

CHAPTER TWO

THE NEW RELIGION OF “DIVERSITY”

There perhaps is no better way to commence a discussion of *THE SHAPE OF THE RIVER* than to begin with Professor Glenn C. Loury’s¹ *Foreword* to the 2000 paperback edition. Once an eloquent opponent of race-conscious policies,² Professor Loury used this occasion to come out as a newly-minted *proponent* for such policies.

In his *Foreword*, Loury offered four important conclusions:

1. Affirmative action is a fiercely disputed *moral* issue;
2. Through the prudent use of racial identity in the admissions process, the goal of increasing racial diversity in our elite higher educational institutions is being achieved at tolerable cost;
3. The net social benefits from this undertaking are graphic, quantifiable, and impressive; and
4. For the gains to be maintained, the preferential policies must be maintained.³

After accurately pointing out that there is universal agreement on his first conclusion, Loury argues that the “evidence” offered by Bowen and Bok provides support for the remaining three. He also claims that opponents of preferential admissions policies find this evidence “most unwelcome.”⁴

Let’s take this last comment first.

The “evidence” provided in *THE SHAPE OF THE RIVER* is that a certain—though far too small—number of first-year black students

The New Religion of “Diversity”

entered 28 highly selective colleges and universities (described as part of the College & Beyond—C&B—database used by the authors) in 1976 and 1989; that among those who later graduated are persons who went on to successful professional and business careers and who have contributed to the communities in which they live.

Loury is correct in one sense. The paucity of black freshmen at highly selective schools in 1976 and 1989 was not welcome news. On the other hand, the evidence of the achievements of these black matriculants who graduated from the 28 schools Bowen and Bok studied should not be “unwelcome” to anyone. In fact, the surprise is not in the authors’ findings, but in the questions they asked, questions which should have offended Loury as much as they do others.

Why, for example, did Bowen and Bok feel it necessary to study whether talented black students, just like talented students of every race, generally do well when they complete their educations at highly competitive colleges and universities? In other words, did Bowen and Bok reasonably expect to discover something different from what they reported? Did they reasonably expect to find that a large number of black graduates from highly selective colleges turned out to be less-than-successful? And if, for whatever reason, that had been the outcome for some, as surely is the case for a percentage of graduates of every race, would anyone seriously believe Bowen and Bok would have attributed it to race?

Because Loury had historically opposed the sorts of racial preferences which Bowen and Bok endorse, his conversion to an apologist for “the prudent use of racial identity in the admission process” is, to say the least, confusing. What, for example, in Loury’s view—or in the view of Justice O’Connor—distinguishes a “prudent use of racial identity” from an imprudent one? If there is a line between the two—and it certainly is nowhere drawn in Justice O’Connor’s opinion in *Grutter*—it is an extremely fine one.

While many, like Loury and Justice O’Connor, may trust Professor Bok or President Bowen to be unerringly prudent when exercising this power to use racial identity, is this a power they would be comfortable conferring upon every college or university president? And if to them, why not to every secondary and elementary school principal and teacher? And if to them, why not to every employer? And if to them, why not to every government administrator? And to

every judge and every policeman? (Does the troubling phrase “racial profiling” ring a bell?)

With regard to the admissions policies approved in *Grutter*, one can only wonder why Justice O’Connor and four of her colleagues (Justices Stevens, Souter, Breyer, and Ginsburg) ignored the plain language of the following promise made by the University of Michigan:

[T]hat no person, on the basis of race, color, religion, national origin or ancestry, shall be discriminated against in the University’s educational programs, activities or admissions.⁵

Unfortunately, as we all now recognize, the University for decades had been using racial preferences⁶ and practicing racial discrimination⁷ when it came to admissions.⁸ Now, with the blessing of Justice O’Connor, schools may, at least temporarily,⁹ continue this practice.

One also can safely assume that the University’s breach of its promise not to discriminate on the basis of race is one of the “costs” Professor Loury believes is “tolerable,” it being clear that Michigan’s discrimination was most definitely tolerable to the five member majority in *Grutter*.

Which raises this question: what *are* the tolerable costs both Loury and Justice O’Connor are willing to accept? Is it once again “tolerable” (some might even say “fashionable”) to discriminate based on race—something both have staunchly opposed in the past without qualification¹⁰—so long as the beneficiaries of these policies are black,¹¹ and the victims are principally white (or Asian-American)? Are they now saying that blatant racial discrimination against innocent students is tolerable because of the “evidence” in THE SHAPE OF THE RIVER regarding the so-called educational benefits that flow from student body diversity?¹²

If so, it is a confusing conclusion for Justice O’Connor to have reached inasmuch as even she, at one point, acknowledged in *Grutter* that “the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all

individuals *regardless of race or ethnicity.*”¹³ Her words—which directly conflict with the outcome she eventually reached—followed her lone reference to the earlier historic Supreme Court holding in *Brown v. Bd. of Education*. It was *Brown* which first announced the principle Barbara Grutter and her attorneys were seeking to have reaffirmed when they appeared before the Court almost 50 years later. The holding in *Brown* was simple:

[W]e declare *the fundamental principle that racial discrimination in public education is unconstitutional.* . . . All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle.¹⁴

Yet, amazingly, Justice O’Connor rejected Ms. Grutter’s plea and slid silently past *Brown*’s “fundamental principle.” She and four of her fellow justices effectively, though no doubt unintentionally, repudiated *Brown*’s holding and, instead, came down squarely on the side of condoning racial discrimination in public education.

Which leads to the next question: What distinguishes *tolerable* from *intolerable* when it comes to racial discrimination? Can there even be such a thing? While one cannot be certain how Loury would answer, Justice O’Connor gave a hint by her concurrence in *Gratz* (wherein the Supreme Court in a 6-3 vote struck down the University of Michigan’s mechanical point system for undergraduate admissions). In essence, *carefully conceal what you are doing.*¹⁵ Or, as Supreme Court Justice David Souter mockingly observed in his dissenting opinion in *Gratz*, “the winners are the ones who [successfully] hide the ball.”¹⁶ The simple message from *Grutter*? So long as you’re not too obvious about it, racial discrimination in pursuit of “diversity” is *tolerable*.

Returning to Professor Loury’s *Foreword*, we can all agree there are social benefits each time any student graduates from college and uses that education for the betterment of his or her family, community, or the country at large. That is true regardless of how that person obtained admission—even if through preferential

admissions; even if the admission were based on one’s legacy status or being an athlete.¹⁷

On the other hand, does that mean that society benefits when the admissions process is demonstrably unfair to many who apply—and who equally could have benefited from the education—but are refused that opportunity because their skin is the wrong color? Is the racial discrimination which Loury now promotes, and Justice O’Connor now condones, really required in order to meet the goal of diversity? And should such discrimination be justified on the basis of the successes of those who purportedly benefited from the discriminatory policies?

Such logic could just as easily support a return to the old economic caste system for surely one could show that at a time when only the white *sons* of mainly wealthy families attended Ivy League schools, many went on to graduate and to make significant contributions to their communities. Yet only a fool would argue for the return of such a system based on (a) the successes of these earlier, and overwhelmingly white, graduates (some of whom clearly would not have been admitted to their particular school without the aid of policies of racial, religious and/or gender discrimination which were then in place), and (b) their presumed satisfaction (at least at the time) with the white male-dominated system which assured their admission to schools like Harvard and Princeton. Yet, in a nutshell, that is precisely the argument Bowen and Bok make in *THE SHAPE OF THE RIVER*, to wit: That some black students were admitted to highly selective colleges via policies which discriminated in *their* favor and against their white and Asian American competitors; that they went on to successful careers after graduating; and, they were satisfied with the system which permitted them to attend their respective college or university.

Actually, Professor Loury perhaps said it best: “It . . . matters a great deal—not just for the colleges and universities in question, but for all of us—how these admissions decisions are made.”¹⁸ He is right, of course; process is important, which raises this question: Isn’t great harm done to individuals and to society in general when the open consideration of one’s skin color becomes part of the process?

Derek Bok once thought so.

A BRIEF HISTORY OF PREFERENTIAL ADMISSIONS

It is interesting to contrast Bok’s current support for preferential admissions with what he has written in the past. For example, in a 1982 book, Bok provided this history of preferential admissions:

After the mid-1960s, . . . [i]n one way or another, colleges and universities began to enroll larger numbers of minority students by admitting blacks, Hispanics, and American Indians with grade point averages and admission test scores *well below* those of white applicants who were rejected.¹⁹

At that time he concluded, simply, “This practice is very hard to defend.”²⁰

Bok also described as deceitful the methods employed by the universities which adopted these policies in response to the problems which, from their inception, they created:

Rather than have such students fail, universities may try to escape the predicament by creating special courses of little academic rigor or by lowering their grading standards.²¹ *Yet neither alternative can be justified, for each attempts to mislead the public about the true academic accomplishments of the students involved while excluding other applicants who could benefit more from attending the institution. Eventually the truth is bound to leak out, . . .*²²

And, of course, the truth *does* leak out, with lasting harm to everyone, including:

1. Employers (who can no longer put any credence on the grades received by minority students);²³
2. Those students who are unfairly placed in an environment for which they are ill-prepared academically and do not graduate;²⁴
3. The largely forgotten students (“who could profit much more from the opportunity to enroll”)²⁵ who were rejected based on the color of their skin;
4. The universities because of the inevitable questions raised over the academic skills of the students who are being admitted, as well as over the questionable nature of the policies themselves; and
5. “Even those blacks and Hispanics who do excel academically [because they] will cease to receive due credit for their accomplishments.”²⁶

Apparently Bok’s earlier comprehensive, and far from complete, list of adverse consequences proved inadequate to convince him there are better, less damaging, more just and lasting solutions to the problems which preferential admissions policies were devised to address. On the other hand, and in fairness to Bok, he provided the reader in 1982 with an outline of essentially the same argument he and Bowen make today:

Those who defend preferential admissions usually agree that universities exclude better-qualified [applicants] *in an effort to make up for past injustices against minorities*²⁷ . . . Some concede that

preferential admissions may inflict a *temporary injustice*, but argue that this is a price worth paying to achieve greater equality in the long run. . .²⁸

It is a critical concession, that *preferential admissions* result in “injustice,” but one he has to make. On the other hand, Bok was wrong in 1982, and he and Bowen are wrong now, to suggest that the *injustice* is “temporary” (and, thus, tolerable). The injustice may *seem* temporary to them, but it is far from temporary to those individuals who are denied admission to the school of their choice solely because of the color of their skin.

It is as if to suggest that the denial of admission to the University of Mississippi before James Meredith finally broke the color barrier was only a *temporary injustice* to those who were turned away because they were black. It is a ludicrous argument. And a younger Derek Bok knew it. In fact, he described it this way in the same 1982 book:

It is never easy to insist that deserving individuals be made to suffer a hardship in the hope of someday rectifying an injustice for which they are not directly responsible. Moreover, *every attempt to penalize one group to benefit another will produce a number of individual injustices*. Few people would assert that all white students have benefited from [past] . . . discrimination [against minorities], or that every successful minority applicant has suffered greater hardships or disadvantages than every white who is turned away.²⁹

Here again we witness Bok’s clear recognition that “individual injustices” inevitably follow in the wake of preferential policies. Nothing he and Bowen wrote in 1998 in *THE SHAPE OF THE RIVER* changes the accuracy and potency of his observations in 1982.

Bok capped off his earlier discussion of *injustice* with a highly rhetorical question using the example of a not-so-hypothetical black student at Andover Academy:

Who is to say that a black student of middle-class parents who has studied at Andover Academy has had to labor under greater hardships than the son of poor white immigrants who has graduated from an inner-city school?³⁰

Interestingly, Bok’s black prep school student reappears in *THE SHAPE OF THE RIVER* though in a somewhat different, but instructive, context. In making the argument that “disadvantage” is irrelevant when deciding which minority applicant to prefer—in other words, admissions directors may logically prefer the *advantaged* rather than the *disadvantaged* minority³¹ because he is presumably the better-prepared student—Bowen and Bok return us to Andover:

The black student *with high grades* from Andover may challenge the stereotypes of many classmates just as much as the black student from the South Bronx.³²

Ignoring the point which Bowen and Bok are attempting to make (i.e., it isn’t *disadvantage* which makes the Andover student valuable, it’s his *color*) perhaps nowhere does their support for preferential admissions come more clearly apart.

In the first place, regardless of race, a student from Andover *with high grades* needs no preference to obtain admission to a selective college. Earning “high grades” at a rigorous, well-respected college preparatory school provides all the evidence necessary to demonstrate the ability to perform well at almost any college.

More importantly, one can fairly assume that the well-prepared black Andover student will enter college on an *equal status*³³ with his non-minority college classmates. Indeed, the very qualities which resulted in the black student’s academic achievements at Andover are the same qualities which will garner the respect of his

classmates wherever he matriculates. His individual achievement, more than any other factor, will provide the most successful, and most permanent, challenge to the sorts of negative stereotypes inevitably created by preferential admissions policies.

As Bok himself admits, the hypothetically less-well-prepared black high school student³⁴ from a presumably less competitive secondary school in the South Bronx runs a substantially greater risk of confirming such negative stereotypes. This is particularly true if it is perceived that this student was the beneficiary of preferential admissions policies. Unless the student is fully qualified to compete, it places an unfair and overwhelming burden on him with the result that, even given the greatest degree of motivation and effort, he may be consumed with remedial courses and tutoring, and still fail.

On the other hand, the black Andover student with high grades will assume the same burden taken on by all Andover students with high grades. It is the expectation that he will continue to work hard and compete at the same high level with the talent he’s been fortunate enough to develop and display. And if he does not? The penalty will be no different from that suffered by other talented college students who fail for reasons wholly unrelated to their skills and, most importantly, unrelated to their skin color.

At the end of his 1982 discussion regarding preferential admissions policies, and his tepid but nonetheless clear support for their continuance, Bok closes with a statement much more in line with the original intent of “affirmative action.” He argues for “a judicious policy of encouraging minority admissions.”³⁵ This, of course, is a policy Americans overwhelmingly endorse, i.e., *encouraging*, but not *preferring*, minority admissions.

Bok knows the difference. In fact, in 1982 when Bok turned from the question of student admissions to the subject of faculty hiring, he fairly fawned over the *original* principles embodied in “affirmative action.” He described them as follows:

[T]he essential thrust of affirmative action is to ensure that all institutions . . . make particular efforts to identify and consider possible candidates from [minority] groups . . . Defined in this way, the *principles of*

affirmative action are consistent with the proper goals of a university and deserve to be retained.³⁶

Or, as he had earlier noted, “professors must be appointed on the basis of their intellectual competence [i.e., their “merit”] in their chosen field and *not because of their race, sex, or ideology.*”³⁷

The “principles of affirmative action” which Bok found worthy formed the foundation for his unalterable opposition to an applicant’s race being considered when faculty positions were being filled. He set forth his views at length:

. . . [F]aculty members . . . are selected almost entirely for their ability as teachers and scholars. . . [U]niversities normally appoint new faculty members with considerable confidence that they are choosing the best available teachers and scholars. *If selection committees decide to pass over the ablest candidates in order to appoint a minority scholar, they can scarcely be said to be furthering the primary educational aims of the institution. On the contrary, they will generally be acting with a clear probability of diminishing the quality of teaching and research.*

Some writers . . . insist[] that black and Spanish-American professors . . . possess peculiar qualifications that entitle them to special consideration “on the merits.” . . . But this is a very difficult position to defend. Most of the highly regarded minority scholars reject the argument out of hand. Moreover, any list of the leading works on race relations or Afro-American history and culture will include many entries by white as well as black authors.

Others have argued that preferential hiring will enrich the quality of the faculty by adding professors with different backgrounds and values. This claim, however, can easily be overstated.

Even the most avid proponent of diversity would be hard put to argue that the special perspective of a minority scholar will contribute much to teaching and research in the natural sciences or in classics, English literature, logic, or many other important fields of study . . . If [a minority scholar’s] special capacities have already resulted in genuine contributions to teaching and research, the candidate may well deserve an appointment. This is scarcely an example of preferential hiring; it is simply a proper recognition of superior work. . .

* * *

In sum, preferential treatment in faculty hiring cannot be justified on academic grounds.³⁸

Returning to student admissions, Bok went on to warn that university administrators “may act unfairly through inadvertence, bad judgment, or outright prejudice,” and that “such actions often do harm individuals, especially when gaining admission to professional schools and acquiring degrees of every kind are important to many careers.”³⁹ And while Bok was, and remains, willing to “concede universities a broad discretion in academic affairs,” he seemed more willing in 1982 than he is today to recognize the need “to protect the occasional victim who suffers from a practice . . . that is demonstrably wrong.”⁴⁰

All of which raises this admittedly rhetorical question: If the University of Michigan Law School’s decision to deny admission to an individual applicant like Barbara Grutter turned on the question of her race (in other words, had Ms. Grutter been black, she would have been admitted), is that not a “demonstrable wrong” which has harmed her?

Taking him at his word (or at least his word in 1982 in the context of faculty hiring), one might firmly place Bok in the camp of those who abhor racial preferences and the harm they inflict on real-life individuals like Ms. Grutter. One can surmise that, today, an intellectually conflicted Bok would concede the harm to Ms. Grutter. Yet we are left with no other conclusion but that Bowen and Bok believe, the harm to her notwithstanding, our society is better off for the University having made the decision it did, for the reason it did. To Bowen and Bok, the rights of innocent men and women like Barbara Grutter are expendable in the quest for some higher social good. On June 23, 2003, five members of the Supreme Court agreed.

BOK’S REJECTION OF THE “ROLE MODEL” RATIONALE

Bok also earlier outlined his view of the “role model” rationale in the context of hiring minority faculty (one which, again, is generally at odds with the views he and Bowen expressed in THE SHAPE OF THE RIVER regarding a related subject, mentoring⁴¹):

Whatever value we ascribe to counseling and role modeling, they are surely less important in a research university than the quality of teaching and scholarship . . . As Jonathan Cole has observed, after careful review of the research on this subject, “*There simply is no strong evidence that . . . racial matching between young people and their elders has a significant influence on career choice. We might like to think that there is such an effect; it may have intuitive appeal; but the facts that are assumed to exist simply don’t.*”⁴²

Having outlined his principled opposition to all of the justifications put forth for preferential hiring policies, Bok again turned to the core issue of injustice. It is here where Bok writes most sensibly, his earlier views colliding directly with the more recent views expressed in his collaborative work with Bowen:

[H]iring professors on [a preferential] basis would . . . be unjust to white candidates of superior ability, for the latter could make a strong claim that they truly deserved the job “on the merits” and that they had done nothing to warrant the loss of the appointment. . . . [A] long history of discrimination . . . [and] past prejudice does not provide a convincing reason for taking jobs from candidates of greater academic promise who bear no responsibility for prior injustices inflicted on minority groups.

The only remaining argument for favored treatment is that it will produce greater equality for all minorities in the long run, thus justifying any unfairness and loss of academic quality that may occur in the shorter term. But it is always hard to demonstrate that we should impose an injustice on some in the hope of alleviating it for others.

For . . . these reasons, preferential hiring is extremely hard to defend on any basis. . . . *Far from promoting justice, preferential hiring unfairly penalizes candidates of superior ability while holding little promise of achieving greater equality in*

Getting Under the Skin of “Diversity”

*the society as a whole. Such a policy is not merely unnecessary, it is also wrong.*⁴³

But are the penalizing effects on individuals any different under the preferential *admissions* policies which Bowen and Bok now champion?

Paraphrasing Professor Bok, in the context of preferential admissions:

Far from promoting justice, preferential admission unfairly penalizes applicants of superior ability while holding little promise of achieving greater equality in the society as a whole. Such a policy is not merely unnecessary, it is also wrong.

The import of his words is virtually indistinguishable from those of his Harvard Law School colleague, Professor Alan Dershowitz:

[T]here can be no serious doubt that significant costs—both moral and constitutional—inhere in allowing a state or a university to consider race *qua* race in admissions decisions. *At the most fundamental level, it is simply wrong to do so.* To reward some persons for the accident of their race is inevitably to punish others for the accident of theirs.⁴⁴

Bok admittedly—though incoherently—argues that the justification for preferential admissions is different from,⁴⁵ and thus cannot justify, the preferential hiring of faculty. Putting aside whether such a distinction exists (and I argue it does not), what neither Bok nor Bowen can argue is that the injustice to the individual student, innocent of any wrongdoing⁴⁶ and yet rejected under a race preference admissions policy, remains identical to the outcome they abhor when it comes to the question of faculty hiring.⁴⁷

The New Religion of “Diversity”

So we return once again to this question, posed earlier to Professor Loury and now posed to our two distinguished educators: Is there not undeniable harm to individuals and to society in general when the open consideration of one’s skin color becomes part of the college admissions process?

Justice O’Connor’s colleague, Justice Anthony Kennedy, had no trouble answering it. As he wrote in dissent in *Grutter*:

Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.⁴⁸

This is a serious charge, one to which even Justice O’Connor at least paid lip service in *Grutter*,⁴⁹ and one to which no rebuttal was offered by any justice who voted to uphold the Law School’s policies.

For his part, Professor Loury had no trouble understanding Justice Kennedy’s concerns before they were ever expressed in *Grutter*. Not long before he penned the *Foreword*, Professor Loury was a strong supporter of “race-blind” admissions, noting that perpetuating “race-consciousness” is something which Americans generally denounce while “enthusiastically endorsing race-blind efforts to achieve the same goals.”⁵⁰

What changed his mind? For that matter, what changed Bok’s mind? If it’s really the “evidence” the authors gathered in *THE SHAPE OF THE RIVER*, then let’s turn to that.

¹ When he authored the *Foreword* to *THE SHAPE OF THE RIVER*, Professor Loury was serving as University Professor, Professor of Economics, and Director of the Institute on Race and Social Division at Boston University.

² Glenn Loury, *Performing Without a Net*, *THE AFFIRMATIVE ACTION DEBATE* (George Curry, ed. 1996) at 49-64.

³ TSR (paperback ed. 2000) at xxi. Dr. Loury has echoed these thoughts in a more recent book. See Glenn C. Loury, *THE ANATOMY OF RACIAL EQUALITY* (2002) at 131.

⁴ TSR (paperback ed. 2000) at xxi.

⁵ Paraphrasing the *University of Michigan Law School Faculty Handbook* (1991)(*Grutter* Trial Exh. No. 78) at 16.

⁶ Justice O’Connor used the phrase “racial preferences” to describe what was being approved by the Court. *Grutter, supra*, 123 S.Ct. at 2347.

⁷ Justices Scalia and Thomas appropriately described the Law School’s system as one involving “racial discrimination.” *See, Grutter, supra* 123 S.Ct. at 2348-50 (SCALIA, J., joined by THOMAS, J., concurring in part and dissenting in part).

⁸ For a detailed explanation of the University of Michigan Law School’s admissions policies at issue in *Grutter*, see R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX.REV.L. & POLITICS 313 (Spring 2003).

⁹ Justice O’Connor concluded her opinion with this statement: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today.” *Grutter, supra*, 123 S.Ct. at 2347. Her judicially legislated time table was met with this response from Justice Thomas: “. . . I agree with the Court’s holding that racial discrimination in higher education admissions will be illegal in 25 years. . . . I respectfully dissent from the remainder of the Court’s opinion and judgment, however, because I believe that the Law School’s current use of race violates the Equal Protection Clause and that *the Constitution means the same thing today as it will in 300 months.*” *Id.* at 2350-51 (THOMAS, J., concurring in part and dissenting in part)(emphasis added). *Also see* Ward Connerly, *CREATING EQUAL* (2000) at 19: “If we are to lay this burden down for good, it seems to me that we must be committed to letting go of racial classifications [now]—not getting beyond race by taking race more into account, as Supreme Court Justice Harry Blackmun famously (and disastrously) advised [in *Bakke*], but just getting beyond race period. . . .”

¹⁰ *See*, “Testimony of Professor Glenn C. Loury,” given before the Subcommittee on the Constitution to the Judiciary, U.S. House of Representatives (Dec. 7, 1995). *Also see* quotes from earlier Supreme Court opinions written by Justice O’Connor, found in the APPENDIX (“I Miss Justice Powell,” the text of the author’s remarks delivered to the Virginia and West Virginia Bar Associations Joint Annual Meeting, Jul. 11, 2003).

¹¹ Supreme Court Justice Ruth Bader Ginsburg seems comfortable with a program which discriminates in favor of “African-Americans, Hispanics, and Native Americans” who, she says, “historically have been relegated to inferior status by law and social practice,” and whose members, “continue to experience *class-based discrimination* to this day.” *Gratz, supra*, 123 S.Ct. at 2445 (GINSBURG, J., with whom Justice SOUTER joins, dissenting) (emphasis added). Of course, the answer to “class-based discrimination” is to offer a preference based on socio-economic disadvantage, not race. Using “disadvantage” as a category of “preference” is never challenged when it is

applied in a race-neutral manner. A perfect example is found in the University of Michigan’s undergraduate admissions policy for 1998 which had a separate category for awarding points to applicants from “socio-economically or educationally disadvantaged” backgrounds. The plaintiffs in the Michigan undergraduate case did not challenge that aspect of University’s policy. In addition to Justice Ginsburg’s implicit comfort with a “groups rights” rationale, a similar argument is made by UCLA law professor Richard Sander. Professor Sander (though opposing preferences in law school admissions on the pragmatic grounds that they do more harm than good to the purported beneficiaries) says this: “Racial admissions preferences are arguably worth the obvious disadvantages—the sacrifice of the principle of colorblindness, the political costs—if the benefits to minorities substantially exceed the costs to minorities [especially in the absence of evidence that whites are substantially harmed].” Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371 n. 6 (Nov. 2004).

¹² *Grutter, supra*, 123 S.Ct. at 2340 (“[N]umerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals;” [citing, among others, THE SHAPE OF THE RIVER]). Of course, Justice O’Connor completely ignored the evidence submitted by plaintiff *at the time of trial* which disputed the weight which should be given to the authors’ work and to the idea that student body diversity, in and of itself, provides educational benefits. *See, e.g.*, the analysis of the trial evidence regarding the alleged “educational value of diversity” found in Purdy, *supra* note 8 at 351-54. In this case, there can be no denying that there existed substantial factual support for the trial court’s ruling that “diversity” was not “compelling” – even though contrary evidence, like THE SHAPE OF THE RIVER, was also before it and available for the trial court’s consideration. Another puzzling deviation (though, in fairness to the Court, it was never raised as a reason warranting reconsideration of the Court’s ultimate conclusion) was Justice O’Connor’s decision to take into consideration numerous source materials prepared *after* the trial had been completed. In effect, this denied Ms. Grutter an opportunity to meaningfully respond to these materials during trial. *See, e.g.*, the Court’s reference to a 2003 book entitled, *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES*, *Grutter, supra*, 123 S.Ct. at 2340. And, in fact, contrary viewpoints to those contained in the post-trial materials selectively cited by the five-justice majority are found in several notable works cited by Ms. Grutter and the *amici* who joined her.

See, e.g., Peter Wood, *DIVERSITY: THE INVENTION OF A CONCEPT* (2003); and Stephen Cole and Elinor Barber, *INCREASING FACULTY DIVERSITY* (2003) at 344, n. 25: “In our opinion so far there is no clear-cut evidence demonstrating that diversity (meaning having, let us say, a higher number of African American students enrolled) has any meaningful influence on the other students attending the university. . . . The data we present later in fact show that race sensitive admissions policies likely have at least some negative educational consequences on those they are intended to help.”

¹³ *Grutter, supra*, 123 S.Ct. at 2340 (emphasis added).

¹⁴ *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955)(emphasis added).

¹⁵ Justice O’Connor focused on the “nonindividualized, mechanical” undergraduate system at issue in *Gratz* versus the allegedly “nuanced judgments” made by the admissions personnel in the Law School case. See, *Gratz, et al. v. Bollinger, et al.*, 539 U.S. 244, 123 S.Ct. 2411, 2431-2433, 156 L.Ed.2d 257 (2003).

¹⁶ *Gratz, supra*, 123 S.Ct. at 2442. See also, Justice Ginsburg’s dissent in which she all but encourages intentional circumvention of any potential constitutional prohibition on racial discrimination: “One can reasonably anticipate, . . . that colleges and universities will seek to maintain their minority enrollment . . . whether or not they can do so in full candor through the adoption of affirmative action plans of the [unconstitutional] kind here at issue. Without recourse to such plans, institutions of higher education may resort to camouflage.” *Id.*, 123 S.Ct. at 2446. Justice Ginsburg made clear that she had no problem with the awarding of a racial bonus of 20 points (out of the necessary 95 to 100 required for admission). In her words, “[S]urely Michigan’s accurately described, fully disclosed [undergraduate award of points based solely on race] is preferable to achieving similar numbers [as the Law School did] through winks, nods, and disguises.” *Id.* Chief Justice Rehnquist offered this politely restrained response to Justice Ginsburg by observing that her “observations are remarkable for two reasons: First, they suggest that universities—to whose academic judgments we are told in *Grutter*, . . . we should defer—will pursue their affirmative-action programs whether or not they violate the United States Constitution. Second, they recommend that these violations should be dealt with, not by requiring the universities to obey the Constitution, but by changing the Constitution so that it conforms to the conduct of the universities.” *Gratz, supra*, 123 S.Ct. at 2430, note 22.

¹⁷ A wonderful example of an extraordinary student-athlete who went on to become an extraordinary man (whose university scholarship unquestionably was based upon his athletic prowess) is Oklahoma University’s first black

football player, Prentice Gault. Dr. Gault’s contributions to his alma mater (he was twice named an All-Big Eight player while at OU, and, more importantly, earned *Academic* All-American honors in 1958) and to his state and nation (“His moral courage helped bring racial justice, not only to our state and to intercollegiate athletics, but also to our entire nation”) are attributable to the preference he was shown as an athlete—for he certainly was given no preference based on his race. See, Debby Copp, “There’s Only One . . . Prentice Gault,” (Sooner Gameday, Oct. 21, 2006) at 76-77.

¹⁸ TSR (paperback ed. 2000) at xxii.

¹⁹ Derek Bok, *BEYOND THE IVORY TOWER* (1982) at 91 (emphasis in original).

²⁰ *Id.* at 92.

²¹ The problem of lowered grading standards is fully recognized by former University of Michigan Law School Dean and Law Professor Terrance Sandalow. See Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH.L.REV. 1874, 1894, 1901-02 (May 1999).

²² Bok, *supra* note 19 at 92 (emphasis added). A similar viewpoint was more recently articulated by Yale Law Professor Stephen L. Carter: “. . . [T]he grades that students work so hard to earn matter a good deal less. . . .Grade inflation is a signal that professors are no longer treating grades as though they matter. . . . And as with most breaches of integrity, they are causing great harm. . . . Indeed, the collapse of grading as a serious enterprise, by forcing potential employers to rely on faculty contacts and other informal sources rather than grades to obtain reliable information, could severely retard racial justice. Working harder in the classroom and thus earning better grades than the white kids has always been one of the things that minority students have been counseled to do: only by being better, we have told each other for a generation or more, can we hope to avoid the pernicious effects of the old-boy network and other informal means of hiring that have traditionally been closed to us. . . . But if every student gets the same high grades without doing the hard work, the informal contacts become even more important and the old-boy network is back in business.” See, Steven L. Carter, *INTEGRITY* (1996) at 80.

²³ Bok, *supra* note 19 at 92.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* See, also, TSR at 265.

²⁷ Interestingly, Bok later asserts that “Since *universities are not seeking* to enroll minority students *to make up for past injustices*, they have no duty to prefer applicants who have suffered the greatest deprivations.” He explains

that, “admissions committees will rationally prefer those minority students, regardless of backgrounds, who are best equipped to benefit from the education they receive and most capable of taking full advantage of the opportunities they will have to contribute in later life.” Bok, *supra* note 19 at 99 (emphasis added).

²⁸ *Id.*

²⁹ *Id.* at 94 (emphasis added).

³⁰ *Id.*

³¹ *Id.* at 99.

³² TSR at 280 (emphasis added).

³³ Gordon Allport, a member of Harvard’s faculty for over 40 years until his death in 1967, wrote the definitive work on the importance of “equal status contacts” between majority and minority groups. See Gordon W. Allport, *THE NATURE OF PREJUDICE* (1954)(1979 ed.) at 261-281.

³⁴ Bok notes that “the failure of many minority students to perform according to expectations may well result from inadequate preparation” Bok, *supra* note 19 at 103.

³⁵ *Id.* at 115.

³⁶ *Id.* at 105 (emphasis added).

³⁷ *Id.* at 28 (emphasis added).

³⁸ *Id.* at 111-113 (emphasis added).

³⁹ Bok, *supra* note 19 at 41.

⁴⁰ *Id.*

⁴¹ TSR at 203-205.

⁴² Bok, *supra* note 19 at 113 (emphasis added).

⁴³ *Id.* at 114-115 (emphasis added).

⁴⁴ Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?* 1 CARDOZO L.REV. 379, 420-421 (1979)(emphasis added).

⁴⁵ “A judicious policy of *encouraging* minority admissions can further legitimate educational goals.” Bok, *supra* note 19 at 115 (emphasis added).

⁴⁶ Bowen and Bok acknowledge Justice Lewis Powell’s finding “that efforts to overcome ‘societal discrimination’ did not justify policies that disadvantaged particular individuals, such as [Alan] Bakke, who bore no responsibility for any wrongs suffered by minorities.” TSR at 8, citing the decision in *Bakke*, 438 U.S. 265 (1978).

⁴⁷ Indeed, one reasonably could argue that expanding the number of minority faculty and administrators, which Bok opposes if accomplished through preferential hiring policies based on race, would be a far more important step than merely expanding minority presence within the student body itself. The

benefits derived by the students, and society as a whole, who observe minority administrators and scholars in leadership positions at elite schools, and who witness their competent performance in these positions, would seem to be a more effective, and immediate, method of breaking down negative stereotypes.

⁴⁸ *Grutter, supra*, 123 S.Ct. at 2371 (KENNEDY, J., dissenting).

⁴⁹ Citing to *Bakke*, Justice O’Connor writes, “We acknowledge that ‘there are serious problems of justice connected with the idea of preference itself.’” *Grutter, supra*, 123 S.Ct. at 2345.

⁵⁰ “Why does the public denounce race-conscious admissions while enthusiastically endorsing race-blind efforts to achieve the same goals? Because Americans intuitively understand that reversing the effects of our history of white supremacy is good, while perpetuating those effects is evil.” Glenn C. Loury, *TRB from Washington – Admit It*, THE NEW REPUBLIC ONLINE (Dec. 9, 1999).