

CHAPTER TEN

THOSE LEFT IN THE WAKE

I had seen [a piece of the river] when coming up-stream, but I had never faced about to see how it looked when it was behind me. My heart broke again, for it was plain that I had got to learn this troublesome river *both ways*.

Life on the Mississippi (page 79)

Injustice anywhere is a threat to justice everywhere.

Martin Luther King, Jr.
(Letter from a Birmingham Jail,
Apr. 16, 1963)

Tragically absent from Bowen's and Bok's analysis of the benefits of race preference admissions policies is any meaningful discussion about those innocent individuals who are left behind in their wake. Bowen and Bok spend hundreds of pages justifying their use based on how well the supposed recipients of these preferences perform. They virtually ignore the other individuals who also are directly affected (meaning "rejected") even as they admit that there is every reason to believe they, too, would have benefited as much, and maybe more, from attending an elite school had they not been denied admission based on the color of their skin.¹

Contrary to the authors' effort to convert this particular set of individuals into an anonymous set of statistics, those who were rejected because of their race are not, like Bowen's and Bok's fictitious "retrospectively rejected" black matriculants, mere statistics. They are real persons with names like Barbara Grutter, Jennifer Gratz, and Patrick Hamacher, and thousands upon thousands of others

Those Left in the Wake

(including thousands upon thousands of black students from decades past) who have suffered similar injustices. It is an injustice which cannot be denied for it is inescapable that every time a person is selected because of *his* race, a different individual is rejected because of *hers*.

The authors' insensitivity is difficult to understand and their argument supporting their lack of concern is disingenuous:

Let us suppose that rejecting, on race-neutral grounds, more than half of the black students who otherwise would attend these institutions would *raise the probability of acceptance for another white student from 25 percent to, say, 27 percent* at the most selective colleges and universities. Would, we, as a society, be better off? Considering both the educational benefits of diversity and the need to include far larger numbers of black graduates in the top ranks of the business, professional, governmental, and not-for-profit institutions that shape our society, we do not think so.²

As illustrated by the above, Bowen and Bok adroitly devise an argument which implies a minimal *group* impact on white students. Their approach misses the point. In each instance, it is the rights of an individual which are at stake, not the rights of any particular group.³ It was a critical point missed by Justice O'Connor as well.⁴

Their view fundamentally misses the point that the discrimination-free society which every dedicated educator should actively be championing cannot be achieved by creating a new hierarchy of victims where some are deemed more or less worthy based on the color of their skin.⁵ Adopting such a view gives continuing and unwarranted life to an abhorrent practice—*racial discrimination*—and threatens to create a mighty river of never-ending claims for retribution over historical injustices for which no living person will ever bear responsibility.

It also misses the single group of individuals most adversely impacted currently by race preference policies: Asian Americans. It is a simple fact that adopting race-neutral admissions at elite schools would offer a greater benefit to Asian applicants than to applicants from any other racial or ethnic group because Asian students routinely outperform all other groups when it comes to excelling on standardized tests and in their high school and undergraduate academic achievement, the two factors routinely given the most weight in the admissions process.

As earlier shown, Professor Bok has long recognized the individual injustices which result from the race preference policies being followed today. He also recognizes the historical injustices of the past:

Those who attack preferential admissions generally begin by assuming that the policy represents a well-meaning but misguided attempt . . . to atone for the injustices society has inflicted on blacks and other racial groups.⁶

His description is one generally accepted by everyone on both sides of the debate—even though it was expressly and appropriately rejected by Justice Powell in *Bakke* as a constitutionally permissible excuse for using racial classifications.⁷ Thus, these policies, while allegedly defended on the basis of the “educational benefits of diversity,” constitute in the minds of most a “well-meaning” if misguided form of retribution, reparations and/or atonement (and, perhaps, all three) for the historical injustices visited mainly on black Americans, but on other minority groups as well.

Yet the real lesson seems lost. For what we should have learned, as Thomas Sowell reminds us, is that continuing to use race to confer benefits on some, or to penalize others, simply leads us further into a proverbial black hole of historical injustices. And this inevitably leads to endless claims for retribution for wrongs committed decades, if not centuries, ago where both victim and perpetrator are no longer alive. It begs for unnecessarily painful—if

not impossible—analyses over who, in fact, is the *victim* and who, in fact, was the *perpetrator*.

For example, is social justice served by granting preferential admission in 2007 to a Native American descendant of a Tribe (e.g., Cherokee or Choctaw) which undeniably owned black slaves and fought for the Confederacy,⁸ while denying admission to a white descendant of abolitionists, or to the white descendant of a Union soldier who gave the ultimate sacrifice—his life—in our country’s fight to end slavery?

Similar intra-racial inquiries could be addressed to every group. For example, is the “Hispanic” offered admission descended from those who may have enslaved and abused other indigenous peoples? Is the white who receives an offer of admission a descendent of a mine owner or railroad baron who may have robbed not only blacks and Native Americans but other whites of their lives and their lands? Is the black who may be offered admission descended from a black who himself held slaves, or from an African ancestor who sold his own black countrymen into slavery in the New World? As even our Nation’s foremost chronicler of the institution of American slavery, John Hope Franklin, has admitted, “Slavery was an important feature of African social and economic life. The institution was widespread and was perhaps *as old as African society itself*.”⁹ And by some accounts, slavery continues to exist on the African continent, even today.

Bok continues his view of the injustice inflicted on the non-minority aspirants:

By admitting minority applicants with lower grades and standardized test scores, university officials . . . [deny] educational opportunities to . . . students who are said to be better qualified “on the merits” to receive them. In failing to gain access to the institution of their choice, *these students are also made to suffer an injustice, since they are seldom responsible for any past discrimination against minority groups*. To make matters worse, *leading universities*

*frequently offer preferred treatment to minority students from comfortable middle-class backgrounds and thus are accused of favoring applicants who have suffered least from discrimination while rejecting . . . students who often come from poor families and may have had to overcome much greater adversity.*¹⁰

Professor Dershowitz provides a similar example:

An applicant’s potential to contribute to the diversity of the student body is uniquely a function of his or her individual experiences, interests, approaches, talents, and characteristics. The prep school black brought up in a middle-class neighborhood by professional parents might contribute far less diversity than a Hasidic Jew from Brooklyn, a Portuguese fisherman from New Bedford, a coal miner from Kentucky, or a recent emigre from the Soviet Union.¹¹

Of course, Bowen and Bok know that the schools which grant preferential admissions make no inquiry whatsoever into the effects, if any, which discrimination may have had on those blacks or Hispanics who *are* preferentially admitted; and no analysis at all of “the much greater adversity” which some rejected whites or Asians may have had to overcome.¹²

As earlier noted, the University of Michigan’s former undergraduate admissions policy, which awarded substantial points based solely upon race, also provided a separate award of points based solely upon socioeconomic disadvantage.¹³ That aspect of Michigan’s undergraduate admissions policy was never challenged during the *Gratz* case.

Clearly Michigan’s Law School could have adopted a similar policy, rewarding those who had overcome demonstrable “disadvantage,” and presumably could have administered it in a race-

neutral manner. And while not every student who is benefited by considerations of socioeconomic or educational “disadvantage” will come from one of the currently-targeted minority groups,¹⁴ it should be no drawback that disadvantaged non-minority applicants will also get an opportunity they might otherwise have been denied.

In the end, no one can seriously argue that white or Asian students want to increase white or Asian percentages as against any other *group*. White and Asian students, and most black students as well, ask only that they be judged as individuals against the same set of standards.¹⁵ Let the number of applicants and their individual achievements, rather than skin color, determine the odds faced by each student. That is the promise of equal opportunity. Any policy which frustrates this promise is simply unfair.

WHAT HAVE WE WROUGHT?

A classic example of the open deception which Bok often warned against but which now literally is encouraged because of the preferential admissions policies he and Bowen support is found in a 1997 copy of THE PRINCETON REVIEW STUDENT ADVANTAGE GUIDE TO COLLEGE ADMISSIONS.

Illustrative are the cynical but painfully honest suggestions which this GUIDE offered to college applicants concerning the impact of one’s minority status on the application process:

College admissions decisions are made without regard to race, creed, color, or any other factor that has nothing to do with your qualifications as a student—right?

Wrong.

The color of your skin, . . . can have a big effect on your chances of being admitted to the school of your choice. Sometimes these factors can help you; sometimes they can harm you. . .

Ethnic Background

Colleges sometimes claim that their admissions departments are “color-blind” or that they pay no attention to race in deciding who gets in and who is rejected. But this is never true. Ethnic backgrounds can make a big difference. Here are some general observations arranged according to particular groups:

African Americans

. . . Most selective colleges would like to have more African American students than they do, if for no other reason than that they very much want to appear to be unprejudiced.

* * *

Here are some important guidelines:

Make sure the admissions committee knows you’re black. (Attach a photograph.) Selective colleges generally have less stringent requirements for black applicants. Take advantage of them.

Don’t be afraid to aim high . . . *You may be able to get into schools that wouldn’t accept you if you were white.*

* * *

Asian Americans

. . . Many [Japanese, Chinese, Korean, and Vietnamese] students have been extraordinarily successful academically, to the point where some colleges now worry that there are “too many” of these students on their campuses. *Being an Asian can now actually be a distinct disadvantage in the admissions processes at some of the most selective schools in the country.*

* * *

. . . [P]ay attention to the following guidelines:

If you’re given an option, don’t attach a photograph to your application and don’t answer the optional question about your ethnic background. This is especially important if you don’t have an Asian-sounding surname. (By the same token, if you do have an Asian-sounding surname but aren’t Asian, do attach a photograph.)

* * *

Hispanic Americans

Being Hispanic can help you, because admitting you will help a college boost its percentage of minority students. . . In general, the guidelines for African Americans apply to you . . .¹⁶

As this prominent college guide makes clear, racial discrimination is being practiced at many selective institutions. However, far and away its worst aspects are the damaging and demeaning messages about black and Hispanic students which are being sent to *all* students, not to mention the sheer dishonesty in the applications process which is openly being encouraged.

If they were aware of it, one would expect Bowen and Bok to be appalled that the race-conscious policies they support have engendered the sort of advice to prospective college applicants typified by The Princeton Review’s 1997 publication.

FAIRNESS

“Fairness” is a principle as old as mankind. When it is violated based on immutable characteristics such as the color of one’s skin, it represents a frontal assault on *the* principle which is perhaps the most revered by the largest number of Americans of *all* races.

That “favors” based on one’s color were wrong was recognized by black leaders over a century ago. Mary Church Terrell, an early graduate of Oberlin College, once gave a highly acclaimed speech to the National American Women’s Suffrage Association. She concluded with this thought:

With courage, born of success achieved in the past, with a keen sense of the responsibility which we shall continue to assume, we look forward to a future large with promise and hope. *Seeking no favors because of our color, nor patronage because of our needs, we knock at the bar of justice, asking an equal chance.*¹⁷

The year was 1898.

Almost one hundred years later, United States Senator Joseph Lieberman, a Democrat from the State of Connecticut, had this to say about policies which provide favorable treatment to persons based on their color:

You can’t defend policies that are based on group preferences as opposed to individual opportunities, which is what America has always been about. . . . *They’re patently unfair.* . . . Not only should we not discriminate against somebody, we shouldn’t discriminate in favor of somebody based on the group they represent. (March 9, [1995])

Affirmative action is dividing us in ways its creators could never have intended, because most Americans who do support equal opportunity, and are not biased, do not think it’s fair to discriminate against some Americans as a way to make up for historic discrimination against other Americans. . . . Two wrongs . . . don’t make a right. (July 19, [1995])¹⁸

Senator Lieberman, a man who never could be accused of harboring racist views, was right. The use of a racial preference, whether in employment, in voting, or in college admissions, is discrimination, pure and simple.

A re-affirmation of this principle, the first to emanate from the United States Supreme Court in the 21st Century before Justice O’Connor turned the principle on its head in *Grutter*, is found in the voting rights case of *Rice v. Cayetano*. Writing for the Court, Justice Anthony Kennedy said this:

The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race.

* * *

. . . *The Amendment grants protection to all persons, not just members of a particular race.*

* * *

. . . *One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.*

* * *

. . . ‘Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’ *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).¹⁹

Justice Kennedy’s words are simple, and timeless in their reach.

Bowen and Bok should read them and re-familiarize themselves with the principle of equality they describe. Justice O’Connor should have done the same before she issued her opinion in *Grutter*. Our nation would be better off today if, instead of undermining the principle, Bowen, Bok and Justice O’Connor had recommitted themselves and their respective institutions to it.

¹ TSR at 282.

² TSR at 285 (emphasis added).

³ Compare the analysis in R. Lawrence Purdy, *Prelude: Bakke Revisited*, 7 TEX. REV. L. & POLITICS 313, 362 (Spring 2003).

⁴ *Grutter*, *supra*, 123 S.Ct. at 2345-2346. Justice O’Connor concedes the harm: “We acknowledge that ‘there are serious problems of justice connected with the idea of preference itself.’ (citing Justice Powell’s opinion in *Bakke*).” She nevertheless goes on to claim that “the Law School’s race-conscious admissions program does not *unduly* harm nonminority applicants.” (Emphasis added.)

⁵ Paraphrasing the view of current combatants in a long-standing civil war. See Robert J. Kozlowski, “If only the PLO could take a cue from the IRA,” MINNEAPOLIS STAR-TRIBUNE (Aug. 3, 2002) at A19.

⁶ Derek Bok, *BEYOND THE IVORY TOWER* (1982) at 93.

⁷ “Powell viewed ‘remedying the effects of “societal discrimination” [as] an amorphous concept of injury that may be ageless in its reach into the past.’” Purdy, *supra* note 3 at 361, citing *Bakke*, 438 U.S. at 307.

⁸ For an example of the slavery practiced by various tribes, see Articles 4 and 9 of TREATY WITH THE CHEROKEE 1866, 14 Stats. 799 (ratified July 27, 1866). Following the Civil War, similar treaties were entered into with many tribes whose members previously owned black slaves and had fought for the Confederacy during the War.

⁹ John Hope Franklin & Alfred A. Moss, Jr., *FROM SLAVERY TO FREEDOM* (8th ed. 2000) at 23 (emphasis added). The conflict and confusion over achieving “justice” through racial or ethnic preferences must be felt by Professor Franklin, himself a descendant of a former slave of a Choctaw Indian. See generally Buck Colbert Franklin, *MY LIFE AND AN ERA: THE AUTOBIOGRAPHY OF BUCK COLBERT FRANKLIN* (John Hope Franklin and John Whittington Franklin, eds.)(1997).

¹⁰ Bok, *supra* note 6 at 93 (emphasis added).

¹¹ Alan Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext?* 1 CARDOZO L. REV. 379, 419 (1979).

¹² As California Supreme Court Justice Stanley Mosk once wrote: “Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race, in favor of another who is less qualified as measured by standards applied without regard to race.” *Bakke v. Regents of Univ. of Cal.*, 18 Cal.3d 34, 48 (1976), *aff’d in part & rev’d in part*, 438 U.S. 265 (1978)(emphasis added).

¹³ For a description of the now unconstitutional undergraduate admissions system at the University of Michigan, see Purdy, *supra* note 3 at 337, n. 122. The system was struck down by the United States Supreme Court on June

23, 2003. *See, Gratz, et al. v. Bollinger, et al.*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).

¹⁴ As Professor Dershowitz points out, a “race-neutral” program invoking “disadvantage” would be expected to disproportionately benefit underrepresented minority applicants. Dershowitz & Hanft, *supra* note 11 at 418.

¹⁵ A former director of admissions for the University of Michigan Law School testified that, “[There were] well-qualified black students . . . who said under no circumstances will I come to your law school if you admit me through a special admissions program, and I want you to tell me you didn’t do it.” *See* Deposition Testimony of Allan Stillwagon in *Grutter* (Nov. 6, 1998) at 28-29.

¹⁶ Adam Robinson and John Katzman (eds.), *THE PRINCETON REVIEW STUDENT ADVANTAGE GUIDE TO COLLEGE ADMISSIONS* (1997) at 118-122 (emphasis added).

¹⁷ Mary Church Terrell (1863-1954) was the daughter of former slaves who went on to own successful businesses. Ms. Terrell earned bachelors and masters degrees in the 1880s from Oberlin College. She later worked in the suffrage movement and helped found the Colored Women’s League and the NAACP. *See*, “Samples of great rhetoric from the past,” *MINNEAPOLIS STAR-TRIBUNE* (Aug. 12, 2002) at A15 (emphasis added).

¹⁸ Stuart Taylor, “Gore-Lieberman: Racial Preferences Forever?” *THE NATIONAL JOURNAL* (Sept. 4, 2000).

¹⁹ *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 1054-57, 145 L.Ed.2d 1007 (2000).