

CULTIVATING INCLUSION

*Patrick S. Shin**

*Mitu Gulati***

Twenty-five years ago, law schools were in the developing stages of a pitched battle for the future of legal education and academia. Faculties fought over the tenure cases of minority candidates, revealing deep divisions within legal academia on questions about the urgency of racial diversification and the merits of critical race scholarship. The students in charge of the law reviews where this scholarship was emerging engaged in their own battles, arguing over the use of affirmative action in the selection of law review editors and then, as neophyte editors, staking their own positions in the “What is legal scholarship?” debates. As students during this period, we could not avoid reflecting on our own attitudes toward the relevance of race in the legal profession and on the value of legal scholarship about race.

Looking back at that time from the perspective of our current positions, we are renewed in our admiration of and appreciation for Professor Matsuda’s scholarship. She was a central figure in the then-emergent critical race movement, and her work was a focus in discussions about the field.¹ Through her fearless and unwavering writings, Matsuda helped spur changes in attitude and perspective within legal academia that prepared the way for other scholars of color. Equal to her impact within the academy was the inspiration she provided to a generation of prospective Asian American legal scholars. In her example, we saw the possibility that our voices might be heard inside the enclave of legal academia.

The idea that established communities have strong reasons to attach value to the voices and perspectives of outsiders is a theme that runs through much of Matsuda’s scholarship. In this Essay, we examine Matsuda’s application of this idea in two articles on affirmative action: an influential early piece, *Affirmative Action and Legal Knowledge: Planting Seeds in*

* Associate Dean and Professor of Law, Suffolk University Law School.

** Professor of Law, Duke University School of Law. Our thanks to Adrienne Davis and Richard Delgado for including us in this symposium, to Richard for his comments on a draft of this Essay, and to Guy-Uriel Charles and Devon Carbado for numerous conversations about the topics herein.

1. See, e.g., Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 706 n.4, 750–51 (discussing Matsuda’s work); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (same).

Plowed-Up Ground,² and one written fifteen years later, *Who Is Excellent?*³ We offer some reflections on the ways in which Matsuda's arguments relate to current thinking about affirmative action and the value of diversity.

What strikes us as distinctive about Matsuda's arguments for affirmative action in *Planting Seeds* and *Who Is Excellent?* is that they are not primarily framed as arguments derived from principles of justice or equality. Although Matsuda elsewhere suggests that affirmative action might be justified as a form of reparations,⁴ she does not make that her argument in these two pieces. Rather, in *Planting Seeds*, Matsuda argues in favor of affirmative efforts to recognize and validate minority scholarship as a means of increasing the scope, robustness, and reach of legal knowledge.⁵ In *Who Is Excellent?*, she argues for affirmative action in university admissions as a way to foster "deep learning"⁶ and "critical thinking."⁷ According to the view that Matsuda articulates, affirmative action in legal academia and in legal education is not a matter of giving minorities a leg up for the sake of achieving broad goals of social justice or racial equality. While she does not deny that these goals may also be served, in *Planting Seeds* and *Who Is Excellent?*, she seeks to justify affirmative action in legal academia and education not in terms of these external social goals but in terms of internal values that fundamentally define those institutions. She presents affirmative action as a natural extension of our commitment to open inquiry and critical thinking that will benefit academia and education on their own terms, regardless of any associated positive benefits for society as a whole.

In the arena of scholarship, affirmative action, according to Matsuda, means constructive engagement with the work of outsiders that might not be deemed worthy of notice under traditional filters.⁸ Matsuda's reason for extending our engagement in this way is rooted in the very nature of the scholarly enterprise. We should engage with unfamiliar scholarship because this will increase our legal knowledge. And we must care about increasing knowledge if we care about scholarship at all, because that is just what

2. Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN'S L.J. 1 (1988) [hereinafter *Planting Seeds*].

3. Mari J. Matsuda, *Who Is Excellent?*, 1 SEATTLE J. SOC. JUST. 29 (2003) [hereinafter *Who Is Excellent?*].

4. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 397 (1987); see also CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 231-44 (1997).

5. *Planting Seeds*, *supra* note 2, at 8.

6. *Who Is Excellent?*, *supra* note 3, at 32.

7. See *id.* at 36-37.

8. See *Planting Seeds*, *supra* note 2, at 7.

scholarship *is*. Similarly, for educators, affirmative action is about opening the learning community to outsider perspectives. The reason for doing so is that this will enrich discourse and challenge students to think critically about conventional assumptions.⁹ And we must care about pushing our students in this way insofar as we care about educating them at all, because that is just what education *is*. Thus, on Matsuda's view, affirmative action serves values that are constitutive of the institutions of legal scholarship and education.¹⁰

Matsuda's early writing about affirmative action may seem at first to resonate with the now-standard view that affirmative action can be justified by a compelling interest in diverse communities of higher learning and discourse. When we read more carefully, however, we notice that the words "diversity" and "diverse" never appear in *Planting Seeds*. Matsuda there expresses little interest in racial or other demographics as such. Rather, her concern is more directly rooted in ideals of intellectual empathy. She strives for a community in which "the perspective of outsiders is considered as a matter of course . . . and is expressed freely without fear of being labeled irrelevant or unrealistic."¹¹ Matsuda's hope in *Planting Seeds* is that through affirmative action, "we will live and work a different kind of academic life."¹² This is not just a matter of increasing the representation of racial minorities in the academic community but is, as she puts it, a commitment that requires active development of our "social skill at integrated life."¹³

In *Who Is Excellent?*, which was written around the time of the Supreme Court's decision in *Grutter*,¹⁴ Matsuda does identify the importance of increasing the diversity of student bodies as a reason for affirmative action.¹⁵ But even here, it is clear that she is not merely advocating for the admission of racial minorities in higher numbers. She agrees with critics of racial identity politics in rejecting "identity grouping as an end in itself"¹⁶ but thinks of the experience of racial identity as one source of different understandings of the world. Again, Matsuda's goal is more than changing

9. See *Who Is Excellent?*, *supra* note 3, at 36–37.

10. In *Who Is Excellent?*, Matsuda also suggests a somewhat analogous argument in the context of private employment. She recounts discussions with businesspeople who explain how having employees who can offer minority perspectives can help their companies make money. See *id.* at 33–34. Although understanding different perspectives and promoting critical thinking are not constitutive of business in the same way that they are of scholarship and education, the idea is the same: affirmative action can be justified in terms of the internal values of the institution that practices it.

11. *Planting Seeds*, *supra* note 2, at 9.

12. *Id.*

13. *Id.* at 10.

14. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

15. *Who Is Excellent?*, *supra* note 3, at 36.

16. *Id.* at 41.

the racial demographic of our students. Her interest in affirmative action reflects, instead, a particular approach to the question, “What will we teach them?”¹⁷ Matsuda’s answer is that by seriously considering outsider perspectives, we can take students “to the place of unheard of ideas.”¹⁸

Re-reading Matsuda’s original account of affirmative action naturally invites comparison with our modern understandings. Arguably, affirmative action as envisioned in Matsuda’s writings is quite different from how we tend to think of it today. In *Planting Seeds* and *Who Is Excellent?*, affirmative action in academia and higher education is portrayed as a form of active intellectual engagement with outsider perspectives, justified by the value of knowledge and critical thinking. In contrast, according to the familiar post-*Grutter* rationale, affirmative action is a decisionmaking procedure that permits the consideration of race in admissions or hiring decisions, justified by various benefits that flow from the resultant diversity. Some of these benefits, such as enhanced classroom discourse, are consistent with Matsuda’s goals for affirmative action. But the diversity rationale tells a different story about *how* these beneficial consequences are achieved.

According to the diversity rationale articulated in *Grutter*, once a community achieves a certain level of racial diversity (“critical mass”), a bundle of benefits opens.¹⁹ Discourse is enriched, stereotype-based thinking is reduced, conscious and unconscious biases are eased, and cross-racial and -cultural understandings are improved.²⁰ But it seems that we think of the activation of these benefits as a mostly passive affair, a matter of social science. The benefits of diversity materialize through the natural operation of psychological mechanisms that accompany social contact. The contemporary view seems to be that the purpose of affirmative action is to manufacture diversity and then diversity itself takes care of the rest. On Matsuda’s view in *Planting Seeds* and *Who Is Excellent?*, the work of affirmative action is not limited to the moment of inclusion but instead requires continuing efforts to incorporate new perspectives into our scholarship and teaching. Affirmative action requires engagement after the moment of inclusion. On the social science view, we tend to assume that once we achieve sufficient heterogeneity in our community—which is no

17. *Id.* at 42.

18. *Id.* at 37.

19. See *Grutter*, 539 U.S. at 325, 329–30. The theory of “critical mass,” we suspect, is intuitively plausible to many. But the empirical case is still a matter of considerable debate. See, e.g., Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Does Critical Mass Matter? Views from the Boardroom*, 34 SEATTLE U.L. REV. 1049 (2011).

20. See generally Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130 (2013).

easy task, to be sure—diversity itself will then take over the work of social integration. On Matsuda’s view, affirmative action consists in striving for the “skill” of integration, not just creating the conditions from which integrative benefits passively materialize.

The idea that diversity, once created, naturally yields socially beneficial consequences has made affirmative action a highly user-friendly proposition. This is not to minimize the level of principled commitment and political resolve necessary to put an affirmative action policy or diversity initiative in place. But there is a certain convenience in the notion that the integrative, discourse-enriching benefits of diversity will be realized simply by virtue of its mere existence. We do not doubt the science supporting the social contact hypothesis, i.e., the notion that exposure to and contact with members of out-groups can lead to reduced bias and stereotyping.²¹ What we wonder, though, is whether the diversity rationale has given rise to a tendency to conflate the production of racial diversity with an intellectual commitment to open inquiry and critical thinking—affirmative action in Matsuda’s sense. The introduction of diversity may very well cause a reduction of discriminatory attitudes that might be necessary for engaging with unfamiliar ideas, but it may not be sufficient. Freedom from bias and stereotypes is not the same thing as being intellectually open to outsider perspectives, pursuing nontraditional modes of argument, or engaging in critical thought. We wonder whether our fascination with diversity as a mechanism for reducing bias has led us to think of diversity as a *substitute* for the kind of intellectual engagement that Matsuda advocated in *Who Is Excellent?* and *Planting Seeds*.

A community can be racially diverse in the sense of being formally inclusive of minorities and yet still demand a high level of conformity in the more performative aspects of identity.²² Demographically diverse institutions can still place significantly disparate burdens on individuals to act in ways that support and reaffirm prevailing norms of appropriate, normal, professional conduct and expression. A community can have a high degree of racial diversity and still have a narrow mindset in judging “who is excellent.” Perhaps in some contexts this narrowness is inescapable. Law schools must think about whether an applicant will be able to pass the bar; corporate firms must take into account project and client needs; faculties must consider publication records. Our interest is not in finding fault. Rather, our point is that the presence of demographic racial diversity implies

21. See Katharine Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1953–56 (2009); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1066 (2006).

22. See generally DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2013).

very little about the extent of genuine pluralism in a community's cultural, intellectual, and performative norms.²³

A further problem is that diversity is a vague and amorphous concept. It is hard to pin down what diversity exactly is.²⁴ This makes it difficult to distinguish institutions that are genuinely committed to diversity from those that are merely good at talking the talk for the sake of goodwill. Additionally, the vagueness of diversity, when combined with its dissociability from particular substantive motives, gives rise to the possibility that the promotion of diversity might be misused as cover for political agendas or to mask ulterior interests.²⁵ Whatever one might say about the applicability of the social contact hypothesis in that kind of scenario,²⁶ the production of diversity under such circumstances would be a far cry from Matsuda's vision of affirmative action.

While we worry that current proponents of affirmative action expect the production of diversity to do too much work for us as we move toward the ideal of a more inclusive society, we do not advocate that the diversity rationale be abandoned. For one thing, racial diversity is one important answer to Matsuda's question, "What is the best mix of people to spark the interactions from which deep learning emerges?"²⁷ Diversity of race is arguably a crucial aspect of the best mix. For another thing, one might argue that the psychological mechanisms by which diversity reduces discrimination have nothing to do with the motives by which that diversity is created.²⁸ So, even if institutions engage in diversity initiatives for reasons that are disconnected from the original ideals behind affirmative action, those initiatives may still be a good thing insofar as they contribute to the reduction of discriminatory attitudes.

The diversity rationale is different from Matsuda's argument for affirmative action. She saw affirmative action as serving values that are

23. And the fact that an institution *claims* a commitment to diversity implies even less. Cf. Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017 (2011).

24. See *id.* at 1027–29.

25. Cf. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 570 n.46 (1984) (expressing skepticism about the efficacy and signification of diversity-based affirmative action in admissions).

26. Social scientists have found that four key conditions are necessary in order for intergroup contact to reduce discriminatory stereotypes: "equal status between the groups, common goals, the interdependence of the groups, and the positive support of authorities, laws, or custom." Bartlett, *supra* note 21, at 1953–54 (discussing research confirming the original findings of Gordon Allport, who first articulated the social contact hypothesis in GORDON ALLPORT, *THE NATURE OF PREJUDICE* 281 (1954)).

27. *Who Is Excellent?*, *supra* note 3, at 32.

28. See Katharine T. Bartlett, *Showcasing: The Positive Spin*, 89 N.C. L. REV. 1055 (2011).

constitutive of academic institutions. In contrast, the diversity rationale seeks to justify affirmative action in terms of the broader social purpose of reducing racial discrimination and inequality. This is, of course, a compelling goal, and we agree that the creation of diversity in various institutional settings is an important means to achieving it. Thus, we support the diversity rationale for affirmative action. But we think that the creation of racial diversity should be understood as but one step toward the ideal of an inclusive community. *Planting Seeds* and *Who Is Excellent?* teach us that affirmative action is not a policy that we can just put in place and then passively reap the benefits. If we are not careful in first being clear as to what benefits we are hoping to obtain from diversity and then working to ensure that our diversity initiatives actually produce those benefits, we will end up wasting resources that might be better spent elsewhere. Affirmative action is hard work, and it is hard work that continues after the moment of inclusion. The planting of seeds is a vivid metaphor, but, ironically, what Matsuda tells us is that the heart of affirmative action is not in the planting. It is in the skill required for successful cultivation.