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AN ESSAY ON THE PROFESSIONAL RESPONSIBILITY OF AFFIRMATIVE ACTION IN HIGHER EDUCATION

by EMILY CALHOUN

I. INTRODUCTION

The debate about affirmative action in higher education underemphasizes a perspective that should lie at the heart of the debate. The perspective belongs to the professor. For my purposes, it is defined by professional responsibilities that run directly to each individual student in the classroom and are intended to ensure that each student has an equal opportunity to make unfettered choices in the classroom. This essay is prompted by the decision of the Court of Appeals for the Sixth Circuit in Grutter v. Bollinger and the Supreme Court's grant of a writ of certiorari to review the validity of conventional diversity justifications for affirmative action. It attempts to bring the professor's perspective into clearer view and focuses on justifications for affirmative action on behalf of racial minorities.

As a preliminary matter, I should note that I am not endeavoring to answer all questions raised by the professor's perspective or to provide a fully integrated theory of affirmative action that takes the perspective into account. I fully appreciate that state institutions attempting to implement and defend affirmative action programs face high burdens of constitutional justification, but I believe that the perspective of this essay can and should be integrated into the Supreme Court's constricted affirmative action doctrine. I intend, however, to leave it to others to choose to make either the intellectual attempt or the strategic advocacy moves that might profit from the perspective I offer here. My modest objective is simply to say something that needs to be said about the professor's perspective and to suggest ways in which that perspective might help defend affirmative action programs.

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4. Since this essay was written, one scholar has offered an extended analysis of affirmative
II. THE PROFESSOR’S PERSPECTIVE DEFINED

The professor’s perspective is informed primarily by the responsibilities owed to each individual student under a professor’s tutelage. There are many ways of thinking about those responsibilities in the higher education context and, to a certain extent, these thoughts have been incorporated into the affirmative action debate. As discussed below, however, the implications of these responsibilities for affirmative action have generally remained on the periphery of the debate.

What are the professional responsibilities that govern the daily work of each faculty member? My primary point of reference is the principles of professional responsibility adopted by the American Association of University Professors (AAUP). The AAUP emphasizes that each professor’s obligation runs to the individual student, who is entitled to the benefits of academic freedom. According to the AAUP, students “should be encouraged to develop the capacity for critical judgment and to engage in a sustained and independent search for truth.” So that these objectives might be achieved, the AAUP entitles students “to an atmosphere conducive to
learning and to even-handed treatment...”9 It recognizes that “[a]ppropriate opportunities and conditions in the classroom” are necessary to the “freedom to learn.”10 Nothing in the instructional role or environment should force students “to make particular personal choices as to... his own part in society.”11

I have no reason to doubt that most professors approve of the sentiments expressed in the AAUP principles. Professors understand that their relationship with students embodies special, professional obligations.12 They endeavor to ensure that each student enjoys the freedom to learn, is willing and able to participate in classroom discussions as a unique and equal individual, and has the confidence to take the necessary risks and make the inevitable mistakes that the acquisition of new knowledge and skills requires. Professors have not, however, brought their professional obligations fully to bear on the affirmative action debate.

As I am going to use the preceding precepts of professional responsibility to justify a strong version of affirmative action in higher education, it will be useful to consider how they fit with the perspective that typically orients conventional diversity justifications of affirmative action.13 The difference in perspective is significant.

Diversity justifications have come to be associated with the argument that exposure of students to the viewpoints of others is an important pedagogical objective of affirmative action plans. Universities represent an intellectual marketplace in which professors and students play with abstract, pre-formulated ideas. Diversity also serves other ends. For example, it encourages students to value pluralism, secures interracial harmony, and

11. A Statement of the Association’s Council, supra n. 9, at 135.
12. For example, a professor’s obligations to students may trump even a professor’s own (arguable) academic freedom interests. See e.g. Amy H. Candido, A Right to Talk Dirty?: Academic Freedom Values and Sexual Harassment in the University Classroom, 4 U. Chi. L. Sch. Roundtable 85 (1996-97).
13. Diversity is currently assumed to be the most promising constitutional justification for race-based affirmative action plans. Universities and their advocates have opted to push diversity justifications for affirmative action, see William G. Bowen & Derek C. Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions (Princeton U. Press 1998), perhaps because remedial justifications have typically not been persuasive in litigation, see e.g. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996); Samuel Issacharoff, Can Affirmative Action Be Defended?, 59 Ohio St. L.J. 669 (1998) (discussing remedial issues in litigation). Some universities do not even attempt to rely on remedial justifications, compare Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001), with Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984), although intervenors may do so, see e.g. Grutter, 188 F.3d 394. Although one of the concurring opinions in the recent decision validating the University of Michigan Law School’s affirmative action program suggests that a remedial justification might be based on prior racial discrimination in the educational system as a whole, the university at present relies solely on the diversity justification. Grutter, 288 F.3d at 768 (Clay, J., concurring).
educates students to succeed in a multicultural society.\textsuperscript{14} The objective commonly associated with diversity justifications for affirmative action plans, however, is improvement of the marketplace of ideas.

In contrast, a professional responsibility perspective focuses on a professor's obligation to ensure that each enrolled minority student has uncoerced and unmanipulated opportunities for intellectual development and the freedom to make independent decisions. The professor's obligation works in tandem with fundamental constitutional rights of each minority student to academic freedom and equality.\textsuperscript{15} From this perspective, the classroom is not an environment characterized solely by principles of social Darwinism and survival of the best pre-defined, static ideas. It is a place in which knowledge and students are nurtured and developed under a professor's tutelage.

The process of learning is dynamic and unpredictable. Furthermore, the classroom-as-marketplace-of-ideas is an impoverished metaphor for either that process or for the relationships recognized by the professional responsibility perspective. It does not suggest ways of thinking about how individual students learn or about the ground rules under which learning should occur. Thus, in emphasizing the marketplace of ideas, conventional diversity theory neglects concerns at the heart of the professional perspective.\textsuperscript{16}


\textsuperscript{15} An excellent discussion of the relationship between traditional notions of academic freedom and the Constitution is found in Candido, supra n. 12, and Van Alstyne, supra n. 7 (discussing the substantive due process and liberty roots of academic freedom principles). For judicial recognition of the link, see e.g. *United States v. Virginia*, 518 U.S. 515 (1996) (linking participation, choice, and personal growth in an academic environment to rights of association and equality); cf. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (joint opinion) (explaining that the freedom to define one's own identity through choice is part of the fundamental concept of individual liberty); see Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 Wis. L. Rev. 105, 158 (discussing the goal of equality to achieve fair participation so that "every individual has the opportunity to gain dignity, equal self-worth, and respect through the power of self-definition.")

\textsuperscript{16} In *Grutter*, 288 F.3d at 762-66 (Clay, J., concurring), one judge spoke to this issue and criticized the dissenters for viewing education as a process in which ideas are simply poured into an empty vessel. The opinion did not, however, link its view of the educational process to the obligations explored in this essay.

My quarrel is not fundamentally with diversity justifications, which are subjected to many ill-founded criticisms. For example, although most affirmative action plans take race into account as only one relevant factor along with many others to evaluate a prospective student, opponents frequently claim that race predominates and functions as a proxy for a particular point of view. See e.g. Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 U.C.L.A. L. Rev. 1745, 1762-65 (1996); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. Rev. 521 (2002); Karlan, supra n. 3, at 1596-97. For thoughtful discussions of potential flaws in diversity arguments, see e.g. Anderson, supra n. 4;
The neglect is unfortunate because the professional responsibility perspective prompts a query that has ramifications for the affirmative action debate. The professor's query is: what measures might one reasonably feel compelled to adopt so as to ensure that each student—including each minority student—has the freedom—an equal freedom—to learn? Careful consideration of this question leads to a justification for strong affirmative action admissions policies.

III. RACIAL STEREOTYPING AND THE CRITICAL MASS REMEDY

When I speak of a strong affirmative action admissions policy, I am thinking of one that seeks to secure what has been called a "critical mass" of students of color in any given classroom within any given university. A critical mass argument is a logical outgrowth of the professor's perspective given what we know will happen in a classroom in which there is not a critical mass of minority students. For those who are not familiar with research pertaining to this issue, I provide a brief summary of research, which I trust does not oversimplify matters.

A. Stereotyping and Token Behaviors

Research suggests that even at current levels of institution-wide affirmative action, it is statistically inevitable that many minority students will be "solo" in any given classroom. According to an AAUP study of one liberal arts college, for example, 66.7% of African-American students were "solo" in the classroom. Most professors at institutions of higher education would undoubtedly attest to this fact or at least that the minority student presence, when it occurs, is frequently a numerically token number. Without race-based affirmative action programs, the percentage of "solos" or tokens would surely rise. Research also suggests that if minority students are "solo" or token in university classrooms, which have historically been

Friedl, supra n. 14; Levinson, supra n. 6; Liu, supra n. 14; Susan Sturm & Lani Guinier, The Future of Affirmative Action: Reclaiming the Innovative Ideal, 84 Cal. L. Rev. 953 (1996).


18. Of course, some small classes, by virtue of professor or subject matter, will draw an enrollment of more significant numbers of minority students.

19. See e.g. Issacharoff, supra n. 13, at 678 (describing what has happened in universities that have abandoned affirmative action admissions policies but have retained most other traditional admissions criteria). The problem is exacerbated by the behavior discussed in this essay, which influences enrollment choices of minority students. See e.g. Shawn Pompian, Expectations of Discrimination as a Justification for Affirmative Action, 8 Va. J. Soc. Policy & L. 517, 539, 543-44 (2001) (arguing that stereotype anxiety influences choices of opportunities and career paths); and Tung Yin, A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action, 31 Loy. L.A. L. Rev. 213, 244 (1997) (noting examples of how minority students make enrollment decisions).
dominated by whites, a given minority student will frequently be perceived as a stereotyped figure rather than as a unique individual and will experience demands and pressures that interfere with learning.20

Racial stereotypes are well-learned, ingrained associations — indeed, a whole set of associations — that are automatically triggered by the fact that a particular person is of a particular race.21 One who acts on the basis of a racial stereotype will assume — perhaps even demand — that stereotyped persons hold specific beliefs or act in particular ways. A familiar stereotyping phenomenon is the tendency of members of a racial majority to ask a token minority student to speak on behalf of a racial group, as in an explicit request for an African American to please enlighten everyone as to “what Blacks think.”22

Stereotyping is, however, more complex than this. Consider, for

20. Low numbers of a low-status racial group in an environment historically deemed the exclusive preserve of whites are key variables. See the refinement of Rosabeth Moss Kanter’s work in Janice D. Yoder, Rethinking Tokenism: Looking Beyond Numbers, 5 Gender & Soc’y 178 (1991). See also Paula Gaber, “Just Trying to be Human in This Place:” The Legal Education of Twenty Women, 10 Yale J.L. & Feminism 165, 239-45 (1998) (emphasizing that historical domination by the majority group exacerbates stereotyping); Maureen T. Hallinan, Diversity Effects on Student Outcomes: Social Science Evidence, 59 Ohio St. L.J. 733, 751 (1998) (perceiving inequality in status of different racial groups reinforces stereotypes).


22. See e.g. Andrea Guerrero, Silence at Boalt Hall: The Dismantling of Affirmative Action 163-165 (U. of Cal. Press 2002); Crenshaw, supra n. 20, at 40-41.
example, what will frequently happen when a token minority student discovers that arguments stereotypically associated with her racial community are being neglected in classroom debate. If the token minority student assumes responsibility for enlarging the debate by including these views, the stereotype that all members of her racial group share the views will be reinforced and will influence future behavior of other students. Even if the token minority student does not herself accept the beliefs, she will become irrevocably associated with them, especially if she must repeatedly assume responsibility for broadening debate throughout an entire semester each time a class meets.23 Or, consider the fact that a token minority student’s participation in classroom discussion may be perceived as “anomalous or discrepant” unless the participation (or view expressed) fits a particular stereotype of the way a given racial minority should act or experience the world.24 If a token minority student deviates from a stereotype that dictates how members of her racial group should act, subtle adverse reactions by stereotyping members of the racial majority may result.

The harms caused by racial stereotyping are significant when measured against the aspirations and obligations set by the AAUP and similar professional organizations.25 Research suggests that racial stereotyping increases performance pressures and isolates the token minority student, ultimately restricting the intellectual role of token minority students in the classroom.

Increased performance pressure stems from what some might call “role encapsulation,”26 “role entrapment,”27 or what others might refer to as racial “policing.”28 Stereotypes dictate what behavior and attitudes are acceptable for a token minority student and create a double bind for that student.29 If she does not conform to the dictates of stereotype, a token minority student risks adverse responses. If, on the other hand, she does conform, she reinforces harmful stereotypes. Performance under these circumstances becomes especially problematic. The token minority student does not have the same choices majority students have.30 She cannot test her opinions,

23. See e.g. Gaber, supra n. 20, at 192-93.
24. Gudeman, supra n. 17, at 51. See also, Gaber, supra n. 20, at 191 (noting that women who speak too much are seen as “pushy”); Yoshino, supra n. 20, at 879-905 (discussing racial “covering”).
25. For a discussion of the significant nature of harms caused by behavior that is similar to racial stereotyping see the discussion of the effects of peer-to-peer student sexual harassment in higher education in Ronna Greff Schneider, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525 (1987).
26. Yoder, supra n. 20, at 188.
27. Spangler, supra n. 20, at 163.
28. Yoshino, supra n. 20, at 913.
29. For discussions of the double bind, see Crenshaw, supra n. 20; Yoshino, supra n. 20, at 916-19.
30. Greene, Tokens, Role Models, and Pedagogical Politics, supra n. 20, at 89. Zatz, supra n. 20, also provides numerous examples of the way in which stereotypes impose constraints on women and minorities. Also see Candido, supra n. 12, for a discussion of how sexual harassment, seeking to reinforce stereotyped notions of a woman’s proper place, interferes with student
conclusions, or feelings with the same freedom majority students have. She is thrown off balance by her uncertainty as to which rules of behavior apply given the double bind imposed by stereotyping and actions taken under these circumstances become especially risky. Thus, token minority students will be tempted to avoid conflict or controversy, and this avoidance will operate to the detriment of those students. This consequence holds true for students enrolled in all areas of study, as students in any academic discipline need to be able to challenge prevailing wisdoms, to “take up space” and to “make mistakes.” For example, students who wish to question premises, goals, research methods, or the use of human subjects in research, as well as students enrolled in the humanities or social sciences, will be affected.

Reduced class participation and decreased interaction with professors are understandable responses to racial stereotyping. By isolating himself, the token minority student can avoid being forced into a behavioral or attitudinal pigeonhole defined by race and can avoid the double bind of racial policing. But the isolation itself, as well as the energies that a token minority student must devote to negotiating appropriate behavior in the presence of racial stereotyping, will surely detract from academic endeavors.

I am not attempting, in this essay, to establish precisely what autonomy.


32. Kanter, Some Effects of Proportions on Group Life, supra n. 20.


34. Cf. The suggestion that minorities are skeptical of conventional assumptions of neutrality, objectivity, and other premises of scientific disciplines, in, e.g., Geoffrey Maruyama & José F. Moreno, University Faculty Views About the Value of Diversity on Campus in Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms 10 (American Council on Education and American Association of University Professors 2000) (available at at http://www.aaup.org/ Issues/Affirmative Action/ Archives/2000/DIVREP.PDF (accessed Feb. 20, 2003)); Gaber, supra n. 20, at 191; Guinier, et al., supra n. 20, at 78 n.212. See also, Charles R. Lawrence III, Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation, 47 Stan. L. Rev. 819, 842-43 (1995) (describing a class in which minorities were numerically dominant and were more vocal, more willing to share life experiences, more willing to articulate their misgivings about prevailing doctrine and theory, more willing to disagree with each other and with the professor, more willing to talk about their own racism and about conflicts between communities of color). Cf. Greenberg, supra n. 16, at 557-62, for comments on the unique social isolation with which African Americans contend.

35. Patricia Marin, The Educational Possibility of Multi-Racial/Multi-Ethnic College Classrooms, in Does Diversity Make a Difference? Three Research Studies on Diversity in College Classrooms 68 (American Council on Education and American Association of University Professors 2000)(available at at http://www.aaup.org/ Issues/Affirmative Action/ Archives/2000/DIVREP.PDF (accessed Feb. 20, 2003)); Gaber, supra n. 20, at 191; Guinier, et al., supra n. 20, at 78 n.212. See also, Charles R. Lawrence III, Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation, 47 Stan. L. Rev. 819, 842-43 (1995) (describing a class in which minorities were numerically dominant and were more vocal, more willing to share life experiences, more willing to articulate their misgivings about prevailing doctrine and theory, more willing to disagree with each other and with the professor, more willing to talk about their own racism and about conflicts between communities of color). Cf. Greenberg, supra n. 16, at 557-62, for comments on the unique social isolation with which African Americans contend.

consequences flow from racial stereotyping.\textsuperscript{37} The critical point is simply that the classroom with token minority representation is not an “atmosphere conducive to learning [by] and to even-handed treatment”\textsuperscript{38} of minority students, but one in which there is less “freedom to learn,”\textsuperscript{39} less freedom of “personal choice [regarding the student’s] own part in society”\textsuperscript{40} than is enjoyed by majority students. These harms are not evidence of psychological weaknesses of persons of any specific race. They would be experienced by any student who is a token member of a perceived low-status racial group in an environment historically deemed the preserve of another racial group.\textsuperscript{41} The harms are the product of predictable human behaviors under specified conditions.

\section*{B. The Critical Mass Remedy: An Effective and Proportional Response to the Harms of Racial Stereotyping}

So, the question for the professor is: what is an appropriate response to racial stereotyping given professional responsibilities to provide an environment in which every student has an equal freedom to learn? My argument is that a professor attuned to the fiduciary-like obligations recognized by the AAUP is likely to prefer a remedial (or preventive) approach that attempts to eliminate the structural conditions in which racial stereotyping flourishes rather than an approach that relies on after-the-fact responses to individual incidents of racial stereotyping.\textsuperscript{42} A strong

\textsuperscript{37} There are, of course, gaps in research, in part because current research into the effects of diversity in universities asks questions pertinent to diversity goals but not always to the problem addressed in this essay. For discussions of research into diversity justifications, see. Friedl, supra n. 14; and Killenbeck, supra n. 6. Yoder, supra n. 20, at 189-90, suggests directions that additional research into stereotyping could take.

\textsuperscript{38} See supra n. 9.

\textsuperscript{39} See supra n. 7.

\textsuperscript{40} See supra n. 9.

\textsuperscript{41} It is essential to emphasize the latter point in order to avoid the mistake made by the court in \textit{Wessman v. Gittens}, 160 F.3d 790 (1st Cir. 1998), which rejected the Boston Latin School’s critical mass argument because it believed the argument was based on a stereotyped, racist assumption that racial minorities are less able to express themselves than majority students. See the similar mistake made by Judge Boggs in \textit{Grutter}, 288 F.3d at 803-06 (Boggs, J., dissenting), infra n. 64-65, and the accompanying text.

\textsuperscript{42} Universities may be hesitant to base arguments for affirmative action on recognition of fiduciary relationships that might ultimately expose them to liability, for example, for educational malpractice, but most courts have apparently rejected claims based on alleged fiduciary relationships. See Hazel Glenn Beh, \textit{Student Versus University: The University’s Implied Obligations of Good Faith and Fair Dealing}, 59 Md. L. Rev. 183 (2000). In any event, liability exposure is not a necessary consequence of incorporating a professor’s point of view into the affirmative action debate, just as liability may exist even if not driven by the professor’s point of view. Cf. The Supreme Court’s rejection of arguments against imposing a Title IX duty on recipients of federal funds to respond to student-to-student sexual harassment in \textit{Davis v. Monroe County Bd. of Ed.}, 526 U.S. 629 (1999). Professors have substantial control over their classrooms and the way in which student discussion and participation occurs. They can, through their conduct, either permit or attempt to prevent racial stereotypes from being incorporated into the classroom. Whether this control is a sufficient basis for recognizing a fiduciary
affirmative action program – i.e., one that takes race into account as a factor in admissions decisions so as to eventually secure a critical mass of minority students in each classroom – will be desirable.\textsuperscript{43}

This approach will be preferred for a variety of reasons. For one thing, the approach is effective.\textsuperscript{44} If a certain number of students of color exists in any given classroom, many of the pernicious behaviors described above can be avoided. Indeed, a certain number of minority students may be a prerequisite to ensuring that stereotypes are confronted, that people do not yield to the tempting but morally indefensible practice of seeing all minority students as fungible, and that the effects of stereotyping are minimized.\textsuperscript{45}

relationship \textit{per se}, it should be sufficient to require institutions receiving federal funds under Title VI not to be deliberately indifferent to the phenomenon of racial stereotyping.

\textsuperscript{43} The critical mass argument is not a subterfuge for the type of quota arguments historically rejected by courts. \textit{See e.g.} \textit{Wessman}, 160 F.3d at 794 (1st Cir. 1998). Numbers will be used simply to estimate how many minority students are needed to minimize racial stereotyping and token effects, and opinions differ on this issue. \textit{See, e.g.}, Kanter, \textit{supra} n. 20, at 208-09, (estimating critical mass at 15-20%); Marin, \textit{supra} n. 35, at 68 (noting underrepresented groups can form a “sympathetic identity” that crosses racial and ethnic lines and functions like a group-specific critical mass does); Maruyama & Moreno, \textit{supra} n. 34, at 20, (reporting 30% of faculty respondents said that a critical mass would represent 16-25% of any given class; 30% said that greater numbers would be required; and 40% said that a critical mass might be achieved with fewer than 16%). The real issue is not numerical. \textit{See e.g.} Lawrence, \textit{supra} n. 35, at 841 (stating critical mass is defined with reference to whether students “can experience some of the safety and nurturance of homeplace . . . [whether] students are confident that there is enough common cause, enough trust, enough good will, enough shared experience and understanding to enable them to confront the most difficult conflicts within and between communities and to address the hardest issues of ideology and strategy”). For purposes of this essay, an affirmative action critical mass represents the point at which race-based assumptions are difficult to sustain, behavioral interactions shift, and individual minority students are not limited by racial policing but are equally free to challenge intellectual traditions, take risks, make mistakes, and learn with the freedom taken for granted by majority students. The inquiry is as precise as that applied to majority-minority political districting, \textit{see e.g.} \textit{Shaw v. Reno}, 509 U.S. 630 (1993), where numerical or other objective criteria for drawing the proper line do not exist. \textit{See Karlan, supra} n. 3, at 1595-96.

\textsuperscript{44} \textit{See} Anderson, \textit{supra} n. 4, at 1224 (addressing the difficulty of eliminating racial stereotyping without increasing numbers of minorities); \textit{Cf.} Armour, \textit{supra} n. 20 (increasing minority representation on juries is one of the most efficacious ways of dealing with the problem of stereotyping); and Susan Sturm, \textit{Second Generation Employment Discrimination: A Structural Approach}, 101 Colum. L. Rev. 458 (2001) (describing how second-generation workplace discrimination – subtle, nuanced, the product of aggregate instances of bad behavior – can be eliminated in the workplace, but premising recommendations on the existence of sufficient numbers of workers to effect change).

\textsuperscript{45} \textit{See e.g.} Gudeman, \textit{supra} n. 17, at 45, 50 (according to faculty respondents, a critical mass of students of color is necessary to increase class participation of these students); Marin, \textit{supra} n. 35, at 68 (a certain proportion of students of color is needed to ensure that stereotypes are confronted); Maruyama & Moreno, \textit{supra} n. 34, at 29 (faculty generally agree that students of color are more likely to participate in classroom discussions if there are peers from the same racial or ethnic group in the same class); and Elizabeth Mertz, Wamucii Njogu & Susan Gooding, \textit{What Difference Does Difference Make? The Challenge for Legal Education}, 48 J. Legal Educ. 1, 67 (1998) (if there is a larger percentage or cohort of minority students, more participation is observed in the classroom; once an unspecified critical mass is reached, there is no increased impact on participation).
Increasing the number of minority students in each classroom is not a complete solution, because a number of factors play into stereotyping and token effects, but numbers do change the classroom dynamic and the discrimination equation. An anti-discrimination, critical mass effort can certainly be pedagogically defended as an important part of an affirmative action program.

In comparison, reactive responses to the problem of racial stereotyping are less satisfactory. The fundamental problem is that they leave in place the structural condition under which racial stereotyping flourishes. In other words, minority students continue to be token or "solo," which means they do not have the support of others indispensable to success in countering racial stereotyping and avoiding token behavior. A change in formal rules of behavior and disapproval of specific incidents of stereotyping by a professor in charge of a classroom, without additional support, are unlikely to adequately address racial stereotyping and its effects. Racial stereotyping affects even people of good intentions and few prejudices. It is a common

46. Kanter, supra n. 20, took the position that increasing numbers would solve the problems associated with stereotyping. As Yoder, supra n. 20, shows, the issue is more complicated. See e.g. Gudeman, supra n. 17, and Marin, supra n. 35, at 63 (faculty pedagogy also matters); Taunya Lovell Banks, Gender Bias in the Classroom, 38 J. Legal Educ. 137 (even though there are many women in law classes, there are still problems of alienation, isolation, and participation); Etkowitz, supra n. 20, at 52 (departments with a critical mass of women still have problems when women are separated by sub-field specialties and dispersed into male-dominated research groups); Gaber, supra n. 20 (other factors that matter are the existence of informal support networks, whether faculty know what to do with increased numbers of students, and how many faculty of color are present); Guinier, et al., supra n. 20, at 78 n. 210 (women still experience numerous problems in the classroom, because of the phenomenon of "virtual tokenism," which exists when there are few women in the elite professorial ranks); Mertz, et al., supra n. 45 at 85-86 (classroom participation is affected by a number of factors, not numbers alone); Wildman, supra n. 33, at 149 (even when women approach fifty percent of those in a given classroom, there are differences in participation rates); and Yoshino, supra n. 20, at 880 (individuals have different coping strategies for dealing with the double bind of stereotyping).

Some researchers caution that increasing the numbers of minority students can exacerbate problems. See e.g. Hallinan, supra n. 20, at 751 (inter-group contact can increase stereotypes unless handled properly); and Yoder, supra n. 20, at 184 (when numbers increase so significantly that the presence of a minority group is felt as a threat to the majority group, there can be an increase in informal barriers in the workplace, e.g., promotion or pay). If significant numbers of minority students do generate these spillover effects, universities will need to be in a position to respond to them; but a fear that such effects might appear at some time in the future is no reason to avoid seeking a critical mass of minority students to overcome current stereotyping.

47. See the recognition of this fact in United States v. Virginia, 518 U.S. 515, 523 (1996) (quoting United States v. Virginia, 766 F. Supp. 1407 (W. D. Va. 1991) and commenting that a "critical mass" of women students—estimated at 10%—might be needed for any individual woman to have a positive educational experience at VMI).

48. For excellent discussions of the type of support needed to eliminate discrimination, see Charles R. Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (University of Chicago Press 1998); Sturm, supra n. 16.

49. See Armour, supra n. 20, at 757. A quick perusal of articles giving practical advice to professors on how to conduct classes so as to counteract effects of discrimination will give anyone a good idea of what would be entailed by this project. See e.g. Roach, supra n. 6, and
event, and constant attention is required to counter it. Effective monitoring by a single individual is thus a practical impossibility.

Finally, even if a professor could discern precisely how stereotypes are operating in a given classroom or for specific students, constant faculty monitoring over the course of a semester to ferret out and address racial stereotyping in each class might have unintended, adverse consequences for solo or token minority students enrolled in a particular class. Although a specific response to a particularly blatant incident of racial stereotyping would typically not be problematic, persistent intervention might only emphasize the presence and predicament of the token minority student. This in turn, has potential to isolation and performance pressure. And, it is highly likely that persistent intervention would be perceived as political correctness run amok and antithetical to the First Amendment.50

The reality is that no individual effort by a professor is likely to be as successful in solving the problem of racial stereotyping and token effects as a critical mass of minority students in that professor’s classroom. And, once a critical mass of minority students is achieved, a professor’s efforts at countering lingering racial stereotyping or token effects will be more fruitful.51

Ineffective responses are unacceptable to a professor because of the serious nature of the conduct and harms at issue. When it occurs under circumstances that produce a denial of equality, racial stereotyping is classic discrimination based on race. And the harms of racial stereotyping interfere with fundamental rights of academic freedom.

Majority students (or professors) who employ racial stereotypes treat minority students in a certain way simply “because of” their race. Of course, racial stereotyping is not always easy to identify. It can be extremely nuanced as well as blatant. It can taint the conduct of persons who have the best intentions but are steeped in race-based norms, as well as the conduct of overt racists who wholeheartedly embrace the stereotype for malicious ends. Moreover, each individual incident of racial stereotyping does not necessarily deny equality. For these reasons – because racial stereotyping is frequently not overt, because penalties for behaving against stereotype are nuanced and

Wildman, supra n. 33.


51. I am reminded of an account of a stereotyping incident related to me by an expert with over twenty years of experience in international and domestic mediation. The mediator told me that she still cannot figure out a good way to handle the problem of racial stereotyping when there is only one person of color in a small training class. I am sure that other teachers share this mediator’s frustration and breathe a sigh of relief whenever they find more than token minority representation in their classrooms.
subtle, because even people without malicious intentions employ stereotypes, and because it is only in the aggregate and over time that the significant nature of the harm of racial stereotyping may become manifest – one might be tempted to assume that persistent racial stereotyping is something other than classic, intentional racial discrimination. This is a mistake.52

Although it has not clearly articulated a theory that brings racial stereotyping within the ambit of constitutional prohibitions on intentional discrimination, the Supreme Court reacts strongly against structures and practices that permit stereotyping.53 In a variety of contexts, the Court has identified stereotyping as the objectionable feature of behavior.54 “Even if some statistical support can be conjured up for” a stereotype, behavior based on that stereotype – for example, sex-based decisions to exclude potential jurors – do not withstand constitutional scrutiny.55 Programs based on customary, ingrained stereotypes of roles deemed appropriate for men or

52. Zatz, supra n. 20, provides an excellent discussion of how stereotypes entail discrimination. Influenced perhaps by discussions of unconscious discrimination, e.g. Lawrence, supra n. 20, there is a tendency on the part of some to assume that racial stereotyping is not unconstitutional, intentional racial discrimination. Certainly stereotyping does not neatly fit within current doctrinal categories. See Clark D. Cunningham, Glenn C. Loury, & John David Skrentny, Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs, 90 Geo. L. J. 835, 838-39 (2002); and Martha Chamallas, Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes, 74 Cal. L. Rev. 747 (2001). But the Supreme Court has many ways of defining “intent.” See e.g. Sheila Foster, Intent and Incoherence, 72 Tul. L. Rev. 1065 (1998); Schwartz, supra n. 20; Michael Selmi, Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric, 86 Geo. L.J. 279 (1997); and Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105 (1989). Even ingrained (or so-called unconscious) racial stereotyping may qualify as intent-based within the meaning of the Constitution.


54. The Court’s abhorrence of stereotyping is commensurate with the view that stereotyping constitutes a serious moral error insofar as it treats individuals of a given race as fungible. John T. Noonan, Jr., The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams (University of California Press 1977) illustrates the point. The Antelope is an account of a judicial proceeding instituted to determine the status of a group of Africans rescued from a pirate ship off the coast of Florida. Some of the Africans were known to be free persons, although the identity of the specific Africans entitled to freedom was not known. Others were known to be slaves, although the identity of the specific Africans held as slaves was not known. One proposal for deciding which Africans should go free and which should be returned to slavery involved, essentially, flipping a coin. Although law imposes significant burdens on the ability of one person to deprive another of personal liberty, Africans – implicitly considered to be less than human – were casually considered fungible when fundamental liberty was at stake. See also Judith N. Shklar, The Faces of Injustice 125 (Yale University Press 1990) (noting lotteries permit people to be willfully ignorant of relevant facts which is the root of passive injustice).

women, such as the nursing program challenged in *Mississippi University for Women v. Hogan*, are invalidated, as are those based on stereotyped notions of what pedagogical practices are suited to women. Laws that enforce stereotypes about the unacceptability of interracial marriage are held unconstitutional, as are laws that create legislative districts likely to promote the stereotyped notion that only African-American legislators can adequately represent African-American citizens. Employment practices that penalize women for not acting in accordance with stereotypes of appropriate behavior for women are declared unlawful. In discussing affirmative action programs in *Regents of the University of California v. Bakke*, Justice Powell adopted a test of constitutionality that turned on whether a given program would foster racial stereotypes. Not only is racial stereotyping pernicious, "vile" conduct. It causes harm to fundamental rights of academic freedom. AAUP obligations are in place to protect that constitutionally-grounded freedom. A critical mass, affirmative action effort to eliminate racial stereotyping and its significant consequences for the academic freedom of minority students is appropriate.

IV. USING THE PROFESSOR'S PERSPECTIVE TO BUTTRESS JUSTIFICATIONS FOR AFFIRMATIVE ACTION

Arguments in support of a critical mass of minority students are not new to the affirmative action debate. The difficulty is that previous critical mass

57. See e.g. *United States v. Virginia*, 518 U.S. at 556-58.
58. See e.g. *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).
59. See e.g. *Reno*, 509 U.S. at 642.
60. See e.g. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), aff'd, *Hopkins v. Price Waterhouse*, 920 F.2d 967 (D.C. Cir. 1990). Such is also the fate of workplace behavior that penalizes men for deviating from stereotypes of appropriate male behavior. See e.g. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998). Although the Supreme Court did not adopt a stereotyping theory to explain its decision in *Oncale*, lower courts have subsequently seen that such a theory is the logical consequence of the decision. See *Schwartz*, supra n. 20, at 1742-43, 1789-90.
63. See supra n. 7-11, 15-16 and accompanying text.
64. For example, in *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), rev'd, 78 F.3d 932 (5th Cir. 1996), cert. denied, 518 U.S. 1033 (1996), it was argued that a critical mass of minority students was needed to ensure that students were socially comfortable rather than isolated and would, therefore, make the desired contribution to the law school's educational mission. Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 Wm. & Mary Bill Rights J. 881, 921 (1996) (quoting from the *Hopwood* transcript). See also the Brief of Amici Curiae American Council on Education et al., at 19, *Board of Education of Township of Piscataway v. Taxman*, 522 U.S. 1010 (1997) (No. 96-679) (more than a few minority students were needed in classrooms because "10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States"); *Grutter*, 288 F.3d at 746-47; and *Wessman*, 160 F.3d at 796-99.
arguments are insufficiently informed by the professor’s perspective.

*Grutter v. Bollinger*\(^6\) provides a good example of one deficiency in previous critical mass arguments. In *Grutter*, the University of Michigan argued that a critical mass of minority students was important because it would ensure both the variety of viewpoints necessary for a good diversity program that minority students would contribute and participate in class, and that minority students would neither feel isolated nor as obliged spokespersons for their race.\(^6\)

The argument reflects points made in this essay. It is, however, incomplete. Although the University took the position that a critical mass of minority students is necessary to ensure that those students are not pressured to be racial spokespersons and will participate in class – *i.e.*, the University discussed token effects – it did not emphasize why the pressure exists. It underplayed the problem of racial stereotyping. This is a significant flaw in the argument, with significant consequences.

If the cause of token effects is not emphasized, the link between the race-based affirmative action remedy and the race-based problem of racial stereotyping is obscured, if not entirely eliminated. For purposes of constitutional argument, of course, the link needs to be emphasized, but the link is also important to the professor. In its absence, opponents of affirmative action find it too easy to mis-characterize the problem with which professors wrestle. If the cause is omitted, discussion tends to focus on the behavior and psychology of minority students, rather than on the behavior and psychology of majority students. Argument tends to degenerate into an offensive discussion of whether minority students are somehow psychologically weak instead of exploring what can be done to avoid racial stereotyping by majority students (and others). For example, in *Grutter*, Judge Boggs interpreted the argument that a critical mass of minority students was needed to prevent isolation as an argument bearing on the “psychological makeup” of minority students.\(^7\) Although the defenders of affirmative action did not intend to ascribe a psychological weakness to minority students, their argument was framed so as to enable Judge Boggs to dismiss it as one that Frederick Douglass and Martin Luther King, Jr., would have shunned.\(^8\)

Any professor attempting to find ways to dispel pernicious racial stereotypes cannot afford to have this particular stereotype – of a disabling personal weakness that connotes a lesser personhood – associated with affirmative action efforts. For such a professor, it is essential to locate the problem accurately in the behaviors and beliefs of majority students and

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66. *Id.* at 737.
67. *Id.* at 805 (Boggs, J., dissenting).
68. *Id.* The court in *Wessman* reacted similarly to a critical mass argument that omitted to include stereotyping as the cause of token effects. 160 F.3d 790.
others who use racial stereotypes.69

Judge Boggs’s opinion points to another consequence of failing to import the professor’s perspective into diversity justifications for affirmative action. In Boggs’s world, harms to token minority students operate solely in the emotional or psychological arena, and those harms are treated as trivial.70 For professors whose interactions with students are guided by AAUP principles and informed by a well-honed understanding of the dynamics of classroom behavior when minority students constitute only a token presence, the harms calling for a race-oriented solution are anything but trivial. Consisting of a fundamental inequality in academic liberties of minority students, an inequality caused by racial discrimination, the harms have a moral and a constitutional dimension.71 Proponents of diversity-oriented affirmative action typically remind courts that they should give deference to pedagogical choices because of constitutionally-grounded principles of academic freedom.72 And, universities sometimes assert that they possess an institutional academic freedom to adopt affirmative action policies.73 But these arguments do not emphasize the personal autonomy and academic freedom of minority students that should be at the heart of the affirmative action debate.

The greatest significance of the professor’s perspective is that it focuses on enrolled minority students and measures their harms by the extent to

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69. Proponents of affirmative action are continually pressed to refute the charge that affirmative action plans stigmatize or stereotype racial minorities. See e.g. Girardeau A. Spann, The Law of Affirmative Action: Twenty-five years of Supreme Court Decisions on Race and Remedies 173 (New York University Press 2000); and Greenberg, supra n. 16 at 582-87.

70. Much has been written about the tendency of courts to devalue emotional harms. See e.g. Martha Chamallas, The Architecture of Bias: Deep Structures in Tort Law, 146 U. Pa. L. Rev. 463 (1998). Cf. the harms of workplace sexual harassment, which were once treated similarly. No longer do courts dismiss workplace sexual harassment claims because of a perception that complaining women are weak or overly emotional in their reactions to harassment. Now, the focus is on the structural conditions that present obstacles to the strong as well as to the weak. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

71. See supra n. 7-11, 15-16, and accompanying text. Cf. Judge Boggs’s dissent in Grutter, which remarks in passing that the University of Michigan had not “promote[d] the potential for moral education in racial tolerance created by a more diverse student body” as a justification for its affirmative action plan. Boggs suggested that, were the University to have as its goal racial tolerance, “the mere presence of minority students may indeed be sufficient to enhance the educational experience.” Grutter, 288 F.3d at 789 (Boggs, J., dissenting). I doubt that Boggs had my perspective in mind when he made these comments, but one could read him to be saying that race might permissibly be used in making admissions decisions if the goal were to promote the potential for moral interactions – interactions (from my perspective) in which members of certain racial groups are not treated as fungible. See supra n. 54.

72. See e.g. the Br. of Amici Curiae American Council on Education et al. at 13-14; Piscataway, 522 U.S. 1010 (No. 96-679); Liu, supra n. 14, at 439 n. 268; Note: An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 Harv. L. Rev. 1357 (1996); and Susan Stefan, Leaving Civil Rights to the “Experts”: From Deference to Abdication Under the Professional Judgment Standard, 102 Yale L.J. 639 (1992).

73. See Hopwood, 78 F.3d at 943, in which the court was not sympathetic to the university’s attempt to rely on a First Amendment argument to serve its own interests. According to the court, the First Amendment protects individual, not institutional, rights.
which AAUP-defined obligations – running to enrolled minority students and intended to protect fundamental rights – are satisfied. Whether one thinks of racial stereotyping as classic race-based conduct or not, race-based affirmative action programs attempting to eliminate disadvantages to enrolled minority students are proportionate and proper responses to such conduct and harms. In order to eliminate conditions in which racial tokens and treated as fungible with respect to their points of view and intellectual contributions are the primary beneficiaries of affirmative action. Minority students admitted pursuant to the affirmative action plan as well as white students whose educational experience improves from the creation of a critical mass of minority students in the classroom are secondary beneficiaries. In contrast, in conventional diversity arguments, benefits of affirmative action are said to flow primarily and equally to both minority and majority students. For example, one amicus brief in Grutter argues that a critical mass of students is needed to dismantle stereotypes so that majority students will see that there is no minority viewpoint. Brief for the Clinical Legal Education Association as Amicus Curiae in Support of Appellants at 16-17, Grutter, 288 F.3d 732 (No. 01-1447). If minority students censor themselves and speak only as representatives of the minority community, “the opportunity to hear, challenge and learn from differing perspectives is lost.” Id. at 11. Of course, stereotyping by majority students will be limited in the presence of a critical mass of minority students, and one can refer to this as a benefit to majority students, but surely the primary benefit is to minority students. For other diversity arguments which tend to focus on majority rather than minority student benefits, see the Brief of Amici Curiae American Council on Education et al., at 20, Piscataway, 522 U.S. 1010 (No. 96-679); and the Brief of Charles A. Wright, Douglas Laycock & Samuel Issacharoff as Amici Curiae in Support of Respondent, at 7-13, Piscataway, 522 U.S. 1010 (No. 96-679).

As Karlan, supra n. 3, at 1602, notes, conventional remedial justifications for affirmative action must be stretched if the minority students being admitted through the diversity program are themselves seen as the primary beneficiaries of the plan. If minority students who would be token or “solo” without an affirmative action plan are primary beneficiaries, the remedial argument looks very different.

75. See supra nn. 53-62. My argument is not about racial stereotyping per se, but there are other advantages to giving racial stereotyping special attention in the affirmative action debate. For example, when racial stereotyping is omitted from the argument, advocates of race-based affirmative action plans relinquish at least one valid response to arguments that there is no limit to the number of groups that might claim “diversity” status for purposes of affirmative action. See e.g. Judge Boggs, dissenting in Grutter, 288 F.3d at 794-95 (Boggs, J., dissenting), echoing Grutter v. Bollinger, 137 F. Supp. 2d 821, 874 (E.D. Mich. 2001) (inquiring about what criteria should be used for determining which groups should be singled out for special, critical mass treatment). Levinson, supra n. 6, has a good discussion of this issue. If problems of racial stereotyping and token behavior only arise with respect to low-status racial groups in circumstances in which there is a history of white domination of the environment, see supra n. 20, and accompanying text, there is a valid way of distinguishing among groups for which a critical mass is sought. White, supra n. 62, argues that justifications for affirmative action on behalf of African Americans are the most compelling.

76. It is possible that, despite the many Supreme Court decisions invalidating conduct based on stereotypes, supra nn. 52-60, and accompanying text, courts will wish to see stereotyping as equivalent only to general societal discrimination that is not recognized as a valid reason for race-based remedial measures. See e.g. Wessman, 160 F.3d 790. If the argument is presented properly, however, courts should see that, although stereotyping may be both pervasive and a legacy of prior history, each instance of stereotyping is current, identifiable race-based conduct, Hunt, 517 U.S. at 909, that, when sufficiently severe, denies equality. See White, supra n. 62 (arguing for particularity in analysis, and that stereotyping can be viewed as state action); Ian Ayres & Frederick E. Vars, When Does Private Discrimination Justify Public Affirmative
stereotyping flourishes, race is used to increase the number of minority students in classrooms. Enrolled minority students who would otherwise be token or "solo", and therefore subjected to the pressures and demands of racial stereotyping described above, are put in a classroom that thanks to the affirmative action plan offers equal opportunities for intellectual development.

The professional obligations to students that dictate my life in the classroom suggest that advocates of affirmative action plans might properly and advantageously adjust their arguments in a modest way. The obligations of professors respecting minority students should carry a fair bit of weight insofar as they derive from a set of concerns that stress fundamental, individual constitutional rights. Reminding courts of a professor's obligations should also dispel suspicions that professors are interested in racial quotas or numbers for the sake of numbers. Instead, professors are seeking the most effective way of ensuring that the classroom is not structured to subject minority students to pernicious racial stereotyping and educational disadvantage.

For the professor, the practical and ethical advantages of having a critical mass of minority students in the classroom cannot be denied. Although a critical mass will not in and of itself eliminate all racial discrimination, it is truly the sine qua non to the elimination of that discrimination, the condition without which race-based behavior will surely not be eliminated. Most important, after-the-fact, reactive approaches to the problem do not comport with professional obligations. Like any person in a position of special trust, a professor should anticipate and act to prevent harm to those to whom her professional obligations run. She will not discharge her professional responsibilities if she waits to respond retroactively to incidents of racial stereotyping. A professor committed to developing every student's capacity for critical judgment and to providing an educational environment that will not force any student into an intellectual pigeonhole will want to have more than a token racial minority presence in the classroom. She will want to take affirmative action.

Action, 98 Colum. L. Rev. 1577 (1998) (discussing when government's passive participation in private discrimination becomes a cause of that discrimination). Even if racial stereotyping is viewed as unintentional conduct with a discriminatory effect, one might justify a race-based response as an effort to comply with Title VI. See Hunt, 517 U.S. at 915 (suggesting that compliance with Sections 2 and 5 of the Voting Rights Act may constitute a compelling state interest justifying race-based districting decisions). Cf. Davis, 526 U.S. 629 (discussing affirmative obligations of recipients of federal funds to respond to student-to-student harassment).

For general accounts of the ways in which affirmative action can work to prevent ongoing racial discrimination, see e.g. Hallinan, supra n. 20, at 733 (one of the three goals of affirmative action is to counter present discrimination); Charles R. Lawrence III, Each Other's Harvest: Diversity's Deeper Meaning, 31 U.S.F. L. Rev. 757, 772 (1997) (the true goal of racial diversity is to stop racism); and Liu, supra n. 14, at 413 (the desire for diversity is, in part, justified as a compellingly moral means of combating the evil of private prejudice).