The Diversity Lie

*By Brian T. Fitzpatrick**

Last term, the Supreme Court mulled over the legality of the University of Michigan's consideration of race in deciding which applicants it admits to its undergraduate college and to its law school. As is now well known, the University ranked undergraduate applicants on a 150-point scale, and it awarded 20 points to applicants who are black, Hispanic, or Native American by mere virtue of their skin color; white and Asian applicants get no such points. By contrast, a perfect SAT score merited only 12 points on the 150-point scale. The law school similarly granted preference to black, Hispanic, and Native American applicants over white and Asian applicants, but did so in a less conspicuous fashion.

Generally, of course, racial discrimination of this sort runs afoul of the Fourteenth Amendment to the United States Constitution, which guarantees all citizens "equal protection of the laws." 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 enough 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. The Supreme Court has 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.[1] The second was during the 1980s, when it held that forcing the Alabama Sheriff's Department to use a 50% black quota in hiring was justified by the compelling interest of remedying the long and sorry history of discrimination against blacks by that department.[2]

The University of Michigan claims that it too has a really good reason to discriminate on the basis of race. The reason it advances is not national security, and it is not to remedy the University's own prior racial discrimination. Instead, the University advances a third reason: it discriminates, it explains, in order to provide its students with the educational benefits of a diverse student body. In particular, the University claims 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. According to the University, meaningful representation of these groups yields educational benefits insofar as it increases the number of merchants in the campus market place 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. As the law school has argued to the Supreme Court, "classroom discussion is more livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[3] A critical mass of these students serves to "introduce students to unfamiliar experiences and perspectives."[4]

There can be no doubt that a university with a more robust market place of ideas offers its students a better education. Whether tinkering with the racial composition of a student body translates into a more robust market place of ideas is less certain. Moreover, even if it does, whether whatever educational benefits derive from doing so should constitute a "compelling interest" alongside national security and remedying specific past discrimination is less certain still. These are among the central questions over which the litigants fought in the United States Supreme Court.

While all interesting questions, these debates are largely beside the point because, regardless of the answers to these questions, the University's admissions policy is still unconstitutional. This is the case for the simple reason that the University of Michigan (along with, for that matter, the rest of the academic establishment) is lying to the Supreme Court when it says that the reason it uses racial preferences is to reap the more robust market place of ideas fostered by racial diversity. And, according to numerous Supreme Court precedents, supported by every sitting justice, the University's utter lack of sincerity in this regard is fatal to its constitutional claims.

The Supreme 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. Post-hoc rationalizations are rejected out of hand. For example, in *United States v. Virginia*,[5] the Court declared unconstitutional the Virginia Military Institute's admissions policy because it discriminated on the basis of gender by limiting enrollment only 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."[6] 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."[7] Although only five members of the Court joined Justice Ginsburg's opinion in the VMI case,[8] every member of the current Court has either penned or joined an opinion

expressing the same view.[9]

For several reasons, it is clear that the University's appeal to the educational benefits of diversity as a justification for its discriminatory admissions policy was even more insincere than was VMI's. Accordingly, the Supreme Court should reject the diversity rationale out of hand.

First, it is clear that the University's rationale was insincere because the University's preference scheme 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 v. White* for a similar lack of sincerity.[10] The state law in question was a Minnesota canon of judicial conduct that required candidates for judicial office to refrain from "announc[ing] [their] views on disputed legal or political issues."[11] As a burden to core electoral speech, the "announce clause" was subject to strict scrutiny[12]—the same test applicable to the University of Michigan's racial preference policies. Minnesota attempted to justify its restriction with the need to preserve the impartiality of the judiciary.[13] The Court, however, rejected that rationale because it "d[id] not believe" that the announce clause was "adopted . . . for that purpose."[14] 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 . . . ."[15] "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."[16] 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*,[17] 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 . . . ."[18]

As were the justifications advanced in *White* and *City of Ladue,* the compelling interest the University has offered to the Supreme Court is so "woefully underinclusive as to render belief in that purpose a challenge to the credulous." The University says it needs 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 will not be forgone: *e.g.*, "livelier, more spirited, . . . more enlightening" classroom discussion that "introduces students to unfamiliar experiences and perspectives."[19] The law school specifically has deemed a critical mass to be at least 11% of the student body, and accordingly, under its current enrollment policy, it has every single year enrolled black, Hispanic, and Native American students in numbers exceeding that percentage.[20]

There are, however, any number of groups of students who do not represent at least 11% 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 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 a Mormon or an Arab-American is just as unique and unfamiliar to other students as the experience of being black, Hispanic, or Native American. Yet the University is 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, it is clear that the University's invocation of the educational benefits of diversity is insincere because, at the same time the University has purported to need the use of racial preferences to create "livelier, more spirited, more enlightening" classroom discussion, it has taken other measures to censor and dull classroom discussion. Indeed, these measures not only sought to censor classroom discussion as a whole, but they have been directed to censor in particular 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 verbal behavior" that "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, 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."[21] According to the University's interpretative guide to the code, prohibited speech included 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."[22] Unsurprisingly, a federal district court promptly struck down the speech code as an unconstitutional infringement of the First Amendment rights of students,[23] finding that "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."[24] Needless to say, as the

Supreme Court put it 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."[25]

As with underinclusiveness, the University of Michigan is not alone in its inconsistencies. Many elite universities that profess to practice racial preferences in order to create "livelier" classroom discussions have similarly sought simultaneously to censor those discussions. These efforts have included speech codes directed at quashing any comments that might offend students of certain racial groups. Many of these practices are catalogued in *The Shadow University* by University of Pennsylvania Professor Alan Kors and Massachusetts attorney Harvey Silverglate.[26] They explain that the theory behind many of these speech codes was, contrary to the current protestations of the educational establishment, 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.[27] Other 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.[28]

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 argues 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."[29] 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."[30] Princeton also filed an *amicus* brief in the Supreme Court in support of Michigan's position that racial preferences are needed to achieve the educational benefits of diversity.

The segregation does not end with orientation. Many universities 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 culture."[31] Cornell University, for example, 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.[32] Yet, Cornell maintains special dormitories for black, Hispanic, and Native American students.[33] Cornell has been investigated by both the United States Department of Education and the New York Civil Rights Coalition for its facilitation of racial segregation in residence halls.[34]

Indeed, 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.[35] Many of the universities which filed briefs in support of Michigan maintain separate graduation ceremonies for black, Hispanic, and Asian seniors, including the University of Pennsylvania, Vanderbilt University, Washington University in St. Louis, and Stanford University.[36] This is all, again, "quite incompatible with the notion" 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 here.[37]

Finally, the case against the sincerity of the University of Michigan and its peer institutions when it comes to the educational benefits of racial diversity is really more open and shut than even all of the above 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.[38]

Professor Kennedy is not alone. Yale Law School Professor Peter H. Schuck: "many 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"; "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."[39] 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."[40] 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 preferences for fundamentalist Christians or for neo-Nazis?)."[41] 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..."[42] 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."[43]

Indeed, the educational elite was using racial preferences long before the educational benefits of racial diversity had even been pondered. The elite embraced the diversity rationale because the real reason they maintain racial preferences—"social justice" (in Professor Kennedy's words)—has been repeatedly rejected by the Supreme Court as a legal justification for racial preferences. Justice Powell rejected this rationale in his opinion in *Regents of University of California v. Bakke*,[44] and a majority of the Court rejected it in *Wygant v. Jackson Board of Education*,[45] where it 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 racially classified remedy."[46]

Thus, having lost years ago with the truth, the University has decided to try a lie: the diversity lie.

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Footnotes

[1] *Korematsu v. United States*, 323 U.S. 214 (1944).
[2] *United States v. Paradise*, 480 U.S. 149 (1987).
[3] Brief for Respondents at 3, *Grutter v. Bollinger* (No. 02-241) ("Grutter Br.").
[4] *Id*. at 2.
[5] 518 U.S. 515 (1996)
[6] *Id*. at 535.
[7] *Id*.
[8] Justices Stevens, O'Connor, Kennedy, Souter, and Breyer.
[9] *See e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (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 convention," at which the law under consideration was enacted).
[10] 122 S.Ct. 2528 (2002).
[11] *Id*. at 2531.
[12] *Id*. at 2534.
[13] *Id*. at 2535.
[14] *Id*. at 2536.
[15] *Id*. at 2537.
[16] *Id*.
[17] 512 U.S. 43.
[18] *Id*. at 52-53.
[19] Grutter Br. at 2-3.
[20] Grutter Br. at 7-8.
[21] *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989).
[22] *Id*. at 857-58.
[23] *Id*. at 853.
[24] *Id*. at 861.
[25] *White*, 122 S.Ct. at 2537.
[26] Free Press, 1998.
[27] *Id*. at 80 (emphasis added).
[28] *See, e.g., Corry v. Stanford*, No. 740309 (Cal Sup. Ct., Feb. 27, 1995) (order on preliminary injunction).
[29] Brief for Respondents at 27, *Gratz v. Bollinger* (No. 02-516) (emphasis added).
[30] Shadow University, at 194.
[31] *Id*. at 198 (internal quotation marks omitted).
[32] Brief of Columbia, et. al., at 2, *Grutter v. Bollinger* (No. 02-241) & *Gratz v. Bollinger* (No. 02-516) (internal quotation marks omitted).
[33] Shadow University, at 200. The University balked at creating a special dorm for gay students. *Id*.
[34] *Id*.
[35] Michael A. Fletcher, *Diversity or Division On Campus?*, Wash. Post (May 19, 2003) at A1.
[36] *Id*.
[37] *White*, 122 S.Ct. at 2537.
[38] *Affirmative Reaction*, The American Prospect, Mar. 1, 2003.
[39] *Affirmative Action: Past, Present, and Future*, 20 Yale L. & Pol'y Rev. 1, 28, 34 (2002).
[40] Daniel Golden, *Some Backers of Racial Preferences Take Diversity Rationale Further*, Wall Street Journal (June 14, 2003) at B1.
[41] *Affirmative Action*, 107 Yale L.J. 427, 471 (1997).
[42] *The Unresolved Problems of Reverse Discrimination*, 67 Cal. L. Rev. 87, 122 (1979).
[43] *Affirmative Action And The Harvard College Diversity-Discretion Model: Paradigm Or Pretext*, 1 Cardozo L. Rev. 379, 407 (1979).
[44] 438 U.S. 265 (1978).
[45] 476 U.S. 267 (1986).
[46] *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).