

CHAPTER SIX

ILLUSIONS AND EVASIONS IN “THE SHAPE OF THE RIVER”

You only learn the shape of the river; and you learn it with such absolute certainty that you can always steer by the shape that’s in your head, and never mind the one that’s before your eyes.

Life on the Mississippi (p.86)

Ominous are the tactics of those who have a clear and righteous vision of the ideal statistical order.

*Albert Shanker*¹

Abraham Lincoln once called the proposition that “all men are created equal” the father of all moral principles within us.² Yet it took almost a century after Lincoln’s death to convince our nation’s leading judges and educators of the importance of this principle. Sadly, many in both professions, Bowen and Bok among them, seem to have abandoned it.

Now more than ever, America needs educators and judges with an unwavering commitment to this principle, a principle which, as Thurgood Marshall argued in *Brown v. Bd. of Education*,³ must be “color-blind” in its application.⁴

Bowen and Bok are not blind to color. Instead, they argue that skin color is an important factor to consider when making college admissions decisions. Indeed, the subject of their study is foreshadowed in the subtitle to their book, “Long-Term Consequences of Considering Race in College and University Admissions.” To Bowen and Bok, the consequences are good. Their conclusion is premised on the following implicit assumptions:

1. Each of the highly selective colleges and universities which they studied used racial preferences to admit black students; and
2. The black graduates *for whom race allegedly made a difference* in their admission went on to have successful post-graduate and professional careers.

The first premise is undoubtedly accurate for certain schools studied by the authors. For example, the policies at the University of Michigan at the time Bowen and Bok were conducting their study were clearly among the most overtly race-conscious. But the authors’ implication that every school among the 28 they studied used race in admissions is not supported by the evidence they offer.

Likewise, their second premise is surely accurate for some individuals. There undoubtedly were black graduates from the 28 schools who, but for their race, would not have been admitted. Again, the University of Michigan provides irrefutable proof of that. Yet nowhere do the authors show that *any* of the reported post-graduate and professional successes were achieved by students for whom race demonstrably made the difference in their respective admission.⁵ Without this empirical support, the authors’ conclusion that there are long-term benefits to considering race in admissions becomes meaningless.

In what should be obvious to everyone, talented black students like talented students of every race have graduated from highly selective colleges and universities and done well thereafter. The surprise is that Bowen and Bok felt it necessary to even study the question to determine that it was true.

Notwithstanding the specific weaknesses of their study (addressed in large measure in this Chapter and in the chapter which follows), proponents of race preference admissions policies suggest that Bowen and Bok have provided the definitive work in support of such policies.⁶ In fact, even the authors admit they have done no such thing.⁷

Another weakness is the important set of questions they leave entirely unasked. For example, which of our nation’s colleges and universities constitute the most prolific pipeline for talented black students who go on to earn doctorates and other professional degrees? What distinguishes the environments at the schools which succeed in producing successful black graduates from those which are less successful in that effort?

Recall that the authors’ principal concern is over “the relative scarcity” of talented black professionals.⁸ They conclude that America needs “high-achieving black graduates who will provide leadership in every walk of life.”⁹ No reasonable person disagrees. America does need high-achieving graduates regardless of race—but ideally including *every* race—who will provide this country’s future leadership.

How does America best achieve that goal? And how, if the authors wish to focus on one specific racial group, is that best accomplished? Most importantly, does this goal require the use of race-conscious admissions? Or, as recently argued by UCLA law professor Richard Sander, do such policies actually frustrate its achievement and, to make matters worse, cause measurable harm to the purported beneficiaries?¹⁰

These are among the questions which should have been more thoroughly evaluated, but weren’t.¹¹ The authors’ failures in this regard are reason enough to pay scant attention to what they’ve written. But they are not their most serious failures.

ILLUSION NO. 1: EVERY SCHOOL WHICH BOWEN AND BOK STUDIED USED RACE-CONSCIOUS ADMISSIONS.

Implicit in their work is the suggestion that each of the 28 schools they studied considers “minority status” as a factor in admissions. Like so much else contained in their book, this is nowhere proven in *THE SHAPE OF THE RIVER*.

In fact, neither the specifics of any particular admissions policy nor the manner in which any of the schools considered race (if at all) is ever mentioned, much less analyzed.

Of course, analyses from the litigation surrounding the undergraduate and Law School admissions policies at the University

of Michigan confirmed that racial preferences were undoubtedly employed at one of the schools studied. Apart from Michigan, however (which we learned about through litigation and not through their book), the degree to which race was employed by any other school in the authors’ database is simply not addressed. As a result, one cannot draw any conclusions from *THE SHAPE OF THE RIVER* as to whether a particular college or university actually used, or even needed to use, race in order to enroll a racially diverse class. Consider the following example.

BRYN MAWR COLLEGE

Bryn Mawr College is among the most selective of the schools studied by the authors. Contrary to the authors’ implicit suggestion that Bryn Mawr’s successful black graduates were recipients of racial preferences when it came to their admission, the evidence suggests something quite different.

In the first place, unlike the University of Michigan and several of the other 28 schools, which for years openly have claimed to consider “minority status” as a factor—indeed, in Michigan’s case, an *important factor*—in admissions,¹² Bryn Mawr expressly denies that it uses race.¹³ The College’s historical rejection of race as a factor in admissions finds substantial support in a 1995 doctoral thesis completed by Dr. Lisa Ellen Wolf-Wendel.¹⁴

In her lengthy analysis of the nation’s best women’s colleges, Wolf-Wendel found Bryn Mawr to be among the nation’s top schools in terms of being the baccalaureate-granting institution for successful female Ph.D.s. More importantly, it was one of only two institutions in the top ten for each of the three racial/ethnic groups evaluated (blacks, whites, and Latinas).

In Wolf-Wendel’s study, Bryn Mawr’s diversity was nowhere mentioned as a factor in the excellent results achieved by the College. To the contrary, Wolf-Wendel attributed Bryn Mawr’s success to its strict adherence to admissions policies which are not altered simply for the purpose of admitting more students of color.¹⁵

Other evidence that Bryn Mawr does not use racial preferences is found in data which compare the College’s relative rate of acceptance for black applicants when compared to its acceptance

rates for applicants from other racial or ethnic groups. By way of example, the College’s acceptance rate for black applicants in the fall of 2000 was forty-six percent as compared with an overall acceptance rate of sixty-two percent.¹⁶ Many selective colleges which employ racial preferences show percentages which are reversed (i.e., percentages which significantly favor the admittance of black applicants).¹⁷ While one must be cautious in drawing conclusions from these statistics for the simple reason that they do not take into consideration the differing academic or other qualifications present within the various pools of students,¹⁸ relative “acceptance rates by race” are nevertheless viewed by some educators as indicative of a school’s commitment to enroll black students.¹⁹

As they do for each of the 28 schools they studied, Bowen and Bok imply that race played a role in the admission of black students to Bryn Mawr. Yet the evidence suggests the opposite. And if the latter is true, *that* should be a fact which makes both the College and all of its graduates—including its black graduates—proud.

Bryn Mawr also may be among the colleges implicated in one of the authors’ more intriguing findings, found buried in one of their footnotes. Therein Bowen and Bok report that three unidentified schools, “all liberal arts colleges with small black enrollments,” showed no evidence of black academic underperformance.²⁰

With black academic underperformance being cited as a pervasive problem, the importance of this finding cannot be overstated. Several key questions spring to mind:

1. What factors led to the academic success of the black students at these three institutions (and why do they remain unidentified)?
2. Why does it appear (at least from what little is disclosed) that a “small black enrollment” per se did not negatively impact the academic performance of the black students at these three unidentified schools?

3. To what extent, if at all, was race considered as a factor in admissions to each of these three schools?

The importance of evaluating and answering these questions should seem obvious. First, if black academic underperformance is reduced or eliminated at schools which place the least emphasis (or, indeed, no emphasis at all) on race, shouldn’t the readers be told that?²¹ Indeed, isn’t this the sort of critically important evidence which should be considered before advocating for the continued use of race-conscious admissions?

Furthermore, the campus life for black students at these three unidentified predominantly white colleges when compared with the campus life at all of the other C&B schools, including the four pre-eminent historically black colleges and universities (the data for the latter being available to, but ignored by, the authors), may well have warranted specific study. This is particularly true in light of the following observation by Mary Patterson McPherson, Bryn Mawr’s former president:

[I]n [my] experience, the black students who were the most comfortable at whatever college they attended also tended to be the most successful academically.²²

While impossible to confirm, one might reasonably suppose that Bryn Mawr was among the three colleges which showed no evidence of black underperformance. First, it is a liberal arts college with a small black enrollment.²³ Furthermore, as Wolf-Wendel noted in her thesis, Bryn Mawr’s black graduates were among the most successful in the country due, in part, to her observation that the College refused to alter its demanding admissions requirements simply to achieve greater racial diversity. Could it be, then, that notwithstanding the relatively low number of black students at Bryn Mawr, and its relative lack of *racial diversity*, the College’s black students still proved to be among the “most comfortable” and at the same time among the “most successful academically” of all the black students studied by Bowen and Bok? That all this may have occurred

at one of the most highly selective schools in their database, and at a college which, the evidence suggests, refused to employ race-conscious admissions (or, at a minimum, may have placed the least emphasis upon race among all the colleges studied), would certainly seem to be worthy of more than a footnote in their book. One wonders why the authors did not pay more attention to these three unnamed institutions and explore the questions raised above.

Because the data to answer at least some of these questions were available to the authors, their failure to perform these inquiries seems inexcusable. Thankfully, though, others have provided some answers. For example, in addition to her analysis of Bryn Mawr, Wolf-Wendel also evaluated Pomona College, another highly selective college which reportedly adheres to strict admissions standards which are not altered merely to increase the enrollment of students of color.

[O]ne of the hallmarks of Pomona seems to be that the college doesn't like to make distinctions between groups of students. In fact, the general belief expressed by both faculty and administrators is that what is expected from one group of students is expected of everyone. In other words, when respondents stated that they had high expectations for Pomona students, they meant all of their students, regardless of race or gender. To demonstrate this point, a student of color told me that from her experience, “When you become part of this community, the same cultural expectation level you find for European Americans are [sic] placed on you as well.”²⁴

As both Shelby and Claude Steele (and others) remind us, placing the same expectations upon a student of color should be the norm. Yet race preference proponents like Bowen and Bok seem unable to grasp the importance of this simple policy. Of course, expecting the same standard of achievement from all students should

begin long before college. It should begin and continue throughout one's K-12 schooling. And there is no reason why the *same* high expectations should be suspended during the college admissions process.

ILLUSION NO. 2: THE SUCCESS STORIES WHICH BOWEN AND BOK REPORT WERE ACHIEVED BY BLACK MATRICULANTS WHOSE RACE MADE A DIFFERENCE IN THEIR RESPECTIVE COLLEGE ADMISSION.

A second illusion in THE SHAPE OF THE RIVER is that the professional success stories reported therein were achieved by black students for whom race made a difference in their college admissions.

Nowhere is the authors' analysis more clearly flawed than in their discussion of the hypothetical 700 black students (out of a total of 1,860 black matriculants who entered the 28 schools studied in the fall of 1976) whom Bowen and Bok claim would have been “retrospectively rejected” had race not played a role in admissions.²⁵

The authors assert that these “700 retrospectively rejected” black students became doctors, lawyers, and business and community leaders in numbers which one can only describe as extraordinary. In fact, if the numbers reported by Bowen and Bok are to be believed, the “retrospectively rejected” black students significantly outperformed the far larger—and presumably more highly qualified—number of black graduates for whom race played no role in admission.

The authors' literary sleights-of-hand are frustrating. If the authors intended readers (and Supreme Court justices) to take anything away from THE SHAPE OF THE RIVER, it unquestionably was to be their “documented”²⁶ proof that racial preferences work precisely because those students who receive them go on to do as well as their white and Asian American classmates and, for that matter, their black classmates who did *not* need a preference. There can be no other conceivable purpose for their work. Yet their book is devoid of a single fact proving that any black student who responded to their survey was admitted to his school because of the conscious consideration of his race.

Unfortunately, readers of *THE SHAPE OF THE RIVER* are sometimes fooled as to what Bowen and Bok actually “documented.” What they *report* they documented were the alleged accomplishments of the nearly 1,900 black matriculants who entered the schools in the fall of 1976,²⁷ including “approximately 700 black matriculants whom,” they estimate, “would have been rejected had [a race-neutral] standard been in effect.”²⁸

Readers were then told that Bowen’s and Bok’s analysis suggested that the estimated 700 “retrospectively rejected” black students went on to accomplish the following:

- Over 225 who went on to attain professional degrees or doctorates.
- About 70 doctors, and roughly 60 lawyers.
- Nearly 125 business executives.
- Well over 300 leaders of civic activities.
- Average earnings exceeding \$71,000.
- Almost two-thirds of whom were very satisfied with their undergraduate experience.²⁹

These are impressive results. Unfortunately, they do not reflect real people.

In fairness to readers of their book, many have been misled by these numbers. Many intelligent readers, including two law professors who testified at trial in support of the Law School’s race-conscious admissions policies, believed that Bowen and Bok were in fact documenting the accomplishments of actual individuals for whom race demonstrably played a role in their college admission.³⁰ In fact, one of them, University of Michigan law professor Richard Lempert, noted that he believed this to be a significant difference

between *THE SHAPE OF THE RIVER* and a similar Michigan Law School study which he and several colleagues later conducted. As Lempert wrote:

Until recently *very little was known* beyond anecdote and impression *about the careers of many cohorts of students of color who have been admitted to the nation’s colleges and professional schools under various race-conscious admissions programs.* [Footnote omitted.] For one important group of students of color, this gap has recently been filled. [Citing *THE SHAPE OF THE RIVER*.] . . . Bowen and Bok document that attending a selective undergraduate institution has profound benefits for *black students admitted under race-conscious admissions programs.*

* * *

. . . [U]nlike Bowen and Bok, we do not attempt . . . to identify which minority graduates would and would not have been admitted . . . if race and ethnicity had not been taken into account.³¹

Of course, Bowen and Bok didn’t either.

The only truth is that (just like Lempert and his colleagues in their study of Michigan’s minority law graduates) neither Bowen nor Bok knew whether any of their black survey respondents would, or more importantly *would not*, have been admitted had their race not been taken into account. In fact, Bowen and Bok offer no proof that any of the “retrospectively rejected” black matriculants actually graduated from the C&B school to which they were initially admitted.

As it turns out, the so-called “70 doctors,” “60 lawyers,” “125 business executives,” and “well over 300 leaders of civic activities” who reportedly came from the “retrospectively rejected” group turn

out not to be real persons at all. They were mere statistical projections,³² and highly suspect ones at that. As outlined in a report prepared by distinguished Texas A&M University economist, Dr. Finis Welch, there appeared to be serious and fundamental errors in the authors’ calculations which cast doubt on every number they reported above.³³

Even without the ability to review the authors’ underlying data, one is nevertheless able to calculate certain things. For example, accepting the authors’ representation that 65.9 percent of the 1,860 black matriculants in the ‘76 cohort graduated from their first school,³⁴ that leaves 634 who did not. One can reasonably assume that to the extent traditional college admissions criteria mean anything (and clearly Bowen and Bok believe they mean a lot, and impact many things including graduation rates), a significant if not overwhelming percentage of the 634 non-graduates may likely have been among those who were preferentially admitted. And if that is true, the authors’ “documented” accomplishments for the “retrospectively rejected” group are simply implausible.

Consider the numbers provided by Bowen and Bok and assume that the 700 “retrospectively rejected” matriculants graduated at the same rate the authors report for the entire cohort.³⁵ At that rate, 462 would have graduated within six years from their school.³⁶ From that number, Bowen and Bok tell us that there were “over 225 doctorates or professional degree holders” or almost 49 percent of the 462 “retrospectively rejected” graduates. If true, the “retrospectively rejected” group would have dramatically outperformed the overall cohort which reported only 40 percent with such accomplishments.³⁷

Stated another way, the authors’ data suggest that those black matriculants with the *highest* entering qualifications³⁸ obtained postgraduate and professional degrees at a rate significantly *lower* than those black matriculants who entered college with the *lowest* academic qualifications.³⁹ This is a conclusion which defies all logic.⁴⁰ It also flies in the face of the authors’ own analyses which demonstrate a direct relationship between a student’s SAT score and GPA and later undergraduate and post-graduate success.⁴¹

For that reason, the numbers Bowen and Bok report on the “accomplishments” of the “retrospectively rejected” group simply defy common sense.⁴²

In the final analysis, Bowen and Bok “documented” nothing which supports their conclusions about the so-called benefits of considering race in college admissions.

It also is worth noting that the authors’ estimate concerning the number of black matriculants in the 1976 cohort who would have been admitted under a hypothetical race-neutral system is eerily similar to the black graduation rate which they report.⁴³ These same numbers suggest—though they clearly do not prove—that the academically less-qualified black matriculants (i.e., those for whom race likely played a role in their admission) formed the bulk of those who failed to graduate from the school to which they were initially admitted. If test scores and academic preparation are any indication of the likelihood of one’s ultimate success in college (a position clearly supported by the authors’ data⁴⁴ as well as by more recent studies⁴⁵), the close symmetry between the number (approximately 700) of “retrospectively rejected” matriculants and the number (634) of black matriculants who failed to graduate within six years from their first school is too close to ignore.

Also assume the accuracy of the authors’ estimate—that nearly two-thirds of the black matriculants in the 1976 cohort would have been admitted under a race-neutral system. “Response bias” being what it is,⁴⁶ why should one suppose that a significant number of the successes were reported by matriculants who received a racial preference as opposed to coming largely, if not exclusively, from those for whom race made no difference in admissions? Nowhere do the authors answer that all-important question.

And make no mistake, *that is the question*. After all, if the vast majority of the successful black matriculants were not recipients of racial preferences, what is the purpose behind the authors’ continued support for these policies?

As noted earlier, Bowen and Bok surprisingly admitted that they had no idea who among the black students they studied were recipients of a racial preference. This striking post-publication admission is found in an article which the apologists for racial preferences have all but ignored. To those who have endlessly believed and repeated the many unproven propositions contained in THE SHAPE OF THE RIVER, here is what Bowen and Bok wrote in

response to a review of their work by a highly respected former dean and a law professor at Michigan’s Law School:

There is absolutely no way of knowing when race was and was not dispositive (or, to put it another way, which African-American candidates would have been admitted had they been white).⁴⁷

They go on to say, incredibly, that “[t]his is an impossible assignment,” and that no one can answer such questions, “not even the admissions committee who made the decisions.”⁴⁸

Can they be serious?

Michigan Law School Professor Terrance Sandalow doesn’t think so. As he wrote in response, “it blinks reality to claim that admissions officers are generally unaware whether race has played a decisive role in a decision to admit a black applicant.”⁴⁹ Worse, it is patently untrue. For example, nothing could have been easier than to determine when race was or was not dispositive in any given admissions decision under Michigan’s former undergraduate system. Whether it took 90 or 100 points to be admitted to Michigan’s freshman class in, say, 1998, it would have been a simple task to examine the applications of all underrepresented minority students who were admitted, subtract from their respective applications the twenty points awarded solely for their race or ethnicity, and from that determine the number who would have been “retrospectively rejected.”

Even as to the better camouflaged “holistic” system employed by Michigan’s Law School, if race is to be considered, indeed, *must* be considered as an “important” factor,⁵⁰ someone must know how to do it. In other words, someone must know how much weight to give to “race” relative to other “important” factors; and most importantly, someone must know when race made the difference in whether a particular applicant is admitted or rejected. If admissions committees vested with this responsibility cannot tell us how race is to be applied, and when it may have made the difference in a particular admissions decision, who can?⁵¹

Finally, if it were really true that no one could tell the authors how race was factored into admissions decisions, what is the need, much less the justification, for continuing to consider it?

The authors’ defensive—indeed, incredible—response to Professor Sandalow’s criticisms simply undermines any reliance on their conclusions. In initially explaining why they could not possibly know when race was a dispositive factor in any student’s undergraduate admission, they offered the following:

In choosing to admit particular individuals within each of these [SAT] ranges, the admissions offices of the schools in our study presumably took into account a multitude of other factors including high school grades, courses taken, socio-economic status, letters of recommendations, region of the country, athletic skills, other extracurricular activities, leadership potential, and on and on and on.⁵²

With all the factors Bowen and Bok cite, one must ask why race is, or ever need be, relevant. On the other hand, they no doubt are correct when they suggest that given the broad range of factors which selective schools routinely consider, it is doubtful that any single *objective* factor is dispositive (with the possible exception of athletic or some other unusual skill). But as we know from the evidence developed during the litigation surrounding the University of Michigan, race clearly *can* be dispositive.⁵³

For what it’s worth, color-blind “preferences,” such as the preference for athletes and even legacy admissions, are legion and apply to the 28 schools Bowen and Bok studied just as they do at many less-selective institutions. Consider this example:

I was a pretty big deal on my high school hockey team. I figured I’d go to the state university with a bunch of my buddies. Then, for the hell of it, I applied to Harvard.

*I didn't have the grades or the test scores,
but they let me in. They needed a forward.*⁵⁴

One does not need a degree in nuclear physics to figure out what was “determinative” insofar as this student’s admission to Harvard was concerned. Being the “needed forward” for Harvard’s highly competitive Division I hockey team explained it. The student knew it, and the director of admissions at Harvard (along with Harvard’s head hockey coach) no doubt knew it; just like the director of admissions would likely know when race made a difference.

On this point, one can, of course, persuasively argue that any admitted applicant who possesses a unique talent, be it in athletics, music, or the arts, is in no way the recipient of a “preference.” The student is simply being rewarded for his or her extraordinary skill in a field which may be valued by the particular institution, in much the same way that academic excellence is valued. It is nowise similar to using race as a factor in admissions. Race, whatever else it may be, is certainly not a “skill.”

Even Bowen and Bok seem to agree, particularly when it comes to preferring applicants with exceptional athletic skills. They point out that the “preferences” given to athletes, which the authors continue to support, are entirely distinguishable from those given to minorities based on race:

In our view, preferences for athletes . . . rest on grounds (presumed benefits to the institution of athletic competitions . . .) sufficiently different from those relating to minority applicants that *they cannot serve as a justification for the use of racial preferences in admissions.*⁵⁵

Similarly, it is no secret that extraordinary musical or artistic talent can be dispositive in a particular admissions decision.⁵⁶ There is no sin or injustice in that. There also is no doubt that Harvard, and virtually every other selective institution, may give extraordinary, sometimes dispositive, weight to the fact that an applicant is a world-class hockey player, pianist, or cellist regardless of his or her

standardized test scores. But when race is dispositive, it is *never* objective—and thus it is fundamentally unfair—for it quite literally means that another person who may be more qualified in every respect, and thus more qualified overall, ends up being discriminated against solely on the basis of her skin color.

We know from the former Law School dean’s sworn testimony in *Grutter*⁵⁷ that this is precisely what was happening at Michigan’s Law School under the admissions plan approved by Justice O’Connor.

THE “HARVARD PLAN”

The authors also make much of the supposed distinction between “quotas and set asides,” which they claim to oppose, and “a much more nuanced approach,” which they claim to favor. They criticize commentators like Professor Thomas Sowell who happen to believe that no such distinction exists.⁵⁸ According to the authors, a *more nuanced approach* is found in the so-called “Harvard Plan,” which Bowen and Bok claim was central to the late Justice Lewis F. Powell’s opinion in the earlier landmark Supreme Court case of *Regents of the University of California v. Bakke* (“*Bakke*”).⁵⁹

For those unfamiliar with the Harvard Plan, a description was provided in the 1977 “Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as *Amici Curiae*” in *Bakke*.⁶⁰ What actually was appended were bits and portions from reports allegedly relating to Harvard admissions, some of which dated back to 1960. Indeed, much of the language cited by Justice Powell appeared to have been crafted by lawyers, not admissions personnel. It referenced concepts of “diversity” which, by the express words found in the Appendix, go back “for the past 30 years.”⁶¹ Since the *Bakke* case was argued before the Supreme Court in October, 1977, that would date some of these alleged Harvard policies as early as 1947, if not earlier. Interestingly, the only portions of the Appendix which appear to actually quote from a Harvard document make no mention whatsoever of an applicant’s race.

Representative of what appeared to be a laudable (though, as we later learned, may actually have been a deceptively anti-Semitic)⁶² admissions plan were these statements:

Faced with the dilemma of choosing among a large number of “qualified” candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years the Committee on Admissions has never adopted this approach. The belief has been that if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence and that the quality of the educational experience offered to all students would suffer. (Citing to the 1960 Final Report of W. J. Bender, Chairman of Admission and Scholarship Committee and Dean of Admissions and Financial Aid.) Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty---perhaps 150 or so out of an entering class of over 1,100---the Committee seeks variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . *The effectiveness of our students’ educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements.*

(Citing to 1968 Final Report of Dean of Admissions Fred L. Glimp.)⁶³

The apparently lawyer-crafted portions of the Appendix admittedly go on to state that “in recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students” and admits that, “[i]n practice, this new definition of diversity has meant that race has been a factor in some admissions decisions.”⁶⁴ However, as the Appendix (and later documents as well⁶⁵) described it, “the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.”⁶⁶

Avoiding altogether the urge to inquire what the drafter of that last statement may have meant, or what assumption, if any, the drafter may have made about the presumed “races” of the aforementioned “Idaho farm boy” or the newly-recruited “Californians or Louisianans,” it seems quite clear that Harvard was not in any sense referring to a policy whereby differing admissions standards were to be applied when it came to considering a candidate’s race (although, in practice, that is precisely what must be done any time “race” is being considered). Harvard’s facially benign intention to consider race as nothing more than a “tie-breaker” between candidates presenting substantially equal qualifications is seemingly borne out in the Appendix’s final paragraph. In it, Harvard’s Admissions Committee is hypothetically “forced to choose” one of three remaining candidates, two black, one white. The first black student is described as “the child of a successful black physician in an academic community with promise of superior academic performance,” the second as “a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power.” The Appendix then describes a situation in which the third student, a

“white” student with “extraordinary artistic talent,” might be given an edge over the two black students.⁶⁷ After reciting the above, the so-called “Harvard Plan” concluded with this:

[T]he critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.⁶⁸

From this, of course, one easily could argue that given the specific example cited, race *in and of itself* ends up being of little or no significance under Harvard’s purported admissions scheme. In the end, it isn’t race which distinguishes these hypothetical black and white applicants from one another, it simply is a matter of deciding which of these three interesting and talented individuals is going to be selected. The first black candidate is likely to be the best scholar. The second offers a background marked by socioeconomic disadvantage coupled with a unique ideology which Harvard apparently found intriguing. The third candidate, who happens to be white, is an extraordinary artist. Switch the colors around in any manner one chooses and the decision remains the same, and just as difficult. And race should not matter.

Of course, as any lawyer knows, neither *Bakke* nor *Grutter* had anything to do with Harvard or its admissions system. Yet both Justices Powell (in *Bakke*) and O’Connor (in *Grutter*) point to the Harvard Plan as a model when it is patently clear that neither of the challenged *professional school* admissions programs (at UC Davis Medical School and the University of Michigan’s Law School) remotely resembled the purported Harvard College *undergraduate* admissions program.⁶⁹ As Harvard also has made clear over the years since *Bakke*, its use of, or “tip” for, race or ethnicity comes into play *only* in cases “where all other factors are substantially equal for two candidates.”⁷⁰ A close reading of Justice Powell’s opinion seems to confirm that he, too, interpreted Harvard’s plan to function in those situations where the candidates *were* deemed substantially equal,⁷¹ a situation dramatically different from that presented in both *Bakke* and *Grutter*.

Moreover, *Bakke* involved a patently obvious quota system, first put into place in the early 1970’s at the University of California-

Davis Medical School. And while Harvard’s alleged system was of obvious interest to Justice Powell as a means of justifying his “diversity” rationale, the distinction which he (and Bowen and Bok) drew between Harvard’s system and a straight quota system found little support from Powell’s otherwise sympathetic brethren in *Bakke*. Indeed, Bowen and Bok once again are guilty of selectively pointing to Justice Powell’s words while ignoring those of Justices Harry Blackmun and William Brennan, both of whom expressed no problem with UC Davis’ use of race as a factor in admissions. In fact, both voted to uphold the quota system at issue in *Bakke*.

Justice Blackmun wrote:

I am not convinced, as Mr. Justice POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound or constitutionally significant. The line between the two is a thin and indistinct one.⁷²

For his part, Justice Brennan said essentially the same thing:

For purposes of constitutional adjudication, there is no difference between the two approaches. . .⁷³

* * *

The “Harvard” program, as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. . .⁷⁴

In language reminiscent of both Justice Souter’s and Justice Ginsburg’s separate dissents in *Gratz*,⁷⁵ Justice Brennan also noted in *Bakke* that:

It may be that the Harvard plan is more acceptable to the public than is the Davis “quota.” . . . But there is no basis for preferring a particular preference program simply because in achieving the same goals that the Davis Medical School is pursuing, *it proceeds in a manner that is not immediately apparent to the public.*⁷⁶

Or, as Justice Blackmun described it, Harvard’s plan “may accomplish covertly what Davis concedes it does openly.”⁷⁷

Little wonder, then, that Justice O’Connor, like Bowen and Bok, found the Harvard Plan appealing—in the same way her mentor Justice Powell did in *Bakke*.⁷⁸ Unfortunately, neither she nor Justice Powell (who had appended the Plan to his opinion in *Bakke* 25 years earlier) took the time to recognize the sinister anti-Semitic purposes underlying the original adoption of Harvard’s Plan.⁷⁹ As former law school professor and current Supreme Court Justice Antonin Scalia wrote shortly after *Bakke* was decided:

The Harvard College “diversity admission” program which Mr. Justice Powell’s opinion so generously praises, was designed to reduce as inconspicuously as possible the disproportionate number of New York Jewish students that a merit admission system had produced.⁸⁰

Professor Scalia’s view found affirmation in a lengthy law review article co-authored by Harvard Law School Professor Alan Dershowitz in which he and his co-author scathingly criticized both Justice Powell’s “diversity” rationale as well as Powell’s praise for the Harvard Plan. As Dershowitz and his colleague wrote, “Mr. Justice Powell legitimated an admissions process that is inherently capable of gross abuse and that . . . has in fact been deliberately manipulated for the specific purpose of perpetuating religious and ethnic discrimination in college admissions.”⁸¹

It is, to say the least, faint praise for the Harvard model. Moreover, it is dismaying that an admissions policy seemingly adopted for a blatantly discriminatory purpose has now been elevated to “model” status, first by Justice Powell in *Bakke* and now, with the support of Bowen and Bok, by Justice O’Connor in *Grutter*.

While Justices Powell and O’Connor, and Professors Bowen and Bok all applaud the Harvard Plan, Justices Brennan and Blackmun clearly agreed with Thomas Sowell’s criticism of it. Simply stated, there is no meaningful, and certainly no constitutional, distinction between the Harvard (or the Michigan Law School) Plan and a straight quota. The Brennan and Blackmun opinions in *Bakke* largely explain why Justice Powell’s controversial and still misapplied language remains fundamentally unworkable.

As Justice Powell also wrote in *Bakke*, “The denial to respondent of this right to individualized consideration *without regard to his race* is the principal evil of [UC Davis’] special admissions program.”⁸² Yet it is inescapable that whenever consideration of one’s race is permitted, Justice Powell’s affirmation of a student’s right to individualized consideration *without regard to race* instantly vanishes. At least Brennan and Blackmun recognized the obvious: When race is being considered, it means that race is being considered.

In the end, justified or not, even Justice Powell treated race as nothing more than a tie-breaker between equally qualified candidates,⁸³ similar to the manner in which geographic diversity might break a tie between equally qualified applicants.

It is a position which was fully endorsed by Harvard University and its then-president Derek Bok in the late 1980’s when the University was being investigated by the U.S. Department of Education’s Office of Civil Rights (OCR) to determine whether Harvard was racially discriminating against Asian American applicants.⁸⁴

As Harvard explained to the OCR:

In an effort to achieve its goal of diversity among its student body, Harvard actively recruits⁸⁵ certain group[s] of applicants and gives members of those groups positive

weight or consideration (i.e., “tips”) in the admissions process. With respect to “tips” in general, Harvard stated that a “tip” is a preference which may help in some situations *where all other factors are substantially equal for two candidates*, but it does not ensure admission. Harvard also stated that the admissions process is not based on a mathematical formula, and that the “tips” have no numerical weight.⁸⁶

Sadly, however, Justice Powell’s vision is nowhere near the reality when race is considered in admissions decisions. A stark example was provided by the former dean of Michigan’s Law School. Though claiming to follow Justice Powell’s language in *Bakke*, the dean readily conceded that minority applicants were admitted to the Law School even though they presented “qualifications” lower than—not substantially equal to—the white and Asian American applicants who were being rejected.⁸⁷

In fact, as the evidence in *Grutter* established, the “qualifications” of many rejected white and Asian Michigan Law School applicants indisputably outweighed by a substantial degree⁸⁸ those of many minority applicants who were admitted. Thus, under the Law School’s system, which nowhere expressly used the term “quota” or “set-aside,” the qualifications of the rejected white and Asian law applicants were not, as even Justice Powell would have required, being weighed fairly and competitively against the qualifications presented by unquestionably less-qualified minority admittees.⁸⁹ As the evidence also demonstrated, the reason for this disparity in treatment was the weight given by Michigan to the color of an applicants’ skin.⁹⁰

EVASIONS

Equally as troubling as the authors’ illusions are their evasions, areas of inquiry for which Bowen and Bok had data but chose to avoid the analyses.⁹¹

DATA COLLECTED FROM GRADUATES OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

As previously mentioned, Bowen and Bok had available the data from four pre-eminent historically black colleges and universities: Howard University, Morehouse College, Spelman College, and Xavier University of Louisiana. These schools are among the most prominent educational institutions in the nation.⁹² HBCUs, including in particular these four storied institutions, served as educational oases for black students when white institutions throughout the South and in parts of the Midwest refused to admit them. HBCUs were at one point, as Professor John Hope Franklin (himself a graduate of historically black Fisk University) has described, “the only civilized places in the South.”⁹³ Few would disagree with his assessment. And with regard to HBCUs, consider this:

If “diversity” is so crucial to a good education, then we would expect HBCUs, some of the least diverse schools in the nation in their way, to provide substandard educations. But many of them do not, and few would say otherwise. Therefore, “diversity” as a benefit to education is a myth.

John H. McWhorter⁹⁴

With this observation, Professor McWhorter succinctly unmask the “diversity” myth.

Professor Franklin reaffirms McWhorter’s view with innumerable examples of his own based on a lifetime devoted to race and educational issues. For example, when questioned in the *Grutter* case specifically about Morehouse College, Professor Franklin opined that, its racial homogeneity notwithstanding, a black student who selected Morehouse over, say, the University of Michigan, would have every expectation of receiving “an excellent education.” Indeed, on the same subject of the educational importance of “diversity,”

Professor Franklin opined that this same black student could also expect to receive an outstanding education at tiny, almost all-white Hope (Michigan) College; and if the student failed to obtain an outstanding education at either of these two non-racially diverse institutions, it would turn on things “other than race.”⁹⁵

Of course, Professor Franklin’s views simply mirror the philosophy expressed in Dr. King’s earlier proclamation that it is the content of a student’s character (and the character of his college classmates) which counts, not the color of his skin (nor the colors of the skins of his classmates). Professor Franklin’s testimony also contrasts sharply with the position of Bowen and Bok, the latter of whom suggest that *only* those black students educated at the most highly selective predominantly white institutions, like the 28 C&B schools they studied, can make a difference in our society.

Unfortunately, their elitist position ended up being implicitly endorsed by Justice O’Connor. After acknowledging that “more than half the seats in the United States Senate” were occupied by individuals with law degrees, Justice O’Connor wrote this: “A handful of these [highly selective law schools] accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.”⁹⁶ One wonders if the other 25 plus United States Senators who hold law degrees, but *not* law degrees from “highly selective” law schools, are somehow less important in the eyes of Justice O’Connor.

Justice O’Connor also attempted to make the same point with reference to our nation’s military leaders. Quoting from the so-called “military” *amicus* brief, she noted that “[t]he primary sources for the Nation’s officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities.”⁹⁷ What Justice O’Connor wholly failed to recognize is the disproportionately large contribution to the professional officer corps made by the HBCUs and many less selective predominantly white institutions, none of which resort to race-conscious admissions.⁹⁸ In fact, of the three black generals listed among the sponsors of the “military” brief, two (Army Lieutenant General Julius Becton and Air Force General

Lloyd Newton) were HBCU graduates. The third was my U. S. Naval Academy classmate, Marine Corps Major General Charlie Bolden.

Charlie Bolden was an outstanding midshipman while at the Naval Academy who, to no classmate’s surprise, became a great Marine Corps officer (as well as an outstanding NASA astronaut). But Generals Becton and Newton are deserving of no less respect—unless one happens to be of the view that it is *where* one attended college that really matters. Yet, sadly, that seems to capture the thinking of Bowen and Bok. And Justice O’Connor, too.

In fact, Justice O’Connor’s focus on the military was richly ironic in view of the fact that so many highly selective universities refuse to permit the presence of ROTC units on their campuses.⁹⁹ Harvard is illustrative. Not only is ROTC not welcomed at Harvard, but in its public statements, Harvard warns students who wish to enter ROTC (by registering in nearby MIT’s program) that they will “receive no Harvard degree credit” for their ROTC classes.¹⁰⁰ Yale, Columbia, and the University of Pennsylvania, three of the four Ivy League colleges among the institutions studied by Bowen and Bok, each appear to have similar anti-ROTC policies.

Many of our nation’s law schools also currently refuse to permit military personnel to visit their campuses for recruiting purposes. What, then, must Justice O’Connor and a limited number of retired military officers have been thinking to suggest that attending an “elite” college or law school, whether admitted on the basis of a racial preference or not, was a necessary prerequisite for successful military leadership? The absence of ROTC programs at many of these schools—indeed, their open hostility to such programs—when compared to the extraordinary contributions to military leadership made by graduates from HBCUs and less selective predominantly white universities makes a mockery of their arguments to the Court in *Grutter*.

At the same time, if racially homogeneous campuses were ever shown to offer inferior educations solely *because* of their racial homogeneity, a rational argument could be made that such institutions (black or white) should be closed—or at a minimum, no longer encouraged or subsidized. But Professor Franklin does not believe that virtually all-black HBCUs or virtually all-white colleges should be closed. Nor has there been any respected research demonstrating

that such institutions, white or black, offer inferior educations solely because of the absence of significant racial diversity among their students.

Which returns us to Bowen’s and Bok’s decision to ignore the data they gathered from the HBCUs. Why did they *not* include them in their study? Surely these are critically important data, in much the same way the data surrounding the *lack* of any black-white academic achievement gap at the three unidentified C&B schools with a small black enrollment are important. Wouldn’t it be important to see, and to analyze, the accomplishments of the graduates from the racially homogeneous HBCUs against those from the predominantly white but arguably more “diverse” C&B schools? In other words, is the value of a so-called elite education to both the black and white students who attend Princeton University or the University of Michigan Law School worth the price of devaluing our most cherished principle?

Thus, the authors’ failure to include and compare these data is inexplicable unless they feared the results would clash with their pre-ordained conclusion that racial preferences are essential in order to insure the production of a truly talented black professional class. The results might also conflict with their views concerning the “educational benefits of diversity,” and the purported need to use race-conscious admissions to assure the levels of racial diversity thought necessary to achieve those benefits (whatever that level of diversity might be—which they also never address).

On the latter point, if student body “racial diversity” were, in fact, essential in order to provide a well-rounded education, what does that say about the authors’ view of the quality of, or the continued need for, the HBCUs? If racial diversity is essential, can there be any justification for continuing to support HBCUs? Do HBCUs, because of their racial homogeneity, in effect penalize the black students who attend them based on what must be the authors’ presumption that the educations at these institutions are inferior? Indeed, given the premise of their book, shouldn’t Bowen and Bok be arguing for the closure of these institutions principally *because* of their lack of “diversity”? These questions are not raised for the purpose of criticizing the continued existence of HBCUs. They are raised merely to point out the apparent, and still unanswered, question of whether

racial “diversity” *in and of itself* meaningfully contributes to a quality education. It seems clear the data from the four HBCUs would have informed that debate.

According to the authors, they did not consider the data from the HBCUs because they were “concerned only with colleges and universities that enroll substantial numbers of white students as well as minority students.”¹⁰¹ But why, if the problem is the “scarcity of talented black professionals,” did Bowen and Bok concern themselves only with institutions which enroll substantial numbers of *white* students? Why not study all institutions which enroll substantial numbers of *black* students?

Again, this is not to suggest that they were wrong to include in their study predominantly white institutions, particularly those with established records of graduating significant numbers of minority students. Yet with the possible exception of the four large public universities (Miami University (Ohio), University of Michigan, University of North Carolina–Chapel Hill, and Pennsylvania State University), none of the other C&B schools necessarily meet this definition when compared with the HBCUs and hundreds, if not thousands, of other less-selective predominantly white institutions. There are, of course, institutions among the C&B schools such as Oberlin College with an historic commitment to educating black students. Even so, Oberlin’s contribution in sheer numbers of black students graduated, while laudable, cannot be described as substantial when compared to hundreds of other less selective institutions where preferences are neither required nor used as a means of enrolling large numbers of black students.

Of course, if Bowen’s and Bok’s concern was, as some might cynically suspect, more focused on the relative scarcity of black professional graduates from *their* particular institutions,¹⁰² a better approach might simply have been to study Princeton and Harvard. Given their respective past positions, each presumably could have gained access to detailed information about the actual black matriculants who most likely were admitted based on a racial preference and compared the outcomes with the black matriculants who most likely did not receive a preference. They could have compared the achievements of their respective black matriculants/graduates *from both groups*, and then compared them with

comparably qualified black graduates from less selective, predominantly white, institutions as well as from the leading HBCUs, none of which use race-conscious admissions.

This would be far more telling in terms of disclosing the degree to which racial preferences actually impact the admissions processes at Harvard and Princeton (a question which is never answered in their book¹⁰³) as well as whether future success was measurably impacted by attending an elite school because of a preference versus attending a less-selective institutions where one’s race made no difference in admission.

They could have asked their counterparts at, say, Penn State and the Universities of Michigan and North Carolina, to do the same. And, again, they could have compared the black graduates from these C&B universities with comparably qualified black graduates from less selective predominantly white universities and HBCUs. With this information, and within this diverse group of schools, some of which profess to use race preferences while others do not, Bowen and Bok should have been able to tell us which schools are doing the most, both qualitatively and quantitatively, to develop talented black professionals. Institutions which are not as successful in this effort could learn from those which are. And, in the end, readers would know vastly more about the purported impact of preferential admissions at Harvard and Princeton, or at Penn State,¹⁰⁴ Michigan or UNC-Chapel Hill, and (their legality aside) whether they are even necessary. Such studies might also have shed additional light on the open question of whether racial diversity, in and of itself, provides measurable educational benefits.

In fact, one aspect of such a study has already been completed by colleagues of Bowen using the same C&B database. In what no doubt is a disappointment to Bowen and Bok, these researchers (who assisted in Bowen and Bok in their work in *THE SHAPE OF THE RIVER*, and thus were granted access to these otherwise “restricted” data) found that “students who attended more selective colleges do not earn more than other students who were accepted and rejected by comparable schools but attended less selective colleges.”¹⁰⁵ These same researchers also found “no evidence that the relationship between school selectivity and subsequent earnings is different for black students.”¹⁰⁶ In other words, it isn’t the school

which matters, *it’s the student*, as confirmed by a black Princeton undergraduate who stated, “I’ve gotten where I’ve gotten because of me, not because of Princeton.”¹⁰⁷

Another reason why the authors’ exclusion of the HBCUs is inexplicable is because both the authors and The Mellon Foundation, which funded their study, know that the C&B schools are not the only, much less the most prolific, producers of black leaders. As Bowen and Bok must know, the vast majority of black members of Congress (see, e.g., those members who served in the 106th United States Congress) graduated from HBCUs and predominantly white institutions which, according to the authors’ criteria, did not need to use preferential admissions policies in order to enroll substantial numbers of black students.

In examining various institutional initiatives which have proven successful in creating black scholars, the authors also cite “The Mellon Minority Undergraduate Fellowship Program” (MMUF).¹⁰⁸ An independent review of its mission is instructive:

The [MMUF] Program is the centerpiece of the Foundation’s efforts to include members of minority groups as full and equal participants in higher education. The program has both immediate and longer-term objectives:

The principal short-term objective is to increase the number of highly qualified candidates for PhDs in core fields within the arts and sciences who come from minority groups that are seriously underrepresented in these fields (African-Americans, Hispanic Americans, and Native Americans).

The longer-term objective is to increase the diversity of faculties at colleges and universities . . . By providing increased opportunities for all students to work with

minority professionals, diversity serves the related goals of structuring a campus environment more conducive to improved racial and ethnic relations and of providing role models for all youth.¹⁰⁹

To accomplish its stated goals, The Mellon Foundation has provided both direct and indirect funding to a total of forty-three “colleges and universities that attract significant numbers of talented minority students from all parts of the country,” *nineteen* of which are HBCUs. According to recent disclosures, only twelve of the 28 C&B schools studied by Bowen and Bok are included in this program.¹¹⁰

HBCUs represent less than three percent of all four-year colleges and universities. Yet, HBCUs represent over forty percent of the institutions selected by The Mellon Foundation as being most critical to the stated mission of the MMUF Program.

While ignoring the data collected from the HBCUs themselves, Bowen and Bok did study MMUF participants who attended the predominantly white C&B schools. They point with justifiable pride to these particular students’ impressive academic accomplishments:

Most relevant to the subject of academic outcomes are the undergraduate academic records of the thirty-two MMUF participants who are also members of the ‘89 cohort at ten C&B schools.¹¹¹ *All* of the students graduated, as compared with 90 percent of all matriculants at these same schools and 81 percent of all black and Hispanic students. The average SAT score of the MMUF participants was 1168, and their cumulative 4-year GPA was 3.40. At these same schools, the average SAT score of all students in the ‘89 cohorts was much higher (1304), but their average GPA was lower (3.28). . . [T]he care with which these

participants were chosen surely helps explain their academic success, . . .¹¹²

From what Bowen and Bok describe, there would appear to be far more to learn from studying the MMUF Program’s success than from studying the use of race preferences in the admission policies at the C&B schools themselves.

And if increasing the flow of talented black men and women “through the country’s system of higher education and on into the marketplace of the larger society”¹¹³ is truly the authors’ main concern, much could have been learned from studying the success of the HBCUs in preparing black college graduates for post-graduate study.¹¹⁴ For example, by itself, Howard University (which was part of the C&B database but was nowhere analyzed in THE SHAPE OF THE RIVER) claims to produce “the highest percentage of black doctors, lawyers, business leaders and other professionals” of any university in the country.¹¹⁵ Or as Thomas Sowell noted in 1999, the year after Bowen and Bok published THE SHAPE OF THE RIVER, “For the sixth year in a row, Xavier University in Louisiana [another C&B HBCU the authors did not analyze] has led the nation in the number of black alumni who have gone on to medical school. Of the ten top academic institutions in the country in [terms of] the number of black alumni who go on to become scientists, six are black colleges. This might have been expected back in the Jim Crow era, when most black students went to black colleges, but most black students don’t go to black colleges. There are more blacks at Ohio State than at Xavier.”¹¹⁶

So the question remains: Why wasn’t the information from the four HBCUs studied?

Finally, Dr. Wolf-Wendel, like Bowen’s colleagues Stacy Berg Dale and Alan Krueger, also reached conclusions which directly contradict the authors’ assumption that only an education at a highly selective predominantly white college or university can produce the best black leaders. At the beginning of her thesis, Wolf-Wendel notes (in the *Abstract*) that, “Historically black women’s colleges graduated the highest proportion of successful African American women in all of the analyses conducted [which included an analysis of many of the same schools studied in THE SHAPE OF THE RIVER].”¹¹⁷

Well, is Wolf-Wendel’s observation true or not? And if it is, what does that say about the so-called “educational value of diversity”? Is “diversity” the myth Professor McWhorter proclaims it to be? Or is it a crucial prerequisite to a quality education? The data Bowen and Bok gathered from the pre-eminent HBCUs might have contributed greatly to answering this question. Yet the conclusion is unavoidable that Bowen and Bok chose *not* to consider these data because they feared the answers they might provide would collide with their preordained vision. It is a vision which assumes that only those black students who graduate from Harvard, Yale or Princeton—or some other highly selective predominantly white school—can truly excel.¹¹⁸

In the end, their vision is clouded by condescension. It reflects, albeit unintentionally, a troubling lack of confidence in the talent found among young black men and women throughout our country, the vast majority of whom, just like the vast majority of their white counterparts, are not the products of so-called elite educations.¹¹⁹ And, of course, such deeply engrained elitism does nothing to help us tap more deeply into that vast reservoir of talent, too much of which is currently and tragically being wasted.

¹ Shanker, Albert, “Quotas and Affirmative Action,” *Proceedings before the United States Equal Opportunity Commission* (1986) at 207. Mr. Shanker was the President, American Federation of Teachers.

² Edwin Meese & John C. Eastman, *Colorblind Equality – The Father of All Moral Principles in Us*, THE CLAREMONT INSTITUTE PRECEPTS (Aug. 9, 2001).

³ *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

⁴ “That the Constitution is color blind is our dedicated belief.” See Thurgood Marshall, et al., Attorneys for Appellants in *Brown v. Board of Education, et al.* BRIEF OF APPELLANTS IN NOS. 1, 2 AND 4 AND FOR RESPONDENTS IN NO. 10 ON REARGUMENT at 65 (quoted in 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 83, Philip B. Kurland & Gerhard Casper, eds., 1976). For a discussion of Thurgood Marshall’s and his colleagues’ belief that the Constitution is “color blind,” see R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. REV. L. & POLITICS 313, 343-44, n. 149. Marshall went on to argue in *Brown* that, [d]istinctions by race are so evil, so arbitrary and invidious that a state, bound to defend the equal protection of the laws must

not invoke them in any public sphere.” See LaShawn Barber, “The Immorality of Racial Preferences” (Sept. 22, 2004) (<http://lashawnbarber.com/archives/2004/09/22/immorality/>) (last visited Jan. 11, 2005).

⁵ The authors’ own data suggest that the majority of the black matriculants who entered the 28 C&B colleges in the fall of 1976 earned their admission by meeting the same standards applied to every other applicant. For example, Bowen and Bok “construct[ed] a rough profile of the approximately 700 black matriculants [out of a total of 1860] in the ’76 entering cohort at the C&B schools whom we estimate would have been rejected had [a race-neutral] standard been in effect.” TSR at 281. However, they provide no evidence of the extent to which any of the self-reported success stories (which form the basis for their conclusions) were provided by black graduates for whom race *was* dispositive in his or her admission.

⁶ See, generally, Professor Loury’s *Foreword* to THE SHAPE OF THE RIVER (paperback ed. 2000).

⁷ Bowen and Bok do not go as far as those, like Professor Loury, who claim their work is the definitive statement on the benefits of race-conscious admissions. They readily concede that, “[our study] does not purport to provide final answers to questions about race-sensitive admissions in higher education.” TSR at 275.

⁸ TSR at 283.

⁹ *Id.*

¹⁰ See, generally, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371 (Nov. 2004): “What I find and describe in this Article is a system of racial preferences that, in one realm after another, produces more harm than benefits for its putative beneficiaries.”

¹¹ See Russel K. Nieli, “The Changing Shape of the River: Affirmative Action and Recent Social Science Research,” NAS Research Paper (Oct. 4, 2004) 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. They were never asked how distant or close they felt to ‘beneficiaries of racial preferences in college admissions.’ They were never asked whether they believed that the average black or Hispanic student they met in college was equally qualified academically with the average white or

Asian student, and if not, whether they thought this situation had any effect on the quality of race relations 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.”

¹² See, e.g., The Princeton Review’s THE BEST 331 COLLEGES – 2000 EDITION (1999) at 575 (At the University of Michigan-Ann Arbor, “Important factors considered include . . . minority status”)(emphasis in original).

¹³ *Id.* at 103 (At Bryn Mawr College, “Factors *not* considered include . . . minority status”)(emphasis in original). See also PETERSON’S FOUR-YEAR COLLEGES (1996) at 1371: “[N]o . . . ethnic or discriminatory guidelines are used” by Bryn Mawr. In addition to Bryn Mawr, the following C&B universities also stated that they did not consider race as a factor in admissions: Penn State, Rice, and Tulane. THE BEST 331 COLLEGES, *supra* note 12 at 377, 401, and 499.

¹⁴ Lisa Ellen Wolf[-Wendel], “Models of Excellence: The Baccalaureate Origins of Successful European American Women, African American Women, and Latinas,” A Ph.D. dissertation submitted to the Faculty of The Claremont Graduate School (1995).

¹⁵ *Id.* at 186. In a later journal article which built on the theme of her thesis, Dr. Wolf-Wendel made clear her view that both racial and gender diversity were not essential and, indeed, may hinder the production of successful female graduates. See, generally, Lisa E. Wolf-Wendel, *Models of Excellence: The Baccalaureate Origins of Successful European American Women, African American Women, and Latinas*, 69 J. HIGHER ED. 141, 171-74 (Mar.-Apr. 1998).

¹⁶ THE JOURNAL OF BLACKS IN HIGHER EDUCATION (AUTUMN 2000) at 18-19. Low black enrollment has been the historical pattern at Bryn Mawr for several years. See, e.g., the Autumn editions of the JOURNAL for the years 1995 through 2001, inclusively.

¹⁷ *Id.* at 19 (citing a 53% admission rate for black applicants versus an overall admission rate of 19.5% at Amherst College for the fall of 2000).

¹⁸ The “evidence” of different admission rates for different racial or ethnic groups at a particular institution can prove meaningless unless one also knows the relative qualifications presented by each group (e.g., in terms of the average SAT/GPA achieved by the respective applicants/admittees within each group). Statistics showing, hypothetically, that black applicants to a particular institution are being admitted at an appreciably higher rate than white applicants does not prove that race is being used as a factor to favor black applicants, or to disfavor white applicants, in the admissions

process. It could be a function of the fact that the average overall qualifications presented by the pool of black applicants exceeded those presented by their white counterparts. Conversely, and for the very same reason, evidence of similar admission rates does not prove that race is *not* being used to heavily favor one group over another.

¹⁹ J. BLACKS IN HIGHER ED, *supra* note 16 at 18-19.

²⁰ TSR at 77 note 28.

²¹ More recent evidence of the intuitive connection between a university’s adoption of race-neutral admissions and the elimination of, or reduction in, black academic underperformance is suggested in Maryanne George, “U-M gap in grad rates at high end,” DETROIT FREE PRESS (Jan. 20, 2005).

²² TSR at 82.

²³ The entering class for the Fall of 2000 reported black enrollment at 2.8 percent. J. BLACKS IN HIGHER ED, *supra* note 16 at 19.

²⁴ Wolf-Wendel, *supra* note 14, at 196.

²⁵ TSR at 281. The authors’ own numbers suggest that nearly two out of every three black matriculants in the ’76 cohort *would* have been admitted under a race-neutral system, numbers which at the very least question the need for race preferences to insure the enrollment of black students. Moreover, these numbers likely understate the actual number of black applicants who would have been admitted under a race-neutral system since Bowen and Bok give no consideration to the effect on black acceptance rates of other so-called “preference” programs (e.g., those directed to recruited athletes, artists, musicians, and those who may demonstrate unique socioeconomic or educational “disadvantage” irrespective of race).

²⁶ TSR at 284.

²⁷ *Id.*

²⁸ TSR at 281.

²⁹ *Id.* Of course, Bowen and Bok admit, as they must, that “[m]any of these students would have done well no matter where they went to school, and we cannot know in any precise way how their careers would have been effected as a result.” TSR at 281.

³⁰ See, e.g., deposition Testimony of Howard University law professor Frank Wu in *Grutter* (Aug. 11, 2000) at 17.

³¹ Richard O. Lempert, David L. Chambers, and Terry K. Adams, *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 396-97 (2000)(emphasis added).

³² TSR at 281 n. 4.

³³ See Expert Report of Dr. Finis Welch (May 26, 2000), on file in *Grutter v. Bollinger*, USDC, Civ. Action No. 97-75928 (E.D.Mich.). As Dr. Welch has

stated, only a thorough review of the authors’ data will confirm the correctness, or disclose the errors of their “evidence” of purported accomplishments by the “retrospectively rejected” black matriculants. Like others who have requested the opportunity to review the authors’ data, Dr. Welch’s request for release of the C&B database so that it could be independently analyzed was refused.

³⁴ TSR, Appendix Table D.3.2, at 378.

³⁵ Dr. Finis Welch estimates that the group of students who may have been preferentially admitted would likely have graduated at a rate under 50 percent, and perhaps substantially lower than that. *See, generally*, Welch, *supra* note 33. A review of the authors’ data may provide the information necessary to make this analysis; but without the release of their data for independent analysis, one cannot know the answer.

³⁶ Here I use the “First-School” graduation rate reported by the authors for the 1976 entering cohort. *See* TSR at 378 and *Notes* at 379. Even if one were to use the “Overall” graduation rate (which reflects that some of the black matriculants left their original C&B school but graduated from another institution within six years), the numbers reported by the authors are still implausible. Moreover, we know nothing about the selectivity of the institutions attended by the additional five percent of black matriculants (roughly 93 graduates) who left their “first” C&B school and “graduated elsewhere.” *E.g.*, we do not know whether the schools from which they eventually graduated used race-conscious admissions.

³⁷ “Forty percent of all black graduates” received professional or doctoral degrees. TSR at 97. *Also see* Table D.4.1., at 385-86.

³⁸ “Black matriculants with the highest entering qualifications” is loosely defined as those for whom consideration of race likely played no role in their college admission.

³⁹ “Black matriculants who entered college with the lowest academic qualifications” is loosely defined as those for whom consideration of race likely was the dispositive factor in their college admission.

⁴⁰ These numbers become even more severely skewed if, as even the authors would concede, a lower graduation rate than that of the overall cohort would have been achieved by the “retrospectively rejected” matriculants based on their lower test scores. *See, e.g.*, *infra* note 41 and citations to miscellaneous text and figures in TSR.

⁴¹ TSR at 142: “Grades have a powerful independent effect on earnings.” Both SAT scores and grades also positively predict the likelihood of one’s attaining an advanced degree. *See, e.g.*, Figure 4.6, TSR at 107; and Figures 4.9 and 4.10, at 113. And as Bowen and Bok write, “The fact that SAT

scores are helpful in predicting advanced degree attainment, *as well as graduation rates* and rank in class, is one reason why we believe they should continue to be used in the admissions process.” *Id.* at 109 (emphasis added).

⁴² A most interesting finding by Bowen and Bok is that a national control group of matriculants at 4-year colleges essentially equaled the overall civic participation rate for the C&B matriculants. These control group matriculants were even more likely than C&B graduates to participate in community and social service activities, youth organizations such as scouting and Little League, religious activities, and groups such as the PTA that operate within elementary and secondary schools. TSR at 157. This hardly represents support for the proposition that attending one of the elite C&B schools enhances the likelihood that one may make important contributions to his or her community. Indeed, the authors’ own data suggest the opposite.

⁴³ According to Bowen and Bok, approximately 1,160 of the 1,860 black matriculants, or 62.4 percent (or slightly higher number if one uses their estimates of “700” out of “nearly 900”) in the 1976 cohort would have been admitted under a hypothetical race-neutral system. TSR at 281. Similarly, they report that 65.9 percent (or approximately 1,266) of these 1,860 black matriculants graduated from their “first school” within six years. *Id.*, Appendix Table D.3.2, at 378.

⁴⁴ TSR at 109.

⁴⁵ “University of Minnesota researchers recently finished a three-year analysis of every major study ever done on the SAT, examining more than a million students. They concluded that the SAT can predict which students will do better in college and graduate.” Peter A. Brown, *ORLANDO SENTINEL* (Aug. 10, 2001). *Also see* Sander, *supra*, note 10 at 421-23 and accompanying notes (especially notes 149 and 159).

⁴⁶ Bowen and Bok point out that the “cohort response rate” for black matriculants was significantly lower from those who failed to graduate from their C&B school when compared to those who did graduate. *See* TSR, Table A.4, at 305.

⁴⁷ William G. Bowen & Derek Bok, *Response to Review by Terrance Sandalow*, 97 MICH. L. REV. 1917, 1918 (May 1999).

⁴⁸ TSR (paperback ed. 2000) at xxxv-xxxvi.

⁴⁹ Terrance Sandalow, *Rejoinder*, 97 MICH.L.REV. 1923, 1924, n. 3 (May 1999).

⁵⁰ Michigan’s Law School stated it as follows: “The Law School admissions policy . . . include[s] *the consideration of race as a factor in admissions*, as part of a broad array of qualifications and characteristics of which race or

ethnicity is but a single though *important element*.” See sworn response to Interrogatory No. 4 in *Grutter v. Bollinger, et al.*, Civ. Action No. 97-75928, USDC (E.D.Mich.), dated Mar. 20, 1998 (emphasis added).

⁵¹ As one former Michigan Law School director of admissions candidly admitted, the numbers cited in the Law School’s grids for the class entering in the fall of 1995 (which showed the enormous difference between the academic qualifications of black admittees and those required from white and Asian admittees) were “generally . . . explained” by the weight given to race in the Law School’s admissions process. See text, *infra*, and Purdy, *supra* note 4, at 323.

⁵² Bowen & Bok, *supra* note 47, at 1918.

⁵³ See *supra*, note 51; and the testimony of the Law School’s former dean. Purdy, *supra*, note 4, at 324.

⁵⁴ Adam Robinson & John Katzman, *THE PRINCETON REVIEW’S STUDENT ADVANTAGE GUIDE TO COLLEGE ADMISSIONS* (1997) at 117 (emphasis added).

⁵⁵ TSR at 287, n. 12 (emphasis added).

⁵⁶ Robinson & Katzman, *supra* note 54 at 117.

⁵⁷ See Trial Testimony of Jeffrey Lehman (Jan. 22, 2001) in *Grutter*, Trial Transcript Vol. 5, at 191-92.

⁵⁸ TSR (paperback ed. 2000) at xxxv.

⁵⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). That Bok exuded praise for the Harvard admissions policy is no surprise. As the University’s former president, he once was responsible for administering it.

⁶⁰ *Id.* at 321-24.

⁶¹ *Id.* at 321 n. 55.

⁶² Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?* 1 *CARDOZO L. REV.* 379, 385 (1979); and Antonin Scalia, *Commentary: The Disease as Cure*, 1979 WASH. U.L. Q. 147, 148 (1979).

⁶³ *Bakke, supra* note 59 at 322 (emphasis in original).

⁶⁴ *Id.* at 323.

⁶⁵ In an Oct. 4, 1990 letter from the United States Department of Education’s Office for Civil Rights to Harvard President Derek Bok (in response to a complaint that Harvard was discriminating against Asian American candidates based on their ethnicity), OCR described Harvard’s policy towards using a “tip” for “ethnic groups, legacies and recruited athletes” as follows: “With respect to ‘tips’ in general, *Harvard stated* that a ‘tip’ is a preference which may help in some situations where *all other factors are substantially equal for two candidates*, but does not ensure admission”

[while further noting “that the ‘tips’ have no numerical weight”]. OCR Letter at 4 (emphasis added).

⁶⁶ *Bakke, supra* note 59 at 323.

⁶⁷ *Id.* at 324

⁶⁸ *Id.*

⁶⁹ As Judge Boggs noted in his dissent in the 6th Circuit, “How does the majority *know* that the Law School’s system is ‘virtually identical’ to Harvard’s? I am deeply puzzled regarding how the majority could place both its confession of ignorance regarding the details of the Harvard plan and its claim that the two plans are identical in the same paragraph . . . [T]here is nothing in the Harvard description that even hints that its preference for race or other[] factors of diversity are of the magnitude here . . .” *Grutter II, supra*, 288 F.3d at 799-800 (Boggs, J., dissenting).

⁷⁰ See OCR Letter, *supra* note 65.

⁷¹ *Bakke, supra* note 59 at 317 (“The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important”).

⁷² *Id.* at 406. Earlier in his own opinion in *Bakke*, Justice Blackmun noted that for purposes of reserving seats for certain minorities, which is what inevitably is done anytime the projected racial composition of the class is being considered (see TSR (paperback ed. 2000) at xxxv), “The same theoretical, philosophical, social, legal and constitutional considerations would necessarily apply [even if] Davis’ special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places *or, indeed, on only 1.*” *Id.* at 404 (emphasis added).

⁷³ *Id.* at 378.

⁷⁴ Note Justice Brennan’s reference to “disadvantaged minority students.” *Id.* at 379. 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 “socioeconomically or educationally disadvantaged” backgrounds. The plaintiffs in the Michigan undergraduate case did not challenge that aspect of University’s policy. (Also cited in Chapter 2, note 11.)

⁷⁵ Justices Stevens and Souter “would be tempted to give Michigan an extra point of its own for its frankness” because the University openly states it grants points for race. *Gratz, supra*, 123 S.Ct. at 2442 (STEVENS, J., with whom Justice SOUTER joins, dissenting). Justice Ginsburg, in perhaps an unintended comparison between the undergraduate system (which the Court struck down) and the Law School’s clearly camouflaged system of preferences, said this: “If honesty is the best policy, surely Michigan’s accurately described, fully disclosed College [undergraduate] affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.” *Id.* at 2446 (GINSBURG, J., with whom Justice SOUTER joins, dissenting). She goes on to note that, “those that candidly disclose their consideration of race seem to me preferable to those that conceal it.” *Id.*, at n. 11.

⁷⁶ *Bakke, supra* note 59 at 379 (emphasis added).

⁷⁷ *Id.* at 406.

⁷⁸ *Grutter, supra*, 123 S.Ct. at 2342.

⁷⁹ See, e.g., *Grutter II, supra*, 288 F.3d at 794 (Boggs, J., dissenting); Dershowitz & Hanft, *supra* note 62 at 385; Scalia, *supra* note 62 at 148; and discussion of the “Harvard plan” in Purdy, *supra*, note 4, at 355, 371-374.

⁸⁰ Scalia, *supra* note 62 at 147-48.

⁸¹ Dershowitz & Hanft, *supra* note 62 at 385.

⁸² *Bakke, supra* note 59 at 318 n. 52 (emphasis added).

⁸³ As THE JOURNAL OF BLACKS IN HIGHER EDUCATION notes: “Many courts supporting racial preferences in higher education have done so in the belief that race is being taken into account by admissions officers *only when other academic and standardized credentials are relatively equal*. That is the rule of the Supreme Court’s *Bakke* case.” See J. BLACKS IN HIGHER ED, *supra* note 16 at 18 (emphasis added). In what can only be described as an understatement, the JOURNAL’s editors go on to note that “many universities have not always adhered to this rule.” *Id.*

⁸⁴ See OCR Letter, *supra* note 65 at 1. Harvard was absolved of the charge that it was illegally discriminating against the Asian American complainants based on OCR’s “finding” that the disparity in Asian American admittance rates (which were significantly lower than those for white applicants) was principally due to “the preference given to children of alumni and recruited athletes.”

⁸⁵ “Active recruitment” of minority applicants has a long and unchallenged tradition as an acceptable form of “affirmative action.”

⁸⁶ OCR Letter, *supra* note 65 at 4. Also see *id.*, attached “Statement of Findings,” at 8 (emphasis added).

⁸⁷ See Deposition of Jeffrey Lehman in *Grutter* (Jan. 21, 1999) at 116. Dean Lehman had earlier conceded that “there are applicants whom we admit who would not be admitted if we were prohibited from taking their race . . . into account.” *Id.* at 112.

⁸⁸ As noted earlier, in 1995 there were ten black applicants with an LSAT score in approximately the 75th percentile who also had undergraduate GPA’s in the 3.25 to 3.49 range. *All ten were admitted*. By comparison, of the fourteen Asian American applicants with those same credentials, *none were admitted*. Of the 51 white applicants with those credentials, *one was admitted*. See, e.g., Michigan Law School grids, *Grutter* Trial Exhibits 15 and 143, *Grutter I, supra*, 137 F.Supp.2d at 832 n. 10, 834; and Purdy, *supra* note 4 at 322-23.

⁸⁹ *Bakke, supra* note 59 at 318 (and n. 52): “The denial to respondent of this right to individualized consideration without regard to race is the principal evil of petitioner’s special admissions program. Nowhere in the opinion of Mr. Justice BRENNAN, Mr. Justice WHITE, Mr. Justice Marshall, and Mr. Justice BLACKMUN is this denial even addressed.”

⁹⁰ Barbara Grutter, a white applicant who was rejected in 1997, had an LSAT score in the 86th percentile and an undergraduate GPA of 3.8. The lawyers for the University essentially admitted that had Ms. Grutter been black, she would have been admitted. See *Grutter II*, 288 F.3d at 775 (Boggs, J., dissenting)(recounting an exchange during oral argument between counsel for the Law School and Circuit Judge Boggs).

⁹¹ One critically important area only tangentially addressed by the authors is the issue of chronic academic underachievement among America’s black student population which, of course, is the only reason why racial preferences in college admissions exist in the first instance.

⁹² In a poll conducted by Black Enterprise Magazine/DayStar Research, Spelman and Morehouse topped the list of the top colleges for African Americans. Howard and Xavier ranked 5th and 6th respectively. Nine of the top ten were HBCUs. Overall, 23 of the top 50 were HBCUs. T. LAVEIST & M. WHIGHAM-DESIR, “Top Fifty Colleges for African Americans,” BLACK ENTERPRISE MAGAZINE (1999).

⁹³ Deposition of John Hope Franklin in *Grutter* (Sept. 25, 2000) at 54.

⁹⁴ John McWhorter personal correspondence to the author (Mar. 2, 2005), used with the permission of Professor McWhorter.

⁹⁵ Franklin deposition, *supra* note 93 at 78-79.

⁹⁶ *Grutter, supra*, 123 S.Ct. at 2341 (citing Brief for Association of American Law Schools as *Amicus Curiae* 5-6).

⁹⁷ *Id.* at 2340 (citing Brief for Julius W. Becton, Jr., et al as *Amici Curiae* 27).

⁹⁸ See R. Lawrence Purdy, “Operation Racial Preferences” (May 28, 2003) NATIONAL REVIEW ONLINE at 3.

⁹⁹ Illustrative of the animosity towards the military displayed by many highly selective schools is Columbia University, an Ivy League institution which currently is being led by Lee Bollinger, the former President of the University of Michigan. He was one of the principal architects of Michigan’s race-based admissions policies and was the lead named-defendant in both the *Grutter* and *Gratz* cases. ROTC is not currently permitted to function at Columbia even though some students are arguing for its return, which Bollinger opposes. See Staff Editorial, “ROTC: Return: Exclusion is not acceptable,” THE COLUMBIA SPECTATOR (Online ed.)(Mar. 3, 2005); and Editorial, “A Tale of Two Columbias: The patriotic and the politically correct,” WALL STREET JOURNAL (Online ed.)(May 11, 2005).

¹⁰⁰ Harvard College Freshman Dean’s Office guide for the class of 2007: ROTC (last visited Mar. 3, 2005).

¹⁰¹ TSR at 291, n. 2.

¹⁰² William Bowen’s Princeton was nowhere to be found in the results of a 1999 poll of black educators concerning the top fifty colleges for African Americans. Fourteen HBCUs and thirteen less selective predominantly white institutions placed ahead of Derek Bok’s Harvard (which ranked 28th overall). Twenty HBCUs were ranked ahead of Yale, UCLA, NYU, Smith College, MIT and Mount Holyoke. Brown and Dartmouth, like Princeton, did not appear in the top fifty. See BLACK ENTERPRISE MAGAZINE/DAYSTAR RESEARCH poll (1999).

¹⁰³ Of interest, Harvard apparently chose not to provide data for use in the C&B database, nor did its graduates participate in the study which Bowen and Bok conducted.

¹⁰⁴ Notably, Penn State, unlike Michigan, disavows considering “minority status” in the admissions process. See, e.g., THE BEST 331 COLLEGES, *supra* note 12 at 377.

¹⁰⁵ Stacy Berg Dale & Alan B. Krueger, “Estimating the Payoff to Attending a More Selective College: An Application of Selection of Observables and Unobservables,” *Working Paper #409, Industrial Relations Section, Princeton University* (Rev. July 7, 1999), Abstract, NATIONAL BUREAU OF ECONOMIC RESEARCH (NBER) WORKING PAPER NO. 7322 (August 1999). Also published in *The Quarterly Journal of Economics* (Nov. 2002) at 1491-1527.

¹⁰⁶ *Id.* at 28.

¹⁰⁷ Barry Beckham (ed.), THE BLACK STUDENT’S GUIDE TO COLLEGES (4th ed.)(1997) at 238.

¹⁰⁸ TSR at 86, note 41.

¹⁰⁹ See REPORT OF THE ANDREW W. MELLON FOUNDATION (1993).

¹¹⁰ *Id.*

¹¹¹ According to the report by the Mellon Foundation, *id.*, a total of 12 C&B schools participate in the MMUF program. Ten were SEL-1 institutions; the other two were SEL-2 institutions. TSR at 337 and 339. Graduation rates are routinely shown to be the highest for *all* students of *all* races at the most selective institutions. See, e.g., TSR at 376 (the only exception being the Native Americans who, in 1989, entered SEL-2 institutions and were shown to have graduated at a higher rate than did the Native Americans who entered SEL-1 institutions).

¹¹² TSR at 86-87 (emphasis in original).

¹¹³ TSR at xxi.

¹¹⁴ See, generally, THE AFRICAN AMERICAN EDUCATION DATA BOOK, VOLUME I: HIGHER AND ADULT EDUCATION, Frederick D. Patterson Research Institute (1997).

¹¹⁵ See, The College Board’s COLLEGE HANDBOOK 2000 (1999) at 180.

¹¹⁶ Thomas Sowell, “Racial Quotas in College Admissions: A Critique of the Bowen and Bok Study,” HOOVER DIGEST (1999).

¹¹⁷ Wolf-Wendel, *supra* note 14 at 382. Also, see Wolf-Wendel, *supra* note 15 at 176.

¹¹⁸ It is a view implicitly endorsed by Justice O’Connor in *Grutter*. See *supra* note 96 and accompanying text.

¹¹⁹ Martin Luther King, Jr. (a graduate of historically black Morehouse College), Colin Powell (a graduate of CCNY), Condoleezza Rice (a graduate of the University of Denver), former Secretary of Education Rod Paige (a graduate of historically black Jackson State University), and the earlier mentioned military Generals Julius Becton and Lloyd Newton (both of whom were graduates of HBCU’s), are examples of extraordinary Americans who effectively refute the notion that an education at a highly selective predominantly white university is a necessary prerequisite to becoming a national leader.