

RACIAL PREFERENCES IN ADMISSIONS: MYTHS, HARMS, AND ALTERNATIVES*

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I. INTRODUCTION

Thank you to *Albany Law Review* for inviting me. I'm here because I'm an attorney at the Center for Individual Rights and we have represented the plaintiffs in most of the legal challenges to race-based admissions practices,¹ most notably, *Hopwood v. State of Texas*,² *Smith v. University of Washington Law School*,³ and the two Michigan cases, *Gratz v. Bollinger*⁴ and *Grutter v. Bollinger*.⁵ Instead of focusing on the broad topic of affirmative action, which in my view includes alternatives that are both legal and desirable, I am going to limit myself to racial preferences. I will be talking about things like the University of Michigan giving twenty bonus points if you are a Black, Hispanic, or Native American applicant, and zero points if you are White, Asian, or Arab.⁶ That is what I mean by racial preferences, as compared to, say, affirmative action

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¹ See CENTER FOR INDIVIDUAL RIGHTS (providing a list of cases which the CIR has participated in), at <http://www.cir-usa.org>.

² 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).

³ 233 F. 3d. 1188 (9th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).

⁴ 122 F. Supp 2d 811 (E.D. Mich. 2000).

⁵ 137 F. Supp. 2d 821 (E.D. Mich. 2001), *rev'd on other grounds by*, 288 F. 3d 732 (6th Cir. 2002).

⁶ See Brief for the Petitioner at 2–10, *Grutter v. Bollinger* (2003) (No. 02-241) [hereinafter Petitioner's Brief] (detailing the admissions process and procedure of the University of Michigan Law School), available at http://www.cir-usa.org/legal_docs/grutter_v_bollinger_SupCt_brief.pdf (last visited Feb. 3, 2003).

based on economic disadvantage, which is one of many race-neutral alternatives.

Now I know a lot of people don't like the term "preference," but if we are not talking about preferences then we can all go home, because there is no need to find a compelling interest. It is only if you are giving preference based on race or ethnicity that you need to justify it with a constitutionally compelling interest. If these really are not preferences, then you don't need more than a rational basis under the Constitution, and someone should tell the University of Michigan that it can stop arguing that diversity is a compelling interest.

I am going to refer to the Constitution most of the time, but the assumption is that the legal standard for racial preferences will be virtually the same, if not identical, under Title VI of the 1964 Civil Rights Act. And thus perhaps one of the most misunderstood things about this whole legal battle is the widespread perception that the result will be limited to state universities. In fact, it is highly unlikely that the Supreme Court's decision is going to be limited to just state universities. It is much more likely that it will apply to all universities, because all universities with a couple of exceptions—the ones that don't accept federal funds—are covered by Title VI.

It is probably true that opinions on both sides of this issue are as vastly different as Professor Johnson pointed out, with some people thinking preferences are the worst thing in the world and some thinking they are the best thing in the world. But I do think there are at least a couple of points of agreement. One I would hope is that the ultimate ideal is a fully integrated society in which race does not play a role in a discriminatory way. I think the fundamental policy disagreement is really over how we get there—whether the way to get there is to be race neutral or to take race into account.

I believe the latter view is too pessimistic. Its proponents essentially say "race is a huge factor in American society and we really can't overcome it. It is naive to even think we can be race blind." I am sure from their point of view, I am, at best, naively optimistic. Professor Johnson said that race neutrality does not exist. Well, if it does not exist and it cannot exist, I think that is sad and we are in real trouble. If the future only holds a battle between preferences for minorities versus preferences for White people, then there is not going to be any good outcome. The only long term solution is race neutrality. We are not perfect human

beings. I don't think we are ever going to be 100% race blind, but I think certainly we should be heading in that direction and not in the reverse direction.

Another point of agreement, which Professor Johnson noted, is that the standard here is strict scrutiny. Ten years ago we might have been up here debating what is the constitutional standard that you apply to racial preferences. But now, due to Supreme Court precedent in the last ten years, we all agree that the standard is strict scrutiny, which is the highest standard of review. Under strict scrutiny, you need both a compelling state interest and narrow tailoring.

II. SUPREME COURT PRECEDENT ON RACIAL PREFERENCE RATIONALES

The Supreme Court has been clear about one compelling interest for racial preferences, namely that you can use preferences to remedy the effects of *your own* past discrimination. I know that to people on the other side of the debate, that remedial rationale is a very narrow exception. However, I actually think that it is a fairly generous standard. It certainly goes beyond the torts standard, under which, if you as an individual suffer an injury, then you are entitled to a remedy. Under that standard, if a school denies you admission because you are black, at the very least, the remedy should be an order that you be admitted. But the remedial rationale goes beyond that, in saying that, because of past discrimination against minorities, a new generation of minorities that may not have even been born when the discrimination occurred, should get a preference. The remedial rationale is getting close to the concept of group rights, which at least Justice Scalia does not accept.⁷

Nevertheless, I think the vast consensus is that the use of racial preferences under the remedial rationale is okay. However, despite this general acceptance, the remedial rationale has not been a very effective defense for racial preferences in admissions. It has been much more successful in the realm of government employment. One reason for that is a difference in how long the effects of past discrimination last. You can look at the composition of a police force and say it's affected by who was hired 20 years ago. But when you are talking about college or professional schools, you are talking

⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

about a 3 or 4 year cycle. It is a lot harder to make the case that the current composition of a student body is being affected by discrimination that occurred 20 years ago.

Arguably, recent Supreme Court precedent suggests that remedying the effects of your own past discrimination—the remedial interest—is the only compelling interest that can justify racial preferences. I think you can make that case pretty strongly when it comes to government employment and contracting. The big, open issue that hopefully will be decided by the Supreme Court this term is whether there is a second compelling interest for racial preference in admissions, namely the diversity rationale.⁸

Whatever the advantages of a diverse student body might be, I do not think you can base the diversity rationale on the Supreme Court's decision in *Regents of the University of California v. Bakke*,⁹ because, at the end of the day, there was only one Justice, Justice Powell, who endorsed the diversity rationale.¹⁰ If there is any case on which people disagree about its meaning, it's *Bakke*. In a fractured opinion, such as the one in *Bakke*, you can combine different parts of the opinion to get a majority, but only where there is a common denominator. But in *Bakke*, there is no common denominator because the four Justices in the Brennan opinion, while voting to uphold the racial preferences at issue, did not endorse the diversity rationale.¹¹ Those four Justices went off on different grounds, specifically the rationale of remedying societal discrimination. Had they said in their opinion that racial preference can be justified both as a remedy for societal discrimination and by diversity, then clearly there would be a common denominator between those four Justices and Justice Powell. In that case, diversity would be a compelling interest under current law. But that's not what the four Brennan Justices did. They did not even join the part of Powell's opinion that set forth the diversity rationale. They joined other parts of Powell's opinion, but not that part.¹²

It has been argued by some that *Bakke* stands for the proposition

⁸ See Petitioner's Brief, *supra* note 6, at 15–17.

⁹ 438 U.S. 265 (1978).

¹⁰ See Reply Brief at 1–3, *Grutter v. Bollinger* (2002) (No. 02-241) [hereinafter Reply Brief] (arguing that Justice Powell's lone opinion in *Bakke* did not establish diversity as a compelling interest), available at http://www.cir-usa.org/legal_docs/grutter_certPet_CIR_reply.pdf (last visited Feb. 3, 2003).

¹¹ See Petitioner's Brief, *supra* note 6, at 21–29 (providing a detailed analysis of the fractured *Bakke* opinion).

¹² *Id.*

that diversity is *not* a compelling interest, since the four Brennan Justices explicitly chose not to join the part of Powell's opinion that endorsed the diversity rationale. I think that view goes too far. The truth is that we do not know the status of diversity as a compelling interest for race-based admissions. There simply is no clear Supreme Court precedent on the issue.

Consider the following example, which illustrates the lack of a common denominator in *Bakke*. Assume that Montana wants to give a preference to Jewish applicants. I am guessing that there are not a lot of Jewish people in Montana. So, if you want to have a critical mass of Jews in your student body, you probably have to give a large preference to Jewish applicants. Under Justice Powell's diversity rationale, such a preference is just fine. However, Justice Brennan and the three Justices who joined his opinion would not find such a preference to be permissible, because that opinion was based on remedying societal discrimination against traditionally disadvantaged groups. As a Jewish person, I do not believe we fall in that category.

Another problem with using *Bakke* to justify racial preferences today is that the Brennan opinion's proposition that remedying societal discrimination is a justification for preferences is clearly not good law under current Supreme Court precedent.¹³ Moreover, the Brennan opinion relied on intermediate scrutiny, which is not the standard today.¹⁴

The bottom line is that five Justices in *Bakke* thought that the UC Davis Medical School system of racial preferences was illegal. That's the one thing that is clear. Interestingly, eight of the nine Justices thought that there was no meaningful distinction between the UC Davis quota at issue in *Bakke* and the Harvard plan mentioned by Powell—which is the model on which modern racial preferences are based. Most notably, the four Brennan Justices made fun of the “distinction” between the Harvard plan and a quota, essentially stating that the Harvard plan differs only in doing a better job of hiding the ball.¹⁵ And for Justice Stevens and the three Justices that joined him, racial preferences were unlawful regardless of their form.

¹³ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470 (1988); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion).

¹⁴ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).

¹⁵ *Bakke*, 438 U.S. at 378.

III. THE DIVERSITY RATIONALE STANDS ON SHAKY GROUNDS

The issue of diversity as a compelling interest is an issue on which the circuit courts are split.¹⁶ The 5th Circuit in *Hopwood* said that diversity is not a compelling interest.¹⁷ The 11th Circuit, in *Johnson v. Board of Regents of the University of Georgia*, said that the Supreme Court has never held that diversity is a compelling interest.¹⁸ The 11th Circuit found it unnecessary to decide the issue itself, because it struck down the University of Georgia's racial admissions preferences on narrow tailoring grounds. On the other hand, the 6th and 9th Circuits have said that diversity is a compelling interest that can justify racial preferences. However, the 9th Circuit's endorsement was not exactly a ringing one. In *Smith*, the 9th Circuit stated that since *Bakke*, "the [Supreme] Court has not looked upon race-based factors with much favor . . . [and] regardless of what we think the Supreme Court might do, we must let it decide . . . that the [diversity] rationale regarding university admissions policies has become moribund."¹⁹ That is not exactly a strong statement that the 9th Circuit thinks current Supreme Court precedent supports diversity as a compelling interest. To be fair, the 6th Circuit opinion in *Grutter* was a clear endorsement of diversity.

I do not think that a majority of the current Supreme Court Justices will say that diversity is a compelling interest. I am not as confident about that as I am that the Court will strike down the specific Michigan admissions systems at issue, but I'll tell you why I think the Justices will say diversity is not compelling. Part of the reason is that the diversity rationale suffers from the same problems that led the Court to say that neither remedying societal discrimination nor providing role models for minority children is a compelling interest that can support racial preferences.

The most important problem is that the diversity rationale does not allow any obvious limits on the scope or duration of racial preferences. What do I mean by no limit on the scope? As an example, if 5% Jewish enrollment at the University of Montana is good for diversity, then 10% must be even better, even if it requires giving massive preferences to Jewish applicants. Never mind if the Jewish population of Montana is less than 1%. And if 15% Black

¹⁶ See Reply Brief, *supra* note 9, at 3-7.

¹⁷ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

¹⁸ 263 F.3d 1234 (11th Cir. 2001).

¹⁹ *Smith v. University of Washington Law School*, 233 F. 3d 1188, 1200 (9th Cir. 2000).

and Hispanic enrollment is good for diversity, then 50% is even better. So there's really no limit. Compare that to the remedial interest, where you tailor the degree of racial preference to that which offsets the effects of discrimination.

There is also no limit on the duration of diversity-based preferences, because there are always going to be numerical minorities. In the foreseeable future, there will still be very few Jews in Montana, and there will still be fewer Blacks and Hispanics nationwide than there are Whites. And so there will always be a diversity-based reason to give preferences to Blacks and Hispanics, as well as to Jews in Montana and whatever other numerical minorities there are, regardless of whether society has progressed beyond certain racial and ethnic groups being disadvantaged. Supreme Court precedent tells us the Court is going to have problems with the lack of limits, just as they did with the societal discrimination and role model justifications for preferences.

Another problem with the diversity rationale is that it is very hard, in practice at least, to distinguish between, on the one hand, Justice Powell's notion of seeking broad intellectual diversity where race can be one of the factors, and on the other hand, outright racial balancing. Perhaps because this nation is so focused on racial politics and political correctness, diversity always seems to degenerate into racial balancing. Miranda Massie can speak for herself when it's her turn, but I would guess that, if the University of Michigan could ensure a wonderfully intellectually diverse student body with robust classroom discussion that everyone agreed was better than ever before, yet there were only 4% minorities on campus, Miranda would not be satisfied. So, in the end, it does come down to racial balancing, which the Supreme Court has said you cannot engage in. Even Justice Powell said that if you are trying to come up with a specific balance of minority students, that's discrimination for the sake of discrimination and it is always illegal.²⁰ In sum, it is hard to police the difference between using race as one factor to achieve intellectual diversity versus engaging in racial balancing, and I think the Supreme Court is going to be concerned about that problem.

Yet another problem is the big difference between saying that diversity is valuable and saying that it is a compelling interest. My colleagues and I have conceded in the Michigan cases that diversity is valuable. I'll concede it for my personal life as well. When I was

²⁰ See *Bakke*, 438 U.S. at 307 (Powell, J.).

in college, long before I knew that diversity was a legal or political issue, I thought it was beneficial that I was meeting a broader range of people, both racially and ethnically, than I did in high school. But the question is whether the benefits rise to the level of a compelling interest. Consider that there are many things that are very important but do not rise to the level of a constitutionally compelling interest. The most obvious is remedying societal discrimination. I think, if you took a poll, virtually every American would say that's important. But the Supreme Court has said it cannot justify racial preferences.

Similarly, there was a case involving child custody where the Supreme Court recognized that the best interests of the child might require taking the race of the adopting parents into account.²¹ Nonetheless, the Court said that race could not be taken into account. As another example, I think many people would agree that there are benefits to scrutinizing Muslims or Arabs more closely at the airport. But it still strikes me as wrong, because the benefits are outweighed by a more important principle, which is the principle of nondiscrimination. That is really what this debate comes down to. Yes, diversity has value, but you have to balance that value against the damage done to the principle of nondiscrimination, especially in light of the diversity rationale's lack of limiting principles. Under that analysis, I believe diversity cannot and will not win out.

There is also an actual motive issue. Supreme Court precedent is very clear that, under strict scrutiny, the compelling interest has to be your actual motive. Yet I think it is very unlikely that the real motive for racial preferences at Michigan or any of the elite schools is the genuine desire to seek Powell-type intellectual diversity. I would point to a number of pieces of evidence. If you look at the studies, about 90% of professors typically self-identify as Democrats or liberals. But I don't hear any of the proponents of diversity saying that that's a problem. Nobody on that side seems to think that the lack of conservatives or the lack of fundamentalist Christians among the faculty or in the student body is depriving students of a good education. Where is the sincerity when universities say how important it is to have diversity of viewpoints?

Also, looking at the Michigan undergraduate admissions system, you get zero points for being a white student born in Serbia, or an

²¹ See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (noting the impermissibility, under the Equal Protection Clause, of denying a natural mother child custody because of an interracial marriage).

Asian student born in Vietnam, or an Arab student who grew up on the West Bank. But you get 20 points—equivalent to the difference between an A and B average—for being a Black or Hispanic student who grew up in Detroit. If Michigan is really looking for Powell-type diversity, it is hard to explain why you get zero points for having grown up in a foreign country, even if you came over on an overcrowded boat in total poverty.

Additionally, I question the real motive of universities because they do not seem to promote integration of the races once students arrive at school. There are minority orientation programs and Third World centers. Those things probably do have some value, but they stand in the way of the schools' professed desire to give students the benefits of meeting people of different races. You do not encourage people to segregate themselves if your real goal is to have people of different races interact as much as possible.

A related point is that I have not heard anybody express concern about the lack of diversity at historically Black colleges. Now that's not to say that historically Black schools are a bad thing because they're discriminating. I realize White students are not knocking down the doors to attend. But if racial diversity is really a crucial part of an education, then how can schools that are virtually 100% Black be desirable? Are you not depriving those Black students of the vital benefits of racial diversity?

The bottom line is that the diversity defense of racial preferences is just not sincere. I think the real motive is much more about racial politics. Miranda was saying earlier that the only reason schools have affirmative action at all is because of agitation by the various civil rights communities, and I think that is basically right. I don't think it is because universities have a deep seated belief in the benefits of intellectual or racial diversity.

Consider, also, that the overall diversity of the nation's colleges is not increased by racial preferences. There are many schools that have open admissions. So while some people may not go to college because they cannot afford tuition and related expenses, nobody is kept from going to college because their LSAT score or their GPA is too low. All we are doing with racial preferences is redistributing minorities. If you believe, as I think Miranda does, in racial preferences as a form of social justice, then redistribution is a fine goal. After all, social justice would require that minority students go not just to any college, but to the best schools, along with the White and the Asian kids. But if racial preferences are all about the educational benefits of diversity, it is not clear why we should be

more concerned about Harvard and Yale students getting those benefits, while drawing away minority students who otherwise would add to the diversity at other schools. If anything, you might be able to argue the opposite, namely that most students at Harvard and Yale come from well educated families in which they have already been taught many of the lessons that one might learn from being part of a diverse student body. If diversity is all about providing a better education, the educational benefits are probably more needed at lower ranking schools. So, again, I do not think racial admissions preferences are really motivated by the educational value of diversity.

In addition to requiring a compelling interest for preferences that is also the actual motive, strict scrutiny requires that the racial preferences be narrowly tailored. But the same schools that point to Justice Powell's opinion in *Bakke* as the supposed basis for diversity as a compelling interest, largely ignore Powell's standard for narrow tailoring. Justice Powell endorsed the use of race only where it is one of many factors used to achieve broad-based diversity. But race has become virtually the definition of diversity, not just one of many diversity factors. An illustration of that is the enormous 20 point racial bonus at the University of Michigan, which is equivalent to the difference between an A and a B average. Race is not one of many factors used to achieve intellectual diversity at the University of Michigan. It is a super-factor and virtually the end all and be all of diversity. Whether that's a narrow tailoring problem comes down to what the justification for preferences is. If social justice and proportionality is the justification, then, yes, give race as many points as needed to get the right percentage of minorities. But if schools are really looking for broad-based intellectual diversity, an almost exclusive focus on race is not a narrowly tailored way to reach that goal.

One other possible compelling interest for preferences that tends to get mixed in with the diversity rationale is the academic freedom or First Amendment argument, which I think Professor Johnson alluded to. That argument is based on Justice Powell's opinion in *Bakke*, where he relied on academic freedom.²² However, I find that argument the least convincing of all because Justice Powell is not even consistent here. He points to academic freedom but then tells schools that you cannot do what UC Davis is doing. Instead you

²² See *Bakke*, 438 U.S. at 312 (explaining that "[t]he [academic] freedom of a university to make its own judgments as to education includes the selection of its student body"); see also Petitioner's Brief, *supra* note 6, at 23.

must use race the way Harvard is doing it. That makes no sense if schools really have the academic freedom to select their student bodies as they see fit. In any case, the idea that universities have the academic freedom to make race-based decisions is a very scary notion. What about a school's academic freedom to decide that an all-White student body is the best thing? I don't think we want to go down that road.

IV. MYTHS ABOUT RACIAL PREFERENCES

I want to discuss some of the biggest myths about racial preferences. I will start with maybe the most controversial, which is the belief that, if we get rid of racial preferences, we are going to have campuses that are all White and Asian. First of all, we are not talking about getting rid of all racial preferences. Racial preferences will certainly still exist as a remedy for the effects of a school's own discrimination. And if we win the Michigan cases, even the most resounding win will not mean the end of preferences to achieve diversity. It would just mean that the preferences will have to be based on something other than race, such as socioeconomic class, or coming from an under-performing high school, or writing an essay about how you are disadvantaged, like applicants do now in California. If you look at the states where racial preferences have been outlawed—Washington, California, Texas, and Florida—you see that schools have come up with effective race-neutral alternatives for maintaining diversity. All the analyses that I have seen show that at some schools minority enrollment has more than bounced back to the level before preferences were abolished, and in some places it is a little below that level. So, overall, schools have been successful and creative at finding race-neutral ways to achieve not only broad based diversity but racial diversity as well.

The idea that we are going to have all-White campuses if we judge people based just on merit is unfounded. It is saying, in essence, that if Blacks and Hispanics have to compete on a level playing field, then virtually none of them are going to get into the best schools. That is just nonsense and it is demeaning to minorities. There are already tens of thousands of minorities getting into the best schools based purely on merit—without needing preferences. And if we get rid of the demeaning and self-fulfilling lower standard for minorities, there will be even more minorities who are in the best schools based solely on merit.

People on our side of the debate are often accused of thinking that admissions should be a numbers game—that is, based virtually all on GPA and standardized test scores. That’s another myth. That certainly is not our position at the Center for Individual Rights. We believe it is none of our business what criteria a school uses, as long as it does not use criteria that are prohibited by the Constitution, such as race. We do talk a lot about test scores and GPA, but that is because the schools rely so heavily on those criteria, especially law schools, where admissions is very numerical. If universities declared tomorrow that they were going to admit students based just on height, we would be asking how come you have to be 6 foot if you’re White but only 5’8” if you are Black or Hispanic. Whatever you want to make the criteria, we will discuss whether you are applying them in a race-neutral manner or not.

Another myth that I already alluded to is the idea that race is used as just a small plus factor, like a thumb on the scale. If that were the case, we would not be here. We can debate whether the size of the preference makes a big difference legally, but if the preference was small, it would be almost impossible to prove and I don’t think anyone would be up in arms about it. The problem is that we see policies like the 20 points at Michigan, which means that if you’re Black, Hispanic or Native American and you had a B-average in high school, you start out at exactly the same point as a White, Asian or Arab applicant who got an A-average in high school. That is not a thumb on the scale. You may agree or disagree with it, but it is not a small plus factor.

A related myth is that schools are only giving a preference to minorities when choosing between roughly equally qualified candidates. That is not true given what I said about a B-average for a minority applicant being equated with an A-average for a non-minority. But even if it were true, the argument that it is okay to prefer one race over another when two candidates are equally qualified is a very dubious proposition. For example, I think we would all disagree if a school said “when we have two equal applicants, we choose the White one, but that’s not discrimination.” Wrong—that is discrimination.

Still another related argument is that racial preferences are okay because schools only select qualified minorities. That is a misleading argument. While it is assumedly true that all minorities that are accepted have at least the minimum qualifications, you have to be *more than* qualified if you are White, Asian, or Arab. Again, I ask you to imagine the reverse situation. Suppose a school

said “sure, we add on an extra 20 points for the White applicants, but the accepted ones are all qualified, so it’s perfectly fair.” Nobody would buy that argument for a second.

Another misleading argument about racial admissions preferences is that there is no injury to rejected non-minority students, because they do not know whether they would have been selected under a race-blind system. Well, that is true, but only because we do not know what the race-blind system would look like. The race-blind system could be based on height, on a lottery, or on extracurricular activities. Since we have no idea what it would look like, we cannot say a particular student would have gotten in. What we can say, though, is that under the current system, had our plaintiffs been Black, Hispanic or Native American, they would have gotten in. Even John Payton, lead counsel for the University of Michigan, conceded at oral argument in the Sixth Circuit that Barbara Grutter, the plaintiff in the law school case, would very likely have gotten in if she had the right skin color. And that is where the discrimination comes in. It’s in the fact that you are being treated differently based solely on the color of your skin.

A similar argument is that there are not that many minority students, so schools are only taking away maybe 10% of the spots that White and Asian kids would have gotten under a race-blind system. That just does not fly as a defense. If I told you that a company or a school discriminates against Black applicants, but they only discriminate by 10%, so don’t worry about it, you would not buy that argument for a second. Consider also that, for every X minorities who get admitted because of racial preferences, there are X White, Asian, and Arab applicants who would have gotten in except for preferences. We may not be able to identify those X applicants, but there clearly are X people whose chances of admission were diminished 100%.

Finally, there is this argument that schools have preferences for athletes and children of alumni, and racial preferences are no different. But they are different, because the Constitution, the civil rights laws, and our moral principles treat race differently. We have erected a very high barrier to racial discrimination, not to help White people, but as the bedrock principle of the civil rights movement. But let me add that, if alumni preferences are having a negative impact on minority enrollment, then schools would be well advised to get rid of alumni preferences. If narrow tailoring requires anything, it requires that schools try race-neutral alternatives first, and one of the most obvious race-neutral

alternatives would be to get rid of alumni preferences. I am all for that.

V CONCLUSION

In closing, let me say that I point out these misleading arguments and myths because I think that supporters of racial preferences are fooling themselves. They want to have the benefits of preferences—such as educational benefits and a politically correct racial balance—while, at the same time, pretending that there are no costs and no victims. But there are victims, and there are costs to minority and non-minority students alike.

Sure, race-based admissions can achieve a proportional racial balance that makes university administrators feel good about themselves. But how can such a system truly help minorities when it is based on and reinforces demeaning stereotypes? I'm talking about stereotypes which say that minorities think alike—one assumption of the diversity rationale—that minorities are not capable of successfully competing if held to the same standard, and that our minority colleague in the class and the workplace are less capable. Even Justice Powell noted that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.”²³ Shelby Steele said it best when he pointed out that “[t]he most dehumanizing and defeating thing that can be done to [minorities] . . . is to lower a standard in the name of their race.”²⁴ It is no wonder that, after thirty years of holding minorities to a lower admissions standard and lowered expectations, we have not made a dent in the racial disparity in standardized test scores and grades. Nor is it any wonder that minority graduation rates and average class rank are uniformly and substantially below those of Whites and Asians.

Anyone who believes that race-based admissions has been a success is focusing on only the most superficial measures of success. Increasing minority enrollment by lowering the admissions standard for minorities is no less cosmetic than a high school raising its graduation rate by lowering the graduation requirements. But little has really been accomplished in either case, other than to make people feel better by cosmetically covering

²³ *Bakke*, 438 U.S. at 298 (Powell, J.).

²⁴ SHELBY STEELE, *A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA* 113 (1998).

up the problems.

History is replete with examples of people and institutions that believed or professed that they had found a “good” reason to discriminate which would benefit their institutions and society. But history never proves them right. This time is no different. As Alan Dershowitz has pointed out, the Harvard diversity plan started out as a Jewish quota designed, ostensibly, to achieve a student body that better reflected the country’s population by limiting the number of Jewish students.²⁵ Not much has changed, except that today we artificially limit the number of White and Asian students. Decades from now, we will surely look back and realize how foolish it was to believe that society could achieve equality by discriminating and by treating minorities as if they are less than equal.

But we need not wait decades. Thirty more years of the cosmetic remedy of racial preferences is not acceptable. Perhaps we should try the race-neutral alternatives that have worked well in Florida, Texas, and California, or perhaps we need to develop other creative approaches to eliminating the racial disparity in academic performance. Either way, it is time to move beyond the flawed policy of racial preferences. The Constitution requires it and our consciences demand it.

²⁵ Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?*, 1 CARDOZO L. REV. 379, 385–90 (1979).