

CHAPTER EIGHT

THE CONSEQUENCES OF RACE PREFERENCES

“Taking account of race helps . . . identify[] individuals of high potential.”¹

Perhaps no statement in *THE SHAPE OF THE RIVER* is more troubling than the one just quoted. Do the authors truly believe that one’s *race* helps identify whether an individual has high potential?

Assuming it does, is the converse true? In other words, does taking account of one’s race also help identify individuals who *lack* high potential? Certainly the drafters of the Nuremberg Laws in 1935 thought so, as did those who drafted Jim Crow laws in various states.

Thus, it is very hard to understand the rationale behind the authors’ statement. Were their words being uttered by old-time segregationists, one might at least understand the context. But coming as they do from two men, neither of whom has a reputation for such thinking, makes it—how shall we put it?—odd.

The danger of acting on their comment is that it directly feeds the worst of the many bad outcomes associated with race preferences. One of the most pernicious, as law professor Viet Dinh points out, is that “[t]he new race-as-merit rhetoric . . . permanently embraces racial divisions, balkanizing American society into warring ethnic fiefdoms.”² Even worse, it lends credence to the suggestion by some that the color of one’s skin *does* dictate one’s ability. Moreover, it devalues the hard-earned achievements by individual members of the *groups* to whom preferences are given. Respected scholars and national leaders, black and white, understand this.

As noted earlier in this book, Colin Powell observed that, “Equal rights and equal opportunity mean just that. They do not mean preferential treatment. . . And *preferential treatment demeans the achievements that minority Americans win by their own efforts.*”³

Shelby Steele has often opined that replacing “merit” with “race” suggests “a loss of faith in a racial equality grounded in merit—in comparable levels of competence and skills between the

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racess.” Perhaps its worst offense, according to Steele, “is to count being black, by itself, as a handicap.”⁴

Syndicated columnist Deroy Murdock has written that, “To claim minorities . . . cannot succeed under . . . a system [blind to race . . . characteristics] is to demean their talents and declare them commercially handicapped — [this is] a bigoted notion, whether uttered by ‘racist white males’ or ‘progressive minority . . . advocates.’”⁵

Albert Shanker borrowed from Bayard Rustin when he cited the “devastating psychological effect” of quotas and race preferences. He wrote, “No matter how benign their intention, those who want to load the dice in favor of one group or another in employment or education, who want to mandate that a person be given a job or admitted to law school because of his or her race or ethnic background are, in effect, making a statement that some people can’t make it on their own and need to be given an absolute advantage over any competition. The result is to confer a quasi-official status of inferiority on the beneficiaries of the favored treatment.”⁶

And the damage does not stop with the beneficiaries. As Shanker explains, “members of the targeted group who do succeed on their merits may well find that their achievements will forever be suspect because of an identification with those who were given a ‘free ride.’”⁷

Nathan Perlmutter similarly observed that “racially based preferential treatment reinforces negative stereotypes that obscure individual characteristics.”⁸

Bowen and Bok ignore all of the above yet apparently find useful a single, demeaning quote from Dr. Kenneth Clark, the noted educator and psychologist:

When Clark was asked, “What is the best thing for blacks to call themselves,” he replied, “White.”⁹

Mr. Perlmutter was not so flippant. He realized that Clark had more to say that was both serious and relevant to the authors’ inquiry. Quoting Clark, Perlmutter offered this:

No black can yet be sure that he is being seen, evaluated and reacted to in terms of his qualities and characteristics as an individual rather than categorized and stereotyped as part of a rejected group.¹⁰

And Mr. Perlmutter followed up with the words of Charles Murray, author and then-senior research fellow at the Manhattan Institute for Policy Research:

The most obvious consequence of preferential treatment is that every black professional, no matter how able, is tainted. Every black who is hired by a white-run organization that hires blacks preferentially has to put up with the knowledge that many of his co-workers believe he was hired because of race; and he has to put [up] with the suspicion that they might be right.

* * *

The old racism has always openly held that blacks are permanently less competent than whites. The new racism tacitly accepts that, in the course of overcoming the legacy of the old racism, blacks are temporarily less competent than whites. It is an extremely fine distinction.¹¹

An unintentional example of this is found in the earlier-discussed thesis by Dr. Lisa Wolf-Wendel. When comparing Pomona College’s relative success in graduating Hispanic students who go on to earn Ph.D.s with its relative lack of success with black students, Wolf-Wendel offered the following observation:

Pomona’s location in southern California means that it will continue to attract Latina students who meet its strict admissions requirements. . . . In contrast, *as long as Pomona maintains its admission criteria, it will continue having trouble attracting African American students*, making the prognosis for Pomona’s success with this group somewhat bleak.”¹²

Interestingly, Wolf-Wendel had noted that Pomona’s practice of maintaining “strict admission standards” meant that students of color who come to Pomona could “make it anywhere.”¹³ That is, or should be, high praise for Pomona’s policies. At the same time, Wolf-Wendel seems to suggest that Pomona may need to relax its admission criteria if it hopes to attract more black students. Of course, the downside is obvious. If more students of any particular race were to arrive on Pomona’s campus because of policies which subjected them to a lower standard of admission, they might well become viewed by their professors and classmates as not *as* able to “make it anywhere.” Once again, the stigma associated with such policies is simply not worth it. And it is cruelly unfair to every black Pomona student who got there on her own merit.

Make no mistake. It is a very real stigma, felt by many black students who worry they are being chosen principally *because* they are black as opposed to being chosen based on their merit. It is perfectly captured in *THE SHAPE OF THE RIVER* by a black Williams College graduate:

I’m really at the point where I say . . . straight out in interviews: “Look, if you want me because I’m a woman and because I’m African American and because I’m trotting along this series of degrees, don’t bother. Don’t think about how many diversity committees I can head up or how many admission fairs I can go to or how many times you can

stick me in your yearbook to make yourself look diverse. But think about what I can really offer your community and your school and your students.¹⁴

To their credit, Bowen and Bok include her words but seem oblivious to their meaning.

In a related passage, the authors recount the words of a distinguished black educator who was talking about his son, an obviously talented young man:

[The father] noted, with understandable pride, that his son had done brilliantly in college and was being considered for a prestigious graduate award in neuroscience. “My son,” the professor said, “needs no special consideration; he is so talented that he will make it on his own.” His conclusion was that we should be indifferent to whether his son or any of the white competitors got the particular fellowship in question. We agreed that, in all likelihood, all of these candidates would benefit from going to the graduate school in question and, in time, become excellent scientists or doctors. Still, one can argue with the conclusion reached by the parent. “Your son will do fine,” another person present at the meeting said, “but that isn’t the issue. *He may not need us, but we need him.* Why? Because there is only one of him.”¹⁵

Of course, the last comment is partially correct, we *do* need this young man. But not because of his color. We need the professor’s son because he appears destined to become a brilliant scientist and doctor. We need his talented colleagues too, regardless of *their* color.

In the end, what Bowen and Bok so condescendingly dismiss as a father’s “pride” was more likely a subtle, though too often silent, plea:

Please give to my son the respect he deserves *as a scholar and a scientist*. Please admire him for what he has accomplished, and not for the color of his skin. *Please have the basic decency of demonstrating that you truly do regard him as an “equal” by holding him to the same exacting standards to which you would hold each of America’s sons and daughters.*

The polite and proud black educator also must have been thinking:

My son neither *needs* nor *wants* your favors; he wants only your respect. And *he has earned it.*

Notwithstanding these admittedly hypothetical thoughts about what most fathers would feel, Bowen and Bok seem unable to get beyond the color of the son’s skin.

Their failure is unfortunate but all too common, particularly among the nation’s academic elites. Just how common was captured in a recent book in which the author ruefully noted that blacks often are forced to “accept the condescension of liberals [though it plainly is not *just* liberals] who, for political, moral, or ideological reasons, won’t pay them the compliment of holding them to universal standards of achievement. . .”¹⁶

That is precisely the compliment which Bowen and Bok withhold. In the end, the absence of this compliment demeans all of the participants—the father, the son, Bowen, Bok, the sons’s co-applicants, and those on the committee who must decide which applicant is to receive the fellowship. It also demeans the selection process and potentially threatens those patients whose lives someday

may depend upon the ultimate skills of the individual who is rewarded this highly sought-after training, all because the irrelevant question of “race” has encroached on the decision.

THE LONG-TERM CONSEQUENCES OF RACIAL PREFERENCES

The authors offer a third reason in support of race preferences. In their view, “taking account of race helps institutions . . . address[] long-term societal needs.”¹⁷

Of course, were it true that preferential admissions policies were the *only* means by which long-term societal needs could positively be addressed, Americans’ long-standing opposition to such policies might well evaporate. But that decidedly is not the case. The authors’ anecdotal offerings aside, the harder evidence overwhelmingly suggests that racial preferences do not advance positive long-term societal needs. On the contrary, racial preferences *positively* hinder their advancement.

Turning to the adverse consequences of these policies, the authors actually address several in their book. Therein, to their credit, they ask this critical question: “Do race-sensitive admissions policies harm the intended beneficiaries?”¹⁸

While they largely dismiss the harms invariably resulting from these policies, they at least discuss some of them—and there are several.¹⁹

Bowen and Bok begin with a discussion of the potential harm these policies can have on “Graduation Rates,” and note that Stephan and Abigail Thernstrom assert *correctly* that “the college dropout rate for black students is at least 50 percent higher than it is for whites.”²⁰ In response to the Thernstroms’ suggestion that this may, in part, be related to blacks entering schools for which they are unprepared, the authors respond with what they imply is a surprising finding:

[I]n our sample of twenty-eight selective schools, none had a dropout rate for minority students anywhere near as high as the average attrition of 60 percent for black students at all NCAA Division I colleges, many of which are not selective.

Black dropout rates are low at all of the C&B schools (averaging just over 25 percent); moreover, *the more selective the college attended, the lower the black dropout rate.*²¹

While their first statement may be true (and references a deeply troubling statistic—sixty percent black attrition rates at Division I colleges—which deserves far more attention than it gets from the authors), the fact remains that a significant percentage of their ‘76 cohort (40 percent)²² matriculated at SEL-3 schools (all of which are listed among NCAA Division I colleges). The “first-school” graduation rate for these black matriculants was a troubling 56.1 percent as compared with 78.1 percent for Asian students and 74.1 percent for whites.²³ Bowen and Bok document significant lags in black graduation rates behind those of Asian and white students at the SEL-1 and SEL-2 schools as well.²⁴

Their second assertion, that black dropout rates at all of the C&B schools averaged “just over 25 percent,” is true for the ‘89 cohort.²⁵ But focusing on the principal cohort they studied (i.e., the 1,860 black matriculants in the ‘76 cohort) shows that the “first-school” dropout rate was approximately 34 percent (or one in every three black matriculants).²⁶

Moreover, the authors’ “surprise” finding that the more selective the school, the lower the black dropout rate, turns out to be no surprise at all. It holds true for *all* students across *all* racial lines.²⁷ In fact, when it comes to the most selective colleges, higher graduation rates is a well-documented pattern. As one of Michigan Law School Professor Terry Sandalow’s students (who graduated from one of the schools studied by the authors) anecdotally reported: “It’s not possible to flunk out at ____.”²⁸ (The blank is in the original text.)

Furthermore, no one seriously suggests that any school, much less the most highly selective schools, would knowingly admit any student who appears *incapable* of completing the program. But the fact that a person graduates from one of these institutions answers none of the inquiries about whether that person should have been admitted in the first instance in place of another, better qualified

student. Nor does it answer the equally important questions of whether that person (irrespective of race), had he or she attended a less selective school, might have done better in terms of class rank, college GPA, and time taken to obtain a degree, each of which has an independent impact on a person’s later success.²⁹

Bowen and Bok also acknowledge the argument regarding the effect of race preference policies on a preference recipient’s “incentive”:

At the college and university level, minorities cannot be expected to focus on maximizing their own efforts when rewarded for factors independent of those efforts.³⁰

Of course, here they didn’t need to go to outside sources for this proposition. Bok had expressed his concern over this same dilemma almost twenty years earlier in the context of graduate and professional school admissions:

[B]y awarding a heavy preference to minority applicants, [universities] may actually sap the incentive of these students, since they know that they do not need to receive the highest grades to gain admission to the best graduate and professional schools.³¹

Having thus acknowledged what Bok already knew, the authors jointly admit that “we know of no way to measure directly the effect that race-sensitive admissions have on the motivation of minority students.”³² The key word is “motivation,” which, of course, *would* be difficult if not impossible to measure. But we most certainly do know some of the deleterious effects of race preferences on black students, which begin with what Bowen and Bok characterize as “demoralization and its possible effect on grades.” It is a consequence closely aligned with the “stigma and stereotyping” which surround preferential policies.

We return to Bok’s 1982 work:

Others argue that any policy *offering special dispensations to minority students stamps them as second rate and thereby lowers their self confidence* and diminishes the respect accorded them by their white peers. . . . As Professor Thomas Sowell has argued, had . . . black law students gone to somewhat less selective schools, they could have competed on more equal terms and might have proceeded with greater confidence to gain from their legal training.

. . . Professor Sowell can point to data to support their concerns.³³

Bok also referenced “a number of studies” showing that minority students tend to perform below the levels predicted by their prior grades and test scores (the “overprediction” phenomenon which the authors acknowledge still exists) and that blacks and Hispanics often are densely clustered at the bottom of their class.³⁴

While Bok professed no understanding as to why this may occur apart from “inadequate preparation,” he issued the following caution to admissions officers everywhere:

[T]he available data should caution admissions officers against a policy of awarding excessive preference to minority applicants in an overzealous effort to achieve impressive percentages of black and Hispanic students. *Some institutions may indulge in this practice, either from noble sentiments or to satisfy the demands of vocal minority groups.* Regardless of motive, there is little justification for admitting minority applicants with scores

150 to 200 points below the average for white students. Differences of this magnitude³⁵ may eventually make a substantial difference in the ability of students to succeed in their profession while threatening to impose handicaps and psychological burdens³⁶ that will impair academic performance. This point seems particularly telling in the case of professional schools that are already enrolling proportions of blacks or Hispanics greater than the percentage of these minorities in the national applicant pool. *Now that so many institutions have adopted preferential policies, such practices threaten to diminish the number of remaining minority applicants to a point that will force less prestigious schools to run the risk of making even more drastic concessions in the admissions process if they wish to obtain a racially diverse class*³⁷

More recently, in *THE SHAPE OF THE RIVER*, Bowen and Bok select a quote by Shelby Steele whose words bear repeating:

The effect of preferential treatment—the lowering of normal standards to increase black representation—puts blacks at war with an expanding realm of debilitating doubt, so that the doubt itself becomes an unrecognized preoccupation that undermines their ability to perform, especially in integrated situations.³⁸

The authors, too, recognize this “debilitating doubt” but proceed, like so much else that was before them, to ignore it.

Steele’s is both an external and a self-inflicted “doubt” having nothing to do with whether a black student needs or even receives a preference based on race. Where racial preferences are in place, this *doubt* afflicts everyone, black and white alike; but perhaps most severely, those black students who require no special consideration at all. It is implicitly captured in the complaint of the talented black Williams College graduate who, as earlier noted, expressed anger over being perceived as nothing more than a poster child for “diversity.”³⁹

Thus, Bok must temporarily have forgotten his previous writings, and Bowen must never have read them, for the authors to now suggest that, based on their survey responses, the black students from the C&B institutions didn’t suffer as a result of the presence of preferential policies.⁴⁰ (Of course, they never asked a question of their respondents which was designed to find out.) Their suggestion is also inconsistent with their acknowledgment a few pages later that “more than a few” black students, in fact, *do* suffer from being beneficiaries of an admissions process “that gives explicit consideration to race.”⁴¹ It is a cost Bowen and Bok describe as “all too real,”⁴² but one they feel is worth tolerating because of the presumptive benefits received.

Of course, their respondents provided no answers whatsoever to questions about the potential adverse “costs” of race preference policies or whether any of them even approved of such policies. The authors’ survey form contained no question designed to shed light on these issues.⁴³

But it could have. For example, how many of the individual black matriculants at the most selective schools actually believed he or she was one of the students admitted because of race rather than because of the impressive high school records he or she compiled (based, e.g., on school leadership, impressive community service, solid grades and/or test scores, extraordinary athletic, artistic or musical skill, or some or all of the foregoing)? One suspects very few.

More fundamentally, if it were true, as Bowen and Bok unconvincingly claim, that neither they nor the admissions committees would be able to determine which of the black students received a race preference, there certainly would be no good reason

for any black matriculant to conclude that race was dispositive when it came to his or her own admission.

Nevertheless, virtually every matriculant, regardless of race, believes that *some* black students are enrolled under preferential admissions policies because, as Bok candidly admits, “so many institutions have adopted [them].”⁴⁴

Even when done for noble reasons, Shelby Steele reminds us that the lowering of standards in the name of one’s race is “the most dehumanizing and defeating thing that can be done to black Americans.”⁴⁵ And recall Glenn Loury’s similar earlier sentiment, finding “unbearable” the thought that “[his] sons might come to see themselves as ‘presumptively disadvantaged’ because of their race.”⁴⁶

It should be unbearable to the authors as well. But here, too, they remain oblivious to the adverse consequences of race-conscious admissions policies even as they documented them.

For example, the authors’ own data showed that the black students *as a group* in the 1989 cohort did poorly in terms of class ranking and GPA when compared with their white classmates:

The grades earned by black students at the C&B schools reflect their struggles to succeed academically in highly competitive academic settings. . . [The difference between their grades and those of their white classmates] is very large when seen in the context of the overall distribution of grades. The average class rank of black matriculants was at the 23d percentile of the class, . . .⁴⁷

These are not results without consequences. The authors note, for example, that “grades have a powerful independent effect on earnings.”⁴⁸ Thus, the higher one’s GPA and class ranking, the better one’s earning potential regardless of the selectivity of the school attended.⁴⁹ And as UCLA law professor Richard Sander has recently observed, attending a less selective school wherein certain minority law students (who would only be admitted to more selective law schools via preferential admissions) can be expected to perform better

academically, can have measurable positive consequences in terms of improving bar passage rates and ultimately becoming practicing lawyers.⁵⁰

Bowen and Bok also purport to analyze whether race-sensitive admissions policies harm minority graduates in their careers. However, once again they are guilty of ignoring the stigma and harm which attach to these policies. It is harm which begins long before careers are established. And there is little question that “stigma” accompanies these policies wherever they are known to be in place.

The authors fully recognize this fact:

The very existence of a process that gives explicit consideration to race can raise questions about the true abilities of even the most talented minority students (“stigmatize” them, some would say). The possibility of such costs is one reason why selective institutions have been reluctant to talk about the degree of preference given black students. . . [S]ome of these institutions may also be concerned that the standing of black students in the eyes of white classmates would be lowered if differences in test scores and high school grades were publicized. More than a few black students unquestionably suffer some degree of discomfort from being beneficiaries of the admissions process . . .⁵¹

The literature and the anecdotal evidence, coupled with the authors’ own admission, provide a consistent message. Stigma attaches to every minority student to the extent he or she is perceived as someone who was—or even may have been—admitted under a preferential admissions policy. This is precisely why, as Bowen and Bok readily admit above, selective institutions are “reluctant to talk about the degree of preference” they give to black students.

And there is no question that this stigma causes harm to blacks students.⁵² Even the former dean of Michigan’s Law School admitted it:

I do know that there are members of minority racial groups who oppose the explicit consideration of racial diversity in admissions because they personally find it stigmatizing.⁵³

How, then, does the Law School dean answer these students’ concerns? Why do these policies continue, particularly when those who may have benefited from a preference arrive inadequately prepared and, as a result, drop out?⁵⁴ But it is not just the “drop outs” or those who end up performing poorly who are damaged by these policies. The most serious stigma may be felt by those for whom preferences played no role at all in their admission. Indeed, the mere presence of such policies can raise questions over the legitimacy of every black student’s admission. It can, as Bok earlier noted, diminish the respect accorded minority students by their non-minority classmates, as well as by faculty, who may then begin to question minority students’ collective abilities. These are terrible and unfair questions which simply would not arise if every student were satisfied that his or her classmates had been evaluated against the same admissions criteria. And, of course, absent from all their discussion, is the patent unfairness to those individual students who are rejected because of the color of their skin.

This is not to say that some minority students who were preferentially admitted, and went on to successful academic and professional careers, did not benefit from the “elite” educations they received. Surely some did. But the qualities which got them admitted in the first instance would likely have insured equally successful careers even had they attended less selective institutions, which Bowen and Bok generally (though no doubt grudgingly) concede.⁵⁵ In fact, this is precisely the finding reached by the authors’ collaborators in a later study which has largely been buried by race-preference proponents.⁵⁶

In summary, there is little question that preferential admissions policies create real damage. Bowen and Bok don’t deny this. Instead, they maintain that their survey data demonstrate that the damage done by preferential admissions policies is simply worth the cost.⁵⁷ But one can reasonably argue that these policies are *not* “worth the cost,” particularly when there are several common sense and far more effective methods⁵⁸ to improve the levels of black participation and success in higher education, none of which are burdened by both the condescension and unfairness inherent in these policies.

One of the simplest methods of overcoming black student underachievement—the *sine qua non* for race preferences—is the solution proposed by, among others, Drs. Uri Treisman and Claude Steele:⁵⁹ Set high standards for all students and do not deviate from them based on one’s race. This is the conclusion reached by Dr. Steele and his colleagues who have extensively studied what he describes as minorities’ “dis-identification” with academic achievement. It is the same phenomenon more recently addressed by Professor McWhorter.

Dr. Steele’s work became the conceptual basis of “The 21st Century Program” at the University of Michigan. The program’s director, Mary Hummel, in discussing Steele’s work, stated the following:

Over time, *practices such as recruitment that stresses minority status, . . . can heighten pressure and push minority students to stop identifying with achievement in school. . . According to Steele, changing the educational environment to one that sets high expectations for all students rather than providing redemption is key to diminishing vulnerability and dis-identification.*⁶⁰

The only way to accomplish what Steele proposes (i.e., the setting of “high expectations for all students”) is to end the use of race which currently results in differing—and inevitably lower—expectations for black students. Ending this practice can do nothing

but improve black students’ success at every level and make their full participation permanent as opposed to merely cosmetic.

An excellent example of the immediate benefit to ending these programs was described by University of San Diego law professor Gail Heriot. In an article discussing the impact of the imposition of color-blind admissions following California’s 1996 passage of Proposition 209, Professor Heriot observed how the previously gaping academic underperformance of black students in the University of California system had narrowed:

At UC [San Diego], for example, in the year before Prop 209's implementation, only one black student had a freshman year GPA of 3.5 or better—a single black honor student in a freshman class of 3,268[!] . . .

Was this because there were no black students capable of doing honors work at UCSD? Of course not. The problem is that such students were usually at Harvard, Stanford, or Berkeley, where often they were not receiving honors. Nationwide, misguided affirmative action was creating the illusion that few black students could excel.

Proposition 209 has changed that at UCSD, where the performance of minority students has now improved dramatically. . . [A] full 20 percent of the black freshmen could boast a GPA of 3.5 or better after their first year. That’s higher than the rate for Asians (16 percent) and extremely close to the rate for whites in the same year (22 percent).⁶¹

It is hard to imagine that Bowen and Bok would quarrel with Professor Heriot’s observation that ending the use of race in admissions, at least in the instance she described, greatly benefited—rather than harmed—black students.

Later, when the authors move on to the harm which these policies may have had on the later careers of black matriculants, they offer one of the most understated conclusions found anywhere in their book:

Judged by [the fact that most *black matriculants at the most selective schools were far more successful in earning advanced degrees than the black men and women in the sample of those who graduated from all four-year institutions*], black students who attended the most academically competitive schools *do not appear to have been penalized*.⁶²

This, of course, is a largely useless comparison which seemingly is refuted by their own data. Their data showed the demonstrably negative impact of graduating with a lower class rank and college GPA versus graduating with a higher class rank and improved GPA even if from a less selective college—a finding confirmed by their colleagues in a subsequent study using the same C&B database.⁶³ It also once again points out the authors’ unfortunate decision not to analyze and compare the achievements of the graduates from the four HBCUs (e.g., did their graduates do as well or better than their black peers who graduated from the 28 predominantly white schools?).

Notwithstanding the lack of any apparent penalty from attending a selective school (a conclusion more recently disputed by law professor Richard Sander in the context of legal education),⁶⁴ the impact of preferential policies is very real on both the recipients as well as their potential employers. As noted earlier in Chapter Two, Bok has observed that:

Some universities are said to have gone so far in trying to expand minority enrollments that they have actually admitted students who show little promise of being able to pass the regular courses. This practice is very hard to defend. . . . Rather than have such students fail, *universities may try to escape the predicament by creating special courses of little academic rigor or by lowering their grading standards.*⁶⁵ Yet neither alternative can be justified, Eventually the truth is bound to leak out, with the result that *most employers will no longer put much weight on grades received by minority students, and even those blacks and Hispanics who do excel academically will cease to receive due credit for their accomplishments.*⁶⁶

Bok’s recognition of the problems associated with race preferences didn’t end with his 1982 book. He elaborated on them with poignant clarity in a more recent book:

It is a bitter lesson indeed to discover that . . . preferential admissions policies and affirmative action laws quickly provoke humiliating debates questioning the native intelligence and intellectual competence of one’s race. . . . [T]he end of discrimination in law has brought educated blacks more directly in contact with . . . racial stereotypes that are highly personal. . . . *Worst of all, contemporary America has placed educated blacks in a confusing shadow world where it is hard for them to know whether the setbacks they experience are due to their own*

*shortcomings or to racial discrimination, and equally hard to tell whether, when they advance, they have truly excelled or only been moved ahead as a grudging concession to comply with some legal requirement.*⁶⁷

Bowen agrees with Bok’s earlier vision. Together they write, “It is for this reason that many high-achieving black graduates *continue to seek reassurance that they have ‘made it on their own’* and why they complain when job interviewers presume that even the most outstanding black student may well have been helped in this way.”⁶⁸

Despite this recognition, they stubbornly cling to their support for race preference policies based on Professor Jennifer Hochschild’s statement that “[o]verall, 55 percent of well-off blacks think affirmative action programs help recipients, and only 4 percent think such programs hurt recipients.”⁶⁹

Here the authors are guilty of overstating the significance, if any, of Hochschild’s statement. Bowen and Bok, and presumably Hochschild, are fully aware of the effect language has on the answers received to questions relating to race. They know, for example, that a majority of *all* Americans support “affirmative action” when defined as non-discriminatory programs.⁷⁰ But they also know that an overwhelming majority of Americans, including a significant percentage of black Americans, fundamentally oppose preferential treatment based on race.⁷¹ Thus, on the basis of a single questionable statement, they conclude that “[i]n the eyes of those best positioned to know, any putative costs of race-based policies have been overwhelmed by the benefits gained through *enhanced access* to excellent educational opportunities.”⁷² Their conclusion also implies that the black graduates in their survey accepted the unestablished “fact” that each received “enhanced access” to the college to which he or she was admitted solely because of their skin color.

Their conclusion is akin to taking two 18-year-old strangers, one black, one white, and handing \$10,000,000 to the black person *because* he is black (and then asking the new black “multimillionaire” whether he thinks this program *hurts* blacks). It takes no great leap to

suppose that the beneficiary of such a program—black or white—would have little difficulty concluding that the “putative costs” were “overwhelmed by the benefits.” Thus, there is no surprise in the suggestion that a majority of blacks *might* view such a program as *helpful* to blacks just as there is little doubt that a majority of whites likely would view the program in the same way if the program’s benefits were directed to whites.

The question is, would either group think it was *fair*?

The fallacy of the authors’ reasoning is laid bare by Thomas Sowell:

[W]hat other public policy is assessed in terms of whether its benefits are beneficial to the beneficiaries? The authors claim that society as a whole benefits, but they are short on even flawed evidence for that. What their data primarily seek to show is that the beneficiaries are benefited. Even if they could prove that, do we regard agricultural subsidies or various forms of corporate welfare as socially beneficial because the recipients like what they get and even lobby for more? For that matter, crimes benefit criminals and lies benefit liars, but are these reasons to favor crimes and lies?⁷³

A few pages later in *THE SHAPE OF THE RIVER*, Bowen and Bok mention important work by Professors Paul Sniderman and Edward Carmines, but they do so in a strange and questionable manner.

[A]ffirmative action . . . produce[s] negative reactions among whites that carry over to affect attitudes toward blacks generally.⁷⁴

What the authors intend by this statement is unclear. If it was their intent to fan the flames of racial intolerance and to affirm the cynical view shared by the University of Michigan’s leaders (and one or two Supreme Court justices) concerning the state of race relations in America in order to further justify their support for policies of racial preference, it is an unfortunate effort.

What is neither unclear nor as easily misinterpreted is what Sniderman and Carmines, in fact, have to say in the book from which Bowen and Bok cite. Their words are critically important and arguably serve to better inform the debate than anything written in *THE SHAPE OF THE RIVER*. Sniderman and Carmines wrote:

There is unmistakably, bitterness and resentment over affirmative action. But *it is a mistake to draw from the observation that many whites are angry over affirmative action the conclusion that they have turned their backs on black Americans*. The actual climate of opinion in white America runs, if anything, in the contrary direction. *The balance of sympathy, rather than opposing, runs in favor of making an extra effort to assure fairness to blacks. . . [A] clear majority supports not merely the importance of giving blacks fair consideration in the abstract but going the extra mile in practice to ensure they really are fairly treated. . . that special attention is necessary and appropriate to make sure they are judged by the same standards as everybody else. It is wrong for them to be judged by standards that are tougher just because they are black. But for the very same reason it is wrong for whites to be judged by tougher standards just because they are white. . .*⁷⁵

Of course, here, too, Bok has long recognized (even if Bowen has not) what Sniderman and Carmines report. Writing for himself, Bok has stated that:

In a democracy, public opinion must eventually count heavily in shaping the direction of policy. And *in the case of . . . racial preferences, public opinion has been consistently opposed . . . by a wide margin. . .* [but it also is true that] *Americans now affirm overwhelmingly that all workers should have equal employment opportunities according to their abilities and effort.*⁷⁶

In fact, Bok observed that “blacks themselves are *much less likely* to support . . . affirmative action than to affirm *the principle of equal access to jobs and schools.*”⁷⁷

An example of this point was captured in the words of basketball star Michael Jordan, one of the most widely recognized Americans of any race. Mr. Jordan offered this vision of America:

I know the kind of America I want for my children. . . It’s a place . . . *where skin color or eye shape doesn’t matter.* It’s time for us to believe in something that would give every American an *opportunity* to succeed and be viewed equally . . .⁷⁸

Michael Jordan’s vision of America is one which most Americans today share. Yet his is a vision which Bowen and Bok and certain members of the Supreme Court stubbornly reject. As Justice O’Connor wrote in *Grutter*, “race unfortunately still matters [in our society].”⁷⁹ And in one sense she is absolutely correct. “Race mattered” when it came to the Law School’s rejection of Barbara Grutter’s application. In fact, according to the University of Michigan, “race matters” when it comes to choosing one’s friends or

deciding with whom one wishes to work.⁸⁰ It is a sad, cynical and, I submit, foolish assessment of Americans’ willingness to look beyond—to get beyond—race. But it captures perfectly the University of Michigan’s views.

Of course, the University’s dim view of America found company on the Court in *Grutter*. Along with Justice O’Connor, Justice Ginsburg offered her own indictment. She wrote that, “It is well documented that conscious and unconscious race bias, even *rank discrimination based on race, remain alive in our land.*”⁸¹ She later compounded her negative view of American society with a compendium of ideologically driven complaints, found in her dissenting opinion in the undergraduate *Gratz* case, all of which she seemingly attributes to an almost ineradicable racism.⁸² Her view, which admittedly she took great pains to document,⁸³ is an amazingly negative one captured by her observation that “the effects of centuries of law-sanctioned inequality remain painfully evident in our communities and schools.”⁸⁴

Justice Ginsburg’s solution? Race should be taken into account in order to “correct inequalities.”⁸⁵ But here she is guilty of ignoring entirely the distinction between inequality of *opportunity* and inequality of *outcomes*. It is a distinction which even Bok understands.⁸⁶ Yet Justice Ginsburg suggests she will not be satisfied until her chosen sets of statistics show no disparities remaining in any conceivable *outcome* (be it in employment or poverty or high school drop out rates, or in the prices allegedly offered by automobile dealers to hypothetical prospective purchasers of new cars). Entirely ignored in her analyses is any effort to measure the particular interests, motivations or the talents of the individuals involved. With all due respect, Justice Ginsburg’s statistical destination is unreachable in a free society in which its members have even the slightest variations in skin tone. No amount of social engineering through the use of race-conscious policies will ever lead us to her desired end. And, sadly, her vote favoring Michigan’s race-conscious policies in *Grutter* only serves to insure that *race will continue to matter* for as long as she and at least four other justices on the Supreme Court are willing to *allow* it to matter.

RACIAL TENSIONS CREATED BY RACE PREFERENCE POLICES

Do preferential admissions policies affect “racial tensions in the society”? Absolutely. And Professor Bok knows it. Furthermore, these tensions are totally unnecessary. But “tension” is hardly the worst that can result. In criticizing the authors’ unwillingness “to assess the backlash created against racial quotas and preferences,” Professor Sowell notes that:

[S]urely these former university presidents cannot be unaware that poisonous racial incidents have become more common in recent times on campuses from coast to coast— . . . As a black student at Harvard in the 1950’s, I never experienced or even heard of the kinds of ugly racial incidents that have occurred on campuses across the country in recent years—and which college administrators have gone to great lengths to try to cover up.⁸⁷

Professor Sowell’s concern extends beyond mere racial incidents. In personal correspondence to his colleague, Dr. Finis Welch, he writes:

Group preferences and quotas are not merely wrong but dangerous. In countries where they have existed longer than in the United States, such as India and Sri Lanka, inter group relations have gotten more poisonous than in the United States. Sri Lanka is a particularly striking example, because it was held up as a model of inter group relations half a century ago, before taking the fatal turn toward group preferences in 1956, leading ultimately to an atrocity-ridden civil war that has now raged for decades and shows

no sign of ending any time soon. . . [I]f we continue long on the road of group preferences, we should at least try to look ahead and see what is at the end of that road.⁸⁸

Bowen and Bok are not oblivious to these dangers. Yet they essentially ignored them when assessing the putative costs of race-conscious admissions policies. Indeed, they offered this surprising admission:

This phenomenon [of negative feelings generated by affirmative action] was neither proved nor disproved by our study, *since we were not directly concerned with the society as a whole but only with the effects of race-sensitive admissions policies on students at selective institutions.*⁸⁹

It is difficult to reconcile this statement with other statements designed to convince the reader that preferential admissions lead to improved attitudes between the races. As they readily concede, their study doesn’t prove that at all. But if they really believed what they wrote above, perhaps they should have limited the distribution of their findings only to the chancellors and presidents of the 28 highly selective school they studied.

Anger, resentment, stigma, rejection of a fundamental American principle—these are the long-term consequences of race preferences, not to mention the outright confusion over who actually meets the definition of an “underrepresented minority” for the purpose of being considered under a preferential admissions policy.

DEFINING WHO QUALIFIES FOR PREFERENTIAL TREATMENT
HORRIBLE QUESTIONS/WORSE CHOICES

Saddled as a great portion of our country now is with these Court-sanctioned preference policies, how does an admissions committee go about defining who is “African American,” “Hispanic,”

“Native American,” or “Asian American” for the purpose of being considered for preferential treatment? What treatment should be afforded the ever-increasing number of mixed-raced applicants? Does a student with one black parent and one white parent qualify as an “African American”?⁹⁰ Why must any student be placed in the position of selecting (or preferring) one-half of her parentage, and rejecting the other half, simply to obtain a race preference?⁹¹ Does a student with one black grandparent, or one black great-grandparent qualify as “black”? Does the abhorrent “one-drop rule”⁹² still prevail, and indeed find not-so-subtle support in the views of those, like Bowen and Bok, who assert that race matters in admissions?

How does one determine whether a student is “Hispanic”? Are there “Hispanics” who are preferred, and “Hispanics” who are not?

Who qualifies, today, as a “Native American”?

And what does one begin to do with the dozens of races, ethnicities, languages and cultures which include all of those individuals who may identify as “Asian”?

It leads to intolerable situations where minority students at a top-tier law school like University of Michigan approach the admissions committee and say, “so and so is not black *because his mother is white* and we don’t want to see [him] come through the [special admissions] system.”⁹³ By this definition, famous black leaders like former slaves Frederick Douglass and Booker T. Washington (both of whom had white fathers) and, without question, all of Thomas Jefferson’s and Sally Hemings’ reputed offspring, would be disqualified by modern day black law students at the University of Michigan from consideration for a racial preference in admissions. In fact, Ms. Hemings herself was listed as “white” in the first census taken after Jefferson’s death in 1830.⁹⁴ Under these circumstances, and as bizarre as it may seem, neither Ms. Hemings nor Mr. Plessy, the (7/8^{ths} white)⁹⁵ “colored man” in *Plessy v. Ferguson*, would likely be viewed as adding the sort of “diversity” desired by Michigan’s Law School under its race preference admissions policies based solely on the literal shade of their skin.

RACE-PREFERENCES: DETERRENT TO MEANINGFUL CHANGE?

Is there more to be said? In fact, yes. Racial preferences deter our society from addressing the difficult, seemingly intractable problems which contribute so significantly to minority student underachievement. Instead of moving forward with the strength which our combined communities can muster to reach a consensus on what must be done to address these problems—improved K-12 schooling; improved community and parental involvement; more and better teachers; insistence on high standards and student achievement—we rely instead on the superficial images of “equality” on our elite college campuses, illusions created by racial preferences, while ignoring the real problems.

Harvard professor and expert on race, Stephan Thernstrom, concurs:

[What is desperately needed] is better K-12 education. Only good schooling can provide [minority students] with realistic hopes of a better life. And race-based admissions policies in higher education are a pernicious palliative that deflects attention from the real problem.⁹⁶

But the problem of black academic underachievement extends well beyond simply providing “good schooling.” To quote Bok, it is caused by innumerable factors:

[F]amily structure, nutrition, employment opportunities, housing, and the prevalence of drugs—that shape the environment in which young people grow and develop and acquire their ambition for the future.⁹⁷

Bok has gone much further in providing his opinion of what is required in order to improve educational opportunity. His views are not ambiguous:

[W]e need to link individualism and competition . . . with a strong sense of personal responsibility towards institutions, communities, and other human beings.

The needed sense of responsibility begins with family, the most immediate community to which we owe a duty. *This obligation is a matter of importance* not only to the family members themselves but *to the entire society*. Parents, if they choose to make the effort, will normally have a greater influence than anyone else on the attitudes of their children—their ethical standards, their respect for rules, their concern for others, their motivations and self-discipline. Parents also have important effects on the education of their offspring not only by creating a stimulating environment at home but also by the interest they show in their children’s homework and activities of the children’s school. Indeed, *a recent study comparing hundreds of effective and ineffective schools revealed that the single most important factor explaining the success of the better schools was not the amounts of money spent per pupil, nor the quality of the facilities, nor even the role played by the principal and teachers, but by the degree of involvement by the parents.*⁹⁸

The importance of the “community” and parental involvement cannot be overstated. It is the focus of efforts throughout the nation to improve academic performance by black American students. Representative is this response from black leaders in Minnesota to a disturbing report concerning American-born

black students: “After seeing how many black 12th-graders [in the high school class of 2000 had] yet to pass [the Minnesota Basic Standards Test], black leaders in Minneapolis schools called on the black community, and parents and students in particular, to step up to do their share of the work.”⁹⁹

One Minneapolis school board member was quoted as saying, “There’s mentoring on every corner. The district has done everything it can do. Now it’s up to the kids and the families.” Another school board member, a respected minister in Minneapolis’ black community, said that the students’ poor performance was an indication of a “lack of community involvement” in our schools and in our children. “The African-American community – every community – should be appalled that the African-American students are failing at [such a] high percentage.” This same board member, noting how attendance problems were adversely affecting black achievement, made the common sense observation that “the schools cannot do their part if the kids aren’t there.” Poor attendance, he noted, “is not a district problem; that is a community problem, it is a family problem.”¹⁰⁰

Interestingly, Bok’s fundamental concern in the past has not been over a lack of racial diversity on campus, but on all of the other concerns expressed above, together with the modern university’s lack of attention to the *moral development* of the students it is producing.¹⁰¹

He goes on at length to offer his view of what should be done to correct *that* failure:

These . . . are the elements of a comprehensive program of moral education: offering courses in applied ethics at the college and professional school level, discussing rules of conduct with students and administering them fairly, building strong programs of community service, *demonstrating high ethical standards in dealing with moral issues facing the university*, and, finally, being more alert to the countless signals that

institutions send to students and *trying to make these messages support rather than undermine basic norms.*¹⁰²

A good starting point would be strict adherence to a universal and basic norm which virtually every institution of higher learning claims to have adopted. It is the simple, unambiguous promise engraved in this country’s historic civil rights legislation and paraphrased by every major college including the University of Michigan:

That no person, on the basis of race, color, national origin, or ancestry, shall be discriminated against in employment, educational programs and activities, or admissions.¹⁰³

The willingness of Bowen and Bok, and the colleges and universities which they so strongly influence, to jettison the promise embodied in these words—depending upon the race of the person who seeks its enforcement—does more harm than a thousand senseless acts of blatant discrimination by otherwise ignorant people.

Bowen and Bok are not ignorant. Nor are the admissions personnel at the University of Michigan, or Harvard, or Princeton. But the authors’ lack of commitment to this principle is bewildering and disheartening.

A quarter of a century ago, and well before he coauthored *THE SHAPE OF THE RIVER* with William Bowen, Derek Bok offered this view of the modern academy which, at this point in our discussion, bears repeating:

[W]e have built a system of higher education *universally regarded as the best in the world in terms of* the quality of research, the eminence of our leading universities, [and] *the access provided to all racial groups* and income strata, . . .¹⁰⁴

After reading his thoughtful words, one might reasonably conclude that Bok would be among those who categorically reject the use of race-conscious decision-making as an answer to the many legitimate concerns about black underrepresentation in selective colleges and universities. How Bok can ignore his prior words, and support—along with Bowen—the blatant discrimination which is continuing, remains a mystery.

¹ TSR at 278.

² Viet D. Dinh, *DEBATING AFFIRMATIVE ACTION* (Nicolaus Mills, ed.) (1994) at 289.

³ Colin Powell, *MY AMERICAN JOURNEY* (1995) at 591-592 (emphasis added).

⁴ Shelby Steele, “We Shall Overcome – But Only Through Merit,” *THE WALL STREET JOURNAL* (Sept. 16, 1999).

⁵ See “Statement on the Judiciary Committee of the Honorable Susan Molinari,” *Subcommittee on the Constitution*, U.S. House of Representatives, December 7, 1995.

⁶ Albert Shanker, “Quotas and Affirmative Action,” *Proceedings from hearings Before the United States Equal Employment Opportunity Commission* (1996) at 206.

⁷ *Id.*

⁸ Nathan Perlmutter, “Testimony of Anti-Defamation League of B’nai B’rith,” *Id.* at 195.

⁹ TSR at xxiii.

¹⁰ Perlmutter, *supra* note 8.

¹¹ *Id.*

¹² Lisa Ellen Wolf, “Models of Excellence: The Baccalaureate Origins of Successful European American Women, African American Women, and Latinas,” Ph.D. dissertation submitted to the Faculty of The Claremont Graduate School (1995) at 212 (emphasis added).

¹³ *Id.*, at 194.

¹⁴ TSR at 190.

¹⁵ TSR at 283 (emphasis in original).

¹⁶ Jim Sleeper, *LIBERAL RACISM* (1997) at 86-87.

¹⁷ TSR at 278.

¹⁸ TSR at 258.

¹⁹ TSR at 258-69.

²⁰ TSR at 258.

²¹ TSR at 258-59 (emphasis in the original).

²² TSR at 295, Table A.2.

²³ TSR at 378, Table D.3.2. It is a subject which is addressed in a slightly different, but related, context by Yale law professor Stephen L. Carter. See Stephen L. Carter, *INTEGRITY* (1996) at 80-81.

²⁴ TSR at 376-79, Tables D.3.1 and D.3.2. These differences apply to both “first-school” and “overall” graduation rates.

²⁵ TSR at 350, 376, Tables B.4 and D.3.1, respectively.

²⁶ TSR at 295, 378, Tables A.2 and D.3.2, respectively.

²⁷ TSR at 376-79, Tables D.3.1. and D.3.2. Only one exception was noted. The data show that Native American matriculants who entered SEL-2 institutions in 1989 had a higher graduation rate than those who entered an SEL-1 school. *Id.* at 376.

²⁸ Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1886 (May 1999).

²⁹ TSR at 140-42, Fig. 5.7.

³⁰ TSR at 260.

³¹ Derek Bok, *BEYOND THE IVORY TOWER* (1982) at 101.

³² TSR at 260.

³³ Bok, *supra* note 31 at 102. Also see *infra* note 50 and accompanying discussion.

³⁴ *Id.*

³⁵ It is noteworthy that virtually all analyses of race preference admissions calculate the differences in SAT scores between black and white admittees to easily reach the “magnitude” which raised concern on Professor Bok’s part. See, e.g., Stephen Cole & Elinor Barber, *INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS* (2003) at 124.

³⁶ Note the early acknowledgement by Bok concerning the harm which these policies can potentially inflict on minority students. Bok, *supra* note 31 at 103.

³⁷ *Id.* (emphasis added).

³⁸ TSR at 261, citing Shelby Steele, “A Negative Vote on Affirmative Action,” *DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION* (Nicolaus Mills, ed.) (1994) at 42.

³⁹ TSR at 190.

⁴⁰ TSR at 261.

⁴¹ TSR at 264-65.

⁴² *Id.*

⁴³ TSR at 315-35, Appendix A.

⁴⁴ Bok, *supra* note 31 at 103.

⁴⁵ Shelby Steele, *A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA* (1998) at 113.

⁴⁶ Glenn Loury, “Performing Without A Net,” *THE AFFIRMATIVE ACTION DEBATE* (George Curry, ed.) (1996) at 63.

⁴⁷ TSR at 72. It is important to note that both of these calculations (grades and class rank) considered all black matriculants, including the presumably substantial group of students for whom race made no difference in their admission. Had the GPAs and class rankings for the students in this latter group been removed, the averages for those who were preferentially admitted would no doubt have been even lower, perhaps substantially so.

⁴⁸ TSR at 142.

⁴⁹ This is the same point made by Bowen’s colleagues, Stacy Berg Dale and Alan B. Krueger, i.e., graduating from a school where the student is better able to compete academically may have positive effects. See Stacy Berg Dale and 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* (revised Jul. 7, 1999) at 28-29.

⁵⁰ See generally, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (Nov. 2004).

⁵¹ TSR at 264-65.

⁵² Paul Ong (ed.), *IMPACTS OF AFFIRMATIVE ACTION: POLICIES & CONSEQUENCES IN CALIFORNIA* (1999) at 173: “Several prominent African Americans have argued that affirmative action stigmatizes its beneficiaries. Carol M. Swain, an associate professor at Princeton University writes: ‘Besides encouraging many to play the victim, affirmative action policy telegraphs an equally harmful subliminal message to its beneficiaries. It says in effect that you, as a woman or minority, are less capable than a white male and will need special preference in order to complete successfully in a world dominated by white males.’ . . .”

⁵³ Deposition of Jeffrey Lehman in *Grutter* (Jan. 21, 1999) at 97-98.

⁵⁴ Of course, as Bowen and Bok accurately observe (TSR at 55), it is wrong to assume that every departure of a minority student from a highly selective college is due to his or her inability to meet the academic challenges posed. Numerous reasons including health, finances, simple dissatisfaction with the institution, or other family or personal commitments, can explain a student’s decision to drop out of school or transfer from one college to another. Not all, nor even most, of the black attrition necessarily relates to the student’s inability to competently handle the work. On the other hand, where race preferences exist, academic failure becomes the *sine qua non* for minority

attrition. Even considering the selectivity of the C&B schools, the overall “first-school” drop-out rate for all black matriculants in the ’76 cohort was almost 35% (44% for those who matriculated at SEL-3 schools). See, TSR at 378, Table D.3.2.

⁵⁵ TSR at 281: “Many 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 affected as a result.”

⁵⁶ Dale and Krueger, *supra* note 49 (Abstract: “. . . We find 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.” Also see *id.* at 30. They note that “there is no evidence that the relationship between school selectivity and subsequent earnings is different for black students.” *Id.* at 28).

⁵⁷ As Professor Loury said in the *Foreword*, TSR (paperback ed. 2000) at xxi, “[the authors’] goal is being achieved at tolerable cost.”

⁵⁸ Alternative methods to achieve greater minority participation in higher education, while undoubtedly more effective and more fair, may also, in many instances, be more painful and difficult because they will require much harder work by everyone in our society (including parents, students and educators at every level).

⁵⁹ Stanford University professor Claude Steele is Shelby Steele’s twin brother who, though less opposed than Shelby Steele to the use of race in admissions, nevertheless echoes his brother’s opinion of the importance of demanding high expectations from all students regardless of race. Claude Steele was originally listed as an expert witness for the University of Michigan Law School but was withdrawn without explanation during trial. He is principally known for his work on the subject of “stereotype threat,” which, according to Dr. Steele, can depress the ability of some black students to perform well in a rigorous academic setting. See Claude M. Steele & Joshua Aronson, “Stereotype Threat and Test Performance of Academically Successful African Americans,” in Christopher Jencks and Meredith Phillips (eds.), *THE BLACK-WHITE TEST SCORE GAP* (1998). After Dr. Steele was withdrawn by the Law School as a witness, certain intervening minority students sought to force Dr. Steele to be a witness in their portion of the case. The minority students’ efforts were strenuously, and ultimately successfully, objected to by the Law School. As a consequence, Dr. Steele never appeared as a witness during the *Grutter* trial.

⁶⁰ Mary L. Hummel, “Eliminating the Achievement Gap: The 21st Century Program,” *About Campus* (Jan-Feb 1997) at 28. Also, see, May Garland,

The Mathematics Workshop Model: An Interview with Uri Treisman, *JOURNAL OF DEVELOPMENTAL EDUCATION* (Vol. 16:3 Spring 1996) at 14-22.

⁶¹ Gail Heriot, *Equal Opportunity Works*, *THE WEEKLY STANDARD* (Apr. 17, 2000) at 20.

⁶² TSR at 263 (emphasis added).

⁶³ Dale and Krueger, *supra* note 49 at 29: “The improvement in class rank for students who choose to attend a less selective college may help explain why those students do not appear to incur lower earnings; employers (and graduate schools) may value their higher class rank by enough to offset any other effect of attending a less selective college on earnings.”

⁶⁴ See generally, Sander, *supra* note 50.

⁶⁵ For confirmation of Bok’s point that grading standards are affected by preferential admissions policies, see Professor Sandalow’s discussion, *supra* note 28, at 1902-03. Even Bowen and Bok make a grudging reference to the alleged phenomenon of colleges creating less rigorous or “soft” majors to accommodate preferentially admitted students whose academic preparation may have been insufficient. See TSR at 259, note 4.

⁶⁶ Bok, *supra* note 31 at 92 (emphasis added).

⁶⁷ Derek Bok, *THE STATE OF THE NATION* (1996) at 188-89 (emphasis added).

⁶⁸ TSR at 265 (emphasis added).

⁶⁹ *Id.* Professor Hochschild is Professor of Government and Professor of African and African-American Studies at Harvard University.

⁷⁰ See generally, Paul M. Sniderman & Edward G. Carmines, *REACHING BEYOND RACE* (1997). The authors are not unaware of the work by Professors Sniderman and Carmines. TSR at 268, note 22. In addition, it critical to understand Bok’s recognition of the importance Americans place on fairness and equal opportunity, their support for anti-discrimination laws, and their overwhelming rejection of preferential treatment. In 1996, Bok wrote, “Whites are not against all practical measures to achieve equality. They do support anti-discrimination legislation. . . . The laws they oppose are the ones that grant minorities preference in . . . applying to college.” Bok, *supra* note 67 at 187. Later in that same book he wrote, “In a democracy, public opinion must eventually count heavily in shaping the direction of policy. And in the case of . . . racial preferences, public opinion has been consistently opposed . . . by a wide margin.” *Id.* at 190.

⁷¹ See, e.g., Paul M. Sniderman and Thomas Piazza, *BLACK PRIDE AND BLACK PREJUDICE* (2002) at 143-54. Also see *BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF SCHOLARS in Grutter* (Jan. 2003) at 9-10.

⁷² TSR at 265 (emphasis added).

⁷³ Thomas Sowell, *Racial Quotas in College Admissions: A Critique of the Bowen and Bok Study*, HOOVER DIGEST No. 3 (1999).

⁷⁴ TSR at 268.

⁷⁵ Snider & Carmines, *supra* note 70 at 26-27 (emphasis added).

⁷⁶ Bok, *supra* note 67 at 190 and 196 (emphasis added).

⁷⁷ *Id.* at 188 (emphasis added).

⁷⁸ Eric Black, “Ad watch: Campaign 2000,” *Minneapolis Star-Tribune* (Feb. 12, 2000) at A17 (emphasis added).

⁷⁹ *Grutter v. Bollinger, et al.*, 539 U.S. 306, 123 S.Ct. 2325, 2341, 156 L.Ed.2d 304 (2003).

⁸⁰ R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. J. LAW & POLITICS 313, 326, n. 66 (Spring 2003).

⁸¹ *Grutter, supra*, 123 S.Ct. at 2347-48 (emphasis added)(GINSBURG, J., with whom SOUTER, J., joins, concurring).

⁸² *Gratz, et al. v. Bollinger, et al.*, 539 U.S. 244, 123 S.Ct. 2411, 2443-44, 156 L.Ed.2d 257 (2003)(GINSBURG, J., with whom SOUTER, J., joins, dissenting).

⁸³ *Id.* at footnotes 1 through 9.

⁸⁴ *Id.* at 2443.

⁸⁵ *Id.* at 2445.

⁸⁶ Bok, *supra* note 67 at 9-10. Also see *infra* note 2 and accompanying text in the CONCLUSION of this text.

⁸⁷ Sowell, *supra* note 73.

⁸⁸ Tom Sowell letter to Finis Welch (May 15, 2000), published with Dr. Sowell’s permission.

⁸⁹ TSR at 268 (emphasis added).

⁹⁰ The confusion is captured by Ward Connerly who, paraphrasing his question, asks, “How can the ‘African-American’ daughter of a ‘white’ mother be of a different race than her mother?” Personal communication to the author and others (Jun. 21, 2002), published with Mr. Connerly’s permission.

⁹¹ See Purdy, *supra* note 80 at 348-50 and accompanying notes.

⁹² See Ward Connerly, *CREATING EQUAL* (2000) at 24: “I’m black in the same way that Tiger Woods and so many other Americans are black—by the ‘one-drop’ rule used by yesterday’s segregationists and today’s racial ideologues. In my case, the formula has more or less equal elements of French Canadian, Choctaw, African, and Irish American.”

⁹³ See Deposition Testimony of former Law School director of admissions Allan Stillwagon in *Grutter* (Nov. 6, 1998) at 29.

⁹⁴ Annette Gordon-Reed, *THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY* (8th paperback printing 2000). Sally Hemings was the daughter of a white man and a woman who was half-white. *Id.* at 160. To the extent Jefferson fathered any of Heming’s children (as the evidence strongly suggests), they would be 7/8^{ths} Caucasian. After Jefferson’s death, Ms. Hemings and her two younger sons (who were freed by Jefferson as part of his will executed in 1826) left Monticello. All three were listed in the census taken in 1830 as “white.” *Id.* at 2.

⁹⁵ *Plessy v. Ferguson*, 163 U.S. 537, 541 (1896)(“[P]etitioner was seven-eighths Caucasian and one-eighth African blood; [and] the mixture of colored blood was not discernible in him . . .”).

⁹⁶ Stephan Thernstrom, *Alamo in Ann Arbor*, NATIONAL REVIEW: SPECIAL EDUCATION SUPPLEMENT (Sept. 13, 1999) at 42 (emphasis added).

⁹⁷ Bok, *supra* note 67 at 186.

⁹⁸ Derek Bok, *UNIVERSITIES AND THE FUTURE OF AMERICA* (1990) at 55-56 (emphasis added). Adding to Bok’s comments are recent observations by Ken Foxworth concerning *A Commitment to Excellence*, a University of Minnesota program designed to boost the academic performance of black boys. According to Foxworth, parent involvement is an integral part of the program. Anne O’Connor, “Community urged to help black kids succeed,” *MINNEAPOLIS STAR-TRIBUNE* (Feb. 9, 2000) at A11.

⁹⁹ O’Connor, *MINNEAPOLIS STAR-TRIBUNE* (Feb. 9, 2000) at A1.

¹⁰⁰ *Id.* at A1 and A11.

¹⁰¹ Bok, *supra* note 98 at 100: “Surveying the efforts currently made to help students acquire a stronger sense of moral and civic responsibility, one cannot say that higher education as a whole pays adequate attention to the issue. . . . More often, . . . and especially in large universities, the subject is still not treated as a serious responsibility worthy of sustained discussed and determined action by the faculty and administration.”

¹⁰² *Id.* at 97 (emphasis added).

¹⁰³ *University of Michigan Law School Faculty Handbook* (1991)(*Grutter* Trial Exhibit 78) at 16.

¹⁰⁴ Bok, *supra* note 31 at 59 (emphasis added).