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The Associated Dangers of "Brilliant Disguises," Color-Blind Constitutionalism, and Postracial Rhetoric

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INTRODUCTION

Affirmative action, since its inception in 1961, has been under siege. The backlash against affirmative action began in earnest almost immediately following its origination through President John F. Kennedy's and President Lyndon B. Johnson's Executive Orders.[1] Organized hostility in opposition to affirmative action crystallized early with "color-blind" theories posited and adopted,[2] "reverse discrimination" alleged and embraced,[3] and constitutional narrowing through adoption of white-privileged justifications.[4] Enmity against affirmative action continues unabated today as exemplified by recent academic writings and studies purporting to prove that affirmative action positively injures African Americans[5] and recent state-wide campaigns seeking to eradicate affirmative action through state constitutional amendments.[6]

Further, a more subtle affront to affirmative action has emerged recently as dozens of commentators and millions of Americans now argue that, with the election of Barack Obama as president, the United States has officially entered a postracial era.[7] Postracialism, in averring that the election of an African American president formally

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1. President Kennedy issued Executive Order 10,925, "Establishing the President's Committee on Equal Employment Opportunity." Exec. Order No. 10,925, 26 Fed. Reg. 1976 (Mar. 8, 1961). President Johnson issued Executive Order 11,246, "Equal Employment Opportunity," expanding on President Kennedy's original order. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965); *see also* OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, FACTS ON EXECUTIVE ORDER 11246 – AFFIRMATIVE ACTION (2002), http://www.dol.gov/OFCCP/regs/compliance/aa.htm.

2. *See generally* NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975).

3. *See generally* WARD CONNERLY, CREATING EQUAL: MY FIGHT AGAINST RACE PREFERENCES (2000).

4. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319–20 (1978).

5. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 370 (2004).

6. *See* CAL. CONST. art. I, § 31 (Proposition 209); MICH. CONST. art. I, § 26 (Proposition 2); NEB. CONST. art. I, § 30 (Initiative 424); WASH. REV. CODE ANN. § 49.60.400 (West 2008) (Initiative 200).

7. *See, e.g.*, Daniel Schorr, *A New, 'Post-Racial' Political Era in America*, (NPR radio broadcast Jan. 28, 2008), http://www.npr.org/templates/story/story.php?storyId=18489466; *cf.* Shelby Steele, *Obama Seduced Whites with a Vision of Their Racial Innocence Precisely To Coerce Them into Acting Out of a Racial Motivation*, L.A. TIMES, Nov. 5, 2008, at A31.

moves the nation past its racial problems, essentially maintains that affirmative action has run its course, is no longer necessary,[8] and is a relic of a past that has been affirmatively overcome.[9] Affirmative action, as a progressive doctrine aimed at diversifying our classrooms and country to the benefit of all and leveling the American playing field, appears to be fighting for survival.

Into this breach steps Professor Deirdre Bowen and her crucially important study *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*.[10] In this article, detailing the results of her empirical study, Professor Bowen carefully analyzes the experiences of minority students currently attending U.S. undergraduate and graduate programs in the hard sciences.[11] While her findings are disheartening (i.e., racism and discrimination continues at alarming rates in upper-level educational institutions), they are critical to understanding what must be done to ensure equality and social justice in the future. What is remarkable about *Brilliant Disguise* is that Professor Bowen asks the *right* questions and gathers the *right* information that allows her to provide the kind of empirical analysis that brings honesty and reality to the affirmative action debate.

For the past decade, as I have carefully followed, engaged in, and written about affirmative action,[12] I have often and openly lamented that modern opponents of affirmative action are frequently dishonest and disingenuous in their opposition.[13] The most outspoken critics of affirmative action have warily refused to ask meaningful questions and have continuously balked at opportunities to analyze consequential issues, data, and material that might serve to cast long shadows over their antagonistic positions.[14] Anti–affirmative action adherents, from the beginning, have focused their attention on the wrong criteria in evaluating the doctrine's potential and effectiveness, leading to wrong-headed arguments that serve to perpetuate white privilege and power.[15]

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8. *See* Peter Slevin, *Affirmative Action Foes Push Ballot Initiatives; Activists, With Eyes on November, Focus on Five States*, WASH. POST, Mar. 26, 2008, at A02 (quoting Ward Connerly as arguing that Barack Obama and Hillary Clinton prove that affirmative action is no longer necessary "to compensate for, quote, institutional racism and institutional sexism").

9. *See* Schorr, *supra* note 7.

10. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197 (2010).

11. *Id.* at 1214–17.

12. *See generally* andré douglas pond cummings, Grutter v. Bollinger, *Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in this Part of Town,"* 21 HARV. BLACKLETTER L.J. 1 (2005) [hereinafter cummings, *The Treachery of Originalism*]; andré douglas pond cummings, *"Never Let Me Slip 'Cause If I Slip Then I'm Slippin": California's Paranoid Slide from* Bakke *to Proposition 209*, 8 B.U. PUB. INT. L.J. 59 (1999) [hereinafter cummings, *Never Let Me Slip*]; andré douglas pond cummings, *"Open Water": Affirmative Action, Mismatch Theory and Swarming Predators – A Response to Richard Sander*, 44 BRANDEIS L.J. 795 (2006) [hereinafter cummings, *Open Water*].

13. *See* cummings, *The Treachery of Originalism*, *supra* note 12, at 46; *see also* cummings, *Open Water*, *supra* note 12, at 844–45.

14. *See* cummings, *The Treachery of Originalism*, *supra* note 12, at 43; *see also* cummings, *Open Water*, *supra* note 12, at 842–49; cummings, *Never Let Me Slip*, *supra* note 12, at 71.

15. *Cf.* Bowen, *supra* note 10, at 1204.

Brilliant Disguise offers a powerful, authentic rejoinder to those opponents that proffer simplistic arguments suggesting that affirmative action should be eradicated for reasons that include stigma,[16] reverse discrimination,[17] hidden quotas,[18] and mismatch.[19] The affirmative action debate desperately needed an empirical examination of the doctrine's impact on minority students purportedly benefiting from its use and a cross-analysis against those minority students attending institutions whose states have banned its use. *Brilliant Disguise* fills this void. Professor Bowen asks the questions that have not been asked and grapples with the vital issues that have been heretofore ignored by opponents and critics. Bowen begins to mine the *right* questions by reversing the primary framework of affirmative action critics, who consistently ask whether affirmative action should exist at all.

First, Bowen profoundly asks what might happen if our nation eliminated affirmative action. Rather than defending affirmative action as a viable tool for equality against calls for elimination, Bowen queries what society would look like absent affirmative action. Because several states have experimented with banning affirmative action, Bowen is able to uncover unexpected and shocking answers to that question.[20]

Second, Professor Bowen shines the empirical spotlight upon majority students and faculty, highlighting the way in which *they* interact with students of color and the environment in which the majority creates this interaction. Critics of affirmative action have succeeded in framing their opposition by focusing on the purported failures of the minority student. Critics consistently question the merit, ability, or success of students of color. This obtuse focus on students of color and their qualifications (or alleged lack thereof) allows critics to easily ignore environment, culture, racism, threats, and discrimination when championing the elimination of affirmative action. The spotlight for opponents is always pointed backward, asking whether the minority student should have been admitted, whether the minority student is stigmatized, or whether the minority student can succeed with lesser qualifications.[21] This backward-looking focus is misplaced, and it does not honestly add value to the debate. Bowen, in looking forward, recognizes that minority students *are* being admitted to colleges and

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16. Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part).

17. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009) (holding that the city of New Haven improperly discarded firefighter examinations in order to achieve a more desirable racial distribution of promotion-eligible candidates).

18. *Grutter*, 539 U.S. at 389 (Rehnquist, C.J., dissenting).

19. *See* Sander, *supra* note 5, at 450.

20. *See infra* Parts II.B & III.B (describing the alarmingly accelerated instances of overt racism and discrimination toward students of color in states where affirmative action has been eliminated). Much of what *Brilliant Disguise* uncovers is what one would expect in connection with showing that stigma is far less important than critics suggest. That said, portions of Bowen's study are stunning, in particular the revelation that 43% of minority students attending our nation's colleges and universities are experiencing overt acts of racism and discrimination. That such percentages of racial animosity continue today, particularly in anti–affirmative action states, is shocking and suggests that we as a nation may be regressing in our quest for national racial harmony.

21. *See infra* Parts I.A, II.A & III.A (summarizing the primary oppositionist arguments to affirmative action supported by Clarence Thomas, Richard Sander, and Ward Connerly, namely stigma, mismatch, and reverse discrimination).

universities across the country through the constitutional use of affirmative action, and she focuses instead on the experiences students of color are encountering at our nation's universities. She poignantly asks whether U.S. educational institutions are truly educating and serving the needs of students of color, rather than questioning whether they deserve to be enrolled. This is a subtle yet significant shift in focus and one that provides disheartening answers.[22]

Finally, Professor Bowen empirically confronts affirmative action opponents' prized "stigma" argument. Bowen penetrates to the root of the stigma that purportedly attaches to minority students who benefit from affirmative action programs. Critics argue that affirmative action injures both minority students through stigma and majority students through reverse discrimination.[23] Bowen's findings in *Brilliant Disguise* provide empirical evidence to the contrary. In fact, the empirical data indicates that affirmative action actually minimizes stigma through the reduction of racial isolation.[24] Bowen boldly confronts the stigma argument, an argument on which affirmative action critics constantly opine but refuse to intellectually or empirically engage. *Brilliant Disguise* uncovers startling results that lead to extremely helpful answers.[25]

Opponents of affirmative action routinely rely on several "go-to" arguments as justification for why the doctrine must be eliminated. For the most part, arguments such as stigma, color-blind constitutionalism, and mismatch have gone unchallenged from an empirical perspective, allowing oppositionists to use simple opinion to perpetuate their objections.[26] But now, *Brilliant Disguise* provides valuable empirical data that can be used to evaluate the justifications most often posited for ending affirmative action. This data allows vital insights into race relations in the twenty-first century and the utility of affirmative action as an effective tool in the quest to achieve social justice in the United States. Professor Bowen's findings are explosive, and in my mind, serve to undermine each of the primary backward-looking oppositionist arguments against affirmative action.

To that end, this Commentary will introduce and inspect three of the most popular arguments posited by affirmative action opponents: stigma, mismatch, and a combination of reverse discrimination and color-blind constitutionalism. Part I

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22. *See infra* Parts I.B, II.B & III.B (finding that U.S. educational institutions continue to perpetuate a culture of white domination and intolerance toward diverse student bodies, most harshly in states where affirmative action has been banned).

23. *See infra* Parts I.A & III.A (summarizing stigma, reverse discrimination, and color-blind constitutionalism).

24. Bowen, *supra* note 10, at 1223–25.

25. *See infra* Part I.B & III.B (finding that racial isolation is far more likely the culprit of stigma than the exercise of affirmative action).

26. The "mismatch theory" has been empirically challenged. *See* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1848 (2005); *see also* David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005). Additionally, the internal and external stigma justifications have recently been empirically confronted. *See* Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299 (2008).

describes Justice Clarence Thomas's stigma justification for eradicating affirmative action and then describes normative contentions that have been made in response. Part II explores Professor Richard Sander's mismatch theory as a basis for eliminating affirmative action. And Part III examines Ward Connerly's reverse discrimination and color-blind ideal justification for terminating affirmative action. Each Part then summarizes the critical findings of *Brilliant Disguise* and applies those findings to illustrate how Bowen's new data undermines each oppositionist argument in insightful ways.

I. CLARENCE THOMAS AND STIGMA

A. The Case for Stigma

Justice Clarence Thomas adamantly opposes affirmative action. Justice Thomas writes passionately about the stigma that purportedly attaches to every minority student admitted to an institution of higher education because presumably that student of color needed a "boost" provided by affirmative action in order to matriculate.[27] In Justice Thomas's world, the taint of stigma attaches to all minority students and assuredly injures them because white students and professors are unable to determine who is truly "qualified" among the students of color who join them in their classrooms. Justice Thomas opined in *Grutter v. Bollinger*:[28]

> Beyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination "engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race." . . . "[Affirmative action] programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."
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> . . . Who can differentiate between those who belong and those who do not? The majority of blacks are admitted . . . because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.[29]

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27. *See* Grutter v. Bollinger, 539 U.S. 306, 372–73 (2003) (Thomas, J., concurring in part and dissenting in part); *see also* cummings, *The Treachery of Originalism*, *supra* note 12, at 12.

28. 539 U.S. 306.

29. *Id.* at 373 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J., concurring in part and concurring in judgment)).

As I have previously argued, Justice Thomas has the stigma concern backwards.[30] Individuals who make the decision to openly question the qualifications of students of color at their institutions of higher learning (i.e., attach a badge of inferiority to them), are engaging in their own brand of racism and judgmental discrimination.[31] "And make no mistake, labeling success that comes from affirmative action as 'stigmatized' or marked by a 'badge of inferiority' is a very personalized evaluation and conclusion, and a conclusion clearly not shared by all individuals who have benefited historically from affirmative action."[32] Justice Thomas believes that his own career has been stigmatized and he blames affirmative action for this stigma.[33]

Now, with the publication of *Brilliant Disguise*, what I (and a host of other commentators) intuitively understood and argued, has now been empirically supported: stigma is of little concern to the vast majority of minority students pursuing higher education and real injury or stigma occurs today because of continuing acts of overt racism and the failure of our colleges and universities to fill their classes with a critical mass of students of color.[34] Justice Thomas, and the throng that he leads in forwarding the stigma argument as the key rationale for eradicating affirmative action,[35] must now reconsider their position. If intellectual honesty is to be paid respect, Justice Thomas and those that oppose affirmative action based on stigma must reevaluate their position in light of the data presented in *Brilliant Disguise*.[36]

B. Stigma Empirically Undermined

Brilliant Disguise reports that overt instances of racism continue unabated in America's colleges and universities. In fact, overt racism displayed by students and faculty toward minority students occurs often and occurs twice as often within the universities located in the four states that have banned affirmative action.[37] This finding is unsettling. Justice Thomas will surely be stunned to learn that in states where affirmative action has been terminated and is no longer practiced (and in some instances has not been for more than a decade), minority students who attend on "equal" footing are victims of racism, stigmatization, discrimination, and outright bigotry far more often than students who attend college in states where affirmative action is still actively practiced.[38] What of the "badge of inferiority" that was supposed

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30. *See* cummings, *The Treachery of Originalism*, *supra* note 12, at 54.

31. *Id.* at 61.

32. *Id.*

33. *See* cummings, *The Treachery of Originalism*, *supra* note 12, at 59–60 ("Thomas's fixation on his own 'badge of inferiority' is well chronicled. He has repeatedly complained of the 'taint' affirmative action has placed on his career and grouses still about the national conceptualizations of him as an 'affirmative action baby' rather than a meritorious, accomplished black man, who earned his positions of prominence through rugged American individualism." (citations omitted)).

34. *See* Bowen, *supra* note 10, at 1242–44.

35. *See* Grutter v. Bollinger, 539 U.S. 306, 372–73 (2003) (Thomas, J., concurring in part and dissenting in part); *infra* Part III.A.

36. *See* Bowen, *supra* note 10, at 1228 tbl.5.

37. *See id.* at 1222 tbl.2.

38. *Id.* at 1218 n.114 (indicating the twenty-three states in the nonexhaustive study sample

to be eliminated when affirmative action ended? What of the stigma that was to evaporate once only true "merit" was considered in admissions decisions?

The eradication of affirmative action was supposed to relieve minority students from the stigma that attaches to all students of color once all students admitted to institutions of higher education enter on the same playing field. Not true. Minority students that attend schools in anti–affirmative action states are much more likely to experience overt instances of racism, including having their credentials questioned and being openly exposed to derision and silencing.[39] According to Professor Bowen, "The results demonstrate a clear trend in which the divergent responses suggest that students experience far *more* stigma at schools without affirmative action, contrary to what color-blind idealists would argue."[40] Further, "[t]he results suggest 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."[41]

Brilliant Disguise, in stark fashion and contrary to the constant grousing by Justice Thomas,[42] illustrates that the "stigma" that attaches to students of color in the affirmative action era is neither the result of affirmative action, nor is it the result of the white majority attaching a "badge of inferiority" to minorities and presuming them to be "unqualified." Rather, the stigma that attaches to minority students is the result of overt racism, continuing discrimination, and racial isolation.[43]

In *Grutter*, Justice Thomas almost invites social scientists to test his stigma theory, so confident was he in the result that because *he* feels stigmatized and because *he* feels a badge of inferiority attached to him by his white peers,[44] that all students of color are similarly stigmatized. Thomas charges that "[b]eyond the harm the Law School's racial discrimination visits upon its test subjects, no social science has disproved the notion that this discrimination 'engender[s] attitudes of superiority or, alternatively, provoke[s] resentment among those who believe that they have been wronged by the government's use of race.'"[45] The data and findings in *Brilliant Disguise* reject this position. Thomas claims that no survey or study has empirically disproven that affirmative action ("discrimination" in his words) acts to "engender" attitudes of superiority in the majority and provoke great resentment amongst "those wronged" (i.e., white students). Justice Thomas was mistaken on this guess. *Brilliant Disguise* is social science that moves toward disproving his theory that affirmative action is primarily if not solely responsible for engendering attitudes of superiority and provoking resentment in the white majority.

Because overt acts of racism displayed by students and faculty toward minority students occur twice as often within the universities located in the four states that have banned affirmative action,[46] then something *other than* affirmative action is causing the

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that continue to practice affirmative action).

39. *See id.* at 1223–25.

40. *Id.* at 1225 (emphasis in original).

41. *Id.* at 1231.

42. *See* cummings, *The Treachery of Originalism*, *supra* note 12, at 61.

43. *See* Bowen, *supra* note 10, at 1244.

44. *See* cummings, *The Treachery of Originalism*, *supra* note 12, at 61.

45. Grutter v. Bollinger, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241(1995)).

46. Bowen, *supra* note 10, at 1222 tbl.2.

feelings of resentment and superiority in the white peers. Stigma, as characterized by Justice Thomas, is not the evil that he imagines it to be. Certainly it is personal to Thomas, but empirically, it is not at the root of continuing acts of racism and modern discrimination.

II. RICHARD SANDER AND MISMATCH THEORY

A. The Case for Mismatch

UCLA Law Professor Richard Sander created a stir in 2004 when he claimed to empirically prove that affirmative action positively injures African American law students.[47] Professor Sander argues, in *Systemic Analysis of Affirmative Action in American Law Schools*, that the practice of constitutionally approved affirmative action by U.S. law schools creates an injurious mismatch between the minority students and the law schools that admit them.[48] Sander argues his statistics prove that because law schools admit African American students with lower Law School Admissions Test (LSAT) scores and Undergraduate Grade Point Averages (UGPAs), the minority students are ill-prepared to face the daunting challenges posed by the "better-than-they-deserve" law school and its majority students that were "more qualified" based only on stronger LSAT scores and higher UGPAs.[49] Sander essentially argues that African American students at most U.S. law schools are summarily "mismatched" (meaning overmatched), overwhelmed, and in over their heads when affirmative action allows their admission to more prestigious schools than their indicator numbers should allow.[50]

Because of this "mismatch," Sander makes several startling predictions and conclusions. Sander claims his data shows that if affirmative action were to be eliminated from law school admissions decisions, more black lawyers would eventually end up practicing law, not less.[51] Sander also concludes that if racial preferences were abolished, then African American law students would naturally "cascade" to the law school they are more academically qualified to attend.[52] The problem of "mismatch" would no longer be in play, according to Sander, as black law applicants would matriculate to the law schools in which their indicator numbers comfortably place them.[53] Based on this downward flow to law schools where the indicator numbers match up better, Sander guesses that African American law students would perform dramatically better and get significantly stronger grades, causing a small net increase in practicing black lawyers.[54]

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47. Sander, *supra* note 5, at 441.

48. *Id.* at 451.

49. *See id.* at 443.

50. *See id.* at 453–54.

51. *Id.* at 372 ("Perhaps most remarkably, a strong case can be made that in the legal education system as a whole, racial preferences end up producing fewer black lawyers each year than would be produced by a race-blind system.").

52. *See id.* at 373–74.

53. *See id.* at 441–42.

54. *Id.* at 372 n.8.

As I have previously argued, Professor Sander has the mismatch issue sideways.[55] In blaming African American students for matriculating at law schools they were not "qualified" to attend, why had Sander refused to empirically study the myriad other reasons that cause minority students to underperform on the bar exam and in law school classrooms? Sander examined law school grade reports of African American law students and compared them against African American bar passage rates and used this data to make sweeping conclusions that many commentators found wholly unreliable[56] and irresponsible.[57] Sander essentially concludes that African American law students fail the bar exam at greater rates than majority students because they go to the wrong law schools.[58] Inexplicably, Sander ignores the overwhelming and emerging information that tends to show that many other reasons exist for bar exam underperformance than "mismatched" law schools.[59] "Sander's study and conclusions discount (né ignore) sophisticated and important studies that have genuinely attempted to quantify and understand many of the very real problems that exist in black and white achievement gaps in the law school setting."[60] Sander simply ignores "stereotype threat," racially hostile environments that continue to persist, racial isolation, and the perplexing grade gap between black and white law students who enter with the same indicator numbers.

Now, with the publication of *Brilliant Disguise*, what I (and a host of other scholars) have intuitively understood and argued, has now been shown empirically: that rather than law school mismatch and affirmative action, the much more likely and reliable explanation for the performance gap and bar-passage gap between majority and minority law students is the continuing existence of overt racism in our nation's classrooms and the attendant stereotype threat that results.[61] *Brilliant Disguise* forthrightly interrogates the issues and conundrums that Sander neglects. Richard Sander and those that follow his lead in arguing that the mismatch theory explains minority underperformance must now reconsider their position. If intellectual honesty is to be paid respect, Professor Sander and those that oppose affirmative action based on the mismatch theory must reevaluate in light of the data presented in *Brilliant Disguise*.[62]

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55. *See* cummings, *Open Water*, *supra* note 12, at 813–14.

56. *See supra* note 26.

57. *See* cummings, *Open Water*, *supra* note 12; *see also* Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); Cheryl I. Harris & William C. Kidder, *The Black Student Mismatch Myth in Legal Education: The Systematic Flaws in Richard Sander's Affirmative Action Study*, J. BLACKS HIGHER EDUC., Winter 2004/2005; Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005); Kevin R. Johnson & Angela Onwuachi-Willig, *Cry Me a River: The Limits of "A Systemic Analysis of Affirmative Action in American Law Schools,"* 7 AFR.-AM. L & POL'Y REP. 1 (2005); David B. Wilkins, *A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); Goodwin Liu, *Commentary; A Misguided Challenge to Affirmative Action; Sander is Wrong: It Helps Blacks in Law School*, L.A. TIMES, Dec. 20, 2004, at B11.

58. *See* Sander, *supra* note 5, at 373–74.

59. *See* cummings, *Open Water*, *supra* note 12, at 816.

60. *Id.* at 846.

61. *See* Bowen, *supra* note 10, at 1233–35.

62. *See id.* at 1228 tbl.5.

B. Mismatch Empirically Interrogated

Brilliant Disguise examines the impact that being the "only minority student in a class" has on students of color.[63] What seems intuitively obvious, but what has not been empirically corroborated before, is that when a student of color is the only minority in a classroom, unsupported by critical mass, then he or she is exposed to overt instances of racism and discrimination at distressing rates.[64] This is unfortunately true at both affirmative action and anti–affirmative action universities. The data reveal that when a student is the only minority in a class, she will experience overt racism from other students at a rate four times as often as students who have never taken a class in which they were the sole minority.[65] "[S]tudents who were the exclusive minority in at least one class encountered racism from *faculty* at twice the rate of students who have never found themselves as the lone minority in the classroom. . . ."[66] Both faculty and students are guilty of perpetuating racist injury and are more inclined to injure when fewer students of color are in their midst.

Additionally, when a minority student has experience as being a lone minority in any course, Bowen's data show that those students experience a much higher rate of internal stigma "across all measures than do their counterparts who have taken no classes in which they were the sole minority student."[67] Sander must surely be stunned to learn that it is not mismatch that primarily causes minority students to underperform in law school and on the bar exam, but that it is much more attributable to overt racism in the classroom and the resultant stereotype threat that materializes on the basis of the injury that attaches when students are forced to constantly fend off racist behavior aimed at them.[68] "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 . . . ."[69]

Sander will also be stunned to learn that once affirmative action has been eliminated, and once students have "cascaded" to the law schools where they "meritocratically belong," their grades will likely not improve as they will be exposed even more often to open hostility and derision and are likely to experience significant stigma and stereotype threat. According to Professor Bowen:

> Students who attend schools in anti–affirmative action states find themselves engaged in an unfriendly environment. Despite being admitted on purely white, normative admissions standards, these students were more likely than any other group to encounter . . . open hostility, internal stigma, and external stigma. . . .

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63. *See id.* at 1227–33.
64. *See id.* at 1230 tbl.6.
65. *Id.* at 1228–29.
66. *Id.* at 1229 (emphasis added).
67. *Id.*
68. *See id.* at 1230 tbl.6.
69. *Id.* at 1229.

> Recall, these are the students attending schools where stigma, "reverse discrimination," or "mismatch" is not supposed to be an issue, yet they fare far worse than other students who attend schools that allow race-based admissions.[70]

Sander, in advocating the elimination of affirmative action and in actively working toward that goal at UCLA and in California,[71] has unwittingly invited greater injury upon students of color in his home state. In California, where the practice of affirmative action is banned by law, students of color "fare far worse" than minority students in states that openly practice affirmative action. Minority students in California (and Washington, Michigan, and Florida) are exposed to frequent instances of "open hostility, internal stigma, and external stigma" significantly more often than minority students in affirmative action states.[72] Presumably this was not the end result Sander had in mind when he began his campaign against affirmative action.

III. WARD CONNERLY AND REVERSE DISCRIMINATION

A. The Case for Reverse Discrimination and the Color-Blind Ideal

Former University of California Regent, Ward Connerly, stridently opposes affirmative action. Connerly, the architect of the three successful state constitutional amendments and one statutory enactment that now ban the use of affirmative action in state contracts and university admissions in California, Nebraska, Michigan, and Washington, has campaigned tirelessly on the theory that affirmative action is nothing more than reverse discrimination against the majority.[73] Connerly has artfully articulated his state amendment campaigns against affirmative action in the language of the civil rights movement, convincing voters that affirmative action, rather than remediating past wrongs, provides unnecessary racial preferences that serve to discriminate against more-qualified majority candidates and applicants.[74] At the core of Connerly's rhetoric exists the fundamental ideal that racism no longer blocks the path to success for minority citizens,[75] that once affirmative action is eradicated, all citizens will be able to compete equally on level playing fields, and that once racial preferences are removed, stigma and discrimination will evaporate and the colorblind ideal will prevail.[76]

Connerly fervently preaches that "[r]ace has no place in American life or law"[77] and is convinced that affirmative action "breed[s] white resentment and the suspicion of

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70. *Id.* at 1234.

71. *See* cummings, *Open Water*, *supra* note 12, at 838.

72. Bowen, *supra* note 10, at 1222 tbl.2 (indicating that overt racism is experienced by minority students in anti–affirmative action states 43.4% of the time compared to students in affirmative action states who experience overt racism 20.9% of the time).

73. *See* Eric Pooley, *Fairness or Folly?*, TIME, June 23, 2007, at 32, *available at* http://www.time.com/time/magazine/article/0,9171,986563,00.html.

74. *See* Ward Connerly, American Civil Rights Institute: Chairman's Message (Oct. 5, 2007), http://www.acri.org/chairman.html.

75. *See* Slevin, *supra* note 8.

76. *See, e.g.*, Connerly, *supra* note 74.

77. Welcome to the American Civil Rights Institute, http://www.acri.org/index.html.

black inferiority."[78] Connerly posits that affirmative action is "merely a polite euphemism for an entrenched system of race preferences that psychologically damages its alleged beneficiaries and unjustly discriminates against its real victims."[79] In Ward Connerly's world, the taint of affirmative action will be systematically erased once artificial preferences are removed, including the end of "white resentment" and the termination of the "suspicion of black inferiority." Once race is erased from the lexicon of admissions decisions and the awarding of government contracts, then the nation will arrive at its desired color-blind, postracial destination.

As I have previously argued, Ward Connerly and his Proposition 209 (which banned affirmative action in California) had the reverse discrimination and color-blind issues upside down and wrong.[80] In arguing that "[r]ace has no place in American life or law,"[81] Connerly and others that make this argument willfully don blinders to the continuing reality of white privilege in American society and the institutional and structural instances of modern discrimination that persist, including legacy admissions, spirit injury, microaggressions, and race hatred.[82] Why do Connerly and other promoters of reverse discrimination and color-blind rhetoric always ignore white privilege and continuing instances of institutional racism and structural race hatred in their campaigns and positionings? Where is the alternative recommendation? Attacking affirmative action as detrimental and calling for its elimination is simple, but proffering an alternative to address inequality and modern discrimination is difficult, and tellingly avoided by Connerly and other affirmative action oppositionists.

Now, with the publication of *Brilliant Disguise*, what I (and a host of other scholars) have intuitively understood and argued, has now been shown empirically: that in an environment where affirmative action and supposed "reverse discrimination" has been formally eliminated, the color-blind ideal championed by Connerly and his faction has failed to materialize.[83] Where academic "meritocracy" is mandated by law, in the states that have banned affirmative action, white privilege and racial discrimination continue with fervor, and now find even more insulation in a "whitewashed" classroom where the few minority students that are brave enough to matriculate and enter the whitewash are subject to ridicule and discrimination.[84] Ward Connerly, and those that follow his lead in arguing reverse discrimination and the color-blind ideal as the key principles for abandoning affirmative action, must now reconsider their position. If intellectual honesty is to be paid respect, Connerly and those that oppose affirmative action based on color-blind rhetoric must reevaluate in light of the data presented in *Brilliant Disguise*.[85]

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78. Pooley, *supra* note 73.
79. CONNERLY, *supra* note 3, at dust jacket.
80. *See* cummings, *Never Let Me Slip*, *supra* note 12, at 62 n.25.
81. American Civil Rights Institute, *supra* note 77.
82. *See* cummings, *Never Let Me Slip*, *supra* note 12 at 68–70, 76–77.
83. *See* Bowen, *supra* note 10, at 1230 tbl.6.
84. *See id.* at 1228 tbl.5.
85. *See id.*

B. Reverse Discrimination and Color Blind Empirically Challenged

Students of color are four times more likely to experience overt racial hatred in the states that cannot practice affirmative action than are minority students who attend universities in states that actively practice racial preferences.[86] Professor Bowen finds "[t]hose states that champion a color-blind ideal are the same states that are complicit in producing whiteness, not color blindness. The colleges and universities within those states engage in norms and practices that code whiteness as natural and logical."[87] Connerly will surely be stunned to learn that, in states where affirmative action has been banned and is no longer practiced, the minority students who attend on "meritocratic" footing are victims of overt racism, open hostility, and outright bigotry far more often than students who attend college in states where affirmative action is still actively practiced.[88] What of the color-blind society that was to take root when racial preferences were abolished?

Connerly perpetually contends that affirmative action "psychologically damages its alleged beneficiaries" and it "unjustly discriminates against its real victims."[89] *Brilliant Disguise* lays these contentions bare. Connerly is simply mistaken on this count and can point to little if any empirical evidence to support his theories. Psychological injury is visited upon students of color through acts of open hostility, overt racism, racial isolation, silencing, perspectivelessness, and derision, not through affirmative action or racial preferences.[90] The majority is not "unjustly discriminat[ed]" against by affirmative action. The majority openly discriminates against students of color in numbers that are simply appalling in an era that is purportedly postracial.[91]

That overt discrimination continues in our nation's colleges and universities and that it is more blatant in the states that have banned affirmative action is shocking. One would expect that if we have truly entered a postracial era, then *zero* or very few instances of overt racism would occur in the twenty-first-century university classroom.[92] Again, not true. All minority students surveyed report having experienced overt instances of racism in the classroom up to 43% of the time.[93]

The crucial connection to be drawn from these findings is that a critical mass of minority students is centrally important to the enterprise of repairing past discrimination and leveling the playing field. While the constitutionally approved ideal is "diversity," a considerable gap exists between constitutionally approved diversity in the classroom and the goal of "critical mass." Additional work must be done to embrace, appreciate, and meaningfully adopt the critical-mass ideal.

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86. *See id.*
87. *See id.* at 1234–35 (footnote omitted).
88. *See id.* at 1218 n.114.
89. CONNERLY, *supra* note 3, at dust jacket.
90. *Cf.* Bowen, *supra* note 10, at 1244.
91. *See id.* at 1226 tbl.3.
92. *See id.* at 1222 tbl.2.
93. *Id.* at 1221.

CONCLUSION

While many articles have been written and important studies have been undertaken to examine the utility of affirmative action,[94] Professor Bowen's work is groundbreaking because it is among first to examine affirmative action in a "postracial," "color-blind" world. Her empirical data is mined from those students of color that attend college in the "new world" of "pure meritocracy," one in which racial preferences have been eliminated. Further, for purposes of evaluative comparison, Bowen's study includes students that attend college in those states where the "taint" of affirmative action, or the "badge of inferiority," purportedly still attaches, those universities that continue to permissibly use affirmative action as a diversity tool.

Brilliant Disguise uncovers important truths that can provide profound guidance to those genuinely interested in leveling playing fields and ending racial discrimination in the United States, particularly in its institutions of higher education. In finally asking the important questions avoided by opponents, Professor Bowen empirically culls evidence that overt racism, spirit injury, microaggressions, and race hatred continues unabated in our nation, and continues in earnest in the absence of the "taint" of affirmative action. The arguments posited by affirmative action opponents always include a beautiful, seductive pot of gold at the end of the rainbow—a color-blind society where discrimination has disappeared. Eliminate racial preferences, allow meritocracy to bloom, and all will be well, per Thomas, Sander, Connerly, Ann Coulter,[95] Rush Limbaugh,[96] and Justice Antonin Scalia.[97] Professor Bowen's study intimates the fallacy of this position perpetuated by these pundits. That said, I do not take Bowen's conclusions as necessarily devastating. Continuing race discrimination and perpetuation of white privilege is, while a discouraging finding, also a helpful one. The crucial nature of critical mass is not a surprising finding, it is intuitive and a most helpful one.

Affirmative action is not the cure for our nation's racial ailments. I doubt it is even the most effective means to redress past discrimination and to level the playing field. For now, it remains the most effective tool available, despite its weaknesses and gaps. *Brilliant Disguise* will allow a more honest and realistic discussion to take place in

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94. *See, e.g.*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997).

95. *See* Ann Coulter, *Dems Affirmative Action Time Bomb Has Detonated*, STATE JOURNAL-REGISTER, Sept. 26, 2008, *available at* http://www.sj-r.com/opinions/x1070363616/Ann-Coulter-Dems-affirmative-action-time-bomb-has-detonated (arguing that absent affirmative action, the financial market crisis of 2008 would have been averted).

96. *See Limbaugh's "Colorblind" History of Racially Charged Comments*, MEDIAMATTERS FOR AMERICA, Oct. 13, 2009, http://mediamatters.org/research/200910130049 (quoting Rush Limbaugh as connecting Barack Obama's election as President to affirmative action claiming that Obama was grossly unqualified for the position like all other affirmative action beneficiaries).

97. *See* Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Scalia, J., concurring in part and dissenting in part) (sarcastically challenging the educational benefits that run from a critical mass of diverse law students, suggesting that reverse discrimination actuates white hostility).

dealing with our nation's racial injustices and inequities. We know where we stand today. And that is *not* yet in a postracial place.