

**MODELS OF INNOVATION & BEST PRACTICES IN TEACHING & LEARNING AT UND**

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**Teaching Race Without a “Critical Mass”\***

*A Teaching Module on Affirmative Action  
and  
Some Lessons Learned in Teaching Race in a Homogeneous Classroom*

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**I. Teaching and Learning Strategy: The Teaching Module on Affirmative Action**

*A. Background*

In constitutional law, the U.S. Supreme Court’s interpretation of the Fourteenth Amendment’s Equal Protection Clause (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws”) requires the government to justify treating people differently under the law. Some distinctions, such as different tax brackets for people earning different incomes, require only that the distinction be a reasonable one. Distinctions based on race, though, require the strongest justification under constitutional law: the government must show that treating people differently based on their race is “narrowly tailored” to serve the government’s “compelling interest.” The Court has used this legal standard to strike down nearly all race-based classifications, including state-sanctioned racial segregation and anti-miscegenation laws. Every race classification employed by government, including affirmative action policies that take race into account and other so-called “benign” or “beneficial” race classifications, triggers this “strict scrutiny” by the Court.

The Supreme Court has twice examined affirmative action in university admissions: first in 1978 in *Regents of the University of California v. Bakke*, and twenty-five years later in *Grutter v. Bollinger* and *Gratz v. Bollinger*, both arising out of affirmative action policies at the University of Michigan.

In *Bakke*, the Court struck down an affirmative action policy that had reserved a number of seats in the UC-Davis medical school for members of specified racial groups. Allan Bakke, a white student whose application to medical school was denied, challenged the policy. Bakke argued that students of color admitted under the policy had lesser qualifications than he, and that while

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applicants of color could compete for all seats (the non-reserved seats as well as the seats reserved for minorities), *Bakke* was able to compete only for the non-reserved seats. The Court struck down the UC-Davis policy as unconstitutional. The Court appeared to accept that achieving classroom diversity could be a compelling government interest, but held that the rigid “quota” of reserved seats, as well as the dominance of race as a factor in admitting students to fill those seats, meant that the policy was not narrowly tailored to meet the compelling interest. Justice Powell’s opinion set forth an example of a narrowly tailored affirmative action policy: the so-called “Harvard Plan,” in which “race or ethnic background may be deemed a ‘plus’ in a particular applicant’s file” without “insulat[ing] the individual from comparison with all other candidates for the available seats.”

After *Bakke*, the Court decided several affirmative action cases in the context of public contracting. This line of cases rejected achieving diversity in the awarding of federal contracts as a compelling government interest. These legal developments, along with growing opposition to affirmative action as “reverse racism,” fueled efforts to prohibit race-based affirmative action at the state level. California, Florida, and Washington all enacted laws prohibiting race-based affirmative action in public employment, contracting, and education. Several states adopted “affirmative access” or “top percent” plans, meant to increase access to higher education without employing race classifications. In Texas, for example, the state legislature enacted the “Texas Ten Percent Plan,” which ensures that the top ten percent of students at all high schools in Texas have guaranteed admission to the University of Texas and Texas A&M system, including the two flagship schools: UT-Austin and A&M College Station. (This spring, a white student denied admission at UT-Austin filed suit challenging the university’s continued use of race-based affirmative action for students not admitted through the Top Percent Plan. At the same time, UT-Austin’s president expressed concerns that the Top Percent Plan was dominating the university’s admissions process, as the university was required to admit 9,100 Texas students under the Plan for its Fall 2008 freshman class – which had a target total enrollment of 7,200.)

When the Court next took up affirmative action in university admissions in 2003, many commentators expected the Court to disavow *Bakke*’s implication that classroom diversity could be a compelling interest. The Court’s decision in *Grutter* came as a surprise. (The Court’s decision in *Gratz* was less surprising: the Court struck down the University of Michigan’s policy of assigning a certain number of points based on racial diversity in its undergraduate admissions. Relying on Justice Powell’s opinion in *Bakke*, the Court held that the point-based system was too rigid and placed too much weight on race as compared to other factors.)

In short, the *Grutter* Court held that the University of Michigan Law School’s affirmative action policy survived strict scrutiny. A key component of the Court’s reasoning was its endorsement of the diversity rationale set forth twenty-five years earlier by Justice Powell in *Bakke*: student-body diversity is a compelling interest that may support an appropriately tailored university affirmative action policy under even the most exacting scrutiny.

In accepting classroom diversity as a compelling government interest, the Court recognized that several benefits accrued through a racially diverse student body, to both white students and students of color. On campus, a diverse group of students promotes social equality through increased “cross-racial understanding” and decreased acceptance of stereotypes; diversity also

enriches classroom discussion through the “robust exchange of ideas” by students with wide-ranging views and experiences. The benefits of a diverse student body continue to accrue outside the university, as graduates educated in a diverse environment are better workers, leaders, and citizens. As the Court put it, “nothing less than the ‘nation’s future depends on’” civic leaders who understand and appreciate a multitude of perspectives and whose own experiences represent the range of American life.

The Court accepted the Law School’s argument that such benefits derive from a campus with a “critical mass” of students of color. “By enrolling a ‘critical mass of [underrepresented] minority students,’ the Law School seeks to ‘ensur[e] their ability to make unique contributions to the character of the Law School.” A critical mass “means ‘meaningful numbers’ or ‘meaningful representation,’ . . . numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.” Importantly, a critical mass of students of color is necessary to break down racial stereotypes, “because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”

Michigan Law School’s affirmative action policy, designed to enroll a critical mass of underrepresented students of color, was narrowly tailored to achieve the educational benefits of diversity, the Court found. As the Court explained, the contributions of diversity to the classroom, the campus, and society are not limited to those related to race, but do depend in significant part on the participation of more than token numbers of students of color in higher education: “[b]y virtue of our Nation’s struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.” Thus, the Court distinguished the Law School’s target critical mass of underrepresented minority students from the rigid quotas struck down in *Bakke* and *Gratz*.

#### *B. The Teaching Module*

In my Constitutional Law II course at the School of Law, I use affirmative action in university admissions following *Bakke* as a case study of the interrelationship of constitutional interpretation and public policy implementation and innovation. I have developed an integrated teaching module, drawing on individual and group activities, PBS’ *Frontline* documentary *Secrets of the SAT* and its companion web page, an overview of the history of affirmative action and university admissions, and, of course, the case law. I described the original exercises used in the teaching module in an article I co-authored with Steve Light (Political Science & Public Administration) in the *Journal of Legal Education*:

The exercise begins with a simple question for students to consider individually: What factors should a university admissions committee take into account in evaluating an applicant? Students are instructed to reflect on their own experiences with undergraduate or law school admissions in generating their own list of relevant criteria. We then assign students to mock admissions committees. After creating a “master list” of possible relevant admissions criteria based on the lists students generated on their own, the committees discuss each factor and decide which to use in evaluating the admissions files of five undergraduate applicants [provided on the companion website to *Secrets of the*

SAT]. After recording a brief explanation of how the committee decided which factors to consider and which to jettison, each committee assesses the available file on each applicant and decides by majority vote whether to admit or reject. After dissolving the groups, we conclude the exercise with a class-wide debriefing session, in which each committee's results are compared and contrasted. Students are asked to discuss the rationales for their admissions decisions in light of the factors they chose for consideration, and to think about the extent to which different committees used similar or differing evaluation criteria.

We then show *Secrets of the SAT* in class. The documentary follows seven high school students of diverse backgrounds, races, and gender as they prepare for the SAT and apply for admission to the University of California at Berkeley – entrance to which is discussed as “opening doors” for each student. The narrative vignettes are compelling, promoting sympathy (or empathy) with these students as they navigate the world of standardized testing and university admissions. In its closing segments, the video shifts perspective, as the Berkeley admissions committee grapples with its legal duty to comply with the mandates of Proposition 209, the 1996 California voter initiative banning the use of race [classifications] in state-administered programs and institutions. Committee members frankly discuss the importance of diversity and the impossibility of discounting the tell-tale “clues” to the race and gender of applicants. The outcome is informative and in some cases surprising, as one African-American male applicant with relatively low SATs is admitted; a Latino male applicant with relatively strong scores is denied admission; a second-generation Asian-American female with moderate scores is admitted while a similarly situated male applicant is denied admission; a white female applicant with high scores is denied admission (although she gets into several Ivy League schools); and a white male applicant with high SATs is denied admission – but appeals and subsequently is admitted.

The stories of the students and the admissions committee members who hold their futures in the balance in *Secrets of the SAT* complete our group exercise on affirmative action law and policy by matching real faces and voices to what otherwise might seem to be a purely academic exercise. The documentary also speaks to the role of standardized testing in reinforcing conceptions of “merit.”

The group exercise and documentary set the stage for students to assess more critically the relevant case law. We continue the module with a lecture on affirmative action that includes the broad definition promulgated by the U.S. Commission on Civil Rights and historical background on public higher education and “selective” universities, as well as the circumstances giving rise to affirmative action programs in higher education. The lecture uses as a case study California's public university system and the evolution of “elite” (and selective) campuses within the state system. Against this background, we then turn to the U.S. Supreme Court case law, covering *Bakke*, *Adarand*, and *Grutter* as key cases. Finally, we explore policy distinctions between public education and other areas of public life, such as public contracting, and policy alternatives to affirmative action, including California's Proposition 209 and “affirmative access” programs in states such as California, Texas, and Florida.

Since that time, I've continued to use versions of the individual and group exercise in my Constitutional Law II course, "tweaking" the exercises each year. (I've attached the two most recent versions I've used.)

## **II. Development of the Strategy: The Challenges of Teaching Race**

In my Constitutional Law II course (a first-year course required for all law students), I cover three main topics – substantive due process (which includes so-called "privacy rights," such as those related to reproductive rights, sexual conduct, and marriage and family), free expression (which includes aspects of free speech, such as regulation of obscenity), and equal protection. I've selected each topic not only as a key area of constitutional law, but also because each is very much in the current public debate. Affirmative action comes at the end of the segment on equal protection law, after students have learned about the Court's approach to race classifications through *Strauder v. West Virginia* (striking down state laws limiting jury service to whites), *Plessy v. Ferguson* (upholding the legal principle of "separate but equal" in racially segregated train compartments), *Korematsu v. United States* (upholding internment of Japanese-Americans during WWII), *Brown v. Board of Education* (overruling *Plessy* to hold racially segregated public schools unconstitutional), and *Loving v. Virginia* (striking down state anti-miscegenation laws).

Here at UND, as across the country, affirmative action is a contentious and controversial issue, even after the U.S. Supreme Court's 2003 decision upholding the use of race-conscious university admissions policies in *Grutter*. Teaching subjects related to race at a school like UND presents particular challenges and sheds light on the varying practicalities of the Court's diversity rationale in *Grutter*. Most UND students are from North Dakota, a state whose population is over 92% white, and many white students come to UND with little or no contact with people of color. As a result, few have given much thought to or see the inherent value of student-body diversity along racial or ethnic lines.

There are pedagogical challenges in teaching topics that are at the forefront of public debate, particularly those related to race. Students do not necessarily come to a first-year law course with a firm grasp of the fundamentals of American history and government, let alone the role that race has played in shaping each. Students also bring with them ideological predispositions and the baggage of political socialization by parents, peers, schooling, and the media. The instructor's job is to orchestrate a dialogue that encourages the free exchange of informed opinions; however, in my experience, students tend to discount the information imparted by the instructor on topics related to race and instead import their own preexisting viewpoints directly into their interpretations of the Constitution and the case law at hand. In our *Journal of Legal Education* article, Light and I observed that students have a strong tendency to devalue diversity, that their predispositions color their ability to acquire and process new information, and that they personalize the issues at hand:

1. Devaluing Diversity. In the course of the group exercise, it is fairly common for white students to start from the premise that admissions decisions should be based solely on GPAs and test scores. Invariably, however, the group discussion leads students to

agree that other factors may be relevant. Although students overwhelmingly oppose taking race into consideration at this point, they tend to see socioeconomic class, overcoming personal hardship, difficulty of coursework, and extracurricular activities as important factors. The lists generated by students vary little in their expansiveness and generally follow the same basic order . . . :

- GPA
- Standardized test scores
- Coursework (type and degree of difficulty)
- Extracurricular activities
- Community service
- Leadership roles
- Awards/honors
- Application essay
- Work experience
- Quality of school
- Letters of recommendation
- Urban/rural school (no distinction between central city and suburban)
- Alumni legacies
- Parental income and/or educational background
- Athletic ability
- Artistic/musical talents

Generated by prompting – and met with student skepticism – is gender. With the absolute final factor – again met with student discomfort and, almost invariably, disagreement – being race or ethnicity.

As the results of this first part of the group exercise indicate, students begin to see beyond conventional measures of academic merit but resist seeing race as relevant to university admissions or to the educational benefits of class discussion. Students collectively reach the opinions that admissions committees should take into account a wide range of factors, although standardized tests and GPA by far are the best measures of merit, and should not take into account race and ethnicity. Both implicitly and explicitly in the group discussions, students conclude that one's experiences are relevant to both an accurate assessment of merit (for example, having to work one's way through college is relevant to assessing one's undergraduate GPA) and to classroom diversity (one common thread at UND is the diversity value of students who are from rural parts of the state). Yet, white students almost uniformly reject the idea (having considered it usually only with instructor prompting) that one's race might shape one's experiences.

2. Predispositions. Cognitive psychologists have found that when presented with information that is dissonant from their understanding of events or processes, individuals erect "conceptual blocks" that make it difficult for them to acquire and process new information – in lay terms, to learn. When teaching about race, one must be especially aware of this tendency, and compensate for it through creative pedagogy.

Even following active-learning exercises like the one we describe here, the obstacles to informed understanding often carry over from students' learned predispositions toward race, which are linked to misperceptions about people of color. . . . Student perceptions of people of color are circumscribed by their upbringing in racially homogenous communities, and by their subsequent lack of exposure to diversity in the classroom. . . .

Linked to their firmly held predisposition toward race neutrality is students' perception that any law or policy that takes race into account can result in "reverse racism" against whites. Students tend to emphasize what they see as the contemporary prevalence of reverse racism and the "disadvantages" of being white. Exposure to equal protection analysis does not always mitigate these predispositions; indeed, in our experience, it may reinforce them. Students largely cannot articulate an equal protection argument concerning reverse racism beyond Justice Harlan's famous dissent in *Plessy*, in which he stated that the Constitution is "color-blind." This becomes the defining standard for many students, minus historical or subsequent interpretive context. . . .

Students often [also] cite a decreasing prevalence of racism in America in support of race-neutral university admissions. In framing this argument, students do not distinguish between the theoretical argument that as a result of the "color-blind" Constitution, race "shouldn't matter," and the empirically driven proposition that today, race "doesn't matter," either in how they, as white students, experience the world around them, or how people of color – in the eyes of white students – do the same. As to the question of whether, in practice, race actually *does* matter today, the distinction between individual race prejudice and institutionalized race discrimination is a difficult concept for students to grasp and acknowledge.

3. Personalization. When we teach about race, our students demonstrate an intense desire to personalize and anecdotalize experiences that they also see as generalizable. For white students, such personal anecdotes connect the storyteller to a larger context of prevalent inequities. It is common for white students to share their own experiences with discrimination, for instance, even if such discrimination is not overtly race-based. Students who have traveled abroad tell stories of the discrimination they experienced as Americans, and students who have suffered disparate treatment based on socioeconomic class, age, or physical appearance relate those experiences as similar to racism.

### **III. Intended Student Learning Outcomes: Teaching Race in a Homogeneous Classroom**

The teaching module is designed to help students begin to question common assumptions about race and affirmative action through both peer-led and instructor-led discussion in a structured context. As I point out to students numerous times over the course of the semester, my goal is not to change students' opinions about affirmative action as good or bad public policy, but to develop their ability to take different perspectives into account, even – or perhaps especially – those with which they disagree, in assessing the legal arguments that may be made to support or oppose affirmative action policies. (This is an important aspect of teaching students to "think

like lawyers” – meaning to engage in legal analysis, or the categorization, articulation, and assessment of a set of facts in terms of principles, doctrines, and rules of law.)

At the end of our *Journal of Legal Education* article, we connected our experiences in teaching issues related to race at UND with the Court’s decision in *Grutter*. Usually, my classes are largely racially homogenous, lacking the “critical mass” sought by the Michigan Law School affirmative action policy and endorsed by the Court as crucial to achieving the benefits of a diverse classroom. According to the Court, diversity, in the form of a “critical mass” of students of color, helps to break down stereotypes, improves classroom discussion, prepares students to be productive citizens and members of the workforce, and permits universities to “cultivate a set of leaders with legitimacy in the eyes of the citizenry.”

From the instructor’s perspective, in the words of Kimberlé Williams Crenshaw, “[t]eaching to a racially and culturally diverse student body . . . [is like] conducting a full philharmonic orchestra – each discussion unfold[s] like a symphony, the music . . . like cutting edge jazz, sometimes discordant, sometimes soulfully melodious, and often surprisingly complex.” After Proposition 209, Williams found herself in a very different classroom at UCLA School of Law: “[T]he music we make in our classrooms today is often flat and monotonous. When I step up to the podium today and pick up my baton, I see that my entire string section is gone – just gone – forget about playing anything that sounds remotely the way it should; the brass section is decimated, and the percussion can barely kick out a beat that can push us along. Surely I try to compensate by playing some of the missing instruments myself; I’ll jump in the string section to play a few measures, run over to the horns to blow a note or two, try to kick at the timpani on the way back to the podium, but there is no denying it – what we are creating in our classrooms today is simply subpar.”

The Court’s decision in *Grutter* led me to think about whether the benefits of a diverse student body could be achieved in a more homogeneous environment. At a university like UND, the question is how to teach race effectively in classrooms without a “critical mass” of students of color? Is an instructor simply left with “flat and monotonous” class discussion or, even short of “cutting edge jazz,” is it possible to achieve some of the benefits of classroom diversity? How can the instructor diminish isolation experienced by students of color, and protect them from being perceived as spokespersons for their race? How can the instructor’s approaches help to break down stereotypes, improve classroom discussion, prepare students to be productive citizens and members of the workforce, and assist UND in cultivating a set of leaders with legitimacy in the eyes of the citizenry? I don’t pretend to have all the answers, but these questions have guided me in continuing to re-work the teaching module in my course.

#### **IV. Assessment of Student Learning**

I’ll be frank: I’m not certain that my teaching strategy accomplishes all of my intended learning outcomes, particularly those focused on ensuring an effective learning experience for students of color. I have attempted to assess the success of the teaching module in a number of ways, and I believe that it is largely, if not fully, successful. Each year, several students mention the value of the affirmative action teaching module in their comments on the USAT forms. After the Court decided *Grutter* and *Gratz*, I wondered whether the teaching module had become moot – after

all, the Court had spoken on the issue. I had students complete a two-page evaluation, in which I asked them to comment on the exercise in the context of my goals as well as their own goals and expectations for the course. The response was overwhelmingly positive. (And, given recent legal challenges to race-based affirmative action, the issue continues to be legally relevant as well.) As a result, I've continued to employ the module.

The main way that I've assessed student learning is by comparing the content of the initial student small-group discussions to subsequent class discussions and students' analysis on the final exam. I "eavesdrop" on each admission committee's discussion at the start of the teaching module. (Students are assured that I am not grading them on the content of their discussions.) I take notes, without identifying individual students, on the general content of the discussions. Almost without fail, I observe many of the same perceptions Light and I described in our *Journal of Legal Education* article. In subsequent class discussions, I try to gauge students' ability to incorporate the case law and other course materials in their answers and comments in class. At the end of the teaching module, I include a "no wrong answer" discussion of the "top percent" plans and the future of affirmative action policies. Generally speaking, this discussion is markedly improved from the initial small group discussions in terms of informed debate and respect for and understanding of differing opinions. At the end of the semester, I typically include some kind of affirmative action scenario in the final exam. The exam question requires students to apply the case law to a factual situation designed to be neither clearly unconstitutional nor clearly constitutional. Students are directed to articulate and support the most persuasive arguments on both sides of the issue. As I grade (anonymously) the exams, I take note of whether, as a class, students have included in their analysis legal and policy arguments on both sides, with appropriate support, and have omitted from their analysis those perceptions without support in the case law (for example, that affirmative action policies necessarily employ "quotas"). Invariably, as a class, students show improvement in their ability to structure a legal analysis of the issue, including assessment and articulation of arguments in terms of legal doctrines and rules.

## **V. Strategy's Applicability: Some Lessons Learned**

In the generally racially homogeneous setting of my classes, I've observed two fundamental challenges: first, regardless of ideological bias, students come to the discussion with firmly held, if ill-informed, opinions on race and affirmative action and these opinions simply may be reinforced in a homogeneous classroom, and second, while beneficial in theory, a spirited debate over affirmative action may detrimentally affect the educational environment for the few students of color in the classroom. In the context of affirmative action, students often reveal predispositions to the topic (for example, the common insistence that affirmative action is "reverse racism" or "quotas"), a tendency to personalize the issues (for example, it seems that many white students have "friends" who are African American or, in North Dakota, Native American, and who automatically received admission and "free rides" based solely on their race), and conceptual blocks (for example, the inability of white students to recognize the impact of their own race on their daily experiences).

My overriding goal in teaching race issues in my law school courses is to introduce all students to legal theories related to race and appropriate critiques of the same in a way that avoids the

“shut down” of spirited and informed debate, while maintaining a safe, welcoming, and effective learning environment, with particular regard for students of color. Here, I offer some suggestions based on my own successes and failures in teaching race at UND:

- **Provide an informational foundation for student discussion.** In the teaching module, the content and timing of class lectures are designed to provide some basic information and to correct some common misapprehensions, so that students have some tools to counter typical, if ill-informed, arguments (e.g., that all universities use race-based admissions, that universities employ quotas, that affirmative action is mandated by federal law, etc.), as well as some ideas for appropriate topics for debate (e.g., how much emphasis should be placed on standardized test scores, what factors predict academic success, is classroom diversity an important goal for public universities, etc.).
- **Use multiple teaching techniques to refract the central issue to reach more students.** In the module, the combination of lecture, individual and group exercises, documentary video, class discussions, and working through case law provide different opportunities to “see” the issues, and to capture visual vs. auditory learners.
- **Situate race within multiple contexts.** In the initial exercise, students brainstorm a range of factors that could be used in admissions, so it is easier to see race as one of those factors – which in turn ties to the legal standard of “race as a plus.” I also cover affirmative action after students have learned about the historical-legal context of race in the U.S.
- **Allow and encourage students to bring their own experiences to bear.** To avoid the kind of personalization by white students that may minimize or even trivialize the experiences of students of color, I’ve incorporated structured opportunities for all students to engage in personalization of the issue, including through thinking about what their experience with standardized tests was like, what they would like to see from an admissions committee, and how UND’s admissions policies operate.
- **Put a human face on the abstract and controversial.** The admissions exercise and then the video documentary ask students to think about applicants as individuals, and the stories of the high school students trying to get into Berkeley show intelligent, racially and ethnically diverse people facing real challenges both similar and dissimilar to those faced by UND students.
- **Anticipate and work to minimize potential negative impacts on the few students of color in the classroom.** I have experimented with a number of different ways to minimize potential negative impacts, such as employing anonymous polls (to avoid putting students of color in the position of being a “spokesperson” for their race) and discussing UND’s admissions policies and practices (to address any assumptions about how students of color were admitted to UND).
- **“Walk the talk” of classroom diversity.** Here, I mean appreciating the contributions of all people in the great American experiment, including in my own classroom. In the lecture, for example, I discuss the work of African-American attorneys, including Thurgood Marshall and Charles Hamilton Houston, to overturn *Plessy* and change how Americans conceived of equal protection under the law. Class discussion generally demonstrates that different experiences lead to different perceptions and opinions, and that there is value in understanding perspectives that differ from one’s own. I also choose

lecture content to illustrate the point that not all people of color share the same opinion on issues related to race (i.e., Ward Connerly's influential opposition to affirmative action).