

## CHAPTER FOUR

### IS THE USE OF RACE REQUIRED?

Suffused throughout *THE SHAPE OF THE RIVER* is the authors' implicit suggestion that the American system of higher education is inadequately open to Americans of all races. While barriers remain based on all sorts of obstacles—societal inequities associated with cultural and/or socioeconomic disadvantage being among them—theirs is a surprisingly cynical view. It is particularly surprising coming from Derek Bok inasmuch as he has often characterized American higher education as the best in the world precisely *because* of its accessibility to members of all racial groups:

[W]e have built a system of higher education universally regarded as *the best in the world in terms of* the quality of research, the eminence of our leading universities, [and] *the access provided to all racial groups* and income strata, . . .<sup>1</sup>

He later echoed these same thoughts:

Our colleges and universities educate a greater proportion of young people than those of any other nation. *Our institutions of higher learning offer unequalled diversity* to fit the needs of a vast heterogeneous student population. . . . By almost any measure, then, higher education in the United States has no peer.<sup>2</sup>

These are hardly the words of one who believes American education limits opportunities for any young man or woman willing to work hard enough to take advantage of them, or suffers from any lack of “diversity.” Yet for all of Bok’s past praise for the American

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system of higher education, he and Bowen steer us down a destructive path with their effort to justify the use of race preference admissions.

Their bias in favor of race-conscious policies notwithstanding, two things stand out after a careful analysis of their work. The first is their utter failure to provide the promised “careful accounting of how race-sensitive admissions policies have been applied during their thirty-year history, and what their consequences have been.”<sup>3</sup> Nowhere do they provide any, much less a careful, accounting of how these policies have been applied or whether the policies have proven beneficial to anyone including, most particularly, their purported beneficiaries.

Their second and perhaps more obvious failure is that, while they do discuss the successes achieved by the black graduates who responded to their survey (successes which should surprise no one), nowhere do Bowen and Bok demonstrate that a single one of their respondents was admitted to his college because of his race.<sup>4</sup> In short, their conclusion that race-conscious admissions have proven beneficial to *anyone* is simply not supported by their data.<sup>5</sup> As one eminent expert, Dr. Finis Welch, has written, “there is no meaningful connection between the data, their analyses, and the stated objectives [of their study].”<sup>6</sup>

More hypocritical than disappointing is the fact that none of what Bowen and Bok conclude concerning the alleged benefits of racial preferences can be squared with the principled criticisms leveled against such preferences by a younger, more thoughtful Bok in the works previously mentioned.<sup>7</sup>

However, before focusing on the weakness of their conclusions, there are points of agreement which should be mentioned. First, and fundamentally, everyone agrees that talented black students have graduated from selective colleges and done well thereafter. Yet contrary to the authors’ conclusion that *but for* the color of their skin, these successful black students would not have been admitted to the elite schools Bowen and Bok studied, the evidence in their book more easily leads to the opposite conclusion. In fact, the most supportable conclusion one can reach after analyzing their work is that many if not most<sup>8</sup> of the black students who provided the data upon which the authors’ book is based, earned their college admission after meeting the same standards applied to every

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other student. In other words, it is equally, if not more, likely that race played little or no role in the successful outcomes Bowen and Bok report.

A second area of agreement is over the need to continue policies of *affirmative action* (as opposed to racial preferences), particularly as they relate to insuring fair and equal access to educational opportunities. But support for affirmative action does not translate into support for racial preferences. Nor does opposition to preferences equate to racism.

Bok has long understood this.<sup>9</sup> He has written extensively about the fact that the vast majority of white Americans, too often accused of harboring a suppressed racism, in fact broadly support practical measures to insure equal opportunity for every citizen.<sup>10</sup> This strong consensus is not the mark of a society dominated by racism. Indeed, few have argued more vigorously than Bok for strict adherence to the principle of “equal opportunity,” opposing, as we saw earlier, any consideration of race when it comes to hiring college faculty. However, for no compelling reason, he and Bowen conclude that this principle is not worth upholding when it comes to student admissions.

Turning to the substantial reasons for disappointment with *THE SHAPE OF THE RIVER*, perhaps nothing is more disappointing than the authors’ support for policies which betray a surprising level of condescension toward the academic skills of black Americans. It is a condescension whose kindest permutation has been described as the “soft bigotry of lowered expectations.”<sup>11</sup> Coming from eminent educators who profess to care deeply about the problems affecting the academic achievement of black students, their implication that but for the racial preferences granted by the most highly selective colleges and universities, black college aspirants are less likely to become truly talented professionals, is disappointing to say the least. That it is an unproven hypothesis goes without saying. The names of great black Americans disproving this are too numerous to mention.<sup>12</sup>

Another problem with *THE SHAPE OF THE RIVER* is the secrecy which surrounds the data that are reported. Bowen and Bok erect fences along their proverbial “river” and, apart from those who agree with their vision of the river’s shape, no others are permitted to navigate it. In short, and as previously discussed, both formal and

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informal requests for their data in order to subject it to independent analyses have been rejected by the authors.<sup>13</sup> It is a puzzling, if not unprecedented, position for any legitimate social policy researcher to take.

Moreover, Bowen and Bok report on a very limited journey. They leave vast and critically important educational landscapes unexplored. Again, the outcomes of graduates from the 28 schools they studied (schools which even they concede are not representative of American higher education<sup>14</sup>) are arguably not the outcomes which should most concern us. Rather, the concern should be the one more broadly described in their “Preface” (which they proceed to ignore):

[It is] the flow of talent—particularly of talented black men and women—through *the country’s system of higher education* and on into the marketplace of the larger society.<sup>15</sup>

That statement more accurately frames the problem. And it covers a much broader array of “higher education,” including technical schools, community colleges and less- or non-elite four-year colleges and universities, than the odd collection of 28 highly selective institutions chosen for study by the authors.

Based on their statement, above, shouldn’t their inquiry have been a much broader one? For example, what must America do within the context of this larger universe and how we can best insure the successful movement of all students of all races through our country’s system of higher education?

Many factors influence this flow of talent. Bok has devoted more than two decades to identifying several.<sup>16</sup> Together, he and Bowen identify several more.<sup>17</sup> But undoubtedly one of the most troubling factors is the persistent gap in academic achievement between majority and minority youth.<sup>18</sup> Combine this achievement gap (which Thomas Sowell and others persuasively argue has nothing to do with skin color)<sup>19</sup> with the academy’s goal of achieving racial balance, or *diversity*, and the recipe is fixed for the purported need for race preference admissions.

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One question, of course, is whether race preference policies help to bridge this gap. But, as many have argued, minority underachievement seems to be exacerbated rather than reversed by the existence of these policies. In plain words, if a black student knows that the level of academic achievement expected from him is demonstrably lower than that demanded from his non-black classmates, there is very little incentive to put in the work necessary to achieve at the same level as his competitors. As the late tennis star Arthur Ashe once put it, racial preference “tends to undermine the spirit of individual initiative. Such is human nature; why struggle to succeed when you can have something for nothing [i.e., without expending your best effort]?”<sup>20</sup>

It is a perverse and crippling situation which begets satisfaction with mediocrity as opposed to excellence when it comes to academic performance. And as Shelby Steele has written:

The most dehumanizing and defeating thing that can be done to black Americans . . . is to lower a standard in the name of their race.<sup>21</sup>

Bowen and Bok include an earlier quote from Steele along the same lines:

The effect of preferential treatment—the lowering of normal standards to increase black representation—puts blacks at war with an expanding realm of debilitating doubt, . . . that undermines their ability to perform, especially in integrated situations.<sup>22</sup>

Yet despite the authors’ obvious recognition of the problems created by lowering standards in the name of one’s race—which is the inevitable outcome every time race is used as a factor in admissions—they summarily dismiss it as disproven by their data.<sup>23</sup> But, of course, it is not disproven anywhere in their book because they never included a question intended to shed light on the subject.<sup>24</sup> Indeed, they

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only briefly and ever so delicately address the tragic consequences of these lowered standards,<sup>25</sup> citing the pioneering work of Signithia Fordham and the late John Ogbu:

One major reason black students do poorly in school is that they experience inordinate ambivalence and affective dissonance in regard to academic effort and success. . . [B]lack Americans . . . begin to define academic success as white people’s prerogative, and begin to discourage their peers, perhaps unconsciously, from emulating white people in academic striving, i.e., from “acting white.”<sup>26</sup>

Thereafter, the authors seem willfully to ignore why this may be so. Why do black American students actively seem to resist achieving academic excellence? Why do they view it as “acting white”? There is much more to say about this than either Bowen or Bok are willing to admit. Yet even they cannot avoid the obvious, quoting Hugh Price and the National Urban League who echo Fordham’s and Ogbu’s concern:

Pressure from peers not to achieve can undermine the best efforts of teachers and parents. Many have succumbed to the message that achievement is tantamount to ‘acting white’ and that they will succeed even if they don’t do well in school.<sup>27</sup>

This educational pathology which afflicts far too many black students is perhaps best described by former UC Berkeley linguistics professor John McWhorter.<sup>28</sup> And it is not, according to McWhorter, explained by poverty. In his highly acclaimed book, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA*, Professor McWhorter begins with the following observation:

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*[T]here is a misconception that the black scholarly lag is essentially a matter of poverty, and that outside that context, black students do as well in school as anyone else regardless of their SAT scores. It would be much easier for all of us if this were true, but it isn't. . .*<sup>29</sup>

McWhorter's view finds support from many quarters. Illustrative are the results from a recent study completed by The Roy Wilkins Center for Human Relations and Social Justice, part of the distinguished Humphrey Institute of Public Affairs at the University of Minnesota. It concluded that “[m]easures of school poverty do not exhibit consistently negative impacts on test scores, once other factors such as racial composition and ranking of schools is accounted for. . . Moreover, the marginal impacts of neighborhood poverty are negligible, and often statistically insignificant.”<sup>30</sup>

More strikingly, The Roy Wilkins Center found that “[t]he effects of *individual* poverty are only evident among white students. Even then the impacts are not substantial.”<sup>31</sup> Based on its data, the Wilkins Center concluded that “individual poverty does not appear to be the proximate cause of the low test scores of minority students.”<sup>32</sup> A follow-up report by The Wilkins Center further confirmed that “[p]overty is not at the root of racial gaps in test scores.”<sup>33</sup>

Professor McWhorter goes on to address what he and many other black leaders and educators<sup>34</sup> believe to be the over-riding explanation of black underachievement in school:

*The sad but simple fact is that while there are some excellent black students, on the average, black students do not try as hard as other students.*<sup>35</sup>

The reason they do not try as hard is not because they are inherently lazy, nor is it because they are stupid. . . The reason . . . is that all of *these students belong to a culture infected with an anti-intellectual*

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*strain, which subtly but decisively teaches them from birth not to embrace schoolwork too whole-heartedly.*<sup>36</sup>

Jazz critic-turned novelist, Stanley Crouch, puts it this way:

The idea that black kids have . . . [is] that being an ignorant, illiterate, D student is being a real black person.<sup>37</sup>

This “idea” is destructive to everyone. It is destructive to black youth for all the obvious reasons. It also is destructive to their non-black peers who, without understanding the reasons for it, observe that black students as a group seem to perform more poorly than students of other races. But this “idea” is too infrequently addressed because openly raising it is considered nothing less than traitorous when expressed by blacks, or racist when expressed by non-blacks.

Supreme Court Justice Clarence Thomas recognized this “tyranny of political correctness” in a notable speech which he delivered in February 2001 to Washington's American Enterprise Institute for Public Policy Research. After being “unwittingly candid” concerning what he thought to be “legitimate objections to a number of sacred policies, such as affirmative action,” Justice Thomas expressed his shock at the public reaction. “I had never been called such names in my entire life.”<sup>38</sup> He went on to note that those who raised questions suggesting doubt about these policies were “subjected to intimidation. Debate was not permitted. Orthodoxy was enforced. When whites questioned the conventional wisdom on these issues, it was considered bad form; when blacks did so, it was treason.”<sup>39</sup>

While the reaction to Justice Thomas' comments, and his consistent and principled stance against the use of racial preferences in any sphere of American life, has been strong, it was nothing like the storm of criticism which greeted more recent comments by prominent entertainer Bill Cosby.

At a gala held in Washington, D.C. on May 17, 2004, celebrating the fiftieth anniversary of the Supreme Court's decision in

*Brown v. Bd. of Education*, Dr. Cosby was the headline speaker. And speak he did. But instead of paying tired homage to the so-called benefits of *affirmative action* and race-conscious admissions, and suggesting that the continued existence of racial discrimination was to blame for the ills which continue to afflict black communities—he said something quite different. It was a speech directed towards the need for individual and family responsibility when it comes to educating children. It was notable because Dr. Cosby did not utter a single word about the need for a helping hand from anonymous white college presidents like Bowen and Bok via a preferential admission to Harvard, Princeton, or the University of Michigan.

A review of the transcript of Dr. Cosby’s remarks is equally notable for its lack of any reference to “diversity.” The word never appears. One had to come away from the gala believing that, at least in Dr. Cosby’s view, more “diversity” is not the answer to minority underachievement whereas learning to speak proper English might well be. In short, Cosby’s comments were a brief, partially comedic, but overall brutally harsh statement about why minority academic underachievement is *the* problem, along with some equally tough suggestions about what needs to be done to address it. Not a word in Cosby’s address suggested that white Americans in 2004 are responsible for, and have the power to change, the problems which Dr. Cosby has diagnosed,<sup>40</sup> which, of course, is not to say that all Americans don’t have a role to play in helping insure this sickness is healed wherever it may appear.

As Cosby and others have made clear, the prevailing orthodoxy has failed us all, and in particular black students. In what has become a painfully consistent pattern throughout the period of the 1990’s, at a time when race preference policies were firmly entrenched, the gap between the test scores of black and white students has widened. Recent reports show that the average black 17-year-old reads only about as well as the average white 13-year-old.<sup>41</sup> These are calamitous results which the use of racial preferences have done nothing to reverse.

Equally distressing is the gap in high school graduation rates between black students and their white and Asian American peers. In a recent study prepared for the Black Alliance for Educational Options (BAEO), noted researcher Jay Greene observed, not

surprisingly, that “children who fail to graduate from high school face a very bleak future.”<sup>42</sup> They are “more likely to become single parents and have children at young ages; and are more likely to rely upon public assistance or be in prison. In short, high school graduation is a very important predictor of young people’s life prospects.”<sup>43</sup>

Dr. Greene’s analysis shows, among other things, that among all black students who began the 1993 academic year as 8th graders in several of the nation’s most populous public school districts, fewer than half graduated from high school on schedule in 1998. Cleveland and Milwaukee had black graduation rates below 35 percent.<sup>44</sup> Entire states, Wisconsin and Minnesota among them, have recently reported black graduation rates barely reaching or exceeding 40 percent. These statistics alone demonstrate the fallacy of claiming that the three-decades-old race-conscious admissions policies praised by Bowen and Bok have done anything to measurably affect the educational disaster which is currently crippling our nation’s black students (and Hispanic and Native American students as well). Of course, it goes without saying that attending any college, much less a highly selective one, is out of the question for those who do not finish high school.

To whatever extent they are present, the problems described by Dr. Cosby, as well as by Professors Fordham, Ogbu, Sowell, McWhorter, and many, many others must emerge from the closet. And the idea described by Stanley Crouch must be changed if, as Professor McWhorter urges, we are to “forge effective solutions to the problem of the education of black students.”<sup>45</sup> Interestingly, few apart from Bowen and Bok have seriously suggested that the problem is related to too few black Ivy League graduates. The problem seems to be, as John McWhorter and Bill Cosby suggest, too few black students working hard enough to earn admission to such schools.<sup>46</sup> One also doubts that Cosby seriously accepts the premise, though Bowen and Bok apparently do, that black students *need* a “bonus” based on their skin color before they will be able to compete effectively for admission to a selective college.

At the same time, everyone agrees that every able black or Hispanic or Native American who graduates from Harvard or Princeton is a welcome result, but no more so than every able white

or Asian graduate, or the graduate from some other non-preferred ethnicity. Few, apart from Bowen and Bok, would argue that graduates from the so-called “elite” schools are inherently more valuable or successful than the graduates of every color and ethnicity from the thousands of less selective institutions which make a vastly greater contribution to the “river” of professionals which our society continually needs to replenish.

If our nation is to overcome rather than continue the pattern of avoiding the problems which plague all students, but particularly impact the education of black students, it will require some very hard work on everyone’s part. It also will require a cessation of the war being waged against judges and educators—and others—who have demonstrated the courage to question the prevailing orthodoxy so dominant in the views expressed by Bowen and Bok in *THE SHAPE OF THE RIVER*.

<sup>1</sup> Derek Bok, *BEYOND THE IVORY TOWER* (1982) at 59 (emphasis added).

<sup>2</sup> Derek Bok, *UNIVERSITIES AND THE FUTURE OF AMERICA* (1990) at 4 (emphasis added).

<sup>3</sup> TSR at 14 (emphasis added).

<sup>4</sup> Lest there be any misunderstanding, it is not my intent to dispute that among the black matriculants who graduated from the C&B schools studied by Bowen and Bok, and went on to successful careers, were students for whom race *was* a factor in their admission. But the fact remains that whether that number was 90 percent or 9 percent, no one can say. Nor can one make an educated guess based on the manner in which Bowen and Bok present their data.

<sup>5</sup> See generally, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.* 367 (Nov. 2004).

<sup>6</sup> See page 4 of Expert Report of Dr. Finis Welch, dated May 26, 2000, filed in *Grutter v. Bollinger, et al.*, USDC, Civil Action 97-75928 (E.D.Mich.). In addition, there have been several other excellent and scholarly critiques of *THE SHAPE OF THE RIVER*. See, e.g., Stephan and Abigail Thernstrom, *Reflections on The Shape of The River*, 46 *UCLA L. REV.* 1583 (June 1999); Linda Chavez, “Three Views of the River,” *Center for Equal Opportunity* (Nov. 1998); Robert Lerner, “The Empire Strikes Back,” *Center for Equal Opportunity* (Nov. 1998); Dave O’Neill, “Muddy River,” *Center for Equal Opportunity* (Nov. 1998); Roger Clegg, “Old Man Quota,” *Center for Equal Opportunity* (Nov. 1998); Shelby Steele, “We Shall Overcome-but Only Through Merit,” *THE WALL STREET JOURNAL* (Sept. 16, 1999); Terrance

Sandalow, *Minority Preferences Reconsidered*, 97 *MICH. L. REV.* 1874 (May 1999); Thomas Sowell, “Misshapen Statistics on Racial Quotas,” *THE AMERICAN SPECTATOR* (Apr. 1999); Hal R. Arkes, “Affirmative Deception,” *LIBERTY* (Mar. 1999); and Curtis Crawford, “Weighing the Benefits and Costs of Racial Preference in College Admission,” 37 *SOCIETY* 71 (May/June 2000). Also see *BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF SCHOLARS in Gratz* (Jan. 2003). A more recent critique is provided by Princeton University Lecturer Russell K. Nieli, “The Changing Shape of the River: Affirmative Action and Recent Social Science Research,” *NAS Research Paper* (Oct. 4, 2004).

<sup>7</sup> See, e.g., Bok, *supra* note 1.

<sup>8</sup> The authors themselves hypothesize that nearly 63 percent of the black matriculants in the ’76 cohort (the only cohort subjected to a complete study) would have been admitted under a race-neutral system. (TSR at 281) Indeed, their hypothetical race-neutral system considered only the applicants’ SAT scores (*id.*, at note 4) and gave no practical consideration to other so-called “preferences” like those given to athletes, artists, musicians, and sons and daughters of alumni, or to other soft factors such as overcoming economic or societal disadvantages, the latter of which clearly are a part of every selective school’s admissions criteria. With the possible exception of “legacy” preferences (although recognizing that even legacy preferences are race-neutral on their face), when these additional race-neutral “preferences” or “soft” factors are considered, it is not unreasonable to conclude that more than 63 percent likely would have been admitted without consideration being given to race.

<sup>9</sup> See, e.g., Derek Bok, *THE STATE OF THE NATION* (1996) at 187: “One can disagree with [the use of racial preferences in jobs and education] and still not harbor prejudice toward minorities or deny their right to equal treatment.”

<sup>10</sup> *Id.* at 187-190: “Whites are not against all practical measures to achieve equality. They do support anti-discrimination legislation. . . . The laws they oppose are ones that grant minorities a preference in getting jobs and applying to college. . . . Blacks themselves are much less likely to support . . . affirmative action than to affirm the principle of equal access to jobs and schools . . . In a democracy, public opinion must eventually count heavily in shaping the direction of policy. And in the case of . . . racial preferences, public opinion has been consistently opposed . . . by a wide margin.” See also Derek Bok, *Assessing the Results of Race-Sensitive College Admission*, *THE JOURNAL OF BLACKS IN HIGHER EDUCATION* (Autumn 2000) at 109:

“Seventy-five percent [of all Americans] do not want college admissions influenced by race.”

<sup>11</sup> See Jonathan Tilove, “Choice between Bush, Gore May Be Seen as Nation’s Crossroads on Race Policy,” *Newhouse News Service*, October 4, 2000. See also THE JOURNAL OF BLACKS IN HIGHER EDUCATION (Autumn 2000) at 106.

<sup>12</sup> Bowen and Bok cite, then conveniently ignore, the example of Dr. Martin Luther King, Jr., who graduated from historically black Morehouse College. TSR at 277 n. 1. The authors’ hindsight, as one might expect, is “20/20.” Surely Harvard and Princeton – and every other American college – would be proud to claim Dr. King as one of their own. But had young Mr. King’s application passed over the desk of either of the authors, is there any doubt what they would have recommended at the time?

<sup>13</sup> Russell K. Nieli, “The Changing Shape of the River: Affirmative Action and Recent Social Science Research,” NAS Research Paper (Oct. 4, 2004) at 47 n. 3: “In a highly unusual procedure, the Mellon Foundation designated the results of its College and Beyond survey as a ‘restricted access database,’ and to date it has not made the database available to any scholars known to hold views critical of affirmative action in higher education.”

<sup>14</sup> TSR at xxix.

<sup>15</sup> TSR at xxi (emphasis added).

<sup>16</sup> “Family structure, nutrition, employment opportunities, housing, and the prevalence of drugs. . .” Bok, *supra* note 9 at 186.

<sup>17</sup> “College grades may well be *less affected* by family income and parental education per se . . . than they are by the number of books at home, opportunities to travel, better secondary schooling, the nature of the conversation around the dinner table, and, more generally, parental involvement in their children’s education.” TSR at 80 (emphasis added). Also see Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (Nov. 2004): “[T]he data show that if blacks were admitted to law school through race-neutral selection, they would perform as well as whites [but] . . . there is nonetheless a very large black-white credentials gap among those applying to law school, and this gap does not disappear when one uses simple controls for such glib explanations as family income or primary-school funding. Researchers have made great strides over the past generation in accounting for the black-white gap in measured cognitive skills. The dominant consensus is that : (a) the gap is real, and shows up under many types of measurement; (b) the gap is not genetic, i.e. black infants raised in white households tend to have the same or higher cognitive skills as whites raised in the same conditions; and

(c) there are a variety of cultural and parenting differences between American blacks and whites (e.g., time children spend reading with parents or watching television) that substantially contribute to measured skill gaps.” *Id.* at 429, n. 175.

<sup>18</sup> See Jay P. Greene and Greg Forster, *Public High School Graduation and College Readiness Rates in the United States*, CENTER FOR CIVIC INNOVATION AT THE MANHATTAN INSTITUTE (Education Working Paper No. 3 -- Sept. 2003), Executive Summary: “[T]he main reason [blacks and Hispanics] are underrepresented in college admissions is that these students are not acquiring college-ready skills in the K-12 system, rather than inadequate financial aid or affirmative action policies.” Drs. Greene and Forster conclude that, “it seems likely that the primary effect of more aggressive affirmative action policies would not be to expand the college attendance of minorities but to change the existing distribution of minority college students. Affirmative action policies cannot increase the total number of minority students who are college ready. . . [G]iven that almost the entire pool of college-ready black and Hispanic students already enrolls in college, the only thing left for affirmative action to do is shuffle those students around from school to school. Intensified affirmative action policies might raise the number of black and Hispanic students at a particular school, but these gains would have to come almost entirely from losses at other schools.” *Id.* at Conclusion.

<sup>19</sup> See Thomas Sowell, *The Education of Minority Children* (undated)([www.tsowell.com/speducat.html](http://www.tsowell.com/speducat.html))(last visited Feb. 23, 2005): “[T]here are concrete examples, both from history and from our own times, of schools that have been successful in educating children from low-income families and from minority families. . . . Back in 1899, In Washington, D.C., there were four academic public high schools – one black and three white. In standardized tests given that year, students in the black high school [called the M Street School and later renamed Dunbar High School] averaged higher test scores than students in two of the three white high schools. This was not a fluke. . . . [F]rom 1870 to 1955 . . . [Dunbar’s black students repeatedly equaled or exceeded] national norms on standardized tests. . . . [I]ts academic performances on standardized tests remained good on into the mid-1950s. . . . Over the 85- year history of academic success of this school, . . . most of its 12,000 graduates went on to higher education. This was very unusual for either black or white high-school graduates of this era. Because these were low-income students, most went to a local free teachers college but significant numbers won scholarships to leading colleges and universities [including Harvard, Amherst College, Williams College, Wesleyan

University]. . . . The first blacks to graduate from West Point and Annapolis also came from this school.” Dr. Sowell goes on to explain how this 85-year history of unusual success was abruptly turned into typical failure, almost overnight, by the “politics of education.” *Id.* See, also, Frank T. Manheim and Eckhard Hellmuth, *Achievers Obscured by History: Black High Schools Summer and Lincoln Dominated Science Awards in Kansas City in the 1950s*, USBE & Information Technology I (June/July 2006) at 70.

<sup>20</sup> Larry Elder, *Colorblindness rejected by the Supreme Court*, WorldNetDaily (Jul. 3, 2003), quoting Arthur Ashe from his autobiography, *DAYS OF GRACE: A MEMOIR* (1993).

<sup>21</sup> Shelby Steele, *A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA* (1998) at 113.

<sup>22</sup> TSR at 261.

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., Nieli, *supra* note 13 at 27: “Incredibly Bowen and Bok never thought to place on their lengthy questionnaire any kind of question soliciting the views of their respondents to affirmative action policy and its beneficiaries. Their respondents were never even asked the crucial question of whether or not they favored ‘race-sensitive admissions’ as a way of increasing racial diversity on campus. . . . One suspects that the reason for the omission of such crucially important questions from Bowen and Bok’s survey was simply a fear of the answers.”

<sup>25</sup> See, generally, TSR at 72-81.

<sup>26</sup> TSR at 84.

<sup>27</sup> TSR at 85. Also see Hugh B. Price, *ACHIEVEMENT MATTERS: GETTING YOUR CHILD THE BEST EDUCATION POSSIBLE* (2002) at 35-36: “In a study that stirred up lots of controversy in the mid-1980s, two scholars named John Ogbu and Signithia Fordham described how low-achieving black high school students disparaged academic success as ‘acting white.’ The pressure knows no boundaries. It’s present in racially mixed and predominantly minority schools, inner-city, and suburban schools alike. . . . Say what black boys may about [academic] achievement not being cool, these widening disparities are calamitous for the African-American community.”

<sup>28</sup> McWhorter is currently serving as a Senior Fellow at The Manhattan Institute.

<sup>29</sup> John H. McWhorter, *LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA* (2000) at 100 (emphasis added).

<sup>30</sup> “Summary of Results: An Analysis of the 1996 Minnesota Basic Skills Test Scores,” *The Roy Wilkins Center for Human Relations and Social*

*Justice, Humphrey Institute of Public Affairs, University of Minnesota* (March 1997) at 2 (emphasis in original).

<sup>31</sup> *Id.* Indeed, Bowen and Bok grudgingly admit that even they were surprised “that the measure of socioeconomic status that we included in [their regression analysis], while statistically significant, had such modest effects on [academic performance in terms of] rank in class.” TSR at 80.

<sup>32</sup> See, full report, “Analysis of the 1996 Minnesota Basic Standards Test Data” (March 1997) at 22 (emphasis added).

<sup>33</sup> See “Racial Disparities in Minnesota Basic Standards Test Scores, 1996-2000,” *The Roy Wilkins Center for Human Relations and Social Justice, Humphrey Institute of Public Affairs, University of Minnesota* (October 16, 2000) at 8.

<sup>34</sup> See, generally, John U. Ogbu, *BLACK STUDENTS IN AN AFFLUENT SUBURB: A STUDY OF ACADEMIC DISENGAGEMENT* (2003).

<sup>35</sup> *Id.* at 15, 18: “. . . Black students did not work as hard as White students. \* \* \* [W]e can confidently say that Black students in Shaker Heights from elementary school through high school did not work as hard as they should and could to make better grades than their records show. The students themselves knew and admitted this.”

<sup>36</sup> McWhorter, *supra* note 29 at 100 (emphasis added).

<sup>37</sup> “A Jazz Critic and Novelist Riffs on Pop Culture, Politics, and Saving America from Nihilism and P.C. Stereotypes (Stanley Crouch Interview),” *THE AMERICAN ENTERPRISE* (Mar. 2001) at 15.

<sup>38</sup> Clarence Thomas, “Be Not Afraid,” *American Enterprise Institute for Public Policy Research* (Feb. 13, 2001).

<sup>39</sup> *Id.*

<sup>40</sup> See, generally, George E. Curry, *Bill Cosby Stands behind Critical Comments*, *ATLANTA DAILY WORLD* (May 27, 2004); John H. McWhorter, *Bill Cosby Can’t Say That, Can He?*, *THE DALLAS MORNING NEWS* (June 3, 2004); Walter Williams, *Three Cheers for Bill Cosby*, *CAPITALISM MAGAZINE* (Jun. 2, 2004); *THE BLACK COMMENTATOR* (Issue 93 – Jun. 3, 2004), *Bill Cosby’s Confused Notions of “Responsibility.”* One of the principal critics of Dr. Cosby’s remarks who was also present that evening was Theodore Shaw, head of the NAACP Legal Defense and Educational Fund and a former law professor at the University of Michigan Law School. While at Michigan, Shaw helped draft the admissions policies which were litigated in *Grutter*. Shaw suggests that the need for racial preferences will be with us for at least another 100 years: “We’re not going to see the problem of race end in the 21<sup>st</sup> century.” Sarah Lewis, “Shaw discusses affirmative action policies,” *THE MICHIGAN DAILY* (Jan. 26, 1999).

## Getting Under the Skin of “Diversity”

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<sup>41</sup> See governmental findings reported by Kate Zernike in “Gap Widens Again on Tests Given to Blacks and Whites, Disparity Widest Among the Best Educated,” THE NEW YORK TIMES (Aug. 25, 2000) at A1, A14.

<sup>42</sup> See HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES, a report by Jay P. Greene, Ph.D., Senior Fellow, The Manhattan Institute for Policy Research (April 2002).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, at Table 8. At least fifteen of the 50 largest public school districts in the U.S. graduated fewer than one-half of their African American students.

<sup>45</sup> McWhorter, *supra* note 29 at 100.

<sup>46</sup> The problem is not only poor high school graduation rates, particularly among black, Hispanic and Native American youth, but the low proportion of minority graduates who are “college ready.” See generally Greene and Forster, *supra* note 18. Drs. Green and Forster determined that for the public high school class of 2001, only 51% of black students, 52% of Hispanic students, and 54% of American Indian students graduated, as compared with 79% for Asian students and 72% for white students. The comparable “college-ready” percentages were: black students (20%), Hispanic students (16%), American Indian students (14%), Asian students (38%) and white students (37%). *Id.* at “Executive Summary.” The gaps in both rates explain, in the authors’ view, the “underrepresented” status of black, Hispanic and Native American college students. It is a status which, according to Drs. Greene and Forster, cannot be solved with more aggressive affirmative action policies. *Id.* at Conclusion.