Perspective and Point of View on Affirmative Action†

KEVIN BROWN*

Professor Bowen's article, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, explores the difficult terrain of whether affirmative action continues to be an appropriate admissions policy for selective higher education programs. She distributed a survey questionnaire at the Annual Biomedical Research Conference for Minority Students held in Anaheim, California.[1] A total of 332 minority students completed her survey.[2] Professor Bowen's survey included students from Puerto Rico, Washington D.C., and twenty-seven states, including four states that have banned affirmative action—California, Washington, Florida, and Michigan.[3] For analysis, Professor Bowen divided the survey responses based on whether the students attended college in states that banned affirmative action or states that continued to allow affirmative action.[4]

According to Professor Bowen, her survey results suggest that underrepresented minority "[s]tudents who attend schools in anti–affirmative action states find themselves engaged in an unfriendly environment."[5] Despite being admitted on purely white normative admissions standards, "these students were more likely . . . to

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∗ Professor of Law at the Indiana University Maurer School of Law and Emeritus Director of Hudson & Holland Scholars Program (HHSP), Indiana University – Bloomington. B.S., 1978, Indiana University; J.D., 1982, Yale University. From August 2004 to August 2008, I directed HHSP, which was a scholarship program that recruited high achieving underrepresented minority students to the Bloomington campus of Indiana University. In fall 2008, there were almost 600 students in the program, including approximately half of the black and half of the Hispanic/Latino students who will graduate from the Bloomington campus. I want to express my thanks to my older brother, Darrell Brown, who graduated with a Masters Degree in Business Administration from the Kelley School of Business at Indiana University – Bloomington, my younger brother, Dwayne Brown, who graduated from Columbia Law School, and my daughter, Crystal Williams, who graduated from Duke Law School. All of us were "beneficiaries" of affirmative action. In light of Professor Bowen's article, we discussed our experiences of affirmative action at a New Year's Day family gathering and arrived at similar conclusions to the ones I express in this Commentary.

1. The Conference was held November 8–10, 2006. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1214–15 (2010).

2. In addition, twenty-two respondents agreed to be contacted for follow up interviews. *Id.* at 1216.

3. *Id.* at 1217–18.

4. Although Michigan passed Proposal 2 banning affirmative action the day before Professor Bowen's survey commenced, she included respondents from Michigan with respondents from the other states that banned affirmative action because of the ongoing anti–affirmative action atmosphere that had existed since 1998, when the plaintiffs in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), filed complaints. *See* Bowen, *supra* note 1, at 1218 n.11. Professor Bowen also subdivided the students into those that had one or more classes where they were the sole minority student and those that did not experience any classes where they were the sole minority student. *Id.* at 1217.

5. Bowen, *supra* note 1, at 1234.

encounter . . . open hostility, internal stigma, and external stigma" than their underrepresented minority counterparts in affirmative action states.[6] What Professor Bowen means by "internal stigma" is that underrepresented minority students admitted on affirmative action "will always doubt their abilities and their merit."[7] These students "will experience external stigma because other students will assume that they were admitted based on their race and not on their merit."[8]

The results of Professor Bowen's survey run counter to what she argues proponents of eliminating affirmative action assert. According to Professor Bowen, they argue that race-based admissions programs will lead underrepresented students to experience both internal and external stigma and hostility from students who resent affirmative action.[9] Professor Bowen explains that the reason underrepresented minority students in states that have affirmative action experience less hostility, internal stigma, and external stigma is because "underrepresented minority students in 'meritocracy' states [(those that have banned affirmative action)] must endure silencing, imposition, and performing in white spaces at a far greater rate than their counterparts in race-based admissions states."[10]

With regard to silencing, Professor Bowen notes that the arguments that stem from the belief that admissions decisions should be color blind, which is dominant in the states that ban affirmative action, masquerade as a "perspectivelessness paradigm."[11] The color-blind approach obscures the reality that whiteness operates as the unrecognized touchstone against which all other races and ethnicities are measured. This removes white racial identity so that everyone else is raced, except whites. Unlike white students, however, minority students "cannot simply turn off race by not talking about it."[12] Thus, the effect of the color-blind approach is to silence minority students because worldviews based on race or ethnicity have no place.

As a supporter of affirmative action, I will not address potential criticisms of Professor Bowen's article that opponents will discuss. I thought Professor Bowen's discussion of the embedded "perspectivelessness paradigm" of the color-blind arguments against affirmative action was excellent. She accurately points out that the color-blind approach works to obscure the reality that whiteness operates as the unrecognized touchstone against which all other races and ethnicities are measured. She is also correct that the color-blind approach leads to a silencing of underrepresented minority students. However, I do not believe that underrepresented minority students attending institutions that practice affirmative action experience less imposition or are in white spaces far less often than their underrepresented minority

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6. *Id.*

7. *Id.* at 1198.

8. *Id.* Professor Bowen also found that "[s]tudents who attended schools in anti–affirmative action states were disproportionately more likely to be in a class in which they were the lone minority." *Id.* at 1227. She found that students who took at least one class as the sole minority student were far more likely to encounter racism from other students and faculty and suffered much higher rates of internal and external stigma. *See id.* at 1227–33.

9. *Id.* at 1234.

10. *Id.*

11. *Id.* at 1235 (citing Kimberlé Williams Crenshaw, *Forward: Towards a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33 (1994)).

12. *Id.*

counterparts attending school in states that ban affirmative action. Thus, I agree with part of Professor Bowen's explanation for the results of her study. Nevertheless, the weakness of Professor Bowen's explanation comes from an embedded assumption that underrepresented minorities, such as African Americans, are not active in producing their own interpretations of their experiences in American society, including their experiences of being on affirmative action. As a result, she misses some important aspects of the nature of underrepresented minorities' experience with affirmative action.

Before addressing the major shortcomings of Professor Bowen's article, I want to provide a little autobiographical information. I would have been a perfect subject for Professor Bowen's study because I had the experience of attending law school for the first year as a black student who did not "benefit" from affirmative action and for the last two years as one who did. I will start by contrasting my experiences in the two law schools that I attended. Then I will address my two major criticism of Professor Bowen's interpretation of her survey results. These criticisms point to her lack of understanding of how underrepresented minority groups, such as African Americans, have a different way of understanding their experiences on affirmative action from the generally accepted understanding of affirmative action provided by Justice O'Connor's opinion for the Court in *Grutter v. Bollinger*.[13]

I. MY EXPERIENCE ATTENDING LAW SCHOOL AS A BLACK STUDENT WHO WAS BOTH A NON-BENEFICIARY AND A BENEFICIARY OF AFFIRMATIVE ACTION

In 1978, I graduated with a 3.64 GPA from the Kelley School of Business at Indiana University–Bloomington with a degree in Accounting. I took the LSAT three times, and my highest score put me around the seventy-fifth percentile. As strange as it may sound, I was not aware of affirmative action when I applied to law school.[14] Deeming my LSAT score inadequate for admission to the elite law schools, I applied only to the two public law schools in my home state, Indiana University School of Law–Bloomington and Indiana University School of Law–Indianapolis (IU–Indy). Both law schools admitted me. While no black person can actually know for certain, I have always believed that my undergraduate GPA and my LSAT scores were sufficient to get me admitted to both law schools without benefitting from affirmative action.

A. The Experience of Attending Law School Without Affirmative Action

In 1979, I enrolled as a first-year law student at IU–Indy. I was one of only three African American students out of about 200 full-time first-year students.[15] IU–Indy did not have any tenure or tenure-track professors, legal writing instructors, or clinicians of

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13. 539 U.S. 306 (2003).

14. According to Professor Bowen, at the time of applying to college, only one-third of the students attending schools in states that allow race-based admissions policies and only one-half of the students attending schools in states that banned affirmative action were aware of affirmative action policies. *Id.* at 1224–25.

15. IU–Indy also had a part-time night division. As a day student, I rarely interacted with the night students. As I recall, however, there were only a couple of first-year black students in the night division.

color. Besides the janitors, a librarian was the only black person who worked in the entire law school building. Needless to say, all three of us were on the best of speaking terms with her.

On the first day of orientation, the three of us sought each other out. Afterward, we sat together in every class, studied together for class, and ate together between classes. None of us believed that we received any positive considerations in the admissions process because of our race. Indeed, it was just the opposite. Our informal discussions with upper-level black students suggested that IU–Indy had an upper limit of three black full-time students per year.[16] Nor did we believe that our law school wanted us to bring, appreciated that we could bring, or was even aware that we brought a different perspective or point of view to the classroom. The three of us often discussed among ourselves how different our perceptions of legal issues were from the way our professors presented them or the way our classmates discussed them. However, we never discussed our different perceptions, which were based on our racial backgrounds, in the classroom. It was clear from the very first day of orientation that one of the unstated presumptions of our legal education was that the experiences of African Americans were simply not relevant to legal discussions.

As is still done by many law schools today, the Black Law Students Association conducted an informal orientation for the three of us. During that meeting, our well-meaning second- and third-year advisors told us that all we should hope for were grades of C, C+, and, if we were lucky, B-. They did not tell us to pursue membership on law review, participate in the activities of the law student association, or seek out research-assistant positions with professors. What we should do is seek to survive, graduate, and pass the bar. At the end of the road, we should be able to find a job with some governmental agency or join a small office of black lawyers where we would share expenses and receive additional legal training on the practicalities of making a living as a solo practitioner.

B. The Experience of Attending Law School with Affirmative Action

Despite the obstacles that the three of us encountered at IU–Indy, my first-year grades and those of one of my other black colleagues[17] put us in the top two percent of the class. After the first year, I applied for and was admitted to Yale Law School as a transfer student in fall 1980. I firmly believe that without affirmative action, Yale Law School would not have admitted me.

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16. My experience is that of an African American attending IU–Indy in the late 1970s and early 1980s, and IU–Indy long ago began to seek out underrepresented minority students. I am proud to tell people I attended IU–Indy as a first-year student because it is an outstanding law school with an exceptional faculty and student body. This Comment in no way reflects on the current faculty of IU–Indy or the experiences of underrepresented minority students who have enrolled at IU–Indy for many years.

17. Alan Mills would later go on to be the first person of color to join the *Indiana Law Review* and was awarded the Faculty Prize as the most outstanding graduate. He was the first person of color to work as an attorney for Barnes & Thornburg—one of Indiana's most prestigious law firms. Alan is also the first racial minority partner at Barnes & Thornburg and has served on the management committee of the firm. A copy of his firm biography is available at http://www.btlaw.com/Person.asp?Personnel_ID=48.

In contrast to being one of three black students, I was one of eleven at Yale, in a class of about the same size. While most (though not all) of us made a point of interacting with each other, we also were very involved in law school activities. For example, Randall Kennedy was a member of the *Yale Law Journal*. Robert Vance was the Articles and Topic Editor for the *Yale Journal of World Public Order*.[18] While Yale did not have any classes that presented a minority perspective on important legal issues, Robert Cover devoted a lot of time in his legal history class to the atrocities of slavery. Charles Black (one of the attorneys who litigated *Brown v. Board of Education*)[19] talked often about the evils of segregation and the need to overcome the legacy of discrimination in American society in his Constitutional Law class. Paul Gewirtz not only taught a course entitled Antidiscrimination Law, but also taught a seminar that focused primarily on the issue of school desegregation. Thus, not only did a number of professors address issues of specific importance to African Americans in the classroom, but they also presented them in a sympathetic light.

Two black professors, Drew Days and Harlon Dalton, joined the faculty during my time at Yale and were instantly important role models for all the black students at the Yale Law School. Black students looked up to these faculty members and were grateful for their presence. The Dean of Admissions, James Thomas, was also black. With regard to the job market, the very same Indianapolis law firms that I had sent my resume to in June, and from whom I received no response, came to Yale Law School and interviewed me in September.

II. PROFESSOR BOWEN'S EXPLANATION OF MY EXPERIENCE, THOUGH PARTIALLY CORRECT, IS FAR FROM ADEQUATE

From my experience as a black law student who was both a nonbeneficiary and a beneficiary of affirmative action, I clearly felt less hostility and less external stigma at Yale than I did at IU–Indy.[20] Professor Bowen would say that the reasons I felt less hostility and less external stigma at Yale than at IU–Indy was because I endured less silencing, imposition, and performing in white spaces at Yale than at IU–Indy.[21] I agree that I felt less silenced at Yale because there were more times in the classroom and outside the classrooms for discussions of worldviews based on race or ethnicity. However, it is untenable to suggest that I endured less imposition or was in white spaces less at Yale than I was at IU–Indy.

Simply put, the lessened hostility and external stigma I experienced cannot be fully explained by a reduction in silencing. Affirmative action is a welcome mat to underrepresented minority students who are not prepared or able to abandon their race or ethnicity at the schoolhouse door. In addition, it is also important to understand something that Professor Bowen did not adequately appreciate. The silencing that

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18. Masthead, 7 YALE J. WORLD PUB. ORD. v (1981).

19. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 50 (1994).

20. I probably felt more internal stigma at Yale than at IU–Indy, but that was because I perceived the white students at Yale as more qualified than those at IU–Indy, not because I was a beneficiary of affirmative action. In this regard, I doubt that my feelings were different from those any law student would experience, regardless of race, ethnicity, or affirmative action.

21. Bowen, *supra* note 1, at 1235.

occurs among underrepresented minority students because of the color-blind approach to education—whether in institutions that have affirmative action or ones that do not—is limited. The silencing that I experienced in the classroom and in interactions with the majority students and professors did not occur when black students discussed our law school experiences among ourselves. At Yale, we had another way of understanding affirmative action than the way articulated by Justice Powell and, later, Justice O'Connor. This alternative interpretation rejected the color-blind interpretation of the easily measurable academic credentials of LSAT scores and undergraduate grade point averages and thereby changed the way we comprehended the external stigma we encountered.

A. Affirmative Action Is a Welcome Mat, Not a "Quiet Please" or "Do Not Disturb" Sign

Affirmative action is not legally mandated. Thus, selective higher education programs have to decide whether they will implement affirmative action. Some members of the faculty and/or the administration have to conclude, for whatever reasons, that their institutions should take account of race and ethnicity in its admissions decisions. They must see some greater benefit from having black and brown students in their student bodies than a color-blind interpretation of easily measurable academic credentials of standardized test scores or grade point averages alone would produce. As a result, a selective higher education institution that employs affirmative action conveys the message to underrepresented minorities that they are valued not in spite of, but because of the fact that they are underrepresented minorities.[22] This welcome mat conveys a far different (and for an underrepresented minority student a far more welcoming) message than the message conveyed to us by institutions that do not have or cannot employ affirmative action. The latter institutions are saying that we accept you as an individual who happens to be black or brown, but not as a black or brown individual. In other words, we accept you as an exception from your underrepresented racial or ethnic group, not as a member of it. This was a major reason that I felt less hostility and more acceptance at Yale than at IU–Indy. As an African American, I perceived myself crossing over a welcome mat as I entered Yale due to the affirmative action policy. At IU–Indy, in contrast, I perceived myself passing by a "Quiet Please" or a "Do Not Disturb" sign posted outside the front door as I entered. Thus, as I walked into Yale Law School, I walked into a place in which I perceived less hostility because I was an African American than I did when I walked into IU–Indy.

B. Understanding Affirmative Action from the Perspective of an Underrepresented Minority Group with a History of Discrimination

I, like most African Americans (student or faculty), encounter silencing, imposition, and the requirement to perform in white spaces in predominately white higher

22. *Cf.* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting) (arguing that the Supreme Court's decision to treat affirmative action programs the same as programs that discriminated against racial minorities was to "disregard the difference between a 'No Trespassing' sign and a welcome mat").

education institutions whether they have affirmative action or not. In these regards, predominately white higher education institutions that profess a commitment to affirmative action are better, but only marginally better, than predominately white institutions that have no such commitment. From my experience, very few of the selective higher education programs that embrace affirmative action have institutionalized a celebration of diversity and multiple points of view, especially in the classroom.

I write regularly in the area of race, law, and education and have written about affirmative action several times.[23] I am very aware of the justifications for affirmative action first articulated by Justice Powell in his 1978 opinion in *Regents of the University of California v. Bakke*[24] and followed by Justice O'Connor in her 2003 opinion for the Court in *Grutter v. Bollinger*.[25] Both opinions accepted the racial neutrality of the easily measurable meritocratic credentials of standardized test scores and undergraduate grade point averages. However, both concluded that the benefits of diversity justified the use of racial classifications in an individualized admissions process.[26] Under Justice Powell's and Justice O'Connor's opinions, begrudging supporters of affirmative action are suppose to swallow hard, hold their noses, and tolerate affirmative action, even though they perceive it as an exception to meritocracy. Affirmative action is the lesser of two evils. While it requires a deviation from meritocracy, it is, nevertheless, preferable to having almost no underrepresented minorities in the student body.

Justice Powell's and Justice O'Connor's opinions bear constitutional imprimatur. They provide the legal rationale that selective higher education programs that wish to employ affirmative action must articulate in order to justify their decision. I am certain that there are underrepresented minority students who understand affirmative action consistent with Justice Powell's and Justice O'Connor's opinions. Applying the color-blind interpretation of their easily measurable academic credentials to their own experiences, these underrepresented minority students could come to understand their admittance as the result of unearned positive considerations because of their race or ethnicity. These underrepresented minority individuals would, presumably, conclude that because their easily measurable academic credentials are below those of the overwhelming majority of the students admitted, they are not as qualified or as worthy of being a member of the student body. Therefore, these underrepresented minority students would feel some type of internalized sense of stigma generated by being a recipient of affirmative action and, probably, would perceive that fellow students

23. *See, e.g.*, Kevin D. Brown, *After* Grutter v. Bollinger—*Revisiting the Desegregation Era from the Perspective of the Post-Desegregation Era*, 21 CONST. COMMENT. 41 (2004); Kevin Brown, *The Hypothetical Opinion in* Grutter v. Bollinger *from the Perspective of the Road Not Taken in* Brown v. Board of Education, 36 LOY. U. CHI. L.J. 83 (2004); Kevin Brown, *The Road Not Taken in* Brown*: Recognizing the Dual Harm of Segregation*, 90 VA. L. REV. 1579 (2004); Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229 (2008).

24. 438 U.S. 265 (1978).

25. 539 U.S. 306 (2003).

26. *See Grutter*, 539 U.S. at 343; Gratz v. Bollinger, 539 U.S. 344, 370–75 (2003); *Bakke*, 438 U.S. at 314–15.

viewed them as less qualified to be in the student body as well. The less that these underrepresented minorities find themselves in white spaces, presumably, the less they would encounter the negative feelings related to internal and external stigma. Thus, Professor Bowen's explanation of her survey results is one viable interpretation. However, this interpretation implies that underrepresented minority students are limited to the race-neutral interpretation of their academic credentials asserted by Justice Powell and Justice O'Connor in understanding our admittance to selective higher education institutions. In other words, Professor Bowen seems to think that we accept the color-blind interpretation of our academic credentials as the only viable interpretation for awarding positive considerations to underrepresented minorities in the admissions process.

The diversity justification for concluding that a critical mass of underrepresented minorities with a history of discrimination would enrich the academic environment for all students implies that there are alternative explanations for important social phenomena, including affirmative action, than the dominant one. As an African American, I come from a people who, against the background of 390 years of racial domination in the United States, formulated a counter discourse to explain our experiences and our condition in American society. This counter interpretation rejects the long held belief of dominant mainstream American culture, whether explicit or—in the case of the color-blind perspective—implicit that we were or are somehow inferior. Rather it views the sons and daughters of the soil of Africa as oppressed, not inferior.[27] Therefore, this perspective does not comprehend racial and ethnic differences in such statistics as family income, family wealth, unemployment, political power, educational attainment, or even standardized test scores as a reflection of our lack of ability. Within the perspective of this counter interpretation, these regrettable differences represent tangible proof of the continuing impact of past and present racism upon African Americans.

As Professor Bowen points out, the color-blind approach not only silences underrepresented minority students, but also prevents white students from seeing how their race privileges them with an invisible package of unearned assets to which they remain oblivious, but upon whose presence they can rely. Viewing affirmative action within the counter interpretation that is the product of the historical discrimination that blacks (and other underrepresented minority students) have suffered in America, one becomes fully aware of the privileging of whites and the racism embedded within the color-blind interpretation of easily measurable academic credentials.

As an African American law student (and faculty member), I learned not to give much credence to the interpretation that the easily measurable academic credentials of undergraduate GPA and LSAT scores were racially neutral. I recognized that this was, and still is, the interpretation of affirmative action articulated by the controlling opinions of the Supreme Court. However, I also firmly believe that the limitations on the ability of Justice Powell and Justice O'Connor to comprehend affirmative action from our point of view should not be the limitation that I, as an African American, should accept on my understanding of my experience of affirmative action. African

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27. For a more complete explanation of this counter discourse, see KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 73–101 (2005).

Americans encounter racial obstacles in their academic pursuits that white and Asian students do not. This is something that, as an African American, I am well aware of, even if Justice Powell or Justice O'Connor—unlike Justice Douglas in *DeFunis v. Odegaard*[28]—were not. Any casual examination of racial and ethnic socioeconomic statistics comparing differences between African Americans or Hispanic/Latinos on the one hand with whites or Asians on the other reveals the impact of race and ethnicity on the lives of people in America. For underrepresented minority students, race and ethnicity generally matter in a very negative way.[29] Admissions committees should consider race and ethnicity when making admissions decisions, regardless of the benefits of diversity. To ignore race and ethnicity when evaluating the academic credentials of underrepresented minorities significantly undervalues their academic merit.[30] Just as importantly, it overvalues the academic merit of whites and Asians.

From my days as a law student over thirty years ago, I recognized the glaring and racist fallacy of those like Barbara Grutter who, given their easily measurable academic credentials, like to assert, "If I had been black, I would have been admitted." First, such an assertion is tantamount to saying that if I were black, I would be considerably better than the best of blacks admitted, a remark that many African Americans justifiably find extremely insulting. Such a person also appears to be oblivious to the privilege she received by being white or Asian, a privilege that underrepresented minorities see operating everyday. These would-be black Barbra Grutters ignore the simple reality that Cornel West so aptly pointed to when he entitled his book *Race Matters*.[31] If these Barbara Grutters had actually grown up black in America, their entire lives would have been different. They would have played with different toys, watched different television programs, listened to different radio stations, gone to different movies, worshipped in different churches, lived in different neighborhoods, attended different schools, eaten different foods, taken different elective classes, been present at different family gatherings, cheered for different heroes, cursed different villains, and read different newspapers, magazines, and books. The differences in their experiences would have affected these would-be black Barbra Grutters in profound ways, and their academic credentials would be among the most negatively affected aspects of their lives.

I understand affirmative action as a way to try and recognize the academic merit of underrepresented minority students in a manner that easily measurable academic credentials cannot. As a faculty member I say this to all law students, including underrepresented minority law students, who listen. With regard to my being a

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28. 416 U.S. 312, 336 (1974) (Douglas, J., dissenting) (concluding that the case challenging the affirmative action program at the University of Washington Law School "should be remanded for a new trial to consider, *inter alia*, whether the established LSAT's should be eliminated so far as racial minorities are concerned").

29. These obstacles are separate and distinct from those related to socioeconomic hurdles and obstacles.

30. This is the basic argument made by the brief in *Grutter* filed by Kimberly James, a black student at the University of Michigan. *See* Response to the Petition for Certiorari by Respondents Kimberly James et al., at 8–12, *Grutter*, 539 U.S. 306 (No. 02-241). For confirmation that Kimberly James is a black student at the University of Michigan, see Motion to Intervene at 2, *Grutter*, 539 U.S. 306 (No. 02-241).

31. CORNEL WEST, RACE MATTERS (2001).

"beneficiary" of affirmative action, I did not and do not feel that I received some unearned academic benefit because of my race. Rather, Yale Law School admitted me based solely on merit; however, its enlightened definition of merit rejected the color-blind approach to easily measurable academic credentials.

If higher education institutions employ affirmative action, then underrepresented minorities will also have access to a competing meritocratic interpretation of why they should receive additional positive considerations in the admissions process. They receive it because some members of the faculty or administration also believe that, regardless of the benefits of diversity, these students have earned the right of admission based solely on their academic merit. As a result, underrepresented minority students are aware that some supporters of affirmative action view all underrepresented minorities as legitimate citizens of the classroom who earned their way into the student body like everyone else, regardless of the benefits of diversity. This counter interpretation of affirmative action—which I would contend is just as valid, though not the accepted legal justification, as the one articulated by Justice O'Connor—eliminates any internal stigma that an underrepresented minority on affirmative action would experience and alters the comprehension of the external stigma they encounter from other students (and faculty).[32] Whatever external stigma underrepresented minority students encounter from other students and some faculty members, it can be understood as a product of lack of understanding by their fellow classmates (and some faculty members).

CONCLUSION

There is much that I liked about Professor Bowen's article. The conclusion of her study, that underrepresented minority students who attend schools in anti–affirmative action states encounter more open hostility, internal stigma, and external stigma than their underrepresented minority counterparts in affirmative action states, was something I have known for thirty years. Professor Bowen would argue that the explanation for this is that underrepresented minorities in states that ban affirmative action endure silencing, imposition, and performing in white spaces at a far greater rate. While I agree that there is more silencing, it is untenable to assert that underrepresented minorities attending predominately white higher education institutions in affirmative action states endure less imposition and have less need to perform in white spaces than those in anti-affirmative action states. Lessened hostility and external stigma cannot fully be explained by a reduction in silencing.

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32. What the late Professor John Calmore stated of critical race theory is applicable to affirmative action as well.

> As [we] confront the texts of America's dominant legal, social, and cultural strata, we are critical, fundamentally so, because we engage these texts [O'Connor's opinion in *Grutter*] in a manner that counters their oppressive and subordinating features. In this endeavor we are not simply in opposition; we are not rebels without a cause. We are the 'new interpreters,' who demand of the dominant institutions a new validity . . . .

John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intelletual Life in a Mulitcultural World*, 65 S. CAL. L. REV. 2129, 2164 (1992).

As a black former law student who was both a non-beneficiary and a beneficiary of affirmative action, I believe two other explanations provide a better rationale for the results of Professor Bowen's survey. First, an affirmative action program is a welcome mat for underrepresented minority students. It conveys a very different message to these students than the message conveyed by institutions that do not or cannot implement affirmative action. The message affirmative action policies convey to underrepresented minority students is that "we want you as a member of our student body because you are an underrepresented minority." In contrast, the message conveyed without affirmative action is that "we accept you in spite of the fact that you are underrepresented minority." For black and brown students, who cannot leave their race and ethnicity behind, the latter message is tantamount to seeing "Quiet Please" and "Do Not Disturb" signs on the front door.

Second, the benefits of diversity spoken of first by Justice Powell and later by Justice O'Connor are not the only way to understand why admissions committees should take account of race and ethnicity in the admissions process. While the Supreme Court's justifications for affirmative action presume the race neutrality of easily measurable academic credentials, underrepresented minorities encounter racial and ethnic obstacles in their academic pursuits that white and Asian students do not. These racial and ethnic obstacles explain the underrepresentation of these minority groups in the first place. Regardless of the benefits of diversity, admissions committees should consider race and ethnicity in making admissions decisions in order to take into account these obstacles. Under this counter interpretation, underrepresented minorities will not feel the same amount of internal stigma they would feel if they accepted a race neutral interpretation of their academic credentials. Additionally, when they encounter hostility or external stigma from other students and faculty members, they will perceive these individuals as simply ignorant of the obstacles they encounter and the privileging majority students receive through the assumption that easily measurable academic credentials are racially neutral.