experience and better learning.<sup>35</sup> According to the Court, an admissions policy that fosters diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"<sup>36</sup> "These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the

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26. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

27. *Id.* at 254. At one time, SAT was an acronym for Scholastic Aptitude Test. Now, SAT refers to the current version of the test, "SAT Reasoning Test." (SAT Subject Tests is the current rubric for what used to be called Achievement Tests.) See SAT in WIKIPEDIA, THE FREE ENCYCLOPEDIA, [http://en.wikipedia.org/wiki/SAT\\_college\\_entrance\\_test](http://en.wikipedia.org/wiki/SAT_college_entrance_test). Michigan also accepted scores on the American College Test (ACT). *Gratz*, 539 U.S. at 254.

28. *Id.* at 255.

29. *Id.* at 267.

30. *Id.* at 256.

31. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

32. *Gratz*, 539 U.S. 244.

33. *Id.*, See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

34. *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 313).

35. *Id.* at 330.

36. *Id.* (quoting *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (2002), *cert. granted*, 537 U.S. 1043 (2002), *aff'd* 539 U.S. 306 (2003), *reh'g denied*, 539 U.S. 982 (2003)).



students have 'the greatest possible variety of backgrounds.'"<sup>37</sup> As it provides a better educational experience, a diverse classroom "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."<sup>38</sup>

Indeed, the Grutter Court further emphasized the important social benefits that diversity in the university provides when students pursue careers after graduation.<sup>39</sup> The Court observed that it has "repeatedly acknowledged" the importance of education in preparing students for their professional lives and that learning in an academic setting characterized by diversity has become especially critical in a world where national boundaries are increasingly less meaningful.<sup>40</sup> In this line of analysis, the Court relied on amicus briefs filed by business interests and retired military leaders arguing the benefits of student body diversity.<sup>41</sup> The corporate community observed that its ability to compete successfully in a global marketplace depended on its ability to recruit employees who have been exposed to a diversity of people, cultures, and viewpoints.<sup>42</sup> The military officials explained that it draws on graduates of the service academies or other universities for its officers and that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle [sic] mission to provide national security."<sup>43</sup>

In addition to the University's interest in providing a diverse classroom experience, because of the benefits in and out of academia, the Court identi-

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37. *Id.* (quoting *Grutter*, 137 F. Supp. 2d 821).

38. *Id.* (quoting Brief of Amici Curiae American Educational Research Ass'n et al. at \*3, *Grutter*, 539 U.S. 306 (No. 02-241)).

39. *See id.* at 330-31.

40. *See id.* (also observing that education plays an important role in preparing students for civic engagement).

41. *See id.* at 330-31.

42. *Id.* at 330-31 (citing Brief of Amici Curiae 3M et al. at \*5, *Grutter v. Bollinger*, 539 U.S. 306 (No. 02-241); Brief of Amici Curiae General Motors Corp. at \*3-4, *Grutter*, 539 U.S. 306 (No. 02-241)). As discussed in one of the briefs, education in a diverse setting enhances the students' later work in a number of ways. *Brief for 3M* at \*7. First, they will be able to integrate the different perspectives to which they were exposed and develop innovative and creative responses to problems. *Id.* In addition, they will be "better able to develop products and services that appeal to a variety of consumers." *Id.* Their cross-cultural experiences in school will prepare them to work with partners, employees and clients both in the United States and in other countries. Fourth, their exposure to diversity will make them less likely to engage in discrimination or stereotyping. *Id.* The 3M amicus brief was joined by 64 other Fortune 500 companies, including American Express, Coca-Cola, Daimler-Chrysler, General Electric, Intel, Johnson & Johnson, Microsoft, Nike, Pfizer, Proctor & Gamble, Shell Oil, and United Airlines. *Id.*

43. *Id.* at 331 (quoting Brief of Amici Curiae Julius W. Becton, Jr., et al. at \*27, *Grutter*, 539 U.S. 306 (No. 02-241) (whose signers included former Secretary of Defense William Cohen and illustrious retired generals such as Wesley Clark and Norman Schwarzkopf)).

fied a strong government interest in expanding opportunity and access to higher education.<sup>44</sup> Given the importance of education to a person's opportunities in life, the ability to attend college and graduate school furthers the governmental interest of ensuring an educated and civic minded population in which individuals can effectively participate in community affairs and obtain training for leadership roles.<sup>45</sup> As the Court observed, we can realize the "dream of one Nation, indivisible," only if all racial and ethnic groups play a meaningful role in civic life.<sup>46</sup>

The *Grutter* Court's emphasis on the importance of diversity in higher education for the development of this country's leaders, parallels the *Bakke*<sup>47</sup> Court's rationale. Justice Powell reasoned that:

The atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. . . . [I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples.<sup>48</sup>

While both Justice Powell and the *Grutter* Court observed that exposure to diversity makes for more capable leadership, the *Grutter* Court also considered the importance of diversity in establishing public trust in the country's leadership:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnic-

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44. *Id.*

45. *Id.* at 332. As the Court observed, "[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." *Id.* (quoting Brief of Amicus Curiae for Association of American Law Schools at \*5-6, *Grutter*, 539 U.S. 306 (No. 02-241)).

46. *Grutter*, 539 U.S. at 332.

47. 438 U.S. 265 (1978).

48. *Id.* at 312-13 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) and *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). As Goodwin Liu has observed, the Supreme Court recognized the importance of diversity in higher education well before *Bakke*. Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 386-387 (1998). In *McLaurin v. Oklahoma State Regents for Higher Education*, for example, the Court discussed the importance of students being able "to engage in discussions and exchange views with other students." 339 U.S. 637, 641 (1950) (rejecting Oklahoma's policy of preventing interaction between black and white students in classrooms, the cafeteria, and the library).

ity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.<sup>49</sup>

Satisfied with the University's purpose behind its affirmative action plan, the *Grutter* Court examined the means the law school used to encourage diversity and whether it was a permissible effort to diversify its student body.<sup>50</sup> The law school employed a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."<sup>51</sup> It did not use a quota system, or otherwise insulate minority applicants from competition with other applicants. Rather, the law school considered race in a "flexible, nonmechanical" manner.<sup>52</sup> Moreover, the law school gave substantial weight to other measures of diversity such as an exceptional record of community service, having overcome personal adversity, or having lived abroad.<sup>53</sup>

In contrast, the *Gratz* Court found the college's affirmative action policy unacceptable.<sup>54</sup> By automatically adding 20 points to the score of every applicant from an "underrepresented minority" group, the college did not perform an individualized assessment of each applicant.<sup>55</sup> Under *Bakke*, wrote the *Gratz* Court, an applicant's race might add to the diversity that she could bring to a university, or it might not, depending upon how she compared with other applicants or those who had already been admitted.<sup>56</sup> The college further deviated from *Bakke* when it gave more points for racial diversity than for other measures of diversity.<sup>57</sup> Applicants with the artistic talent of "Monet or Picasso" would receive an addition of no more than 5 points to their ad-

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49. *Grutter*, 539 U.S. at 332.

50. *Id.* at 335-40.

51. *Id.* at 337.

52. *Id.* at 334-35 (citing *Bakke*, 438 U.S. at 315-16). The Court did recognize the law school's goal of admitting a "critical mass" of minority students, "so as to realize the educational benefits of a diverse student body." *Id.* at 318. The school viewed a critical mass as entailing "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," a number that would help ensure that "underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 318-19. A critical mass would also ensure that nonminority students would hear a range of perspectives from minority students, thereby counteracting the tendency to assume that there is a "minority viewpoint." *Id.* at 318-20 (citing testimony from multiple law school officials). While the idea of a "critical mass," has provoked controversy, the legitimacy of the idea is beyond the scope of this article. *See id.* at 380-86 (Rehnquist, J., dissenting).

53. *Id.* at 338.

54. *Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003).

55. *Id.* at 271-72.

56. *Id.* at 272-73.

57. *See id.* at 272-74.

missions score.<sup>58</sup> In the college's view of enhancing the student body's diversity, being a member of an underrepresented minority was always four times more meaningful than having artistic talent.<sup>59</sup> On the other hand, if a policy of individualized assessment were utilized a student's artistic talent would sometimes result in a higher priority for admissions.<sup>60</sup> Most troubling was the fact that the college's award of 20 points to underrepresented minorities effectively made race a "decisive" rather than contributing factor in a student's admission.<sup>61</sup>

In sum, the Supreme Court in *Grutter* and *Gratz* reaffirmed Justice Powell's understanding of the role of affirmative action in higher education. Universities have a compelling interest in striving for diversity in their student bodies, and considering the race of applicants is a legitimate way of increasing student body diversity. However, admissions offices must give applicants individualized consideration, taking into account a broad range of measures of diversity and not assuming that an applicant's race entails a specific measure of diversity.

### *C. Diversity in Non-Educational Settings*

Despite the *Grutter* Court's resounding affirmation of the importance of diversity in higher education, the Court has not found diversity to be an interest sufficiently compelling to justify affirmative action in other settings. In *Metro Broadcasting, Inc. v. FCC*,<sup>62</sup> the Court held that diversity in ownership of broadcast media was an "important" government interest,<sup>63</sup> but it has invoked diversity as a "compelling" state interest only in the context of higher

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58. *Id.* at 273.

59. Under the University's admissions system, membership in a minority group warranted an addition of 20 points whereas exceptional artistic talent warranted only an additional 5 points. *Id.* at 274.

60. *Id.* at 272-73.

61. *Id.* at 271-72.

62. 497 U.S. 547 (1990), *overruled in part by* *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

63. *Id.* at 566-68. In *Metro Broadcasting*, the Court did not need to find a compelling governmental interest, as it decided *Metro Broadcasting* under intermediate scrutiny, which requires only an important government interest rather than a compelling interest. *Id.* at 564. At that time, the Court subjected state affirmative action programs to strict scrutiny and federal affirmative action programs to intermediate scrutiny. *Id.* at 563-566; Nina Farber, Comment, *Justifying Affirmative Action After City of Richmond v. J.A. Croson: The Court Needs a Standard for Proving Past Discrimination*, 56 BROOKLYN L. REV. 975, 993-99 (1990). In *Adarand*, the Court overruled *Metro Broadcasting* and held that even federal affirmative action programs must satisfy strict scrutiny – they too must be justified by a compelling state interest. 515 U.S. at 227.

education.<sup>64</sup> The Court's unwillingness to rely on diversity as justification for non-educational affirmative action policies suggests that it views diversity in higher education differently than it views diversity in other settings.<sup>65</sup> This difference is illustrated by the Court's failure to cite diversity as a compelling justification for affirmative action in the marketplace in its decisions in *Adarand*<sup>66</sup> and *Croson*<sup>67</sup> when it addressed the use of affirmative action in contracting for highway construction or other public works projects.<sup>68</sup>

### III. DIVERSITY'S FUNDAMENTAL IMPORTANCE

Although the Court has identified the interest in diversity as one tied primarily to the educational setting, the importance of diversity appears throughout American legal and social principles and institutions. Indeed, it is no exaggeration to say that diversity is an interest of fundamental importance to America's constitutional and social systems. The United States Constitution reserves governmental power not to a single national authority but to a diverse collection of a national government and multiple state governments, all of which are further divided into three separate branches. Likewise, the American economic system eschews a system of central planning by a single national entity, instead treasuring marketplaces characterized by a diversity of independent competitors.

#### *A. Diversity in Government*

The federalist structure of government in the United States is premised on a belief that diverse approaches to governance are both beneficial and necessary. Rather than depend upon a single national government to write the country's laws, reliance is placed upon a mix of a national government and

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64. *Metro Broadcasting*, 497 U.S. at 568 n.15 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986)).

65. In *Metro Broadcasting*, the Court did emphasize that just as First Amendment considerations were important to its analysis of diversity in *Bakke*, where it found the promotion of diversity to be a compelling state interest, First Amendment considerations were important in establishing diversity in broadcasting as an important government interest. *Id.* at 567-68. As the Court observed, the public benefits from hearing a diversity of views and information on the airwaves. *Id.* at 568.

66. 515 U.S. 200.

67. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

68. Some justices have stated explicitly that the diversity rationale has much greater weight in the educational context and some employment settings than in the general marketplace. *See, e.g., id.* at 512-13, 513 n.2 (Stevens, J., concurring in part and concurring in the judgment) (contrasting the value of diversity among teachers in the public schools or among police officers in a city with racial unrest with a lack of comparable benefit from diversity among contractors on public works projects).

the governments of the several states. Regulation of the environment,<sup>69</sup> control of narcotics distribution,<sup>70</sup> and the promotion of excellence in the public schools<sup>71</sup> are a few examples of the governing that occurs through a combination of state and federal action. And the state contribution to the law can vary greatly from state to state, as different legislatures pursue different approaches.

It is, in fact, predictable that the different states will have different priorities with respect to public policy. A state with high unemployment that rests along the U.S.-Mexico border will likely view illegal immigration differently than a state with low unemployment located some distance from the border. A Midwestern state with plentiful reserves of coal may be less interested in policies to encourage alternative sources of energy than a Northeastern state that lacks coal beds. A largely rural state with fertile soil will care more about farm policy than a largely urban state, and a state that is home to military contractors will likely support greater funding for new weaponry than will other states.

States will not only pursue different priorities, but will employ different approaches to the same issues. Consider in this regard how states have varied in their efforts at Medicaid reform. Tennessee tried to extend health care coverage to more uninsured persons by placing all of its Medicaid recipients in managed care programs believing that the lower costs of managed care would free up dollars to fund the expansion of coverage.<sup>72</sup> Oregon attempted to extend coverage to more indigent persons by reducing the number of treatments for which coverage would be provided. Under the Oregon Health Plan, the state ranked different medical treatments in terms of their benefits and

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69. Automobile manufacturers, for example, are subject to both federal regulations regarding permissible levels of vehicle emissions and the stricter standards established by California. John Hiski Ridge, *Deconstructing the Clean Air Act: Examining the Controversy Surrounding Massachusetts's Adoption of the California Low Emission Vehicle Program*, 22 B.C. ENVTL. AFF. L. REV. 163, 175-76 (1994).

70. A seller of cocaine or heroin can be prosecuted under both federal and state law. See, e.g., 21 U.S.C. § 841 (2000) (prohibiting the distribution of cocaine and other controlled substances) and GA. CODE ANN. § 16-13-31 (2003) (prohibiting the distribution of cocaine and other controlled substances).

71. With the enactment of the federal "No Child Left Behind" legislation, public schools now must meet both federal and state standards with respect to the assessment of their students' academic achievement. See 20 U.S.C. § 6316 (2000 & Supp. 2002) (requiring states to assess on an annual basis the academic progress of its students) and IND. CODE ANN. § 20-32-5-15 (Michie 2005) (requiring statewide testing for educational progress in grades 3, 6, 8, and 10).

72. James F. Blumstein and Frank A. Sloan, *Health Care Reform Through Medicaid Managed Care: Tennessee (TennCare) as a Case Study and a Paradigm*, 53 VAND. L. REV. 125, 129-131 (2000). Although there has been significant retrenchment from the expansion of Medicaid under TennCare, *National Briefing South: Tennessee: Approval To Trim Medicaid Rolls*, N.Y. TIMES, April 13, 2005:A17, it has done much to increase coverage. Blumstein and Sloan, at 243-44.

costs and promised coverage only up to a certain point.<sup>73</sup> Again, the idea was that by spending less on each Medicaid recipient, Medicaid could cover more people.<sup>74</sup> Utah has taken still a third path. In a limited demonstration project, Utah covers the costs of an emergency department visit or appointments with a physician for basic care, but it does not cover the costs of care from a specialist or for hospitalization.<sup>75</sup> With different states attacking a common problem, multiple responses, instead of a single approach, will emerge.

In addition to promoting diversity through the federalist relationship between the national and state governments, the American system of governance incorporates diversity through the separation of powers within the national and state governments. Rather than having a single national authority, for example, there exists a national government whose power is dispersed through the tripartite combination of an executive, a legislature, and a judiciary. Moreover, the legislative power is further divided between the Senate and the House of Representatives.

### 1. Diversity in Government Promotes Good Governance

Diversity in governance increases the likelihood that public officials will implement optimal public policies. Two aspects of this analysis are especially important. First, the national government and each of the fifty different state governments can respond to a common problem with its own approach. Instead of one government trying one option at a time in the search for the best approach, fifty-one governments can try as many as fifty-one different options simultaneously.<sup>76</sup>

This opportunity to try multiple options is critical because of the limited ability of policy-makers to predict the outcome of a shift in policy. If states restrict the ability of physicians to prescribe expensive drugs to patients in the Medicaid program, will people receive the same quality of care at lower cost, or will some people receive drugs that are less costly but also less effective in

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73. Howard M. Leichter, *Oregon's Bold Experiment: Whatever Happened to Rationing?*, 24 J. HEALTH POL. POL'Y & L. 147, 149 (1999).

74. Lawrence Jacobs, Theodore Marmor & Jonathan Oberlander, *The Oregon Health Plan and the Political Paradox of Rationing: What Advocates and Critics Have Claimed and What Oregon Did*, 24 J. HEALTH POL. POL'Y & L. 161, 166 (1999). After ten years, health care cost inflation eroded the gains of the Oregon Health Plan, leaving the state with about the same percentage of uninsured residents as existed before the Plan's implementation. Don Colburn, *In Oregon, 1 in 6 Lacks Medical Coverage*, THE OREGONIAN, Jan. 18, 2005, at A1.

75. Kirk Johnson and Reed Abelson, *Model in Utah May Be Future For Medicaid*, N.Y. TIMES, Feb. 24, 2005, at A1.

76. The point is somewhat oversimplified. The national or a single state government could try a few options simultaneously through demonstration projects. Still the opportunities for variation are much greater with fifty-one different governments.

treating their illnesses?<sup>77</sup> If a school district opens charter schools, will the competition stimulate innovation and improvement in the traditional public schools, or will the competition worsen public school quality by draining resources and siphoning the best students from the traditional schools?<sup>78</sup> As different governments implement different policies, some of the national and state government reforms will be more successful than others, and the governments with less successful approaches can learn from their counterparts with more successful approaches. By trial and error, public officials can discover the best policies, and trial-and-error will be more effective with multiple, simultaneous trials than with a single trial.

Diversity in governance is also valuable because it reduces the potential harm caused by the adoption of misguided policies. As Justice Brandeis so aptly noted, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>79</sup> If Missouri or North Carolina changes policy in a way that turns out to be harmful, the damage is far less than if the entire country makes the same policy change. When Oregon legalized physician-assisted suicide, many people expressed concern about the risks that might materialize - suicide might be chosen out of depression or coercion rather than genuine choice, or patient trust in physicians might be compromised, for example.<sup>80</sup> The fact that Oregon has a population of about 3.5 million made the risk of harm more tolerable than if physician-assisted suicide had been legalized nationwide for a population of more than 280 million.<sup>81</sup> As mentioned earlier, the analogy to investment strategy is useful.<sup>82</sup> Just as investors reduce their risk by spreading their funds over a diversified portfolio of investments,<sup>83</sup> the American federalist system reduces the risk of innovation in public policy by relying on a mix of smaller policy experiments rather than a single large policy experi-

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77. Bridget M. Olson, *Approaches to Pharmacy Benefit Management and the Impact of Consumer Cost Sharing*, 25 CLINICAL THERAPEUTICS 250, 256-57 (2003).

78. Kevin S. Huffman, Note, *Charter Schools Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U.L. REV. 1290, 1300-1303 (1998). Charter schools are public schools, but they operate with greater autonomy from state regulation, giving them more freedom to design their curricula, hire their teachers, etc. *Id.* at 1294.

79. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

80. DAVID ORENTLICHER, *MATTERS OF LIFE AND DEATH* 41-43, 45-46 (2001).

81. U.S. CENSUS, *CENSUS 2000*. So far, it appears that physician-assisted suicide has been employed in Oregon in an appropriate manner (unless one thinks that physician-assisted suicide is inherently wrong). ORENTLICHER, *supra* note 80, at 48-49; Susan Okie, *Physician-Assisted Suicide -- Oregon and Beyond*, 352 N. ENGL. J. MED. 1627 (2005).

82. See *supra* note 16 and accompanying text.

83. See Fabozzi, *supra* note 16.



ment. In short, diversity is fundamental to American governance because it encourages the innovation that has fostered the great economic, social, and political progress of our nation since its founding.

Diversity in government also promotes better policymaking because it reduces the likelihood that government leaders will adopt extremist positions. As more individuals become responsible for decisions, their policies will tend more toward the middle of the ideological spectrum. A single decision maker might come from the extreme right or left, but a large group of decision makers will come with a wide range of views, and the need for compromise will push them to positions of moderation.<sup>84</sup> When a majority of 435 Representatives and a second majority of 100 Senators must approve legislation before it comes to the President, Presidents must accept a dilution of their proposals that would not occur if he or she could act alone.

The jury system illustrates the moderating effect of diversity and provides a smaller scale analogy of the effect of diversity in a legislative body. When a judge is the sole decision maker, a wider range of decisions occur than when twelve jurors must reach consensus.<sup>85</sup> Single judges have the ability to impose their extreme views, but a juror with the same views must persuade eleven other persons before those views can be implemented. The need for a consensus of twelve will push decisions toward the philosophical and political middle.<sup>86</sup>

## 2. Diversity in Government Prevents Tyrannical Authority

Diversity in government makes for better governance in another way - it protects the public against the abuse of power, and it does so for multiple reasons. First, as the Federalist papers explain, diversity in government frustrates the possibility of a tyrannical authority.<sup>87</sup> Instead of having a single governmental entity that possesses all of the government's power and that is subject to no outside control, the United States employs a system of government in which authority is divided among multiple, distinct entities that are subject to external controls.

The division of power alone helps prevent tyranny. When authority is apportioned among one national and multiple state governments and then subdivided among executive, legislative and judicial branches of government, it becomes more difficult for a single entity to accumulate excessive power.

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84. Cf. Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 11 (1987) (observing that "by increasing the number of persons whose views must be taken seriously, the provisions on sharing power reduce the dangers of mistake and impetuosity")

85. See *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (observing that "the right to be tried by a jury of his peers [gives the defendant] an inestimable safeguard . . . against the compliant, biased, or eccentric judge.).

86. See *id.*

87. See THE FEDERALIST NO. 51 (James Madison).

This is so partly because of the fragmentation of power, as in the admonition to divide and conquer. It is also the case because different governmental entities have different kinds of authority. A national government lacks a plenary police power but must act within the powers enumerated in the Constitution;<sup>88</sup> state governments enjoy a plenary police power but its reach is limited by the state's boundaries.<sup>89</sup> Only the legislature can write laws, but it must turn to the executive branch for implementation of the laws.

The division of authority also prevents tyranny because the different governmental entities operate in a system of checks and balances designed to prevent any one entity from aggregating too much power. When the national government tries to expand its power, for example, the states will push back. Thus, when Congress tried to solve the national problem of low-level radioactive waste disposal<sup>90</sup> by harnessing the legislative authority of the states, New York successfully challenged the Congressional encroachment.<sup>91</sup> Or when Congress tried to implement its background checks for gun purchasers by deputizing state law enforcement officials, the state officials successfully pushed back against the federal government's invasion of their sphere of influence.<sup>92</sup>

Just as state governments resist expansion by the national government, the different branches of government resist expansion by each other. Thus, when the legislative branch tries to increase its power, the executive and/or judicial branches may push back.<sup>93</sup> For example, when Congress tried to interject itself into the executive branch's deportation proceedings the Supreme Court invalidated the intrusion.<sup>94</sup> By dividing authority among many groups of actors, the Constitution limits the ability of a tyrant to gain all of the government's power. Or as Madison wrote, with a division of power between national and state governments, and then a subdivision of power among sepa-

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88. *McCullough v. Maryland*, 17 U.S. (4 Wheat) 316 (1819) (observing that the national government is "one of enumerated powers").

89. Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M.L. REV. 271, 277-78, 291-92 (1998). In addition, both national and state governments must respect constitutionally protected rights in the exercise of their power.

90. *New York v. United States*, 505 U.S. 144, 149-150 (1992) (addressing legislation to regulate the disposal of radioactive waste from "watch dials, smoke alarms, measurement devices, medical fluids, research materials, and the protective gear and construction materials used by workers at nuclear power plants").

91. *Id.* at 175-77.

92. *Printz v. United States*, 521 U.S. 898 (1997).

93. In this system of checks and balances, the public is protected because the "ambition" of each branch of government is "made to counteract" the "ambition" of the other branches. THE FEDERALIST NO. 51 (James Madison).

94. *INS v. Chadha*, 462 U.S. 919 (1983).

rate branches of government, "[t]he different governments will control each other, at the same time that each will be controlled by itself."<sup>95</sup>

The federalist structure protects citizens not only from tyranny by the government but also from oppression by fellow citizens.<sup>96</sup> As Madison observed, people are not angels, so government is necessary to ensure order.<sup>97</sup> And because public officials are not angels, the governmental structure must include both internal and external controls. To be sure, "[a] dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."<sup>98</sup>

Having a national government alongside the state governments is a key auxiliary precaution to provide security for minority interests. In a small state like Rhode Island, one might expect a majority of people with similar interests to unite and dominate the minority.<sup>99</sup> In the entire United States, where the population is much more diverse, an oppressive majority is less likely to develop. As Madison wrote:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority; and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a great variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens.<sup>100</sup>

This country's experience with slavery illustrates the principle. Had Mississippi remained a sovereign state not subject to the commands of a national government, slavery would likely have endured much longer than it did in that state. Slavery was eliminated in Mississippi not because voters in the state voluntarily chose to prohibit the practice but because voters in other states rejected the secession of the Confederate States and insisted on the

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95. THE FEDERALIST NO. 51 (James Madison). The division of Congress into a Senate and House also was designed to frustrate an excessive accumulation of power. *Id.* Madison viewed the legislative branch as the strongest; by dividing its power between two disconnected houses, its authority could be weakened. *Id.*

96. *Id.*

97. *Id.* (writing that "[i]f men were angels, no government would be necessary.").

98. *Id.*

99. *Id.*

100. THE FEDERALIST NO. 10 (James Madison). (noting also that in a society with a larger population, it is more difficult for a majority to act in unison).

enactment of the Thirteenth Amendment to the United States Constitution after the Civil War.<sup>101</sup>

In short, the American constitutional system reflects a belief that diversity both promotes good government and prevents bad government.<sup>102</sup> First, governance is improved by having diversity in the governmental structure - a national government and multiple state governments, all of which are subdivided into three branches, will generate greater innovation and less tyranny. Second, governance is improved when a national government that represents a larger and therefore more diverse public is joined with the individual state governments - a heterogeneous populace is less likely to be captured by factional interests.

Although there are some differences between diversity in government and diversity in other settings, one key similarity is apparent. Just as a diverse range of governments promotes better governance a diverse range of participants promotes better outcomes elsewhere.

### *B. Diversity in the Market*

As discussed in the preceding section, the American constitutional structure rests on the premise that diversity promotes better governing. Similarly, the American economic system rests on the premise that diversity promotes greater wealth. Underlying this belief is the assumption that a diversity of individual entrepreneurial activities creates stronger economic growth than a system of central control by the government. In other words, the economy

101. See generally U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States . . .").

102. To be sure, the Constitutional framers lacked a full sense of diversity. While they promoted a diversity of governmental entities - a national government and multiple state governments, three branches of government, a bicameral Congress - they established a system in which the voters and officeholders were white men. Since the founding, there has been greater recognition of the importance of diversity among voters and office-holders. Thus, the Fifteenth Amendment prohibits the denial of the right to vote on the basis of race or color, and the Nineteenth Amendment prohibits the denial of the right to vote on the basis of sex. U.S. CONST. amends. XV, § 1, XIV, § 1 As Elizabeth Anderson has observed,

Democracy is a system of collective self-governance among equal citizens, in which we work out, collectively and inclusively, our rules for living together in society. To enjoy democratic legitimacy, the terms of interaction through which we work out these rules must credibly claim to be reasonably responsive to the legitimate concerns of all. To achieve such responsiveness requires a robust civil society, in which people from different walks of life exchange their views about the problems they face, their interests, values, conflicts, hopes and fears.

Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENT. 15, 21-22 (2004).

prosper when economic decision-making is controlled by many private individuals instead of by a single government entity.<sup>103</sup>

### 1. Free Enterprise and Diversity

An economic market of diverse competitors is one of the key hallmarks of the American economy. Unlike many other countries where the national government maintains monopolistic ownership of natural resources, airlines, and other commercial enterprises, the American economy relies broadly on competition among privately-owned enterprises.<sup>104</sup>

Note that there are two aspects to the American preference for competition among diverse and privately-owned enterprises. First, enterprises should be owned by private individuals rather than the state. Thus, through the takings clause of the Fifth Amendment<sup>105</sup> and other principles of property law, American law preserves private ownership of property. Second, the economy should comprise multiple enterprises in competition with each other. Thus, through principles of antitrust law, American law preserves competition within the system of private ownership of property.

Consideration of basic free-market principles illustrates the importance of diversity in the American economy. Like the American economic system, capitalist - or free enterprise - economic systems are characterized by the existence of a core sphere of private economic activity that is detached from the government and "conducted for the self-interest of its actors [rather than] for the glorification of the state."<sup>106</sup> Under capitalism, individuals enjoy the

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103. James Gwartney, Robert Lawson, & Erik Gartzke, *ECONOMIC FREEDOM OF THE WORLD: 2005 ANNUAL REPORT* 3-4 (2005), available at <http://www.freetheworld.com/release.html>.

104. This is not to say that the national and state governments in the United States take a laissez-faire approach to the economy. Government regulation is not hard to find. Nevertheless, the United States is more oriented toward the free market than most other countries. According to one ranking, the United States is tied with two other countries for the third-highest rating of economic freedom among 127 countries in the world. *Id.* at 3, 12.

105. According to the Bill of Rights, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Even if the preference for a private market were not expressed in a provision of the Constitution, it would still rank as a fundamental state interest. The Constitution was designed to talk about national interests and limitations thereon. Accordingly, many important state interests are not enumerated in the Constitution. Protection of the public health, for example, is a state interest of the highest importance despite the Constitution's failure to talk about public health. (And even though protection of the public health is not enumerated in the Constitution as a power of the national government, Congress has established the U.S. Centers for Disease Control and Prevention which plays a leading role in addressing threats to the public's health.).

106. ROBERT L. HEILBRONER & LESTER C. THUROW, *THE ECONOMIC PROBLEM* 11 (3d CPCU ed. 1984).

economic freedom to prosper from their labor and ingenuity,<sup>107</sup> and this freedom to prosper creates an incentive for innovation and the generation of greater wealth.<sup>108</sup> In contrast, when economic activity is conducted for the benefit of the state and its rulers, individuals lack sufficient incentive to create technological change.<sup>109</sup>

The free market structure not only creates incentives for the generation of wealth, it also channels the behavior of economic actors so that they act both in their self-interest and in the interest of the greater society. If a manufacturer produces a desired good, public demand will drive up the good's price, profits will increase, and more of the good will be produced to meet demand. On the other hand, if a manufacturer produces an unattractive good, its price will drop, profits will decline, and less of the good will be produced. Thus, for example, if Toyota manufactures more reliable cars than does Chevrolet, consumers will purchase more Toyotas and fewer Chevrolets, and Toyota will expand its manufacturing capacity while General Motors will shutter some of its factories. Capital and labor will flow to the manufacturers of desired goods from manufacturers of unattractive goods.<sup>110</sup> Through its "invisible hand," the free market will direct the selfish behavior of individuals in socially-beneficial directions.<sup>111</sup>

In short, the free-enterprise system rests on a market in which different individuals use their particular skills to develop their own goods or services and consumers vote with their pocketbooks to weed out the less desirable goods and services.

## 2. Diversity as an Alternative to Inaccurate Prediction

In contrast to the beneficial effects of a free market of diverse competitors, a reliance on central economic planning would result in serious inefficiencies from the inability of planners to predict which products will be desired by consumers and in what amounts.<sup>112</sup> Indeed, diversity in the marketplace compensates for the fact that people are not particularly adept at identifying ideas or enterprises that will be commercially successful. For example, among those launching new businesses, fewer than half will remain in business after a few years.<sup>113</sup> Even sophisticated professional investors are incor-

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107. *Id.* at 15.

108. *Id.* at 18-19.

109. *Id.* at 16-18.

110. *Id.* at 28-31.

111. *Id.* at 30.

112. While the collapse of the U.S.S.R. and the failure of other socialist economies provide empirical support for the value of a capitalist economy, this country's belief in capitalism is also an important article of faith.

113. Joel Popkin and Company, *Business Survival Rates by Age Cohort of Business* (RS Number 122, U.S. Small Business Administration, Washington, D.C., April 1991), available at <http://www.sba.gov/advo/research/rs122.html>. A study by the

rect more often than they are right in identifying companies that will prosper in the future. As a result of the inability to consistently and accurately predict business success, the majority of mutual fund managers return a smaller increase in value than portfolios based on a broad index of publicly-traded stocks.<sup>114</sup> In other words, the professional investors fail to outperform a portfolio of randomly selected stocks.<sup>115</sup>

The difficulty of gauging potential success is not limited to commercial enterprises, but extends throughout American society. There are no readily applicable standards for deciding whether someone will be a good writer, an insightful scholar, or an effective teacher. Similarly, movie producers and television executives have a difficult time predicting whether a new film or show will be an artistic hit.<sup>116</sup> This inability to predict success means that society must create a system in which different approaches can be tried, and the public can express its preferences among the different approaches.<sup>117</sup>

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Small Business Administration looked at survival rates of small businesses between 1976 and 1986. *Id.* Of the businesses that were no more than two years old in 1976, fewer than half were still in business in 1982 and about a third were still in business in 1986. *Id.*

114. BURTON MALKIEL, A RANDOM WALK DOWN WALL STREET 173-174 (5th ed. 1990).

115. Some mutual fund managers may outperform an index fund for short periods, but only the occasional manager does so over the long term. Of the top ten mutual funds in 1968, only one ranked in the top ten in 1969, and none ranked in the top hundred in 1974. Indeed, four of the top ten in 1968 no longer were in business in 1974. MALKIEL, *supra* note 114, at 173-174. The occasional consistently successful mutual fund manager may possess special skills, but it is also true that random chance alone would produce an occasional manager with a consistently strong track record. *Id.* at 173-76.

The lack of predictability in the market exists not only with respect to ideas or enterprises; corporate officers also have difficulty identifying the best people for a job. Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1262-64 (1995). Many try to use seemingly objective employment tests to screen applicants, but the tests lack strong predictive power. Indeed, the best tests predict only about nine percent of the variation in productivity among employees. *Id.* This low level of predictability is consistent with an important aspect of employee productivity - performance on the job correlates best with on-the-job training. Susan Sturm & Lani Guinier, *Rethinking the Process of Classification and Evaluation: The Future Of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 1003-04 (1996). People who succeed do so in large part because they have been given the chance to succeed. *Id.*

116. While some movies may fail at the box office despite critical acclaim, it is telling that most movies are commercial failures. Indeed, 78 percent of motion pictures lose money. ARTHUR DE VANY, HOLLYWOOD ECONOMICS: HOW EXTREME UNCERTAINTY SHAPES THE FILM INDUSTRY 214 & n.7 (2004) (studying all films released in North American movie theaters between 1984 and 1996).

117. The inability to predict merit very well also extends to college admissions. Objective measures like high school grades and SAT scores are meaningful; students

Because the value of a new product, service or idea cannot be identified accurately, society relies upon a marketplace of multiple competitors where consumers and critics are allowed to sort out the good vendors or professionals from the bad ones on a case-by-case basis. The builder of a better (or worse) mousetrap may need to satisfy certain government regulations before introducing the new device to the market, but once it is approved for sale, the builder is free to try to sell it, and the market will decide if the device is worth having or whether other mousetraps are more desirable.<sup>118</sup>

This need for sorting on the basis of trial and error makes diversity particularly important. When there is diversity in the marketplace, it is more likely that the best products, services, and ideas will be created or discovered.<sup>119</sup> For example, pharmacologic theory might suggest that several different kinds of drugs could be effective in treating high blood pressure. If pharmaceutical companies test all the different kinds, their likelihood of identifying the optimal treatment is greater than if they test only one kind of drug.

In the University of Michigan affirmative action cases, several amicus briefs emphasized the value of diversity in promoting the development of better products. For example, according to British Petroleum (BP) "[b]ecause BP strongly believes that innovation, one of its core brand values, can only come from encouraging true diversity of styles and ideas while leveraging multiple talents, BP has made diversity and inclusion a strategic focus of its business."<sup>120</sup>

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who graduate in the top 10% of their high school class and who score well on the SAT go on to rank higher in their college graduating class. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 74-76 (1998). However, high school grades and admissions test scores account for only about 15-20 percent of differences among students in college class rank. *Id.* at 277. (These findings from Bowen and Bok are based on data from 28 academically selective colleges and universities. *Id.* at xxvii-xxx. It may be that high school grades and SAT scores are more predictive of class rank at less selective colleges and universities.) See also Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 970-971 (2004) (observing that standardized tests are much more useful in distinguishing between the qualified and unqualified than in determining who is more qualified)

118. The manufacture and sale of some goods, like prescription drugs, are heavily regulated by the government, but even there the market will decide the economic success of the good. After the Food and Drug Administration approves a new drug to treat high blood pressure, doctors, through their writing of prescriptions, will determine the profitability of the drug.

119. Diversity also responds to the different tastes that different people have. More people will be happy if General Motors sells sports cars, family sedans, pick-up trucks, minivans, and SUVs than if it sold just one of those models.

120. See Motion for Leave To File Brief Amicus Curiae Out of Time and Brief of BP America Inc. as Amicus Curiae in Support of Neither Party at \*2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003)



Reliance on a marketplace of multiple competitors parallels society's preference for a broad laboratory of state experimentation to identify the best public policies. The lack of clear predictors of quality exists with legislation as much as it does with goods and services. Accordingly, promoting diversity permits society to maximize the opportunities for the best approaches to develop.

Diversity not only underlies the success of the American market and consumer culture, it also enhances the economic growth and development of communities. In this regard, consider the observations of Richard Florida in his provocative book, *The Rise of the Creative Class*.<sup>121</sup> According to Professor Florida, communities prosper economically when they have high concentrations of members of what he calls the "Creative Class," the class of persons who are involved in the creation of ideas, technology or other creative content.<sup>122</sup> Included in this class are scientists, architects, artists, and entrepreneurs.<sup>123</sup> It is these people, argues Florida, who drive economic growth.<sup>124</sup>

If communities thrive when they have high representation from the Creative Class, then why do members of the Class flock to some cities and

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(No. 02-516); see also Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at \*7, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516) (observing that "a diverse group of individuals educated in a cross-cultural environment has the ability to facilitate unique and creative approaches to problem-solving arising from the integration of different perspectives"); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at \*24, *Grutter*, 539 U.S. 306 (No. 02-241), *Gratz*, 539 U.S. 244 (No. 02-516) (writing that "[a]bundant evidence suggests that heterogeneous work teams create better and more innovative products and ideas than homogeneous teams"). To be sure, the limited empirical evidence that is available paints a mixed picture about the value of diversity in the workplace, and it seems clear that focusing on diversity alone will not guarantee a more productive workplace. David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity is Good for Business": The Rise of Market-Based Diversity Arguments and The Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1586-88 (2004). Cf. Carole J. Buckner, *Realizing Grutter v. Bollinger's "Compelling Educational Benefits of Diversity" - Transforming Aspirational Rhetoric Into Experience*, 72 UMKC L. REV. 877, 878-80 (2004) (noting that diversity enhances the educational process when the academic institution also provides the right conditions for diversity to make its contributions, including the active promotion of interaction among students from diverse backgrounds). Nevertheless, the larger point still holds - the inability to predict who will do the best (whether it be lawyering, doctoring, or business management) means that society needs to ensure that the workplace is open to as diverse a workforce as possible.

121. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT'S TRANSFORMING WORK, LEISURE, COMMUNITY AND EVERYDAY LIFE* (2002).

122. *Id.* at 243-48.

123. *Id.* at 8.

124. *Id.* at 243-48.

not others? Florida discusses a number of considerations,<sup>125</sup> and finds that the community's degree of diversity is one of the most important factors.<sup>126</sup> In the view of members of the Creative Class, diversity in culture, ethnic identity and race, as well as in age and sexual orientation, fosters the opportunity to find new influences, ideas, and perspectives, which are key elements for creative activity.<sup>127</sup>

This is not to say that Americans prize pure diversity or that more diversity is always better. Although limitations exist in the ability to predict whether a particular person, policy, product or service will be successful, it is possible to identify those that have a very high or very low likelihood of success.<sup>128</sup> But for the great middle, it is difficult to say one way or the other, and therefore the market, or the laboratory of state experimentation, is relied upon to sort things out.<sup>129</sup>

Indeed, despite society's firm belief in the need for diversity in the market and in government, at some point, a weeding out must occur. While fostering diversity helps to ensure that the best products and services emerge in the market, it is also ultimately important to sort the successful from the unsuccessful. If a business cannot make a profit, or a physician cannot make a diagnosis, then the business should stop operating, and the physician should cease practicing. Similarly, as states experiment with different policies to address a public problem, the states that come up with the better approaches should serve as models for other states. Nevertheless, as new products are explored or new issues are tackled, promoting diversity is critical to success.

In short, the government's very strong interest in fostering economic prosperity includes a very strong interest in fostering diversity in the marketplace. A substantial degree of diversity increases the chances of progress because it increases the opportunity for better ideas to emerge. Enhancing diversity serves in effect as an invisible hand to guide society to the best

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125. *Id.* at 223-34 (also listing the presence of a labor market thick with opportunities for lateral movement, a good quality of life, venues for social interaction, diversity of thought, and uniqueness as key considerations).

126. *Id.* at 226-27.

127. *Id.*

128. Those with a low likelihood of success may be - and often ought to be - denied access to the market. It may not be possible to rank all doctors in terms of their competence, but society can conclude that some would-be physicians do not meet minimal standards of quality and therefore should not be licensed to practice medicine. More diversity is not always better also because having too many options can overwhelm people. Sheena S. Iyengar and Mark R. Lepper, *When Choice Is Demotivating: Can One Desire Too Much of a Good Thing?*, 79 J. PERSONALITY & SOC. PSYCH. 995 (2000).

129. Consider, for example, the professional success of athletes drafted by teams in the National Basketball Association. Five years after the 1999 draft, eight of the first ten players selected were starters on their teams, and two made the All-Star squad. Of the next forty-eight players selected, there were also eight starters and two All-Stars. (Compiled by author from information available at <http://www.nba.com>.)

ideas, policies, and people. Or to put it another way, promoting diversity does not come at the cost of promoting excellence.<sup>130</sup> Rather, promoting diversity fosters the promotion of excellence.

### 3. Diversity Discourages Harmful Economic Behavior

This article has discussed how diversity in the marketplace promotes socially beneficial economic activity just as diversity in government promotes good governance. It is also the case that diversity in the marketplace discourages socially harmful economic activity in the same way that diversity in government discourages bad governance.

Recall that the economy prospers when individuals pursue their economic self-interest. But self-interested actors can harm their fellow-citizens - charging them exorbitant fees, for example.<sup>131</sup> For this problem, Adam Smith provided an answer in *The Wealth of Nations*.<sup>132</sup> In a free market of numerous entrepreneurs, each person will face a host of similarly self-interested competitors who will rein each other in.<sup>133</sup> A worker who seeks too high a wage from a prospective employer will lose out to other applicants, and a company that offers too low a wage will not be able to hire anyone.<sup>134</sup> It is the competitive structure of the market itself that contains self-interest - a market of diverse entrepreneurs.

This economic theory of self-interested actors being constrained by the structure of the market parallels the Madisonian idea of factions pursuing their political self-interest and being constrained by the American system of government.<sup>135</sup> In Madison's view, differences in interest among different citizens would give rise to factions in the political process that would seek to control government to their own advantage and to the disadvantage of others.<sup>136</sup> As discussed previously, Madison provided a two-fold response to concerns of consolidated power. First, in a large, national government with a more heterogeneous citizenry, the population's diversity of interests will reduce the likelihood of factional tyranny.<sup>137</sup> In addition, the system of checks and balances within the national government will also prevent factional tyranny. If a faction captured one branch of government, the other two branches

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130. Cf. Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191, 214-16 (2004) (critiquing the argument that diversity comes at the expense of excellence).

131. HEILBRONER & THUROW, *supra* note 106, at 28.

132. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (P.F. Collier & Son 1901).

133. *Id.* at 141.

134. HEILBRONER & THUROW, *supra* note 106, at 28. See also SMITH, *supra* note 132 at 141.

135. See *supra* notes 87-92 and accompanying text.

136. THE FEDERALIST NO. 10 (James Madison).

137. STONE ET AL., *supra* note 15, at 19-20.

would be able to resist.<sup>138</sup> Thus, just as Adam Smith recognized that a free enterprise system would prevent the self-interested behavior of economic actors from being socially harmful, Madison recognized that the Constitution's structure for the national government would prevent the self-interested behavior of political actors from being socially harmful.<sup>139</sup>

### C. Diversity and Affirmative Action

#### 1. Affirmative action is important in promoting diversity

The American constitutional and economic systems rest on the belief that the promotion of diversity fosters good government and economic prosperity. In pursuing America's fundamental interest in diversity, governments and other institutions will often recognize that affirmative action has an important role to play. If people cannot predict with much accuracy whether an idea will pan out or a person will succeed, society should ensure that there is a diversity of ideas and individuals from which to choose.<sup>140</sup>

Affirmative action helps ensure a sufficient degree of diversity in society. If a particular racial, ethnic or other group is systematically shut out of important social institutions like the marketplace, the military or the university, then society has lost an important source of diversity. People from different backgrounds and with different experiences bring different perspectives and skills to the table. A society that can draw on the full breadth of its members' perspectives and skills enhances its chances of prospering. As the amicus brief of former Secretary of Defense William Cohen, General Wesley Clark, General Norman Schwarzkopf, and other military leaders explained in support of the affirmative action programs at the University of Michigan, full minority participation in the U.S. military is a prerequisite to an effective fighting force, indeed is "critical to national security."<sup>141</sup>

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138. *Id.* at 24.

139. Jonathan R. Macey, *Competing Economic Views of the Constitution*. 56 GEO. WASH. L. REV. 50, 54-56 (1987). Inasmuch as *The Wealth of Nations* was published in 1776, it is not surprising that Madison would have been guided by an understanding of human nature being driven by the pursuit of self-interest. *Id.*

The analysis presented here reflects a widely-held view of constitutional principle, but not a unanimous one. Some scholars view the Constitution as facilitating rather than impeding the ability of factions to satisfy their self-interest. *Id.* at 57 (discussing the views of other scholars).

140. Recall the point that society does not have the ability to identify in advance the best public policies, the best business ideas, or the best providers of professional services. Some sorting may be done in advance, but allowance must also be made for a broad range of options and opportunity which lets experience separate the good from the bad.

141. Brief of Amici Curiae Julius Becton, Jr., et al. at \*13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-

Conversely, societies that shut off part of their human resources reduce their likelihood of progress. For example, the lack of socio-economic progress in Islamic Middle Eastern countries reflects in part the failure of those countries to draw on the human capital of their women, preferring instead to relegate them to traditional roles in the home.<sup>142</sup> Similarly, the exclusion of a particular racial or ethnic group from full participation in society's major institutions results in the loss of beneficial contributions to societal well-being. Consider in this regard how diminished America would have been without the inventiveness of George Washington Carver, the music of B.B. King, the leadership of Colin Powell, the choreography of Alvin Ailey, the writing of Toni Morrison, or the jurisprudence of Thurgood Marshall.

Of course, more diversity is not always better.<sup>143</sup> Some ideas, policies or people will be superior to alternatives, and should be recognized even when diversity is reduced as a result. However, when selection processes effectively shut out an entire racial, ethnic, or other group, then the benefits of diversity are likely to have been too greatly sacrificed.

Having established that diversity helps ensure that the best ideas, people and places will emerge, it becomes clear that affirmative action is valuable not only in the university but also in other sectors of society. Indeed, affirmative action is important even in the selection of subcontractors for a highway project.<sup>144</sup> To ensure that society has the best construction companies, assurance must be provided that careers in construction are open to a diverse range of people. Similarly, to ensure that society has the most successful entrepreneurs, entrepreneurial opportunities must be open to a diverse range of people. Given the lack of knowledge about what makes someone successful in business, law or other professions, advancement as a society depends on taking full advantage of the strengths of all citizens.<sup>145</sup>

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516) (citing *Review of Federal Affirmative Action Programs, Report to the President* § 7.1 (Dept. of Justice, July 19, 1995)). The importance of minority participation in the military is reflected by the fact that the armed forces would not be able to recruit a sufficient number of qualified soldiers without relying on minority enrollment. *Id.* Regardless of this fact, affirmative action is fundamental to ensuring the presence of an ethnically and racially diverse officer corps that can command the respect of the front-line troops. *Id.*

142. BERNARD LEWIS, WHAT WENT WRONG?: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE 156-157 (2002) (observing that some commentators attribute the failings of Islamic societies to Muslim sexism).

143. See *supra* note 128 and accompanying text.

144. On this point, Justice John Paul Stevens erred. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 512-13 & n.2 (1989) (Stevens, J., concurring in part and concurring in the judgment) (contrasting the value of diversity among teachers in the public schools or among police officers in a city with racial unrest with a lack of comparable benefit from diversity among contractors on public works projects).

145. The value of workplace diversity is particularly obvious in some workplace settings. For example, a diverse police force is desirable for serving a community of diverse citizens. *Petit v. City of Chicago*, 352 F.3d 1111, 1114 (7th Cir. 2003). Simi-

In addition, other, non-demographic, measures of diversity are as important to the workplace as to higher education. In this regard, consider some of the measures of diversity identified by the University of Michigan.<sup>146</sup> The University of Michigan Law School valued exceptional records of community service and experiences of having overcome personal adversity, and so will a wide range of employers.<sup>147</sup> The athlete or the artist will bring the same valuable traits to the office as the class room, because becoming an outstanding athlete or musician often entails a strong work ethic, an ability to withstand great pressure, a commitment to teamwork, and superior leadership skills. It should not be surprising that employers and universities give weight to similar measures of diversity. When business, law, medical, and other professional schools choose among applicants, they consider not only the applicant's potential to excel in professional school but also their potential to succeed in their careers.<sup>148</sup>

Again, the fact that some personal traits that correlate with success are identifiable in life does not change a key point - with all of the predictors used in assessing an individual's potential, it remains impossible to predict with much accuracy how successful different people will be, once the qualified are sorted from the unqualified. This is why efforts to pinpoint exactly how diversity makes a difference can be misleading. A desire may exist to draw a clear link between increasing diversity and achieving better outcomes, but demanding a clear link misses the point. In the absence of measurable criteria for predicting quality, the promotion of diversity is turned to as a method to increase the opportunities for the best ideas to emerge.

Finally, note that diversity-based affirmative action does not permit the unqualified to be recognized as qualified. Rather, affirmative action becomes relevant when a business, university or other institution is ranking candidates after the unqualified and exceptionally qualified have been identified. That is, affirmative action applies to the middle range of candidates, all of whom are

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larly, diversity in the workplace would be beneficial in other public agencies whose employees have frequent interaction with a diverse public. Eric A. Tilles, *Lessons from Bakke: The Effect of Grutter on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451, 460-461 (2004); White, *supra* note 12, at 272. Still, that the value of diversity may be more obvious in some settings does not necessarily mean that it is more important in those settings.

146. See *Grutter*, 539 U.S. at 338-39.

147. *Id.* at 338.

148. See, e.g., J.D. Standards for Admission, Yale Law School, at <http://www.law.yale.edu/outside/html/Admissions/admis-jdstandards.htm> (discussing the school's assessment of an applicant's "potential for academic and professional excellence"); JD Program Admissions, Stanford Law School, at <http://www.law.stanford.edu/admissions/jd/admissions.html> ("Admission to Stanford Law School is based primarily upon superior academic achievement and potential to contribute to the development and practice of the law.").

qualified,<sup>149</sup> but none of whom clearly stands out as worthy of acceptance. In this middle range, the benefits of diversity can be pursued without concern that quality is being sacrificed. And this middle range can be quite large. As mentioned earlier,<sup>150</sup> for example, high school grades and admissions test scores account for only about 15-20 percent of differences among students in class rank at academically selective colleges.<sup>151</sup> Employing diversity as an additional method of sorting these candidates ensures that businesses, universities or other organizations capture the individuals who will bring the best and most innovative ideas to their endeavors.

Affirmative action not only captures the ability of diversity to promote better outcomes, but also the ability to prevent harmful outcomes. Recall that diversity in government or in the marketplace creates important checks and balances on the self-interested behavior of individuals. Diversity in government protects the public from factional control; diversity in the market protects the public from exploitation. Similarly, by opening businesses, universities, and other organizations to a diverse group of people, affirmative action protects the public from the harm that can result when a majority's lack of experience with members of a minority lead it to act with indifference to the effects of its actions on that minority. Thus, for example, a company that does not employ persons with disabilities may not take into account the needs of such persons when it designs a new workplace.<sup>152</sup>

## 2. Responding to the criticisms of diversity-based affirmative action

Some scholars have criticized diversity-based arguments for affirmative action, arguing that whites can bring the same perspectives and skills to the table as blacks or other minorities. For example, Peter Schuck complains that efforts to promote racial diversity in higher education ignore other measures of diversity that are at least as likely to widen the range of perspectives in the classroom.<sup>153</sup> According to Schuck, proponents of diversity should be just as concerned about diversity in political and religious affiliation as they are about diversity along racial and ethnic lines.<sup>154</sup>

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149. *Grutter*, 539 U.S. at 338-39.

150. See *supra* note 117 and accompanying text.

151. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 277 (1998).

152. The Americans with Disabilities Act responds to this indifference by imposing on employers and others a duty to make "reasonable accommodations" for the needs of persons with disabilities. 42 U.S.C. 12112(b)(5)(A) (2000).

153. Schuck, *supra* note 3, at 38-39.

154. *Id.* at 38-39. Cf. Richard A. Posner, *The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 7-9 (observing that race-based admissions are a valuable way to add diversity only because race is correlated with other measures of diversity, like a background of hardship);

This critique misses some important considerations. First, it fails to account for the fact that the Supreme Court permits racial affirmative action only when it is part of a larger practice of promoting diversity. Seeking diversity in higher education on the basis of race is allowed as part of an admissions policy that also seeks diversity on the basis of athletic skill, artistic talent, economic background, place of residence, and a range of other qualities.<sup>155</sup> Moreover, recall that the decisions in *Bakke*<sup>156</sup> and *Grutter*<sup>157</sup> do not require schools to seek racial diversity; rather they simply permit schools to do so. In other words, the point of *Bakke* and *Grutter* is not to elevate race as a higher form of diversity but to ensure that racial diversity is not singled out as the *only* measure of diversity that colleges and universities may not pursue.

In any event, Schuck's critique lacks force because if the issue is whether other groups have access to higher education, jobs, or other opportunities in society, diversity already exists in terms of political preference, religious affiliation, and other measures of diversity. There is no need to search for Catholics, Republicans or Cubs fans because those groups ordinarily already contribute to social diversity. Affirmative action is relevant when society is shutting out a particular segment of the public; thus, proponents of affirmative action cite diversity concerns because affirmative action is necessary to ensure participation of the underrepresented group even if it is not necessary for other kinds of diversity. To the extent that some political, religious or other groups are not adequately represented, the answer is to promote their diversity rather than to discourage the fostering of racial diversity.

There is a more serious criticism of affirmative action. According to some commentators, the idea that blacks and other minorities have different perspectives or talents rests on the kind of racial stereotyping that the Equal Protection Clause rejects.<sup>158</sup> In this view, one cannot assume that there is an African-American or Mormon way of thinking or acting; therefore, it is misguided to believe that diversity is achieved simply by bringing in people of a particular race or religion.<sup>159</sup>

The response to this critique of diversity-based affirmative action follows from a central argument of this article. As discussed previously, diversity is critical because society cannot fully identify in advance which charac-

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Robert Westmoreland, *A New and Improved Affirmative Action?*, 72 U. CIN. L. REV. 909, 923 (2004) (questioning the use of race as a measure of diversity).

155. To be sure, the kinds of diversity actually sought by colleges may not exhaust the universe of ways in which we differ from each other, but admissions offices face real time constraints, and it makes sense to start with some of the important measures of diversity. Moreover, there is nothing problematic with different schools employing different measures of diversity. Diversity in choosing methods of diversity is also good.

156. 438 U.S. 265 (1978).

157. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

158. Posner, *supra* note 154, at 8-10; Volokh, *supra* note 2, at 2066-67.

159. Schuck, *supra* note 3, at 40-45.



teristics of persons are important.<sup>160</sup> If it were possible to identify which attributes matter, it would be possible to seek those attributes directly and not rely on the promotion of diversity as an indirect way to find people with the right attributes. Because it is unknown in advance who will be the better contributor in the classroom or the workplace, the idea is to widen the net. And confidence can exist in the belief that minorities add an important element of diversity. Blacks may not think or act any differently than whites because of their genetic endowment, but they grow up with a different set of experiences and those different experiences give them qualities that other people lack. For example, blacks experience a level of discrimination that whites do not,<sup>161</sup> and having been the victim of discrimination may make an individual more sensitive to the discriminatory effects of a proposed policy.

To understand the importance of ethnic or racial diversity in society, consider the American approach to geographical diversity. Americans do not think that people from Wyoming are intrinsically different from people from Vermont, but generally do believe that the nation benefits by having people from both states rather than just one of the two. Growing up and living in Wyoming gives a person a different set of experiences than does growing up and living in Vermont. Moreover, when universities or companies seek geographic diversity, meaningful segments of society are not excluded from academic or professional opportunities. Accordingly, it is well accepted that universities may seek geographic diversity in their admissions policies.<sup>162</sup>

American society feels comfortable giving weight to geographic diversity despite the fact that the Constitution generally disfavors distinctions on the basis of place of residence. For example, a state may not reserve access to private sector jobs in the state for its own residents,<sup>163</sup> nor may a state give greater benefits to residents who have lived for a longer time in the state.<sup>164</sup> However, a state university may reach out to out-of-state residents to increase their representation in the student body. In other words, while the Constitu-

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160. See *supra* note 113-117 and accompanying text.

161. Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862 (1995); Sturm & Guinier, *supra* note 115, at 1022-23; Tanya Washington, *The Diversity Dichotomy: The Supreme Court's Reluctance to Give Race a Capital "R,"* 72 U. CIN. L. REV. 977, 989-94 (2004).

162. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17 (1978) (describing with approval the admissions policy of Harvard College, in which the College took into account many measures of diversity, including geographical diversity).

163. *Toomer v. Witsell*, 334 U.S. 385 (1948) (prohibiting South Carolina from imposing greater burdens on out-of-staters than on state residents who catch shrimp off the South Carolina coast).

164. *Saenz v. Roe*, 526 U.S. 489 (1999) (prohibiting states from paying new state residents lower welfare benefits than those paid to other state residents); *Zobel v. Williams*, 457 U.S. 55 (1982) (prohibiting Alaska from giving larger shares of oil revenues to residents who had lived for a longer time in the state).

tion prohibits states from discriminating against people from other states,<sup>165</sup> it does not prohibit states from favoring people from other states. The Constitution permits this kind of "reverse discrimination" against residents of the state because it recognizes that the two kinds of geographic discrimination are very different. When a state discriminates against residents of other states, it undermines the idea of a union of states acting together for common purposes. When a state favors residents of other states, on the other hand, it promotes interstate comity.

Similarly, policies that discriminate against blacks or other minorities can be very different from policies that favor those minorities. As Justice Stevens observed, there is a difference between the policies that excluded blacks from America's institutions and those that try to integrate them into American life.<sup>166</sup> Exclusionary policies undermine the American ideal of all persons being created equal,<sup>167</sup> while integrating policies foster the American ideal of ensuring that everyone has a fair opportunity to succeed in life.

This article's analysis of diversity responds to another critique of using diversity in university admissions or other settings - the impression that efforts to increase diversity are essentially quotas in disguise. For example, the University of Michigan Law School tended to admit minority applicants roughly in proportion to their representation in the applicant pool.<sup>168</sup> African-Americans accounted for 7-10 percent of the applicant pool and 7-10 percent of those admitted; Hispanics made up 4-5 percent of the School's applicant pool and 4-5 percent of those admitted; and Native Americans came in at about 1 percent of both the applicant pool and the group of applicants that were offered admission.<sup>169</sup> As critics have observed, this degree of correlation between minority representation in the applicant pool and minority representation among those admitted belies the Law School's claim that it was seeking a "critical mass" of minority students.<sup>170</sup> How, after all, could it achieve a

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165. Some discrimination against out-of-staters is permitted. For example, New York may require that students from Connecticut or other states pay a tuition fee to attend K-12 public schools in New York, and New York may also charge a higher tuition rate for non-New Yorkers to attend public universities in New York. *Vlandis v. Kline*, 412 U.S. 441, 445 (1973).

166. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (emphasizing the distinction between a "'No Trespassing' sign and a welcome mat."). To be sure, some whites may feel aggrieved by affirmative action just as some of a state's residents might feel aggrieved by policies favoring out-of-staters.

167. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal").

168. *Grutter v. Bollinger*, 539 U.S. 306, 346-47 (Scalia, J., concurring in part and dissenting in part).

169. *Id.* at 382-85 (Rehnquist, J., dissenting).

170. According to testimony from the Law School's Director of Admissions, critical mass meant a number that would "encourage[] underrepresented minority

critical mass of Native Americans at 1 percent of the class, but it needed 7-10 percent African-Americans to achieve a critical mass of that minority group?<sup>171</sup>

Although it is difficult to justify proportionate representation of minority students in terms of critical mass concerns, proportionate representation is exactly what would follow from using diversity to ensure that a student body encompasses all of the desirable attributes that it had not recognized and/or could not measure. In trying to ensure that unmeasured abilities and talents are appropriately represented, it makes perfect sense to assume that those abilities and talents are spread evenly across different demographic groups. If the unmeasured abilities and talents are evenly spread across different ethnic and racial groups, then proportionate representation of different ethnic and racial groups maximizes the capturing of those abilities and talents.

In sum, the criticisms of diversity-based affirmative action rest on a failure to consider the role of diversity to its full extent. Diversity is valuable because it compensates for gaps in our ability to identify applicants who will be the best students or the best employees. By creating a diverse student body or workforce, universities and companies can maximize their likelihood of bringing all important attributes to their organizations.

#### *D. Diversity and Opportunity*

Up until now, this article has focused on the utilitarian benefit to society from diversity. A society that fosters diversity in government, market and other socially-important institutions ensures that individuals realize numerous benefits including better policies, products, services, and education in a society that fosters diversity. Hence, diversity has traditionally been a fundamental interest in American government and the free enterprise system.

Promoting diversity has the additional benefit of promoting the American ideal of opportunity for all. Indeed, diversity is central to this American concept. Under this American ideal, one does not have to be the descendant of a President to become President,<sup>172</sup> nor does one have to be from a high-ranking caste or a particular religion. Americans hold fast to the belief that all citizens can aspire to any academic institution, employment position, or political office,<sup>173</sup> regardless of that person's circumstances at birth. Accordingly, as the Supreme Court recognized in *Grutter*, without diversity in higher

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students to participate in the classroom and not feel isolated." *Id.* at 318. For further discussion of the critical mass idea, see *supra* note 52.

171. *Grutter*, 539 U.S. at 382-85 (Rehnquist, J., dissenting); Robert F. Nagel, *Diversity and the Practice of Interest Assessment*, 53 DUKE L.J. 1515, 1519-20 (2004).

172. John Quincy Adams and George W. Bush may, however, acknowledge that it helps to be a President's child if one wants to become President of the United States.

173. There is one exception to this broad statement. Naturalized citizens may not aspire to the Presidency of the United States. U.S. CONST. art. II, § 1, cl. 4.

education, all persons are not being offered a real opportunity for advancement in life.<sup>174</sup> Blacks shut out of the leading universities will not have the same professional options as the graduates of those universities. Similarly, diversity is necessary in the corporate world, government, and other sectors of society to ensure that everyone has the chance to succeed in pursuing one's goals in life. As the *Grutter* Court observed, "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."<sup>175</sup> In short, a society in which people of all racial and ethnic groups are well represented in positions of leadership creates confidence that one's racial or ethnic group is not an obstacle to the opportunity for advancement.<sup>176</sup>

To be sure, the absence of diversity in education, employment or public office does not always reflect an absence of opportunity. It is quite possible that a lack of diversity can be attributed to factors other than opportunity, such as a difference in interests between demographic groups. However, the absence of diverse participation in many positions provides a strong indicator of an absence of fair opportunity. Despite all of the progress in eradicating racial discrimination in the United States, studies consistently identify persistent discrimination in the workplace and the marketplace. Employers often reserve some positions for whites only and other positions only for minorities.<sup>177</sup> New car dealers sometimes offer lower prices to whites than to blacks,<sup>178</sup> and some landlords still refuse to rent apartments to non-white tenants.<sup>179</sup> A number of studies have identified discrimination against women in various labor markets, including hiring of musicians by symphony orchestras, hiring of waiters by restaurants, and treatment of faculty at the Massachusetts Institute of Technology.<sup>180</sup>

Given the close relationship between opportunity and diversity, promoting diversity ensures fair opportunity. Determining whether someone has been given a fair opportunity to succeed is often difficult to establish; it is a much simpler matter to decide whether diversity is being achieved. That is, when it is not feasible to make a direct determination of opportunity and

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174. *Grutter*, 539 U.S. at 332-33.

175. *Id.* at 332.

176. It may be that Americans do not always live up to the ideal of opportunity for all, but that is part of the point of affirmative action – to help society meet its ideal of ensuring that people of all backgrounds have the chance to fulfill their potential.

177. See Anderson, *supra* note 3, at 1200.

178. Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 817 (1991); Ian Ayres, *Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause*, 94 MICH. L. REV. 109, 110 (1995).

179. Teresa Coleman Hunter & Gary L. Fischer, *Housing: Fair Housing Testing – Uncovering Discriminatory Practices*, 28 CREIGHTON L. REV. 1127, 1128-29 (1995).

180. See, e.g., Christine Jolls, *Is There a Glass Ceiling?*, 25 HARV. WOMEN'S L.J. 1, 3-9 (2002).

therefore to ensure that fair opportunities are being afforded, society can look for proxies that can be measured and that can help ensure fair opportunity. Promoting diversity serves that proxy purpose. Moreover, it can do so without having counterproductive effects. Recall, for example, that diversity-based affirmative action is used when the pool of qualified applicants for college admissions, employment, or another position exceeds the number of people who can receive the position.

#### IV. CONCLUSION

When Justice Lewis Powell articulated the diversity rationale for affirmative action in *Bakke*, he identified an interest of fundamental importance to our constitutional and social systems.<sup>181</sup> However, by tying his argument too closely to the role of diversity in higher education, Powell mischaracterized the nature of the diversity interest.<sup>182</sup> In doing so, he left the diversity justification for affirmative action unduly susceptible to attack and not conducive to application outside of the educational context. The Court in *Grutter* and *Gratz* perpetuated this problem.<sup>183</sup>

By considering the contributions of diversity in non-educational settings, more appropriate weight can be given to the diversity rationale and better validate affirmative action policies both in higher education and elsewhere in society. Diversity plays a fundamental role in the American structure of government and ideal of a free enterprise economic system because it both promotes good outcomes and prevents socially-harmful behavior. Similarly, diversity can enhance the quality of educational institutions, business enterprises, and other social entities. Just as diversity compensates for gaps in our ability to predict which public policies or private economic activities are optimal, it compensates for gaps in our ability to predict which individuals will be the best students, employees, or entrepreneurs.

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181. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

182. See *id.*

183. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).