

THE DIVERSITY LIE

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Last Term, the Supreme Court considered the racial preference plans used by the University of Michigan's undergraduate and law schools.¹ In its opinions upholding the law school program and striking down the undergraduate program, it resolved a fierce debate that had occupied this country for an entire generation: Are the educational benefits of a diverse student body so important that they constitute a compelling governmental interest? The Supreme Court ruled affirmatively.² Accordingly, the Court held that, so long as its admission's office is careful about how it does so, a university is free to discriminate on the basis of race in order to maintain racial diversity on campus.

Or did it? The Court acknowledged that its holding was contingent upon one determination that it did not have occasion to consider: whether the University of Michigan was being *sincere* when it told the Court that the reason it discriminated on the basis of race was to obtain the educational benefits of a diverse student body. As the Court recognized, a governmental interest cannot be compelling if it is not sincere.³ Because the disappointed applicants who had sued the University had not challenged the University's sincerity in this regard, the Court "presumed" that the University was acting in "good faith."⁴ The Court noted, however, that this would not have been the case if there had been "a showing to the contrary."⁵

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1. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

2. *Grutter*, 123 S. Ct. at 2338-41; *Gratz*, 123 S. Ct. at 2426-27.

3. *Grutter*, 123 S. Ct. at 2338 ("[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision-maker for the use of race . . .").

4. *Id.* at 2339 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318-19 (1978)).

5. *Id.*

What follows is a showing to the contrary. It is quite clear that the University of Michigan lied to the Supreme Court when it claimed it discriminates to obtain the educational benefits of diversity, and well near every other elite university lies when they say the same thing. Accordingly, the diversity fight is not over—it has only just begun.

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In the Michigan cases, the Court considered two different admissions plans employed by the University. The plan employed by the University's undergraduate school, which ranks applicants on a 150-point scale, awards 20 points to applicants who are black, Hispanic, or Native American; white and Asian applicants get no such points. (By contrast, a perfect SAT score merits only 12 points on the 150-point scale.) The plan employed by the University's law school similarly grants preference to black, Hispanic, and Native American applicants over white and Asian applicants, but does so in a less conspicuous fashion.⁶

Generally, of course, racial discrimination of this sort runs afoul of the Fourteenth Amendment to the Constitution, which guarantees all citizens "equal protection of the laws."⁷ The Supreme Court has, however, decided that not *all* racial discrimination is illegal. Rather, if a state has a really good reason to discriminate, and if it is careful in how it goes about discriminating, then the state is free to do so. The Supreme Court evaluates the constitutionality of racial discrimination under what it calls the "strict scrutiny" test. In order to pass this test, the state must advance a "compelling interest" that it seeks to serve by racial discrimination, and the discrimination must be "narrowly tailored" to serve that interest.⁸ Prior to its opinions in the Michigan cases, the Supreme Court had found this test satisfied on only two occasions. The first was during World War II, when it held that the internment of Japanese-Americans, although racial discrimination, was nonetheless justified by the compelling interest of national security.⁹ The second was during the 1980s, when the Court held that the compelling interest of remedying the long history of discrimination against blacks by the Alabama Sheriff's Department

6. See *infra* text accompanying notes 11-12.

7. U.S. CONST. amend. XIV, § 1.

8. *Grutter*, 123 S. Ct. at 2337-38.

9. *Korematsu v. United States*, 323 U.S. 214 (1944).

justified the use of a 50% black quota in hiring by that department.¹⁰

The University of Michigan told the Supreme Court that it needed to discriminate on the basis of race, but not for the sake of national security and not to remedy its own prior racial discrimination. Instead, the University told the Supreme Court that it discriminates in order to provide its students with the educational benefits of a diverse student body. In particular, the University claimed that it must discriminate on the basis of race in order to enroll “meaningful numbers” or a “critical mass” of black, Hispanic, and Native American students.¹¹ The University argued that meaningful representation of these groups yields educational benefits insofar as it increases the number of merchants in the campus marketplace of ideas: If these groups were not included in meaningful numbers on campus, the University says, valuable and unique perspectives would be lost from classrooms, dormitories, and quadrangles.¹² As the law school argued to the Supreme Court, “‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’”¹³ A critical mass of these students serves to “introduce[] students to unfamiliar experiences and perspectives.”¹⁴

The Supreme Court agreed with the University. In a rather surprising turn in its Equal Protection jurisprudence, the Court held that diversity is a compelling interest because: “The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”¹⁵ The Court failed to cite any other case in which it granted similar deference to an accused racial discriminator. Certainly, for example,¹⁶ the Kansas Board of Education in *Brown v. Board of Education* was not granted deference to its “educational judgment” that whites and blacks receive better educations in separate schools.

The Court acknowledged, however, a potentially significant question it did not have occasion to consider: whether the University

10. *United States v. Paradise*, 480 U.S. 149 (1987).

11. *Grutter* at 2332 (quoting J.A. at 120-21).

12. *Id.* (noting the “unique contributions” that minority students bring to the Law School and that a critical mass of minority students would encourage their class participation).

13. Respondents’ Brief at 3, *Grutter* (No. 02-241) (quoting Pet. App. 246a, 244a).

14. *Id.* at 2.

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

16. 347 U.S. 483 (1954).

of Michigan was being *sincere* when it told the Court that the reason it discriminated on the basis of race was to obtain the educational benefits of a diverse student body.¹⁷ The Court further noted that “strict scrutiny is designed to provide a framework for carefully examining the importance and *sincerity* of the reasons advanced by the governmental decision-maker for the use of race”¹⁸ Indeed, the Court has repeatedly held that, when a litigant comes before it and offers a justification for race or gender discrimination, the justification must be sincere. That is, the justification must be the *actual reason* the state decided to discriminate, not some post-hoc, litigation-driven rationalization.

For example, in *United States v. Virginia*,¹⁹ the Court declared unconstitutional the Virginia Military Institute’s (“VMI”) admissions policy because it discriminated on the basis of gender by limiting enrollment to men. In defense of its single-sex policy, VMI advanced educational-benefits arguments not unlike Michigan’s; it asserted that “[s]ingle sex education affords pedagogical benefits,” and that “diversity among public educational institutions [serves] the public good.”²⁰ Justice Ginsburg’s opinion for the Court rejected these justifications for lack of sincerity: “Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the Commonwealth.”²¹ Although only five members of the Court joined Justice Ginsburg’s opinion in the VMI case,²² every member of the current Court has either penned or joined an opinion expressing the same view.²³

17. See *supra* text accompanying notes 3-5.

18. *Grutter*, 123 S. Ct. at 2338 (emphasis added).

19. 518 U.S. 515 (1996).

20. *Id.* at 533, 537.

21. *Id.* at 537.

22. Justices Stevens, O’Connor, Kennedy, Souter, and Breyer joined Justice Ginsburg. See *United States v. Virginia*, 518 U.S. 515 (1996).

23. See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (O’Connor, J., joined by, *inter alia*, Stevens, J.) (“Thus, we conclude that, although the state recited a [legitimate purpose], it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.”); *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) (Rehnquist, C.J., joined by O’Connor, J., Scalia, J., Kennedy, J., and Thomas, J.) (holding that a racially discriminatory law cannot “withstand strict scrutiny based upon what ‘may have motivated’ the legislature”; instead, “the State must show that the alleged objective was the legislature’s ‘actual purpose’”); *Hunter v. Underwood*, 471 U.S. 222, 232 (1985) (Rehnquist, J., joined by, *inter alia*, O’Connor, J.) (refusing to hear the state’s “legitimate interest in denying the franchise to those convicted of crimes involving moral turpitude” because “such a purpose simply was not a motivating factor of the 1901

Although the disappointed applicants in the Michigan cases challenged many aspects of the University's racial preference plans, they never challenged the University's sincerity in its proffered justification for those plans. Accordingly, because plaintiffs in our system of justice have the burden to prove their case, the Court was forced to "presume[]" that the University was being sincere and acting in "good faith."²⁴ The Court noted, however, that this would not have been the case if there had been "a showing to the contrary."²⁵

Future litigants will have little trouble making this showing. Indeed, for several reasons, it is clear that not only was the University of Michigan's appeal to the educational benefits of diversity as a justification for its discriminatory admissions policy quite insincere, but so are the same appeals of well near every other elite university. Accordingly, the prospects for racial preferences in higher education remain just as dubious today as before the Supreme Court ruled in the Michigan cases.

First, the University's rationale was insincere because the preference scheme it employed is wholly underinclusive. There exist any number of other groups of students that have interesting and unique perspectives to share with their classmates, yet to whom the University grants no preferences and of whom it has indicated no desire whatsoever to develop a "critical mass." Just last year, the Supreme Court struck down a state law in *Republican Party of Minnesota v. White* for a similar lack of sincerity.²⁶ The question presented in *White* was "whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues."²⁷ As a burden to core electoral speech, the "announce clause" was subject to strict scrutiny²⁸—the same test applicable to racial preference policies in university admissions. Minnesota attempted to justify its restriction with the need to preserve the impartiality of the judiciary.²⁹ The Court, however, rejected that rationale because it "d[id] not believe" that the announce clause was

convention," at which the law under consideration was enacted).

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

25. *Id.*

26. 536 U.S. 765 (2002).

27. *Id.* at 768.

28. *Id.* at 774.

29. *Id.* at 775.

“adopted . . . for that purpose.”³⁰ The Court noted that, while the announce clause restricted speech only during election campaigns, “statements in election campaigns are [] an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake”³¹ “As a means of pursuing the objective of [impartiality] that [Minnesota] now articulate[s], the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.”³² Although only Chief Justice Rehnquist, and Justices O’Connor, Kennedy, and Thomas joined Justice Scalia’s opinion in *White*, Justice Stevens authored a unanimous opinion in 1994, *City of Ladue v. Gilleo*,³³ that struck down another state law under strict scrutiny for precisely the same reason: The law was underinclusive to serve its purported goal and this “diminished the credibility of the government’s rationale”³⁴

As were the justifications advanced in *White* and *City of Ladue*, the compelling interest the University offered to the Supreme Court is so “woefully underinclusive as to render belief in that purpose a challenge to the credulous.”³⁵ The University said it needed to use racial preferences in order to generate a critical mass of black, Hispanic, and Native American students so that the educational benefits of interacting with persons from these unique backgrounds would not be forgone: e.g., “livelier, more spirited, . . . more enlightening” classroom discussion that “introduces students to unfamiliar experiences and perspectives.”³⁶ To achieve this critical mass, the law school has filled 13.5 to 20.1% of its seats with African American, Latino and Native American students.³⁷

There are, however, any number of groups of students who do not represent even 13.5% of the law school class and of whom the University has not sought to achieve a critical mass. To take just two groups as examples, there can be no doubt (and the University certainly has not contended otherwise) that enrolling a critical mass of Mormons and Arab-Americans would also provide similar

30. *Id.* at 778.

31. *Id.* at 779.

32. *Id.* at 780.

33. 512 U.S. 43 (1994).

34. *Id.* at 52-53.

35. *White*, 536 U.S. at 780.

36. Respondents’ Brief at 2-3, *Grutter* (No. 02-241) (quoting Pet. App. 246a, 244a).

37. See *Grutter*, 123 S. Ct. at 2343.

educational benefits to the student body. To whatever extent a critical mass of black, Hispanic, and Native American students can contribute to “livelier, more spirited, more enlightening” classroom discussion by “introducing students to unfamiliar experiences and perspectives,” surely a critical mass of Mormon and Arab-American students can do so as well. The experience of being Mormon or Arab-American is just as unique and unfamiliar to other students as the experience of being black, Hispanic, or Native American. Yet the University remains wholly unconcerned about enrolling a critical mass of these students. Indeed, it appears that none of the elite universities who similarly employ racial preferences and who filed briefs in support of the University of Michigan seeks to enroll a critical mass of Mormon and Arab-American students.

Second, the University’s invocation of the educational benefits of diversity is insincere because, during the period it purported to need the use of racial preferences to create “livelier, more spirited, more enlightening” classroom discussion, it adopted other measures to censor and dull classroom discussion. Indeed, these measures not only sought to censor classroom discussion as a whole, but they were particularly directed to censor discussions on the very topics one would think would be generated by a more diverse student body. In 1988, after several racial incidents on campus, and in response to demands by members of the same minority groups to which it grants preferences in admissions, the University of Michigan adopted a speech code that prohibited, among other things, “any behavior, verbal or physical,” that “stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, [or] sexual orientation,” by creating an “intimidating, hostile, or demeaning environment” or by having the “reasonably foreseeable effect of interfering with an individual’s academic efforts.”³⁸ According to the University’s interpretative guide to the code, prohibited speech included a male student suggesting in a classroom that “[w]omen just aren’t as good in this field as men” and “display[ing] a confederate flag on the door of your room in the residence hall.”³⁹ Unsurprisingly, a federal district court promptly struck down the speech code as an unconstitutional infringement of the First Amendment rights of students,⁴⁰ finding that

38. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989).

39. *Id.* at 857-58.

40. *Id.* at 853.

“the record of the University’s enforcement of the Policy over the past year suggested that students in the classroom and research setting who offended others by discussing ideas deemed controversial could be and were subject to discipline.”⁴¹ Needless to say, to paraphrase a statement the Supreme Court made in *White* when confronted with similar inconsistencies, this is all “quite incompatible with the notion that the need for [livelier classroom discussion] lies behind the [racial preferences] at issue here.”⁴²

As with underinclusiveness, the University of Michigan is not alone in its inconsistencies. A number of elite universities profess to support racial preferences in order to create “livelier” classroom discussions yet simultaneously censor those discussions.⁴³ These efforts have included speech codes directed at quashing any comments that might offend students of certain racial groups.⁴⁴ Many similar practices are catalogued in *The Shadow University* by University of Pennsylvania Professor Alan Kors and Massachusetts attorney Harvey Silverglate.⁴⁵ They explain that, contrary to the

41. *Id.* at 861.

42. *Republican Party of Minn. v. White*, 536 U.S. 765, 779 (2002).

43. See *infra* note 44 (listing speech codes that forbid racially sensitive speech at universities that filed amicus briefs in support of the University of Michigan’s admissions policy in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003)).

44. See, e.g., CORNELL U., POLICY NOTEBOOK FOR CORNELL COMMUNITY 74-75 (2001) (forbidding materials that reference an individual based on his or her protected class status), <http://www.speechcodes.org/pdfs/7072.pdf>; GEORGETOWN UNIVERSITY, STUDENT CODE OF CONDUCT (Georgetown University’s Code of Conduct Regulations and Speech and Expression Policy forbid any act deemed hostile, coercive or offensive and especially those acts that can be offensive because related to a person’s race, religion, ethnicity, gender, sexual orientation or disability), <http://www.speechcodes.org/pdfs/6414.pdf> (Code of Conduct Regulations), <http://www.speechcodes.org/pdfs/6412.pdf> (Speech and Expression Policy) (last visited Nov. 23, 2003); HARVARD U., FREE SPEECH GUIDELINES (adopted February 13 and May 15, 1990) (forbidding any “behavior evidently intended to dishonor such characteristics as race, gender, ethnic group, religious belief or sexual orientation . . .”), <http://www.fas.harvard.edu/~secfas/FreeSpeech.html> (last visited Nov. 23, 2003); THE OHIO STATE U., DIVERSITY STATEMENT, <http://www.osuhousing.com/living/programdetail.asp?pid=41> (last visited Nov. 23, 2003) (forbidding, among other things, jokes about difference related to race or ethnicity and offensive public conversations); TOMMY LEE WOON ET AL., STANFORD U., PROTOCOL FOR ADDRESSING ACTS OF INTOLERANCE AND THREATS TO COMMUNITY 5 (2001) (noting that even “protected speech and acts may generate harms that require intervention”), <http://www.speechcodes.org/pdfs/7149.pdf>; OFF. OF STUDENT LIFE, WILLAMETTE U., SELECTED POLICIES MANUAL 11 (2002) (“The University may take disciplinary action against a student or student organization that willfully engages or attempts to engage in any . . . [a]cts that threaten, intimidate, harass, degrade or disgrace another.”), <http://www.speechcodes.org/pdfs/10347.pdf>.

45. ALAN CHARLES KORS & HARVEY SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA’S CAMPUSES* (1998).

current protestations of the educational establishment, the theory behind many of these speech codes was that the “constitutional commitments to freedom of expression . . . conflict with the nation’s commitment to providing equal access to educational opportunities” because, according to the fears of many in the educational establishment, minority students are not fully capable of learning in an environment in which they are not comfortable and not insulated from comments that might cause them offense.⁴⁶ Several elite universities, including some of those (such as Stanford University) that filed *amicus* briefs in the Supreme Court supporting the University of Michigan’s racial preference policy, have had their speech codes struck down by courts as well.⁴⁷

Indeed, the measures taken by elite universities to undermine the purported educational benefits of racial diversity extend far beyond attempts to censor classroom discussions. The University of Michigan argued that the purported educational benefits of diversity accrue from “opportunities for students of different races and ethnicities to interact in *and out* of the classroom.”⁴⁸ Yet many elite universities go out of their way to facilitate and encourage racial segregation outside the classroom. The segregation begins as soon as students step foot on campus for the first time. As Professor Kors and Mr. Silverglate report: “Most colleges and universities with significant populations of racial minorities hold separate orientations for them. . . . Minorities in the class of 1999 at Princeton University were invited to a special ‘minority orientation.’ At the bottom of that invitation, they were told they also were welcome to attend the university’s general orientation.”⁴⁹ Ironically, Princeton also filed an *amicus* brief in the Supreme Court in support of Michigan’s position.

The segregation does not end with orientation. Some universities even maintain special “multicultural” dormitories that allow minority students to segregate themselves from the white population. Professor Kors and Mr. Silverglate report that these “racially separatist dormitories . . . provide the chance to avoid unsympathetic white American students, or, for that matter, anyone of a different

46. *Id.* at 80 (emphasis added).

47. See, e.g., *Corry v. Stanford*, No. 740309 (Cal. Super. Ct., Feb. 27, 1995) (order on preliminary injunction), cited in KORS & SILVERGLATE, *supra* note 45, at 86 n.33.

48. Respondents’ Brief at 27, *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003) (No. 02-516) (emphasis added).

49. KORS & SILVERGLATE, *supra* note 45, at 194.

culture.”⁵⁰ Yet Cornell University, which submitted a brief in support of Michigan’s need to use racial preferences in order to reap the educational benefits that accrue from “informal interactions with peers” of different races,⁵¹ maintains special dormitories for black, Hispanic, and Native American students.⁵² Cornell has been investigated by both the New York State Department of Education and the New York Civil Rights Coalition for its facilitation of racial segregation in residence halls.⁵³

Such segregation continues all the way through graduation. The University of Michigan maintains a separate graduation ceremony for black seniors, and it is not alone in this regard.⁵⁴ Indeed, many of the universities which filed briefs in support of Michigan maintain separate graduation ceremonies for black, Hispanic or Asian seniors, including the University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, Stanford University and the University of California at Berkeley.⁵⁵ This is all, again, “quite incompatible with the notion”⁵⁶ that the need for students of different races and ethnicities to interact in and out of the classroom lies behind the racial preferences at issue in the Michigan cases.⁵⁷

In his dissent in the Michigan law school case, Justice Scalia, too, recognized that all of these inconsistencies rendered the racial preference plans employed at elite universities easily vulnerable to further constitutional attack. He noted that “[future] suits may challenge the bona fides of the institution’s expressed commitment to the educational benefits of diversity”⁵⁸ “Tempting targets . . . will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial

50. *Id.* at 198 (internal quotations omitted).

51. Brief of Amici Curiae Columbia University et al. at 2, *Grutter v. Bollinger* (No. 02-241) & *Gratz v. Bollinger* (No. 02-516) (internal quotations omitted).

52. KORS & SILVERGLATE, *supra* note 45, at 200. The University balked at creating a special dorm for gay students. *Id.*

53. *Id.*

54. Michael A. Fletcher, *Diversity or Division On Campus?*, WASH. POST, May 19, 2003, at A1.

55. *Id.*

56. Republican Party of Minn. v. White, 536 U.S. 765, 779 (2002).

57. *Cf. id.* 778-81 (overturning a Minnesota prohibition on position statements by candidates for judicial office, in part because the purported justification for the prohibition—maintaining an appearance of judicial openmindedness—was undermined by statements made after elections).

58. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2349 (2003) (Scalia, J., dissenting).

segregation on their campus—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”⁵⁹

Finally, the case against the sincerity of claims about the educational benefits of racial diversity is really more open and shut than even all of the above arguments would suggest. In their more candid moments, members of the academic establishment freely admit their purposes are entirely different. In March of this year, Randall Kennedy, a professor of law at Harvard and a supporter of affirmative action, had this to say:

Let’s be honest: Many who defend affirmative action for the sake of ‘diversity’ are actually motivated by a concern that is considerably more compelling. They are not so much animated by a commitment to what is, after all, only a contingent, pedagogical hypothesis. Rather, they are animated by a commitment to social justice. They would rightly defend affirmative action even if social science demonstrated uncontrovertibly that diversity (or its absence) has no effect (or even a negative effect) on the learning environment.⁶⁰

Professor Kennedy is not alone. Yale Law School Professor Peter H. Schuck: “[M]any of affirmative action’s more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds;”⁶¹ “even today when defenders of affirmative action use diversity rhetoric in order to avoid legal pitfalls, the heart of the case for affirmative action is unquestionably its capacity to remedy the current effects of past discrimination.”⁶² Columbia Law School Professor Samuel Issacharoff: “The commitment to diversity is not real. None of these universities has an affirmative-action program for Christian fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint.”⁶³ Yale Law School Professor Jed Rubenfeld: “Everyone knows that in most cases a true diversity of perspectives and backgrounds is not really being pursued. (Why no

59. *Id.* at 2349-50.

60. Randall Kennedy, *Affirmative Reaction*, THE AMERICAN PROSPECT, Mar. 1, 2003.

61. Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 28 (2002).

62. *Id.* at 34.

63. Daniel Golden, *Some Backers of Racial Preference Take Stand Beyond Diversity: Society Wins With Integrated Elite*, WALL ST. J., June 14, 2003, at B1.

preferences for fundamentalist Christians or for neo-Nazis?).”⁶⁴ Columbia Law School Professor Kent Greenawalt: “I have yet to find a professional academic who believes the primary motivation for preferential admission has been to promote diversity in the student body for the better education of all the students”⁶⁵ Harvard Law School Professor Alan Dershowitz:

The *raison d'être* for race-specific affirmative action programs has simply never been diversity for the sake of education. The checkered history of ‘diversity’ demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals. In recent years, it has been invoked—especially by professional schools—as a clever post facto justification for increasing the number of minority group students in the student body.

Indeed, the educational elite were using racial preferences long before the educational benefits of racial diversity had even been pondered. Racial preferences in university admissions began in the 1960s.⁶⁷ Yet as Professor Peter Wood reports in his recent book, *Diversity: The Invention of a Concept*, the diversity justification for racial preferences was virtually nonexistent in higher education until Justice Powell’s 1978 opinion in *Regents of University of California v. Bakke*⁶⁸ made reference to it.⁶⁹ It was only then that the elite began to embrace the diversity rationale; they did so only because the real reason they maintain racial preferences—“social justice” (in Professor Kennedy’s words)—was rejected by Justice Powell himself in *Bakke* and by a majority of the Supreme Court in *Wygant v. Jackson Board of Education*,⁷⁰ which held unconstitutional a school board’s use of racial preferences in deciding which faculty members to terminate. The court held that alleviation of “the effects of societal discrimination” was not a compelling interest because “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a

64. Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997).

65. Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979).

66. Alan Dershowitz et. al., *Affirmative Action And The Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 CARDOZO L. REV. 379, 407 (1979).

67. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 5 (2d ed. 2000).

68. 438 U.S. 265, 1315 (1978).

69. PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* 99, 112, 123-24, 237-38 (2003).

70. 476 U.S. 267 (1986).

racially classified remedy.”⁷¹

Professor Wood further notes that, after *Bakke*, much of the elite “made a shift from a rhetorical emphasis on overcoming the lingering effects of slavery and Jim Crow to the softer appeals of diversity.”⁷² The fact that those in the educational elite discovered the diversity rationale only many years after the inception of racial preferences deals another fatal blow to their sincerity. The Supreme Court has held that only those government interests actually relied upon at the outset of racial preference programs can count as compelling. As the Court put it in *Shaw v. Hunt*, “the institution that makes the racial distinction must have had a strong basis in evidence even when taking remedial action, before it embarks on an affirmative-action program.”⁷³

It is thus clear that, having lost years ago with the truth, the University and its peers have decided to try a lie: the diversity lie. Accordingly, the prospects for racial preferences in higher education remain just as dubious today as they were before the Supreme Court ruled in the Michigan cases. The diversity fight is not over. It has only just begun.

71. *Id.* at 274, 276 (plurality opinion); *accord id.* at 288 (O’Connor, J., concurring in part and concurring in judgment); *id.* at 295 (White, J., concurring in judgment).

72. WOOD, *supra* note 69, at 141.

73. 517 U.S. 899, 910 (1996) (internal quotations omitted).

