

How the Diversity Mission Has Limited Free Expression on Campus

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How do we explain the assault on freedom of thought and expression that pervades our college and university campuses? How do we explain that significant numbers of students are supportive of speech codes, that faculties are often the authors of such codes, and that college and university presidents are willing to withdraw speaking invitations and are loath to intervene when speakers are shouted down?

At least a partial explanation for widespread acceptance of restrictions on free speech and academic freedom lies in a seemingly unrelated development of the past four decades. Beginning in the 1970s, higher education undertook to eliminate racial discrimination in hiring and admissions. Because many black students (and other minorities) had been deprived of educational opportunities that would have prepared them for college and graduate school, affirmative actions were taken to increase minority enrollments. These affirmative actions were challenged as discriminatory against white applicants leading eventually to a Supreme Court ruling that race could be taken into account in admissions. Colleges and universities responded to this ruling with policies and institutional arrangements that have, it turns out, invited restrictions on free speech and academic freedom. So how did the noble cause of eliminating racial discrimination from higher education contribute to today's restrictions on freedom of expression?

When I was a law student in the early 1970s, racial preferences in hiring and university admissions were called “benign discrimination.” In a 1975 [article](#) in the *Columbia Law Review* Kent Greenawalt defined benign discrimination as “any classification that assists some previously disadvantaged group.” So the discrimination described as benign was not benign in the sense of imposing no harm, but rather in the sense of being friendly and benevolent toward members of previously discriminated against groups. Perhaps because the racial preferences were clearly not benign toward plaintiffs like Marco DeFunis (whose claim against the University of Washington Law School was [held](#) moot by the Supreme Court because he had since graduated) and Allan Bakke (who the Supreme Court [found](#) to be a victim of unconstitutional discrimination by the University of California Medical School at Davis), the term benign discrimination would soon be abandoned in favor of the term affirmative action to describe racial, gender and other preferences intended to benefit previously discriminated against groups.

In the earliest affirmative action cases the justification was generally compensation for past discrimination. But with the passage of time and the enactment and enforcement of numerous anti-discrimination laws, the compensation rationale became less persuasive as most beneficiaries of affirmative action were not those actually discriminated against, and those suffering the costs were not those who had discriminated. While the concepts of institutional racism and sexism seek to convey that past discrimination has lingering effects and therefore continues to justify preferential hiring and admissions, the more usual justification for affirmative action today is diversity.

Replacement of the incongruous concept of benign discrimination with diversity as an institutional and social goal was given a huge boost by Justice Lewis Powell’s 1978 opinion announcing the judgment of the United States Supreme Court in *Regents of the University of California v. Bakke*. While the Court found that the university’s effective quota system violated the equal protection clause, it did not rule out consideration of race in admissions when done for compelling reasons. Seeking diversity in the student body, wrote Powell, “clearly is a constitutionally permissible goal for an institution of higher education.” Indeed for Powell it was a question of academic freedom, “long . . . viewed as a special concern of the First Amendment.” As recently as 2016 the Supreme Court reaffirmed “the educational benefits of diversity” as a compelling reason for race-based admissions in *Fisher v. University of Texas*.

Thus were launched four decades of affirmative action in the name of diversity, and, more significantly, diversity as a core mission of almost every institution of higher education in the country. Most colleges and universities have made significant gains in pursuit of that mission. The Atlantic Monthly [reported](#) that in 1994, 28 percent of students at top-tier institutions were racial minorities. By 2013 minority enrollment had increased to 42 percent. Harvard’s [class of 2010](#) included 10.5% African Americans, 17.7% Asians, 9.8% Hispanics, and 1.4% Native Americans. Only a dozen years later Harvard’s [class of 2022](#) increased ethnic representation in every category: 15.2% African Americans, 22.9% Asians, 12.2% Hispanics, and 1.9% Native Americans.

Certainly in a diverse society like the United States an absence of ethnic and racial diversity in institutions of higher education reasonably establishes a prime facie case of discrimination in admissions and hiring, just as the presence of diversity is a good indication that people of all races and ethnicities have had a fair chance at enrollment or employment. The diversity of an institution’s

workforce or student body is thus a useful, but not conclusive, indicator of the existence or nonexistence of discrimination. But that was not the point of Justice Powell's diversity discussion in *Bakke*. Rather his claim was that racial diversity is a positive contribution to the education of all students. Diversity is thus an end to be achieved, not a test for the existence of discrimination or a measure of one's success in eradicating discrimination.

There can be little doubt that diversity of culture and experience among students contributes to a more engaging and challenging education, and that it better prepares graduates for work in an array of settings. But students who matriculate with a particular background and set of beliefs, whatever their race, will not graduate with those same beliefs and will be transformed by four years of education. Or so we should wish. What else is the purpose of higher education? Yet with diversity as a goal and a necessary element of the educational process, it becomes important to preserve the diversity among those who entered as freshmen. And so we have offices of diversity and inclusion; Black, Asian, Native American, and Pacific Islander student groups; trigger warnings, cultural appropriation and obsessive reporting on racial and ethnic enrollments; and diversity requirements for accreditation.

The educational advantages of diversity influenced college admissions long before the advent of affirmative action. Students from my home state of Montana had a bit of an advantage in the admissions process because we were few in number and universities and colleges sought students from different parts of the country. The theory was that a farm or small town kid from Montana would expose the more numerous urban kids to aspects of America with which they were unfamiliar – and visa versa. It was expected that once all of the students converged on campus they would share their personal stories while engaging in the common enterprise of education. Their diverse backgrounds would contribute to their mutual development and advancement.

But there were no student organizations for small town or farm kids, no segregated dorms for students from the different geographic regions, no administrators dedicated to counseling students anxious about fitting in, and certainly no programs intended to celebrate and preserve the differences students brought with them to college. Indeed, such initiatives would have run counter to the reason for mixing rural and urban kids—namely to broaden their horizons and facilitate their growth.

Having now embraced diversity as central to their educational mission, universities not only recruit students of diverse backgrounds, but seek to preserve that diversity after the students arrive on campus. They resist the melting pot of natural human interaction by reminding white students of their privilege and minority students of their victimhood, and by mandating diversity training founded on a belief in immutable differences and presumed discrimination on the basis of those differences. White students, unconsciously inflicted with "white fragility," learn how to recognize their privilege and appreciate the beliefs and disadvantages of those who are their victims. Students of color learn how to challenge white privilege and take pride in what makes them different. They are taught to pursue their personal and identity group truths, and that the idea of a common pursuit of truth is a vestige of historic discrimination.

Once it is understood that the traditional pursuit of truth, formerly thought to be protected against perversion by academic freedom and what Oliver Wendell Holmes called the “market place of ideas,” is in fact an exercise in exploitation and domination, constraints on free expression become necessary to the preservation of diversity.

The fear that incoming diversity will be corrupted by the free exchange of ideas over the four years of college is well-founded. When everyone is free to express ideas, including ideas that might offend others, people of different backgrounds and experiences will reflect on their own views and sometimes embrace the views of others or persuade others to alter their views. That has been the history of civilizations. The law that I taught as a law professor was influenced by, and borrowed from, the ancient Greeks and Romans, the English, Spanish, Scots, French and so on. Our federal constitution was influenced by European political theorists, the Swiss and German federations, and, some claim, the Iroquois. Our language, architecture, clothing, art and the food we eat reflect influences from every continent. So it is not surprising that efforts to preserve diversity have led to the peculiar concept of cultural appropriation. But the idea of cultural appropriation is part and parcel of the misguided and destructive efforts to resist the melting pot of human civilization by promoting and even demanding a form of apartheid on our college campuses.

Based on four decades as a teacher, I know that having students of diverse backgrounds and experiences contributes to the education of all students. But I also know that the reason it does is because the free exchange of ideas among students changes those students in fundamental ways. That is the point of a university education. If the students who enter as freshmen are not changed in significant ways by the time they graduate, their university has failed them.

Once diversity became a mission of higher education rather than a means of facilitating learning and growth, demands for safe spaces and censorship of uncomfortable ideas were inevitable. The controversies over freedom of expression in the academy will not end until university presidents, trustees and faculties abandon sustained diversity as one of their core missions and accept that the value of diversity in education is in the exchange and mutual appropriation of ideas and values. Sometimes that will be uncomfortable.

Eleven years before Justice Powell invited universities and colleges to make diversity an institutional mission as a justification for race-based admissions policies, Justice William Brennan addressed the relationship between diversity and free expression in invalidating a New York State loyalty oath required of university professors.

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, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the “marketplace of ideas.” 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.”

Our universities and colleges have turned Brennan’s insight on its head. Faculty and students must adhere to an unspoken oath of loyalty to the mission of preserving, promoting and protecting difference—or risk their good standing and reputation. Rather than seeking truth through the

interaction and free expression of diverse points of view, a pall of identity group orthodoxies has descended on our institutions of higher education in the interest of protecting students from the discomforts inherent in true education, human development and the pursuit of truth.

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