

ATTACKING “DIVERSITY”: A REVIEW OF PETER WOOD’S *DIVERSITY: THE INVENTION OF A CONCEPT*

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The word “diversity” is ubiquitous these days, especially in academia. Peter Wood, a professor of anthropology at Boston University, has written an invaluable book, *Diversity: The Invention of a Concept*,¹ that explores the rise of the concept and, one hopes, will hasten its demise. There is, I must quickly add, nothing wrong with diversity per se, meaning a variety of people, with different skin colors and national origins, outlooks, and experiences. The trouble is that, whenever one hears the term, it is almost certainly because the speaker has an agenda that favors racial and ethnic discrimination in order to achieve a particular and predetermined demographic mix, while opposing merit and assimilation to American culture.²

This brief review is divided into three parts. Part I summarizes and discusses Wood’s book, with particular emphasis on its treatment of the Supreme Court’s *Bakke* decision;³ part II adds some additional criticisms of the diversity agenda; and part III discusses how the Supreme Court’s recent acceptance of the diversity rationale as “compelling” might be attacked in future litigation.

I. REVIEW OF PETER WOOD’S *DIVERSITY: THE INVENTION OF A CONCEPT*

Peter Wood begins his book by discussing Martin Luther King’s repeated declaration that all people are tied together in a “single garment of destiny,” which Wood finds to be a “striking image of human unity.”⁴ It is, however, to be contrasted with the current concept of “diversity,” which, Wood says, “bids us think of America not as a single garment, but as divided into separate groups—on the basis of race, ethnicity or sex, for starters—some of which have historically enjoyed privileges that have been denied the others.”⁵ Moreover, the concept “is more than a propensity to dwell on the separate threads that make up the social

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1. Peter Wood, *DIVERSITY: THE INVENTION OF A CONCEPT* (2003).
2. See Roger Clegg, *Why I’m Sick of the Praise for Diversity on Campuses*, CHRON. HIGHER EDUC., July 14, 2000, at B8.
3. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
4. WOOD, *supra* note 1, at 3.
5. *Id.* at 5.

fabric.”⁶ Rather, “[i]t is above all a political doctrine asserting that *some* social categories deserve compensatory privileges”⁷ But this is “more than a matter of government mandates.”⁸ It is “also a *belief* that the portion of our individual identities that derives from our ancestry is the most important part, and a *feeling* that group identity is somehow more substantial and powerful than either our individuality or our common humanity.”⁹ “The new movement is something different, and in some ways a repudiation of the older attempts”—like Dr. King’s—“to find a oneness in our many-ness.”¹⁰ Rather, it “tends to elevate many-ness for its own sake.”¹¹

Accordingly, Wood states early on that he “aim[s] to show that, in one area of American life after another,” the principle of diversity “represents an attempt to alter the root cultural assumptions on which American society is based.”¹² Indeed, the diversity mindset “already has achieved a substantial record of increased social discord and cultural decline.”¹³ The diversity movement:

has contributed significantly to falling educational performance and lower academic standards (e.g. attacks on the SAT as a tool for identifying high school students who have the aptitude to succeed in college); undermined love of country (by elevating racial separatism); trivialized art (by emphasizing the social identity of the artist, e.g. Toni Morrison); and made certain forms of racialism respectable again.¹⁴

While it may occasionally have made matters better instead of worse, Wood believes that in general the diversity mindset “is a challenge to higher virtues and greater goods. We jeopardize liberty and equality by our friendship with this new principle. It is an unruly guest in our house, and the time may have come to call a cab and send it home.”¹⁵

In the first three chapters, Wood traces the different meanings of the word diversity and how the concept of diversity has changed over the years, with a special focus—appropriately enough—on diversity in terms of a variety of races and cultures. The spirit of our age would, of course, paint a picture of earlier generations that view the Other—really, all Others—as not only different but inferior, even subhuman, with gradual progress to our own current enlightened state of seeing all races and cultures as not so different and certainly with none—save the Western white Christian, perhaps—as inferior.

But Wood sees that it is more complicated than this, and that the rise of diversity has not always meant a rise of tolerance or heightened appreciation of other cultures. “The diversiphiles,” Wood writes, using one of his neologisms,

6. *Id.*

7. *Id.*

8. *Id.* at 11.

9. *Id.*

10. *Id.* at 8.

11. *Id.*

12. *Id.* at 3.

13. *Id.*

14. *Id.*

15. *Id.*

“hope to replace America’s live-and-let-live pluralism with an edgier respect-my-group-or-else pluralism.”¹⁶ And, for instance, in the theological context, “the differences among American religions are small though important; but construed through the lens of *diversity*, the inverse image appears: the differences are huge yet somehow inconsequential,” since it is considered disrespectful to minimize differences but unacceptable to critique them.¹⁷ In chapter four, Wood discusses the way that the word is now most often used (in order to distinguish the word when used with the old meaning from the way it is used now, throughout the book Wood italicizes the word whenever used in the new way—as you can see in the preceding sentence).

Chapter five, “*Bakke* and Beyond,” is the book’s pivotal chapter.¹⁸ It discusses the litigation in *Regents of the University of California v. Bakke* and the culminating Supreme Court decision in 1978.¹⁹ In that case, a badly fractured Court struck down the admissions system at the University of California-Davis (“UC-Davis”) medical school.²⁰ That system had set aside a certain number of slots for members of certain racial groups.²¹ Four justices (Brennan, White, Marshall, and Blackmun) would have reversed the lower court decision striking down the system;²² four (Stevens, Stewart, Rehnquist, and Chief Justice Burger) would have invalidated the system,²³ resting their decision on the unambiguous language in Title VI of the 1964 Civil Rights Act,²⁴ that flatly prohibits what the school did: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²⁵

The deciding vote, however, was cast by Justice Lewis Powell. He agreed with Brennan et al. that the plain language in Title VI didn’t mean what it said, and was instead supposed to prohibit discrimination only to the extent that it would be barred by the Equal Protection Clause.²⁶ But, unlike the Brennan group, Justice Powell found that the UC-Davis system was illegal because it failed to pass the “strict scrutiny” he thought was demanded by this standard.²⁷ That standard required that the discrimination be narrowly tailored to the achievement of a compelling interest.²⁸ The overt quotas set by the UC-Davis were not narrowly tailored, even though Powell did find there to be a compelling interest—namely

16. *Id.* at 168.

17. *Id.* at 169.

18. *Id.* at 99–145.

19. 438 U.S. 265 (1978).

20. *Id.* at 271.

21. *Id.* at 276–77.

22. *Id.* at 267.

23. *Id.*

24. Pub. L. No. 88-352, §§ 601–605, 78 Stat. 241, 252–53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2000)).

25. 42 U.S.C. § 2000d (2000).

26. *Bakke*, 438 U.S. at 287–88.

27. *Id.* at 289–90.

28. *Id.* at 299.

diversity.²⁹

That the diversity rationale should carry the day came as a shock even to supporters of racial preferences, concludes Wood. This may seem implausible to some in retrospect, now that the word has become so ubiquitous in our culture, but it fits in with my own experience. I remember first reading the decision. Justice Powell's opinion lays out the legal framework, discusses the general requirement of a compelling interest, and then posits four possible candidates for such an interest in this case. He rejected the first three in less than five pages: "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," "countering the effects of societal discrimination," and "increasing the number of physicians who will practice in communities currently underserved."³⁰ Well, I thought, those are not frivolous claims, and yet Justice Powell has quickly given them the back of his hand. He must be saving the weakest for last, the puny "educational benefits that flow from an ethnically diverse student body."³¹ I remember my eyes growing wide with disbelief as I read further and, astonishingly, the diversity rationale was accepted.

As Wood writes:

Powell cannot be credited with having invented the idea. Diversity as a cultural principle—including the idea that ethnically and racially mixed classrooms are educationally stimulating—had been floating around in leftist American intellectual culture for about a decade. The immediate reaction to Powell's opinion suggests that leftist intellectuals were taken by surprise that such an incidental concern—that racially mixed classrooms might benefit white folks too—should have played a significant role in rescuing affirmative action from the conservative justices. It took a while for the Left to realize that it had been handed a potentially powerful new weapon in the culture wars.³²

But catch on they did. Nor did college and university admission officials, in particular, have to do much in order to provide the necessary fig leaf for their ethnically preferential policies. "They simply nodded to the *Bakke* decision by disguising their old racial quotas as 'plus factor' systems and got on with the business of discriminating."³³ Wood concludes the *Bakke* chapter on an even more somber note:

In the end, Justice Powell's *Bakke* decision was a case of wish fulfillment: a search for a painless way to accelerate racial and ethnic integration by detouring around academic standards. But "race" is *not* a "plus factor" in performing surgery, practicing law, or any other form of advanced study; it is an irrelevancy. And the kind of *diversity* achieved by racially preferential admissions is not educationally invigorating; it is intellectually threadbare and ethically contemptible.

29. *Id.* at 314–15.

30. *Id.* at 306.

31. *Id.*

32. WOOD, *supra* note 1, at 113–14.

33. *Id.* at 123.

Far from being a painless solution to the nation's racial divisions, Powell's exaggeration of the importance of *diversity* only deepened our racial problems, and affirmative action remains an unsettled and vexing issue. But as large and important as it is, that debate is not the central legacy of *Bakke*, or the primary subject of this book. The *Bakke* decision's even larger legacy was to give scope, legitimacy, and force to a new way of thinking about social diversity, which would prove to have cultural applications far beyond college admissions and even race.³⁴

Those last two sentences provide the roadmap that Wood follows for the rest of the book: the impact of the diversity mindset on religion (or, at least, religion's bureaucracies—chapter six),³⁵ the arts (chapter seven),³⁶ business (chapter eight),³⁷ the campus beyond student admissions (chapter nine),³⁸ and even consumer goods (chapter ten).³⁹ Chapter eleven is about how the diversiphiles—that Wood neologism again—have pervaded women's colleges, which have embraced it even as they still reject the obvious diversification that would ensue if they went co-ed.⁴⁰ Chapter twelve brings us up-to-date, with a section on “Diversity After 9-11” and some concluding prognostications.⁴¹

Let me conclude my brief summary of Wood's book by quoting his own:

President Johnson inaugurated legalized racial preferences in 1965, but “affirmative action” met increasing popular resistance and legal challenges, culminating in the Supreme Court's split decision in the 1978 *Bakke* case. The outcome of that case included a one-man opinion drafted by Justice Powell in which he declared that race preferences in college admissions are unconstitutional under most circumstances, but that the minority racial status of an applicant could be considered as “a plus factor” if the college was seeking to increase its intellectual “diversity.” Powell's *diversity* argument, though eccentric, connected to some cultural currents in leftist politics, in American churches and among education theorists. (Perhaps it connected as well with the strain of American pragmatism extending back through John Dewey to William James, in which “pluralism” was rated as among the highest educational values.) In any case, within a few years of the *Bakke* case, most colleges and universities relabeled their racial preferences in admissions as programs intended to enhance *diversity*.

The *diversity* movement grew quietly until it burst into prominence in 1987. That year, the Hudson Institute [a conservative think tank, ironically—mirroring the irony that Justice Powell was a Nixon

34. *Id.* at 145.

35. *Id.* at 146–74.

36. *Id.* at 175–200.

37. *Id.* at 201–25.

38. *Id.* at 226–56.

39. *Id.* at 257–72.

40. *Id.* at 273–87.

41. *Id.* at 288–309.

appointee] issued its *Workforce 2000* report, which provided the business world with a demographic excuse to switch from affirmative action rationales for ethnic preferences in hiring and promotion, to *diversity* preferences—said to be prudent planning for the future. Higher education and the business sector thus discovered common cause: in order to have the ethnically diverse workers that business would need, universities would have to admit and graduate more minority students, even at the cost of lowering admission standards. The Business-Higher Education Forum's January 2002 report, *Investing in People*, is a late reverberation of the alliance that has made *diversity* a pivotal idea in American life. In the meantime, the ideology of *diversity* has continued to shape much of American culture, including religion, the arts and personal consumption.⁴²

II. ADDITIONAL THOUGHTS ON “DIVERSITY”

As discussed above, Peter Wood weaves a persuasive critique of the “diversity” mindset into his description of its origin and growth, but I would add a few other observations to his.

First, while of course Wood is correct that diversity proponents tend to be “leftist,” they are also, literally but ironically, reactionary in this sense. No one in his right mind can really believe that all cultures are of equal worth. Malcolm Muggeridge once observed on the television show *Firing Line* that one can believe that all men are brothers, but not that all men have equal talents. Likewise, the individuals of any culture are human beings and entitled to decent treatment, and there may be elements of most cultures worthy of interest and even of emulation—but not all, and at the end of the day it is difficult not to believe that the West is best.

The problem is that the West has a history that includes racism and oppression (as do most civilizations, incidentally, which have a less impressive record than the West in eventually embracing liberty and tolerance). Those who oppose and lament this high-handed supremacy rather naturally find themselves arguing that it is unjustified because the West has nothing to feel superior about. That is a tempting argument in reaction to the excesses of imperialism and the horrors of Jim Crow, but it is just not true.

Put another way, the correct reaction to the powers that treat certain people as incapable of meeting the standards of civilization is to insist that those people be given the chance to meet those standards, not to deny the worth of the standards themselves. Indeed, one suspects that, deep down inside, many diversiphiles fear that, if they preserve the standards, those other people will not be able to meet them, and that this will vindicate the bigots and, what is worse, make the diversiphiles look silly. That is why, as I wrote in this review's first paragraph, the diversity movement is anti-merit, pro-preference, and anti-assimilationist.

It should be noted that diversity is more likely to appeal to those who don't really believe in truth. If there are only subjective feelings, if “stories” and

42. *Id.* at 289–90.

“narratives” are more persuasive than evidence, then why should a school waste its time trying to find and admit the students best able to pursue truth—that is, those smartest and hardest working? It should simply make sure that all stories get told. On the other hand, if the truth is out there, and if finding it requires intelligence and diligence, then schools should try to find and train the most intelligent and diligent scholars they can even if the resulting student body and faculty lack the desired “diversity.”

In some areas—cuisine, say—diversity may be desirable in and of itself, but in the college or university, diversity is desirable principally as a means. A means, that is, to the truth. The marketplace of ideas is similar in this respect to the regular marketplace. In the latter, we want a variety of companies not because we think they all will be equally good, but because they will compete and are more likely to market the products that consumers want. Likewise, we want professors with different approaches to research not because we think they will all be equally successful; we want that variety precisely because we do not know which *one* will be most successful. If we know beforehand that certain approaches are false, they should not be encouraged simply because we like variety.

We should not want diversity in all things, after all. We want all our students and professors to be civil and smart. We want them all to tell the truth and to be committed to finding it. We want them to have the requisite foundation-level of knowledge. We want them to be not only able, but also willing, to do the research and study required by their discipline. And some ideas are too bizarre to be entertained: No flat-earthers, no Nazis need apply. Some institutions—particularly private ones—may have stricter limitations on the common ground to be held: Only Christians at some schools, only non-Marxists at others. William F. Buckley, Jr., was right in *God and Man at Yale* that the truth can be pursued vigorously without allowing every fundamental tenet to be reargued or rejected.⁴³ Indeed, at some point that becomes a waste of time. And different institutions can draw the line in different places when it comes to deciding which approaches are not worth paying for.

But perhaps the more critical point is that there is no reason to suppose that the kind of intellectual diversity that we do welcome—of viewpoints and experiences—can be achieved by using skin color and ancestors’ national origins as proxies for thought and life. Do we really believe that skin color can serve as the best proxy for different outlooks and experiences? And do we really believe that those different outlooks and experiences are so educationally valuable that they justify (a) the relative devaluation of academic qualifications, and (b) racial discrimination?

This proxy approach is becoming more and more unreliable as time goes by. There is less and less that being black tells us about a person’s outlook and experience. And are we to believe that *that* lesson can be taught only by meeting different blacks face to face, and that it is critically important to do so? Likewise, are we to believe that the best—the only—way to learn to deal with Latinos, say, is by meeting some on campus? But now we are getting into the dubious arguments

43. WILLIAM F. BUCKLEY, JR., *GOD AND MAN AT YALE: THE SUPERSTITIONS OF “ACADEMIC FREEDOM”* (1951).

unfortunately accepted by the Supreme Court in its *Grutter* decision, which takes us to the next part of this review.

III. SIX SUGGESTIONS FOR THE NEXT LEGAL ASSAULT ON “DIVERSITY”

While Wood is correct that the diversity mantra is now chanted outside of academia, it is nowhere chanted louder. For this reason, and because the Supreme Court’s own recent (2003) affirmation of the approach took place in the college and university context, it is there that a successful counterattack would be most welcome. And, with a new Justice or two, this is a real possibility.

Herewith a quick review of the Supreme Court’s decisions in *Grutter v. Bollinger*⁴⁴ and *Gratz v. Bollinger*.⁴⁵ In *Grutter*, the Court upheld the use of racial and ethnic preferences in law-school admissions at the University of Michigan.⁴⁶ It applied the two prongs of strict scrutiny, requiring the school to show a compelling interest for its discrimination and that only narrowly tailored means were used to achieve it.⁴⁷ For purposes of this review, the most important part of the Court’s decision was its conclusion—which the Court justified for the reasons discussed in more detail below—that student body “diversity” is a compelling interest.⁴⁸ Having swallowed that camel, the Court had no trouble with the gnat of determining that the law school’s discrimination was narrowly tailored⁴⁹—that it gave “individualized consideration” to students,⁵⁰ was flexible,⁵¹ eschewed quotas,⁵² gave sufficient consideration to race-neutral means of achieving diversity,⁵³ did not “unduly” harm non-minority applicants,⁵⁴ and was limited in time.⁵⁵ In *Gratz*, the Court struck down as unconstitutional (and, therefore, also violative of Title VI of the Civil Rights Act of 1964 and 42 U.S.C. § 1981) the use of racial and ethnic preferences in undergraduate admissions to the University of Michigan.⁵⁶ Because the Court had accepted the diversity interest as compelling in *Grutter*, it focused in *Gratz* on the narrow tailoring prong of strict scrutiny. The Court concluded that the university—by, in particular, its automatic award of twenty points, or one-fifth of the number required for admission, to black, Latino, and Native American applicants on the basis of their ethnicity alone—failed to provide the “individualized consideration” necessary to pass constitutional muster.⁵⁷

44. 539 U.S. 306 (2003).

45. 539 U.S. 244 (2003).

46. *Grutter*, 539 U.S. at 307.

47. *Id.* at 326.

48. *Id.* at 328.

49. *Id.* at 334.

50. *Id.* at 337.

51. *Id.* at 337.

52. *Id.* at 335.

53. *Id.* at 339.

54. *Id.* at 341.

55. *Id.* at 343.

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

57. *Id.* at 271.

Like generals, lawyers often err by preparing to fight the just-past war rather than the next one, but it stands to reason that, in order to persuade the Court that it got things wrong in *Grutter* when it found a university's interest in student-body diversity to be "compelling," the opinion there will have to be refuted. The six suggestions below will do that; of course, if one is arguing to a lower court (and maybe even to the Supreme Court), then one is advised to present these arguments in a way that might only limit the opinion's reach implicitly, rather than attack it explicitly.

1. Attack the social science evidence that diversity provides "educational benefits."

The Court's *Grutter* opinion found that student-body diversity provides "educational benefits."⁵⁸ It began by noting that diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'"⁵⁹ Additionally, the Court noted that "classroom discussion" is improved.⁶⁰ All this according to "expert studies and reports."⁶¹

The next time around, then, the social science evidence cited in support of this notion needs to be attacked aggressively, and the counterevidence marshaled for the deleterious effects of preferences, particularly with regard to the members of those groups supposedly being benefited. The Court thought that law schools, and particularly selective law schools, are the ticket to leadership, and that leadership "visibly open" to all—that is, leadership with plenty of diversity—is needed for "legitimacy in the eyes of citizenry"⁶² Accepting this dubious and unsubstantiated claim arguendo, it can be countered that, for instance, a comprehensive study by Dr. Richard H. Sander of the University of California-Los Angeles Law School shows that preferences have actually resulted in *fewer* black lawyers.⁶³ At the end of the day, the Court should at least be left with a sense of the indeterminacy of the social science evidence here.

In his recent and important article, Dr. Sander concludes:

What I find and describe in this article is a system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries. The admission preferences extended to blacks are very large and do not successfully identify students who will perform better than one would predict based on their academic indices. Consequently, most black law applicants end up at schools where they will struggle academically and fail at higher rates than they would in the absence of preferences. The net tradeoff of higher prestige but weaker academic performance substantially harms black performance on bar exams and harms most new black lawyers on the job market. Perhaps

58. *Grutter*, 539 U.S. at 328.

59. *Id.* at 330.

60. *Id.*

61. *Id.*

62. *Id.* at 332.

63. Richard H. Sander, *Systemic Analysis*, 57 STAN. L. REV. 367 (2004).

most remarkably, a strong case can be made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system. Affirmative action as currently practiced by the nation's law schools does not, therefore, pass even the easiest test one can set. In systemic, objective terms, it hurts the group it is most designed to help.⁶⁴

Professor Sander is not alone. Recent papers by Russell Nieli of Princeton University⁶⁵ and Marie Gryphon of the Cato Institute⁶⁶ summarize a variety of other empirical studies, all concluding in one way or another that the use of racial preferences has many harms and few if any benefits, even for those they are, in Dr. Sander's words, "most designed to help."⁶⁷

64. *Id.* at 371–72 (internal citation omitted).

65. Russell Nieli, *The Changing Shape of the River: Affirmative Action and Recent Social Science Research*, available at http://www.nas.org/reports/river_change/affirm-act_soc-sci.pdf (Oct. 4, 2004).

66. Marie Gryphon, *The Affirmative Action Myth* (forthcoming April 2005) (manuscript on file with author).

67. Sander, *supra* note 63, at 372. Among the works summarized by Nieli are Stacy Berg Dale & Alan Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q.J. ECON. 1491 (2002) (arguing that going to a more selective school generally does not result in higher income, if academic qualifications are controlled for); STEPHEN COLE & ELINOR BARBER, INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS (2003) (arguing that preferences have resulted in fewer minority academics); and Stanford psychologist Claude Steele's work on "stereotype threat," including Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *THE BLACK-WHITE TEST SCORE GAP* (Christopher Jencks & Meredith Phillips, eds., 1998) (arguing that students who fear that they are academically less qualified will actually do worse on tests than they would if they lacked this fear)—and, of course, this fear is fed by the use of racial preferences, as suggested by Douglas Massey et al. in *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* (2003). Nieli, *supra* note 65, at 2–21. Massey also found that there is considerable resentment held by white and Asian students toward the black and Latino beneficiaries of racial preference policies, and Roper and Gallup surveys likewise find that most Americans dislike the use of racial preferences, as did a survey by the research firm of Angus Reid. *Id.* at 22–23.

Nieli also discusses John Ogbu's Black American Students in an Affluent Suburb—A Study of Academic Engagement and Black Students' School Success: Coping with the Burden of Acting White on the phenomenon of African Americans believing that studying hard is "acting white." *Id.* at 36, 50 n.25 (internal citations omitted). Nieli observes that:

Ogbu does not speculate on the effect that affirmative action policies at America's better colleges may have on th[is] tendenc[y], but it is hard to imagine that such policies do not negatively impact the work ethic of the more academically talented black students in communities like Shaker Heights and other integrated suburbs.

Id. Nieli also notes that other researchers have recently documented this latter tendency, likely fueled by affirmative action's perverse incentives for black students to study less diligently—and for black parents to demand less diligent study—than members of other races. *Id.* at 36–37. See LAURENCE STEINBERG, *BEYOND THE CLASSROOM* (1996); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING* (2003).

Gryphon collects evidence that preferences have not increased the number of minority students attending college, have not increased their earning power, and are not popular. Gryphon, *supra* note 66, at 1–6. See also Karlyn Bowman, *Opinion Pulse: Attitudes Toward the Supreme*

Nor is the evidence of benefits from student-body diversity persuasive, even if we ignore the more recent studies. As discussed above, the Court noted in the Michigan cases that the university proffered social-science evidence to buttress its claim that its interest in a diverse student body is compelling. But such evidence should not be sufficient to justify governmental action as divisive, disturbing, and damaging as racial discrimination. After all, claims of educational benefit arising from a particular teaching technique, or creating a particular school environment, are frequently made, but they are also frequently controversial and disputed.⁶⁸

That was certainly the case in *Grutter*. The evidence presented by Professor Patricia Gurin on behalf of the university was strongly criticized in at least two studies cited to the court of appeals. *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*, by Dr. Robert Lerner and Dr. Althea K. Nagai, concluded: "There are many design, measurement, sampling, and statistical flaws in this study. The statistical findings are inconsistent and trivially weak. No scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in school benefits students."⁶⁹ Likewise, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected*, by Dr. Thomas E. Wood and Dr. Malcolm J. Sherman, painstakingly reviews the data available and concludes: "The central problem that Gurin faced in producing her Expert Report is that the national database on which she had to rely actually *disconfirms* the claim that she was asked by the University to defend."⁷⁰ Yet another study contradicting the Gurin

Court, AM. ENTERPRISE, Jan./Feb. 2005, at 60–61 (stating that 76% of Americans surveyed disagreed, while only 19% agreed, with the Supreme Court's ruling that "A university is allowed to use race as one of several factors when deciding whom to admit"). Gryphon also discusses evidence that preferences are likely to increase dropout rates (citing Audrey Light & Wayne Strayer, Determinants of College Completion: School Quality or Student Ability?, *J. Hum. Resources* 35 (2000) and MASSEY ET AL., *supra*) and lower grades (citing COLE & BARBER, *supra* and Steele & Aronson, *supra*); increase isolation and stigma (citing MASSEY ET AL., *supra*); and mismatch students and institutions (citing COLE & BARBER, *supra*). Gryphon, *supra* note 66, at 6–10.

68. For instance, there is considerable controversy over whether bilingual education helps or hurts limited-English-proficient children. See, e.g., Keith A. Baker & Adriana A. de Kanter, *The Effectiveness of Bilingual Education*, in BILINGUAL EDUCATION 33–86 (Keith A. Baker & Adriana A. de Kanter eds., 1983); THE FAILURE OF BILINGUAL EDUCATION (Jorge Amselle ed., 1996). All kinds of factors are said to correlate with improved educational performance. See, e.g., Eugenia Costa-Giomi, *The Effects of Three Years of Piano Instruction on Children's Cognitive Development*, 47 J. RES. MUSIC EDUC. 198 (1999); U.S. DEP'T OF EDUC., THE CLASS-SIZE REDUCTION PROGRAM: BOOSTING STUDENT ACHIEVEMENT IN SCHOOLS ACROSS THE NATION (2000); Sheila G. Terry & Kimberly Kerry, *Classroom Breakfast: Helping Maryland Students Make the Grade*, MD. STATE DEP'T OF EDUC. (2000); Julia Ellis et al., *Mentor-Supported Literacy Development in Elementary Schools*, 44 ALBERTA J. EDUC. RES. 149 (1998); Laverne Warner, *Classroom Basics: How Environments Affect Young Children*, 25 TEX. CHILD CARE 2 (2001) (highlighting the importance of classroom design and organization).

69. Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*, CENTER FOR EQUAL OPPORTUNITY 1, available at <http://www.ceousa.org/pdfs/Gurin1.pdf> (last visited Mar. 12, 2005).

70. Thomas E. Wood & Malcolm J. Sherman, *Race and Higher Education: Why Justice Powell's Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected*, NAT'L ASS'N OF SCHOLARS 79, available at <http://www.nas.org/rhe.pdf> (May 2001).

report, *Does Enrollment Diversity Improve University Education?* by Stanley Rothman, S.M. Lipset, and Neil Nevitte, was published in the peer reviewed *International Journal of Public Opinion Research*.⁷¹

It is worth bearing in mind that, when racial segregation was challenged in the 1940s and 1950s, the improved-education argument was made by social science experts on behalf of the *proponents* of segregation. In *Davis v. County School Board*,⁷² a companion case to *Brown v. Board of Education*,⁷³ the Supreme Court brief by the State of Virginia attacked the social science evidence presented by the plaintiffs, arguing that their witnesses “bas[ed] their opinion on a lack of knowledge of Virginia.”⁷⁴ And besides, “they were by no means the only experts who testified before the Court below.”⁷⁵ To the contrary, the state “presented 4 educators, a psychiatrist and 2 psychologists,”⁷⁶ all “eminent men”⁷⁷ whose work was supported by “other outstanding scholars”⁷⁸ and who testified that “segregated education at the high school level is best for the individual students of both races.”⁷⁹

One college president concluded that, without segregation, “the general welfare will be definitely harmed” and “the progress of Negro education . . . would be set back at least half a century.”⁸⁰ A child psychiatrist testified, “When the two groups are merged, the anxieties of one segment of the group are quite automatically increased and the pattern of the behavior of the group is that the level of group behavior drops.”⁸¹ And the *chairman of the department of psychology at Columbia University* also had no doubt that separate-but-equal education was superior:

If a Negro child goes to a school as well-equipped as that of his white neighbor, if he had teachers of his own race and friends of his own race, it seems to me he is much less likely to develop tensions, animosities, and hostilities, than if you put him into a mixed school where, in Virginia, inevitably he will be a minority group. Now, not even an Act of Congress could change the fact that a Negro doesn't look like a white person; they are marked off, immediately, and I think, as I have said before, that at the adolescent level, children, being what they are, are stratifying themselves with respect to social and economic status, reflect

71. 15 INT. J. PUB. OPIN. RSCH. 8 (2003).

72. 347 U.S. 483 (1954).

73. 349 U.S. 294 (1955). The shakiness—from both a jurisprudential and an empirical perspective—of the reliance on social science data in *Brown* is discussed in ANDREW KULL, THE COLOR BLIND CONSTITUTION 112, 154–55 (1992). Kull concludes, “But if the legality of racial segregation properly depends on the current state of psychological opinion, expert or homespun, then it is probably a mistake to regard it as a constitutional question at all.” *Id.* at 155.

74. Brief for Appellees at 24, *Davis* (No. 3).

75. *Id.*

76. *Id.*

77. *Id.* at 27.

78. *Id.* at 28.

79. *Id.* at 29.

80. *Id.* at 25.

81. *Id.* at 26.

the opinions of their parents, and the Negro would be much more likely to develop tensions, animosities, and hostilities in a mixed high school than in a separate school.⁸²

In *Brown*'s predecessor, *Sweatt v. Painter*,⁸³ the State of Texas defended its segregated law schools, arguing that "there is ample evidence today to support the reasonableness of the furnishing of equal facilities to white and Negro students in separate schools."⁸⁴ Texas continued:

After much study for the United States Government, [Dr. Ambrose Caliver] found that a very large group of Northern Negroes came South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more "secure" at a college of his own people.⁸⁵

Texas also cited Dr. Charles William Eliot, "President of Harvard for forty years," who concluded after a tour of the South that "if in any Northern state the proportion of Negroes should become large, I should approve of separate schools for Negro children."⁸⁶

It is by no means inconceivable that social scientists and educators can still be produced who will testify that a *lack* of diversity will facilitate education. They would testify that there are fewer distractions and more mutual support—indeed, single sex education has its advocates for these reasons, as do historically black colleges.⁸⁷

Furthermore, the diversity rationale could equally be used to justify discrimination *against* formerly disadvantaged groups as well as in their favor. The discrimination undertaken by colleges and universities in the name of diversity typically hurts not only whites but also Asian Americans. Indeed, there is evidence that it hurts Asian Americans more than whites.⁸⁸ Frequently other racial

82. *Id.* at 27.

83. 339 U.S. 629 (1950).

84. Brief for Respondents at 96, *Sweatt* (No. 44).

85. *Id.*

86. *Id.* at 97.

87. See Dale Baker & Kathy Jacobs, *Winners and Losers in Single-Sex Science and Mathematics Classrooms*, Nat'l Ass'n of Research in Sci. Teaching Annual Meeting (1999) (on file with the Library of Congress). Sexual discrimination has frequently been supposedly justified by evidence similar to that used to justify racial discrimination here. See, e.g., *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996).

88. See George Bornstein, *How Affirmative Action Affects Minorities: Experience Shows Racial Preferences Take Seats From Asian-Americans, Echoing Past Discrimination Against Jewish Students*, DETROIT NEWS, Mar. 27, 2003, available at <http://www.detroitnews.com/2003/editorial/0303/27/a13-120129.htm>; Brief of the Asian American Legal Foundation as Amicus Curiae in Support of Petitioners, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516); Anthony K. Lee, *No More Chinese Need Apply*, LEGAL TIMES, Mar. 31, 2003, at 68; Denis Binder, *Affirmative Action Lunacy: College Quotas Limit Asian-Americans in the Name of Atoning for White Racism*, ORANGE COUNTY REGISTER, Mar. 16, 2003; Eugene Volokh, *Making Hay with*

and ethnic minorities—such as Arab Americans and Latinos—are also discriminated against (the University of Michigan law school discriminated against some Latino groups but in favor of others⁸⁹). If a state has an interest in having a university's student body approximate the demographic mix of the state, then logically the number of students from *any* group ought to be capped. For example, in *Johnson v. Board of Regents of the University of Georgia*,⁹⁰ women were discriminated against relative to men, apparently because women were thought to be “overrepresented.”⁹¹ And indeed the federal government has already acknowledged that an improved-education argument based on diversity can be used to justify discrimination against African Americans.⁹²

In the final analysis, it ought to be possible to persuade the Court—especially in light of the most recent empirical studies—that the diversity rationale is simply too thin to justify as constitutional an action as abhorrent as governmental discrimination based on a person's skin color or country of ancestry.

2. Line up some ex-military officers, some businessmen—and some universities.

The Court also seemed to be impressed by the briefs filed by some ex-military officers and some corporations.⁹³ Next time around, there ought to be at least one brief filed on behalf of ex-military officers who do not think that racial preferences or racial bean-counting are desirable, and there should likewise be at least one brief filed by businesses that reject the need for a predetermined racial and ethnic mix in the schoolroom or the workplace. Such people do exist: Bruce Fleming, who was recently a member of the admissions board at the U.S. Naval Academy in Annapolis, has criticized the use of racial preferences,⁹⁴ as has T.J. Rodgers, CEO of Cypress Semiconductor.⁹⁵

Of course, the Court was no doubt also impressed by the apparently solid phalanx of college and university support for preferences. But recent freedom of information requests by the National Association of Scholars (“NAS”) has revealed that many perfectly fine undergraduate institutions do not use racial and

Shifty Labels, L.A. TIMES, Apr. 9, 1998, at B9.

89. See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 852 (E.D. Mich. 2001). Likewise, the University of California at Berkeley for years granted preferences to Mexican-Americans (but not other Latinos) and to Filipinos (but not other Asians). See BOB LAIRD, *THE CASE FOR AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS* (forthcoming 2005) (uncorrected bound proofs at 59–60, 113, on file with author).

90. 263 F.3d 1234 (11th Cir. 2001).

91. See *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1375–76 (S.D. Ga. 2000) (discussing the validity of the University of Georgia's gender preference in admissions).

92. See TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION* 112–15 (1996) (discussing brief filed by the United States in a racial preference case involving the layoff of a public school teacher and statements by President Clinton regarding that brief).

93. *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003). See Jonathan Alger & Marvin Krislov, *You've Got to Have Friends: Lessons Learned from the Role of Amici in the University of Michigan Cases*, 30 J.C. & U.L. 503, 516–24 (2004).

94. Bruce Fleming, *Not Affirmative, Sir*, WASH. POST, Feb. 16, 2003, at B2.

95. Edward Iwata, *Race Issues Shake Tech World*, USA TODAY, July 24, 2000, at 1B.

ethnic preferences (nineteen of the sixty-six schools NAS has so far contacted, or 29%).⁹⁶ The responses to NAS's document requests indicate that among the schools eschewing preferences are the University of Iowa, the University of Northern Iowa, and Iowa State University; the University of Arizona and the University of Northern Arizona; the University of North Carolina, Greensboro; Central Connecticut State University, Southern Connecticut State University, Eastern Connecticut State University, and Western Connecticut State University; Eastern Kentucky University; and the University of Tennessee, Martin.⁹⁷ Added to this list are the public colleges and universities in California (by Proposition 209, a 1996 ballot initiative amending the state constitution),⁹⁸ Washington (by Proposition I-200, a 1998 ballot initiative amending the state constitution),⁹⁹ and Florida (the One Florida Initiative, announced by Florida Governor Jeb Bush on November 9, 1999),¹⁰⁰ whereby law preferences have been ended statewide. And we must also add the public and private schools in the federal Fifth Circuit—Texas, Louisiana, and Mississippi—and the University of Georgia, since they had for years used, and in some cases are still using, no preferences in light of judicial decisions there.¹⁰¹ Clearly, schools can prosper without preferences.

Perhaps some of these schools would be willing to join a brief saying that racial preferences are not necessary for being a good school; the state of Florida said as much in an amicus brief in the *Gratz* case.¹⁰² But even if they are unwilling to say so, the fact that such schools exist makes it harder to assert the necessity of preferences.

3. Expose the incoherence of the supposed link between diversity and outlooks or experiences.

In addition to its citation of the experts' claim of "educational benefits" discussed above, in the concluding paragraph of its compelling interest discussion, the *Grutter* Court relied on this rather convoluted reasoning:

The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students. Just as growing up in a particular region or having a particular professional experience is likely to affect

96. NAS President Steve Balch, Speech to the Virginia Association of Scholars (Nov. 13, 2004) (on file with author).

97. *Id.* (letters on file with author).

98. See CAL. CONST. art. I, §31(a) (approved Nov. 5, 1996) (codifying Proposition 209).

99. See WASH. REV. CODE §§ 49.60.010–020 (West 2002).

100. See ONE FLORIDA INITIATIVE, available at <http://www.oneflorida.org/> (last visited Mar. 12, 2005).

101. See *Hopwood v. Tex.*, 78 F.3d 932 (5th Cir.), *cert denied*, 518 U.S. 1033 (1996); *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001).

102. Brief of Amici Curiae State of Florida, at 5–15, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters. The Law School has determined, based on its experience and expertise, that a "critical mass" of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.¹⁰³

As this paragraph shows, there are superficially a number of benefits that might be claimed for a diverse student body. On any analysis, however, none can justify racial or ethnic discrimination. For instance, greater diversity might teach toleration, acceptance, and open-mindedness about other racial groups—but this lesson is undermined when there is a pronounced gap in the academic ability of the members of the different groups on campus, as there is when admission preferences are used.

Greater diversity might lead to exposure to people with different ideas or backgrounds, but it is very dubious to use race as a proxy for anticipating individuals' thoughts and experiences. There are few ideas or experiences that only members of a particular racial group can have, and fewer still that all members of that group will share. The most commonly cited such experience—of systematic discrimination—becomes less convincing with every tick of the clock (today's college applicants were born in the latter part of the 1980s), and can hardly justify preferring Hispanics over Asians (and, of course, the white plaintiffs in the Michigan cases were themselves discriminated against). In sum, racial diversity cannot be equated with actual viewpoint diversity¹⁰⁴ (and, indeed, universities show little interest in viewpoint diversity relative to melanin diversity¹⁰⁵).

It might be argued, rather contradictorily, that greater diversity is needed to teach the specific lesson that not all African Americans, for instance, think alike, and indeed the Court says as much. But this is a rather obvious and narrow lesson, and it is hard to understand why it can be taught only by using racial and ethnic

103. *Gutter v. Bollinger*, 539 U.S. 306, 333 (2003) (internal citations omitted).

104. The errors in this approach were convincingly explained by Justice O'Connor in her dissent in *Metro Broadcasting, Inc. v. F.C.C.*: "Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting). It makes more sense to select for the desired qualities rather than rely on increasingly dubious generalizations and stereotypes. *See id.* at 622 ("The FCC could directly advance its interest by requiring licensees to provide programming that the FCC believes would add to diversity."). In sum, the government should not use race and ethnicity as "a proxy for other, more germane bases of classification." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (quoting *Craig v. Boren*, 429 U.S. 190, 198 (1976)). *See also Metro Broadcasting*, 497 U.S. at 632 (Kennedy, J., dissenting) (criticizing "the stereotypical assumption that the race of [station] owners is linked to broadcast content"); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating that "supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications.").

105. *See, e.g., AM. ENTERPRISE INST., The Shame of America's One-Party Campuses*, AM. ENTERPRISE, Sept. 2002, at 18–25; Karl Zinsmeister, *Diversity on Campus? There Is None*, AM. ENTERPRISE, Jan./Feb. 2005, at 42.

preferences. Teaching the five-word truth, “Blacks don’t all think alike,” can hardly justify institutionalized racial discrimination. A law school might, instead, simply assign to its students selected opinions from Justice Thurgood Marshall, on the one hand, and Justice Clarence Thomas, on the other.

The diversity rationale posits that the broadening effects of random interracial conversations and comments can be obtained only by face-to-face exposure at a university; they cannot be gained in any other way (for example, by studying Martin Luther King, Jr.’s “Letter from a Birmingham Jail” or Ralph Ellison’s *Invisible Man*) or any other place (such as the interracial workplace for which the student is being prepared, or the popular culture—where the message of equality and tolerance is ubiquitous—or the student’s neighborhood or house of worship, or the student’s home). None of this is plausible, let alone compelling.

4. Explain why preferences retard educational progress for African Americans.

Justice O’Connor in *Grutter* seemed to take some solace in the fact that this whole messy, ugly business of racial preferences could be ended in twenty-five years: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”¹⁰⁶

Next time, then, the point needs to be made that the system of preferences actually makes it harder to close the academic skills gap that drives the use of preferences in the first place. That is, the use of racial preferences blessed by Justice O’Connor will make it harder to close the academic gap she identifies. It is ironic but likely that preferences are themselves a critical element in keeping the gap wide. They enable politicians to sweep the real problems under the rug by, to mix a metaphor, using preferences to paper over them; and preferences also remove the incentive for academic excellence at the same time that they stigmatize and encourage a defeatist and victim mentality among their supposed beneficiaries. These points have always been commonsensical, and they have increasing empirical support as well, as discussed above.

In addition to the above four suggestions, there are two other points that ought to be made to the Court when the student-body diversity argument is reconsidered, although they are in indirect rather than direct response to the opinion in *Grutter*.

5. Whatever the benchmark for “compelling” is, this does not make it.

Prior to *Grutter*, the only justification that the Supreme Court had consistently found sufficiently compelling to justify racial and ethnic discrimination was discrete remediation of prior discrimination.¹⁰⁷ There are, perhaps, other

106. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

107. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (race classifications must be “strictly reserved for remedial settings”); *Id.* at 524–25 (Scalia, J., concurring). See also *Metro Broadcasting*, 497 U.S. at 612 (O’Connor, J., dissenting) (“Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination.”); *Id.* at 632 (Kennedy, J., dissenting) (criticizing “the use of racial classifications . . . untied to any goal of addressing the effects of past race discrimination”); *United States v. Paradise*, 480 U.S. 149 (1987) (upholding remedial use of

governmental interests that might be hypothesized as compelling enough to justify temporary racial and ethnic classifications by the government—such as national security,¹⁰⁸ or preventing bloodshed in a prison¹⁰⁹—and it is probably impossible to adduce them all or to state a formula by which they can be derived and limited. But, except in situations literally involving life and death, the Court has been rightly reluctant to accept non-remedial justifications as compelling,¹¹⁰ and it should be especially reluctant to accept a justification that is both amorphously grounded and threatens a permanent institutionalization of racial and ethnic discrimination.¹¹¹ As the petition in the *Grutter* case pointed out, the diversity rationale, if accepted for higher education, could also justify pervasive discrimination in other areas of public life, including primary and secondary education, employment, service on different public boards, jury selection, housing, and so forth.¹¹² Less than three months after *Grutter*, the diversity rationale was extended to the employment context by the U.S. Court of Appeals for the Seventh Circuit.¹¹³

If education were impossible without racial classifications, then it might be fair to argue that states have a compelling reason to discriminate. But the University of Michigan's claim was merely that education is improved, to some uncertain and unquantifiable degree, by interracial conversations and comments that occur randomly, sometimes in classrooms and sometimes outside them. Whatever the meaning of "compelling" may be, this falls short.¹¹⁴

6. Deciding whether diversity is "compelling" requires consideration of costs as well as benefits.

For an educational interest to be sufficiently compelling to justify race discrimination, it is also logical to require that the purported educational benefits significantly outweigh the various costs to the institution and to the wider society. The value of anything must consider its liabilities. As Wood notes:

racial preference).

108. See *Korematsu v. United States*, 323 U.S. 214, 218 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100–02 (1943).

109. See *Johnson v. California*, 543 U.S. ____, 125 S.Ct. 1141 (2005); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (concurring opinion of Black, Harlan, and Stewart, JJ., concurring).

110. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–77 (1986) (plurality opinion).

111. See *Wygant*, 476 U.S. at 276 ("ageless in [its] reach into the past, and timeless in [its] ability to affect the future"); *Metro Broadcasting*, 497 U.S. at 612, 614 (O'Connor, J., dissenting) (noting that the diversity rationale is "too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications," and "would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the broadcasting spectrum continues to reflect that mixture").

112. See Petitioner's Brief at 28, *Grutter v. Bolinger*, 539 U.S. 306 (2003) (No. 02-241).

113. *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003).

114. Note that, if "diversity" is compelling for Equal Protection Clause purposes, then it ought to be compelling for First Amendment purposes as well. Thus, a state could force newspapers to print viewpoints with which they did not agree, citing the need for "diversity." But this is flatly at odds with the Court's precedent. See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

“[R]ace” is *not* a “plus factor” in performing surgery, practicing law, or any other form of advanced study; it is an irrelevancy. And the kind of *diversity* achieved by racially preferential admissions is not educationally invigorating; it is intellectually threadbare and ethically contemptible.

Far from being a painless solution to the nation’s racial divisions, Powell’s exaggeration of the importance of *diversity* only deepened our racial problems . . .¹¹⁵

Wood is right. As we have seen, and as the empirical data increasingly show, the liabilities attendant upon the use of racial and ethnic preferences are substantial: They are personally unfair, and they set a disturbing legal, political, and moral precedent to allow state racial discrimination; they create resentment;¹¹⁶ they stigmatize the so-called beneficiaries in the eyes of their classmates, teachers, and themselves;¹¹⁷ they foster a victim mindset, remove the incentive for academic excellence, and encourage separatism;¹¹⁸ they compromise the academic mission of the college or university and lower the academic quality of the student body; they create pressure to discriminate in grading and graduation; they breed hypocrisy within the school; they encourage a scofflaw attitude among college and university officials; they mismatch students and institutions, guaranteeing failure for many of the former;¹¹⁹ they obscure the real social problem of why so many African-Americans and Hispanics are academically uncompetitive; and they get state actors involved in unsavory¹²⁰ activities like deciding which racial and ethnic minorities will be favored and which ones not, and how much blood is needed to

115. WOOD, *supra* note 1, at 145. See also KULL, *supra* note 73, at 118 (noting that the Court’s scrutiny of racial classifications “necessarily incorporates a weighing of costs and benefits”).

116. See PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 8–9, 97–104, 109, 130, 133–34, 146–50, 176–77 (1993); PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* 15–58 (1997).

117. The principle of nondiscrimination serves all Americans, and the use of preferences harms not only those immediately discriminated against but also the supposed beneficiaries. The use of a double standard communicates, in this context, that some racial and ethnic groups are incapable of competing at the same intellectual level as others. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (“Classifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility.”); *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting). On self-stigmatization, see SHELBY STEELE, *THE CONTENT OF OUR CHARACTER: A NEW VISION OF RACE IN AMERICA* 111–25 (1990).

118. See JOHN H. MCWHORTER, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* 235–38 (2000).

119. See *supra* Part III.1; STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 405–11 (1997); Abigail Thernstrom & Stephen Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preference, and Higher Education*, 21 CONST. COMMENTARY 251, 273 (2004).

120. See *Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (“[T]he very attempt to define with precision a beneficiary’s qualifying racial characteristics is repugnant to our constitutional ideals.”) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 534–35 n.5 (1980) (Stevens, J., dissenting)).

establish authentic group membership.

CONCLUSION

One last thing: We need a slogan with which to counter the word “diversity.” One is tempted to go with, “Diversity sucks,” except that the problem, of course, is not diversity per se—as stated at the outset of this review, no one is opposed to that—but the discrimination that is undertaken in its behalf. So, how about “No preferences,” or “No discrimination,” or simply “Quality”? The key words on one side are “fairness,” “unity,” “everyone,” and “equality”; on the other, “preferences,” “discrimination,” and “favoritism.” At a discussion of Peter Wood’s book, Professor Stephan Thernstrom suggested that we should be putting “uni” back in “university.”¹²¹ Or perhaps the counter-slogan is not necessary: The word “diversity” has become a joke.¹²²

In any event, Peter Wood has done a superb job in *Diversity: The Invention of a Concept* of describing the origins of evolution of the “diversity” mantra—and demonstrating how it is at once nonsensical and pernicious. In particular, he has done fine work in exposing its dubious legal roots in the *Bakke* case. Wood’s work will inspire those of us working for the overturning of *Grutter*—a decision of manifest weaknesses of its own—in the not-too-distant future.

121. Stephan Thernstrom, Remarks at The Heritage Foundation Event, *Diversity: The Invention of a Concept* (March 26, 2003), available at www.heritage.org/press/events/ev032603.cfm.

122. See, e.g., Dave Barry, *An Off-Color Rift*, WASH. POST MAGAZINE, Dec. 19, 2004, at 32 (“This is called ‘diversity,’ and it is why we are such a great nation—a nation that has given the world both nuclear weapons and SpongeBob SquarePants.”). In addition, in his 2004 book *I Am Charlotte Simmons*, Tom Wolfe has characters refer to his fictional campus’s “diversoids,” meaning those students admitted for diversity’s sake. TOM WOLFE, *I AM CHARLOTTE SIMMONS* 12, 97 (2004).