

## CONCLUSION

### SOME FINAL THOUGHTS ABOUT RACE

When speaking to young people, both black and white, the professor himself extolled the “unlimited possibilities” for success available to all, regardless of birth. Many of these speeches concluded with the recitation of [a] poem . . . which ended with these words:

You were born with all  
that the great have had  
With your equipment they all began,  
Get hold of yourself, and say: “I can.”<sup>1</sup>

*George Washington Carver:  
Scientist & Symbol*

Despite all the arguments that divide us, Americans remain surprisingly united on what the basic goals of the society ought to be. . . [One] *basic aim is a society that offers a chance for all people to achieve as much as they can in light of their talents, aspirations, and efforts.* Americans may not care a great deal about equality of results;<sup>2</sup> . . . *What they do believe in strongly, however, is equality of opportunity.*<sup>3</sup>

*Derek Bok*

Equal treatment under the law should be the law of the whole land and ingrained in our souls. Work remains.<sup>4</sup>

*Barbara Grutter*

### Some Final Thoughts About Race

Despite their statements intimating otherwise, neither Bowen nor Bok seriously can believe that a person’s talents, aspirations, efforts, and one’s faith in oneself are a function of his or her race. And most assuredly they both know that racial preferences do nothing but undermine the principle of “equal opportunity” which Americans across racial lines overwhelmingly support. Whether they acknowledge it or not, they cannot be unaware the race preference policies are premised—unwittingly or otherwise—on the demeaning (and some would way “racist”) notion that certain men and women are unable to compete effectively in certain areas unless their race or ethnicity is given a “plus” in the selection process. And finally, neither Bowen nor Bok denies that race preference policies impose injustices on those innocent individuals who are rejected because of the color of their skin, as always has been, and always will be the case.

Despite their knowledge of these consequences, they nevertheless conclude that preferential admissions policies, on balance, seem good and noble and benign; that the hurt and resentment of those unfairly displaced because of their race is unfortunate, but is a tolerable price for society and those perfectly innocent individuals to pay; that despite the stigma which attaches to members of the preferred groups, those who directly benefit from preferential admissions—and even those who don’t—appreciate, and are willing to accept, what is being done in the name of their race (as “evidenced” by their reported “satisfaction” with their college experience); that the need for preferences will hopefully be temporary; and, in the end, that the *principle* that no person will be denied an equal opportunity because of the color of his or her skin is a principle worth shelving—at least for awhile.

Shame on them. Not because they are evil men; for surely they are not. But for precisely the opposite reason. They are good and intelligent men who should know better. They should be directing us to solutions which are fully consistent with fundamental American principles and with the promise which contemporary America offers to every citizen. But they don’t.

Instead, they seem resigned to, if not entirely comfortable with, the injustices which result. Indeed, the disturbing shallowness of their concern over these injustices is perhaps best reflected at the very end of their book. There they describe their angst over the

reported reaction of a well-known black United States Circuit Court of Appeals judge following the decision in the Fifth Circuit *Hopwood* case. According to Bowen and Bok, after learning of the court’s decision which ended the use of racial preferences at the University of Texas School of Law, this distinguished judge reportedly said, “I sometimes feel as if I am watching justice die.”<sup>5</sup>

Bowen’s and Bok’s response? “To engender such *feelings*, and a consequent loss of hope on the part of many who have not attained [the judge’s] status, seems a high price to pay for a tiny increase in the probability of admission for white applicants to academically selective colleges and universities.”<sup>6</sup> In short, who cares if thousands of innocent and faceless white applicants—as well as applicants from other non-preferred racial and/or ethnic categories—are merely the latest victims of racial discrimination? What is so unsettling about their comment is their easy acceptance of this outcome. It is not unlike the insensitivity expressed by white segregationists to the historical injustices visited on innocent and faceless black applicants of years past who similarly were victimized by these practices. It was wrong then. It is wrong now.

Moreover, it is puzzling, to say the least, for Bowen and Bok to suggest, or for a person of this particular judge’s undoubted intellect to have “felt,” that the court’s decision in *Hopwood* (which, in essence, reaffirmed the principle that racial discrimination in public education is unconstitutional) should engender a “loss of hope” on the part of *any* American, black or white. Yet, Bowen’s and Bok’s willingness to sacrifice the fundamental rights of innocent students who lose a seat they otherwise would have awarded *but for* the color of *their* skin to assuage the “feelings” of a distinguished black federal judge, as well as their own apparent guilt over what they describe as “the continuing effects of a legacy of unfair treatment [of black Americans],”<sup>7</sup> seems the perfect conclusion to their book.

Sadly, like the bulk of their work in *THE SHAPE OF THE RIVER*, their reaction to this late judge’s “feelings” gets us nowhere.

It is even more disappointing in light of the distinctly more positive assessment which Bok earlier had made about the United States:

[I]t is hard to think of any advanced industrial nation that has worked harder to tear down racial barriers and promote equality.<sup>8</sup>

It’s a simple but important observation. Given his words, neither he nor Bowen should be advocating policies which ignore—indeed, may eventually destroy—the very principle upon which the effort “to tear down racial barriers and promote equality” was built.

But that danger is all too real.

As Professor Sandalow pointed out in his own incisive criticism of the authors’ work:

The expanding claims for racial representation in all socially valued positions thus poses a significant dilemma. . . [U]nder present circumstances and for the foreseeable future, *those claims cannot be met without sacrificing profoundly important ideals and values.*<sup>9</sup>

It is the same warning which Justice Kennedy expressed in dissent in *Grutter*:

*Preferment by race*, when resorted to by the State, *can . . . destroy* [our] confidence *in the Constitution and in the idea of equality.*<sup>10</sup>

Justice Kennedy’s was a view once shared by Justice O’Connor:

Classifications based on race carry a danger of stigmatic harm. *Unless they are strictly reserved for remedial settings*, they may in fact promote notions of racial inferiority and *lead to a politics of racial hostility.*<sup>11</sup>

Yet now, with her opinion in *Grutter*, Justice O’Connor has saddled the nation with a confusing jumble of words in which she, in effect, rejected all she had written in the past when it came to the damage caused by the government’s use of race. Like *Plessy*’s “separate but equal doctrine,” Justice O’Connor’s adoption in *Grutter* of the “diversity rationale” as a lawful excuse for racial discrimination was wrong the day it was decided.

Carl Cohen<sup>12</sup> is a distinguished faculty member at the University of Michigan. He is a life-long opponent of racial and religious discrimination. He has written profusely on these subjects and testified before the Congress on the specific topic of racial preferences.<sup>13</sup> He, more than most, recognizes the evil consequences which can result from even the best of intentions.

Not long ago, Professor Cohen was asked by the University to complete a “Self-Identification Form” as part of his nomination for the post of Associate Vice President for Human Resources and Affirmative Action.

Professor Cohen wrote to the Provost to express his concern over this request:

Permit me to recount a small chapter in my life history. As an undergraduate at the University of Miami in the late 1940s, I was a member of a student group called the U of M Liberals. . . [O]ne of our chief goals was to cause the University to cease to discriminate by race. By that date (1948/49) the University . . . had become embarrassed by racism incorporated in its admissions process; some skin colors were (of course) markedly preferred over others, although no one wanted to say that openly. But university administrators exercised discriminatory practices informally, and therefore in ways difficult to combat. . . Of course the administrators of the University believed, honestly believed, that they were acting in the best interests of the University and the

society in using the racial identification that ensued. . .

By calling public attention to this unwholesome process of racial identification at the University of Miami, . . . we succeeded in convincing University officials . . . to abandon the [practice]. . . [Thereafter, the] admissions process . . . was to be free of the taint of racial preference.

But our admissions process at the University of Michigan in the year 2000 is not free of this taint, . . . I regret that deeply. Were I to be appointed to the post of Associate President for Human Resources and Affirmative Action one of the first important steps to be taken here, in the interest of genuinely equal treatment of the races, would be the cessation of all requests for identification by race or nationality.

. . . [I]t is a dreadful inquiry into matters irrelevant, . . . [an] exhibition of an institution’s willingness to discriminate, or at least to consider discriminating, on the basis of factors that are and should be none of its business.<sup>14</sup>

It also is, by the way, an explicit violation of the specific promise made by the University of Michigan to each of its students and faculty.

Professor Cohen sent a copy of his response to one of the Regents of the University and further noted (with regard to the 1935 Nuremberg Laws):

I think it is unlikely that any officer of our University, . . . would knowingly support

explicit racial inquiries of this kind. The Nuremberg Laws were deeply wrong, not because it was German blood that was to be safeguarded but because they supposed (as the University of Michigan form also seems to suppose) that the blood in one’s veins, the race of one’s ancestors, may have some bearing upon one’s work or merit. . .

Dr. Martin Luther King, Jr., said this, “Color only matters in crayon boxes.” One day, I do hope, we will take his wisdom to heart.<sup>15</sup>

Professor Cohen’s plea to his beloved University to end its highly discriminatory admissions policies will in the end—and *Grutter* notwithstanding—prevail, though sadly it took the voters in Michigan to bring about this long overdue change rather than courageous leadership from the University itself.

The long-term societal challenges ahead are extraordinarily difficult ones involving, as Bowen and Bok concede, “desperately difficult work.”<sup>16</sup> They also recognize that there will be no positive changes without “addressing the underlying problems in families, neighborhoods, and primary and secondary schools, that many have identified.”<sup>17</sup> What they entirely fail to recognize is that “preference” policies divert us from this difficult work. But these policies should no longer hold this critical work hostage.

When it comes to the question of when to end the use of race in college and university admissions, we should heed a similar, and closely-related, analogy once described by Bok:

[Our work] *will not bear fruit overnight*. We will need years to develop the educational programs and to make the . . . advances that will help society progress. Hence, *it is important to begin and not to temporize or defer to other more immediate reforms*. In this, we can recall the story President Kennedy used to tell about Marshall Lyautey

after he assumed control of France’s territories in North Africa. Surveying the barren countryside around him, he remarked to his aide, “We must plant trees.” “But sir,” the aide responded, “in this environment, it will take one hundred years for a tree to grow to its full height.” “In that case,” Lyautey replied, “we have no time to lose. We must begin this afternoon.”<sup>18</sup>

At the end of her opinion in *Grutter*, Justice O’Connor suggested that we *temporize* for another 25 years before ending the sorts of race preference policies employed by the University of Michigan Law School.<sup>19</sup>

I disagree. Each day such policies remain in place, more young men and women are crippled by both the condescension and discrimination inherent in them. Those to whom a lower standard is applied cannot possibly grow to their full height. Those forced to bear the pain of injustice from (as Justice Kennedy described them) these “most divisive of all policies,” only grow in their resentment. Our collective confidence in our Constitution and in the idea of equality itself becomes lost in an unending series of what everyone recognizes to be claims for retributive justice. None of these outcomes need to occur.

### THREE FINAL POINTS

Ending racial preferences is not about dismantling *affirmative action*.

Ending preferences is not about rejecting our country’s respect for, and its embrace of, the richly diverse peoples and cultures which make up and strengthen our nation.

And, finally, ending preferences unequivocally is not about condoning or refusing to take steps to aggressively remedy racial discrimination or the unequal treatment which may result whenever it occurs.

Ending preferences is about the opposite. It is about *meaningfully* respecting our nation’s diversity. It is about supporting

and reaffirming *affirmative action* to help every citizen overcome disadvantage whether or not, but most assuredly every time, it is related to one’s race. It is about ending—not perpetuating—policies of racial discrimination. For all these reasons, administrators and teachers, parents and students, legislators and judges should be outraged when such discrimination is uncovered in the polices being followed by our most trusted flagship public educational institutions.

When she applied to the University of Michigan Law School, Barbara Grutter asked only for the chance to be measured by the same admissions standards applied to every other candidate, not different ones based on her race or her gender. When the Supreme Court heard her claim, the nine justices had before them the opportunity to reaffirm *Brown*’s fundamental holding that “racial discrimination in public education is unconstitutional.”<sup>20</sup> By a single vote, they failed.

But the people in this nation, as well as future judges and Supreme Court justices, have the power to correct the Court’s aberrant decision in *Grutter*, as the people in the State of Michigan most recently—and strikingly—demonstrated. So, too, principled college administrators throughout the land have the power to end these abhorrent and destructive policies with the stroke of a pen. And they should.

If our pre-eminent institutions truly care about the futures of all young men and women, black and white, courageous leaders within these institutions will end these policies now, *not* in the 21 or so years remaining under now-retired Justice O’Connor’s judicially-legislated formula.

Borrowing the words which Professor Bok chose to end one of his earlier and best known books, “We have no time to lose. We must begin this afternoon.”<sup>21</sup>

<sup>1</sup> Linda O. McMurray, *GEORGE WASHINGTON CARVER, SCIENTIST AND SYMBOL* (1982) at 270.

<sup>2</sup> Thomas Sowell quotes Milton Friedman: “A society that puts equality—in the sense of equality of outcome—ahead of freedom will end up with neither equality nor freedom. The use of force to achieve equality will destroy freedom, and the force, introduced for good purposes, will end up in the hands of people who use it to promote their own interests.” Thomas Sowell, *THE QUEST FOR COSMIC JUSTICE* (1999) at 6-7.

<sup>3</sup> Derek Bok, *THE STATE OF THE NATION* (1996) at 9-11 (emphasis added).

<sup>4</sup> Personal communication between Ms. Grutter and the author (14 Nov 2006), celebrating the passage of the Michigan Civil Rights Initiative on 7 Nov 2006. Used with Ms. Grutter’s permission.

<sup>5</sup> TSR at 286.

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> *Id.*

<sup>8</sup> Derek Bok, *BEYOND THE IVORY TOWER* (1982) at 190.

<sup>9</sup> Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1915 (May 1999)(emphasis added).

<sup>10</sup> *Grutter, supra*, 123 S.Ct. 2325, 2371 (KENNEDY, J., dissenting) (emphasis added).

<sup>11</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)(emphasis added).

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<sup>13</sup> *See, e.g.*, “Statement of Carl Cohen,” *Subcommittee on the Constitution*, U.S. HOUSE OF REPRESENTATIVES (Dec. 7, 1995). *See also* Carl Cohen & James P. Sterba, *AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE* (2003); and, Carl Cohen, *NAKED RACIAL PREFERENCE* (1995).

<sup>14</sup> Personal correspondence from Carl Cohen to Candace Johnson, Office of the Provost, University of Michigan (Jan. 19, 2000)(published with the express permission of Professor Cohen).

<sup>15</sup> Personal correspondence from Carl Cohen to Regent David Brandon (Jan. 20, 2000)(published with the express permission of Professor Cohen).

<sup>16</sup> TSR at 285.

<sup>17</sup> *Id.*

<sup>18</sup> Derek Bok, *UNIVERSITIES AND THE FUTURE OF AMERICA* (1990) at 122 (emphasis added).

<sup>19</sup> *Grutter, supra*, 123 S.Ct. at 2347 (2003).

<sup>20</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 298 (1955).

<sup>21</sup> Bok, *supra* note 18.