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Professor Loewy's Diversity Defense of Racial Preference: Defining Discrimination Away

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PROFESSOR LOEWY'S "DIVERSITY" DEFENSE OF RACIAL PREFERENCE: DEFINING DISCRIMINATION AWAY

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The test of lawyerly skill is the overcoming of inconvenient facts, proving, for example, that black is white or white is black, as one's interest requires. This skill, amazing to the layman, actually requires no more than the redefinition of words. The inherent defect of the rule of law, indeed, is that it depends on the meaning of words, but words do not shout in protest when abused; their fate is entirely in the hands of the clever and well-placed, such as famous professors of constitutional law. "Affirmative action" faces the difficulty that, insofar as it is controversial, it is a euphemism for racial discrimination, and our law has made racial discrimination exceedingly difficult to justify. Professor Loewy, skilled lawyer and law professor that he is, has come up with a solution: a redefinition of racial discrimination. What appears to be racial discrimination—making decisions on the basis of race—is not really racial discrimination, he argues, when used to promote "diversity" (increased racial mixing), though it would be, of course, if used to reduce racial mixing and promote homogeneity.

I. "DIVERSITY" VERSUS "AFFIRMATIVE ACTION"

Professor Loewy begins his argument with the assertion, developed at some length with illustrations, that "*diversity and affirmative action are not the same thing.*"[1] Because he does not quote or cite anyone to the contrary, it is not clear who, if anyone, he thinks he is refuting. His statement is literally correct, but because undisputed, somewhat confusing. Let us try to be clear as to what is in dispute. "Affirmative action," as already noted, is a euphemism for racial preferences. Anyone who offers a different definition is

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1. Arnold H. Loewy, *Taking* Bakke *Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479, 1479 (1999).

seeking to avoid, rather than confront, the only point at issue: the justifiability of racial discrimination. "Diversity" (itself a euphemism), on the other hand, is one of the justifications offered for the use of racial preferences, particularly, though not exclusively, in the context of higher education. The argument is that the presence of an additional black student, for example, in a classroom contributes more to the educational program than would a person of another race, even one with better academic credentials.

Professor Loewy uses "affirmative action" as if it were synonymous with the justification initially offered for the use of racial preferences: It serves to "remedy" prior racial disadvantage. That this justification is invalid is plain enough from the fact that it is impossible to remedy an injury to one individual caused by another in the past by granting a benefit to a different individual at the expense of still another in the present. It is equally obvious that if the concern were to remedy disadvantage, then disadvantage, not race, would be the criterion. Race is not a valid proxy for disadvantage, because not all and not only blacks—the primary intended beneficiaries of racial preferences—have suffered disadvantage. Indeed, blacks who apply to selective institutions of higher education—typically, like white applicants, children of parents of the middle or upper-middle class[2]—are among the most economically and educationally advantaged.

The "remedy" rationale for racial preferences has appeal, as Professor Glenn Loury has pointed out, only because "[t]he suffering of the poorest blacks creates, if you will, a fund of political capital upon which all members of the group can draw when pressing racially-based claims."[3] Very few of these poorest blacks, unfortunately, seek admission to selective colleges and universities, and it would be difficult to think of a program less directed to helping them than preferential admission to such institutions. If anything, such programs serve to divert attention from efforts that could be helpful, such as seeking means to improve education in our inner-city schools. The fraudulence of the remedy rationale for racial preferences in higher education is further illustrated by the fact that

2. *See, e.g.*, Stephen Magagnini, *Minority Drop Stirs Up Regents*, SACRAMENTO BEE, June 19, 1998, at A1, *available in* 1998 WL 8827896. Herma Hill Kay, Dean of the University of California at Berkeley Law School, reported that a group of 150 "socioeconomically deprived" applicants included no blacks. *Id.* None qualified as socioeconomically deprived, she said, " 'generally because African Americans who apply to our law school are not disadvantaged. Their mothers and fathers are professionals with good family incomes.' " *Id.* (quoting Dean Kay).

3. Glenn C. Loury, *The Moral Quandary of the Black Community*, PUB. INTEREST, Spring 1985, at 9, 20.

no black has ever been denied preferential admission to the University of Texas School of Law, for example, or probably from any other selective school, on the ground that he was not sufficiently disadvantaged or, indeed, that he was exceptionally advantaged. It is only necessary and always quite sufficient that he be black.

As the public became increasingly aware that "affirmative action" meant racial preferences and that such preferences cannot be justified as a remedy for disadvantage, defenders of racial preferences were pressed to produce a new rationale. Possible arguments for advantaging some individuals on the basis of race—and therefore necessarily disadvantaging others—are few and unpromising, however, and "diversity" has become the new shibboleth. The effect has been to shift the offered justification from aiding the preferred individual to aiding the discriminating institution. Race is no more a proxy for any personal characteristic relevant to higher education, however, than it is a proxy for disadvantage; discrimination on the basis of race produces "diversity" in nothing but race.

II. JUSTICE POWELL'S OPINION IN *BAKKE*

The "diversity" rationale for racial preference was given great impetus by Justice Powell's tie-breaking opinion in the famous 1978 *Bakke* case,[4] the Supreme Court's last word on racial preferences in higher education. The case involved a challenge to the setting aside of sixteen of 100 places for members of designated minority racial groups in the grant of admission to the Medical School of the University of California at Davis.[5] The issue, it would have seemed to one without benefit of legal training, could not have been more simple. Title VI of the Civil Rights Act of 1964 prohibits racial discrimination by any institution that receives federal funds,[6] and the school received federal funds.[7] When race is involved in American law, however, truth and honesty tend to go out the window. Only four of the Justices—Justice Stevens, joined by Chief Justice Burger

4. Regents of the Univ. v. Bakke, 438 U.S. 265 (1978).

5. *See id.* at 269-80.

6. Section 601 of Title VI provides: "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." Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252, 252 (codified at 42 U.S.C. § 2000d (1994)).

7. *See Bakke*, 438 U.S. at 412 (Stevens, J., concurring in the judgment in part and dissenting in part).

and Justices Stewart and Rehnquist[8]—were willing to read the 1964 Act in good faith to mean what it says: no racial discrimination. This willingness to abide by the statute's text made it unnecessary for them to reach the question (which Congress and everyone else thought had already been decided in *Brown*[9]) whether racial discrimination by a state institution was also prohibited by the Constitution.[10]

Four other Justices—Justices Brennan, White, Marshall, and Blackmun—skilled in legal reasoning, saw no reason to hold that a statute prohibiting all racial discrimination should be read to prohibit racial discrimination of which they did not disapprove.[11] The statute's language, "No person in the United States shall, on the ground of race, color, or national origin ... be subjected to discrimination"[12]—no doubt entirely clear to a mere layman—they found (in an opinion signed by all four) to be "cryptic."[13] After much cogitation, therefore, the Brennan group concluded that the statute, despite its terms, did not prohibit racial discrimination against whites.[14] This reading required that they reach the constitutional question, and the Constitution, they concluded, was equally amenable to discrimination against whites. Although neither the school, which had opened only ten years earlier, nor California had ever segregated blacks, they found the school's use of racial discrimination justifiable as a "remedy" for "societal discrimination."[15] The opinion perhaps reaches its acme of dishonesty with the statement that the school "considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial

8. *See id.* at 408 (Stevens, J., concurring in the judgment in part and dissenting in part).

9. Brown v. Board of Educ., 347 U.S. 483 (1954).

10. *See Bakke*, 438 U.S. at 411-12 (Stevens, J., concurring in the judgment in part and dissenting in part).

11. *See id.* at 324-25 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). For liberals, the higher morality of the pursuit of racial equality easily overrides requirements of good faith; so good an end justifies all means.

12. 42 U.S.C. § 2000d (1994).

13. *Bakke*, 438 U.S. at 340 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). Except for Justice Brennan, each of the four also wrote a separate opinion. *See id.* at 379 (opinion of White, J.); *id.* at 387 (opinion of Marshall, J.); *id.* at 402 (opinion of Blackmun, J.).

14. *See id.* at 340 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

15. *Id.* at 362 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

discrimination."[16]

This split of opinions left the decision up to Justice Powell, a "moderate" and inveterate seeker of the middle way, even when there was no middle way.[17] Like the Brennan Four, Justice Powell, too, had difficulty understanding Title VI. Although it would seem quite simple and direct, he found it "majestic in its sweep,"[18] which, like "cryptic," is a very bad sign. Unfortunately, Title VI's sweep was not majestic enough, it turned out, to prohibit *all* racial discrimination. As a result, Justice Powell was, like the Brennan Four, forced to consider the constitutional question. Justice Powell, however, vigorously insisted that discrimination against whites was every bit as bad as discrimination against blacks, requiring "strict scrutiny."[19] But then, in a remarkable demonstration of his "moderation," Justice Powell concluded in effect that just a little bit of discrimination against whites would nonetheless be okay.

Reviewing the arguments offered for racial preferences, Justice Powell rejected the "underrepresentation" argument as "facially invalid."[20] It is indeed less an argument than an assertion of the tautology that more members of the designated groups should be preferentially admitted in order that more be admitted. Justice Powell correctly pointed out that to make this argument is simply to favor racial or ethnic "discrimination for its own sake."[21] He also rejected the use of racial preferences to remedy "societal discrimination," arguing—unfortunately incorrectly—that the Court had allowed racial discrimination in the past only to remedy specific past discrimination.[22] Finally, he rejected as unproven the argument

16. *Id.* at 377 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

17. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 217-53 (1973) (Powell, J., concurring in part and dissenting in part). After arguing correctly that compulsory integration could not be justified as a remedy for a past constitutional violation, Justice Powell adopted exactly that justification for the lesser requirement of integration that he favored. This opinion is analyzed in detail in LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 185-97 (1976). As came out in connection with Robert Bork's nomination to the Supreme Court, Powell was, unlike Bork, a liberal's idea of a good "conservative" Justice; that is, one who could be counted on to vote for the liberal position when his vote really mattered.

18. *Bakke*, 438 U.S. at 284 (opinion of Powell, J.).

19. *See id.* at 289-90 (opinion of Powell, J.) ("The guarantees of the Fourteenth Amendment extend to all persons.... The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.").

20. *Id.* at 307 (opinion of Powell, J.).

21. *Id.* (opinion of Powell, J.).

22. *See id.* at 307-10 (opinion of Powell, J.). Powell had himself pointed out in his

that preferential admission to the medical school would result in better medical services to members of the preferred groups.[23]

Having first correctly rejected the underrepresentation argument as simple racism, however, Justice Powell in effect then accepted it in a slightly different form. While a school may not prefer blacks, for example, simply to enroll more blacks, it may prefer blacks in order to achieve a "diverse student body,"[24] although the only "diversity" thereby produced is the presence of more blacks. It has been hard for anyone but Justice Powell to believe that racial discrimination to obtain student "diversity" can meet the "strict scrutiny" test he purported to apply. Even Professor Loewy, for example, is unwilling to argue that it can.[25]

Although a school's interest in a diverse student body permits it to consider race in making admissions decisions, according to Justice Powell, it may do so only as a "plus" factor and as one among many other factors.[26] This permissible limited use of race was illustrated, Justice Powell believed, by the Harvard College admissions program, a statement of which he quoted in his opinion[27] and reproduced as an appendix.[28] The Davis Medical School program was importantly different from Harvard's program, in Justice Powell's view, and invalid, because it supposedly used race not as a mere plus factor but as a determining factor. Race is always the determining factor, however, when it results in the admission of an applicant who would not otherwise have been admitted. The only distinction between programs purporting to use race as a plus factor and those using race as a determining factor is the size of the gap in qualifications that race will be permitted to overcome. In short, Powell purported to see a distinction between permissible and impermissible uses of race that few, if any, others—except, apparently, Professor Loewy—have been able to see. Nevertheless, he established "diversity" as the new buzzword for proponents of racial preferences.

As the Justices who would have upheld the Davis program

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concurring and dissenting opinion in *Keyes* that the Court's school "desegregation" decrees—requiring steps to increase racial integration—could *not* be justified as a remedy for past segregation. *See Keyes*, 413 U.S. at 224-26 (Powell, J., concurring in part and dissenting in part); GRAGLIA, *supra* note 17, at 185.

23. *See Bakke*, 438 U.S. at 310-11 (opinion of Powell, J.).

24. *Id.* at 311-12 (opinion of Powell, J.).

25. *See* Loewy, *supra* note 1, at 1495 ("Although the question is not free from doubt, I assume that diversity does not constitute a 'compelling' governmental interest.").

26. *See Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

27. *See id.* at 316-17 (opinion of Powell, J.).

28. *See id.* at 321-24 (appendix to opinion of Powell, J.).

pointed out, the distinction Justice Powell purported to see between the Davis and Harvard programs is illusory. Why setting aside seats on the basis of race involves a prohibited "explicit racial classification,"[29] but granting a plus on the same basis does not, is not easy to see. Even on the counter-factual assumption that the Harvard program "treats each applicant as an individual,"[30] individuals of some races are treated better than others. If the evil of the Davis program was, as Justice Powell said, that it denied Bakke his "right to individualized consideration without regard to his race,"[31] it defies understanding how that evil is not also found in another program that also distinguishes on the basis of race, even if only to "tip the balance" in close cases.

Justice Powell's distinction between race as a plus factor and as a determining factor, even if not nonexistent, is much too refined to be useful in stating a meaningful rule of law. The result is that his opinion is seen—as he himself recognized it might be—as little more than an invitation to deviousness, concealment, and pretense.[32] The truly significant point of Justice Powell's opinion, as the Brennan group opinion gleefully pointed out, was that it condoned the use of race in making admissions decisions.[33] If race can be used at all in admitting applicants to selective institutions, it will necessarily be used as a major factor—to overcome large gaps—with whatever degree of deviousness, concealment, and pretense may be required because the desired minimum racial proportions can be achieved in no other way.

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29. *Id.* at 319 (opinion of Powell, J.).

30. *Id.* at 318 (opinion of Powell, J.).

31. *Id.* at 318 n.52 (opinion of Powell, J.).

32. *See id.* at 318 (opinion of Powell, J.) ("[A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system."). Of course, it may be noted again, a policy of openly using race as a plus factor is not a "facially nondiscriminatory" policy. "Moderation" seems often to mean in practice a willingness to live with contradiction.

33. The Brennan group stated:

> [The several opinions] should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

Id. at 325 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

III. THE EVIL OF RACIAL DISCRIMINATION

Justice Powell's attempted justification of the use of racial preferences in admissions to selective colleges and graduate schools is not only incoherent but also seriously misguided. Racial preferences cannot, whatever the value of "a diverse student body," be reasonably thought to meet the "strict scrutiny" test that the Court holds to be applicable to racial discrimination. Less legalistically, the costs of abandoning or qualifying the no-racial-discrimination principle are too great to be acceptable. The central issue presented by the use of racial preference is simply whether government or government institutions may advantage some individuals and therefore necessarily disadvantage others on the basis of race. For most ordinary Americans, the answer could not be more clear.[34] Such discrimination is plainly inconsistent with the democratic principle of individual worth, rather than worth by reason of assignment to a particular racial group. This principle was made a matter of constitutional law, everyone thought, by the *Brown* decision in 1954[35] and ratified and extended by Congress in the great Civil Rights Act of 1964.[36] Few principles, if any, are considered more valuable or to have a higher moral status.[37] What could possibly justify its abandonment?

The greatest cost of abandoning an official policy of racial neutrality is simply that it reverses the educational effect of law. Instead of insisting that race is irrelevant to a person's merit or deserts, a belief essential to the maintenance of a multi-racial society, it teaches that one's race is of central importance, determinative of one's treatment by government. It therefore becomes appropriate and necessary to form racial and ethnic organizations to fight for racial advantage and defend against racial disadvantage. Race

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34. *See, e.g.*, Sam Howe Verhovek, *In Poll, Americans Reject Means but Not Ends of Racial Diversity*, N.Y. TIMES, Dec. 14, 1997, § 1, at 1 (reporting that 69% of whites and 63% of blacks said race should not be a factor in college admissions).

35. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).

36. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6 (1994 & Supp. II 1996)).

37. Consider the following statement by Professors Philip Kurland and Alexander Bickel:

> For at least a generation the lesson of the great decisions of this Court and the lesson of contemporary history have been the same: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.

Brief for the Anti-Defamation League of B'Nai B'rith at 16, DeFunis v. Odegaard, 416 U.S. 312 (1974) (No. 73-235).

consciousness is enhanced as race becomes a consideration in virtually every activity. Racial conflict necessarily replaces racial tolerance and cooperation.

The racially preferred inevitably come to see preferences as a right and demand that they be extended. What was originally introduced and justified as a temporary measure[38] will soon enter its fifth decade, with increasingly outraged protests at any suggestion that it be ended.[39] If it is appropriate or necessary to exempt blacks, for example, from meeting the requirements applicable to others in admission to institutions of higher education, why should blacks not also be exempt from other requirements? The tendency is to create a general "black exemption" from the application of ordinary societal standards, to come to accept that blacks are "just too different" to be expected to conform to standards applicable to others. Such an exemption for blacks, however, would leave all others with no choice except to seek to escape association with blacks. To accept a policy of racial preference is to accept the inevitability of racial separation and abandon hope for an integrated society.

IV. THE MAGNITUDE OF THE QUALIFICATIONS GAP

Apart from all questions of principle and overall and long-run social effects, a policy of racial preferences must be rejected on purely practical grounds—at least in the context of admission to selective institutions of higher education. Racial preferences are an attempt to overcome the fact that members of the preferred groups are not, in general, competitive with whites (and Asians) in terms of the ordinary academic admissions criteria. The crucial practical consideration, usually ignored by proponents of racial preferences, is the size of the gap in academic qualifications that must be overcome. As Richard Herrnstein and Charles Murray have pointed out, "data about the core mechanism of affirmative action—the magnitudes of the values assigned to group membership—are not part of the public

38. *See, e.g., Bakke*, 438 U.S. at 403 (opinion of Blackmun, J.) ("I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade at the most."). Justice Blackmun's statement was made, of course, more than 20 years ago.

39. When the Georgia Supreme Court invalidated an Atlanta program of racial preferences in contracting, a black Atlanta councilman announced at a meeting of 300 black contractors, " 'I am prepared to die for affirmative action, so help me God,' . . . to [a] round of roaring amens." TAMAR JACOBY, SOMEONE ELSE'S HOUSE: AMERICA'S UNFINISHED STRUGGLE FOR INTEGRATION 453 (1998) (quoting Marvin Arrington).

debate."[40]

The inescapable fact is that the gap is very large, so large as to require not merely the bending or shading, but the virtual abandonment, of the usual admissions criteria if more than a very small number of blacks is to be admitted to selective institutions. For example, in 1994 the average black seventeen-year-old lagged behind the average white seventeen-year-old by 3.9 years in reading and 3.4 years in math.[41] In 1995, college-bound black seniors had an average combined SAT score that was 202 points lower than that of the average white student.[42] Even blacks from families with an annual income of $70,000 or more scored lower than whites from families with an annual income under $10,000.[43]

The situation as to graduate schools, and specifically law schools, is at least equally grim. In the 1996-97 academic year, there were no more than 103 blacks (and 224 Hispanics) in the country with an LSAT score at or above the 83.5 percentile and a 3.25 GPA.[44] When the standard is raised to the 92.3 percentile and a GPA of 3.50, the number of blacks drops to sixteen (forty-five Hispanics).[45] An LSAT score above the 92nd or even the 83rd percentile is a very good score, good enough to gain admission to more than two-thirds of the nation's law schools. Such scores are rarely good enough to gain admission, however, to the nation's most selective—the top ten or so—law schools. In the same 1996-97 year, the average student receiving an offer of admission to the law school of the University of California at Berkeley, for example, had an LSAT score at the 97.7 percentile and a GPA of 3.74.[46] At this level, the number of blacks

40. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 449-50 (1994).

41. *See* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 357 (1997).

42. *See id.* at 398 tbl.3. In 1995, a score above 600 on the verbal SAT was made by 1.7% of the black test-takers, 9.6% of the whites, and 10.0% of the Asians; in the 700-and-up bracket of the verbal, the ratio of whites to blacks was 49 to 1; in the 750-and-up bracket in math, it was 89 to 1. *See id.* at 399 tbl.4. A score above 650 in math was made by 2.0% of the blacks, 13.4% of the whites, and 25.8% of the Asians. *See id.* Asians, 3.5% of the population in 1995, were 13% of all students scoring 700 or more on the verbal and 27% of those scoring 750 or more on the math. *See id.* at 399. Of the 734 outstanding students named Advanced Placement Scholars by the College Board in 1995, 29.7% were Asian, 53.1% were non-Hispanic white, and 0.3% (2 students) were black. *See id.* at 399-400.

43. *See id.* at 405 tbl.7.

44. *See* John E. Morris, *Boalt Hall's Affirmative Action Dilemma*, AM. LAW., Nov. 1997, at 4, 5.

45. *See id.*

46. *See id.*

(and to a lesser degree, Hispanics) is vanishingly small.

What this means is that all talk of achieving "a diverse student body," that is, a substantial percentage of blacks, in a selective law school by using race as a "plus" factor or to "tip the balance" in close cases ignores reality. The only way in which such schools can and do obtain an entering class that is more than one or two percent black[47] is by "race-norming": placing applications in separate stacks according to the applicant's race—so that blacks compete only with blacks—and selecting from the top of each stack until the desired numbers are reached. By this process, hundreds of whites and Asians can be passed over to reach and admit a lower-scoring black, and the gap in average scores can be large. At the University of Texas Law School before *Hopwood*,[48] for example, the presumptive reject score for whites and Asians was *higher* than the presumptive admit score for blacks and Mexican-Americans.[49] A table given in a footnote to Justice Powell's opinion in *Bakke* shows that the situation was no different in medical schools.[50] The racially preferred were admitted with an average MCAT score in the 31st percentile, while the average of regular admittees was in the 76th percentile, and Bakke was twice rejected—not even put on the waiting list—with an average score in the 88th percentile.

V. THE HARVARD PREFERRED ADMISSIONS PROGRAM

Professor Loewy begins discussion of his proposal by reproducing at length the statement of the "Harvard College

47. The *Journal of Blacks in Higher Education*'s editor calculated, on the basis of 1994 data, that without preference—i.e., using test scores alone to make admissions decisions—the number of blacks in the nation's 25 most selective schools would drop from 6.3% to 1.5%. *See* THERNSTROM & THERNSTROM, *supra* note 41, at 401.

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

49. *See id.* at 936.

50. The Table is reproduced, in part, below.

Class Entering in 1973:

				MCAT (Percentiles)		
	SGPA	OGPA	Verbal	Quanti -tative	Science	Gen. Infor.
Bakke	3.44	3.46	96	94	97	72
Average of regular admittees	3.51	3.49	81	76	83	69
Average of special Admittees	2.62	2.88	46	24	35	33

Regents of the Univ. v. Bakke, 438 U.S. 265, 277 n.7 (1978) (opinion of Powell, J.).

Admissions Program" that Justice Powell appended to his *Bakke* opinion as a model of a permissible racial preference program.[51] The statement is also a model, however, of the disingenuousness that characterizes all defenses of racial preferences. It tells us, for example, that " 'scholarly excellence' " is neither the sole nor " 'even [the] predominant criterion' " for admission to Harvard,[52] which will no doubt come as a surprise to generations of Harvard applicants and graduates. Indeed, the statement continues, if scholarly excellence were the predominant criterion for admission to Harvard, the result would be the loss of " 'a great deal of [Harvard's] vitality and intellectual excellence,' "[53] as if scholarly and intellectual excellence are not only different but incompatible.

Harvard has long sought student "diversity," the statement points out: " 'Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College.' "[54]

How seeking these types of diversity—for example, students from California, New York, and Massachusetts (and, presumably, Mississippi and Alabama)—resulted in admitting few ethnic and racial minorities is not explained and is inexplicable. The main result, if not the purpose, of Harvard's quest for geographical diversity, it might be noted, was that fewer students were admitted from the Northeast and particularly New York City; this in turn meant the admission of fewer Jews. Jews presented and continue to present a serious "overrepresentation" problem, accounting for less than three percent of the nation's population, but making up a quarter to a third of the Harvard student body.[55] If geographical diversity—favored even more strongly, if anything, at Columbia Law School, which is actually *in* New York City—produces any educational advantage, I was unable to discern it while a student at Columbia.

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51. *See* Loewy, *supra* note 1, at 1483-86.

52. *Bakke*, 438 U.S. at 321 (appendix to opinion of Powell, J.) (quoting Harvard College Admissions Program).

53. *Id.* at 321 (appendix to opinion of Powell, J.) (quoting Harvard College Admissions Program).

54. *Id.* at 322 (appendix to opinion of Powell, J.) (quoting Harvard College Admissions Program).

55. *See* Ron K. Unz, *Some Minorities Are More Minor than Others*, WALL ST. J., Nov. 16, 1998, at A38.

" 'In recent years,' " the statement continues, " 'Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups.' "[56] Seeking here to bolster the diversity rationale for racial preferences by blending it with the remedy rationale, the statement necessarily adopts and asserts the basic falsehood that racial preferences are meant to aid the disadvantaged and that race is a proxy for disadvantage. One may be confident that at Harvard, no less than was true at the Texas Law School, no black is denied preferential admission on the ground that he is not disadvantaged. Harvard, like Texas, necessarily seeks the most highly qualified blacks it can find, and these are almost always those who have been most advantaged—probably more advantaged than many higher-scoring whites and Asians who are rejected.

The central and crucial dishonesty in Harvard's defense of its racial preference program, however, lies in the statement:

> "In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases."[57]

The gap between the average combined SAT scores of whites and blacks is smaller at Harvard than at any other selective school—few applicants decline an invitation to Harvard—but it is still substantial, about 100 points.[58] It almost surely is not the case at Harvard, and even less so at other schools, that a large number of blacks can be admitted—the usual objective is about ten percent, with a minimum of five percent, of the entering class—by granting preference only to blacks who fall within a "large middle group" of more or less equally qualified applicants. It almost certainly will be necessary, as it was at Texas, to admit blacks who would be automatically rejected if they were white or Asian. "Geographic

56. *Bakke*, 438 U.S. at 322 (appendix to opinion of Powell, J.) (quoting Harvard College Admissions Program).

57. *Id.* at 323 (appendix to opinion of Powell, J.) (quoting Harvard College Admissions Program).

58. *See* HERRNSTEIN & MURRAY, *supra* note 40, at 451 (reporting data for classes entering in 1991 and 1992). The gap was close to 300 points at Berkeley. *See id.* (reporting data from 1988).

origin" or "life spent on a farm" (or being a child of a Harvard alumnus—the much more important "legacy" preference) may be used "to tip the balance" in some cases,[59] but when it comes to comparing the academic qualifications of black applicants with white and Asian applicants, very rarely is anything in or near balance.

No one even slightly aware of the facts as to the black-white gap in the standard admissions criteria can read the concluding paragraph of the Harvard statement—which is essentially the Loewy proposal—without recognizing it as the wishful musings of a high-minded writer of fiction:

> "The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; *and vice versa.* If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it."[60]

The black who grew up in "an inner-city ghetto" and applies to a highly selective school is a famous mythical figure (he reappears in Loewy's proposal) in discussions of racial preference programs. The number of such blacks who can hope to apply to and compete at Harvard is, in reality, very small to nonexistent. The reality, as already noted, is that even the number of blacks from middle or upper-middle class homes (the *A's* in the Harvard statement) who can meet or come close to meeting Harvard's ordinary admission standards is extremely small. The will to believe must be very strong to accept that an "inner-city ghetto" black, should one appear, might be refused preferential admission on the ground that "a good number" like him had already been admitted. It is, if possible, even

59. It is unlikely, however, that a significant difference in scores can be seen on a geographic basis.

60. *Bakke*, 438 U.S. at 324 (appendix to opinion of Powell, J.) (quoting Harvard College Admissions Program) (emphasis added).

more incredible that such an applicant might be denied admission in order to admit a white applicant, even one with "extraordinary artistic talent"—if necessary, a different applicant would be rejected. Statements such as Harvard's have a superficial, if any, plausibility only because the reality regarding racial differences is a taboo subject; ignorance on the part of most readers can be assumed. The distance between the real world and the world represented in the Harvard statement is indicated by the fact, noted above, that literally hundreds of white and Asian students are regularly passed over at selective institutions to admit academically less-qualified, and usually highly advantaged, blacks.

VI. LOEWY'S REPLAY OF POWELL

Professor Loewy's proposed justification for racial preferences in law school admission is essentially a replay of Justice Powell's argument in *Bakke* and suffers from the same defects. First, it is not credible that obtaining "a diverse student body," even as evaluated by Loewy, can or should be found sufficient to meet the "strict scrutiny" standard applicable to the practice of racial discrimination by a state institution. Second, the size of the gap in academic qualifications to be overcome leaves Loewy's proposal with very little relevance to the problem selective law schools face.

Like the Harvard statement, Professor Loewy tries to convince us—and perhaps has convinced himself—that it is "diversity" in general, not just race, that is the subject of interest. In his scheme, he says, race is not "the only, or even the most significant, feature marking diversity."[61] But race is nonetheless important, he insists, because the applicant pool could after all include those mythical applicants crucial to proponents of racial preference, "black[s] growing up in the inner city."[62] The applicant pool at selective law schools, however, is much more likely to include only blacks from advantaged backgrounds. They will nonetheless be preferentially admitted, despite much lower credentials, because there is no other way to achieve the desired racial result.

Professor Loewy is not candid in stating that race is not "the only, or even the most significant" diversity factor.[63] Except for race, there would be no subject of "diversity," and Loewy would be spared his exertions. Race is the only factor in dispute, the only factor giving

61. Loewy, *supra* note 1, at 1486.
62. *Id.*
63. *Id.*

rise to litigation and grass roots movements to end preferences across the country. Race is the only factor that can determine the fate of university administrators. They can do fine without students from the farm or California, but they must have black faces, and it matters not at all whether they come from slums or Park Avenue. Loewy's entire defense of his proposal is based on his willingness to pretend that he does not know that this is so.

Professor Loewy claims to find great value in classroom racial diversity. Like him, I have taught classes, large and small, with and without black students. Unlike him, I have not experienced a significant difference. Andrew Hacker, an ardent proponent of racial preferences, who teaches extremely racially and ethnically mixed classes at Queens College in New York City, reports a similar experience.[64] Whatever the benefits from replacing some whites and Asians with academically less-qualified blacks in selective schools, however, the costs involved in abandoning an official policy of race neutrality, especially considering the size of the gaps involved, greatly outweigh them.

I also differ from Loewy in my unwillingness to make decisions that severely affect the lives of other people on the basis of essentially subjective considerations. He tells us, for example, (not very credibly) that at some point in the process of admitting students to a state university he would choose an Iranian or a Sikh over a (presumably better-qualified) black.[65] He doesn't mention, however, the magnitude of the preference he would give. Exactly how many points is being an Iranian worth? a Sikh? a Cambodian? a New Zealander? Answering these questions requires a willingness to play God that I am happy to avoid. Further, even if racial diversity is thought to make a selective law school even better, surely that can be true only when the difference in objective qualifications is small, and it is not small when the admission of blacks is the issue.

64. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 136 (1992).

65. *See* Loewy, *supra* note 1, at 1489. Presumably, he means to indicate an Iranian or Sikh who comes close to meeting the ordinary (academic) admissions standards, but then a black who comes even closer. The reality is, however, that such blacks are so rare that it is inconceivable that one would be rejected in favor of an applicant of another race or ethnicity. Being an Iranian or Sikh might trump being Irish, Italian, or Jewish, but not being black.

VII. WHEN RACIAL DISCRIMINATION IS NOT RACIAL DISCRIMINATION

Racial discrimination by government is difficult, indeed for most Americans impossible, to justify. At least it should require the most extraordinary justification. Instead of undertaking the unappealing task of attempting to show that racial discrimination by a state school has such justification, Professor Loewy, exercising the prerogative of a law professor, simply redefines racial discrimination. What would appear to an ordinary person to be racial discrimination is not such at all, he argues, and is therefore permissible if it has *any* justification. He proceeds, in conventional legal fashion, by offering analogies, albeit particularly inapt ones. If a football team "desperately needs" a place kicker, it is not to be accused of improper discrimination, he argues (quite persuasively), if it hires a merely competent one, even though truly excellent players are available to play other positions.[66] Similarly, a law school lacking a commercial law professor does not discriminate improperly when it hires a competent one even though superior constitutional law professors are available.[67]

So far so good. Suppose now that a law school that has granted admission on the basis of GPA and LSAT scores to an overwhelming proportion of women decides to fill the last two places by passing over a group of women applicants in order to admit two lower-scoring men. "[I]t could be argued," Loewy graciously concedes, that the higher scoring women "who were not admitted were discriminated against because of their gender."[68] Indeed, less subtle minds might even think that that could be asserted as a logical certainty, as true by virtue of the meaning of words. But this, Loewy informs us, would be a "shortsighted" way of looking at it.[69] You see, "being a man is a big plus" in this situation, just as being a place kicker is a big plus to a team that needs a place kicker.[70] The result is that the admissions process is "not male-favoring," after all, but just "institution-favoring."[71]

If anything is too clear for argument, surely it is that favoring a male because he is a male—granting him a benefit denied a better-qualified female—does not cease to be "male-favoring" if the discriminating institution has a reason to favor males, and even if the

66. *Id.* at 1492.
67. *See id.*
68. *Id.*
69. *Id.* at 1493.
70. *Id.*
71. *Id.*

favoring might be beneficial, as Loewy claims, to some other females. Equal protection, as we have often and rightly been told, is a matter of the treatment of individuals, not groups.[72] Similarly, the football team was not favoring place kickers or the law school favoring commercial law professors any less simply because they had good reasons for doing so. None of this sheds any light on the issue of whether the law school may discriminate on the basis of sex or, more to the point, race. If admitting blacks is thought to do more for a school than admitting otherwise better-qualified whites and Asians, that is a reason to favor blacks; it is not a reason to deny that the school is discriminating (that is, classifying, distinguishing) on the basis of race.

A black might be favored by a school, Loewy points out, for some reason other than being black—for example, because he had traveled around the world—and "we would have no problem with [that] choice."[73] Loewy finds it strange that if, however, the black is favored simply for being black—because "his blackness adds the necessary diversity"—then "we would say that can't count."[74] This argument indicates only that Loewy apparently has some difficulty in keeping in mind that we treat racial discrimination, for very good reasons, much more harshly than discrimination on other grounds. A student's blackness, as such, adds only blackness—chromatic diversity. Loewy's argument requires that it be used as a proxy for something relevant to legal education. Of the many serious objections to this, surely the most important is that race might be used as a proxy for many things, but a regime that insists upon individual worth must demand that it not be.

Following Justice Powell in *Bakke*, Loewy argues that to set aside a portion of a school's entering class for blacks would be racial discrimination, but to use a black applicant's race as an admissions qualification—an indicator of "one's potential contribution to the betterment of the institution," a "race-neutral" standard—is not.[75] Loewy is correct that to discriminate on the basis of potential contribution is not race discrimination; to use race as a proxy for potential contribution, however, very certainly is. By Loewy's reasoning, of course, using whiteness as an admissions qualification for the same reason would also seem not to be race discrimination. But that is not so, Loewy argues with perfect illogic, because seeking

72. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 22 (1948).
73. Loewy, *supra* note 1, at 1494.
74. *Id.*
75. *Id.* at 1496.

a "balance of ... ethnicity ... is reasonable" while seeking to segregate is not.[76] The fact that the justification may be appraised differently in the two cases does not, unfortunately for Loewy's logic, change the fact of discrimination.

Loewy sees support for his argument in a Supreme Court decision indicating that it is permissible for school districts to assign students to schools on the basis of race to increase integration.[77] In fact, the Court not only permits but requires racial discrimination when it is supposedly necessary to undo the compulsory segregation by law that was held unconstitutional in *Brown*.[78] Unlike Loewy, however, the Court does not claim that what it permits or requires in the name of school "desegregation" is not race discrimination.[79]

Loewy's confusion and illogic reach their crescendo with his final thoughts. He reintroduces our familiar friend, the law school applicant from an "all-black ghetto"—all black, that is, except for the applicant who happens now to be a white woman. To admit the woman rather than a better-qualified black would be, he tells us, to make "a racial choice."[80] He had just told us, however, that she was admitted because she had " 'one of the most unique backgrounds' "[81] the law school had ever seen, which is not a racial choice. Finally, in his boldest move, he flatly states that although choosing the woman "would be a racial choice," it "*is not a racial classification.*"[82] His reasoning here is a bit obscure. Race, he notes, indicates a " '*group* classification,' " which is not involved when an applicant is "analyzed as an individual, not as a member of a racial group."[83] There is no

76. *Id.* at 1497-98.

77. *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 470-84 (1982) (striking down a statewide initiative terminating mandatory busing for the purpose of integrating public schools); Loewy, *supra* note 1, at 1498 (discussing *Seattle*).

78. *See* Green v. County Sch. Bd., 391 U.S. 430, 441-42 (1968) (striking down a "freedom-of-choice" plan on the ground that it was not an efficacious method of dismantling the dual system). *See generally* GRAGLIA, *supra* note 17, at 67-89 (discussing the Court's school assignment cases).

79. *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45-46 (1971) (rejecting a "race neutral" standard). Loewy tells us, "[s]o far as we know, no racial, ethnic, or gender litmus test was applied to any cabinet post" of the Clinton administration. Loewy, *supra* note 1, at 1497. It seemed clear enough to most people, however, that being a female was a qualification for the post of attorney general. I personally know of a white male who was told that he was not eligible for a high position because it had been set aside not only for a Hispanic, but for a Hispanic of a particular national origin.

80. Loewy, *supra* note 1, at 1500.

81. *Id.*

82. *Id.* at 1500-01.

83. *Id.* at 1501 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

quarreling with that; the only difficulty, of course, is that if her admission was a racial choice, as he says, she *was* analyzed as a member of a racial group and not as an individual. (Apart from this, it is pure fiction to suggest that anyone is ever admitted to a highly-selective institution of higher education in preference to a better-qualified black who comes close to meeting the ordinary academic admissions requirements.)

VIII. AN EXERCISE IN PRETENSE

Professor Loewy's defense of the use of racial preferences in granting and denying admission to selective law schools suffers from a more serious defect than incoherence. It is an exercise in pretense, simply ignoring the facts that it is only race—primarily the perceived need for black faces—that is the source of the problem under discussion and that it is the magnitude of the gap in academic qualifications between blacks and whites (and Asians) for admission to selective law schools that is the source of the difficulty. Loewy never specifies exactly how many points being black is worth in his view, nor how large a gap in academic credentials he is willing to overlook to obtain the alleged educational benefits of racial diversity. His taking the Harvard program as his guide, however, with its talk of "tipping the balance" and selecting among students in the "broad middle" group, suggests that the gap he contemplates is very small. The brutal reality, again, however, is that the gap between the academic qualifications of blacks and those of whites and Asians is not small. The grant of racial preference only to tip balances will result in the admission of very few blacks to highly selective schools, far fewer than is necessary to satisfy the need that is the only reason we are even talking about "diversity." This need has nothing to do with obtaining supposed educational benefits, but is only the felt need of the schools for black faces for public relations and political purposes, to escape the devastating charge of being "lily white" (Asians apparently do not count). Unless, therefore, Loewy's proposal is to be like Justice Powell's—merely a cover for fraud—his earnest pleading and logical acrobatics will be to no avail.