

CHAPTER THREE

A “SOUND ANALYSIS” BASED ON THE “BEST AVAILABLE EVIDENCE”?

Professor Loury accepts on faith that the authors’ findings in *THE SHAPE OF THE RIVER* are “based on sound analysis of the best available data.”¹ Presumably Justice O’Connor and her law clerks agreed.² Yet no one can test that assertion because Bowen and Bok and the Mellon Foundation (which provided support for their project) have refused to make the underlying data available for independent, critical review.³ Why do they refuse? If their refusal does not trouble Loury, it should because few have been more ardent proponents for openly examining hard facts than Loury himself.⁴

Suppose, for example, that Loury—and Justice O’Connor—were to learn that the adoption of race-neutral systems would have had no significant impact on either the admissions or the outcomes for the majority of the black students involved in Bowen’s and Bok’s study. Would either remain persuaded by the arguments contained in *THE SHAPE OF THE RIVER*?⁵

If they were to learn that at least some of the schools which Bowen and Bok studied actually reject the use of race in their admissions processes, would Loury’s—and Justice O’Connor’s—enthusiasm over the authors’ so-called “evidence,” at a minimum, be tempered?

Would Loury’s apparently blind acceptance of the authors’ statements regarding the supposed success of “retrospectively rejected” black matriculants be reconsidered if the facts were to show that many, if not most, of the responses to the authors’ questionnaire were provided by black graduates who would *not* have been “retrospectively rejected” under race-neutral admissions policies?

In fact, did Loury and Justice O’Connor know that Bowen and Bok had written elsewhere that it was “impossible” for them to determine whether race played a role in the admission of *any* of the black graduates about whom they later report?⁶ Given that astonishing admission, how can Bowen and Bok argue—and Loury and

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Justice O’Connor accept—that the “successes” they report constitute “quantifiable” evidence supporting racial preferences when they profess an inability to show that a single successful black graduate actually received such a preference?

In fact, wouldn’t that be the best news of all, that few, if any, of the successful black graduates needed a preference based on race in order to gain admission to their respective schools? Apparently neither Bowen nor Bok care all that much about reporting such an outcome for the obvious reason that it would undermine their arguments in support of such policies. Yet surely Loury would have wanted to know all of these things before making permanent his conversion as a proponent for the “prudent use of racial identity.” And one would have expected Justice O’Connor to have demanded even greater assurances in that regard before voting to saddle our nation with another quarter century of overtly race-conscious policies.

If both Loury and Justice O’Connor were also to learn that highly selective institutions which formerly practiced race-based admissions have demonstrated the ability not only to attract but to enroll and, more importantly, to graduate⁷ a racially diverse class *without considering race*, would either remain convinced of the need for race-conscious admissions? Justice Clarence Thomas’ dissenting opinion in *Grutter*—which Justice O’Connor must have read before she signed off on her own opinion—makes clear that racial diversity *can* be achieved at even the most elite law schools without race being considered.⁸ The evidence fully supports Justice Thomas’ position.⁹

So, is the analysis in *THE SHAPE OF THE RIVER* sound? Are there critical analyses the authors did not undertake? In fact, did the authors consciously ignore some of their “best available data”?

This last question is particularly important for both Loury and Justice O’Connor must have been aware that the authors also gathered data on four pre-eminent historically black colleges and universities (HBCUs) which they inexplicably refused to include in their study.¹⁰ Did Loury or Justice O’Connor (or any of the other four justices who joined her opinion in *Grutter*) express wonderment over this omission? Wouldn’t Loury and each of the five justices who voted to uphold the Law School’s use of race consider the achievements of black graduates from Howard University, Morehouse College, Spelman College, and Xavier University of Louisiana to be an

important part of the “best available data”? Or do Loury and members of the Court majority consider the contributions of the HBCU graduates unworthy of being compared with the contributions of the black graduates from their own “elite” undergraduate alma maters (Northwestern, Harvard, Stanford, Cornell, and the University of Chicago among them) as well as from the other selective and predominantly white institutions included in the authors’ study?

Independent analysis of the authors’ methods and their data—particularly as they pertain to the black graduates from nearly all-black colleges and universities—would seem essential in determining whether the goal of achieving campus “diversity” (as the authors and Justice O’Connor perceive it) really requires, as Justice O’Connor now seems to accept, the cost of continuing racially discriminatory practices.

Since we also know both Loury and Justice O’Connor profess support for race-neutral alternatives to achieve diversity¹¹ such as the “ten percent” plan in Texas,¹² and since such plans have unquestionably proven successful,¹³ one would have expected each of them to demand a thorough review of the authors’ data before concluding that a return to the abhorrent practice of racial discrimination is required in order to accomplish the same result.

By the words in this book, I do not mean to argue with either Loury or Justice O’Connor over the goal. I believe we share the same one, which is to insure openness and fair treatment to every individual, not just in terms of his or her ability to compete for admission to an elite educational institution, but in terms of each individual’s right to move freely and reach for all the things our society has to offer. Yet we differ when it comes to the means.

Apparently they are content to do so by consciously considering race. Yet most Americans are not. In particular, I fear that Justice O’Connor’s decision to condone the race-based policies followed by the University of Michigan when it was considering Barbara Grutter’s application will continue to lead to intolerable outcomes, as it unquestionably did for Ms. Grutter. And these intolerable outcomes will continue to be faced by thousands of other innocent law school applicants who will be denied admission solely because of the color of their skin, though they are not the only victims of these practices.¹⁴

The threat to America—not black America or white America but the America which Loury, Justice O’Connor, and all Americans share an equal and collective stake in—remains great if we continue to accept the race-based policies Bowen and Bok praise in their book. With all we have been through when “race matters,” one struggles to explain why five justices on the Supreme Court in 2003 seemed comfortable continuing such policies rather than ending them once and for all, as the Supreme Court in *Brown v. Bd. of Education* so clearly meant to do in 1954.

Finally, Loury’s recent conversion is irreconcilable with much of what he has written and said about race in the past. His words have been both powerful and unequivocal:

*It is morally unjustified – and to this African-American, humiliating – that preferential treatment based on race should become institutionalized for those of us now enjoying all the advantages of middle-class life. The thought that my sons might come to see themselves as “presumptively disadvantaged” because of their race is unbearable to me.*¹⁵

Loury has frequently provided wise counsel, advice from which every American parent and child—regardless of race—could benefit. To a question (“Just who are you?”) posed by the Reverend Jesse Jackson to black youngsters, Loury responded:

The black youngster *should* [say]: Because I *am* somebody I will not accept unequal rights. Because I *am* somebody, I will waste no opportunity to better myself. Because I *am* somebody, I will respect my body by not polluting it with drugs or promiscuous sex. Because I *am* somebody—in my home, in my community, in my nation—I will comport myself responsibly, I will be accountable, I will be available to

serve others as well as myself. . . . As Dr. Martin Luther King, Jr., understood, whether or not a youngster *is* somebody has to do with the content of his character, not the color of his skin.¹⁶

Dr. King was right. A unanimous Supreme Court in *Brown* was right. Supreme Court Justice Clarence Thomas, writing in dissent in *Grutter*, was right:

The Constitution *abhors classifications* based on race, . . . because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. “Purchased as the price of immeasurable human suffering, the equal protection principle reflects our Nation’s understanding that such classifications ultimately have a destructive impact on the individual and our society.” [Cite omitted.]¹⁷

With all due respect, Dr. Loury and Justice O’Connor were, once upon a time, also right when it came to criticizing the use of racial classifications.¹⁸ Both are wrong now to condone their use.

¹ TSR (paperback ed. 2000) at xxi.

² Professor Claude Steele, designated as an expert witness by the University of Michigan in both *Grutter* and *Gratz*, was extremely concerned about the effect which the book by Stephen Cole and Elinor Barber, *INCREASING FACULTY DIVERSITY* (2003), might have on Justice O’Connor’s views in both cases: “I think Sandra Day O’Connor’s law clerks are going to read [the Cole & Barber study] and they’ll say, “Look at this. *Here’s a real thorough study, and it is arguing that affirmative action is harming these kids.*” See Robin Wilson, *The Unintended Consequences of Affirmative Action: A Controversial Study from Unlikely Sources Asks Why College Faculties Lack Diversity*, *THE CHRONICLE OF HIGHER EDUCATION* (Jan. 31, 2003)(emphasis added). Whether Justice O’Connor or any of her law clerks actually read Cole’s & Barber’s book is problematical even though it was

explicitly mentioned in the brief filed by the lawyers for Jennifer Gratz in the University of Michigan undergraduate case. See PETITIONERS’ REPLY BRIEF in *Gratz, et al. v. Bollinger, et al.* at 7. What is certain is that Justice O’Connor and the Court majority ignored what was perhaps the most thorough and respected study performed up to that point, a study far more thorough than anything offered in *THE SHAPE OF THE RIVER*. Of interest, Cole’s and Barber’s work was sponsored by both the Council of Ivy Group Presidents and the Mellon Foundation. The latter, of course, is the same foundation which funded the collection of data for *THE SHAPE OF THE RIVER* and, in 2003, was headed by none other than William G. Bowen. The *CHRONICLE* described both the Council and the Mellon Foundation as groups “know for their strong support for affirmative action.” *Id.*

³ See Russell K. Nieli, “The Changing Shape of the River: Affirmative Action and Recent Social Science Research,” NAS Research Paper (October 4, 2004) at 47 n. 3. Also see Thomas Sowell, *Quotas on Trial: Part II*, *Jewish World Review* (Jan. 10, 2003): “Their refusal to separate out those black students admitted under lower academic standards, combined with *their refusal to let others get their hands on the data they used*, so that others could make that separation if they wished, make the Bowen and Bok study an odd choice to rely on so uncritically as much of the media and academia have relied on it.” (Emphasis added.)

⁴ “Some people say African Americans are not interested in achievement, that they think getting good grades is acting white, etc., etc. . . . Well is it true or isn’t it? That requires data. I don’t think we can be worse off with the facts.” *THE AFRICAN AMERICAN EDUCATION DATABOOK, VOLUME I: HIGHER AND ADULT EDUCATION* (1997) at ii.

⁵ Evidence demonstrating the ability of several pre-eminent law schools to enroll racially diverse classes using race-neutral criteria (as required in states where racial preferences had been banned before *Grutter* was decided) was completely ignored by Justice O’Connor in her opinion in *Grutter*. See, e.g., R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 *TEX. REV. L. & POLITICS* 313, 333-34 (Spring 2003); and Justice Thomas’ reference to UC-Berkeley’s law school minority enrollment after 1996 when the race-neutral admissions were mandated by a change to the California State Constitution (pursuant to Prop. 209). *Grutter, supra*, 123 S.Ct. at 2359 (THOMAS, J., concurring in part and dissenting in part).

⁶ William G. Bowen & Derek Bok, *Response to Review by Terrance Sandalow*, 97 *MICH.L.REV.* 1917, 1918 (1999).

⁷ “Schools with smaller [black-white graduation rates than the 21% gap reported by the University of Michigan] included the University of

California at Berkeley [12.8%], . . . the University of Florida [9.2%], . . . [and] Florida State University, a large state school [that] has virtually closed the gap, . . .” Maryanne George, “U-M gap in grad rates at high end,” DETROIT FREE PRESS (Jan. 20, 2005). The California and Florida university systems are prohibited by state law from using racial preferences in admissions. *See infra* note 11.

⁸ *Grutter, supra*, 123 S.Ct. at 2359 (THOMAS, J., concurring in part and dissenting in part): “The sky has not fallen at Boalt Hall at the University of California at Berkeley, for example. Prior to Proposition 209’s [ban on the use of race in admissions to California public universities], Boalt Hall enrolled 20 blacks and 28 Hispanics in its first-year class for 1996. In 2002, without deploying express racial discrimination in admissions, Boalt’s entering class enrolled 14 blacks and 36 Hispanics.”

⁹ *Also see*, Purdy, *supra* note 5, at 333-335 on the impact of eliminating race in admissions to highly selective flagship universities and law schools.

¹⁰ TSR at 291 note 2: “Analysis of the data from these four [HBCUs] was beyond the scope of this study, which is concerned only with colleges and universities that enroll substantial numbers of white students as well as minority students.”

¹¹ *Grutter, supra*, 123 S.Ct. at 2346 (“Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other states should draw on the most promising aspects of these race-neutral alternatives as they develop.”).

¹² Texas established a policy which generally guaranteed that high school graduates in the State of Texas who finished in the top ten percent of their graduating classes were guaranteed admission to the University of Texas. Commenting on this plan, Professor Loury wrote, “When courts or voters demand that student admissions be color-blind, they are not insisting that universities abandon the effort to achieve racial diversity. Indeed, this is exactly the point of the new programs, programs that voters applaud and judges accept” Glenn C. Loury, THE NEW REPUBLIC ONLINE (Dec. 9, 1999).

¹³ *Grutter, supra*, 123 S.Ct. at 2359 (THOMAS, J., concurring in part and dissenting in part); and Purdy, *supra* note 5 at 333-335.

¹⁴ A recent study purports to demonstrate actual damage to black students who were admitted to law schools as a result of race preference admissions. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (Nov. 2004).

¹⁵ Glenn C. Loury, THE AFFIRMATIVE ACTION DEBATE (George Curry, Ed.)(1996) at 63 (emphasis added).

¹⁶ *Id.* (emphasis in original).

¹⁷ *Grutter, supra*, 123 S.Ct. at 2352 (THOMAS, J., concurring in part and dissenting in part).

¹⁸ *See* selected quotations by Justice O’Connor in previous Supreme Court cases, found in the APPENDIX.