

PREFACE

“Wrong the day it was decided”

— Supreme Court Justice Sandra Day O’Connor (joined by Justices Anthony Kennedy and David Souter) referring to the 1896 decision in *Plessy v. Ferguson* which established the “separate but equal” doctrine. *Planned Parenthood v. Casey*, 505 U.S. 833, 863 (1992) —

Shortly after 9:01 a.m. (CDT) on June 23, 2003, the United States Supreme Court issued its decision in *Grutter v. Bollinger, et al.*¹ In a narrow 5-4 majority, the Court upheld the University of Michigan Law School’s consideration of race as a reason to reject Barbara Grutter’s application. (Barbara is white.) As the law school admitted during the case,² had Ms. Grutter been black, she almost certainly would have received an offer of admission. Indeed, the evidence developed at trial proved this point beyond any doubt. Not a single black applicant with Barbara Grutter’s qualifications was rejected.

As a consequence of the voluminous evidence demonstrating the extraordinary weight given to race in the law school’s admissions process, I had maintained an unwavering belief that the Supreme Court would take the opportunity before it in *Grutter* to reaffirm the principle announced almost fifty years earlier in the landmark case of *Brown v. Board of Education*.³ In *Brown*, a unanimous Court—comprised of nine white male Supreme Court justices—reached the short, simple and long-overdue conclusion “that racial discrimination in public education is unconstitutional.”⁴ Until we learned of the Court’s decision in *Grutter*, I had never doubted that similar language would be its bedrock holding. It was not to be.

So here we are in the year 2008 and beyond, still talking about race—and watching as many of our nation’s pre-eminent educational institutions continue the abhorrent practice of classifying our young men and women by their skin color and ethnicity. With former Supreme Court Justice Sandra Day O’Connor’s blessing (writing for a slim five justice majority), these flagship institutions use this information to racially discriminate in favor of some, and

against others, when deciding who shall receive an offer of admission. It is a practice buttressed in large measure by the work of William Bowen and Derek Bok.

Bowen is a former president of Princeton University. Bok once served as president at Harvard University and, before that, as dean of Harvard’s Law School. Together they wrote *THE SHAPE OF THE RIVER: Long-Term Consequences of Considering Race in College and University Admissions*.⁵ Their book is almost 300 pages of text accompanied by nearly 160 pages of appendices, designed to convince the reader, as it did Justice O’Connor, that a college applicant’s race is a relevant factor to consider when deciding who should be admitted to our nation’s most elite schools.

Because the University’s lawyers had listed Bowen as an expert witness in the undergraduate case, and Bok in the law school case, I spent many hours preparing to cross-examine each of them.⁶ Part of that preparation required a review of *THE SHAPE OF THE RIVER* upon which much of their proposed testimony was premised.

To understand Bowen, Bok and Justice O’Connor, we begin with a common definition:

di • ver • si • ty. *n.* 1. the quality or condition of being diverse; complete difference; unlikeness: *The quiet student and the active athlete were close friends in spite of the diversity of their dispositions.* 2. a point of unlikeness. 3. variety. . .⁷

Where previously it was a word with an uncomplicated meaning, “diversity” today in the context of higher education stands mainly for the narrow goal of racially balancing the nation’s colleges and universities. To be sure, a desire to see racial diversity at each of our nation’s colleges is not without merit. It was in fact being achieved, even if imperfectly (which is the only way it ever will be achieved short of imposing strict racial quotas) long before Justice O’Connor wrote her fateful opinion in *Grutter*. Take a stroll across the campus of almost every major college or university today, many of which do *not* resort to race-conscious admissions policies, and one

cannot help but notice the ever-widening range of racial and ethnic diversity among the students. This diversity is openly welcomed by the vast majority of Americans, not so much for the gauzy educational benefits which supposedly follow, but more for what it says about the openness of our society and *the* bedrock American principle of “equal opportunity.”

Today, unlike our tragic past when race alone created a nearly impenetrable barrier to the educational aspirations of many—mainly black—students, the opportunity to fairly compete for admission to the college or university of one’s choice unencumbered by the melatonin content of one’s skin is the common expectation of every American. Moreover, until Justice O’Connor’s decision in *Grutter*, it had been widely-viewed for decades as the absolute legal right of each person to be treated equally without regard to one’s race.⁸

By strictly adhering to the principle—the promise—that our most important institutions will *not* discriminate in favor of, or against, any student on the basis of her skin color, it also is our common hope that these institutions will roughly—if never perfectly—reflect America’s ever-changing racial and ethnic diversity. It is a hope grounded in a faith in the abundant talent which exists in individuals found in every one of our nation’s communities.

But this deeply shared hope does not come with the public’s blessing of the use of race as a factor in deciding who gets admitted.⁹ By overwhelming margins, Americans who support taking affirmative steps to provide equal opportunity for every person, oppose the explicit consideration of race to achieve that goal. Whenever the question is squarely presented to the people, as it was in 2006 to the citizens in the State of Michigan,¹⁰ the concept of using race as a factor in university admissions is soundly rejected. Americans do not oppose the use of race because they desire more students of one race versus another in the classrooms. They oppose the use of race because it once was the immoral and reprehensible means by which certain—mainly black—students were kept out of the classrooms.

For its part, “affirmative action,” too, was once upon a time an uncomplicated expression. President John F. Kennedy coined the phrase in the early months of his presidency. In an executive order signed on March 6, 1961, he called for federal government

contractors to take *affirmative action* to insure that no person was denied employment based on his skin color.¹¹ It was a young president’s unambiguous directive that race be *removed* rather than *added* as a factor in government employment.

Yet today, nearly 50 years after President Kennedy issued his order, *affirmative action* has been politically redefined by those who practice raw racial politics, a group which in 2003 included five justices sitting on our nation’s highest court. The policies spawned in the name of *affirmative action* now mock the phrase’s original meaning.¹² Indeed, Justice O’Connor’s opinion in *Grutter* represents the first time since *Brown* was decided in 1954—ending the disgraceful “separate but equal” doctrine of *Plessy v. Ferguson*¹³ (adopted in 1896)—in which our highest Court has condoned the use of racial classifications for a purpose other than to remedy the effects of demonstrable past discrimination.¹⁴ With the support of Bowen and Bok, *affirmative action* now stands for programs which openly practice racial discrimination, plain and simple. It is a practice which, as I argue throughout this book, should not be condoned.

Many believe the solution is as simple as a commitment to return to the original meaning of the words *affirmative action*. It also requires an acknowledgment of the obvious: that each individual, irrespective of her race, brings something unique and diverse to our classrooms. It requires, too, that our political leaders commit to govern by the principle upon which *affirmative action* was first based: that racial discrimination against any person is wrong.

At the same time, it requires a never ending commitment to eliminate such discrimination and to dismantle barriers to equal educational opportunity wherever they are found. This is precisely the sort of *affirmative action* which is necessary and must remain permanent.

One measure of the strength of these commitments will be reflected in the choice our pre-eminent flagship universities make over the role they permit race to play in the educations of our young men and women. I respectfully submit that their choice—to insure race plays *no* role—would seem simple. How can any American familiar with our nation’s history forget the injustices which result whenever race is used to identify and divide us? It is long past time for that to end.

When—not if, but when—we make that final commitment to treat everyone equally regardless of race, we will reach the goal best expressed by The Reverend Dr. Martin Luther King, Jr. on the steps of the Lincoln Memorial in 1963. The “dream” Dr. King described on that occasion is no longer merely a dream—it is the expectation shared by the vast majority of Americans today. It is a society where our children truly shall be judged by the content of their character, and not by the color of their skin.¹⁵ But so long as a handful of Supreme Court justices, influenced by authors and educators such as Bowen and Bok, resist that dream, our common goal of creating such a society shall surely remain out of reach.

This book has been written with three related purposes in mind: (1) to demonstrate that the data offered by Bowen and Bok in *THE SHAPE OF THE RIVER* are insufficient to support their main conclusion that race-conscious admissions policies are a net benefit to our society—and in many cases appear to support conclusions quite different from those set out in their book; (2) to critique the legal result reached by Justice O’Connor (on behalf of the slimnest of Court majorities) in *Grutter*; and (3) generally, to discuss the continued use of racial preferences in higher education and the injustices inevitably experienced by both the “victims” and “beneficiaries” for, in the end, both are harmed.

The book is divided into roughly three equal parts. The first third, through the end of chapter 5, is devoted to a broad-ranging discussion of race, the role it has played in our past and, because of the race preference policies at issue in *Grutter*, the role it continues to play in so many aspects of our lives. The terms “diversity” and “affirmative action” are defined and discussed together with the policies they’ve spawned. These particular words and phrases, as well as “equal opportunity” and “merit,” are infused throughout the debate over using race as a factor in admissions. Each is often misunderstood and frequently misused which leads to incoherent arguments over the appropriateness of so-called “affirmative action” policies. The first third of the book also includes an introduction to *THE SHAPE OF THE RIVER* together with critical quotations from the majority opinion in *Grutter*, juxtaposed with criticisms expressed by the various dissenters (including Justices Clarence Thomas, Antonin Scalia, Anthony Kennedy, and the late Chief Justice William

Rehnquist). Professor Bok’s earlier and often contradictory positions on the appropriateness of considering race are also introduced here. As the reader will see, the views espoused by Bok in *THE SHAPE OF THE RIVER* cannot be reconciled with his earlier—and, some might suggest, more thoughtful—writings about the harm done by these policies.

The middle third of the book, encompassing chapters 6 and 7, directly addresses the empirical data and arguments offered by Bowen and Bok in support of race preference policies.

The final third of the book, beginning with chapter 8, contains a discussion of the injustice and injury suffered by those directly affected by these policies. It includes a powerful collection of voices raised in opposition to the use of race in education. It also addresses an important and legitimate concern raised by proponents of these policies—whether eliminating race preferences might lead to re-segregated campuses—and demonstrates why this frequently predicted outcome need never to occur.

Whatever one decides after reading this book, I hope there is no mistaking my deeply held view that Bowen and Bok—and Justice O’Connor—got it exactly wrong in choosing to support the old-time segregationists’ view that “race matters.” I also hope the reader will find within these pages a persuasive case for the proposition that the Supreme Court’s temporary adoption of the “diversity” rationale as an acceptable excuse for racially discriminating against persons innocent of such conduct in their own lives is deeply flawed both legally and morally. I hope it proves to be a short-lived detour in our nation’s constitutional jurisprudence.

One thing should be clear to every reader. More than anything, what follows is an accumulation of the collective wisdom of scores of men and women wiser than me. To each whose work is cited herein, I thank them at the outset for their contributions to this important debate.

Finally, much of this manuscript was completed well before November 7, 2006, an important milestone in the debate over the use of race preference policies in higher education. On that date, in direct response to the Supreme Court’s decision in *Grutter*, the citizens of Michigan adopted an Amendment to the Michigan Constitution which expressly prohibits the use of race preferences in the context of public

education.¹⁶ Thus, the Supreme Court’s 2003 decision to temporarily permit the continuation of such policies at the University of Michigan must now give way to the voters in Michigan who have demanded their State return to the principle established in *Brown* over a half century earlier.

Similar referenda are scheduled to be considered by the voters in several more states in the 2008 elections. It is my fervent hope that the discussions and analyses found in the following pages will provide a positive contribution to this ongoing debate and will serve to enlighten and inform political candidates and voters as they consider their support for these important color-blind measures.

In the meantime, one hopes that the leaders at other pre-eminent educational institutions, too many of which – like the University of Michigan before the passage of Proposition 2 – seem sadly to have deviated in recent years from *Brown*’s principle, will find within themselves the courage necessary to insure the prompt return of that principle to their respective campuses. Each has it within her or himself to effect such a change by simply declaring, as each should, that racial discrimination against any person shall never again be tolerated. If this book even modestly advances that outcome, I will be deeply gratified.

Larry Purdy
Minneapolis, MN
12 February 2008

(Notes to Reader: The following chapters were originally conceived as separate monographs. Thus, the reader will notice some repetition necessitated by a desire for a complete discussion of each topic addressed. I also encourage the reader to devote some attention to the endnotes which follow each chapter. Extensive, and what I hope proves to be valuable, supplemental discussion of a particular point can be found in many of these notes. Finally, all italics are those of the author unless otherwise noted.)

¹ *Grutter v. Bollinger, et al.*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

² *Grutter v. Bollinger, et al.*, 288 F.3d 732, 735 (6th Cir. 2002)(“*Grutter II*”)(Boggs, J., dissenting). The United States Court of Appeals for the Sixth Circuit, in an earlier and controversial 5-4 en banc decision, reversed the historic trial court victory won by Barbara Grutter in *Grutter v. Bollinger, et al.*, 137 F.Supp.2d 821 (E.D.Mich. 2001)(“*Grutter I*”).

³ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); and *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

⁴ *Id.*, 349 U.S. at 298.

⁵ William G. Bowen & Derek Bok, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS*, Princeton University Press (1998)(“TSR”); and First Paperback Edition (2000)(“TSR (paperback ed. 2000)”), which added a new *Foreword* by Professor Glenn Loury and an expanded Introduction by the authors themselves.

⁶ Dr. Bowen, who was listed as an expert witness in the undergraduate case (*Gratz, et al. v. Bollinger, et al.*, 539 U.S. 244 (2003)) never had to appear at trial. As it turned out, the undergraduate case was decided by the trial court on cross motions for summary judgment so a trial never occurred. Derek Bok was listed as an expert witness in *Grutter* but, on the eve of trial in the Law School case, he was withdrawn as a witness by the University’s lawyers.

⁷ *THE WORLD BOOK DICTIONARY* (1987).

⁸ This right is guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as well as Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d).

⁹ See, e.g., Marie Gryphon, *The Affirmative Action Myth*, CATO INSTITUTE POLICY ANALYSIS No. 540 (Apr. 6, 2005) at 5-6.

¹⁰ On November 7, 2006, three years after the Supreme Court narrowly upheld the University of Michigan Law School’s race preference admissions policies, a proposed amendment to the Michigan State Constitution banning the use of racial preferences was overwhelmingly adopted by Michigan’s voters. See the language of Proposition 2, known as the Michigan Civil Rights Initiative, *infra* note 16.

¹¹ See, PRESIDENTIAL EXECUTIVE ORDER 10925 signed by President John F. Kennedy (March 6, 1961): “WHEREAS discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; . . . The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin.” (Emphasis added.)

¹² As commentator Paul Greenberg has observed, “Affirmative Action . . . used to be a respectable term. It used to mean just casting the net wide enough to make sure all those eligible for some consideration were indeed considered – whether for a job, a political appointment, or a place in medical school. . . . Unfortunately, Affirmative Action is now little more than a euphemism for the use of quotas, though they often go under the cover of ‘goals’ or ‘diversity’ or some other verbal disguise.” Paul Greenberg, “Affirmative action’s latest victim: a black judge,” TOWNHALL.COM (July 26, 2002).

¹³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁴ As Justice Clarence Thomas noted in dissent, prior to *Grutter* a majority of the Court had validated only two circumstances in modern times where racial classifications may be used: (1) where national security interests are implicated, and (2) to remedy past discrimination. *Grutter*, *supra*, 123 S.Ct. at 2351 (THOMAS, J., concurring in part and dissenting in part). Justice O’Connor all but concedes his point: “It is true that some language in [our affirmative-action cases since *Bakke*] might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action.” *Id.* 123 S.Ct. at 2338. But, of course, it wasn’t just *any* justice’s “language” which had suggested that remedying past discrimination is the only permissible justification for race-based governmental action. It was the language of Justice O’Connor herself. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989): “Classifications based on race carry a danger of stigmatic harm. *Unless they are strictly reserved for remedial settings*, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.” (Emphasis added.)

¹⁵ Coretta Scott King (ed.), *THE WORDS OF MARTIN LUTHER KING, JR.* (1983) at 95: “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”

¹⁶ **Article I, Section 26** of the Michigan State Constitution now reads, in part, as follows:

Civil Rights. . . . (1) The University of Michigan . . . and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public education, . . .”