A STUDY IN CONTRADICTION: A LOOK AT THE CONFLICTING ASSUMPTIONS UNDERLYING STANDARD ARGUMENTS FOR SPEECH CODES AND THE DIVERSITY RATIONALE

Chi Steve Kwok *

I. INTRODUCTION AND A DESCRIPTION OF THE PROBLEM

Ever since Hopwood v. Texas,1 in which the Fifth Circuit Court of Appeals barred "any consideration of race or ethnicity... for the purpose of achieving a diverse student body,"2 scholars wishing to preserve colleges' diversity programs have renewed their energies defending Bakke's diversity rationale3 against further legal attacks.4

1 78 F.3d 932 (5th Cir. 1996).
2 Id. at 944.
3 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-15 (1978). In the context of defending affirmative action programs, two separate rationales are usually adduced—the diversity rationale and the remedial justification. See, e.g., Bakke, 438 U.S. at 306; Hopwood, 78 F.3d at 938.
4 The diversity rationale justifies race-conscious admissions practices on the ground that they bring special educational benefits that are otherwise difficult to attain. In contrast, the remedial justification defends race-conscious admissions policies based on arguments about justice and the moral imperative to compensate for the lingering effects of past discrimination. In Bakke, the Supreme Court imposed stringent requirements that have since made arguments grounded in the remedial justification difficult to succeed. See Bakke, 438 U.S. at 307 (noting that the "amorphous" claim of societal discrimination will not suffice and requiring a showing of "specific instances of racial discrimination"). Scholars, therefore, have tended to concentrate their energies on the diversity rationale, which is widely seen as a more promising alternative. See, e.g., Terrance Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role, 42 U. Chi. L. REV. 653, 685-86 (1975) (justifying race-conscious admissions policies on the ground that students "need knowledge of the attitudes, views, and backgrounds of racial minorities"); Kathleen M. Sullivan, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 HARV. L. REV. 78, 96-98 (1986) (urging the use of forward-looking reasons to justify affirmative action programs).
5 See, e.g., Akhil Reed Amar & Neal Kumar Katyal, Bakke's Fate, 43 UCLA L. REV. 1745 (1996) (maintaining that of the two "domains" of affirmative action, one relating to government contracts and the other to college admissions policies, the latter stands on much stronger constitutional grounds); Goodwin Liu, Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test, 33 HARV. C.R.-C.L. L. REV. 381 (1998) (arguing that the diversity rationale of Bakke can meet the compelling interest test); Matthew S. Lerner, Comment, When Diversity Leads to Adversity: The Principles of Promoting Diversity in Educational Institutions, Premonitions of the Taxman v. Board of Education Settlement, 47 BUFF. L. REV. 1035 (1999) (arguing the Supreme Court should consider the principle of diversity in all educational institutions to be a compelling state interest); Expert Report of Derek Bok (last modified Feb. 29, 2000), at
Criticizing the Fifth Circuit’s interpretation in *Hopwood* of Supreme Court precedents such as *Croson* and *Adarand*, these commentators stress the distinctive character of education. Even if government contract set-asides for minority businesses are constitutionally problematic, they say, diversity-enhancing admissions policies that use race as a “plus factor” do not run afoul of the Equal Protection Clause. This is because diversity, in the context of higher education, serves the “compelling interests” of ensuring the robust exchange of ideas, enhancing the quality of education for all students, and so on.

However, as soon as these arguments are made, other observers—even friends of affirmative action—immediately question the sincerity of these justifications. They openly wonder whether “diversity” is not simply a buzzword administrators have learned to mouth since *Bakke* to maintain what are, in truth, programs that are predominantly remedial in purpose and operation. Jed Rubenfeld, hardly an enemy of affirmative action, made explicit a sentiment that was probably lurking in the minds of many others when he asked “the pro-affirmative action crowd . . . to own up to the weakness of ‘diversity’ as a defense of most affirmative action plans.” “Everyone knows,” he wrote, “that in most cases a true diversity of perspectives and backgrounds is not really being pursued. (Why no preferences for fundamentalist Christians or for neo-Nazis?)”

This Article originates from a similar skeptical spirit. Even if it is desirable and morally imperative for colleges and universities to maintain, and even increase, the level of minority enrollment, is the diversity rationale an honest justification? The question is not whether it is possible to maintain the diversity rationale on a theoretical level...
against constitutional attacks. Several law review articles have suggested that the task is at least not hopeless. Rather, the questions asked here is: Given what we know about how schools are run today, is the diversity rationale actually being taken seriously by universities? Or is "diversity" merely a pretext for what are, in fact, affirmative action programs that are purely remedial in purpose—an objective disfavored by the Court.

To take the first step toward answering these questions, I shall examine the co-existence of campus speech codes with school policies designed to enhance the diversity of the student body. The prevalence of speech regulations on college campuses creates at least an apparent tension with the rhetoric of the diversity justification. If schools truly take diversity seriously and want to have represented in the student body as many perspectives, experiences, and backgrounds as possible so that students can learn from and challenge each other, why do they consciously restrict students'—and sometimes, faculty's—speech, especially when many of the banned expressions concern the topics of race, gender, and homosexuality? Although some restrictions undoubtedly can be defended as innocuous "time, place, manner" regulations\(^\text{16}\) vital to any community of civil discourse, other codes unabashedly regulate the content and viewpoint of speech.\(^\text{17}\)

\(^\text{13}\) See Liu, supra note 4, at 382-84; see also Amar & Katyal, supra note 4, at 1778-79.

\(^\text{14}\) In this Article, I will use the term "campus speech codes," instead of the narrower "hate speech regulations." This is because many speech codes not only regulate what a reasonable person would regard as "hate speech," but also cover a range of other controversial expressions that some people might deem offensive. See infra note 17. Similarly, I will avoid the term "racist speech" when referring to expressions that, while controversial, fall short of reaching the level of vile racial epithets and insults.

\(^\text{15}\) The inquiry in this Article will be directed mostly toward state institutions and their policies. This is because public institutions are subject to the constitutional requirements of the First and Fourteenth Amendments while private universities are not. However, the arguments made here can easily be modified to apply to the nonstate context as well, since most private universities seek to follow the requirements imposed by the Constitution and voluntarily tailor their policies with this goal in mind. See TIMOTHY C. SHELL, CAMPUS HATE SPEECH ON TRIAL 56 (1998) (noting that many private universities have a "historical commitment to follow First Amendment guidelines"); Cass R. Sunstein, Academic Freedom and Law: Liberalism, Speech Codes, and Related Problems, in THE FUTURE OF ACADEMIC FREEDOM 93, 101 (Louis Menand ed., 1996) (noting that "many private universities like to follow the Constitution even if they are not required to do so").

\(^\text{16}\) "Time, place, manner" regulations are content-neutral measures designed to preserve order in the public forum, rather than to stifle speech. When they are narrowly tailored, these regulations are constitutionally permissible. See, e.g., Madsen v. Women's Health Ctr., 512 U.S. 753, 764 (1994); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

\(^\text{17}\) A regulation proposed by Washburn University of Topeka is typical. It would apply only to "the use of racial epithets by a dominant group or member of a dominant group to oppress, harass, or fluster a member of a subordinate group," but would not cover comments, however derogatory, by a minority student toward a member of a "dominant group." WASHBURN UNIVERSITY OF TOPEKA, PROPOSED STATEMENT ON LEARNING ENVIRONMENT \(\text{1}\) (May 7, 1990),
Further, many of these codes do not simply cover racial epithets wholly devoid of intellectual content, but also comprehend a range of other expressions that have the effect of making some minority students feel unwelcome or excluded, even if no intent to injure was present. These regulations amount to a "heckler's veto" approach to speech regulation that has been repeatedly disapproved by the Supreme Court's First Amendment case law.

With hundreds of articles already written about campus speech codes—most of them sparked by three seminal law review pieces by Professors Richard Delgado, Charles Lawrence, and Mari Matsuda—many justifications for speech restrictions leap to mind. Some say quoted in Suzanna Sherry, Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech, 75 MINN. L. REV. 933, 941 & n.38 (1991). Yet another typical example is the regulation enacted by the Buffalo Law School. The law school's policy warns that "racist, sexist, homophobic, anti-lesbian, ageist and ethnically derogatory statements" will bring "swift, open condemnation by faculty." Mark Cammack & Susan Davies, Should Hate Speech Be Prohibited in Law Schools?, SW. U. L. REV. 145, 159 n.99 (1991) (quoting Faculty Statement Regarding Intellectual Freedom, Tolerance, and Prohibited Harassment, State University of New York at Buffalo School of Law, Oct. 3, 1987). This regulation, by explicitly discriminating on the basis of content and viewpoint, is indistinguishable from the one struck down by the Supreme Court in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). See also ALAN CHARLES KOBS & HARVEY A. SILVERGLATE, THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES, 233-61 (1998) (discussing various instances of discriminatory speech code application); Henry Louis Gates, Critical Race Theory and Freedom of Speech, in THE FUTURE OF ACADEMIC FREEDOM, supra note 15, 120, 151 (discussing a regulation adopted by the University of Connecticut that regulates conduct by a dominant group toward a minority group); Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal, 1990 DUKE L.J. 484, 506 (reviewing campus speech codes and finding that "[m]any proposed or adopted campus speech regulations constitute unconstitutional discrimination against particular views, either as they are written or as they are applied").

Because they are often neither content- nor viewpoint-neutral, speech codes have not fared well in the courts. See, e.g., UWM Post v. Bd. of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down Wisconsin’s speech code on First Amendment and due process grounds); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (striking down Michigan’s speech code on First Amendment and due process grounds). See generally SHIEL, supra note 15, at 73-98 (discussing campus speech code cases and noting the courts’ aversion to speech regulations). These failures are, of course, not surprising in light of the Supreme Court’s holding in R.A.V., which invalidated St. Paul’s ordinance because it discriminated on the basis of content and viewpoint by only banning the display of symbols “that arouse anger in others on the basis of race, color, creed, religion, or gender,” but not anything else. R.A.V., 505 U.S. at 380, 391-92.

See, e.g., Univ. of Mich., 721 F. Supp. at 866 (finding that “[t]he innocent intent of the speaker was apparently immaterial to whether a complaint would be pursued” and noting that the broadly worded speech code could be interpreted to bar the teaching of controversial biological theories that other students might deem racist and sexist).

See, e.g., Reno v. ACLU, 521 U.S. 844, 880 (1997) (expressing disapproval of a "heckler's veto" approach to regulating speech); Forsyth County v. Nationalist Movement, 505 U.S. 125, 134 (1992) ("Listeners' reaction to speech is not a content-neutral basis for regulation.").

that universities, in addition to their primary missions of research and teaching, have the responsibility of instilling in students the civic habit of tolerance and respect for others.\textsuperscript{21} Speech codes, by banning expressions that degrade and debilitating, are enacted in that spirit. Other scholars argue that these codes—even if they are discriminatory in favor of minority students—are necessary to foster a “true” diversity of views.\textsuperscript{22} The idea is that racial epithets and other hurtful expressions so seriously injure minorities’ self-worth that, if left unregulated, would render these students effectively paralyzed, unable to contribute their perspectives to the mix of ideas—to the detriment of genuine diversity.

All these arguments may be true. There is nothing inherently illegitimate or hypocritical about the existence of speech codes on campuses committed to diversity. One can surely argue that, while diversity is crucial to a quality education, there are other goals a university should pursue, including the eradication of racial inequality to the fullest extent allowable by law. Thus, even if a speech code does indeed chill the expression of some legitimate controversial views, the price is worth paying in light of our shameful historical legacy of racial injustice. To do otherwise would be to ask minorities most affected by hurtful speech to bear yet another burden for the benefit of everyone else. This response surely does not mean that administrators are dishonest when they uphold the diversity banner to defend their admissions programs from legal challenges. As economists remind us, everything has costs, and trade-offs must be made.

I do not quarrel with these arguments here. What is troubling is not the existence of campus speech codes per se, but the way commentators go about defending them, the arguments they use when they do so, and, most importantly, the assumptions they make.

In the following pages, I will make explicit the assumptions codes proponents employ when they defend campus speech codes against critics’ standard free speech challenges and compare them with the counterparts assumptions that supporters of diversity use when they defend admissions policies against standard equal protection attacks. A comparison will reveal that assumptions made in one context are often incompatible with those made in another. If the assumptions used in the two areas are indeed incompatible, a serious problem of inconsistency arises for those commentators and universities—and I

\textsuperscript{21} See, e.g., Mary Ellen Gale, Reimagining the First Amendment: Racist Speech and Equal Liberty, 65 ST. JOHN’S L. REV. 119, 126-27 (1991) (lamenting universities’ failure to instill values and arguing that “it is difficult to identify other social institutions that can accomplish” the task).

\textsuperscript{22} This argument was made most prominently in the context of urging restrictions on pornography. See generally CATHARINE A. MACKINNON, ONLY WORDS 71-110 (1993); OWEN M. FISS, THE IRONY OF FREE SPEECH 5-26 (1996).
would guess there are many—who sincerely embrace both agendas. In order to avoid charges of hypocrisy and contradiction, these groups have to either argue in some other way to continue their simultaneous defense of diversity programs and speech codes or abandon one project entirely in pure pursuit of another.

The different types of lawsuits that the University of Michigan has had to defend over time dramatize the problem of using incompatible assumptions in different settings. In defending against challenges to the constitutionality of its admissions policies, the university trumpets the need for and the benefits of a diverse student body in the hopes of satisfying Bakke's requirements. In doing so, it echoes the usual arguments in favor of the diversity rationale, which, as I will demonstrate below, depend on certain conceptions about the nature of higher education, the First Amendment, the special ability of minority students to enhance campus discussions, as well as university admissions officers' commitment to making truly individualized inquiries.

These assumptions, as I will also show, diverge from the assumptions underlying standard pro-speech codes arguments the university once made when it (unsuccessfully) defended speech restrictions from attacks in Doe v. University of Michigan. This clashing incongruity would undoubtedly provide powerful ammunition for advocates of color-blindness and opposing counsel who now wish to impugn the sincerity with which Michigan puts forth arguments in support of the diversity rationale. This should be reason enough for scholars to pay careful attention to the interplay between speech codes and race-conscious admissions policies. Once the conflict is noticed, scholars might want to modify the way they argue to avoid this problem.

There may perhaps be an additional, and more troubling, reason why anyone should care about the incongruous assumptions of speech codes and admissions policies. This concern relates to Rubenfeld's worries about the purely pretextual nature of the diversity rationale. The conflict, one may say, is an obvious symptom of a deeper problem—namely that the diversity rationale is a cover for what are, at bottom, remedial policies. Under this more cynical view, there is in reality no conflict between the actual operation of these two policies—both of which are remedial in purpose—which explains their peaceful coexistence on many college campuses. If it were otherwise, how could policies with such conflicting underpinning principles both survive for so long? The collision only arises when one

---

24 See Compelling Need, supra note 4.
takes the diversity rationale seriously and analyzes its assumptions carefully. As most administrators know, however, the diversity rationale and its justifications are quite irrelevant outside the courthouse. If this view is correct, Rubenfeld’s suspicion is confirmed and affirmative action programs—buttressed only by remedial justifications and lacking a credible diversity rationale—are in a truly precarious condition, their demise momentarily delayed only because the façade has not quite been demolished yet. But once the mask is off, affirmative action programs are bound to fall if the Court’s hostile stance toward the remedial justification remains unchanged.25

The implications of these incompatible assumptions will be explained in greater length at the end. But let me declare now that I do not know whether the cynical view is correct. This Article simply aims to draw attention to the problem and to pose a troubling question. Definitive answers, if there are any, must await another day.

The Article is organized in the following way. Part II first describes the conceptions of higher education implicit in the usual arguments for diversity. It then compares these conceptions with the counterpart assumption about higher education implicit in standard arguments for speech codes, showing their incompatibility in the process. Parts III and IV accomplish a similar task for assumptions about the First Amendment and the minority student, respectively. Part V demonstrates that, as evidenced by the way universities enact and enforce speech codes, the commitment to individualized inquiry and using race as only one factor in decisionmaking is clearly not honored outside the admissions arena. The prevalence of race-based remedial thinking among college administrators outside of the admissions context in turn impugns the integrity of colleges’ representations that their admissions policies in fact comply with Bakke’s dictates. Part VI elaborates on the implications of the observations made in Parts II-V and then concludes.

II. CONFLICTING CONCEPTIONS OF HIGHER EDUCATION

In this Part, I borrow from Robert Post’s descriptions of “critical education,”27 “democratic education,”28 and “civic education”29 to analyze admissions policies and speech codes. While Post has written about the link between civic education and campus speech regula-

25 See supra note 3 and accompanying text.
28 Id. at 321.
29 Id. at 319.
tions, he has not explicitly located a place for the diversity rationale in his own classification scheme. This Part fills that gap by fitting the arguments for race-conscious admissions programs into what Post called the "critical" and "democratic" conceptions of education and, in the process, reveals the conflicting conceptions about higher education that underlie speech codes arguments on the one hand and the diversity rationale on the other.

A. Conceptions of Higher Education: The View from the Diversity Rationale

1. Critical Education

In a crucial passage in the Bakke opinion discussing the diversity rationale, Justice Powell quoted from the Court's opinion in Keyishian v. Board of Regents. It reads:

Our Nation is deeply committed to safeguarding academic freedom which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment . . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

The idea that the primary mission of a university is to discover truth "out of a multitude of tongues, rather than through any kind of authoritative selection" fits into what Post described elsewhere as the "critical education" conception of higher learning. This model imagines the university as a place primarily devoted to the cooperative search for knowledge and understanding, as well as to the dissemination of ideas.

The university, under this formulation, does not make as "its primary and dominant value the fostering of friendship, solidarity, harmony, civility, or mutual respect." To be sure, Post wrote, "these are important values; other institutions may properly assign them the highest, and not merely a subordinate[,] priority; and a good university will seek and in some significant measure attain these ends." A university faithful to the idea of critical education, however, "will

---

30 Id. (noting that "there is a strong tendency to use [value inculcation] as a basis for the regulation of speech").
34 Post, supra note 27, at 322.
35 Id. (citing Report of the Committee on Freedom of Expression at Yale, 4 HUM. RTS. 357, 357 (1975)).
36 Id.
never let these values, important as they are, override its central purpose37 of pursuing truth and knowledge, wherever the road might lead. Under this view of education, a university values "freedom of expression precisely because it provides a forum for the new, the provocative, the disturbing, and the unorthodox."38 On a university campus dedicated to this vision of education, no idea is immune from challenge; no subject is too taboo to be discussed. The critical conception of education, then, "has strong affinities to the traditional ‘marketplace of ideas’ theory of the [F]irst [A]mendment,” which posits that truth will, through the process of competition, rise to the top of the heap.39 It is therefore common for courts with this conception of education in mind “to speak of the ‘classroom’ as ‘peculiarly the “marketplace of ideas.”’”40 To fix the idea into a popular, but perhaps ultimately fictitious, college slogan, the university is a place to "speak the unspeakable and think the unthinkable and challenge the unchallengeable."41

It is easy to see why this conception of higher education appeals to defenders of the diversity rationale and race-conscious admissions policies. Simply put, these programs consciously seek to bring onto the campus a heterogeneous group of individuals who, because of varied life experiences, have different perspectives and ideas. They may naturally disagree with each other, sometimes vehemently, on topics ranging from the most trivial to the most monumental. Such disagreements, it is hoped, will expose students (and, perhaps, their teachers as well) to opposing points of view and make them rethink unexamined assumptions. Faulty presuppositions may then be revealed and discarded, and real understanding achieved, not through any system of “authoritative selection” imposed from above, but out of “the multitude of tongues.” This process cannot occur if students are surrounded by clones of themselves. They will then simply reinforce each other’s unexamined suppositions about the world.

It is, therefore, not surprising that the presidents of the nation’s top universities (all supporters of race-conscious admissions policies) “speak[ing] first and foremost as educators,” publicly stated their belief that a “very substantial portion of [the] curriculum is enhanced by the discourse made possible by the heterogeneous backgrounds of our students.”42 These educational leaders believe that “students

37 Id.
38 Id.
39 Id. at 323.
40 Id. (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
41 Benno Schmidt, President of Yale University, quoted in NAT HENTOFF, FREE SPEECH FOR ME—BUT NOT FOR THEE 152 (1992).
benefit significantly from education that takes place within a diverse setting. . . . [because] students encounter and learn from others who have backgrounds and characteristics very different from their own.\textsuperscript{43}

A perusal of the materials compiled by the University of Michigan about the pending lawsuits challenging its undergraduate college's and its law school's admission programs\textsuperscript{44} similarly reveals the warm embrace given to the critical model of higher learning when educators defend their admissions practices from legal attacks. For example, Derek Bok, in his expert testimony, described in detail the important role informal learning plays outside the classroom in breaking down barriers of ignorance and falsehoods.\textsuperscript{45} Kent Syverud discussed the importance of racial heterogeneity in the law school classroom in challenging students' deepest-held assumptions.\textsuperscript{46}

These admissions policies and the anticipated benefits of diversity, educators are careful to note, do not depend on the pernicious notion that there is a "black viewpoint," an "Asian viewpoint," and so on.\textsuperscript{47} Taking race into account only recognizes that race, given its present salience, may affect—but by no means determines—how one views the world. Just as growing up on a farm may affect—but does not preordain—one's perspectives, race may add a new dimension to the discussion.\textsuperscript{48}

To bolster such claims with empirical evidence, psychologist Patricia Gurin sought to demonstrate that students in racially diverse educational settings engage in more complex patterns of thought—what she called "effortful thinking," as opposed to "automatic 'think-

\textsuperscript{43} Id.

\textsuperscript{44} See University of Mich., Information on Admissions Lawsuits (last modified Feb. 29, 2000), at http://www.umich.edu/~urel/admissions/.

\textsuperscript{45} See Bok, supra note 4.


\textsuperscript{47} See Compelling Need, supra note 4; see also MARI J. MATSUDA, WHERE IS YOUR BODY? 19 (1996):

No one is saying that all people of color think alike. Neither are we saying that our color is irrelevant to our intellectual development. It is not an either-or situation . . . . For many of us the heritage and experience of being part of one or more oppressed groups in twentieth-century America is a rich part of our lives.

\textsuperscript{48} Of course, this justification is controversial. The Hopwood court, for example, frowned on this line of argument. See Hopwood v. Texas, 78 F.3d 932, 946 (1996) ("The assumption . . . that a certain individual possesses characteristics by virtue of being a member of a certain racial group . . . does not withstand scrutiny."); see also Richard A. Posner, The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 SUP. CT. REV. 1, 12 ("[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America."). The purpose of this Part, however, is not to take a definitive position on this debate, but to show simply that this argument is made by proponents of the diversity rationale.
This is because individuals tend to engage in active thinking processes, as opposed to merely following the usual mental routine, only when they encounter the new and the unfamiliar. If Gurin's conclusions are correct, they will surely help the diversity rationale and race-conscious admissions policies under a critical conception of education. The logic is straightforward: 1) If, as Gurin argued, a racially diverse educational environment encourages more productive modes of thought; 2) and if, as seems indisputable, an "effortful"—as contrasted with a merely robotic—engagement with the world is crucial to discovering knowledge; 3) then, because universities are institutions devoted to discovering knowledge through discussions (per Bakke and the critical education conception); 4) race-conscious admissions policies are necessary to the successful attainment of a university's institutional objectives and, thus, are nothing less than a "narrowly-tailored" means to the achievement of a recognized "compelling interest."

Cass Sunstein's recent work on group deliberation and group polarization lends additional empirical and theoretical support for attaining a diverse student body in universities committed to the critical conception of education. Sunstein's review of the empirical studies shows that "members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members' predeliberation tendencies."[5] "[L]ike polarized molecules, group members become even more aligned in the direction they were already tending."[52] This predilection may be due to members' concerns about their relative standing within the group—what Sunstein terms "reputational reasons"—or it may be related to members' conceptions of themselves. For whatever reason, however, members belonging to an environmental protection group, for example, regularly and predictably gravitate toward a more extreme position after deliberating together as a group. "[S]ocial homogeneity," Sunstein concludes, is "damaging to good deliberation."[55] For there to be true deliberation, members of an institution must be exposed to a reasonable range of views, so that they do not hear only "echoes of their own voices" which would only reinforce their prior, and often

[51] Id. at 74.
[52] Id. at 74-75 (quoting JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP 142 (1987)).
[53] Id. at 80.
[54] Id. at 75.
[55] Id. at 76.
unexamined, notions about the world and push them toward even more extreme positions.\textsuperscript{56}

If Sunstein's findings are correct, diversity-oriented admissions policies serve the mission of knowledge discovery through the additional route of preventing group polarization and thoughtless extremism. They do so by consciously bringing onto the campus individuals with varying backgrounds and experiences to enrich the mix of perspectives.\textsuperscript{57} These programs and the moderating tendencies they bring about make possible the genuine deliberation and free interchange of ideas that are indispensable to the critical process of education. Otherwise, individuals holding opposing viewpoints would simply move further and further away from each other, becoming entrenched in polarized extremes, instead of seeking to find common grounds.

All these observations, of course, merely elaborate on and eventually bring us back to \textit{Bakke}:

\[\text{[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds... who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed... 'People do not learn very much when they are surrounded only by the likes of themselves.'}\textsuperscript{58}

In sum, the diversity rationale hinges, in a non-trivial way, on the critical model of education. It believes in the "marketplace of ideas" and sees the university as an institution devoted to rooting out falsehoods and ignorance and lighting the path of truth and understanding. Race-conscious admissions policies assist in that mission.

2. \textit{Democratic Education}

A very closely-related, but not identical, conception of higher education embraced by diversity proponents is that of "democratic education."\textsuperscript{59} Democratic education begins with the premise that the

\textsuperscript{56} Id.

\textsuperscript{57} I am aware of the obvious objection that could be made against the argument here, namely that race, the factor focused on by most admissions committees, is but poor a proxy for an individual's viewpoint. However, as mentioned in supra note 48, diversity proponents' answer is that given the present salience of race in American society, it does affect how individuals who are otherwise similar view the world. Once again, this is not the place to debate the correctness of this proposition. The purpose here is simply to acknowledge that this argument is often made by diversity proponents.

\textsuperscript{58} Regents of the Univ. of Cal. v. Bakke, 488 U.S. 265, 312-13 n.48 (quoting William Bowen, \textit{Admissions and the Relevance of Race}, PRINCETON ALUMNI WKLY, at 7, 9 (Sept. 26, 1977)).

public school is "in most respects the cradle of our democracy."60 Again, borrowing from Post's classification scheme in another context, democratic education "understands the purpose of public education to be the creation of autonomous citizens, capable of fully participating in the rough and tumble world of public discourse. Democratic education strives to introduce that world into the . . . more sheltered environment of the school."61

In contrast to the critical education conception, the purpose of democratic education is not the search for knowledge per se, although knowledge and understanding are clear by-products of a successful democratic educational process. Rather, democratic education simply aims to replicate in the public schools, as closely as possible, society's democratic processes and allows students to interact as citizens do in the wider polity. The free interaction among students is seen as a good—not primarily because it is a means to the end of knowledge discovery—but because, in mimicking democratic dialogue and self-governance (through, for example, student government), it prepares them for later democratic participation.

The Supreme Court at times spoke highly of this democratic conception of education. In Tinker v. Des Moines Independent Community School District, the Court held that the purpose of public education is to prepare students for the "sort of hazardous freedom . . . that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."62 The Tinker majority explicitly rejected the transmission or inculcation of canonical values as the goal of education.63 Rather, the version of democratic education endorsed by the Court stresses the importance of leading students to think for themselves. This goal is achieved by granting students an amount of liberty that is as close as possible to the degree of freedom that exists in the outside world, so that they may gradually learn, each in her own way, how to get along with others in "our vigorous and free society."64

The attraction of this conception of higher education to the admissions crowd is similarly obvious. Because meaningful involvement in the democratic bazaar often requires citizens to interact with those

---

60 Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting); see also Post, supra note 27, at 321.
61 Post, supra note 27, at 321.
63 Id. at 511 ("In our system, state-operated schools may not be enclaves of totalitarianism . . . [Students] may not be regarded as close-circuit recipients of only that which the [s]tate chooses to communicate."). But see Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) ("[T]he objectives of public education [include] the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.'") (citations omitted).
64 Healy v. James, 408 U.S. 169, 194 (1972).
from vastly different backgrounds, schools should, under this view, replicate that environment as much as possible. Diversity-oriented admissions policies help accomplish this end by consciously creating microcosms of society within individual universities. In the absence of these programs, schools might not sufficiently "look like America" for this learning and socialization process to occur.

Comments by educators themselves again best illuminate this conception of higher education. Akhil Amar and Neal Katyal, in their defense of diversity-oriented admissions policies, referred repeatedly to the importance of preparing students for participation "in a pluralist democracy," of teaching them how "to be sovereign, responsible, and informed citizens in a heterogeneous democracy." Similarly, Professor Gurin, in addition to noting the pay-offs of cognition and knowledge creation from diversity, remarked upon the importance of equipping students for participation in "our increasingly heterogeneous, complex and multicultural democracy." Diversity, according to her, teaches students how to "interact with diverse peers on an equal footing." Higher education therefore plays a central role in "developing students into active citizens and capable participants in a pluralist democracy." She marshaled empirical evidence to support these claims as well. Experience with diversity during the college years is correlated with more "ethnically integrated lives." Students exposed to diversity have more diverse colleagues, friends, and neighbors later on in life—suggesting a heightened capacity to interact with others as democratic equals.

Derek Bok, in arguing for the importance of diversity-enhancing admissions policies for law schools, drew substantially the same conclusions. Because lawyers often play important public roles in our society and are frequently thrust into situations where they need to deal intimately with people from vastly different walks of life, the argument for diversity applies to legal education with added force. Bok concluded, therefore, that "the future of the legal profession depends upon lawyers who are trained in racially diverse settings, who are comfortable working and interacting with clients with backgrounds, perspectives, and life experiences that are different from their own."
More evidence could be marshaled, but the demonstrations above should be enough to make the point. The standard arguments for the diversity rationale not only hinge considerably on the critical education conception of higher learning, but rely quite heavily upon the democratic model as well. Diversity proponents often slide comfortably from one model to another in their arguments. But that just proves how powerful both of these conceptions of education are in justifying the diversity rationale and race-conscious admissions practices, especially when they are used in conjunction with each other.

B. Conception of Higher Education—The View from Campus Speech Codes

1. Civic Education

While commentators sometimes defend speech codes under the critical and democratic conceptions by arguing that these regulations are somehow necessary to achieve the anticipated educational payoffs—an argument I will deal with later—they often make a marked, but perhaps unconscious, conceptual shift and reject these models entirely in the heat of battle, forgetting how crucial they were to the diversity rationale.

Instead, they center on what Post describes as the "civic education" model of higher learning. Under this conception, the objective of public education is the inculcation of fundamental values, including "the habits and manners of civility... indispensable to the practice of self-government." Instead of allowing its members uncluttered space to discover knowledge (critical conception) or to interact freely among themselves (democratic conception), the civic model takes a highly substantive turn. Moreover, "[t]he validity of

---

73 See, e.g., Liu, supra note 4, at 418-19 (noting that a diverse educational setting is conducive to breaking down barriers of ignorance and prejudice and that this would facilitate "social intercourse and political cooperation"). Of course, it is unsurprising to see commentators weave these two conceptions together in their arguments. If education helps students gain a truer understanding of the world and of people different from themselves, it is entirely predictable that they will cooperate with other citizens more effectively as democratic equals. Unblinded by prejudice, they can more easily see commonalities and find common ground with people from different walks of life.

74 Post, supra note 27, at 319. Although the civic conception of education is most prominent in discussions of primary and secondary education, it does not disappear entirely in the university context. Note, for example, Justice Burger's dissent in Papish v. University of Missouri Curators: "[A] university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals [must come to learn] . . . the need for those external restraints to which we must all submit if group existence is to be tolerable." 410 U.S. 667, 672 (Burger, C.J., dissenting).

75 Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, NEW BASIC HISTORY OF THE UNITED STATES 228 (1968)).
those values is largely taken for granted, and there is a strong tendency to use them as a basis for the regulation of speech. . . .

"Civic education," Post concluded, "conceptualizes instruction as a process of cultural reproduction, whereby community values are authoritatively handed down to the young."76 But most importantly—yet perhaps least noticeable when one is busy warding off free speech challenges—student diversity is of almost no importance to the civic education model, since students learn from rules and prescribed lessons, not from debates with peers, nor from repeated engagements with fellow students.

With these conflicting conceptions of education in mind, a careful examination of proponents' rhetoric and these codes' avowed purpose leaves little room for doubt about which model is endorsed in this context. Richard Delgado and David Yun were most explicit. They remarked that requiring students to engage in debates and to "talk[ ] back [in response to hurtful speech] is a burden. Why should minority undergraduates, already charged with their own education, be responsible constantly for educating others?"77 They harbored reservations about "the talking back solution" because it "puts the onus on young minority undergraduates to redress the harm of hate speech. This is a burden to them, one they must shoulder in addition to getting their own educations."78 "In other words," Delgado and Yun continued, "in addition to educating themselves, they must educate the entire campus community, and do so every time a racial incident takes place."79 Instead of imposing this "burden" on the minority students, Delgado and Yun would have the university take a stance, rather than being a passive bystander or a neutral referee who merely preserves order in the public forum evenhandedly. Racist speech, therefore, should be banned outright. Note that the discredited nature of racist views is not discovered through the multitude of tongues, but is imposed from above.

These statements are as clear a renunciation of the democratic and critical conceptions of education as one can get. As seen earlier, arguments in support of the diversity rationale, as well as the democratic and critical conceptions of education, place a heavy premium on student-to-student learning. The mutual give-and-take in the edu-

76 Post, supra note 27, at 319.
77 Id.
80 Id.
81 Delgado & Yun, supra note 78, at 888-90 (discussing the affirmative reasons for campus speech restrictions); see also Delgado & Yun, supra note 79, at 1296.
cational process is never characterized as an "onus." In the marketplace of ideas, moreover, nothing is privileged over opposing perspectives ex ante.

Matsuda’s and Lawrence’s pro-speech codes writings, though not as explicit, similarly spurn the critical and democratic models in favor of the civic education conception. For Lawrence, for example, the critical education conception’s faith in the “marketplace of ideas” is misplaced in the racial context because “the idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick cattle, or diseased wheat).” Counterspeech and education are ineffective because ingrained and unconscious racism “makes the words and ideas of blacks and other despised minorities less saleable, regardless of their intrinsic value . . .” Because racism is “irrational,” “instinctive,” and “unconscious,” the critical conception’s “reasoned deliberation” and the democratic model’s repeated interactions with peers do not help students “reject racist beliefs.” Regulation that bans racist speech is therefore necessary—both to protect minority students from harm and to make an unmistakable institutional commitment to widely accepted societal values.

However, it is crucial to note that Lawrence, in the context of defending affirmative action programs, did not reject the utility of education and speech when the discussion concerned race. Instead, he

82 See Matsuda, supra note 20; see also MATSUDA, supra note 47, at 108-09 (noting that even if students manage to keep functioning, they do so “under a burden”). Matsuda, in her pro-speech codes writings, conspicuously failed to give serious consideration to the possibilities of counter-speech. She mentioned the possibility of “look[ing] away,” id. at 108, but failed to tell us why the “victim” could not talk back in situations where the threat of immediate violence is entirely absent.
83 See Lawrence, supra note 20.
84 Id. at 468.
85 Id.
86 Id.
87 Id. at 469 n.139.
88 Id. at 468. For a fuller exposition of Lawrence’s views on unconscious racism, see Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987).
89 Lawrence, supra note 20, at 468-69.
90 Charles R. Lawrence III, Each Other’s Harvest: Diversity’s Deeper Meaning, 31 U.S.F. L. REV. 757, 765, 774-76 (1997) (noting the contributions black students’ perspectives make to class discussions about racism and arguing that such contributions would be hard to attain without race-conscious admissions programs). To be sure, Lawrence argues in this article for a “deeper meaning of diversity”—a substantive, non-value-neutral understanding that reflects American society’s racism—to replace Bakke’s “substanceless definition of diversity.” Id. at 772. Nonetheless, Lawrence admits that he has in the past engaged in the embrace of the traditional diversity argument in order to lend support to cherished affirmative action policies.

As an advocate of affirmative action, I have argued not just for the maintenance of affirmative action but for its expansion. I stand in solidarity with my academic colleagues and with the public interest bar who pursue what they no doubt see as the most prag-
seemed to embrace the critical conception of education. In the admissions context, he urged admissions officers to admit black applicants even if they are less numerically qualified because these students can contribute unique perspectives to class discussions. He went so far as to say that the "diversity rationale is inseparable from the purpose of remedying our society's racism." However, if racism were, as he argued in the speech codes context, so ingrained, instinctive, and unconscious, and if speech and education were of such limited utility, it would seem that black students' contributions would not bring that much positive educational benefit to the university community. If ideas expressed by blacks were less "saleable," then the value of their contributions to campus discussion would be much less than Lawrence claimed. This would surely undermine Lawrence's plea on behalf of minority applicants. Problematically, his faith, expressed in the admissions arena, that black students would teach their classmates something valuable relies on the same assumptions that he rejects in the speech codes context.

Similarly, although Matsuda's writings on speech codes, like that of Lawrence, spurn the critical and democratic models, she, too, seems to endorse these conceptions in other domains. Elsewhere,

motic strategy for saving affirmative action in higher education: to... distinguish the diversity rationale from the remedial rationale.
Id. at 765. Even more tellingly, despite the heavily remedial-centered nature of his more recent arguments, he still refuses to part with the vocabulary of "diversity," id. at 765 (arguing for a "deeper meaning of diversity" (emphasis added)), which, as the term is used in Bakke, is understood precisely to incorporate the value-neutral, process-oriented view, concerned only with enhancing the number of perspectives represented on college campuses and not with the content of those conversations. If Lawrence truly wishes to divorce affirmative action policies from the traditional diversity idea completely, it would seem more logical for him to distance his arguments from the term "diversity," which has become laden with a particular social and cultural meaning. More importantly, even if one agrees with Lawrence and takes a more substantive view of the "diversity" idea—namely, diversity with an eye to eliminating racial hierarchy, so that blacks should be admitted in greater numbers than their test scores would indicate in order to teach their white classmates valuable lessons about racism and so forth—one cannot escape the fact that the marketplace of ideas continues to play an important role in the argument. One must believe that racism is at least not so ingrained and prevalent that honest conversations become impossible. These are, however, precisely the assumptions that are often deployed in arguments in defense of speech codes. See, e.g., Lawrence, supra note 20, at 468-69. In any case, even if Lawrence does not now simultaneously embrace both the diversity rationale as traditionally understood and speech codes, his passionate arguments in support of the latter project may lead universities committed to the diversity rationale to accept his arguments for speech codes uncritically. See supra text accompanying notes 23-25 (discussing the dilemma that the University of Michigan confronts as it espouses both the diversity rationale and standard arguments for speech codes).

See supra note 90.
92 See Lawrence, supra note 90, at 765; see also MATSUDA, supra note 47, at 22.
93 See MATSUDA, supra note 47.
94 Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN'S RTS. L. REP. 7 (1989) (urging lawyers to see the world from the standpoint of the
she asked us to "look[ ] to the bottom" and listen to the "victims' story." She praised the contributions made by "outside scholars" who bring "specific experiences and histories" of oppression into the jurisprudential inquiry. These invitations, no doubt, originate from her belief that, by listening to the bottom, we would learn something new and valuable. These beliefs are inseparable from the assumptions underlying the marketplace of ideas and the critical model of education.

Of course, speech codes proponents might attempt to rationalize away the conceptual conflict noted above and say that the identified incompatibility is more apparent than real. Different rules, they might reply, apply in the special realm of "racist speech." They could, for instance, stress the sui generis nature of racist expression by highlighting its uniquely devastating impact, its one-of-a-kind mind-closing capacity, its malignant influence over the most shameful chapters of our history, so on and so forth. Hence, they might argue, the democratic and critical models of education—as well as the usual power of counterspeech and ideas—are simply inapplicable in the narrow confines of racist expressions. Because these expressions appeal to the basest prejudice against minorities, the usual educational process breaks down, even though, everywhere else, the critical and democratic education conceptions reign supreme.

oppressed and to maintain multiple consciousness as a way of transferring the details of our own special knowledge to the standard jurisprudential discourse) [hereinafter When the First Quail Calls]; Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L L REV. 323 (1997) (urging scholars to listen to the voices of the powerless and use the information to enrich their scholarship) [hereinafter Looking to the Bottom].

55 Matsuda, Looking to the Bottom, supra note 94, at 323.
56 Matsuda, supra note 20, at 2320.
57 MATSUDA, supra note 47, at 6, 22.
58 While I only discussed the civic model of education here as a contrast to the critical and democratic models, yet another way speech codes proponents have sometimes characterized education is to think about higher education in entirely practical terms. Instead of going to college to hone one's critical skills, to help in the search for knowledge, to engage in democratic interactions, or even to imbibe accepted societal values, one goes to college to "get[ ] a degree." Gale, supra note 21, at 174. Under this view, colleges should restrict hurtful speech because it impedes the efficient attainment of this practical goal. See, e.g., Lawrence, supra note 20, at 465 ("The testimony of non-white students about the detrimental effect of racial harassment on their academic performance and social integration in the college community is overwhelming."); MATSUDA, supra note 47, 108-09 ("People manage, but they manage under a burden . . . . Maybe they do not get a full night's sleep, and maybe they do not do as well on the calculus exam. There is a cost, a burden, a price paid for the epidemic of assaultive speech on our campuses, and the cost is paid disproportionately by historically subordinated groups.").

Although such a characterization is different from the civic model, the important thing to note is that this way of thinking about higher education, like the civic model, similarly spurns the critical and democratic conceptions of education. Diversity is of no importance if one's purpose in going to college is simply to satisfy the course requirements of a degree in order to get a good job after graduation.
At first glance, the response sounds eminently reasonable. Upon closer inspection, however, a major flaw leaps out. Simply put, the problem is that by suggesting that democratic and critical conceptions of education are inapplicable in the context of "racist speech," the simple answer facilely assumes that the category "racist speech" is a self-defining or easily ascertainable category. But, of course, the reality is that reasonable people—even those who renounce First Amendment absolutism and agree that a balance must be struck between equality and liberty—often differ about what expressions are sufficiently disabling or prejudicial to warrant the "racist" label and should be forbidden. Defining sanctionable "racist speech" involves a laborious process of compromise and reflection. It is, therefore, not enough simply to say that different rules and assumptions should apply to "racist speech." Doing so begs the question of what expressions uttered in what circumstances, in the judgment of the entire university community after a process of deliberation, are simply not to be tolerated. It does not tell us the range of expressions that need to be cordoned off from the normal marketplace of ideas.

To do the balancing forthrightly, it is important first to openly recognize that controversial expressions span a continuum of acceptability. Administrators who wish to balance between equality and freedom often have little problem with expressions that fall on either extreme. For racial epithets—"nigger," "faggot," etc.—that do not appeal to reason and that do not invite response, proscription might be desirable for the reasons speech codes proponents suggest—namely that the usual assumptions about the power of counterspeech and the utility of critical and democratic education simply lose touch with reality. Vexing difficulties arise in the troublesome middle range, however.

Here, the offensive utterances, unlike racial epithets that convey no substantive idea worthy of discussion, might still convey an idea, even though it might widely deemed to be false. An example might be a remark made by a white student to the effect that he believes blacks are innately intellectually inferior. The expression, though almost universally condemned as offensive and patently untrue, is open to response and rebuttal, assuming it was made in the context of a serious discussion (a biology class) and not in circumstances where dialogue is impossible, as when the threat of imminent violence is present.

Unlike in the context of vile racial epithets, therefore, the assumptions of critical and democratic education are not as unrealistic. On the other hand, also unlike discussions about less sensitive and emotionally charged topics such as the national debt, the utility of education in dispelling ingrained racist beliefs might arguably be less, while the immediate injury caused to certain members of the college community might be immense. Hence, in this problematic middle-range situation, a clear recognition of the possibilities, as well as the limitations, of critical and democratic education is crucial. We need to know whether debates and intimate interactions with peers that underpin the critical and democratic processes of education would be effective in these scenarios.

Unfortunately, instead of engaging in the fruitful dialogue of evaluating whether it would be realistic to let the public forum operate without interference under different circumstances and being sensitive to contextual nuances, commentators such as Delgado, Lawrence, and, to a lesser extent, Matsuda, as we have seen, all-too-readily dismissed, ex ante, the utility of both the critical and democratic conceptions of education categorically when they advocate for speech codes. For example, by asking, “Why should minority undergraduates, already charged with their own education, be responsible constantly for educating others?” and by invoking, without any qualification, a picture of omnipresent racism that forecloses any possibility of learning through critical and democratic education, they foreclosed any chance for an honest and transparent conversation about where the balance between competing values should be struck. While a complete renunciation of the critical and democratic education models might be more easily defensible in extreme cases, much more subtle considerations apply in the vast middle range. These scholars should inject some of their faith, expressed in other spheres, about the promise of critical and democratic education into the speech codes debate as well. Sadly, however, when the topic of speech restrictions is on the table, their rhetoric undergoes an uncompromising switch and dismisses the worth of these conceptions of learning without any satisfactory justification.

III. CONFLICTING CONCEPTIONS OF THE FIRST AMENDMENT

In this Part, I will accomplish a similar task as I have done in Part II. I will demonstrate the jarring conceptions of the First Amendment underlying standard arguments for speech codes on the one hand and the diversity rationale on the other. I will do so by highlighting the direct clash of these two policies—a clash generated by

\[10^9\] Delgado & Yun, supra note 78, at 885.
arguments spokespersons for speech codes employ to advance their agenda. But as a first order of business, I will demonstrate the implausibility of arguments about the beneficial diversity-enhancing effects of campus speech restrictions.

Some speech codes proponents defend campus speech restrictions by attempting to cram them into the various "exceptions" carved out by the First Amendment case law—the "fighting words" doctrine, group defamation, Brandenburg's "imminence test." However, the staunchest codes proponents recognize that, given the Court's gradual movement toward an ever-more expansive interpretation of the Amendment, victory, even if attainable, would only be ephemeral. Therefore, they argue instead for a reformulation of First Amendment theory. Such a reformulation, they contend, is neces-


102 See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem . . . including the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . ."). modified, Gooding v. Wilson, 405 U.S. 518 (1972) (finding "fighting words" as used in Chaplinsky meant words that would cause a breach of the peace or instigate a fight).

103 See Beauharnais v. Illinois, 343 U.S. 250 (1952) (finding an Illinois law restricting group defamation constitutional). But see Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978) (holding an ordinance similar to the one in Beauharnais unconstitutional), cert. denied, 439 U.S. 916 (1978); James Weinstein, A Constitutional Roadmap to the Regulation of Campus Hate Speech, 38 WAYNE L. REV. 163, 174 n.46 (1991) (arguing that Beauharnais is no longer good law); Strossen, supra note 17, at 518 (questioning the continuing vitality of Beauharnais).

104 See Brandenburg v. Ohio, 395 U.S. 444 (1969). The Brandenburg test "do[es] not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Id. at 447. Although Brandenburg is technically still good law, the "imminence" requirement has been interpreted much more strictly over time. See, e.g., Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (holding that yelling "[w]e will take the fucking street later" in a loud voice to the police during a demonstration does not satisfy Brandenburg's imminence test); see also R.A.V. v. City of St. Paul, 505 U.S. 377, 428 (1992) (Stevens, J., concurring) ("[T]he history of the categorical approach is largely the history of narrowing the categories of unprotected speech.").

105 Such a reformulation, of course, would be contrary to the Court's holding in Buckley v. Valeo, 424 U.S. 1 (1976), which, in the course of invalidating limitations on campaign expenditures, disapproved of the theory that the First Amendment allows the silencing of some in order to enhance the voice of others. The Court declared in no equivocal terms, "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes
sary to nurturing a genuine diversity of perspectives—to the ultimate benefit of the “marketplace of ideas.”

Professor Lawrence’s argument—tracking the theories advanced by Catharine MacKinnon and Owen Fiss in other areas of academic discourse—is typical. Hurtful speech that makes minorities feel unwelcome, Lawrence argued, “decreases the total amount of speech that enters the market by coercively silencing members of those groups who are its targets.” Speech codes, by preventing this coercion and intimidation, allow minorities truly to participate in the discussion and contribute their viewpoints. This particular line of argument does not reject the “multitude of tongues” ideal that seeks truth through open debate, but contends that the market needs some adjustments—analagous to anti-trust regulations, for example—in order for it to work properly. Speech codes fulfill that function. Thus, even if one subscribes to the critical model of education, speech regulation is consistent with that purpose. Only by silencing some can schools ensure that others speak.

As a preliminary matter, the argument—even putting aside its suspicious Orwellian double-think quality—is implausible, given what is known about speech codes. Four brief points about Lawrence’s argument are in order.

First, numerous observers have noted that many students—both minorities and non-minorities alike—admitted to having censored their own speech in response to campus speech regulations to avoid getting into trouble. This surely is a bad sign for Lawrence’s argument are in order.

Four brief points about Lawrence’s argument are in order.

First, numerous observers have noted that many students—both minorities and non-minorities alike—admitted to having censored their own speech in response to campus speech regulations to avoid getting into trouble. This surely is a bad sign for Lawrence’s argument. ...
ment that speech restrictions enhance speech, rather than bringing it to a screeching halt. Speech codes proponents have yet to face up to this real difficulty.

Second, as Professor Alan Kors has found, many campus disciplinary procedures set up to handle speech violations are secretive. A “gag” rule of sorts is imposed on the “offender” and, sometimes, the “victim” as well." A strong emphasis on secrecy might be unavoidable to protect the confidentiality of students involved in disciplinary proceedings, but the result is unfortunate in its conversation-stopping effects. Instead of taking the opportunity arising out of student conflicts as a springboard for discussions about important topics, schools have squandered any chance for real dialogue by burying these disputes under the thick maze of bureaucratic inquisition. Further, the “offender” is often so intimidated that he often blindly succumbs to whatever demands are made of him. As Henry Louis Gates observed, some regulations positively bar any further dialogue once a student is accused.1

Witness, for example, the rule adopted by the University of Connecticut. Under this regulation, the accused is forbidden to attribute the complainant’s “objections to... ‘hypersensitivity.’” This, argued Gates, “was... cunning. It meant that even if you believed a complainant was overreacting to an innocuous remark, to try to defend yourself in this way would only serve as proof of your guilt.” Since when does shutting up the accused encourage dialogue, further mutual understanding, and promote the full airing of views on controversial topics?

Third, if the goal of a speech code is really to encourage dialogue, why should it automatically apply to all areas of the campus equally, as is often the case? Why does it have to apply to, say, students and faculty in the graduate geology department, in exactly the same way as it applies to undergraduates and teachers’ assistants in the political

charged with racism... This is thought control and interference in free debate of the worst variety (alteration in original)); Robert A. Sedler, The Unconstitutionality of Campus Bans on “Racist Speech”: The View From Without and Within, 53 U. Pitt. L. Rev. 631, 638 (1992) (“Today we see the universities trying to implement a new secular orthodoxy, one component of which is the imposition of restrictions on racist speech.”); Strossen, supra note 17, at 561 (noting that “anti-hate speech policy stultifies the candid intergroup dialogue concerning racism and other forms of bias that constitutes an essential precondition for reducing discrimination”); Weinstein, supra note 102, at 215 (“I have no doubt... that the possibility of discipline for uttering racist statements would deter many students from this critique of affirmative action.”). See generally Fleischer, supra note 101, at 740-41 nn.221-24 (cataloguing commentators’ observations about the chilling effects of speech codes).

111 See KORS & SILVERGLATE, supra note 17, at 289-311.
112 See Gates, supra note 17, at 150.
113 Id.
114 Id.
science department? Nourishing a true diversity of views is surely im-
portant in the latter, but not clearly so in the former, case. Why,
then, do we have these so-called “diversity-protecting speech codes”
administered across-the-board, instead of having them tailor-made
department to department, depending on how much of a program’s
success depends on having the widest range of perspectives repre-
sented? By Lawrence’s logic, a speech code, because its purpose is to
help nurture a “true diversity” of perspectives, would be more helpful
and acceptable in the politics department than in the math depart-
ment, because the vibrancy of the former academic enterprise de-
pends much more on having the most diverse set of viewpoints. The
natural policy prescription under Lawrence’s argument, therefore, is
to assign the highest priority to enforcing speech code provisions in
precisely those departments that are most dependent on the open in-
terchange of opinions.

However, I trust that for most readers, this result is simply too
hard to swallow. The fact that we do not ever hear about such coun-
terintuitive policy recommendations simply goes to show the implau-
sibility of Lawrence’s argument about the diversity-enhancing pur-
pose behind campus speech codes. The argument, while clever,
simply has no connection to reality. Moreover, as Lawrence knows,
administrative ease is no answer for preferring a one-size-fits-all ap-
proach. When speech restrictions touch the sensitive area of the First
Amendment, narrower solutions that are just as effective must be
adopted. Indeed, if the rationale for a speech code is that it fosters
diversity, it is nothing less than a constitutional requirement that it be
tailor-made, instead of mass manufactured for the entire campus, in
order to account for relevant differences, so that the least amount of
“disfavored” speech would be chilled by the regulation.

Finally, even if one were to concede that speech codes do in fact
enhance the total number of viewpoints that enter the public forum
successfully, it is at least arguable that speech codes, because of their
chilling effects with respect to certain disfavored viewpoints, may un-
dermine those educational benefits usually associated with having the

\[\text{Ref: Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (noting that regulations must be “narrowly tailored” to advance a compelling interest of the state); see also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986). This point of course applies to public schools, which cannot contravene the First Amendment in their actions. But the point can be extended to private schools with only minor modifications. As discussed supra note 15, most private schools purport to follow the requirements of the Constitution and seek to tailor their policies accordingly. To remain faithful to this commitment, their speech restrictions likewise cannot be overbroad.}\]

\[\text{Ref: Boos v. Barry, 485 U.S. 312, 329 (1988) (striking down the challenged statute because a less speech restrictive alternative is available under the circumstances).}\]
most diverse range of perspectives represented on the college campus. In short, even if the total quantity of perspectives are increased by speech codes, the quality of campus discourse might decline drastically. The argument here has to do with the actual process through which the theoretical advantages from diversity are realized.

Dean Anthony Kronman of the Yale Law School has long been an eloquent proponent of a vision of education that goes beyond the mere promotion of free expression, of a type of university community that transcends the emptiness of tolerating “each other’s stupid views.” This is because, Kronman argued, passively sitting in a classroom listening to other people talk confers no obvious educational benefit. Instead, in order genuinely to profit from the give-and-take of the educational process, one needs to engage sympathetically with the speaker, to step actively into the speaker’s shoes, and to attempt, “in a spirit of generosity,” to search for the best “elements in an opponent's view that make it appealing to the opponent herself.” Otherwise, having the most diverse range of perspectives represented in the college community would simply be an empty gesture devoid of real educational payoffs for students.

However, speech codes, because they are imposed from above, do not guarantee—indeed they positively impede—this process of “sympathetic engagement.” Because certain views on certain topics are disfavored under a speech code regime, there are risks in engaging sympathetically with an opponent (Y) who espouses the officially favored set of viewpoints. Arguments advanced by X to rebut Y’s contentions may have the effect of making Y herself, or those who overhear the conversation, feel unwelcome, thus subjecting X to the risk of punishment or, at the very least, the hassles of exonerating himself before an administrative panel. Therefore, the logical choice for X would be to reduce the number of such risky encounters. At the end of the day, X and Y may literally talk past each other and never engage with the opposing perspective. If, as Kronman believes, students obtain educational benefits primarily by sympathetically engaging with their classmates, increasing the range of viewpoints while reducing the number of such meaningful engagements is a counterproductive measure to undertake. In short, even if Lawrence is correct about the effects of speech codes on the total number of perspectives represented in the public forum, the victory would be tragically Pyrrhic at best.

\[118\] Id.
\[119\] Id.
Much more importantly for present purposes, however, these demands to rethink the First Amendment arising out of dissatisfactions with current free speech theory are deeply at odds with the basic assumptions of the diversity rationale.

As demonstrated in Part II, the diversity rationale has a strong affinity to the traditional optimistic understanding of the “marketplace of ideas” theory of the First Amendment. I will not recapitulate the discussion here. Suffice it to say that few administrators, when asked to defend their university’s admissions programs, will be so bold as to refuse to pay homage to Bakke, Bakke’s reference to the First Amendment, and the First Amendment case law. However, after having succeeded (so far) in maintaining their admissions policies on the shoulders of the First Amendment, these same administrators are now, so to speak, turning around to stab the Amendment in the back.

Other commentators have shown why this attempt to “reimagine [ ]” the First Amendment is bound to fail on First Amendment doctrinal and policy grounds. In the next few pages, I will only add that these attempts, to be successful, would also need to radically transform Bakke and other Supreme Court cases upholding affirmative action programs. Given the Court’s aversion to such a radical move, these pro-speech codes arguments may actually backfire and imperil diversity-oriented admissions policies as we know them. This will demonstrate that the conflicting assumptions underlying speech codes and the diversity rationale have significant practical consequences.

A. Speech Codes and the Lessons from Affirmative Action Cases

Speech codes could fruitfully be described as a remedial affirmative action plan in favor of minorities. Conceiving speech codes this way is consistent with the writings of pro-speech codes commentators such as Mari Matsuda, who wants to right the power imbalance through speech codes. Matsuda scorns the idea that speech restrictions should be applied even-handedly to majority and minority groups. Only utterances and actions conveying a message of “racial inferiority” “directed against a historically oppressed group” should be punished. Thus, maliciously calling someone a “honky,” an “Oreo,” a “Nazi,” a “racist,” a “poor white trash” would not be sanctionable, but addressing someone as a “nigger” surely would be. This characterization of speech codes is also consistent with Lawrence’s arguments. In asking schools to right the power imbalance and fix

\[120\] Gale, supra note 21, at 119.
\[121\] See Matsuda, supra note 20.
\[122\] Id. at 2357.
the skewed marketplace of ideas through regulations, he was certainly not seeking to soften the cries of powerless racial minorities by punishing them when their heated rhetoric gets out of line. In fact, while many campus speech codes are worded neutrally, their applications, most commentators agree, are discriminatory in favor of minority groups.

Such deeply race-conscious applications of speech regulations, in effect, confer a "plus" on minorities. This observation led scholars such as Charles Fried, who vigorously opposes speech restrictions, to remark that these codes constitute "a kind of affirmative action in the realm of discourse . . . . [T]he idea is that our society has victimized certain groups . . . and that justice (if not the Constitution) requires compensation in the public forum as well as everywhere else."

Whatever one's normative position on this debate is, the clear legal conclusion is that such remedial "affirmative action" plans would not stand under an equal protection challenge.

Taken collectively, Bakke and other affirmative action cases have imposed at least three requirements. For any race-conscious program to pass constitutional muster, the preference has to be limited in duration, impose only slight and dispersed burden on non-minorities, and entail only a trivial stigmatic impact on minorities.

When defending diversity-enhancing admissions programs, administrators stress the short duration of the preference by contending that affirmative action is only a short-term fix and contains a natural stopping point. "[R]acial preferences work themselves out of existence," they say, "when the educational and social benefits of diversity have so permeated our society that institutions of higher education no longer need to adopt a self-conscious goal of improving racial understanding." "As university affirmative action achieves its long-run effect of healing racial separation, division, discrimination, and inequality in American society," they assert, "race will gradually

---

123 Lawrence, supra note 20.
124 See sources cited supra note 17.
127 See, e.g., Adarand, 515 U.S. at 229; Croson, 488 U.S. at 495 (expressing concerns that race-conscious programs will always make race "relevant in American life").
128 See, e.g., Wygant, 476 U.S. at 282-84 (expressing concerns that race-conscious lay-off policies impose too drastic a burden on non-minority workers).
129 See, e.g., Adarand, 515 U.S. at 229; Croson, 488 U.S. at 493 (expressing concerns that race-conscious programs may "promote notions of racial inferiority and lead to politics of racial hostility").
130 Liu, supra note 4, at 427.
become irrelevant and—like eye color or blood type—will cease to be significant for university admissions." But until we get there, special efforts are needed to increase the level of minority enrollment. Of course, ascertaining whether affirmative action has indeed reached the stopping point is difficult as a practical matter. However, there exists, at least in theory, a benchmark to measure whether we have crossed the finishing line.

With respect to the burden imposed on non-minorities, scholars emphasize that the imposition, if any, is slight, because the costs fall on a wide pool of rejected applicants who have not gained any entitlement to study at the particular school. But until we get there, special efforts are needed to increase the level of minority enrollment.

Finally, they can show the trivial nature of any stigmatic impact on minorities by pointing to the obvious fact that, post-admissions, everyone would be judged solely on her academic merit without regard to non-academic factors.

With the introduction of race-conscious speech codes, however, the calculations would be drastically altered. First, ascertaining a logical stopping point for speech restrictions is a much more hopeless task. In the admissions context, one can collect statistical information and run regression analyses to determine what the level of minority enrollment would have been had the university not paid any attention to applicants' race. Administrators can then use the information to aid them in determining whether or not there is a continued need for race-conscious admissions policies. Unfortunately, no such quantitative data are available in the speech codes context. For example, we will never know with nearly the same degree of certainty whether we have advanced so far in the march to equality such that opinions expressed by black students are as "saleable" as those expressed by whites, thus rendering an "affirmative action" plan in the public forum superfluous. We can only guess whether we have already reached a point where racial epithets directed toward a minority would have no more injurious effect than those directed toward minorities.

131 Amar & Katyal, supra note 4, at 1754.
132 See, e.g., Expert Report of William Bowen (last modified Mar. 27, 2000), at http://www.umich.edu/~urel/admissions/legal/expert/bowen.htm ("[A] school does not start from the premise that any applicant has a 'right' to a place in a college or university. Instead, the starting premise is that a school has an obligation to make the best possible use of the limited number of places in each entering class so as to advance as effectively as possible the broad purposes the school seeks to serve."); reprinted in 5 MICH. J. RACE & L. 427, 429 (1999).
133 See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 374-76 (1978) (Brennan, J., dissenting) (noting that race-conscious admissions policies do not "establish an exclusive preserve for minority students apart from and exclusive of whites" and observing that members of both races would be required to satisfy the same degree requirements). For a discussion of the stigma argument, see Andrew F. Halaby & Stephen R. McAllister, An Analysis of the Supreme Court's Reliance on Racial "Stigma" as a Constitutional Concept in Affirmative Action Cases, 2 MICH. J. RACE & L. 235 (1997).
members of the dominant group. Given the weight of inertia that usually attaches to committee-driven administrative decisions, the duration of a remedial speech code is, therefore, potentially "timeless in [its] ability to affect the future."\(^{134}\)

Second, the burden imposed on non-beneficiaries is heavy because these other students have, by now, gained an entitlement to study at the school and must now act and speak with an artificial disability imposed on them for the benefit of the minority students. Furthermore, because the codes are not applied evenhandedly, minority students are under a constant, one-sided threat of accusation and must, on some campuses, labor under the special infirmity even when defending charges levied against them.

Finally, the notion that minority students are unable to speak up for themselves and engage in counter-speech is offensive and stigmatic. In Alan Keyes' words, "To think that I [as a black man] will . . . be told that white folks have the moral character to shrug off insults, and I do not . . . . That is the most insidious, the most insulting, the most racist statement of all!"\(^{135}\) The stigma, moreover, lasts for all four college years, not just at the gates of admissions.

If such considerations do not quickly invalidate discriminatory speech codes, the requirements imposed by precedents such as Adarand, Croson, and Wygant about duration, burden, and stigma have no meaning. It is clear, therefore, that as long as these requirements stand, speech codes that are discriminatory in nature—either facially or in their applications—cannot survive an Equal Protection challenge.

Hence, defenders of diversity, at least until recently, wisely have not advocated for preferences for minorities beyond the admissions stage. When pressed, they continued to maintain that, if enough students from different backgrounds were let in the door, a diversity of perspectives would naturally emerge. As shown above, this line of argument depends on an expression of faith—whether sincere or manufactured—in the First Amendment and its associated “marketplace of ideas” theory.

However, when administrators start openly advocating for speech restrictions on the ground that a “real diversity of perspectives” is not now being achieved because minority students are being silenced, their argument undermines the viability of current diversity-oriented admissions policies. To the extent that the Court is unwilling to break new ground and eliminate the Adarand-Croson-Wygant requirements, speech codes proponents’ argument—by openly conceding


\(^{135}\) Strossen, supra note 17, at 486 (quoting Alan Keyes in Stanford News Press Release (Mar. 19, 1990)).
that race-conscious admissions programs have not been "delivering the goods" (i.e., diversity of perspectives) as promised—virtually compels the Court to invalidate them. A class that simply looks black, brown, and yellow, the Court has made it clear long ago, is not enough. If a true diversity of viewpoints is not being realized, the diversity rationale is a sham. Even if attaining a diversity of perspectives on college campuses remains a recognized "compelling state interest," race-conscious admissions practices—because they concededly do not work as envisioned—would surely flunk the tailoring prong of strict scrutiny.

There is nothing inherently wrong with trying to find a truer theory of the First Amendment. There may, on closer analysis, be something to Lawrence's idea that less speech sometimes is more. But this Part has shown how friends of speech codes and the diversity rationale may have talked out of both sides of their mouths by exaggerating the promise of the First Amendment in one context (admissions) and overstating its weakness in another (speech codes). The conflict between these two projects' assumptions is seen most clearly when one realizes that the arguments for speech codes, pushed to the extreme, can threaten the very existence of race-conscious admissions policies.

IV. CONFLICTING CONCEPTIONS OF THE MINORITY STUDENT

Part II's discussion of the diversity rationale (and the rationale's associated critical and democratic conceptions of education) painted a happy picture of the minority student. When the minority student engages in debates and interacts with his fellow students, he does not occupy any second-class status. Instead, he is fully his classmates' equal. That is, indeed, the only way informal student-to-student learning can realistically occur. No white student occupying a superior status is likely truly to listen to a classmate wearing a badge of inferiority. Conversely, no minority with that wretched badge can engage any white student in a candid enough dialogue to be able to learn anything from him. The educational benefits, moreover, are mutual. Blacks have as much to learn from whites, as whites have to learn from blacks. There is no exploitation in the picture.

Similarly, Part III's discussion of the diversity rationale's faith in the First Amendment constructed a self-reliant picture of the minority student. The minority student does not need any remedial assistance to amplify his voice because he puts his faith in the marketplace of ideas. His voice is just as good as any; he can hold his own and win in the market.

See, e.g., Bakke, 438 U.S. at 315 (finding that a "special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity").
The contrasting assumptions of pro-speech codes arguments have, in contrast, painted a much more gloomy and distressing image. The lamentable state of this snapshot has not escaped speech code proponents’ notice. On the contrary, proponents advance their arguments by capitalizing on this depiction—complete with colorful metaphors.

Delgado and Yun picked the picturesque image of a bloodied chicken. Instead of possessing Alan Keyes’ “moral character” to “shrug off” insults, Delgado and Yun’s minority student, when exposed to hurtful speech, becomes completely paralyzed—just like a “bloodied chicken.” In a chicken coop, Delgado and Yun informed us, any chicken with a speck of blood is invariably pecked to death by other chickens who take the speck of blood as a sign that the injured chicken cannot defend itself. These chickens’ simultaneous attack on the singled-out chicken make its death a self-fulfilling prophecy. Analogously, a minority student unfortunate enough to be the target of a racist remark cannot fend for himself. Intervention must be forthcoming before it is too late.

In another article, Delgado picked the image of a dwarf: “Like a dwarf in a world of menacing giants, [the minority student] cannot fight on equal terms.” Professor Matsuda, though less colorful, was not far behind. Her picture of the college-bound minority student is not one of boundless energy, eager to learn and contribute his perspectives. On the contrary, minority students come to college “at a vulnerable stage of psychological development.” They “often come to the university at risk academically, socially, and psychologically.” College, to these students, is a “major life-stress event.” What is more, “many emotional disorders manifest for the first time in college.” Therefore, “this is not the time to subject someone to psychological assault.”

Charles Lawrence’s descriptions are substantially the same. Minority students exposed to racist speech become “disable[d],” imprinted with “a badge of servitude and subservience for all the world

137 Delgado & Yun, supra note 78, at 871, 879-80.
138 Id. supra note 78, at 879-80 & n.56.
139 Delgado, supra note 20, at 147.
140 Matsuda, supra note 20, at 2370.
141 Id. at 2371.
142 Id. & n.249.
143 MatsuDA, supra note 47, at 107.
144 Id.
145 Lawrence, supra note 20, at 452.
to see.”\footnote{Id. at 461.} Self-help and counter-speech is not a viable option for “victims”\footnote{Id. at passim.} who have been “inflicted”\footnote{Id.} with such serious injuries.

The reason behind these colorful depictions is obvious. The more sympathetic picture one paints of the “helpless” minority student, the more likely it is to garner support for speech regulations that harshly penalize the “oppressors,” even if these “victimizers” did not make their remarks out of spite, but out of ignorance. Because of the serious nature of the injury, imminent redress is of the essence. The marketplace must be suspended in favor of centralized fiat. Because education and dialogue take time and the resulting outcomes are uncertain, such remedies are a luxury we cannot afford.

While understandable, it is especially strange to see Lawrence, among others, paint this picture of the minority student. As noted in Part II above, one does not get any hint of this flavor in his other writings.\footnote{See, e.g., Lawrence, supra note 90, at 765, 774-76; supra note 90.} A strong proponent of race-based admissions policies, Lawrence stressed, in this other context, the unique perspectives minority students bring to classroom discussions, especially on the topic of race. For this reason, he argued, minority students, even if they have less sparkling paper credentials, should be admitted. Yet, if minority students are so easily paralyzed by insults, one wonders whether their potential contributions should not be discounted by a huge factor in the admissions process. If so, Lawrence’s arguments on behalf of minority applicants would be substantially weakened.

Let me explain.

One can conceive of admissions officers’ task as approximating each applicant’s expected contribution to the class. To derive this, the officer takes into the account the qualifications of the applicant, i.e., her academic record, race, and background. This alone, is not enough, however. The admissions officer must also gauge the likelihood that the student will, in fact, deploy these unique talents and perspectives for the benefit and edification of her future classmates. Therefore, a highly qualified applicant who has traveled widely but who is otherwise known to be a complete hermit who absolutely refuses to converse with anyone should give an admissions officer second thoughts.

By this logic, if minority students are easily disabled by racist arguments, their potentially rich contribution to campus discussions must also be discounted by a huge factor in the admissions process to account for the likelihood of non-contribution. Short of round-the-clock monitoring, even a stringent speech code cannot stop all racist
remarks. Although black students’ paralyzation and their subsequent failure to contribute arise through no fault of their own, this response is beside the point. Admissions officers’ calculations are, at base, utilitarian. Their decisions are done for the good of the university and the benefit of the admittees. It is not the hermit’s fault for being unsociable either.

Finally, speech codes proponents’ sorry portrayals of the minority student are at odds with the aspirations for equality and integration embodied in Brown—the case that first articulated these ideals for the whole Court and that spawned Bakke and, indirectly, today’s affirmative action programs. In addition to its concerns about unequal educational opportunities, Brown worried about the “feeling of inferiority” generated by a segregationist system. Indeed, Lawrence himself has championed this reading of Brown. He argued that Brown invalidated school segregation primarily because of the “defamatory message” of black inferiority, rather than because of the practical inequality in educational opportunity available to students of different races.

Indeed, one could go further and argue that, even before Brown, this concern about the “defamatory message” was roiling just beneath the surface. In McLaurin v. Oklahoma State Regents for Higher Education and Sweatt v. Painter, the Court struck down restrictions that segregated black law students from the general student body. These restrictions not only denied minority students equal opportunity, but also stamped them as inherently inferior just as they were starting out their legal careers. Ironically, however, speech codes proponents’ portrayals of the “powerless” minority students align closely with these abhorrent conceptions of the minority students that were squarely rejected by Brown, McLaurin, and Sweatt. Moreover, speech codes that are discriminatorily applied, in effect, segregate the student body into several discrete categories by race. Although the lines of demarcation are less visible, the stigmatizing effects are no different from a system of enforced physical segregation.

The conflicting depictions of the minority student should now be clear. It is ultimately self-defeating for commentators fighting for increased minority enrollment in schools to exaggerate minorities’ powerlessness when advocating for speech codes. Moreover, it is, as Keyes reminded us, insidious and insulting to so picture the minority student. These sorry pictures, purveyed by the most respected minority scholars, have more power to adversely affect the “hearts and

---

153 Lawrence, supra note 20, at 448.
minds’ of college-age minority students than any vile racial epithet hurled by the occasional drunken undergraduate.

V. COMMITMENT TO BAKKE’S VISION

In this Part, I will demonstrate that the way colleges enact and enforce speech codes openly conflicts with Bakke’s, as well as the diversity argument’s, commitment to making individualized inquiries and using race as only one factor in decisionmaking. The actual operation of speech codes provides a glimpse into the prevalence of group- and race-based thinking among college administrators. The purpose of speech codes, as seen above, is remedial in the sense that Fried argued. Taking all these observations together—that speech codes are remedial in design primarily for the predominant benefit of racial minorities—raises some disturbing possibilities to the larger questions posed at the very beginning of this Article.

A. The Remedial and Race- (Sex-) Centered Nature of Speech Code Regulations

As noted above, Professor Matsuda probably has been most explicit about the real motivation behind speech codes. Speech codes aim to abolish "racist vertical relationships." Therefore, there is no need to proscribe "[e]xpressions of hatred, revulsion, and anger directed against historically dominant-group members." These members have "access to a safe harbor of exclusive dominant-group interactions." In contrast, "retreat and reaffirmation of personhood" is not often available to minorities.

Matsuda is not troubled by the difficulty of determining who exactly should be counted as the "oppressed." She is comfortable using broad racial and gender categories. What if an individual—say, a white student trapped by generations of poverty—does not get counted? This is not a huge problem for Matsuda because she is ultimately concerned, not so much with individuals, but with "the rise and fall of group status." Finding an individual "counterexample" does not change the fact of white male group domination.

---

155 Brown, 347 U.S. at 494.
156 Matsuda, supra note 20, at 2361.
157 Id. (emphasis added).
158 Id. at 2362 (emphasis added).
Speech codes in real life, for obvious reasons, cannot be as explicit as scholarly writings. As shown below, however, their operation tracks these descriptions closely.

The myth that needs dispelling quickly is that speech codes aim to teach “respect for individuals.” If such is indeed the case, as Professor Henry Louis Gates pointedly observed, why do campuses not proscribe insults “tailor-made to hurt someone” for the most part? Why, in short, do we not often find undergraduates punished for jeering at someone’s “acne [or] obesity”? It is certainly an open question which of the following is more wounding for X: a) to be picked on because she is Asian; or b) to be picked on because her peers think she is born ugly. If the university truly cares about X for X and not just as a member of a group, why does it only protect her from one kind of injury, when it does not seem much harder to cover the other, and arguably much more personally wounding, type of insults as well.

In a similar vein, it is not at all obvious that all blacks exposed to racist epithets are “bloodied chickens,” “dwarfs,” or paralyzed victims. If the goal is to protect the individual’s well-being, why does the policy have to be applied across-the-board to every targeted minority student and her “victimizer,” especially when there is strong evidence that punishment stifles speech and, thus, should be used sparingly? The answer cannot be that it is administratively costly to make individualized inquiries.

The response is implausible because disciplinarian proceedings are, by nature, individualized inquiries, tailor-made for the particular complaint. It certainly would be possible to discharge the complaint once it is discovered that the “victim” is not adversely affected. If schools care only about the individual, the enforcement pattern should look like a tort system. As Professor Kors observed, however, in his extensive study of speech codes enforcement, such is not the usual case. Even when a so-called “victim” is not harmed, schools encourage him to press ahead and prosecute the offender.

One might say that consistent enforcement, regardless of the injury inflicted in any particular case, fosters respect for individuals in

---

163 Gates, supra note 17, at 141 (emphasis added).
164 Id. Of course, there are exceptions to this general assertion. The regulation adopted by the University of Michigan, and later struck down by a federal district court in Doe, covered comments made “in a derogatory way about a particular person or group’s physical appearance.” Doe v. Univ. of Mich., 721 F. Supp. 852, 858 (E.D. Mich. 1989) (quoting the University of Michigan guide to Policy on Discrimination and Discriminatory Treatment). No one, however, seems to have been disciplined under such a provision.
165 Delgado & Yun, supra note 78, at 871, 879-80.
166 Delgado, supra note 20, at 147.
167 See KORS & SILVERGLATE, supra note 17, at 147-83.
the long term because it gives credibility to the school's commitment to eliminating incivility. This, however, is a bad answer. Recall, once again, that most speech codes cover only insults based on a minority group characteristic. Across-the-board enforcement of these codes helps in the long run only in the sense that punishing this particular student for hurling racist insults will deter him, and possibly others, from doing the same thing in the future to other students possessing the covered group characteristics. The focus is still on groups, not individuals.

Let's face it: The reason schools do not punish tailor-made insults and have, instead, one-size-fits-all, across-the-board implementation of speech regulations is simply that universities, tracking Matsuda's arguments, are concerned about historically disadvantaged groups. Speech codes, despite claims to the contrary, do not cultivate "respect for individuals." Rather, they seek to end racial and gender hierarchies. Schools encourage the target of racial epithets (call her "Z") to press charges, regardless of the particular injury inflicted, because the injury, it is thought, is done not only to Z, but to a larger collectivity. By the same logic, most schools do not much care if X is jeered at for her acne or birthmarks because no recognized group trait is involved.

To summarize, it should be clear by now that speech codes are remedial in design, concerned with eliminating hierarchies. As such, group characteristics, such as race and sex, play a dominant role; the individual fades into the background. When juxtaposed with Bakke and the diversity rationale, a wide gulf exists. Instead of treating the individual for who she is, she is simply seen as a member of a group. This picture is particularly distressing because schools, post-admissions, have a greater opportunity to treat students as individuals, instead of just an applicant with a file number. If administrators fail to treat X as X when she stands right in front of them, it is questionable whether they really do treat X as X when she is just No. 15092 competing for the 1209th college seat.

VI. IMPLICATIONS AND CONCLUSION

Where does the above discussion leave us? The observation that the coexistence of speech codes and the diversity rationale creates an apparent tension, as well as the demonstrations in Parts II-V showing their conflicting assumptions, goes toward providing some possible answers to the larger question posed at the beginning: whether universities are sincere about the diversity rationale? Two replies are possible.

First, there is the relatively innocuous response. The coexistence of speech codes and colleges' race-conscious admissions policies may simply indicate the fact that many college administrators sincerely wish to pursue various lofty, but sometimes conflicting, objectives. In
short, they want to attain a true diversity of perspectives, but not at the cost of utterly sacrificing equality and civility. Under pressure from the courts on both fronts, however, they have at times succumbed to the lawyerly tendency to frame facts in the most convincing way possible to fit the particular occasion, even when the descriptions are not entirely accurate and contradict the characterizations made in another context. Hence, when arguments justifying the diversity rationale and arguments justifying speech codes are juxtaposed, it is not surprising to find diverging assumptions lurking underneath. The cure, as urged several times above, is to avoid rhetorical excesses, as well as those self-serving, but extremely shortsighted, conceptual shifts.

Under this view, the fact that speech codes are remedial in design does not undermine the sincerity with which administrators put forth the diversity rationale in defending admissions programs. The coexistence of speech codes and race-based admissions engenders no serious objections because this arrangement represents a good compromise among different objectives, with the admissions policy pursuing the goal of genuine diversity, and speech codes righting the wrongs of past discrimination.

Now comes the more disturbing answer. One can also say, however, that the tension between the diversity rationale and speech codes is more apparent than real. They have so far coexisted comfortably on campuses precisely because they both have, at bottom, a remedial purpose, despite rhetoric to the contrary. Under this view, these policies work in tandem, not at loggerheads. Otherwise, according to this response, one would expect administrators to have voiced complaints about being torn between pursuing conflicting goals with wildly different assumptions. On the one hand, they are told to do everything they can to diversify perspectives, and on the other hand, they are told to enact policies that chill discussion. On the one hand, they are told that minority students are ready to contribute a great deal to campus-wide discussions when admitted, and on the other hand, they are told that minority students are "at-risk," \text{6}8 "dwarf[s] in a world of menacing giants."\text{6}9 So on and so forth. But one listens in vain for these complaints. While one often hears grumbling about speech codes and horror stories about admissions policies as separate matters, one rarely hears these cries of schizophrenia.

The reason, the cynical response continues, is that the diversity rationale and its assumptions are irrelevant in the everyday operation of a university, since race-conscious admissions programs serve the same

\text{169} \text{Matsuda, supra note 20, at 2371.}
\text{169} \text{Delgado, supra note 20, at 147.}
remedial function as speech codes. Anyone who has been around universities long enough gets the message. The inconsistency is a problem only for the unfortunate university counsel charged with defending both of these two policies in court and asked to repeat their legal (but not genuine) justifications with a straight face. But of course, she knows enough to keep any complaints to herself.

It is a deeply cynical answer, but one that, sadly, cannot be easily dismissed. Witness the de facto racial segregation in undergraduate housing on campuses around the country. It is hard to believe that administrators, if they truly were believers of the diversity argument, could have tolerated this abomination for so long. Forget the facile reply that says that students “should have the freedom to be with who they want to be with.” If students want to be around clones of themselves, that’s fine. This, however, would mean that the benefits of a diverse educational environment are not being realized. The diversity rationale becomes only a pretext, and race-based admissions policies should stop, as long as Bakke remains good law.

Witness also the uniform operation of race-conscious admissions policies across departments and academic programs. The payoffs from diversity surely vary from department to department, but little thought has been given to how much preference should be given in different contexts. Administrative ease, once again, is not an excuse, when suspect classifications are being employed.

These concerns are nothing new. They have been expressed time and again—in law review articles, magazines, and newspapers. Why has there been no action? It is a puzzle only for one who takes the diversity rationale seriously. But if race-conscious admissions policies, like speech codes, are remedial in purpose, the efforts are simply not worth the candle. Blacks and whites can self-segregate, as long as blacks enjoy the same opportunity as whites in receiving quality higher education. Similarly, schools should admit, on a proportional basis, as many blacks to the politics department as to their physics graduate program, because the purpose of affirmative action programs is to right a gross historical wrong, not to ensure a diversity of perspectives, though, of course, no one denies that it would be nice to have the latter benefit as a bonus.

Before I conclude, one point bears repeating for the final time. I do not wish to be misunderstood to be arguing that speech codes and

---

diversity-oriented admissions programs cannot coexist. On the contrary, as I have labored to point out repeatedly, because we live in a world where choices among different social goods must be made, it is perfectly permissible to say that a balance must be struck between competing ideals, so that we do not utterly sacrifice one set of cherished values in obsessive pursuit of another. Instead of demonstrating the inherent logical inconsistency between speech codes and race-based admissions, this Article has been about the problematic way administrators and commentators have gone about defending the diversity rationale and speech codes, the usual arguments they make, and the assumptions they employ. The problem, to put it succinctly, is that spokesmen for these policies have defended them as if they exist in a vacuum, living in splendid isolation from each other. When defending speech codes, for example, they have all too often brandished about assumptions that are expedient for the moment, without realizing their implications for the diversity rationale, and vice versa. This Article aims to call attention to this problem of inconsistency. It has also attempted to elaborate on the significance of the existence of this contradiction.

For supporters of race-conscious admissions policies and the diversity rationale, the task now is to assess, in an open and honest way, whether the cynic is right. If so, drastic modification of admissions programs must be made immediately. Admissions programs must be redesigned to align more closely with what the diversity rationale has promised in theory. Among other things, de facto housing segregation on university campuses must end. Moreover, in an admission program that is genuinely oriented toward enhancing viewpoint diversity and enriching campus discourse, one should expect to find admissions committees assigning more weight to non-racial factors and evaluating, in a more critical spirit, the justification for continuing to accord great significance to race.

However, even if the cynic is dead wrong, wise administrators should modify the way they defend speech codes and race-conscious admissions to avoid charges of hypocrisy and contradiction. They need to be much more cognizant of the interrelatedness of the way different campus policies function. They need to marshal this newfound awareness to fashion more nuanced arguments to justify speech codes and affirmative action. There will, as always, be no easy solutions. The cost of inaction, however, is clear. This Article has drawn attention to the problem. Honest answers await.