

Race Preference Is Morally Wrong

(1) The Principle of Equality

That *equals should be treated equally* is a fundamental principal of morality. Race preference is morally wrong because it violates this principle.

But who are equals?¹⁸ Identical treatment for everyone in all matters is certainly not just. Citizens have privileges and duties that aliens do not have; employers have opportunities and responsibilities that employees do not have; higher taxes may be rightly imposed upon those with higher incomes; the right to vote is withheld from the very young. Groups of persons may deserve different treatment because they *are* different in critical respects. But what respects are critical? Surely the poor or the elderly or the disabled may have special needs that justify community concern.

The principle of equality does not require that all be treated identically; but this much is clear: if some receive a public benefit that others do not receive, that preference will be unfair unless the advantages given can be justified by some feature of the group preferred. Unequal treatment by the state requires defense.

As a justification for unequal treatment some group characteristics are simply not relevant and not acceptable, all agree. Ancestry we reject. Better treatment for Americans of Irish decent than for those of Polish decent is wrong; we haven't any doubt about that. Sex we reject. Privileges to which men are entitled cannot be denied to

¹⁸Aristotle wrote: "All men admit . . . that equals ought to receive equally. But there still remains a question: equal treatment for equality or inequality of what?" *Politics*, book III, chapter 12.

women. Religion we reject. Opportunities open to Methodists must be open to Baptists. Color we reject. When the state favors white skins over black skins—a common practice for centuries—we are now properly outraged. Such categories cannot determine desert. This matter is morally settled: in dealings with the state, persons *may not* be preferred because of their race, or color, or religion, or sex, or national origin.

Bigots, of course, will draw distinctions by race (or nationality, etc.) in their private lives. But private opinions, however detestable, are not public business. Under rules to be enforced by our body politic, bigotry is forbidden. Persons of all colors, religions, and origins are equals with respect to their rights, equals in the eyes of the law. And equals must be treated equally. Race and nationality simply cannot serve, in our country, as the justification for unequal treatment.

This we do not learn from any book or document. These principles are not true because expressed in the Declaration of Independence, or laid down in the Constitution of the United States. The principles are found in those great documents because they are true. That “all men are created equal” is one way, perhaps the most famous way, of expressing the fundamental moral principle involved. A guarantee that the “equal protection of the laws” is not to be denied to any person by any state (as the Fourteenth Amendment to our Constitution provides) is one way of giving that moral principle political teeth. Our great documents *recognize* and *realize* moral truths grasped by persons everywhere: All the members of humankind are equally ends in themselves, all have equal *dignity*—and therefore all are entitled to equal respect from the community and its laws.

John Dewey, rightly thought of as the philosopher of democracy, put it this way:

Equality does not mean mathematical equivalence. It means rather the inapplicability of considerations of . . . superior and inferior. It means that no matter how great the quantitative differences of ability, strength, position, wealth, such differences are negligible in comparison with something else—the fact of individuality, the manifestation of something irreplaceable. . . . It implies, so to speak, a metaphysical

mathematics of the incommensurable in which each speaks for itself and demands consideration on its own behalf.¹⁹

This recognition of the ultimate equality and fellowship of humans with one another is taught by great thinkers in every culture—by Buddha, and St. Francis, and Walt Whitman. At bottom we all recognize, as Walter Lippmann wrote, a “spiritual reality behind and independent of the visible character and behavior of a man. . . . [W]e know, each of us, in a way too certain for doubting, that, after all the weighing and comparing and judging of us is done, there is something left over which is the heart of the matter.”²⁰

This is the moral standard against which race preference must be judged. The principle of equality certainly entails at least this: It is wrong, always and everywhere, to give special advantages to any group simply on the basis of physical characteristics that have no relevance to the award given or to the burden imposed. To give or to take on the basis of skin color is manifestly unfair.

The most gruesome chapters in human history—the abomination of black slavery, the wholesale slaughter of the Jews—remind us that *racial* categories must never be allowed to serve as the foundation for official differentiation. Nations in which racial distinctions were once embedded in public law are forever shamed. Our own history is by such racism ineradicably stained. The lesson is this: Never again. Never, *ever* again.

What is today loosely called “affirmative action” sticks in our craw because it fails to respect that plain lesson. It uses categories that *must not* be used to distinguish among persons with respect to their entitlements in the community. Blacks and whites are equals, as blondes and brunettes are equals, as Catholics and Jews are equals, as Americans of every ancestry are equal. No matter who the beneficiaries may be or who the victims, preference on the basis of race is morally wrong. It was wrong in the distant past and in the recent past; it is wrong now; and it will always be wrong. Race preference violates the principle of human equality.

¹⁹*Characters and Events*, Vol. ii (New York: Henry Holt & Co, 1929), p. 854.

²⁰*Men of Destiny* (New York: Macmillan, 1927), p. 50.

(2) Race Preference Is not Justified as Compensation

What about people who have been hurt because of their race, damaged or deprived because they were black or brown? Do they not deserve some redress? Of course they do. But it is the *injury* for which compensation is given in such cases, not the skin color.

But (some will respond) it is precisely the *injuries* so long done to minorities that justify special consideration for minorities now. Bearing the past in mind, deliberate preference for groups formerly oppressed reverses historical injustice, and thereby makes fair what would otherwise seem to be unfair. They argue that blacks, Native Americans, Hispanics, and other minorities have for many generations been the victims of outrageous discrimination, the sum of it almost too cruel to contemplate. Explicit preference to these minorities now makes up, in part, for past deprivation. Historical wrongs cannot be undone, but we can take some steps toward the restoration of moral balance. At this point in our history, advocates continue, equal treatment only appears to be just. Minorities have been so long shackled by discriminatory laws and economic deprivation that it is not fair to oblige them to compete now against a majority never burdened in that way. The visible shackles may be gone, but not the residual impact of their long imposition. We must *level the playing field* in the competition for employment and other goods. Only explicit race preference can do this, they contend; therefore, explicit race preference is just.

This is the essence of the argument in support of race preference upon which most of its advocates chiefly rely. It is an argument grounded in the demand for *compensation*, for redress. It seeks to turn the tables in the interests of justice. White males, so long the beneficiaries of preference, are now obliged to give preference to others. Past oppression must be paid for. Is turnabout not fair play?

No, it is not—not when the instrument turned about is essentially unjust. The compensatory argument is appealing but mistaken, because preference *by race* cannot serve as just compensation for earlier wrongs. It cannot do so because race, as a standard, is crude and morally blind. Color, national origin, and other accidents of birth have no moral weight. Historical injustices we now seek to redress were themselves a product of moral stupidity; they were inflicted

because burdens and benefits were awarded on grounds entirely irrelevant to what was deserved. Blacks and other minorities were not injured by *being* black or brown. They were injured by treatment unfairly *based* on their being black or brown. Redress deserved is redress that goes to *them*, to persons injured, in the light of the injuries they suffered. Many are long dead and can never be compensated. Those ancient injuries are not remedied by bestowing benefits now upon other persons who happen to belong to the ethnic group of those injured.

Using race to award benefits now does injustice in precisely the way injustice was done originally, by giving moral weight to skin color in itself. The discriminatory use of racial classifications is no less unfair when directed at whites now than it was when directed at blacks then. A wrong is not redressed by inflicting that same wrong on others. By devising new varieties of race preference, moreover, we give legitimacy to the consideration of race, reinforcing the very injustice we seek to eradicate. We compound injustice with injustice, further embedding racial categories in public policy and law.

The moral blindness of race preference is exhibited from both sides: *the wrong people benefit, and the wrong people pay the price of that benefit.*

Consider first who benefits. Race preference gives rewards to some persons who deserve no rewards at all, and is thus *overinclusive*. Preferential systems are designed to give special consideration to *all* those having some physical or genetic feature, all those who are black, or female, or of some specified national origin. Hispanics, for example, receive the advantage because they have parents or grandparents (is one enough?) of certain national origins. But have all those of Hispanic origin been wrongly injured? Do all those of that single national origin deserve compensation now for earlier injuries? No one seriously believes that. Discrimination against Hispanics in our country has been (and remains) common, to be sure. But it is also true that many of Hispanic ancestry now enjoy here, and have long enjoyed, circumstances as decent and as well protected as those enjoyed by Americans of all other ethnicities. The same is true of African Americans, some of whom are impoverished and some of whom are rich and powerful. Rewards distributed on

the basis of ethnic membership assume that the damage suffered by some were suffered by all—an assumption that we know to be false.

But, knowing the falsehood of that assumption, we remain unable to refine our moral responses in the light of that knowledge where race rules. The University of Texas long gave preference to all blacks seeking admission, claiming that by this preference it was giving remedy for the deprivations suffered by blacks in the Texas public schools. If some of the very finest public school students (and public school teachers) in Texas are black, as they surely are, the university's racial favoritism could not even recognize that fact; the system was unable to attend to morally significant differences. Blackness in itself, naked race, was the ground of preference in Texas, and the finest black students of the Texas schools received preference in admission along with every other applicant whose skin was black. Black applicants to the University of Texas were given preference if they hadn't attended Texas public schools at all. It was their blackness that counted. Graduates of private schools in Dallas or Houston, if they were black, received admission preference as *compensatory relief*. Applicants could have come from any other state, might have attended public or private schools of any description—but if they were black they were given preference at the University of Texas. Even applicants not residing in the United States, graduates of schools in France or in India, were preferred if their skin was the right color: Preference in Texas was by color. Blind to all moral considerations, the university relied solely on skin color to determine who deserved special treatment. The defense of these preferential admissions as compensatory, presented by the University of Texas in lengthy federal litigation, was categorically rejected by the U.S. Court of Appeals.²¹

²¹*Hopwood v. Texas*, 78 F. 3d 932 (5th Cir., 1996). The *Hopwood* decision should have been no surprise in Texas. The former attorney general of Texas, Dan Morales, looking back, said this: "What was going on at the University of Texas was a discriminatory admissions scheme. If you were a minority applicant, you had a lower standard to meet and you went to a separate admission committee. If you were a non-minority applicant, you had a higher standard to meet and went to a different admission committee." See *Dallas Morning News*, 10 January 2002.

Overinclusiveness was unavoidable because racial categories are exceedingly crude, far too blunt to do justice. "Set-asides" for minority contractors also illustrate this crudity. To compensate for past discrimination against minority contractors in the City of Richmond, Virginia, the City Council reserved 30 percent of all city contracts for minority-owned firms. Before that, only a few minority contractors had done business in Richmond, and their portion of city contracts had indeed been small. The allegedly compensatory preference, however, was given not only to Richmond firms that may have suffered unfairly, but to every firm, wherever based, whose owners happened to be in one of certain specified racial categories, including Native Americans, Eskimos, and Aleuts. Discriminatory injustices against Eskimos or Aleuts in Richmond are likely to have been few, but the City Council was not truly seeking to compensate anyone; they were relishing the spoils of municipal power. The 30 percent set-aside was a quantity of business impossible for the existing minority contractors of Richmond to conduct, so the statute indirectly obliged the award of "compensatory" benefits to minority contractors who had never suffered injustice in Richmond or anywhere, and even to minority contractors based far beyond Virginia who, if they had suffered at all, certainly had not been victims of any discrimination by the City of Richmond. Overinclusive to the point of absurdity? Plainly. But racial set-aside programs similar to this one pervade city and state governments in America still, and the federal government as well. Such preferences intensify the moral consequences of race, indirectly confirming the legitimacy of the very instrument of classification that we find repugnant.

Race preference is morally defective also in being *under*inclusive, in that it fails to reward many who deserve compensation. If redress is at times in order, for what injuries might it be deserved? Inadequate education perhaps: teachers poorly qualified, books out of date or in short supply, buildings vermin-infested and deteriorating, schools rotten all around. High school graduates who come to the verge of college admission in spite of handicaps like these may indeed be thought worthy of special consideration—but that would be a consideration given them not because of the color of their skins, but because of what they have accomplished in spite of handicap. *Everyone* whose accomplishments are like those, whose

determination has overcome great barriers, is entitled to whatever compensatory relief we think graduation from such inferior schools deserves. Everyone, no matter the color of her skin.

So race preference is morally faulty in what it does not do, as well as in what it does. Seeing only race we cannot see what may truly justify special regard. Blacks and Hispanics are not the only ones to have been burdened by bad schools, or undermined by poverty or neglect, or wounded by absent or malfunctioning families. But those with skins of other colors, however much they too may have been unfairly injured or deprived, get no support from race-based "affirmative action." They are simply left out.

Also left out are most of those blacks and Native Americans who really were seriously damaged by educational deprivation, but who fell so far behind in consequence that they cannot possibly compete for slots in professional schools, or for prestigious training programs, and therefore cannot benefit from the race preferences commonly given. So those most in need of help usually get none, and those equally entitled to help whose skins are the wrong color get absolutely none.

Whatever the community response to adversity ought to be, this much is clear: what is given must be given without regard to the race or sex or national origin of the recipients. It is the injury and not the ethnicity for which relief may be in order, and therefore relief cannot be justly restricted to some minorities only. If some injury or deprivation does justify compensatory redress, whites and blacks who have suffered that injury should be entitled to the same redress. Racial lenses obscure this truth.

A just apportionment of remedies should be designed to compensate most those who were injured most, and to compensate least, or not at all, those who were injured least, or not at all. Therefore a keen regard for the nature of the injury suffered, and the degree of suffering, is critical in giving redress. Remedy for injury is a complicated matter; naked race preference must fail as the instrument in providing remedy because by hypothesis it has no regard for variety or degree. How gravely injured are they who complete undergraduate studies and compete for admission to law school, or medical school? The daughter of a black physician who graduates from a fine college has been done no injury entitling her to preferential

consideration in competitive admissions simply because she is black—but she will surely receive it. The principal beneficiaries of "affirmative action" in law schools and medical schools are the children of upper middle-class minority families, for the simple reason that they are the minority applicants most likely to be in a position to apply to such schools. Those whose personal histories of deprivation may in truth entitle them to some special consideration are rarely in a position even to hope for preference in such contexts. It is one of the great ironies of "affirmative action" that those among minority groups receiving its preferences are precisely those least likely to deserve them.

This moral obtuseness is partly a consequence of measuring the success of affirmative action by race *counting*. Acting on the premise that in the absence of oppression the distribution of ethnic groups in educational and employment categories would be proportional to their percentage in the population at large, universities and private firms establish minority admission and employment goals that roughly duplicate the ethnic profile of the larger community. These numerical targets are usually not attainable so long as normal standards are applied. But the political pressure upon administrators to approach these goals is intense; their jobs may depend on the racial numbers they report. In the law schools, for example, the question of whether those receiving favor truly *deserve* those special benefits is not even asked. The compensatory arguments that engendered the preferences are quite forgotten in what becomes a press for minority numbers. Our immediate concern, say the affirmative action bureaucrats in the universities, in private industry, and in government agencies, is our employment or student profile: we must have more black (or brown) faces.

Defending the practice of laying off white teachers with high seniority to protect the jobs of black teachers with much lower seniority, an attorney was asked by a justice of the U.S. Supreme Court *why* the employment preference in question had been given. His answer was blunt but honest: "We want them there."²² "Them" in such contexts refers to people having the color preferred; it mattered not at all to that school board that those persons had no claim

²²*Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

whatever for compensatory relief. At the University of Michigan, where highly qualified majority applicants are rejected in great numbers while minimally qualified minority applicants are accepted in their place, questions by admissions officers about the degree of injury possibly suffered by those minority applicants are rarely asked; whether any discriminatory injury has been suffered is simply not their concern. They have "affirmative action goals" to meet.

One commonly alleged justification for racial goals is "underrepresentation." But the passion to remedy the underrepresentation of minorities is not matched by a concern for the underrepresentation of the white majority. To illustrate: U.S. Department of Housing and Urban Development (HUD) gives preference to Asian males in hiring for its professional work force because the proportion of Asian males (in the year 2002) on that force is only 3.4 percent, while the proportion of Asian males in the larger technical labor force is 3.5 percent. This difference of *one-tenth of one percent* is reported by HUD as a "manifest imbalance" that justifies explicit hiring preference for Asians. But white males constitute just 5 percent of the technical employees at HUD, while the proportion of white males in the larger technical work force is 36 percent. This 31 percent discrepancy does not trigger preferences—plainly because the preferences would then go to the "wrong" group. Surely, if manifest imbalance is to trigger preference (a principle not obviously correct), it must at the very least be considered for all ethnic groups equally. That is certainly not the case at HUD.²³

²³See Stanley Kurtz, "Fair Fight," *The National Review*, 9 August 2002. Kurtz provides the documented detail of a class action civil suit against HUD (and against the Equal Employment Opportunity Commission, which encourages and supports such preferences in many federal agencies!), *Worth v. Martinez*, filed on 8 August 2002. Kurtz points out that in cases in which a minority (say, Hispanic females) is overrepresented in a category (say, "administrators"), it is the practice of the EEOC to search out a subcategory of administrators, such as "criminal investigator," in which Hispanic females are underrepresented, and institute hiring preferences there. The result is that minorities must be proportionally or more than proportionally represented in every employment subcategory, while white males are bound to be greatly underrepresented overall.

What federal agencies do by formal rule, universities more commonly do informally and surreptitiously; candor is rare in the world of college admissions. But it is easy to see, and painful to note, that race preference often results in the college enrollment of students who are deemed "qualified" only by stretching the concept of qualification until it is meaningless. Standards in the appointment of faculty members are similarly eroded. "Affirmative action hiring goals" result in the hiring of faculty who would not have been hired but for their race. Those favored invariably include many who have been earlier deprived of nothing because of their race.

In sum, race preference gives to those who don't deserve, and doesn't give to those who do. It gives more to those who deserve less, and less to those who deserve more. These failings are inescapable because the preferences in question are grounded not in earlier injury but in physical characteristics that cannot justly serve as grounds for advantage or disadvantage. Whatever is owed persons because of injuries they suffered is owed them without any regard to their ethnicity. Many who may now deserve remedy for past abuse are not minority group members; many who are minority group members deserve no remedy. Preference awarded only to persons in certain racial categories, and to all in those categories whatever their actual desert, invariably overrides the moral considerations that are genuinely relevant, and cannot be rightly defended as compensatory.

(3) Race Preference Imposes Unfair Penalties Upon Those Not Preferred

Not only the benefits, but also the *burdens* imposed by race-based preferences are distributed unfairly. By attending to skin color rather than to what should truly count, racial instruments invariably impose penalties upon those who deserve no penalty at all, persons entirely innocent of the earlier wrong for which the preference is allegedly given, but whose skin is of the wrong color.

Even if those receiving race preference now had been injured earlier because of their race, it is plainly false to suppose that those over whom they are now preferred were in any way responsible for the earlier injuries. A race-based system of penalty and reward is morally cockeyed.

In a competitive setting, advantages given must be paid for by disadvantages borne. If the goods are in short supply—as jobs and promotions and seats in a law school and the like are certainly in short supply—whatever is given to some by race is necessarily taken from others by race. If some are advantaged because of their color or sex, others must be disadvantaged because of their color or sex. This is a truth of logic that cannot be escaped. *There is no ethnic preference that can be "benign."*

Advocates of preference scoff at the alleged burden of race preferences, contending that their impact upon the majority is insignificant. The body of white job applicants, or white contractors, or white university applicants is large, while the number of minority applicants given preference is small. So if those preferences impose a burden, the advocates contend, it is at worst a trivial burden because of the great number over whom that burden is distributed. The complaint about unfairness, the advocates conclude, thus makes a mountain of a molehill. Preferences given to minority applicants are so greatly *diluted* by the size of the majority that their consequences are barely detectable.

This argument is deceptive and its conclusion is false. True it is that only some in the majority are directly affected, and true also that after such preferences are given we often cannot know precisely who among the majority would have been appointed or admitted if that preferential system had not been in place. But it is not true that, because the group from whom the benefits are taken is large, the burden of preference is diluted or rendered insignificant. The price must be paid, and some among that larger group must pay it. Some individual members of the majority must have been displaced, and upon them the burden is as heavy as it is unfair. Injustice is not made trivial because the names of its victims are not known.

Do this thought experiment: Suppose you are the incorruptible admissions officer at the University of Michigan law school (where race preference is very marked), and, with all due diligence, you select those to be admitted by applying, at the direction of the governing faculty, only the criteria for admission appropriate for a fine law school: earlier academic performance, character, promise, related intellectual attainments, recommendations, performance on

admissions examinations, and so on. With great care you at last select the list of those applicants who are to be offered admission in a given year. Suppose also that you scrupulously avoid all racial classifications in weighing applicants, giving no preference whatever for ethnic status or any other suspect classification. Some five hundred persons, let us say, are to be sent letters of acceptance, perhaps one out of each ten applicants. You place the name of each one of the applicants accepted on a single long list, starting at the top with those whose acceptance was clear and uncontroversial, continuing with the names of less commanding applicants, completing the list with the names of those applicants who, although succeeding, barely made it above the cut-off line. There must have been a cut-off line because you have confronted many thousands of applicants, and the great majority of them, of course, you must have rejected.

But now suppose that you and your colleagues construct the list of accepted applicants a second time—this time introducing also the preferences for applicants of certain races actually employed at the Michigan law school.²⁴ Again you write down the names of all those accepted in one long column. This list and the other will not be identical, of course, for if they were, race would not have entered the process in the second listing, as we know it does in fact. Therefore there will be many names on the second list that did not appear on the first—the names of persons who received special consideration because of their race. We will be happy for them. But there will also be—there *must* also be!—some names on the first list that do *not* appear on the second. These are the persons who pay the price of the preferences. They do not pay it just a tiny bit. There is no dilution of the burden for them; they lose 100 percent of what would otherwise have been theirs, because they are not to be admitted. They are rejected—although, by hypothesis, they would have been admitted had there been no racial considerations introduced. It is an inescapable fact that, with

²⁴The University of Michigan law school uses race in its admissions very heavily, and has become respondent in a federal case—*Grutter v. Bollinger*—now awaiting resolution by the United States Supreme Court.

race weighed, some people must lose out who would not have lost out if race had not been weighed. The burdens of preference are fully borne by them.

In many contexts that penalty, inevitably imposed by preference, is very heavy. Getting a job, or keeping one, is no minor matter. Some folks lose out in their quest for employment *because of their race*. Some employees who might have been promoted in their workplace are passed over. Some who might have been admitted to fine colleges, or law schools, or medical schools, are not admitted because of their race, and must go elsewhere, or perhaps go nowhere. The white applicants squeezed out in this process are, ironically, often the children of first generation Americans, the first members of their families pulling their way into universities and professional life. They, not the established rich, are the ones hit hardest by race preference.

Persons who have been displaced in this way usually do not know, cannot know, that they are the ones who are paying this price. That first list constructed hypothetically in our thought experiment never gets constructed in fact. The names on it are never specified, so we cannot know which among them have been deleted when the second list takes its place. But there is such a first list; that is, there is a list of persons who would have been accepted had race not been weighed, and the second list (constructed with race as a factor) *does* take the place of that one. The fact that we cannot name the persons squeezed out of the first list does not make the squeezing any less unfair.

Because the names of those actually displaced cannot be identified, each of those many applicants who thought his chances of admission excellent or at least good is likely to think, when rejected, that *he* is one of those whose race cost him his place. Most rejected white applicants may reasonably suppose that if only their skin color had been darker they would have been accepted. Ugly and awful are the consequences of what is now commonly done with good intentions: some deserving applicants do not get, simply because of their race, what they would have gotten if their color had not been held against them. This outcome is morally unacceptable, but it is an ineluctable consequence of every system of race preference.

The underlying problem is everywhere the same: in deciding upon what is to be given by way of redress for injury the properly critical moral consideration is the injury itself, its nature and its degree—not the race or national origin of the persons compensated. When preference is given to persons because of their race alone, many who are in fact owed redress do not receive it (either because they had been too greatly damaged, or because they happen not to be members of the favored categories), while many who are members of the favored categories receive benefits although owed nothing in the way of redress. And those who bear the burden of the preferential award are totally innocent of wrongdoing, bearing no responsibility whatever for injuries that may have been done to persons of the race preferred. Because both benefits and burdens are a function of race, and are not determined by considerations having genuine moral weight, race preference is perfectly incapable of achieving the compensatory objective offered in its defense; such preference is inevitably unfair and morally wrong.

(4) Race Preference Cannot Be Justified by the Quest for Diversity

Diversity is now widely offered as a justification of race preference. In universities, and where information or argument is reported or discussed, intellectual diversity is indeed a value worthy of pursuit. Among students, teachers, and journalists, a wide range of opinions and perspectives is certainly healthy. But the importance of diversity in these spheres is often greatly exaggerated, and its merits, even when they are substantial, cannot override the principle of equality. The quest for variety cannot justify the suspension of our moral duty not to discriminate by race.

In any case, the term “diversity” (as commonly used in this arena) does not actually mean variety of viewpoint and opinion; in practice it means variety among the *races* in their proper proportions. Colleges and universities that could greatly enrich their *intellectual* diversity do not work very hard at that, except so far as the variety they claim to seek is associated with minority ethnic groups. The almost complete homogeneity of political views on the faculties of major universities—one respect in which diversity would be particularly

helpful—is extraordinary, but appears not to be a matter of great concern.²⁵ And even ethnic diversity, if it does not satisfy the quest for more of those minorities thought to have been earlier oppressed, does not count for much. Diversity of religion, diversity of life-style, diversity along any one of many other dimensions that really could provide more genuine enrichment is commonly ignored. The only “diversity” that is said to justify preference is racial diversity, and the standard by which it is decided whether “diversity goals” have been adequately achieved is the *match* of the proportion of certain minorities entering college (or entering professional schools, owning radio or TV stations, and so on) to the proportion of those minorities in the population at large. “Diversity,” as everyone well understands, is today no more than a euphemism for race proportionality. A candid demand for proportionality would require highly objectionable (and probably unlawful) racial quotas, so politically correct institutions insist that it

²⁵In a survey of 151 Ivy League professors conducted in 2002 *not one* identified himself as conservative. When a reporter for Denver’s *Rocky Mountain News* surveyed the humanities and social science departments at the University of Colorado, Boulder, in 1998 he found that of 190 professors with party affiliations, 184 were Democrats; in the psychology, journalism, English, and philosophy departments he discovered not a single Republican. (Meanwhile, there are two hundred thousand more registered Republicans in Colorado than there are Democrats, and both senators are Republicans!) A 1999 survey of major history departments found 22 Democrats and 2 Republicans at Stanford—and no Republicans, not one, among the 29 professors in the history department at Cornell, or among the 10 in the history department at Dartmouth. In the spring of 2001 at Brown University the number of Republicans among the entire liberal arts faculty was 3—but zero in the English department, zero in the history department, zero in sociology and in political science. Also zero was the number of Republicans in the department of Africana studies. At the University of New Mexico, there were 10 Republicans—but none in the departments of history, or journalism, or political science, and only one each in the departments of sociology, English, women’s studies, and African American studies. At the University of California, Santa Barbara, 97 percent of all professors were Democrats, and only one Republican professor could be found. Diversity in political views (unlike skin color) probably does have a bearing on how controversial issues are taught—but political diversity is not a great concern in university precincts. See *Jewish World Review*, 28 January 2002, and *The Christian Science Monitor*, 2 May 2002.

is only “diversity” that they pursue—an objective with wide appeal that is superficially race neutral.

But even where the quest for diversity is honest, that quest cannot justify outright unfairness. Preference by race is plainly unfair, as we have seen, and the demand for ethnic diversity simply ignores that unfairness. Are the numbers of black students enrolled, or Hispanic faculty appointed, sufficiently large? Is the racial profile of those employed, or of those winning prizes, or of those going to prison proportionate to the profile of the larger population? *Proportionality* is the unquestioned standard of success in achieving diversity; the racial *numbers* are what count. But ethnicity has no bearing whatever in many spheres, and in such spheres percentages cannot justifiably govern or distort the selection process. The alleged but uncertain benefits of some desired racial distribution do not override moral principles requiring fair treatment.

Suppose we were confronted with very strong evidence that racially *segregated* classrooms improve learning and teaching. Suppose the evidence in support of segregated schools were far more impressive than the very thin materials now offered in support of ethnic diversity. Would we think that such evidence (supposing it reliable) provided a *justification* for the deliberate racial segregation of our classrooms? Of course we would not. On the contrary, we will condemn the imposition of racial discrimination by the state in any case; we will point out that *whatever* the evidence of its consequences may show, racial discrimination is unacceptable, *wrong*, and that any advantages that may flow from it could not begin to justify a policy that is intrinsically unjust. And that is what race preference is.

As it happens, the praises of diversity as an instrument of education are greatly overblown; there is serious doubt that racial diversity has any measurable impact upon the quality of learning or teaching in a university.²⁶ But even if those claims of benefit had substantial merit, they would carry very little weight in a just society. Racial discrimination imposed by the state is despicable, we

²⁶See “Why Justice Powell’s Diversity Rationale for Racial Preferences in Higher Education Must Be Rejected,” Princeton, N.J. 2001. Available online at www.nas.org.

know. Whichever the race favored by some discriminatory policy, the policy itself is morally intolerable; no studies or scholarship aiming to persuade us of its educative benefits can make it acceptable.

(5) Race Preference Cannot Be Justified by the Need for Outreach

To overcome the racism that has long pervaded American society we have a duty to insure that persons of all races and ethnicities have genuine and equal opportunities in all spheres of social life. Where previously invidious exclusion had been the rule, inclusion must now replace it. Deliberate efforts to accomplish this is a genuine duty deserving emphasis—but that duty cannot possibly justify race preference.

Utilizing truly equal opportunities requires a flow of unrestricted information that must not be reserved for the members of the establishment. In public settings, systems of selection that rely on an inner network of friends or acquaintances are unjust. And because the contributions of those who come from outside the inner circle may be lost, those “old-boy networks” are also often counterproductive. Reaching out to the larger community in announcing opportunities, in offering scholarships, in posting available jobs, and so on is right. Qualified members of all ethnicities, of both sexes, are entitled to have the same educational and employment opportunities that white males have traditionally enjoyed. To extend this inclusiveness, to advertise with the deliberate aim of reaching groups beyond those already well represented and well informed is *affirmative action* in its original and honorable sense. Where the availability of jobs and educational opportunities have traditionally favored some and disfavored others, honest outreach, favoring none, is certainly the duty of the arms of a state.

To illustrate: The State of Florida recently created two new law schools in which race is to play no role whatever in admission. But they are located at universities that have historically attracted a majority of minority students. One of these laws schools, at a fresh location in Orlando, is associated with Florida A&M University, historically black. The other, in Miami, is associated with Florida In-

ternational University, where most students are Hispanic. This is outreach properly conceived; no preference is involved.²⁷

Some varieties of race preference are *disguised* as outreach, and they ought to be condemned. Several examples:

First, when race preference in college admissions was forbidden in Texas by the *Hopwood* decision earlier noted,²⁸ a plan was devised in Texas to evade the law without giving preference explicitly. The system is ingenious and simple: all those graduating in the top 10 percent of their high school class are admitted to the University of Texas. The high schools in Texas are largely segregated de facto, not by law but because of residential patterns sustained by many socioeconomic factors. By automatically admitting a fixed and generous percentage from each of the de facto segregated secondary schools, the University of Texas is able to admit Hispanics and blacks in roughly the same proportion as when explicit race preference was in force. Maintaining those racial numbers was the principal reason for the adoption of the Texas bill imposing the 10 percent scheme. One of the sponsors of that bill in the legislature was candid: “We hope to increase the number of minority admissions to colleges and universities, which had plummeted with the chill that *Hopwood* had put on admissions.”²⁹ Another sponsor described the bill as “a joint effort to zero out the impact of *Hopwood*.”³⁰ It was, moreover, highly unusual for the Texas legislature to dictate university admissions policy. Now, with the constitutionality of race preference in serious doubt, officials are reluctant to admit that preference to advance racial balance is indeed the objective of the 10 percent plan. But no one is fooled.

²⁷The new law school at Florida International University, which opened in the fall of 2002, received 41 percent of its applications from Hispanics, 32 percent of its applications from whites, 19 percent of its applications from blacks, and 2 percent of its applications from Asians. And of those accepted for the first year, 46 percent were white, 43 percent Hispanic, 10 percent black, and 3 percent Asian. Florida is reaching out; honest reaching neither requires nor justifies race preference.

²⁸78 F. 3rd 932 (5th Cir. 1996).

²⁹R. G. Ratcliffe and Lydia Lum, “Senate Approves Bill Designed to Boost Minority Enrollments,” *Houston Chronicle*, 9 May 1997.

³⁰Renee C. Lee, “State University Admissions Policy Proposed: Bill Seeks to Increase Minority Enrollment after Recent Affirmative Action Ruling,” *Fort Worth Star-Telegram*, 15 March 1997.

Texas's success in thus advancing racial goals has led other states to do likewise. In Florida, with de facto segregation as marked as that in Texas, the top 20 percent of each high school class wins automatic admission to the premier state universities; in California it is the top 4 percent. Such systems advance racial proportionality only because the public high schools are segregated de facto. Race neutral on the surface, these are in reality instruments designed mainly to circumvent the prohibition of racial considerations. Fine students are replaced by mediocre students of the right color.³¹ Ostensibly introduced as "outreach," these percentage plans are a species of indirect preference of which no one can be proud.³²

³¹The impact of these percentage systems on the intellectual standards of the universities concerned is clearly adverse. In high schools with demanding curricula and many high-performing students, graduates below the top 10 or 20 percent may be very much more suitable for university admission than those with higher rankings from much weaker schools.

³²Whether programs like the Texas 10 percent plan will stand up under constitutional examination is a question whose answer is not known. On the one hand, the Supreme Court has suggested, in the 1989 case in which a racial set-aside in Richmond was struck down, that it might have been reasonable for the city to rely upon race-neutral considerations to achieve the result sought, which was greater minority participation in certain business spheres. (*City of Richmond v. Croson*, 488 U.S. 469, at p. 507.) On the other hand, the court has also suggested in a 1979 case that a policy has a discriminatory purpose if the state "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." [*Personnel Administrator v. Feeney*, 442 U.S. 256, at p. 278.]

Percentage plans like that of Texas aim to do indirectly what is plainly unlawful to do directly; in the long run such devices are very likely to be rejected. Antidiscrimination law is about substance, not just form. If it is illegal to require blacks to attend one school and whites to attend another, it must be illegal to require students from one geographic zone to attend one school and students from another geographic zone to attend another, in cases in which those geographic zones are delineated to ensure that most blacks would be in one zone and most whites in the other. That precisely was the decision of the U.S. Supreme Court in *Keyes v. School District No. 1* [413 U.S. 189 (1973)]—and the analogy to the Texas plan is close. Years will pass before this controversy is fully resolved—but it is plain that the Texas 10 percent plan, and others like it, have a racially disparate purpose, and are much more than race-neutral outreach.

Second, scholarships at public universities may no longer be openly reserved for specific racial groups.³³ Nevertheless, at the University of Texas that "technicality" has been overcome in the name of outreach. Special scholarships are offered—not to minorities, but to 130 carefully selected high schools located in the inner cities where enrollment is overwhelmingly black and Hispanic. Race has nothing to do with these special scholarships, we are told. "We're interested in a geographically, culturally, and economically diverse student population," explains the university spokesman, Ahmed El-sweewi. "This is not something designed to recruit minority students." Honest Texans cover their faces.³⁴

Third, no race preference may be given in Texas after *Hopwood*. But at Texas A&M, the other huge and wealthy public university in that state, the prohibition is circumvented in yet another way. From a substantial number of specified inner-city high schools (whose students consist largely of minorities) the top 20 percent rather than the top 10 percent of the graduating class are deemed automatically admissible. Because the targeted schools from which the larger percentage of those accepted are racially identifiable, the device is transparently preferential.³⁵

Fourth, at the campuses of the University of California, the recent shift to the "comprehensive review" of applicants has opened a back door to preference, giving significant advantage to candidates who claim to have faced hardships. At UCLA, an applicant now receives extra points to supplement his academic credentials if he's been the victim of a shooting; at UC Davis applicants earn up to 250 extra points for "perseverance"—which is inferred if they've faced family disruptions such as divorce or desertion, poverty, or life in "dysfunctional environments." At UC Berkeley good grades count

³³A scholarship program exclusively for blacks was struck down at the University of Maryland at College Park in the case of *Podberesky v. Kirwan*, 38 F. 3d 147 (1994). I served as an expert witness on behalf of the plaintiff in that case.

³⁴See "UT Tailors Scholarship to Minority High Schools," *The Houston Chronicle*, 11 February 2002.

³⁵Texas A&M's "top 20" plan was bluntly described by former U.S. secretary of education Lamar Alexander as "a step back toward racial quotas." See "Alexander Criticizes Top 20 Plan," *The Texas A&M Battalion*, 31 January 2002.

more if they have been earned at a poor high school, especially one that is afflicted with gangs, crime, dropouts, and drugs. Applicants from middle-class families that are loving and prosperous are at a distinct disadvantage. The Associated Press reported the pained response of one student with a 4.0 GPA and SAT scores of 1300, a varsity athlete in high school, who was turned down at all three of these campuses: "If my parents had been divorced I would have gotten in." Everyone understands that special boosts to applicants from single-parent homes, to crime victims and graduates of rotten schools, are designed to raise black and Hispanic enrollment. It works; black admissions rose 19 percent, Hispanic admissions 9 percent (with fewer whites and Asians, of course) for the fall term following the introduction of what is sardonically referred to as the "sob story sweepstakes."

Such efforts to evade the prohibition of race preference in the California constitution do more than simply dilute the role of intellect; they teach precisely the wrong lessons. A black professor of linguistics at the University of California, John McWhorter, laments the fact that "this new policy enhances the culture of victimization, teaching students of any color a lesson history will consider curious and misguided. . . . For decades now, students entering college have imbibed a 'victimologist' perspective; now UC's 'hardship' policy serves as a kind of college prep course on the subject."³⁶

Nor is there any real doubt about why such preferences are given. McWhorter reports his experience sitting on a university committee that distributes scholarship money: packages once earmarked for "diversity" are now simply labeled as "hardship" bonuses. McWhorter writes: "Of course, the official line is that administrators are deeply concerned about hardship across race lines, but it doesn't wash. How seriously can we take this sudden concern for the coal miner's daughter when we heard not a peep of such class-based indignation during three decades of [outright] racial preferences? . . . [The system of hardship bonuses] is being utilized as a way to revive precisely the racial bean-counting that Proposition 209 outlawed."³⁷

In their willingness to sacrifice scruples to advance racial balance in these ways, universities humiliate themselves. Outreach that is genuine, that seeks the spread of opportunity to all regardless of race or nationality, outreach that attends in a genuinely race-neutral way to life experiences that enhance individual qualifications, is affirmative action to which we may all subscribe. But acting affirmatively to insure that opportunities are indeed equal does not justify schemes designed to evade the law. Programs introduced in the name of "outreach"—race neutral on their surface but implemented to achieve a preferential outcome—are shameful cheats.

In summary: Race preference conflicts with the principle of equality that every decent society morally ought to respect. Race preference cannot be justified as a compensatory device. It cannot be justified by the quest for diversity. It cannot be justified by the call for outreach. It is morally wrong.

³⁶John McWhorter, "It Shouldn't Be Good to Have It Bad," *Washington Post*, 4 August 2002.

³⁷*Ibid.*