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Racial Discrimination

SCOTT AND LOU ANN MULLEN have their own little melting pot in their household in rural Lexington, Texas. Scott is white, and Lou Ann is Native American. When the Mullens married, they adopted her younger siblings. The family also includes a natural daughter and a biracial adopted daughter along with six other adopted children. Scott and Lou Ann have served as foster parents to a number of children of various races and ethnicities. Their home brims with love and utter devotion to their children.

In 1992, a black baby named Matthew came into the Mullen family as a foster child. Little Matthew, only a few days old, was addicted to crack cocaine and infected with syphilis. The

Mullens painstakingly nursed him to health; and remarkably, by the time he was two years old, he was developmentally on par with other children his age.

Along the way, the Mullens fell in love with the little boy, and decided they wanted to adopt him. When they learned that Matthew had an older brother, Joseph, the Mullens decided they wanted to adopt him, too. They made their intentions known to the Texas Department of Protective and Regulatory Services. The Mullens had an excellent record as foster parents, so they didn't expect any problems. Instead, their hopes were transformed into a living nightmare.

As Lou Ann Mullen recounted, "Several caseworkers [and] the adoption supervisor, they all said 'No, it would be in the kids' best interest to place them in an African American home.' Those words will stick with me for the rest of my life. What about love?"[1]

Matthew was removed from the Mullens' home and placed with his brother in an adoptive home with black parents. Lou Ann recalled the tears that streamed down the entire family's faces the day the little boy was wrenched from the only home he had ever known. The tears returned when Lou Ann discovered Matthew's handprint on the window from which he often would look outside. She refused to clean the window, wanting to keep the handprint as a reminder of their loss, hoping that one day Matthew would be reunited with his true family.

The adoption placement fell apart. But instead of sending Matthew and Joseph to the Mullens' home, they were sent to a home with black foster parents. Meanwhile, Lou Ann experienced the horror and dismay of seeing Matthew advertised on television seeking a loving home.

Texas law at the time forbade discrimination in adoption placements. But social workers contended that they had been

"following the law which says that race cannot be the *determining* factor in adoption."[2] It has been my experience that any time race is "one factor," those who favor its use will pry that seemingly benign exception to the rule of nondiscrimination so wide that you can drive a truck through it. "Once one starts down the road of let's wait a little while to find a racially suitable family, that's a very slippery slope," argued Harvard law professor Laurence H. Tribe. "Once you allow the principle that it's O.K. to wait for a short time, there is no principled way to say waiting twice as long is not also O.K."[3]

And indeed that was happening in the area of interracial adoptions. The problem was (and continues to be) a huge statistical mismatch. At the time of the Mullens' struggle, there were 500,000 children in the U.S. foster care system. More than half were minorities, and 40 percent of the total were black. But nationwide, only 13 percent of Americans are black. Moreover, 67 percent of the hard-to-place children were black, while only 31 percent of the waiting families were black.[4]

But for the National Association of Black Social Workers, the issue is not about moving children from foster homes to adoptive families; it's about race. The group considers interracial adoptions "cultural genocide." It would prefer to keep black children in foster homes or orphanages than to allow adoption by nonblack families. But as Harvard law professor Elizabeth Bartholet pointed out, "These policies are seriously harmful to black children. . . . There is not one iota of evidence in all the empirical studies that transracial adoption does any harm at all, compared to same-race adoption. There is plenty of evidence that delay in adoption does do harm."[5]

The resulting system in many instances resembled the Jim Crow era. In Tennessee, a mixed-race child—half black and half white—was considered a black child by the state. But the

state considered a mixed-race couple white, with the perverse effect that mixed-race couples were forbidden to adopt children who would appear to be their own biological offspring.

My colleagues and I filed a lawsuit on behalf of the Mullens challenging Texas's racist adoption practices. The issue transcended the ideological divide, and we were joined as cocounsel by Harvard law professors Bartholet, Tribe, and Randall Kennedy.[6] Within days, the agency capitulated and allowed the Mullens to adopt Matthew and Joseph.[7]

The state of Texas strengthened its laws to make discrimination in adoption placements a crime punishable by incarceration. My colleagues and I call it our "send a social worker to jail program." Thereafter, Congress passed a law sponsored by Sen. Howard Metzenbaum (D-OH), the Multiethnic Placement Act of 1994,[8] which forbade discrimination in federally funded adoption placements throughout the country.

Today, Matthew and Joseph Mullen are happy Texas adolescents. But the thought that we as a nation remain so infected by race consciousness that a wonderful family was nearly destroyed by it—and numerous others actually were—is a sobering commentary on where we are in achieving a society that is governed by the principle of racial equality.

This year celebrates the 50th anniversary of *Brown v. Board of Education*[9] and its sacred promise of equal educational opportunities. Who could ever have predicted that half a century after that triumph for equality—and 40 years after the Civil Rights Act of 1964—that Americans would be as divided by race as ever before? Today, individuals' race, color, or ethnicity often determines what jobs are available to them, what district they will be in for voting opportunities, where they can attend school, whether they can get into top colleges or receive scholarships, and the likelihood of whether they will be stopped by police or airport security guards. In many

such instances, the government (often state or local or one of their agencies) is engaged in discrimination, in clear violation of the blanket nondiscrimination guarantee of the 14th Amendment.[10]

Too often, one's position on such issues varies according to ideological preferences. Many conservatives will decry racial preferences in college admissions while finding racial profiling entirely permissible; while many liberals see it exactly the reverse. That is one reason why the promise of equality is eroding: Too few of us honor the principle across the board, and too often exceptions to the rule are found. Exceptions that, unfortunately, then serve to sanction the use of discrimination when others find ample justification. In the context of slavery, Thomas Paine argued that it was impossible to compromise equality without destroying it, for whenever we

> depart from the principle of equal rights, or attempt any modification of it, we plunge into a labyrinth of difficulties from which there is no way out but by retreating. Where are we to stop? Or by what principle are we to find out the point to stop at, that shall discriminate between men of the same country, part of whom shall be free, and the rest not?[11]

Paine's warning has proven prophetic repeatedly over the course of American history, from the institution of slavery, to the Jim Crow laws, to the modern forms of state-sanctioned discrimination. Although the federal government has practiced and continues to engage in racial classifications, many of the most egregious violations have occurred at the state and local level. Indeed, it was such discriminatory practices that led to the adoption of the 14th Amendment.[12]

Today, discussions about racial discrimination by government usually revolve around so-called affirmative action or

racial profiling. They are not different issues, but two sides of the same discrimination coin. One characteristic shared by all forms of modern discrimination is that race is only "one factor" among many to be considered—but that means, by definition, that at least in some instances it will be the *deciding* factor, as illustrated by the shameful example of barriers to interracial adoption above. Another constant feature of departures from the nondiscrimination principle is that today's beneficiaries of racial preferences can be tomorrow's victims. And still another is that when the use of race by government is permissible under "exigent" circumstances, those circumstances will tend to arise with greater frequency. As Tom Paine urged, whatever the justification, any exception to the absolute principle of equality destroys the rule.

That point was made eloquently by U.S. Supreme Court Justice Tom Jackson in the context of one of the most shameful episodes of racial discrimination in American history, the internment of Japanese Americans during World War II. When the incarceration was challenged, the U.S. Supreme Court upheld it under the government's perceived emergency powers. But Justice Jackson dissented, warning that

> a judicial construction . . . that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. . . . [O]nce a judicial opinion rationalizes the Constitution to show that [it] sanctions such an order, the Court for all time has validated the principle of racial discrimination. . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.[13]

That proverbial weapon has been fired over and over again, always with tragic consequences.[14]

The inherently perverse effects of racial classifications are exacerbated by the growing phenomenon of multiracialism in

the United States. With increasing interracial marriage, children often cannot be placed into easy racial and ethnic categories. One might hope that multiracialism would hasten the day when our governments look at people as Americans, rather than as racially hyphenated groups. Instead, the desire to maintain racial pigeonholes has led public policy along ever more circuitous and arbitrary paths, with the predictable result that racial and ethnic groups increasingly are battling over their share of a racial spoils system.[15]

Most Americans clearly want to remove race from government's policymaking arsenal, even as they support true "affirmative action" for disadvantaged individuals.[16] Outside of the narrow realm of America's elite class, an overwhelming public consensus exists, even among minorities, that merit rather than race should be the sole criterion in hiring, promotion, and college admissions.[17] Voters in California and Washington State approved by lopsided margins initiatives that banned the use of race in public education, employment, and contracts. But in ways reminiscent of the "massive resistance" to federal court desegregation orders in the 1950s and '60s, state and local government officials often refuse to implement voter initiatives and judicial decisions, sometimes blatantly and other times coming up with subtle ways to evade them.

Racial classifications and the ideology that sustains them so permeate public policy at every level of government that officials can be punished for *refusing* to discriminate. Dr. Stanley Dea, a Chinese American, worked his way up the ranks at the Washington Suburban Sanitary Commission in the suburbs surrounding the nation's capital. When he finally earned a supervisory position, he discovered that the commission applied two policies that were hopelessly at odds with each other: a nondiscrimination policy and an affirmative action policy that required the promotion of women and

minorities over more-qualified nonminorities. When he learned that the U.S. Supreme Court had forbidden such policies, but that the commission had decided to ignore the ruling, he objected to it. The commission responded by relieving Dea of his supervisory responsibilities.

Represented by private attorney Douglas Herbert and the Institute for Justice, Dea filed a claim of retaliation under the Civil Rights Act of 1964. He was ostracized at the commission, and forced to submit to demeaning working conditions. He suffered a debilitating setback when the federal district court denied his claim. Dea passed away shortly thereafter, unable to witness his vindication in the U.S. Court of Appeals for the Fourth Circuit that had taken 11 years to secure.[18]

Dea's struggle illustrates painfully how far we have strayed in the 40 years since the Civil Rights Act: from an absolute and unequivocal command of nondiscrimination to the threat of official government retaliation for those who dare to stand up for that principle. No wonder that few government officials do dare.

The United States Supreme Court recently had a golden opportunity to strike a vital blow for the principle of equality—but instead, it delivered a mighty blow *against* that principle. Over the past two decades, the Court had been constructing an equal protection jurisprudence that applied the strictest scrutiny to racial classifications created by governments at every level. The Court required that government entities demonstrate a compelling interest—one that could be accomplished only through the narrowly tailored and temporary use of race as a criterion. Racial balancing as an end in itself was completely forsaken. The Court rejected such rationales as the perceived need to provide racial "role models," and found that the only compelling purpose was remedying a governmental entity's own past discrimination; and

even then it approved race-conscious remedies only if there was no alternative.[19] For years, the Supreme Court did not uphold any racial classifications. Applying the Supreme Court's precedents, lower federal courts consistently struck down racial classifications as well. It appeared we were on the way to embracing as a reality government neutrality toward race.

That progress all came to a jarring end in two cases challenging racial preferences in admissions policies at the University of Michigan. Advocates of race-based university admissions policies asserted that there was an exception to the rule of nondiscrimination. They pointed to the 1978 *Bakke* decision,[20] in which the swing justice, Lewis Powell, generally eschewed racial preferences in the university admissions process but endorsed a Harvard affirmative action program that used race as a "plus factor" in admissions. Contemporary defenders of racial preferences in academia wielded the *Bakke* precedent along with the mantra of the supposed academic benefits flowing from racial diversity.

Still, the Supreme Court since *Bakke* repeatedly had indicated in forceful terms that the same strict scrutiny standard would apply regardless of the context. The hopelessly subjective standard of "diversity" seemingly would be far too nebulous to constitute a "compelling" governmental objective. Even if the Court accepted the rationale, true diversity could be far better achieved through consideration of individual attributes than through the casual and wholesale deployment of racial stereotypes.

Real-world experience also suggested that racial preferences were not an effective means of redressing the real cause of racial disparities in college attendance: a large and growing racial academic gap in K–12 education. Social scientists Stephan and Abigail Thernstrom found that in the late 1980s, the

average black high school senior graduated at a performance level three academic years behind the average white senior. A decade later—in the midst of massive racial preferences in college admissions—that gap had actually *increased* to four academic years.[21] "The truth is that affirmative action is largely irrelevant to increasing minority representation in higher education," argue Jay P. Greene and Greg Forster in a recent *Washington Post* op-ed. "The primary obstacle to getting more minority students into college is that only one in five such students graduate from high school with the bare minimum qualifications needed even to *apply* to four-year colleges." As a result, Greene and Forster conclude, "[u]nless we fix the leaks in the K–12 education pipeline, no higher education policy can possibly improve minority opportunities to attend college."[22]

Not only does the superficial quick fix of racial preferences do nothing to cure the underlying cause of racial disparities in higher education, it actually exacerbates the crisis by creating the illusion that the problem is being solved, when in fact it is growing worse. Race-based affirmative action programs are a form of "trickle-down" civil rights, bestowing most of their benefits on the most-advantaged members of the selected minority groups, while doing nothing to help those at the bottom of the economic or educational ladder.[23]

Moreover, states that abandoned overt racial preferences, due to voter initiatives, court orders, or executive decree, found that there were better ways to increase minority admissions. In the wake of Proposition 209, which abolished racial preferences in California public education, employment, and contracting, the University of California at Berkeley moved toward more-individualized admissions processes and began sending tutors to inner-city schools to boost test scores of economically disadvantaged, mostly minority students.[24] As the

New York Times reported, "ending affirmative action has had one unpublicized and profoundly desirable consequence: it has forced the universit[ies] to try to expand the pool of eligible minority students."[25] Texas and Florida adopted programs that guaranteed admission to all students graduating at the top of their high school classes.[26] But the public universities did not take those steps until the easy out of racial preferences was removed from their policy arsenals.

The existence of such less-burdensome alternatives seemed to seal the constitutional fate of programs—like those employed by the University of Michigan—that overtly used racial preferences. And indeed the Court, by a 6-3 vote,[27] did strike down the university's rigid preferences in undergraduate admissions, where each minority candidate automatically received 20 points on a 150-point scale.[28] (By contrast, an outstanding personal essay was worth only 3 points, and only 5 points were awarded for personal achievement, leadership, or public service.[29])

But by a 5-4 margin, the Court approved the more subtle, yet still massive, use of race at the University of Michigan law school.[30] That challenge was filed by Barbara Grutter, a white woman who applied to the law school with a 3.6 undergraduate grade-point average and a 161 score on the Law School Admission Test. While Grutter was not admitted, black and Hispanic students with far lesser academic credentials were.

The law school acknowledged that the admissions process was designed to achieve a "critical mass" of minority students—a goal no one could define with precision—and that race could be a determinative factor.[31] While the Court's majority purported to apply strict constitutional scrutiny, its actual analysis fell far short of that exacting standard. Far from demanding a compelling purpose, the Court's majority stated that the "Law School's educational judgment that such

diversity is essential to its educational mission is one to which we defer."[32] The Court dispensed with the narrow tailoring requirement as well. While public universities "cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks," the Court declared, they "can, however, consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."[33] Soothing words; but in practical consequence, a distinction without a difference. The undergraduate school was a bit more honest about its techniques, but the end result—and the massive preferences utilized to attain it—was essentially the same. Whether "flexible" or rote, racial discrimination is still discrimination, and any exception to the principle of nondiscrimination inevitably swallows the rule.

All of which the four dissenters pointed out.[34] Justice Kennedy declared that the Court did "not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents."[35] He derided the concept of critical mass, which is "a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas." The Court's abandonment of principle, he argued, could have devastating consequences. "Preferment by race, when resorted to by the State," Kennedy proclaimed, "can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality."[36]

Justice Clarence Thomas highlighted the huge racial credentials gap among law school applicants: Although blacks constitute 11.1 percent of those applying to law schools, they account for only 1.1 percent of applicants who score 165 or higher on the LSAT.[37] As a consequence, he charged, the

"Law School takes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. Those overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition."[38] Moreover, "the Law School's racial discrimination does nothing for those too poor or uneducated to participate in elite higher education and therefore presents only an illusory solution to the challenges facing our Nation."[39] Ultimately, Thomas concluded that the "Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all."[40]

For the majority, Justice O'Connor remarked that "[w]e take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable"[41]—an assertion that is almost laughable considering the persistence and ubiquitousness of racial preferences in university admissions. She added, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[42] Unfortunately, the impact of the Court's decision will be to delay the day of reckoning over the racial achievement gap, therefore decreasing the likelihood that racial disparities will disappear. In the meantime, as Justice Thomas quipped, the Court granted "a 25-year license to violate the Constitution."[43] And the murky rationale on which the decision rests easily could seep out into other areas of public policy, giving government-imposed racial classifications a new lease on life.

Racial classifications in the name of diversity infect not only university admissions, but school assignments at the

K–12 level as well. The bizarre yet all-too-predictable effects of such social engineering played out in Montgomery County, Maryland, which like many school districts uses race to determine admission into elite, specialized "magnet" schools. In 1995, the parents of Eleanor Glewwe and Hana Maruyama decided to remove their children from Takoma Park Elementary School and enroll them in a French immersion program at Maryvale Elementary School in Rockville. Both Eleanor and Hana had one white and one Asian American parent. Because the school district forces parents to choose a category for their children, the girls were classified as Asian.

The school district rejected their applications because there were too few Asian children already at Takoma Park, and the girls' departure would further reduce that number. "It's painful to hear you cannot get into one of the programs Montgomery County is famous for just because you're Asian," complained Warren Maruyama, Hana's dad. "It's clear what you have here is a thinly disguised system of racial quotas."

Don't worry, school officials told the disappointed parents: just reclassify the girls as white and apply again. There weren't too few white students at Takoma Park, so leaving shouldn't be a problem.

Eleanor's mother did just that—but the application was denied again. This time, the problem was that there were *too many* whites at Maryvale, so their transfer would adversely alter the racial balance in the receiving school.[44]

Eventually, the girls were allowed to transfer, but only after exposés in the *Washington Post* and on *CBS Evening News*.[45] The notion that the educational opportunities of a child of mixed ancestry depend on which racial category he or she checks is all too reminiscent of the case of Adolph Plessy, who was denied admission to a railway car because he was one-eighth black. Can it be that we have traveled so far and

painful a distance over the past century only to end up in the same place we started?

Children like Eleanor and Hana should not be sacrificed at the altar of racial discrimination, whether the euphemism is "separate but equal" or "diversity." America is not about redistribution of opportunities on the basis of race. It is about expanding opportunities, so that every individual, regardless of race, is ensured a chance to strive and risk and achieve to the limits of his or her abilities.

If we have learned anything since our nation's founding, it is that the results of racial classifications ultimately are never benevolent. For every beneficiary there is a victim. Today's winners can be tomorrow's losers. And even those who seem to benefit are made worse off by the corrosive effects of unearned gains.

The problem exists at every level of government, but at the state and local levels racial preferences are especially pervasive. The concept of equal protection of the laws cannot long abide arbitrary racial classifications. As a nation, we need to decide which we value more: our cherished constitutional values or a racial system that divides Americans on the most invidious of grounds. When empowered to do so, Americans invariably choose to vindicate the values that make us free. Unfortunately, government too often refuses to listen, thereby perpetuating a particularly vexing and demoralizing form of grassroots tyranny that should long ago have been consigned to a richly deserved demise.

Perhaps racial preferences will collapse under the weight of their own illogic, as ethnic groups battle one another for an ever-bigger share of racial entitlements, often for the wealthiest members in the name of the most-disadvantaged. Personally, I think it already has reached that point: Recently a middle-class, mixed-race member of my own family qualified

for a race-based affirmative action program and eagerly took advantage of it. Put another way, in the government's eyes, my sibling's marriage to a non-Caucasian rendered their children disadvantaged—a transformation that seems more than a bit condescending and tinged with notions of ethnic inferiority. That a member of the Bolick family—which has been in America for more than 200 years—qualified for race-based affirmative action demonstrates that the whole racial classification enterprise is certifiably insane.