

## The Devil Is in the Lack of Details

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### INTRODUCTION

In an interesting and potentially important article, Professor Deirdre M. Bowen declares that her goal “is to scrutinize what happens when the judiciary and anti-affirmative action activist groups exploit color blindness to rationalize away affirmative action admissions policies.”<sup>1</sup> She argues that her *research* and her *study* demonstrate that “reactionary ‘color blindness’”<sup>2</sup> does not actually show that “affirmative action is no longer necessary.”<sup>3</sup> Instead, she believes the *results* of her *study* establish that anti-affirmative action forces have embraced an “ideal [that] does not appear to exist” and are “promoting a deeply flawed discourse [by asserting] that affirmative action causes stigma.”<sup>4</sup>

My emphasis on the words “research,” “study,” and “results” is intentional. Professor Bowen now writes as a law professor, but her initial academic homes were in sociology and criminal justice. Her first postbaccalaureate degree was in law, but her most recent academic training is in sociology, and this informs much of what she tries to accomplish. For me, then, the noteworthy portions of her article are those that mark it as an empirical study: survey research that collects and analyzes data, testing a series of hypotheses against what is revealed by the information secured.<sup>5</sup>

Professor Bowen’s article is part of a long and important dialogue between lawyers and social scientists focusing on what Judge Richard Posner characterized as “the need for empirical knowledge.”<sup>6</sup> As Posner stressed, in many important cases “[t]he big problem is not lack of theory, but lack of knowledge—lack of the very knowledge that [social science] research, rather than the litigation process, is best designed to

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1. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1204–05 (2010) (footnote omitted).

2. *Id.* at 1201.

3. *Id.* at 1202.

4. *Id.* at 1244.

5. That is what I did at the University of Michigan, where survey research provided the foundations for my doctoral dissertation. See Ann M. Killenbeck, *Racial Diversity in Legal Education: Do Racially Diverse Educational Environments Affect Selected Attitudes of White First-Year Law Students?* (May 3, 2000) (unpublished Ph.D. dissertation, University of Michigan) (on file with author). This was the first social science study exploring whether diverse learning environments produced actual changes in selected law student attitudes.

6. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 3 (1998).

produce.”<sup>7</sup> Indeed, Professor Bowen ties her work to one of the most significant decisions in the law and social science canon, *Brown v. Board of Education*,<sup>8</sup> arguing that “[j]ust as the Supreme Court in *Brown* . . . considered empirical evidence as it contemplated which social experiment should be adopted—integration or segregation—this study offers legislators and courts alike the opportunity to take the bold step of breathing new life into affirmative action.”<sup>9</sup>

Perhaps.

Professor Bowen believes that affirmative action’s opponents ignore “the legacy of past racism” and refuse to “confront present racism.”<sup>10</sup> There are many who disagree, viewing affirmative action as a form of invidious discrimination<sup>11</sup> and, in the noteworthy case of Justice Clarence Thomas, as “racial paternalism” that demeans and harms the very individuals it is supposedly designed to benefit.<sup>12</sup> My goal in this brief Commentary is not to take sides in this debate. Rather, I want to do three things. First, I will stress why rigorous and objective social science studies are so important in this area. Second, I will raise questions about the extent to which Professor Bowen has actually conducted a rigorous study showing that affirmative action itself is responsible for many of the effects she identifies. Third, I will note why, in spite of this, certain of her findings are interesting given a key aspect of the majority opinion in *Grutter v. Bollinger*,<sup>13</sup> that is, its acceptance of the argument that institutions may consciously attempt to assemble a “critical mass” of minority students as part of a constitutionally

7. *Id.* I agree with Posner and assume Professor Bowen would too, although, ironically, she criticizes Posner as one of the scholars who “re-conceptualized race as ethnicity.” Bowen, *supra* note 1, at 1209 n.56 (citing Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1).

8. 347 U.S. 483 (1954). The use of social science materials by the Court has been controversial. For the history and arguments, pro and con, see Anne R. Oakes, *From Pedagogical Sociology to Constitutional Adjudication: The Meaning of Desegregation in Social Science Research and Law*, 14 MICH. J. RACE & L. 61 (2008), and Sanjay Mody, Note, *Brown Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy*, 54 STAN. L. REV. 793 (2002).

9. Bowen, *supra* note 1, at 1199.

10. *Id.* at 1243.

11. See, e.g., Gail Heriot, *Affirmative Action in American Law Schools*, 17 J. CONTEMP. LEGAL ISSUES 237, 238 (2008) (agreeing that we “should aspire to be a society in which members of racial minorities are fully integrated into the mainstream” but questioning “whether racial discrimination—something that nearly all Americans abhor—is an appropriate tool to achieve that end”).

12. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., concurring in part and dissenting in part) (arguing that affirmative action “tantalyzes unprepared students with the promise of a . . . degree,” only to place “overmatched students” who “cannot succeed in the cauldron of competition”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in the judgment) (arguing that affirmative action is “racial paternalism” whose “unintended consequences can be as poisonous and pernicious as any other form of discrimination”).

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

sound affirmative action plan.<sup>14</sup> In particular, I will show why Professor Bowen's arguments about the value of a critical mass—and the harms she posits when one is not present—are suggestive but incomplete, given what I believe to be the single most important obligation imposed on institutions employing affirmative action in pursuit of diversity: the need to engage in proactive programming as an integral part of its efforts.<sup>15</sup>

## I.

The philosopher Lawrence C. Becker once argued that “[a]ll the relevant material [about affirmative action] is known to people of good will on both sides; continued discussion of it has very little practical effect beyond educating successive generations of adversaries.”<sup>16</sup> Professor Jack Greenberg, who as assistant counsel for the NAACP Legal Defense and Educational Fund litigated many of the most important civil rights cases decided between 1949 and 1984, agrees, noting that “[o]pposing sides in the war over affirmative action in higher education have generated a rat's nest of arguments over facts, philosophy, and constitutional law.”<sup>17</sup>

I believe both Becker and Greenberg are correct in one important respect. Virtually all of the arguments for and against affirmative action are couched in philosophical, moral, or political terms. This makes it inevitable that the ensuing dialogue generates wildly divergent and inevitably adversarial statements.<sup>18</sup> The single most important point of departure for most participants in these debates is their belief that a particular vision should control. Affirmative action's supporters—among whom Professor Bowen candidly places herself—believe deeply that it is morally right and educationally necessary because “racism has more compelling roots than just individual actions” and can be “found in the very social structures of society.”<sup>19</sup> Its opponents maintain with equal vigor that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>20</sup> Both groups accordingly spend extraordinary amounts of time and energy disputing, bitterly and at length, who may lay claim to

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14. *Id.* at 330 (noting that the “concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce” and stating that “[t]hese benefits are substantial”).

15. This is one of the major arguments that I make in my own work on this subject. See Ann M. Killenbeck, Bakke, *With Teeth? The Implications of Grutter v. Bollinger in an Outcomes-Based World*, 36 J.C. & U.L. 1 (2010).

16. Lawrence C. Becker, *Affirmative Action and Faculty Appointments*, in AFFIRMATIVE ACTION AND THE UNIVERSITY: A PHILOSOPHICAL INQUIRY 93, 93 (Steven M. Cahn ed., 1993).

17. Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1610 (2003).

18. For a small sample of the hundreds of articles, pro and con, see Symposium, *From Brown to Bakke to Grutter: Constitutionalizing and Defining Racial Equality*, 21 CONST. COMMENT. 1 (2004); Symposium, *Meeting the Challenge of Grutter—Affirmative Action in Twenty-Five Years*, 67 OHIO ST. L.J. 1 (2006); Symposium, *Post-Grutter: What Does Diversity Mean in Legal Education and Beyond?*, 35 PEPP. L. REV. 569 (2008).

19. Bowen, *supra* note 1, at 1208.

20. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

landmark rulings like *Brown*<sup>21</sup> and what the Reverend Martin Luther King meant when he appealed for “a nation where [people] will not be judged by the color of their skin but by the content of their character.”<sup>22</sup>

Professor Bowen understands this,<sup>23</sup> even as she makes it clear that she embraces the rhetoric and arguments of the pro-affirmative action side.<sup>24</sup> But she also tries to redirect the discussion by focusing on critical and too often ignored questions: What does diversity mean as an educational matter? What actually happens to the students themselves during their undergraduate education? And does affirmative action itself actually play a role in all of this?<sup>25</sup>

These questions lie at the heart of the Supreme Court’s recent affirmative action decisions, *Grutter v. Bollinger*<sup>26</sup> and *Gratz v. Bollinger*.<sup>27</sup> Much of the attention devoted to these cases focuses on the threshold question posed and answered in *Grutter*, “whether the use of race as a factor in student admissions . . . is unlawful.”<sup>28</sup> A narrow majority of the Court concluded that such policies are legal, holding, in an opinion written by Justice Sandra Day O’Connor, that the University of Michigan Law

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21. Compare *id.* at 747 (arguing that *Brown* stands for the proposition that state actors cannot engage in “differential treatment to American children on the basis of their color or race” (citations omitted) (internal quotation marks omitted)), with *id.* at 868 (Breyer, J., dissenting) (arguing that the decision “to invalidate the plans under review is to threaten the promise of *Brown*”).

22. Martin Luther King, Jr., I Have A Dream (Aug. 28, 1963), in I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 101, 104 (James M. Washington ed., 1992). Compare Martha Minow, *After Brown: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 644–46 (2008) (arguing that a proper understanding of King’s message would allow institutions “to take race into account”), with STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE 528 (1997) (“It was a central hope of the civil rights movement that blacks would come to be seen as individuals—‘judged [not] by the color of their skin but by the content of their character,’ as Dr. King so famously put it.” (alteration in original)).

23. See, e.g., Bowen, *supra* note 1, at 1199–1201 (“The debate over whether affirmative action is an appropriate admissions policy in higher education continues to rage in academic, activist, judicial, and citizenry circles.” (footnotes omitted)).

24. See, e.g., *id.* at 1199 (“Affirmative action is but one brick in the institutional reconstruction needed to undo the grip of the dominant group’s privilege.”); *id.* at 1244 (“Affirmative action provides but one important tool in the tool box of equitable education. It unmask[s] the brilliant disguise of the stigma fallacy and demonstrates the power of critical mass.”).

25. The best studies would be longitudinal, testing the effects of the presence or absence of diversity over the course of a student’s enrollment, rather than simply at a given point in time. The important question is whether diversity actually changes attitudes or adds some otherwise absent dimension to an education—what Professor Smith has called in her important new book the extent to which it “interrupt[s] habitual modes of thinking.” DARYL G. SMITH, DIVERSITY’S PROMISE FOR HIGHER EDUCATION: MAKING IT WORK 211 (2009). Such changes can only be measured by comparing student attitudes before and after the arguably critical event: education and socialization in a diverse environment.

26. 539 U.S. 306 (2003).

27. 539 U.S. 244 (2003).

28. *Grutter*, 539 U.S. at 311.

School had “a compelling interest in attaining a diverse student body”<sup>29</sup> and that the specific policy at issue was narrowly tailored and, therefore, constitutional.<sup>30</sup> But, as I have argued at length elsewhere,<sup>31</sup> *Grutter* did more than simply resolve longstanding questions about the legal force of Justice Powell’s “lonely” opinion in *Regents of the University of California v. Bakke*.<sup>32</sup> Rather, I believe that the most important aspect of *Grutter* is that it tells us that we should focus our attention on “the educational benefits that diversity is designed to produce”<sup>33</sup>—outcomes Justice O’Connor characterized as “substantial” and “not theoretical but real.”<sup>34</sup>

Professor Bowen devotes considerable space and attention to normative arguments. In particular, she argues that “legislators and courts alike” need “to take the bold step of breathing new life into affirmative action,”<sup>35</sup> creating an environment within which “remediation diversity can be accepted, and social justice achieved.”<sup>36</sup> Those are noble goals. But the individuals who designed Michigan’s litigation strategy recognized that even “Justice Powell’s decisive opinion in *Bakke* . . . specifically precluded any justification of using race and ethnicity as factors in admissions as a ‘remedy’ for past societal discrimination.”<sup>37</sup> They also understood that “[y]ou cannot separate social

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29. *Id.* at 328.

30. *Id.* at 334. In *Gratz*, the Court acknowledged that the *Grutter* principle controlled. *Gratz*, 539 U.S. at 268 (stating that “for the reasons set forth today in *Grutter* . . . the Court has rejected” the argument that diversity is not a compelling interest). But it held that a different admissions policy was unconstitutional. *Id.* at 270 (“We find that the University’s policy . . . is not narrowly tailored to achieve the interest in educational diversity that [the University] claim[s] justifies [its] program.”).

31. See Killenbeck, *supra* note 15.

32. 438 U.S. 265 (1978). One of the major post-*Bakke* arguments was about the weight of authority Justice Powell’s opinion carried. Compare *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) (“Justice Powell’s view in *Bakke* is not binding precedent on this issue.”), and Charles Fried, *Revolutions?*, 109 HARV. L. REV. 13, 47 (1995) (“What is called the controlling opinion in *Bakke*, authored by Justice Powell, in fact was joined by no other member of the Court.”), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000) (“[A]t our level of the judicial system Justice Powell’s opinion remains the law.”), and Antonin Scalia, Commentary, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race,”* 1979 WASH. U. L.Q. 147, 148 (criticizing the Powell opinion as “thoroughly unconvincing as an honest, hard-minded, reasoned [constitutional] analysis” but nevertheless “one we must work with as the law of the land”). The *Grutter* majority punted, stating “[w]e do not find it necessary” to resolve the issue and simply “endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.” *Grutter*, 539 U.S. at 325.

33. *Grutter*, 539 U.S. at 330.

34. *Id.*

35. Bowen, *supra* note 1, at 1199.

36. *Id.* at 1243.

37. Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1590 (2003). Bollinger was president of the university at the time the lawsuits were filed and, as such, the lead named defendant. The university refused to rely on the only other constitutionally acceptable justification for employing race-based admissions criteria, the “compelling interest of remedying the effects of [its own] past intentional discrimination.” *Cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). For a discussion of the reasons for that decision, see Killenbeck, *supra* note 15, at 5 n.28.

reality from educational benefits.”<sup>38</sup> Michigan therefore mounted what one observer characterized as a “full-throated counteroffensive,” a vigorous response that included “the marshaling of statistical evidence of the benefits of racial diversity.”<sup>39</sup> As one university official noted, “[t]he lawsuits, ironically, did force the university to clarify what it had been doing and why, and to articulate a rationale for the educational benefits of diversity.”<sup>40</sup>

The “cornerstone” in that approach was “research evidence” regarding “the educational value of diversity.”<sup>41</sup> The need for that type of information became quite clear in May 1997, when the Harvard University Civil Rights Project hosted a meeting exploring the implications of recent judicial and political setbacks for proponents of affirmative action and diversity.<sup>42</sup> They had two goals: to examine with care what the available social science studies showed about the actual impact of a diverse student body on educational outcomes; and, anticipating the lawsuits everyone knew were coming, to develop a research agenda to make the case for diversity before what one individual attending characterized as “a reactionary Supreme Court.”<sup>43</sup>

The picture painted was sobering. The lawyers present “poked . . . holes” in the research presented, “disheartening some of the academics . . . who were confronted with the need to justify a concept they believe in implicitly.”<sup>44</sup> That was not surprising given the number and types of studies available at that time. As the then-President of Harvard University, Neil L. Rudenstine, subsequently stressed, “current research on diversity [was] not substantial enough to withstand a court’s scrutiny.”<sup>45</sup> Everyone involved—educators, social scientists, and lawyers—recognized the need to transform what had largely been an article of faith into an educational fact. Anything short of that posed far too many risks, given the intense scrutiny an increasingly skeptical Supreme Court was imposing on any measure that actively considered race as an element in the decision-making process.<sup>46</sup> The defense team assembled by Michigan decided,

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38. Bollinger, *supra* note 37, at 1591.

39. Steven A. Holmes, *A New Turn in Defense of Affirmative Action*, N.Y. TIMES, May 11, 1999, at A1.

40. Earl Lewis, *Why History Remains a Factor in the Search for Racial Equality*, in DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN 17, 55 (Patricia Gurin, Jeffrey S. Lehman & Earl Lewis eds., 2004) [hereinafter DEFENDING DIVERSITY]. At the time Lewis was the dean of Michigan’s Rackham Graduate School.

41. Patricia Gurin, Eric L. Dey, Gerald Gurin & Sylvia Hurtado, *The Educational Value of Diversity*, in DEFENDING DIVERSITY, *supra* note 40, at 97, 99.

42. See Douglas Lederman, *Backers of Affirmative Action Struggle to Find Research That Will Help in Court*, CHRON. HIGHER EDUC. (Wash., D.C.), May 23, 1997, at A28. This meeting was by invitation only and I was present, invited in light of the work I was undertaking for my dissertation.

43. *Id.* (quoting Anthony M. Platt, professor of social work, California State Univ. at Sacramento).

44. *Id.*

45. Matthew W. Granade & Adam S. Hickey, *High Court Will Rule on Merits of Diversity*, HARV. CRIMSON, Sept. 12, 1997, available at <http://www.thecrimson.com/article/1997/9/12/high-court-will-rule-on-merits/>.

46. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–24 (1995) (emphasizing that “all [governmental] racial classifications” are subject to the rigors of strict scrutiny). *Adarand* was at the time the Court’s most recent affirmative action decision. One of the central

accordingly, to develop a “broad array of evidence” designed to “support [the university’s] educational judgment”;<sup>47</sup> that is, the university’s belief that it should assemble “a mix of students with varying backgrounds and experiences who will respect and learn from each other.”<sup>48</sup>

Six years later the Supreme Court vindicated Michigan’s strategy in an opinion stressing that the benefits associated with diversity were documented by “the expert studies and reports entered into evidence at trial”<sup>49</sup> and “numerous studies show[ing] that student body diversity promotes learning outcomes and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”<sup>50</sup> Various prominent social scientists viewed these results as a vindication of their efforts. One expert that Michigan relied on, Professor Sylvia Hurtado, characterized the decisions as “a victory for higher education research,” given that “the evidence about the need for racial diversity in education was cited as compelling evidence by both the appellate court judge in the undergraduate case and by the Supreme Court, with Sandra Day O’Connor writing the opinion for the majority in *Grutter*.”<sup>51</sup>

The individuals who challenged Michigan’s policies, in turn, now appear to understand that they made a critical tactical mistake: they failed to challenge this portion of Michigan’s case at the trial level, in effect conceding the point that diversity could have positive educational outcomes.<sup>52</sup> Future defendants may not be so fortunate. Indeed, in what some critics characterized as an attempt “to foment . . . further litigation,”<sup>53</sup> Justice Scalia noted in *Grutter* that “[o]ther lawsuits may focus on whether, in the particular setting at issue, any educational benefits flow from racial diversity,” an “issue [that] was not contested” in that case.<sup>54</sup> Perhaps recognizing this, Roger Clegg, the vice president and general counsel of the Center for Equal

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premises in the majority opinion was that there was, at least for constitutional purposes, no such thing as a “benign” racial classification and that “[m]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.” *Id.* at 226 (quoting *Drew S. Days, III, Fullilove*, 96 YALE L.J. 453, 458, 485 (1987)).

47. Jeffrey S. Lehman, *The Evolving Language of Diversity and Integration in Discussions of Affirmative Action from Bakke to Grutter*, in *DEFENDING DIVERSITY*, *supra* note 40, at 61, 89. Lehman was dean of the University of Michigan Law School when the suits were initiated.

48. *Id.* at 67 (quoting the Law School’s admissions policy).

49. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

50. *Id.* (quoting Brief of Am. Educ. Research Ass’n, Ass’n of Am. Colls. & Univs. & Am. Ass’n for Higher Learning as Amici Curiae in Support of Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241)).

51. Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 REV. HIGHER EDUC. 185, 188 (2007).

52. *See, e.g., Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D. Mich. 2001) (stating that plaintiffs did not dispute that “racial diversity . . . may provide . . . educational and societal benefits”). The few challenges eventually made were too little and came too late. *See, e.g.,* Brief for Amicus Curiae Nat’l Ass’n of Scholars in Support of Petitioners at 18–21, *Grutter*, 539 U.S. 306 (No. 02-241) (citing a single study that showed that the “fostering of group over individual identity by universities has led to *more*, not less, racial balkanization on our nation’s campuses” (emphasis in original)).

53. Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 889, 896 (2004).

54. *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part).

Opportunity, now stresses that “[l]ike generals, lawyers often err by preparing to fight the just-past war rather than the next one.”<sup>55</sup> He suggests six arguments that should be made in future litigation, the first of which is to “[a]ttack the social science evidence that diversity provides ‘educational benefits.’”<sup>56</sup> In particular, he states that “evidence cited in support of this notion needs to be attacked aggressively, and the counterevidence marshaled for the deleterious effects of preferences, particularly with regard to the members of those groups supposedly being benefited.”<sup>57</sup>

## II.

It is important to recognize what the Court did, and did not do, in *Grutter*. Justice O’Connor did make it clear that social science evidence about the effects of diversity was important. Other Justices recognized this, pointedly noting that the plaintiffs had not contested this issue<sup>58</sup> and observing that “[t]he Court relies heavily on social science evidence to justify its” decision.<sup>59</sup> Justice O’Connor did not, however, cite any specific studies.<sup>60</sup> In particular, she never mentioned what Michigan and many others argued at the time was the most important of them, that of Professor Patricia Gurin,<sup>61</sup> which the university characterized as providing “conclusive proof that a racially and ethnically diverse university student body has far-ranging and significant benefits for all students, non-minorities and minorities alike.”<sup>62</sup>

Social science’s “victory” in *Grutter* was a tenuous one. The evidence the university marshaled was clearly important. But it was, even after six years of intense activity, also arguably weak.<sup>63</sup> Accordingly, it is essential that current research employ sound

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55. Roger Clegg, *Attacking “Diversity”: A Review of Peter Wood’s Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 425 (2005).

56. *Id.*

57. *Id.* Clegg devotes almost six pages to this point and offers far more evidence than the plaintiffs and their amici during the five and one-half years from filing the initial complaint to the Court’s decisions. *See id.* at 425–30.

58. *See supra* notes 53–54 and accompanying text (discussing Justice Scalia’s opinion).

59. *Grutter*, 539 U.S. at 364 (Thomas, J., concurring in part and dissenting in part). The actual statement is that the Court relied on this evidence to “justify its deference.” *Id.* Whether or not there was “deference” in the O’Connor opinion, and if so, as to what, is a hotly contested issue. *See Killenbeck, supra* note 15, at 31–36.

60. This may have reflected the reality that virtually all of the studies available focused on undergraduate education and had no bearing on whether diversity matters in the different and distinctive world of legal education.

61. *The Compelling Need for Diversity in Higher Education: Expert Report of Patricia Gurin*, 5 MICH. J. RACE & L. 363 (1999). None of the opinions in either *Grutter* or *Gratz* mention, much less discuss, rely on, or criticize, the Gurin study.

62. *The Compelling Need for Diversity in Higher Education: Introduction*, 5 MICH. J. RACE & L. 243, 249 (1999).

63. A number of individuals have criticized the quality of the materials that Michigan relied on. *See, e.g.*, James H. Kuklinski, *Review: The Scientific Study of Campus Diversity and Students’ Educational Outcomes*, 70 PUB. OPINION Q. 99 (2006); Brian N. Lizotte, *The Diversity Rationale: Unprovable, Uncompelling*, 11 MICH. J. RACE & L. 625 (2006); Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761 (2006).



methodology and that its findings bear out the claims made. Unfortunately, viewed in this light, Professor Bowen's study leaves much to be desired.

Professor Bowen recognizes some of this. She concedes in her appendix that there are certain limitations to her study, noting that "[i]n conducting any research, there are constraints in what a researcher can do that lead to limitations on the conclusions drawn from the research."<sup>64</sup> She acknowledges, for example, that her "sample is in no way representative of the general population of minority students attending college and university."<sup>65</sup> Professor Bowen was able to undertake, accordingly, only "an exploratory study of over three hundred underrepresented minority students from twenty-seven states" that offers "some trends of how to think about the . . . arguments."<sup>66</sup> Unfortunately, the concession comes in the appendix,<sup>67</sup> rather than in the body of her article, where the disclaimer would have provided clearer context and had greater force about the extent, for example, to which "legislators and courts" can or should "take . . . bold step[s]" in response to this study.<sup>68</sup>

A second, more troubling problem occurs as the result of her inability to identify which institution a given respondent attended, in particular whether it is public or private. Professor Bowen observes in a footnote that her "Human Subjects Review Board limited the type of questions [she] could ask"<sup>69</sup> and would not allow her to "identify the school a respondent attended beyond the state in which it was located" or, tellingly, whether it was public or private.<sup>70</sup> She returns to this in her appendix.<sup>71</sup> But the qualifications she places on the conclusions she reaches are curious and limited. In a textual footnote, for example, she notes only that "[t]hese variables most certainly would have provided a more nuanced story."<sup>72</sup> In the appendix, in turn, she states regarding the public/private distinction that "[i]t may be that students are affected differently within a state depending on the type of institution they attend"<sup>73</sup> and that knowing which institution they attend "would [have] allow[ed] for analysis on the varying reaction to affirmative action policies based on the competitiveness of admissions at a particular school."<sup>74</sup>

Professor Bowen is correct that "identifying whether a student attends a public or private university is important because affirmative action laws apply only to public institutions."<sup>75</sup> The bans in place in her four "anti-affirmative action states" apply only

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64. Bowen, *supra* note 1, at 1252 app.B.

65. *Id.*

66. *Id.* But see *id.* at 1204 (claiming that "[t]his article seeks to consider students' experiences on a national scale"); *id.* at 1207 ("Part III explores the results from this national study . . ."). These claims are technically true, but potentially misleading given the actual scope of the study.

67. See *id.* at 1214–17 (discussing how the survey was conducted and noting the number of participants).

68. See *id.* at 1199.

69. *Id.* at 1216 n.104.

70. *Id.*

71. See *id.* at 1252 app.B.

72. *Id.* at 1216 n.104.

73. *Id.* at 1252 app.B.

74. *Id.*

75. *Id.*

to the public colleges and universities in those jurisdictions.<sup>76</sup> Thus, California's Proposition 209 restricts what its elite public universities can do, for example, the University of California, Berkeley and the University of California Los Angeles. But it has no impact on policies at private institutions like the California Institute of Technology, Stanford University, or the University of Southern California.

Unfortunately, we do not know, and given the limitations imposed on Professor Bowen's study, we cannot know whether any of the institutions attended by any of the participating students did or did not employ affirmative action when it admitted them. California has hundreds of colleges and universities. But, as William Bowen and Derek Bok documented in their important study, "[m]any people are unaware of how few colleges and universities have enough applicants to be able to pick and choose among them."<sup>77</sup> Like many others who have examined the question, they understand that "the vast majority of undergraduate institutions accept all qualified candidates and thus do not award special status to any group of applicants, defined by race or on the basis of any other criterion."<sup>78</sup> Indeed, a recent study indicates that while the very top colleges and universities are almost certainly more selective now than they were when Bowen and Bok conducted their study, "the average college has *not* become more selective: the reverse is true, though not dramatically."<sup>79</sup>

Simply put, most undergraduate institutions do not need to employ affirmative action. But the fact that the highly selective ones do does not make Professor Bowen's case. She stresses that the GPAs and SAT scores of the students who participated in her study indicate that they have a "high level of academic achievement."<sup>80</sup> These characteristics suggest that these individuals were likely targets for affirmative action admissions and may well have matriculated at highly selective institutions. But even if that is the case, that tells us nothing about the policies in effect at the institutions they are attending. In California they may be attending Berkeley or UCLA, elite public institutions that cannot use affirmative action. Or they may be enrolled at Cal Tech, Stanford, or USC, equally elite private universities that remain free to do so.

This would not be a problem if Professor Bowen confined her observations and findings to differences between student experiences in *states* that ban affirmative action and those in *states* that allow it. That tells us something, although even here we need to be careful. One of her so-called "anti-affirmative action states" is, after all, Michigan,

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76. See, e.g., CAL. CONST. art. I, § 31(a) ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."). In a similar vein, the Supreme Court has long emphasized that the Equal Protection Clause of the Fourteenth Amendment restricts only the actions of the states. See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

77. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 15 (1998).

78. *Id.*

79. Caroline M. Hoxby, *The Changing Selectivity of American Colleges* 21–22 (Nat'l Bureau of Econ. Research, Working Paper No. 15,446, 2009) (emphasis in original), available at <http://www.nber.org/papers/w15446>.

80. Bowen, *supra* note 1, at 1219.

where the voters approved Proposition 2 in November 2006, a measure declaring that “[t]he University of Michigan . . . shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.”<sup>81</sup> It may well be that at a state level, as a political matter, Michigan exhibits an “ongoing anti-affirmative action atmosphere in which students have operated.”<sup>82</sup> And it is also possible that some of those impulses may actually operate on the campus of that state’s elite institution, the University of Michigan. But it would be difficult, if not impossible, to find any institution in this nation that exhibits, as a matter of institutional climate, a greater and more pervasive commitment to affirmative action and diversity.

Further, a substantial portion of Professor Bowen’s findings are not confined to questions about what may or may not be happening in a given state. She argues that “the data from this study reveal that affirmative action—as a social experiment—may be working”<sup>83</sup> because “critical mass is more likely to occur in university settings that use race-based admissions and those students are the ones least likely to report stigma or overt racism.”<sup>84</sup> She states that her survey “reveal[s] that regardless of a school’s policy on affirmative action, race always matters, particularly for students who attend schools with anti-affirmative action policies.”<sup>85</sup> And she declares that “[a]lmost three-fourths of students in states that *bar* race-based admissions reported feeling pressure to prove themselves because of their racial group membership compared to less than half of students who attend schools with race-based admissions. Indeed, the difference between these two groups’ responses is statistically significant.”<sup>86</sup>

Unfortunately, these conclusions do not follow from her actual findings, given her constant shifts from assumptions about the climate of a given state to the realities of what is supposedly happening at a given institution. Professor Bowen has simply not established key cause and effect relationships for many of her most interesting and potentially important findings. For example, in a footnote to one of the statements quoted above,<sup>87</sup> she states that “[a] particularly poignant piece of data from the study, is the effect of the colorblind ideal on students who were admitted to school based on the normative white meritocracy criteria. The spirit injury is acute in this group.”<sup>88</sup> But the fact that a group of students are attending college in states that have imposed bans on affirmative action at public institutions tells us nothing about the bases on which these particular students were admitted. We simply do not know whether any of the students in her sample “attend[ing] schools in anti-affirmative action states” are attending a public or private institution and, as a result, were in fact actually “admitted on purely white, normative admissions standards.”<sup>89</sup>

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81. MICH. CONST. art. I, § 26, cl. 1. For a detailed history of Proposition 2 from the point of view of those supporting it, see CAROL M. ALLEN, *ENDING RACIAL PREFERENCES: THE MICHIGAN STORY* (2008).

82. Bowen, *supra* note 1, at 1218 n.111.

83. *Id.* at 1199.

84. *Id.*

85. *Id.* at 1207.

86. *Id.* at 1223 (emphasis in original).

87. *See supra* text accompanying note 85.

88. Bowen, *supra* note 1, at 1207 n.46.

89. *Id.* at 1234.

The critical research question is not which state is involved, but which institution. Absent that information, we simply cannot know whether “critical mass is more likely to occur,” or whether “students [will be] least likely to report stigma or overt racism,” because we do not know whether the university in question is actually using “race-based admissions.”<sup>90</sup> This does not mean that some of Professor Bowen’s findings are not interesting, or that some of what the students reveal is not poignant. It does establish the need to exercise considerable care when reading this article, much less in basing any action on it.

### III.

There is nevertheless a great deal to be said for Professor Bowen’s discussion of the potential importance of “critical mass,” which she describes as necessary so that “minority students . . . are viewed not as a token aesthetic, but first and foremost as legitimate citizens of the classroom to be engaged on their own terms.”<sup>91</sup> The Court’s acceptance of the critical mass concept is arguably the most controversial aspect of *Grutter*. As both the majority and dissent noted, the concept conjured up the image of the quota system adopted by the University of California, Davis Medical School and rejected in *Bakke*.<sup>92</sup> But the majority rejected the argument that Michigan’s policy was a quota in disguise, accepting the university’s argument that “[s]ome attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.”<sup>93</sup>

The concept is nevertheless a dangerous one. It is one thing to say that an institution believes critical mass is important and will pursue it within the constraints imposed by the narrow tailoring requirements articulated in *Grutter*. It is quite another, as the *Hopwood v. Texas*<sup>94</sup> litigation revealed, to resist the temptation to cut corners in the face of political and social pressure to get the “right” numbers. That said, Professor Bowen provides potentially valuable evidence that the importance of critical mass is something more than a simple matter of experience or belief.<sup>95</sup>

It is important to recognize, however, that many of the problems Professor Bowen identifies may well not be confined to situations where affirmative action is unavailable or where a critical mass has not been achieved. Educators need to recognize that

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90. *Id.* at 1199.

91. *Id.* at 1199.

92. *See Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003) (accepting Michigan’s argument that critical mass “is defined by reference to the educational benefits that diversity is designed to produce” and did not reflect “outright racial balancing, which is patently unconstitutional”); *id.* at 379 (Rehnquist, C.J., dissenting) (“Stripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.”).

93. *Id.* at 336 (quoting *Regents of the University of California v. Bakke*, 438 U.S. 265, 323 (1978)).

94. 78 F.3d 932, 936 n.6 (5th Cir. 1996) (noting that officials at the University of Texas School of Law lowered its admissions index in order to admit more members of a particular group).

95. *See Grutter*, 539 U.S. at 318–20 (relying on the experience-based beliefs of Dean Jeffrey Lehman and Professor Kent Syverud of the University of Michigan Law School to support the need for a critical mass).

admitting a critical mass of minority students is only the necessary first step in the process of realizing the supposed benefits of diversity. As I have noted in my own work,<sup>96</sup> many institutions and individuals assume that it is enough to achieve “structural diversity,” generally defined as the numerical representation of a critical mass of minority students.<sup>97</sup> The underlying assumption in many affirmative action policies is that structural diversity alone provides “students with opportunities to interact with peers who are different from themselves and that these interactions ultimately contribute to a supportive campus environment and mediate students’ intellectual and personal development.”<sup>98</sup>

Admitting a wide array of students is clearly an important first step. As one recent study notes, “[s]tructural diversity is perceived as a catalyst for promoting a more hospitable campus racial climate.”<sup>99</sup> However, despite the importance of structural diversity, research has revealed “that the singular act of increasing the number of people of color on a campus will not create a more positive racial climate.”<sup>100</sup> Structural diversity is accordingly “a necessary, but not sufficient, factor” if the goal is to actually create “a more comfortable and less hostile environment for all.”<sup>101</sup> As Professor Patricia Gurin has explained, “‘If diversity is really going to mean anything, it is not just having students [of different races] in the same place. They have to interact. . . . They need to learn to have deep and meaningful conversations about topics that people want to avoid.’”<sup>102</sup> As she and her colleagues noted even before *Grutter* was decided, “[a]lthough structural diversity increases the probability that

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96. See Killenbeck, *supra* note 15, at 47–48.

97. This is also called “representational diversity” or “numeric diversity.” Even here, there are nuances. For example, “unitary” structural diversity simply measures the number of white students to the number of minority students. See Pidot, *supra* note 63, at 765–67. “Heterogenic” diversity considers the number of different racial and ethnic groups represented in the student body. *Id.* at 765. Finally, “multifaceted” diversity considers the race and ethnicity of individuals as well as other attributes including “socioeconomic, geographic, and ideological diversity, as well as a diversity of skills, interests, and experiences, and demonstrated ability to overcome different kinds of disadvantages.” Kenneth L. Marcus, *Diversity and Race-Neutrality*, 103 NW. U. L. REV. COLLOQUY 163, 167–68 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/39>.

98. Gary R. Pike & George D. Kuh, *Relationships Among Structural Diversity, Informal Peer Interactions and Perceptions of the Campus Environment*, 29 REV. HIGHER EDUC. 425, 426 (2006).

99. Sylvia Hurtado, Kimberly A. Griffin, Lucy Arellano & Marcela Cuellar, *Assessing the Value of Climate Assessments: Progress and Future Directions*, 1 J. DIVERSITY HIGHER EDUC. 204, 207 (2008).

100. *Id.*

101. *Id.*; see also Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 17 (2006) (arguing that “[s]tructural diversity without more . . . will not” achieve the goals embraced by the Court in *Grutter* because it “will not influence student outcomes”); Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment of the Educational Benefits of Interaction Across Racial Boundaries*, 50 J.C. STUDENT DEV. 67, 84 (2009) (“Structural diversity is only the first step in a journey of a thousand miles to capitalize on the educational value of multicultural diversity.”).

102. Peter Schmidt, “Intergroup Dialogue” Promoted as Using Racial Tension to Teach, CHRON. HIGHER EDUC., July 16, 2008 (quoting Professor Patricia Gurin).

students will encounter others of diverse backgrounds, given the U.S. history of race relations, simply attending an ethnically diverse college does not guarantee that students will have the meaningful intergroup interactions that . . . are important for the reduction of racial prejudice.”<sup>103</sup> These interactions must, moreover, be conducted with care, as simply “[t]alking about these topics can blow up if you don’t do it right.”<sup>104</sup>

As the authors of one very important recent study stress, “[t]he challenge to colleges and universities is to ‘move beyond Michigan’ and make the most of diversity.”<sup>105</sup> Their point is an arguably simple one: “[d]iversity work does not end at the admission office.”<sup>106</sup> It is nevertheless one that is often overlooked. And it is one that must be taken into account when exploring the actual educational outcomes associated with diversity and critical mass. Professor Bowen provides suggestive support for the value of critical mass. But the limitations imposed on her work mean that we must be very careful in drawing any conclusions from the data and anecdotes she has assembled.

#### CONCLUSION

It is essential that the higher education community document the extent to which widespread assumptions about the value of affirmative action and diversity are borne out by actual educational and social outcomes. Certain portions of Professor Bowen’s article advance our understanding and lay potentially valuable foundations for the future. But a number of the claims she makes are simply not supported by her research, given the methodological shortcomings of her study.

Professor Bowen arguably anticipated these criticisms by noting that her human subjects research board would not let her gather certain information,<sup>107</sup> given “the sensitive nature of the subject.”<sup>108</sup> That reflects a reality that scholars working in this area routinely encounter. It also, ironically, places her in the company of Professor Richard H. Sander, a scholar who reaches essentially opposite conclusions about affirmative action.<sup>109</sup> Sander, like Bowen, has tried to examine with care the “massive social experiment” regarding “whether the use of racial preferences in college and graduate school admissions could speed the process of fully integrating American society.”<sup>110</sup>

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103. Patricia Gurin, Eric L. Dey, Sylvia Hurtado & Gerald Gurin, *Diversity and Higher Education: Theory and Impact of Educational Outcomes*, 72 HARV. EDUC. REV. 330, 333 (2002).

104. Schmidt, *supra* note 102 (quoting Professor Patricia Gurin).

105. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 388 (2009).

106. *Id.*

107. *See supra* text accompanying notes 69–74.

108. Bowen, *supra* note 1, at 1216 n.104. She also states that she “gained access to the conference” at which she gathered her data “through a two-year negotiations process,” *id.* at 1215 n.99, but does not explain why it took so long to secure permission to undertake what precisely the sort of study that all educational professionals should be interested in supporting.

109. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 371 (2004) (describing affirmative action in law school admissions as a “system of racial preferences that, in one realm after another, produces more harms than benefits for its putative beneficiaries”).

110. *Id.* at 368.

Sander's controversial study suggests that affirmative action in legal education may do more harm than good by admitting minority students to programs for which they are ill-prepared and within which they struggle to succeed.<sup>111</sup> Sander stresses that, given his personal background and professional interests, he "consider[s him]self to be someone who favors race-conscious strategies in principle, if they can be pragmatically justified."<sup>112</sup> That has not assuaged his critics, who argue that he writes with an "agenda."<sup>113</sup> More to the point, Sander has encountered considerable difficulties in securing the information he needs to conduct his research,<sup>114</sup> in one instance resorting to litigation in an attempt to secure data that had apparently been given to others.<sup>115</sup>

The inability to look candidly and rigorously at what affirmative action and diversity actually accomplish, simply because the subject is "controversial," or because one or the other side in the debate disagrees with a scholar's agenda (real or imagined), is a telling indictment. Not, however, of Professor Sander's work per se, or in this instance, that of Professor Bowen. It reflects and condemns, rather, unfortunate aspects of the climate within which we now labor. Historically, both the existence and details of affirmative action admission have been treated "like an embarrassing family secret."<sup>116</sup> As Rupert W. Nacoste, an academic psychologist who has studied these matters, stressed as the *Hopwood* litigation was unfolding:

Many colleges and universities have made a critical mistake in managing their affirmative-action policies: They have hidden the procedures they follow to admit students, including the weight they give to an applicant's racial or ethnic background. Whatever the reasons for this strategy, the institutions' failure to discuss affirmative action in concrete, procedural terms has set the stage for the premature elimination of affirmative action in higher education.<sup>117</sup>

It is time to get beyond fears and sensitivities and confront, openly and honestly, the issues and opportunities that face us. Professor Bowen's article is a step in the right direction. I wish she had been allowed to gather key information that would have permitted her to fully explore the issues and properly draw some of the conclusions she tries to advance. At the same time, I am pleased that she has laid the foundations for

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111. *Id.* at 372–74.

112. *Id.* at 371.

113. See Peter Schmidt, *Scholars Mount Sweeping Effort to Measure Effects of Affirmative Action in Higher Education*, CHRON. HIGHER EDUC. (Wash., D.C.), Jan. 18, 2008, at A19. The article describes new work being undertaken by Professor Sander and quotes Professor Charles E. Daye: "I am not going to characterize the study. . . . I can tell you that they have a project that is on a mission." *Id.* Shirley J. Wilcher, Executive Director of the American Association for Affirmative Action, in turn declared that "we view the likely outcome of this research with skepticism, given Mr. Sander's previous work." *Id.*

114. See Sander, *supra* note 109, at 409 n.117 (noting that only seven law schools "responded thoroughly" to the request for information about their admissions processes and results).

115. See Nancy McCarthy, *Researcher Sues Bar for Exam Data*, CAL. B.J., Sept. 2008, at 1.

116. Gary Peller, *Espousing a Positive Vision of Affirmative-Action Politics*, CHRON. HIGHER EDUC., Dec. 18, 1991, at B1.

117. Rupert W. Nacoste, *The Truth About Affirmative Action*, CHRON. HIGHER EDUC. (Wash., D.C.), Apr. 7, 1995, at A48.

reasoned consideration of the importance of critical mass, subject to the reservations I have noted about the need to place any discussion of the strengths and weaknesses of critical mass in the contexts provided by recognizing that institutions need to do more than simply admit students from historically under represented groups. For me, and I suspect many others, the ultimate value of Professor Bowen's work will lie in what she does to follow up on this first step, rather than in the details of what she written here. I for one hope she persists in these efforts.