

COMMENTARY

POST-ADMISSIONS EDUCATIONAL PROGRAMMING IN A POST-GRUTTER WORLD: A RESPONSE TO PROFESSOR BROWN

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I. INTRODUCTION

When asked to provide commentary on another scholar’s reflections on *Grutter*¹ and *Gratz*² and affirmative action, I am

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1. *Grutter v. Bollinger*, 539 U.S. 306, 316–17, 321, 325 (2003) (upholding the University of Michigan Law School’s (“Michigan Law School’s”) policy that allowed race to be considered a “plus” factor for admissions against an equal protection challenge).

2. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (finding the University of

usually struck by two fears. First, because so much ink has been spilled on this topic, I worry the main presenter will have nothing new and interesting to say. Today this worry has been put to rest; I am so pleased that Professor Dorothy Brown offers a number of novel and intriguing observations and, in the end, advances a novel and intriguing proposal about the role Critical Race Theory ought to play in our nation's law school classrooms. Second, for the same reason, I worry that I will have nothing new and interesting to say. Whether that is the case today I will leave in your capable hands to judge.

Rather than rehash the debate over diversity in admissions, Professor Brown usefully addresses here what I will call "second-generation issues." Once a law school attains a modicum of racial diversity, through whatever "first-generation" race-based admissions process it deems necessary and appropriate, what then can, or should, or indeed must it do in terms of "second-generation" academic programming to ensure that the full value of diversity in the classroom is being realized?

I agree with Professor Brown that this second-generation question is critically important. There is a meaningful distinction between simply creating a diverse community and actually getting the community to function so as to achieve the goals of diversity. I agree that law schools should provide an environment in which students learn how to approach legal problems, as well as life itself, from multiple perspectives or viewpoints.

Indeed in some ways, as I shall explain, the questions posed by a second-generation focus are perhaps more vexing than the first-generation admissions decision, in part because they require even greater specificity of the goals of a diverse educational environment. I shall use these remarks to begin thinking aloud about these issues, in the context of responding to Professor Brown's interesting propositions and proposals. In my comments today I will focus primarily on her most ambitious and novel proposal: that law schools with race-based admissions policies are obligated to infuse the curriculum expressly with discourse about racial issues.³ In particular, Professor Brown urges law schools to use the insights of Critical Race Theory as a lens through which to teach courses ranging from Admiralty to Wills.⁴

Michigan's College of Literature, Science, and the Arts' point-based admissions policy unconstitutional based on a failure to create narrowly-tailored means).

3. Dorothy A. Brown, Address, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 4 (2006) ("Law schools at the very least must ensure that race based discussions are incorporated into their classrooms.").

4. *Id.* at 32-35.

In my view, this proposal presents some constitutional risks to affirmative action programs, and I wonder whether it is a good idea.

II. THE NEED TO ADDRESS SECOND-GENERATION ISSUES

Professor Brown claims that the constitutionality of race-based admissions policies might well turn on the successful adoption of post-admission programs designed to turn what she calls “structural diversity,” by which she means integrated classrooms, into “classroom” and “informational interactional diversity,” by which she means classrooms in which stereotyped thinking is challenged and students are exposed to and develop understandings about racial and ethnic issues.⁵ She asks whether law schools that use race in admissions but do not require curricula that specifically promote “cross-racial understanding” are “walking targets.”⁶ And she quotes from Justice Scalia’s dissent in *Grutter* suggesting that law schools with race-based admissions policies can claim to be advancing a compelling state interest only if they “walk the walk” with integrative post-admissions programming: “[T]empting targets” for future legal challenges “will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”⁷

I personally believe it is silly to conclude from the fact that racial segregation persists in campus cafeterias and residence halls that universities aren’t all that serious about breaking down racial divisions once students are admitted. It is entirely natural for all students to seek some spaces where they can congregate with fellow travelers with whom they feel some social affinity. Athletes often choose to eat and live and hang out with

5. This argument was more clearly made in the version of the paper Professor Brown presented at the Frankel Lecture itself, in response to which this Commentary was crafted. In this updated version of the paper, she presents the question rhetorically: “If all a law school does is admit a racially diverse class, without ensuring that any cross-racial dialogue is taking place inside the classroom, will that be sufficient to prevail against the next [constitutional] challenge?” *Id.* at 4. Professor Brown then observes, “It is here that Dean Caminker and I part company,” evidencing her continuing belief that “[be]ing] concerned about what happens to the student body once they matriculate . . . is . . . a legal requirement under *Grutter*.” *Id.* at 4 n.14.

6. *Id.* at 29.

7. *Id.* at 6 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part)).

other athletes. Thespians and artists do the same. And marching band geeks do too—I know, as I was one of them myself, though admittedly I was a drummer and I mostly hung out with other drummers because we thought we were cooler than the rest. Which, I know, isn't saying much. But the point is that members of many groups, not just minorities, choose to hang out together—even though this may not be as visible to Justice Scalia and others walking across college campuses because unlike race, one cannot easily “see” groupings of athletes or actors sitting together; their common trait is not visible to the casual observer.

And the fact that minorities or athletes or southerners or preppies often hang out together in social spaces does not undermine the fact that, in the classroom, as well as many extracurricular settings, members of these groups do inevitably interact with others of diverse backgrounds and experiences. One doesn't have to be in a diverse group every minute of the day in order to gain from it.

But more importantly, neither the majority nor concurring opinions ever suggested in *Grutter* that any post-admission programming efforts were a precondition for the validity of admissions-related diversity efforts.⁸ For example, the Court did not inquire, or suggest the district court should have inquired, into the nature and success of classroom conversations, the content of course syllabi, or any other aspects of the educational curriculum.⁹ Rather, as I read *Grutter*, the Court held that the goal of “structural diversity,” again meaning simply the modest racial integration of the student body, is *itself* a sufficiently essential component of a high-quality educational environment so as to constitute a compelling state interest.¹⁰

And this determination is not surprising, because a great deal of social science and anecdotal data supports the notion that putting a diverse group of people together in a collaborative environment of sustained interaction will tend to break down stereotypes and generate feelings of tolerance and respect.¹¹ I

8. *Grutter*, 539 U.S. at 328–29 (emphasizing Michigan Law School's right to select students, deferring to the institution's judgment that diversity itself will accrue benefits, and making no reference to any post-admission requirements).

9. *Id.* at 317–21 (summarizing the district court's holding as invalidating Michigan Law School's admissions policy based on admissions criteria, and making no reference to post-admissions criteria).

10. *Id.* at 329, 333 (finding Michigan Law School's interest in obtaining a diverse student body compelling and agreeing that “a ‘critical mass’ of underrepresented minorities is necessary to further [this] compelling interest”).

11. *See, e.g., id.* at 330.

have seen this myself over the past fifteen years of teaching in diverse classrooms, both at UCLA and Michigan law schools, and I have heard many other professors express the same experiences.

Moreover, I think the majority opinion accepted diversity in admissions as a permissible goal in part because society has come to accept the same goal in many other institutions. The Court was clearly moved by the argument of the military and Fortune 500 companies that diversity in membership served compelling interests.¹² And surely the Court is aware that many other actors tout the value of diversity—including our current President when he selects Supreme Court Justices and cabinet members. But in none of these other contexts has anyone seriously suggested that race-conscious hiring decisions are unconstitutional absent good-faith second-generation efforts to make sure that racial issues are then discussed in the workplace or considered in judicial or cabinet-level decisions. Our legal and social culture has come to accept the legitimacy and importance of diversity in many different contexts without demanding further efforts to maximize its effects.

For these reasons and more, I disagree with Professor Brown's suggestion that teaching Critical Race Theory throughout the law school curriculum, or adopting any other post-admissions curricular reform, is constitutionally *required* for any university with an affirmative action admissions program. Diversification of the student body is an important enough goal in and of itself, given the inevitable ways in which a critical mass of minority students will lead all students to confront and embrace alternative perspectives and viewpoints.

But this legal conclusion does not make Professor Brown's focus on second-generation issues of educational equality irrelevant or unimportant. To the contrary, I believe these issues are quite critical to our educational missions—even though they present issues of public policy or political morality rather than legal compulsion under the compelling state interest standard. In other words, while as a matter of equal protection doctrine diversity in admissions *is itself* "walking the walk," we do our

12. *Id.* at 330–31 ("These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people What is more, high-ranking retired officers . . . of the United States military assert that . . . a 'highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security.'" (citations omitted) (quoting Brief for Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241))).

students a disservice unless we also consider whether specific curricular or extracurricular programs can constitutionally and productively build on the benefits of our admissions program.

III. RATIONALES BEHIND AFFIRMATIVE ACTION

Several different rationales have been advanced for affirmative action in admissions. The three primary rationales are remedial, integrative, and diversity. The remedial rationale is backward-looking, arguing that affirmative action is necessary to redress prior discrimination against minorities in admission decisions.¹³ The integrative rationale is forward-looking, arguing that affirmative action is necessary to break down societal barriers and allow for integrated leadership in various professional and social walks of life in future society.¹⁴ The diversity rationale is focused on the present, arguing that racial diversity in the classroom enhances the quality of education provided.¹⁵

For the most part, these rationales have been advanced in public policy debates and in litigation as alternatives that justify roughly the same policy: taking race into account in admissions decisions as necessary to enroll more than a token number of underrepresented minorities.¹⁶ When it comes to program specifics, however, each of the three rationales might plausibly be thought to justify a different model, or range of models, of admissions policies. *Grutter* reaffirms that an affirmative action program must be narrowly tailored to achieve the interest that is defined as compelling.¹⁷ A number of important program variables, such as how many individuals, from which minority

13. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–09 (1978) (Powell, J., plurality opinion) (finding that only in response to specific cases of disparate treatment does “[t]he State certainly [have] a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of [such] identified discrimination”).

14. See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1197 (2002) (defining the integrative rationale “as a forward-looking remedy for segregation” that “dismantl[es] *current* barriers” by “proactively us[ing] race-conscious means to undo the continuing causes of unjust race-based disadvantage”).

15. See *Grutter*, 539 U.S. at 333 (relying on Michigan Law School’s determination that diversity is a necessary component of a quality education).

16. See, e.g., Anderson, *supra* note 14, at 1197–99 (presenting competing justifications for affirmative action—compensatory and integrative—as different ways to rationalize affirmative action).

17. *Grutter*, 539 U.S. at 333 (“Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still ‘constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.’” (alterations in original) (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 (1996))).

groups, and how long ought they benefit from special consideration, must necessarily be determined by reference to the compelling goal supposedly being served. So far, the affirmative action debate has focused primarily on whether *any* special consideration is appropriate. And because ever since *Bakke*¹⁸ the Court has seemed open only to the diversity rationale in the context of higher education, little judicial attention has been paid to how each of these three rationales might translate differently into specific admissions programs.

Grutter might be understood as opening the door to greater consideration of the integrative rationale than had previously been assumed. After a long discussion devoted to the proposition that diversity in the classroom enhances the learning experience for budding lawyers in several respects,¹⁹ Justice O'Connor spends several paragraphs discussing the ways in which an integrated student body at an elite institution, such as the University of Michigan Law School ("Michigan Law School"), can lead to important forms of societal integration down the road.²⁰ First, she observes that law schools (especially elite ones) have traditionally produced a meaningful number of leaders of the legal profession or government, including judges and elected policymakers.²¹ In the undergraduate context, elite colleges and universities (including the service academies) provide training for important leadership positions in the military.²² Racial diversity in elite schools will enhance, over time, racial diversity in these and other leadership positions. Second, in a more general sense, access to higher education puts students in a better position to engage more fully in civic society after graduation.²³ Finally, affirmative action can enhance the legitimacy of leadership whatever its ultimate composition, by

18. *Bakke*, 438 U.S. at 307–10 (qualifying affirmative action as a remedial measure).

19. *See Grutter*, 539 U.S. at 328–30 (accepting that "diversity . . . yield[s] educational benefits" and finding that "[t]hese benefits are substantial").

20. *See id.* at 330 (finding that "[t]he Law School's claim of a compelling interest is further bolstered by . . . evidence . . . that student body diversity . . . 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'" (quoting Brief for Am. Educ. Research Ass'n et al. as Amici Curiae Supporting Respondents at 3, *Grutter*, 539 U.S. 306 (No. 02-241))).

21. *Id.* at 332.

22. *See id.* at 331 (emphasizing that colleges and universities with ROTC programs are one of "[t]he primary sources for the Nation's officer corps").

23. *See id.* at 331–32 (recognizing that "education [plays] . . . a fundamental role in maintaining the fabric of society" because it can facilitate "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation").

ensuring that the “path to leadership” through higher education remains “visibly open.”²⁴

Without a doubt, though, the bulk of *Grutter’s* analysis focuses on the present-time educational benefits secured through a racially diverse student body.²⁵ And the remedial rationale finds no expression at all in Justice O’Connor’s opinion for the Court. At the moment, then, the diversity rationale is the dominant justification for race-conscious admissions policies within the realm of judicial doctrine.

IV. AFFIRMATIVE ACTION RATIONALES AND SECOND-GENERATION ARGUMENTS

For this reason, it seems to me that any serious conversation about second-generation issues, again meaning curricular or extracurricular programming to enhance the benefits of diversity in law schools, must start with the assumption that improving the educational experience is the primary compelling interest driving the analysis, perhaps as supplemented by the integration goal.

Therefore, I will comment only briefly on a couple of the proposals Professor Brown advances. Although these proposals might be sensible as a matter of policy, they seem more directly tailored to goals other than enhancing the educational benefits of diversity. I’ll then spend more time reflecting on Professor Brown’s novel proposal to promote these educational benefits of diversity by infusing the law school curriculum with insights from Critical Race Theory.

A. *Full Participation in Law School*

First, Professor Brown proposes that, beyond being admitted in appropriate numbers to law school, students of color should “be involved in every part of the law school’s activities” and “must become student bar presidents and editors in chief of law reviews.”²⁶ The idea here is that “law schools are not performing right”²⁷ unless minority students are fairly represented in

24. *Id.* at 332.

25. *See id.* at 328–33 (finding sufficient evidence that student body diversity enhances the learning experience among all students and deferring to “[t]he Law School’s educational judgment that such diversity is essential to its educational mission”).

26. Brown, *supra* note 3, at 30.

27. *Id.* at 23.

leadership positions within the student body; “[h]aving students of color present but without a voice will not solve the problem.”²⁸

It’s not clear to me just how law schools themselves can or should ensure that minority students have greater representation among the student body leadership positions. If Professor Brown has in mind some race-conscious selection criteria or race-conscious boost to minority candidates for such positions, then the question arises whether the program is narrowly tailored to a compelling interest. I can easily understand how the goal of promoting minority leadership within law school communities and activities flows from the integrative rationale for diversity. If the point of integration is to produce minority lawyers who will assume important leadership roles in society, then perhaps it makes sense to give minority students experience at handling leadership roles during law school, essentially as a training ground for the professional life to come. This also provides some answer to Justice Scalia’s challenge that minority-only political or social groups on campus reflect a betrayal of diversity principles.²⁹ Rather, minority-only groups provide opportunities and space for minority students to embrace leadership roles, whereas many of these students might not find such roles in integrated student groupings. More tenuously, I suppose one could argue that placing more students of color in leadership positions furthers the remedial rationale for race-based admissions, on the assumption that many of these students would have been better situated to compete for such leadership positions but for prior illegal racial discrimination.³⁰

But it isn’t clear to me how having more minority student leaders in extracurricular or social activities flows from *Grutter*’s primary rationale of promoting the educational benefits of diversity. Student government, law review, and similar leadership roles function outside of the classroom. Of course, students talk about the law and legal issues all the time in these groups, so diversity within the groups will positively influence the educational value of the conversation. But if minority students were not involved in and spending time with these groups, they’d likely be spending time in other groups. So it is

28. *Id.* at 30.

29. *See supra* text accompanying note 7.

30. Perhaps this is what Professor Brown has in mind when she suggests that “[l]aw schools will not have lived up to *the debt they owe their students of color* who are providing structural diversity until they are as likely to be a member of law review or order of the coil as they are to be the president of the student bar association.” Brown, *supra* note 3, at 22 (emphasis added). The only “debt” I can imagine being owed as a moral matter is an obligation to compensate for prior illegal discrimination.

unclear if there is a net gain to be had, rather than just a reallocation of conversational benefits, from diversifying leadership groups as opposed to other groups. Specifically with reference to law reviews, Professor Brown endorses Professor Paul Finkelman's view that increasing the number of black students on law review will increase the number of student notes written about issues concerning racial inequality.³¹ Even assuming this is true, it's not clear that increasing such student notes will even indirectly improve "cross-racial understanding" in the classroom or achieve any of the other pedagogic benefits that motivate the diversity rationale for race-conscious admissions.

B. Improving Minority Academic Performance

Professor Brown also endorses several suggestions for improving the "academic performance of [law] students of color."³² She, following Rick Sander,³³ does an important service by focusing our attention on the underappreciated reality that minority students tend to cluster in the bottom half of the class.³⁴ Without question this is a problem deserving of serious study and a meaningful response—whether through a race-based educational program such as special tutoring for minority students, through race-based hiring to diversify the faculty, as Professor Brown proposes,³⁵ or through some other (plausibly race-neutral) means.

How these efforts to enhance minority performance flow from a commitment to race-conscious admissions decisions, however, is not so clear. I suppose one could plausibly ground this initiative in the integration rationale, based on the premise that if more minority students perform well academically during law school, then more minority graduates are likely to be offered either initial or mid-career employment opportunities in leadership positions. And I suppose one could plausibly ground this initiative in the remedial rationale, to the extent that the

31. *Id.* at 23 & n.99 (citing Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 STAN. L. REV. 161, 166 (1994)).

32. *See id.* at 4, 27 (arguing that "incorporating race-based discussions into the classroom . . . [would create an] environment . . . more likely to improve the academic performance of students of color" and suggesting that better academic performance can be achieved by "increased gender and racial diversity on the faculty").

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

34. *See id.* at 430 (noting that "across most of the spectrum of legal education . . . blacks are heavily concentrated at the bottom of the grade distribution").

35. *See* Brown, *supra* note 3, at 27 (concluding that increased diversity on a law school's faculty results in "better academic performance by *all* students").

particular program could be viewed as compensating for prior years of discriminatory deprivation of educational opportunities (this might work for special tutoring on writing skills, say, but not easily for a commitment to diversity in new faculty hiring).

Finally, I suppose one could articulate a conceptual connection between such initiatives and enhancing the educational benefits of diversity; but, the connection strikes me as very loose. If individual minority students perform better in law school, they might develop greater self-confidence and then be more active participants during class discussions or within informal learning groups—and the more frequently minority students speak, the more the values of interactive diversity will be realized. This is, of course, an empirical question, and it is not my experience that better performance on law school exams generally leads to more and better classroom participation. My sense is that the causal connection between improving individual minority students' performance and enhancing the educational benefits of diversity would seem too weak to satisfy the demands of strict scrutiny.

In my view, the reason law schools should work mightily to eradicate this pattern of comparative underachievement by minority students is not because doing so would flow naturally from the rationales leading a school to embrace an affirmative action admissions program in the first place. Rather, it is because providing low-performing students opportunities to improve their benefit from the educational experience is clearly the right thing to do for its *own* sake. Where we see students struggling—students of any racial or other background—we should do our best to ensure they have opportunities to get the most they can out of law school, and are as prepared as possible for success in the legal profession.

C. *Introducing Critical Race Theory into Law Schools*

So let's now turn to what I consider to be Professor Brown's most ambitious and novel proposal, that a commitment to the diversity rationale entails an obligation to infuse the substantive curriculum with discourse about racial issues.³⁶ In particular, Professor Brown urges law schools to use the insight of Critical Race Theory as a lens through which to teach substantive law school courses throughout the entire first-year and upper division curriculum.³⁷

36. *See id.*

37. *Id.*

I agree with Professor Brown's claim that a good teacher can find racial issues, or issues that can be seen as having a different meaning for or impact on people of different races, in virtually every law school class.³⁸ And I understand and appreciate the argument that, given the deep structure and impact of race relations on our laws and institutions and culture throughout this nation's history, it is immensely valuable to have students come to grips with this history and its current manifestations as they prepare to go forth into a profession where these issues still matter greatly. But I am less sure how or how much the adoption of an explicit agenda for teaching such issues throughout the curriculum would enhance the educational benefits of diversity per se.

Professor Brown says that by "incorporat[ing] a racial perspective of the law into all law school classes[,] . . . law schools will become more welcoming, thereby encouraging all of our students to excel academically."³⁹ But it isn't intuitively obvious to me how a more welcoming environment encourages "all" students to excel academically. Professor Brown elsewhere suggests that students who fail to take classes dealing with racial issues "are missing the opportunity to learn how to think critically."⁴⁰ Perhaps missing "an" opportunity, but "the" opportunity? There are many, many places in the substantive curriculum where students are encouraged to think critically, and it isn't clear to me what is so special about racial issues in this regard. I'd like to hear Professor Brown's fuller explanation of the mechanism by which the teaching of racial issues *uniquely* improves the educational environment.

But my primary qualm about Professor Brown's proposal is a different one. In *Grutter*, the Court makes clear that race is a permissible factor in admissions only if other "diversity" factors also figure prominently into admissions decisions.⁴¹ The Court clearly wanted to know that racial considerations do not dominate the decisionmaking process and that non-minority candidates can also merit admission based on the ways they diversify the class by bringing special talents, backgrounds, or experiences to the mix.⁴² Michigan Law School did more than

38. *Id.* at 31–34.

39. *Id.* at 27.

40. *Id.* at 32.

41. *See Grutter v. Bollinger*, 539 U.S. 306, 336–37 (2003) (deeming constitutionally paramount Michigan Law School's "engage[ment] in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment").

42. *Id.* at 338 (concluding that Michigan Law School did "not . . . limit in any way

proclaim its commitment to a broad range of diversity factors; it amassed data demonstrating that this is how its admissions policy actually works on the ground.⁴³

Why would this matter so much? Because, I believe, the Court would have viewed an admissions program that privileged only or mostly race as a sham, as a compensatory wolf dressed in diversity sheep's clothing. Indeed, some critics of diversity admissions programs continue to claim they are disguised efforts to "pursu[e] racial representation for its own sake."⁴⁴

I vehemently disagree with this characterization, and I have a good vantage point from where I sit.⁴⁵ It is true that the Michigan Law School policy does not self-consciously purport to enroll a "critical mass" of students with many of the other diversity characteristics that we hold dear.⁴⁶ But in some cases our weighting of the factor easily generates a critical mass such that we need not focus on the numbers in the same way. For example, even without identifying a critical mass as an express goal, between fifteen and twenty percent of our entering students have at least one of the following characteristics: they have already earned an advanced degree in some nonlaw field; they have had real-world experience in another career path; or they have at least one parent whose education ended short of college (one measure of socioeconomic diversity). Plenty of students naturally represent each of various ideological perspectives and regional experiences. And in some cases the concept of critical mass is inapt, because a threshold presence isn't necessary to overcome cultural forces counseling against participation (for example, the risk of being stereotyped as the "black" voice in the class). Focusing more closely on the number of minority admittees than other diversity admittees is therefore consistent with a meaningful effort to enhance the diversity of the student body along numerous dimensions. The Michigan Law School

the broad range of qualities and experiences that may be considered valuable contributions to student body diversity").

43. To this day I believe that the most important data in the record from Justice O'Connor's perspective were statistics showing how many nonminority applicants possessing special diversity factors had "leapfrogged" over nonminority and even minority applicants with more impressive traditional academic credentials (GPAs and LSAT scores), proving that diversity factors other than race had a significant impact on admission prospects. *Id.*

44. Larry Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3, 5 (2004).

45. For a detailed description of Michigan Law School's admissions policy in operation, see generally Sarah C. Zearfoss, *Admissions of a Director*, 30 HASTINGS CONST. L.Q. 429 (2003).

46. See Alexander & Schwarzschild, *supra* note 44, at 4.

policy and practice makes clear that race can, indeed, constitute but one of many diversity factors influencing admissions decisions, and *Grutter* suggests that this is necessary to sustain the constitutionality of a race-based admissions program.⁴⁷

If this is so, then it seems to me the same concern would apply to race-based efforts to enhance educational diversity as a second-generation issue. Now, Professor Brown's proposal is quite interesting, among other reasons, precisely because it is *not*, I believe, a race-based program of the sort that would trigger strict scrutiny under the *Grutter* framework. It represents a curricular decision that would apply to classes regardless of the race of any faculty member or student, and it would be designed to improve the educational experience of all students, not just minority students. So I do not think the proposal would be subject to serious constitutional challenge as a race-based measure triggering strict scrutiny.

Professor Brown teasingly suggests the opposite, that perhaps the teaching of Critical Race Theory is constitutionally *required* to convince a court that a school with a race-conscious admissions program is "walking the walk," and not just "talking the talk," of diversity. As I said earlier, I think it is difficult to read *Grutter's* approval of first-generation affirmative action as constitutionally requiring commitment to this or any other second-generation initiative.⁴⁸ To begin with, Michigan Law School's admissions program passed constitutional muster despite the absence of this or any similar curricular reform. And if a curricular program focusing directly on racial issues were viewed as essential to "walking the walk" with respect to this aspect of a diversity program, then presumably the *Grutter* Court would insist that schools also adopt a curricular program focusing on the other aspects of diversity that the Court deemed important to ensure that the commitment to diversity was real and not a cover for racial representation, such as infusing the curriculum with discussions of the roles that socioeconomic status, disabilities, interdisciplinary training, globalization, and other diversity factors have played and still do play in the development of the law and legal institutions.⁴⁹

Because the teaching of Critical Race Theory is, in my view, neither constitutionally prohibited nor constitutionally

47. *Grutter*, 539 U.S. at 336–38.

48. *See supra* Part II (doubting that post-admission diversity initiatives are required for a law school's admission program to pass constitutional review).

49. *See Grutter*, 536 U.S. at 336–38 (emphasizing the importance of nonracial diversity factors in the application process).

compelled, the provocative question that Professor Brown puts before us is whether teaching Critical Race Theory throughout the curriculum would be a good idea, one that is consistent with and furthers the laudable objectives of a race-based admissions program designed to diversify the student body. As to this question, I have some lingering concerns.

On one hand, I agree with Professor Brown that this curricular reform would be a great way to ensure that all law students have some exposure to legal issues involving race or that affect people of different races differently. Race has played such a central role, almost always an unfortunate one, in the development of our law and legal institutions that it seems ridiculous to claim that law schools can fully educate a budding lawyer, particularly one likely to confront an increasingly diverse array of colleagues and clients, without significant exploration of these issues.

But on the other hand, the very boldness and visibility of this initiative raises questions. First, employing more subtle ways of introducing racial issues into class discussions, perhaps providing the same examples but without the label and theoretical superstructure, might actually do a *better* job of encouraging class participation and thus generating “cross-racial understanding.”⁵⁰ Professor Brown explains that classes taught from a Critical Race Theory perspective will make law schools more welcoming.⁵¹ Is this really clear, from a psychological or sociological perspective? One can of course imagine that more minority students will participate in class discussion where issues concerning race are highlighted. But I can just as easily imagine a seemingly forced discussion of race issues in some classes making some (including some minority) students less likely to participate. That’s because some minority students might have a greater fear of being stereotyped when they speak during a discussion ostensibly about Critical Race Theory than during a discussion that just happens to use examples where race is a factor, because the salience of race in the content of the conversation will be further heightened. I can also imagine that non-minority students will feel less comfortable expressing controversial ideas when the conversation is structured around Critical Race Theory than otherwise; the self-conscious relevance

50. See Brown, *supra* note 3, at 28–29 (criticizing current efforts with the Critical Race Theory superstructure for not generating enthusiastic participation from law students).

51. *Id.* at 27.

of race might make the invisible force of the “p.c. police” all the stronger.

Indeed, when I teach Introduction to Constitutional Law, the class and I typically generate far more rich, nuanced, and participatory conversations about the racial implications of, say, abortion rights or Section 5 powers than about affirmative action directly. I suspect this is because students of all races sense that discussing race head-on puts them at risk of being stereotyped in various ways or being perceived as insensitive or reactionary. In my own experience, at least, I have found that introducing relevant racial issues into discussions in a seamless, natural way frequently stimulates more vibrant and open conversations about difficult topics than does introducing the topic with great public fanfare. Perhaps much would depend on the law school professor’s skill at steering classroom conversations through difficult terrain and creating an atmosphere of mutual trust. Not all professors are likely to teach and lead discussions about Critical Race Theory, or even racial issues more generally imbedded in tax law or other doctrines, with as much skill, knowledge, and sensitivity as I imagine Professor Brown would do. I’ll leave it to you students in the audience to draw your own conclusions as to whether all or many professors would successfully rise to the occasion under these circumstances.

Now, to be clear, I am raising questions about which I have no confident answers. The only thing I am confident about is that classroom dynamics are very complex and delicate phenomena, and not easily predicted. At the very least, I would think we’d want to experiment carefully with Professor Brown’s proposal and gain some empirical support for her hypothesis before assuming it will improve rather than hurt classroom dynamics for purposes of enhancing cross-racial conversation and understanding. I tentatively believe that employing more subtle ways of introducing racial issues into class discussions, perhaps providing the same examples but without the label and theoretical superstructure of Critical Race Theory, might actually do a *better* job of encouraging class participation and thus generating “cross-racial understanding.”

Second, the exclusive focus on conversations about race as a means to improve the educational process might itself cast aspersions about the legitimacy of the underlying race-based admissions policy. As explained above, the Court has insisted that other diversity factors be considered along with race for an

admissions program to satisfy equal protection standards.⁵² The Court wants to know that the law school's expressed interest in evaluating candidates holistically rather than mechanically is honest, to avoid the possibility that "educational diversity" is merely a cover-up excuse for a program designed to enhance racial representation for unapproved reasons, such as compensating for background societal discrimination. Some of the other diversity factors that a school might choose to value, such as sex and socioeconomic diversity, also historically have played a significant role in the development of the law and legal institutions. And one could easily imagine constructing a curricular focus on the historical and ongoing relevance of these other diversity factors; classes could be taught from the perspective of feminist theory, for example, and certainly classes could be taught highlighting the significant role wealth or poverty have played in the construction of legal doctrines and the allocation of legal rights and duties.

My worry is that adopting Professor Brown's proposal in unadulterated fashion might signal that a law school, despite giving lip service to diversity of many different backgrounds and perspectives, is *in reality* concerned with diversity only regarding race. One could, of course, just as easily imagine a law school focusing the curriculum around gender, or sexual orientation, or socioeconomic, or religious issues. I worry that Professor Brown's proposal, focusing on race, would send the message, whether intended or not, that race is the "real" type of diversity that matters, and other forms of diversity are mere window dressing to satisfy the Court's desire for holism. Such a message, it seems to me, would thus have a perverse effect. Rather than demonstrating that a school was "walking the walk" by embracing a second-generation component to its diversity efforts, embracing a Critical Race Theory curriculum would actually suggest that the school's first-generation emphasis on nonracial diversity factors was just "talking the talk," and thereby weaken the foundation of the underlying affirmative action admissions policy.

Professor Brown suggests in reply that law school classrooms already do engage in conversation involving issues of sex or class or religion, though not race.⁵³ As such, she claims to be advocating only that the faculty raise the level of focus on race

52. See *Grutter*, 536 U.S. at 336–37; see also *supra* notes 41–42 and accompanying text (noting that admission decisions must be based on a wide range of diversity factors, if race is one such factor).

53. See Brown, *supra* note 3, at 34 & n.161.

in the curriculum just to the level that other diversity factors are already being engaged.⁵⁴ This raises an empirical question, though it is my personal experience (with much supporting anecdotal evidence) that actually law school classrooms already discuss racial issues as much if not more than issues involving sex and class, and certainly religion. And there is a labeling question: even if many law school courses today address nonrace diversity factors, they do so through the pedagogic decisions of individual faculty members rather than adoption of a school-wide curricular program. I doubt that federal courts would ever scrutinize the actual frequency and depth (let alone nuance) with which classes address issues of sex, class, and religion; but courts are likely to have their attention caught by mission statements or express policies that focus curricular attention uniquely on racial issues.

In the end, therefore, a unique curricular commitment to bringing racial issues into the classroom, especially under the bold banner of Critical Race Theory, might cast a shadow on race-based admissions more so than forgetting entirely about second-generation questions. Instead, a curricular commitment to bringing racial and other diversity issues into the classroom in subtle ways strikes me as being both legally safer and pedagogically wiser.

V. CONCLUSION

Professor Brown is to be congratulated for focusing and indeed riveting our attention on the second-generation issues concerning the content of legal education in a post-*Grutter* world. And her particular proposal, spreading the word of Critical Race Theory, is certainly provocative. In my view, however, the connection between this proposal and the underlying diversity rationale for affirmative action in admissions is such that the very visibility of the initiative creates a vulnerability. A lower-key effort to provide meaningful classroom opportunities for cross-racial understanding might, in the end, be the better route. As elsewhere in the law of affirmative action, appearances matter.

54. See *id.* at 34 (proposing similar methods be used to integrate Critical Race Theory as are used to introduce other critical perspectives into classroom discussion).