

CHAPTER ONE

LOOKING BEYOND RACE

Countee Cullen (1903-1946) was a highly educated American poet whose work often was associated with black themes. In one of his early poems, a tiny eight-year-old character describes a day in the old city of Baltimore which began with his “head [and] heart filled with glee.”¹ It ended with lost innocence caused by the indelible sting of a racial slur hurled at the boy by an equally small Baltimorean of undefined race. Cullen’s little protagonist had offered a smile to the stranger only to be met with a childish impolite act and a single word: “Nigger.”² It proved to be the young boy’s only lasting memory of his stay in the old city.

Notwithstanding Cullen’s desire to be seen as a great American poet—which he was—as opposed to being viewed more narrowly as a “Black,” or Negro, poet—a description he reportedly abjured³—he could not fail to recognize, as he demonstrated so poignantly in “Incident,” that we all, on occasion, can be overtly race-conscious beings. We were that way long before the innocent eight-year-old in Cullen’s verse encountered his very small contemporary who stuck out his tongue and called him a name. Still, Cullen’s point notwithstanding, his words remind me of a different lesson which every person should learn and never forget. It is found in a far more widely known verse which has been memorized by virtually every American schoolchild:

Sticks and stones
May break my bones
But words
Will never hurt me.

Actually, Cullen was right. Words *can* hurt. But it is doubtful that any childish name-calling can cause an injury which an act of genuine kindness in response will be unable to heal. At the same time, as Cullen points out, race is one of many often troublesome

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labels. Like ethnicity, religion, gender, our political affiliation, the jobs we hold, the neighborhoods in which we live, we can be labeled by the color of our skin. Certainly we cannot help but *notice* each other’s skin color; but should whatever we observe in that regard matter any more than would an observation about the shape or color of one’s eye, or one’s height, or the length and color of one’s hair?

Another more subtle lesson from Cullen’s poem is that we should not put too much stock in those who, like Cullen’s little antagonist in Baltimore, seem obsessed with a person’s skin color. Which brings us to William Bowen and Derek Bok. Like the young, impolite Baltimorean in “Incident,” both seem all too concerned with race.

IT’S A MUDDY RIVER BOWEN AND BOK TRAVEL

Paraphrasing Thomas Sowell,⁴ the authors of *THE SHAPE OF THE RIVER* run aground with their metaphorical use of Mark Twain’s words from *LIFE ON THE MISSISSIPPI*. A more accurate metaphor might be found in the introductory words to a recent edition of Twain’s work:

Mark Twain knew how much he believed in and needed the beautiful and powerful and deceptive river at the center of his country. It was a muddy river—the river he knew—so that you couldn’t see the bottom that was always so near. . . .⁵

Twain’s was both a deceptive and muddy river—an inapt metaphor for what Bowen and Bok set out to study, but perfectly apt for what they have given us. And, though they probably would profess otherwise, the fundamental premise of their book seems to assume the continued presence of a malignant racism in America.

Adopting a similar view is a former provost at the University of Michigan who recently wrote: “[R]ace still matters in profound ways in this nation. Race still delineates the haves and the have-nots. Racial stereotypes and conflict undermine our productivity, security, and the harmony of our democracy.”⁶ She then endorsed an almost

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forty year old view of America offered up by former Illinois Governor Otto Kerner in 1968:

Our nation is moving toward two societies, one black, one white – separate and unequal. Discrimination and segregation have long permeated much of American life; they now threaten the future of every American.⁷

Of course, were Kerner’s aged description still accurate, opposition to government-sanctioned racial preferences might well disappear. But Bowen and Bok offer no evidence in *THE SHAPE OF THE RIVER* to support such a presumption.

So there is no misunderstanding, the underlying assumption of this book is that it no longer is accurate to label America as a racist society. Instead, it is time to acknowledge what the vast majority of Americans instinctively understand. Americans, black and white, are fundamentally fair people who strongly desire to “do the right thing”⁸ when it comes to all matters racial. This, of course, is not to deny that isolated acts of discrimination based on race or ethnicity occur every day in our nation, as they do everywhere around the world. It is no different from acknowledging that every day in our generally healthy nation a terrible disease is diagnosed. Indeed, it may be true that *racism* (though surely with a little “*r*”) will remain a fact of life for as long as there exist within the human race men and women with even the slightest differences in skin tone. It is not, and never will be, a perfect world. In a perfect world, *race* would be no more than a verb or a noun describing a speed event or a political contest. Yet if our life experience has taught us anything, it is that continuing a pattern of “race-consciousness” does not cure racism. It merely perpetuates it.

Unfortunately, these are views Bowen and Bok seemingly do not share. Instead, their bias runs in favor of race-conscious admissions because, in their words, American society still overtly and consciously uses race “to thwart aspirations for an open and just society.”⁹

It is only fair that I disclose my counter-bias. America in 2007 is far more deserving of being described as “open” and “just”

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than as a country which is closed and dominated by injustice based on race. And here is a second counter-bias: That racism, to the extent it exists in America, no longer is the barrier to equal opportunity it undeniably was a half century ago.¹⁰ Moreover, it is my conviction, as I believe it was Dr. King’s, that strict adherence to color-blind principles remains the surest antidote to racism wherever it is found.

Americans today desire a fully integrated and just society. For that reason alone, they overwhelmingly reject the use of race when it comes to equal educational opportunity.¹¹ It is a rejection shared across racial lines.¹² To fully appreciate why most Americans take this view, it is helpful to understand the relationship between a commitment to equal opportunity and opposition to racial preferences. It is described by Northwestern University Professor Charles Moskos:

An emphasis on standards [for college admissions, employment, or promotion] can work only if it goes hand in hand with *a true commitment to equal opportunity*, and vice versa. As Professor Seymour Martin Lipset of George Mason University has pointed out, *most Americans make a critical distinction between compensatory action and preferential treatment*. Compensatory action helps members of disadvantaged groups to meet the standards of competition. In preferential treatment, those standards are suspended; that is, quotas are adopted to favor individuals on the basis of their membership in groups rather than on the basis of merit. Most Americans support compensatory action, but *majorities of both blacks and whites consistently oppose the latter*.¹³

Colin Powell, though labeled by some as favoring race-conscious policies, echoed Professor Moskos when he described *affirmative action* in his best-selling autobiography:

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The debate over affirmative action has a lot to do with definitions. If affirmative action means programs that provide equal opportunity, then I am all for it. If it leads to preferential treatment or helps those who no longer need help, I am opposed. I benefited from equal opportunity and affirmative action in the Army, but I was not shown preference. The Army, as a matter of fairness, made sure that performance would be the only measure of advancement. . . . Affirmative action in the best sense promotes equal consideration, not reverse discrimination. Discrimination “for” one group means, inevitably, discrimination “against” another; and all discrimination is offensive.¹⁴

Bowen’s and Bok’s definition of *affirmative action* could not be more different. Indeed, almost every page of their book makes clear that the discrimination Powell described as “offensive” is the very sort of discrimination they are willing to tolerate. More sadly, their conclusions and recommendations do nothing to bring our nation closer to the day when racism is recognized as the anachronism it need be; never to be forgotten, but obsolete in terms of its impact on the lives of our citizens.

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There is both irony and an important history lesson contained in the authors’ choice of *LIFE ON THE MISSISSIPPI* as the metaphorical source for the title to their work. It is ironic because Americans in general have long displayed a capacity which Bowen and Bok seem to lack. It is the ability to look beyond race. It is a trait beautifully if not universally illustrated by events which took place over a century ago, around the time Samuel Clemens was penning his book about the mighty Mississippi. These events involved one of America’s most

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admired citizens, George Washington Carver. The following are the observations by Mr. Carver’s white neighbors on the western plains of Kansas in the 1880s, and those of his white Simpson College (Iowa) classmates in 1890:

In Beeler [Kansas, Carver’s] talents and personality soon won him the respect of his white neighbors. Indeed, on the frontier he appeared even more remarkable to those around him and was widely considered to be the best-educated person in the area.¹⁵

* * *

The whites of Ness County clearly recognized Carver’s “specialness.” One later remarked, “When I was in the presence of that young man Carver, as a white man of the supposed dominant race, I was humiliated by my own inadequacy of knowledge, compared to his.”¹⁶

* * *

One [Simpson College] classmate recalled that “in young Carver, as we came to know him, *we saw so much beyond the color that we soon ceased to sense it at all,*” and the surviving information on Carver’s career at Simpson College seems to support that assertion.¹⁷

The vignettes from Carver’s biography, though by no means the universal reaction which the former slave received from whites, also make another important point which seems completely lost on Bowen and Bok. It was their respect for Carver’s extraordinary intelligence and talent which caused his neighbors and his college classmates to be drawn to him. He was admired and sought out for

what he had accomplished, and plainly *not* because of the color of his skin. This capacity to look beyond race, demonstrated over a century ago on the Kansas plains, is a capacity which Bowen and Bok and too many like-minded “elites” in our nation still struggle to achieve.

This capacity was more recently described by Linda Chavez-Thompson, appointed by President Bill Clinton to serve on his advisory panel on race. While visiting Bailey’s Elementary School in Fairfax County, Virginia on December 17, 1997, Ms. Chavez-Thompson remarked:

[I]t is absolutely delightful that the children at the elementary level *don’t know what color is*. . . [Fourth and fifth graders say] there is absolutely no difference between all of them, no matter what the color of their skin is.¹⁸

Rather than recognize and nourish this long-demonstrated American capacity to move beyond race and toward the ideal of a color-blind society, Bowen and Bok reinforce the importance of “color” in ways which threaten to make it a permanent divider.

Paraphrasing Ignazio Silone,¹⁹ policies, like trees, must be judged by their fruit. By that measure, Bowen’s and Bok’s concept of *affirmative action*, has produced a barely digestible yet highly addictive fruit. It is barely digestible because it is so clearly wrong and immoral as practiced by such prominent institutions as the University of Michigan. Yet it is addictive because for far too many—mainly white—academics, it seems to assuage an almost pathological guilt²⁰ over a history which they neither controlled nor can ever change. It is a guilt which drives not just educators, but politicians and judges sitting on some of our nation’s highest courts, to behave in unfortunate ways.²¹

The history is clear. And so it is that for almost 150 years, the United States has struggled to right historic wrongs committed against its racial minorities, particularly black Americans who were subjected to the horrific institution of slavery. Indeed, that desire is almost universally recognized as the only true motive underlying race-conscious admissions policies.²²

What proponents fail to grasp, however, is that the opportunity to right historic wrongs is no longer available. As Thomas Sowell regrettably points out:

[I]t remains painfully clear that those people who were torn from their homes in Africa in centuries past and forcibly brought across the Atlantic in chains suffered not only horribly, but unjustly. Were they and their captors still alive, the reparations and the retribution owed would be staggering. Time and death, however, cheat us of such opportunities for justice, however galling that may be. We can, of course, create new injustices among our flesh-and-blood contemporaries for the sake of symbolic expiation, so that the son or daughter of a black doctor or executive can get into an elite college ahead of the son or daughter of a white factory worker or farmer, but only believers in the vision of cosmic justice are likely to take solace from that.²³

LaShawn Barber states it more concisely: “The idea that we can ‘fix’ history by preferring the race once discriminated against over the race once doing the discriminating is flat out wrong, not to mention counterintuitive.”²⁴

Thus, while many Americans are led to believe that by making Bowen’s and Bok’s version of *affirmative action* a permanent part of our social diet, we can right historic wrongs, it simply isn’t true. And at the same time, as Justice Thomas wrote in *Grutter*, these policies threaten to “weaken the principle embodied in the Declaration of Independence and the Equal Protection Clause,”²⁵ that all persons are entitled to equal treatment under the law.

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AFFIRMATIVE ACTION DEFINED

As noted earlier, *affirmative action* was a phrase originally coined by President Kennedy. It required government subcontractors

[T]o take *affirmative action* to ensure that applicants are employed and employees treated during their employment *without regard to their race*, creed, color, or national origin.²⁶

It is not difficult to apply this principle²⁷ to college admissions. Illustrative is the promise contained within the language, not coincidentally found under the bold heading “EQUAL OPPORTUNITY/AFFIRMATIVE ACTION,” in student and faculty literature published by the University of Michigan:

[I]t is the policy of the University of Michigan that no person, on the basis of race, color, religion, national origin, or ancestry . . . shall be discriminated against in . . . admissions.²⁸

This same literature also said this:

[E]ducational . . . decisions should be based on individuals’ abilities and qualifications and [not on] irrelevant factors or personal characteristics which have no connection with academic abilities or job performance. Among the traditional factors which are generally “irrelevant” are race, sex, religion, and national origin . . .²⁹

Of course, what the University promised is precisely the opposite of what the University did.³⁰ Consider the words of the Law School’s former dean who, in 1999, testified that, far from ignoring the “irrelevant” factor of race, “there are [minority] applicants whom

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we admit who would not be admitted if we were prohibited from taking their race . . . into account.”³¹

It is an approach which drew the disapproval of not only Barbara Grutter and her lawyers, but eminent historian and Duke University professor *emeritus* John Hope Franklin. Dr. Franklin, long a supporter of *affirmative action* policies in general, said the following in response to a question posed to him during the trial of the Michigan Law School case:

QUESTION: Professor Franklin, when it comes to university and college admissions, you’ve been clear, have you not, that you do not support the admission of less qualified minority applicants over more qualified Asian or white applicants?

ANSWER: That’s right.³²

When referring to *affirmative action*, Dr. Franklin was not talking about preferential treatment. He simply expected “fair treatment.”³³ And he knew the difference, as shown by his support for the following declaration (issued over 60 years ago by a commission appointed by President Truman):

The aspirations and achievements of each member of our society are to be limited only by the skills and energies he brings to opportunities offered equally to all Americans. We tolerate *no* restrictions upon the individual which depend upon such *irrelevant* factors as race, color, religion, or the social position into which a person is born.³⁴

Turning to Barbara Grutter and the literally hundreds of white and Asian American (and other) applicants who, every year, were rejected by Michigan’s Law School, would the result under

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Michigan’s policy have been different had the only change in their application been the color of their skin? The answer is, “yes.”

Michigan law professor Richard Lempert, one of the principal authors of the Law School’s written admissions policy, explained:

I think that there are [white and Asian Americans who every year are rejected by the University of Michigan Law School] who *if their application had been strengthened* by belonging to a historically discriminated minority, they would have been admitted to the law school.”³⁵

Boston University Professor Glenn Loury stated it more simply:

As a matter of simple logic, a college with limited places to fill can achieve more racial diversity only if some black applicants are admitted who would otherwise have been rejected, while some non-black applicants are rejected who would otherwise have been admitted.”³⁶

It would be difficult to find a more clear definition of racial favoritism.

Of course, building upon Professor Lempert’s observation, every individual has an opportunity to “strengthen” her chances for admission in myriad ways. For example, the aspiring law applicant can choose to work harder in undergraduate school; can prepare for and hopefully improve her performance on standardized tests; can devote more time to important extracurricular activities; can contribute more time to her community; or may be able to demonstrate that she has overcome extraordinary personal obstacles. But no individual has the ability to “strengthen” her application by changing her skin color or ethnicity. It’s impossible.

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A BRIEF REVIEW OF THE UNIVERSITY’S RACE-CONSCIOUS POLICIES

In their book, Bowen and Bok claimed that they were neither defending “quotas . . . [nor] mechanical, formulaic approaches to admitting students.”³⁷ Yet that was precisely what they were defending in *Gratz v. Bollinger, et al.*,³⁸ the lawsuit which successfully challenged the highly mechanical undergraduate admissions policies at the University of Michigan.³⁹ In fact, Bowen filed an expert report supporting the University’s undeniably mechanical undergraduate admissions policy. Bok filed a similar report supporting the admittedly less-mechanical (yet even more heavily weighted) use of race under the Law School’s system.⁴⁰ Both systems are briefly examined, below.

MICHIGAN’S PRE-2003 MECHANICAL UNDERGRADUATE ADMISSIONS POLICIES

The University’s undergraduate admissions policies went through several iterations before being dismantled by the Supreme Court in 2003. The final version at issue in *Gratz* perfectly illustrated a mechanical, formulaic system of the sort Bowen and Bok professed to oppose.⁴¹ When selecting its entering freshman class for the fall of 1998 (the year *THE SHAPE OF THE RIVER* was published), *every* factor in an applicant’s file was assigned a numerical weight by the University’s admissions personnel. A 4.0 high school grade point average earned an applicant 80 points; a 3.0 earned 60 points; a 2.0, 40 points; a perfect SAT or ACT score earned 12 points; being a Michigan resident added 10 points; being the son or daughter of a Michigan alumnus added 4 points; winning a National Science Award added 5 points; submitting an “outstanding” personal essay was worth 1 point. Additional factors could add to, or subtract from, the applicant’s total depending upon the strength of the high school attended and the curriculum completed by the applicant.⁴²

In 1998, it took approximately 95 points to insure an automatic offer of admission from the University. Being black, Hispanic, or Native American, irrespective of any demonstrated

personal, educational, or socioeconomic disadvantage, added 20 additional points related solely to race.⁴³

What should have been clear to everyone, Bowen and Bok included, was that white and Asian American applicants under Michigan’s mechanical undergraduate approach (or, for that matter, its better camouflaged Law School admissions system), could never—to borrow Professor Lempert’s phrase—have their applications “strengthened” in the manner in which black, Hispanic and Native American applicants automatically did. Thus, no white or Asian-American applicant was being allowed to fairly compete against an applicant from a preferred race, the latter of whom received over *twenty percent* of the necessary points toward admission based solely on her skin color. Even Professor Franklin, generally a supporter of efforts to achieve “diversity” through *affirmative action*, was incredulous when the policy was actually described to him. He simply could not believe such a system existed.⁴⁴

THE LAW SCHOOL’S “HOLISTIC”
ADMISSIONS POLICIES

The allegedly “holistic” Law School system was dramatically different on paper from its undergraduate cousin,⁴⁵ its greatest difference being that it contained no automatic numerical bonus for race. But a heavy award for race was clearly present during every admissions cycle. In fact, as later studies have demonstrated, the impact of race under the Law School’s “holistic” system was even greater than it was under the now-unconstitutional undergraduate “point” system.⁴⁶ In short, the Law School’s “diversity” goals could not be achieved without giving extraordinary weight to an applicant’s race—in effect, race-norming⁴⁷ the qualifications of each applicant.⁴⁸ The net result is that black applicants end up competing against other black (and, in some instances, other “under-represented” minority) applicants, not against the more highly-qualified pools of white and Asian-American applicants—and vice versa.

An illustration of how heavily race was factored into the process is found in the Law School’s internal grids which were maintained separately by race.⁴⁹ In 1995, the average LSAT score for

all admitted applicants was in approximately the 97th percentile. The average undergraduate GPA for all those admitted was approximately 3.64. To understand the role race played in individual admissions decisions, in 1995 there were ten black applicants with an LSAT score in the 75th percentile range and an undergraduate GPA between 3.25 and 3.49. *All ten were offered admission.*⁵⁰ By comparison, there were fourteen Asian-American applicants with similar credentials, and not a single one was offered admission. There were fifty-one white applicants in this same grid position, only one of whom was admitted.⁵¹

The Law School’s former director of admissions admitted that these results were generally “explained by the extent to which race [was] taken into account in the admissions process.”⁵² This, combined with the statistical reports and testimony offered by both Ms. Grutter’s expert and the expert for the Law School, was just one aspect of what the district court in *Grutter* later characterized as “mathematically irrefutable proof that race [was] indeed an enormously important factor” in admissions.⁵³

CRITICAL MASS: A CAMOUFLAGED QUOTA

The evidence introduced at trial in *Grutter* also demonstrated beyond any doubt that the Law School adopted the phrase “critical mass” as a non-numeric euphemism for “at least ten percent” of the entering class.⁵⁴ It was, and remained, the ruse by which the Law School insured that a fixed *minimum* percentage of seats were filled each fall with applicants from certain preferred minority groups. It was best described by the learned district court judge who, after patiently listening to weeks of testimony from all the Law School’s witnesses, explained it this way:

While the law school has not set aside a fixed number of seats for under-represented minority students, as did the medical school in *Bakke*, *there is no principled difference between a fixed number of seats and an essentially fixed minimum percentage figure.* Under either system, students of all

racers are not competing against one another for each seat, with race being simply one factor among many which may “tip the balance” in particular cases. The reservation of some seats for applicants of particular races, and the attendant lack of competition for those seats [necessary to constitute a “critical mass”] was the principal reason Justice Powell found UC Davis’ quota system unconstitutional. . . . [T]he fact of the matter is that approximately 10% of each entering class is effectively reserved for members of particular races, and those seats are insulated from competition. The practical effect of the law school’s policy is indistinguishable from a straight quota system, and such a system is not narrowly tailored under any interpretation of the Equal Protection Clause. It appears that the law school is engaged in simple racial balancing by focusing so carefully on admitting and enrolling a particular percentage of students from particular racial groups.⁵⁵

The camouflaged nature of this rank quota system, though entirely ignored by Justice O’Connor, was not lost on Chief Justice Rehnquist:

Stripped of its “critical mass” veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.⁵⁶

Justice Scalia was more blunt:

As [The Chief Justice] demonstrates, the University of Michigan Law School’s

mystical “critical mass” justification for its discrimination by race challenges even the most gullible mind. The admissions statistics show it to be a sham to cover a scheme of racially proportionate admissions.⁵⁷

For whatever reason, five justices on the Court ignored this hard evidence. Speaking for them, Justice O’Connor correctly observed that a race-conscious program cannot use a quota system which insulates each category of applicants with certain desired qualifications from competition with all other applicants.⁵⁸ But that, of course, is precisely what the Law School’s program was doing,⁵⁹ and what Justice O’Connor approved. Black applicants with academic qualifications nowhere near the minimal qualifications required for non-minority applicants, or near the qualifications of the admitted class as a whole, were being insulated from competition against their white and Asian co-applicants.

Indeed, as Justice O’Connor acknowledges, one cannot justify the use of race to promote an interest in ethnic diversity by resorting to a program “in which a specified percentage of the student body is in effect guaranteed to be members of the selected minority groups.”⁶⁰ Yet, again, that is precisely the sort of policy she approved, one which guaranteed that a “critical mass” of seats (which never fell below ten percent) were being awarded only to underrepresented minority applicants.

In the end, it is undeniable that *affirmative action*, as practiced at Michigan, had metastasized into something far removed from President Kennedy’s original intentions; perhaps far different even from what Bowen and Bok assumed it to be. No longer was it a policy involving aggressive recruitment and outreach to minorities, combined with equally aggressive enforcement of anti-discrimination laws. Instead it had become a policy which relied upon overt racial discrimination in deciding who would, and would not, be offered admission.

Divorced from the principle laid out almost fifty years ago by a young and idealistic president, *affirmative action* at the University of Michigan had become a combination of bigotry, masquerading as piety, and a hotly denied, but irrefutable, condescension towards

certain minority students by those who favor and administer these policies.

Are these policies really necessary in order to achieve racial diversity on our nation’s campuses? Do they really help anyone? Do they address the problems which cause too many minority students to underachieve academically—thus creating the perceived need for race preferences in the first instance? These questions are explored in the chapters which follow.

¹ The American Poetry & Literacy Project, 101 GREAT AMERICAN POEMS (1998) at 78.

² *Id.*

³ [Http://www.duboislrc/ShadesOfBlack/CounteeCullen.html](http://www.duboislrc/ShadesOfBlack/CounteeCullen.html) (last visited 3 Feb 07): “Cullen preferred *not to be considered as a Black poet*, but rather wanted to achieve success on the basis of traditional English standards. However, in spite of this, it was his race-conscious lyrics which were his most fruitful.” (Emphasis added.)

⁴ Thomas Sowell, THE QUEST FOR COSMIC JUSTICE (1999) at 14.

⁵ Mark Twain, LIFE ON THE MISSISSIPPI (1984) at 23 (Introductory words by Professor James M. Cox).

⁶ Patricia Gurin, Jeffrey S. Lehman, and Earl Lewis, DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN (2004) at 5.

⁷ *Id.* (citing the words of Illinois Governor Otto Kerner, the chairman of the National Advisory Commission on Civil Disorders, from *Report of the National Advisory Commission on Civil Disorders* (March 1, 1968) at 1).

⁸ Ward Connerly, CREATING EQUAL: MY FIGHT AGAINST RACIAL PREFERENCES (2000) at 13-14.

⁹ TSR at xxiii.

¹⁰ *See*, Shelby Steele, “Racism – fact or faith?”, Los Angeles Times (latimes.com) (December 23, 2006).

¹¹ *See, e.g.*, Paul M. Sniderman and Edward G. Carmines, REACHING BEYOND RACE (1997) at 25-27, 102.

¹² *See, e.g.*, *Report on Academic Life Survey*, submitted by Zogby International (April 7, 2000) (Reuters News Wire, April 18, 2000). *See also* Washington Post/Kaiser/Harvard Poll (Mar. 8 – Apr. 22, 2001), and New York Times/CBS Poll (Dec. 6 – 9, 1997), among others, cited in BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SCHOLARS in *Grutter v. Bollinger* (In the Supreme Court of the United States) at 7-11.

¹³ Charles Moskos, “Affirmative Action in the Army: Why it Works,” THE AFFIRMATIVE ACTION DEBATE (George E. Curry, ed.) (1996) at 231 (emphasis added).

¹⁴ Colin Powell, MY AMERICAN JOURNEY (1995) at 591-92.

¹⁵ Linda O. McMurray, GEORGE WASHINGTON CARVER, SCIENTIST AND SYMBOL (1982) at 26. In 1886, Carver was about 21 years of age, a freed slave with little formal education.

¹⁶ *Id.* at 27.

¹⁷ *Id.* at 28 (emphasis added).

¹⁸ The President’s Initiative on Race, ONE AMERICA IN THE 21ST CENTURY: FORGING A NEW FUTURE (1998) at 27.

¹⁹ Stephane Courtois, *et al.*, THE BLACK BOOK OF COMMUNISM (1999) at 2 (“Revolutions, like trees, are recognized by the fruit they bear”).

²⁰ *See, generally*, Shelby Steele, WHITE GUILT: HOW BLACKS & WHITES TOGETHER DESTROYED THE PROMISE OF THE CIVIL RIGHTS ERA (2006).

²¹ *See, e.g.*, Judge Danny Boggs’ description of the disturbing procedural history of the *Grutter* case. It is found in the “Procedural Appendix” to Judge Boggs’ dissenting opinion in *Grutter v. Bollinger*, *et al.*, 288 F.3d 732, 810-15 (6th Circuit 2002)(“*Grutter II*”)(Boggs, J., dissenting). *Also see* Michael I. Krauss, “Loading the Dice on the Sixth Circuit,” NAS ONLINE FORUM (Jun. 6, 2003): “Acting Chief Judge Alice Batchelder confirmed . . . that two fundamental breaches of the 6th Circuit’s own operating procedures were committed by its [then] Chief Judge, Boyce Martin. First, Chief Judge Martin assigned himself to the three-judge panel that heard the appeal of the trial court’s ruling. This is absolutely irregular – panel assignments are and must be made at random, precisely in order to minimize politicization of the judicial process. Martin then compounded his misconduct, after his panel ruled in favor of UM, by refusing to notify his colleagues that an *en banc* petition had been filed. Martin evidently did this in the expectation that two conservative Circuit court judges were about to ‘go senior.’ Senior judges hear some cases and receive full pay, but they are not allowed to participate in *en banc* deliberations. The two judges about to ‘go senior’ manifestly did not know that an *en banc* petition had been filed, else they likely would have delayed their semi-retirement until after hearing the Michigan decision. But they never had a chance to make that choice. [Rules also would have permitted them to participate in the *en banc* consideration even after they took senior status had they only been permitted to consider and vote on the *en banc* petition *before* taking senior status.] What would likely have been a 6-5 majority in favor of race-blind admissions [or even a 5-5 tie—had just one of the ‘conservative’ judges been permitted to vote on the *en banc*

petition—which would have left in place Ms. Grutter’s trial court victory] became a 5-4 triumph of racism, thanks to these two vacancies.” In other words, Chief Judge Martin’s conduct effectively precluded the participation of two then-active judges who were viewed as potentially sympathetic to Ms. Grutter’s position. (How they actually would have voted is, of course, pure speculation.) Additional problems arose within the Senate Judiciary Committee which was, at the time the appeal was pending before the Sixth Circuit, considering nominations for vacancies which then existed on the Court. Elaine Jones of the NAACP Legal Defense Fund forwarded information to Senator Edward Kennedy seeking to persuade the Committee “to hold off on any 6th Circuit nominee until the University of Michigan case . . . is decided by the *en banc* 6th Circuit. . . . The thinking is that the current 6th Circuit will sustain the affirmative action program [as it eventually did on a 5-4 vote with Chief Judge Martin writing the lead opinion], but if a new judge with conservative views is confirmed before the case is decided, that new judge will be able, under 6th Circuit rules, to review the case and vote on it. . . . Elaine will ask that no 6th Circuit nominee be scheduled until after the Michigan case is decided.” See Mark R. Levin, *MEN IN BLACK* (2005) at 215. No new 6th Circuit nominee was confirmed in time to participate in the University of Michigan’s appeal.

²² Note Justice Thomas’ “sympathies” for the presumably well-intentioned proponents of race preference policies. *Grutter*, *supra*, 123 S.Ct. at 2350 (THOMAS, J., concurring in part and dissenting in part).

²³ Sowell, *supra* note 4 at 32.

²⁴ LaShawn Barber, “The Immorality of Racial Preferences” (Sept. 22, 2004), <http://lashawnbarber.com/archives/2004/09/22/immorality/> (Last visited, Jan. 11, 2005).

²⁵ *Grutter*, *supra*, 123 S.Ct. at 2365 (THOMAS, J., concurring in part and dissenting in part).

²⁶ See, PRESIDENTIAL EXECUTIVE ORDER 10925 (Mar. 6, 1961) signed by President John F. Kennedy (emphasis added). See, also, PRESIDENTIAL EXECUTIVE ORDER 11246 (Sept. 24, 1965) signed by President Lyndon Baines Johnson.

²⁷ As Yale law professor Steven Carter writes, “[M]ost philosophers still hold the view that a principle, in order to be a principle, must be applied universally and impartially - that is, must actually be applied to all the cases that it fits, with no exceptions for partisan considerations.” Steven L. Carter, *INTEGRITY* (1996) at 48.

²⁸ *University of Michigan Law School Faculty Handbook* (1991)(*Grutter* Trial Exhibit No. 78) at 16. Harvard University makes a similar claim under

the heading HARVARD ADMISSIONS POLICY: “Discriminating against individuals on the basis of race, color, . . . national or ethnic origin . . . is inconsistent with the purposes of a university and with the law.” See HARVARD, 2000-2001, the 54-page booklet mailed to prospective students in Spring 2000, at 40.

²⁹ *Law School Faculty Handbook*, *supra* note 28 at 16.

³⁰ For a detailed explanation of the University of Michigan Law School’s race-based admissions policies which were being challenged in *Grutter*, see R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEXAS JOURNAL OF LAW & POLITICS 313, 319-28 (Spring 2003).

³¹ Deposition of Jeffrey Lehman (January 21, 1999), *Grutter v. Bollinger*, *et al.*, USDC, Civil Action 97-75928 (E.D.Mich.) at 112 and 116.

³² See Volume 7, Trial Testimony of John Hope Franklin, (January 24, 2001), *Grutter v. Bollinger*, *et al.*, USDC, Civil Action 97-75928 (E.D.Mich.) at 144.

³³ *Id.* at 153-154.

³⁴ John Hope Franklin, *A Half-Century of Presidential Race Initiatives: Some Reflections*, 24 J. SUP. CT. HISTORY 226, 229 (1999)(quoting from the report of the President’s Committee on Civil Rights, appointed by President Harry S. Truman in December 1946)(emphasis in original).

³⁵ Deposition of Richard Lempert (August 10, 2000), *Grutter v. Bollinger*, *et al.*, USDC, Civil Action 97-75928 (E.D.Mich.) at 229-30 (emphasis added). Also see Purdy, *supra* note 30 at 325, n. 63.

³⁶ Glenn C. Loury, *THE ANATOMY OF RACIAL INEQUALITY* (2002) at 132.

³⁷ TSR (paperback ed. 2000) at xxxv (emphasis in original).

³⁸ *Gratz v. Bollinger*, *et al.*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).

³⁹ The University of Michigan-Ann Arbor was one of the 28 undergraduate institutions studied in *THE SHAPE OF THE RIVER*.

⁴⁰ For copies of Bowen’s and Bok’s respective “expert reports,” see the court files in *Gratz v. Bollinger*, *et al.*, Civ. Action No. 97-CV-75231 and *Grutter v. Bollinger*, *et al.*, Civ. Action No. 97-75928, USDC (E.D.Mich.).

⁴¹ For an explanation of the numerical guidelines which governed applicants to the freshman class at the University of Michigan for the fall of 1998, see UNIVERSITY OF MICHIGAN 1998 GUIDELINES FOR CALCULATION OF SELECTION INDEX and Purdy, *supra* note 30 at 337, n.122.

⁴² See *id.*

⁴³ *Id.*

⁴⁴ Dr. Franklin characterized the undergraduate point system as “a case that’s beyond . . . imagination. I mean, it strains my credulity as well as my

imagination to think that that could come out like that.” See Deposition of John Hope Franklin (Sept. 25, 2000), *Grutter v. Bollinger, et al.*, USDC, Civ. Action 97-75928, at 93-94. See, also, Purdy, *supra* note 30 at 346-47, n. 163.

⁴⁵ The Law School’s Admissions Policies, *Grutter* Trial Exhibit 4, are discussed in Purdy, *supra* note 30 at 319-28.

⁴⁶ Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 404 (Nov. 2004).

⁴⁷ *Id.* at 405-410.

⁴⁸ In her opinion, Justice O’Connor offered this surprisingly inaccurate observation: “[T]he Law School actually gives substantial weight to diversity factors besides race. The Law School frequently accepts nonminority applicants with grades and test scores lower than underrepresented minority applicants who are rejected.” *Grutter, supra*, 123 S.Ct. at 2344. Support for her assertions came not, as they should have, from any hard evidence submitted at trial, but rather from self-serving, but factually unsupported, testimony from the Law School’s witnesses. Independent analysis by a respected law professor who “favors race-conscious strategies in principle, if they can be pragmatically justified” (see Sander, *supra* note 46 at 371), confirms the inaccuracy of her observations. According to UCLA law professor Richard Sander, “it is difficult to see how Justice O’Connor could have thought the law school’s system passed constitutional muster, or that blacks and whites were in any sense on the same ‘playing field’ in admissions, being judged by a myriad of personal characteristics of which ‘race’ was only one. *Race is obviously given far more weight* [under the Michigan Law School admissions system] *than all other ‘diversity’ factors together.*” *Id.* at 405 (emphasis added).

⁴⁹ For a discussion of how the Law School’s policies were implemented, see Purdy, *supra* note 30 at 318-333.

⁵⁰ Barbara Grutter, a 47-year-old Michigan resident, wife and mother of two sons, had an LSAT score in the 86th percentile and an undergraduate GPA of 3.8 (graduating from Michigan State University with “High Honors”).

⁵¹ See, generally, discussion in Purdy, *supra* note 30 at 322-23.

⁵² See *Grutter v. Bollinger, et al.*, 137 F.Supp.2d 821, 832 n. 10, 834 (E.D.Mich. 2001) (“*Grutter I*”), Trial Testimony of Dennis Shields (Jan. 19, 2001), Trial Transcript Vol. IV, at 209-13 (mentioning Trial Exhibit No. 15).

⁵³ *Grutter I*, 137 F.Supp.2d at 841.

⁵⁴ Purdy, *supra* note 30 at 319-324.

⁵⁵ *Grutter I*, 137 F.Supp.2d at 851.

⁵⁶ *Grutter, supra*, 123 S.Ct. at 2365 (REHNQUIST, CJ, dissenting).

⁵⁷ *Id.* at 2348 (SCALIA, J., concurring in part and dissenting in part).

⁵⁸ *Id.* at 2342.

⁵⁹ See Judge Friedman’s description in the text accompanying note 55. His view was echoed by several of the Sixth Circuit Court of Appeals judges. See, e.g., *Grutter II*, 288 F.3d at 802-03, 816-17 (opinions by Judges Boggs and Gilman, dissenting).

⁶⁰ *Grutter, supra*, 123 S.Ct. at 2337.