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Entitled to be Heard: Improving Evidence-Based Policy Making Through Audience and Public Reason

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"On this important and vital matter of education, I think the children should be entitled to be heard."

–Justice William O. Douglas dissenting in Wisconsin v. Yoder[1]

"[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"

–John Rawls, Political Liberalism[2]

"The task of formulating an acceptable definition of the idea of 'empirical science' is not without its difficulties. Some of these arise from the fact that there must be many theoretical systems *with a logical structure very similar to the one which at any particular time is the accepted system of empirical science. This situation is sometimes described by saying that there are a great many—presumably an infinite number—of 'logically possible worlds'. Yet the system called 'empirical science' is intended to represent only* one *world: the 'real world' or the 'world of our experience'."*

–Karl Popper, The Logic of Scientific Discovery[3]

INTRODUCTION

My initial reaction to Deirdre Bowen's important empirical study of underrepresented minority students at colleges and universities with and without affirmative action policies[4] was emotional. Before my skeptical, habitually critical side automatically started trying to vet the validity or methodology of the study itself, my initial reaction was one of empathy with and self-reflection in response to the study's

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1. 406 U.S. 205, 244 (1972) (Douglas, J., dissenting in part) (rejecting the majority's view that the religious views of Amish parents determined the question whether the state could place Amish children under compulsory education past eighth grade).

2. JOHN RAWLS, POLITICAL LIBERALISM 4 (1993).

3. KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 39 (Karl R. Popper et al. trans., Hutchinson & Co. 1959) (1934) (emphasis in original).

4. Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197 (2010) (explaining the development of affirmative action).

implications. What if this study is right? What if minority students who are selected solely on the basis of their so-called objective merit nevertheless truly face such ironic and unfair psychic injury at schools that have banned affirmative action?[5] What if the policy of banning affirmative action ironically ends up doing more harm than good to the very people affirmative action is trying to help?[6] Do I have any unacknowledged biases that might have blinded me from seeing these counterintuitive facts?

I recall feeling a similar emotional reaction five years ago after first reading Richard Sander's controversial "mismatch thesis" affirmative action empirical study.[7] Bowen's study appears at least in part to be in response to Sander's study.[8] Before my critical, analytical side kicked in,[9] my empathic, self-reflective side had a moment of dominance. I asked myself what if Sander's study was right? What if affirmative action policies actually cause black applicants to be mismatched with law schools and thereby result in more black law students performing poorly academically, dropping out of school, having trouble finding jobs, and failing the bar examination?[10] What if the policy of affirmative action ironically ends up doing more harm than good to the very people it is trying to help?[11] Do I have any unacknowledged biases that might have blinded me from seeing these counterintuitive facts?

Although Bowen and Sander differ in their respective methodology,[12] areas of measurement,[13] and ultimate prescriptive policy recommendations,[14] they agree that the

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5. *See id.* at 1199.

6. *See id.*

7. Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

8. *See* Bowen, *supra* note 4, at 1200–01 nn.11 & 19.

9. The methodology of Sander's study has been criticized extensively. *See* andré douglas pond cummings, *"Open Water": Affirmative Action, Mismatch Theory and Swarming Predators – A Response to Richard Sander*, 44 BRANDEIS L.J. 795, 799 & n.22, 844–45 (2006) (collecting criticism). For Sander's earlier reply to such criticism, see Richard H. Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005). For a more recent reply, see Gail Heriot, *Affirmative Action in American Law Schools*, 17 J. CONTEMP. LEGAL ISSUES 237 (2008).

10. Sander, *supra* note 7, at 478–80.

11. *Id.* at 369.

12. Whereas Bowen is a sociologist and her study is a qualitative opinion survey, *see* Bowen, *supra* note 4, at 1214–17, 1245–51 app.A, Sander is an economist and his study is a quantitative cost-benefit analysis, *see* Sander, *supra* note 7, at 367 n.*, 369. Cost-benefit analysis has been defined "as a strategy for choice in which weightings are allocated to the available alternatives, arriving at some kind of aggregate figure for each major option." Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, *in* COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES 169, 192 (Matthew D. Adler & Eric A. Posner eds., 2001). Qualitative research has been defined "as a research strategy that usually emphasizes words rather than quantification in the collection and analysis of data." ALAN BRYMAN, SOCIAL RESEARCH METHODS 19–20 (2d ed. 2004). Quantitative research, on the other hand, has been defined "as a research strategy that emphasizes quantification in the collection and analysis of data." *Id.* at 19.

13. While Bowen's study examines emotional, psychic, and educational costs and benefits, Bowen, *supra* note 4, at 1204–08, Sander's study examines vocationally related cost-benefit metrics like academic performance and bar passage rates, Sander, *supra* note 7, at 478–80.

14. While Bowen concludes that affirmative action continues to be an "important tool in the tool box of equitable education," Bowen, *supra* note 4, at 1244, Sander concludes that

target audience[15] of policies promoting or banning affirmative action is minority students.[16] I believe that when faced with such empirical evidence about the policies' target audience, even the most hardened ideologues can experience a similar—and perhaps fleeting—emotional and empathic moment of self-reflection. As Deborah Merritt has observed, such empirical studies are "one of the tools we have for overcoming bias, for showing people that the world is not the way they think it is."[17]

Is there a way to use this empathic moment to change—as Martin Luther King, Jr. reportedly said—"a few human hearts"[18] without sacrificing what is in our "heads"? Is there a way to use this empathic moment, which may be caused by empirical studies about the target audience of a policy, to facilitate evidence-based policy making?

I submit that the interplay of Bowen's and Sander's studies suggests something broader. Perhaps one of the greatest challenges facing pluralistic democracies today is how to make the best policy decisions amid increasingly irreconcilable ideological disagreement (what I call *ideological conflict*) and an overwhelming glut of often contradictory information of varied quality and objectivity, obtained through a panoply of different methods (what I call *methodological conflict*). While most would agree in principle that policy making should be dictated by the best factual evidence and for the maximum benefit of the target audience,[19] there is disagreement over how to implement this principle in practice.

In this Commentary, I present a working idea, the "Audience-Focused Overlapping Consensus Model," as one attempt to put this principle into practice. How can policy making be dictated by the best factual evidence and for the maximum benefit of the target audience? Two possible ways are by requiring (1) the public statement of the

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affirmative action "produces more harms than benefits for its putative beneficiaries," Sander, *supra* note 7, at 371, 481–82. Given the ideological and methodological differences between Bowen and Sander's studies, *see supra* notes 12–13, their different policy prescriptions may not be surprising.

15. To promote clarity, I will *italicize* my own terms when they first appear. For a definition of *target audience*, see *infra* text accompanying notes 31–32.

16. *See* Bowen, *supra* note 4, at 1197–99, 1208–14 (quoting Justice Thomas's statement concerning the need to "address the real problems facing 'underrepresented minorities'" and identifying the color-blind ideal's focus upon the alleged ill effects of affirmative action on minority students); Sander, *supra* note 7, at 368 (concluding that "the overriding justification for affirmative action has always been its impact on minorities"). Bowen's study was limited to undergraduate and graduate minority students, Bowen, *supra* note 4, at 1215, whereas Sander's study was limited to black law students, Sander, *supra* note 7, at 369.

17. Deborah Jones Merritt, *The Future of* Bakke: *Will Social Science Matter?*, 59 OHIO ST. L.J. 1055, 1058 (1998); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1495 n.27 (2005) (stating that empirical studies "rattle us out of a complacency enjoyed after the demise of de jure discrimination").

18. Jonathon Keats, *The Power of the Pulpit: King's Famous Dream Woke up America to Racial Injustice*, CHRISTIAN SCI. MONITOR, July 10, 2003, *available at* http://www.csmonitor.com/2003/0710/p15s01-bogn.html. When the executive secretary of the National Association for the Advancement of Colored People (NAACP) publicly boasted about the success of their litigation efforts, he reportedly remarked to Martin Luther King, Jr., "In fact, Martin, if you have desegregated anything by your efforts, kindly enlighten me." *Id.* King allegedly responded, "Well, I guess about the only thing I've desegregated so far is a few human hearts." *Id.*

19. The principles underlying this Commentary are also intended to critique policy makers who rely upon demagoguery, inaccurate or unsupported assumptions, and raw emotion to sway popular opinion.

audience of a particular policy and (2) that policy makers scrutinize publicly available empirical evidence about that audience *before* making policy decisions. Because it is impossible to obtain useful factual evidence about the entire world, policy makers serious about using evidence to guide their decision making out of unavoidable necessity must place boundaries upon the scope of their information gathering. This binding public declaration of audience simply provides such boundaries. Moreover, by publicly stating the target audience of a policy, policy makers in a divisive policy debate should be able to circumvent both ideological and methodological conflicts and encourage greater consensus. After summarizing the working model and explaining some of its potential implications with examples from Bowen's and Sander's studies, I conclude with directions for future research.

TOWARD AN AUDIENCE-FOCUSED OVERLAPPING CONSENSUS MODEL

My working Audience-Focused Overlapping Consensus[20] Model for divisive debates in a deliberative democracy[21] is composed of five parts and is illustrated in Figure A.[22]

During divisive debates—consistent with the duty of civility[23] and public reason[24]—each opposing side should: (A) identify clearly and publicly the target and *incidental*

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20. An "overlapping consensus" is John Rawls's answer to the critical question of how to accommodate "a diversity of conflicting and irreconcilable—and what's more, reasonable—comprehensive doctrines." RAWLS, *supra* note 2, at 36. By definition, an overlapping consensus must be "a freestanding view starting from the fundamental ideas of a democratic society and presupposing no particular wider doctrine." *Id.* at 40. An overlapping consensus somehow must transcend the reasonable yet irreconcilable ideological disagreement among conflicting policies such that both sides will buy into its framework in spite of their severe division. Ideally, it would be "possible for all to accept" the overlapping consensus "as true or reasonable from the standpoint of their own comprehensive view, whatever it may be." *Id.* at 150.

21. This model is informed by Amy Gutmann and Dennis Thompson's theory of "deliberative democracy," which "affirms the need to justify decisions made by citizens and their representatives. Both are expected to justify the laws they would impose on one another." AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 3 (2004).

22. Figure A uses three generic opposing viewpoints ("Opposing Viewpoint 1," "Opposing Viewpoint 2," and "Opposing Viewpoint 3") as examples. Each viewpoint has its own associated *audience*, *authentic outcomes*, *individual narratives*, *benefits*, and *burdens*. Although none of the sample *audiences* are coextensive, there is overlap among all three *audiences*.

23. Adhering to an overlapping consensus, thus, is a "duty of civility" in a constitutional democracy where citizens are "able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by . . . public reason." RAWLS, *supra* note 2, at 217.

24. "Public reason . . . involves a set of shared considerations which count as good reasons in public deliberation and argument about laws and their interpretation . . . ." SAMUEL FREEMAN, JUSTICE AND THE SOCIAL CONTRACT: ESSAYS ON RAWLSIAN POLITICAL PHILOSOPHY 219 (2007). In divisive policy debates, because individual citizens maintain their "non-public, unshared reasons" for their policy position, "citizens may dissent from the outcome of public reason or endorse it for non-shared reasons, while still acknowledging it as valid from the public political perspective." William P. Umphres, In Defense of Overlapping Consensus: Stability, Legitimacy and Disagreement 16 (Mar. 2008) (unpublished manuscript, presented at Midwest Political Science Association Annual National Conference, Apr. 3, 2008), *available at*

audience of its respective policy position; (B) present for public scrutiny (1) *authentic outcomes* obtained from empirical studies about the *benefits* and *burdens* of the current policy upon its audience, or (2) *individual narratives* only in rebuttal to such authentic outcomes; (C) examine civilly and sincerely the other side's publicly available authentic outcomes or rebutting individual narratives about the benefits and burdens of the current policy upon the other side's target and incidental audience; (D) consider whether the current policy actually affects every side's audience in the manner envisioned by every side; and (E) adjust the current policy until it can be ascertained through authentic outcomes or rebutting individual narratives that the policy benefits or burdens the target audience in such a way that the target audience both knows and understands the benefits or burdens.

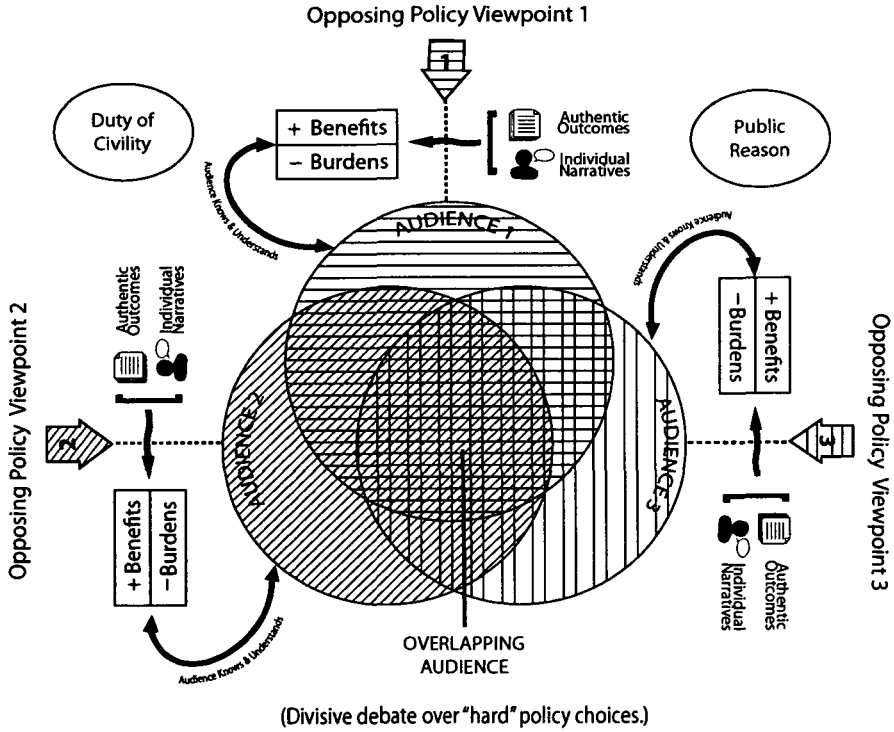

Figure A: Audience-Focused Overlapping Consensus Model

A. Identify the Audience of Each Policy Position

First, each opposing side should clearly and publicly identify the target and incidental audience of its respective policy position. This working model is intended

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http://www.allacademic.com/meta/p267283_index.html. Public reason, therefore, "does not end political disagreement; it guides it." *Id.* at 17. "[I]t is possible that different or even contradictory positions will find support in the public reason of a given society." *Id.*

for "hard"[25] policy choices in a pluralistic democracy like affirmative action. Affirmative action remains one of the most divisive ideological issues in America today.[26] As Lloyd Weinreb observed, affirmative action "has produced the most explicit and persistent concrete conflict about the nature of justice in recent American life."[27] On a theoretical level, such conflict may be unavoidable because affirmative action is "a specification of the abstract contradiction between the ideas of liberty and equality," and "[t]here is no correct principle of liberty or equality in such a situation; the effects of principles applied in the past, which are now perceived to be wrong, can be undone only by the application of principles that also appear to be wrong."[28] Like theoretical "Blue States" and "Red States,"[29] proponents and opponents of affirmative action just may be divided fundamentally and irreconcilably on first principles.

The working model thereby seeks to answer John Rawls's critical question: "[H]ow is it possible for there to exist over time a just and stable society of free and equal citizens, who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?"[30] The overlapping consensus[31] that the model aspires to attain is

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25. GUTMANN & THOMPSON, *supra* note 21, at 10 (discussing the importance of decisions based on merit, rather than party power, in a deliberative democracy).

26. 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, 2–7, nn.5 & 19 (2005) (collecting media stories about the divisiveness of the affirmative action debate). As John H. Bunzel, former president of San Jose State University, observed:

> [T]he debate over affirmative action was already being cast in a familiar idiom: If you are not actively with us, you are actively against us. However, I could not accept the simplistic choice of "friend" vs. "enemy," especially when applied to a college or university. The issue for me was not simply "doing the right thing" but of competing and legitimate values and their relationship to many practical problems. It was my contention that affirmative action involved (and still involves) a collision of rights and principles.

JOHN H. BUNZEL, AFFIRMATIVE ACTION IN HIGHER EDUCATION: A DILEMMA OF CONFLICTING PRINCIPLES 2 (1998).

27. LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 232 (1987).

28. *Id.* at 232–33.

29. *See* Barack Obama, Ill. State Sen., Keynote Address at the Democratic National Convention (July 27, 2004) ("The pundits like to slice-and-dice our country into Red States and Blue States; Red States for Republicans, Blue States for Democrats.").

30. RAWLS, *supra* note 2, at 4. Before attempting to answer that critical question, I want to clarify what Rawls declines to do. All of Rawls's theories are *ideal*. Based upon his famous "original position" and "veil of ignorance," Rawls assumes a utopian ideal society where everyone is reasonable and willingly complies with just, enlightened laws. Chantal Mouffe, *The Limits of John Rawls's Pluralism*, 4 POL. PHIL. & ECON. 221, 223–26 (2005).

Accordingly, one problem with applying Rawls's framework here is that affirmative action attempts to remedy a clearly *nonideal* situation. HARRY BRIGHOUSE, JUSTICE 125 (2004). Had the United States acted reasonably and ideally in the first place, there would be no need for affirmative action. While Rawls himself never explicitly addressed affirmative action or other "serious problems arising from existing [racial] discrimination," JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT § 18.6, at 66 (Erin Kelly ed., 2001), I nonetheless believe his framework can provide new insights on old divisions precisely because it is idealized. This view is shared by other scholars. *See, e.g.*, Martin D. Carcieri, Rawls, Reparations, and Affirmative

premised upon each opposing side's clear and public statement of who they believe is the audience of the policy. Ideally, this public declaration of audience can provide some common ground upon which opposing sides can build.

This Commentary defines audience as the answer to the question, "Whom precisely are you trying to benefit or burden with this policy?" Whereas the target audience is the primary population that the policy intends to influence directly, the incidental audience is the population that may face secondary or collateral effects as a result. Whereas benefits are supposed to be considered positive and desirable by the target audience and are intended to reinforce some socially desirable conduct, burdens are the opposite and may either be intended to discourage some socially undesirable conduct by the target audience or simply be an unforeseen or unavoidable consequence affecting the incidental audience. Affirmative action in higher-education admissions is a stark example where the target audience's benefit, a coveted spot in a limited college or graduate school entering class, comes with the incidental audience's burden, being denied that same spot despite the fact that but for the affirmative action policy the incidental audience might have been admitted.

Policy makers sometimes explicitly define the target audience of a particular policy, but, because the target audience oftentimes remains unclear, opposing sides in a policy debate can have a totally unrelated target or incidental audience or share some (or all) of their target or incidental audience.[32]

For example, the United States Supreme Court has failed to define explicitly the target audience of school affirmative action admissions policies. Whereas minority students sometimes appear to be the target audience of such policies,[33] at other times

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Action: Toward a Theory of Racial Justice 2 n.10 (unpublished manuscript, presented at the American Political Science Association annual meeting, Aug. 31, 2006), *available at* http://www.allacademic.com/meta/p150623_index.html (collecting authorities that argue affirmative action can be derived from Rawls's theory).

Another problem with Rawls's framework is that it ignores the antagonistic dimension of politics and the inescapable reality that divisive issues like affirmative action will ultimately be decided by the most powerful in a democracy. Undoing past injustice unavoidably causes pain and conflict. Moreover, sometimes conflict is constructive. *See* Orlando Patterson, *Why Can't We Find Consensus on Affirmative Action?*, *in* THE MORAL FOUNDATIONS OF CIVIL RIGHTS 77–87 (Robert K. Fullinwider & Claudia Mills eds., 1986).

To this problem, Rawls would respond that such "might-makes-right" coerced stability (commonly called a *modus vivendi*) not only comes at the potentially unjust expense of the less powerful but also can be lost during divisive debates when a side concludes that maintaining such stability is no longer in its self-interest. Umphres, *supra* note 24, at 4–7 (explaining Rawls's concept of "stability for the right reasons"). While the procedural protections of a traditional constitutional democracy do provide much stability, there remains the risk that a tyrannical majority or secessionist minority will act solely out of self-interest. *Id.* Rawls aspires for a more principled stability through overlapping consensus. *See supra* note 20.

31. *See supra* note 20.

32. This Commentary is limited to the situation where opposing sides share the same target audience, like Bowen and Sander. Not only do opposing sides often have different target audiences but also a particular side's intended target audience may be different than its publicly declared target audience for political or pragmatic expediency.

33. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 751 (2007) (Thomas, J., concurring) ("The Constitution generally prohibits government race-based decisionmaking, but this Court has authorized the use of race-based measures for remedial purposes . . . .").

all students appear to be the target audience.[34] While Bowen and Sander appear to agree that minority students are the target audience of policies promoting and banning affirmative action,[35] Ward Connerly, in his public campaign to outlaw affirmative action altogether, appears to believe that all students are his target audience.[36] Bowen and Sander might consider white students an incidental audience of such policies. Both argue in their respective studies that the target audience, minority students, in reality are not receiving the policy's intended legal benefit.[37]

Bowen, for example, believes that one of the alleged benefits of banning affirmative action policies for the target audience, minority students, is that minority students will no longer feel the burden—internal and external stigma—that affirmative action policies ostensibly cause.[38] Her empirical study argues that, contrary to the colorblind ideal, the banning of affirmative action policies might have the opposite effect.[39]

In a different manner, Sander believes that one of the alleged benefits of affirmative action policies for the target audience is that they provide the target audience "access to higher education, entrée to the national elite, and a chance of correcting historic underrepresentations in the leading professions."[40] His empirical study argues that, contrary to conventional wisdom, affirmative action policies might have the opposite effect.[41] Sander concludes that affirmative action "hurt the very people they were intended to help."[42] Despite sharing the same audience, both Bowen and Sander nevertheless present differing evidence about the people that form that audience.

This audience-focused approach thereby spotlights those who matter most, the people the law affects. As Gary Melton observed, to fulfill law's "noble purposes," law "must take people seriously" because "people . . . value the law when it treats them with respect—when it offers them a voice in a context in which they are treated with politeness and dignity in a state of equality."[43] Before policy makers truly can evaluate any policy, they must know what or who they are trying to measure—namely, the audience. Without knowing the audience, policy makers cannot be serious about using evidence to guide decision making and may be using such evidence after the decision already has been made to provide political or popular cover for their inferred justification.

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34. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("[T]he Law School's admissions policy promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables [students] to better understand persons of different races.'").

35. *See supra* note 16.

36. *See* Ying Ma, *Men of Stature: Obama Has No Monopoly on Hope*, WASH. TIMES, Feb. 21, 2008, at A15 ("Mr. Connerly declared that 'all Americans are entitled to equal treatment by their government' and that 'racial, gender, and ethnic preferences are morally wrong.'"); *see also* Bowen, *supra* note 4, at 1212 n.87 (describing Connerly's activism).

37. *See supra* notes 6 and 11 and accompanying text.

38. Bowen, *supra* note 4, at 1198–99.

39. *Id.*; *see also supra* note 6 and accompanying text.

40. Sander, *supra* note 7, at 368.

41. *Id.*; *see also supra* note 11 and accompanying text.

42. Carol J. Williams, *Does Affirmative Action Help or Hurt Lawyers? Professor Seeks State Bar Exam Data to Study Racial Bias. Bar Says No*, L.A. TIMES, Sept. 8, 2008, at 1.

43. Gary B. Melton, *The Law Is a Good Thing (Psychology Is, Too): Human Rights in Psychological Jurisprudence*, 16 LAW & HUM. BEHAV. 381, 385 (1992).

Inferred justification "operates as a backward chain of reasoning that justifies the favored opinion by assuming the causal evidence that would support it."[44] Ideologues infer justification when they begin with their ideologically motivated belief and then ask themselves "what must be true about the world" for that belief to hold.[45] Because inferred justification inverts the proper steps of evidence-based policy making,[46] it should be avoided.[47]

How is this different from conventional interest group analysis?[48] This audience-focused approach differs from interest group analysis primarily in the preclusive nature of the public declaration of the audience. Consistent with public reason,[49] all sides in a divisive policy debate must limit their public advocacy to their publicly declared target and incidental audience. While a side can publicly amend their audience, they are precluded from discussing anyone outside that audience. While a side can define their audience as narrowly or expansively as they want, they must do so publicly and expect opposing sides to hold them accountable for publicly demonstrating how their position actually benefits or burdens their audience.

In effect, the public articulation of a policy's target audience provides the content of the principle that should serve as the ideal of public reason.[50] The target audience needs to be expressed publicly for two reasons. First, because this model is limited to deliberative democracies,[51] any proposed guiding principle must be expressed publicly to encourage the open debate essential to deliberative democracy.[52] Second, requiring a

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44. Monica Prasad, Andrew J. Perrin, Kieran Bezila, Steve G. Hoffman, Kate Kindleberger, Kim Manturuk & Ashleigh Smith Powers, *"There Must Be a Reason": Osama, Saddam, and Inferred Justification*, 79 SOC. INQUIRY 142, 155 (2009).

45. *Id.*

46. *See, e.g.*, TERENCE ANDERSON, DAVID SCHUM & WILLIAM TWINING, ANALYSIS OF EVIDENCE 47–48 (2d ed. 2005) (discussing "the dangers of a commitment to a single hypothesis" and "the need to distinguish between generating a hypothesis and testing it against the available data").

47. There is significant empirical research about the "legal preference for assumption over fact" and the popular tendency "to select results that align with their prior beliefs rather than adjusting their beliefs in response to contrary results." John F. Pfaff, *A Plea for More Aggregation: The Looming Threat to Empirical Legal Scholarship* 3–4 (Fordham Univ. Sch. of Law Working Paper Series, 2009) (citations omitted), *available at* http://ssrn.com/abstract=1444410.

48. *See generally* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 228–29 (1986). Interest group analysis treats policies like laws "as commodities that are purchased by particular interest groups or coalitions of interest groups that outbid and outmaneuver competing interest groups. The currency through which laws are bought and sold consists of political support, promises of future favors, outright bribes, and whatever else politicians value." *Id.* (internal citations omitted).

49. *See supra* note 24.

50. *See* Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1466 (2006) (observing that "[c]ontemporary debates about public reason have tended to focus on the content of the principle (or set of principles) that should serve as an ideal of public reason").

51. *See supra* note 21.

52. As Professor Solum has noted, "An ideal of public reason provides a systematic answer to the following question: what limits does political morality impose on public political debate and discussion by the citizens of a modern pluralist democracy?" Solum, *supra* note 50, at 1465.

target audience not only provides such a guiding principle but also facilitates empirical studies about the relevant policy.[53]

Thus, one of the primary reasons for the apparent paucity of evidence-based policy making in pluralistic democracies may be that opposing sides in a divisive policy debate initially fail to clarify who is the target or incidental audience. In essence, by publicly defining their audience, opposing sides set forth their burden of proof in the public debate.

Accordingly, opposing sides can meet their burden of proof only by publicly providing factual evidence, what I call *authentic outcomes* or *individual narratives*, about the policy's impact upon their audience. This public framework thereby encourages gathering and analyzing evidence before making policy decisions.

B. Present Evidence About the Audience for Public Scrutiny

Second, each opposing side must factually and publicly demonstrate how its policy position can actually benefit or burden its respective audience, the people it claims it wants to benefit or burden. This paradigm shift changes the focus from the ideological conflict between irreconcilable ideologies that fuels divisive policy debates to constructive fact gathering. Because this model assumes that examining empirical evidence before making policy is preferable,[54] it also assumes that each opposing side should generate empirical evidence to support all of its arguments.[55] Whereas empirical studies have often served as servants (or even hired guns) to legal ideology,[56] this approach seeks to elevate empirical studies from ideological servant to referee of ideological conflict. In effect, this approach seeks to make an end run around ideological conflict by looking directly at facts about the policy's audience, much like both Bowen and Sander have done.

When considering such facts—the "evidence" of this model—there are two competing considerations. On the one hand, I hypothesize that one possible way ideologically irreconcilable sides (mired in ideological conflict) can hope to build consensus is through the power of studies like Bowen's and Sander's that, by relating facts about a policy's audience, might create emphatic moments like I experienced.[57] On the other hand, good policy making must be premised upon accurate facts and the

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53. *See supra* note 43 and accompanying text.

54. *See supra* notes 19, 46 & 53 and accompanying text.

55. This includes even hypothetical arguments. For example, policy analysts frequently use simulations to test untried scenarios before spending enormous amounts of money on public-works projects. *See, e.g.*, EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 89–90 (1978).

56. *See* David Nelken, *Can Law Learn from Social Science?*, 35 ISR. L. REV. 205, 209 (2001) ("In general terms, there is nothing surprising in saying that the relevance of social science depends upon the extent to which it becomes subservient to the legal."); *cf.* Samuel R. Lucas & Marcel Paret, *Law, Race, and Education in the United States*, ANN. REV. L. & SOC. SCI., 2005, at 207 ("Law is the midwife of race. . . . To justify their taking of the land and its abundant resources, Europeans sought to set themselves over and above the native peoples. . . . The developing concept of race became key to this undertaking.") (collecting empirical studies on race and education).

57. *See supra* notes 4–12 and accompanying text.

potentially transformative, empathic power of such facts—particularly individual narratives—also can make their accuracy and objectivity suspect.[58] As illustrated in Figure B, I hope to balance these two considerations through a continuum of facts with authentic outcomes about multiple people on one end and individual narratives on the other.[59] Instead of substituting feeling for thinking, I want opposing sides to both feel and think.

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58. As James Boyd White has observed, "The narrative is the archetypal legal and rhetorical form, as it is the archetypal form of human thought in ordinary life as well." JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 175 (1985). Critical legal scholars have long recognized the power of outsider narratives to change the law. Reginald Oh & Thomas Ross, *Judicial Opinions as Racial Narratives: The Story of* Richmond v. Croson, *in* RACE LAW STORIES 381, 389 (Rachel F. Moran & Devon Wayne Carbado eds., 2008) (collecting authorities); *see also* ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 110 (2000) (concluding that "[l]aw lives on narrative"); ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE (1999); James R. Elkins, *On the Emergence of Narrative Jurisprudence: The Humanistic Perspective Finds a New Path*, 9 LEGAL STUD. F. 123, 145–46 (1985) (defining narrative jurisprudence); Valorie K. Vojdik, *At War: Narrative Tactics in the Citadel and VMI Litigation*, 19 HARV. WOMEN'S L.J. 1, 2 (1996) (explaining how actual named plaintiffs make a difference in civil rights litigation). Such transformative power lies at the heart of the Gandhian nonviolent philosophy of conflict, *satyagraha*, where "dogma gives way to an open exploration of context. The objective is not to assert propositions, but to create possibilities," JOAN V. BONDURANT, CONQUEST OF VIOLENCE: THE GANDHIAN PHILOSOPHY OF CONFLICT, at vi–vii (Univ. of Cal. Press, rev. ed. 1965) (1958), by "dramatiz[ing] the issues at stake . . . to get through to the opponent's unprejudiced judgment," *id.* at 11.

59. Figure B illustrates a continuum of evidence accuracy based upon the number of people in the audience represented by the evidence. On the extreme left, little to no information representing nobody from the audience would be highly inaccurate. On the extreme right, total information representing everyone from the audience probably would be highly accurate. There is a *line a*, past which individual narratives are accurate enough to be used for rebuttal purposes. There also is a *line b*, past which outcomes are accurate enough to be authentic outcomes.

In addition, among the many translation problems between social science and the law, two are particularly relevant here. First, because law is primarily normative and prescriptive (whereas social science is primarily descriptive), empirical research at most can *inform* divisive policy debates but can never resolve them. *See* Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 555. Second, because social science can model only individual behavior, there is the "macro-micro problem," the "problem of developing explanatory accounts that link individual and collective behavior." *Id.* at 556. Empirical studies "can model the behavior of individuals or the behavior of institutions, but when an institution is primarily composed of semi-independent, discretionary decision-makers," as with an education system or society, "only an account which links both levels will provide a satisfactory image of the totality." *Id.* at 557. As demonstrated by the "macro-micro problem," the participants in most empirical studies will fall somewhere between these two ends of the continuum with more than one participant but less than the entire audience.

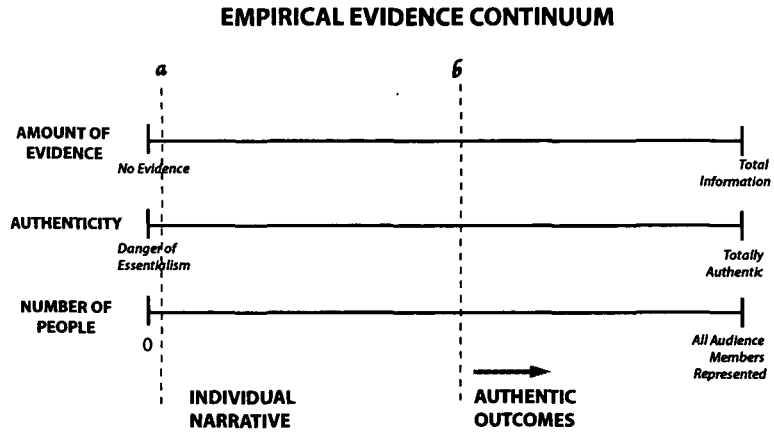

Figure B: Empirical Evidence Continuum

1. Authentic Outcomes Obtained from Empirical Studies

What distinguishes an empirical study with authentic outcomes from another empirical study with just plain facts? Essentially, there are three characteristics. First, the facts must concern more than one individual to be reflective of the audience.[60] Second, the facts must be authentic—meaning they accurately reflect the audience and are not caricatures or misrepresentations.[61] Third, the facts must be outcomes. I define outcomes as facts that are universally available from any audience regardless of normative outlook.[62] Facts that require a normative determination or might differ

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60. Unless the audience happens to be one person. *See, e.g.*, Robert C. Farrell, *The Equal Protection Class of One Claim:* Olech, Engquist, *and the Supreme Court's Misadventure*, 61 S.C. L. REV. 107 (2009).

61. *See, e.g.*, Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM 25, 30 (Amy Gutman ed., 1994). As illustrated in Figure B, authentic outcomes are not necessarily authoritative. Opposing sides often will have conflicting authentic outcomes about their respective audiences. As John Pfaff has observed:

> And so we find ourselves awash in seemingly contradictory claims. In criminology, for example, studies claim that imposing tougher sentences reduces, has no effect on, or possibly increases crime. And that is putting aside the death penalty literature, where again the punishment either saves lives or has no effect—or possibly even leads to a net loss of life. Felon disenfranchisement laws either influence elections or do not. Then there is abortion, which is either a critical or trivial factor in the crime drop of the 1990s. And the problem extends to unemployment and crime, gun-control laws, the role of race in the criminal justice system, and so on.

Pfaff, *supra* note 47, at 10-11 (collecting studies) (citations omitted). An authentic outcome merely has satisfied some threshold requirement of accuracy so that it can be used as evidence in the policy debate. *See supra* fig.B and *infra* note 62 and accompanying text.

62. *Cf.* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF

between audiences by definition cannot be outcomes. Addressing methodological conflict, this audience—and outcome—focus helps disciplines with different methodologies compare and critique each other's empirical studies in an adversarial manner. This public adversarial process should result in better empirical evidence.

For example, both Bowen's and Sander's studies contain outcomes. Although Bowen's survey of psychic injury might appear subjective, the fact that minority students felt psychic injury[63] (as opposed to whether such feelings truly were justified, which would not be an outcome) is an outcome that could apply equally to all students. Likewise, Sander's quantitative academic and job-related data are outcomes that could be obtained about all students.[64] These outcomes are not necessarily mutually exclusive. Because Bowen and Sander examined different aspects of the same audience, both studies together might provide a more complete picture that combines psychological self-image and pedagogical concerns with academic and job performance.

Furthermore, this audience and outcome focus may remedy what Pfaff terms the deductive "epistemological failure" of most empirical social science studies.[65] Pfaff argues that the empirical social sciences are built around Karl Popper's idea of falsification, that "the task of empiricists is to propose ever-more daring hypotheses, test them, and seek to falsify them."[66] This *deductive* attempt "to refute a null hypothesis"[67] is unhelpful for policy making, argues Pfaff, because "the most that can ever be said about a hypothesis is that it has not yet been refuted. Failure to refute provides no evidence of confirmation. . . . [T]hat an observation contradicts a hypothesis does not establish *why*, or perhaps even *whether*, the hypothesis is in fact incorrect."[68] In contrast, both Bowen and Sander sought to disprove a null hypothesis through *inductive* empirical counterexamples.[69] By ignoring the methodological conflict between different empirical studies,[70] allowing for the comparison and synthesis of those studies, and focusing on the subject of those studies—the audience—this approach may better provide the affirmative, inductive evidence required for good policy making.

THE OUTCOME MEASURES COMMITTEE 3 (2008) (contrasting "outcome measures" and "input measures"), *available at* http://www.abanet.org/legaled/committees/subcomm/OutcomeMeasuresFinalReport.pdf.

63. *See* Bowen, *supra* note 4, at 1223–25.

64. *See* Sander, *supra* note 7, at 478–81.

65. Pfaff, *supra* note 47, at 6.

66. *Id.* at 12.

67. *Id.* at 6.

68. *Id.* at 12–13 (emphasis in original).

69. *See supra* notes 6, 11 & 13 and accompanying text. Whereas Bowen sought to contradict the colorblind ideal's null hypothesis that banning affirmative action would improve the target audience's self-esteem, *see* notes 38–39 and accompanying text, Sander sought to contradict what he considered conventional wisdom's null hypothesis that affirmative action would result in the target audience possessing improved performance and job outcomes, *see* notes 40–41 and accompanying text.

70. Although the adversarial nature of this model will allow opposing sides to criticize the case-by-case methodology of their respective studies, this approach allows the model to remain agnostic to the overall question of which methodological approach is best.

2. Individual Narratives Only in Rebuttal to Such Authentic Outcomes

The reason why individual narratives are restricted to rebuttal is to avoid essentialism. Essentialism is where one voice, the "second voice," claims "to speak for all."[71] While an individual narrative might not be authentic or accurately represent the audience, an individual narrative can provide a counterexample to rebut authentic outcomes. Moreover, because empirical studies are often very expensive,[72] individual narratives allow even the most impoverished party a way to participate in the policy debate.

In recent history, I believe that anti–affirmative action activists like the Center for Individual Rights[73] have appropriated the transformative power of individual narratives from affirmative action supporters with their careful selection of sympathetic, diverse, white plaintiffs like Cheryl Hopwood and Barbara Grutter.[74] In his controversial opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,[75] Chief Justice Roberts appeared to acknowledge implicitly the power of such individual stories when, out of the thousands of potential student stories, he decided to tell Andy Meeks's sympathetic story in his statement of facts.[76] Because such individual

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71. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990). Essentialism assumes that one or a few members of a group represent the entire group. For example,

> [g]ender essentialism refers to the fixing of certain attributes to women. These attributes may be natural, biological, or psychological, or may refer to activities and procedures that are not necessarily dictated by biology. These essential attributes are considered to be shared by all women and hence also universal. "Essentialism thus refers to the existence of fixed characteristics, given attributes, and ahistorical functions that limit the possibilities of change and thus social reorganization."

Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 7 (2002) (citation omitted); *see also* Ian Ayres, *Is Discrimination Elusive?*, 55 STAN. L. REV. 2419, 2428 (2003) (book review) (identifying the importance of empirical evidence that cannot be as easily dismissed by the "general public and lawmakers" as individual narrative).

72. *See, e.g.*, Stephen N. Subrin, *Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism*, 35 W. ST. U. L. REV. 173, 189 (2007). Professor Pfaff, however, believes that relatively inexpensive statistical computer software programs have resulted in more low-quality empirical work. Pfaff, *A Plea for More Aggregation*, *supra* note 47, at 3–4.

73. Adrien Katherine Wing, *Race-Based Affirmative Action in American Legal Education*, 51 J. LEGAL EDUC. 443, 446 (2001) (identifying the Center for Individual Rights as an anti–affirmative action group).

74. Wendy Parker, *The Story of* Grutter v. Bollinger: *Affirmative Action Wins*, *in* EDUCATION LAW STORIES 83, 87–88 (Michael A. Olivas & Ronna Greff-Schneider eds., 2008).

75. 551 U.S. 701 (2007).

76. *Id.* at 713–14 ("Andy suffered from attention-deficit hyperactivity disorder and dyslexia, . . . and his mother and middle school teachers thought that the . . . program held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment."). Incidentally, the *Parents Involved* decision demonstrates that a majority of the Supreme Court may agree that "'[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals.'" *Id.* at 730 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

narratives can rebut authentic outcomes powerfully, stories like Andrew's are entitled to be heard not just by the side supposedly representing his interests but also by the opposing side.

C. Examine the Opposing Sides Evidence Civilly and Sincerely

Third, in the spirit of civility[77] and public reason,[78] each side should examine civilly and sincerely the opposing side's publicly available authentic outcomes or rebutting individual narratives about the benefits and burdens of the current policy upon the other side's audience. In so doing, they would follow the advice of perhaps the greatest lawyer in American literature, Atticus Finch: "You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it."[79] With divisive debates, perhaps the only way to attain an overlapping consensus[80] that transcends intractable ideology or cynical power struggles is to allow your adversary a sincere and respectful opportunity to be heard.[81]

D. Consider How the Current Policy Actually Affects Every Side's Audience

Fourth, each side should consider whether the current policy actually affects every side's audience in the manner envisioned by every side. This step helps insure there is an efficient and appropriate "fit" between lofty legal principles and the implementing ground-level procedures. Educational policies like affirmative action are often "not self-executing" and "frequently require public managers to design and implement ordered reforms."[82] For example, even the most ardent affirmative action supporter would probably agree with affirmative action adversaries that implementing procedures which rely solely upon unsophisticated racial quotas are no longer preferable.[83] This instrumental perspective of law recognizes that in the final analysis real law is how

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77. *See supra* note 23.

78. *See supra* note 24.

79. HARPER LEE, TO KILL A MOCKINGBIRD 33 (40th Anniversary ed. 1999).

80. *See supra* note 20.

81. Kim Forde-Mazrui has advocated for an inclusive and candid study of race and the law with "a committed willingness to invite a broad range of perspectives and experiences into the discussion, including from race exceptionalists or people reluctant to risk expressing politically incorrect views." He proposes discussions that "take adverse views seriously and acknowledge legitimate points by intellectual or political adversaries, even when those points cut against one's own position." Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL. 1, 26–27 (2005).

Such civility and respect for opposing viewpoints is essential for improving evidence-based policy making in a pluralistic democracy. As Chief Justice Warren Burger noted, "There is nothing incompatible between zealous and courageous advocancy [sic] and conformity to standards of ethics and professional behavior." Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 381 (1980).

82. Terry W. Hartle, *The Law, the Courts, Education and Public Administration*, 41 PUB. ADMIN. REV. 595, 595 (1981).

83. Of course, such racial quotas are also unconstitutional. Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

everyday people act.[84] Consequently, for a policy to be truly meaningful and people-focused, it must be created and implemented in such a way that the target audience understands the policy.

E. Strive for the Target Audience to Understand the Policy

Finally, policy makers should adjust the current policy until it can be ascertained through authentic outcomes or rebutting individual narratives that the policy benefits or burdens the target audience in such a way that the target audience both knows and understands the benefits or burdens. This last requirement is based upon my own intuitive opposition to legal paternalism. If the target audience indeed is appropriate, then for the policy to have its intended effect *a priori*, the target audience must know and understand the intended effect. While such "recognition of cultural particularity" is "compatible with a form of universalism that counts the culture and cultural context" as a basic interest, this consideration is more difficult when the content of that cultural particularity is biased or discriminatory.[85] This requirement should result in greater popular buy-in and, consequently, more effective results. Ultimately, the best rationale for evidence-based policy making is the belief that it will result in better, more effective governance.

CONCLUSION

In future research, I hope to develop this working model further. In addition to the difficult question of biased or discriminatory audiences above, I recognize that I still need to address some fundamental questions, competing concerns, and underlying access to information.

First, there is the broader question whether this approach is too idealistic. Because, in a pluralistic democracy, divisive policy debates ultimately will be determined by the political process, the most this working model can ask for is that opposing sides civilly and sincerely examine the publicly available evidence about their respective audiences. Why would the more privileged and powerful agree to encourage greater evidence-based policy making? How would the public hold a bad-faith party accountable for lack of public transparency in its audience or evidence?

While these questions are well-taken, I submit that the current approach is worthwhile precisely because it is idealistic. In a pluralistic democracy, we always will

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84. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3 (1990).

85. Amy Gutman, *Introduction*, *in* MULTICULTURALISM, *supra* note 72, at 3, 5. For example, a hypothetical affirmative action policy that provided a specific underrepresented Jawa-American target audience greater benefits than a specific underrepresented Klingon-American incidental audience might publicly justify itself by reinforcing a cultural stereotype shared among both audiences that Jawa-Americans are not as hard working as Klingon-Americans. While both audiences may know and understand the benefits and burdens of the policy, the public explanation nevertheless reinforces inaccurate racial stereotypes.

Rawls recognized there are some extremist worldviews incompatible with a constitutional democracy. *See* RAWLS, *supra* note 2, at 39. Determining how to distinguish between reasonable and unreasonable worldviews is an important question, *see, e.g.*, Mouffe, *supra* note 30, at 223–26, but I leave it for another time.

have cynical power struggles over vote-counting in elections, on the courts, or in the legislature. Not only should an audience-focused approach result in more effective policies but also such principles still can guide and inform debate even if they are far from reality. For example, the evidence-based, policy making ideal can be likened to the ideal of honest, fair, and diligent governance. Although most Americans might believe that "the honesty and ethical standards of 'members of Congress' are low or very low,"[86] the governance ideal can—and, I would argue, should—still guide and inform debate.

Second, this Commentary addressed only the Bowen and Sander situation where both sides agreed upon the target audience. Although Bowen and Sander agreed upon the same target audience and presented authentic outcomes obtained from their empirical studies about the benefits and burdens of affirmative action upon this audience,[87] they fundamentally disagree over whether or not affirmative action is helping or hurting their shared audience.[88] I need to address how the working model would function when there is little or no overlap among audiences. How does a pluralistic democracy balance a target audience's benefit with an incidental audience's burden, particularly in the zero-sum context of higher education admissions? The working model examines each policy in isolation. What about the interaction of multiple audiences for multiple policies?[89]

Finally, I believe Sander has raised a data access question worthy of inquiry. In 2006 testimony in front of the United States Commission on Civil Rights, Sander accused law schools of being "captive to a dominant ideology that has become deliberately entrenched," of "go[ing] to great lengths to disguise" their true affirmative action policies, and of refusing to disclose "accurate information about law school policies and the likely impact of these policies" upon minority students.[90] If Sander is

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86. Lydia Saad, *Honesty and Ethics Poll Finds Congress' Image Tarnished*, GALLUP POLL, Dec. 9, 2009, *available at* http://www.gallup.com/poll/124625/honesty-ethics-poll-finds-congress-image-tarnished.aspx.

87. *See supra* notes 15, 37–42 and accompanying text.

88. *See supra* note 14 and accompanying text.

89. Perhaps the interaction of multiple audiences for multiple policies can provide the inductive empirical knowledge and systematic reviews that Pfaff argues are most helpful for what he calls "[e]vidence based policy." Pfaff, *supra* note 47, at 25–26. Pfaff's crossword puzzle analogy for inductive empirical knowledge also might apply to the aggregation of policy audiences:

> One answer, sitting alone in the grid, is tentative at best. But as other words successfully cut across it, and as still-other words successfully intersect these crossing words, our confidence in both the original answer and the overall solution grows. So too with empirical work. One study provides little insight on its own, but as we derive other results that align with the first study our confidence in both that study and those that warrant it (and those that in turn warrant the warranting studies) grows, and thus our confidence in our overall understanding of a particular issue. And conversely with disagreement: like answers in the puzzle that do not line up, contradictions provide warning that some part of the overall story we are telling may not be accurate.

Id. at 15 (citing SUSAN HAACK, DEFENDING SCIENCE–WITHIN REASON: BETWEEN SCIENTISM AND CYNICISM (2007)).

90. U.S. COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 34

correct that schools are capable of making relevant evidence public but decline to do so, perhaps out of a fear of litigation or alienating public opinion, then this policy-making decision merits further investigation. Consistent with public reason and transparency, should this information be made public or are there intervening concerns that necessitate an exception?[91] Regardless of your opinion of Sander's efforts, it is difficult to quibble with the general plea for mutual respect issued by one of Sander's supporters, "'We see our job as getting the data and giving it to both sides' of the debate over the value and efficacy of affirmative action, 'Politics should not block otherwise valid, even if controversial, academic research.'"[92]

Public policy based upon mutual respect and focused upon people may provide the only way to build consensus in divisive debates over difficult issues like affirmative action. Deirdre Bowen's recent study provides necessary and provocative evidence to move this debate forward.

(2007). Sander specifically recommended that Congress pass the Racial and Ethnic Preference Disclosure Act sponsored by Representative Steve King (R-Iowa), *id.* at 8–9, a bill that Sander believes would require higher education institutions to "document and explain their procedures in areas in which much independent evidence suggests an inappropriate consideration of racial factors." *Id.* at 34; *see also* Sander, *supra* note 7, at 385 (citations omitted). Along with the California First Amendment Coalition, Sander has sued the State Bar of California in an effort to obtain historical bar exam data. Mike McKee, *Affirmative Action Study Hits New Snag*, RECORDER (San Francisco), Mar. 18, 2010, at 1 (describing pending *Sander v. State Bar of California* lawsuit).

91. The *Los Angeles Times* has observed, "Regardless of what we think of Sander's hypothesis, he should be given the data he seeks. Defenders of affirmative action should not fear a serious examination of how well it's working." Editorial, *Don't Bar Data: A Professor Studying Affirmative Action Should Have Access to Law School Performance Statistics*, L.A. TIMES, Sept. 17, 2008, at 22. Others fear that the data might lead to misleading conclusions. For example, the executive director of the Minority Corporate Counsel Association responded, "'Studying statistics tells you what, but not how or why.' If the purpose of Sander's research 'is to take people and categorize them and point fingers and say affirmative action works for this one but not that one, I don't see any good purpose served.'" Williams, *supra* note 42.

92. Williams, *supra* note 42.