

## On Disguises, Tokens, and Affirmative Action Policies<sup>†</sup>

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In *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, Professor Deirdre Bowen provides a valuable service by undertaking an empirical assessment of the accuracy of some predictions associated with affirmative action bans. Her analysis suggests that minority students attending schools using affirmative action programs feel better about themselves and their educational experiences than those attending schools where such programs are not used. She offers evidence supporting the importance of having a critical mass of minority students in college classes, and she presents plausible hypotheses with respect to whether state bans on affirmative action in public higher education are likely to have the salutary effects for minority students that are sometimes claimed. Regrettably, in part because of the external constraints imposed on her study, her conclusions are not warranted by her empirical data. Indeed, her findings may well be viewed as providing support for the respective positions of both those supporting and those opposing affirmative action policies. While her study suggests a number of research avenues that might fruitfully be pursued, the results of this study alone are too indeterminate to provide the ringing endorsement of affirmative action that she would like.

Professor Bowen argues that the “color-blind ideal” employs three premises to support the claim that affirmative action policies are no longer necessary: (1) it is not an appropriate method by which to combat racism because it may in fact cause it;<sup>1</sup> (2) minority students admitted under affirmative action programs will feel stigmatized both externally and internally, that is, they will feel that others are undervaluing their worth<sup>2</sup> and also will undervalue their own worth;<sup>3</sup> and (3) nonminority students will be more resentful of and hostile toward minority students who will be assumed to have been accepted because of their race rather than because of their qualifications.<sup>4</sup> She then suggests that one might anticipate that “underrepresented minority students attending school in the states that are participating in the experiment of *banning* race-based admissions would suffer lower rates of internal and external stigma as well as less hostility in the form of racism from nonminority students.”<sup>5</sup> However, she continues, the opposite is true. “Underrepresented minority students in states that *permit* affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states.”<sup>6</sup>

Her findings and conclusions are startling and demand analysis. She implies both that minority students who are known to have been accepted in light of generally

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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, 1198 (2010).

2. *Id.* (“[M]inority students will experience external stigma because other students will assume that they were admitted based on their race and not on their merit.”).

3. *Id.* (“[M]inority students will experience internal stigma because they will always doubt their abilities and their merit.”).

4. *Id.*

5. *Id.* at 1198–99 (emphasis in original).

6. *Id.* at 1199 (emphasis in original).

applicable criteria are nonetheless assumed to have been admitted because of their race, and that students who are admitted because of affirmative action policies are nonetheless more likely to be perceived as admitted because of their “objective” qualifications.<sup>7</sup> If her study can be shown to establish these conclusions, then she will have gone a long way in undermining some of the arguments of affirmative action opponents.

This Commentary will explore some of the respects in which the results of Professor Bowen’s study are less paradoxical than might appear, for example, because people may not believe that state policies are being implemented in good faith. It will also discuss some of the limitations of the study and how those limitations undercut the persuasiveness of the author’s thesis. The Commentary concludes that while Professor Bowen’s analysis suggests several areas requiring additional research, her empirical study does not offer persuasive support for the thesis that she offers.

#### I. ON ACHIEVING A CRITICAL MASS OF MINORITY STUDENTS

Professor Bowen offers a plausible explanation of why minority students in affirmative action states face less hostility when she notes that affirmative action policies “can create a critical mass of minority students who are viewed not as a token aesthetic, but first and foremost as legitimate citizens of the classroom to be engaged with on their own terms.”<sup>8</sup> Students who are viewed as having a rightful place in the classroom and the institution are more likely to be taken seriously and to be viewed as having something of value to contribute.

Yet, a critical mass of students can be created in differing ways. For example, a school might adopt aggressive recruiting or marketing strategies whereby minority candidates meeting the relevant “objective” criteria will be induced to attend that school. Such a school would not have adopted a policy of admitting students based on their race *rather* than their qualifications, and might even be understood to have an anti-affirmative action policy as the term is being used in Professor Bowen’s study.<sup>9</sup> Indeed, Professor Bowen fails to adequately explore the ramifications for her thesis of the possibility that states might attract a critical mass of minority students using a policy that does not meet her definition of an affirmative action policy. It may turn out, for example, that the most effective way of assuring that both minority and nonminority students will thrive is to have a critical mass of minority students in a variety of classes. But if that is true, then the allegedly paradoxical results that she has uncovered turn out not to be particularly paradoxical after all.

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7. *See id.* at 1224–25. “[S]tudents experience far *more* stigma at schools without affirmative action, contrary to what color-blind idealists would argue.” *Id.* at 1225.

8. *Id.* at 1199.

9. Professor Bowen includes the state of Washington as one of the states with anti-affirmative action policies even though the state engaged in aggressive recruiting to increase the number of minority students. *See id.* at 1202–03 n.24.

## II. COMPARING AFFIRMATIVE ACTION AND ANTI-AFFIRMATIVE ACTION STATES

Professor Bowen considers students attending schools in four states that have banned affirmative action—California,<sup>10</sup> Washington,<sup>11</sup> Florida,<sup>12</sup> and Michigan<sup>13</sup>—and compares their responses to those of students attending schools in twenty-three states and two territories where affirmative action is permitted.<sup>14</sup> Raw numbers are included in the reported results so that it is clear how many students attend schools in anti-affirmative action states (55)<sup>15</sup> versus affirmative action states (277).<sup>16</sup> But there is no breakdown with respect to how many students go to school in particular states, say, California versus Washington. Further, she is unable to offer a breakdown with respect to how many of the surveyed students attend public schools rather than private schools.<sup>17</sup>

A state described as anti-affirmative action for purposes of this study is one that precludes the use of affirmative action in admissions decisions in public higher education.<sup>18</sup> Michigan is included as one of the anti-affirmative action states, “because of the ongoing anti-affirmative action atmosphere in which students have operated since 1998,”<sup>19</sup> even though the referendum requiring the adoption of that policy was passed the day before the survey was taken.<sup>20</sup> While Professor Bowen’s reasoning is understandable in that it is quite plausible to believe that an anti-affirmative action atmosphere can have negative effects,<sup>21</sup> the results obtained from students attending

10. CAL. CONST. art. 1, § 31(a) (added in 1996 by Proposition 209) (“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.”).

11. WASH. REV. CODE ANN. § 49.60.400(1) (West 2008) (added in 1998 by Initiative Measure No. 200) (“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.”).

12. FLA. ADMIN. CODE ANN. r. 6C-6.002(7) (2009) (“Neither State University System nor individual university admissions criteria shall include preferences in the admissions process for applicants on the basis of race, national origin or sex.”).

13. MICH. CONST. art. 1, § 26(1) (added in 2006 by Ballot Proposal 2) (“The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district 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.”).

14. See Bowen, *supra* note 1, at 1217–18.

15. *Id.* at 1218 n.112.

16. A total of 332 students took the survey, *id.* at 1216, and fifty-five were from anti-affirmative action states, *id.* at 1218 n.112. Therefore, 277 were from states and territories that allow affirmative action.

17. *Id.* at 1216 n.104 (“Due to the sensitive nature of the subject, the Board did not want questions that would identify the school a respondent attended beyond the state in which it was located. Thus, information on whether the students attended a historically black college or university or whether they attended a public or private institution is not available.”).

18. See *id.* at 1217–18.

19. *Id.* at 1218 n.111.

20. *Id.*

21. See *infra* notes 30–31 and accompanying text.

school in Michigan cannot be used in the same way that results from California might be used, given that California's referendum banning affirmative action in public colleges and universities occurred a decade before the survey was given.<sup>22</sup>

Consider the paradox that allegedly has occurred—students in anti-affirmative action states are judged by generally applicable criteria but are treated as if they had been admitted because of their race rather than their qualifications. But *ex hypothesi* at least some of the students attending Michigan state schools *might* indeed have benefited from affirmative action. Thus, it cannot be said that Michigan students were known to have been admitted in light of generally applicable criteria but were nonetheless assumed to have benefited from affirmative action.

The point here is not that all minority candidates in Michigan public colleges and universities benefited from affirmative action; on the contrary, just because some minority students benefited from affirmative action does not mean that all minority students benefited from affirmative action. That said, however, the Michigan results are not paradoxical. There was heated public discussion about affirmative action,<sup>23</sup> which might have led some to have made unwarranted assumptions about which students in particular benefited from affirmative action. But there would have been no paradoxical result whereby students who could not have been afforded certain preferences were nonetheless assumed to have benefited from those preferences.

Indeed, an analogous point might be made about the results from the other states. In California, Florida, and Washington, public (but not private) colleges and universities are prohibited from implementing affirmative action policies. This means that students attending private colleges and universities in those states might have benefited from such policies. Nonminority students in those schools who assume that a particular minority candidate is less qualified, according to the "objective" criteria, might be wrong with respect to that particular student, but they might not be wrong that some students benefited from such policies.

The point here is not to deny the harm that can occur when individuals are made to feel that they do not belong or when individuals are made to feel as if their admission was a mistake. The point is merely to note that the analysis of the data from the anti-affirmative action states is mistaken in an important respect—it is wrongly assumed that individuals responding to the questions attend schools that do not use affirmative action. Because schools in Michigan might have used affirmative action at the time the students were admitted and because students in Florida, California, and Washington might have attended private schools where affirmative action is permitted, it is simply a mistake to conclude that these students were "admitted on purely white, normative admissions standards."<sup>24</sup>

Professor Bowen was precluded from asking whether the students attended public rather than private schools, so it is simply unclear what proportion of students in the anti-affirmative action cohort were from Michigan public schools or from private

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22. See Bowen, *supra* note 1, at 1217 n.108 (California's Proposition 209 was passed in 1996).

23. Raphael Rajendra, "The People" and "The People": Disaggregating Citizen Lawmaking from Popular Constitutionalism, 27 LAW & INEQ. 53, 71 (2009) ("In the months leading up to the November 2006 election in which Michiganders passed the MCRI, debate over the MCRI was fierce.")

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

schools in the other three states. However, if minority applications to public colleges and universities have dropped significantly in states adopting such bans,<sup>25</sup> then it *may* be that many of the students from those states attend private schools where such policies are permitted.<sup>26</sup>

The difficulty with Professor Bowen's analysis is that students attending schools in states where affirmative action was prohibited for public but was permitted for private colleges and universities might be especially subject to stereotype. There might have been highly charged public campaigns to convince voters to vote for or against a ballot initiative limiting affirmative action,<sup>27</sup> and those discussions might well have affected public understandings long after the vote in question occurred. Further, because a state banned affirmative action in public higher education years ago does not guarantee that the issue disappeared from public consciousness; on the contrary, the benefits and drawbacks of affirmative action might still be the subject of heated and vigorous debate.<sup>28</sup> Students in states where this issue is given a great deal of attention might well be subject to more unwelcome comments if they attend schools where affirmative action is still permitted.

One of the ironic results of this study is that it is perfectly compatible with what the color-blind idealist would say—namely, that minority students suffer lower rates of stigmatization in those schools where affirmative action bans have been implemented. It may be, for example, that students attending public colleges and universities in the anti-affirmative action states face lower rates of hostility but that students attending private colleges and universities in those states face greater rates of hostility. While Professor Bowen may be correct that minority students in schools without affirmative action programs are stigmatized as much as are students attending schools with such programs, her study does not provide as much support for that contention as she implies.

Professor Bowen notes that “the results . . . suggest that students attending schools in states that ban affirmative action may be experiencing higher rates of internal stigma.”<sup>29</sup> Yet, given that there may be extremely negative descriptions of affirmative action in the media, it is not surprising that some students internalize the communicated messages. For example, Professor Bowen plausibly suggests that Michigan's atmosphere may have been poisoned by the heated discussion of the merits and

25. *See id.* at 1202–03 (discussing decreased minority enrollments after these policies were adopted).

26. *But see infra* notes 38–40 and accompanying text (discussing the increased minority enrollments in Washington's public schools that resulted from aggressive recruiting strategies adopted after the ban on affirmative action).

27. *See* Rajendra, *supra* note 23, at 71–72 (discussing the “fierce” public debate in the months leading up to an affirmative action ballot initiative in Michigan); Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 404 (1999) (suggesting that a “ballot initiative[] affecting minority rights” may well involve “a highly charged political contest”).

28. *See* Michelle Maitre, *A Decade Later, Affirmative Action Debate Still Boils*, SAN MATEO COUNTY TIMES (Cal.), Nov. 3, 2006 (“Proposition 209 is as debated today as it was 10 years ago.”).

29. Bowen, *supra* note 1, at 1224.

demerits of affirmative action.<sup>30</sup> Presumably, the same point might be made about the atmosphere in the other states that preclude affirmative action by law. This makes it difficult to determine whether it is the ban on affirmative action that causes harm or, instead, the incendiary discussions about the merits or demerits of affirmative action policies.

Professor Bowen mentions in passing that there have been unsuccessful ballot initiatives in some of the affirmative action states.<sup>31</sup> It might be interesting, for example, to compare the educational experiences of students in states where there have been unsuccessful attempts to adopt affirmative action bans by referendum with the experiences of students in states where there have been successful attempts to adopt such bans. Such a study would need to be carefully controlled because the advertisements and campaigns in one state might have been much more incendiary or prevalent than those in another. Nonetheless, such a comparison may provide or undermine support for the claim that the negative attitudes manifested toward or adopted by minority students is more strongly correlated with public “education” attempts regarding the alleged evils of affirmative action than with the official policy of the school or the state.

Professor Bowen notes that some of the schools in the anti-affirmative action states stepped up efforts to increase minority enrollment,<sup>32</sup> so it cannot be assumed that very few minority students attended public institutions of higher learning during the period when the survey was given. But it is simply impossible to say what percentage of students in the anti-affirmative action cohort attend private schools where affirmative action programs are permitted and what percentage attend public schools where affirmative action programs are not permitted. Without that information, it is simply impossible to know what percentage of minority students are assumed to have benefited from programs that are barred by state law.

An additional complicating factor is that affirmative action might be defined broadly or narrowly. For example, how should the programs adopted by the state schools to increase minority enrollments be described? They are programs *permitted* by law that are intended, among other goals, to increase minority representation. Some would characterize them as affirmative action because they are designed to increase minority presence at the school, but others would not, because the programs might simply be designed to induce those who meet the “objective” criteria to attend this school rather than another. The point is merely that it might be difficult for a student to say whether his or her school utilizes an affirmative action program, depending upon which definition is used.<sup>33</sup> But this ambiguity might skew the results upon which Professor Bowen relies.

The adoption of these programs to achieve a more diverse student population raises yet another issue. Professor Bowen notes:

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30. *See id.* at 1218 n.111.

31. *See id.* at 1212 n.87.

32. *Id.* at 1203 (“[M]any colleges and universities in anti-affirmative action states developed programs to help ensure support of underrepresented minorities in their pursuit of higher education.” (footnote omitted)).

33. A surprisingly high percentage of students simply did not know what their school’s admissions policy was. *See id.* at 1222 tbl.2. (showing that 30.2% in the anti-affirmative action states did not know the school’s policy).



[O]ne would anticipate lower rates of hostility expressed through racism in states that had done away with affirmative action. Specifically, if underrepresented minority students were admitted into colleges and universities under a “merit” based model in which race is not considered, the entire student body would feel confident that all members deserved to be there.<sup>34</sup>

As an initial matter, Professor Bowen’s point is correct as long as the people judged in light of generally applicable criteria will be *known* to have been judged by those criteria and will thus not be assumed to have been accepted for “nonmeritorious” reasons. However, if perceptions do not track reality, for example, because the actual policies are not known<sup>35</sup> or because people (wrongly) suspect that official policies are being disregarded,<sup>36</sup> then even those advocating color-blind admissions policies would not predict that minority students would be subject to less stigmatization.

Suppose that students suspect administration officials of somehow trying to get around the legal limitations, for example, through use of athletic scholarships or other legally permissible means.<sup>37</sup> Even if these suspicions are completely unfounded, the alleged paradox would not in fact be a paradox—instead, Professor Bowen would merely have shown that students believe that administrators are willing to circumvent laws to achieve what they view as beneficial results.

### III. WHAT CAUSES THE STIGMATIZING HARM?

The decrease in minority-student populations at state schools following adoption of affirmative action bans and the subsequent increase in minority-student populations at state schools following the use of legally permissible efforts presents a potential research focus. For example, after Washington adopted its ban by referendum in 1998,<sup>38</sup> there was a precipitous drop in the number of minority students attending public schools.<sup>39</sup> However, the state was able to increase minority enrollment to levels higher than before the ban through aggressive recruiting strategies.<sup>40</sup> It would be interesting to compare the attitudes of students attending Washington public schools

34. *Id.* at 1220–21.

35. *See id.* at 1224–25 (noting that “one-third of students in both categories were not aware of their school’s policy on admissions”).

36. *See id.* at 1226 (One student recounted: “Just because we don’t have affirmative action doesn’t mean they think I should be here. They’re always looking for the loophole of how I got here.”).

37. *See id.* at 1224 n.126 (explaining that minority students reported that they had been asked by nonminority students whether they had been admitted because of some athletic program).

38. *Id.* at 1217 n.109.

39. *Id.* at 1202–03 n.24 (“Washington State encountered precipitous drops in applications of minority students.”). *But see id.* at 1252 app.B (“Brown and Hirschman’s work from 2006 in Washington State suggests that underrepresented student enrollment was most affected at the state’s most competitive school, the University of Washington, but had virtually no effect at the state’s other schools in the aftermath of the passage of a 1998 ban on race-based admissions.”).

40. *Id.* at 1202–03 n.24 (“Four years later, however, due to aggressive recruitment efforts, the state has seen enrollment increase to levels higher than the previous decade, prior to a ban on race-based admissions policies.”).

prior to the affirmative action ban with the attitudes of students attending Washington public schools under the affirmative action ban to determine whether the two groups' experiences were similar during the years in which the overall number of enrolled minority students was comparable. It might turn out, for example, that the general poisoning of the atmosphere that might occur when heated discussions occur is less likely to affect the educational experience of minorities than other factors—for example, having a critical mass of minority students at the school, particularly in one's classes.

Professor Bowen notes that “those underrepresented minority students who are racially isolated bear the greatest burden of overt racism and external and internal stigma[, and they] are most likely to be found in states that have adopted *anti-affirmative action policies*.”<sup>41</sup> But it is unclear whether the stigmatizing harm is brought about by being the sole minority in one's classes (whether one is in an affirmative action or an anti-affirmative action state) or whether the adoption of the affirmative action ban itself is causing the stigmatization.

It seems quite clear that being the sole minority student in one or more classes is correlated with negative educational experiences. For example, “those students who have taken at least one class as the sole minority encounter overt racism from other students at a rate almost four times as often as students who have taken no classes in which they were the lone minority.”<sup>42</sup> Not surprisingly, individuals who are the sole minority in a class are more likely to feel that they have to prove themselves because of race.<sup>43</sup> Further, students in the anti-affirmative action states are more likely to take at least one class in which they are the sole minority.<sup>44</sup> However, these findings may suggest that one of the most undermining factors in the educational experience of minority students involves being the sole minority student in a class, regardless of whether one's college or university employs an affirmative action program.

Professor Bowen writes:

Students who have experienced being the lone minority in a course report the lowest percentage of students ranking their ability to succeed as high among all sample groups, including the anti-affirmative action states students. Conversely, students who have never been the lone minority in a class represent the highest percentage of students who assess their ability to succeed as high.<sup>45</sup>

Thus, there is an inverse correlation between a student having been the sole minority in a class one or more times and that student's ranking his or her own ability to succeed as high. That said, most students in this study rate their ability to succeed as high,<sup>46</sup> which is not surprising given that the students answering these questions have done rather well in college—those in the anti-affirmative action states have a mean college GPA of

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41. *Id.* at 1199 (emphasis in original).

42. *Id.* at 1228–29.

43. *See id.* at 1229–31.

44. *See id.* at 1227 tbl.4.

45. *Id.* at 1229.

46. *See id.* at 1230 tbl.6 (showing that 74.2% of those who had been the sole minority in one or more classes rated their ability to succeed as high, compared to 86.5% of those who had never been the sole minority in class).



3.46, while students in the affirmative action states have a slightly higher mean college GPA of 3.49.<sup>47</sup>

Professor Bowen suggests quite plausibly that “affirmative action encourages greater minority enrollments, which leads to concentrations of minority students in classes and reduces the risk of racial isolation.”<sup>48</sup> But this explanation undercuts her thesis that her research “demonstrates that as soon as the dominant group in society, and institutions of higher education in particular, convinces itself that race no longer matters [i.e., by banning affirmative action], it gives itself permission to ignore the ‘other,’ in this case underrepresented minorities.”<sup>49</sup> Rather, her research seems to suggest that in both affirmative action and anti-affirmative action states, it is important for minority students not to be the sole minority in their classes, if only because nonminority students may be more likely to resort to stereotypes when encountering very few minority students.<sup>50</sup>

There is further support for the thesis that being the sole minority in a class can have deleterious effects—almost 62% of the students who have been the sole minority in at least one class report that they feel pressures to prove themselves academically because of their race, whereas about 32% of those students who have never been the sole minority in a class report that they feel such pressure.<sup>51</sup> Further, students who have never been the sole minority in class are more likely to report fitting in at school.<sup>52</sup> Indeed, Professor Bowen suggests that “the stigma encountered by students is not clearly associated with affirmative action, but is more definitively associated with being a member of a particular racial or ethnic group and being racially isolated.”<sup>53</sup> Thus, Professor Bowen’s study at least suggests that being the sole minority student in a class may have more of an effect on minority students’ educational experience than might initially be thought.

Professor Bowen’s attempt to use the findings from her study to undercut the position of the color-blind idealist was not persuasive, because she was unable to identify which or even how many students in the anti-affirmative action cohort attended schools where affirmative action programs were nonetheless utilized. That said, her study suggests numerous avenues for possible research—for example, studies that attempt to assess the degree to which being the sole minority in a class adversely impacts one’s education and self-image or studies that attempt to assess the extent, if any, to which heated discussions of affirmative action in the media impact the educational experience of minority and nonminority students. In any event, Professor Bowen’s study does highlight the importance for the educational experience of all students to have a critical mass of minority students not only in the school more generally but in individual classes as well.

47. *Id.* at 1219.

48. *Id.* at 1225.

49. *Id.* at 1205 (footnotes omitted).

50. *Id.* at 1240 (“[W]hen white students encounter fewer minority students, those students are more likely to conceptualize race in terms of stereotypes.”).

51. *Id.* at 1230 tbl.6.

52. *See id.* (showing that 91.6% of students who had never been the sole minority in a class said that they fit into the college population, compared to 66.4% of students who had been the sole minority in one or more classes).

53. *Id.* at 1231.

